A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE
Editor-in-Chief: Enrico Pattaro

Volume 1

The Law and the Right

A Reappraisal of the Reality that Ought to Be

by
Enrico Pattaro

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The Law and the Right

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by

Enrico Pattaro

CIRSFID and Law Faculty, University of Bologna, Italy

with an Appendix by

Alberto Artosi, Antonino Rotolo, Giovanni Sartor and Silvia Vida

Assistant Editor: Corrado Roversi

Springer

A C.I.P. Catalogue record for this book is available from the Library of Congress.

5 Volume Set:
ISBN-10 1-4020-3387-7 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-10 1-4020-3505-5 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3387-2 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3505-0 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York

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Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Printed on acid-free paper

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Printed in the Netherlands.

Aller Idealismus ist Verlogenheit vor dem Nothwendigen.

All idealism is mendaciousness in the face of necessity.

(Friedrich Nietzsche, *Ecce Homo*, 1888)

Science is what we know and philosophy is what we don't know.

(Bertrand Russell, *Bertrand Russell Speaks His Mind*, 1959)

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A NOTE ON THE AUTHOR AND THE CONTRIBUTORS

ENRICO PATTARO is professor of philosophy of law at the University of Bologna, president of the Italian Association for Legal and Political Philosophy, and a former president as well as an honorary president of the International Association for the Philosophy of Law and for Social Philosophy (IVR). He has some familiarity with the committees of jurists called on to draft texts of law; for example, from 1997 to 1999 he chaired the legal committee appointed by the Italian government to draft the bills of law for Italy's changeover to the euro. His scholarly interests are in general jurisprudence, the history of ideas, computer science and law, and the studies concerned with the formation of character and personality in the context of social structure. He has written fifteen books and about 200 other works; among them, "Validità o verificabilità del diritto?" in *Rivista trimestrale di diritto e procedura civile* (Milan, Giuffrè, 1966); "Il realismo giuridico come alternativa al positivismo giuridico," in *Rivista internazionale di filosofia del diritto* (Milan, Giuffrè, 1971); *Il pensiero giuridico di L. A. Muratori tra metodologia e politica* (Milan, Giuffrè, 1974); "Il positivismo giuridico italiano dalla rinascita alla crisi," in *Diritto e analisi del linguaggio* (Milan, Comunità, 1976); *Lineamenti per una teoria del diritto* (Bologna, Clueb, 1985); "Alle origini della nozione Principi generali del diritto: Profilo storico-filosofico," in *Soggetto e principi generali del diritto* (Milan, Giuffrè, 1987); and *Temi e problemi di filosofia del diritto* (Bologna, Clueb, 1994). Among the works of which he is editor are *Le fonti normative sull'euro* (Roma, Ministero del Tesoro, del Bilancio e della Programmazione Economica, 1999, 2 vols.) and *Codice di diritto dell'informatica* (Padua, Cedam, 2000).

ALBERTO ARTOSI graduated in philosophy at the University of Bologna in 1974. He became research assistant in logic and philosophy of science in 1983, and professor of logic of normative systems in 1992. He was subsequently professor of philosophy of science at Bologna University and is currently professor of legal logic and legal computer science at the Faculty of Law of the University of Bologna and a member of CIRSFID (Research Centre for History of Law, Philosophy and Sociology of Law, and Computer Science and Law). His major publications include some monographies; in particular, *Metodi tableaux per la logica classica e modale* (Bologna, Clueb, 1995), *Il paradosso di Chisholm: Un'indagine sulla logica del pensiero normativo* (Bologna, Clueb, 2000), and *Studies on Normative Reasoning: Logical and Philo-*

sophical Perspectives (Bologna, Clueb, 2000), and several essays on automated deduction in non-classical logics, deontic logic, and formal ethics. His current research topics include normative reasoning, philosophy of law, and legal computer science. He is a member of the editorial board of the journal *Discipline filosofiche* (Macerata, Quodlibet).

ANTONINO ROTOLO (PhD, Padua) is research scientist in legal philosophy at the University of Bologna Law Faculty. He is a member of CIRSFID (Research Centre for History of Law, Philosophy and Sociology of Law, and Computer Science and Law) at the University of Bologna. He published two monographic volumes: *Identità e somiglianza: Saggio sul pensiero analogico nel diritto* (Bologna, Clueb, 2001) and *Istituzioni, poteri e obblighi: Un'analisi logico-filosofica* (Bologna, Gedit, 2002). He has also written several essays on the application of formal logic for modelling legal reasoning and on the relation between law and practical reason. He is assistant editor of *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* (Oxford, Blackwell).

GIOVANNI SARTOR is currently professor of computer and law at the University of Bologna, a position he took up after earning his PhD at the European University Institute (Florence), working at the Court of Justice of the European Union (Luxembourg), doing research at the Italian National Council of Research (ITTIG, Florence), and holding the chair in jurisprudence at Queen's University of Belfast (where he is now honorary professor). He is coeditor of the journal *Artificial Intelligence and Law* (Dordrecht, Springer) and has published widely in legal philosophy, computational logic, legislation technique, and computer law. Among his publications are *The Law of Electronic Agents* (Oslo, Unipubskriftserier, 2003), *Judicial Applications of Artificial Intelligence* (Dordrecht, Kluwer, 1998), *Logical Models of Legal Argumentation* (Dordrecht, Kluwer, 1996), and *Artificial Intelligence in Law* (Oslo, Tano, 1993).

SILVIA VIDA graduated in philosophy at the University of Bologna in 1994, and in 1999 earned a doctorate in philosophy of law at the University of Milan. She is currently research assistant in philosophy of law at Bologna University and member of CIRSFID (Research Centre for History of Law, Philosophy and Sociology of Law, and Computer Science and Law). She is author of two books, *Norma e condizione: Uno studio dell'implicazione normativa* (Mi-

lan, Giuffrè, 2001), on the logic of conditional norms, and *Saggi sulla filosofia morale di William David Ross* (Bologna, Gedit, 2003), on the metaethical aspects of moral intuitionism, as well as of a number of essays on logic and the philosophy of norms. Her current research topics include normative reasoning, formal ethics, and more recently philosophy of politics. She is assistant editor of *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* (Oxford, Blackwell).

EDITOR'S PREFACE

1. The Five Theoretical Volumes

The present Treatise divides into a theoretical and a historical part. This preface introduces the theoretical part. The volumes of the historical part deserve a separate preface, which I will premise to the first of these volumes, the sixth of this Treatise: *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, edited by Fred D. Miller, Jr., in association with Carrie-Ann Biondi Khan.

The five theoretical volumes are 1. Enrico Pattaro, *The Law and the Right: A Reappraisal of the Reality That Ought to Be*; 2. Hubert Rottleuthner, *Foundations of Law*; 3. Roger Shiner, *Legal Institutions and the Sources of Law*; 4. Aleksander Peczenik, Scientia Juris: *Legal Doctrine as Knowledge of Law and as a Source of Law*; and 5. Giovanni Sartor, *Legal Reasoning: A Cognitive Approach to the Law*. These volumes are theoretical by definition, in a stipulated sense of "theoretical" expressing the aforementioned division of the Treatise volumes into two classes, theoretical and historical.

In a second sense, the qualifier "theoretical" is conventional, rather than stipulated: It is rooted in the scholarly tradition that in continental Europe traces back to the German *allgemeine Rechtslehre*. This German expression should properly be rendered as "general doctrine of law," even though the term *Lehre* ("doctrine"), as it occurs in the expression, is often translated as "theory," and that even in the languages of civil-law countries, examples being *teoría, théorie,* and *teoria* in Castilian, French, and Italian respectively.[1] In any event, in this second, conventional sense, "theoretical" stands for "legal-theoretical" and applies properly to Volumes 3 through 5.

In a third sense we have "theoretical" as distinguished from "metatheoretical," this in the light of Alfred Tarski's (1901–1983)[2] use of the distinction between language and metalanguage (Tarski 1983).

With reference to the distinction between "theoretical" and "metatheoretical," and taking the two previous qualifications also into account, Volume 1 (which introduces the entire Treatise) can be said to be an intertwining of theory, metatheory, and history, and specifically a history of ideas; Volume 2 is

[1] But compare the Swedish *allmän rättslära*, which instead is literal to the German expression it translates, *allgemeine Rechtslehre*. On legal doctrine, legal theory, and related terms, see, in this Treatise, Peczenik, Volume 4, Chapters 1 and 2.

[2] Antonino Rotolo, in the Assistant Editor's Preface, which follows this preface, explains, among other things, the criteria used for indicating the dates of birth and death of the people mentioned in this volume as well as some of its other editorial aspects.

declaredly metatheoretical; Volume 3 is theoretical; Volume 4 is part-theoretical, part-metatheoretical; and Volume 5 is prevalently metatheoretical.

We can now give some substance to these distinctions. I will begin with Volumes 3 through 5, which I qualified as legal-theoretical (in the second of the three senses listed, the conventional sense).

Roger Shiner, in Chapter 1 of Volume 3, draws as follows the distinction between "strictly institutionalized sources of law" and "quasi-institutionalized sources of law":

A law, or law-like rule, has a strictly institutionalized source just in case:

i) the existence conditions of the law, or law-like rule, are a function of the activities of a legal institution

and

ii) the contextually sufficient justification, or the systemic or local normative force, of the law, or law-like rule, derives entirely from the satisfaction of those existence conditions.

Clause (i) is intended to capture the idea of a "source" for a rule, and clause (ii) the force of the qualification "strictly." Two further comments are needed on this definition. The expression "law-like rule" is added to permit the possibility that certain forms of law less close to the paradigm of institutionalized sources of law might still qualify as strictly institutionalized sources of law. It might be thought controversial whether the decisions of such sources are "laws" in some strict sense. Also, the term "contextually sufficient" is taken from Aleksander Peczenik (1983, 1; 1989, 156–7). Peczenik defines a contextually sufficient justification as one "within the framework of legal reasoning, in other words, within the established legal tradition, or paradigm." "Deep" or "fundamental" justifications, by contrast, are those from outside the framework of legal reasoning, such as justifications by moral reasoning. For Peczenik, strictly institutionalized sources would be a sub-class of contextually sufficient justifications, but not the whole class (1989, 157). I am concerned, then, in this volume with that sub-class.

Other sub-classes would include the forms of justification considered in Volumes 4 and 5 of this Treatise, as "quasi-institutionalized sources of law." Consider, for example, coherentist justifications for legal claims. It might be that, within some jurisdiction, a legal claim is regarded as justified if in fact it is the one of competing claims, which coheres best with the existing body of justified claims within that jurisdiction. Neil MacCormick has argued for the validity of such coherence-based arguments within common law legal reasoning (MacCormick 1984, 46–7; 1978, 152–7, 233–40). Ronald Dworkin extended the idea to include coherence with principles whose postulation would make the legal system the best it could be (Dworkin 1986, 226ff.). Similarly, in most jurisdictions there are well-understood rules for the interpretation of statutes (Cross, Bell, and Engle 1995; MacCormick and Summers 1991). [...] Both coherence and interpretation are analyzed by Aleksander Peczenik in Volume 4 of this Treatise. Similarly, there are a variety of modes of legal reasoning and argumentation. A distinction can be drawn between cases decided by the content of a legal source "directly" and cases decided after supplementation of the content of the legal source by one or more acceptable forms of legal argumentation. The source may be said to be a "strictly institutionalized source of law" in the first case, but a "quasi-institutionalized source of law" in the latter case. The analysis of forms of legal argumentation is undertaken by Giovanni Sartor in Volume 5 of this Treatise [...].

We are not going to investigate the ultimate sources of legal validity itself, if that is taken to be an enquiry into what moral values, or what political forces, or what historical antecedents led to a particular law being a part of the system of which it is a law.[3]

[3] Shiner, Volume 3 of this Treatise, Chapter 1, 3–4. Cf. ibid., 7, 19, 32–3, 85–113, 115, 140–1, 145, 150, 158, 197–8, 210, 215, 217, 221–3, 227–9.

I borrowed this passage by Shiner because—on the basis of the distinction between "strictly institutionalized sources of law" and "quasi-institutionalized sources of law"—he sets out the legal-theoretical program of Volumes 3 through 5 at the same time as he indicates, on the other hand, and by exclusion, the areas consigned, in full or in part, to the investigation undertaken in Volumes 1 and 2.

In fact, there were three distinctions that from the outset served as guiding principles at the meetings held to set out the guidelines for the various drafts of the Treatise project: In the first place, there was the mentioned distinction between the "theoretical" and the "historical" volumes; in addition, there was at work, in the theoretical volumes, the distinction between "strictly institutionalized sources of law" and "quasi-institutionalized sources of law" and, in the historical volumes, the distinction between the philosophers' philosophy of law and the jurists' philosophy of law.[4]

Thus, the legal-theoretical Volumes 3, 4, and 5 were initially and provisionally entitled as follows: Volume 3 was *Strictly Institutionalised Sources of Law* and eventually became *Legal Institutions and the Sources of Law*; Volume 4 was *Quasi-Institutionalised Sources of Law I: Legal Dogmatics* and eventually became Scientia Juris: *Legal Doctrine as Knowledge of Law and as a Source of Law*; and Volume 5 was *Quasi-Institutionalised Sources of Law II: General Legal Theory, Logic, and Legal Computer Science as Auxiliary to Legal Dogmatics* and eventually became *Legal Reasoning: A Cognitive Approach to the Law*. Analogously, Volume 6, the first of the historical volumes, was initially and provisionally entitled *The Philosophers' Philosophy of Law from Greece to the Seventeenth Century* and eventually became *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*.

