

Chapter 1

LEGAL DOCTRINE AND LEGAL THEORY

1.1. Introduction

1.1.1. *The Purpose, Method, and Materials of This Volume*

The primary aim of the present volume is a rational reconstruction of legal doctrine.

By “rational reconstruction” is meant the activity of explaining fragmentary and potentially conflicting data by reference to theoretical objects in the light of which the data is seen as relatively coherent, because presented as part of a complex, well-ordered whole (MacCormick and Summers 1991, 19; cf. Eng 1998, *passim*).

This volume is based on the following materials:

- published writings of legal scholars;
- the practice of teaching of law;
- *travaux préparatoires* and other documents originating from lawmakers;
- the published written opinions of higher courts;
- writings in legal history; and
- writings in philosophy.

Because of my European background, the present volume will deal mainly with continental European legal doctrine. But legal doctrine in common-law countries is not essentially different from European doctrine.

1.1.2. *Legal Doctrine and Legal Dogmatics*

There is one kind of legal research prominent in professional legal writings, such as handbooks, monographs, commentaries, and textbooks of law, that implements a specific legal method consisting in the systematic, analytically evaluative exposition of the substance of private law, criminal law, public law, etc. Although an exposition of this kind may contain historical, sociological, philosophical, and other considerations, its core consists in the interpretation and systematization of valid law. More precisely, it consists in a description of the literal sense of statutes, precedents, etc., intertwined with many moral and other substantive reasons. One may call this kind of exposition of the law “legal doctrine.”

Terminology is not uniform. Legal doctrine may be called, for example, “analytical study of law” or “doctrinal study of law.” The word “legal science” (*scientia juris*, *Rechtswissenschaft*), frequently used in many European coun-

tries, is ambiguous. It may refer to legal doctrine, either pure or containing elements of legal sociology, history, etc. It may also refer to any kind of legal research. Another term is “constructive legal science” (cf. Agell 2002, 246ff.).

Legal doctrine is often called “legal dogmatics” (*Rechtsdogmatik*). The term has an established meaning well known among continental law theorists. Indeed, this volume deals with legal dogmatics on the understanding of this discipline that has obtained among these theorists. In Anglo-American legal theory the term “legal dogmatics” is not so well known, however. It also produces misunderstandings among legal researchers who dislike the word “dogmatic” because it calls up the idea of “narrow-mindedness,” or something like it. For these reasons, I will avoid using this term in the present volume. I do this with regret and in the hope that the situation will change in the future and that the term “legal dogmatics” will be used consistently in all jurisprudential contexts.

The term “legal doctrine” refers in this volume to the activity of scholars as well as to the products of this activity, that is, to the content of books and research. My original intention was to write about the products rather than about the activity. But an understanding of the products very often requires reference to the activity.

Legal doctrine picks up questions from legal practice and discusses them in a more general and profound manner. But the perspective of the legal scholar differs in some respects from the perspective of a judge.

- A legal scholar has no power to make binding decisions. Scholars choose their subject matter freely. The claims, demands, and motions of the parties, on the other hand, bind the judge.
- Judicial argumentation pays attention only to information that, at most, is indirectly relevant to the case under consideration. In contrast, scholars express themselves in a more abstract manner and are less oriented towards actual cases and facts. The scholar uses many examples of actual as well as hypothetical situations.
- Scholars seek out problems, whereas judges confine themselves to the problems that are necessary for the case in adjudication.
- The scholar may freely make recommendations *de lege ferenda* and even boldly propose new juristic methods, whereas the judge must make correct decisions in the light of the prevailing legal method.

Scholars must argue explicitly. Judges, in contrast, may rightly feel that the decision is justifiable and yet find themselves in a position where they are unable to formulate a satisfactory justification. Moreover, in many cases, the judge has no time to prepare a general and extensive justification. Finally, when a number of judges decide a case jointly, they must often find an acceptable compromise. In some cases, only a less extensive and less general justification can satisfy this demand.

1.1.3. *Particular and General Doctrine*

Particular legal doctrine describes the structure of the law (the so-called outer legal system) and develops justificatory standpoints for various parts of this structure (the so-called inner legal system).

There also exists a general legal doctrine. It is a discipline in itself rather than fragments used within particular legal doctrine. Traditionally, this part contains the theory of the sources of law and the theory of legal argumentation. These two theories are central in legal doctrine in this sense: Almost all other theories belonging to legal doctrine include theoretical assumptions about the sources of law and about statutory interpretation.

