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European New Legal Realism and International Law: How to Make International Law Intelligible

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Abstract

International law remains in many ways a challenge to legal science. As in domestic law, the available options appear to be exhausted by either internal doctrinal approaches, or external approaches applying more general empirical methods from the social sciences. This article claims that, while these major positions obviously provide interesting insights, none of them manage to make international law intelligible in a broader sense. Instead, it argues for a European New Legal Realist approach to international law accommodating the so-called external and internal dimensions of law in a single more complex analysis which takes legal validity seriously but as a genuinely empirical object of study. This article constructs this position by identifying a distinctively European realist path which takes as its primary inspirations Weberian sociology of law and Alf Ross' Scandinavian Legal Realism and combines them with insights originating from Bourdieusian sociology of law.

Key words

Alf Ross; international law; legal realism; Max Weber; Pierre Bourdieu

Das 'empirische' Gelten kommt ja dem 'juristischen Irrtum' eventuell in genau dem gleichen Maße zu wie der 'juristischen Wahrheit'.[1]

Max Weber

Une science rigoureuse du droit se distingue de ce que l'on appelle d'ordinaire la 'science juridique' en ce qu'elle prend cette dernière pour objet.[2]

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1 Translation: '"Empirical" validity can be ascribed to both "juristic truth" and "juristic error" in exactly the same degree.'

2 Translation: 'A rigorous science of the law is distinguished from what is normally called jurisprudence in that the former takes the latter as its object of study.'

1. INTRODUCTION

International law (IL) remains in many ways a challenge to legal science. While many legal scholars long wrote IL off as simply too political, others eventually found ways – via formalist legal theory – of constructing it as either residual to national law or, in the other extreme, as a foundational norm of national law. International legal positivism, be it dualism or monism, has, however, suffered from all the deficits of legal positivism at the national level. More recently, scholarship in the vein of Critical Legal Studies (CLS) has examined the underlying politics of IL by launching a critique of doctrinal law and, particularly, its liberal assumptions. Both positions have, however, some clear limitations. On the one hand, legal formalism (and its variants) is forced to assume an autonomy of IL which is far from always empirically evident. CLS, on the other hand, have suffered from a sort of externalist reductivism, which tends to reduce law to a mere tool of domination. In a nutshell, one camp takes legal form too seriously and misses how legal argumentation ultimately gain its power because of overarching societal structures; the other loses sight of how IL produces something specific – particularly legal form(s) and discourse – which cannot be revealed by functionalist analysis of law as ideology.

Our claim is that while these major positions obviously provide interesting insights, none of them manages to make IL (or national law for that matter) intelligible in a broader sense. Instead, we argue for an approach to IL which accommodates the so-called external and internal dimensions of law in a single, more complex analysis. The way we construct our position within New Legal Realism (NLR) is, however, not via the well-trodden path of American Legal Realism (ALR), but rather by identifying a different, distinctively European, path. Our approach takes as its primary inspirations Weber's sociology of law and Alf Ross' Scandinavian Legal Realism and combines them with insights originating from Bourdieu's sociology of law. While these prominent authors are typically viewed as belonging to very different intellectual traditions, we demonstrate how there is in fact a distinct intellectual trajectory from Weber over Ross to Bourdieu and European New Legal Realism (ENLR) with regard to developing a rigorous legal science. This approach shares some of its roots with ALR, notably via the influence of Ehrlich, and the overall empirical research interest, yet it articulates a different position particularly with regard to the crucial epistemological question of what is legal science. This approach – ENLR – is however not simply an exegesis of the possibilities of knowledge on law, but rather an operational program for better explaining IL and its institutions.

The article proceeds in the following way. Section 2 is concerned with the underlying question of European legal realism as a viable approach to legal science. We draw on the unique insights offered by a combination of Weberian interpretive sociology of law and Scandinavian realism as propounded particularly by Alf Ross. We draw out their strikingly common concept of legal validity as a genuinely empirical object of study and how it makes for a difference from ALR. Against this background, in section 3, we then link these precursors of European legal realism to the programme for a rigorous science of law laid out by Pierre Bourdieu with a view to the particular challenges of studying IL. We argue that to make IL

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Intelligible as an object of legal realist inquiry, one needs to devise an approach, which simultaneously takes seriously both the production of IL and those precise – yet changing – social conditions making that production possible. Finally, in section 4, we demonstrate the practical applicability of this approach by discussing empirical studies, which have sought comparable ends.

2. Avoiding 'the fatal plunge into the 'world of values' – Weber, Ross, and taking epistemology seriously

While both American New Legal Realism (ANLR) and ENLR seek an empirical approach to law, ENLR stands out with regard to the philosophical premises on which its empirical approach rests. Although these premises may at first glance appear to be only of academic importance, we believe that they have profound implications for the theory and practice of NLR as a scientific approach. More specifically, ENLR differs from ANLR in that it takes far more seriously a line of philosophical questions, which have been at the centre of European thought since at least the days of Descartes and Kant. These questions are essentially epistemological, having to do with *the possibility of knowledge* – or, in our case, with *the possibility of (legal) science*. The intellectual background to ENLR is therefore not an attempt to provide a more pragmatic and action-orientated scholarly discipline as in ALR and ANLR, but the specific question: how is a science *of (international) law* possible? And, against that background, how can we make IL intelligible in scientific terms?

2.1. Getting real or staying positive: The contested place of legal positivism in legal realism

Taking this starting point also reveals that ENLR has a different relationship with legal positivism and thus with mainstream doctrinal legal studies than ANLR. As we shall see, ENLR is simultaneously both closer to and farther away from legal positivism than most ANLR.

ENLR is *closer* to legal positivism, at least in its Continental Kelsenian version, precisely in taking seriously the epistemological challenge facing the scientific study of IL. Kelsen's key project was indeed to demonstrate how a legal science was possible.[3] He was worried that unless he found a solution to this problem, scholarly studies of law would no longer make sense; they would be revealed merely as politics cloaked as science. And although Weber, Ross, and Bourdieu, the main theoretical inspirations for ENLR, all disagreed strongly with the particular legal positivist answer provided by Kelsen, they were essentially driven by the very same question. This ambitious epistemological project is precisely what makes the genealogy of ANLR and ENLR different regardless of their many commonalities.[4]

3 H. Kelsen, *Pure Theory of Law* (1967).

4 This is particularly noticeable in passages where the *pragmatist* character of ANLR is emphasized (see, e.g., G. Shaffer in this issue). This difference might in part be due to the specific historical – institutional contexts in which each movement operates. European law faculties were (and are) clearly not professional schools as in the United States, but assumed to be proper university faculties with corresponding basic scientific aspirations. Researchers of law are assumed to be legal scientists, not merely scholars.