In Volumes 3 through 5 there is a fourplex idea involved, as I see the matter, in speaking of "strictly institutionalized sources of law" and "quasi-institutionalized sources of law": (*a*) In a broad sense, all of social reality and culture is an institutional reality (cf. Section 15.2.4 of this Volume 1); (*b*) law is part of the institutional reality, or rather, of cultural reality, as I prefer to say; (*c*) law and the sources of law need to be analytically distinguished, even though "sources of law" is not infrequently taken to mean "kinds of law" (cf. Section 3.5 of this volume); and (*d*) once the sources of law in the sense of "kinds of law" have been distinguished within the sphere of social, cultural, and institutional reality broadly understood,[5] they will need to be further dis-

[4] It was Norberto Bobbio (1909–2004) who made the distinction between the jurists' philosophy of law and the philosophers' philosophy of law (Bobbio 1965, 43ff.): He favoured the first of these two, in the sense that he judged it to be the task of professional philosophers of law to work with the jurists, and hence to be able to carry on with them a meaningful discourse.

[5] Cf. Sections 15.2 and 15.5 of this volume and Fassò 1953 (Guido Fassò, 1915–1974).

tinguished, or at least can be further distinguished to advantage, by applying to the expression "sources of law" the qualifiers "strictly institutionalised" and "quasi-institutionalised." The sense of this last distinction is that statutory law, customary law, and judge-made law, for example, are each a strictly institutionalised kind of law, however much they are so to different degrees and in different ways; in contrast, legal dogmatics, the general theory of law, and legal logic, for example, are each a quasi-institutionalised kind of law, however much they are so to different degrees and in different ways.

The distinctions just made came to bear when we started working on the Treatise. Of course, what counts as the outcome of this process, even in what concerns the distinction between "strictly institutionalised sources of law" and "quasi-institutionalised sources of law," is the outcome fixed in the theoretical volumes in their present form. So this is how the matter was finally worked out: Shiner, in Volume 3 (*Legal Institutions and the Sources of Law*), treats of legislation, precedent, custom, delegation, constitutions, international law, general principles, and authority, and does so with explicit reference to strictly institutionalised sources of law; Peczenik, in Volume 4 (Scientia Juris: *Legal Doctrine as Knowledge of Law and as a Source of Law*), with implicit reference to quasi-institutionalised sources of law, treats from different angles, and entering into several interrelated questions, of general and particular legal doctrine, legal theory, legal interpretation, coherence, defeasibility, and reflective equilibrium in legal doctrine, and also of metatheory and ontology in legal doctrine; and Sartor, in Volume 5 (*Legal Reasoning: A Cognitive Approach to the Law*), likewise with implicit reference to quasi-institutionalised sources of law, treats from different angles, and entering into several interrelated questions, of practical rationality, basic forms of reasoning, doxification of practical reasoning, normative beliefs, various kinds of rationalisation and rationality, multi-agent practical reasoning, collective intentionality, and legal bindingness: These topics he discusses in Part I of his magnum opus (the entire volume consisting of over eight hundred pages, for an overall twenty-nine chapters and 102 sections); in Part II he treats of legal logic, covering an entire spectrum of questions.

As we can gather from Shiner's previously quoted passage, Volumes 3 through 5 are not concerned with "deep or fundamental justifications"—the justifications found "outside the framework of legal reasoning"—or with "any enquiry into what moral values, or what political forces, or what historical antecedents led to a particular law being a part of the system of which it is a law." By exclusion, these questions are consigned, in full or in part, and along with other questions, to Volumes 1 and 2 of the Treatise (and of course to the historical volumes).

In Volume 2, Rottleuthner addresses from an explicitly metatheoretical angle the question of the foundations of law, and he distinguishes seven kinds of foundations: basic, fundamental concepts; basic research; logical and episte-

mological foundations; moral or legitimacy foundations; historical, genetic foundations of law; extralegal foundations of law; and preconditions for the efficacy of law. He further distinguishes the extralegal foundations of law (Chapter 3 of Volume 2) from the internal foundations of law (Chapter 4 of Volume 2). The extralegal foundations of law can be transcendent (mythological and religious foundations of law) or immanent (natural, economic, moral, societal, political, and historical foundations of law). Examples of internal foundations of law are found in the theories of Hans Kelsen (1881–1973), Niklas Luhmann (1927–1998), and Lon Fuller (1902–1978).

Rottleuthner criticises "mono-foundationalism" in application to law, such as happens in Karl Marx (1818–1883) and Friedrich Engels (1820–1895), and welcomes instead "multi-foundationalism": "a multi-variate approach of the kind that can be found," for example, in Max Weber (1864–1920) (Volume 2 of this Treatise, xi).

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I will turn now to the present Volume 1. Here, theory and metatheory, as well as the history of ideas, find themselves variously intertwined in a discourse devoted to unpacking the theme of the law and the right, and also in an effort to reappraise the reality that ought to be (the Ought, *das Sollen*, normativeness) from a monistic perspective.

This volume is divided into four parts: *Part One*, "The Reality That Ought to Be: Problems and Critical Issues" (Chapters 1 through 4); *Part Two*, "The Reality That Ought to Be: A Monistic Perspective. Norms as Beliefs and as Motives of Behaviour" (Chapters 5 through 7); *Part Three*, "Family Portraits. Law as Interference in the Motives of Behaviour" (Chapters 8 through 10); and *Part Four*, "In Search of Confirming Others" (Chapters 11 through 15).

In Chapter 1, I outline the Is-Ought dualism ("reality that is" versus "reality that ought to be"), a dualism proper to the tradition of legal thought in civil-law countries; and then I bring out (*i*) an underlying ambiguity that manifests itself in the use of "law" as an English equivalent for such terms as *derecho*, *diritto*, *droit*, and *Recht*, proper to the languages of civil-law countries, and (*ii*) the complex web of concepts that this ambiguity conceals. Further, the expressions "what is objectively right" and "what is subjectively right" are introduced and four senses of "right" and one of "wrong" are specified. Some of the questions dealt with in this chapter are taken up and developed in Section 2.2, Chapter 3, Section 5.1, Chapter 6, Section 10.2.4, Chapter 11, Section 12.2, and Chapters 13 and 14.

In Chapter 2 the concept of validity is introduced and connected with the distinction between types and tokens. Further, the idea of normative production (or normative causality) is taken into consideration and connected with the idea of the typicality of law. Some of the questions dealt with in this chap-

ter are taken up and developed in Chapter 3; Sections 5.2, 5.3, and 6.4; Chapter 7; and Sections 8.2, 9.6, 13.7, 13.8, and 15.2.3.

In Chapter 3 I take a dive into the sources of law, showing the parallelism between operative facts and sources of law in one sense of this expression. It is pointed out, further, that "sources of law" takes other meanings as well, notably "kinds of law" and "legal norms as Ought-effects in the reality that ought to be," between which there needs to be a clear distinction. Lastly, voluntaristic normativism is introduced and exemplified with reference to Grotius (1583–1645) and Kelsen, in which regard a continuity is underscored between the voluntaristic-normativistic conception of positive law occurring in natural-law theories (even in rationalistic ones) and the voluntaristic-normativistic conception of positive law occurring in German legal positivism. Some of the questions dealt with in this chapter are first mentioned or introduced in Chapters 1 and 2 and are taken up and developed in Sections 4.3 and 4.4, Chapter 7, and Section 9.6.

In Chapter 4, the first of the historical chapters in Volume 1, I discuss the matrix of normativeness as the ultimate source of what is right by virtue of human-posited norms: There come into play here some of the foundations that Rottleuthner treats more amply in Volume 2 and that Rotolo, in Chapter 7 of Volume 3, calls "sources of validity" in line with a long-established and venerable tradition. I also call the Koran into play in regard to the problem of the matrix; and Grotius and Kelsen are taken up anew; so, too, different classic conceptions of "nature" and the origin of the term *jus positivum* are considered. But what I am especially concerned to underline in this chapter is how the problem of the ultimate source of what is right, in all the manifestations of it described here, comes down to the problem of the authenticity of norms (Section 4.2): Cicero (106–43 B.C.) speaks of *vera lex*, and Augustine (354–430) and Aquinas (1225/1226–1274)[6] of the cases in which a *lex* is not a *lex sed legis corruptio* (it is not a norm but the forgery of a norm). And it is for this reason that I introduce (in Sections 4.1 through 4.3) the expression "matrix of normativeness." Some of the questions dealt with in Chapter 4 are first mentioned or introduced in Section 3.6 and are then taken up again in Sections 5.1, 13.7, and 15.5.

In Chapters 5 through 7 (Part Two) I present and flesh out my vision of the reality that ought to be, and do so from a monistic perspective: Norms are beliefs and motives of behaviour that acting subjects internalise in their brains and that become therein operative in different ways. I will not prefigure here in any summary fashion the contents of these chapters, and rather invite the reader to jump right in and work through them. Some of the questions dealt with in these chapters are first mentioned in Chapter 1, Section 2.1, and

[6] On Aquinas's date of birth—whether it is 1225 or 1226—see, in Volume 6 of this Treatise, Lisska, Section 12.1.

Chapter 3 and are then taken up again in Chapters 8, 9, and 10 and Sections 15.2.5, 15.3, and 15.4; the questions treated in Chapters 6 and 7 of this Part Two are also taken up again in the Appendix ("Elements for a Formalisation of the Theory of Norms Developed in This Volume").

Chapters 8 through 10 (Part Three) introduce my conception of law: realistic and normativistic but not normativistic in full. Indeed, Chapter 8 is entitled "No Law without Norms," and Chapters 9 and 10 follow through on this thought with the title "But Norms Are Not Enough" (Chapter 9) and "The Law in Force: An Ambiguous Intertwining of Normativeness and Organised Power" (Chapter 10). The same Chapter 8 begins by placing Hart 1961 (H. L. A. Hart, 1907–1993) on an ideal line that connects him to Axel Hägerström (1868–1939) and Karl Olivecrona (1897–1980), on grounds I hope will be deemed plausible. Further, there is criticised in this chapter the current concept of validity of norms (Hart's concept being a part of it), and it is argued that Hart, in his *Postscript*, presents us with an abjuration of normativeness in law (contrary to what he so excellently maintained in 1961), and that he does so to retain his staunchly defended distinction between law and morality, a distinction that staggers under the heavy blows dealt to it by Ronald Dworkin's critique. Some of the questions dealt with in Chapter 8 are first mentioned or introduced in Sections 2.2 and 5.1 and Chapters 6 and 7 and are then taken up again in Sections 9.1, 9.3, and 9.6 and Chapters 10 and 15.

In Chapter 9 some criticism is addressed to the analytical legal theory that reduces norms to propositions, or in any event to linguistic entities, and there is discussed at some length the relationship between language and the motives of behaviour; and it is also argued that language cannot bring out conative effects in an acting subject unless there concur, to this end, intra-psychical motives of action the agent has already internalised (whether these are inborn or acquired by internalisation from the social environment). Some of the questions dealt with in Chapter 9 are first mentioned or introduced in Chapter 2, Sections 3.5 and 3.6, and Chapters 5 through 8 and are then taken up again in Chapter 10 and Sections 11.3, 15.2.5, and 15.3.

In Chapter 10 I first expound Olivecrona's view of the role of force in law, a view I share with Olivecrona; I then introduce a different concept, the concept of "law in force," of which I provide my own characterisation, a characterisation intended to show the crucial importance both of the normative dimension and of organised power in the machinery of law. Some of the questions dealt with in Chapter 10 are first mentioned in Chapters 1 and 5 through 9 and are then taken up again in Sections 11.3, 15.3, and 15.5.

Chapters 11 through 15 (Part Four) are devoted to some of my confirming others.[7] Here, in Part Four, I will be especially concerned with bringing out

[7] "The image of self which a person already possesses and which he prizes leads him to

the essential traits of their thought. I do this in an extensive presentation that makes reference to the idea of the reality that ought to be, as this idea occurs in mythology and as I see it in the way that existentialism considers fate (Chapter 11), and to the idea of what is right, as this idea occurs in Homeric epic (Chapter 12), Aquinas (Chapter 13), and Kelsen (Chapter 14). Some of the questions dealt with in Chapter 11 are first mentioned in Chapter 1, Sections 5.3 and 6.3, Chapter 7, and Sections 9.6 and 10.2 and are then taken up again in Sections 12.2 and 15.2. Some of the questions dealt with in Chapter 12 are first mentioned in Chapters 1 and 6 and Sections 10.2.4 and 11.3 and are then taken up again in Chapters 13 and 14. Some of the questions dealt with in Chapter 13 are first mentioned in Chapter 1, Section 2.1, Chapter 4, and Section 12.2 and are then taken up again in Chapter 14 and Sections 15.2.2 and 15.5. Some of the questions dealt with in Chapter 14 are first mentioned in Chapter 1, Sections 3.6 and 12.2, and Chapter 13.

