Ratio and Voluntas

The Tension Between Reason and Will in Law

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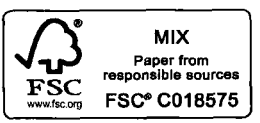

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Series Editor's Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focused on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

Tom Campbell
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Preface

Iustitia, the Roman goddess of Law and Justice, is armed not only with the sword but also with the balance. From the ancient beginnings of Western legal tradition, law has been conceived as traversed by a fundamental tension: power (will) and reason. The symbolism of representations of Iustitia seems as familiar and decipherable to us as to the ancient Romans. The law remains ineffectual without the sword; to make a difference, the law cannot be mere *ratio*. But not only does the balance as the law's *ratio* need the sword as its complement; power could neither achieve its objectives nor organise itself without assistance from the law.

The tension between these two poles, reason and will, or – to use the Latin expressions – *ratio* and *voluntas* – is the main topic of this study. Although I try to locate it in time and place, I do not follow its vicissitudes from the very origins of our legal tradition but focus on the historical type of law we are accustomed to calling modern law. In *Critical Legal Positivism* (Ashgate 2002), I presented my view of the distinctive features of the ideal-typical mature modern legal system; this study builds on that view. My starting point is that modern law is essentially positive law, based on conscious human action, such as decisions of the legislator and the judges. This fundamental positivity and the decisionist element it implies seem to entail the clear supremacy of *voluntas* in law. But to show the vital role that *ratio* also plays, I have drawn a very different picture of the law's positivity than has been usual in twentieth-century legal positivism, dominated by the two main figures of Hans Kelsen and H.L.A. Hart.

I draw a distinction between two aspects of law or – if you wish – two meanings of the concept of law. Law is at once a symbolic-normative phenomenon and a social phenomenon: it consists both of a normative order – a *legal order* – and of specific social practices – *legal practices*, such as lawmaking, adjudication and legal scholarship. These two aspects of law constantly interact. Legal practices are social practices whose function lies in producing and reproducing law in its other aspect, as a legal order. Legal practices also provide the ontological support for law as a symbolic-normative phenomenon: without their backing we could not speak of the existence of a legal order. On the other hand, legal practices need support from legal norms. This goes especially for such institutionalised practices as lawmaking and adjudication, which receive their legal character from legal norms of competence, organisation and procedure – secondary rules in the sense defined by Hart.

The contribution of legal practices, especially of lawmaking and adjudication, lends modern law its positive character. However, the decisions on which law relies are not decisions 'out of nothing' (*aus Nichts*) but based on certain

presuppositions. These presuppositions point to another crucial distinction in my conception of 'mature' modern law: a distinction between *levels of law* or – to be more exact – between levels of the legal order. I understand the law as a multi-layered normative phenomenon which, in addition to the *surface* of individual statutes, decisions and scholarly interventions, also includes 'sub-surface' *legal-cultural* elements, such as general legal concepts and principles, legal theories or doctrines, and patterns of argumentation. The legal-cultural layers stand in constitutive relation to events on the law's surface: they make up the normative, conceptual and methodological reservoir without which the legislator could not enact its laws, the judges issue their rulings, or the scholars write their articles and monographs. In legal practices, they mainly function in an unconscious, tacit way: they form an integral part of the hermeneutic *pre-understanding* through which legal actors approach their specific tasks. But the relationship between the law's surface and its legal-cultural infrastructure is of a recursive character: not only is the surface dependent on legal-cultural presuppositions but these, in turn, originate from individual contributions of the legislator, judges or legal scholars, to mention the main actors of modern law. The cultural, sub-surface elements of law result from a process of *sedimentation*, starting from what transpires on the surface. The relation of sedimentation also extends the law's positivity from its surface to its legal-cultural underpinnings, bringing the idea of modern law's multi-layered nature into harmony with its positivity.