There is an interplay between general and particular legal doctrine: Particular theories use arguments justifiable in general doctrine; general theories, for their part, generalize results obtained from different particular theories.

Moreover, general legal doctrine derives its best examples, inspiring theory construction, from various parts of particular legal doctrine. This must be so, because particular legal doctrine in various parts of the law gets integrated with a tacit knowledge in the respective legal disciplines. Lawyers often know how to perform legal reasoning without being able to tell why they do what they do. Theories of particular legal doctrine express verbally a part of this tacit knowledge, thus converting it into explicit legal knowledge, in turn funnelled into general legal doctrine.

This dynamic of legal doctrine explains the never-ending quarrel between scholars in general legal theory and scholars in particular legal disciplines, such as private law and criminal law. The former tend to forget that their roots are in particular legal doctrine, thus sliding more and more into philosophy. They risk becoming second-class philosophers, no longer jurists at all, doing work that is trivial and sterile. The latter, on the other hand, risk losing the self-reflective insight that can only come to hand at a higher level of abstraction. Moreover, they tend to do unnecessary work, since the basic problems of legal doctrine are the same in most particular disciplines.

1.1.4. *Justification, Description, Explanation*

Legal doctrine is committed to justifying its statements. Karl Popper's famous contrast between the context of discovery and context of justification thus applies to it (cf. Anderson 1996, 11–6, quoting widely known works of Wasserstrom and MacCormick; cf. Bergholtz 1997, 69ff.). But it is not entirely clear what exactly the word “justification” means in the context of legal doctrine.

All kinds of legal doctrine claim to be justified in a stronger sense than that of lay description and judgment. Claims to justification sometimes mean the same as claims to objectivity. Legal scholars are expected to be more objective than attorneys, for example. It is acceptable for an attorney to interpret the

same law differently in different trials, depending on the client's interest. By contrast, it is not acceptable for a scholar to advocate opposing views in different legislative committees, etc.

Legal scholars with scientific ambitions sometimes present legal doctrine as an explanatory enterprise. Were this description accurate, legal doctrine would be a branch of the sociology of law. However, the word "explanation" often conceals the normative aspect of legal doctrine. Thus, Jan Hellner (2001, 38ff.) writes about many kinds of explanation. Hellner's typology is descriptive, and based on interesting examples. Reprocessed in a more analytical manner, it boils down to this: "Explanations" in Hellner's meaning can be the same as conceptual analysis of legal concepts and rules, especially through clarification of their connections with other concepts and rules.

Explanations can also be causal. Historical explanations describe the causal links that legal rules have with their background history, with the history of legal institutions, with the history of society as a whole, or with the history of political, philosophical, and other ideas. Sociological explanations of legal rules are of a similar kind, but they emphasize the present state of society, not its history.

However, such legal scholars as Hellner also write about justificatory, or normative, "explanations," that is, justifications of legal rules through the legal evaluations of the members of society, through considerations of justice, or through rational will, interest, etc. Some justificatory "explanations" give certain legal rules their legitimacy. Functional, final, and teleological "explanations," mentioned by Hellner, also have a normative character.

One may wonder how an outstanding scholar can confuse justification with explanation. One reason for this confusion can be the unconscious self-defence of a scholar who intends to effect a "science of law" in an objective, value-free manner and so tends to conceal justification behind the façade of explanation.¹ Another reason is deeper. Such terminology reveals a tension in legal doctrine between doing and saying. Scholars do both description and valuation; they speak mostly about description and are almost ashamed to do valuation. Indeed, the work of legal doctrine is usually value-laden. To be sure, jurists draw a distinction between conducting a cognitive inquiry into the law as it is (*de lege lata*) and making justified recommendations for the lawgiver (*de lege ferenda*). But as every legal scholar knows, the distinction between *de lege lata* and *de lege ferenda* is not clear-cut. Legal doctrine pursues a

¹ This "scientist" attitude in legal doctrine follows a similar attitude in the social sciences in the first half of the 20th century, when causal and functional explanation was often perceived to be less problematic than intentional explanation. But this view was facing serious criticism so early as the 1970s and 80s. Thus, Jon Elster (1983, 1989, and 1999) criticized functional, institutional, and other sociological explanations of action; in his opinion, action can only be explained intentionally, in the light of rational-choice theory. But this theory, too, is overly formalistic for legal doctrine.

