Law and Politics

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A Dilemma for Contemporary Legal Theory

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Preface

This work started as a preliminary step in a larger project aiming to discuss and build a legal theoretical model to help lawyers better understand the policy aspects of the relations between law and politics. At the very beginning I soon realized how extremely diversified the positions of the legal scholars as to these relations were. This book aims at being nothing more than a descriptive tool for both legal theoreticians and legal scholars in general with which to organize the various contemporary legal theories into different ideal-typical ways in order to portray the relations between law and politics. It absolutely does not pretend to be the final words on this issue; just the opposite, this work simply aims at proposing a descriptive starting point from which to begin to consider and critically evaluate contemporary legal theories and their ideas as to the issue on law and politics

Before starting, I would like to thank Laura Carlson, Jes Bjarup, Brian Bix, and David Wood for reading the entirety of the manuscript and providing me with invaluable comments along the way. I am also deeply indebted to Bruce Anderson, Reza Banakar, Åke Frändberg, and Kaarlo Tuori for taking their time to read the manuscript and giving me insightful and valued comments. Roger Cotterrell, Fredric Korling, and Jori Munukka also gave me very helpful comments on earlier drafts of this work for which I am very grateful. Last, but not least, to Tiziana and Nicole, for always being there, to whom this book is dedicated.

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Introduction

The central position politics and the political discourse occupy in the modern legal theoretical discussion has been summarized as that:

"Virtually all of modern jurisprudence rests on a distinction between legal reasoning and politics. Legal analysis and reasoning, on the one end, and political argument or philosophy, on the other, are thought to be recognizably distinct discursive practices."[1]

However, the absence or presence of any general connection between law and politics and how this has been mirrored in legal theory obviously is not simply a recent phenomenon. Niccolò Machiavelli and Thomas Hobbes stand out clearly for their early lucid and penetrating analyses of the law-politics issues in early modern times.[2] From the very birth of the nation state, and particularly after its transformation into the modern welfare state, attention has been specifically devoted to explaining the interrelationship of the legal and political phenomena. This theoretical interest has its roots in the fact as pointed out by Jürgen Habermas, that the very "complex of law and political power characterizes the transition from societies organized by kinship to those early societies already organized around states."[3]

Closer to the present, Friedrich Carl von Savigny has a central position in particular among legal scholars attempting to draw a conceptual line between law and politics. According to Savigny, the law elaborated by jurists is indeed formed by two interacting elements: the political element, i.e. the one connecting the law to the feelings of the social community, and the technical element, i.e. the one living its own separate life.[4]

Despite all this attention, the 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

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1 Karl Klare, *The Politics of Duncan Kennedy's Critique*, 22 CARDOZO L. REV. 1076 (2001).

2 *See, e.g.*, MACHIAVELLI, THE PRINCE Ch. V, Ch. XII (J. M. Dent and Sons 1908) [reprint 1532]; and HOBBES, LEVIATHAN Ch. XXVI (Penguin Books 1985) [reprint 1660].

3 HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 137 (1998). *See also* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 263 (2004).

4 For Savigny, however, the role played by political actors in the process of creating legal norms is starkly limited, in particular in comparison to the one played by legal scholars. *See* SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 12-14 (1814).

politics have increased considerably over time, in particular after the birth of welfare state and its dissemination in the Western part of the world.[5]

The objective of this work is to reconstruct and to classify, according to ideal-typical models, the different positions taken by the major contemporary legal theories as to whether and how law relates to politics. This reconstruction and classification is done with the purpose of determining whether these major legal theories, though reaching different conclusions, have some common points of departure as to the "law and politics" issue.

After presenting the methodological and terminological apparatus used in this work in Chapter One, the relationship between law and politics as based on this structure will be explored as considered and interpreted by the major contemporary schools or movements of legal theory. The approaches of the different legal theoretical streams are classified according to their responses to the following issues: How these contemporary legal scholars view the law in relation to politics (the static aspect); how the law-making relates to the political order (the dynamic aspect); and the degree of the relation of the legal discipline to the political material (the epistemological aspect).

Three ideal-typical models are proposed based on the answers given to these questions by the legal theories: the autonomous model (Chapter Two), the embedded model (Chapter Three), and the intersecting model (Chapter Four). These provide an ideal-typical classification of the different ways the legal and political phenomena's relations work for the various contemporary legal theories.

According to the autonomous model, the relations between law and politics are depicted as between two connected but still autonomous phenomena. Legal positivism (as espoused by Hans Kelsen) and Herbert L. A. Hart's analytical jurisprudence will be ascribed to this ideal-typical model. The "embedded model" is the ideal-type better representing the law-politics relations as portrayed by movements such as Critical Legal Studies (hereinafter "CLS"), Law and Economics, and John Finnis' natural law theory. These theories are viewed as depicting the law-politics relations as one (law) embedded into the other (politics). In Chapter Four, the American and Scandinavian legal realisms are presented as representatives of a third ideal-typical model, designated as "intersecting," as law and politics within these theories are two intersecting phenomena. Chapter Five ends with a brief discussion as to how these three models, and the legal theories encompassed therein, share a common ground. Each mirrors the peculiar situation of modern law: law and politics tend to keep the features of being two different phenomena as well as of presenting regions of interaction, although with differences as to extent and intensity.

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[5] *See, e.g.*, Neil Duxbury, *The Theory and History of American Law and Politics*, 13 OXFORD J. LEGAL STUD. 249 (1993): "It seems, during this century, that there has been no question more troubling to American academic lawyers than that of whether or not judges are ever entitled to adjudicate politically."

Chapter 1. A Methodology of Analysis and Certain Key-concepts

As the title indicates, this work is an investigation of the positions as to the relations between law and politics as taken by contemporary legal theories. Before commencing the actual investigation, a clarification of the methodology adopted here for tackling and systematizing the positions of contemporary legal theories on the issue of law and politics relations needs to be provided. This necessity stems in particular from the fact that it is quite alien in legal theory to use, as done in this work, an ideal-type methodology to penetrate the complex reality represented by more than 100 years of legal-theoretical discussions as to the issue of the law and politics.

As with any method employed for categorization, the methodology used in this work also has its limits. These are specifically noted here, in particular those limitations resulting from using *ideal*-typical models to group apparently very different legal theories. Moreover, the meanings of different key-concepts (*e.g.* politics, political order) used throughout the work are specified below.

1. A Methodology of Analysis

The law currently is subjected to a system of forces towing it in opposite directions, affecting the very nature of the legal phenomenon. This specific feature of contemporary law is further discussed in Chapter Five, but for the moment, it is sufficient to point out how that one of these forces pulls the law into the hands of politicians (*politicization of the law*) while the other pulls the law away from the political world instead due to the law becoming more and more complex and specialized (*specialization of the law*).[1]

The very fact that these contemporary tensions stretch the law towards and, at the same time, away from politics, affects the work of legal scholars.[2] As pointed

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[1] As to how these forces concretely operate, for instance, with respect to constitutional law, *see* Christoph Möllers, *The politics of law and the law of politics: two constitutional traditions in Europe, in* DEVELOPING A CONSTITUTION FOR EUROPE 129-139 (E. O. Eriksen et al. eds., 2004).

[2] *See, e.g.*, Joseph Raz, *Disagreement in Politics*, 43 AM. J. JURIS. 26 (1998); and KAARLO TUORI, CRITICAL LEGAL POSITIVISM 283 (2002) and his idea of "dual citizenship of legal science." *See also* HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 388-390.

out by Duxbury, "the political nature of law represents a fundamental – if not the fundamental – problem of modern jurisprudence."[3]

The focus of this work is the actual investigation and mapping out of the main contemporary legal theories according to the answers they provide as to whether and how legal and political phenomena relate. It is necessary here, however, to examine the methodology used in tackling the difficult and complex issue of how the different contemporary legal theories have positioned themselves in the debate concerning the relations between law and politics.

The perspective investigated in establishing a divisive line among the different theories is internal. "Internal" in this work has a very broad meaning, primarily taking into consideration how legal scholars *think* (i.e. that which is demonstrated in their theoretical constructions) law is related to politics. Using Hartian terminology freely, one could claim that the criterion here is "the internal perspective" taking into consideration the phenomenon of how legal theories perceive the law-politics relations from the point of view of an internal observer (the legal theories themselves) instead of an external one.[4] This choice in favor of an analysis from an internal perspective, for example, permits the exclusion of a more sociological approach as to considering the ideas or theoretical constructions of legal scholars as products of certain political and social environments. The question of *why* legal scholars think in terms of law and politics (i.e. the sociological, political or moral background they have) then is not addressed here.[5]

The adoption of an internal perspective however does not imply the exclusion from the analysis of the contemporary legal theories embracing a sociological or quasi-sociological position (i.e. the one of the external observer) as to the relationship between law and politics (*e.g.* certain representatives of the legal realisms). The sociological contributions such theories give to the debate as to law and politics, i.e. in pointing out the law in terms of human behaviors regulated by legal norms, can be measured as one of the internal point of views legal scholars have of the phenomenon. In other words, this work retains its normative perspective as it investigates quasi-sociological legal theories and the external observer's perspective of the law from the inside, but without necessarily sharing the perspective as to the law as a sociological phenomenon.[6]

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[3] Duxbury, *The Theory and History of American Law and Politics*, *supra* at 270.

[4] *See* HERBERT L. A. HART, THE CONCEPT OF LAW 55-56 (1961). *See also* Stephen R. Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171-1775 (2006).

[5] *See* Max Weber, *Some Categories of Interpretative Sociology*, 22 SOC. Q. 158 (1981). An example of how the sociology of law examines legal ideas as the product of a certain environment can be found in Roger Cotterrell's book, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 13-19 (2nd ed., 2003). Consequently, the effects on the legal culture by the stratification among the different legal actors are also ignored in this work. *See, e.g.*, WILLIAM M. EVAN, SOCIAL STRUCTURE AND LAW. THEORETICAL AND EMPIRICAL PERSPECTIVES 79-82 (1990); and COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 184-187 (2nd ed., 1992).

[6] A similar operation, but in the opposite manner, is conducted by Cotterrell. He approaches and exhibits from a sociological perspective not only the quasi-sociological le-

As an almost natural outcome of the use of an internal perspective, the differences among the different theories have been drawn based more on how the schools and legal scholars define their positions on the law-politics issues rather than on how they have been categorized by their critics. This work focuses on whether such theories *explicitly* embrace the idea that law and politics have to be studied as two different phenomena, as two similar phenomena or as two intersecting phenomena.

For example, criticism has been directed at one of the most striking representatives of the model claiming an autonomy of law from politics, Hans Kelsen, for defining the specific field of investigation for the legal disciplines. Kelsen stresses that the legal discipline should be purified from political evaluations and considerations.[7] However, his critics contend that politics, expelled from any investigation of the lower levels of law-making (i.e. in the work of judges and of the legislator) tends to re-enter by the main door, i.e. when it comes to the moment of analyzing the Basic Norm giving validity to the entire legal order.[8] The analysis of Kelsen's ideas concerning the relations between the legal discipline and politics is here based on that which he states ("legal discipline is not legal politics") rather than on that as stated by his critics ("Kelsen's idea of the legal discipline is political").

Once the perspective from which to investigate the contemporary legal theories has been chosen, the second step is to summarize the major issues taken into consideration in the debate about the relations between law and politics into three aspects: static, dynamic and epistemological.[9]

1.1 Law and Politics (*Static Aspect*)

Only a few exceptions can be found among legal scholars claiming that the *content* of the law is either completely independent from or completely dependent upon politics, particularly after the growth of the nation state and the current globalization occurring in law-making processes. As to this first aspect, the content of

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gal theories ("Empirical Legal Theory"), but also that which he defines as "Normative Legal Theory." *See* COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 24-28 (1997).

7 *See*, *e.g.*, KELSEN, REINE RECHTSLEHRE iii (2nd ed., 1960).

8 *See*, *e.g.*, Julius Cohen, *The Political Element in Legal Theory: A Look at Kelsen's Pure Theory*, 88 YALE L. J. 13-14 (1978).

9 Although developing in different directions, this classification starts from the distinction made by Brian Bix, *Law as an Autonomous Discipline*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 975-978 (P. Cane & M. Tushnet eds., 2003). As will become clearer in the following, static and dynamic are used in this work (when nothing to the contrary has been specified) with a meaning quite different from that which is ascribed to them by KELSEN, THE PURE THEORY OF LAW 195-198 (1970); KELSEN, GENERAL THEORY OF NORMS 112-113 (1991); and Kelsen, *'Foreword' to Main Problems in the Theory of Public Law*, *in* NORMATIVITY AND NORMS. CRITICAL PERSPECTIVES ON KELSENIAN THEMES 11-12 (S. L. Paulson & B. Litschewski Paulson eds., 1998).

the law cannot be viewed as completely independent from politics because the organizational political form of the nation state is characterized, in part, by the fact that the law (in particular in its statutory forms) is a tool available to Parliaments and Governments (i.e. the most important political actors) in order to effectuate programs within a certain community.[10]

On the other end, the content of the law does not usually disappear completely into politics. The nation state has brought with it (at least beginning in the second half of 18th century) the principle of the separation of powers. From an institutional point of view, this implies that the actors enacting a statute are not the same as those applying it. Moreover, the increasing specialization and sophistication of legal categories and concepts have made it almost obligatory for politicians and layman to employ persons educated in the specific art of drafting laws.[11]

As this is the environment in which most contemporary legal scholars live and work, it is then almost natural that the vast majority of scholars claim that the content of the law is separate from or identified with politics only to a certain extent. Luhmann, for example, is one of the strongest paladins of a clear separation between law and politics. He admits, however, that law as a concrete phenomenon is only *relatively* autonomous from the surrounding environment. In reality, law and politics (rarely) interrelate with each other. It is only when giving a legal sociological account that Luhmann introduces the "systems theory" and the "closedness" of the different subsystems (i.e. legal and political) as investigative fields for legal sociologists.[12]

In spite of this similarity, it is possible to find a dividing line, in particular among the major schools, based on the issue of whether the political substance or message that the law always carries also affects the structures and forms of the law itself. One example of this boundary can be seen between the legal positivistic vision of law as a more or less neutral machine in the hands of politicians, and the claim of natural law theory that a certain "understanding" between the rulers and the ruled is necessary in order to speak of a legal phenomenon. The famous debate between Lon L. Fuller and Herbert H. Hart is an example of the distances separating these two schools as to the issues of law and politics. They address the question of whether the highly political influence the Nazi regime had on German law affected the very nature of the legal phenomenon so much as to make it something

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[10] *See generally* RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA (2000), as an example of the fundamental role played by political factions and their (often short-sighted) political goals in shaping a central part of a modern state's legal system

[11] *See, e.g.*, William Robinson, *Polishing what others have written: the role of the European Commission's legal revisers in drafting European Community legislation*, 1 LOOPHOLE. J. COMMONWEALTH ASS. LEG. COUN. 71-81 (2007).

[12] Luhmann speaks of the law as a "cognitively open" subsystem towards the other political, economic and cultural subsystems. *See* LUHMANN, A SOCIOLOGICAL THEORY OF LAW 281-283 (M. Albrow ed., 1985); Luhmann, *The Unity of the Legal System*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 18-19 (G. Teubner ed., 1985); and Luhmann, *Closure and Openness: On Reality in the World of Law*, *in* AUTOPOIETIC LAW, *supra* at 335-338.

else (Fuller); or whether it was more a question of reaching different (although morally regrettable) political goals (Hart) with the same legal machinery as used in England.[13]

The divisive question then becomes whether the law is *flexible* by nature, i.e. whether it tends to adapt its forms and nature according to the political substances it carries; or, alternatively, whether the law is *rigid*, i.e. whether it tends to keep the same forms and mechanisms regardless of the content. The central question is whether the law, as perceived by legal actors, changes its shape and manner of functioning in accordance to the values the political actors aim at implementing in the community.[14]

1.2 Law-making and Political Order (*Dynamic Aspect*)

Moving to the second dynamic aspect of the relationship between law and politics, the legal schools address the functioning of law-making here as an alternative or dependent process with respect to the political order and its processes. This is particularly true with the aim of politics to control the entire life of a community (all social, economic and cultural aspects). This aim is typical of the nation state and taken to its extreme by the welfare state and, although in very different forms, by totalitarian regimes such as the Nazi and the Soviet ones. Law-making in its functioning appears to be more and more an integral part of the political machinery. The process of legal production (either in a legislative, judicial or scholarly form) in the creation of new norms, categories and concepts, is viewed as strongly affected by the political environment.[15]

On the other hand, there is a tendency towards an increasing specialization of the legal world. This makes it more difficult for the political order to interfere with the work of the courts, lawyers and legal scholars. Moreover, the growing establishment of the rule of law has generally taken away any complete freedom of action from the political sphere, limiting the political influences inside the legal

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[13] *See* Hart, *Positivism and the Separation of Law and Morals*, 71(4) HARV. L. REV. 615-621 (1958); and Fuller, *Positivism and Fidelity to Law –A Reply to Professor Hart*, 71(4) HARV. L. REV. 648-657 (1958).

[14] *See* AULIS AARNIO, REASON AND AUTHORITY. A TREATISE ON THE DYNAMIC PARADIGM OF LEGAL DOGMATICS 20-25 (1997). The dichotomy "flexible-rigid" law is used in the present work in a meaning different from the one normally used by legal sociologists. For the latter, flexibility of the law refers to the tendency of present legal phenomenon of retreating from some areas of community life, leaving them to other forms of non-legal regulation. *See, e.g.*, JEAN CARBONNIER, FLEXIBLE DROIT. POUR UNE SOCIOLOGIE DU DROIT DANS SANS RIGUEUR 62-71 (7th ed., 1992).

[15] *See, e.g.*, the effect of the Welfare State on the concept of rights in Ulrich K. Preuss, *The Concept of Rights and the Welfare State*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 162-166 (G. Teubner ed., 1986). *See also* IAN WARD, LAW, PHILOSOPHY AND NATIONAL SOCIALISM. HEIDEGGER, SCHMITT AND RADBRUCH IN CONTEXT 18-24 (1992).

world and the law-making mechanisms to certain specific areas and through specific modalities of action.[16]

This dualistic general tendency inside modern relations between the law-making and the political order (i.e. separation and integration) also impacts legal theory. A divisive line can be drawn between the theories according to the solutions presented as to the question of whether law-making, with its own internal logics, works with the political order on a peer-to-peer basis, i.e. the idea of an *closed* law-making; or whether law-making simply is an operative long hand of the political power, faithfully mirroring the modes of operation and the logics taking place inside the political order, i.e. the idea of a *open* law-making.[17]

Naturally, it is difficult to distinguish the static aspect from the dynamic aspect. It is often through the dynamic aspect that one defines the static aspect; for many theories, the law is considered as distinct from politics because it is born through certain processes. Nevertheless, the dynamic aspect concerns the processes and mechanisms of the creation of the law, while the static identifies the complex of norms (i.e. the product of such processes) that are created.

1.3 Legal Discipline and Political Material (*Epistemological Aspect*)

The assembling of the different contemporary legal theories into an ideal type model relating law and politics has also been done according to the answers given to a third question: To what extent does the legal discipline take into consideration the political material in its work, i.e. the epistemological aspect of the relationship between law and politics.[18] This issue is a typical, although not exclusive, province of contemporary legal theories. With the growth of politics as an autonomous object of investigation, a noticeable trend beginning at the end of the nineteenth century with the rise of political science faculties in various Western universities, legal scholars began to focus on whether and to what extent their discipline was influenced by categories and concepts developed in non-legal academic environments, i.e. political science.[19]

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[16] *See* HAROLD J. BERMAN, LAW AND REVOLUTION. THE FORMATION OF THE WESTERN LEGAL TRADITION 9-10 (1983). *See also* PETER STEIN & JOHN SHAND, LEGAL VALUES IN WESTERN SOCIETY 32-34 (1974).

[17] *See* AARNIO, REASON AND AUTHORITY, *supra* at 53-54.

[18] As to the definition of epistemology as used in this work, it is the branch of philosophy dealing with the questions of how and on which basis the processes of knowledge of a certain phenomenon are developed and validated. *See* Jaap C. Hage, *Formalizing legal coherence*, *in* PROCEEDINGS OF THE 8TH INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW 22-27 (2001), also pointing out the problems of developing an epistemology of legal discipline due to the particular nature of the legal phenomenon. *See also* Brian Leiter, *Is There An 'American' Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 370-371 (1997).

[19] *See, e.g.*, Edward H. Levi, *The Political, The Professional, and The Prudent in Legal Education*, 11 J. LEGAL EDUC. 464-466 (1959) as to the debate that took place in some law schools in the USA at the beginning of the Twentieth century.

The environment surrounding universities and research institutions complicates this epistemological question. On one side, there is a socio-political reality always pushing towards the integration of the law into a broader political context and encouraging a more political approach to the study of law, i.e. an approach more oriented towards the goals of the law that are external to the legal system itself (*e.g.* labor issues). On the other side, there is also the tendency towards and increasing specialization of both the legal profession and the legal conceptual apparatus, a tendency leading to the emergence of disciplines only focusing on purely legal technical matters, addressing only the language of the law and leaving politics to the politicians (*e.g.* taxation). In other words, there is a tendency towards a Weberian bureaucratization of the profession of legal scholars.[20]

This tension has led to two different approaches toward the issue of the purity of that considered within the legal discipline. The first is the *pure* approach to legal studies, embracing all those theories claiming the possibility and necessity of a legal discipline not contaminated by political categories and concepts (such as "democracy" or "legitimization"). The second is the *mixed* approach to legal studies, maintained by those theories and scholars asserting the necessity of integrating into the legal discipline categories and concepts not specifically belonging to the legal language (mostly produced inside of sociology, psychology, political sciences and economics), relevant in order to fully understand current legal phenomenon.[21]

2. Using an Ideal-typology for Legal Theories

By examining the positions taken by contemporary legal theories with respect to these three aspects, an ideal-typology of three models is presented: an "autonomous model," an "embedded model" and an "intersecting model."[22] Similar to the utility of Weber's ideal-types when applied to the complexity of social reality, these models are intended to be a heuristic device helpful for mapping out the complex world of contemporary legal theories and to reveal certain similar fun-

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[20] *See* Weber, *Parlament und Regierung im neugeordneten Deutschland: Zur politischen kritik des Beamtentums und Parteiwesens, in* WEBER, GESAMMELTE POLITISCHE SCHRIFTEN 352-354 (5th ed., J. Winckelmann ed., 1988). *But see* WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 886 (G. Roth & C. Wittich eds., 1978). This duality of forces operating on the legal discipline is already present in Weber's more general investigation of the contemporary state. The latter is characterized by stressing in its components (legal studies among them) both the "obedience based upon the observation of rules of technical efficiency" (i.e. a "technical" legal discipline) and, at the same time, "obedience required as a governmental end in itself" (i.e. a "political" legal discipline). John O'Neill, *The Disciplinary Society: From Weber to Foucault*, 37 BRIT. J. SOC. 57 (1986).

[21] *See, e.g.*, Richard Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1319 (2002).

[22] For a similar use of ideal-types in order to map out different legal theoretical positions as to the issue of law and society, *see* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 59-65 (1984).

damental ways of understanding the relation of law and politics, similarities among legal movements otherwise treated as very distinct from each other (*e.g.* between CLS and Law and Economics).[23] The ideal-types are used as "heuristic magnets" with the capacity of drawing out the iron-cores of each of the contemporary legal theories as to the issues concerning the relation of law and politics. Figuratively, one could say that in this work, the ideal-types play the same role as the cave did in a famous fictitious case by Lon L. Fuller: to point out the fundamental differences between contemporary legal theories in their answers to highly controversial questions (in Fuller's case, on the issue of the relations between law and morals).[24]

By cross-referencing these two methodologies (aspects of the relation between law and politics and ideal-typical modeling), this work aims at filling in the gray spaces in Table 1 with the features characterizing each model as to its vision of how legal and political phenomenon interact. The investigation will also identify those contemporary legal theories that can be considered representative of each model and, therefore, placed under the autonomous, embedded, or intersecting labels.

In addition to the three models presented in this work, a fourth model can be posited. This model, also of an embedded nature, however in the reverse direction, shows how politics (i.e. both the values to be implemented via the law and the process of selection of those values) is embedded or integrated into the law. This implies that the choices and processes taking place at the political level can only be explained by using the law (flexibility of politics towards law). The political order runs only in accordance (and in a subaltern relationship) with law-making. The political disciplines are then forced to use the categories and concepts as produced inside the legal world in order to investigate that happening inside the political world.

It is very difficult to find adherents to this model among contemporary legal theories and, for this reason, the model of embedding politics into law is not further considered in this work. There are two possible reasons for the lack of attention by contemporary legal theory towards this fourth model in which politics is embedded into law.

First, all Western countries have embraced a democratic form of the state. Consequently, at least theoretically, the legal production ultimately is in the hands of the people through its representatives, i.e. through the political actors.[25] The second reason is typical of the modern state and can be traced back to Machiavelli, the growth and dominance of political reasons and categories over almost all other kinds of discourses.[26]

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[23] *See, e.g.*, DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 304-308 (1995). *But see* Owen M. Fiss, *The Death of the Law?* 72 CORNELL L. REV. 2 (1986) (where the author points out the programmatic elements linking Law and Economics to CLS).

[24] *See* Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 645 (1949).

[25] *See* ADAM SMITH, LECTURES ON JURISPRUDENCE 200 (R. L. Meek et al. eds., 1978) [reprint 1766]. *But see* HART, THE CONCEPT OF LAW, *supra* at 72-74; *cf.* WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY 505-506 (2nd ed., 1972).

[26] *See, e.g.*, GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 344-347 (3rd ed., 1964).

Table 1. Aspects of the Relations Between Law and Politics in Contemporary Legal Theory

	Relationship of law to politics (*static aspect*)	**Relationship between law-making and political order (*dynamic aspect*)**	**Relationship of legal discipline to political material (*epistemological aspect*)**
Autonomous model			
Embedded model			
Intersecting model			

Another possible objection against these explanations is that most modern forms of the state actually are based on the German principle of *Rechtsstaat* (or its common law variant, the rule of law) in which politics is supposed to be framed by the law. This objection, as pointed out by Habermas, however, tends to overestimate the power of the legal principle of *Rechtsstaat*. First, in the German tradition, the *Rechtsstaat* "is only supposed to guarantee the private autonomy and legal equality of citizens."[27] Second, in countries adopting the *Rechtsstaat*

> "[i]t is not the legal form as such that legitimates the exercise of governmental power [i.e. politics] but only the bond with *legitimately enacted law*…. [Therefore] the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion- and will-formation."[28]

In other words, the law legitimizing politics in its turn needs itself to be legitimized by the political process, convincing the community of the "good reasons" or the inherent values for obeying such law directed at controlling the political exercise of power.

Similarly, the common law's idea of the rule of law apparently requires the subjugation of politics to the constraints of the law. However, as critically pointed out by Brian Tamanaha, the political discourse heavily affects the very way the rule of law is interpreted by legislatives and judges.[29] As a result, the rule of law set boundaries to politics, but what "rule of law" means in reality and where these boundaries are is a question ultimately decided according to the various political ideologies law-makers, judges and law professors have embraced.[30]

3. Limits of the Methodology

There naturally are limitations with respect to the use of the three main aspects of the relationships between law and politics, as well as the use of ideal-typologies as heuristic devices in order to classify the positions of the different legal schools in the models with respect to these aspects.

First, as the history of epistemology demonstrates, the issue of identifying the object of investigation (in our case, establishing the borders of the legal phenomenon with respect to the political one, i.e. the epistemological aspect) often implies the very same ontological issue of constructing the same object of investigation. Immanuel Kant, in his theory of knowledge, clearly pointed out that reality as such (*Ding an sich* or, in our case, the law *per se*) cannot be known through hu-

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27 HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 134-135.

28 *Id*. at 135 [italics in the original].

29 *See* Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 470-484 (2007).

30 Though following another path, Ronald Dworkin also depicts the rule of law as always more than the rule of positive law. Rule of law always incorporates and ultimately depends on the ideas of what is morally and politically "right" in a certain community. *See, e.g.*, DWORKIN, A MATTER OF PRINCIPLE 11-12 (1985).

man investigation. The only thing human beings can do is create order in the chaos of things as they appear to us.[31]

In our case, the very ordering (or the establishing of the borders to the fields of investigations) of the problem of the relationship between law and politics can itself create the relationship. The epistemological issue of defining the field of competence for the legal discipline with respect to politics tends to spill onto the ontological issue of constituting the same object to investigate, i.e. here the specificity of law and of law-making towards politics and the political order, respectfully.

One example can be traced in the work of Hart, and to some extent, also of Kelsen. According to Hart, law is formed by a system of rules characterized separately, apart from morals and politics, by their being normative in the sense that they are perceived as objectively binding by the legal actors.[32] However, this normative character of the law as phenomenon implies a certain overlapping with the law as a discipline. Law as phenomenon occurs only when and to the extent it is perceived or conceptualized as law by a group of actors. It is then this very process of the conceptualization of law by certain legal actors (law as a legal discipline) that creates the law these actors are supposed to describe and/or use (law as the object of a legal discipline):[33]

> "What law is, exactly, obviously depends on which concept is being used, and so we cannot in any simple way compare the effects on law of different possible concepts of, precisely, law."[34]

Nevertheless, the answer to the general epistemological question of whether and to what extent contemporary legal theoreticians (legal discipline) actually create their object of investigation (law) through the definition of the space occupied by such an object in their analysis (concept of law) is outside the scope of this work.

Another limitation arises from the fact that the classification according to the typologies used here is loosely based on the ideal-type methodology of Weber:

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[31] *See* Kant, *Kritik der reinen Vernunft (1 Aufl.), in* KANTS WERKE. BAND IV 217 (Georg Reimer 1911) [reprint 1781]. This basic idea is also shared by Weber, who stated: "Without the investigator's evaluative ideas, there would be no principle of selection of subject matter and no meaningful knowledge of the concrete reality." WEBER, THE METHODOLOGY OF SOCIAL SCIENCES 82 (1949).

[32] *See* HART, THE CONCEPT OF LAW, *supra* at 97-107.

[33] *See, e.g.*, the lack of analytical character (in the sense of understanding and not simply describing the object of investigation) in the Hartian investigation of the concept of obligation in Perry, *Hart's Methodological Positivism, in* HART'S POSTSCRIPT: ESSAYS TO THE POSTSCRIPT TO THE CONCEPT OF LAW 331-336 (J. Coleman ed., 2001). *See also* DWORKIN, LAW'S EMPIRE 39-41 (1997); and Liam Murphy, *The Political Question of the Concept of Law, in* HART'S POSTSCRIPT, *supra* at 384, where he points out the political motives behind such conceptualization.

[34] *Id.* at 388. *But see* Raz, *Two views of the Nature of the Theory of Law: A Partial Comparison, in* HART'S POSTSCRIPT, *supra* at 6-11 (suggesting a high degree of autonomy between the nature of law and its conceptualization).

"The ideal type [is] essentially… a mental construct for the scrutiny and systematic characterization of individual concrete patterns which are significant in their uniqueness."[35]

When it comes to the individual scholar or, even less, to a broader (and therefore more variegated) legal philosophical movement, it subsequently is not possible in reality to sharply distinguish between the theories falling within the "pure" embedded-model or the "pure" autonomous-model. On the contrary, as the models are ideal-types, most legal theories actually never fit in one model or the other. It is more likely that they would be placed in-between. In dealing with law and politics issues, contemporary legal scholars *tend* to embrace a certain model, but almost always with one or more features from the others. A revealing example can be found in the progressive shifting of legal positivism, in particular in its recent "inclusive" or "incorporationist" forms, towards positions explicitly embraced by natural legal theory or CLS' views when acknowledging the importance of morals and the political environment for judicial reasoning or for legislative processes.[36]

Moreover, it is possible to find in many cases more similarities concerning the relationship between law and politics among authors belonging to different movements than among authors belonging to the same movement. For example, concerning the function of politics within the legal discipline, the ideas of the legal realist Alf Ross are more similar to those expressed within legal positivism than, for example, to another legal realist such as Vilhelm Lundstedt.[37]

Even within the work of the same individual legal scholar, it can be difficult to trace any unconditional embracing of one model over another. There simply is too much awareness of that which has previously been defined as the "dilemma of law." The manifest presence in modern societies of multiple and often conflicting tendencies, where the law more and more often is used by non-professional (i.e. political) actors but, at the same time, more and more a subject for experts, softens the positions of even the more radical individual scholars. One example representing the embedded model is the work of John Finnis and his natural law theory. Despite Finnis' claim that the law, in order to be defined as such, has to embrace and fulfill certain goals, he recognizes that law-making, and with it the legal investigation, sometimes tend to go its own specific way, deviating from that of fulfilling the "good of community."[38]

Although accepting the substantial validity of such possible methodological objections, one should also keep in mind that in this work, the ideal-type models are used, in accordance with Weber, as heuristic devices, i.e. as tools and not aims for

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[35] WEBER, THE METHODOLOGY OF SOCIAL SCIENCES, *supra* at 99-100. *See also* ROSS, WHY DEMOCRACY? 87 (1952).

[36] *See* WILFRID J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 81–82 (1994): "On this view, which [shall be termed] inclusive legal positivism, moral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid laws." However, for a defense of the specificity of the legal positivist approach, although in its soft forms, *see* Waluchow, *Authority and the Practical Difference Thesis*, 6 LEGAL THEORY 72-81 (2000).

[37] *See* ROSS, ON LAW AND JUSTICE 327-339 (1958).

[38] *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS 148-149 (1980). *See also* COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 142-143.

the investigation.[39] The models presented here therefore cannot be considered as photographs, faithfully representing the reality of how contemporary legal theories consider law and politics relations.[40] Instead, they are more like surrealistic paintings used in order to begin a process of the interpretation (and evaluation) of such a reality.[41]

The ideal-type models are mental constructs that are not representative but instead are to be used "for the scrutiny and systematic characterization" of the highly fragmented reality represented by the various positions of contemporary legal theories on the relationship between law and politics. Each ideal-type model in its pure form epitomizes certain features of how legal scholars depict the relationship between law and politics. In this way, although not fully ascribable specifically to one theory or one legal scholar, the models nevertheless can be helpful in revealing certain fundamental streams or tendencies that link (or differentiate) the various contemporary legal theories.

An example can be traced in the idea of the legal discipline as developed by a movement usually considered as closed to legal positivism, the institutional theory of law. This movement depicts the legal discipline as not totally "pure" from non-legal material, where "the jurist must also ask questions which concern the social existence of law, its way of operating in society and the relations between law and society."[42] However, this is to take place inside a general framework aimed at preserving the purity of the legal discipline, its "distinctiveness of norm-logical analysis," from the "socially actual elements" of the law.[43]

The assembling of different legal theories under the same label (and of different authors under the same movement) therefore presents certain limitations, mainly caused by the fact that the types used here are *ideal* by definition. The models offered in this work tend to correspond only *to a certain extent* to the concrete treatment by such theories (and their scholars) of the general question of how the law interrelates (or not) with politics.

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[39] *Compare, e.g.*, Dhananjai Shivakumar, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L. J. 1383-1414 (1996).

[40] More in general, Weber has no problem in stating that ideal-types cannot "be found empirically anywhere in reality. It is a *utopia*." WEBER, THE METHODOLOGY OF SOCIAL SCIENCES, *supra* at 90 [italics in the original]. For a similar use of the ideal-types, though to the political reality, *see* ROSS, WHY DEMOCRACY? *supra* at 87-88.

[41] The methodology applied in this work is then loosely inspired by the *reconstructivist* approach used by Robert S. Summers in his book "Instrumentalism and American Legal Theory." *See* Summers, *On Identifying And Reconstructing A General Legal Theory – Some Thoughts Prompted By Professor Moore's Critique*, 69 CORNELL L. REV. 1041 (1984).

[42] Weinberger, *The Norm As Thought and As Reality*, *in* N. MACCORMICK & O. WEINBERGER, AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM 45 (1986).

[43] *Id.*

4. Certain Key-concepts

A terminological clarification as to certain key concepts used throughout this work is required before concluding this chapter. In contrast to law, law-making and legal discipline, the use of the concepts of "politics," "political order" and "political material" in this work is focused around a more restricted range of meanings. This restriction is first due to the mapping out of different contemporary legal theories in the law-politics relations. In this work, the primary criteria for classifying the different contemporary legal theories under the different ideal-types model are the very differences as to that which the various theories mean when speaking about law, law-making and legal discipline, in particular in relation to politics.

On the contrary, "politics," "political order" and "political material" are assumed to have almost unique meanings in the different legal theories. In this way, it is then possible to differentiate the theories in the different models accordingly to where they locate the law, the law-making and the legal discipline with respect to the assumed-as-fixed posts represented by the political concepts.

This methodological choice of fixing the political concepts into a very narrow range of meanings is also reinforced by the observation of the ideas that the different contemporary legal theories have of the political phenomenon. If it is true that the meanings assigned to the law by the different legal scholars vary radically, it is also true that the different legal movements tend to perceive the political phenomenon in a quite similar way. Thus, it is possible to give a hard-core definition of how politics, political order and political material are understood and used by the legal world, i.e. definitions shared by the vast majority of legal movements and, within them, the vast majority of legal scholars.[44]

The commonly accepted meaning of *politics* as perceived by the legal world is that it is a complex of values (of an economic, social or moral nature) as well as processes through which such values are then chosen to be implemented by the public authoritative apparatus into the community using the law-making.[45] Values, in their turn, are

[44] Many but not all legal scholars share this generalization of the terms "politics" and "political." For example, Dworkin tends to keep a distinction between moral standards and *stricto sensu* political standards. *See, e.g.*, DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLE FOR A NEW POLITICAL DEBATE. Ch. 1 (2006). *See also* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 568 (1982).

[45] *See* MARK VAN HOECKE, LAW AS COMMUNICATION 64 (2002). *But see* a possible distinction from the normative perspective between political values (to reach through the persuasive capacity of power) and moral values (based on the autonomous choices made by individuals) in MacCormick, *Institutional Normative Order: A Conception of Law*, 82 CORNELL L. REV. 1062-1064 (1997).

"whatever human beings hold to as the underpinning reasons behind more immediate reasons for acting, for approving action, and for preferring certain ways of acting and states of affairs to others. They are as such themselves not necessarily backed by further or ulterior reasons."[46]

Politics in this sense can be traced, for example, in CLS (*e.g.* David Kairys) as much as in legal realists (*e.g.* Ross) or legal positivists (*e.g.* Kelsen or Raz).[47]
As a consequence of this definition of politics, one can find within the same way of considering their ideas of how law relates to politics, *e.g.* the embedded model, both theories that claim the importance of morals for the law, such as the natural law theories, and schools that completely neglect it, such as the school of Law and Economics, but which nevertheless consider (economic) values and the production of values as a constitutive part of the law, of the law-making and of the legal discipline.

Political order is the complex of actors, both in their institutionalized forms and in the looser form of interest groups, and their relationships interrelating in the production of politics, i.e. of values then to be implemented into the community using the law-making. This order is characterized in Weberian terminology as having the primary criterion of action, the "striving for a share of power or for influence on the distribution of power."[48] In this definition of political order, "power" is adopted as detached from any normative relevance, *e.g.* it neither refers to any legal possibility of influencing the behaviors of others nor to Hart's concept of power as the legal competence to create or vary duties or obligations conferred by secondary rules.[49] Instead, power in this definition simply refers to the concrete capacity of forcing people to do things that they otherwise are not willing to do.[50]

Political material is both the conceptual and ideological data shaped by the political actors (*e.g.* in political party programs) but also those created and used by

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[46] MACCORMICK, H.L.A. HART 48 (1981). *See also*, for a similar definition but under the label of "ideology," COTTERRELL, LAW'S COMMUNITY, *supra* at 13. In this work, the distinction is rejected between *values* and *ideals* as recently drawn by SANNE TAEKEMA, THE CONCEPT OF IDEALS IN LEGAL THEORY 4-8 (2003).

[47] *See* Kairys, *Introduction*, *in* THE POLITICS OF LAW. A PROGRESSIVE CRITIQUE 5, 14-15 (D. Kairys ed., 3rd ed., 1998); ROSS, ON LAW AND JUSTICE, *supra* at 334-339; KELSEN, ALLGEMEINE STAATSLEHRE 28 (1925); and Raz, *Rights and Individual Well-Being*, *in* RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 37-40 (1994). *See also* the definition of "political morality" as made by WALUCHOW, INCLUSIVE LEGAL POSITIVISM, *supra* at 43. Many justices of the US Supreme Court as well as federal judges also share a similar idea of politics. *See, e.g.*, Justice ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 20-22, 51-54 (1955). *Compare* the definitions for political sciences in JENS BARTELSON, THE CRITIQUE OF THE STATE 58-68 (2001); DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 21-33 (1979); ROBERT A. DAHL, MODERN POLITICAL ANALYSIS 9-10 (5th ed., 1984); and *generally* HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1958).

[48] Weber, *The Profession and Vocation of Politics*, *in* WEBER, MAX WEBER: POLITICAL WRITINGS 311 (P. Lassman & R. Speirs eds., 1994).

[49] *See, e.g.*, HART, THE CONCEPT OF LAW, *supra* at 26.

[50] *See* WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 152 (T. Parsons ed., 1964).

scholars in order to understand, explain and criticize the values chosen and the processes that have led to their selection (*e.g.* political scientists, moral philosophical works, studies in economic policy).

In conclusion, it is necessary to note that hereafter "politics," "political," "politics of law" and "legal politics" are used synonymously and, if nothing to the contrary is specified, they all refer to the different aspects of the political phenomenon as seen from the perspective of the legal actors. Moreover, in particular when speaking of "law-politics relations," the term "politics" sometimes is used as synonymous to political phenomenon in general, i.e. also encompassing that which here has been defined as political order and political material.

5. Conclusion

This chapter defines the methodological and terminological grounds upon which the following chapters are built. The methodology of investigation and systematization of contemporary legal theories and their positions on law and politics relations has been constructed on two major platforms. The theories are divided according to the answers they provide to three aspects: the static aspect, or that which distinguishes the concept of law from that of politics; the dynamic aspect, or how the law-making and the political order relate to each other; and the epistemological aspect, the degree to which the legal discipline takes into consideration the political material. Moreover, based on their positions as to these issues, the different contemporary legal theories are then grouped accordingly under three main models of a Weberian ideal-type nature: autonomous, embedded and intersecting. The limits of this methodology have been noted, in particular those entailed with models as *ideal-typical* (not depicting but interpreting reality) and *heuristic device* (not goals but tools for the investigative work).

Finally, the chapter provides a terminological explanation for several of the key-concepts used throughout this work. Broad meanings have been ascribed to certain concepts (law, law-making and legal discipline), while for others, more focused definitions have been offered, in particular due to the legal theoretical nature of the present investigation (politics, political order, political material). The analysis of the different contemporary legal theories and their positions as to the relation between the legal and the political phenomenon can now begin, as supported by this methodology and conceptual apparatus.