Chapter 15 closes the volume. Some of the questions dealt with in Chapter 15 are first mentioned in Sections 2.1, 4.3, and 4.4 and Chapters 5 through 11. I outline in this chapter my general conception of the relationship between nature (brute reality) and culture (social or institutional reality). In this chapter there are also identified, as confirming others in support of my conception of normativeness, (*i*) some contemporary scholars who study distributed artificial intelligence (DAI) and multi-agent systems (MAS)—most notably Rosaria Conte and Cristiano Castelfranchi—and (*ii*) some 20th-century sociopsychologists, most notably Hans Gerth (1908–1978) and Charles Wright Mills (1916–1962) and some of their predecessors. In this last connection, some important analogies are brought out between Gerth and Mills's concept of "generalised other" and the concept of "norm" as I understand this concept following in the wake of Hägerström, Olivecrona, and Hart 1961.

Finally, I identify in the same chapter a line of philosophical thought—an ontological and epistemological line stretching from Bertrand Russell (1872–1970) to Willard Van Orman Quine (1908–2000) and John Searle—to which I anchor my monistic and materialistic view of reality (including the reality that ought to be), a view that can be understood as non-reductionist nonetheless (despite being monistic and materialistic) in the sense that it accepts causal reductionism but rejects eliminative reductionism.[8] Also finding a rationale in

select and pay attention to those others who confirm this self-image, or who offer him a self-conception which is even more favorable and attractive than the one he possesses. [...] They treat him as he would like to be treated: they are confirming others" (Gerth and Mills 1961, 86–7; cf. Section 15.3.4). Of course, my use of "confirming others" in the title to Part Four of this volume, though it takes its cue from these two authors, makes no pretence to correspond to the technical or semi-technical use they make of the same expression.

[8] The sense in which my ontology is monistic and materialistic but not reductionist is that

the line stretching from Quine to Searle are some expectations I have in the regard to the neurosciences, and specifically in regard to the contributions the neurosciences will be able to make in enabling a satisfactory understanding of the psychological aspects of the internal dimension of human beings—of the dimension that Hart, in his account of normativeness, cautiously called "the internal point of view." Norms, as I characterise them in the course of the present volume, belong to this internal dimension of humans: They get internalised in their brains, or so I argue. For this reason I expect the neurosciences to contribute to clarifying normativeness, too.[9]

I know full well, for reasons having to do with statistics and biology, that when the neurosciences, in their progress, will verify or falsify this prediction of mine, I will have become dust again ("In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return"; Genesis 3:19), and that therefore I won't be able to plume myself on my prediction or have a change of heart. But I would still like to clearly state my expectation, so that those who will witness the developments in the neurosciences which I am referring to will be able to see with certainty (without having to enter into interpretation) whether I was right or wrong.

Nor does the fact that my expectations may well be forgotten by the time these developments come to hand strike me as a good reason not to express them.

2. The Background Leading up to the Treatise

There were three ideas I was turning over in my head just about midway through the 1980s, or rather three projects I wanted to see through. The first of these was an international journal of philosophy of law based in Italy but written in English, and fashioned after the model of the most authoritative scientific journals (as in chemistry and biology), that is, a journal having a selective access based on the method of blind refereeing. And as to the English, the rationale behind it was the service it can render as a lingua franca, "just as

it substantially welcomes materialism à la Searle, who criticises eliminative reductionism at the same time as he adopts causal reductionism (cf. Section 15.4).

[9] After all, criminology, criminal psychology, and neuropsychiatry have always concerned themselves, from a sociological, psychological, and neuropsychiatric perspective, with behaviour held in violation of norms. Of course this implies that these disciplines should also study behaviours in compliance with norms and what a norm's internalisation consists in. Those who believe, as I do, that much, if not all, of psychology is destined, in the progress of scientific knowledge, to be supplanted by the neurosciences will consequently believe that the neurosciences will in the future provide important contributions to our understanding of normative phenomena, individual as well as social, as conceived and presented in the course of this volume.

had been the case with Latin until about the mid-18th century," as I was wont to remind some learned and respected colleagues of mine who would frown upon English, with a leeriness motivated in part by a patriotism rooted in their erudition, and in part by an uneasiness with the "invasion" of American culture, deemed "barbaric." But the reminder I was making did not resonate very much with them. Nor did my reminder with regard to the "invasion": I pointed out to them that *Grecia capta ferum victorem cepit* ("Greece, the captive, made her savage victor captive"; Horace, 65–8 B.C., *Epistles*, II, 1, v. 156). At any rate, from this idea was born, in 1988, *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*, Oxford, Blackwell Publishing.

The second idea was an interdisciplinary research centre in which the history, philosophy, and sociology of law and legal computer science—and artificial intelligence and law in particular—could all communicate and, whenever possible, interact. Here, the strongest objections and resistance came from respected jurist colleagues: "We don't need any artificial intelligence," was their slogan. "We can fare well enough with our natural intelligence." At any rate, from this idea was born, in 1986, CIRSFID, a University of Bologna Centre for Interdisciplinary Research in the History, Philosophy, and Sociology of Law and in Computer Science and Law.

The third idea was a multivolume treatise in legal philosophy and general jurisprudence. This third idea did not meet any particular objections, but it remained on the back burner nonetheless, because all of my time was taken up in the first place to overcome the resistance and objections to the first two ideas, and then to develop these ideas into operative projects and consolidate these last so as not to have the facts prove right those people who had countered the same projects, not only for the reasons mentioned a moment ago, but also because, in their estimation, the projects were impracticable.

This premise may well be overly autobiographical, but it effectively conveys the reason why my first and warmest thanks for this Treatise—which finally sees the light of day—goes to Carla Faralli, despite the fact that she has not occupied herself directly with the Treatise. Indeed, for some time now, in recent years, Carla has generously accepted to take my place as editor-in-chief of *Ratio Juris* and as director of CIRSFID,[10] and has done so improving on both, enabling me to devote myself amply to research, and with great freedom of movement, such as I have not been able to enjoy for a long time. Without

[10] Granted, these two tasks may bring a nuance of distinction. But then, in the rough-and-tumble of Italian academic life, they also guarantee a personal, non-transferrable, and huge expenditure of time and energy, at the same time as they also impose a daily and forcible sharing of living quarters with bureaucratic pseudo-problems that one would never expect to encounter—this is especially true in directing CIRSFID, as it is in directing any other university institution in Italy.

such freedom and time, the Treatise project would not have found its completion.

3. Acknowledgements

The first dedication goes to the Advisory Committee: to the late Norberto Bobbio, and to Ronald Dworkin, Lawrence M. Friedman, and Knud Haakonssen, who have honoured us with their faith and prestige. So, too, Gerald Postema and Peter Stein, a new friend and a longtime friend, have contributed with their expertise to enrich and set in the right balance such scholarship as this Treatise was looking for from the moment of its original framing.

My thanks go to all the volume authors and editors, without whose essential contributions, and without whose steady collaboration, there would clearly be no multivolume Treatise that we could present to an audience of students and scholars. I am fond of recalling that I first contacted Aleksander Peczenik (Volume 4), to whom I am tied by a relationship of esteem and fellowship—a relationship begun in Lund (Sweden), as both of us were in touch with Karl Olivecrona. Hubert Rottleuthner (Volume 2) is an English gentleman born and bred in Germany: clear-minded, transparent, and headstrong. Roger Shiner (Volume 3) came in with all his wisdom, sense of life, and humour in taking part in the teamwork required by the Treatise project. Giovanni Sartor is to me the correlative of what in Volume 5 he says I am to him: He is like a little brother who keeps making trouble, opening new horizons previously undisclosed to me, and he startles me with his ingenuity and ingeniousness.

There is also a special group I am indebted to: These are the people at CIRSFID and at the university of Bologna—some of them already mentioned—who at different times, and in different ways and measures, have contributed directly to the effort and intellectual work required by the Treatise. I will first group them in alphabetical order in this list I have drawn up (I have tried to make it exhaustive, but there are many people in this group, so I hope I have not left anyone out): Alberto Artosi, Claudia Cevenini, Giovanni Costa, Emilio Franco, Matteo Galletti, Fabio Lelli, Daniela Montuschi, Sergio Niger, Andrea Padovani, Monica Palmirani, Enrico Pelino, Pierluigi Perri, Bernardo Pieri, Andrea Marco Ricci, Enrico Ronchetti, Antonino Rotolo, Corrado Roversi, Giovanni Sartor, Guido Scorza, Ughetta Tona, Francesco Tura, Filippo Valente, Annalisa Verza, Silvia Vida, Giorgio Volpe. A specific thanks goes out individually to each of these persons.

Some of the contributions from these people are now integral to the Treatise. Thus, Andrea Padovani served as coeditor, with Peter Stein, of *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*—the seventh volume of this Treatise and the second of the historical volumes—and as co-

author of it with the same Peter Stein and with Andrea Errera and Kenneth Pennington; and Alberto Artosi, Nino Rotolo, Giovanni Sartor, and Silvia Vida cowrote and contributed the appendix to Volume 1, "Elements for a Formalisation of the Theory of Norms Developed in this Volume"; Rotolo also contributed to Volume 3, by Roger Shiner, Chapter 7, "Sources of Law in the Civil Law."

I am further very grateful to Giorgio Volpe and the four Bolognan scholars just mentioned, because they gave of their time to discuss amply with me some of the contents of Volume 1, and in particular my conception of norms as beliefs and as motives of behaviour: I have received from them valuable insights and suggestions. Even when we ended our discussions maintaining different views, their accurate criticisms have made it so that I should hone my formulation of the ideas I was putting forward. Of course responsibility for any error or omission rests solely with me.

Also, Giorgio Volpe joined me, in the initial phases of the project, and kept contact with the authors and volume editors—an effortful task in which he was helped out as well by Annalisa Verza. The work these two persons were doing was then taken up by Nino Rotolo, who, in addition to that, served excellently in the role of assistant editor for all the Treatise volumes, theoretical and historical, and was responsible for preparing the bibliography of Volume 1. He coordinated a fine editorial team whose members were, each in a different role, Matteo Galletti, Fabio Lelli, Daniela Montuschi, Pierluigi Perri, Andrea Marco Ricci, Corrado Roversi, Francesco Tura, and Filippo Valente.

Corrado Roversi—the youngest of those who have found themselves working in the frontline—has proved to be nothing short of irreplaceable in the task entrusted to him as assistant editor of Volume 1: He had to integrate the work of different people, and to do so in a manner I could be satisfied with (and I admit I have a reputation for being quite fastidious). Filippo Valente got me to improve my English through my effort to keep his under control: He repaid me by producing for certain literary crotchets of mine, and certain idiomatic turns of phrase in which I like to indulge in Italian, effective English equivalents I had theretofore been innocent of.

Among many libraries, a special thanks goes to those at CIRSFID and at the Antonio Cicu Department of Legal Studies, of the University of Bologna, as well as to the Bologna Library of the Italian Dominican Province.

Enrico Pattaro

University of Bologna
CIRSFID and Law Faculty

ASSISTANT EDITOR'S PREFACE

This preface briefly introduces the reader to the editorial rules adopted in this Treatise. The conventions used here are widely established within the scholarly community, to be sure, so the acquainted reader will find much of the explanation trivial and can safely move on. But the unacquainted reader is advised to stay: The discussion will be of help in using the text to full advantage, without having to wonder what this or that notation is meant to do. The entire Treatise is styled on the basis of *The Chicago Manual of Style* (13th ed., Chicago, Ill.: The University of Chicago Press, 1982): The choices made under this guideline (and occasionally departing from it) are designed to solve the specific editorial issues involved in this Treatise and are dictated by consistency. Here are the main issues and the choices, our "house style."

Citations and quotations follow the so-called author-date system. Under this system, in wide use in the Anglo-American world, all sources are cited by indicating the author's surname (or surnames, in case of multiple authors), followed by the year the work was published and—whenever a specific passage is quoted from a source—the page number or numbers locating the quotation within the source (in third position, along with any other piece of information deemed necessary). The full citation, expanded to include the editorial details, appears as back matter in an alphabetical bibliography containing those items actually quoted in the text. This system is useful for providing information that would otherwise end up in the footnotes: Source notes are reduced to a minimum, thereby freeing up space that can be used to advantage for textual digressions (placed under the main text in discursive content notes). The sheer number of works cited in this Treatise calls for just such a solution, enabling the reader to focus on content and not be burdened with full and immediate documentation.