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ENLR is simultaneously *farther away* from legal positivism than ALR in that it rejects *in toto* the answer proposed by Kelsen as to the possibility condition of doctrinal legal science – and, by implication, also Hart's roughly analogous solution. That is, ENLR rejects any notion of a pure theory of law as a body of normative doctrinal truths about valid law derived through normative chains of inference from a foundational premise in the shape of a basic norm/rule of recognition. That ENLR should be farther away than ANLR in this regard may sound surprising. However, the common perception of ALR's antagonism with legal positivism has increasingly been challenged by leading contemporary scholars on American realism who emphasize that the actual rule-scepticism of American realism is in fact quite limited. More specifically, it has been emphasized how the kind of rule-scepticism underlying ALR amounts only to a claim about *local* and not *global* underdetermination of legal rules.[5] Not only do we as a matter of fact have knowledge of a vast body of legal rules singled out as valid ultimately by a legal positivist basic norm/rule of recognition. These rules also yield fairly determinate legal outcomes in the vast majority of cases.[6] Rule-scepticism applies only to judicial decision-making in cases that are litigated, and, in particular, to appellate cases.[7] Only in these extraordinary cases does ALR conclude that doctrinal analysis should be supplemented with an empirical study of the factors actually influencing judicial decision-making.[8]

In this sense, the kind of rule scepticism ascribed to ALR is *forward-looking*: it accepts and de facto presupposes roughly the same comprehensive body of knowledge of legal doctrine postulated by legal positivism. It only challenges the causal influence of this legal doctrine in judicial practice. This leaves an overall image of peaceful coexistence and even interdependency with legal positivism where the empirical approach advocated by legal realism remains supplementary to traditional doctrinal approaches. On this account of ALR, its only real disagreement with traditional legal doctrinal scholarship relates to questions about relative scope and, perhaps, academic priority between the two kinds of study, and this is a position which seems to have been taken over by many proponents of ANLR.[9] In other words, it seems that both old and new American realism do not have decisive objections to the doctrinal study of law as traditionally conceived. They mainly object, perhaps, to the practical usefulness and the notion of completeness, which most doctrinal lawyers seem to associate with their discipline.

This contrasts sharply with the approach adopted in ENLR, which – inspired first of all by Scandinavian legal realism – assumes a more radical epistemological

5 See, e.g., B. Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (2007); F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009); M. S. Green, 'Leiter on the Legal Realists', (2011) 30 *Law and Philosophy*. For discussion of implications, see J. v. H. Holtermann, 'Getting Real or Staying Positive – Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence', (Forthcoming, 2015) *Ratio Juris – An International Journal of Jurisprudence and Philosophy of Law*.

6 See, e.g., K. Llewellyn, 'Some Realism about Realism – Responding to Dean Pound', (1931) 44 *Harv Law Rev* at 1239 and M. Radin, 'In Defense of an Unsystematic Science of Law', (1942) 51 *Yale Law Journal* at 1271. See also Schauer, *supra* note 5, at 137.

7 See, e.g., Leiter, *supra* note 5, at 77–8 and Schauer, *supra* note 5, at 137–8.

8 See, e.g., Leiter *supra* note 5, at 60 and 72–3.

9 V. Nourse and G. Shaffer, 'Empiricism, Experimentalism, and Conditional Theory', (2014) *SMU Law Review* at 110. See also Shaffer in this issue.

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criticism of the traditional doctrinal study of law. Thus, ENLR adopts instead a *backward-looking* version of rule-scepticism in the sense that it does not ask what decisions do or do not follow from given legal rules but asks instead the more wide reaching fundamental question: what – if anything – justifies the doctrinal lawyers' (be they scholars or practitioners) beliefs in the validity of those rules in the first place? And this turns out to be a regressive-foundational question, which takes the realist back through the doctrinal legal scholars' preferred chain of normative reasoning – from the primary legal rules, the 'no vehicles in the park' of every legal system, through the hierarchy of norms in search of ultimate epistemological foundations. But unlike doctrinal lawyers, proponents of ENLR reject as epistemologically flawed the kinds of foundations usually offered. They obviously reject the foundations offered in natural law, where the validity of particular legal rules is determined ultimately by their derivability from self-evident truths of reason/intuitively valid ideas of justice. But they also reject the kind of foundation offered by legal positivism.

Scandinavian legal realist Alf Ross provides a paradigmatic expression of this line of criticism. Starting with the natural lawyers' intuitions of justice, he emphasizes how they (in contrast to, for example, publicly observable behaviour) are inextricably private. Intuitions can vary from person to person and patently do so quite often. They are therefore categorically disqualified as a starting point of legal science. What is more often overlooked, however, is that Ross is equally dismissive of legal positivism's attempts to save legal science as a body of doctrinal knowledge by reference to whatever foundational rule happens to be positively found regardless of its moral status.[10] In short, the problem is that it will always be possible to construe different foundational norms that justify different sets of valid legal rules, and we have no uncontroversial way of authoritatively deciding between them. Positing the existence of such a norm in order to end the justificatory chain, even if done only hypothetically, is as epistemologically arbitrary as the kind of moral foundations suggested in natural law. For these reasons, it is in fact not only natural law, as in Ross' original famous quote, but also legal positivism that 'is like a harlot … at the disposal of everyone':[11] 'From the standpoint of such presuppositions a specific "validity" cannot be admitted, neither in terms of a material *a priori* idea of justice nor as a formal category.'[12]

On these grounds, we see clearly why Ross, and ENLR with him, deny that the combined strategy of peaceful academic coexistence and containment toward doctrinal legal positivism is possible let alone desirable for a genuine legal realism and ultimately legal science.

2.2. Legal validity and normativity as genuine objects of empirical study

So far, the character of the argument has been entirely negative. We have shown how, from the perspective of ENLR, traditional doctrinal scholarship simply remains impossible as a legal scientific paradigm. This raises the question whether ENLR has

10 See, e.g., H. L. A. Hart, *The Concept of Law* (1994), 107; Kelsen, *supra* note 3.
11 A. Ross, *On Law and Justice* (1958), 261.
12 Ibid., at 68.

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perhaps gone too far in the pursuit of its scientistic agenda. In particular, it raises the question whether ENLR disregards completely elements such as legal validity and normativity that would usually be considered quintessential to the legal field – or, at best, reduces them to epiphenomena determined entirely by extralegal factors and without any causal powers of their own.