It is precisely in relating modern law's positivity to its multi-layered nature that my critical positivism differs from Kelsen's and Hart's approach. Arguably, their hierarchical legal order is a surface-level phenomenon; they do not thematise its legal-cultural underpinnings. Kelsen, for example, was interested in the presuppositions of surface-level regulations merely as regards their conceptual infrastructure; the normative contents of the legal order were entirely dependent on the *voluntas* of the legislator. Emphasis on the law's sub-surface layers also makes it difficult to locate critical legal positivism within the distinctions related to the notions of *inclusive* and *exclusive positivism*, so very much in vogue in Anglo-American jurisprudential debates, especially in the 1990s: exponents of both inclusive and exclusive positivism seem to be interested mainly in the surface-level legal order. By contrast, in my view of 'mature' modern law, connections to morals and ethics are knit primarily on the law's sub-surface levels. According to my suggestion put forth in this study, modern law's *ratio* finds its main locus in the law's sub-surface, legal-cultural layers; *ratio* is sedimented or layered reason, which informs legal actors' pre-understanding and unfolds its influence primarily through this pre-understanding. And as legal practices, producing the material on the law's surface, depend on sub-surface presuppositions, so the *voluntas* of the law's decision-makers, the legislator and the judge, depends on this sedimented or layered reason.

This study also endeavours to locate the tension between *ratio* and *voluntas* in time and space; in fact, alterations in the law's *temporality* and *spatiality* constitute one of my central sub-themes. I focus on two ruptures: the one inaugurating the

modern period (Chapter 2) and the other warranting the talk of late modernity (Chapter 9). In its temporal aspect, the modern era is characterised, first, by a linear conception of time which leaves the horizon of the future open and malleable, and, second, by increasing social acceleration. In its spatial aspect, in turn, modernity is characterised by liberation from the bounds of locality and the conquest of new space, first in the shape of the nation state then, in our late modernity, in the processes of globalisation and virtualisation. Development of law is inextricably bound to development of cultural conceptions of time and space as well as to temporal and spatial characteristics of social structures. In addition, it is vital to relate the law's time and space to its two dimensions – the legal order and legal practices – as well as to the layers of the legal order. Thus, the law's surface level is constantly changing, whereas its putative deep structure or deep culture represents legal *longue durée*. In spatial respect, in turn, the legal-cultural layers of modern law have never been so exclusively tied to the nation state as has been the case with the surface-level legal order.

However, my objective to heed the time and space of the law's *ratio* and *voluntas* does not merely imply attention to the law's general temporal and spatial coordinates. This study alternates between legal-theoretical and legal-historical discussions. I make three forays into the history of legal thinking. These are intended to highlight the manner in which the law's *ratio*, in particular, has been conceived. All three forays are directed to periods of transition: the first to the seventeenth- and eighteenth-century debates between classical common-law authors and the early representatives of legal positivism, such as Thomas Hobbes and Jeremy Bentham (Chapter 2); the second to the ideas of the German historical school of the early nineteenth century and its subsequent conversion into *Begriffsjurisprudenz* (conceptual jurisprudence) (Chapter 3); and the third to the twentieth-century realist and analytical criticism of legal conceptualism (Chapter 4). These historical forays make it plain how differently the law's *ratio* has been understood in different historical and cultural settings. Thus, the traditionalist, communal notion of reason, still espoused by the classical common-law doctrine, has not been able to withstand the pressure of cultural modernisation. Nonetheless, as I also try to argue, this historical and legal-cultural variety should not obscure the continuity of tasks that fall to the law's *ratio*. I distil these tasks from the English seventeenth- and eighteenth-century debates: providing legal actors with their indispensable hermeneutic pre-understanding; maintaining a certain coherence in law; keeping open the channels between law and the moral and ethical spheres of society; and disciplining the free reign of the law's *voluntas*. My legal-theoretical interests dictate my perspective on legal history; I am not engaged in an independent study in the history of ideas, but endeavour through my legal-historical forays to shed light on certain still pertinent legal-theoretical issues.

In fact, throughout the study I maintain a dialogue between the legal-theoretical and the legal-historical approach. This methodological choice is based on my belief in the profoundly historical nature of the law's *ratio* and *voluntas*,

as well as their relationship. Within the modern period, I lay particular stress on two developments: the law's instrumentalisation, and the democratisation of lawmaking. The law's *instrumentalisation* in the service of the legislator's political aims already motivated the anti-conceptualist criticism which I discuss in my last historical foray (Chapter 4) and reached its zenith in the post-Second World War welfare state. Arguably, instrumentalisation augmented the weight of *voluntas* in law. But it also called for novel ways to control this *voluntas*, thus accounting for many twentieth-century developments within judicial and constitutional review (Chapters 7 and 8). At present, the law's instrumentalisation appears to have drifted into difficulties, mainly because of late modern temporal and spatial transformations, connected to globalisation (Chapter 9).