One problem that comes up with the standard author-date system is that it makes it difficult to specify the year of the first edition of any work that the author is citing from an edition other than the first. That is because the year shown in author-date notation must match the year shown in the bibliography, and that year identifies the edition the author is actually working from and has on hand. So if the reader finds somewhere the indication "(Hegel 1980)," this only means that the author is using the 1980 edition of Hegel's *Grundlinien der Philosophie des Rechts*, not, of course, that the work was first published in that year. One way of getting around this problem is by specifying the date of the first edition in square brackets. But this solution we felt to be cumbersome for a notation conceived for brevity—and it would have to be used consistently, requiring authors to specify the first edition of *all* their sources, rather than only of those sources whose first edition belongs to a his-

torical past or is historically significant. We thought it best to let the authors decide for themselves, on a case-by-case basis, whether this information is relevant, as when citing a classic, and when it *is* deemed relevant, to specify it in the bibliography; so, any dates indicating first editions now appear in the bibliography, at the end of the source and within parentheses.

A second issue was the way to go about citing ancient works. Here, we decided to remodel the author-date notation (as just specified) into an author-title notation. Thus, rather than indicating the author's name and the year of publication, we indicate the author's name and the title of the work cited (or its shortened form). This solution is provided for by *The Chicago Manual of Style*, and our reason for taking it up is the oddity involved in citing Plato's *Republic*, for instance, by some such label as "(Plato 1987)," 1987 being the modern reprint edition (from of the Loeb Classical Library), translated into English by Paul Shorey. Thus, ancient works whose original editions are in manuscript form are cited by author and title: in the example, "(Plato, *The Republic*)." And we have extended this rule to a tight selection of non-ancient works standardly cited by title, even if their first edition appeared in print. The other variant application this rule finds in this Treatise is with abbreviated titles; in other words, some contributors use abbreviated rather than full titles because they are working with a great many ancient works that they need to cite frequently.

The Treatise is written in English and is addressed to an English-speaking audience. Quotations are generally reproduced in English. If the quoted matter is a translation, and the author has thought it useful to provide the original quotation (in the source language), that text will appear in a footnote. And if the translation is the author's own, that fact is indicated by "my translation." Any omission of quoted matter or any addition to it is indicated by square brackets: Ellipsis points within square brackets indicate omitted text matter; anything other than ellipsis points, added matter. Any square brackets in the original are labelled as such (as "square brackets in original," which points out omissions or additions made by the author being quoted, rather than by the author who is doing the quoting). Italicised text, instead, is labelled only when it is *not* in the original, as "italics added" (all unlabelled italics are therefore to be understood as occurring that way in the original). Both practices ("square brackets in original," "italics added") are standard. Exceptions to the italics rule occur when a Treatise contributor has felt it necessary to make a point by stating that certain italicised text matter is not his own doing.

Another issue was how to go about quoting original text not based on the Latin alphabet, such as ancient Greek. Here, too, each author was free to reproduce the original in a footnote. But in quoting or using short strings or single words, we chose to transliterate into the Latin alphabet, as *The Chicago Manual of Style* suggests doing in secs. 9.85ff. In some cases we quote words that may take two different transliterations: Here we chose to quote the word as transliterated in the text being quoted, without making any changes to it.

A few final remarks are necessary that apply specifically to Volume 1, by Enrico Pattaro.

All quoted translations provided in this volume have, with a few exceptions, their corresponding original in a footnote, this on the principle that the reader ought to be able to see for himself or herself whether the English translation is faithful to the original. In the same spirit, many of these quoted translations are also provided with alternative renditions of terms and strings relating to crucial concepts: These renditions occur in square brackets (in line with the editorial guidelines just described) and are inserted because deemed better able to convey the concepts involved.

Another specific point concerns Aquinas's *Summa Theologiae*: This title is spelled as such in the run of text (rather than as *Summa Theologica*), as it is in Volume 6, Chapter 12, by Anthony J. Lisska, among other places. To be sure, the editions used in writing Volume 1 are entitled *Summa Theologica*, and would have to be so spelled in the run of text, but here philological reasons in favour the spelling *Summa Theologiae* override the editorial criterion. Of course, the bibliographic reference to this text specifies both variants of the title, in keeping with the editorial rule governing citations.

There is also the question of the spelling for such Latin terms as *ius*, *iustitia*, and *obiectum*. The Treatise authors were free to adopt either of two solutions: the *i* spelling (as just exemplified) or the *j* spelling (*jus*, *justitia*, *objectum*). The letter *j* does not figure in the alphabet of classical Latin: The graphic sign *j* appeared only later, in the Middle Ages. Here, too, the decision was made in Volume 1 to spell these words as they occur in the texts from which they are being quoted, despite a preference of taste that would lean toward *jus*, *justitia*, *objectum*, and so on. The reader of Volume 1 will find *jus* or *ius* depending on who is actually writing; thus, if the word is being quoted it could be *jus* or *jus*, depending on how the author being quoted has spelled it; if it's *not* being quoted (but simply used or discussed), it will *jus*. The other volume authors were left free to chose their own rules in this regard; thus, Volume 4 is titled *Scientia Juris* (not *Scientia Iuris*), and in Volumes 6 and 7 the *i* spelling is retained throughout.

Finally, Volume 1 provides the dates of birth and death (only where both apply) for all the scholars, thinkers, and philosophers it mentions. These dates are specified only on first occurrence, the first time the author's name is mentioned anywhere in the text: Readers coming across an author's name on any occurrence other than the first can find out the corresponding dates of birth and death by using the index of names at the end of the volume.

Antonino Rotolo

University of Bologna
CIRSFID and Law Faculty

Part One

The Reality That Ought to Be: Problems and Critical Issues

Mir ist wohl bewußt, daß eine monistische Weltanschauung weder den Dualismus von Sein und Sollen, noch jenen von Inhalt und Form als einen endgültigen anerkennt und auch nicht anerkennen darf. Wenn ich hier dennoch prinzipielle Gegensätze erblicke und auf Verbindung von Sein und Sollen, von Inhalt und Form zu einer höheren Einheit, die beide einander ausschließende Begriffe umfaßt, verzichten zu müssen glaube, so finde ich als Rechtfertigung dieses meines Standpunktes im Grunde keine andere ehrliche Antwort als die: Ich bin nicht Monist. So unbefriedigend ich auch eine dualistische Konstruktion des Weltbildes empfinde*, in meinem* Denken *sehe ich keinen Weg, der über den unleidlichen Zwiespalt hinwegführt zwischen Ich und Welt, Seele und Leib, Subjekt und Objekt, Form und Inhalt—oder in welche Worte sonst sich die ewige Zweiheit verbergen mag.*

I am fully aware that a monistic vision of the world does not recognise and is not allowed to recognise as definitive the dualism between Is and Ought or that between content and form. But here, if I descry principled oppositions, and believe I have to renounce the bond of the Is with the Ought, of content with form, into a higher unity embracing the two mutually exclusive concepts, then I fundamentally find as a justification for this standpoint of mine no other honest answer than this: I am not a monist. So, I too *perceive* as unsatisfactory a dualistic construction of the image of the world, but in my *thought* I see no path that will lead beyond the unbearable inner clash between self and world, soul and body, subject and object, form and content, or whatever other words this eternal duality may instead conceal itself under.

(Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, 1911)

Die Norm als solche, nicht zu verwechseln mit dem Akt,
in dem sie gesetzt wird, steht—
da sie keine natürliche Tatsache ist—
nicht in Raum und Zeit.

The norm—not to be confused with the act by which it is posited—
does not as such reside in space and time, since it is not a natural fact.

(Hans Kelsen, *Reine Rechtslehre.*
Einleitung in die rechtswissenschaftliche Problematik, 1934)

So wie, solange es eine Religion gibt, es eine dogmatische Theologie geben muß,
die durch keine Religions-Psychologie oder -Soziologie zu ersetzen ist,
so wird es—solange es ein Recht gibt—eine normative Rechtslehre geben.
Deren Rang im Gesamtsystem der Wissenschaften ist eine andere,
eine untergeordnete Frage. Was not tut, ist nicht: diese Rechtswissenschaft zugleich
mit der Kategorie des Sollens oder der Norm aufzuheben,
sondern sie auf ihren Gegenstand einzuschränken
und ihre Methode kritisch zu klären.

So long as there is a religion, there must be a dogmatic theology, not to be substituted
with any psychology or sociology of religion. In the same way, so long as there is a legal order,
there will be a normative legal doctrine. Its rank in the overall system of the sciences
is a different and subordinate question. What is necessary is not that this legal science be dismissed,
along with the category of the Ought, or of norm, but rather that
it be circumscribed to its object and its method critically clarified.

(Hans Kelsen, *Reine Rechtslehre.*
Einleitung in die rechtswissenschaftliche Problematik, 1934)

Chapter 1

A FIRST GLANCE

1.1. The Reality That Ought to Be as Opposed to the Reality That Is

In the tradition of continental legal literature, the Ought is usually contrasted with the Is.

The Is is broadly understood to mean nature, namely, the physical (mineral, plant, and animal) world. Its makeup is the way it is and cannot change except according to laws characterised as necessary.[1] In German, the native language of scholars often turned to in dealing with these matters, the Is is referred to as *das Sein*, a reality pervaded by necessity (*das Müssen*).

I will call this reality "the reality that is."

Unlike mineral, plant, and animal behaviour, human behaviour is somehow believed to fall outside the reach of natural necessity: Human beings share physical, biological, and kindred necessary laws with other earthly beings. But unlike these other beings, human beings are believed to be endowed with a free will. Free will is subject to laws peculiar to it, which, unlike physical and biological laws, are not necessary, and hence can as a matter of fact be broken. Nevertheless, these laws are binding, that is, they ought to be adhered to despite their de facto violability. They are a normative must: the Ought (*das Sollen*) (Kelsen 1911, 3–33).

I will call the Ought "the reality that ought to be."

The reality that ought to be is a world of norms and of other kindred entities. It presents two aspects that are in a sense complementary: what is objectively right and what is subjectively right. I will take these up beginning in Section 1.2.

It is rarely the case, at least in civil-law countries, that a jurist should dwell on explaining what "ought" means. Jurists are rather more inclined to pointing out why one "ought" to do something, taking the notion of ought for granted. They will say that people ought to behave in certain ways, for this is "called for" or "commanded" by law, or by the lawmaker, the sovereign, the state, the legal system, and so on. However, by saying that a certain item of behaviour is to be engaged in because this is what the law or the sovereign "calls for" or "commands," a jurist will fail on two accounts: (*a*) in explaining what "ought" means and (*b*) in providing reasons why anyone should behave in the manner specified by the Ought.

As for point (*a*), until we limit ourselves to saying that norms pertain to the world of Ought, we will not explicitly have said what norms are, what they are made of, what entities they are.

[1] According to an established usage, we might refer to the physical world as "brute reality" and to its necessary laws as "exceptionless."

As for point (*b*), assuming the behaviour at issue is called for or commanded by law or by the sovereign, we are still left to ask why we should comply with the law and obey the sovereign. There is at play here what in Chapter 4 I call "the problem of the matrix."

In any event, civil-law jurists are together in assuming that a norm is not at one with the behaviour of the people it refers to, meaning that the existence of a norm does not depend on whether the obligation to comply with it is fulfilled, or on whether the rights it confers are exercised. Let us look at two examples.

First. The norm requiring people not to smoke in public places continues to be a norm even when no one is gathering in these places, so that no actual obligation properly subsists and no fulfilment or non-fulfilment of the norm is possible. Further, this norm continues to be a norm even when people are gathering in public places and not refraining from smoking, so that actual obligations do subsist but are routinely violated.

Second. Imagine you own a boa constrictor and that the reptile coils around you, effectively getting you into a stranglehold: You are in the boa's power, at its complete mercy. Nevertheless—cheer up!—in the realm of Ought you have full and exclusive power over that boa (you even have a right of life and death over it), while the boa has none over you. Given the situation you find yourself in, you may in practice succeed in exercising your right over the boa or fail to do so; either way, neither the norm on property nor your right of ownership over the boa stands affected. This is so even if the boa strangles and eats you, in which case your right of ownership over the boa will simply transfer from you to your heirs.[2]

Does this warrant the view that norms, rights, and obligations[3] belong to an ideal reality—the reality that ought to be—which persists over time even if the facts in the reality that is point to the contrary?

A legal-philosophical current of thought—natural-law theory, which is actually a variegated cluster of theories—has always upheld this view.[4]

German legal positivism—traditionally opposed to natural-law theories, and whose concepts at least in continental Europe still work their way into the

[2] If we want to drive this story to extremes, we will have to conclude that even what is left of you—your mortal remains in the boa's stomach—will become your heirs' property along with the boa. The boa constrictor example is taken from Leon Petrażycky (1867–1931); here I made it a bit more gruesome and adapted it to Article 832 of the Italian Civil Code, on property rights.

[3] "Rights and obligations" is not exhaustive. I should add "duties" (in distinction to "obligations") as well as "(legal) relations" and "normative subjective positions." But for ease of exposition I will often use "obligation" and "duty" interchangeably, assuming all other normative subjective positions to be understood.