Chapter 2. The Autonomous Model

This work explores the relationship between law and politics as considered and interpreted by certain of the major contemporary schools of legal theory. Based on the methodology as described in Chapter One, this next part investigates and classifies the contemporary legal movements according to three ideal-typical models with respect to the relationship of law and politics. The focus in this chapter is on the first of these models, namely the autonomous one, while Chapters Three and Four explore the embedded and intersecting models, respectively. The placement of contemporary legal theories under one or another model is based on their positions as to the following issues: How the law interacts to politics (the static aspect), how law-making relates to the political order (the dynamic aspect) and finally, the position of the law as a branch of study, an academic discipline towards the political material (the epistemological aspect).

Legal positivism, and analytical jurisprudence in particular, are considered in this chapter as depicting the relations between law and politics as tendential between two autonomous phenomena. The rigid nature of the law, the closed character of law-making and the purity of the legal discipline towards politics, the political order, and political material respectively shape the feature of the legal phenomenon as autonomous towards the political world.

1. Autonomy of the Legal Phenomenon Towards Politics

One of the tasks most often pursued by legal scholars beginning in the second half of nineteenth century and throughout the entire twentieth century has been the categorization of the legal phenomenon as a specific phenomenon. In this pursuit, many scholars have embraced that which can be depicted as an autonomous model when viewing the relationship between law and politics. The relationship is one between two autonomous phenomena, processes of creation and exploratory disciplines.

Autonomy in this context does not mean that these legal theories claim a lack of any contact between the two different orders.[1] Embracing the autonomous model simply means that despite acknowledging the presence of contacts between

[1] *See*, *e.g.*, KELSEN, GENERAL THEORY OF LAW AND STATE 438 (1949); or Raz, *On the Autonomy of Legal Reasoning*, *in* RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* at 314-315.

law and politics, the inner nature of the law and its functioning (and consequently also its analysis) can only be described in terms and categories particular and specific to the law itself, with minimal contacts with non-legal systems, in particular the political system. Included among the schools adopting such an ideal-type model for describing the relationship between the law and politics are legal positivism and analytical jurisprudence.[2]

In recent decades, a distinction has been made between "inclusive" and "exclusive" legal positivism. Starting mostly with Hart's work, the first stresses more its adherence to the Social Thesis, i.e. the idea that the basic conditions of legal validity are derived from social facts. Conversely, exclusive legal positivism bases its theoretical constructions on the Separation Thesis, i.e. maintaining that there is a conceptual separation between law and morality.[3] These developments within legal positivism, in particular the one in the inclusive direction, do not significantly affect the idea embraced here, that legal positivism in general can be seen as tendentially depicting an image of autonomy of the legal phenomenon from the political one. When it comes to the issue of the relationship between law and politics, both the inclusive and exclusive legal positivisms appear to remain anchored in the general legal positivistic idea that the law is something *per se* different from the political phenomenon and the kind of moral, economic or cultural values that the latter expresses.[4]

As an inclusive legal positivist states, "[m]oral principles figure as legally binding only to the extent that the law recognizes their role in some fairly determinate way, for example through enactment…. [T]he relevant moral principles acquire their status as law by acquiring the appropriate pedigree," i.e. if and only once converted into a legally relevant category or concept.[5] Consequently, both the law-making and legal disciplines should also be treated as autonomous processes and branches of knowledge respectively.[6]

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2 *See*, *e.g.*, HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 202. *But see* BIX, JURISPRUDENCE: THEORY AND CONTEXT 34 (3rd ed., 2003).

3 *See* WALUCHOW, INCLUSIVE LEGAL POSITIVISM, *supra* at 103-140; and Leiter, *Positivism, Formalism, Realism: Legal Positivism in American Jurisprudence. By Anthony Sebok*, 99 COLUM. L. REV. 1141-1144 (1999). *See also* the general outline of the different positions in the legal positivism(s) of past decades in Matthew Kramer, *How Moral Principles Can Enter Into The Law*, 6(1) LEGAL THEORY 83-92 (2000).

4 *See*, *e.g.*, KRAMER, WHERE LAW AND MORALITY MEET 223-244 (2004). *See also* MICHAEL D. A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 332-333 (7th ed., 2001); and, reaching more or less the same conclusion though following a different path, Danny Priel, *Farewell to the Exclusive-Inclusive Debate*, 25 OXFORD J. LEGAL STUD. 681-686 (2005).

5 Waluchow, *Authority and the Practical Difference Thesis*, *supra* at 80-81. *But see* WALUCHOW, INCLUSIVE LEGAL POSITIVISM, *supra* at 82.

6 Stating the necessity for every legal positivistic approach to separate the legal phenomenon from the values it carries, *see* Raz, *Authority, Law, and Morality*, *in* RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* at 210-219. *Compare* the defense of the specific features of inclusive legal positivism against Raz' criticisms in Waluchow, *Authority and the Practical Difference Thesis*, *supra* at 47-52.

Although not examined in this work, it is worth mentioning that another important legal school embraces the autonomous model: Luhmann's autopoietic approach to the law, and in particular its full development inside the legal world as argued by Teubner.[7]

Kelsen, Hart, the autopoietic approach and even the most recent developments of legal positivism converge therefore towards a similar position where they all "emphasize the closed character and autonomy of a legal system impermeable to extralegal principles."[8] It is worth stressing, as will also be seen in the following, that this impermeability to political principles does not mean that these theories deny the presence of a space where legal and political phenomena meet. On the contrary, the presence of such a space is the main reason behind the choice of labeling as autonomous and not "independent" the model covering legal positivism and analytical jurisprudence. The term "independent" would have stressed the quality of a system as being completely not only self-governing but also self-sufficient, creating its own inputs.

The view of the legal order as autonomous is used in this work for marking Kelsen and Hart's ideas of law and politics. This label emphasizes the fact that the law and its system tend to be self-governing, however still with spaces where they interact with the other systems. As will be pointed out, both the legal theories covered by the autonomous model recognize the existence of spaces where law meets politics.

Neither Kelsen nor Hart deny the fact that law, in particular in the contemporary age, is mostly produced by political actors, i.e. by institutional actors whose primary goal is to see their values implemented into a community. That which is typical of legal positivism and analytical jurisprudence is not that they deny such spaces of contacts between law and politics, but the fact that they reduce their extension and frequency as much as possible (*e.g.* limiting them into the Basic Norm).[9]

Moreover, it is worth noting that which is stated in the previous chapter, where attention was focused on the *ideal*-typical nature of the models used in order to classify the different legal theories. The autonomous model, as the other models, does not claim to capture Kelsen and Hart's theories as totally embracing an idea of rigid law, closed law-making and pure legal discipline. It simply points to which *ideal* features (of the law, law-making and legal discipline) legal positivism and analytical jurisprudence tend in describing the law and politics relations.

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7 *See, e.g.*, LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* at 366. Although both Luhmann and Teubner start from a sociological point of departure, they soon enter into a typical normative discussion as to the features characterizing the law from politics, the distinction between jurisprudence as concerning norms and sociology facts being outdated. *See* Luhmann, *Law as Social System*, 83 NW. U. L. R. 136 (1989); and Teubner, *Introduction to Autopoietic Law*, *in* AUTOPOIETIC LAW, *supra* at 1-2. *See also* COTTERRELL, LAW'S COMMUNITY, *supra* at 105-108.

8 HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 202. *See also* Torben Spaak, *Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification*, 16 RATIO JURIS 471-476 (2003).

9 *See, e.g.*, MACCORMICK, LEGAL REASONING AND LEGAL THEORY 236-238 (1997).

2. The *Rigidity* of Law

A common point of departure for each of these schools and scholars is the fact that the law is considered, more or less, as a surgical tool, stable and precise, while politics is seen, at least from a normative point of view, as an unclear and unstable complex of conflicting ideologies, values and processes competing with each other outside the legal world for the control and establishment of the goals the legal tools are to pursue.[10]

That which characterizes legal positivism and the analytical legal philosophy is that they see the law as structurally *rigid* against politics. The rigidity of the law entails that the law is based, in its definition, on forms and structures that tend to remain constant regardless of the political content given to them or the political environment in which they operate. The law does not lose its nature only because it is filled with inhuman content, the orders of a dictator instead of rational decisions taken by a democratically elected parliament. The law is the law for the very reason that its most characteristic feature, its normativity (i.e. its form being an authoritative form) can be properly derived only from an internal, legal perspective.[11]

Naturally, this does not imply that according to these theories, the law cannot be seen from a political or sociological perspective. In contrast to the interdisciplinary approach as espoused by the legal scholars included within the embedded model, the autonomous model's theories stress the fact that non-legal perspectives (as psychology or sociology) are unable to assist the legal discipline in its journey of discovering the hard-core of legal phenomena, i.e. its "Ought" dimension as autonomous from the value-world.[12]

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[10] Concerning the connection between the rise of legal positivism and the nation state, *see, e.g.*, FRIEDMANN, LEGAL THEORY 256 (5th ed., 1967). For the idea of legal positivism as the legal thinking most suitable to the needs of stabilization and predictability of a modern state and its political powers, *see also* WEBER, ECONOMY AND SOCIETY, *supra* at 874-875. *Cf.* Csaba Varga, *Kelsen's Pure Theory of Law: Yesterday, Today and Tomorrow*, *in* VARGA, LAW AND PHILOSOPHY: SELECTED PAPERS IN LEGAL THEORY 290-291 (1994).

[11] *See, e.g.*, HART, THE CONCEPT OF LAW, *supra* at 86-88, 181-182; and KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 15-16 (Clarendon Press 1996) [reprint 1934]. *See also* Cotterrell, *Law and Community: A New Relationship?* 51 CURRENT LEGAL PROBS. 372 (1998).

[12] *See* KELSEN, THE COMMUNIST THEORY OF LAW 193 (1955). For the narrow and purely preliminary role attributed by Kelsen to sociological studies in normative investigations, *see, e.g.*, MacCormick & Weinberger, *Introduction*, *in* MACCORMICK & WEINBERGER, AN INSTITUTIONAL THEORY OF LAW, *supra* at 2. Similarly, *see also* Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 974 (1957).

2.1 Kelsen's Law and Politics

Kelsen stresses the fact that law has the specific property of being an authoritative concept, i.e. it aims to "direct human behaviour by imposing duties backed by sanctions."[13] He recognizes that both law and politics try to make people do something, the law being "a social order, that is to say an order regulating the mutual behavior of human beings."[14] Further, law and politics both have the same characteristic in that they try to establish a bridge between two elements (for example, murder and imprisonment) not connected by any cause-effect relation in the natural world. According to Kelsen, the law of imputation (if someone commits a murder, then he or she *must/ought* to be imprisoned) is at stake both in law and in politics, not the law of causality (if someone commits a murder, a person *will* die).[15]

For Kelsen, the essence of the law as distinct from politics is traceable to the distinction between a *subjective* and an *objective* meaning of legal statements. As pointed out by Stanley L. Paulson, already in Kelsen's early legal theory,

> "[t]he legislator's intention to enact a bill into law – in traditional parlance, the will of an individual state organ – is essentially different from the expression of 'legislative will' found in the bill."[16]

The fundamental difference is the fact that the ultimate constituting elements of the political dimension of the law are the subjective meanings of the law itself, i.e. the meanings attached to the legal statement by the actor creating it in terms of commands or requests. The political dimension of the law consists of the feelings expressed in subjective meanings ("abortion *must* be punished") addressed to the community. Political statements are statements advertising the values one wishes to implement into the community through the use of legal tools.[17] For example, the

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[13] RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 113 (2nd ed., 1980).

[14] Kelsen, *Law, State, and Justice in the Pure Theory of Law*, *in* KELSEN, WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE 289 (1957). As to a very similar correspondence between the task of legal professions and politicians, *see also* WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 94-95 (H. H. Gerth & C. Wright Mills eds., 1946).

[15] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 89-91.

[16] Stanley L. Paulson, *Hans Kelsen's Earliest Legal Theory: Critical Constructivism*, 59 MOD. L. REV. 803 (1996). As to the persistent problems raised by this differentiation for Kelsen's epistemology, and in particular by the possibility of identifying "legislator's intention" with some sort of psychological phenomenon, *see id.* at 807-810.

[17] *See* MacCormick, *Legal Obligation and the Imperative Fallacy*, *in* OXFORD ESSAYS IN JURISPRUDENCE 104, 111 (A.W.B. Simpson ed., 1973). More specifically, for Kelsen there are two meanings of *politik*. The first concerns "politik" as connected to the ethical sphere; the second refers directly to law as a specific social technique. Concerning the significance of "politics-as-ethics," this concerns the fundamental question of which type of content is to be given to a certain system, i.e. the choice of ultimate goals to which this system should strive. "Politics-as-technique" concerns the realization of already established goals (*objektiven Ziele*) with the use of appropriate means. That

legislator enacts a statute or the judge issues a judgment because they want to fulfill value *f*.

Kelsen clarifies the subjective meaning in order to avoid the subjective pulverization of the collective concept of morals and politics. By subjective meaning he does not "mean that every individual has his own system of values. In fact, very many individuals agree in their judgments of value."[18] Subjective meaning simply indicates that the meaning is not related to an outside reality but to individual (class or group diffused) feelings, impressions, and orientations.[19]

That which is relevant as law, Kelsen continues, is not this factual meaning of the legal statement, i.e. the meaning given to such a statement by actors living in a space-time dimension. That which is important for future legislators or future judges dealing with the statute or the judicial precedent is their objective legal meanings, i.e. the meaning given to them in terms of the legal Ought or, in other words, the meaning given to the statute or the judicial precedent by being a step in the *Stufenbau*.[20] For example, this can be the judicial step of resolving a dispute in accordance with a statute or the legislative step of enacting legal statutory rules not contrary to the Constitution. Both steps, moreover, are taken by actors whose power to act in this direction is attributed to them by the law.

The law, in contrast to politics, comprises a system of *norms* ("A person who commits a murder *ought* to be punished with *x* years imprisonment"). This complex of norms has objective meanings not given to them by the subjective intent of the enactor (*e.g.* the political actor) but by the location of such norms in a wider (and hierarchical) construction of other legal norms. The meanings of legal norms are objective as they can only be derived from a construction situated outside the subjective perspectives of the legislator, judge, scholar or politician: the normative reality of Ought (in German, *Sollen*), the reality of the legal system.[21] According to Kelsen, a "normative reality" in this case comprises of legal norms that certainly can be considered as a qualifying system of human behavior. However, legal norms in themselves have to be studied by the legal scientist as belonging to a reality different than that of human behavior (*Is*, the domain of sciences such as legal sociology): the reality of *Ought*.

The Kelsenian separation of law from politics occurs at the structural level, not at the material level. Kelsen is well aware that the content of the law (*e.g.* the mes-

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which distinguishes this second meaning from the ethical dimension of politics is the fact that it begins to operate only after politics-as-ethics has established the goals of the social (and legal) order. *See* KELSEN, ALLGEMEINE STAATSLEHRE, *supra* at 28.

18 Kelsen, *What is Justice? in* KELSEN, WHAT IS JUSTICE? *supra* at 7.

19 *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 2-3.

20 *See id*. at 3-5, 193. *See also* KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* at 11: "To comprehend something legally can only be to comprehend it as law." *But see* Alida Wilson, *The Imperative Fallacy in Kelsen's Theory*, 44 MOD. L. REV. 276 (1981), as to the lack of "objectivity" in the legal meanings attributed to the norms merely by their belonging to a hierarchical system.

21 *See* Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 45-48 (1941). Although beginning with different patterns, Jeremy Waldron more or less arrives at the same conclusion. *See* WALDRON, LAW AND DISAGREEMENT 144 (1999).

sages sent by political actors with a statute or legal judgment as issued by a judge or administrative agency) depends upon political considerations.[22] However, he recognizes this dependency only as to the content of the objective meanings constituting the system of norms, not to their nature.

In the end, law is structurally separated from politics because "[i]t is a peculiarity of the law that it regulates its own creation, application and execution."[23] A characteristic of the law, that it is formed by a specific and distinctive type of means (the legal norms), keeps its internal structure regardless of the varying political messages it is charged with during its formation or its application to concrete cases. In this way, Kelsen aims

"to show that, given that it is impossible to secure agreement on moral and political principles, law can be regarded as an autonomous system of social control, independent of morals and politics."[24]

This tendency towards the separation of law from politics can be extended to all legal theories claiming to embrace a legal positivistic approach to the legal phenomenon. For example, the leading figure of exclusive (or 'hard') legal positivism, namely Raz, states that, in the end, "the law consists of *authoritative* positivist *considerations* enforceable by *courts*."[25] Raz then brings the ontologies of all constitutive elements of what law is, namely *legal* authority, *legal* consideration and *legal* courts, back within the shadow of the legal world.[26]

Even the most temperate version of the current legal positivistic movement, the institutional theory, begins with the assumption of structural diversity between the law and the world of values:

"[L]aw is institutional, authoritative, and heteronomous, contrasting with the personal and controversial, the discursive, and the autonomous character essential to morality."[27]

MacCormick states more clearly in a different article: "[P]olitics is not law, nor law politics, despite occasional assertions to the contrary from the ramparts of Critical Legal Studies."[28]

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[22] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 352.

[23] Kelsen, *On The Pure Theory Of Law*, 1(1) ISRAEL L. REV. 5 (1966).

[24] Tony Honoré, *The Basic Norm of a Society*, *in* NORMATIVITY AND NORMS, *supra* at 94. *See also* FULLER, THE MORALITY OF LAW: REVISED EDITION 110, 119 (1969); and FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 274.

[25] Raz, *The Problem about the Nature of Law*, *in* RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* at 192 [*italics added*].

[26] As to the law's capacity for self-building its own constitutive elements (*in primis* its "authority"), *see* Raz, *Authority, Law, and Morality*, *supra* at 201.

[27] MacCormick, *The Concept of Law and 'The Concept of Law'*, 14 OXFORD J. LEGAL STUD. 1 (1994). "Autonomy" as used by MacCormick differs from the meaning adopted in this work. For MacCormick, "autonomy" refers to the self-justifying character of morals, while the law needs to be based on (although not rooted upon) a foundation external to itself. *Id*. at 4.

[28] MacCormick, *Institutional Normative Order*, *supra* at 1062.

2.2 Hart and the Autonomy of Law

Analytical jurisprudence is often considered a part of the more general movement of legal positivism. The movement however is treated here as a separate school. Although the final results are similar (i.e. the embracing of the autonomous model), their patterns of approaching the question of how the law relates to politics, as seen, differ considerably.

If for Kelsen the rigidity of the law towards politics is quite evident, this feature of the law towards other value-phenomena (*e.g.* morals or *stricto sensu* politics) in Hart's case is even more clearly articulated. For Hart, the law is such a complex phenomenon that he avoids directly answering the general question of what is the law.[29] Instead, he finds that the union of both primary rules (i.e. rules making a behavior mandatory) and secondary rules (i.e. rules regulating the production and implementation of the primary rules) can be considered as a "sufficient condition for the application of the expression 'legal system'."[30]

Once the legal system is defined in this way, Hart openly acknowledges that such a system of rules belongs to a wider social reality and that legal rules are a specific kind of social rules grounded upon social practices.[31] In particular, the legal system somehow has to be accepted and perceived as a binding standard "to be followed by the group as a whole."[32] For this reason, all legal systems present a common "minimum content of natural law." Hart means by this expression that each legal system normatively implements through its rules certain common (moral) values in order to be accepted as it aims at preserving the coexistence among individuals in a community (*e.g.* restrain killing or violence).[33]

Hart's recognition of the fact that the values arising from the social environment fill the legal system with a certain content does not however imply that he considers such values as having a constitutive role in the nature and structure of the legal system built upon these very values. In Hart's words, it is true that the

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[29] *See* HART, THE CONCEPT OF LAW, *supra* at 16-17. *See also* Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 959, where he criticizes the reductionist attitude of Kelsen, "reductionist" in the sense that Kelsen, in trying to find the basic elements of the law, tends to reduce it to a (relatively) simple phenomenon.

[30] HART, THE CONCEPT OF LAW, *supra* at 208. *See also id.* at 92-95; and DWORKIN, LAW'S EMPIRE, *supra* at 33-35. In this context, the debate concerning Hart's reference, on one hand, of primary and secondary *rules* and, on the other hand, of primary and secondary *norms*, is not taken up here. *See*, *e.g.*, Notes, *The Distinction between the Normative and Formal Functions of Law in H.L.A. Hart's 'The Concept of Law'*, 65 VA. L. REV. 1359-1361 (1979).

[31] Hart begins his investigation with the "widespread common knowledge of a modern municipal system… I attribute to any educated man," i.e. from the law as phenomenon of social culture. Hart, *Postscript*, *in* THE CONCEPT OF LAW 240 (2nd ed., 1994). *See also* HART, THE CONCEPT OF LAW, *supra* at 80; and Sylvie Delacroix, *Hart's and Kelsen's Concepts of Normativity Contrasted*, 4 RATIO JURIS 504-510 (2004).

[32] HART, THE CONCEPT OF LAW, *supra* at 55. *See also* Hart, *Postscript*, *supra* at 255.

[33] *See* HART, THE CONCEPT OF LAW, *supra* at 189-195. *See also* Hart, *Problems of the Philosophy of Law*, *in* HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 112 (1983).

law is a form of social institution. Its characterizing aspects however are not rooted in the social but somewhere else since the law "in its recurrence in *different societies* and periods exhibits many *common features* of form, structure, and content," i.e. features transcending the contingent social environment and the values the latter expresses.[34]

Based on this assumption separating the legal phenomenon from the surrounding contingent environment and in contrast with Kelsen, Hart grounds his investigation of the legal system and its constitutive parts on a more empirical analysis of the legal language. "Empirical" here simply means that Hart looks more at how the legal language actually appears in the space-time reality, instead of imposing its own categories, constructed *a priori*, as in the Kelsen's neo-Kantian approach.[35] In particular, Hart focuses on the features present in certain legal concepts, that is in logical-linguistic unities of different legal rules.[36]

MacCormick finds that Hart's work by this focus becomes "clearly recognizable as the work of an English lawyer," that is a lawyer operating

> "in a system which entrusts so much to the wisdom of the political nation, there seems scarcely any room for grand notions of fundamental law, 'basic norm' which cement together the whole legal and political edifice, founts of all rightful authority."[37]

Considering the legal language from an internal perspective, specifically the perspective of an English lawyer, Hart arrives at the conclusion that it is still possible to identify the constitutive features of the system of legal rules as not derived, at least directly, from the value-world, either as politics or as morals.[38] Such features peculiar to the legal system, namely its generality, persistency, and the general habit of obedience, remain the same, characterizing the legal phenomenon regardless of the moral or political values (and the issues attached to them), which the rules

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[34] Hart, *Comment*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 36 (R. Gavinson ed., 1987) [*italics added*].

[35] *See* COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 81-83 as to the distinction in legal theory between "empiricist" and "conceptualist" approaches. Although not speaking expressly of an "empirical approach," MacCormick also points out this basic difference between Kelsen and Hart in approaching legal issues: "[I]n this respect Hart is Humean where Kelsen is a Kantian." MACCORMICK, H.L.A. HART, *supra* at 26.

[36] *See* Hart, *Problems of the Philosophy of Law*, *supra* at 90. He also speaks of "special characteristics of concepts in the use of rules." Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 958. *See also* Coleman, *Second Thoughts and Other First Impressions*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 258 (B. Bix ed., 1998).

[37] MACCORMICK, H.L.A. HART, *supra* at 3-4. This very "English feature" of Hart's perspective is one of the features that lead some critics to doubt the truly general character of his legal theory. *See* Perry, *Hart's Methodological Positivism*, *supra* at 316-319.

[38] "On both theoretical and moral grounds Hart opts for the thesis that moral value ought not to be treated as a necessary condition of legal validity." MACCORMICK, H.L.A. HART, *supra* at 159. However, as admitted by Hart himself, this choice of considering the value-aspect as neither constitutive nor essential to the idea of law, is *per se* a value-choice. *See* HART, THE CONCEPT OF LAW, *supra* at 206-207. *See also* MacCormick, *A Moralistic Case for A-moralistic Law?* 20 VAL. U. L. REV. 37-40 (1985).

are loaded with or built upon.[39] For example, the feature of the legal system such as the general habit of obedience is certainly built upon the socio-psychological dimensions of the community and its values (*e.g.* the moral one of respecting always the authority).

However, Hart depicts the legal system as always being characterized by the same feature, the same general habit of obedience, regardless of the changes in the underpinning values (*e.g.* regardless of the shift from the moral value of due respect to public authorities, as in pre-Nazi Germany, to a more political value of obeying the *Fuehrer*). The value-ground can change, but the legal system is always characterized for its "habit of obedience," no matter to what or to whom.[40]

It is true that Hart stresses as a characteristic aspect of legal concepts the fact that they have a core of established meanings surrounded by a penumbra of uncertain meanings. It then can be argued that political criteria actually should come into the depiction of law as given by Hart when it comes to deciding cases falling into the penumbral meaning of a certain legal concept. Hart himself is well aware of the possibility for such criticism and counters it by restating that vagueness and ambiguity do not mean that the concepts are, in this penumbral area, politicized.[41] Even this penumbra, Hart argues, usually does not allow political concepts and categories to come into the area reserved to the legal concepts. This area of uncertainty as to legal concepts and categories does not belong to politics (or to morals); it is an integral part of Hart's idea of law as it is an expression of legal linguistic, or conceptual, problems.[42]

According to Hart, continuity exists between the core and penumbra of a certain legal concept, consisting of the fact that legal language, as many other languages, tends to have an open texture. The introduction of non-legal linguistic criteria (such as the evaluation of social policy in a decision by a judge) breaks this (i.e. one goes outside the text into a reality different from the linguistic one), not allowing us to see that there is a legal rationality, specific to the world of legal language, behind the many apparently discrepant uses of the same term.[43]

MacCormick has further developed this basic idea of Hart as to incorporating into the legal system the discretion used by judges when dealing with penumbral

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[39] Moreover, legal concepts have as characteristic features the fact that they are ascriptive (i.e., in particular in judicial statements, they attribute a right or responsibility) and defeasible (i.e. one can contest such attribution). *See* HART, THE CONCEPT OF LAW, *supra* at 21-23, 56.

[40] *See id.* at 49-40; and Hart, *Positivism and the Separation of Law and Morals*, *supra* at 626-627.

[41] *See id.* at 607-608.

[42] In replying to David Lyons' criticism of Hart's idea as to the open-texture of language, Bix also stresses Hart's idea of a legal domain on the penumbrial area. The penumbrial area is constituted by legal language (although uncertain) and only elements with the same ontology are allowed to enter and affect it. *See* BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 35 (1993).

[43] *See* Hart, *Positivism and the Separation of Law and Morals*, *supra* at 614-615; and Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 956, 963 n.20 and 968.

meaning of legal concepts. MacCormick in particular has indicated that principles like those of coherence or consequentiality show that

"there are *in legal systems* canons or standards of legal reasoning which establish what are satisfactory [from the lawyers' perspective] justifications of judicial decisions."[44]

Finally, according to Hart, legal concepts although based on the social reality, are not rooted into it, that is they do not directly stand for anything factual but instead are used as performative statements.[45] For example, the essence of the concept of right does not lie in any political or moral ideology, identifying it simply as the "individual choice," i.e. the legal possibility to do or not do something. That which is central is the function words such as "right," i.e. constituting the legal language, *perform* by their being used by people (mostly officials) in the operation of a legal system. They are words written or pronounced in order to do something (*e.g.* to gain certain values in the society via the law), but they still remain words. Their essence and function is ultimately given with reference not to the outside reality but to the linguistic context in which such words are written or pronounced, a linguistic context shaped by the system of legal rules.[46]

The law in the end is a linguistic tool whose essence then tends to be grounded upon but still autonomous from (i.e. not permeated by) all of the values for whose implementation into the community the tool is being used. All of these features stress the idea Hart has of the law as a system of rules leaning towards rigidity in the relations with politics and morals.[47] The features are politically neutral in the sense that they make reference only to elements belonging to the legal language; for example, a statute becomes law when it has been "declared as valid law" by the head of Parliament with certain written or pronounced words. This leaves outside as necessary constitutive elements of the legal system any politically charged features. The statute, in order to be called law, does not necessarily have to be produced by a democratically elected assembly. Law, "in spite of many variations in different cultures and in different times, has taken the same general form and structure;" law keeps remaining law through very different and countless social, moral and *stricto sensu* political environments.[48]

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[44] MACCORMICK, H.L.A. HART, *supra* at 126 [*italics added*]. Hart's defense against various critics as developed by BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY, *supra* at 28-35 is also in the same direction.

[45] *See* Hart, *Definition and Theory in Jurisprudence*, *in* HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* at 28.

[46] *See* Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 970. *Compare* COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 81-83 (2003).

[47] *See*, *e.g.*, Hart, *Commands and Authoritative Legal Reasons*, *in* HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 254-255 (1982). Hart actually speaks of the "stability" of legal concepts. *See* Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 957.

[48] Hart, *Postscript*, *supra* at 240. *See also* HART, THE CONCEPT OF LAW, *supra* at 73, where Hart stresses the decisive role played by the legal rules and the habit of obedience.

In the end, it is fully possible for Hart to identify legal concepts and categories in terms of rules and standards. Such rules and standards are recognized by looking "inside the legal world," that is making reference to the legal linguistic structure and complex as it appears to the legal actors and without making reference to political elements which may lie behind (or outside) such language.[49] In the same manner as with Kelsen, this does not mean that the legal and political phenomena are totally separate according to Hart. He simply stresses the fact that the legal system, even if surrounded by a social context, is still rigid towards the values the latter produces. The legal system is a specific phenomenon, whose hard-core, namely the legal rules shaped in legal language, is affected by the different value-environments but only in terms of the content of the messages such rules transmit to the community (*e.g.* behavior *f* instead of *e*), not in the way such messages are actually transmitted (*e.g.* with legal rights and legal obligations).[50]

For both Kelsen and Hart, the law certainly is open to receiving contributions to its content from the surrounding political world in terms of values; the structures of the law (either in terms of *Sollen* or of legal language) however still tend to be rigid, i.e. to remain the same no matter which values come in.[51]

3. The *Closed* Law-making to the Political Order

This rigidity of the law, as intended by the theories within the autonomous model, tends to be translated into a *closedness* of law-making towards other orders in general, and the political order in particular. The closedness of law-making in the autonomous model results from the view by legal positivists and analytical legal philosophers that law-making receives inputs from the political order (*e.g.* in form of legislative propositions) but once these inputs arrive into the law-making, they are treated purely according to the rationality and parameters offered by the legal order itself. The workings of law-making and its results (*e.g.* enacted statutes, judicial opinions, scholarly works) are influenced by the battles and victorious parties in the political arena only before they are translated into legal categories and concepts, that is only before the political instances are converted into law.

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[49] *See* Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 957.

[50] For this specific character, a "necessity of a new sensitivity to logical and linguistic distinction" and of a new specific tool, namely analytical jurisprudence, therefore arose. *Id*. at 974. *Compare* Hart, *Postscript*, *supra* at 268, where he speaks of conceptual autonomy "between the *content* of law and morality" [*italics added*]. In this passage, that which Hart is actually referring to however is the diversity in the ontology (in terms of forms and structure) of the legal and moral phenomena as a *medium*, not in the messages law and moral (in terms of what behaviors are accepted or not) carry to the community of addressees. *See*, *e.g.*, Hart, *Positivism and the Separation of Law and Morals*, *supra* at 598-599.

[51] *See* Kelsen, *Science and Politics*, *in* KELSEN, WHAT IS JUSTICE?, *supra* at 372. *See also* Raz, *The Identity of Legal Systems*, 59 CAL. L. REV. 814-815 (1971).

The political order then is seen by these theories mainly as the arena in which the goals law-making is to fulfill are evaluated and decided. Law-making, on the other side, is perceived as a politically neutral machine. A politically neutral machine in that the law-making tends to be detached in its way of functioning, producing and creatively applying the law, from the various subjective contents for which it is the expression, i.e. the value-contents the different political actors wish to give to their use of the legal machinery. Moreover, the mechanisms and procedures of law-making in general are perceived as disconnected from the political processes through which such subjective value-contents have been selected.[52]

The autonomous model states that once a political instance has left the political order and becomes a legal instance, the legal machinery tends to function autonomously. The legal system is influenced in its operational aspects only by an extremely limited (and mostly at the highest constitutional level) number of inputs coming from the political discourse, i.e. the discourse about the type and manner by which values have to be implemented into a community through law. Law-making tends to work in its own autonomous manner with its own rules, regardless of the factual circumstances that the political order uses it to fulfill, value *f* or *e*. That which is important is the fact that the legal machinery tends to run in the same manner, regardless of whether driver *A* drives to *f* or *B* drives to *e*.[53]

For scholars applying the autonomous model, the turning point of transforming political statements, *e.g.* discussions in the lobby of Parliament, into legal norms, *e.g.* the formal request of amending a legislative proposition when such request is accepted by the Parliament and becomes part of a new statute, is typically when the statement first becomes "legally valid."

Political statements become legally valid when they are produced by legally competent subjects (*e.g.* the Parliament) in the forms and according to the procedures stated by the law-making (*e.g.* a formal request for the amendment of a statute presented during a session of Parliament accepted by the necessary majority). The issue then becomes the identification of actors "legally competent" and the formal procedures to be used in order to allow the political order to insert its political statements into the law-making's mechanisms, becoming legally relevant statements (i.e. legal rules).[54]

The answers produced by legal positivism and analytical jurisprudence are similar. They both try to save the closedness of law-making and legal application me-

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[52] *See, e.g.*, KELSEN, THE PURE THEORY OF LAW, *supra* at 63. *See also* COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 104: "Like Hart's concept of law in terms of primary and secondary rules, Kelsen's view of a structure of norms authorizing their own creation, modification and destruction provides a picture of law from which human beings have almost disappeared."

[53] *See* Waldron, *Legislation, Authority, and Voting*, 84 GEO. L. J. 2189 (1996).

[54] *See generally* Raz, *Legal Positivism and the Sources of Law*, *in* RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979). As pointed out by Fuller, this implies that it often is the very ideas about the law-making processes that characterize the embracers of legal positivism or analytical jurisprudence. *See* FULLER, THE MORALITY OF LAW, *supra* at 192-193. *See also* DWORKIN, TAKING RIGHTS SERIOUSLY 40-41 (1997) and his idea of "Pedigree Thesis" as one of the features characterizing legal positivism.

chanisms by referring to a highest binding *legal norm* (most of the time, implicit in a national legal system) establishing the fundamental normative criteria to use in order to separate that belonging to the legal system (the valid law) from that belonging to the political system (a political statement).

3.1 The Basic Norm and the Political Order

According to Kelsen, from a dynamic perspective, the legal system can be seen as a hierarchical system in which the legal validity of certain norms (*e.g.* the opinion of a judge), i.e. their being the carrier of an objective meaning, is ensured by the fact that a higher norm (*e.g.* a statute) has given this objective quality to certain subjects (*e.g.* persons that, because they pass certain criteria, are relevant to the legal system as judges) and their declarations, when expressed according to certain forms and procedure (judgments).[55] In its turn, the higher valid norm takes its own objective meaning from an even higher norm, for example, a constitutional norm establishing the procedure and competence of the Parliament in enacting a statute.

For Kelsen, the legal system is characterized (if analyzed from a legal positivistic perspective) as being a dynamic system, i.e. a system made up of norms produced by means of another through a relationship of delegation. In contrast, the system of natural law is not *produced*, but *deduced*.[56] It is the previous and higher norm that, in the end, allows different subjective meanings as expressed by different subjects, such as judges or the parties to a contract, i.e. their ideas of how the law (*e.g.* legal relationships of a contract) should be, to be transformed into objective meanings that are legally valid, i.e. transformed into law:

"Thus, though every law is created by human action, it derives its validity [i.e. its existing as a law] not from the act, but from another law authorizing its creation."[57]

This hierarchical system of ensuring the validity of a norm, i.e. its relevance to the legal system, by referring to higher (and prior) valid legal norms, is also known as *Stufenbau*. The result, after all the steps are taken, is that the foundation of the validity of the entire legal system (i.e. its quality of being binding for human beings,

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[55] *See* KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 134-135. *See also* KELSEN, THE PURE THEORY OF LAW, *supra* at 233-236.

[56] *See* KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 128-130. *See also* Norberto Bobbio, *Kelsen and Legal Power*, *in* NORMATIVITY AND NORMS, *supra* at 445.

[57] Raz, *Kelsen's Theory of the Basic Norm*, 19 AM. J. JURIS. 96 (1974). *See also id.* at 98-99, 105-107; and KELSEN, THE PURE THEORY OF LAW, *supra* at 6, 8-10. *But see* Carlos Santiago Nino, *Some Confusions surrounding Kelsen's Concept of Validity*, *in* NORMATIVITY AND NORMS, *supra* at 256-258. According to Nino, Kelsen's validity is not a feature of a legal system or of a particular norm, but a descriptive quality attached to such system or norm by the judgments formulated by jurists. Validity is then transferred from the ontological dimension of the legal system to the scientific work of legal scientists. If one accepts Nino's interpretation, validity should then instead have been dealt within the next section (*The Ideal of a "Pure" Legal Discipline*).

a quality that distinguishes the legal system, for example, from the political system) is based completely on that which Kelsen calls the *Basic Norm*.

This norm has a fictitious character but it plays a fundamental function in and for the legal system. The Basic norms is that norm which is presupposed by lawyers, judges, and the community at large in order to justify and give validity, and therefore its specific binding character, to the entire legal system. For example, the decision of a judge is considered valid law because it is taken according to the procedures prescribed in a statute enacted, in its turn, according to a valid Constitution. The latter is considered valid, and therefore existing because it presupposes the existence of a Basic Norm.[58]

It is the Basic Norm that decides which subjective instances, *e.g.* political statements, are allowed to enter, at the various steps of the *Stufenbau*, into the legal system and then acquire an objective meaning, becoming valid law.[59] For example, the political opinions of citizens acquire a "legal validity," or in other words, are transformed into legally relevant instances, only when they are expressed in certain forms prescribed by the legislation, *e.g.* voting at elections. This legislation is binding because it has arisen under a Constitution that ought to be obeyed because it has been adopted in accordance to the procedure set out in the first Constitution, which, in its turn, is binding because of the existence of the Basic Norm ("one ought to obey the prescriptions of the historically first constitution").[60]

Another example can be the political instances of interest groups for the adoption of a certain measure for the protection of the environment. Such instances become relevant for the legal system only if and when such instances are expressed into legal categories, *e.g.* in form of a legal action to be decided by a judge appointed according to a statute that is considered valid in light of a valid Constitution.[61]

According to Kelsen, the entrance of political elements into law-making does not occur only at the constitutional or legislative levels. Instead, it follows, almost parallel, the entire *Stufenbau*, from the first Constitution to the individual opinion as issued by a judge in the lowest court. However, as in the latter case, the subjective meaning of the judge's statement (*e.g.* political statements) acquires an objective meaning (*e.g.* becomes binding rules for the parties) only if made in formal

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[58] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 193-195, 201; and KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 116-117. *See also* Raz, *Kelsen's Theory of the Basic Norm*, *supra* at 110-111; and Paulson, *Kelsen's Legal Theory: the Final Round*, 12 OXFORD J. LEGAL STUD. 268-270 (1992) as to the fictitious character of the Basic Norm.

[59] *See* Kelsen, *On The Pure Theory Of Law*, *supra* at 6. *See also* Delacroix, *Hart's and Kelsen's Concepts of Normativity Contrasted*, *supra* at 513-514.

[60] The "first constitution" is the constitution according to whose procedure the current constitution has been formed and enacted. *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 201-205.

[61] *See* Kelsen, *The Function of a Constitution*, *in* ESSAYS ON KELSEN 112-115 (R. Tur & W. Twining eds., 1986).

accordance with the *Stufenbau*, which, at the very end, grounds its validity upon the Basic Norm.[62]

The Basic Norm is important, according to Kelsen, then in the interrelationship between the political and legal systems for its transcendental-logical function throughout the entire law-making. It is the key passage presupposed by the legal actors for determining that which remains within the subjective meaning of politics, and that which can acquire the objective meaning of law.[63]

Consistent with his legal positivistic premises, Kelsen clearly emphasizes the disinterest of the legal system as to the content of the Basic Norm. That which is relevant within law-making is that the Basic Norm performs the function of transforming non-legal instances (or values) into valid law. The choice of the types of instances the Basic Norm determines as legally relevant is not interesting to the legal actors, whether it is the political value of obeying the first constitution or the value of obedience to the Fuehrer.[64]

As pointed out by Raz, Kelsen actually develops Austin's basic idea of connecting the validity chains with a higher authority. While for Austin the latter is to be identified with the will of the sovereign (i.e. the political will of a political actor), Kelsen transfers the grounding source of law-making to inside the legal system itself by speaking of a norm validating other norms:

"Austin's solution to the problem of identity is seen to rest on the combination of two concepts: validity chains and sovereignty. Kelsen accepts the first… and rejects the second, substituting his own concept of a basic norm. *The focal point, the uniting link, is not one legislator but one law*."[65]

To Kelsen, the Basic Norm acts as a box upon which the entire legal system, its reproduction and its application, is based. However, the value contents of the box are not relevant to the law-making. That which is important to the legal actors is the presence of the box.[66] In this way, Kelsen depicts law-making as tending towards closedness in its relations with the political order, i.e. as a complex of mechanisms, procedures and actors which tend to work in the same way (and accord-

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[62] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 238-240, 242-245; and KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 135. *See also* KELSEN, REINE RECHTSLEHRE: EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK 97 (1934).

[63] *See* Delacroix, *Hart's and Kelsen's Concepts of Normativity Contrasted*, *supra* at 509. As stated by Bobbio, the Basic Norm plays the role of "transforming power into law." Bobbio, *Kelsen and Legal Power*, *supra* at 438. *See also* Jes Bjarup, *Kelsen's Theory of Law and Philosophy of Justice*, *in* ESSAYS ON KELSEN, *supra* at 281; and Agostino Carrino, *Reflections on Legal Science, Law, and Power*, *in* NORMATIVITY AND NORMS, *supra* at 517.

[64] *See* KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 120, where the author points out how the content of the Basic Norm is a matter of contingency, i.e. it "is determined by the facts through which an order is created and applied." *See, e.g.*, Kelsen, *Professor Stone and The Pure Theory of Law*, 17 STAN. L. REV. 1144 (1965).

[65] RAZ, THE CONCEPT OF A LEGAL SYSTEM, *supra* at 100 [*italics added*].