To illustrate this worry, consider how it is a well-known fact of common sense that rules mentioned in, for example, duly passed and promulgated statutes are generally considered legally valid in a way that rules stated in, for example, Machiavelli's *The Prince* are not. And consider also how it is generally agreed that this fact has tangible real-life implications. It seems somewhat counter-intuitive that these facts of common sense should be of virtually no importance to the legal scientist. It was precisely to accommodate this uneasiness that Hart famously found it necessary to introduce a distinction between two aspects of law: the *internal* aspect, which recognizes the characteristic normativity of law, and the *external* aspect, which focuses exclusively on its social efficacy in terms of publicly observable behaviour. As he writes in *The Concept of Law*, 'One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence.'[13]

For any legal theorist approaching the field from the empirical angle this warning is well advised. And it is not unlikely that present day proponents of ANLR are driven by this kind of anxiety when opting for their ecumenical approach to doctrinal legal scholarship. The problem is, however, that the particular distinction between internal and external aspects of law which Hart invokes as a remedy, while somewhat on the right track and in spite of its popularity, is so vague and ultimately ill-conceived that it is useless as a starting point for a realist rigorous science of law.

There is, however, a more promising starting point readily available right in the heart of the realist movement itself. Alf Ross, one of the well-known proponents of the original movement's Scandinavian branch, and also Max Weber, one of its theoretical precursors, developed, apparently independently of each other, essentially the same conception of legal validity. This conception not only renders it possible to maintain legal validity as a genuine object of empirical study but also allows the legal scientist to investigate much more closely and ascribe a far more crucial role to this particular feature of legal thought in empirical analysis.[14] More precisely, both Ross and Weber emphasize the need for empirical legal science to distinguish sharply between two kinds of (legal) validity, i.e. so-called *axiological* and *empirical* validity,[15] a distinction

13 Hart, *supra* note 10, at 91.

14 Ross' most elaborate and consistent analysis of legal validity can be found in his main work *On Law and Justice* (1953). Weber's most rewarding analysis of legal validity can be found in his less known work *Critique of Stammler* (1977). As this is not an exegetic paper, we shall make some simplifications to further the overall purpose of the paper – while of course staying faithful to their overall theories. For detailed discussion of Ross, see, e.g., J. v. H Holtermann, 'Naturalizing Alf Ross's Legal Realism: A Philosophical Reconstruction', (2014) *Revus Journal for Constitutional Theory and Philosophy of Law* 24.

15 In order to express the relevant distinction, Ross uses two different inflections of the Danish word for valid (*gyldig* and *gældende*) which unfortunately do not easily lend themselves to English translation. For linguistic reasons we shall instead be applying Weber's terminology – or, more specifically, Weber's terminology as it is found in Guy Oakes' 1977 translation. We emphasize this particular choice because, in Weber's original

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which renders it perfectly possible to do full justice to the complexity of the facts *without* simultaneously jeopardizing ENLR's epistemological ideals.

Weber initially explains axiological validity in the following way:

> [C]onsider the 'validity' of a legal maxim in [. . .] the 'ideal' sense. From the standpoint of the scholarly conscience of the person who wants to establish 'juristic truth', it is constituted by a rigorous logical relationship between concepts. In other words, it is constituted by the 'axiological validity' which a certain logic has for the legal mind.[16]

Axiological validity, in other words, is the kind of validity which steers the analysis of doctrinal scholars (whether legal positivists or natural lawyers). From the perspective of axiological validity the key questions that 'can be raised about a given "paragraph" of the code of civil law'[17] are those that can be answered with the traditional legal method, i.e. questions about pedigree (involving chains of internormative reasoning back towards fundamentals) and about conceptual extension (involving application of given canons of legal interpretation).

However, the actual widespread existence in society of this ambition of establishing juristic truth conceived thus as axiological validity *simultaneously* establishes itself as a genuinely empirical object of enquiry:

> On the other hand, consider the following *fact*. *In general*, actual persons who *want* to establish 'juristic truth' are *disposed* to infer 'axiological validity' of a certain 'legal maxim' from certain verbal relationships. This fact is obviously not without empirical consequences. On the contrary, it is of the greatest conceivable empirical-historical significance. Simply consider the fact that a 'jurisprudence' exists. And consider the 'intellectual habits' which are actually governed by this 'jurisprudence', habits which develop in an empirical-historical fashion. This fact is of tremendous practical-empirical significance for the actual organization of human affairs. The reason for this is as follows. Within empirical reality there are 'judges' and other 'officials' who are in a position to influence human behaviour by employing certain physical and psychological instruments of coercion. They have been educated in such a way that they *want* to establish 'juristic truth'. And – actually, with very different degrees of consistency – they conform to these 'maxims'. . . . To say that a 'legal order' in fact exists is to say that it exists as a 'maxim', an idea of something *obligatory*. This 'maxim' is a causal determinant of human conduct.[18]

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text in German, he actually does not use the term 'axiological validity' but writes '*Gelten-Sollen*' (he does use 'empirical validity': 'empirische Geltung'). And in a new translation of Weber's text, Hans Henrik Bruun translates this as '*should* be valid'. The basic distinction at play is the well-known German dichotomy between *Sein* and *Sollen*. Strictly speaking, Weber is therefore referring to a *Sollen*-validity as opposed to a *Sein*-validity. We have opted for using Oakes' translation as his neologism 'axiological validity' captures well the intention of Weber, even if it introduces a different term. For the purpose of providing a systematic account, we have therefore also relied on Oakes' translation of Weber throughout the article. We have however consulted and compared both Weber's original German text and Bruun's new translation, which generally provides a very precise translation of Weber compared to Oakes more idiomatic translation. In the case of the actual citations of Weber in the article, we have however not found that Oakes' more idiomatic translation changes the intellectual content of Weber's text. We are grateful to Hans Henrik Bruun and Anne Lise Kjær for their input in this regard. See H. H. Bruun and S. Whimster, *Max Weber: Collected Methodological Writings* (2012), 218 and more generally the glossary to the translation.