[4] Views similar to these, though less sophisticated, recur as well in other contexts of legal thought: In Volume 7 of this Treatise, Sections 2.2.4 through 2.2.6, Padovani shows that Accursius (1182–1260), for example, placed *jura*—among which rights (like usufruct, understood as *jus utendi*, "right of use") and obligations (*juris vincula*)—within the group of incorporeal things (*res incorporales*).

reasoning of jurists—is loath to be likened to natural-law theories, but it nevertheless uses notions of norm, right, and obligation that cannot be understood to be anything but ideal entities.[5]

Another current of thought, Scandinavian legal realism, holds that norms, rights, and obligations exist only as psychical phenomena in people's minds: These normative psychical phenomena are powerful motives behind human action, and they will be greatly effective in social life to the extent that people come to convince themselves (whether on reflection or not) that norms, rights, and obligations are entities possessing a reality "of their own," for example, a spiritual reality that is nobler and longer-lasting than the reality that is (where the latter, depending on various theories, may include, besides physical and biological reality, the reality of psychical and social phenomena) (cf. Pattaro 1974).[6]

The vague notions of Ought, norm, right, and obligation constantly thwart efforts to make the concept of law clear and unequivocal, and yet they are useful to law in buttressing its function of guidance to, and social control of, human conduct. The law would be weaker and less effective if legal literature and the common conscience were not freighted with these notions, often taken up as scientific notions referring to nonfactual entities: to a reality that ought to be.

1.2. The Law and the Right. What Is Objectively Right and What Is Subjectively Right

If we consider the civil-law countries, like France, Germany, Italy, and Spain, we will find that in their languages the equivalents of the English noun "law" are *droit*, *Recht*, *diritto*, and *derecho*. These nouns can mean "law" or "the right," or both, depending on context, whereas English "law" bears no linguistic kinship with "the right": It comes from Old English *lağu*, from Old Icelandic *lag*, meaning "something laid down."[7]

[5] I am referring specifically to German legal positivism because speaking of legal positivism in general (including the analytical jurisprudence of Jeremy Bentham, 1748–1832, John Austin, 1790–1859, and their followers) can be misleading in several respects, especially with regard to the concepts of "norm" and "binding force of law." On legal positivism in common-law countries, see, in Volume 9 of this Treatise, Lobban, Chapter 6, devoted to the age of Bentham and Austin.

[6] The Scandinavian realists' recurrent claim that rights and obligations are imaginary entities has occasioned clamour among some sensitive scholars, such as Julius Binder (1870–1939), Gerhard Beseler (1878–1947), Emilio Betti (1890–1968), and Wolfgang Kunkel (1902–1981): On them see Faralli 1987, 71ff. And yet—as Padovani shows in Volume 7, Section 2.2.5, of this Treatise—Bartolus of Sassoferrato (1313/1314–1357), among others, had already written that obligations *sunt simplices imaginationes* (are simple imaginings).

[7] In the languages of the civil-law countries just mentioned, the terms *loi*, *Gesetz*, *legge*, and *ley* translate the English "law," but this mostly in the sense of "a law," that is, in the sense that "law" takes in expressions like "the tax law enacted by Parliament" and "the law on illegal immigration."

Moreover, students in civil-law countries meet from the beginning of their legal education the distinction between *droit objectif* and *droit subjectif*, *objektives Recht* and *subjektives Recht*, *diritto oggettivo* and *diritto soggettivo*, *derecho objectivo* and *derecho subjectivo*.

Translating these terms and rendering into English the distinction they express is a tricky job. The difficulty is usually dodged by taking a kind of shortcut: by saying that the distinction does not hold in common-law systems, and by proceeding to suggest that the noun "law" be used for *objektives Recht* (and for its equivalents, like *droit objectif*) and "right" for *subjektives Recht* (and for its equivalents, like *droit subjectif*) (cf. de Franchis 1996, vol. 2, s.v. "Diritto (I) oggettivo" and "Diritto/i (II) soggettivo in genere," 658–9 and 680–1).

We cannot follow this way to tackle or, rather, work our way around the problem, because by so doing we would miss both points: (*a*) In civil-law literature one and the same word, for example, *das Recht* in German, can mean either "the law" or "the right"; and (*b*) this word, *das Recht*, in expressions like *objektives Recht* and *subjektives Recht*, is used regularly to mean that the thing referred to, the right, is in some sense either objective or subjective.

To be sure, the noun "right" has been used to translate the noun *Recht* into philosophical English—thus, G. W. F. Hegel's (1770–1831) *Philosophie des Rechts* has been translated to *Philosophy of Right* (cf. Hegel 1955 and 1980).[8]

But in *legal* English the noun "right" typically translates *subjektives Recht*, and does so in only one of its senses (namely, "a power, faculty, or legitimate claim," in short "a right"), so that we would have a misleading legal English if we used "right" as a noun to translate both *subjektives Recht* and *objektives Recht*.

If we accept the shortcut solution by which "law" translates *objektives Recht* and "right" *subjektives Recht*, we will fail to see that there is a reason why the noun *Recht* occurs in both expressions, namely: These expressions refer to one and the same reality. And we will obscure as well the distinction between what in this reality is qualified as objective and what is therein qualified as subjective, or the sense in which that is so.

The question is not only linguistic, but also conceptual and ontological.

As previously announced, I will call the reality presupposed by the ontology at issue "the reality that ought to be," meaning "the Ought" as opposed to "the Is": in German, *das Sollen* as opposed to *das Sein*. The reality that ought to be is the world of norms, rights, and obligations. Law, when assumed to belong to this reality, can be viewed as a set of rules that are binding per se or as a set of rights and obligations, the ones conferred and the others im-

[8] It is common in moral and political Anglophone philosophy to draw a distinction between "the right" and "the good," as is the case with the classic work by W. D. Ross (1877–1971), *The Right and the Good* (Ross 1930).

posed on certain subjects and possibly not on others, or it can be viewed in both of these ways.[9]

I see no better solution, in the effort to make the previously outlined ontological clot understandable and manageable, than to use "right" as an adjective and set it into an expression which gives it a nominal (substantival) form and function, and which is not open to the ambiguities the noun "right" is open to. I will translate *objektives Recht* to "what is objectively right" and *subjektives Recht* to "what is subjectively right." Let me point out again that translating *objektives Recht* to "law" and *subjektives Recht* to "right" would prove misleading to common-law and civil-law jurisprudents and jurists: It would not help toward improving their reciprocal understanding of those issues that are peculiar to each other's legal culture. The distinction between "what is objectively right" and "what is subjectively right" is not a distinction pertaining to the concept expressed by "law." It rather pertains to the concept expressed by "what is right" or "the right."[10]

What is *objectively* right is the content of norms, where norms are per se binding rules. The question of what is objectively right understood as the content of norms I will come back to in Section 1.3 and in the chapters to come.

What is *subjectively* right bears an inherent connection with what is objectively right: It is the content of norms insofar as it refers to actual persons, or subjects, who are in the reality that is. Hence, "subjectively" is not the opposite of "objectively" here, just as in the equivalent German context *subjektives* is not the opposite of *objektives*. "Subjectively" is used to mean that actual persons, or subjects, are involved because they are referred to by the content of a norm that is applicable to them.[11]

[9] It may be better to say that law can be viewed as a set of standards rather than as a set of rules. This is because Ronald Dworkin has made the distinction between rules and principles so popular that using "rule" in a broad sense (as inclusive of principles and other possible kinds of standards) may prove to be misleading. See Dworkin 1996. Nevertheless, I still prefer to use "norm" in a broad sense and specify, when context requires it, whether I am using this term to refer to rules exclusively or to refer to any legal standard. The distinction between rules and principles is dealt with in this Treatise, Volume 4, Section 5.1.4, by Peczenik, apropos of the distinction between decisive and defeasible reasons.

[10] As is known, there is an effort underway in the European Union to make everything uniform among member states, even the size of zucchini and tomatoes. And now the names designating university faculties. Even so, since this uniformity of names is not yet complete, you can still create an ideal legal curriculum in Europe like so. You might start out at Oxford University, attending the faculty of law ("the faculty of *what is laid down*," which see the beginning of this section), and then move on to the University of Paris 5, at the *faculté de droit* ("the faculty of *what is right*"), and then, up a notch, to the University of Bielefeld, at the *Fakultät für Rechtswissenschaft* ("the faculty of *the science of what is right*"), and finish up nicely at the University of Bologna—in Italy, which styles itself as "the cradle of law"—at the *facoltà di giurisprudenza* ("the faculty of *the wisdom of what is right*," from the Latin *juris-prudentia*).

[11] Clearly, "what is subjectively right" does not mean "what one or more subjects believe to be (objectively) right" (see Section 6.2).

What is subjectively right with respect to a *duty-holder* is an obligation ascribed to him or her, because a duty-holder is an actual person referred to by the content of a norm as being under an obligation.

What is subjectively right with respect to a *right-holder* is a right ascribed to him or her, because a right-holder is an actual person referred to by the content of a norm as being endowed with a right: with a legitimate power, faculty, or claim.

Some subtler expressions have been used to underscore the implication that holds between what is objectively right and what is subjectively right in the reality that ought to be: *Recht in einem objektiven Sinn* and *Recht in einem subjektiven Sinn.* The English translation of these expressions should therefore be "what is right in an objective sense" and "what is right in a subjective sense." It is Hans Kelsen, among others, who uses the German expressions just mentioned: He uses them to criticise German legal positivism for failing to work out all the consequences entailed by its revision of the conceptual apparatus it inherited from natural-law theories. Kelsen clarifies that according to German legal positivism, "what is right in a subjective sense" (*Recht in einem subjektiven Sinn*) includes obligations: German legal positivism in the 19th and early 20th centuries considered *die Rechtspflicht* (legal duty, or obligation) to be *die zweite Form des subjektiven Rechts* (the second form of what is subjectively right), the first form (of what is subjectively right) being a legal right (*Berechtigung*, literally "authorisation, permission, or power granted by an authority")[12] (Kelsen 1934, 40, 46; more on this in Chapter 14). This is so, recall, because what is subjectively right is understood to be what is objectively right insofar as the latter refers to actual persons, or subjects, in the reality that is.

So conceived, what is objectively right (the content of norms) and what is subjectively right (the rights and obligations ascribed to the actual subjects referred to by the content of norms) are not heterogeneous; rather, they imply each other. A long-established historical connection between them warrants their distinction as a distinction between two aspects of the reality that ought to be: "What is objectively right" and "what is subjectively right" are both entailed by "what ought to be."

A comment is in order here.

Some scholars seem to assume that what is subjectively right lies in the content of norms. This is only partially true. What is subjectively right depends on what is objectively right (on the content of norms), to be sure, and it likewise belongs to the reality that ought to be, but that is not enough: What

[12] Note here that the word *Be*recht*igung* contains *recht* ("right"), and that *berechtigen* means "authorise" in the sense of "to give a right." Compare "licence," from Latin *licere* ("be allowed"), and "permit," in the sense of "to allow to do something," "to grant permission," "to afford opportunity."

is subjectively right requires as well certain subjects (people) to exist and certain events to occur in the reality that is. Hence the content of a norm is a necessary but not a sufficient condition of what is subjectively right. Again: "Subjectively" is used to say that actual persons, or subjects, are involved because they are referred to by the content of a norm applicable to them.

Felice Battaglia (1902–1977), a professor of mine when I was an undergraduate law student, would use a geometric metaphor to illustrate the connection between what is objectively right and what is subjectively right: What is objectively right (norms) is likened to the circumference of a circle, and what is subjectively right (rights and obligations) to the circle closed in by the circumference. Just as there can be no circumference without a circle to be enclosed in, or a circle without a circumference to enclose it, so there can neither be what is objectively right without what is subjectively right nor what is subjectively right without what is objectively right. What is objectively right cannot but establish and delimit what is subjectively right, and what is subjectively right is necessarily settled and delimited by what is objectively right. Each entails the other, so that, according to Battaglia, there is no "logical priority" of one over the other; rather, a "logical simultaneity," coexistence, and complementarity holds between them (cf. Battaglia 1962, 145).

Battaglia and others seem to miss the distinction between the content and the referent of a norm: What is objectively right is the content of a norm *independently of* any person, or subject, being actually referred to by the norm; what is subjectively right is the content of a norm *insofar as* the norm refers and applies to actual people, or subjects, in the reality that is. What is objectively right makes up, as it were, the top layer of the reality that ought to be; what is subjectively right, its bottom layer. I discuss this distinction in Sections 1.3 and 3.3, and in Chapter 14, as well as in Sections 6.3 and 6.4 in connection with my characterisation of norms.

1.3. What Is Objectively Right as the Content of Norms. Four Meanings of "Right"

As we may readily observe, the legal-dogmatic language of civil-law scholars requires us to detect shades of meaning that are not always made explicit in this language. The expressions "what is objectively right" and "what is subjectively right" designate distinct entities in the reality that ought to be: The former expression designates norms and types of behaviour as set forth in the content of norms *and therein qualified as obligatory, permitted, or forbidden* (Section 2.1); the latter expression designates obligations and rights that people actually hold under a norm. The different meanings that "right" acquires in these two expressions should have come through in the clarifications made in Section 1.2. Still, we will need to distinguish at least four meanings of "right," the first three of which make reference to the reality that ought to be

(to what is objectively right and what is subjectively right) and the fourth to the reality that is (to actual behaviours held by people under a norm).