[66] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 217-218. *See also* KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 316; and Delacroix, *Hart's and Kelsen's Concepts of Normativity Contrasted*, *supra* at 511.

ing to their own criterion of legal validity), unaffected by the processes and the results happening in the political order.[67]

As pointed out by several critics of the *Stufenbau* theory, Kelsenian law-making *tends* to a closure towards the political world. Kelsen has been able to exclude the political content from the lower stages of the *Stufenbau* (a political instance is nothing if not transformed into a legal valid instance) simply because he transferred the political content to the highest level. At the level of the Basic Norm, as pointed out by Ross, "the problem of relationships of the norm with the reality becomes inevitably urgent."[68] The choice of the content given to the Basic Norm is not totally arbitrary, but bound by the actual legal order in force. According to Ross, this necessary reference to that which the legal system is in reality ("actually in force"), implies that the choice of the content of the Basic Norm ultimately becomes a politically charged one.[69]

3.2 Rule of Recognition and Law-making

As Kelsen, Hart also feels the need to identify a normative turning point (i.e. belonging to the legal world), a crossroad that allows and controls when and how the inputs coming from the political order can enter into the legal one.[70] After distinguishing between two major types of rules, primary duty-imposing rules and secondary competence-imposing rules, Hart states that among the secondary rules, a specific relevance is given to the "Rule of Recognition." This rule has the very role of determining which rules are to be considered valid law for the system, and implicitly, those that are not.[71]

Hart's model of relating law-making and the political order thus is based on the premise that law-making presents itself as leaning towards a model of a closed mechanism as it does not tendentially allow non-legal instances to get into the law-making with the status of direct relevance. For example, according to Hart, due to the presence of a continuity between the core and penumbra of a certain legal concept, even in the judicial law-making "the social policies which guide the

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67 *See, e.g.*, KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 114, 132-133. *See also* Raz, *Kelsen's Theory of the Basic Norm*, *supra* at 105-106.

68 ROSS, ON LAW AND JUSTICE, *supra* at 69. *See also* JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONING 124-125 (1964). *But see* Kelsen's replay in *Professor Stone and the Pure Theory of Law*, *supra* at 1140-1151.

69 *See* ROSS, ON LAW AND JUSTICE, *supra* at 70. Raz has responded to such criticism by asserting a possibility for laws that indirectly authorize their own creation within Kelsen's theory. Therefore, Raz continues, every legal system in the end does not require a basis on "a non-positive" (i.e. politically and not legally justified) Basic Norm. *See* RAZ, THE CONCEPT OF A LEGAL SYSTEM, *supra* at 138-140.

70 Although some differences exist, the analysis here of Hart's idea of law-making and legal discipline is also essentially valid for the position of inclusive legal positivism on these issues. *See, e.g.*, Hart, *Postscript*, *supra* at 250-254.

71 In many cases, the Rule of Recognition can be identified with that widely known as a "living constitution." *See* HART, THE CONCEPT OF LAW, *supra* at 103.

judges' choice are in a sense there for them to discover; the judges are only 'drawing out' of the rule what, if it is properly understood, is 'latent' within it."[72]

This closure of the procedures and mechanisms of creation and implementation of the law is evidenced by the fact that the turning point transforming political inputs into legal categories or rules is a presupposed valid secondary rule, i.e. "a rule for conclusive identification of the primary rules of obligation."[73] The transformation of political statements into law is regulated inside the legal order with the use of legal categories such as competence or validity, and not from the political order with the use of political categories such as "social justice" or "democracy." Hart's legal theory thus portrays the law as tending to be a self-regulating system of rules, whose way of working in the acceptance or rejection of political instances is based on the norms themselves.[74]

However, in contrast to the transcendental-logical nature of Kelsen's approach, Hart has a more empirical starting point as to the issue of how the political order interrelates to the legal one. He notes that the Rule of Recognition is of an empirical nature in the sense that it only can be revealed by looking at how the legal actors actually think, the ultimate foundation of the validity of the legal system.[75]

According to Hart, the social context influences the mechanisms of implementation and production of legal rules to the point that he states:

> "Perhaps I need hardly insist that even in England, even in Oxford, we have come around to the view that law 'for its proper functioning' – which I suppose means if the decisions rendered by courts are to be satisfactory and intelligent – needs recourse to other disciplines than law."[76]

By basing the Rule of Recognition upon the social context, certain of Hart's commentators refer to a "social thesis" as implicitly endorsed (or at least not rebutted) in his idea of law. This thesis consists of the "view that, while being just or morally good is not in general a criterion of legal validity, no outrageously unjust apparent laws are valid."[77] However, that most relevant for Hartian law-making is not how such empirical evidence of the ultimate foundation of the validity of the legal system (*e.g.* the general social approval of the latter as "just"), although fundamental for its existence and working, objectively appears, in other words, its ex-

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[72] Hart, *Positivism and the Separation of Law and Morals*, *supra* at 612. Raz states that Hart has to be counted among those expressing the "incorporation thesis," i.e. the idea that "all law is either source-based or entailed by source based law." Raz, *Authority, Law, and Morality*, *supra at* 194-195.

[73] HART, THE CONCEPT OF LAW, *supra* at 92.

[74] *See* RAZ, THE CONCEPT OF A LEGAL SYSTEM, *supra* at 199-200. *See also* Coleman, *Rules and Social Facts*, 14 HARV. J. L. & PUB. POL'Y 707 (1991).

[75] For Hart, the Rule of Recognition "is a rule of the group to be supported by the social pressure it exerts." HART, THE CONCEPT OF LAW, *supra* at 92.

[76] Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 955.

[77] Murphy, *The Political Question of the Concept of Law*, *supra* at 385. *See also* Waluchow, *The Weak Social Thesis*, 9 OXFORD J. LEGAL STUD. 26-27 (1989); and Raz, *Legal Positivism and the Sources of Law*, *supra* at 37: The social thesis is "that what is law and what is not is a matter of social fact."

ternal perspective. Instead, it is how such empirical data are perceived inside the legal order itself, rather its internal perspective.[78] The Rule of Recognition's

> "existence as a rule is constituted simply and solely by the fact that 'from the internal point of view' it is 'accepted'… by at least the judges and other superior officials exercising powers within the system."[79]

If one adopts the internal perspective, the way in which the legal actors perceive such a Rule of Recognition, one inevitably falls back into the Hartian normative dimension, that is the dimension where the actors consider not the type of political messages for which the rule is actually the carrier, but rather its normative shape.[80] It is true, as stated by Liam Murphy, that according to Hart, "moral or political considerations play a role in determining what the law is only to the extent that there is some social or institutional warrant for this."[81] When it comes to identifying Hart's warrant with an actual example, however, Murphy himself cannot ground his assessment better than by referring to a normative entity, i.e. an entity coming into existence because of and only to the extent it is thought-of-as-Ought by the legal actors: "a *constitutional provision* declaring a right to freedom of speech."[82]

This normative feature of the Rule of Recognition, relevant for law-making, is confirmed by one of the essential aspects for the existence of a legal order itself, that is its continuity. The legal order has the characteristic of securing "the uninterrupted continuity of law-making power by rules which bridge the transition from one lawgiver to another."[83] This capacity certainly cannot be related to either

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[78] *See* Hart, *Postscript*, *supra* at 255-256. For an exhaustive analysis on Hart's internal perspective of the legal phenomenon, *see* MACCORMICK, LEGAL REASONING AND LEGAL THEORY, *supra* at 275-292; *generally* Scott J. Shapiro, *What Is The Internal Point of View?*, 75 FORDHAM L. REV. 1157-1170 (2006); and, for the internal perspective's following refinements (*e.g.* by Raz and Finnis), *see* Bix, *H. L. A. Hart And The Hermeneutic Turn In Legal Theory*, 52 SMU. L. REV. 183-186 (1999). *See also* the similar division drawn by Arnold W. Thurman, *Institute Priests and Yale Observers –A Reply to Dean Goodrich*, 84 U. PA. L. REV. 813 (1936), between a science of law ("the one for ceremonial use inside the institution") and a science about law ("for observation from above").

[79] MACCORMICK, H.L.A. HART, *supra* at 109. *See also* Hart, *Postscript*, *supra* at 256-257.

[80] The prevalence of the normative dimension of the Rule of Recognition as to its being originated into the social reality has led Coleman to state: "[T]he claim that the rule of recognition is a social rule recognizes that the rule itself may not be constituted by convergent social practices. Instead, *its authority as a rule of recognition* [i.e. its *raison d'être*] *depends on there being a social practice of accepting it as authoritative.*.. [such rule] can be specified independently of the existence of a social practice." Coleman, *Rules and Social Facts*, *supra* at 708 n.9 [*italics added*]. *See also id*. at 721.

[81] Murphy, *The Political Question of the Concept of Law*, *supra* at 372.

[82] *Id*. [*italics added*]. Also stressing Hart's Rule of Recognition as a rule of positive law, *see* Rolf Sartorius, *Hart's Concept of Law*, *in* MORE ESSAYS IN LEGAL PHILOSOPHY 157 (R. Summers ed., 1971).

[83] HART, THE CONCEPT OF LAW, *supra* at 53.

a continuity inside the political order or socio-psychological data such as "the habit of obedience."[84]

This continuity, as a basic element of a legal order, is ensured by general rules concerning the qualifications and mode of determining the lawgiver; for example, among the secondary rules, there are those which Hart defines as the "rules of change," i.e. those directed to empower individuals with law-making power.[85] For Hart, the more radical upheavals in a political order (for example, a revolution) do not affect the manner by which law-making functions in a society. The latter always has, as a point of departure for its functioning, an Ought-statement, a rule internally perceived by legal actors, prescribing that the new lawgiver has the right to enact new legal norms. For example, in the case of a revolution, the right naturally can be based on such argumentation as natural rights or the will of the people. Nevertheless, Hart continues that it is always necessary to transform this political statement into the legal category of the "right to legislate."[86]

The relationship of law-making to the political order is then characterized by the necessary presence of a normative node: The Rule of Recognition conferring rights or authority to a person(s). The "Rule of Recognition… [is the] first step from the pre-legal to the legal," but not as a political product of a revolution, but as "the acknowledgement of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule."[87]

To summarize, the complex of mechanisms and procedures of production of the law, in both legal positivism and analytical jurisprudence, are depicted as tending to be *closed* in their relations to the political order.[88] Law-making as perceived by legal positivism and analytical jurisprudence *tends* to be closed towards the political order because they build the ultimate existence of such Norm or Rule upon the social reality. The turning-points of the law-making have to be supported by some sort of general social consent and by the values (moral, political *stricto sensu* or cultural) the community expresses.[89] The law-making, however, tends towards its

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[84] *See id.* at 50. Hart stresses in particular that this cannot be the case in modern democracies where "the composition of a legislature… [is characterized by] a frequently changing membership." *Id.* at 53.

[85] Even in the most absolute monarchies, these rules have to exist as they identify that which is "the rule of succession" in the role of the lawgiver entitled to the title of Rex II, the right to succeed and the right to make law. *See id.* at 52-53.

[86] *See id.* at 58, 60. Through a slightly different pattern, inclusive legal positivism reaches the same conclusion as Hart does. *See, e.g.*, WALUCHOW, INCLUSIVE LEGAL POSITIVISM, *supra* at 39.

[87] *Id.* at 92 [italics in the original].

[88] For example, José Juan Moreso and Pablo E. Navarro argue that the Hartian and Kelsenian ideas of the "reception of norms" (i.e. the idea that despite any revolution, it is still possible to find structural relations between the earlier norms and the new system) are a sign of a propensity to perceive law-making as closed in relations to political turmoil. *See* Moreso & Navarro, *The Reception of Norms, and Open Legal Systems*, *in* NORMA-TIVITY AND NORMS, *supra* at 273-275.

[89] *See* Kelsen, *Science and Politics*, *supra* at 365. *See also* Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 131 (1984); and MACCORMICK, LEGAL REA-

closure because both schools build the ultimate norm *upon* the social reality, but they do *not* root the norm *within* it.[90] Kelsen and Hart do not view a social or political underpinning as validating the creation of legal norms but instead a norm itself, the Basic Norm or the Rule of Recognition, as the basic mechanism of the transformation of political instances into legal instances.

This presentation, of an origin internal to the legal order of the Basic Norm or the Rule of Recognition, has been subject to strong attack by critics of both schools. Concerning the Kelsenian construction, it has been pointed out that Kelsen is finally forced to state that the prevalence of one Basic Norm on the others has to be decided looking at the legal order "in force," i.e. taking into consideration a factual (i.e. not belonging to the Ought-world) condition.[91] With respect to Hart, one critic notes that Hart did not support his "empirically founded" Rule of Recognition upon any empirical data, but only with the normative distinction between the internal and external perspectives of the law, i.e. an assumption of how the legal system interrelates with the outside world.[92]

4. The Ideal of a "Pure" Legal Discipline

Moving to the issue of how the legal discipline should relate itself and its investigations in general to politics and political material, the theories within the autonomous model usually deny any need for the presence of political elements within the legal analysis. The legal discipline, as with natural or social sciences, is defined as an autonomous branch of knowledge precisely due to its autonomous working space, the law.[93] As the law, as already seen above, is described in a rigid terminology, i.e. making use only of strictly legal terms and qualities, it seems almost natural for the theories falling within the autonomous model to promote a "pure" idea of the legal discipline. The legal phenomenon is to be purified of any political dust, or in other words, of the categories and concepts typical for other scientific branches, such as political science or sociology.[94]

SONING AND LEGAL THEORY, *supra* at 139-140, as to the socio-political underpinning of Hart's Rule of Recognition.

90 *See, e.g.*, Raz, *The Problem about the Nature of Law*, *supra* at 191. *But see* MACCORMICK, H.L.A. HART, *supra* at 159.

91 *See* ROSS, ON LAW AND JUSTICE, *supra* at 66-67.

92 *See* COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 100-101.

93 In the first edition of the *Reine Rechtslehre*, Kelsen dedicated one section to underscoring the "anti-ideological" character of the Pure Theory of Law, i.e. its being totally emptied of any political discourse or usage. *See* KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* at 18-19.

94 *See* COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 96, 102-103. *See also* Delacroix, *Hart's and Kelsen's Concepts of Normativity Contrasted*, *supra* at 512; and Bobbio, *The Promotion of Action in the Modern State*, *in* LAW, REASON, AND JUSTICE. ESSAYS IN LEGAL PHILOSOPHY 194 (G. Hughes ed., 1969).

When it comes to the law, the legal scholars within the autonomous model seldom contest the fact that the law is actually influenced by politics and vice versa.[95] They rarely claim that the phenomenon the legal scholar is to investigate (i.e. the object of the pure legal science) lacks any connection whatsoever with other systems, such as political or social ones. Moreover, as with the majority of legal theories, the legal positivist's ultimate goal is also to implement via the law a certain kind of society and a certain kind of political order. For example, Kelsen and Hart's legal theories are identified by many scholars as vehicles for the promotion of an individualistic, liberal political organization.[96]

However, in order to discover the basic structures of the law, legal scientists have to pass through the empirical dust surrounding the legal phenomenon, i.e. through the different subjective meanings attached to the law (as in Kelsen) or the political usage of the legal language (as in Hart). They have to go deep into the core of the law and fulfill the primary goal of the legal discipline: to identify and investigate the objective meaning of the law, the true normative meaning of legal language and, from that perspective, to look (with a normative lens) at the functioning of the entire legal system.[97]

The legal discipline then should exclusively deal with the positive law as it objectively is expressed in legal norms, norms that according to the legal system have the peculiar feature of having an objective meaning (or, as in Hart, the quality of being produced according to the Rule of Recognition), independent from the one attached to it either by the creator of such norms, by the agent who has to apply them or by the scholar that is to investigate them.[98]

From the idea of having a specific and autonomous object of investigation (i.e. the law), the theories within the autonomous model derive the possibility of having a specific and autonomous study of it (i.e. the legal discipline). The study of the law, in order to fully grasp the normative shape of the law, is to avoid the misleading terminology used in other sciences (with categories such as "democracy"

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[95] *See, e.g.*, COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* at 4-5 n. 4.

[96] *See* MACCORMICK, H.L.A. HART, *supra* at 160. *See, e.g.*, KELSEN, VOM WESEN UND WERT DER DEMOKRATIE 98-103 (2nd ed., 1929). In contrast with natural law scholars, however, most of the twentieth century legal positivists claimed (at least until the end of World War Two) a neutrality (i.e. not laden by any political values or meanings) for their methodology and results. *See, e.g.*, KELSEN, ALLGEMEINE STAATSLEHRE, *supra* at 44-46. *See also* WALUCHOW, INCLUSIVE LEGAL POSITIVISM, *supra* at 80-81, depicting the traditional idea of legal positivists as denying "anything but contingent connections between law and morality."

[97] *See, e.g.*, Hart, *Definition and Theory in Jurisprudence*, *supra* at 47; and KELSEN, THE PURE THEORY OF LAW, *supra* at 70.

[98] *See, e.g.*, WALUCHOW, INCLUSIVE LEGAL POSITIVISM, *supra* at 15-30. In this long excursus, Waluchow promotes the possibility of a descriptive-explanatory approach to the legal phenomenon and rejects Dworkin's claim that each description of the law is actually an interpretation, implying necessarily a "taking of a moral stand" by the observer. For a similar argument, *see also* Gerald Postema, *The Normativity of Law*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART 85 (R. Gavinson ed., 1987).

or "justice") and focus instead exclusively on the analysis of the internal characteristics of the law and of the law-making (with categories such as "validity" and "jurisdiction").

4.1 Kelsen's Pure Theory of Law

In the famous *incipit* of Kelsen's "The Pure Theory of Law," legal politics is clearly distinguished from legal science:

> "As a theory, [the Pure Theory of Law's] exclusive purpose is to know and to describe its object… it is a science of law, not legal politics. It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements."[99]

In their turn, legal politics and legal science are different from the psychological and sociological approaches to the legal phenomenon for the very ontology of the object of investigation. For psychology, for example, an object of investigation is the *human* will, intended as an empirical manifestation of a bio-psychological being living in a space-time reality (*Mensch*). In contrast, legal politics and legal science focuses, although with different approaches, on the *personal* will, that is an expression in the world of *Sollen* coming from an entity existing only as far as the ethical and legal systems recognize it (*Person*).[100]

For Kelsen, the political approach to the legal phenomenon is characterized by the fact that, at the end, the central point of the investigation are those statements which do not point out how the law "*is*" (i.e. the law as a normative phenomenon) but how the law "*ought* to be" or how the law "*ought* to be produced" (i.e. how such normative phenomenon should be).[101] In the latter case, that which is under investigation is not the reality of the law (*e.g.* "the law states *a* and *b*") but simply the interests and conflicts behind the idea that the law "ought to be just."[102]

In contrast, in order to be defined as scientific, legal work has to rationally explain the reality (that which *is*) of the law. The law, at least for those parts dealt with by the legal discipline, does not consist of either interests or conflicts, but of an "order that either satisfies one interest at the expense of the other, or seeks to establish a compromise between the two."[103]

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[99] KELSEN, THE PURE THEORY OF LAW, *supra* at 1. *See also* Raz, *On the Functions of Law*, *supra* at 287-288. As to the ambiguity of the term "legal science" in the Kelsenian writings, *see* Paulson, *Appendix I: Supplementary Notes*, *in* KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* at 127-129.

[100] *See* KELSEN, ÜBER GRENZEN ZWISCHEN JURISTISCHER UND SOZIOLOGISCHER METHODE 52-55 (1970).

[101] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 1. *See also* Bjarup, *Kelsen's Theory of Law and Philosophy of Justice*, *supra* at 301.

[102] *See* Kelsen, *On The Pure Theory Of Law*, *supra* at 4, separating the philosophy of law ("speculation about justice") from the *science* of law ("as a science of positive law").

[103] Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, *supra* at 49.

According to Kelsen, the fundamental criterion to use in order to distinguish legal science (used here in the Kelsenian meaning) from other non-pure sciences related to the law (i.e. the sociology of law or political science) can be found in the same ontology of the object of investigation, i.e. in the same peculiar feature that qualifies certain statements as law instead of, for example, as political or sociological instances. This feature is "validity," defined by Kelsen as "the specific existence of a norm."[104]

Legal scientists then should not be interested in the type of values that are (i.e. in the politics of law) or should be (i.e. in the philosophy of law) transformed into law, as their content is irrelevant for the functioning and validity of the legal system.[105] That which matters to the legal scholar is finding out whether the norms under investigation are valid law, i.e. whether they are part of a valid legal system or, in other words, they can be derived from an *existing* Basic Norm. This idea of the existing Basic Norm, referring to the concrete reality of social acceptance instead of to the Ought reality, is one of the major critical points of the entirety of Kelsen's construction and goal of preserving the purity of the legal discipline.

Using the previous example, the Basic Norm of "one ought to obey the prescriptions of the historically first constitution" usually is a common feature of any legal order, but it is not the only possible Basic Norm. Another type of Basic Norm could be one that was in force in Germany for more than 10 years, claiming that "one ought to obey what the Fuehrer says, regardless any former prescription."[106]

The actual possibility of a conflicting content of the Basic Norm (*e.g.* should one obey the law or the Fuehrer?) is one of which Kelsen is well aware. This is the reason why he introduces, as a major criterion by which to solve this dilemma, the idea of the "effectiveness" of a legal system. Kelsen states that the Basic Norm to be taken into consideration by legal scholars and by legal practitioners, has to be effective in the sense that "the norms created in conformity with it are by and large applied and obeyed."[107] It is true that the Basic Norm can state that "one ought to behave according to the *actually established* and *effective* constitution"

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[104] KELSEN, THE PURE THEORY OF LAW, *supra* at 10.

[105] *See* KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 437-439. The structural rigidity of the Kelsenian law towards the outside world leads Raz to state that Kelsen implicitly takes the lawyer's perspective. *See* Raz, *The Problem about the Nature of Law*, *supra* at 185.

[106] FRIEDMANN, LEGAL THEORY, *supra* at 277.

[107] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 210. *See also* KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 437. However, as pointed out by Friedmann, "[h]ow this minimum of effectiveness is to be measured Kelsen does not say, nor could he do so without going deep into questions of political and sociological reality." FRIEDMANN, LEGAL THEORY, *supra* at 278. Raz, although coming from another point of observation, reaches more or less the same critical results as Friedmann does. *See* Raz, *The Purity of the Pure Theory*, *in* ESSAYS ON KELSEN, *supra* at 82. *But see* James W. Harris, *When and why does the Grundnorm change?* 29(1) CAMBRIDGE L. J. 116-117 (1971) (against the identification of the Basic Norm with a social or political phenomenon).

but the political fundamental choice of deciding to obey the constitution instead, for example, what the Fuehrer says, still remains.[108]

Despite this sliding into the world of the empirical reality (*Sein*) through the idea that valid law is derived from an effective Basic Norm, i.e. observable in the concrete behaviors of the majority of a community, it still remains clear that according to Kelsen, the legal scholar, in order to study the legal machinery and its way of working, does not need to know either who the driver behind the wheel is (the political actors) or in which direction the car will be driven (the kind of interests the law is designed to satisfy). For him, the tools of investigations have to be compatible to the object of investigation, the legal order; therefore, using concepts such as "justice" or "democracy" misleads the entire investigation, since the focus then no longer is on the objective legal machinery but on the subjective choice of goals, for whose fulfillment such machine is used.[109] On the contrary, pure concepts such as validity, competence, and legal persons are welcome in the Kelsenian construction, as their origins and ends are entirely inside the legal world, i.e. inside the legal machinery, and therefore entirely Ought- statements.
This purity in the way the legal discipline should work is constructed by Kelsen parallel to the purity of the natural sciences:

> "The difference between natural science and jurisprudence lies not in the logical structure of the statements describing the object, but rather in the object itself, and hence in the meaning of the description. Natural science describes its object –nature- in *Is*-statements; jurisprudence describes its object –law– in *Ought*-statements."[110]

In the end, the legal discipline has to limit its work to describing the specific world of the Ought of the legal norms, a description that then requires specific theoretical tools, Ought-statements. Kelsen constantly stresses the fact that a distinction must be drawn between Ought-statements as used by the legislator as part of constructing the legal order, i.e. norms establishing duties and rights, and Ought-statements as used by legal scientists in order to describe, and not influence or modify, such an Ought-statements world.[111]

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[108] *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 197. According to Kelsen, it is important to note that it is possible to distinguish between a positive constitution and the Basic Norm as a constitution of the legal system, the latter being posited above the first. *See id.* 198-199. As to the relation in Kelsen's works between the Basic Norm and the constitution, *see, e.g.*, UTA U. BINDREITER, WHY *GRUNDNORM*? A TREATISE ON THE IMPLICATIONS OF KELSEN'S DOCTRINE 62-65, 80-85 (2000).

[109] *See, e.g.*, KELSEN, ALLGEMEINE STAATSLEHRE, *supra* at 321.

[110] Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, *supra* at 51. *See also* KELSEN, THE PURE THEORY OF LAW, *supra* at 73-75; and Paulson, *Appendix I: Supplementary Notes*, *supra* at 130-131. As to the problem raised by Kelsen's terminology (in particular the descriptive use of Ought-statements), *see* BINDREITER, WHY *GRUNDNORM*?, *supra* at 131-143

[111] KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at 163. Much criticism has been directed at Kelsen's idea of the legal discipline as a mere descriptive enterprise of Ought-statements, in particular as depicted in the *General Theory of Law and State*. *See* particularly Hart, *Kelsen Visited*, *in* NORMATIVITY AND NORMS, *supra* at 70-76. Carrino points out that Kelsen's attempt to specify a sharp distinction between the object (the

4.2 Analytical Jurisprudence and the Political Material

The same ideal of a *pure* legal discipline is present in Hart's analysis, although he starts from a point quite distant from the one chosen by Kelsen. While Kelsen focuses his attention on the clear distinction between subjective (*e.g.* political material) and objective (*e.g.* legal norms) meanings attached to the law, the major concern for Hart is pointing out the fact that the peculiar features of the legal phenomenon (*e.g.* generality, continuity, etc.) are given to it by the fact that specific words and concepts are used in a specific context.

It is pointless then for the legal discipline to define single words (i.e. outside such linguistic context) such as "right" and "corporation." The legal discipline, on the contrary, has to move in two specific directions internal and external to the legal order. Both directions tend to be *normatively pure*, as they both take as their point of departure how the concepts are conceived and used inside the legal order by the legal actors, or in Hartian terminology, their internal aspect.[112] The declared internal task of the legal discipline, however, is quite traditional and common to other legal theories. It consists of putting the different legal concepts on to the map of legal thinking. The legal discipline has to properly construct the conceptual apparatus used in its work.[113]

The external task, and here comes the original contribution, is founded on Hart's basic idea that the law is characterized by using words in a particular manner, this particularity given to them by the *legal context* in which such words and concepts operate.[114] This must be done in order to clarify the specific meanings such concepts and categories acquire, as well as to distinguish them from the use such concepts can have in ordinary everyday or political language. The task of the legal discipline is "the elucidation of the use of [legal] words in characteristic legal contexts."[115]

With the help of the linguistic scrutiny offered by analytical jurisprudence, the legal discipline can draw a clear line between the normative uses of terms such as "corporation" or "rights" and other uses by sciences that study law as a psycho-

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law-Ought) and the method of approach (descriptive statements of the Ought-statements) finds its roots in the neo-Kantian critical idealism of the nineteenth century. *See* Carrino, *Reflections on Legal Science*, *Law and Power*, *supra* 519-520.

[112] As pointed out by many of Hart's commentators, this purity in the approach to the legal phenomenon of course does not exclude that the Hartian analytical methodology, in its turn, has a hidden external political task. *See*, *e.g.*, Murphy, *The Political Question of the Concept of Law*, *supra* at 380. *See also* Perry, *Hart's Methodological Positivism*, *supra* at 342-347.

[113] *See* Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 972.

[114] *See id.* at 961. *See also* HART, THE CONCEPT OF LAW, *supra* at Chapter II, Chapter IV; and Hart, *Definition and Theory in Jurisprudence*, *supra* at 28. MacCormick labels Hart's methodology as "hermeneutic," since it seeks to explain a phenomenon (the law) through an interpretation of the meaning attached to it by the actors participating to the phenomenon itself (the legal actors). *See* MACCORMICK, H.L.A. HART, *supra* at 29. *But see* Shapiro, *What Is The Internal Point of View?*, *supra* at 1158-1161.

[115] Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 961-962.

logical, social, moral or political phenomenon. In this manner, Hart excludes from the materials available to the legal discipline legal-sociological investigations of how certain legal concepts are perceived in society and the political science investigations as to the type of uses a certain political actor has of certain legal categories. Before getting into the question, for example, of whether the government or society is the "true author of law," Hart suggests giving a normative answer, based entirely on the internal perspective of the meaning(s) such expression has inside the legal order, to the meaning of the "true author of law."[116]

One could say that the attitude of the legal discipline towards non-pure legal materials and disciplines as offered by Hart is probably softer. He does not deny that some general benefits, *e.g.* gaining a wider perspective, can be derived from knowing that which is going on with respect, for example, to the frontiers of moral philosophy, political sciences or sociology.[117] This cautious opening by Hart towards other disciplines, combined with the stressing of the famous passage in the *Introduction* to *The Concept of Law* about how the book should be regarded as "an exercise in descriptive sociology," has led many contemporary inclusive legal positivists to speak of a Hartian idea of jurisprudence-as-a-sociology.[118] Coleman, for example, states that from Hart it follows that

> "law is ultimately a matter of sociology… [f]or I believe the point of positivistic jurisprudence is to demonstrate exactly how thin the concept of law is; how few are the substantive inferences that can be drawn from it; how minimal its moral content is."[119]

However, and this is repeatedly stressed by Hart, this can only be an activity complementary to the fundamental normative core of legal science. Similar to Kelsen, Hart then promotes a legal discipline which cannot gain any essential advantage from other non-purely normative materials and methodologies (*e.g.* of a moral or political nature) because of both the peculiarity of its object of investigation (i.e. the legal language) and the fact that "legal notions… can be elucidated by *methods properly adapted* to their special character," i.e. analytical methods.[120] According to Raz,

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[116] *Id.* at 974-975.

[117] *See, e.g.*, Hart, *Abortion Law Reform: The English Experience*, 8 MELB. U. L. REV. 391-392, 394-397, 400-408 (1972), where the author brings into play sociological and political data while investigating the English legislation relating to abortion.

[118] HART, THE CONCEPT OF LAW, *supra* at vii.

[119] Coleman, *Rules and Social Facts*, *supra* at 717-718. *See also* COLEMAN, THE PRACTICE OF PRINCIPLE, *supra* at 199-201; and Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* at 1034-1035. *But see* MACCORMICK, H.L.A. HART, *supra* at 166 n. 34 (pointing out the similarities between Hart and Kelsen's idea of the legal discipline).

[120] Hart, *Definition and Theory in Jurisprudence*, *supra* at 21 [*italics added*]. *See also* Hart, *Analytical Jurisprudence in Mid-Twentieth Century*, *supra* at 973-974.

"this argument correctly reflects our unreflective thinking about law. Judges regard the fact that a statute was enacted by Parliament as a reason to regard it as binding and to hold the litigants to be bound by it…. [The judges] may accept the rule of recognition because they believe in Parliamentary democracy or in some law and order argument [i.e. in values]…. But those norms which make them accept the binding force of the rule of recognition are not themselves part of the law. From the point of view of the study of the law the ultimate rule is the rule of recognition directing the courts to apply Parliamentary legislation."[121]

As pointed out by Coleman and more recently by Spaak, one of the *sine qua non* elements linking all the streams of legal positivism (including analytical jurisprudence) together, from Austin's classic legal positivism to Waluchow's inclusive version, is this very endorsement of the separability thesis, i.e. the assumption "that there is no *conceptual* connection between law and morality."[122]

5. Conclusion

This chapter has mapped out the positions of certain contemporary legal theories on a fundamental issue of modern times: the relationships between law and politics. The centrality of this issue is demonstrated by the fact that all the major legal-theoretical streams have addressed it in one way or another. The goal of this chapter has been to begin to look to some of these major contemporary legal theories and build a first typology under which some of these ways of dealing with the relations of law to politics can be assembled. The first model of this typology, looking at the relationships between law and politics, has been labeled as *autonomous* according to the answers given to the three questions (the static issue, the nature of law; the dynamic issue, the production of law; and the epistemological issue, the character of the legal discipline). This model unites those theories that argue a sharp distinction between the legal phenomenon and the world of politics.

In particular, the focus has been on how the relations between law and politics have been portrayed by legal positivism, namely by Kelsen, and by analytical jurisprudence, as espoused by Hart (*see* Table 2). These legal theoretical movements attribute to the legal phenomenon the feature of an autonomous relation towards politics. Legal positivism and analytical jurisprudence, although explicitly recognizing the factual necessity of relations between the legal and political worlds, tend to keep the two separate by arguing the *rigidity* of the law's structures towards the complex of values as well as the processes through which such values

[121] Raz, *The Purity of the Pure Theory*, *supra* at 96-97 [*italics added*].

[122] Spaak, *Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification*, *supra* at 473 [italics in the original]. *See also* Coleman, *Rules and Social Facts*, *supra* at 715-717. *Compare* Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 800-801 (1993). It is worth stating again that the definition of politics adopted in this work includes not only the *stricto sensu* political values, but also those of the economic, cultural or moral nature.

are chosen. Moreover, Kelsen and Hart stress the feature of the autonomy of the legal phenomenon by portraying the law-making and the legal discipline as tendentially *closed*, or *pure*, respectively, towards the political order and the material produced by and within it.

As Chapter Three will show, a second way of approaching the question of how the law relates to politics can be identified, portraying the legal phenomenon as embedded and, to some extent, confused with the processes and values of the political phenomenon.

Table 2. Politics And Law In The Autonomous Model

	Relationship of law to politics (*static aspect*)	**Relationship between law-making and political order (*dynamic aspect*)**	**Relationship of legal discipline to political material (*epistemological aspect*)**
Autonomous model (Legal Positivism, Analytical Jurisprudence)	*Rigidity* of law	*Closed* law-making	*Pure* legal discipline

Chapter 3. The Embedded Model

In addition to approaching the relations between law and politics as between two autonomous phenomena, contemporary legal thinking presents a second major ideal-typical model of considering how the legal world interacts with the political one: the embedded model. This chapter explores certain legal theories that can be described as embracing such an ideal-typical model. The placing of these legal theories under the embedded model is based on the same methodology as used in Chapter Two. Consequently, the focus will be on the positions of these theories as to the following issues: how the law interacts to politics, how law-making relates to the political order and to what extent the legal discipline makes use of political material.

In particular, natural law theories, CLS and the school of Law and Economics are considered as representative of the contemporary legal theories that embrace a model of relating law and politics in which law is embedded into politics. These theories have the tendency of considering the legal phenomenon as comprising a *flexible* law, an *open* law-making and *mixed* legal discipline towards the political phenomenon and its material.

1. "Law is Politics"

The slogan, "law is politics", summarizes, although in a quite rudimentary manner, the central perspective adopted by the theories and scholars ascribed to the embedded model with respect to the relationship between law and politics. To state that the law is embedded within politics according to this model, means that the legal phenomenon is nested within the political phenomenon. This concept of "embeddedness" has been loosely borrowed from economic sociology, where the concept is used in order to point out how economic activity can be explained mainly by examining the social and political constraints of the economic system.[1] The adoption here of the sociological idea of embeddedness however is not total. It is limited to the portion of this idea stressing how the (political) environment heavily affects, but does not fully determine, a certain (legal) phenomenon.[2]

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[1] *See* in particular the debate that developed based on Mark Granovetter's article, *Economic Action and Social Structure: The Problem of Embeddedness*, 91(3) AM. J. SOC. 485-487 (1985).

[2] *See id.* at 487. Granovetter's more specific claim, that the social, political and cultural contexts determine the concept of self-interest, is not considered in this work.

This embedded relationship between law and politics is viewed as a two-systems relation in which the legal system is embedded within the wider context of the political order. In this model, the interrelationships and exchanges between the two phenomena are frequent, for example, from the drafting of statutes to the legal reasoning of judges, as well as disseminated within all levels, from the structures and nature of the law to the manner in which the legal discipline is portrayed. This frequency of exchange often renders it very difficult to identify distinctive features within the legal phenomenon.

As the theories within this model posit that "*law* is *politics*," they still find a degree of autonomy in the law that allows for a discussion of the legal phenomenon, however strongly politicized, as distinct from the political one.[3]

The embedded model unites under its flag several, and as to certain aspects, quite contrasting legal theories: contemporary natural law theories, CLS and the School of Law and Economics. Though not investigated in this work, Public Choice Theory, Legal Process, Dworkin, Marxist approaches, and the movement of Law and Society can be considered as also endorsing a depiction of law as embedded in the political phenomenon.[4]

2. A *Flexible* Law

For this heterogeneous group of theories, the law becomes an integral part of a wider context, the political and moral environment in which statutes, judgments and other legal production take place. A certain norm or category becomes fully legal, i.e. truly binding for the community, only if it fulfils certain requirements determined by this external environment. These can be requirements such as "goodness" or "justice," and also those of "efficiency" or "fidelity."

The theories covered by the embedded model can then be generally distinguished from those of the autonomous model for considering the economic, moral

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[3] *See, e.g.*, POSNER, THE PROBLEMS OF JURISPRUDENCE 153-154 (1990); and MACCORMICK, LEGAL REASONING AND LEGAL THEORY, *supra* at 62.

[4] For the Law and Society movement, *see* LAWRENCE M. FRIEDMAN, THE LIMITS OF LAW: A CRITIQUE AND A PROPOSAL 8, 13 (1986). For a general description of Public Choice Theory, *see* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1-11, 55-62 (1999). The location in the embedded model of the school of Legal Process is due particularly to both their idea of the "soundness" of the legal process and their embracing many of Fuller's positions. *See* DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 251-262; BIX, JURISPRUDENCE, *supra* at 84-85; and FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 820 (considering the Legal Process movement as a bridge between legal realism and Dworkin's legal theory). *But see* William N. Eskridge & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2045 (1994) (defining the Legal Process as a "procedure-based positivism"). For the Marxist approach, *see* Karl Marx, *Preface to A Critique of Political Economy*, *in* KARL MARX: SELECTED WRITINGS 423-427 (2nd ed., D. McLellan ed., 2001) [reprint 1859]. For Dworkin, *see* DWORKIN, JUSTICE IN ROBES 13-14 (2006); and George C. Christie, *Dworkin's "Empire"*, 1987 DUKE L. J. 183-184 (1987).

or *stricto sensu* political ends for whose implementation in the community the legal phenomenon is used as a constitutive part of the law.[5] In other words, law is certainly considered by natural law theory, CLS and Law and Economics as an authoritative tool in the hands of the political actors. However, this authoritative tool is qualified as "law" on the basis of which moral, political, or economic value the tool is going to promote into the community.

Naturally, this does not mean that the uniqueness of the legal phenomenon according to the embedded model disappears. The theories produced within the embedded model remain normative theories. The law, in the fulfillment of non-legal values, plays a central role (*e.g.* allowing the State to promote economic growth) due to its very authoritative and obligatory nature (*e.g.* legal sanctions against money laundering). It is the Ought nature of the value that distinguishes legal norms and the legal system (i.e. the complex of norms) from other kinds of norms as used by the political order in order to gain a result (*e.g.* moral norms encouraging investors to purchase domestic bonds instead of foreign securities).

However, characteristic for the theories placed within this embedded model is the definition of the nature and structures of law as *flexible*. In contrast with the autonomous model, these theories claim that some of the fundamental features constitutive of the legal phenomenon have to be found outside the legal world, therefore rendering the internal structures of the law themselves necessarily flexible to the changes occurring at the political and moral levels. Consequently, the answer to the question of what the law is necessarily has to pass by, and pay tribute to, the political/moral environment, for example in terms of statements such as "*just* and *therefore valid* law."

2.1 Finnis' Reasonability and the Common Good

One of the most prominent representatives of the embedded model is certainly contemporary natural law theory.[6] Differently from classical natural law, contemporary natural law scholars particularly stress the fact that the law cannot be explained merely in political or moral terms. Consequently, as pointed out by Free-

[5] *See, e.g.*, Fuller, *Human Purpose and Natural Law*, 3 NAT. L. F. 73-74 (1958); and Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. L. F. 95-99 (1958). Fuller points out in these articles the general impossibility of clearly separating the "either means or ends" functions two phenomena (as the legal and the political ones) play in their relations.

[6] In recent decades, a debate has grown around the differences between the contemporary natural law theory (as derived by Thomas Aquinas and leading to Finnis, and Fuller's theories) and the natural rights theory (originating in Locke and whose main representative today is John Rawls). *See* Bix, *Natural Law Theory: The Modern Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY 69-70 (J. Coleman & S. Shapiro eds., 2002). *See also* Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 615 (1991); and Michael P. Zuckert, *Do Natural Rights Derive From Natural Law?* 20 HARV. J. L. & PUB. POL'Y 695-697 (1997). In this work, contemporary natural rights theory however is considered as encompassed within contemporary natural law theory.

man, Finnis rejects the idea, for example, that positive laws violating rationally demonstrable principles of behavior are automatically non-law.[7] The law, although incorporated in a wider moral and political context, occupies a characteristic space distinct from both.[8]

The distinction from morality is a result of the major shifting of the focus in classical natural law on the law as part of a wider ethical inquiry to the present natural law's awareness of law as a social phenomenon and the consequent recognition of one of the features of the (although embedded) law in our age: the *monopoly* of physical force.[9] Just as for Kelsen and Hart, with respect to politics, the distinction results in a depiction of the law by current natural law scholars as consisting of specific authoritative statements, and not general assessments of the goals to be pursued by the authoritative apparatus.[10]

Despite this evolution from traditional natural law theory towards positions closer to legal positivism, when it comes to the issue of what the law is, Finnis stresses its multi-faceted nature. This multi-faceted nature of the law is derived by Finnis from the fact that his analysis, in contrast to Hart's internal point of view, is based on the layperson's ordinary understanding of law. This brings into law the "irreducible multiformity of human goods" and, as a consequence, the fact that the law, by its own nature, is an "unfocused" idea, more similar to the laws of arts and crafts than to those of biology or chemistry.[11]

From the layperson's ordinary understanding, it is possible, Finnis continues, to consider the law as an authoritative tool dealing with the regulation of a community of persons. This definition, however, necessarily requires, among the constitutive elements of the law, an open door to the political elements. The law is one of the several tools invoked by the political authority to settle co-ordination problems inside a community. Moreover, according to Finnis, politics is the general "field of action and discourse to do with the affairs of complete communities."[12] It then becomes quite consistent for him to consider legal phenomenon as a specific (au-

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7 *See* FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 132.

8 *See* Bix, *Natural Law Theory*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 223-240 (D. Patterson ed., 1996); and Philip E. Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2394-2403 (1992).