knowledge of existing law, yet in many cases it leads to a change of the law (Peczenik 1995, 312ff.). Thus, legal doctrine appears to be descriptive and normative at the same time. Dreier (1981, 90ff.) makes the following example. Consider two competing theories in contracts, the will theory and the declaration (reliance, trust) theory. According to the first, a party is in principle not bound by declared contract terms that unintentionally end up conflicting with the real will expressed when concluding the contract. According to the second, the declared will takes precedence over factual will, because the other party must go by what was stated. How does one test which theory is right? If the theories are descriptive, the test is in their coherence with the words of the statute and with factual judicial practice. If the theories are normative, the ultimate test lies in the justice and reasonableness of their consequences. In practice, both kinds of testing take place.

Svein Eng has put forward a more general theory on the descriptive and the normative element in legal language and argumentation (Eng 1998, chap. 2, Sec. F; Eng 2000, *passim*; Eng 2003, chap. 2, Sec. F). According to Eng, statements *de lege lata* have a “fused descriptive and normative modality.” They are neither purely descriptive nor purely normative. If a discrepancy emerges between one lawyer’s statement *de lege lata* and the opinion of other lawyers in that same regard, the lawyer who made the statement may either align it with the other lawyers’ opinion or uphold the statement despite the other lawyers’ differing opinion. In the first case, statements *de lege lata* appear to be descriptive; in the second, normative. But there are no rules at the level of legal language or of legal methodology that may help us determine usual kinds of *de lege lata* statements by lawyers as either descriptive or normative. We will return to this theory later on.

This tension between description and change in legal research *de lege lata* has a parallel in the tension between the maximalist goal of classical natural-law doctrine—i.e., arriving at necessary substantive principles—and the more modest goal of the historical school, that is, finding only a general legal method by which to interpret and systematize positive law. According to Savigny (1993, 197), legal doctrine does not create settled rules, but a method that continually changes the rules (cf. Sandström 1989 and 1993; Peterson 1997).

This mixture of description and recommendation becomes apparent when one asks the question, Who profits from legal doctrine? An attorney, it is true, may profit from legal doctrine using doctrinal writings to make predictions about future judicial decisions. Such predictions are possible because legal doctrine describes the law. But high-court judges, too, can use legal doctrine, not to predict their own decisions, of course, but to learn what decisions would be normatively correct. These two clients of legal doctrine, attorney and judge, correspond ideally to its two aspects, description and recommendation.

Legal doctrine is Janus-faced: It aims to attain a knowledge of the law. At the same time, it is a part of the law in the broadest sense, for it participates in developing the norms of society.

1.1.5. *Influence of Legal Doctrine*

Once the normative aspect of legal doctrine is recognized, one may ask about its influence on the law and legal practice. In studying legal research, we find explicit and implicit reasons to think that legal doctrine produces beneficial effects, such as:

- giving the law precision, coherence, and a transparent structure;
- promoting justice and morality, as by interpreting old law in a new way;
- promoting trust in the law;
- promoting the globalization of law, considering, inter alia, that scholars maintain international contacts; and
- promoting stability in a world dominated by political dynamics.

One may even call these effects the functions of legal doctrine but this may drag us into a functional sociology with all its attendant problems.²

The importance of legal doctrine varies in different countries and historical periods. In Rome, Augustus granted to certain prominent jurists the right to answer questions of law by authority of the Emperor: *Ius publicae respondendi ex auctoritate principis*. The so-called citation-statute of A.D. 426 accorded a binding force to the books of Papinian, Paulus, Ulpian, Gaius, and Modestinus and regulated in detail these jurists' authority. Medieval Europe was under the dominating influence of the legal *communis opinio doctorum*, based on Roman sources and embraced by the majority of celebrated legal writers, mostly French and Italian. In a monumental work, Lars Björne summarizes the subsequent evolution as follows. In 18th-century aristocratic society, the role of legal doctrine was confined to description and to piecemeal, technical refinement of the law. In the 19th century, its role expanded to include innovative claims and pioneering work, exerting a great influence on the law. In the 20th century, its influence ebbed again. The democratic establishment of the present time needs jurists as little as did the aristocratic establishment of the 18th century. Moreover, human rights now overshadow the normative work of legal doctrine, just as 18th-century natural law did.³

It is not easy to map out the factors that make legal doctrine important. Let me only mention two facts coinciding with the emergence of the grand

² We may also list the following functions of law, and so of legal doctrine: (1) governing the conduct of people, (2) contributing to the distribution of goods, (3) fulfilling expectations, (4) solving conflicts, and (5) propagating ideals and values (cf. Aubert 1975).