(*i*) "Right," in the expression "what is objectively right," designates what is objectively right in the reality that ought to be, and that thing—what is objectively right in the reality that ought to be—is norms and their content.

What makes objectively right the content of a norm is the norm itself insofar as the deontic modalities contained in a norm are assumed (believed) to be normative (see Section 4.2.1 and Chapter 6). Here are three types of behaviour: "paying taxes," "making a purchase," and "committing theft." They all exemplify what is objectively right insofar as they are set forth in norms and are therein qualified as obligatory, permitted, and forbidden respectively. Notice that the three examples would be no less probatory if we changed them to accommodate norms under which "making a purchase" is obligatory, "committing theft" is permitted, and "paying taxes" is forbidden. If the familiar deontic modalities—O*p*, P*p*, F*p* (obligatory *p*, permitted *p*, forbidden *p*)—are understood to be contained in norms, then (on this understanding) they determine what is objectively right independently of the type of behaviour referred to by the variable *p* (and whatever the definition of the modalities, since in the standard system of deontic logic, it is known, O, P, and F are interdefinable).

In the light of these remarks, and in order to avert possible misunderstandings, I will *not* use "objectively wrong" in opposition to "objectively right"; thus, I will avoid using the expression "what is objectively wrong." Indeed the content of a norm is *always* what is objectively right, because what makes up the content of a norm is a type of behaviour *in combination with* the deontic modality that *in the norm* qualifies that type.

(*ii*) "Right," in the expression "what is subjectively right," designates what is subjectively right in the reality that ought to be, and that thing—what is subjectively right in the reality that ought to be—consists of obligations and rights and of other normative subjective positions that people actually hold under a norm.

So "right," in the expression "what is subjectively right," stands not only for "rights," but also for "obligations" and "duties" and other normative subjective positions. These entities, though they belong to the reality that ought to be, get necessarily ascribed to actual *subjects* (people) in the reality that is, and for this reason are called what is *subjectively* right.

Here, too, in order to avert possible misunderstandings, I will *not* use "subjectively wrong" in opposition to "subjectively right"; thus, I will avoid using the expression "what is subjectively wrong."

(*iii*) The words "obligations" and "rights" designate obligations (bonds, duties) and rights (powers or claims) respectively, meaning different entities in what is subjectively right in the reality that ought to be.

So we have here, with "rights," a third sense of "right" meaning "a right" or "rights," but not "obligation" or "obligations." If we stipulate that obliga-

tions are proper to passive normative positions in what is subjectively right, then rights are proper to active normative positions in what is subjectively right.[13]

(*iv*) Lastly, the term "right," in expressions like "a right behaviour," qualifies an actual behaviour held in the reality that is: It qualifies an actual behaviour as being in accordance with the reality that ought to be, and in particular with the content of a norm, namely, with the type of behaviour set forth in this norm and therein qualified as obligatory, permitted, or forbidden. An actual right behaviour complies with the deontic modality that in a norm qualifies the corresponding type of behaviour.

An actual right behaviour may be one held by a duty-holder or by a right-holder. One consequence to follow from this is that a duty-holder's and a right-holder's behaviours will be different even if they are both right. A duty-holder's actual behaviour will be said to be right when the duty-holder fulfils an obligation in accordance with the content of the norm under which he or she is a duty-holder. A right-holder's actual behaviour will be said to be right when the right-holder uses a right in accordance with the norm under which he or she is a right-holder.

In this sense of "right"—and in this sense only: with regard to actual behaviours in the reality that is—I will use the term "wrong" in opposition to "right." In the reality that is—and only in this reality (in our imperfect and human reality)—we will see both right and wrong behaviours. In the ideal reality that ought to be we won't see anything but what is right.

We will see in Section 12.2 that these four meanings of "right"—the four meanings here distinguished and constructed drawing upon the tradition of civil-law dogmatics—can also be detected in the ancient Greek term *dikē*, and in derivatives of it like *dikaios*, in several contexts of Homeric epic. In Chapter 13 I will consider the concept of what is right, *jus*, in Aquinas. Lastly, in Chapter 14 I will distinguish, with regard to Kelsen, nine concepts relative to "law," "what is right," and the "reality that ought to be"—a distinction that proves necessary if we are to make any headway in working through the meanders of Kelsen's normativistic reductionism.

[13] This is the reason for my stipulation. There is a distinction in Italian legal language, with regard to legal relations, between *soggetto attivo* (literally, "active subject") and *soggetto passivo* (literally, "passive subject") under the law: between active and passive normative subjective positions, we might say. A right-holder is a *soggetto attivo*, and a duty-holder a *soggetto passivo*, in the legal relation that holds between them.

Chapter 2

DUALISM AND INTERACTION BETWEEN THE REALITY THAT OUGHT TO BE AND THE REALITY THAT IS: VALIDITY AS A PINEAL GLAND

2.1. Constitutive Types and Valid Tokens as Independent of Norms

2.1.1. Validity as Congruence

I will adopt and adapt a current distinction terminologically traceable to Peirce (1839–1914), among others—that between "type" and "token"—and use it to render into English the German distinction between *Tatbestand* and *Tatsache* (or *Sachverhalt*; cf. Kaufmann 1982—Arthur Kaufmann, 1923–2001).

I will say that actual states of affairs and events are tokens, meaning instances, of certain states of affairs or event types. Thus, for example, every actual commission of theft is a token of the type "committing theft," and every actual celebration of a matrimony is a token of the type "celebrating a matrimony."[1]

Types may be represented or described in sentences: either in truth-apt sentences (I will call these "apophantic sentences") or in non-truth-apt sentences (such as deontic sentences and directives). Types may also be set forth in norms in the sense of "norm" specified in Chapter 6 (norms in brains, or normative beliefs). I will call "deontic" the sentences that qualify states of affairs or events as obligatory, permitted, or forbidden.[2]

A type is only a component—a component within the descriptive or representative component—of the content of a sentence (apophantic or deontic) or

[1] For the purposes of the present volume, I distinguish two kinds of entities: (*a*) states of affairs, which may consist in the possession of a property by an object (a thing or a person) or in the existence of a relation between two or more objects, and (*b*) events, among which people's actions are a special concern here. However, it should be emphasised that nothing of any special importance hinges on the adoption of this metaphysical stance, since the arguments developed in the present volume may easily be recast in the terms of many competing metaphysical positions. Similarly, G. H. von Wright (1916–2003), in "Deontic Logic" (1967, 59), distinguishes between "act-qualifying properties, e.g., theft" (approximately my type) and "act-individuals," that is, the "individual cases which fall under these properties, e.g., the individual thefts" (approximatively my tokens). The same distinction appears in G. H. von Wright (1963, 36) as a distinction between "generic acts or act-categories" (corresponding to the "act-qualifying properties" and ultimately to my types), e.g., murder, and "individual acts or act-individuals," e.g., the murder of Caesar.

[2] A deontic sentence may either express or not express a norm, and whether it does will depend on the characterisation of norms one adopts. In this volume, a norm is such when it satisfies the requisites described in Chapter 6. See also, in this volume, Artosi, Rotolo, Sartor, and Vida, Appendix, Section 2.

of a norm: It cannot by itself be the full content of a sentence or of a norm. A type by itself is part of the phrastic, to use R. M. Hare's (1919–2002) terminology: There is also needed at least a neustic (in the same terminology)[3] if an apophantic sentence, a deontic sentence, or a norm is to have its full content.

In an apophantic sentence the neustic states, affirms, or denies the phrastic and hence the types therein described.

In a deontic sentence the neustic qualifies as obligatory, permitted, or forbidden the type of behaviour described in the phrastic (and the same holds true of the type of behaviour set forth in a norm in the sense of "norm" specified in Chapter 6).

On my own characterisation, validity is the congruence, and invalidity the incongruence, of a token with a type. I will understand "validity" as "a token's congruence with a type," whether the type in question is set forth in the phrastic of an apophantic or a deontic sentence or in the phrastic of a norm not expressed in any sentence. My characterisation of validity therefore parts ways with the current legal-linguistic use of this term.

If a type gets described in an apophantic sentence, validity will be a token's congruence, and invalidity its incongruence, with the type described in the phrastic of the sentence, whatever neustic this sentence takes, that is, whether the apophantic sentence affirms or denies the type in question.

Consider the two sentences (*a*) "Peter sleeping [phrastic], is [neustic]" and (*b*) "Peter sleeping [phrastic], is not [neustic]." An actual nap that Peter should take will be a valid token of the type described in the phrastic of (*a*) and (*b*) alike, even if it will make only sentence (*a*) true, and sentence (*b*) false.

Likewise, if a type is described in a deontic sentence, validity will be a token's congruence, and invalidity its incongruence, with the type represented in the phrastic of the deontic sentence, whatever neustic this sentence takes, that is, whether the deontic sentence makes the type obligatory, permitted, or forbidden. Finally, if a type is set forth and qualified in a norm in the sense of "norm" specified in Chapter 6, but is not expressed in any sentence, validity with regard to that type will be a token's congruence with the type, and invalidity its incongruence, whether this norm makes the type obligatory, permitted, or forbidden.

Let us consider, with regard to the last two cases, the three deontic sentences or norms (*c*) "Peter sleeping [phrastic], is obligatory [neustic]," (*d*) "Peter sleeping [phrastic], is permitted [neustic]," and (*e*) "Peter sleeping [phrastic], is forbidden [neustic]." An actual nap that Peter should take will

[3] Hare's terminology I take up here without claiming any philological faithfulness to his text or any interpretive faithfulness to his thought. The phrastic, or descriptive (representative) part of a sentence, can describe either a type or a token. The neustic, in contrast, is the part by reason of which a sentence is apophantic (indicative, in Hare's terminology) or deontic (imperative, in Hare's terminology). I will use Hare's syntactic expedients to bring the phrastic into relief with respect to the neustic (see Hare 1952, 17–28, 37, 188–90).

be a valid token of the type set forth in the phrastic not only of (*a*) and (*b*), but also of (*c*), (*d*), and (*e*), even if Peter's nap complies only with (*c*) and (*d*), while it violates (*e*). Instead, any actual non-sleeping on Peter's part will not be a valid token of any of the types set forth in the phrastics of (*a*) through (*e*); but at the same time it will make (*a*) false and (*b*) true and will comply with (*c*) and (*d*) and violate (*e*).[4]

What is beginning to come through from the examples just made is that an actual token's validity (congruence) or invalidity (incongruence) with respect to a type must be kept separate from the truth or falsity of the apophantic sentence the type is set forth in as well as from compliance or noncompliance with the deontic sentence, or with the norm (in the sense of "norm" specified in Chapter 6) the type is set forth in. We will see in Section 2.2.2 what the connections are that—with this distinction in place—can be made between valid tokens and tokens whose occurrence is obligatory, permitted, or forbidden.

2.1.2. Some People Speak of Types. The So-called Typicality of Law

Let us in the meantime return to *Tatbestand*. This German legal term means "the constitution of a fact or an act"; in Italian the same concept is named "fattispecie astratta," literally, "abstract fact-type." As far as I know, there is no established equivalent for these legal terms in the common-law tradition. I have called *Tatbestand* and *fattispecie astratta* into play to show that my use of the term "type" is not accidental: It rather belongs to the Western tradition of legal thinking (at least in civil-law countries) and of philosophy. As to "token," I will task this term with rendering into English the German legal term *Tatsache* (or *Sachverhalt*) and the Italian legal term *fattispecie concreta*.

Consider that the Italian legal term *fattispecie* derives from the Latin expression *facti species*, which is not necessarily a legal term and refers to the *species*, form, or type of *factum*—to the specificity or difference that distinguishes one state of affairs or event from another, marking out its "otherness," even when two types belong to the same genus: for instance, the types "spaghetti" and "tagliatelle" under the genus "Italian pasta," or, in law, the types "theft" and "robbery" under the genus "crimes against property."

In one of its main senses, the Latin word *species* means "the set of characteristics whereby something is recognisable"—this is tantamount to "form" or "type"—and the Latin word *specimen* (derivative of *species*) means "example" or "sample": This is tantamount to "token."

[4] Recall, too, that logical connectives, including negation, can as a rule be inserted in the phrastic (rather than in the neustic) if that proves expedient. We could do that with (*b*) in the examples just made; but we can also do it with (*c*) and (*e*) by changing the deontic modality (O to F and F to O) and introducing a negation into the phrastic.

The neoplatonist Porphyry (233–309), who was not a jurist but a philosopher, remarked that differences are *constitutive* of species (*sustatikai tōn eidōn*; *constitutivae specierum* in the Latin translation of Boethius, ca. 480–525) and *divisive* of genera (*diairetikai tōn genōn*; *divisivae generum* in Boethius's Latin translation) (Porphyry, *Isagoge*, 10, 9–10; Boethius, *Porphyrii Isagoge Translatio*, 10, 9–10). This view is traceable to Plato's dialectical-divisive method.[5]

In modern times, the psychology of form (*Gestaltpsychologie*) and the philosophical doctrines of schema (witness I. Kant, 1724–1804, and F. W. J. Schelling, 1775–1854) provide an account—each in a way distinctive to it—of how we frame our cognitive and practical activities within forms, or schemata.[6] *Si parva licet*, the legal notion of *Tatbestand*, which I am rendering with the English "type," makes it possible to interpret these activities as valid or invalid tokens of given types, and that without making any reference to law, norm, rule, or the like.