16 Weber, *Critique of Stammler* (1977), at 128.

17 Ibid., at 126.

18 Ibid., at 128–9.

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Correspondingly, to Weber and Ross, to observe of any given legal order or particular rule that it actually exists as a 'maxim', i.e. as an idea among judges and other officials of something obligatory (because thought by them to be axiologically valid), is precisely to observe that it has *empirical validity*. And in so far that a realist legal theory wants – in the name of 'the complexity of the facts' – to deal specifically with validity it has to be this kind and *not* axiological validity:

> It is obvious that anyone who undertakes to discuss the empirical *existence* of 'social life' cannot legitimately base his discussion upon the foundation of axiological dogmatics. Within the domain of 'existence', a 'rule' can be identified in our example only in the following sense: as an empirical 'maxim' that is both causally effective and causally explicable.[19]

Unfortunately, this particular distinction is repeatedly confused by many legal scholars who move indiscriminately back and forth across the divide seemingly without paying sufficient attention to whether they are talking about one or the other kind of validity. This kind of carelessness is particularly problematic for legal realism. First of all, statements about axiological and empirical validity respectively are categorically different in terms of *semantics*. Thus, a statement about axiological validity is straightforwardly a normative statement. It directly expresses a normative fact, a maxim (e.g. that a certain right exists) and as such it belongs, as Kelsen would say, in the realm of the ought (*Sollen*). This in contrast to statements about empirical validity that, even though concerning certain maxims/norms, are genuinely descriptive assertions, and as such belong to the world of is (*Sein*). This linguistic distinction between the two kinds of propositions is often overlooked because they both deal with the normative, with validity. To avoid this confusion, Ross helpfully introduces the twin-terms *norm-descriptive* and *norm-expressive*:

> Since the doctrinal study [of law] is concerned with norms it can be called normative. But the term must not be misunderstood. ... The normative character of the doctrinal study of law signifies [...] that it is a doctrine *concerning* norms, and not *of* norms. It does not aim at 'setting up' or expressing norms, but at establishing their character of 'valid law.' *The doctrinal study of law is normative in the sense of norm descriptive and not in the sense of norm expressive.*[20]

Second – and closely related, the distinction between axiological and empirical validity has deep *epistemological* implications for the scholar who seeks to establish knowledge of either kind. More specifically, the norm-expressive statements about axiological validity and the norm-descriptive statements about empirical validity have categorically different truth conditions. In Weber's terms:

> [T]he empirical 'existence' of 'law' [is] completely different from the legal idea of the '*axiological* validity' of law. 'Empirical' validity can be ascribed to both 'juristic truth' and 'juristic error' in exactly the same degree. Consider the question: *What* is 'juristic truth'? That is to say, in view of certain 'objective' principles of jurisprudence as a scholarly discipline, what logically *should* be 'valid', or what should *have been* 'valid'? The logical import of this question is entirely different from the import of the following question:

19 Ibid., at 115. Compare Ross, *supra* note 11, at 68.
20 Ross, *supra* note 11, at 19, last emphasis added.

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> In a concrete case or in a plurality of cases, what in fact *followed* as the empirical, causal 'consequence' of the 'validity' of a certain 'paragraph'?[21]

This difference in truth conditions[22] simultaneously points to a weakness, or more accurately a category mistake in the argument of those who advocate that NLR not only coexists peacefully with but actually needs traditional legal positivist doctrinal scholarship to help identify at least part of what determines the way in which law operates – first of all, in lower courts but also, even if only to a limited degree, in appellate courts and international courts.[23]

The problem is that it simply remains unintelligible how a(n alleged) fact about axiological validity, i.e. about strictly logical, internormative relations between given legal rules, can possibly *causally determine* even in the slightest the actual conduct of judges. A given logical relation between one rule and another does not per se endow that rule with causal powers. The gap between axiological validity and actual behaviour/practice is unbridgeable in principle because of the categorical difference between the two phenomena. It can only be bridged with the use of empirical validity. Or, more precisely, empirical validity makes the gap disappear; axiological validity is consumed by empirical validity because the former is defined in terms of the latter. Once this distinction is in place it is clear that axiological validity per se is empirically irrelevant. It plays no causal role, not even as a co-determinant. Only *perceptions of axiological validity* play such a role, *that is, empirical validity.* In other words, legal positivism as it stands is superfluous in explanatory empirical theory. It cannot contribute to the realist empirical study of law.[24]

From this, we also see why we simply cannot, as Hart and some realists do, rest content with merely observing the presence of the internal, axiological point of view. Of course, ENLR is perfectly aware of the all-importance of the internal aspect of law in the sense that it clearly acknowledges the need to invoke internal ideas in order to explain external behaviour.[25] However, in terms of spelling out a research program vis-à-vis legal validity this only takes us half the way and serves only to eliminate the crudest forms of reductionism (be they behaviourist, IR, political scientists, sociologists, etc.). The key methodological question remains: *should we ourselves qua legal scientists be internal also in the further sense of adopting those reasons as axiologically valid, or should we remain external in the sense that we strictly observe and*

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21 Weber, *supra* note 16, at 129–30.

22 This problem persists even for those pragmatist doctrinal lawyers who reject the scientism of Kelsenian legal positivism. Weakening the epistemic modality of validity-statements in the direction of 'legally more compelling' or 'practically reason giving' does not per se change the fact that one is doing axiology, i.e. is expressing value judgments/making norm-expressive statements. We are grateful to Brian Tamanaha for pressing us on this point.

23 According to Shaffer: '[F]rom an internal perspective of the making of legal arguments before judges, some legal realists will accept Hart's pedigree view on legal sources, while contending that those legal sources *play only a partial role in determining how law acquires meaning and has effects* [emphasis added]' see this issue, see also Leiter, *supra* note 5, at 77–8 and Schauer, *supra* note 5, at 137–8 ascribing similar views to at least Llewellyn and Radin.

24 That is, except as itself a part of the object of study, see Weber, *supra* note 16, at 129: '[C]onsider the fact that a 'jurisprudence' exists'.

25 It is very clear that the early European realists did not commit the error, which Hart explicitly ascribed to at least Ross of defining this particular aspect out of existence. See, e.g., Ross' unequivocal rejection of crude behaviourism, Ross, *supra* note 11, at 15.

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explain the behaviour of legal officials by reference to their belief in such reasons? And unlike legal positivists and some American legal realists, the European legal realists strictly maintain that an empirically respectable legal science should remain external in the latter sense – for the reasons stated above.

2.3. Rudiments of a legal science: 'complex of maxims in the minds of certain men' and 'judge ideology'

With this fundamental framework in place, the next step for ENLR is to establish more precisely the contents of a viable norm-descriptive theory about empirical legal validity. And this is, perhaps, where there are some limitations to the older European realists. Weber mentions briefly how, from the norm-descriptive point of view of empirical validity, 'a "legal order" may be analysed as a complex of maxims in the minds of certain men who really exist',[26] yet he does not give much direction at how to study such a 'complex of maxims' with the exception of his ideal-types of legal rationalization. Ross is more elaborate, possibly because he in contrast to Weber actually was professor at a law faculty, which forced him to deal with law more directly. Taking off where Weber left, Ross maintains that the focal point of a realist study of empirically valid legal doctrine has to be what he calls *the judge ideology*:

> The changing behaviour of the judge can only be comprehended and predicted through ideological interpretation, that is, by means of the hypothesis of a certain ideology which animates the judge and motivates his actions.[27]