³ Björne 2002a, 241–2, referring to Björne 1995, 1998, and 2002b.

style of legal doctrine in Germany in the early 19th century. The first was political dynamics and crisis: the atrocities of the French revolution, the Napoleonic wars, the emergence of the new system of German states after the Congress of Vienna. The second was philosophical dynamics and crisis: Natural-law philosophy lost ground in favour of Hegelianism and the historical school. In a world of unsure politics and equally unsure philosophy, lawyers attempted to attain intellectual certainty by shaping legal doctrine for coherence. Both factors exist even today, after the two world wars, the collapse of ideologies, the outcry of post-modernism, etc. No one knows whether this situation will promote a revival of legal doctrine. Too many other factors are involved to make possible any sensible prediction. Let me make one example. One would have expected legal doctrine to play a big role in the process of unifying European law. But this role is proving to be lesser than expected.

The role of legal doctrine varies as well in different parts of the law. For example, it is often weaker in environmental law than in other areas of regulation. One reason for this may be that experts in environmental law are frequently involved in political controversy. Moreover, the principles of traditional, public, criminal, and civil law are old, as opposed to the now emergent environmental law. Finally, it is difficult to achieve coherence between traditional private law—highly informed by the idea of individual autonomy—and environmental law, by definition concerned with common values shared by all.

In general, legal doctrine exerts a significant influence in creating law. For example, in many countries legal researchers join legislative committees. Moreover, in international relations, model law (a kind of soft law) is often made by bodies of professors, sometimes having a tenuous authorization (as from the U.N.) and recognized as authoritative.

An important question in this context is whether legal experts exert a real influence on political solutions or only on political rhetoric. Politicians often use legal doctrine as a drunkard uses a lamppost: To get support rather than to get light. But whatever intentions they have, they need to be alert to the possibility of criticism from jurists and—more important—from voters, who often demand consistency, coherence, legal certainty, predictability, and, not least, justice and objectivity.

The influence of legal researchers is great on the courts as well. In many countries, law professors are appointed to serve as members of the courts, especially supreme courts and constitutional tribunals. It is a known fact that judges read books written by legal scholars, sometimes quoting them and sometimes not, depending on the tradition of the country, but it is unreasonable to assume that they ignore them.

Among the institutions and channels of influence open to legal doctrine, one may mention, too, legislative councils (*conseil constitutionnel* in France, *lagrådet* in Sweden, etc.), advisory committees of constitutional tribunals (as in Poland) and the opinions delivered by faculties of law.

An interesting problem is the relation of legal doctrine to politics.

Legal doctrine can be used in the service of politics: Politicians establish goals and values; legal scholars help convert these into draft law.⁴ This is the only option when juristic theories are weakly developed and do not lead to any extensive *communis opinio doctorum*. This may also be justifiable in the face of strong social pressure for change. But there is also a limit. If the pressure for change conflicts too much with the moral expectations of the members of society, legal doctrine should rather act in a reactionary manner, aiming to slow down the pace of change.

On the other hand, politics is conducted within the frame of the law: Politicians initiate legislation within the framework constructed by legal scholars. Thus, legal doctrine may produce exceptions to statutory rules. A more interesting phenomenon is that it may produce “subsidiary” general norms (principles and rules) to which the statutory rules are exceptions. For example, scholars of civil law have developed such norms as the negligence principle and *pacta sunt servanda*. They also have developed clusters of norms specific to such general theories as the theory of adequate causation in torts and the theory of assumptions in contracts (which see Chapter 2 below). Particular legislation has introduced specific rules that may be regarded as exceptions to such norms.

1.1.6. *Kinds of Legal Research*

Legal argumentation is not uniform. There exist various legal roles and corresponding types of argumentation. Judicial argumentation cannot ignore the judge’s duty to make binding decisions, regardless of whether the reasoning employed is conclusive or not. Moreover, the procedural framework binds the decider and the parties.