The impact of *democratisation* on the relationship between the law's *ratio* and *voluntas* has been ambivalent. On the one hand, democratisation has granted economically and socially depressed groups access to lawmaking, enabling them to promote their interests and remedy their particular problems by legislative means; this, of course, is a central backdrop to the legislative activism of the welfare state. But democratisation has not only further enhanced the law's instrumentalisation and strengthened the position of legislative *voluntas*; it has also at least potentially enriched the reason associated with this *voluntas*.

Voluntas should not be equated with irrationality or arationality. As Hobbes makes quite clear, the legislator is guided by a specific rationality: instrumental rationality, which conceives of the law as a means to achieve the legislator's political goals. What constitutes the problem with such a view of legislative *voluntas* is not a lack of rationality but rather its truncated nature. Hobbes' and Bentham's legislator acknowledges only one dimension in practical reason: namely, instrumental reason. Here, democracy alters the situation, at least potentially, by sensitising the lawmaking procedure to such discourses within civil society where even the ethical and moral aspects of legislative issues are addressed. In Kantian terms, democracy enables the legislative will to convert from a mere instrumentalist *Willkür* to a fully rational *Willen*.

Hence, it would be erroneous to link the perspective of *ratio* solely to legal scholarship and adjudication and see lawmaking as necessarily dominated by a *voluntas* which only attends to instrumentalist viewpoints. On the other hand, adjudication inevitably includes moments of fiat, as is shown particularly by analysis of hard cases that involve weighing and balancing principles and counter-principles; legal scholarship, too, is affected by the conscious or unconscious strategic motivations of schools and individuals, competing for academic and social recognition and influence. If it is mistaken to treat lawmaking as mere *voluntas*, it would also over-stretch the point to explore adjudication or academic legal scholarship exclusively in terms of a disinterested *ratio*. If the main focus of this study is on academic legal science, that does not imply a claim that legal scholars would be the only guardians of *ratio* in modern law. Rather, my choice of emphasis is based on the view that legal scholarship accomplishes vital tasks in modern law by articulating and elaborating the professional legal culture and in

forming the pre-understanding of legal actors. I have tried to capture the particular role of legal scholarship in the catchword of its *dual citizenship*: legal scholarship is a citizen of both the realm of science and the realm of law. Accordingly, many of its distinctive features as an academic discipline flow from its participation in the functioning of the legal system while, vice versa, many of its peculiarities as a legal practice derive from its other citizenship as an academic discipline.

Ratio and *voluntas* also constitute two possible perspectives on law. As regards academic disciplines, the perspective of *voluntas* appears typical of the way social sciences, such as sociology or political science, approach the law. However, the respective emphasis on *ratio* and *voluntas* varies within legal scholarship, too. Legal positivists define the law's unity through the hierarchical order of legal norms and the authorities issuing them. Hence, they tend to privilege the position of *voluntas*, whereas those striving for principle-based coherence – say, Dworkin and Habermas – adopt the standpoint of *ratio*.

This study endeavours to apply some of the basic lessons of the contemporary conceptual approach to intellectual history, with Quentin Skinner as perhaps its most prominent exponent. These include due attention to the argumentative context of interventions in various types of discourse: discursive interventions always relate to previous interventions which they dispute, with which they argue, on which they concur or elaborate, and so on. Throughout the study, my main interlocutor will be a collective person who will be graced with female form and termed the *Critic*. Her main real-life models exist in the shape of some Critical Legal Studies researchers, such as Martti Koskenniemi, my colleague at the Law Faculty of Helsinki University. The Critic tends to reduce legal discourse to strategically motivated interventions which aim at promoting particular extra-discursive interests. I try to demonstrate the one-sidedness of the Critic's conception of legal discourse by taking recourse to the speech act theory of J.L. Austin and John Searle. The Critic absolutises the perlocutionary dimension of legal speech acts, with its focus on their extra-discursive effects. She allows no independence to the illocutionary dimension of speech acts where their claims to formal and substantive validity are located and discussed. Yet the very notion of legal discourse seems to require an understanding of the importance of the illocutionary dimension: it is the continuous mutual assessment of their claims to normative validity that links individual speech acts together and constitutes in the first place something we can call legal discourse. In addition, the Critic, zealous to disclaim any normative involvement, ignores what can be termed the *imposed normativity of all legal scholarship*. The normativity of legal scholarship concerns not only such overtly normative interpretive or systematic standpoints that are a vital element in the standard legal science which on the Continent is called legal dogmatics. In addition, all legal scholarship, including the type driven by the Critic, is subject to another kind of normativity, flowing from its dependence on legal-cultural preconditions, on a legal pre-understanding. Here, too, a certain recursivity is at work: legal scholarship contributes to the reproduction of its very presuppositions.