9 As for the legal positivists, the law for Finnis is also "one of the paradigms of political authority." Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 133 (1984). *See*, for the change of focus by the natural law theories, BIX, JURISPRUDENCE, *supra* at 71-72. *See also* Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 204-205 (R. P. George ed., 1996).

10 This attention by contemporary natural law scholars to the specificity of legal concepts and categories, has led, for example, MacCormick to state in the conclusions of his review of Finnis' book "Natural Law and Natural Rights": "In this way Finnis enables himself to draw into his natural law framework much in modern analytical jurisprudence which he sees as wholly compatible with it." MacCormick, *Natural Law Reconsidered*, 1 OXFORD J. L. STUD. 108 (1981).

11 *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 276-278; and Finnis, *Law as Co-ordination*, 2 RATIO JURIS 103 (1989).

12 FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 148.

thoritative) part of the way "to do with the affairs" of complete communities instead of placing the law outside this field of action and discourse, as is done by the theories within the autonomous model.

In contrast to the majority of classical natural law theorists, Finnis explicitly recognizes the possibility of a conflict of values inside one community. Nevertheless, he finds that the law has to be directed at ensuring the existence of "some set (or set of sets) of conditions, which needs to be obtained if each of the members is to attain his own objectives."[13] Finnis' law incorporates into its ontology such a set of conditions or values which it aims to realize, i.e. it becomes more *political*, specifically in two of its prongs.

First, according to Finnis, law is a complex of rules

> "directed to *reasonably* resolving any of the community co-ordination problems… for the *common good* of [the] community."[14]

This definition directly foresees political evaluations. These are the evaluations taking place concerning the choice of values to be implemented via the law within a community: the political value of the "reasonability" of the law produced, i.e. the choice of *appropriate* legal means in order to satisfy certain goals, and the political value of a "common good" as the guiding light for the work of the legal apparatus, i.e. the fulfillment of the ideal of *justice*. Finnis states that the authoritativeness of the law has to be derived through a non-purely legal evaluation: the evaluative criterion of "justness" of the law (or at least its ability to secure justice).[15]

Finnis' act of choosing in itself can be considered political, as an

> "[a]nalysis of what is involved in *choosing* certainly shows that any account of it must include reference to that active interest, that bestirring of oneself in pursuit of something, that attachment, and equally that positive aversion from other possibilities, all of which we can call 'will', willingness, decision."[16]

Second, the law according to Finnis structurally becomes an integrated part of a wider political context. The law, as for Kelsen, is a specific tool in the hands of political actors. However, Finnis moves a step further and incorporates into the structure of law also that which Kelsen would define as its political goal, its having as a primary target the wealth of a "complete community." The law is directed at coordinating "any and every individual life-plan and any and every form of as-

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[13] *Id.* at 156.

[14] *Id*. at 276 [*italics added*].

[15] *See id.* at 147-150, 267. *See also* Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1610-1611 (2000).

[16] Finnis, *On 'Positivism' and 'Legal Rational Authority'*, 5 OXFORD J. LEGAL STUD. 81 (1985). According to Bix, residing within the same authoritative and obligatory nature of law as described by Finnis is its political character, namely the choice of "alternative social conditions." Bix, *On the Dividing Line between Natural Law Theory and Legal Positivism*, 75 NOTRE DAME L. REV. 1622 (2000).

sociation."[17] In particular in modern territorial states, such communities for Finnis are entirely identical with the "political community," that is with the association of persons directed to securing "the all-around good of its members."[18] It is not a coincidence that Finnis, in explaining that which he means by a political community, uses as examples, in addition to the contemporary territorial state, the other historical form where (although for different reasons and through different modalities) such embracement of the law in a wider political environment is most distinctive: the Greek *polis*.[19]

Finnis perceives the law then as tending towards an ontology of structural flexibility to the surrounding political environment, as it is characterized both for being constituted by value-choices criteria (the "reasonability" in choosing the proper means to fulfill the idea of justice) and for being directed at implementing such values into a group of persons primarily identified by their belonging to a community which has been politically defined (the territorial State).

2.2 Law and Politics for CLS Movement

As seen above, the law for natural law scholars has a certain degree of resistance towards politics, however low. The law keeps certain specific qualities regardless of the surrounding political environment, *e.g.* its forms as authoritative statements *vs.* mere political propaganda. In contrast, the law for the CLS movement is so flexible towards politics as to disappear completely into the sea of ideologies, categories and value conflicts forming the political world:

"Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society."[20]

This disappearance of law into the political ocean is derived from the fact that CLS simply defines the function of law as a "mechanism for creating and legitimizing configurations of economic and political power," without clearly framing the law in itself, i.e. the ontology of the fundamental element constituting such mechanism.[21]

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[17] FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 148-149. Finnis however stresses the possibility of the co-existence of several global coordinating tools for the same community of persons (for example, law and morals).

[18] *Id*. at 148. As pointed out by MacCormick, the embedding by Finnis of the legal community into the political community is a *conditio sine qua non* also for the survival of the very political system. *See* MacCormick, *Natural Law Reconsidered*, *supra* at 105.

[19] *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 148.

[20] Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 206 (1984). *See also* FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 1041.

[21] Unger, *The Critical Legal Studies Movement*, *supra* at 582. However, as shown below, this is simply a tendency. It is therefore possible to find within the CLS movement some "conceptual" definition of what is law (i.e. a vague and undetermined linguistic phenomenon).

Similar to natural law legal theorists, CLS scholars define the law as embracing political (and economic) features, as for them, the apparatus of legal concepts and categories tends to encompass competing ideals and politics. For example, in a classical CLS article written by Kennedy, he notes how in contemporary American contract law, two different political ideals (or, as Kennedy calls them, "two opposed rhetorical modes for dealing with substantive issues") are embraced: the individualistic and the altruistic ideals.[22]

For CLS, the law is so structurally embedded into the political dimension of the community's life that all battles occurring at the political level between different visions and ideals are reflected in the legal language. The discord one finds in the different concepts and legal categories are simply the reflection of the discord between the "broader contests among prescriptive conceptions of society" (i.e. the conflict of different political values). The world of the law is then fragmented, as it simply reflects (or better, incorporates) the fragmentation existing in the world of politics.[23]

Similar (but not identical) to the position taken by the CLS movement with respect to the relationships between law and politics, are schools that, more or less, are considered derived (at least in the United States) by the critical approach to the legal phenomenon, in particular, feminist legal theories, critical race theory and the postmodern approach to the law. For example, feminist jurisprudence and critical race theory

> "can both be seen as emanating from the same core problem: the extent to which law reflects the perspective of and the values of white males, and the resulting effects on citizens and on members of the legal profession who are not white males."[24]

According to CLS and its spin-off schools, this transferring of political concepts and categories into the legal world originates from the very nature of the legal language through which the legal concepts and categories are constructed and expressed. As legal language is vague and indeterminate, it therefore is malleable to political manipulations (both by legislators, judges and legal scholarship).[25] As a

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[22] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

[23] *See* Unger, *The Critical Legal Studies Movement*, *supra* at 578. *See also* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 222 (1986). The adjective actually used by CLS to define the inherent disposition of the law as to reflecting the changes and conflicts occurring inside the political world is the "malleability" of fundamental legal concepts. *See* Note, *'Round and 'Round the Bramble Bush: from Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1679 (1982).

[24] BIX, JURISPRUDENCE, *supra* at 221. *See, e.g.*, Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L. J. 83-88 (1980); and Harlon L. Dalton, *The Clouded Prism: Minority Critique of the Critical Legal Studies Movement*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 82 (K. Crenshaw et al. eds., 1995).

[25] *See* David M. Trubek, *Where the action is: Critical Legal Studies and empiricism*, 36 STAN. L. REV. 578 (1984). In contrast to natural law theory, CLS scholars however do not give an absolute preference to any one political value as viewed as "better." Their

result, the interpretation the various legal actors (in particular judges and lawyers) give to such concepts then becomes fundamental, an interpretation which is then heavily influenced (if not entirely determined) by the political context in which such actors live and operate.[26]

For this reason, with respect to CLS, it would probably be more correct to speak of the *politicization of the interpretation of the law*, and not simply of the "politicization of the law." Their attention is more focused on the manipulation by legal actors of the existing legal concepts and categories (*e.g.* how the idea of contractual freedom has been influenced and manipulated by the 1800's liberal ideology) rather than on the original political influences as to the birth of such conceptual apparatus (*e.g.* how the idea of contractual freedom reflected the situation of the Roman political and economic system). This leads to the illustration by CLS scholars of legal categories and constructions as empty bottles that can be filled with various, and often contradictory, political concepts and ideas.[27]

In his famous article on Blackstone's Commentaries, Kennedy shows that a clash between two different political instances is actually hidden behind the legal concept of individual freedom. On one side, there is the claim of protection of the individual against organizations (the family or the State, for example) that can threaten his or her freedom. On the other side, there is the need for the activation of the very same organizations and their "communal coercion action" in order to implement this protection. For example, only the State apparatus can guarantee or realize the legal right to individual freedoms.[28]

If, for legal positivists and Hart, the rigidity of the law towards politics is only a tendency, in a similar manner (although in the opposite direction) the legal phenomenon only tends to its dissolution into the political mass for CLS. In other words, the law still maintains a certain separate, although very limited own space inside the legal world for CLS. They still speak of the law as one of the elements constituting politics and therefore living, to some extent, its own life as a part separate from the constituted unity. Although the law is extremely flexible to the sur-

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preferences are always relative to the community and political reality in which the law has to operate. *Cf.* Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, *supra* at 217-218 (a comparison of the idea of what law is in CLS and in Dworkin).

[26] In particular, the decisions of supposedly "purely" legal actors as judges "are no more neutral than the decisions of a legislature or an executive. Political choices are equally involved." FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 1047.

[27] *See, e.g.*, Unger, *The Critical Legal Studies Movement*, *supra* at 570. Finnis criticizes as ambiguous this depiction by CLS of legal concepts and categories as empty bottles. In particular, Finnis continues, CLS does not resolve the question from where in the indeterminacy of the legal conceptual apparatus it derives its complete uselessness to legal reasoning and the law-making; or whether the emptiness of the legal concepts indicates their bridge function to a content external to the logic and rationality of the legal system. *See* Finnis, *On 'The Critical Legal Studies Movement'*, 30 AM. J. JURIS. 23-24 (1985).

[28] *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 211-212 (1979).

rounding political environment, it is still possible to see a certain autonomous structure of a legal phenomenon inside the wider political phenomenon.

This autonomous space of the law, however, is extremely limited since, according to the majority of CLS followers, the law in the end is *flexible* towards politics. This fundamental feature is given to the legal phenomenon by the fact that certain political forms, or types of social organizations, do not have a "natural" (built-in) legal structure.[29] In other words, the same political organization can take different legal forms in different communities (*e.g.* a democratic regime can choose between a formalistic or substantive concept of contractual freedom) and the same legal form can be used in different types of political organizations (*e.g.* a contract type can be suitable for both a democratic or a communist regime). That which is important in order to understand what the law is, is the historical, social and political contingency in which the legal phenomenon is created and operates: who is in charge, for what purpose and how the process of filling the empty bottles of legal concepts and categories with their political content occurs.[30] The aim of the school of CLS is then to show "the narrow 'logic' of the cases… by revealing in detail the economic and political context in which it is developed and how case outcomes relate to wider tendencies in American society and politics."[31]

2.3 The Political for Law and Economics

Although often viewed as a quite uniform school (in comparison, for example, to CLS), the school of Law and Economics presents extremely differentiated internal positions.[32] The major focus here, however, is on that unanimously considered the most prominent stream of Law and Economics: the Chicago School of Posner.

If one shifts to the approach this school has on the issue of the relationship between law and politics, two distinctions must be noted. The first is that the definition adopted here of "politics" refers to the complex of values that the state apparatus has as a goal to implement into the society. Such values, as already stated, can be of a political character (such as the construction of a one-party system), of a cultural nature (such as the promotion of the nuclear family), of a moral nature (such as a prohibition against prostitution) or of a social character (such as the

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[29] *See* Unger, *The Critical Legal Studies Movement*, *supra* at 568. *See also* COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 203-204.

[30] *See* Gordon, *Critical Legal Histories*, *supra* at 101; and Note, *'Round and 'Round the Bramble Bush*, *supra* at 1678. *See, e.g.*, Peter Gabel & Jay Feinman, *Contract Law as Ideology*, *in* THE POLITICS OF LAW, *supra* at 497-498, 504-509.

[31] COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 205.

[32] *See* Denis J. Brion, *Norms and Values in Law and Economics*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 1042-1048 (B. Bouckaert & G. De Geest eds., 2000), adopting the classical distinction between a "descriptive" and a "prescriptive" Law and Economics. *See also* Gilles Paquet & Pierre M. Pestieau, *Economics and Law*, *in* THE PHILOSOPHY OF LAW. AN ENCYCLOPEDIA, *supra* at 246-248, who distinguish three main streams in the scholarship of the school of Law and Economics: the Chicago School, the anthropological approach, and the social learning approach.

construction of an unemployment compensation system). One cannot ignore the economic values among these values of legal politics (and processes directed to choose such values by the political actors).

Clear-cut distinctions between cultural, political, social, moral and economic values tend to disappear in reality.[33] A classical example is the social value of unemployment assistance. This belief can easily be categorized as a value of a political nature (*e.g.* for the protection of the *working class*), of a moral nature (*e.g.* for the *unjustness* of leaving on the streets persons who earlier had contributed to the wealth of the nation) or of an economic nature (*e.g.* for somehow keeping the unemployed a part of the economic system in the perspective of their future *re-utilization as active subjects of production*). Despite this partial overlapping, it is possible to state that the economic values as brought into play by Law and Economics are the assumed-as-true beliefs primarily directed at influencing how the national system of production and distribution of goods and services works.

The second characteristic is that according to Law and Economics' scholarship, the term "law… can be used but cannot be defined."[34] Law, as economics or religion, is a word with neither a fixed conceptual nor a referential meaning. The law is not a set of fixed features, pre-determined regardless of the content the political actors (*in primis* the legislature and judges operating in their law-making function) intend to give it. The law, Posner maintains, is an open-ended set of concepts, most of which are derived from a common set of assumptions, to a certain extent "when used in sufficient density."[35]

The law, no longer treated as a unifying idea or thing (i.e. a complex of products shaped by lawyers, judges and legislators), then becomes a series of actions by legislators, judges and lawyers.[36] Being depicted as a complex of social and political actions, the law then lacks any specific normative features, that is the features derived to the law for its very Ought nature and not for its being a social phenomenon.[37] The law becomes a part of politics intended as the environment shaping the values reproduced into the law.

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[33] *See, e.g.*, Posner, *Law and Economics Is Moral*. 24 VAL. U. L. R. 166-172 (1990), claiming the possibility for economic values to deliver solutions to moral issues which are out of reach of the moral discourse. *See also* Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979), pointing out the intercrossing position (i.e. in the social, political and legal environments) occupied by the "wealth maximization" value.

[34] Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1 (1987). *See also* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 220-221.

[35] *See* Posner, *The Law and Economics Movement*, *supra* at 2. Posner has repeatedly stated that his idea of the law actually is derived from the one expressed by Justice Oliver Wendell Holmes, i.e. the law as a type of prediction of how the power of the State will be deployed in particular circumstances. *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 221-223.

[36] *See id.* at 238: "Law [is]… *a professional activity* bounded and shaped by custom, tradition, community feeling, and so on" [*italics added*]. *See also id.* at 225-226.

[37] "The law has no nature, no essence." *Id.* at 226.

Posner himself confirms this incorporation of law into politics. According to Posner, the idea of what law is as produced by the economic analysis of the law presents not only aspects of legal positivism (in its basic idea that the law is only the one produced by certain legitimized actors, such as a legislature or judge), but also of the natural law doctrine.[38] In particular, the idea of the law has to take into consideration the fact that, looking at human history, one can recognize the constant presence of certain given economic constructions, such as property ownership or contractual freedom, which, in order to allow the economy of a country to work properly, have to be brought to the legal surface.[39]

The openness of this concept of law to politics is also promoted by one of the most characterizing theoretical products of Law and Economics: the attachment to the very core of the legal phenomenon of exogenous elements, in particular those coming from economic and political morals (such as the ideas of "efficiency" or "welfare maximization"). Claiming, as Posner does, that "[t]he logic of the law is really economics," is a way to make the ontology of law implicitly flexible and dependent upon the changes of ideas and values occurring at the economic-political level:[40]

"How could legal ideas be 'uncoloured by anything outside the law,' when… the law is - and should be- shaped by social needs and interests?"[41]

Many legal philosophers, based on Posner's statement, have determined that in the end, the school of Law and Economics should be included within the legal positivistic stream. For example, Morton J. Horwitz states that Law and Economics "is one of the many responses to the Realist critique of all attempts to create a completely autonomous and internally consistent realm of 'pure law'."[42]

This interpretation (limited, however, by Horwitz to the first phase of the Law and Economics' movement, until the early 70's) seems quite hazardous since one of the main features of legal positivism has been the description of the law (and its

[38] In his work, Posner speaks of a "weak sense of natural law" present in the idea of law as elaborated by Law and Economics. *See id*. at 228, 231-232. For Posner, it is possible to mix, in what is used as the idea of law, both legal positivistic and natural law instances because "the law seems best regarded as an activity of licensed professionals (judges and lawyers), cabined by vague but powerful notions of professional property rooted ultimately in social convenience or, equivalently, durable public opinion. Positive law and natural law materials are inputs into the activity we call law," *id.* at 239.

[39] *See*, for the argument within Law and Economics claiming the existence of some rights (in particular, the right to private property) as independent from their recognition by the lawmaker, Brion, *Norms and Values in Law and Economics*, *supra* at 1044-1047. For the important role played by the political morality in the idea of what law is as elaborated by the Law and Economics' movement, *see also* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 238.

[40] Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 764 (1975).

[41] POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 243.

[42] According to Morton J. Horwitz, one of the major tasks of Law and Economics scholarship has been to present themselves as apolitical scholars, i.e. as true legal scientists. *See* Horwitz, *Law and Economics: Science or Politics?*, HOFSTRA L. REV. 905, 909-910 (1980).

logic) with categories and features entirely derived by the legal order and the law itself. In Posner's case, he explicitly states that the logic of the law has a source external to the legal world: the logic of the law has to be found inside the "other" world of economics (other at least according to the legal positivistic idea). In contrast to Kelsen, he claims that the logic of the law cannot be fully explained making reference to a purely legal kind of relationship (*e.g.* the imputation principle).[43]

In the theoretical construction presented within the school of Law and Economics, the law is presented as flexible to politics because the law is an activity produced according to certain non-legal values living in a certain community (like the economic values of property or a free market).[44] The inner structure (or logic) of the complex of social actions going under the name of law tends to reflect the working of the economic and political environments in which it operates.[45] In the case of the modern capitalist society, for example, the efficiency of the market is translated into the efficiency criterion inspiring the entire contract law.[46]

As to the use of such values non-directly derived from the legal world as fundamental elements of legal reasoning of judges and legislative, Dworkin strongly criticizes the contradictory position of the school of Law and Economics towards the idea of values and their role in a legal system.[47] While Law and Economics, on one hand, tends to reject such categories as "justice" (because they are value-loaded), they take in on the other hand (at least the "softer" scholars within Law and Economics as represented by Guido Calabresi) concepts such as the "right mix of total wealth and distribution" as leading criteria for a working legal system.[48] This latter criteria, Dworkin argues, seems to repeat the original latent mistake of the school of Law and Economics: treating concepts such as "total wealth" or "efficiency" as values in themselves (that is to objectify as empirical and economically self-evident from reality that which actually is primarily the taking of a position between moral values).[49] If these concepts are implicitly treated as values

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[43] *See, e.g.*, Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, III J. L. STUDIES 278 (1974). *See also* Paul H. Rubin, *Why is Common Law Efficient*? VI J. L. STUDIES 53-57 (1977). *Compare* the strong criticism as to Posner's reduction of the formal characteristic of law from economics in Arthur A. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. R. 469-477 (1974).

[44] *See, e.g.*, Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 182 (1987); and POSNER, THE ECONOMICS OF JUSTICE 4 (1983).

[45] *See* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8(3) HOFSTRA L. REV. 495-497, 499-506 (1980).

[46] This embeddedness of law into politics is emphasized in a debate between Dworkin, Posner and Calabresi as it appeared in the Hofstra Law Review. *See generally* Calabresi et al., *Symposium: Efficiency as a Legal Concern*, 8(3) HOFSTRA L. REV. 485-770 (1980).

[47] *See* Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8(3) HOFSTRA L. REV. 563-590 (1980).

[48] *See id.* at 564.

[49] *See id.* at 572. In the direction of this tendency of objectifying as self-evident truths that actually are political or economic values is the article by Louis Kaplow & Steven Shavell, *Why the Legal system is less efficient than the income tax in redistributing income*,

by the school of Law and Economics, then it is difficult to understand why they are to prevail *per se* over other values such as "justice." Why should one "regret sacrificing a higher aggregate level of wealth (or utility) for a lower in order to achieve justice"?[50]

To sum up, Law and Economics, just as natural law theory and CLS, tends to depict the law as a system flexible to politics. This flexibility towards the world of values and their selection processes not only affects, like the rigidity feature in the autonomous model's theories, the content of the law, i.e. the choice of which behaviors promote and/or impede. The law is considered flexible towards politics because the moral, *stricto sensu* political or economic values shape and heavily influence the very structure of the law.

3. Law-making Means Politics-making

When it comes to the moment of analysis of the relationship between the legal and political orders, theorists falling within the embedded model adopt a clear position of an *openness* of the law-making towards the political order. Similarly to the theories falling within the autonomous model, those within the embedded model maintain that the political inputs coming from the political system have to be transformed into a final legal product by a specific group of persons, working according to specific criteria, using specific categories and concepts. For example, the will of a certain party to distribute the risks of certain economic activities among the entire national community has to be transformed by members of a Parliamentary committee, according to the parliamentary procedures concerning legislative propositions, and using the legal tool of strict liability.

Within the embedded model, however, the law-making is open to the political order in the sense that there is no clear distinction between the formation and the process of selection of certain values inside the political order and the formation

XXII J. L. STUDIES 667-681 (1994). In the introduction of their analysis, Kaplow and Shavell take for granted that efficiency (and not other values of religious, moral cultural nature) is the only "objective" criterion according to which to evaluate the different ways to redistribute incomes, *e.g.* to the poorest strata of a population, *see id.* at 667-669.

[50] Dworkin, *Why Efficiency? supra* at 569. *See also* Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUDIES 200-201 (1980). Although coming from a different legal theoretical perspective, Coleman reaches the same conclusions as Dworkin. In particular, he criticizes the fact that, as a postulate, Law and Economics makes the value of wealth maximization overlapping with and somehow monopolizing the one of justice. *See* Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's 'The Economics of Justice'*, 34 STAN. L. REV. 1129-1131 (1982). *See also* Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, *in* LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895-1995 150 (R. Rawlings ed., 1996). Teubner condemns Law and Economics for having simply eliminated in their explanation of what the law is the "moral-political monotheism" in favor of the "economic monotheism."

and selection of certain corresponding legal categories inside the law-making procedures. In contrast to the closure of the law-making as within the autonomous model, the law-making here is *open* to the political order in the sense that the rationality and the parameters supervising the working of a legal system tend to be directly imported by the political order. For example, in drafting legislation, the legislature, according to the theories falling within the embedded model, is entitled to expressly motivate the adoption of strict liability as it improves the value of economic solidarity among the members of the national community.

The working of the law-making and its results (*e.g.* in form of statutes or judicial decisions) are continuously influenced by the confrontations occurring at the political level. The influence of the political order as to the working of the law-making occurs before, during, and after the transformation of certain politics values into legal categories. The embracers of the embedded model then consider the law-making as a mechanism whose manner of working and results are predominately determined by the battles taking place within the political arena.[51]

To state that scholars within modern natural law theory, CLS and the school of Law and Economics see law-making as open means that this feature of the flexibility of the law towards politics tends to also imprint the relationship between the political order and the creation of law. As seen above, the law is determined with a view as to that occurring within the political order (*e.g.* the law is truly law only when directed at fulfilling Christian values). Therefore, the factual circumstance that politics uses the legal order to fulfill the value *f* (*e.g.* Christian values) instead of value *e* (*e.g.* Nazi values) does matter for the determination of whether it is true (and therefore binding) law or, for example, simply "unjust" (non-binding) statements.

The theories within the embedded model tend to speak of a true binding legal system (different, for example, from an unlawful Nazi system) only when both the driver is *A* (where *A* is determined according to a political evaluation, *e.g.* a *democratic* Parliament) and the legal order is directed to fulfill value *f* (also a value determined outside the legal system, *e.g.* the *welfare of the community*). When the legal machinery does not fulfill these requirements, it cannot be called a legal system. The law-making process within the embedded model, in its way of working and in its final products, is open to the discourse developed in the political arena and therefore political concepts such as democracy or social welfare become legally relevant.

This openness to the political order does not hinder the embedded model's theories from depicting the law-making as still keeping a certain (although very limited) degree of self-defense against the political order, even for the most extreme theories falling within the embedded model. For example, in Nazi legal theory, an authority viewed as judicial still existed, having the duty of implementing at the legal level (almost without transforming into legal language) those decisions

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[51] *See, e.g.*, POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 442: "Law and economics and critical legal studies resemble each other… in looking outside law for its springs and lifeblood." *See also* Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 46-48 (D. Kairys ed., 1982).

and concepts entirely elaborated (according to the *Fuehrersprinzip*) in the political world.[52]

Despite this fine line separating the law-making and political order, it is very difficult for the scholars falling within the embedded model to distinguish the point at which the transformation of political statements (*e.g.* debates during a Parliamentary session) into legally valid statements (*e.g.* binding statute) occurs. To solve this problem, most scholars make reference to factual criteria, such as the opinion of the majority of judges (in the Law and Economics school) or to moral criteria (for the natural law scholars). The issue then becomes how to identify the extra-legal criteria that permit the political order to open the law-making, allowing its own concepts and ideas to freely travel (i.e. without the necessity of being transformed into purely legal concepts and categories or, in other words, without being too disturbed by "legal technicalities") in the space occupied by the legal system.

The use of the expression "extra-legal" in this section can cause some confusion. Since the discussion in this work has been concerning the internal point of view of the different theories, i.e. how they conceptualize the law and its relationship with politics, then according to the embedded model, such criteria are not at all extra-legal but purely and simply legal. This is because, as seen in the previous section, their idea of law also encompasses concepts and categories coming from the political order. However, in this section, extra-legal criteria simply mean that such criteria are not entirely originated by the internal (formal) logic of a law-making process.[53]

3.1 Law-making in the Natural Law Theory

The openness towards the political order is pretty clear in the natural law theory's representation of what the law-making processes are and how they work. As discussed previously, the legal system according to Finnis is not simply a set of rules but counts among its constitutive elements parameters and criteria (such as the common good) that can also be found in the surrounding social and political environment. In particular, the values that exist in these "other" environments get into the legal system through a process defined by Finnis as *determinatio*. *Determinatio* is the mechanism of transformation of the general principles of politics into law. It occurs through a practical reasoning (following one of the "intermediate

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[52] *See* WARD, LAW, PHILOSOPHY AND NATIONAL SOCIALISM, *supra* at 41-49.

[53] For example, while the criterion of jurisdiction can be entirely derived and explained using concepts and categories found in the legal linguistic apparatus, the criterion of social welfare necessarily has to make reference (to a greater or lesser extent) to concepts and elements originating in the economy or in the social situation of a certain community. *See* WEBER, ECONOMY AND SOCIETY, *supra* at 657; and HART, THE CONCEPT OF LAW, *supra* at 94. As to the historical and theoretical limits of such a distinction, *see, e.g.*, *id.* at 30; WEBER, ECONOMY AND SOCIETY, *supra* at 653-654; and Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW, *supra* at 38-39.

principles" described by Finnis), a reasoning directed at fulfilling one of the basic goods the legal system is to promote.[54]

Both the principles the legal system has to follow and the goods it is to realize inside a certain community are constituted by values not belonging, at least not directly or exclusively, to the legal world. According to Finnis, the social common goods that the political order must promote (for its own sake, not as a means to other ends or purposes) through the legal order are: life, play, knowledge, sociability (friendship), aesthetic experience, practical reasonableness and religion.[55]

Such goods can, in general, be achieved following the nine "basic requirements of practical reasonableness:" adopting a coherent plan of life, having no arbitrary preferences among either values or persons, maintaining a certain detachment from the specific and limited projects one undertakes, not abandoning one's commitments lightly, not wasting one's opportunities by using inefficient methods, not choosing to do something which in itself does nothing but damage or impede the realization of or participation in one or more of the basic goods, fostering the common good of one's community, and acting in accordance with one's conscience.[56]

However, for natural law scholars, the legal system also maintains a certain degree of specificity. Such a realization of common goods has to happen through specific legal categories and concepts (such as *pacta sunt servanda* or no individual criminal liability without *mens rea*).[57] These types of legal principles however are considered by Finnis as "second-order principles" because "they concern the interpretation and application of other rules or principles whose existence they presuppose," rules and principles (the intermediate principles and the basic goods) situated outside the legal system.[58]

In this implanting into the legal system the values formed and expressed in the political order, the *determinatio* is not simply a deductive process produced by law-makers (legislators or judges). Finnis stresses the rational nature of the *determinatio*, in the sense the *determinatio* consists of choosing the right means to get a

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[54] *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 282. *See also* Finnis, *On 'The Critical Legal Studies Movement'*, *supra* at 35-38. In this, Finnis and Posner seem to be on the same path. The representatives of the Law and Economics movement also speak of legal reasoning (in particular that produced by the most powerful law-making actor, the judges) as a practical reasoning, that is the complex of "methods… [which] involves setting a goal… and choosing the means best suited to reaching it." POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 71.

[55] *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 86-89. *See also* Robert P. George, *Human Flourishing as a Criterion of Morality: a Critique of Perry's Naturalism*, 16 TUL. L. REV. 1462 (1989).

[56] *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 100-126. *See also* Bix, *Natural Law Theory: The Modern Tradition*, *supra* at 85-89.

[57] *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 288. Finnis also mentions among such legal principles estoppel, no aid to the abuse of rights, relative freedom to change existing patterns of legal relationships by agreement and no liability for unintentional injury without fault.

[58] *Id*. at 286-287.

certain result. Law-makers do not mechanically transform non-legal values into the corresponding legal categories, but they play a central and active role in choosing the proper legal tool (the second-order principles) in order to implement into a certain community a certain good (among the basic ones). This is always to be done respecting certain rules (the intermediate principles of practical reasonableness).[59]

The *determinatio* does not work as a type of mathematical formula, where mathematical rules are represented by positivistic abstract and independent legal principles. Instead it works as a social mechanism of authoritative ("impartial") adjudication and, therefore, requires an active intervention and selection (according to the intermediate principles) of the "best" legal principles (for the realization of the common goods).[60]

The idea of *active choice* by law-makers is a central point in Finnis' idea of the relationship between the law-making and political orders. In this act, Finnis points out how two (sometimes conflicting) factors play an important role: the attachment (i.e. sharing) by the law-makers to certain values that they want to realize in society via the law, and the understanding by law-makers that "there is some good at stake" not always coinciding with the law-makers' interests and values.[61]

Although it is not explicitly stated, it seems that according to Finnis, the political order is, or at least should be, a sort of public face of morals. The political order should work, at least in relation to the law-making processes, as the system picking out the most appropriate channels (in this case, the most "correct" legal principles and categories) through which to implement and realize into a certain community the basic goods (and their combinations) as defined by morals.[62]

Moreover, the core of the activity taking place inside the political order can be described for Finnis as framing the problems that the political actors want to solve in society through the law, choosing the best legal solutions for them.[63] The political order then is introduced into the dynamical aspects of the legal system, not only at the level of choosing the values to implement, but also in choosing the legal

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[59] *See* Finnis, *On 'Positivism' and 'Legal Rational Authority'*, *supra* at 88. *See*, *e.g.*, Finnis, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. R. 377-382 (1998). This is a concrete use of Finnis' ideas of how to implement into a community a basic good (life) by choosing second-order principles (right to live and right to equality in dignity) through the respect of principles of practical reasonableness (having no arbitrary preferences among either values or persons).

[60] As to the problem of choosing a second-order principle that, while implementing a basic good, violates another basic value, *see* George, *Human Flourishing as a Criterion of Morality*, *supra* at 1472-1473.

[61] Finnis, *On 'Positivism' and 'Legal Rational Authority'*, *supra* at 87-88.

[62] *See* Finnis, *On 'The Critical Legal Studies Movement'*, *supra* at 42.

[63] *See* Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, *supra* at 135. It is important to stress the fact that the description given by Finnis of the basic goods to whose implementation the legal order should be directed, keeps a strict normative feature. The derivation of the goods then is done by Finnis looking to what is the best (Ought) for the community and not, for example, to the sociologically derived "average of basic goods" the various national legal systems try to implement (Is). *See* Finnis, *On 'Positivism' and 'Legal Rational Authority'*, *supra* at 84.

instruments which best fit the purpose of implementing these basic goods into a certain community.[64]

For Finnis, however, there still is a difference between a political order and the operational aspects of the legal system embedded within it. The political order is characterized as producing "unstable" outputs (for example, political statements or propaganda): "The variety and complexity of basic human goods and of reasonable ways of pursuing and realizing human goods, make actual 'preferences' radically unstable."[65] On the contrary, the very purpose of the law-making process (and its requirements of coherence and formalism) is to give to such the choices of both goals (basic goods) and procedures (intermediate principles) a certain degree of rigidity (for example, a formal statute enacted by Parliament incorporating political statements as expressed by a political party).[66]

In spite of this (marginal) rigidity, and therefore a certain (low) degree of autonomy of the law-making processes towards the political order, the dynamical aspects of the legal phenomenon for Finnis are largely dominated by the fact that the law-making tends to be open to the political system. The legal actors still have to operate inside (and consequently adapt their work to) a larger political framework, a complex of goods and procedures designed and chosen by the political order, its reasoning and its values.[67]

3.2 CLS and the Politicization of Legal Reasoning

If, for natural law scholars, law-making has a (very) limited degree of autonomy, for CLS it is even more difficult to speak of law-making as a separate system of mechanisms and procedures embedded into a wider political order. Once the premise that the "law is politics" is accepted, it is difficult to even distinguish between the system producing law and the system producing politics. Law is politics does not simply mean that at a static level the structure of law tends to reflect the political struggle going on in the political world. It also means that the law-making is considered by CLS as one of the primary enforcing mechanisms through which political values are introduced under the guise of an objective and "natural" legal form into the everyday life of a certain community.[68]

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[64] *See* Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, *supra* at 133.

[65] *Id*. at 136.

[66] *See* Finnis, *On 'The Critical Legal Studies Movement'*, *supra* at 38.

[67] For Finnis, of course, as a natural law scholar, the same actions and choices of the *stricto sensu* political actors are, in their turn, limited by the presence and the very nature of morals. They are limited by the fact that the legislator should always answer the (moral) question "what laws should a 'good' legislator pass"? The political actors should then always consider that their use of the legal system is to be with the purpose of implementing within a community the basic goods as enumerated by Finnis. *See* Bix, *On the Dividing Line between Natural Law Theory and Legal Positivism*, *supra* at 1615.

[68] *See* Gordon, *Law and Ideology*, *in* FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 1057 [reprint 1988].

Another important difference between CLS and modern natural law theory can be found in the limitations the political order finds when using the legal system to implement certain politics or values into society. While for natural law theorists the political order should pursue with the law certain basic goods through intermediate principles, for CLS "there are no purposes, principles or policy constraints with any dispositive bite, and… consequently *every outcome is arbitrary*."[69]

CLS' law-making does not transfer into the legal discourse only the ideologies (or better, politics) of the economic ruling classes. According to the Crits, the law-making tends in its functioning and outputs to be more pluralistic and absorbing, expressing at a legal level (*e.g.* in statutes, judicial decisions, and scholarship) the wide spectrum of conflicting values and ideologies fighting with each other within the political order.

The law, in contrast to contemporary Marxist legal theory, is not simply the tool of the dominating elites; it is more a mirror of the battles between the several actors that populate the political world.[70] This is why CLS does not speak so much of the relationship between the law-making and political order, but instead focuses most of the attention on explaining the functioning of the most important tool that allows the political order (and the values expressed there) to more or less freely dispose over the law-making: legal reasoning. In particular, once CLS turns its attention to the actors belonging to the legal world whose legal reasoning is important, they give a central position to judges, seen as the turning point of the transformation of political instances into legal instances. As the law is defined by CLS as a "variety of stylized rationalizations that a judge may freely choose from" in his or her legal reasoning, the embedding of the law-making within the political order occurs at two levels.[71]

First, the law-making is completely open to the political order at a macro level.[72] Politics affects the law when the law-maker (both in the form of legislative or judiciary) has to construct those rationalized schemes through which to resolve

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[69] HARRIS, LEGAL PHILOSOPHIES 109 (2nd ed., 1997) [*italics added*].

[70] *See* Unger, *The Critical Legal Studies Movement*, *supra* at 570. As a result, the legal system is affected by an endless "struggle between conceptual frameworks," each representing a certain political value. *Id.* at 633. *See also* Kennedy, *The Structure of Blackstone's Commentaries*, *supra* at 211-221. *Compare* LOUIS ALTHUSSER, SUR LA REPRODUCTION Ch. XI (1995) (representing of the neo-Marxist legal theory and its idea of a mono-ideological political character of the law-making).

[71] Kairys, *Law and Politics*, 243 GEO. WASH. L. REV. 245 (1984).

[72] The distinction between the macro- and micro-level of influences of politics on the law must not be confused with the distinction, rejected by CLS, between "foundational politics" (the choice of a social type, *e.g.* socialism or democracy) and "ordinary politics" (the choices made during ordinary legislation within the framework established by the foundational politics, *e.g.* inside a democratic system, the choice of strict liability instead of *culpa* principles as the regulating mechanism of tort law for dangerous activities). While the distinction micro/macro concerns the lines connecting the law-making and political order, the foundational/ordinary politics dichotomy refers to the internal features of the political order, at least as defined in this work. *See* Unger, *The Critical Legal Studies Movement*, *supra* at 568.

social and economic conflicts. For example, Unger argues that the choice of freedom of contract as a fundamental value of an economic system is in itself neither a self-evident nor a logical consequence derived from the existing legal system. It is a choice dictated exclusively by the political surroundings (in this case, classical liberal ideology).[73] As a result, the law-making is totally open to the political order (and almost totally dependent upon the battles occurring within) when it comes to the macro level of choosing the type of fundamental legal categories upon which the legal system is to be based. For example, individual private property is the *privileged* product of a liberal political order instead of collective property as in a socialist political environment.

In this context, the term "privileged" has been deliberately used. In contrast to Marxist legal thinking, claiming the necessity of changing the political order in order to change the legal order, CLS does not claim that a contract law system based on the principle of "pure freedom of contract" must necessarily be derived from a liberal political order. On the contrary, the law-making for CLS is so open to the political system that once a fundamental political choice (democracy or socialism) is made, the political actors are still free to use any and all categories and principles produced by the legal order, i.e. they are not limited to only certain legal tools (*e.g.* those produced for a democratic regime). This openness or malleability of the legal production allows CLS, once a Western capitalistic democratic system is accepted, to introduce legal categories (such as rotating capital funds) usually defined as belonging to a different political order (like the socialist ones).[74]

The second stage at which the law-making opens its borders to the political system, according to CLS, is more at a micro level, that is at the moment when judges (or jurors) choose to apply a certain rationalization (i.e. principles and categories formalized in the traditional legal sources) to the concrete case.[75] The different principles and categories have been rationalized (at the macro level) by legislation or previous judicial decisions and they are all applicable to the same case (because of their vagueness and the *per se* indeterminacy of the legal language):

"[T]he choice of any one or any combination of [these rationalizations] bestows legitimacy within the legal system as an explanation for why one is ruling this way or that way. But *there is nothing within the law that determines which rationalization a judge should choose in particular situations*."[76]

The choice made by the judge among the principles and categories formalized in the traditional legal sources is then rooted, according to CLS, in the political and social environments in which the judge operates.

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[73] It should be noted that for CLS, the choice made at this macro political level does not imply at all an automatic choice for certain legal categories and principles. This is because CLS strongly criticizes "the idea of types of social organization with a built-in legal structure." *See id*. at 568 n.59.

[74] *See id*. at 593-597.

[75] *See, e.g.*, Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N. Y. U. REV. L. & SOC. CHANGE 383-384 (1983); and FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 1049-1050.

[76] Kairys, *Law and Politics*, *supra* at 245 [*italics added*].

3.3 Law and Economics' Law-making

In contrast to CLS, the relationship between the law-making and the political order as envisioned by the school of Law and Economics is not as clearly in the direction of an openness of the first towards the second. At first blush, it can appear that the school of Law and Economics considers the law-making a neutral system where both the actors and processes tend to follow their own internal logic (*in primis*, the economic logic of efficiency). Moreover, similar to legal positivism, Law and Economics tends to reject the idea that concepts such as "morality" or "democracy" enter into the creation of law in the legal system.[77]

Despite this, Law and Economics scholars embrace a model of a relationship between law and politics that includes an idea of *openness* of the law-making towards the political order. It is true that the focus of the scholarship has been devoted to the relationship between the legal and economic systems. Nevertheless, the political order keeps a centrality in their analysis of the legal phenomenon. The political order is the key system through which economic approaches to the law can enter into the economy and society through the law-making.[78] In particular, this happens when Posner states that wealth maximization, a value assumed as *per se* good, has been, and still is, the basic belief shaping the (common law) law-making.[79] As the role of the political order is central, the relationship between the law-making processes and the political order also becomes crucial for the entire Law and Economics construction, as it is only through this link of law-politics that some value-proposals (mostly of an economic nature) can be implemented and rooted into the economic system.

Posner states, for example, that political stability is positively related to the value of income averages. This relationship necessarily has to pass through measures of a legal nature (*e.g.* the adoption of a principle of proportionality instead of regressiveness in taxation law) through which the value of an average income is implanted into a community.[80]

In particular, the implementation of value-proposals into the economic system is mostly done through the work of judges. In Law and Economics' theory, courts are and should remain an integral part of the system of government, that is an integral part of the political order. The functions of the judges in this embedded model of law and politics are so relevant that, according to Posner, political actors

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[77] For example, Posner claims the possibility of more or less excluding moral or *stricto sensu* political values from the grounds that the judicial law-making activities investing the constitutional provisions of freedom of speech and religion have been built upon. *See* Posner, *The Law and Economics Movement*, *supra* at 5-12.

[78] Posner repeatedly promotes the adoption of a liberal democratic political order as the most suitable for his idea concerning the relationship between social and economic values. *See* POSNER, FRONTIERS OF LEGAL THEORY, *supra* at 115.

[79] *See id*. at 100-101.