Legal decision-making is not arbitrary '… but a process determined by attitudes and concepts, a common normative ideology, present and active in the minds of judges when they act in their capacity as judges'.[28] While Ross is fully aware of the obviously limited access to the mindsets of judges, he argues, 'it is possible to construct hypotheses concerning it, and their value can be tested simply by observing whether predictions based on them have come true'.[29]

Ross tries to break down this judge ideology into its constituent parts and to reveal the underlying logic that structures the particular 'complex of maxims in the minds' of judges at any given time. In rough outline, Ross here ascribes a central role to the doctrine of *the sources of law*, which he identifies as 'the aggregate of factors which exercise influence on the judge's formulation of the rule on which he bases his decision'.[30] Considering our emphasis on the incompatibility between ENLR and doctrinal legal scholarship this centrality of old-fashioned sources of law may come across as surprising. It should however be remembered that the shift from axiological to empirical validity does not necessarily imply a complete shift with regard to the particular legal rules or kind of rules whose validity we are talking about. The crucial question to ask with regard to any given rule or kind of rule is

26 Weber, *supra* note 16, at 130.
27 Ross, *supra* note 11, at 37.
28 Ibid., at 75.
29 Ibid.
30 Ibid., at 77.

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whether they are considered valid because of their logical relation to other rules or *because they are believed by judges and other officials to be thus logically related*. And it is obviously possible for the same rule to be identified as satisfying both these criteria if they are applied in separate investigations. In fact, as already observed by Weber, occurrences of this kind of coincidence are only to be expected considering the relation between empirical validity and the notion of axiological validity, i.e. as *beliefs about* axiological validity.[31] Put differently, legal doctrinal scholars are believers in law themselves and thus objects of empirical enquiry.[32]

3. Operationalizing European New Legal Realism

We have so far established the basic differences between American and Scandinavian realism and particularly how Scandinavian realism seeks a different epistemological ambition than American realism's pragmatist approach and how it operates with a different genuinely empirical conception of the internal aspect of law, i.e. as empirical and not axiological validity described norm-descriptively, not norm-expressively. Whereas this conception has the advantage, at the theoretical level, of making the scientific study of the internal aspect compatible and continuous with empirical studies of the external aspects of law neither Weber nor Ross provide much indication as to how this could be done empirically. To operationalize these aspirations for legal science and particularly with regard to the study of IL, in the following we turn to French sociologist Pierre Bourdieu who sketched out an ambitious program for what he termed a rigorous science of law, and one that in numerous ways can be adapted to both further develop and operationalize the key insights of his precursors.

One crucial linkage from Weber and Ross to Bourdieu is the notion of *complex of maxims in the minds of certain men/judge ideology* in the former, which we analyse and refine using the notions of habitus and symbolic power developed by Bourdieu with the goal of providing a more viable framework for actual empirical inquiry of legal practices and legal habitus. Moreover, we raise the question of how to relate the practices of legal agents (judges, officials, and others) to structural elements of society, which both Weber and Ross find central but to which they never provide a viable answer. We deploy the notion of (legal) field for establishing a framework capable of linking what is typically (mis)construed as the external and internal dimensions of law (see discussion of Hart above). Weber, Ross, and Bourdieu are all in search of an integrative (or integrated in the case of Bourdieu) approach to law which goes beyond this traditional dichotomy. Instead of accepting doctrinal law as being the inner (practical scientific) logic of purely axiologically valid law, their solution is to accommodate the so-called external and internal dimensions in a single more complex analysis. In our view, this is absolutely central not only for

31 See Weber, *supra* note 16, at 129, as quoted above. Ross makes an analogous observation; see A. Ross, *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi* (2013), at 152–3.

32 M. R. Madsen, 'Reflexivity and the Construction of the International Object: The Case of Human Rights', (2011) 5 *International Political Sociology*.

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studying IL, but also for legal science more generally. We will therefore initially develop our argument in general terms before turning to the specifics of IL.

3.1. Towards a rigorous legal science – Bourdieu as legal realist

Bourdieu's well-known essay 'The Force of Law'[33] opens up with a key observation on the possibility of a genuine legal science, which shares important elements with both Weber and Ross:

> A rigorous science of the law is distinguished from what is normally called jurisprudence[34] in that the former takes the latter as its object of study. In doing so, it immediately frees itself from the dominant jurisprudential debate concerning law, between formalism, which asserts the absolute autonomy of the juridical form in relation to the social world, and instrumentalism, which conceives of law as a reflection, or a tool in the service of dominant groups.[35]

Bourdieu is fully in line with Weber and Ross that doctrinal legal scholarship cannot be legal science in itself, but rather empirically observable complexes of expressions about law, which need to be analysed as an object of empirical inquiry. This stance further allows him to distance himself from the two major contemporary positions in legal studies: *internalist reductivism* which presupposes law's autonomy as the starting-point for any analysis of legal normative order as is the case of most legal formalism; and *externalist reductivism* which in some variants of sociology of law and critical legal studies reduces law to a mere tool of domination, that is, law does not in any meaningful way provide the means of its development or power.

On the one hand, his critique of instrumentalism highlights that law produces something specific – particularly legal form(s) and discourse – which cannot be revealed by simplistic functionalist analysis, for example analysis of law as (functional) ideology. On the other hand, his critique of formalism reveals that the form(s) produced in the legal field are not simply powerful because of the internal structures of legal argumentation but ultimately gain their power because of underlying and broader societal structures. It is this crucial aspect that remains unexplored in Ross' work and somewhat unconnected in Weber's.[36]

Bourdieu's program for a rigorous science of law can be summarized as

> a legal science that takes seriously legal form and discourse [as an object of empirical inquiry] but with the understanding that the relative autonomy that law enjoys is the product of the specific historical conditions that made autonomy possible in terms of the production and reproduction of a distinct *corpus juris*[37].

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33 P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', (1987) 38 *The Hastings Law Journal*.

34 In the original text Bourdieu refers to 'science juridique' in citation marks, see P. Bourdieu, 'La force du droit: Éléments pour une sociologie du champ juridique', (1986) 64 *Actes de la recherche en sciences sociales* 3.

35 Bourdieu, *supra* note 33, at 814.

36 This argument for a truly integrated approach to law is emblematically evoked in Bourdieu's critique of legal system's theory (see ibid., at 816) which can for present purposes be aligned with the critique of legal positivist conceptions of legal doctrine found in both Ross and Weber as propounded elsewhere in this article.

37 Y. Dezalay and M. R. Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law', (2012) 8 *Annual Review of Law and Social Science* 436.