As should be evident by now, my own approach stresses the role of *ratio* in law. Just as the law itself, this *ratio* displays two aspects: it is inherent in law both as a symbolic-normative phenomenon – as a legal order – and as legal practices. Thus, the law's *ratio* should be understood not only as the sedimented, legal-cultural foundations of the legal order but also in procedural and discursive terms: as distinctive features of legal practices and legal discourse that allow due space for all the aspects of practical reason, without one-sidedly privileging the instrumental dimension. Nonetheless, I do not deny the possibility or legitimacy of examining legal discourse in strategic terms; throughout the study, I refer both to the Critic's standpoint and to 'external' sociological analyses, such as Pierre Bourdieu's depiction of the legal field. But – and here my divergence from the Critic or my social-scientific colleagues is evident – just as we may bracket out the illocutionary aspect, we may also suspend the perlocutionary aims and consequences of legal speech acts and confine our discussion to the normative claims that speech acts make in the illocutionary dimension. Indeed, the main thrust of this study lies in the latter dimension: my aim is not merely to reconstruct or describe particular features of modern law and legal discourse. I employ the means of the conceptual approach to intellectual history (see esp. Chapter 4), but unlike an intellectual historian *à la* Skinner, I do not usually content myself with locating the interventions in their argumentative context and identifying their claim to normative correctness. I also take an overt normative stand on these claims; on, for example, the merits of anti-conceptualist criticism (Chapter 4). My normative standpoints are premised on the continuing pertinence of such tasks of the *ratio* as maintaining the law's coherence and disciplining the instrumentalism of *voluntas*. This is also the backdrop to the Epilogue (Chapter 9) which addresses the globalisation or de-nationalisation of law.

I understand this study as a contribution to the legal theory of modern law and, as such, thus transcending the boundaries of particular legal cultures. But my own roots lie in the Continental, Romano-Germanic culture. This, of course, impregnates the pre-understanding with which I have tackled the issues I have chosen to discuss. I have included comparative and historical material to show the general purport of the issues – all in one way or the other connected to the many-faceted tensions between the law's *ratio* and *voluntas* – but, by the same token, also their culturally and historically varying guises. But it is apparent that my discussion of common-law culture is coloured by own legal-cultural prejudices ('prejudices' in Gadamer's sense). By far the most intricate chapter of this study for me has been Chapter 2, where I discuss common law and its inherent *ratio* as portrayed by the classical common-law authors of seventeenth- and eighteenth-century England. When drafting and re-drafting the text, I had to radically revise my preliminary view – a culturally dependent pre-understanding. The starting-point was to depict classical common-law ideology as epitomising a traditionalist, pre-modern view of law and, thus, to obtain a contrast, firstly, to the reflexive legal culture of a mature modern legal system and, secondly, to academic

legal scholarship as the main articulator of that culture. But the more I tried to comprehend the specific common-law rationality, the more simplistic my initial conception, with its clear-cut distinctions, began to look. In Chapter 2, I still resort to the contrast between pre-modern and modern, but more in an ideal-typical way, thus – so I hope – avoiding at least the most obvious of the dichotomous pitfalls. It would, however, be a miracle, if the exposition of common-law thinking in Chapter 2 or the rule of doctrine in Chapter 8 were not affected by my legal-cultural subconscious. The same qualification goes for my discussion of American legal conceptualism (Chapter 3) and its realist criticism (Chapter 4).