Argumentation in legal scholarship varies with each kind of legal research. For example, one can distinguish the following kinds of legal research:

- particular legal doctrine;
- general legal doctrine, coupled with normative legal theory;
- general description of the law and conceptual analysis;
- sociology of law;
- descriptive meta-theory;
- critical legal theory and applied normative philosophy.

Of course, each kind is an ideal type, legal research being a mixture of any number of these types.

⁴ The Swedish MP Lars Erik Lövdén once said that law is nothing but an instrument of politics.

A jurist may attempt to elaborate a “scientific” legal theory—one that is value-neutral. For example, she can present a general account of legal method. She may thus describe the sources of law (statutes, precedent, *travaux préparatoires*, etc.) and modes of legal reasoning (by analogy, teleological, systematic, etc.). Using Hart’s somewhat strange term, one can call such description a descriptive sociology. It often employs conceptual analysis. Hart is again a good example, since he succeeded to integrate the analysis of fundamental legal concepts with the general description of the legal system.

The genesis of such description is complex. A big part of it developed out of legal research, purified of normative components; another part originated from philosophy and the sociology of law.

The general description of law can morph into a professional sociology of law. The sociology of law studies causal, structural, and functional connections between legislation, legal practice, legal research, and a number of social factors. In particular, a sociologist of law can inquire into the psychological motivations behind the legislative process, as well as behind judicial decision and scholarly texts. The sociology of law can provide useful information for legal practice and legal doctrine alike.

Going deeper, the legal theorist may realize that describing the law must be philosophically problematic. For instance, this cannot be done in the language of strict empirical science. To make any such description meaningful to a lawyer, the theorist must speak of valid statutes, precedents, interpretations, etc., as if these were physical objects, even though they obviously are not. Moreover, one can suspect that the concept of law is not a given, but is rather an outflow of analytical, descriptive, normative, and metaphysical reflections on the law.

The legal theorist will then realize that legal method makes sense when a certain philosophical position (or theory) is assumed, and will make no sense at all when another is assumed. She can even note that different fragments of legal method make sense under different philosophical theories.

If she is a philosophical relativist, she will stop there. Jerzy Wróblewski, for instance, consciously adopted this way of working (cf. Wróblewski 1992; Peczenik 1975b). He thus formulated theories about the ideologies of statutory interpretation. His project can be characterized as follows: Its philosophical basis—meta-theoretical relativism—is not philosophically neutral; it has its background philosophy, namely, relativism; it is totally devoid of normative components; it assumes—at least tacitly—that science must be non-normative. The lack of normative components will savour of sterility to lawyers seeking advice on how to answer normative questions, about statutory interpretation, for example.

Critical legal theory and applied normative philosophy are normative. The borderline between legal doctrine and critical legal theory is unclear. All legal doctrine includes normative components. But legal scholars usually play down

their genuine normative standpoints and harmonize them with values implicit in the law itself. If a scholar exceeds the limit of contextually acceptable valuation, she will either conceal it or enter the realm of critical legal theory.

Critical legal theory always has a philosophical background. It therefore deserves the name “applied normative philosophy.” But applied normative philosophy is not always critical. It may also be aimed at understanding the law and at a profound justification of it.

When working in applied normative philosophy, a theorist makes some basic normative assumptions, preferably taken from the rich tradition of moral philosophy, and applies them to the law. A normative theory can take any number of philosophical theories as its basis. I will mention only some of the more influential ones, namely, Aristotle’s rhetoric and theory of practices, Kant’s philosophy of practical reason, utilitarian moral philosophy, and communitarian or Hegelian philosophy, in which normativity is made to arise from society.

Gerald Postema has elaborated a radical version of the view that jurisprudence is a practical philosophy. He states what follows:

Philosophical jurisprudence [...] is in the first instance a practical, not a theoretical study. It is a branch of practical philosophy. (Postema 1998, 330)

The recognition of a practice as normative arises from observation of a people engaging in a living, functioning practice, not of participant’s beliefs about it. (Ibid., 355–6)

In general, we need to be conscious of the following problems:

- Some (though hardly all) legal theorists believe that a “scientific” theory of law cannot be normative.
- Normative issues in philosophy are notably controversial. Different philosophical views can carry incompatible normative consequences.
- There is no neutral criterion of choice between them.
- Each such philosophy can be paraphrased in numerous ways.
- There is also the possibility of combining them with one another.