We have here an interesting concept—it is, indeed, one of the concepts of "concept," and it has been variously construed and rendered under different terms in both philosophy and law: in philosophy, from Plato and Aristotle (384–322 B.C.) to Kant and then Peirce, among others; in law, under *Tatbestand* and *fattispecie astratta*, as previously introduced.[7]

Notice that in German and Italian legal literature the use of *Tatbestand* and *fattispecie astratta* is limited to the types to which legal norms attach normative legal consequences, or Ought-effects (see Lazzaro 1967, 40ff.—Giorgio Lazzaro, 1938–2002; Hassemer 1968, 11ff., 109ff.). I will not follow this limitation here, and will give a broader scope to *Tatbestand* and *fattispecie astratta* and to their English rendition as "type."[8]

[5] In Volume 6 of this Treatise, Chapter 3, Section 1, footnotes 3 through 5, Stalley provides a short bibliography on Plato's (Plato, 427–347 B.C.) theory of forms. Plato's forms are the source to which Porphyry's forms (*eiden*) are to be traced. Boethius, in his Latin translation of *Isagoge*, renders *eidos* with *species*.

[6] In what follows I will use "scheme" in distinction to "schema" (pl. "schemata"), a term currently associated with Kantian epistemology, which marks a turning point in the history of the concept of "type," or "form." So in using "scheme" I am not ascribing to Immanuel Kant the concept of "type" I have adopted.

[7] One of the terms used is of course "form" (*eidos*). On the use of this term (*forma* in Latin) found in the medieval jurists, such as Martinus (ca. 1100–ca. 1166) and Baldus (1320–1400), as well as in Placentinus (ca. 1135–1192), though he uses *genera* and *species*, see, in Volume 7 of this Treatise, Padovani, Sections 2.2.1 through 2.2.4: The sources these jurists drew from are Porphyry and Boethius. In Sections 13.7 and 13.8 of this volume I will discuss Aquinas's use of *ratio* as signifying "type," "form," and the like.

[8] Instead, the sense in which *Tatbestand* and *fattispecie astratta* are used in German and Italian legal literature I will express using "type of circumstance." Specifically, I will use "type of circumstance" in a strict sense to designate a type to which a norm attaches normative consequences, or Ought-effects (see Section 6.3 and Chapter 7), and in a broad sense to designate any type with which a type of action is conditionally connected, independently of whether any norms are involved (see Section 5.3).

It bears recalling here—since I am speaking of "types"—that in the tradition of civil-law literature, typicality (along with abstractness and generality) is listed among the so-called distinguishing traits of law, and hence of legal norms (see Larenz 1992, 349ff.—Karl Larenz, 1903–1993). But these traits are not distinctive to law in particular, for in any field we have to do with both sides of the coin: with tokens (concreteness, and individuality) as well as with types (typicality, abstractness, and generality). Typicality is a feature not only of law but of all the domains of culture (and the same holds for concreteness, at least to some extent). Even so, there is a specific import that attaches to the abstractness and generality of legal norms, that is, to the fact that legal norms contain types (which by definition are general and abstract). Some aspects of this specific import we will look at in Section 2.2.1.

2.1.3. Other People Presuppose Types

Let us return to "type" in the more general sense of this word and adapt to it Porphyry's previously recalled remark: As the genus is constitutive of the possibility of types—of the possibility of divisions that distinguish species, or types, within the genus itself (and do so by proper or specific differences: *idion*, *proprium*)—so every type is constitutive of the possibility of tokens, of the possibility of instances that concretely exemplify the type understood as a form.

It will be noted in passing, because relevant from the standpoint of legal theory, that there are types for verbal behaviours as well, and these types, too, may get instantiated—by tokens of verbal behaviour, of course. Thus, actual verbal actions (like uttering certain words) can, given the proper circumstances, perform the type "making a promise" or "celebrating a matrimony," for example. It is no accident that verbal behaviours of this kind have been called "performative," notably by J. L. Austin (1911–1960) (Austin 1962): "To perform" means, literally, "to *fill* a form by going exactly through it"; what goes through a form fits this form; it is congruent with the form, it is valid with respect to it.

Because types are constitutive of the possibility of their being instantiated, they are also the schemes which make it possible to understand and "interpret" actual events or states of affairs as the tokens that validly instantiate (or do not validly instantiate) the types in question.

There is no reason to link the idea of something being an interpretive scheme with the idea of law, norm, rule, or the like. An interpretive scheme is not a norm or a rule, but a type. As such, it can be set forth in the content of norms or of rules, and therein possibly qualified as obligatory, permitted, or forbidden, but it can also be represented in apophantic sentences and questions, for example. Types are schemes, or forms, by which we interpret and classify actual states of affairs or events, whether these types are set forth in the content of

a norm or in the content of a directive, or whether they are represented in an apophantic sentence, a question, and suchlike. Thus, Hans Kelsen and Alf Ross (1899–1979), among others, are too narrow in the way they maintain that norms are "schemes of interpretation": German *Deutungsschema* in Kelsen (1934, 4; compare the English translation: Kelsen 1992, 10); Danish *tydningsskema* in Ross (1971, 52; compare the English translation: Ross 1958, 39).

2.1.4. Types Are Constitutive, Rules Are Regulative

Let us go one step further.

The debate is well known on the difference between constitutive rules and regulative rules. The distinction traces at least to John R. Searle. He writes:

> I want to clarify a distinction between two different sorts of rules, which I shall call *regulative* and *constitutive* rules [...]. As a start, we might say that regulative rules regulate antecedently or independently *existing forms* of behaviour; for example, many rules of etiquette regulate interpersonal relationships which exist independently of the rules. But constitutive rules *do not merely regulate*, they create or define *new forms* of behaviour. The rules of football or chess, for example, *do not merely regulate* playing football or chess, but as it were they create the very possibility of playing such games. (Searle 1969, 33; italics in original on first and second occurrence, added on all other occurrences)

My concept of "constitutiveness" is not the same as Searle's. Nor is this the place to discuss Searle's concept or anyone else's (that of Amedeo G. Conte, for example).[9] From the standpoint of my concept of "constitutiveness," it is misleading to link the fact of "being constitutive" with "rule" or "norm." Indeed what in my view is constitutive is not a rule but a form, or type, and types may be the content not only of a rule, deontic sentence, or norm, but also of an apophantic sentence, among other things. Types are constitutive of the possibility of being instantiated by actual tokens, and it does not matter to this end where a type is set forth: It could be in a rule, a deontic sentence, a norm, an apophantic sentence, or a question, or anywhere else.

Consider, for example, Shakespeare's *Romeo and Juliet*. We can all agree that the play is made up of sentences that are not rules, much less deontic sentences. Let us imagine a company of actors performing this play by having Juliet kill Romeo because moved by hate, by the rivalry that had traditionally been pitting the Montecchi and the Capuleti families against each other. This company of actors cannot be said to be acting out Shakespeare's *Romeo and Juliet*, but some other play, if any—in much the same way as, in a chess match, any two players who should move the rook diagonally and the bishop along ranks and files will be said to play not chess, but some other game, if any. What happens in these two cases is a failure to instantiate certain types de-

[9] A. G. Conte has devoted himself profusely to the question of constitutive rules. See his collected essays: Conte 1989, 1995, and 2001.

scribed in Shakespeare's *Romeo and Juliet* and in the game of chess respectively. Hence, what is played in one case is not Shakespeare's *Romeo and Juliet*, and what is played in the other is not the game of chess. It is a mere accident, on my concept of "constitutiveness," that the types in chess are described in rules and that the types in the play are described in a literary text not made up of rules. What matters in either case is that the actions performed (Juliet killing Romeo and a chess player moving the rook diagonally, and the bishop along rank and files) are not valid tokens of the types described in *Romeo and Juliet* and in the game of chess respectively, at least not in my sense of the word "valid": These actions are not congruent instantiations of any type described in *Romeo and Juliet* or in the rules of chess.

The token Juliet killing Romeo can also be said not to have a corresponding type, or form, in Shakespeare's *Romeo and Juliet*, and the token moving the rook diagonally and the bishop along ranks and files can be said not to have a corresponding type in the game of chess; or again, the first token can be said to be invalid with respect to all the types described in Shakespeare's *Romeo and Juliet*, and the second token invalid with respect to all the types described in the rules of chess.[10]

I am not objecting here to Searle's thesis. On the contrary, I quoted the 1969 Searle excerpt, and italicised some of Searle's words, because this excerpt, at least when taken in isolation, makes me comfortable with my preferred concept of "constitutiveness," that is, the concept of "constitutiveness" as independent of "norm" or "rule." Indeed, in the excerpt, Searle speaks of *forms of behaviour* in connection with regulative and constitutive rules alike, and does not exclude that constitutive rules are also regulative: Instead, he says that *they are not merely regulative*. So extracted, Searle's statement does not contradict, but in a way supports, my thesis.

Indeed, on my understanding of "constitutiveness," the point is not so much that some rules and not others are constitutive. All types or forms are constitutive. Therefore, any rule—insofar as its phrastic includes forms (or types), however much these forms (types) may never have been thought of before appearing in the rule that creates or defines them—can be said to be constitutive not qua rule, but insofar as its content includes a type (as of behaviour), however much this may be a new type, a type never before conceived of.

Instead, independently of the type described in the phrastic, all rules may be said to be regulative qua rules; that is, they may be said to be regulative because of their neustic. Rules are regulative because they qualify through deontic modalities (the modality obligatory, permitted, or forbidden as set forth in their neustic) the types they themselves set forth in their phrastic, and

[10] But these tokens will be valid with respect to other types (extraneous to *Romeo and Juliet* and to the rules of chess) because, in a sense, every token presupposes a type with respect to which it is valid—a type of which it is a congruent instantiation (cf. Section 15.2).

also—if they are normative rules—because they attach normative consequences (Ought-effects: see Chapter 3) to the valid instances of such types (see Section 2.2.2).[11]

2.1.5. *Simple and Compound Types and Tokens*

On my characterisation, "valid" and "invalid" mean congruent and incongruent with a type, form, or scheme. In geometry, "congruent" means "coinciding at all points when superimposed"—such is, for example, the meaning of "congruent triangles." Just as a triangle, *a*, can be incongruent with triangle *b* but congruent with triangle *c*, so a token, *t*, can be incongruent with type *U*, and hence invalid with respect to it, but congruent with type *V*, and hence valid with respect to it.

It may be that my characterisation will cause validity to appear as only a vestige of validity as this word is so often used to credit what is believed to be the binding force of law. Still, I feel confident that the characterisation of validity resulting from my approach will prove useful in simplifying the way this term is variously, and not always consistently, used in legal literature. Besides, my main purpose for characterising validity as a concept bound up with the concept of "type," but not with those of "norm" and "rule," is precisely to free it from all contamination with the concepts expressed by "binding force of law" and the like. In sum, I maintain that an actual token is valid if it counts as a happy token: as a congruent realisation, or happy performance, of a given type, form, or scheme.

It is possible, as well as useful, to draw a distinction between compound types and simple types.

A compound type is made up of two or more types, and these in turn can be compound or simple. A simple type is not made up of types: It is not susceptible of further subdivision.

An actual state of affairs or event will be a valid token with respect to a compound type if, and only if, its components congruently instantiate all the simple types making up the compound type. A valid token of a compound type is itself compound: It is made up of two or more tokens, compound or simple. Moreover, an actual compound state of affairs or event will be a valid token of a compound type only if it reproduces in its structure whatever relevant order is found in that type.

It might be argued that the realisations, instances, or tokens of a given type are by definition congruent, happy, or valid—for otherwise they would not be

[11] On my conception of norm (cf. Chapter 6), a rule is normative only for those who believe it to be so. But then all rules are regulative independently of their being believed to be normative. Rules, if they meet the requisites specified in Section 9.2, will in any event be a variety of directive.

realisations, instances, tokens, or performances of the type in question. And we could add that, given an actual state of affairs or event and a type, we ought properly to speak of realisations and instances that *prima facie* are realisations and instances of that type. For my present purposes, however, it suffices that I speak of tokens that are valid or invalid, congruent or incongruent, happy or unhappy with respect to a given type.

2.1.6. Competence, or Capacity

From the idea that types are constitutive of the possibility of their instantiation by tokens we get a characterisation not only of validity, but also of competence, or capacity.

The Latin verb *competere* means to "meet," "match," "correspond," or "fit together." Every type constitutes the possibility that a state of affairs or an event will meet or match this type, or correspond to it, or fit together (be congruent) with it: Every type is constitutive of the possibility of its valid (and invalid) instantiations, and, when these involve the action of one or more agents, it will be constitutive as well of the competence, or capacity, of the actual persons who instantiate it validly. Competence, or capacity, is the validity of acting persons: It is the validity or congruency of actual agents (tokens) with respect to an abstract agent (an agent-type).