In present-day debates of a putative convergence between Romano-Germanic and common-law legal cultures, I find myself in the camp of the sceptics. Despite evident deep-structural similarities, significant differences remain, say, in the doctrine of legal sources and in the respective position of legislator, courts and scholars as the main legal actors. In addition, since the latter part of the nineteenth century the US and English legal systems have in important respects followed different routes. For instance, as regards the role of academic legal scholarship, the United States stands closer to Continental Europe than the former mother country. Still, in the United States, too, the common-law heritage is clearly detectable in, for example, the elevated status of the courts.

Legal language is a pivotal element of legal culture; indeed, legal-cultural differences may even cause linguistic misunderstandings. Continental authors already come up against difficulties when trying to find proper terms for scholarly activities. In this study, I use '*legal scholarship*' as a synonym for '*legal science*'. However, at the same time I am conscious of the particular – and in respect of my own linguistic use, misleading – connotations of 'science'. In the Anglo-Saxon world, 'science' easily brings to mind the natural sciences, as opposed to the humanities, with their distinct understanding of scientific research. Furthermore, in the United States 'legal science' is often related to Christopher Columbus Langdell's late nineteenth-century endeavour to 'scientify' the law. I hope the reader keeps in mind the 'neutral' sense which I attach to 'legal science'.

In addition to 'legal scholarship' (or 'legal science'), I employ the term '*normative legal scholarship*', which may further confuse the reader. By this expression I refer to legal scholarship which presents overt normative standpoints, on, say, interpretation of statutes or precedents, the systematisation of law, or the significance and use of legal concepts and principles. The term covers both what on the Continent is called *legal dogmatics* and (normative) *legal theory*. 'Legal dogmatics' itself is a continuous headache for Continental scholars trying to express themselves in English; neither English nor American legal culture recognises the term. According to the standard definition, 'legal dogmatics' refers to scholarly activity focusing on interpreting and systematising legal norms (norm statements). I have chosen to use the term '*doctrinal research*' for such academic activities. In turn, the term '*doctrine(s)*' refers to the end product of doctrinal research, especially its systematising endeavours. Thus, the '*Allgemeine Lehren*' of distinct departments of law that play a pivotal role in Continental legal culture(s)

will be called 'general doctrines'. However, I am aware of the polyvalence of 'doctrine' in the legal language of common-law cultures and the courts' central task in articulating and developing the normative whole called doctrine. Here, problems in translation noticeably reflect important differences in the respective status of the key legal actors of modern law.

Emphasis on the intractable culture-dependence of legal theory implies a response to the ever-recurring accusation of *ethnocentrism*: yes, my discussion of modern law is ethnocentric in the sense that my legal pre-understanding is permeated by the 'prejudices' (again, the term taken in its Gadamerian sense) of my own Continental European legal culture. But I also do believe that legal cultures, and not only those falling under the label of 'Western legal tradition', include sufficiently common elements to make cross-boundary discussion both possible and worthwhile. I try to be cautious against simplistic *evolutionary-theoretical assumptions* which such expressions as '*modern law*' and '*legal modernisation*' may evoke and which, in critical interventions, are often seen to go together with ethnocentrism. Still, I believe that it makes sense to anchor legal-theoretical discussions in a Weberian ideal type of 'mature' modern law which existing legal systems match to a greater or lesser extent. And I also believe that it makes sense to speak of legal modernisation as a process where the legal system acquires features related to this ideal type. But I do not conceive of legal modernisation as a uniform process which always and everywhere traverses the same successive stages and assumes identical guises.