For example, Åke Frändberg (2000, 654ff.) advocates a value-free, scientific legal theory. This view must, however, be interpreted restrictively. We can ask some rhetorical questions in this regard. What is to count as a “scientific” theory? Only natural science or also what are called the social sciences? For example, isn’t sociology normative? Maybe it is normative but not scientific. Is the philosophy of science scientific? Popper’s philosophy of science, for example, assumes some methodological rules. Does this fact make it unscientific? Some epistemologists (e.g., Pollock 1986, 123ff.) write of epistemic norms: Does that make epistemology unscientific? The concept of justification is normative: Should science then evade justification? Even logic is normative in a sense, since it formulates rules of logic. Frändberg is no doubt

aware of these problems. What he finds objectionable in a theory of law, then, is not that it includes norms, but more specifically that it includes moral norms.

The Anglo-American discussion about the descriptive versus normative character of legal theory includes increasingly sophisticated interpretations of few standard-setting authors, such as Hart and Dworkin (see recently Coleman 2002, 311–51).

1.2. General Legal Doctrine

1.2.1. *General Legal Doctrine and Normative Legal Theory*

Classical German *Juristische Methodenlehre* (e.g., Larenz 1983) delivers the best examples of general legal doctrine. General legal doctrine describes and systematizes legal sources and legal arguments. It therefore codifies the legal method used in particular legal doctrine and in judicial practice. As part of legal doctrine, it is also a part of the law in the broadest sense.

Not only is general legal doctrine general in its content, but large tracts of it remain relatively uniform as we pass from one modern legal order to another. This is certainly the case when it comes to interpreting statutes. In a study on the operative interpretation of statutes by courts of law in nine very different countries—a study undertaken from the point of view of legal doctrine (MacCormick and Summers 1991, 462)—important similarities have been discovered to exist between the major types of arguments that figure in the opinions. There were also found to exist similarities in the materials incorporated into the content of such arguments, as well as in the main patterns of justification involved, in the ways of resolving conflicts between types of argument, and in the role of precedent in interpreting statutes. There are differences, too (*ibid.*, 463ff.), for example, between conceptual frameworks and justificatory structures. Thus, in continental systems, justification is often presented as deductive, explicit, or enthymematic; in the United States and the United Kingdom, the basic model is an alternative discursive justification (*cf. ibid.*, 492ff.). The overall impression is that of a large crowd of crisscrossing and difficult-to-explain differences: Certainly, not all of them follow the distinction between continental and common law. All fall within the same legal culture. Though the study is directly concerned with statutory interpretation by the courts, its findings are applicable to statutory interpretation by legal doctrine as well.

General legal doctrine is a cluster of theories that differ by their age, geography, and generality.

- Some are traditionally juristic; others are more abstract and philosophically oriented.

- Some have attained greater sophistication in the common-law environment; others are more sophisticated in continental law.
- Some have developed relatively uniformly across different parts of the law and across various legal systems; others are rather local and fragmentary.

There is also, at law schools, a tradition of legal theory that the English-speaking world often refers to as jurisprudence. But what is legal theory?

It has many names: general theory of law, theory of state and law, *allgemeine Rechtslehre*, jurisprudence. Its content is a mixture of legal philosophy, methodology of law, sociology of law, logical analysis of normative concepts, some comparative law and some study of national positive law. The didactic value of legal theory is great. It can give students of law elementary information about philosophy and social doctrines. I believe that such information can facilitate the work of lawyers. The scientific value of legal theory is, however, problematic. Nobody can be competent in philosophical, logical, sociological and legal disciplines at once. The progress of doctrine is rapid. A lawyer, even if working in legal theory, needs greater effort to become an expert in some *part* of logic *or* philosophy *or* sociology. In order to do any creative work of value, he must rather find a topic whose discussion requires a combination of his *legal* qualification with his general knowledge of the mentioned extra-legal disciplines [...]. But if such a topic cannot be found at all, a specialist in legal theory would soon only be a teacher while his scientific position would recall that of a hero in A. Bester's science fiction: Education: none. Skills: none. Merits: none. Recommendations: none. (Peczenik 1971b, 17)⁵

The normative theory of legal doctrine is just such a research topic (cf. Peczenik 1966 and 1967). It is similar to the theory of science (cf. Peczenik 1974, 9ff.), a product of self-reflection by legal scholars. Its primary aim is the rational reconstruction of legal doctrine. It provides standards of rationality for legal doctrine. It is—again—Janus-faced: It studies legal doctrine (its object of study), but at the same time has much in common with traditional methods of legal doctrine. It optimizes legal doctrine by generalization. In fact, legal doctrine is itself a kind of rational reconstruction of the law. The main difference is that normative legal theory operates on a more fundamental level of inquiry, thus pushing rational reconstruction a step further.