[80] One of the basic values the political order has to promote in a society, according to Posner, is the one of increasing the average incomes of a community and not, as sustained by economists such as Amartya Sen, the one of promoting an equality of incomes. For the reasons behind this choice, *see id.* at 110-115.

should limit their function to interpreting that which is best for economics and translating it into legal instances with the role "to lend a necessary regularity and predictability to the process" then implemented by the judiciary.[81]

Despite this central role played by the law-making (and the courts as legal actors) as an intermediary link between the political and socio-economic systems, Law and Economics depictions the law-making as a system of processes and actors lacking a relevant degree of autonomy both in their acting and in their resulting choices of new laws. The space given to the law-making indeed seems to be squeezed, on one side by the construction of certain policies by the political actors. On the other side, the action of the law-makers is dependent upon the evaluation of the impacts such policies have, mainly on the economic system. In both cases, the primary criteria the law-making and its actors have to look to in their functioning, *e.g.* political stability and average incomes, are primarily non-legal principles of a political or an economic nature respectively.[82] The law-making then becomes a sort of ceramic crucible between two iron pots.

The restriction of this autonomy given to the law-making processes by Law and Economics is also reflected by another facet of the theory: the distinction between a *prescriptive* and a *descriptive* (or *explanatory*) Law and Economics. While the first "advocates the application of economic principles in the decision making of legal institutions, both substantively and procedurally," the second focuses on "the enterprise of developing models that, in economic terms, account for the phenomena of human activity."[83]

Therefore, while prescriptive Law and Economics tends to have as privileged addressees the actors belonging to the political order (primarily the law-maker) for the construction of the "right" (mostly from an economic perspective) solutions, the explanatory Law and Economics has as a main target the economic and social systems in which the law is operating. In both cases, the law-making is sort of caught in between political programs and evaluations of the economic impact of such programs, without much space for maneuvering with respect to its own normative principles.[84]

The law-making however does not disappear into the political magma. According to Law and Economics, a line, very thin but still present, can be drawn separating that belonging to the legal system and its law-making processes from that which actually is more of a political nature. The existence of this line is based on a certain (low) degree of rigidity in the law-making towards the stimuli coming

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81 *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 232-234.

82 *See, e.g.*, Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 4-8 (1996). In this article Posner expressly rejects what he calls the "judicial positivist" approach, i.e. the one embraced by a "judge who… would begin and usually end with a consideration of cases, statutes, administrative regulations, and constitutional provisions," *id.* at 4.

83 Brion, *Norms and Values in Law and Economics*, *supra* at 1042. *See also*, for a similar partition of Law and Economics into a *positive* and a *normative* type of approach, Francesco Parisi & Jonathan Klick, *Functional Law and Economics: The Search for Value-Neutral Principles of Lawmaking*, 79(2) CHI.-KENT L. REV. 432-435 (2004).

84 "The invisible hand of economic reality is portrayed as guiding judicial development of common rules." COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 201.

from the political order in the form of policies. In particular, as pointed out by Posner, the legal system usually presents a certain degree of path dependence, that is rigidity towards legal innovation. Posner considers the law-making, and the actors belonging to it, as self-bound by their way of reasoning in historical terms. This inertial tendency renders the legal system quite different from the political and economic ones, where politicians and economic actors are (for several types of reasons) more present-day oriented.[85]

The legal order is unwilling to give space to modifications of its conceptual and categorical apparatus as a result of and in order to respond to the stimuli coming from the political actors (in particular legislators and law-making judges). This resistance of the legal system towards innovation as promoted by the political order is mainly due to that which Posner defines as "heavy transitional costs," that is the costs of changing a legal structure or a legal institution.[86]

The presence of such transitional costs also has an impact on the way the political order operates on the law-making, since they restrain political actors from using the law-making as a tool completely under their control. The consciousness of politicians with respect to the *inertia* built into the legislative process sometimes can prevent them from using statutory provisions, in particular in cases where a quick decision as well as its quick implementation is necessary.[87] For example, politicians can utilize systems other (such as the financial one) than the legal one in cases such as an acute crisis within the stock market.

The law-making for Law and Economics then tends to be compressed between the political and the economic systems. The specific normative feature of the law-making disappears when Law and Economics states that legal actors should try to evaluate the "soundness of the solutions as a matter of public policy." The evaluative criteria of soundness and public policy are derived from non-legal categories, principles and ways of thinking.[88]

Moreover, when Posner speaks in favor of the pragmatic judge who has as criterion the "best promotion of the goals of society" (at least in the common law countries), he opens the law-making and its reasoning to considerations of a political nature.[89] In the end, it is a type of legal reasoning based on a criterion that "asks the judge to focus on the social consequences of his decision" and not on the

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[85] *See* POSNER, FRONTIERS OF LEGAL THEORY, *supra* at 153-154. One of the major sources of this inertia is the American Constitution, which is difficult to amend, with each change having to go through a very complicated legislative procedure. *See id.* at 158.

[86] *See id.* at 159. For example, the settled distinction between the legal categories of absolute and relative rights typical of civil law countries has created some inertia in the adaptation of the legal system to the current economic and political realities, impeding the extension to the pure economic losses of the protection *erga omnes* guaranteed by absolute rights. *See* Mauro Bussani et al., *Liability for Pure Financial Loss in Europe: An Economic Restatement*, 51 AM. J. COMP. L. 125-127 (2003).

[87] *See* POSNER, FRONTIERS OF LEGAL THEORY, *supra* at 158. According to Posner, however, the presence of this built-in inertia does not seem to be so serious a problem for judges when they act as law-making actors.

[88] *See id*. at 155.

[89] *See* Posner, *Pragmatic Adjudication*, *supra* at 5.

decision's legal validity (as intended by legal positivism).[90] However, even if it is thus squeezed, the law-making still remains and, to a certain extent, influences (even if only in the negative manner of slowing it down) the transformation of certain politics into concrete measures for implementation into the economy of a certain community.

In conclusion, the natural law theory, CLS and the school of Law and Economics are characterized for opening the law-making processes and mechanisms to the political influences not only at substantive level, i.e. at the level of the content of the messages sent to the community in authoritative forms (a feature also shared by legal positivism and analytical jurisprudence). The opening of the law-making occurs also at a deeper level, by allowing the political reasoning and the political actors to directly shape the forms and the structures of the already politically loaded messages. As one representative of CLS writes: "If legal reasoning does not provide the source for results, what does? The results come from those same political, social, moral, and religious value judgments from which the law purports to be independent."[91]

4. A Mixed Legal Discipline for a Mixed Law

The issue as to how the legal discipline should handle materials of political origin is, for the theories falling within the embedded model, heavily affected by their ideas of the law and law-making. As the nature of the law and the functioning of the law-making are strongly interconnected with politics and the political order, it is consequential for these theories to stress and promote the use by the legal discipline of both the materials and the methodologies developed in the various branch of knowledge dealing with the political world. As seen above, the theories subsumed within the embedded model neither solely nor primarily refer to the queen of the sciences investigating the political world, i.e. political science. They also take other branches of human knowledge into consideration, those which, albeit perhaps not primarily, have a specific perspective and approach to politics, such as economics, sociology and moral philosophy.

In contrast to the theories falling within the autonomous model, the embedded model provides for a legal discipline that can directly draw from the conceptual and methodological apparatus built by and for non-legal disciplines, without waiting for the transformation into legal language. This, of course, does not result in the disappearance of the legal discipline as an autonomous branch of investigation. None of the schools within the embedded model have ever claimed the abolition, for example, of the specific institutions in which legal phenomenon is contemplated, learned and studied; neither have they espoused the direct relevance for legal scholars of statements expressed in the contexts of economics or political science. This is because the legal phenomenon, although with a radically reduced

[90] *See* POSNER, FRONTIERS OF LEGAL THEORY, *supra* at 163, 166 n.42.
[91] Kairys, *Law and Politics*, *supra* at 247.

autonomous space, still keeps a (low) degree of distinction from the surrounding political world.

Even in the Nazi and Soviet regimes, where the embedding of law into politics was brought to its extreme, faculties of law and legal doctrine as such never ceased to exist. The awareness of the fact that the law, in the end, is a different phenomenon from politics, forced these political establishments to encourage the study and teaching of law functional to their political goals (*e.g.* Andrei Y. Vyschinsky and Schmitt). Except for a few short periods of revolutionary radicalism, the faculties of law (although heavily purged) were never closed and the legal discipline was constantly used in order to both furnish these governments with persons particularly trained in (a strongly politicized) law and to legally justify political acts and maneuvers.[92]

This distinction between the legal discipline and other branches of knowledge, even for the most extreme theories within the embedded model, is still kept alive, even if one has to view the law as a material reality (i.e. even if one adopts a sort of vulgar empiricist position towards the legal phenomenon). The fact still remains that, for the practical and historical reasons as briefly described in the two first chapters here, the law cannot be examined, understood and taught using exclusively political, moral or economic terms and methodologies.

However, since the legal phenomenon is embedded within the political environment and is malleable to the political order, the legal discipline does not refrain from looking around in order to obtain from the same environment better tools and methods for understanding and teaching the law. The result is that the legal discipline is configured as *mixed*, composed both of normative components (such as the use of the doctrinal concepts of competence and jurisdiction) and more political categories (such us the possibility of declaring a law invalid as it is "undemocratic").

The schools falling within the embedded model not only often support, but also impose, an interdisciplinary approach as the only way to penetrate the legal phenomenon down to its *stricto sensu* political, economic, or moral roots. They find an inadequacy within a purely normative legal analysis for truly penetrating the constituting elements of the law. As the latter's ontology is something more than a purely normative statement, the embedded model's theories conclude that the investigation of the legal phenomenon has to occur with the help of those disciplines whose object of analysis co-exists with the normative aspects at the core of the law. Regardless of whether in the direction of economics or morality, the legal discipline has to open their methodological and conceptual spectrum to other disciplines and to a mixture of heuristic and explanatory devices (from moral philosophy to cost-benefit analysis) far beyond the restricted number of tools offered by a legal conceptual investigation.

In particular, the legal theories tending towards an embedded model of viewing the relations of law and politics do not hesitate to connect certain legal categories with specific political ideologies or values. Moreover, they often directly engage

[92] *See, e.g.*, Andrei Y. Vyschinsky, *The Fundamental Tasks of the Science of Soviet Socialist Law*, *in* SOVIET LEGAL PHILOSOPHY 317-321 (1951).

in defining and defending (or attacking) ideas or concepts that do not strictly represent specific legal categories but still, being part of the environment surrounding the law, are considered relevant for the law itself. This often gives birth to questions such as what is *good* for the community, or what is more *efficient* for an economic system, i.e. the capacity of the law to properly fulfill extra-legal needs and values.[93]

4.1 Natural Law Theory and Political Material

This mixed character of the legal discipline is explicitly adopted by Finnis, who states that

"[l]egal theory is only a part of social theory… [and] the shape of a methodologically critical social theory is determined by moral and political theory."[94]

This introduction of moral and political features into the study of law occurs at three levels in Finnis' concept of the legal discipline.[95] First, Finnis' idea of the law is based on the assumption that the legal phenomenon, in order to be fully normative, has to be placed in a wider legitimizing environment of a moral nature. This also directly affects his view of the legal discipline. The branch of knowledge dealing with the legal phenomenon must pass through the purely normative dimension (constituted by second-order principles) to get to the moral and political ground.

For example, "one of the central enterprises of legal theory… [is] the explanation and *justification*, in principle, of the law's *moral authority*."[96] Legal scholars must then have an acquaintance with all those categories typical of moral and political philosophy, such as life or sociability. This expansion of the conceptual tools at the disposal of legal scholars is necessary because, in the end, "legal theory can and should appeal to a full conception of fairness to explain why a law can be judged morally binding even by those who reasonably regard it as unwise."[97]

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[93] In order to underline this feature of the legal scholars of the embedded model, of engaging directly into socio-economic issues as part of their idea of legal discipline, Freeman states: "Finnis is a social theorist who wants to use law to improve society." FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 138.

[94] Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, *supra* at 115.

[95] There is actually also a fourth level where the legal discipline has to mix with other disciplines. According to Finnis, the analysis of the "goodness" of a legal order should always include the evaluation (mostly of socio-political nature) of the impact the system produces on the surrounding political environment. *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 271.

[96] Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, *supra* at 115 [*italics added*].

[97] *Id*. at 116. Finnis has been recently labeled as a realist in the medieval sense (Michael Moore) or as a cognitivist (Jeffrey Goldsworthy) for this very assumption of the existence of an objective moral reality outside and detached from the processes of human investigation, of which the legal discipline is part. *See* MOORE, EDUCATING ONESELF IN

The fact has to be stressed that the duty of jurisprudence, according to Finnis, is neither to build such links between the moral bottom and the legal surface nor to investigate the nature and content of the moral and political foundations of the legal system. Jurisprudence simply has to recognize them as existing and *per se* just.[98]

This recognition of the interdisciplinary nature of the legal investigation then implies an embracing by jurisprudence of the validity of the grounding political and moral values, i.e. it implies a jurisprudence that is a branch of human knowledge of a (partial) moral and political character. This is because, according to Finnis, the complete understanding of a moral or political value (in this case, necessary for understanding the legal supra-structure) can only be obtained through an attachment to the same value, that is through the shearing of its inner-true by the investigator (in our case, by the legal scholar).[99]

The mixed character of the legal discipline is also reflected in the methodology used in order to produce such penetration through the legal phenomenon. Since the law is derived by the values expressed within the political community (also in the form of morality) with the use of the non-legal mechanism of *determinatio*, the legal discipline then has to be familiar with ways of reasoning primarily of a moral and political character, and in particular, practical reasoning.

The expression "non-legal mechanism" is used in the sense that this mechanism is not entirely constructed and operative inside the normative dimension of the legal phenomenon. As seen above, *determinatio* is a general heuristic tool of a more political and moral nature. For natural law theory, however, the law also has moral and political components and way of reasoning, and therefore, such mechanism of *determinatio* is as legal as the other more purely legal logical tools (such as reasoning by analogy).

Finally, the legal discipline is considered by Finnis as mixed in relation to the political material because it ultimately has the duty of generating a value-charged result. According to Finnis, the ultimate goal of legal knowledge is to determine whether a legal system (or part thereof) works *well*, that is whether the law-makers have produced norms, principles and categories adherent to the fundamental moral and political values on which a valid legal system has to be based. For example, legal knowledge is to investigate and give a qualitative answer (i.e. in terms of just and unjust) to the issue of whether a statute permitting abortion is binding law since it violates one of the basic values shaping the legal order, i.e. the basic good of life with respect to the fetus.[100]

As pointed out by Bix, even if Finnis' requisite of "sharing the inner value" is somehow reminiscent of the Hartian internal point of view, it is with this very entering of the legal scholar as a soldier directly into the value-battle, into the politi-

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PUBLIC. CRITICAL ESSAYS IN JURISPRUDENCE 342 (2000); and Jeffrey Goldsworthy, *Fact and Value in the New Natural Law Theory*, 41 AM. J. JURIS. 22-25 (1996).

98 *See* FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 265.

99 *See id*. at 3-13.

100 *See, e.g.*, Finnis, *Abortion and health care ethics*, *in* BIOETHICS: AN ANTHOLOGY 13–20 (H. Kuhse & P. Singer eds., 1999).

cal dimension of the law, that the legal discipline as portrayed by natural law theory takes an incommensurable distance from the legal positivistic idea of a legal analyst or legal scientist.[101]

4.2 Legal Discipline According to CLS

Even though CLS also embraces an idea of a mixed nature of the legal discipline, they reject the natural law theory's idea of a complex of values as the driving and guiding force of the legal discipline. For them, the engine of development in legal studies neither lies in the introspective work (as for legal positivism and for analytical jurisprudence) nor in the values and traditions "naturally" attached to the surrounding environment. This rejection by CLS is based on the idea that the legal discipline, regardless of how it is structured, "fails to track any specific ideological position within the debates of modern politics and modern political thought." [102]

The legal discipline instead finds the source and energy of its work and progress in the political (and to some extent economic) struggle. From this source, legal scholars have to proceed and fulfill two basic goals of the legal discipline: *depth of insight* and, through it, *political utility*. These double entrances of the political environment into the legal discipline as invoked by CLS can also be defined as *inquiry* (i.e. the theoretical speculation) and *social experimentation* (i.e. practical activity).[103]

Starting with the entrance of the political environment into the legal discipline's inquiries, if law is politics, and much law is created in the common law through the judiciary, then the primary goal of legal science according to CLS is to expose the "hidden motive" of the decisions of judges.[104] Legal scholars have to go through the formal logic of legal reasoning and legal language and break into the reign of politics, i.e. into the area of values the lawmakers intended to promote when enacting a statute or writing a judicial decision. This opening of the door of the legal discipline to other sciences (in particular political and social) originates from the idea that, law being politics, the study of the law then has to go through the indeterminacy and contradiction characterizing legal reasoning, negative features typical in particular of the decisions written by judges.

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[101] *See* BIX, JURISPRUDENCE, *supra* at 72-73.

[102] Unger, *Legal Analysis as Institutional Imagination*, *in* LAW, SOCIETY AND ECONOMY, *supra* at 179.

[103] *See* Note, *'Round and 'Round the Bramble Bush*, *supra* at 1686. A classical example of the suggestion of such dualistic dimensions by CLS to the legal discipline can be found in Kennedy's article "Form and Substance in Private Law Adjudication." He makes a combined use of traditional legal investigation, social theories, political theories and history, demonstrating how the legal discipline is affected by the political surroundings but, in their turn, legal studies do have an impact on that environment. *See* Kennedy, *Form and Substance in Private Law Adjudication*, *supra* at 1687.

[104] *See* Unger, *The Critical Legal Studies Movement*, *supra* at 570.

In this task, the legal discipline becomes a mixed knowledge, where legal scholars have to "cross both an empirical and a normative frontier."[105] In order to find the true law, one has to find the political values given expression behind the legal phenomenon. It then becomes almost natural that CLS stresses the necessity for the legal discipline to expand both their investigative task and their theoretical apparatus towards materials and theories proper to these political underpinnings of the law. This mixture of normative and political materials can then "elevate the level of generative speculation from specific legal categories to social theory."[106]

The legal discipline in this passive connotation is then a mixed discipline, i.e. assuming the role of absorbing, while investigating, the law, the materials and the theories produced in the political world. The necessity of such a methodological mixture of law and politics is functional to the fulfillment of the other basic goals of legal discipline, "political utility," or social experimentation.[107] The study of the law is also a mixed discipline in an active meaning, that is when it comes to the moment of considering that which is to be the result of this hopefully deep insight. With the attribution of this active role, CLS then gives to the legal discipline a certain role, a certain limited degree of autonomy, although embedded in a wider political context. According to CLS, the legal discipline has the goal of helping society to "break free from outworn vocabularies and attitudes."[108] These attitudes are based on the false idea that legal reasoning is grounded on an objective basis (the law as an autonomous world), dissecting legal construction to find in it a rational foundation for the adjudication of value conflicts.

Once free from the traditional formalistic legal barriers erected between the law and politics, CLS legal scholar should then not be indifferent to the type of political values the legal orders ought to implement in society. In other words, she should preliminarily charge her investigation with political indications of the type of values the law-making should implement.[109] In this way, CLS aims at directly integrating the legal discipline into the social processes of selecting values to realize into a community through the law. They then explicitly point towards the

[105] *Id*. at 577. *See also* Note, *'Round and 'Round the Bramble Bush*, *supra* at 1677-1681.

[106] *Id*. at 1679. It should be noted that in contrast to American Legal Realism, CLS scholars usually have a skeptical attitude, however, towards empirical research produced by the social sciences. *See* Gordon, *Critical Legal Histories*, *supra* at 101-102. *See also* COTTERRELL, LAW'S COMMUNITY, *supra* at 207, speaking of CLS' "highly ambivalent attitude to social theory." *But see* Note, *'Round and 'Round* the *Bramble Bush*, *supra* at 1682.

[107] CLS repeatedly stresses the necessary link between the legal discipline and a "radical political agenda." *See id*. at 1677; and *compare* Unger, *The Critical Legal Studies Movement*, *supra* at 583, in which he states that the legal discipline can actually play an active role in the functioning of a legal order if it shares its theoretical underpinnings with (social and) political theories.

[108] Terrence L. Moore, *Critical Legal Studies and Anglo-American Jurisprudence*, 1 U.S.A.F. ACAD. J. LEGAL STUD. 4 (1990).

[109] *See id*. at 14.

enumeration of legal scholars among the law-making actors and, in this way, towards the mixing of legal discipline with legal and political material.[110]

4.3 A Legal Discipline Mixed with Economics

While CLS has always from the very beginning openly recognized the political character (both in the methodology and in the results) of the legal discipline as promoted by them, the path followed by Law and Economics to the recognition of the mixed character of the legal discipline as portrayed by them has been more convoluted.

Law and Economics started with the claim of proposing a scientific approach to the legal phenomenon, an approach detached from values of a *stricto sensu* political nature.[111] This detachment, however, did not free the legal discipline from the necessity of finding categories and principles outside the legal world. This dependency of the legal discipline from non-legal categories was derived from the fact that Law and Economics stressed the centrality of purely economic criteria, such as efficiency, as the driving force of both the law-applying and law-making processes, forcing legal scholars to adopt the conceptual apparatus produced by economic sciences (in particular microeconomics). The early stage of Law and Economics was then in favor of a scientific approach to the law, not of a *legal* science.[112]

This original mixed character of the legal discipline (legal rules and economic material) has been further emphasized by the later shift (from the 1970's) of Law and Economics towards a more political consideration of the legal discipline. This shift occurred mostly due to the fact that, with time and criticism, Law and Economics scholars came to realize that efficiency, in its turn, is not an independent and stable factor (such as the law of gravity is in physics), but a function depending upon a particular distribution (i.e. on an economic-political environment).[113]

Once Law and Economics introduces as the goal of the legal phenomenon criteria such as welfare maximization or social wealth, it forces legal scholars to think and reason in political terms, terms of values assumed as "right" for a community.

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[110] *See* Note, *'Round and 'Round the Bramble Bush*, *supra* at 1689.

[111] A classical example in this direction is the article founding the school of Law and Economics by Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 41-44 (1960).

[112] *See* Calabresi, *The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence? Maccabaean Lecture in Jurisprudence*, LXVII PROC. BRIT. ACAD. 86 (1982).

[113] *See* Posner, *Some Uses and Abuses of Economics in Law*, 46 UN. CHI. L. REV. 288-294 (1979); and Calabresi, *The New Economic Analysis of Law*, *supra* at 87-91. *Compare* James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 277, 307-322 (1997). Hackney claims that law and ('neoclassical') economics is characterized, in particular from the 60's throughout the end of the century, for its "analytical turn," *see id.* at 310, and for offering an approach to the legal issues both scientific in its methodology and political in its underpinnings and goals, *see id*. at 321.

Moreover, the legal discipline is then opened to the theoretical debate occurring in the world of political theories and, to some extent, in political philosophies, in the world where welfare and social wealth have their origin.

Concerning this shift, from a *science* of Law and Economics to Law and Economics as a *policy analysis*, Horwitz sharply states:

"After twenty years of attempting to claim that they stood above ideology in their devotion to science, the practitioners of Law and Economics have finally been forced to come out of the closet and debate ideology with the rest of us."[114]

In a softer version of Law and Economics, i.e. as elaborated by Guido Calabresi, there is even space for the concept of justice, a classical concept of the schools within the embedded model.[115] In Calabresi's construction, this is a value that must be used by the legal discipline in order to limit any aberrations that a pure application of other political principles, such as the utilitarian wealth maximization, might entail.[116]

Posner himself explicitly recognizes this mixed nature of the legal discipline as intended from a Law and Economics perspective. He claims that one of the strongest merits of his school consists in the very circumstance that it contributed to making the legal discipline more interdisciplinary. Law and Economics, together with CLS in particular, has forced legal actors to abandon a strict adherence to principles like logic, analogy or stare decisis, and look instead at the law "from the outside, from perspectives shaped by other fields of scholarly inquiry, such as economics… [or] political theory."[117] In order to dig beneath the traditional conceptual apparatus of the law and find the underpinning "real" (namely economic) reasons behind legislative or judicial choices, legal students and their teachers have to equip themselves with conceptual tools and material data of economic origin, i.e. they have to mix the legal discipline with results and conceptual tools coming from the world of (economic) values.[118]

These very different contemporary legal theories, CLS, natural law theory and Law and Economics, then present a common tendency towards an idea of the legal discipline as a *mixed* discipline, i.e. as using conceptual and analytical devices from other disciplines not specifically devoted to the investigation of the legal

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[114] Horwitz, *Law and Economics: Science or Politics? supra* at 912.

[115] *See, e.g.*, GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES 83-87 (1978). *But see* POSNER, ECONOMIC ANALYSIS OF LAW 27 (4th ed., 1992).

[116] *See* Calabresi, *An Exchange. About Law and Economics: A Letter to Ronald Dworkin*, 8(3) HOFSTRA L. REV. 559 (1980).

[117] Posner, *Legal Scholarship Today*, *supra* at 1316-1317. *See also* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* at 23. Moreover, in order to avoid the inertia of the legal order towards legal innovation, Posner even rejects the use of history inside the legal disciplines, as the method of reasoning employed by legal historians differs from that used by politicians. *See* POSNER, FRONTIERS OF LEGAL THEORY, *supra* 154.

[118] As consequence, "[t]he economics of law is a set of economic studies that build on a detailed knowledge of some area of law; whether the study is done by a 'lawyer,' an 'economist,' someone with both degrees, or a lawyer-economist team has little significance." Posner, *The Law and Economics Movement*, *supra* at 4.

phenomenon (*e.g.* moral philosophy, economics, political sciences, political philosophy). This depiction of the legal discipline as in the embedded model's theories can be summarized in Finnis' statement: "[I]t is quite possible to draft the entire legal system without using normative vocabulary at all."[119]

5. Conclusion

This chapter has mapped out the positions of certain contemporary legal theories as to the three questions (the nature of law, the production of legal norms and the character of the legal discipline). In particular, how modern natural law theory (represented by Finnis), CLS and Law and Economics tend towards an ideatypical model of embeddedness of the legal phenomenon within the political world has been analyzed. The law is portrayed by these legal theoretical movements as embraced by politics because of its flexible nature towards the values and their production in the political world, because the law-making is open towards the value conflicts taking place inside the political order, and finally, because the legal discipline is considered to be mixed with legal and political material.

For these reasons, an additional row has been added to Table Two as presented at the end of Chapter Two, a row representing the main features of the embedded model and the actual legal theoretical movements that tend to embrace such a model (*see* Table 3). However, the panorama is not yet complete. As Chapters Four and Five show, it is possible to identify a third way of approaching the question of how the law relates to politics, an alternative to the two models of answers presented in this and in the previous chapter. A stream of legal theories heavily characterizing the legal thought in the twentieth century follows this third path: the legal realisms.

[119] FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* at 282.

Table 3. Politics And Law In The Autonomous And Embedded Models

	Relationship of law to politics (*static aspect*)	**Relationship between law-making and political order (*dynamic aspect*)**	**Relationship of legal discipline to political material (*epistemological aspect*)**
Autonomous model (Legal Positivism, Analytical Jurisprudence)	*Rigidity* of law	*Closed* law-making	*Pure* legal discipline
Embedded model (Natural Law Theory, CLS, Law and Economics)	*Flexibility* of law	*Open* law-making	*Mixed* legal discipline

Chapter 4. The Intersecting Model

In the exploration in Chapters Two and Three concerning how legal scholars perceive the relations between law and politics, an assessment of two of the major movements of contemporary legal theory was postponed: the American and the Scandinavian legal realisms. This chapter and the following will now analyze, using the same methodology, the positions of the legal realists concerning the question of how the legal and political phenomena interact with each other.

The legal realist theories are placed under a common roof, using the mode of inquiry as to the relations between law and politics in accordance to the answers the legal realists give to the three aspects: the static aspect (i.e. how the concept of law relates to politics), the dynamic aspect (how the law-making interacts with the political order), and the epistemological aspect (the uses the legal discipline makes of the political material). The mapping started in Chapters Two and Three of the different contemporary legal theories and their positions regarding the question of law and politics will thus be completed.

Before starting the analysis, one clarification is required. As already seen in Chapter One, it is quite difficult in general to speak of *a* movement or *a* stream of legal thought. 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). For this reason, the very hardcore American legal realists actually reject the label of "school" as too reminiscent of the existence of theoretical boundary lines that should be strictly followed by scholars. Instead, they prefer to define themselves as a "movement."[1]

Moreover, it is often difficult to find common elements between the American and the Scandinavian legal realisms. They differ both in their theoretical premises

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[1] *See* Karl N. Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1233-1234 (1931). Duxbury is more extreme in dissolving the unity of American legal realism, speaking instead of a legal realistic "mood" as opposed to a movement. *See* DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 68-71, 79. *See also* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 725, 735 (2nd ed., 1995). The authors insert American legal realism in the more general movement of "reform jurisprudence" (*e.g.* with Scandinavian legal realists, Pound, Henry Sumner Maine, Holmes, and James Coolidge Carter) characterized by its rejection of formalism and their opening towards social sciences. A third type of legal realism, i.e. the German legal realism, is not considered in this work. *See* Werner Krawietz, *The Concept of Law Revised –Directives and Norms in the Perspectives of a New Legal Realism*, 14(1) RATIO JURIS 35-36 (2001).

(pragmatism in USA, 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 text in Scandinavia). These differences have led some authors to even state that the only thing these two movements have in common is the labeling "legal realism."[2]

This negative perspective however seems to over exaggerate certain national legal peculiarities of the two legal streams too much while underestimating their common central points. For example, this perspective of simply a nominal coincidence between the Americans and the Scandinavians does not pay particular attention to the work of Ross and his ideology of the courts as a central moment in the explanation of the legal phenomenon. Moreover, it underestimates the common point that both American and Scandinavian realists, in the end, consider the law as socio-psychological phenomenon.[3]

Despite the position taken with respect to this problem, the goal of this chapter is the very demonstration that the American and Scandinavian legal realists' attitudes concerning the issue of law and politics bring them to the same path: the proposal of an intersecting model, as within it, law and politics are portrayed as two intersecting phenomena.

1. The "Modernity" of Legal Realisms

The typology of autonomous *vs.* embedded models 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. Despite this generalization, it can be maintained as is typical of investigations using models, that this typology covers the vast majority of contemporary legal theories. The typology however is incomplete, as until now, it has postponed a third way of looking at the issue of law and politics, not addressing the answers given by two movements of legal thought appearing in the Western legal culture in the first half of twentieth century, and which had an enormous impact, both on legal thinking and on legal practice: the American and Scandinavian legal realisms. In the United States and in Scandinavia, the general attitude inside the legal

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[2] *See* FRIEDMANN, LEGAL THEORY, *supra* at 304-305; and Twining, *Talk about Realism*, 60 N. Y. U. L. REV. 361 (1985). *See also* FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 872; and Gregory S. Alexander, *Comparing the Two Legal Realisms – American and Scandinavian*, 50 AM. J. COMP. L. 132 (2002).

[3] Supporting the idea of Ross as "an American realist in Scandinavia," *see* Hart, *Scandinavian Realism*, 1959 CAMBRIDGE L. J. 237 (1959). As to the issue of legal realism and law as a socio-psychological phenomenon, *see, e.g.*, Karl Olivecrona, *Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy*, 26 N. Y. U. L. REV. 124 (1951). "Realists were also the first lawyers to undertake empirical social scientific research into laws and legal institutions, though many of their assumptions were naïve and what they produced is generally thought to suffer from a reliance on crude empiricism." FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 803.

world has been that "realism is dead; we are all realists now."[4] Far from being the legal academic cliché described by Bix, this expression simply states the centrality of legal realism in the general American (and Scandinavian) contemporary legal discussion.[5]

The autonomous and embedded models embrace legal theories like natural law theory or legal positivism that have been present in the Western legal history long before the twentieth century. In contrast, the third way of viewing law and politics is typical of legal theories of recent formation, such as the legal realisms. This third model, defined as intersecting, appears to cover legal theoretical schools mirroring the phenomena typical of the contemporary age. It is then not a coincidence that the other legal movements, distinctively products of the twentieth century, claim their roots either directly in legal realism (as CLS) or its legal philosophical sources (*e.g.* Holmes for Law and Economics).[6]

The philosophical roots of the American and Scandinavian legal realisms stretch back to the end of the nineteenth and beginning of the twentieth centuries. Americans have always recognized their ideological roots in the teaching of Justice Oliver Wendell Holmes, Jr. and his manifesto for a more pragmatic approach to the law, as articulated in his famous essay, *The Path of the Law*.[7] The Scandinavians, on their side, have always explicitly recognized, to a greater (Lundstedt) or lesser (Ross) extent, their philosophical foundation in the Uppsala School, and in particular in Hägerström's inquiries in the world of legal and moral philosophies.[8] Even with these roots in the past, the theories covered by the intersecting model directly face the core of the twentieth century. In their own basic features, the legal realisms embrace and (at least as is the intentions of their followers) resolve the basic dilemma faced by legal theories today.

The legal theories, as it will be further discussed in Chapter Five, are presently caught in the midst of a reality in which two divergent pulling forces co-exist. One

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4 TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973). *See also* HANS-HEINRICH VOGEL, DER SKANDINAVISCHER RECHTSREALISMUS 9 (1972). *But see* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 492-496, 507-510 (2003); and LAURA KELMAN, LEGAL REALISM AT YALE 1927-1960 229 (1986).

5 *See* BIX, JURISPRUDENCE, *supra* at 177. *See also* Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 274 (1997). *But see* Posner, *Legal Scholarship Today*, *supra* at 1315.

6 *See* BIX, JURISPRUDENCE, *supra* at 185-186. *See also* Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 468 (1988). More skeptical on Law and Economics as a legitimate offspring of legal realism is HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 270 (1994). *See also* MICHAEL MARTIN, LEGAL REALISM: AMERICAN AND SCANDINAVIAN 2 (1997).

7 *See* Holmes, *The Path Of The Law*, 10 HARV. L. REV. 461, 465-467 (1897). Frank defines him as "[o]ne wise leader pointing the way." FRANK, LAW AND THE MODERN MIND 253 (1949). As to possible links between the American legal realist movement and the Ger-man Free Law movement (*Freirechtslehre*), *see* James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 440-452 (1987).

8 *See* BJARUP, SKANDINAVISCHER REALISMUS 23-38 (1978); and ROSS, ON LAW AND JUSTICE, *supra* at x.

force, because of the nation state phenomenon, pulls in the direction of the concentration of law into the hands of politicians. A legal order more obedient to the reasons of politics than, for example, to those of a systematic legal development, is therefore required. The other force, because of the increasing complexity and number of areas the legal order recognizes as its domain, pulls in the direction of a more specialized legal phenomenon. It then encourages a development of legal studies towards a closed feature of legal knowledge, i.e. a branch of knowledge dealing with a specific object (the law) and its monopolization by a group of professionals. These two features, a mirror of modern times, have resulting in several of the representatives of the intersecting model viewing themselves as offering a new approach to the law and the legal issues, an approach alternative to the traditional legal theoretical streams represented, for example, by legal positivism and natural law theories.[9]

2. Law *and* Politics

A path alternative to those followed by the embedded and autonomous model theories is the one followed by the legal theories encompassed by the intersecting model for explaining the relationships between law and politics. This model is based on the fundamental idea of law as a *partially distinct* phenomenon from the political one. In the intersecting model, in contrast to the embedded one, the law only partially collides with politics, and is not totally embedded into the political mass; the law does keep a certain degree of separation. Law is *distinct* from politics because the law has a true normative core, an area which can be defined, can work and which can 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, tends to be passed from one generation to the next.

A distinction exists between law and politics since, at least historically, they have diverged as two different ways of forcing or convincing people onto paths that they otherwise would have not chosen. In particular, Scandinavian legal realism has produced several works of a legal-historical character in order to discover why people are usually more obedient to guidelines enacted in legal forms than to political propaganda.[10]

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[9] *See, e.g.*, ROSS, TOWARDS A REALISTIC JURISPRUDENCE: A CRITICISM OF THE DUALISM IN LAW 11-13 (1946); and, in a more indirect form, Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 586-589 (1940). *But see* Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* at 1021. According to Summers, only the American version of legal realism can be considered as alternative to the traditional legal theories of law (by him identified with analytical positivism, natural law philosophy and historical jurisprudence). *Cf.* SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 21 (1982).

[10] *See, e.g.*, HÄGERSTRÖM, RECHT, PFLICHT UND BINDENDE KRAFT DES VERTRAGES NACH RÖMISCHER UND NATURRECHTLICHER ANSCHAUUNG 16-38 (K. Olivecrona ed., 1965).

The law has then acquired over time 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). For example, judges are politically influenced in their decisions. However, they must balance this influence with their legal education and the limits (or directions) imposed by the existing ways of legal reasoning(s).[11]

However, the intersecting model differs from the autonomous model to the extent that this separation of law from politics is only *partial*. 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 theories covered by the intersecting model 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 the theories covered by the intersecting model, 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.

For this reason, the legal phenomenon in the intersecting model is also considered a political product, exploited for political purposes by actors belonging to the political arena.[12] This instrumental nature of the law in its relations to politics is particularly evident in the modern nation state, where the law has become one of the tools politicians use more widely in order to implement their values into a community. 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.[13]

In summary, the legal theories covered by the intersecting model recognize the existence of a normative hard-core in the legal phenomenon, with actors and types of reasoning different and autonomous from the political ones. Nevertheless, the

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[11] *See, e.g.*, Llewellyn, *On Reading and Using the Newer Jurisprudence*, *supra* at 589; and ROSS, TOWARDS A REALISTIC JURISPRUDENCE, *supra* at 72. *See also* MACCORMICK, LEGAL REASONING AND LEGAL THEORY, *supra* at 188. *Compare* Hart's criticism in THE CONCEPT OF LAW, *supra* at 133-134.

[12] This opening of the law towards politics is also confirmed by the fact that several movements covered by the embedded model (CLS *in primis*) claim that the roots of their "law is politics" motto can be found in the work of the adherents to the intersecting model, namely the American legal realists. *See* Edward G. White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819 (1986).

[13] *See* Bjarup, *Legal Realism or Kelsen versus Hägerström*, 9 RECHTSTHEORIE 256-257 (1986); Edward G. White, *From Sociological Jurisprudence to Realism: Jurisprudence in Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 1013-1026 (1972); and HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, *supra* at 219-220, reporting Pound's criticisms of the connection between the New Deal's "administrative absolutism" and legal realism's disregard for the rule of law. *But see*, COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 196-198; and Duxbury, *The Theory and History of American Law and Politics*, *supra* at 266-267.

paladins for this third model admit that these different legal and political worlds actually have boundaries that cross and to some extent overlap with each other.

3. Partial Rigidity of the Law Towards Politics

When it comes to law and its relations to politics, the legal theories within the intersecting model favor a *partial rigidity* of the legal concepts and categories. They see the law as a phenomenon whose essence eventually consists of being a specific normative phenomenon, i.e. in terms stressing the separation and rigidity of the legal structure towards the political world. In the intersecting model, law is seen as instrumental to politics, but is still considered a neutral tool that can be used in order to implement radically different values into society. As in the autonomous model, law is then conceived as a technology, with its own space and its own rules, a main reason why legal realisms are sometimes treated as a particular version or as spin-off of legal positivism.[14]

However, in contrast to legal positivism and analytical jurisprudence, the intersecting model's theories also 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*.[15]

As already noted, a broad definition of normativity of the law has been adopted in this work. The normativity of the law refers to the characterizing feature of the legal phenomenon of being "thought as binding" in a certain community (i.e. a socio-psychological phenomenon), an idea fundamental for the functioning and understanding of the legal machinery. In this way, the idea of the normativity of the law has been disconnected from the formalistic idea of law, an idea against which both the American and the Scandinavian legal realisms ferociously fight.[16]

According to the formalistic approach, law is seen as an entirely self-sufficient purely logical (and therefore not empirical) construction of ought-sentences, a construction that can only be penetrated using the purely normative tools of the

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[14] *See* Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* at 1017. *See, e.g.*, Friedmann's definition of legal realisms as a type of "pragmatic positivism" (in contrast to the analytical positivism as represented by Austin or Kelsen) in LEGAL THEORY, *supra* at 255. *But see* Bix, *Law as an Autonomous Discipline*, *supra* at 978-980; Anthony Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2094 (1995); and HART, THE CONCEPT OF LAW, *supra* at 132-144.

[15] *See* Llewellyn, *Some Realism about Realism*, *supra* at 1237, points 5 and 6. *See also* Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 35-36 (1910).

[16] *See* BIX, JURISPRUDENCE, *supra* at 179-180 (on formalism as the real target of the American realists' attacks).

analytical approach.[17] Once the normativity of the law is separated from the formalistic approach, it is then possible for legal theories to use criteria other than those strictly analytical or logical for defining what the law is and, at the same time, still depict the law as a normative phenomenon, i.e. a phenomenon whose specific nature makes it ontologically rigid to the ideas produced inside the political world.[18]

The intersecting model's theories then 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."[19]

The legal categories and concepts directly pay the price of 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.[20] For example, the legal scholar has to take into consideration the conservative environment in which the judge is educated and how this value-environment affects his or her legal construction (or destruction) of the concept of strict liability. For this very reason, the theories covered by the intersecting model can generally be seen as having the idea of a *partial* rigidity of the law in relation to politics.

The main difference between the intersecting model and the autonomous model then 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. Even the most extreme legal positivist would never support such a position. The distinction between the two models lies in the fact that the autonomous model 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

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[17] For legal formalism, as put by Leiter, the idea is that "law and legal decision-making are to be understood as taking place within a hermetic logical universe of clear-cut legal rules and deductive inferences." Leiter, *Is There An "American" Jurisprudence?*, *supra* at 374.

[18] Only by separating the anti-formalistic attitude endorsed by the American legal realists from their depiction of the law fundamentally as a normative phenomenon, it is then possible to understand Duxbury's claim that "[l]egal realism, we might say, was not entirely anti-formalistic; for legal formalism, often heavily disguised, persisted under the realist banner." DUXBURY PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 64.

[19] ROSS, TOWARDS A REALISTIC JURISPRUDENCE, *supra* at 49.

[20] "[I]nstead of the single avenue of logic, realists seek to utilise the multiple avenues which modern science has opened or is opening up." FRIEDMANN, LEGAL THEORY, *supra* at 296.

on their legal solutions of 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 model, on the other end, claims that political values sometimes directly enter into the legal world and directly influence and shape the different legal concepts and categories.[21] For example, in studying the judicial creation of the legal category of strict liability, legal scholars have to also directly take into consideration as its constitutive part whether judges have been formed and educated in an environment in which the idea of economic democracy has been disseminated.