This study is divided into three parts, preceded by a Prologue and succeeded by an Epilogue. The Prologue aims to situate and defend normative legal scholarship by responding to two challenges to its legitimacy and very possibility as an academic, scientific enterprise. The first challenger comes from social sciences: the claim is that normative legal scholarship is indelibly tainted by ideology and, because of its normative and discursive closure, cannot rise to the level of science; and that legal scholars make the fatal mistake of not acknowledging that norms really are facts. In my counterargument, I examine legal scholarship's dual citizenship and its participation not only in scientific but also in legal discourse; the divergent roles that norms and facts play in legal and social science; and the different nature and function of legal and social theories. Here, my discussion relates to the internal/external distinction which legal theorists – at least ever since publication of Hart's *The Concept of Law* – have invoked as both an account and a vindication of the specific legal standpoint. The other challenger with whom I dispute in Chapter 1 is not an outsider but an insider: a legal scholar but one who attempts to expel normative legal scholarship from the realm of academic research. My counterargument employs the concepts of speech act theory: I criticise the Critic for reductionism, for examining legal speech acts in a one-sided manner merely from the perspective of their perlocutionary, extra-legal effects and for ignoring the illocutionary dimension where claims of normative validity are raised and appraised. The Critic is also blind to the 'imposed normativity' which

is inescapable because the Critic's research, too, necessarily depends on available legal-cultural resources and participates in reproduction of the prevailing legal culture.

Part I focuses on three instructive phases in the history of the law's *ratio*. Chapter 2 sketches the basic temporal and spatial parameters of modern law that frame the highly volatile tension between *ratio* and *voluntas*: modern law, at least on its surface, is constantly changeable law with the nation state as its privileged space. I introduce the discussion of legal modernisation by distinguishing between two concepts of *tradition*: a *philosophical* or *hermeneutical* concept, referring to the inevitable cultural situatedness of all human cognition and interpretation, and a *historical-sociological* concept, referring to particular arrangement of social beliefs and practices. The central argument is that in the course of legal modernisation, the law moves from the pole of a tradition (in the historical-sociological sense), firmly attached to time (the past) and place (the locale), towards the pole of an expert system, increasingly detached from temporal or spatial bounds. This implies significant alterations in the nature of the legal culture that provides legal actors with their pre-understanding. If tradition in the historical-sociological sense functioned in pre-modern, largely customary law also as a tradition in the philosophical-hermeneutical sense, then modern legal culture has opened up to reflexive assessment and elaboration, and reserved for legal scholarship a prominent role in legal-cultural change. However, my brief foray into the history of English common law should serve as a caution against hasty and sweeping – evolutionary! – generalisations.

In Chapter 2, I resort to English seventeenth- and eighteenth-century debates between common-law authors and the early legal positivists Hobbes and Bentham. The aim is not only to portray 'semi-traditional' classical common-law ideology as a contrast to my ideal-typical mature modern law, but also to distil the tasks of *ratio* which have not lost their importance in (further) cultural and societal modernisation. These tasks, such as maintaining the law's coherence and tempering the instrumentalism of its *voluntas*, structure many of the discussions in subsequent chapters.

Chapter 3 moves the focus from seventeenth- and eighteenth-century England to nineteenth-century Germany, where the law's modernisation was taking decisive steps. According to my judgement, the historical school of the first half of the century deserves merit for perceiving the particular role of legal scholarship in the development of law and for recognising its peculiar dual citizenship as both a scientific and a legal practice. I also claim that the historical school already gave expression to many of the tensions that have subsequently permeated modern law and its self-understanding and that are all in one way or another related to the precarious relationship between *ratio* and *voluntas*. These include the tension between modern law's positivity and its 'supra-positive' preconditions; the tension between the law's autonomy and its ineffaceable societal and cultural moorings; and the tension between the law's positivity and systematicity.