Normative legal theory is the continuation of a research program that in the mid-19th century culminated with the German juristic encyclopaedias (see Brockmöller 1997, 137ff.). These encyclopaedias, framed to attain the most general knowledge of the law, border between general legal doctrine, analysis of legal concepts, and sociology of law.

Normative legal theory is a theory about legal doctrine at the same time as it makes up the most general part of legal doctrine. This normative theory should properly take the somewhat strange name “general part of general legal doctrine.” One can also call it “legal doctrine driven to the extreme.”

The law theorist is identified as one who acts as a liaison between law and philosophy, providing philosophical tools and philosophical insight for jurists

⁵ Quoted by van Hoecke 1985, 7. Van Hoecke 1985 has a different conception of legal theory, but this is another story.

and juristic data for philosophers. Normative legal theory needs bridges to normative, moral, and political, philosophy. Its most general theories, such as conceptual jurisprudence (e.g., Puchta) or the jurisprudence of interests (e.g., Jhering; Heck 1968) come quite close to the philosophical level of abstraction. And yet it is a juristic discipline, relatively stable and relatively resistant to the moods of philosophical fashion—albeit only *relatively* so. Thus, the success of analytical philosophy in the first half of the 20th century doubtless affected general legal doctrine. Even if doctrine never fully adjusted to analytical philosophy.

1.2.2. *Defeasible Norms of General Legal Doctrine*

Some norms that have developed in legal doctrine—source norms—determine the hierarchy and importance that various sources of law, such as statutes, precedents, and *travaux préparatoires*, have in the legal system.

Other norms of legal doctrine—reasoning norms—regulate legal reasoning; in particular, they indicate how one should construe statutes.

Reasoning norms and source norms come into existence by effect of the interplay between legal practice and legal doctrine, but legal doctrine formulates them in a more explicit manner. Thus we have, among other things, treaties and textbooks on legal method.

Reasoning norms and source norms are defeasible. Much of this volume deals with defeasible theories, defeasible norms (rules and principles), and defeasible beliefs. It is not only a rule's validity that makes the rule applicable to the case considered; what is equally important is that no defeating reason intervene which, if added to the rule, makes it inapplicable (see Section 5.1, *infra*, on defeasibility).

Reasons are often defeated by weighing. In a concrete situation, sufficiently strong reasons may outweigh each reasoning norm and each source norm. In other words, such norms have a *pro tanto* character. One may also say that these norms are outweighable.

In some earlier writings (e.g., Peczenik 1989), I characterized them as *prima facie* rules. But the term *pro tanto* is better (Rabinowicz 1998, 21; cf. Kagan 1989, 17; Peczenik 1998b, 57). In particular, the idea of weighing reasons seems natural for *pro tanto* reasons but inappropriate for *prima facie* reasons. Certain considerations may appear *prima facie*—at first sight—to be reasons for a decision or a judgment, only to prove irrelevant when one takes into account other aspects of the situation. A *prima facie* reason can be *undercut* by other aspects of the situation and then drop out of sight altogether. To put it differently, *prima facie* reasons are not a special kind of reason. They are ordinary reasons that come to bear in the light of what we presently know or take into consideration. If new knowledge intervenes that changes what we know, they may turn out not to be reasons at all. Not so with *pro tanto* rea-

sons. These reasons normally prevail but may be outweighed if the situation strays from normal. In other words, they can never be undercut but only outweighed in some cases by reasons to the contrary, if the latter are stronger. Since they can be outweighed, they are contributive, not decisive reasons.

Source norms and reasoning norms have an analytic dimension, too: They are bound up with the concept of legal reasoning. One may disregard any one of these norms singly, but it would be strange to simultaneously reject a significant part of the set comprising the same norms and still try to engage in legal reasoning.

One may inquire whether a source norm or a reasoning norm is justifiable. This question presupposes some normative standards other than the source norm itself. Such standards are thinkable in the realm of profound—ultimately moral—justification, as when it is said that some source norms are more just or more democratic than others.

