A Theory of Precedent

From Analytical Positivism to a Post-Analytical Philosophy of Law

Raimo Siltala

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by
RAIMO SILTALA

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". . . the unlimited right to ask any question, to suspect all dogmatism, to analyze every presupposition, even those of the ethics or the politics of responsibility."

Jacques Derrida, *On the Name*, 28.

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Raimo Siltala
Helsinki, January 2000

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Abbreviated Contents

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Part A

How to Do Things with Precedents

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Frame of Analysis

1. WRÓBLEWSKI ON THE THREE IDEOLOGIES OF JUDICIAL DECISION-MAKING

Jerzy Wróblewski has distinguished three distinct ideologies of judicial adjudication: the ideology of *bound* judicial decision-making; the ideology of *free* judicial decision-making; and the ideology of *legal and rational* judicial decision-making.[1] By means of the typology he is then able to classify the great schools of legal thought under three main headings.

1.1 Ideology of bound judicial decision-making

The ideology of bound judicial decision-making is the outcome of *political liberalism*, which aims at safeguarding the rights of an individual citizen against the state and other citizens, and *legal positivism*, as exemplified by, e.g., the English school of analytical jurisprudence and John Austin, the German School of *Begriffsjurisprudenz*, and the French *école exégètique*.[2] The formal values of liberty, legal certainty, legal security, and stability and consistency in law application are regarded as the highest values to be protected by the state under the valid rules of law.[3] Under such premises, law is conceived of as a closed, consistent and complete system of general and abstract norms of statutory origin, as enacted by Parliament. Statutory norms and formally valid enactments of a lower hierarchical status are, moreover, the only formally acknowledged source of law. As Wróblewski wrote:[4]

> "The ideology of bound judicial decision-making has a very simple doctrine of the 'sources' of law and it can be summarised briefly: the unique primary source of law is a statute in the formal sense of this term; decisions have to be based on statutory rules."

The law-creating role of the judge is held at bay by reference to Baron de Montesquieu's well-known *dictum*, to the effect that "judges are only the mouth which proclaims the formulation of law".[5]

[1] J. Wróblewski, *The Judicial Application of Law* (Kluwer, 1992), 270, 273–314. On Wróblewski's notion of reconstruction, see ibid., 266–7.

[2] On the ideology of bound judicial decision-making, see ibid., 273–83.

[3] Ibid., 278, 280.

[4] Ibid., 291. Cf. H. Kelsen, *Pure Theory of Law* (Peter Smith, 1989), 233: "According to a positivistic theory of law, the source of law can only be law".

[5] Wróblewski, above at n. 1, 274, 276. Cf. Baron de Montesquieu, *L'esprit des lois*, 404 (Book XI, ch. 6): "*Mais les juges de la nation ne sont, comme nous avont dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur*".

Today such extreme formalism in judicial decision-making is often taken as a textbook example of legal fiction, although there are still some remnants of it in the French system of adjudication.[6] A somewhat more realistic interpretation of the ideology of bound judicial decision-making would admit of a judge's limited discretionary powers, as either deliberately delegated to the courts by Parliament or as brought into effect in the mutual interaction of rapid social change and the flexible legal standards laid down by the legislator. Thus, Hans Kelsen argued that the application of a statutory or any other legal norm by necessity requires some discretion on part of the judge.[7] Hart, in turn, pointed out that, because of the open-textured character of linguistic concepts and legal rules, judges need to exercise some overtly rule-creating discretion on the "grey", penumbral areas of a legal rule's semantic coverage.[8]

In Wróblewski's classification, however, neither Kelsen nor Hart would count as true representatives of the ideology of bound judicial decision-making, because of the said discretionary powers granted to judges. But neither do they easily qualify as representatives of the third category, the ideology of legal and rational judicial decision-making. The Polish author himself admits that the three-fold classification of the ideologies of judicial decision-making is not clear-cut at the boundaries, due to its status as a set of reconstructions of judicial decision-making.[9] In actual jurisdiction, a full-scale enforcement of the ideology of bound judicial decision-making would, of course, be extremely rigid and blind in the face of social injustice. The belief in the formal completeness of law at the point of its inception and the denial of the interpretive powers of the judiciary might also require some intellectual self-sacrifice on the part of judges and other legal professionals alike.

1.2 Ideology of free judicial decision-making

Wróblewski's ideology of free judicial decision-making is an expression of the revolt against legal formalism, as inspired by the shortcomings of legal positivism of the nineteenth century. The ideology of free judicial decision-making comprises various intellectual movements such as François Gény's *libre recherche scientifique* in France, the *Freirechtslehre* or *Freirechtsbewegung* (i.e. Free Law Movement) in Germany, sociological jurisprudence and the realist movement in the United States, and the *Führerstaat* ideology of Nazi Germany in the 1930s.[10]

[6] See M. Troper, C. Grzegorczyk and J. Gardies, "Statutory Interpretation in France", in D.N. MacCormick and R.S. Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth, 1991), 203–4, 211. Cf. M. Troper and C. Grzegorczyk, "Precedent in France", in MacCormick and Summers, ibid., 107, where it is said that the judges are supposed to exercise, not "judicial power", but only a "jucidial function".

[7] Kelsen, above at n. 4, 233–6.

[8] H.L.A. Hart, *The Concept of Law* (Clarendon Press, Oxford, 1961), 124–8, 200.

[9] Wróblewski, above at n. 1, 267.

[10] On the ideology of free judicial decision-making, see Wróblewski, ibid., 284–304, and on its general description and theoretical justification, see ibid., 284–94.