3.1 Politics, Law and American Legal Realism

This complex relation of law towards politics is present in American legal realism, in which there is a normative core but certain parts of the law's nature extend beyond into the political world.[22] One of the fathers of American legal realists, Holmes, seems to adopt a twofold definition of the law: The law is constituted by the "prophecies of what the courts will do in fact."[23] In this definition, law is defined in its socio-behaviorist dimension ("do in fact"). Nevertheless, a partially normative dimension is also present, since what the courts do is write decisions, i.e. to enact ought-statements. These statements only produce empirical consequences when and as far as they are considered as a part of the law, i.e. only when they are thought (even by the "bad" man not actually obeying them) as coming from the normative world and therefore binding.[24]

In a similar way, the complexity of the nature of law originates for American legal realism 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 results of the work of the courts and their decisions in the concrete cases.[25] This identification of the law with the decisions of the courts leads to the rejection of any ontology of the legal phenomenon trying to establish the law's grounds elsewhere, in particular in the value world (as done by natural law scholars). On

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[21] *See, e.g.*, Leiter, *Rethinking Legal Realism*, *supra* at 278.

[22] *See* Llewellyn, *A Realistic Jurisprudence –The Next Step*, 30 COLUM. L. REV. 431 (1930).

[23] Holmes, *The Path of the Law*, *supra* at 461.

[24] *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 225. *But see* Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 284 (1973); *cf.* HART, THE CONCEPT OF LAW, *supra* at 143-144.

[25] *See* Llewellyn, *A Realistic Jurisprudence*, *supra* at 447-448. For this very reason, the law, that which is stated inside the courtrooms, the American legal realists' theory of law, i.e. their idea of what the law is, has to be reached by passing their theory of adjudication, i.e. their ideas of the ways judges decide cases.

the path established by Holmes, American realists consequently perceive a solid border between the legal phenomenon, i.e. the courts decisions, and the values (or politics) this phenomenon is directed to implement in the community. The ought-statements forming the judicial decisions are labeled "legal" regardless of whether they are directed at fulfilling value *f* or the opposite value *e*:

"*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."[26]

It can be argued implicitly that 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."[27]

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. To deny the use of a different logic for law and for politics does not mean the acceptance that 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."[28]

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.[29] 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:

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[26] Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L. J. 204 (1931) [*italics added*]. *Compare* Holmes, *The Path of the Law*, *supra* at 459-460.

[27] *See*, with the same objection, JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW. AN INTRODUCTION TO JURISPRUDENCE 39 (1984).

[28] FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 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* at 374.

[29] *See* SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at 60-80.

"'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?"[30]

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.[31] 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 Sherman Antitrust Act's prohibition of "*every* contract… in restraint of trade or commerce among the several states."[32] 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).[33]

Differently from CLS, the legal realist 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."[34]

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

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[30] Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 811 (1935). Cohen however implicitly withdraws from his nihilist avowal when he further states that legal concepts play a central role in defining what the law is, although they have to be conceived from a more functional perspective. *See id.* at 822.

[31] *See* DWORKIN, LAW'S EMPIRE, *supra* at 36. *See also* WILFRID E. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS 55-63 (1968); and LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 189 (1960).

[32] 15 U.S.C. § 1 (1890) [*italics added*]. This example is used by the American realist Frank in his LAW AND THE MODERN MIND, *supra* at 22-24.

[33] *See* the different interpretations given by the US Supreme Court in *Standard Oil v. United States*, 221 U.S. 1, 87-89 (1911) (restricting the prohibition to contracts "unreasonably" limiting trade) and in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 327-328 (1897) (expanding the prohibition to all contracts perceived as limiting commerce).

[34] LLEWELLYN, THE COMMON LAW TRADITION, *supra* at 12 n.1 [italics in the original].

main purposes of legal realism is "not the elimination of rules, but the setting of words and paper in perspective."[35]

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.[36] 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 the trade. It does not choose (at least explicitly) between the economic value of 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."[37]

This choice among different legal categories however is the point at which American legal realists begin to open the structures of law. They make the law more flexible, or better, only *partially rigid* towards the political world. 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."[38]

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 values environment in which they are educated, live and work. The American legal realists introduce here the socio-psychological element of judicial behaviors as a component of the law, a law always seen as the concrete rules produced by the judiciary.

It is this very idea that the law is what judges produce, and not what 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. Only after this 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.[39] Using the previous example of the attitudes of the

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35 Llewellyn, *A Realistic Jurisprudence*, *supra* at 453.

36 *See* Llewellyn, *Some Realism about Realism*, *supra* at 1252; and TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, *supra* at 490.

37 *Id*. at 491.

38 Herman Oliphant, *A Return to Stare Decisis*, XIV A. B. A. J. 73 (1928).

39 "Behind decisions stand judges; judges are men; as men they have human backgrounds." Llewellyn, *Some Realism about Realism*, *supra* at 1222. *See also* LLEWELLYN, THE COMMON LAW TRADITION, *supra* at 201; and Walter Wheeler Cook, *Facts and Statements of Fact*, 4 U. CHI. L. REV. 233 (1937). This tendency of the American legal realists to identify judge-made law with *the law* in general, originates from the side of Holmes' *The Path of Law*, in JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 125 (1909). Moreover, for every legal theory in general, "[t]he theory

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.[40]

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 (*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…. [b]ut 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 judges.[41]

In summary, American realists consider the law as *rigid* towards politics because the law is that 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. 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."[42]

In other words, American legal realists are legal positivists to the extent that "they employ primarily pedigree tests of legal validity."[43]

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 contradic-

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of [judicial] interpretation is crucial in assessing the degree to which values enter into legal reasoning." Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism. A Review Essay of 'Instrumentalism and American Legal Theory' by Robert S. Summers*, 69 CORNELL L. REV. 1006 (1984).

40 FRANK, LAW AND THE MODERN MIND, *supra* at 23.

41 Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* at 839. *See also* Leiter, *Legal Realism*, *in* A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 270 (D. Patterson ed., 1996); and HOLMES, THE COMMON LAW 41 (1991).

42 Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* at 1018. *See also* SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at Chapter 4; and FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 1040.

43 Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT, *supra* at 355. *But see* Bix, *Law as an Autonomous Discipline*, *supra* at 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* at 65-159. The main purpose of Duxbury's chapter is to show how "in some ways, realist jurisprudence failed to progress significantly beyond formalist legal thought; and indeed, to a certain extent, it remained fixed in the clutches of such thought," *id.* at 4; in our case, in the clutches of a rigid concept of the law towards politics.

tory, judicial decisions are influenced by the values they share (or not). 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.[44]

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." [45] Therefore, the law can be fully understood in all its fundamental components only if the new value environment is taken into consideration as constitutive of the law itself.

The orientation of the legal realists towards an idea of a partial rigidity of the law towards politics is also evidenced by the personal history of one of their leaders, Llewellyn. He was a leading figure of the committee that drafted the Uniform Commercial Code, in particular Article 2. In this article, Llewellyn opened up commercial law to concepts such as "good faith" and "reasonableness" which, in their turn, refer to the commercial culture, i.e. to non-legal categories and concepts as basic elements for the legal regulation of commerce. However, Llewellyn pushed harder for the idea that these traditionally non-legal concepts should be part of the legal conceptual apparatus (in this case through their introduction into the Uniform Commercial Code). This incorporation was necessary because the concept of the law retains a certain degree of rigidity towards the political concepts and the latter becomes a part of the idea of law only as long as they are recognized as such by the judges and/or in the legislation.[46]

In the end, "[t]he 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."[47]

3.2 Scandinavian Legal Realism and the Partial Rigidity of Law

Although coming from a different theoretical background as well as premises, the 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. This idea of a (partial) rigidity has led some contemporary legal scholars to place Scandinavian legal realism among the legal positivistic

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[44] "The consequence of defining law as a hodge-podge of political force and ethical value ambiguously amalgamated is that every legal concept, rule or question will present a similar ambiguity." Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* at 839.

[45] Llewellyn, *A Realistic Jurisprudence*, *supra* at 454.

[46] *See* Leiter, *Legal Realism*, *supra* at 277-278.

[47] FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 810. *See also* Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 285 (2001): "[T]he crux of Realist position (at least for the majority of Realists) is that nonlegal reasons (e.g. judgment of fairness or consideration of commercial norms) explain the decisions."

schools.[48] The Scandinavian legal realism movement itself however views its position more as a third force between the natural law and the legal positivistic schools. This is particularly evident with Lundstedt, who repeatedly accuses legal positivism of being "ultimately based on natural justice, however anxious one may be to speak as silently as possible of it," and Karl Olivecrona, for whom "there is no 'positive' law in the sense of the term as used in legal positivism."[49]

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 definition of law. 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.[50] 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. 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.[51] 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

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[48] *See, e.g.*, Bjarup, *Law and Legal Knowledge from a Realistic Perspective*, *in* THEORIE DES RECHTS UND DER GESELLSCHAFT. FESTSCHRIFT FÜR WERNER KRAWIETZ ZUM 70. GEBURTSTAG 459-483 (M. Atienza et al. eds., 2003). *But see* Hart, *Self-referring Laws*, *in* HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* at 175-178.

[49] LUNDSTEDT, LEGAL THINKING REVISED. MY VIEWS ON LAW 27 (1956); OLIVECRONA, LAW AS FACT 77 (2nd ed., 1971) [hereinafter OLIVECRONA, LAW AS FACT (1971)].

[50] For an example of the logical positivist aspects in Ross' work, *see* ON LAW AND JUSTICE, *supra* at 67. *See also* ROSS, DIRECTIVES AND NORMS 15 (1968), particularly in connection with Ross, *Legal Fictions*, *in* LAW, REASON, AND JUSTICE, *supra* at 225.

[51] *See* Ross, *Tû-tû*, 70 HARV. L. REV. 818-822 (1957). Directives are "utterances with no representative meaning, but with the intent to exert influence." ROSS, ON LAW AND JUSTICE, *supra* at 8. Ross finds judicial actors as the primary addressees of legal directives, while Olivecrona and Lundstedt in general speak more of national communities. *See id.* at 32-33; LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 34, 133; and OLIVECRONA, LAW AS FACT (1971), *supra* at 135.

make the traffic slower or faster) but for the function they play (*e.g.* lights are directed to influence, in one direction or the other, the behavior of drivers).[52]

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 the end, the inner nature of the law is 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. 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), works each time 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.[53]

Moreover, in both ancient Roman times as today, legal concepts and categories operate in the same way: with a stimuli-response mechanism at a linguistic and a symbolic level (similar to the "red light–stop the car" phenomenon).[54] Symbols can be of magical origins (as in Roman law) or of a more formalistic and abstract nature (as, in the contemporary State, the printing on a piece of paper of the words "will of the Parliament"). In either case, it is law.

In order to emphasize this detachment from the political, social, and economic categories prevailing at the time of the creation of a certain legal concept, Olivecrona speaks of legal rules as "independent imperatives." With this terminology, Olivecrona points to how legal rules, once created, become fully independent from their creator (the Parliament or the King). They tend to live their own life as imperatives self-sufficient from the personal destiny (and the values) of the actors creating them. Only in this way, Olivecrona continues, can one explain the survival of certain legal concepts and categories from the death or overthrown of their creators.[55]

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

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[52] *See id.* at 128-129.

[53] *See* ROSS, ON LAW AND JUSTICE, *supra* at 52-58; and OLIVECRONA, LAW AS FACT 134-143 (1st ed., 1939) [hereinafter OLIVECRONA, LAW AS FACT (1939)].

[54] *See* OLIVECRONA, LAW AS FACT (1971), *supra* at 129.

[55] *See id.* at 128-134. Despite the fact that Olivecrona repeatedly stresses his distance from the legal positivistic idea of law, 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. *See* KELSEN, THE PURE THEORY OF LAW, *supra* at 233-237.

property *vs.* collective property) are considered "real" law and therefore binding in their respective national legal orders. It is up to the political, economic, and cultural powers, more or less, 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." A norm is legal, and therefore binding on the community, even if it is highly unjust or economically inefficient.[56] That which is fundamental for speaking of a legal concept or category is that it *works in reality* as a stimulus to make people following 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, making 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 used to influence human behaviors.[57]

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 renders the legal phenomenon, similarly to American realism, only *partially* rigid towards the political world.

According to Hägerström and his followers, 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.[58] 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 ad-

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[56] *See* LUNDSTEDT, LEGAL THINKING REVISED, *supra* at Chapter 1; and OLIVECRONA, LAW AS FACT (1971), *supra* at Chapter 2. 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, ENGLAND ODER DEUTSCHLAND? (1941).

[57] As to the similarity of the general projects of American and Scandinavian legal realisms, *see* MARTIN, LEGAL REALISM, *supra* at 203-204; and ROSS, TOWARDS A REALISTIC JURISPRUDENCE, *supra* at 9.

[58] *See* OLIVECRONA, LAW AS FACT (1971), *supra* at 113-114.

dressees observes them.[59] Moreover, in order to speak of a valid law, it is necessary not only that people observe and follow it, but also that the law is felt by this majority as "socially binding."[60]

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.[61] 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. 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).[62]

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 to introduce 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 actors.[63]

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

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[59] *See* ROSS, ON LAW AND JUSTICE, *supra* at 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 FACT (1971), *supra* at 112.

[60] *See* ROSS, ON LAW AND JUSTICE, *supra* at 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 [i.e. its efficacy] and something valid in the world of ideas [i.e. its obligatory force]." ROSS, ON LAW AND JUSTICE, *supra* at 38.

[61] *See*, for criticism of Ross' idea of validity as in "On Law and Justice," Hart, *Scandinavian Realism*, *supra* at 238-240; and Ross' defense in Ross, *The Concept of Law. By H. L. A. Hart*, 71 YALE L. J. 1186-1187 (1962).

[62] *See id.* at 1188-1190; ROSS, ON LAW AND JUSTICE, *supra* at 55; and OLIVECRONA, LAW AS FACT (1939), *supra* at 161-168.

[63] *See, e.g.*, LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 150; or OLIVECRONA, LAW AS FACT (1971), *supra* at 272.

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). In order to remain the valid law or the law in force, it then has to have a content of concepts and categories intersecting the concepts and categories produced in the political world.[64]

4. The *Open* Law-making

Moving to the relationships between the processes of production of new legal categories and concepts and the political order, the theories covered by the intersecting model design the law-making as *open* to political processes. In particular, the law-making process is structurally open to choices made in the political arena, of values to be implemented into a community through the law.

As in the embedded model, both American and Scandinavian legal realists claim that the procedures and directions taken in the political order directly influence the workings of the law-making processes. Legal actors are human beings, educated by and operating inside a larger community and a larger system of production and selection of values. The latter, defined previously as the political order, influences legal actors when they operate within the law. If the focus is on the law-in-action or on the law as fact, then the environment in which the actions or the facts take place becomes of primary importance for the creation of those very actions and facts.[65] For example, the appointment of a judge with a certain conservative background and legal education will probably push the legal order, in a particular case, to promote certain legal constructions instead of others. He or she will give a law-making interpretation (or, in other words, a creative reading of the actual legal system) defending a formal concept of equality instead of a substantive concept of equality based on legal reasoning more oriented towards positive discrimination.

This openness of the law-making processes and procedures is also created by the fact that, according to both American and Scandinavian legal realists, legal concepts and categories are generally expressed in a quite vague and, more or less, open-ended language. The legal actors deal primarily with molding the legal language and reasoning in favor of one legal construction over another. In doing so,

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[64] 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, at the same time, its empirical nature, i.e. its "existing" only when and if other socio-psychological components exist. *See, e.g.*, Bjarup, *Legal Realism or Kelsen versus Hägerström*, *supra* 247-251; and *generally* SUNDBERG, HÄGERSTRÖM AND FINLAND'S STRUGGLE FOR LAW (1983).

[65] "[T]he Realist hero is the social engineer who masterfully wields law as an instrument of policy." Gordon, *Critical Legal Histories*, *supra* at 67.

they take direct inspiration from the political order, i.e. from the system of values in which they live and towards whose implementation their decisions (in form of legislation or judicial decisions) are directed.[66]
It has to be pointed out that the open character of the law-making does not specifically characterize the theoretical proposals made by the legal realisms. All legal theories, more or less, admit that the functioning of the political order interferes with the functioning of the legal order. A democratic political order usually promotes the expansion of legal actors participating in the works of the legal order, *e.g.* through the attribution of legal relevance in procedural law to the opinions of NGO associations defending environmental interests.

The innovative contribution of the openness proposed by the theories covered by the intersecting model (and also by the embedded model) is that the political stimuli and processes of production of those stimuli have to be treated as an integral part of the law-making procedures. The democratic environment of a Faculty of Law where a judge has been educated then has to be considered an integral part of the legal process through which he or she, and his or her co-workers, recognizes the idea of "diffuse interests" as legally relevant for the promotion of a civil action against a corporation by an NGO.

The law-making of a legal system does not end at the statutes, judicial decisions or legally relevant procedures aimed at producing (and interpreting) both statutes and decisions. The legal realists' idea of law-making procedures also includes those processes, which, although belonging to the political world, have a direct impact on the production of legal rules or judicial decisions.

4.1 American Legal Realism and Law-making

This feature of law-making as being *open* to that which occurs inside the political order is particularly evident with the American legal realists. They designate the law-making procedures as open to the political order in two fundamental moments of the process: during the act of choosing the legal categories for the implementation in a community of certain values, and during the modification of old or the creation of new legal categories.

Concerning the first, the central moment for legal realists in the working of a legal system is the interpretation of statutes and precedents; the main actors devoted to this activity are judges. Therefore, the openness feature of the law-making activities of a legal system has to be found in the judicial production and way of working. It is through the work of judges that certain instances, values and, in Llewellyn's terms, "interests" developed inside the political order eventually become law.[67]

In investigating the work of judges, legal realists point out how, during the interpretative process regarding precedents and statutes, judges often face a norma-

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[66] *See id*. at 68.

[67] *See* Llewellyn, *A Realistic Jurisprudence*, *supra* at 443-447. *See also* SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at 209.

tive dilemma. Because of the vagueness and obscurity of both statutes and judicial precedents, judges can easily justify two or more contrasting legal solutions to the same concrete case with support; often using the same literal text of a statute or precedent.[68] The path the judge can follow and justify with the law-in-books can either be in direction *l* (*e.g.* the general applicability of the strict liability principle in a certain economic activity) or in the opposite direction *m* (*e.g.* fault liability).

According to American realists, it is in this very choosing by the judges that the law-making opens itself to the political order. This choice of one legal path over another (*e.g.* strict liability instead of fault liability) is indeed taken with reference also (but not only) to the procedures and choices occurring in the political arena. The law is

"capable of criticism, change, and reform not only according to standards found inside law itself (inner harmony, logical consistence of rules, parts and tendencies, elegantia juris) but also according to standards vastly more vital found outside law itself, in the society law purports both to govern and to serve."[69]

Moreover, Llewellyn writes in another article:

"[O]nly policy considerations and the facing of policy considerations can justify 'interpreting' (making, shaping, drawing conclusions from) the relevant body of precedent in one way or in another."[70]

In other words, during the selection process as to which normative solution should be reached, i.e. during the law-making, the judge is strongly influenced both by the values the chosen solution is to implement into the society, and by the environment the judge has been educated and is living within.

The political order affects judicial law-making processes not only at the moment of choosing among the different legal categories, but also during the shaping and modification of these very legal concepts and categories. According to Llewellyn, for example, the very development of the law often occurs not because of an evolution internal to the legal order. The law develops because the legal order, opening the door to disputes between values taking place outside the legal world, is then forced to adapt itself by means of the law-making to the changes occurring in the surrounding environment.[71]

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[68] "In the work of a single opinion-day I have observed 26 different, describable ways in which one of our best state courts handled its own prior cases, repeatedly using three to six different ways within a single opinion." Llewellyn, *Remarks On The Theory Of Appellate Decision And The Rules Or Canons About How Statutes Are to Be Construc-ted*, 3 VAND. L. REV. 395 (1950). *See also* LLEWELLYN, BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 74 (1996). For more in general about the views of American legal realism on this issue, *see* Rumble, *American Legal Realism and the Reduction of Uncertainty*, 13 J. PUB. L. 51-64 (1964).

[69] Llewellyn, *A Realistic Jurisprudence*, *supra* at 442 [italics in the original]. *See also* Cohen, *The Ethical Basis of Legal Criticism*, *supra* at 219-220, identifying in "justice" the end of the law.

[70] Llewellyn, *Some Realism about Realism*, *supra* at 1253.

[71] *See* LLEWELLYN, BRAMBLE BUSH, *supra* at 2.

The system in which values are created and chosen (the political order) does furnish judges with a theoretical apparatus of an economic, political, or social nature, for supporting modifications of old legal concepts or the creation of new legal categories. A classical example, often taken by American legal realists as a positive paradigm of this idea of open law-making, is the Brandeis' Brief.[72] This trial brief, written by Louis Brandeis, supported the constitutionality of a state statute limiting maximum work hours for women. While the legal arguments presented in the brief occupy two pages, ninety-five pages are devoted to economic and sociological data concerning the conditions of working women in factories, i.e. data depicting the non-legal values' environment in which the law-making activity of the judge takes place.[73]

Despite this politicization of two fundamental moments of the judicial law-making activity (interpretation and production), American legal realists do not completely embed the law-making processes into the political order. Because of the rigid nature of the law towards political concepts, the creating activities of the legal system are open to the political world but still distinct. Constituted by different sources (judicial decisions instead of values), the legal order plays a function different from the political one.

The legal system is designed by American legal realists as instrumental. The instrumentality of the legal system is derived from the assumption that this system is particularly interconnected with the political order when it comes to the very production of legal rules. Legal rules are produced and function as a tool directed at realizing the wishes (i.e. the values) of those in power.[74] On one side, the political order stands with its values, on the other, the community in which the political order wishes to implement the values. Between these two blocks, the legal system is inserted and, through the law-making process, it operates as an instrumental system producing the "means to ends."[75]

Actually, it is possible to distinguish within American legal realism two lines of interpretation as to the way the law-making processes operate as a means of the values produced in the political arena.[76] The first line corresponds roughly to the

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[72] *See, e.g.*, LLEWELLYN, THE COMMON LAW TRADITION, *supra* at 233.

[73] *See Muller v. Oregon*, 208 U.S. 419 (1908), 1908 WL 27605 18-112 (U.S.) [Appellate Brief]; and HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, *supra* at 209.

[74] *See* Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* at 837. In other words, the legal system for the legal realists is in an instrumental relation to the political world because "[t]he law exists to serve 'wants' or 'interests' external to law." Summers, *On Identifying And Reconstructing A General Legal Theory*, *supra* at 1017.

[75] Llewellyn, *Some Realism about Realism*, *supra* at 1223. In another article, Llewellyn uses as an example the value of the "security of transactions" for whose protection and implementation the rules and rights of contract law are created. *See* Llewellyn, *A Realistic Jurisprudence*, *supra* at 441. *See also* Edward G. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 280 (1973).

[76] This distinction can be considered a specific application in the law-making area of Leiter's more general division between an "Idiosyncrasy Wing" and a "Sociological

supporters of fact-skepticism (*e.g.* Frank). Values enter into the law-making processes, and influence their way of operating, mainly through the fact that the legal actors ultimately are human beings. This renders the legal actors carriers in their work of their own private values, values in and with which the legal actors have grown.

Many critics have negatively termed this approach to the relationships between value-production and law-making process as "breakfast jurisprudence." This emphasizes the claim by certain American realists, and in particular by Frank and Cohen, that one should look into the legal actors' private lives in order to understand why judges render certain decisions instead of others.[77] In other words, because of the indeterminacy of the legal language, the judges directly make use of their own private value-system in order to establish a normative meaning of the categories and concepts of such language and, on those bases, decide a case.

The second line of interpretation of how the law-making of a legal system is an intermediary means between politics and community corresponds, to some extent, to the adherents of the rule-skepticism stream (*e.g.* Llewellyn). In contrast to the first approach, for them the political order influences the production's activities of the legal system mainly through a public stimulus the political arena exercises on the legal actors. "Public" here is that the legal actors actually tend, during the interpretative process of statutes and precedents, to consider the values expressed by the political arena more than their own private value system.[78] Nevertheless, in this public interpretation the role of the law-making also remains central and distinct. Once the political order has established the directions or values that the legal order is to take, these values as expressed by the political actors often are in contradiction with each other, uttered in vague and unclear forms in the statute. It then is the task of the legal actors (and in particular of the judiciary) to determine, through the law-making processes (in particular through the creative interpretation

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Wing" in American legal realism. *See* Leiter, *Positivism, Formalism, Realism*, *supra* at 1148-1149.

77 *See, e.g.*, Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* at 845-847. As an extreme example of the coarseness in interpreting the message of legal realism as to the (judicial) law-making process and the role of values, *see* Alex Kozinski, *What I Ate For Breakfast And Other Mysteries Of Judicial Decision Making*, 26 LOY. L. A. L. REV. 993 (1993). *But see*, FRANK, LAW AND THE MODERN MIND, *supra* at 104, and the importance of the "legalistic ideology" of observing previous rules, principles and precedents. *See also* Leiter, *Legal Realism*, *supra* at 271.

78 This "de-personalization" of the values to be implemented by the legal actors (and judges in particular) is considered by American legal realists as a necessary step towards the creation of a more scientific approach to the law. The latter is reached through the objective assessment of the values the political order wishes to fulfill into the community through the law. In Llewellyn's *American Common Law Tradition, and American Democracy*, *in* K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 282-315 (1971), the author points out the content of the democracy (*e.g.* the possibility to modify the dominant values), *see id.* at 287-299. After that, Llewellyn moves to analyze how this objective (political) data affects the legal order (*e.g.* its working through the judicial review), *see id.* at 299-315.

of the existing law), the "best" values to be implemented by law into the community.[79]

As can be easily noticed, the private values of judges in this second interpretation also play a very important role, namely the one of deciding which is the "best" of the directions proposed by the political order. This is due to the relative rigidity of law towards politics, a relativity that forces judges to always deal (to a limited extent) with values and values-choice. In the public interpretation (*e.g.* Llewellyn's), the judiciary however tends to decide to implement the best among given (by the political actors) values.[80] Frank and the other adherents to the private line of interpretation tend instead to emphasize the (almost) absolute freedom of the judges and juries in choosing their own personal values and politics that they can pursue and implement in a community with their own decisions.[81]

It has been previously discussed how in the autonomous model, the values-environment is not taken into account in defining how the law-making processes and procedures function. In contrast, American legal realists depict the moments of the creation of the law as standing on quite rigid feet (partial rigidity of the law) but having those feet still directly in the mud of the political world. The fact that Llewellyn's last unfinished book would have been entitled "Law and Leadership," i.e. how the legal phenomenon relates to a classical political category, is then not a coincidence.[82]

An explanation for the combination, in American legal realist theories, of a rigid character of the law with an open design of the law-making process can be traced back to their program. The main consumers of their theories are professional lawyers and judges.[83] As a consequence, legal realists have to keep a (partially) rigid distinction between legal and political concepts in order to preserve the specificity of such legal professions.

Nevertheless, Murphy and Coleman rightly state that the work of the legal realist is not only *for* lawyers but also *from* lawyers, that is what American realists take into account is the lawyers' perspective.[84] The primary needs of lawyers and judges are those of mediating between practical problems, often in forms of value clashes, and the legal constructions available (or *in fieri*). Since for lawyers and judges, the most important goal is to resolve a case, then it is quite expected that

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[79] "According to the legal realists… the highest value should be given to the decision the outcome or result of which is pragmatically best." RUMBLE, AMERICAN LEGAL REALISM, *supra* at 191.

[80] *See, e.g.*, LLEWELLYN, THE COMMON LAW TRADITION, *supra* at 24-25.

[81] *See, e.g.*, FRANK, LAW AND THE MODERN MIND, *supra* at 111.

[82] *See* Llewellyn, *American Common Law Tradition, and American Democracy*, *supra* at 284. *See also* LLEWELLYN, BRAMBLE BUSH, *supra* at 127-128; and SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at Chapter 2.

[83] *See* BIX, JURISPRUDENCE, *supra* at 185. *See also* Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, *in* HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* at 127-128. Hart criticizes American legal realism for stressing the courts as primarily law-making actors "as if adjudication were *essentially* a form law-making" (128) [italics in the original].

[84] *See* MURPHY & COLEMAN, THE PHILOSOPHY OF LAW, *supra* at 40.

legal realists open the law-making processes in order to give lawyers a broader set of interpretative and creative tools to support their legal reasoning (*e.g.* admitting the use of criminological reasoning in an innovative decision of a criminal case). The opening of the law-making then is directed particularly towards that world in which the concrete cases originate, i.e. where the values clashing in a case have been formed (*e.g.* the clash between the punitive and the preventive role of punishment).[85]

4.2 Law-making and the Scandinavian Legal Realism

When it comes to the law-making and its relations with the political order, the Scandinavian legal realists start from a situation very different from the one in which the Americans operate. While the latter, as seen above, covers quite a broad variety of positions (*e.g.* rule-skepticism and fact-skepticism) on the issue of how the law-making relates to the political order, the Scandinavians tend to have a more unitarian solution. This can be explained by two factors, one of a theoretical, the other of a practical nature.

The unifying factor of the theoretical nature is the strong influence Hägerström's philosophical structure had on all the realist legal philosophies in Scandinavia. With the partial exception of Ross, Hägerström and his works were always treated as holy material by the Scandinavian realists (also because most had personally been his students). In the United States, although a leading role was played by figures such as Holmes or Gray as to the birth of American legal realism, the realist movement actually was more the product of a general pragmatically oriented philosophical and social environment than the child of one single philosophy and parent.[86]

The second factor was a result of the fact that the contemporary Scandinavian political panorama is characterized for being quite narrow. The different political ideologies present at the national level, the carriers of interests and values, are not so different from each other. This narrow political spectrum, together with the quasi-monopolistic position in the law-making process occupied by the Swedish Parliament (and the absence of a judiciary perceived as an alternative source in the law-making process), has then somehow contributed to narrowing the Scandinavian realists' spectrum of theoretical solutions to the issue of how the law-making processes relate to the political world. In the United States, in contrast, the division of power, as implemented with the co-presence of a National Assembly, a Federal legislative system and a strong and articulated judiciary, together with a

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[85] *See, e.g.*, Llewellyn, *Some Realism about Realism*, *supra* at 1236, points 1-3. *See also* RUMBLE, AMERICAN LEGAL REALISM, *supra* at 194-195.

[86] *See id.* at 4-13; MORTON WHITE, PRAGMATISM AND THE AMERICAN MIND: ESSAYS AND REVIEWS IN PHILOSOPHY AND INTELLECTUAL HISTORY 41-67 (1975); and SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at 23. *But see* Moore, *The Need for a Theory of Legal Theories*, *supra* at 994-995.

more litigious political panorama, has certainly contributed to opening the theoretical positions among the American legal realists.

Despite coming from such different factual situations, Scandinavian realism portrays the law-making processes and procedures with the same fundamental feature as attributed to them by the American realists: the open nature of the law-making processes towards the political world and towards the process of value-selections occurring within it. The opening of the law-making takes place, according to the Scandinavian realist movement, in two moments of the legal phenomenon: during the creation of the legal rules and during the processes that lead to such a creation.

Concerning the moment of creation, the opening to the political world has its starting point in the Scandinavian realist's idea of law-making as the processes producing valid legal concepts and categories. As discussed previously, the latter are considered valid, and therefore binding, when they are followed by the majority of the community (or, in the case of Ross, by the judges).[87] The law-making, in order to remain a system of processes directed at producing valid law (i.e. *the* law), has to then produce statutes and judicial decisions that absorb the values prevalent in the political arena of a certain community and reproduce them in the legal world. In other words, the legal order and its actors have to set in motion processes and procedures that produce statutes and judicial decisions which embrace and realize the values that are shared by (or at least that are not contrary to the feelings of) the majority of the community (or by the judges).[88]

For example, the promulgation of a statute criminalizing the consumption of alcohol could endanger, or at least diminish, the validity, the feeling of bindingness that the population experiences towards the entire criminal law system. This can occur because the population does not perceive, among its values, that alcohol-related behaviors are so dangerous to the community as to merit being harshly punished with imprisonment.[89]

Concerning the problem of considering which are the prevalent values in a certain community, the positions within the Scandinavian legal realism tend to become less unitarian. Lundstedt claims that the socio-eco-political concept of "social welfare" is the value that all legal actors should take as a guiding light, both in the law-making and law-applying processes. This is because this value fulfils both that which the population usually feels as basic needs of human beings, and also because it increases the feeling of a duty to respect the law. Ross strongly criticizes this position, stressing the fact that social welfare actually tends to unify a complexity of interests and values that, for their own nature, are both incommensurable and in mutual disharmony.[90]

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[87] "It is here [in the decisions of the courts] that we must seek for the effectiveness that is the validity of law." ROSS, ON LAW AND JUSTICE, *supra* at 34-35.

[88] *See* LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 149. *See also* OLIVECRONA, LAW AS FACT (1971), *supra* at 89-90.

[89] *See, e.g.*, LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 235.

[90] *See id.* 167-175; and ROSS, ON LAW AND JUSTICE, *supra* at 289-296.

In any case, according to all Scandinavian legal realists, the legal world has to take models of a political nature into its creating process, regardless whether the content of such models is Lundstedt's "social welfare" or Ross's idea of "democracy." Only by conducting the law-making process in this way is the legal order able "to promote and encourage those activities through which people in general may be able to attain what they attach value to and strive for."[91]

The opening of the law-making to the political world also occurs during the processes that lead to the creation of legal norms. For Scandinavian legal realists, a central element of the processes and procedure for the making of the law is the legal language. The language is the primary means through which legal rules are produced by a legal order and addressed to the community.[92] The legal language, however, is not seen by the Scandinavian realists as a means to describe a certain situation (neither an ought-*Sollen* world, an economic efficient reality nor a fidelity between rulers and the ruled).[93] In the tracks of Austin, the Scandinavian realists consider legal language as having primarily a directive function. Legal language is an instrument of social control directed at shaping and/or creating a certain situation, in particular through the influence it exercises on human behaviors.[94]

In particular, Olivecrona stresses the point that the legal language adopts a regularized, repetitive and impersonal form. This, Olivecrona continues, has to be done in order to make the prescriptive nature of the legal language more effective, i.e. in order to be easier to make people adopt the patterns of behavior "suggested" in the law.[95] This influence occurs, as seen above, through a process based on a linguistic (or sometimes symbolic) stimuli-response reaction. Therefore, it is of vital importance for the legal order that it send out the "right" linguistic stimuli in order to get the strived for reactions. For example, a judge uses the word "guilty" at a certain moment so that a person will be taken away and imprisoned by the enforcement authority.

The rightness of the stimuli, in turn, depends upon the socio-psychological environment in which the legal language is used. Continuing with the previous example, the word "guilty" is pronounced by a certain person (the judge) to whom the enforcement authority attaches a certain power to do so; in other words, the judge, the enforcement system and probably the accused all share the value that

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[91] LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 173. *See also* ROSS, WHY DEMOCRACY?, *supra* at 231-243.

[92] *See, e.g., generally* OLIVECRONA, DAS WERDEN EINES KÖNIGS NACH ALTSCHWEDISCHEM RECHT. DER KÖNIGSRITUS ALS MAGISCHER AKT (1946).

[93] *See, e.g.*, Olivecrona, *The Imperative Element in the Law*, 18 RUTGERS L. REV. 800 (1964).

[94] *See* ROSS, ON LAW AND JUSTICE, *supra* at 158-160; OLIVECRONA, LAW AS FACT (1971), *supra* at 117, 252-254; and Folke Schmidt, *The Uppsala School of Legal Thinking*, 22 SCANDINAVIAN STUD. IN L. 171 (1978). *See also* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 21-23 (1954).

[95] OLIVECRONA, LAW AS FACT (1971), *supra* at 253.

certain words in a certain context (in a courtroom) ought to produce consequences in the space-time dimension (*e.g.* to be incarcerated).[96]

In the words of the Scandinavian realists, the traditional constitutive elements of the legal language (concepts such as rights and duties) are *per se* meaningless. Nevertheless, they acquire their authoritative status, i.e. they become what one calls the law, simply because and from the moment they are inserted in a certain social and political framework which, for example, make words such as *tû-tû* meaningless while that of "property right" meaningful.[97] It is this framework and the values it bears that then heavily influence the law-making through determining, as Ross would say, the semantic reference of concepts and categories that otherwise would be a mere *tû-tû*.[98] As a consequence, the law-making has to lead to results (*e.g.* a new legal category) that are expressed in a legal language that shares, in most cases, the values of the majority of the population or, in the case of Ross, the majority of the judges. Only in this way can the mechanism of stimulus-reaction of the law work properly, i.e. the addressees will effectively consider the new law as binding.

It has to be noted that this sharing of values between legal and political orders occurs *in most cases*. This is because the Scandinavian realists are well aware of the fact that sometimes the law does operate on issues of which the majority of the population (or of the judges) have no knowledge at all. Even if the population has some information as to these technical issues, they do not attach any value at all to them. In this case, the Scandinavian legal realists affirm a duty of the law-maker to look at the "legal consciousness prevailing among the population" (Ross) or at the "attitude of the general public" of the population (Lundstedt).[99] This investigation should conclude by giving to the law-maker the answer to the question: what "would be" the values of the majority of the people if they knew about the issue in question or if they cared so much about it to have a value attached to it?

The conflicts and changes of values occurring at the political level also directly affect the way the law-making processes work. The law-making tends to mirror in its production the changes and conflicts among the dominant values occurring in the political order. Otherwise, the legal order runs the risk of becoming "not-in-force-anymore" and therefore not a valid system.[100] This is one of the reasons why

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[96] "The legislator is not like a god whose word creates a world out of nothing. The task of the legislator is to motivate men toward a certain desired course of action. The source of his power lies in the political ideology or myth which invests him with legal authority." ROSS, ON LAW AND JUSTICE, *supra* at 352-353.

[97] *See* Ross, *Tû-tû*, *supra* at 818. Another interesting comparison is the one by Olivecrona. In one of his writings, Olivecrona states that the legal concept of right and monetary units play a similar symbolic function. *See* OLIVECRONA, LAW AS FACT (1971), *supra* at 297-303. *See also* LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 16-17; and, for tracing a similar contextualization in American legal realism, SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at 32.

[98] *See also* OLIVECRONA, LAW AS FACT (1971), *supra* at 184.

[99] *See* ROSS, ON LAW AND JUSTICE, *supra* at 371-377; and LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 150-152.

[100] *See, e.g.*, *id*. 149-150.

Scandinavian legal realists reject the voluntaristic explanations of the law-making process. According to Olivecrona and his Scandinavian colleagues, these theories all give a false representation of the law-making authority, since they identify it with one single will (either of an individual, or of the state, or of the people) expressing one package of values; an identification obscuring the complex and heterogeneous reality of the law-making processes. Through the idea of "valid law" as the law in force, the Scandinavian legal realists then succeed in designing an *open* law-making process. It is a law-making that tends to reproduce, both in the creation of legal rules and in the processes that lead to such creation, the value-conflicts and the prevailing ideologies that appear inside the political world.[101]

It is however a tendency towards the ideal-typical feature of an open law-making. For the Scandinavian legal realists, the law-making although open to the political order, still maintains a certain limited degree of autonomy and specificity in its way of working. The political order "aims at bringing about practical agreement by influencing an opponent's viewpoint *through argumentation and persuasion*." The law-making, in contrast, produces norms that are "effectively complied with because they are *felt to be socially binding*."[102]

5. The Legal Realistic Discipline

The considerations of the nature and role played by the legal discipline occupy a crucial position in the theories covered by the intersecting model. This centrality is mainly due to the fact that the legal realists try to combine two elements that, during the history of legal analysis, have always seemed to be irreconcilable: a (partially) rigid nature of the law towards politics and, at the same time, a law-making open to the influences and to the processes occurring in the political order.

It has to be stressed again, however, that this historical incompatibility is not of an absolute character. For example, most natural law theories still maintain, together with an idea of the openness of the law-making process, a certain autonomy of the law with respect to political concepts and categories. Similarly, the legal positivistic approach, while claiming an autonomous character of the law, admits that when it comes to the creation of law, the legal order necessarily has to somehow deal with that happening in the political order.[103]

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[101] *See* OLIVECRONA, LAW AS FACT (1971), *supra* at 93; and LUNDSTEDT, SUPERSTITION OR RATIONALITY IN ACTION FOR PEACE? ARGUMENTS AGAINST FOUNDING A WORLD PEACE ON THE COMMON SENSE OF JUSTICE. A CRITICISM OF JURISPRUDENCE 133 (1925).

[102] ROSS, ON LAW AND JUSTICE, *supra* at 326 [*italics added*]. *See also id.* at 29.

[103] This relativization of the natural law and legal positivistic positions partially explains the several attempts made to show how in the last decades, these opposite legal philosophical positions are actually on converging paths. *See, e.g.*, Raz, *The Morality of Obedience. Review of Soper, "A Theory of Law"*, 83 MICH. L. REV. 737-738, 740-742 (1985); and MacCormick, *Natural Law Reconsidered*, *supra* at 109. For the possibility of conciliation between a legal positivist theory of validity with a natural law's theory of adjudication, *see* David O. Brink, *Legal Positivism and Natural Law Reconsidered*,

However basing their analysis on those two apparently repelling poles (rigid law *vs*. open law-making), the theories covered by the intersecting model try to find a point of convergence in the construction of a new typology of legal discipline. On one side, they claim that the legal discipline, in order to receive the label of a "scientific" discipline, has to stress the specific nature of its object of investigation, the law. The latter, although intersecting with other phenomena (and in particular with the political one), cannot be fully assimilated with them; it is possible to assess a certain degree of autonomy of the legal phenomenon. Law, in the course of history, has developed its own logic, its own rationality, its own intellectual apparatus, and its own staff of people. The legal discipline, in order to be viewed as a scientific form of knowledge, therefore has to reflect the (partial) autonomy of its object of investigation.

On the other side, the theories covered by the intersecting model do open the law-making of the legal system to the influences of the processes occurring in the political world. A scientific investigation of legal phenomenon is an investigation aiming at finding out what the law *really* is. Law is one of the most powerful tools in the hands of the political establishment, used to get their goals implemented into the society. Legal scholars therefore have to take into consideration that which happens in the political world as relevant for that happening in the legal world during the creation of new laws. The legal discipline needs to focus on those parts or elements of a legal phenomenon that are politically charged in order to discover and bring into the light of day what "political" still remains in the reality of law.

The intersecting model's theories then unlock the doors of the legal discipline to categories such as "welfare" or "policy," categories produced by disciplines typical of the political arena such as political science or political philosophy. The legal discipline is *mixed* in character because

> "it is… impracticable to draw any sharp boundary line between cognitive pronouncements concerning valid law and legal political activity… therefore, the cognitive study of law cannot be separated from legal politics."[104]

68 THE MONIST 369-384 (1985). For a more cautious approach to the issue, *see* Bix, *On the Dividing line Between Natural Law Theory and Legal Positivism*, *supra* at 1618-1624. For a clear-cut definition of the specificity of analytical jurisprudence towards other legal-theoretical positions, *see* Coleman & Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 554-557 (1993).