Chapter 4 brings us already to the threshold of our own time. The focus is on the realist and analytical criticism of German-oriented *Begriffsjurisprudenz* and its American conceptualist counterpart. This criticism, in line with its object, was an international phenomenon, although in its concrete manifestations, of course, depended on particular legal-cultural contexts. Against the backdrop of an examination of the methodological premises adopted in conceptual history, I make a foray to four critical debates: the German criticism from the positions of *Interessenjurisprudenz* and *Freirechtslehre*, already initiated by Rudolph von Jhering in the second half of the nineteenth century; American Legal Realism with its Golden Age in the 1920s and 1930s: the partly contemporaneous but largely independent Scandinavian Realism, whose dominance lasted well into the 1960s, if not even longer; and, finally, Finnish post-Second World War analytical scholarship. But even in Chapter 4, my main interest does not lie in the history of ideas as such. Rather, by assessing the merits of anti-conceptualist criticism I attempt to summarise lessons which would be of relevance for present-day and future post-realist and post-analytical legal scholarship. I dispute the relevance of formal-logical criticism of the conceptualists' constructive method. As regards the first, so-called inductive phase, I recall the significance for the historical school of the method of *Anschauung*; a method of grasping organic interdependencies which cannot be compressed into the logically-tuned categories of present-day philosophy of science. The historical school's notion of the law's organicity emphasised two features of law which their analytical critics in their formalism and universalism tend often enough to ignore: the law's substantive coherence, and its historicity. Slightly paradoxically, in logically-oriented criticism, legal conceptualism has been blamed not only for unwarranted inductivism but also for conceptual apriorism or Platonism, to resort to one of the critics' favourite denigrating expressions. And it is true that both the historical school and the subsequent *Begriffsjurisprudenz* construed their positivism on a supra-positive foundation. But here, too, the conceptualist argument displays a sound core: it draws attention to the legal-cultural presuppositions of the singular events on the law's surface: the legislator's laws, judges' rulings, and scholars' monographs and articles. The second, deductive phase of the conceptualists' constructive method can also be stripped of its quasi-logical attire and understood in terms of analogical and principle-based reasoning. But the requirement, raised especially by American Legal Realists, of tearing down the quasi-logical façade and of engaging in overt morals- or policy-based argumentation retains its strength even after such 'sympathetic' re-reading of the conceptualists' methodological premises. But, under my final counterargument directed both at empiricist re-definitions of basic legal concepts and at suggestions to integrate legal scholarship into social sciences, law remains a particular normative enterprise. Instead of attempting to reduce legal normativity to social facticity, we should explore law and society in their interdependency and, thus, (re-)connect with the tradition instigated by Savigny with his notion of *legal institutions*. The law possesses autonomy but this is merely of a relative, not an absolute character.

In our post-analytical and post-realist age, many analytical or realist insights have been sedimented into central elements of our legal pre-understanding. But, as I have tried to show with the discussions in Chapter 4, this should not obscure the still relevant aspects of the programme for legal scholarship of the historical school, such as striving for coherence and systematisation while simultaneously being sensitive to historical change. Part II focuses on the way legal scholarship, especially doctrinal research (legal dogmatics), can and should contribute to the law's coherence. Chapter 5 discusses the law's systematisation through its division into distinct fields: contract law, the law of torts, criminal law, administrative law, and so on. I argue that aspiration for *total coherence*, covering the legal order as a whole, has lost its pertinence, but that *local coherence* within diverse fields of law is still a relevant objective, as is shown by debates on such putative new fields as, say, information or communications law, medical law or environmental law. The traditional divisions, dating from the nineteenth century, have been disputed in the course of the law's increasing instrumentalisation and its resulting bifurcation, which has found its manifestation in such distinctions as F.A. Hayek's rule of just conduct and rules of organisation, or Jürgen Habermas' law as an institution and law as a medium. However, it would be overhasty to declare nineteenth-century systematisation wholly moribund; rather, it has been complemented by new divisions, following different criteria and cutting across traditional lines. In Chapter 5, I also present my argument for the continuing importance and achievability of the normative aim of coherence.

Arguably, the main instrument for achieving coherence in law consists in legal doctrine, in what Continental Europe calls general doctrines (*allgemeine Lehren*) of distinct fields of law. Particularly in Romano-Germanic legal cultures, the main responsibility for their articulation and elaboration falls to legal scholarship. Chapter 6 analyses general doctrines in terms of legal concepts, principles and theories.

Constitutional law holds a key position in managing the tension between law's *voluntas* and *ratio*. On the one hand, through its provisions on lawmaking, a constitution establishes the law's positivity and provides the political legislator's *voluntas* access to the law. But on the other hand, particularly through its provisions on basic rights and constitutional review, a constitution also imposes restrictions on this same *voluntas*. The law's *voluntas* is formed in the political system, while a constitution fulfils a peculiar intermediary function at the interface between the legal and political systems. Part III is devoted to discussing this function from the perspective of the former. Chapter 7 examines the common-law notion of the rule of law and the Continental notion of the *Rechtsstaat* as two legal-cultural ways of handling the tension between law's *voluntas* and *ratio*. My conclusion is that what I call the English *Sonderweg* with its emphasis on parliamentary supremacy and its rejection of constitutional review seems to be approaching its end. I also claim that in a mature modern legal system the law's *ratio* primarily exerts its tempering influence on the law's *voluntas* in everyday legal practices through the legal-cultural pre-understanding of legal actors, in, say, principle-based interpretation

of policy-based statutes. Institutional constitutional review constitutes merely the last resort in monitoring the law's legitimate limits.