Moreover, it may be taken to refer to any judicial ideology in which the role of the judge is emphasised, and the role of the legislator is belittled, in the creation of valid legal norms. As adherents of the ideology of free judicial decision-making Wróblewski mentions Gény, Ehrlich, Kantorowicz, Heck, Schmitt, and Bülow, among others.

The ideology of bound judicial decision-making was said to be connected with the ideas of political liberalism. No parallel, uniform background rationale can be pointed out for the ideology of free judicial decision-making, with the one exception of national socialism and the ideas put forth by the legal scholars of the *Third Reich*.[11] Rather, what is common to all the various traits of free judicial decision-making is their critical attitude towards the formalist premises of legal positivism and the ideology of bound judicial decision-making. The profound changes which have taken place in the legislative techniques in the twentieth century may have, in part, contributed to the birth of such judicial anti-formalism. An increased use of general clauses in legislation has denoted a more or less open delegation of norm-creating power from the legislator to the courts of justice,[12] and the general belief in the formal values of legal positivism may also have waned among citizens. Instead of the formal characteristics of law, the ideology of free judicial decision-making underscores the dynamic character of jurisdiction, its responsiveness to the problems of the real world "out there".

Apart from statutory rules, Wróblewski enumerates the following value-laden sources of law which are acknowledged by the ideology of free judicial decision-making: legal practice, social rules, social facts and social regularities, evaluations of facts connected with law, evaluation of other facts, sources of evaluations, and evaluations in general.[13] Wróblewski also comments briefly on the American doctrine of the "hunch", or an irrational, emotion-based evaluation of the concrete facts at hand and the judge's intuitive legal response to it;[14] but his main emphasis is on the European free law doctrine. Despite his rather severe criticism, Wróblewski still deems the ideology of free judicial decision-making to be better grounded than the bound alternative.[15]

1.3 Ideology of legal and rational judicial decision-making

The third alternative, the ideology of legal and rational judicial decision-making, is given a somewhat laconic treatment by the Polish legal philosopher, even though it is the one he himself opts for.[16] Wróblewski defines this

[11] Ibid., 297.

[12] On a critical account of the impact of such general clauses, see J.D. Hedemann, *Die Flucht in die Generalklauseln: Eine Gefahr für Recht und Staat* (JCB Mohr, Tübingen, 1993).

[13] Wróblewski, above at n. 1, 292–3.

[14] Ibid., 290.

[15] Ibid., 300–1.

[16] Ibid., 305–14. At 311–13, some attention is given to socialist legal systems as examples of the ideology of legal and rational judicial decision-making. Subsequent changes in society though, have turned such considerations to address issues of legal history.

alternative, as the terminology reveals, with reference to the two formal values of legality and rationality in judidial adjudication. Legality denotes conformity with the requirements of the law in force, while rationality concerns the internal and external premises of legal justification.[17] By means of the outward justification of a judicial decision, i.e. by reference to the epistemic and axiological premises of adjudication, the legality of a judicial decision can be displayed in open terms.

The ideology of legal and rational judicial decision-making is said critically to analyse—or, rather, critically to deviate from—the two other ideological alternatives, thus being situated in the middle ground between bound and free ideologies of legal adjudication. Such a judicial ideology avoids both the *ultrarationalistic fallacy* of strictly bound judicial decision-making and the *irrationalistic fallacy* of entirely free judicial decision-making.[18] It is less constrained *vis-à-vis* prevalent legal source material than the model of formally bound law application, since it leaves room for the use of judicial evaluations as "a necessary element of judicial heuresis and justification".[19] However, in contrast to the model of entirely free law application, legal and rational judicial decision-making does not approve of the conception of judge-made law, i.e. the creation of general and abstract legal rules by the courts. Finally, Wróblewski points out that no ideology of judicial decision-making is able to draw the conceptual boundaries of legality in judicial law application, as that task is left for legal doctrine to fulfil.[20] One might perhaps say that no rule or meta-rule can determine its own terms of application in an exhaustive manner.[21]

2. ROSS ON A JUDGE'S NORMATIVE IDEOLOGY

In his empiricism-inspired[22] book, *Om ret og retfærdighed* (*On Law and Justice*), the Danish legal philosopher, Alf Ross, argued for the adoption of a moderate prediction theory in legal science, to the effect that an insight into the

[17] Wróblewski, above at n. 1, 307–311; Wróblewski, "Informatics and Ideology of Judicial Decision-Making", in *Informatica e diritto* (1984), 119–20.

[18] Wróblewski, above at n. 1, 306.

[19] Ibid., 310.

[20] Ibid.

[21] Cf. L. Wittgenstein, *Philosophische Untersuchungen—Philosophical Investigations* (Basil Blackwell, Oxford, 1967), § 85 (pp. 39–40/39^{e}–40^{e}); Hart, above at n. 8, 123.

[22] "The leading idea of this work is to carry, in the field of law, the empirical principles [of science] to their ultimate conclusions": A. Ross, *On Law and Justice* (University of California Press, 1958), IX. Yet, as Markku Helin has convincingly argued, there are some specifically hermeneutics-laden elements at the very core of Ross' conception of law. The idea of using legal norms as a "*tydningsskema*", i.e. a scheme of interpretation, in qualifying a set of social phenomena as legally relevant, plus the adoption of a judge's normative source ideology in predicting the future outcomes of judicial adjudication, self-evidently cannot be reduced to the basic postulates of logical empiricism, strictly defined. The idea of understanding valid legal norms as *tydningsskema* is no doubt derived from Hans Kelsen. See M. Helin, *Lainoppi ja metafysiikka* (Suomalaisen lakimiesyhdistyksen julkaisuja, Helsinki, 1988), 162–3 ff.