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Hence, legal form and reasoning, conceived as empirically valid complexes of 'maxims in the minds of certain men [in Bourdieu: agents]', should be analysed in correlation with the changing societal structures that valorize those juridical formulas and forms of reasoning and ultimately produces the force of law.

This double take on law (as a legal field connected to other social fields) allows us to avoid the pitfalls of externalizing (i.e. defining out of existence) or internalizing (i.e. accepting as axiologically valid) law.[38] Instead, it introduces an integrated approach to law that sees the alleged external and internal dimensions of law as two integrated dimensions of the same empirical object of study. To this end, Bourdieu suggests a radical epistemological rupture, what is known as the double rupture[39] and subsequently reflexivity.[40] Its purpose is in part similar to what is found in Weber and Ross, namely an attempt to devise an approach to studying normative phenomena like law without falling into the trap of normativity found in both legal positivism and some variants of ALR. In other words, to develop knowledge of IL, we need to introduce an analytical framework that allows us to assess law empirically independent of the force of the many normative stakes and interests that are always at play in the legal field, yet with an understanding of the patterned ways of normative legal reasoning, which are influenced by normative ideas.[41]

3.2. Research tools for New Legal Realism

Unlike Weber and Ross, who would generally agree on these preliminaries but do not provide a more operative empirical program, Bourdieu is acutely aware that a specific set of research tools are necessary for understanding the double construction of law as both a battle within the legal field over the meaning of law and the transformation of the societal structures giving value to those legal ideas and practices as a result of the battles between for example the fields of law and politics, law and economics, etc. Bourdieu's reflexive sociology provides in his conjunction a set of research tools for precisely conducting such an analysis of law. We will, however, for the purpose of this analysis limit ourselves to discussion of only the most central notions: field, habitus, and symbolic power.[42]

Abstractly, the *field* is defined as a site for struggle between different agents where different positions are held based on the amount and forms of capital. It is a:

> ... network, or a configuration, of objective relations between positions. These positions are objectively defined, in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present and potential situation (*situs*) in the structure of the distribution of species of power (or capital) whose

38 Scholars working in the area of systems theory have developed similar arguments. See for example on the co-evolution of law and other social systems ('blinde Rechtsevolution') in G. Teubner, *Recht als Autopoietisches System* (1989).

39 P. Bourdieu, J.-C. Chamboredon and J.-C. Passeron, *The Craft of Sociology. Epistemological Preliminaries* (1991).

40 Madsen, *supra* note 32; P. Bourdieu, *Science de la science et réflexivité* (2002).

41 Madsen, *supra* note 32.

42 In the following, we only very briefly introduce these concepts. For further introduction, please see P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology* (1992); M. R. Madsen and Y. Dezalay, 'The Power of the Legal Field: Pierre Bourdieu and the Law', in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory* (2002).

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> possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.).[43]

The emergence of a field implies a degree of structural stability, meaning a set of objective and symbolic relations between agents and institutions around increasingly specific issues. Through this process, a field constructs its own particular symbolic economy in terms of the valorization of specific combinations and forms of capital (social, economic, political, legal, etc.). The process of capitalization results from the struggle between the agents over gaining dominant positions in this social space, a process fuelled by interest, dedication, belief, and knowledge of the issues at stake.

The difference between studying IL (as a field) and what Bourdieu refers to as the legal field, is immediately clear from this definition. National legal fields have been relatively stabilized and routinized over a long period by processes of institutionalization, legitimization, and autonomization of both material and immaterial means in terms of institutions and knowledge (and typically as part of complex processes of state formation).[44] International legal fields are on the contrary generally less coherent[45] and stable than national legal fields and therefore more prone to sudden transformations. This particularity of international legal fields is due to a number of reasons, but probably most of all to the fact that international legal fields are not ingrained in the deeply institutionalized set-up of states like national legal fields. Moreover, international fields, including some of the seemingly most autonomized such as European Union law, are marked by the fact that the agency is for the most part transnational, implying that very different national approaches and interests impact on international practices and the formation of international legal fields.[46]

As indicated, these differences between national and international fields can also in part be attributed to the (differences in) habitus of the relevant agency. This is important if we are to take seriously Ross and Weber's suggestions for a legal realism whose object of empirical inquiry is in part what they respectively term *judge ideology/complexes of maxims in the minds of certain men* referring to the patterned ways in which the reasoning of legal agents (in Ross' case, judges; in Weber's case, legal officials more generally) determine their practices. They are both pointing at the externally identifiable consequences of this ideology/complex of maxims – legal practices – as well as the internal motivations – the mental schemes of the particular legal agency.

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43 See Bourdieu and Wacquant, ibid., at 97.

44 On the history of law and lawyers in the formation of states, see, e.g., J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (2008); L. Martines, *Lawyers and Statecraft in Renaissance Florence* (1968).

45 A fact much debated in public international law where functionalist notions of international legal order still prevail. See for example M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 LJIL 573.

46 The only relative stability of international legal field has been addressed in a number of previous publications. See, e.g., Y. Dezalay and M. R. Madsen, 'La construction européenne au carrefour du national et de l'international' in A. Cohen et al. (eds.), *Les formes de l'activité politique: Èlements d'analyse sociologique XVIIIè–XXè siècle* (2006).

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While these related notions of Weber and Ross are somewhat underdeveloped, it is tempting to breathe fresh scientific life into them by reconceptualizing them along the lines of the Bourdieusian notion of *habitus*. Bourdieu defines this as the internalized schemes guiding agents' behaviour which are both social and individual but produce relatively similar practices among social groups – thus generally close to both Ross' and Weber's respective definitions. For Bourdieu, it is more specifically a practical sense of reality that is acquired throughout the agent's particular and individual trajectory *in* society.[47] In this regard, Weber, Ross, and Bourdieu all have fairly structured national fields in mind, where for example commonality in education – in this case above all legal education – results in collectively shared (legal) outlooks.[48] Moreover, judges as a social class also share many normative preferences. All in all, this leads all three authors to argue that social disposition can be correlated to social and professional position and outlook.[49]

There are however generally good reasons to expect such correlations in national legal fields. Yet, when we move to the international realm of law, what we find is obviously neither national nor strongly stabilized legal fields. What nevertheless structures and organizes the behavioural schemes at the international level is the fact that international jurists also tend to organize around professional identities, regardless of national differences. Differences in legal training and outlook, however, also produce competition and conceptual uncertainty and even confusion as seen at, for example, some international courts. Inter- and transnational fields present therefore, at a single point in time, both a structured structure and a relatively unsettled mix of different and competing outlooks and ideas on the very same (legal) issue. This poses some challenges to the adoption of not only Ross' and Weber's relevant notions, but also Bourdieu's notion of habitus at the international level. It seems nevertheless sustainable to argue that at a more structural level, international legal practices are indeed largely the product of generally shared legal outlooks of international judges and other international legal agents. And these are largely due to similarity in education, a consequence of both cultural legal imperialism (notably Spanish, French, and English) and the century old tradition of *peregrinatio academica* of individual jurists to metropolitan universities in Europe and, more recently, also the United States.[50]

