ALEKSANDER PECZENIK
Lund University, Sweden

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Preface

This is an outline of a coherence theory of law. Its basic ideas are: reasonable support and weighing of reasons. All the rest is a commentary.

I am most grateful to many colleagues for extensive discussions and criticism concerning various ideas presented in this book, in particular to Aulis Aarnio, Robert Alexy and Horacio Spector. Others to whom I am indebted for comments are more numerous than it would be possible to mention here. I will do no more than to record my gratitude to the readers of the publisher whose penetrating remarks helped me to reorganise the manuscript.

A Scandinavian reader must be informed that the present book constitutes a modified version of my Swedish work Rätten och förnuftet. However, the content has been radically changed. I hope that the alterations make the main point of the work clearer. Especially, the key sections 2.3, 2.4, 3.2.4, 5.4, 5.8 and Chapter 4 are entirely new.

The book contains extensive examples of legal reasoning and reports of various moral and legal theories. Though relevant, this material could make it difficult for the reader to focus attention on the main line of argument. To avoid this, a smaller printing-type size has been chosen for such a background information.

Lund, 18 May, 1989

Aleksander Peczenik

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INTRODUCTION

In his book "Juridikens metodproblem" (Methodological Problems in Law), Aleksander Peczenik describes the concept of "neorealism" with the help of six criteria: (1) research in jurisprudence should utilise varied disciplines in law, philosophy and the social sciences; (2) these varied and multifaceted disciplines can and must be utilised particularly effectively in an analysis of the fundamental legal concepts (for example "valid law"); (3) the analysis should be deliberately neutral in respect to philosophical conflicts; (4) this type of analysis should be adapted to numerous examples of the use of concepts in law; (5) the author uses such an analysis as the point of departure for a description of established rules of legal interpretation and calls this "practical jurisprudence"; and (6) the analysis can also be used in a comparison between legal research and the established scientific disciplines.

The author calls jurisprudence that meets the conditions described above "juristic theory of law". It is "juristic", since it is based on legal research, and it is "theory" because it is more general and analytical than ordinary legal research. "Neorealism" is another term for this juristic theory of law. However, Peczenik does not approve of the view of Legal Realism which demands that legal research must avoid all loose and "metaphysical" concepts. It is the task of neorealism to specify what is valuable in legal research and alive in legal practice. Neorealism is constructive and not, as classical Legal Realism, destructive.

Since over ten years, Aleksander Peczenik has modified his theories in many ways. Yet, the basic attitude is the same as in the beginning of the 1970s. Also today, Aleksander Peczenik can be characterised as a neorealist. In the following, I shall seek to provide a general description of the legal, jurisprudential and philosophical background which renders Peczenik´s neorealism understandable from another point of view than that he himself uses. My perspective is to a large extent that of a collaborator, as I have had the privilege to work together with Peczenik for almost fifteen years. This fact has both advantages and disadvantages for the present introduction. The advantage is that it makes it possible to "see" through Peczenik´s conceptual apparatus, which is both technical and complex. Because

of this, it is easier than it might otherwise have been to understand the sound basic ideas which colour his entire theoretical system. On the other hand, it is precisely this closeness as a collaborator that is a source of weakness. The introduction can, in this sense, become subjectively coloured.

2. The purpose of this introduction is the following. First, I shall briefly define the concept of legal dogmatics and then I shall use this definition to analyse certain basic elements in the very complicated phenomenon known as legal interpretation. This will lead us to fundamental problems concerning legal **truth** and in legal **knowledge**. It is not possible to understand neorealism without entering into these cornerstones of Peczenik´s world of ideas.

3. In the ordinary legal usage, the term "legal research" refers to at least four different types of scientific activity. We can distinguish between the history of law, the sociology of law, comparative jurisprudence and legal dogmatics. Of these, the last two are close relatives. The difference lies in the object of the activity: comparative law describes, analyses and explains legal norms in force in other countries, while legal dogmatics concentrates on a particular legal order. Sociology of law has a special position in the family of legal disciplines. It is not particularly interested in the interpretation of legal norms in force; instead, it concentrates on certain **regularities** in legal society, for example in respect of the behaviour of people, or the effects legal norms have in society. Sociology of law uses special research methods (empirical, statistical etc.). This means that there is a clear line of demarcation between legal dogmatics and sociology of law. On the other hand, sociology of law is closely related to history of law. The latter uses, in many respects, the same methods as does the former: it describes, analyses and explains historical material in the same way as does the sociology of law - or at least it can do so. The difference between the two disciplines lies in the object of inquiry. History of law is interested in the past, while the sociology of law focuses on the present society.

From the point of view of our analysis, the difference between sociology of law and legal dogmatics is central. Legal dogmatics is a typical interpretative discipline. It uses facts provided by sociology of law, but the interpretation itself has a non-empirical nature. According to normal usage, legal dogmatics has two