One may also inquire to what extent such norms are dependent on the written and unwritten norms of the state's constitution. This relationship is quite complex.

- Obviously, the constitution can defeat norms formulated in legal doctrine; it can establish exceptions to such norms.
- On the other hand, the constitution is open to interpretation in view of these norms.
- Moreover, these norms are common to many legal orders, whereas a constitution is always linked to a particular state.
- The basis of legitimacy for these norms is, at least *prima facie*, independent from the constitution: Legitimacy is a matter of legal culture, not of enacted law.

1.3. The Sources of Law

1.3.1. Causal Factors, Legal Justification, and Sources of Law

There are several kinds of non-legal factors that influence legal decision-making causally; among these we have:

- the media;
- the views expressed by private organizations;
- the intentions of the government and other political agents, often expressed in a formal manner, especially when these intentions reflect influential political values;
- influential values in civil society, political ideologies, standards of political correctness, etc., expressed in the media, in political lobbying, etc.; and
- viewpoints formulated by international organizations, influential though lacking the formal authorization of international law.

Some of these factors may increase the legitimacy and authority of decisions. This is a complex problem, considering that legitimacy and authority are particularly complex concepts (cf. Biernat 1999). Documents affecting decision-making causally sometimes gain so much authority that decision-making courts or authorities may openly quote them. One may say, then, using a more or less established Scandinavian terminology, that causal factors convert into sources of law.

Sources of law are one kind of authority reasons. One proffers an authority reason when supporting a certain legislative, judicial, or other decision by circumstances other than its content.⁶ All texts, practices, etc., that a lawyer must, should, or may proffer as authority reasons are sources of law in the sense adopted in this volume.⁷

The list of sources of law changes over time. Thus, statutes and custom had a special position in the 19th century in the classical continental doctrine of the sources of law. They created legal rights and duties for private persons, and also determined the limits of legal argumentation (cf. Malt 1992, 55ff.). Classical doctrine recognized as well a number of secondary sources of law (argumentative auxiliary tools) such as “the nature of things,” legal practice, *travaux préparatoires*, and foreign law (ibid., 52). Scandinavian legal realists, notably Torstein Eckhoff (cf. Eckhoff 1993, 17ff.), replaced this doctrine with a more extensive list of “source factors” influencing legal decisions. Thus, Eckhoff listed administrative practice, among other things, and also accepted valuations as one such factor.⁸ In time, the realists presented a more sophisticated view, including in the list of sources of law only such factors as precedents and *travaux préparatoires* (cf. Schmidt 1957).

Enrico Pattaro in Volume 1 and Roger Shiner in Volume 3 of this Treatise provide an extensive analysis of the sources of law.

1.3.2. *Classification of the Sources of Law*

Legal doctrine often assumes that the sources of law are hierarchically ordered. Thus, the following can be said of Sweden, and indeed of many other states (Peczenik 1989, 319ff.; MacCormick and Summers 1991, 422ff.).

All courts and authorities must use applicable statutes and other regulations in the justification of their decisions.⁹ The expression “other regula-

⁶ The term “authority reason” has been introduced by Summers (1978, 707ff.). Cf. Peczenik 1989.

⁷ I do not discuss other senses of the term “source of law” (cf. Ross 1929, 291, and Raz 1979, 45ff.).

⁸ In an extreme form, this approach has led to an absurd “breakfast jurisprudence.” In the 1960s, Ivar Agge of Stockholm argued the sources of law to consist of all factors having a conscious or unconscious effect on legal decision-making. It may be asked, then, whether this list of factors might include a bad breakfast that should cause a judge to be grumpy.

⁹ The problem of the direct effect of EU law is left out of account here.

A Treatise of Legal Philosophy and General
Jurisprudence

Volume 1: The Law and The Right, Volume 2:
Foundations of Law, Volume 3: Legal Institutions and
the Sources of Law, Volume 4: Scientia Juris, Legal
Doctrine as Knowledge of Law and as a Source of Law,
Volume 5: Legal Reasoning, A Cognitive Approach to
the Law

Pattaro, E. - Editor-in-chief: Pattaro, E.

2005, XCVIII, 1958 p. In 5 volumes, not available
separately., Hardcover

ISBN: 978-1-4020-3387-2