There is, however, another problem with particularly Ross' approach (which he shares with many old American realists), namely his fixation on judges as the key for explaining law. While there obviously has been a well-documented proliferation of international courts[51], most of these are specialized courts and can hardly be said to have judicialized all or most IL: international courts are still more the exception than the rule. The obvious solution to this inherent problem is to expand the

47 P. Bourdieu, *Outline of a Theory of Practice* (1977).
48 For a discussion of this point, see Dezalay and Madsen, *supra* note 37, at 441–2.
49 Bourdieu amply documents this in his seminal analysis of categories of taste as socially determined. See P. Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (1984).
50 See further in M. R. Madsen and C. Thornhill (eds.), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* (2014).
51 C. Romano, 'The Proliferation of International Tribunals: Piecing together the Puzzle', (1999) 31 *NYU Journal of International Law and Politics.*

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relevant agency beyond judges – national or international. What is relevant for an international legal realism is instead to identify the agency that produces and practises IL – as argued also by ANLR. The notion of field is highly helpful in this regard, as it allows us to rethink law around the competition over law of all agents constituting a particular legal field as a structure of objective relations between these positions. More specifically Bourdieu's approach identifies what empirically are the main proponents and producers, not what institutionally or otherwise formally are assumed the main producers, i.e. judges. A present day international legal realism logically will have to focus on the actual producers of IL, not what formally are assumed the guardians of the law;[52] that is, it will have to focus on the relevant legal field and its constituents.

The biggest difference between particularly Ross and Bourdieu in this regard is that Bourdieu makes the question of power – *the force of law* – a central part of his integrated approach. As outlined above, law – understood as the empirically documentable practices of law – can never alone be explained by reference to the practices within the legal field itself; it requires relating those practices to other fields and structures of national and international society. Importantly, in Bourdieu's analysis of law, the force of law is understood at three levels. First, the effect of the force of law is noticed at the level of legal agency in the sense that agencies internalize legal ideas and make them their own. This is precisely what makes the practices of law a viable empirical object for Ross, Weber, and Bourdieu via the concepts of ideology, complex of maxims, and habitus, respectively. Second, the force of law is understood as the 'power of form' in the sense that law recreates social questions and relations in legal terms and formulas which the legal agents adopt as their own professional formulas.[53] There is however a third meaning, namely the power of law *in* society. In more practical terms, the question is how the practices of international legal fields have effects beyond themselves.

This brings us to a third key concept in Bourdieu, namely *symbolic power*. Symbolic power is the power to impose visions and divisions of the social world.[54] Thereby it becomes the power to transform the world: 'by transforming the words for naming it, by producing new categories of perception and judgment, and by dictating a new vision of social divisions and distributions'.[55] This corresponds to the two meanings of the force of law already outlined. The third meaning, in some ways the most crucial for international legal realism, can however also be understood along the lines of symbolic power. While law imposes on its own agency a particular and limited way of reasoning and set of formulas, it is simultaneously this particular reduction of social complexity that gives it its pertinence as a unique way of articulating social reality and offers practical (legal) solution to some of its conflicts. However, the precise articulation in law of social issues and problems cannot just be assumed to gain force beyond legal discourse. The making of the force of law beyond the legal

52 Public international law scholarship, although long reluctant, has generally accepted this in recent years. See, e.g., A. Boyle and C. Chinkin, *The Making of International Law* (2007).
53 Bourdieu, *supra* note 33, at 819–20.
54 P. Bourdieu, *Language and Symbolic Power* (1991).
55 Bourdieu, *supra* note 33, at 839; Bourdieu, ibid.

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field therefore requires an analysis of the relevant interfaces of the legal field with surrounding fields. That empirical operation clearly requires a sociological analysis of the interplay of the making of law with the power of law in society.

4. ENLR IN ACTION

We have in the preceding sections sought to translate the program of early European Legal Realism into an operational research framework using the theory of Pierre Bourdieu. In this last section, we will exemplify and refine our argument by introducing examples of empirical studies, which have used such approaches to understanding IL. Generally, the application of Bourdieu in the area of IL has been in empirical studies of specialized legal fields – with or without judicial institutions. The best known application in the area of IL is the seminal analysis of international commercial arbitration conducted by Yves Dezalay and Bryant Garth in *Dealing in Virtue*.[56] Using both legal and sociological insights, they demonstrated how the battle over the form and the law of international commercial arbitration can be explained as a battle between not only different forms of expertise (European academic law vs. American-style Wall Street law), but also as a clash between different global elites.

Inspired by this analysis and the identification of legal elites as an entrance to studying transnational legal fields, John Hagan's *Justice in the Balkans* on the International Criminal Tribunal for the Former Yugoslavia (ICTY) provides another legal realist take on international law.[57] Hagan scrutinizes the interplay between investigators, prosecutors, and witnesses, as well as specific powerful individuals employed by the tribunal, in a complex analysis of the making of humanitarian and international criminal law. The analysis is again focalized on the conditions of possibility for law, and how those conditions are created as an assemblage of knowledge, networks and power of the relevant agency.[58]

A set of related studies concern the creation and perpetuation of European law by European international courts. Particularly Antonin Cohen, Antoine Vauchez, and Mikael Rask Madsen have examined the interplay between the agency of European supranational courts and the simultaneous transformation of the social structures in which they evolve, in part as a consequence of the complex of maxims/ideology/habitus of European legal agents.[59] By using a distinct power-perspective on the making of international (European) law and its relative force, they have highlighted how larger societal and geopolitical currents have had an enduring impact on the evolution of European law and institutions, as well as European

56 Y. Dezalay and B. G. Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

57 J. Hagan, *Justice in the Balkans. Prosecuting War Crimes in the Hague Tribunal* (2003).

58 J. Hagan and R. Levi, 'Crimes of War and the Force of Law', (2005) 83 *Social Forces*.

59 A. Cohen, '"Dix personnages majestueux en longue robe amarante": La formation de la cour de justice des communautés européennes', (2010) 60 *Revue française de science politique*; M. R. Madsen, 'The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in M. R. Madsen and J. Christoffersen (eds.), *The European Court of Human Rights between Law and Politics* (2011); A. Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity', (2010) 16 *European Law Journal*.