[104] ROSS, ON LAW AND JUSTICE, *supra* at 48-49. This attempt to insert political material into the legal discipline has led many scholars to draw the conclusion that legal realism is the theoretical father of the CLS movement. *See* MARTIN, LEGAL REALISM, *supra* at 209-221; Gordon, *Critical Legal Histories*, *supra* at 69-70; HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, *supra* at 193; and, with some reservations, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 45-48 (1987). For a similar evaluation as to the Scandinavian legal realism, *see, e.g.*, SUNDBERG, FRÅN EDDAN TILL EKELÖF 191-193, 212-215 (2nd ed., 1990). Duxbury is more cautious about such a connection between legal realism and the different socio-legal and legal political theories originating during the second half of the twentieth century. *See* DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 200-201, 424-426.

This mixed nature of the legal discipline, however, is of a *partial* character. It always has to be kept in mind that the political material tends to flow freely between different value options, but when introduced into the legal discipline, it sometimes is subjected to legal limitations and constraints (either doctrinal, judicial or previous legislative production). These limitations and constraints are caused, as seen above, by the partial autonomy of the law, by the principles and doctrines governing both the legal process and the legal production. One example in this sense is the principle of the rule of law and its restraining effects on the use by the political order of the legal machinery.

The efforts of the theories covered by the intersecting model then head towards building a *partially mixed* legal discipline in relation to the political material. This is a legal discipline that has as a main object of its investigations a (partially) *rigid* law produced in a legal order; a legal order whose law-making processes however are *open* to the influences of the conflicts and processes occurring in the arena in which the values are formed and selected.[105]

This effort of combining an idea of law as a phenomenon partially autonomous from politics, and a depiction of the law-making as functional in its nature to the political power, is also mirrored in the actual careers of individual legal realists. The legal realists knew the influence political power has on the legal order and on its law-making activities. They actively participated in the politics in their own countries and were heavily involved in periods of deep political reforms (*e.g.* Llewellyn and Frank in Roosevelt's New Deal in the United States or Ross and Lundstedt in the Social democratic governments in Scandinavia).[106]

However, the legal realists were also promoting an idea of law as separate from politics. Therefore, although "collaborating" with the political order, they always worked for the political order as "lawyers" and not as "politicians" (*e.g.* only Lundstedt served as member of the national assembly). Their work and positions were those always traditionally assigned to lawyers due to their technical expertise: legal consultants in the legislative process (Llewellyn and Ross) or judges (Frank) or professors at law faculties (almost all of them).

It is then not a coincidence that many of the criticisms against the legal realists are based on their very ideas of the legal discipline. These critics state that the legal discipline as proposed by the realists still leaves the basic dilemma unsolved. On one side, there is a (partially) rigid idea of the law; on the other side, there is the admittance into the legal order, via law-making, of categories such as "welfare" or "political establishment."

In particular, there are two criticisms stressing the negative impact such a spurious combination has on the legal discipline. The first points out how the introduction into the legal world, and in particular legal education, of categories be-

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[105] *See* Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 337-338 (1988).

[106] *See* HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, *supra* at 213-246. *But see* DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 153-158. For the involvement of Scandinavian legal realism in the construction of Social democracy in Sweden, *see* Sundberg, *Scandinavian Unrealism*, 9 RECHTSTHEORIE 315-320 (1986).

longing to the political world, actually politicizes the work of future lawyers and judges. This opening of the law-making results in the legal professions, lawyers, and judges, losing the character of civil servants; a character acquired in centuries of working (and looking at themselves) as autonomous third parties in the conflicts between the different values proposed by the political order.[107]

The second criticism stresses the fact that once adopted as a primary postulation, the consideration of the nature of law as (partially) autonomous from politics, it is then easy to forget that the legal order is in the hands of the politicians. As a result of this oversight, the legal discipline tends to be considered as pure from political material.[108] The legal discipline proposed by the realist theories constantly focuses on the goal of being scientific and of having an unique object of investigation (the law). It consequently becomes a discipline incapable of penetrating and understanding that which is happening in a system (the political one) that, although not sharing the same nature, heavily influences the legal world.[109]

In summary, these criticisms claim either that in opening the law-making procedures to the political world, one loses the specificity of the object of the study of the legal discipline, i.e. the law as having an autonomous nature; or that, in asserting the focus of the legal discipline as to the law as seen in normative terms, the legal discipline overlooks the relationships the law-making has with the processes occurring in the political order.

5.1 The Legal Discipline for American Legal Realism

American legal realism certainly goes in this direction of considering the nature of the legal discipline towards the political material as *partially mixed*. Generally speaking, the goal of the legal discipline, according to this movement, is to establish that constituting the "real" law. Once the "law" is established, i.e. judge-made law, the legal discipline is to follow two paths in order to fully grasp the complexity of the legal phenomenon.

Because of the open character of the law-making processes towards external influences coming from the political world, the main path leads into the direction of a *mixed* nature of legal studies.[110] According to the realist vision, the goal of legal scholars is to investigate the law as it really is. This investigation follows Holmes'

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[107] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1182-1188 (1989); and Sundberg, *Scandinavian Unrealism*, *supra* at 311-312.

[108] *See, e.g.*, the legal realist Thurman's activity under the Roosevelt administration as described in Duxbury, *The Theory and History of American Law and Politics*, *supra* at 268.

[109] *See*, in particular, the criticism put forward by CLS, such as in Jeffrey A. Standen, *Critical Legal Studies as an Anti-Positivists Phenomenon*, 72 VA. L. REV. 995-998 (1986); or, speaking of "the uneasy marriage of formalist and Realist tradition," Note, *'Round and 'Round the Bramble Bush*, *supra* at 1669.

[110] *See* Leiter, *Rethinking Legal Realism*, *supra* at 285-286, 298-300, in particular about the "Naturalism" component in legal realism, i.e. its commitment to a continuity between, on one hand, legal investigation and, on the other, natural and social sciences.

teaching, rejecting the idea of the legal discipline as a purely logical investigation of the law-in-books and instead focusing on the behaviors of the judges.[111]

Judicial behaviors are not produced in a vacuum of rules and principles but are strongly affected by the value system in which judges live and work. Legal scholars therefore must venture into a landscape wider than merely the law-in-books. They must go into a field where human beings, their lives, and their actions together play a central role. The legal discipline, although through the lenses of legal actors, cannot avoid taking into consideration the results provided by non-legal disciplines, such as sociology, political science, statistics, criminology, and economics.[112]

It is true that legal realists constantly stress the importance of the investigation of the specific logic of the law, i.e. the conceptual investigations of legal tools such as contract or liability. Some commentators, *in primis* Leiter, have even labeled American legal realism as a conceptual theory.[113]

However, in contrast with legal positivism and analytical jurisprudence, the blueprints of the legal discipline as proposed by Llewellyn and his colleagues have a more open attitude towards contributions coming from other disciplines in order to better identify and explain the environment in which legal concepts are shaped and used.[114] For example, Llewellyn writes of the importance for legal scholars to take advantage of the material developed inside of sociology on the idea of the "institution." This material can be applied in the world of legal investigation as an essential cognitive tool. It "provides eyes and vocabulary for handling what otherwise would remain blind and puzzling, hardly graspable situations."[115]

At the same time as the American realists present the mixed nature of legal studies, they also try to follow another path. In order to preserve their idea of the partially rigidity of legal concepts and categories towards the political material, the legal realists affirm the necessity that the legal discipline itself constitutes a scientific approach to the law.[116] It is a secondary track pulling towards a more scien-

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[111] "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." HOLMES, THE COMMON LAW, *supra* at 1. *See also* SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at 154-155.

[112] *See* Llewellyn, *Some Realism about Realism*, *supra* at 1243; and Cohen, *Transcendental Nonsense and The Functional Approach*, *supra* at 833-834. *See also* BIX, JURISPRUDENCE, *supra* at 184. According to some critics, legal studies as described by American realists end up being a part of psychology. *See* Leiter, *Legal Realism*, *supra* at 264.

[113] *See* Leiter, *Legal Realism*, *supra* at 262-263.

[114] *See, e.g.*, Llewellyn, *On What Is Wrong With So-called Legal Education*, 35 COLUM. L. REV. 656 (1935). *Cf.* HART, THE CONCEPT OF LAW, *supra* at 132-137. According to Hart, American legal realists' theory cannot be classified as a "normative" conceptualization (at least as he views the idea of normativity), since they conceptualize the law as a prediction of the courts' concrete behaviors.

[115] Llewellyn, *Law and The Social Sciences –Especially Sociology*, 62 HARV. L. REV. 1294 (1949).

[116] "More and more it grows clear that the goal of *technical* study [of law] is better rules for decision which will make unnecessary much of the elaborately two- or seven-faced

tific idea of legal investigations, an idea bordering on what the law is from what it is not. It is a track pulling legal studies towards the idea of a discipline autonomous from the world of values.[117]

In particular, this track is built on the idea that the legal inquiry must go further than the written rules and principles, and look into the real law: the regularities of the *legally relevant* behaviors of legal officials, and in particular, of judges.[118]

"Legally relevant behavior" according to American legal realists refers to that which is relevant for studying the law, the behaviors of the courts and of the lawyers. They clearly reject the identification of the legal phenomenon with a specific set of rules of conduct, stressing the fact that such behaviors are the real law although they do not fit into a wider normative framework (such as Kelsen's *Stufenbau* theory).[119] Nevertheless, they promote the use of categories such as the "concrete behavior of the judges" in the sense of looking at the behaviors of legal actors that become *relevant for the legal system* (*e.g.* their written decisions).[120]

With some exceptions (as in certain passages in Frank's works), American legal realists never identify those behaviors as direct physical or social phenomenon. They seem to consider them more as those social and physical behaviors that become relevant for the legal order.[121] For example, they speak of the "behaviors of judges." In this expression, both the definitions of judges and behavior necessarily presuppose interpretative categories of "law" and "legal system." Only with such pre-behavioral interpretative categories is it then possible to distinguish an ordinary man or woman sitting in a room on a higher bench from one called a "judge;" or a shopping list as handed out by a judge from a formal judgment.

As said, this is a secondary track. However, the goal of pursuing a scientific approach to the law and the consequent necessity of always taking into consideration the normative framework in which the behaviors of the judges take place, renders the character of legal investigations only *partially* mixed with the material coming from the value-environment in which the law operates.

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techniques now current… The goal of technical study is thus the reduction of its own field of operation. Not its elimination; for rules of lawfully plain to every plain man are a will-o'-the wisp." Llewellyn, *My Philosophy of Law*, *supra* at 195 [italics in the original].

[117] *See, e.g.*, Llewellyn, *The Theory of Legal "Science"*, *supra* at 22.

[118] *See, e.g.*, Llewellyn, *A Realistic Jurisprudence*, *supra* at 444.

[119] *See, e.g.*, LLEWELLYN, BRAMBLE BUSH, *supra* at 4. *See also* Leiter, *Is There An "American" Jurisprudence?*, *supra* at 376.

[120] "Practice is the bony structure of a legal system. Yet practice is no part of *law* except as it comes wrapped in and is measured constantly against the held norm or felt ideal." Llewellyn, *My Philosophy of Law*, *in* MY PHILOSOPHY OF LAW. CREDOS OF SIXTEEN AMERICAN SCHOLARS 187 (1941) [italics in the original].

[121] *See* Llewellyn, *The Theory of Legal "Science"*, 20 N. C. L. REV. 7-8 (1941). In particular, Llewellyn underlines the incapacity of psychological studies to grasp the essence of the judicial behaviors; such studies, indeed, "have not fully understood the *context of tradition* in which such legal behavior as 'deciding' occurs, and their analyses thus leave out a vital factor," *id.* at 8 [italics in the original].

The tracks followed by American legal realists in their depiction of the legal discipline can then be seen as mutually exclusive: the (partially) mixed nature of the legal discipline *vs.* the (partial) specificity of its object of investigation, the law.[122] Nevertheless, in the eyes of American legal realists, these two aspects can coexist. The solution as to the theoretical gap between a mixed discipline and a specific object of investigation is found in the idea of "science."[123] According to American realists, the legal discipline is a specific science because it systematically and consistently investigates a specific object, the legal phenomenon. However, in order to be fully systematic and consistent, the legal discipline has to open itself during the investigative process. It has to unlock the door to "*all* the relevant data one can find to *add* to the haphazard single life-experience, to *add* to general common sense."[124]

In other words, the legal discipline, simply because it wants to be scientific and discover the reality of its specific object (the law), must lose its normative virginity, or "purity" in Kelsenian terms. It has to distrust "the received set of rules and concepts as adequate indications of what is happening in the courts" and turn its attention instead to the results reached by other non-legal disciplines.[125] After opening their gates to non-legal data, legal studies can then truly become science, as the empirical facts constituting the essence of the law, the behaviors of the judges, then become available to legal scholars.

Also following the teaching of Holmes here, American legal realists stress the importance of considering the legal discipline as a science.[126] The legal discipline is a branch of knowledge with a specific object of investigation, the law as an empirical phenomenon (the behaviors of the courts), and with a specific tool of analysis, the realist approach. Llewellyn recognizes a working space inside the legal

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[122] *See*, *e.g.*, the accusation against American legal realists of hiding highly formalistic elements in their idea of legal doctrine as in DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 131. *See also* Leiter, *Is There An "American" Jurisprudence?*, *supra* at 377-378, where the author points out that to embrace the belief of a specific nature of the legal phenomenon does not necessarily imply a legal discipline formalistic (i.e. pure) in its investigation.

[123] *See* Leiter, *Rethinking Legal Realism*, *supra* at 271-272, 315 as to the intellectual environment underpinning this legal realist's attention to the idea of a legal "science."

[124] Llewellyn, *Some Realism about Realism*, *supra* at 1250 [italics in the original].

[125] *Id.*. *See also* DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 92 ("Realism marked the marriage of social science and law").

[126] American legal realists are probably one of the last American movements labeling the legal discipline with the term "science," a labeling still often invoked in European jurisprudence. *See* RUMBLE, AMERICAN LEGAL REALISM, *supra* at 31-32, 167-169. In the United States, and to some extent also in England, the use of the expression "legal science" is no longer common. Almost paradoxically, the decline of the use of "science" as a complex of specific investigations of the legal phenomenon is sometimes ascribed to the very emergence of the legal realist movement. *See* Brian A. W. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 678 (1981). *See also* John Veilleux, *The Scientific Model in Law*, 75 GEO. L. J. 1976-1979 (1987), ascribing the decline of the idea of legal science more to the fathers of American legal realism, namely Holmes and Cardozo.

discipline also for those who are usually considered the major target of the realists' attacks: the legal logician.[127] Even the most radical among American legal realists, Cohen, acknowledges the specificity of the object of investigation by the legal discipline. It is true that he proclaims that law, at the end, has to be identified with physical facts. However, Cohen admits in the same article the presence and relevance for legal scholars of what he calls the judges' "aesthetic ideal," i.e. their own legal logic and their own legal culture. In other words, Cohen acknowledges the relevance of what Hart would have called the internal aspect of the law to the understanding of the legal phenomenon.[128]

After rejecting the formalistic vision of the legal discipline as a study of law-in-books, American realists still claim the existence of a specific space in which the legal discipline plays a central role, a space outside the books.[129] It is the space of the law-in-action. In doing this, the legal realists also bring to the surface the necessity of separating the analysis of what law actually *is* in-action from what the law *ought to be* in-action. That is, they stress the necessity for investigators to treat the law as it appears in the judges' behaviors, not as it ought to appear according to judicial or other value systems.

In contrast from the legal discipline as proposed by the theories within the embedded model, American legal realists constantly stress the necessity in legal inquiries of then separating the law from its political or moral aspects, as in Llewellyn's famous statement claiming the temporary separation, in the study of the law, of the *Is* from the *Ought*.[130] It is important to stress that for American legal realists, the distinction Is/Ought of the legal phenomenon, and the limitation of the job of the legal scholar to its "Is" dimension, is still compatible with the idea of a mixed nature of the legal discipline.

First, for most legal realists, this separation between Is and Ought is temporary. One of the goals of the legal scholar is to contribute, at the end of the process of the scientific investigation of the law, with his or her own value-loaded proposals (i.e. own politics) for the construction of a "better" legal order. The legal discipline of American legal realism is to be built upon "scientifically established facts" (the law, an Is) against which the legal scholar then introduces an ideology or a value system (the increasing of the general welfare of citizens, an Ought). Llewellyn also confirms this two-step project by introducing value judgments into the latter step of the legal analysis and, consequently, by rejecting the agnostic attitude of legal positivism as to the issue of the work and values of legal scholars.[131]

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[127] *See* Llewellyn, *A Realistic Jurisprudence*, *supra* at 447 n.12(c).

[128] *See* Cohen, *Transcendental Nonsense and The Functional Approach*, *supra* at 845.

[129] In the view of legal realists, the job of a legal scholar is not merely "the arrangement of rules in orderly coherent system." LLEWELLYN, BRAMBLE BUSH, *supra* at 3.

[130] *See* Llewellyn, *Some Realism about Realism*, *supra* at 1235. *See also* Mark V. Tushnet, *The Supreme Court as Communicator: Carter's 'Contemporary Constitutional Lawmaking'*, 1987 AM. B. FOUND. RES. J. 225 (1987), as to the effects of such separation on the American academic institutions.

[131] *See* Llewellyn, *A Realistic Jurisprudence*, *supra* at 449. Cohen speaks of "legal criticism" as the moment in the work of legal scholars when, once the law (Is) has been established, the different values are weighed and an ethical choice is made in favor of

Second, legal scholars are not allowed, at least in the first stages of their work, to give judgments of an ethical or political nature about the law; they simply are to investigate the empirical data, i.e. judicial behaviors. However, these judicial behaviors consist precisely of the fact that the courts actually "judge ethically." The courts and judges exist in a wider environment in which value considerations leave their marks on their decisions, on the law they create. Therefore, the legal discipline has to open itself to all the non-legal disciplines. The latter are only able to help the legal scholar understand which and why values are present in a certain community and why judges introduce some values (instead of others) into their decisions. In short, the legal discipline has to be mixed because only in this way is it possible for legal scholars to investigate what the legal order is: "[A] system that operates under the influence of the political world."[132]

The legal discipline is to isolate the law from the value-context in which it is created, from its political environment. Legal scholars are to try to find out, in legal behavioral terms, how the law appears in the eyes of the wide spectrum of people touched by it, a spectrum that ranges from the Holmesian bad man to Llewellyn's appellate court judges.

"If normative legal theory is theory attempting to explain the nature of law as a structure of legal ideas or legal doctrine," then the prominent goal of a realist legal discipline cannot be entirely assimilated to one of a mixed (and therefore non-normative) nature as put forward by the theories covered by the embedded model.[133] Legal realists aim at presenting, to a certain extent, a model of a normatively pure legal discipline. They strive for providing both the tools for guiding the work of legal actors, and the rationalization of judicial decisions and, in general, of legal production. Their work, in the end, is directed at providing legal actors with an inventory of clarified legal concepts and categories. While the goal of sociological jurisprudence is "the appraisal of law in terms of conduct of human beings who are affected by the law," the specific task of a legal realist scholar is the "definition of legal concepts, rules and institutions *in terms of judicial decisions or other acts of state force*."[134] The importance of this analytical task for the legal realist discipline is determined by one of the very features of its object of investigation, namely the (partial) autonomy or rigidity of the law towards the surrounding political environment.[135]

Despite this smattering of normativity, the legal discipline as depicted by American legal realists still remains, although partially, *mixed* in its relation to the

"important" values (Ought). *See* Cohen, *Transcendental Nonsense and The Functional Approach*, *supra* at 847-849; and Cohen, *The Ethical Basis of Legal Criticism*, *supra* at 207-208.

[132] Cohen, *Transcendental Nonsense and The Functional Approach*, *supra* at 840.

[133] COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 182.

[134] Cohen, *The Problems of a Functional Jurisprudence*, 1. MOD. L. REV. 8, 5 (1937) [*italics added*].

[135] "[R]ules, too, then and their arrangement, and their logical manipulation, make up an unmistakable portion of the business of the law and of the lawyer…. [They] are important to you so far as they help you see or predict what judges will do or so far as they help you get judges to do something." LLEWELLYN, BRAMBLE BUSH, *supra* at 5.

political material. As Llewellyn states, "[t]o right, to left, in front, are materials crying out of use."[136] Only by using those materials external to the traditional legal field can the legal discipline then have a comprehensive view of the legal phenomenon and its place and functions in society.[137]

5.2 Scandinavian Legal Realism and the Legal Discipline

The Scandinavian legal realists also consider the legal discipline as *partially mixed* in its relation to the political material. The followers of Hägerström propose a legal discipline that is *mixed* in its nature, stressing the necessity for legal scholars to make use, in their investigations, not only of the traditional legal analysis but also of material produced by political science, social science, anthropology and, to some extent, statistics. The legal discipline, in order to be ranked in the world of science, has to analyze the law as an empirical phenomenon, for example looking to the behaviors of the judges (Ross) or to the ideas of what the law is among members of a community (Olivecrona). Legal scholars have to analyze how the law and its elements manifest themselves in the space-time dimensions.[138]

In particular, the Scandinavian legal realists stress the importance for legal scholars to deeply investigate the main means used by law to come into reality: the legal language.

> "Legal language is not primarily a reporting language. It is a directive language since its principal function is to influence people's behavior. Legal language is a means to this end. Therefore it is not a veil hiding the true contents of the law, like clouds concealing the face of the earth to the eyes of an astronaut. It is an integral part of the legal order. As such it is well worth study."[139]

This inquiry cannot be concluded using only traditional analytical tools (*e.g.* investigating the logical coherence of legal concepts within different statutes enacted in the course of time). Legal scholars must use material coming from history, political science, social science, psychology, socio-linguistic and anthropology.[140] This has to be done in order to place the different legal concepts and

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[136] Llewellyn, *On What Is Wrong With So-called Legal Education*, *supra* at 678.

[137] *See* Oliphant, *A Return to Stare Decisis*, *supra* at 159-161.

[138] *See, e.g.*, LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 18. *Compare* Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* at 842-843.

[139] Olivecrona, *Bentham's "veil of mystery"*, 31 CURRENT LEGAL PROBS. 235 (1978). *See also* Olivecrona, *Legal Language and Reality*, *in* ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 177-185 (R. A. Newman ed., 1962). *But see* Harris, *Olivecrona on Law and Language –The Search for Legal Culture*, 40 TIDSSKRIFT FÖR RETTSVITENSKAP 636-646 (1981).

[140] "[I]t is not very surprising that Scandinavian realism originated at the beginning of the twentieth century at a time when the psychological theories of Sigmund Freud were very much in the public eye." HILAIRE MCCOUBREY & NIGEL D. WHITE, TEXTBOOK ON JURISPRUDENCE 178 (1999). For a similar influence of psychological studies on American legal realism, *see* DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE, *supra* at 126-127.

categories into a wider value context in which these concepts and categories originated or have been used. Ross states, for example, that it is not possible to draw a clear-cut distinction, in particular in the English environment, between the study of law (i.e. the traditional analysis of valid law, the sociology of law and the history of law) and jurisprudence (i.e. the philosophical analysis of what the nature of law is).[141]

This enlargement of the materials available to the legal discipline, as promoted by the Scandinavian legal realists, implies the necessity of redefining the traditional sources of legally relevant materials to which legal scholars have to look to in order to find the solution to a legal question. One classical example is the legal authority ascribed to legislative preparatory works, i.e. of material of a clearly political nature, as one among the highest sources of law with quasi-binding force within certain Scandinavian countries.[142]

The legal discipline has to open itself to other disciplines, not only in the materials used, but also in the methodologies, i.e. in their ways of working. In particular, the legal discipline needs to start from the empirical reality of the debate occurring inside the political arena. Legal scholars must also supply proposals and interpretations that, although not fully compatible with the formalistic or logical structure of the legal system, are still the most suitable for directly implementing certain values inside a community.[143]

In order to do this, legal scholars necessarily have to go deeper than the letter of the law and the traditional doctrinal legal reasoning (*e.g.* the reasoning *ex analogia*). They have to investigate and weigh the different values (political, economic, social, etc.) at stake in certain legal issues. In the end, legal scholars are to decide in favor not of the solution that is the best according to the legal order, but of the solution that best fits a certain community. This can also be seen as a consequence of the fact that, as expressed by Mario Jori, Scandinavian legal realism "expresses a preference for a *performance-oriented* rather than a *competence-oriented* approach to meaning and language."[144]

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[141] *See* ROSS, ON LAW AND JUSTICE, *supra* at 24-27.

[142] *See, e.g.*, Åke Frändberg, *Interpretation of Statutes –the Use and Weight of travaux préparatoires in Sweden, in* ANGLO-SWEDISH STUDIES IN LAW 208-219 (M. Andenas & N. Jareborg eds., 1999). *See also* Ekelöf, *Teleological Construction of Statutes*, 2 SCANDINAVIAN STUD. IN L. 84 (1958).

[143] In the first period, under the influence of the German legal debate, it was self-evident among Hägerström's followers that the legal discipline should operate and be structured similarly to the natural sciences. *See, e.g.*, LUNDSTEDT, DIE UNWISSENSCHAFTLICHKEIT DER RECHTSWISSENSCHAFT, vol. I & II-1 (1932-1936); and OLIVECRONA, LAW AS FACT (1939), *supra* at 25-27. After 1945, Ross shifted the Scandinavian realist's focus to the similarities between the social sciences and legal discipline. *See* ROSS, ON LAW AND JUSTICE, *supra* at 47. *See also* BJARUP, SKANDINAVISCHER REALISMUS, *supra* at 85.

[144] Jori, *Introduction*, *in* LEGAL POSITIVISM xix (M. Jori ed., 1992) [italics in the original]. *See, e.g.*, LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 69, 267-268. It has to be noted that for the Scandinavian realists, the legal scholarship can intervene in the law-making process with mere "recommendations" to the political actors. *See* ROSS, ON LAW AND JUSTICE, *supra* at 377.

This mixed nature of the legal discipline, with the introduction within it of materials coming from the political world, is however conceived by the Scandinavian realists as being *partial*. This limitation of the openness of the legal discipline towards political material originates in two points in the Scandinavian realists' theory: The idea of law as partially rigid towards politics and the different type of reasoning behind the legal and political phenomena (dichotomist for the first, compromising for the second).

As to the first limitation in the opening of the legal discipline towards political data, the Scandinavian legal realists repeatedly stress the fact that, because of historical reasons, the legal discipline is constituted by and deals with ideas of law.[145] These ideas are implanted in the mind of the population, through centuries of education and ideologies, *as if* they were entities belonging to the space-time world. Therefore, in the socio-psychological dimension, the ideas of law tend to live and function somehow independently from the ideological world of those values that they implement in the community.[146]

The construction of the law with concepts and ideas perceived *as if* they denote something real is derived, according to Olivecrona, from one of the uses of the legal language: to convey information. According to Olivecrona, the primary function of the legal language is directive. However, the legal language also plays an informative function: it helps the addressees to extend their knowledge of the world.[147] For example, news that two corporations have merged, although expressed in a legal language (concept of corporations, merge, etc.), has the purpose of conveying certain information to the audience. In order to do so, however, both the sender and the addressees of the information have to think of the legal concepts *as if* they actually were special words denoting a special real and autonomous phenomenon. For example, "corporation" is perceived by the public at large as if it is an entity, living in the space-time dimension, instead of what it really is: a conceptual fictional roof covering several other realities (employers, machines, products, etc.).

The legal discipline then cannot neglect to take into consideration these ideas of law as the community (or the judges for Ross) conceives them: *as if* they were pure from the political dust. Legal scholars, although working with other materials, must also allow for those aspects of the legal phenomenon that traditionally characterize it among the people; in particular, the operating of the law according to a logical reasoning (*e.g.* with the dichotomy valid/non valid law) and by means of specific concepts (*e.g.* ownership).[148]

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[145] *See, e.g.*, OLIVECRONA, LAW AS FACT (1971), *supra* at 184-185. *See also* Olivecrona, *Realism and Idealism*, *supra* at 131; and LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 8-9.

[146] *See* ROSS, ON LAW AND JUSTICE, *supra* at 59; and ROSS, DIRECTIVES AND NORMS, *supra* at 51. *See also* Olivecrona, *The Imperative Element in the Law*, *supra* at 806.

[147] *See* OLIVECRONA, LAW AS FACT (1971), *supra* at 253-255.

[148] *See, e.g.*, ROSS, ON LAW AND JUSTICE, *supra* at Chapter 2; and Ross, *Tû-tû*, *supra* at 822-824. *See also* Vilhelm Aubert, *The Structure of Legal Thinking*, *in* LEGAL ESSAYS. A TRIBUTE TO FREDE CASTBERG ON THE OCCASION OF HIS 70TH BIRTHDAY 61-62 (1963).

This limitation of the freedom of legal scholars in mixing legal and political materials in their investigations is well represented in some of the textbooks produced by Scandinavian legal realists. In contrast to CLS scholars, for example, the Scandinavian realists' textbooks in constitutional law, civil law, torts law, or procedural law rarely present any reference to political material.[149] If they take in some of the reasoning developed inside the political arena, the Scandinavian realists usually put it under a specific and clearly separated section or chapter dealing with the politics of law. In doing this, they share some of the aspects of the idea of the legal discipline as developed by Kelsen.

Legal scholars have to also pay particular attention to the traditional logical reasoning because of the second factor limiting the mixed nature of the legal discipline: the different type of reasoning behind the production of political material. The latter tends to always take into consideration simultaneously differing interests or values, developing its reasoning with compromising categories such as "social justice." In the Scandinavian legal realists theoretical construction, these political categories emphasize the fact that the main task of the reasoning of politics is to integrate opposing solutions and values (*e.g.* compromising individual and collective justice).[150] As a consequence, the

> "political discussion does not lie on the plane of [the legal discipline's] logic: it does not strive to prove truths; it lies on the psychological-technical-causal plane: it aims at bringing about practical agreement by influencing an opponent's viewpoint through argumentation and persuasion. Within this framework a part is played by rational, argumentative assertions based on common experience or scientific insight. But their function is not to prove a truth, but to convince an opponent, that is, convert him to one's own standpoint."[151]

In contrast, in the reasoning put forward by the legal discipline, the *tertium* is often *non datum*; that is the choice is only between two opposite poles (*e.g.* validity-invalidity) and a compromising solution is thus not at issue (*e.g.* partial validity). The choice is to be made between a correct statement, i.e. reflecting the law in force, and an incorrect statement, when it deals with norms which actually are not in force and therefore are not (in the realist perspective at least) valid law.

This interest in the correctness (or not) of the statements produced by legal scholars is particularly important for the Scandinavian legal realists. Similarly to the American legal realists, the Scandinavians also have as a primary task the one of creating a *scientific* legal discipline. In their view, the task is to design a legal discipline whose final product (statement) can be tested, with a correct-incorrect outcome, to the empirical reality of the law in force (either as Ross' judicial deci-

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But see Aleksander Peczenik, *The Concept of 'Valid Law'*, 16 SCANDINAVIAN STUD. IN L. 219 (1972).

[149] *See, e.g., generally* OLIVECRONA, DOMSTOLAR OCH TVISTEMÅL: EN FÖRSTA BOK I PROCESSRÄTT (1965); or ROSS, DANSK STATSFORFATNINGSRET. 1. (1959).

[150] "The task of politics will always be anchored in a multiplicity of attitudes that do not constitute a system but are a conglomeration… the political task is always one of integration, an adjustment of incommensurable considerations." ROSS, ON LAW AND JUSTICE, *supra* at 321.

[151] *Id.* at 326.

sions, as Olivecrona's socio-linguistic phenomenon or as Lundstedt's social phenomena).[152]

These two elements, the idea of the law as autonomous from politics and the different reasoning, then render the legal discipline only *partially* mixed, or, in other words, they somehow restrict the possibilities of legal scholars in their reasoning to use materials produced in the political arena. The door, however, remains fundamentally open; that is the legal discipline as designed by the Scandinavian legal realists continues to remain of a *mixed*, although partially, nature in relation to the political material.[153] In particular, this fundamental and central position of the political material in the legal realists' idea of the legal discipline is well represented by the fact that Ross devotes more than one hundred pages (i.e. almost one third) of his book, "On Law and Justice" as to the relationship between legal discipline and politics.[154]

6. Conclusion

A third way of perceiving the relation of law to politics can be traced in the history of legal theory, an alternative to those described in Chapters Two and Three, the autonomous and embedded models respectively. This chapter has shown how the legal realists have their own perspective regarding the law-politics issue. This is a perspective typical of the twentieth century for its very viewing of the law as a phenomenon intersecting with politics. In this way, the legal realisms both want to save the specificity of the legal phenomenon, which remains partially rigid in its relations to the political conceptual apparatus, and its dependency relation towards the political actors, by portraying the law-making as open to the mechanisms and influences coming from the political order.

Finally, how the American and Scandinavian legal realisms have attempted to mediate in their idea of the legal discipline those two apparently mutually exclusive features, namely the specific and mixed characters of legal discipline, has been explored here. The legal realists have depicted legal scholarship as tending to the ideal-type of a discipline partially mixed with the political material. This mixture is given by the fact that the possibilities of legal scholars in their reasoning to use materials produced in the political arena are admitted but with some structural limitations, i.e. limitations derived by the (partial) rigidity of the law.

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[152] *See* ROSS, ON LAW AND JUSTICE, *supra* at 38-50; OLIVECRONA, LAW AS FACT (1971), *supra* at 261-267; and LUNDSTEDT, LEGAL THINKING REVISED, *supra* at 171-189.

[153] "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. If we are to understand the actual working of law in human society it is not enough simply to peruse a collection to the relevant legal norms for these tell us little about actual 'legal behaviour,' in the sense of how legal business is in fact transacted." FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 810-811.

[154] *See* ROSS, ON LAW AND JUSTICE, *supra* at Chapters 13-17.

Table 4. Politics And Law In The Autonomous, Embedded And Intersecting Models

	Relationship of law to politics (*static aspect*)	**Relationship between law-making and political order (*dynamic aspect*)**	**Relationship of legal discipline to political material (*epistemological aspect*)**
Autonomous model (Legal Positivism, Analytical Jurisprudence)	*Rigidity* of law	*Closed* law-making	*Pure* legal discipline
Embedded model (Natural Law Theory, CLS, Law and Economics)	*Flexibility* of law	*Open* law-making	*Mixed* legal discipline
Intersecting model (American and Scandinavian Legal Realisms)	*Partial rigidity* of law	*Open* law-making	*Partially mixed* legal discipline

Chapter 5. Contemporary Legal Theory and the Dilemma of Law

A brief analysis of the mapping out, as begun in Chapter Two, of the different contemporary legal theories and their positions regarding the question of law and politics is presented in this final chapter. Whether there is only a unique platform where the debate concerning law and politics takes place or whether different theories actually operate on different levels when speaking of law and politics issues will be first addressed.

Moreover, the results reached by this investigation demonstrate that the intersecting, autonomous and embedded models have a common field from which their different perspectives all commence: law and politics are two (to a lesser or greater degree) different phenomena that interact with each other (with lesser or greater frequency).

Finally, a possible explanation is presented as to why such different legal theories, though often reaching diametric results, somehow must still begin from these common basic points. The explanation for this is found in the specific character of law in the modern state, and the welfare state in particular. This is a form of political organization that heavily affects the law in our times and somehow puts it in the horns of a dilemma in its relations to the political phenomenon: an increased use and manipulation of the law by political actors and, at the same time, an escalating specialization of the legal world, developing its own logic, system of values and rationality.

1. “The” Law and Politics Debate?

Before starting to address the possible common points among the different legal theories as to the issue of the relations between law and politics, it is first necessary to tackle a preliminary question: does “the” issue of law and politics really exist? When speaking of law and politics relations, do the different legal theories investigated here address the same question or do they instead refer to the different levels at which law and politics meet?

In other words, one can note that contemporary legal theories, when facing this issue, tend to position themselves at different levels in the discussion, thus in the end discussing different things that somehow overlap but nevertheless are fairly recognizable as distinct.

One can easily argue, for example, that in the 19th century codification debates in both Europe and the United States, the discussions turned on the belief that the "law" – meaning the common law, properly understood – somehow reflected something that was above mere politics. The "correct" common law reflected either the spirit of a nation at a particular stage of development, the customs of the people, or perhaps even an ideal of rationality. By contrast, legislation, or otherwise coined, the "politicians' law", was the importation of inappropriate foreign ideas or the mere reflection of temporary alliances of particular political pressure groups. This idea of "law vs. politics" consequently turned on a fairly strong idea of the autonomy of law and legal reasoning, combined with doubts as to the legitimacy or value of the "politicians' law" or legislation.[1]

CLS theorists, on the other hand, have much more recently stated that the basic starting point in understanding the law is the recognition that "law is politics." This is largely a denial of the autonomy of legal reasoning, as seen in this work, but where autonomy is understood in a less substantial way. Here the autonomy of legal reasoning (as rebutted by CLS) would simply mean the understanding that judges can and should reach results that are independent of that which the judges might subjectively prefer.[2]

Similarly, as pointed out by Bix, "legal positivism is built around the belief, the assumption, the dogma, that *the question* of what is the law is separate from, and must be kept separate, from *the question* of what the law should be."[3] In other words, legal positivism and analytical jurisprudence stress their idea of a separation between *the study* of law and *the study* of politics. Using the terminology of this work, these legal theoretical movements claim a separation between law and politics primarily at the epistemological level, i.e. a purity of the legal discipline towards the political material.

However, the purpose of this work is the very showing of how this clear stand on the epistemological issue, namely the clear separation between two different kinds of disciplines, for instance, is ultimately based on (or ultimately presupposes) a clear stand on the static and dynamic issue, i.e. an idea of actual separation between the two objects of those studies: between the very law (and its production) and the very politics (and its production).[4]

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1 *See, e.g.*, SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 31-40 (1979) [reprint 1867]; and James Coolidge Carter, *The Ideal and the Actual in the Law*, 24 AM. L. REV. 756-759, 772-775. *See also* Mathias Reiman, *The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 97-107 (1989).

2 *See, e.g.*, Richard L. Abel, *Ideology and Community in the First Wave of Critical Legal Studies. By Richard W. Bauman*, 30 J. L. & SOC'Y 605 (2003).

3 BIX, JURISPRUDENCE, *supra* at 33 [*italics added*].

4 As pointed out by Cotterrell, "Austin's idea of law as an expression of political power has been replaced in both [Kelsen and Hart's] theories with the idea of law as a relatively self-contained system of rules or norms." COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 106. *But see* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 24: "Most though not all legal positivists are skeptical about the claim that law is objective and autonomous."

More in general, it is then true that most legal theories, even if they all address the same "law and politics" issue, in the end tackle different aspects of the issue. However, the underpinning goal of this work has been the very identification of a common, and sometimes quite hidden, basic starting line. Though the different legal theories discuss whether and how politics and law relate in different directions, they still all have to base their discussion on "groups" or "ideal-typical ways" of considering law, law-making and the legal discipline as having (or not) a political nature. In other words, the central focus of this work has been exactly the one of bringing the different legal theories down from their different direction of debates and grouping them on a common starting line, i.e. common basic ways of perceiving law, law-making and legal discipline in relation to the political world.

2. Common Points Among the Three Models

It can be clearly seen from Table Four that the results for each model are unique, each having its own particular way of viewing how and to what extent the legal phenomenon relates to the political one. The theories covered by the autonomous model tend to see the law and its system of production as relatively closed to that which is happening in the political world. In contrast, the scholars of both the embedded and intersecting models tend to open the legal phenomenon to the political reality, i.e. to the world in which the values to be implemented in a community via law, are produced and selected.[5]

However, the legal movements covered by the intersecting model distinguish themselves from the positions taken, for example, by CLS scholars and natural law scholars. It is true that legal realists consider law-making as open to the influences coming from the political world and that this openness is reflected in a mixed nature of legal discipline, i.e. in its being open to the use of material produced in the political arena. Nevertheless, this opening of the legal discipline is only partial since the theories covered by the intersecting model still retain a certain degree of autonomy with respect to the legal concepts and categories as towards the conceptual political apparatus.[6]

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[5] As to the overlapping among legal realism and critical legal theories, *see*, *e.g.*, Note, *'Round and 'Round the Bramble Bush*, *supra* at 1676-1679; and James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 691-708 (1985).

[6] *See*, *e.g.*, SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY, *supra* at 20, 176-190. Summers points out how legal positivistic patterns are clearly traceable in the work of some of the American legal realists, although legal realism, and pragmatic instrumentalism in general, remain an alternative way to conceive the legal phenomenon. *See also* Waldron, *"Transcendental Nonsense" and System of Law*, 100 COL. L. REV. 31 (2000); Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *supra* at 355-356; and Leiter, *Legal Realism and Legal Positivism Reconsidered*, *supra* at 300-301. *See also id*. at 271-274 (where the theoretical relations between CLS and American legal realism are devaluated).

Despite these distinctions, it is still possible to find at least two common points of discussion among the different models, even if their answers differ. First, each of the theories covered by the three models begins their analysis from the fact that law and politics relate to each other. That which actually characterizes their approaches, and distinguishes the models, is the degree of intensity in the interrelationship between law and politics, not the dilemma of its presence or absence.

The intensity of this relationship varies according to the models encompassed by the theories. The degree of intensity is extreme in the embedded model. Here the norms are considered law only when they adapt themselves to certain values produced inside the political arena; the law-making is widely open to that which is happening inside the political world and the legal discipline is actually of a mixed nature, largely making use of material and categories produced inside the political arena (*e.g.* economic efficiency or moral sociability). It is a model in which one phenomenon (law) is surrounded entirely by the other (politics).[7]

The relationship between law and politics can also be less obvious, as in the intersecting model. The legal realist theories covered by this model posit the openness of both the processes leading to the creation of the law and (to some degree) the legal discipline towards the political phenomenon. However, they still try to keep the law as a partially rigid concept, for whose nature only a limited amount of political concepts and categories is required as constitutive elements (*e.g.* the law refers to the behavior of specific actors, the judges, identified by the law itself). In this model, the two phenomena of law and politics overlap, while keeping a certain degree of an autonomous hard core, whose nature can be fully explained making a limited use of the other's categories and concepts. As seen above, the hard core of the legal phenomenon towards politics is due to the fact that the law has a (partial) rigid conceptual structure towards that which is inside politics. This rigidity renders the legal discipline of an only *partially* mixed character, i.e. they can make use of political material only to a certain extent.[8]

In the third model, law and politics are considered as two autonomous phenomena. Both the natures of the law and law-making processes of the legal order do not directly require any reference to the political world; moreover, the legal discipline avoids any contact with the political material and conceptual apparatus. Although this model stresses the central and monopolizing role played by the legal world in deciding how and when the values are transferred into the legal world, the autonomous model also still recognizes that there actually is a transfer of values from one world (politics) to the other (law), i.e. that there is a point of contact where the law does touch politics (either at judicial level, as for Hart, or at the

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[7] *See* Alan Hunt, *The Politics of Law and the Law of Politics*, *in* LAW AND POWER: CRITICAL AND SOCIO-LEGAL ESSAYS 51-53 (K. Tuori et. al. eds., 1997), speaking of a "law is politics" thesis.