In Chapter 8, I present my last-resort argument for constitutional review in a more detailed way and by discussing the 'core case' against such review, boiling down to claims of its anti-democratic nature – what Alexander Bickel famously called the *counter-majoritarian difficulty* – and its tendency to juridify political issues. The critical observations do not annihilate the last-resort defence; instead, they serve as warning signs against a review exceeding its justifiable reach. I renounce the simplistic conception which reduces legislation to *voluntas* associated with instrumental reason and emphasise the potential of the democratic lawmaking procedure to embody a wider notion of practical reason and to include deliberations on the ethical and moral dimensions of legislative issues. Nonetheless, because the legislator's privileged perspective is – entirely legitimately! – instrumental, sidestepping or at least underrating basic-rights aspects cannot be excluded. The ongoing debates about constitutional review tend to assume the dichotomy of judicial or legislative supremacy and to reduce the alternatives in judicial review to the US-type diffused model and the German-type concentrated model. In Chapter 8, I argue that in fact the so-called hybrid forms, such as those included the *New Commonwealth Model of Constitutionalism* or – for that matter – the Finnish system, are best suited to avoiding those problematic consequences of constitutional review to which critical commentators have drawn our attention.

In Chapter 9, which constitutes the Epilogue to this study, I turn to those ongoing transformations in the law's temporal and spatial characteristics which have engendered discussion of law's de-nationalisation, even globalisation. I am especially interested in the implications these transformations might have with regard to the tension between the law's *ratio* and *voluntas*. I agree with critics of the traditional black-box model of international and municipal law and contend that it is impotent to serve as a framework for exploring such instances of a new type of transnational law as, for instance, EU law. But I also caution against a new version of black-box thinking where autopoietically functioning, mutually closed global social systems are all engendering their own 'law beyond the state'. I stress that our present legal experience should rather be depicted in terms of *interlegality*: overlapping and continuous discursive contacts between various legal orders and legal systems. We see a tendency of legal fragmentation but we should also be sensitive to the counter-tendencies of legal integration which lie behind Klaus Günther's tentative concept of the *universal code of legality*. As a result of the phenomena attesting to mounting legal pluralism, the nation-state legislator has lost its monopoly on the law's *voluntas* and, by the same token, new forms are called for, transcending nation-state boundaries, for achieving the tasks of the *ratio*. In addition to the coherence-creating processes to which Günther has alluded with his 'universal code of legality', we can point to tendencies of constitutionalisation, including a rights-dimension, which are detectable within at least some transnational legal systems. But the big issue remains: how to replace

the normative and institutional arrangements of the democratic *Rechtsstaat* whose locus lies in the nation state and which the law's de-nationalisation has bereaved of much of their efficacy?

This study is a thoroughly revised version of one that I published in Finnish in 2007 (*Oikeuden ratio ja voluntas*, WSOYpro, Helsinki). I have detached the discussions from their Finnish contexts, although Finnish material is still used in illustrating the issues and, in some connections, in suggesting normative solutions with a wider pertinence. The manuscript to the Finnish edition was reviewed by many colleagues to whom I again address my collective thanks. In addition, I have received invaluable comments on the changes and additions I have made for the English edition. Here I want to mention especially Sabine Frerichs, Juha Lavapuro, Toni Malminen, Kimmo Nuotio, Tuomas Ojanen and Heikki Pihlajamäki. Most of them are members of the Centre of Excellence in European Law and Polity, with its main seat at the University of Helsinki, and their constructive criticism is a concrete sign of the benefits of such a research organisation. The Centre has enabled me to concentrate on scholarly work in the academic year 2008–2009. Hopefully, this study may also be of assistance in specifying the framework for approaching the particularities of European law, thus contributing to execution of the Centre's research plan.