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integration more generally.[60] In the case of Vauchez and Madsen, there is moreover an explicit focus on how these structural dimensions influence the very output of the courts in focus, that is, an analysis which explains how structural constraints (and opportunities) influence legal practice and vice versa.[61] They basically seek to explain the conditional autonomy of legal norms, i.e. their empirical validity, by an analysis of the production and maintenance of the symbolic power of law at the intersection of legal agency and broader legal and social structures.

Vauchez's analysis of the making of *Van Gend en Loos*,[62] widely regarded the ECJ's most important decision, and his subsequent work on the practices of perpetuation of such landmark decisions,[63] offer a striking analysis of how a landmark decision is indeed a symbolic construction. As Vauchez argues, these decisions were not initially perceived as landmark decisions. Establishing them as such was largely the outcome of a systematic lobbying by jurist networks and associations seeking to promote EC law and using these early decisions as their case in point. These findings might come across as extreme constructivism for legal formalists, but they are empirically well grounded and highlight how legal norms are created as a symbolic form and force. While legal formalists would claim that these norms are established – and by recognized and legitimate means in this case – what these studies demonstrate is that the symbolic power of law, even of the most fundamental nature, has to be maintained in both the legal field and society to gain force.

An even more explicit example of a New European Realist take on the law making of international courts is found in Madsen's analysis of the emergence and transformation of the European Court of Human Rights (ECtHR) as interdependent with the transformation of human rights as a new and powerful force in European and international society since the Second World War.[64] In this study transnational legal entrepreneurs take centre stage, yet in an ever-changing encounter with other experts, including diplomats, statesmen, and activists. It is the interface of the practices of 'transnational power elites'[65], and the social structures and legal and political institutions they help produce, that form the core of the explanation of the rise of the ECtHR. *Identifying these structural frameworks and the concrete mobilizations, law no longer can exist as a normative structure but as a set of practices of knowledge and symbolic power, which eventually produces norms, including legal norms that are empirically valid.* Importantly, as Madsen demonstrates, the interface of law-making by the ECtHR

60 A. Cohen and M. R. Madsen, 'Cold War Law: Legal Entrepreneurs and the Emergence of a European Legal Field (1945–1965)' in V. Gessner and D. Nelken (eds.), *European Ways of Law: Towards a European Sociology of Law* (2007).

61 The model has also been applied across the globe in studies of other international courts. For an example, see M. R. Madsen and S. Caserta, 'Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies', (Forthcoming 2015) *Law and Contemporary Problems.*

62 Vauchez, *supra* note 59.

63 A. Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence', (2012) 4 *European Political Science Review.*

64 M. R. Madsen, *La genèse de l'Europe des droits de l'homme: Enjeux juridiques et stratégies d'Etat (France, Grande-Bretagne et pays scandinaves, 1945–1970)* (2010).

65 N. Kauppi and M. R. Madsen (eds), *Transnational Power Elites: The New Professionals of Governance, Law and Security* (2013).

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judges and the structures in which it takes place is consequential for the substantive contents of those legal decisions. In other words, a 'legal order', even when projected as autonomous, remains a symbolic order continuously conditioned by other social forces. Thus, studying the forms and knowledge(s) of law is in itself insufficient for explaining law. This implies that when the ECtHR embarked on its celebrated practices in the late 1970s of carving out a doctrine of European human rights law, its standard-setting, formulas, and interpretive principles, although undoubtedly conditioning practice because empirically valid, are still themselves ultimately conditioned by other social forces.

5. Conclusion

We have in this analysis outlined a program for New Legal Realism using the insights of a series of key European thinkers seeking a rigorous empirical science of law. This line of inquiry and the kind of scientific aspirations it entails can be dated back to the early twentieth century and notably Max Weber's *Rechtssoziologie* and his search for objectivity in terms of a value-free social science.[66] And in the context of early to mid-twentieth century European science, the turn to empirical studies seemed in many ways a logical consequence of that commitment as evidenced in the work of Ross.[67] We locate a similar idea in the program for a rigorous legal science put forward by Bourdieu half a century later, and one, as we argue, that can link to both Weber and Ross. Bourdieu also offers ENLR something which is somewhat missing in both Ross and Weber, namely a set of research tools for realizing the program of a rigorous legal science. More concretely, he suggests an integrated analysis of the fabrication of IL and the conditions enabling its force.

IL is for a number of reasons a particularly fertile ground for legal realism.[68] Generally, the assumptions concerning legal autonomy, which are the necessary conditions for legal positivism – judicial institutions, institutionalized separation from politics, etc. – can much less so be taken for granted with regard to IL. International courts are the exception rather than the norm, the law-politics interface rarely clear-cut and typically not overly institutionalized. And there is, for the most part, not much secondary legislation as IL consists mainly of treaties and conventions, which are the main body of legal norms to be interpreted and made operational. Strictly speaking, although the basic scientific stance of ENLR applies equally to national and international, IL makes the turn to realism perhaps more evident in terms of providing an analytical framework for its explanation. And one that does not relegate it to a sort of secondary order of law as legal positivists, implicitly or explicitly, tend to do. Rather, if we take seriously the framework outlined here in combination with the basic epistemological ideas and the concept of empirical

66 Another European precursor for legal realism inquiry is obviously Eugen Ehrlich. Due to space limitations, we have not integrated his work in our analysis.

67 J. v. H. Holtermann et al., 'Kan retsvidenskaben være empirisk? Om aktualiteten af Alf Ross' empiriske vending i retsfilosofien', (2013) 2 *Retfærd – Nordic Journal of Law and Justice.*

68 Shaffer makes the same point in this issue.

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validity developed in the first part, new legal realism provides indeed a powerful foundation for making IL intelligible.

In this light, it is not surprising that ENLR resembles not only ANLR in many respects but also so-called European Law in Context (ELiC) approaches which have been developed by scholars of EU law, notably Joseph Weiler and Hjalte Rasmussen. The main difference between ENLR and both ANLR and ELiC is obviously at the epistemological level. From our examples, it could also appear that ENLR is somehow an advanced sociology of law, but it is a sociology, which takes the legal phenomena more seriously than mainstream law and society. While the traditional, externalist sociological analysis is clearly necessary for explaining the power of law beyond the immediate legal field, ENLR does not preclude studies, which zoom in on legal norms and study their empirical validity and how it can be made intelligible. In fact, we fully agree with Weber when he notes that 'it is of the greatest conceivable empirical-historical significance [to] consider the fact that a "jurisprudence" exists [and to] consider the "intellectual habits" which are actually governed by this "jurisprudence"'.[69] This by no means implies a return to doctrinal legal studies but rather, with Bourdieu, taking them seriously as an object of empirical inquiry.

69 Weber, *supra* note 16, at 129.

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