[8] *See, e.g.*, Llewellyn, *On Reading and Using the Newer Jurisprudence*, *supra* at 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 original]. *See also* OLIVECRONA, LAW AS FACT (1971), *supra* at 111: "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."

higher, Basic Norm's level for Kelsen).[9] The presence of this contact, taken-for-granted, between law and politics is also indirectly supported by the deep and life-long interest many of the adherents under the autonomous model (Kelsen *in primis*) had regarding evaluating political issues (*e.g.* the idea of democracy) with typical legal concepts and categories.[10]

The second common point of discussion among the different models is the consideration that law and politics, regardless of the intensity of their relations (highest in the embedded model, lowest in the autonomous one), actually identify two phenomena that cannot be fully assimilated within each other. This separation between law and politics is transparent for the theories within the autonomous and intersecting models (in particular because of their idea of a hard core of the law with a normative nature). Both groups of theories would probably agree without any fundamental problem to Ross' claim that

> "[e]ven the most ephemeral political intervention has its legal-political aspects. Around the changing tax legislation and its purely financial-political problems, a whole body of legal-technical problems accumulates in the course of time."[11]

This division becomes *prima facie* opaque when speaking of the embedded model. This model is characterized indeed by the law being implanted inside the political phenomenon, and for its existence and procreation being dependent upon that which happens inside the political world.

Nevertheless, embeddedness does not mean the dissolution of law into politics. All the theories covered by the embedded model first still speak of two different phenomena, one called law, the other, politics. Stressing the dependency of the first to the second does not imply that they are simply two words identifying one phenomenon. It is true, in particular within CLS, that "law is politics," but this statement simply points to the fact that the law tends to become incorporated into the political world and its conflicts. Still, the law is not assimilated into politics and there is always a difference in nature between the two phenomena.[12]

Second, each of the theories covered by the embedded model is designed with the very purpose of arousing the awareness of lawyers and judges. Law and Economics followers, natural law scholars, and CLS want to create a consciousness of

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[9] *See, e.g.*, Raz, *On The Autonomy of Legal Reasoning*, *supra* at 324. Raz embraces a "weak thesis" of the autonomy of legal reasoning from the moral reasoning, i.e. an autonomy operating only when "morality runs out."

[10] *See, e.g.*, KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* at Chapter 4; or Kelsen, *Foundations of Democracy*, LXVI ETHICS 86-94 (1955). *See also* Adolf Merkl, *Hans Kelsen als Verfassungspolitiker*, 60 JURISTISCHE BLÄTTER 385–387 (1931).

[11] ROSS, ON LAW AND JUSTICE, *supra* at 329. *See, e.g.*, Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POLITICS 184-188 (1942).

[12] *See, e.g.*, Klare, *The Politics of Duncan Kennedy's Critique*, *supra* at 1078-1079; Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1381-1387 (1988), where the author proposes a "pragmatic use" of legal rights; and Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 188 (1984), admitting that the insertion of values into the legal world does not happen *per se* but somehow has to be "required by law" itself.

their central positions in the wider political environment and the possibility of operating as legal actors and influencing both what happens inside their legal world and also what happens outside in the surrounding political world.[13]

This influencing of the surrounding world naturally can take various directions, according to the values or politics whose protection or implementation the different theories tend to prioritize. For example, Law and Economics privileges the influence (although in a *laissez-faire* direction) of the political world as to economic questions. In contrast, natural law theories tend to be more concerned with using lawyers and judges in order to mark the extreme borders (*e.g.* with category such as "wrongful" law) the political power can never transgress (*e.g.* as the Nazis did) if it still wants to make use of the tool of coercion called law.[14]

Even if "law is politics," with the right type of legal education and training, legal actors can still play a part in the political world, not as politicians but as politically-oriented judges or lawyers. The fact that the vast majority of representatives of the theories covered by the embedded model (with the exception of some of the "self-destructive" members of CLS movement) have produced a large bulk of academic scholarship stressing the need to reform the law, not abolish it, is then not a coincidence.[15]

If one observes the legal theories that have taken the flexibility of the law to its extreme, namely the totalitarian legal theories, one can see how that even in the darkest period of the Stalin or Nazi regimes, the vast majority of executions were justified based on concepts and categories produced (or better, reproduced in legal terms) by legal actors. The stripping of property from the Jews or "class" enemies was sanctioned by judges and the legal scholarship through legal categories such as "expropriation" and "seizure."[16]

This is a clear indication of the fact that for those within the embedded model, the law is also a vital component of the political phenomenon that cannot be substituted by other types of coercive procedures or mechanisms.[17] In summary, in

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[13] *See, e.g.*, Wendy Brown & Janet Halley, *Introduction, in* LEFT LEGALISM/LEFT CRITIQUE 33 (W. Brown & J. Halley eds., 2002), in particular as to the role a critical legal theory can have in shaping the political agenda.

[14] *See, e.g.*, Ronald J. Colombo, *Buy, Sell, or Hold? Analyst Fraud from Economic and Natural Law Perspectives*, 07-7 HOFSTRA U. LEGAL STUD. RES. PAPERS 40-45, 58-61 (2007).

[15] *See, e.g.*, Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1862 (1988), where the author points out the common agenda of a (radical) transformative project for both CLS and Law and Economics; and Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 GEO. MASON L. REV. 995 (1998).

[16] *See* WARD, LAW, PHILOSOPHY AND NATIONAL SOCIALISM, *supra* at 11-13. *See also* FULLER, THE MORALITY OF LAW, *supra* at 202-204. *Compare* Varga, *Logic of Law and Judicial Activity: A Gap Between Ideals, Reality and Future Perspectives, in* VARGA, LAW AND PHILOSOPHY, *supra* at 272 (speaking of Vyschinsky's "socialist normativism").

[17] *See* Gordon, *Critical Legal Histories*, *supra* at 101. *See also* Gordon, *'Of Law and the River,' and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 14 (1985); and LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* at 364. *See, e.g.*, Kennedy's appeal to judges to transform into law (with their decisions) the value of substantive justice,

current legal theories, law and politics, two (more or less) different phenomena remain, and these two phenomena still communicate and transmit with each other.

3. Dilemma of Law as a Dilemma for Contemporary Legal Theory?

Most of the contemporary legal theories, regardless of the model in which they fall, tend to reflect the historical situation in which they operate. As pointed out by Cotterrell for legal theories in general,

"[t]o see normative legal theory in context is to try to relocate its perspectives on legal reality in the perspective of a 'larger' social reality, of which both the activity of philosophising about law and the particular legal experience philosophised about form only a part."[18]

If one looks at the historical and social situation in which contemporary legal theory has grown and developed, a partial explanation can be found of why, on one end, the disagreement as to the relation of law and politics has increased, given then birth to three alternative ideal-typical models to depict such relations. On the other end, the actual environment in which contemporary legal theory operates can also help to illuminate the common elements recognizable in the apparently so different and scattered pictures taken by the various theoretical streams as to the relations of law and politics.

The overwhelming majority of contemporary legal theory operates in a similar institutional environment, the welfare state form of political organization, which requires as one of its fundamental features the very use of the law as an instrument of social engineering.[19] 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."[20] This phenomenon arises due to the co-existence in the contem-

Form and Substance in Private Law Adjudication, *supra* at 1777. *But see* Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars*, *supra* at 243-244.

18 COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 18.

19 *See* Friedman, *Introduction*, 4 THEORETICAL INQUIRIES IN LAW 446 (2003). For a theoretical debate on this tendency of the increasing "juridification" of the community's life under the Welfare state, *see also* Habermas, *Law as Medium and Law as Institution*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, *supra* at 203-220; and Teubner, *Juridification -Concepts, Aspects, Limits, Solutions*, *in* JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTI-TRUST AND SOCIAL WELFARE 3-4 (G. Teubner ed., 1987). For the more practical impacts of juridification on different areas of law, *see*, *e.g.*, Eric W. Orts, *Reflexive Environmental Law*, 98 NW. U. L. REV. 1227-1320 (1995); or Renèe Römkens, *Law as Trojan Horse: Unintended Consequences of Right-Bases Interventions to Support Battered Women*, 13 YALE J. L. & FEMINISM 265-291 (2001).

20 Teubner, *The Transformation of Law in the Welfare State*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, *supra* at 6-7. *See also* Friedman, *Legal Culture and the Welfare State*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, *supra* at 13-27; and TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 65 (Z. Bankowski ed., 1993).

porary age of two systemic forces towing the law in opposite directions, affecting the very nature of the legal phenomenon: the politicization and specialization of contemporary law.

3.1 The Politicization of Contemporary Law

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. Politicization of law does not simply mean that the content of the law cannot be viewed as completely independent from politics, as the contemporary state is characterized by the very fact that the law is a tool available to Parliaments or Governments in order to realize programs within a certain community.

Politicization of the law is the phenomenon by which the very structure or nature of the legal phenomenon and legal reasoning is changed due to the fact that political and legal actors make increasing use of the law, having as primary (and often exclusive) criterion the implementation of their own values and of their own politics. The actors belonging to both the political and legal arenas tend to submerge the traditional internal rules superseding the working of the law-making (*e.g.* the formal consistency of the legal order) in favor of a more pragmatic approach, a getting-things-done approach (*e.g.* introducing a certain model of behavior into a community).[21]

Using the Weberian ideal-types, one can speak of a politicization of the law when the actors involved in the law-making process (both in its legislative and judicial forms) tend to reason in terms more of substantive rationality than of formal rationality. This happens when the legal production is reached and justified looking primarily to the observation of criteria and the fulfillment of needs positioned outside the system of law and traditional legal reasoning (*e.g.* the reach of a political goal at the expense of the logic of the legal order).[22]

An example in this sense can be traced in the contemporary phenomenon of globalization and its impact on one fundamental element considered essential for the law, at least from the growth of nation states. In one of his works, Teubner shows how, in order to fulfill the values and needs attached to the globalization of the markets, a new type of law has been built, namely the "new" *lex mercatoria.* This law is "new" not as much for its content (which often tends to reproduce parts of different national and international laws), but for its "new" structural ele-

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[21] *See, e.g.*, PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 95 (1978); or LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* at Ch. 9, though here the author takes into consideration not only the merging of law into the political discourse, but also its overlapping with (and dependency from) the discourse developed by scientific experts and knowledge.

[22] *See* WEBER, ECONOMY AND SOCIETY, *supra* at 654-658.

ment, namely the absence of a clear hierarchical system of both rules and public authorities in charge of its creation and implementation.[23]

As pointed out by Luhmann, the political control of the law is characterized "by the fact that it operates within an *incongruent* perspective, in that it judges decisions with a view not to their correctness, but to their consequences."[24] In other words, law becomes not only more political in its content but also structurally more flexible to the reasons of politics.[25]

The phenomenon of the politicization of the law certainly did not originate in the twentieth century. Historically, political powers (here also including powers of moral, religious, social, cultural and economic natures) have made a quantitatively extensive use of the law in order to get their values implemented into a community.[26] That which is typical of modern times, at least in Western legal orders, is the fact that the politicization of the law has reached a different qualitative level. The law previously was considered one among many tools at the disposal of the political powers. Today it is the favored instrument for enforcing values into a community, as:

"[t]oday the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner."[27]

The legal phenomenon is then conceived, both in the political and in the legal worlds, as one of the privileged tools in the hands of the political actors in order to reach their goals, to realize their ideologies. Carl Schmitt in particular has stressed this feature of the modern relations between law and politics. His position goes to the extreme of making the legal phenomenon not only instrumentally, but also ontologically, fully dependent on the political one. According to Schmitt, law is not only used by politics but also "is" because of politics.[28]

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[23] *See* Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW & SOC. REV. 769-770 (1997).

[24] LUHMANN, A SOCIOLOGICAL THEORY OF LAW, *supra* at 224 [italics in the text].

[25] *See* Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 766-767, 773-774 (1987); and, as an actual example of such flexibility, Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 250 (1991).

[26] One example is the use of Roman law in 13-14th centuries by jurists loyal to the emperor and other secular authorities as against the legal foundation of the pope's authority. *See* SABINE, A HISTORY OF POLITICAL THEORY, *supra* at 277-280; and QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT. VOL. ONE: THE RENAISSANCE 12-22 (1978).

[27] WEBER, ECONOMY AND SOCIETY, *supra* at 37 [italics in the text]. As a result, "[l]aw has now come to be recognised as an agency of power; an instrument of government." COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 44 (2nd ed., 1992). *See also* HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 171.

[28] "Every law… in order to be valid, necessarily ultimately requires a prior political decision, taken by an existing political power or authority. Every existing political unit finds its value and its 'justification of being' not in the justice or in the fitness into norms, but in its own existence. That which exists as a political entity is, from a legal

One effect of this new qualitative level reached by the politicization of the law is traceable in a contemporary phenomenon affecting almost every legal order around the world on both a practical and theoretical level: the intensification of the debate concerning judicial activism. Judicial activism is when "the courts impose a judicial solution over an issue erstwhile subject to political resolution" by intervening and striking down a part of properly enacted legislation.[29] Judicial activism is a sign of the politicization of the law as it comprises judicial activity directed at stretching not only the content of the law. "Activist" judges also work on the formal structures and letter of the law (in particular at the constitutional level) in order to implement those values the political actors are unable to sense in the community or are unable to transform into legislative measures or that simply are part of the political baggage of the judges. In this way, judicial activism is value-free in the sense that it works in the same way, regardless of the contents (*e.g.* liberal or conservative) of the values it is to implement.[30]

3.2 The Specialization of Contemporary Law

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. The law is increasingly used by political actors as an instrument to influence society, becoming more and more complex, more specialized and therefore requiring a specific and unique core of knowledge for production and functioning. The specialization of law, due to the increasingly detailed "marking out of what counts as legal knowledge, legal reasoning and legal issues," leads to the progressive marginalization of the political discourse from the mechanisms (though not the content) of law-making, as well as their substitution by the specific knowledge and discourse provided by specific actors, the lawyers.[31]

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point of view, worthy of existing." CARL SCHMITT, VERFASSUNGSLEHRE 22 (1928) [translated from the German by this author].

[29] David L. Anderson, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STA. L. REV. 1570 (1990). For ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 3 (1990), the politicization of the law occurs when the law becomes "a tame instrument of a particular political thrust." *See also*, for a more articulated definition of the term "activism," Tushnet, *Comment on Cox*, 47 MD. L. REV. 147-153 (1987); and Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 142-145 (2002).

[30] As strikingly expressed by Duxbury, judicial activism implies that "for every *Brown* there is likely to be a *Lochner*." Duxbury, *The Theory and History of American Law and Politics*, *supra* at 252 [italics in the text]. *See also* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1405 (2002). *But see* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 49, 55-57 (2002).

[31] COTTERRELL, LAW'S COMMUNITY, *supra* at 12. *See* Summers, *Law as a Type of "Machine" Technology*, *in* SUMMERS, ESSAYS IN LEGAL THEORY, *supra* at 49, pointing out the autonomous character of the law and its capacity to not only "escape" from politics

As a result, the distances between the legal phenomenon and the political world tend to become increasingly greater. Weber had already predicted that

> "[w]hatever form law and legal practice may come to assume… it will be inevitable that, as a result of technical and economic developments, the legal ignorance of the layman will increase. The use of jurors and similar lay judges will not suffice to stop the continuous growth of the technical elements in the law and hence of its character as a specialists' domain."[32]

For example, the relations between law and politics nowadays are heavily influenced by one typical feature of the Welfare state, namely the increasing use of secondary legislation. This supremacy of delegated law-making, in its turn, tends to distance the legal discourse from the political control exercised by political actors such as national or local assemblies and, instead, promotes the role of ("undemocratic") actors such as legal experts working for administrative agencies.[33] Similarly, the growth at the transnational level of new types of laws (*e.g.* international labor law or the law of commercial transactions) is characterized by the very domination, in both its law-creation and law-implementation, of legal actors such as international courts of arbitration panels or multinational corporate attorneys.[34]

As with politicization, the specialization of the legal phenomenon is not a product of the twentieth century. Beginning in ancient Rome through the Middle Ages, a branch of human knowledge and a group of actors dealing specifically with the law and its making have existed.[35] What characterizes the contemporary legal phenomenon is the high degree of its specialization, paralleling (and somehow connected with) an equally strong politicization of the law.[36]

This growing specialization is echoed in the degree of penetration of the law in different areas of human activity, *e.g.* with the phenomenon of over-regulation both in the United States and the European Union. This also increases the specificity of the area of expertise required of lawyers. For example, historically there basically was simply one distinction drawn at bar, between civil and criminal law-

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but also to somehow dominate and direct it. *See also* Raz, *The Inner Logic of Law*, *in* RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* at 236-237, on the judicial law-making powers as ultimately directed by the law itself, i.e. the law as determining the mechanisms of its own creation.

32 WEBER, ECONOMY AND SOCIETY, *supra* at 895.

33 *See, e.g.*, LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* at 366, 411-412; and HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 430.

34 *See, e.g.*, Teubner, *The King's Many Bodies*, *supra* at 770: "Technical standardization and professional self-regulation have developed similar tendencies toward worldwide coordination with minimal intervention of official international politics."

35 *See, e.g.*, ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 104 (1991).

36 *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 835-836 (1987); Hunt, *The Politics of Law and the Law of Politics*, *supra* at 82-83; LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* at 421-422; and Luhmann, *Closure and Openness*, *supra* at 346. *See, e.g.*, Teubner, *The King's Many Bodies*, *supra* at 783, where the author points out the "self-destruction of political power" as somehow both cause and effect of the parallel "self destruction of law' hierarchy."

yers. Today, lawyers specialize to such degrees that, for example, they can be experts solely in one area such as the ramifications as to employment contracts with respect to corporate take-overs, only one facet in the entire legal transaction. Last but not least, this growing specialization also becomes visible in the training required for future lawyers, *e.g.* in the increasing number of specialized courses and curricula given by law faculties.[37]

In general, as put forward by Luhmann, it is possible to state that nowadays a force influences the relations between law and politics in such a way that the role of the political actors operating in legislative bodies almost appear to no longer be one of creating the law but merely choosing among the bulk of legal categories already available and produced by the legal expertise through the centuries.[38]

3.3 Dilemma of Law and Contemporary Legal Theory

These tendencies, by which the law is politicized or framed in spaces of autonomy, certainly are not typical only of our time.[39] 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.[40] 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 these 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.[41]

Political authorities usually promote and implement deregulations of the welfare state through the law. Almost paradoxically, new and often extremely detailed legal measures are now required from the state for regulating the services freed from the state monopoly and now offered by the private sector. The complex and

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[37] *See, e.g.*, Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-first?*, 74 SO. CAL. L. REV. 101 (2000); ANDREW D. ABBOT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 248-254 (1988); and Edward Vink & Edward Veitch, *Curricular Reform in Canada*, 28 J. LEGAL ED. 438-445 (1977).

[38] *See* LUHMANN, A SOCIOLOGICAL THEORY OF LAW, *supra* at 159-160.

[39] *See, e.g.*, WEBER, ECONOMY AND SOCIETY, *supra* at 775-776, 789-792, 856.

[40] *See* Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 L. & SOC'Y REV. 745 (1989). In particular, Teubner points out how contemporary legal phenomenon is characterized by the simultaneity of two communicative events, internal (because the legal discourse has its inner logic) and external (because legal discourse is always part of a larger game). The Marxist sociology of law has resolved this tension by denying the existence of a conflict between systems, the law being only a part of the general social system. *See, e.g.*, Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 L. & SOC'Y REV. 585 (1977). *Compare* Varga, *Law as a Social Issue*, *in* VARGA, LAW AND PHILOSOPHY, *supra* at 462; and LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* at 422.

[41] *See* FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* at 1047. *But see* Raz, *Government by Consent*, *in* RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* at 339-340.

highly technical nature of the legal deregulation measures relegates a leading role then to such legal actors as legal consultants or administrative judges and, more importantly, to their methods of reasoning.[42]

Already at the peak of this deregulation wave Luhmann predicted that building a weaker or less regulative welfare state with legal measures (or "with remedies available *within the system*") would neither decrease the importance of the law as a political tool nor eliminate the law's specific nature and function: "If it is the function *of* the law it cannot stimulate an alternative *to* the law."[43]

This simultaneous and increasing intensity of the forces pulling law both towards and away from politics, almost equal in strength, characterizes the systems conflict and inserts a tension not only within the legal phenomenon, but also within the legal scholarship:

> "As legal thought is invaded by the challenges of social complexity and its autonomy and identity are questioned and threatened it spins increasingly intricate networks of doctrine…. Thus, ironically, as legal doctrine's relations with the contexts of its social existence become more important topics for lawyers and legal scholars, this doctrine seems to retreat further into moral and social obscurity. It is as though, while society presses in on law, dissolving it into a diversity of regulatory practices, law hides from society's gaze behind dense webs of proliferating technical detail."[44]

As a result of the fact that the contexts of law's social existence and the central role played in it by political actors become more important for legal scholars (*politicization of the law*), contemporary legal theories are all forced to recognized that the legal phenomenon is influenced by the political discourse not only as far as it concerns the authoritative model of behaviors (i.e. values) imposed on a community that is the content of the law. Law, though to a very different extent according to the different legal theories, has always structural points of contacts or overlapping with politics, that is points to where the very definition of what law is (and not simply what the law says) depends upon what is going on in the political world.[45]

However, contemporary legal theorists are also well aware of the fact that law, because of its larger use by the political arena, has become a very complex phenomenon, with its own rules, its own actors and its own very detailed conceptual apparatus (*specialization of the law*). Therefore, contemporary legal theories are all forced, though to a very different extent, to maintain within their ideas of law,

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[42] *See, e.g.*, Gordon, *A New Role For Lawyers? The Corporate Counselor after Enron*, 35 CONN. L. REV. 1211 (2003); and Mary Ruggie, *The Paradox of Liberal Intervention: Health Policy and the American Welfare State*, 97 AM. J. SOC. 927-940 (1992).

[43] Luhmann, *The Self-Reproduction of Law and its Limits*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, *supra* at 120-121 [italics in the text]. *See also* LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* at 272. Similarly, Posner states: "[e]ven a decision to make law more political… is a decision within law –a decision about the kind of law the dominant groups in society want –rather than a decision to shrink law domain." POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* at 225-226.

[44] COTTERRELL, LAW'S COMMUNITY, *supra* at 299. *See also* Summers, *Law as a Type of "Machine" Technology*, *supra* at 52.

[45] *See* COTTERRELL, LAW'S COMMUNITY, p. 8-9.

law-making and legal discipline a partition of the legal phenomenon from the political one.[46] Although there is a contemporary tendency towards law becoming a privileged instrument to do politics, it is of primary importance for legal theories to put into their portrayals of the relations between law and politics a (thin or thick) wall still delimiting one from the other.[47]

This simultaneous and increasing intensity of forces as operating on the modern Western legal systems directly affects not only the specific depictions provided by each of the legal theories, but also the general landscape of contemporary legal theory as to the issue of law and politics. On one side, as pointed out by Cotterrell, contemporary legal scholars are inclined to be attracted into a dyadic way of solving the law and politics dilemma, by focusing on the law either as *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).[48] In other words, contemporary legal theory can be diversified in several ideal-typical models or tendencies, by looking whether the theory stresses either the specific character of the law's *ratio* towards the political phenomenon or the political origin of modern law as *voluntas regis*.

On the other side, 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.[49] In their portrayals of the relations between law and politics, contemporary legal theories are affected by an historical environment in which

> "[t]he constant tension between the available juridical norms, which appear universal, at least in their form, and the necessarily diverse, even conflicting and contradictory, social demand."[50]

Contemporary legal theories then 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*.[51] Only few contemporary legal scholars claim an

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[46] *See* Hunt, *The Politics of Law and the Law of Politics*, *supra at* 51-56. According to him, there is a "common tendency to construct some taken-for-granted opposition or displacement between law and politics," *id.* at 56.

[47] *See, e.g.*, Summers, *My Philosophy of Law*, *in* SUMMERS, ESSAYS IN LEGAL THEORY 99-108 (2000). In particular, Summers points out the central position the formal features of law play in the process of transforming various values during the creation (and implementation) of a statute.

[48] *See* COTTERRELL, LAW'S COMMUNITY, *supra* at 165-166, 317-320, in particular referring to Franz Neumann's book 'The Rule of Law.' 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* Raz, *On The Functions of Law*, *in* OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES), *supra* at 280-288.

[49] *See* Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?* 25 J. L. & SOC'Y 181 (1998).

[50] Bourdieu, *The Force of Law*, *supra* at 841. Bourdieu more generally recognizes the simultaneous operation of these two factors as constitutive of the *juridical field*. *See id*. at 816.

[51] *See* COTTERRELL, LAW'S COMMUNITY, *supra* at 277-278, 319. *See, e.g.*, HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 152. *Compare* Tuori, *Self-Description And Ex-*

independence of legal concepts from values and interests (*e.g.* Scalia) or, on the opposite, the absolute interchangeability of legal and political categories (*e.g.* Schmitt). The vast majority of contemporary legal theories are forced to recognize that the law's *ratio* is affected by the fact that law is an expression of political *voluntas*. At the same time, they all admit that law tends to operate according to different rules than other "usual" tools though which the politicians express their *voluntas*, such as mass-media propaganda. It is in the legal systems of contemporary Western states that "law-making continually disrupts the tendencies to *ratio* in law, so that lawyers are engaged in a permanent repair job on law's edifices of doctrinal reason."[52]

4. Summary

This work began by describing and discussing in Chapter One two combined methodologies used in order to measure the distance or closeness of the legal border to the political border as estimated by contemporary legal theories. The first methodology loosely applied Weber's ideal-types as a heuristic device in order to show how contemporary legal theory has depicted the relationship of law and politics. Once the limits of such a device (i.e. its constructing *ideal*-typical models) were established, this Weberian methodology presented a considerable advantage in pointing out the fundamental traits of the positions of the different legal theories within this very complex phenomenon of the relationship between law and politics.

The second methodological maneuver concerned the criteria used for assembling the legal theories into these ideal-typical models positioned according to the answers the theories give to three main issues with respect to the relationship of law and politics: how contemporary legal scholars view the concept of law in relation to politics (the *static* aspect), law-making in relation to the political order (the *dynamic* aspect) and the position of the legal discipline towards the political material (the *epistemological* aspect).

Once these preliminary aspects were defined, the analysis started by exploring how the major contemporary legal-theoretical streams have coped with the relationship between law and politics. This work identified three ideal-typical models symbolizing the positions of different legal movements as to the static, dynamic and epistemological aspects of law and politics: the autonomous model, the embedded model and the intersecting model.

If a legal theory postulated a sharp distinction between the legal phenomenon and the world of politics, it was categorized as within the autonomous model. Ex-

ternal Description Of The Law, 2 NO FOUNDATIONS: J. EXTREME LEGAL POSITIVISM 37-38 (2006).

[52] COTTERRELL, LAW'S COMMUNITY, *supra* at 319 [italics in the text]. *See also* the basic idea behind the "reflexive law" as described by Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 245 (1983).

amples of such theories are legal positivism (as posited by Kelsen) and analytical jurisprudence (in the writings of Hart). Although with different modalities as well as several exceptions and mitigations, both Kelsen and Hart tend to endorse a vision of the law as *rigid* toward politics. A tendency of considering the law as keeping the same forms and nature regardless of any values (politics) endorsed can be found in both legal positivism and analytical jurisprudence. Moreover, Kelsen and Hart depict a propensity of law-making as being *closed* towards the political order. Naturally, law-making receives impulses coming from the political order (*e.g.* in form of legislative propositions). However, once these impulses arrive into the legal order, their treatment is only according to the discourse and rationality offered by the legal order itself.

As a consequence of these fundamental features of the law and law-making towards the political phenomenon, the legal theories encompassed within the autonomous model tend to limit the field of the legal discipline to *purely* legal technical matters, addressing only the language and the rationality of the law, leaving politics to the other disciplines (*e.g.* sociology or political science).

The legal movements adopting an embedded model have been positioned on the other side of the map, depicting positions as endorsed by contemporary legal theories as to law and politics, among these can be found the works of CLS, natural law scholars (in particular, of John Finnis) and Law and Economics. These theories tend to exhibit a *flexible* nature of the law towards the political phenomenon. The law tends to adapt its forms and structures according to the political substances and values it carries. At the same time, law-making tends to be *open* to the influences coming from the political order. In the end, law-making is perceived by CLS, natural law theories and Law and Economics as permitting the political powers (in the general sense of institutional actors that create and or choose values) to enter into the processes of the creation of the law, both in the legislative and judicial phases.

This entrance not only occurs in the form of political inputs (values), but also as political discourses and political rationalities, directly participating (and often with a decisive role) in the making of the law. Finally, the legal theories encompassed by the embedded model have been described as promoting an idea of a *mixed* nature of legal studies. In order to fully understand the legal phenomenon, they assert the necessity of integrating the legal discipline with categories and concepts belonging to sociology, psychology, political sciences and economics.

A third ideal-typical model of depicting the relations between law and politics has been presented in Chapter Four. For the legal theories embracing this model, namely American and Scandinavian legal realisms, law and politics are two intersecting phenomena. Both the American and the Scandinavian legal realisms, despite their differences, aim at retaining the specificity of the nature of law towards politics, a law which remains *partially rigid* in its relations to the political phenomenon. The legal realists, moreover, recognize the *open* character of law-making to the wishes and participation of the political actors (and their rationality) to the law-making and law-applying processes. Finally, both American and Scandinavian realists stress the peculiar nature of the legal discipline, which is *partially mixed* and therefore allows a limited entrance into the legal investigations of mate-

rial coming in general from non-legal discipline and in specific from the political world.

The fact that the contemporary legal theories covered by the three models operate on a common field, from which their different perspectives all commence, is highlighted in Chapter Five. The issue of the relations between law and politics is one of the central concerns for contemporary legal theories, no matter how such theories then answer the question. In particular, each recognizes that law and politics are two different objects, regardless of where legal scholars then position the law with respect to politics (separated, embedded or intersecting). Second, the legal and the political phenomena necessarily interact with each other, although the range of the frequency of such interaction varies considerably from a zenith (as in the embedded model) to a nadir (as in the autonomous model).

Finally, these common platforms from which the discussion among the different contemporary legal theories begins, have been traced back to the dilemma of law in welfare state, i.e. to the political environment in which all Western contemporary legal theories operate. This dilemma consists in the growing political use of the law, a growth that affects the very nature of the legal phenomenon and the way the very law is pictured by all contemporary legal theories as always being somehow connected to politics. At the same time, this rising exploitation of the law makes the latter a more complex phenomenon, difficult to be administrated by the political actors and instead more the monopoly of specialized legal actors. This feature of contemporary law is also mirrored in the general idea of legal theories that law and politics, as far they are close and overlapping, still identify two different phenomena.

5. What's Next?

The ambition of this work has been to frame, by using an ideal-type methodology, some possible points of convergence among various contemporary legal theories as to the issue of how much political exists in the law. It must be stressed that the purpose has simply been one of charting the positions taken by legal theory, without critically scrutinizing the way of perceiving and depicting the relations between law and politics as endorsed by the different legal scholars. Moreover, it was not intention of this author to present any explanations for how legal and political phenomena interact from a legal theoretical perspective. However, after this examination and after also pointing out a possible "environmental" reason behind the fact that some common elements are shared by the vast majority of legal theories, it is possible to briefly sketch a line of development for the future of legal theory as to its answer to the issue of which modalities law interrelates with politics.

If a legal theoretical approach aims to provide "an explanatory and clarifying account of law as a complex of social and political institutions with a self rule-governed (and in that sense 'normative') aspect," in general it necessarily has to deal with the political world and to address the specific modalities through which

law and politics relates.[53] Specifically, it needs to identify and explain the mechanisms through which not only legal categories and concepts are created as instrumental to value-environments, but also why, after so many attempts to reduce one phenomenon to the other, the debate is still open as between two (to a greater or lesser extent) different phenomena, namely law and politics.

Regardless which position a possible future legal theoretical scholar takes on the issue, due to the constraints of the environment in which law operates, namely specialization and politicization, contemporary legal theory will need to be developed simultaneously based on two major lines of work. In other words, a possible middle-range legal theory from which to start a normative investigation of the moment where politics and law meet, always needs to take into consideration these two elements as its fundamental minimum denominators.

First, due to the specialization of the law characterizing modern society and the consequent central role lawyers play in it, future investigations on the law and politics issue need to take as a central point of observation the perspective of the legal actors, these actors playing a leading (although not exclusive) part in most of the areas and processes where law and politics meet.[54] In particular, every legal theory should start from the Weberian distinction between a formal and substantive legal rationality.[55] With the Weberian distinction in mind, a line can be drawn between actors working primarily from within the legal system, whose coherence or consequentiality are to preserve, and those political actors that, although active in the law-making process, strive for goals external to the internal logic of the legal system (*e.g.* the realization of a certain political ideology or the improvement of the efficiency of an economic system).[56]

In drawing this line, the legal theoretician will always have to keep in mind however the relative nature of this distinction between legal and political institutional actors (as well as their goals). Considering the vast variety of roles a legal actor can assume, it is often unclear where the latter ends and the political actor begins.[57] One example can be seen with lawyers working for a legislative agency.

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[53] Hart, *Postscript*, *supra* at 239. *See also* Hart, *Problems of the Philosophy of Law*, *supra* at 103-105; MACCORMICK, H. L. A. HART, *supra* at 37-40; Raz, *Two views of the Nature of the Theory of Law*, *supra* at 30-31 (as to the aim of jurisprudence in general to provide "interpretative explanations"); and, more or less reaching the same conclusion, Summers, *On Identifying and Reconstructing a General Legal Theory*, *supra* at 1024-1025.

[54] *See, e.g.*, Maureen Cain, *The Symbol Traders*, *in* LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 15-48 (M. Cain & C. Harrington eds., 1994). *But see*, DWORKIN, LAW'S EMPIRE, *supra* at 32, claiming that these types of theories (*e.g.* Hart's idea of internal perspective as characterizing legal actors) falsely assumes a total agreement among legal actors as to what the law is and is not.

[55] *See* WEBER, ECONOMY AND SOCIETY, *supra* at 654-658.

[56] *See* TUORI, CRITICAL LEGAL POSITIVISM, *supra* at 36-39.

[57] *See, e.g.*, Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, *supra* at 277-280, as to the legislators; HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, *supra* at 271, as to the legal scholars; or FRANK, COURTS ON TRIAL. MYTH AND REALITY IN AMERICAN JUSTICE 147-149 (1950), as to the judges. *See also* STEVEN

Moreover, legal actors themselves (judges *in primis*), even when embracing as unique a value as the maintenance of the internal logic of the legal system, often are also carriers of messages of a political nature; messages that are likely to surface in particular in the presence of hard cases. Even the most obedient judge with respect to the letter of the positive law must sometimes "go beyond the law and (without sacrifice of impartiality) consult his own sense of moral and political rightness or equity."[58]

Though recognizing this relative character of the distinction, the perspective of legal actors on the law and politics issue retains and maintains its central place. By claiming, as recently done by many "socially oriented" legal scholars, that this dichotomy between the perspectives of legal actors (or the Hartian internal perspective) and non-legal actors (external perspective) is (more or less) wrong, they simply dismiss as wrong not a theoretical claim but the fact of how a large sector of the legal world perceives its position in relation to other sub-systems of the society.[59] In other words, they dismiss as "wrong" what actually is an existing social cultural reality, at least for some segments of the legal world.

Legal actors can be "right" or "wrong" in their depiction of the relation between law and politics. However, it is certainly a point of view that has to be taken in serious consideration by legal theoretical scholars, since, as pointed out by critical legal theories, legal theory shapes the very law's idea of what its relations to politics are, via the education of generations of legal actors, such as judges, lawyers and law-makers.

In addition to the perspective of the legal actors, there is a second methodological pattern that a legal theory has to take as fundamental starting point of its analysis of the relations between law and politics, due in particularly to the phenomenon of the politicization of law. This pattern starts from the channels through which the communications occur between legal actors and political actors and among the different level of the legal phenomenon (*e.g.* between local courts and constitutional courts). A future legal theoretical model explaining the relations between law and politics should in particular include a thorough investigation of legal language. The latter has already been a central focus of the legal phenomenon as seen by many contemporary legal theories, from Finnis to Hart, from the Critical Legal Studies Movement to the Legal Realists, from feminist legal theories to postmodernists.[60]

VAGO, LAW AND SOCIETY 139 (6th ed. 2000), as to the overrepresentation of lawyers in the political law-making authorities.

58 MACCORMICK, H. L. A. HART, *supra* at 126. *See, e.g.*, Bojan Bugaric, *Courts As Policy-Makers: Lessons From Transition*, 42 HARV. INT'L L. J. 257-269, 277-279 (2001), where the author critically exposes the operating as political actors of many constitutional courts in Europe as one of the elements characterizing the globalization of law.

59 *See, e.g.*, REZA BANAKAR, MERGING LAW AND SOCIOLOGY: BEYOND THE DICHOTOMIES IN SOCIO-LEGAL RESEARCH Ch. 2 (2003). *See also* COTTERRELL, THE POLITICS OF JURISPRUDENCE, *supra* at 96-98.

60 *See generally* Timothy A. O. Endicott, *Law and Language*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 935-968 (J. Coleman & S. Shapiro eds., 2002). *See also* James Boyd White, *Law as Language: Reading Law and Reading Lit-*

However, as pointed out by Peter Goodrich:

"Legal language like any other language usage is a social practice and… its texts will necessarily bear the imprint of such practice or organisational background."[61]

In order to fully understand the intersecting (or at least "coming-into-contact," if one embraces the autonomous model) character of the activities taking place among the different actors and among the different levels, it is then necessary to substitute the concept of legal language with the broader one of "legal discourse."[62] Legal discourse, by placing the legal phenomenon in the centre of its ontological web of relations with, among the others, the political discourse, will be relevant for understanding how much of "political" there is in the legal text. In other words, it will help answer the questions: what are the political motives driving legal actors in the choice, construction, or implementation of a certain legal category or concept? Are these motives somehow recognizable in the text of a statute or in the behaviors of a judge?

If, as previously seen, no one can deny the fact that the law has a political content, then the value behind a certain legal category needs to be among the starting points of a legal theory aiming to depict (and perhaps criticize) the reality of law and politics. Moreover, as pointed out particularly by critical legal theories, a central role in such a process of "hiding" values behind legal curtains is played by the legal discourse, i.e. "all legal communication which takes place within the legal practices of the legal system; to all communicative acts which – to use Luhmann's terminology – rely on the binary code of lawful/unlawful."[63]

It then seems sound to expect that a legal theoretical model will also sieve through the different moral, political, social, economic and cultural aspects underlying the legal reasoning taking place in the receiving legal system.[64] As matter of fact, the analysis of the legal discourse in particular serves to uncover the fact that apparently neutral legal categories

"serve the interests of the section of society within which the discourse originates and which works ideologically to naturalize those meanings into common sense."[65]

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erature, 60 TEXAS L. REV. 415 (1982). *See, e.g.*, Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 n. 1 (1982); *generally* Finnis, *Natural Law and Legal Reasoning*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS (R. P. George ed., 1992), 134-157; Hart, *Definition and Theory in Jurisprudence*, *supra* at 26-28; and DWORKIN, LAW'S EMPIRE, *supra* at 104-108.

61 PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC, AND LEGAL ANALYSIS 2 (1987).

62 For example, Habermas maintains the necessity of moving from the "logicosemantic" idea of legal discourse to a more "pragmatic conception" of it. *See* HABERMAS, BETWEEN FACTS AND NORMS, *supra* 225-228.

63 *See* Tuori, *Self-Description And External Description Of The Law*, *supra* at 27.

64 *See* COTTERRELL, LAW'S COMMUNITY, *supra* at 275-278. *See also* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8-9 (1987).

65 BRUCE A. WILLIAMS & ALBERT R. MATHENY, DEMOCRACY, DIALOGUE, AND ENVIRONMENTAL DISPUTES: THE CONTESTED LANGUAGES OF SOCIAL REGULATION 29 (1995).

The legal theorist will then have to take a step into the world of moral reasoning because, for example, the law-maker (either as legislator, scholar or judge) will always reason and argumentatively explain his/her choices in terms of finding the correct legal category for a certain value. The law-making authority will transform a value into law or the judge will apply a statute, trying to be as faithful as possible to some authoritative criteria or, in other words, discursive practices to which the authority itself (and hopefully the addressees) attributes an *a priori* validity, i.e. a value status.[66] These criteria can be of a different nature; they can be economic criteria (*e.g.* the economic efficiency), formal legal criteria (*e.g.* the consistency and logic of the legal system), or *stricto sensu* political criteria (*e.g.* the idea of democracy). Regardless of the kind of criteria the law-making and law-applying agencies opt for, they are all perceived and used by the legislator, judge or scholar as moral logical axioms, i.e. as assumed-to-be-valid lights guiding the work of law-makers, law-appliers and the addressees in general.[67]

In other words, each legal theory dealing with the law and politics issue needs to somehow be a "critical rhetoric… capable of indicating and specifying the political dimensions of legal language."[68] In this sense, the relations between law and politics can be the object of investigation of that which Dworkin defines as a more general "theory of the grounds of law."[69]

No matter the theoretical depiction of the relations between law and politics at which one is aiming, the descent into the political roots is necessary because only by first openly recognizing the *stricto sensu* political, moral, social or economic origins of the legal categories and concepts made or used in the law-making or law-applying processes, the legal theorists can then proceed to identify that which is "legal" as left in the law.

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66 *See* HABERMAS, BETWEEN FACTS AND NORMS, *supra* at 226-229.

67 *See* GOODRICH, LEGAL DISCOURSE, *supra* at 76-81. *See also* Moore, *The Need for a Theory of Legal Theories*, *supra* at 1003-1004, in particular point 3.

68 Goodrich, *Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language*, 4 OXFORD J. LEGAL STUD. 90 (1984). *See also* JOHN S. BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 270 (1983); and TWINING, GLOBALISATION AND LEGAL THEORY 12 (2000), stating that "one of the main jobs of jurisprudence is the critical exploration and evaluation of prevailing assumptions underlying legal discourse."

69 *See* DWORKIN, LAW'S EMPIRE, *supra* at 4, 11.

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