It is not always the case that a type should include an agent-type and then constitute the possibility that certain actual agents (agent-tokens) have the competence to act a certain way or be in the capacity of doing so. Consider, for instance, the types "wildfire," "earthquake," and the like: They constitute the possibility of their valid instantiation, but they do not constitute the possibility of any competence, or capacity, unless we assume that the type "wildfire" or "earthquake" requires human agency.

At any rate, a relevant distinction with regard to validity and competence, or capacity, is that between "action" and "acting person," or "agent." Consider the type "the well-off aiding the needy." With respect to this type, the actually well-off are competent to aid the actually needy (they are in the capacity of aiding them), and the actually needy are competent to be aided (or in the capacity of being aided) by the actually well-off, whereas the converse is not true. The actually needy are not competent to aid the actually well-off, and the actually well-off are not competent to be aided by the actually needy. Of course nothing prevents the needy from helping the well-off. This, however, would not be a valid token of the type "the well-off aiding the needy." It would rather be a congruent, or valid, instantiation of the type "the needy aiding the well-off."

Just as "validity" need not involve "law," "norm," "rule," and the like, so "competence," or "capacity," need not involve these concepts, either. My characterisations of validity and competence, or capacity, presuppose only the

terms "type," "token," and the like, whether the type at issue is set forth in a norm, rule, or deontic sentence or in an apophantic sentence, or elsewhere. For example, the types "the well-off aiding the needy" and "the needy aiding the well-off" can occur in true or false sentences (apophantic sentences) like the following: "In my country the well-off aid the needy" and "In your country the needy aid the well-off." These sentences describe types which do not involve any reference to law, norms, or rules, and which, despite this feature, are constitutive of the possible validity or invalidity (congruence or incongruence) of behaviour-tokens with respect to the behaviour-type "aiding" and of the possible capacity or incapacity of agent-tokens with respect to the agent-types "the well-off" and "the needy."

The ideas of validity and of competence, or capacity, stem from the idea of constitutive types or forms: If and where a type or a form is described, or set forth, is not relevant to understanding that the core meaning of "validity" and "competence," or "capacity," is "congruency with a type (or form)."

2.2. The Chain of Normative Production. The So-called Typicality of Law

2.2.1. The Primacy of the Reality That Ought to Be

Despite the Is-Ought dualism, more or less consciously presupposed by the legal doctrine of civil-law countries, any event in the reality that ought to be is conditioned, according to the same legal doctrine, by events occurring in the reality that is: There is no event in the reality that ought to be which is not the normative consequence of events occurring in the reality that is. I will call the former events "Ought-events," "Ought-effects," "Ought-changes," or "normative consequences," and the latter "Is-events," "Is-causes," or "Is-changes."

Ought-effects, caused in the reality that ought to be, consist in the birth, modification, or extinction of rights or obligations ascribed to subjects under the law, or they consist in the birth, modification, or extinction of norms: In the former case the Ought-effects are caused in what is subjectively right; in the latter case they are caused in what is objectively right. In both cases the Ought-effects regard normative entities: They regard either rights and obligations in what is subjectively right or norms and their content in what is objectively right.

The reality that ought to be enjoys a primacy over the reality that is, for Is-causes (in the reality that is) will have to be valid tokens of types *set forth in norms* if they are to produce Ought-effects (in the reality that ought to be)—and they will produce *only* those effects that the same norms attach to those Is-causes. Is-events will produce Ought-effects if, and only if, they are valid (congruent) tokens of the types to which norms attribute a capacity to produce Ought-effects.

We can grasp here the true sense of so-called typicality, understood (as noted in Section 2.1.2) to be a distinguishing trait of law. As such, as a distin-

guishing trait of law, typicality does not consist merely in the fact that the law sets forth types of behaviour, for even a literary text sets forth types of behaviour. As has been observed already, typicality is, in this sense, a feature common to all the domains of culture: It is not a specificity of law.

The deep sense of typicality as a distinguishing trait of law lies elsewhere: It lies in the fact that no normative consequence will flow from valid tokens of types that are not set forth in legal norms. Only norms can produce normative consequences, either in what is subjectively right (rights and obligations) or in what is objectively right (norms and their content). True, norms use types and their valid tokens to govern and control the production of Ought-effects and so, more generally, to govern and control change and development in the reality that ought to be. *But they do so through types they themselves contain*, and that without exception. The valid tokens of types not contained in norms do not, cannot, and must not produce any Ought-effects.

There is here a chain of normative production like so: norm → valid token of a type set forth in this norm → new norm (or modification or extinction of norms already existing in what is objectively right) or new rights or obligations (or modification or extinction of rights or obligations already existing in what is subjectively right).[12] There will not be any chain of normative production with types not set forth in norms, for in this case we are left without the prime mover. So *herein* lies the true sense of so-called typicality as a distinguishing trait of law: It lies not in the fact that there are types only in the law (since they are found elsewhere, too), or in the fact that there is no law without types (since, more in general, no branch of science or the humanities is devoid of types), but in the fact that there is no law without norms (see Chapter 8), and that only the types contained in norms make possible the proliferation of norms in human brains and so also of legal norms (see Chapters 7 and 8 and Section 9.6).

It is misconceived to equate or connect validity with norms (Ought-effects). Validity depends not on norms but on types. And in fact a token's validity with respect to types not contained in norms has nothing to do with the production of Ought-effects. Obviously, the types and typicality that jurists and jurisprudents are concerned with are the types and typicality set forth in legal norms, and the valid tokens they are interested in are the tokens that are valid with respect to types set forth in legal norms. Perhaps the misconception in equating or connecting validity with norms is rooted in part in this (understandably) specific concern of the jurist and the jurisprudent with types as found in norms and with the tokens that are valid with respect to such types. This does not avert the misconception but perhaps explains it.

[12] Of course, the arrows in this sentence are not to be understood as logical connectives. They rather simply represent a sequence.

2.2.2. *Valid and Invalid Behaviours*

2.2.2.1. Noblesse Oblige

The concepts of "type" and of "valid token" are the device which, in civil-law dogmatics, explains the interaction between the reality that ought to be and the reality that is. This device is a sort of pineal gland in that it is meant to connect heterogeneous realities: the reality that ought to be, on the one hand, and the reality that is, on the other (in something like the manner in which the Cartesian pineal gland had this function with respect to soul and body: *res cogitans* and *res extensa*).

The way I characterise validity and competence, or capacity (Section 2.1), does not make them any less essential as components of the Cartesian pineal gland of sorts devised in legal doctrine to account for the interaction between the reality that ought to be and the reality that is (and for the primacy of the former over the latter).

We will consider in detail in Chapter 3 the role played by validity—by an Is-event's congruence with the types set forth in the reality that ought to be—within the chain of normative production. We will see how continental legal doctrine and general jurisprudence commonly (though not always consciously) understand the functioning of the legal pineal gland with regard to the Ought-effects produced by Is-causes in both of the aspects of the reality that ought to be: what is subjectively right and what is objectively right. The question of the Ought-effects in what is subjectively right is treated within the continental legal theory of "facts, acts, and transactions (or declarations of will)" (see Section 3.2). The question of the Ought-effects in what is objectively right is treated within the theory of the "sources of law" (see Sections 3.4 and 3.5).

But now I will comment instead on the peculiar way in which the concept of "valid state of affairs, valid event, or valid behaviour" is used, at least implicitly, in continental legal dogmatics. There is a body of legal literature concerned with the so-called interpretation of facts, states of affairs, events, and behaviours, namely, with the way in which to understand these things (as valid or invalid tokens, I would comment) with respect to the types set forth in the law.[13] But this last statement, to be more accurate, should rather read as follows: There is a body of legal literature concerned with the so-called interpretation of facts (of actual states of affairs, events, or behaviours), namely, with the way in which to understand these things (as valid or invalid tokens, I would comment) with respect to the types set forth in *and not forbidden by* the law.

[13] Cf. Engisch 1960, 19—Karl Engisch, 1899–1990; Kaufmann 1982, 37ff.; Larenz 1992, 166ff.; Guastini 2004, 99ff. In Volume 4 of this Treatise, Section 1.6, Peczenik refers to this topic under the heading "the doctrine of fact-finding."

The crucial point here is "not forbidden by the law." Thus, "paying your taxes" and "making a purchase" are types set forth in *and not forbidden by* the law, whereas "committing theft" is a type set forth in *and forbidden by* the law.[14]

Jurists will speak of a valid or an invalid actual payment of taxes or purchase depending on whether an actual event they are considering in the light of the type "paying your taxes" or "making a purchase" is or is not a congruent token of this type. But the same jurists, at least in civil-law countries, will not speak of a valid or an invalid actual theft despite the fact that an actual event they are considering in the light of the type "committing theft" is going to be either a congruent or an incongruent token of this type.

Jurists reserve the qualification "valid" or "invalid" for the congruence or incongruence of actual states of affairs or events (tokens) considered in the light of types set forth in the law and therein qualified as obligatory or permitted, but not in the light of types set forth in the law and therein qualified as forbidden: "Committing theft" is a type of behaviour set forth in the law *and therein qualified as forbidden*. To a jurist, "valid or invalid token" means not simply "congruent or incongruent token of just any type set forth in the law," but "congruent or incongruent token of a type whose instantiation is obligatory, or at least permitted, under the law," as is the case with the tokens of the types "paying your taxes" (obligatory) and "making a purchase" (permitted).

Jurists never assume "valid or invalid token" to mean "congruent or incongruent token of a type whose instantiation is forbidden under the law," as in the case of the type "committing theft." The use of "valid" and "invalid" is thereby circumscribed to only such tokens of behaviour as are right, in that these tokens do not violate any legal norm and so are not wrong (Section 1.3 under point (*iv*)).

Further, as was previously pointed out, jurists are not interested in tokens of types not set forth in law, and therefore never assume "valid or invalid" to mean "congruent or incongruent token of a type not set forth in any legal norm."

Maybe the reason why jurists do not say "valid" or "invalid" of wrong behaviours (actual behaviours instantiating types set forth in a legal norm *and*

[14] Clearly, since in the standard system of deontic logic the concepts of obligation, permission, and forbiddance are interdefinable, the expression "It is obligatory to pay your taxes" is equivalent to (i) "It is forbidden not to pay your taxes" and to (ii) "It is not permitted not to pay your taxes." Analogously, the expression "It is permitted to make a purchase" is equivalent to (iii) "It is not obligatory not to make a purchase," and to (iv) "It is not forbidden to make a purchase," whereas the expression "It is forbidden to commit theft" is equivalent to (v) "It is obligatory not to commit theft" and to (vi) "It is not permitted to commit theft." In fact, it may be said that the conceptual sense of expressions such as (i) and (ii) corresponds to the general idea of obligation, the conceptual sense of expressions such as (iii) and (iv) corresponds to the general idea of permission, and the conceptual sense of expressions such as (v) and (vi) refers to the general idea of forbiddance.

therein forbidden) is that this use is held back by an unconscious voluntaristic prejudice on their part: An agent who commits a wrong does not will the Ought-effects the legal normative system "wills" for the wrongdoer. I am referring here to the doctrine of legal transactions (Section 3.2.4). Underlying this doctrine is the idea that the persons who stipulate a valid and right transaction are aiming to produce legal Ought-effects as these are willed by the normative legal system.

So, too, the reason why jurists do not say "valid" or "invalid" of behaviours that instantiate types *not* set forth in law may be that this use is held back by an unconscious professional bias: The tokens of types not set forth in law are irrelevant; they deserve no attention.

Or maybe what in both cases holds back the jurists is a sort of Platonic noblesse oblige, which legal dogmatics is still influenced by. "Valid" and "invalid" are terms too noble to apply to actual wrong behaviours, because wrong behaviours appear to carry derogatory connotations, or to apply to the tokens of types not set forth in law, because these tokens appear to be of little importance (*de minimis non curat praetor*). Plato, it is known, did not admit that there should be forms or types for such things as seem undignified or ridiculous:

> "And what about these, Socrates? Things that might seem absurd [*geloia*, better translated as "ridiculous"], like hair and mud and dirt, or anything else totally undignified and worthless? Are you doubtful whether or not you should say that a form [*eidos*] is separate for each of these, too, which in turn is other than anything we touch with our hands?" "Not at all," Socrates answered. "On the contrary, these things are in fact just what we see. Surely it's too outlandish to think there is a form [*eidos*] for them." (Plato, *Parmenides* (b), 130c)[15]

On my characterisation of validity, in contrast, a token will be valid or invalid when congruent or incongruent with a given type, independently of whether the type in question is set forth in a norm or in an apophantic sentence, for example, and—if the type *is* set forth in a norm—independently of whether the norm makes this type obligatory, permitted, or forbidden.

Hence, a behaviour-token that is valid with respect to a given type set forth in a norm will be right, in addition to being valid, if it complies with the modality that in a norm qualifies that type as obligatory or permitted; and it will be wrong, in addition to being valid, if it does not comply with the modality that in a norm qualifies that type as forbidden. Given, for example, the type "crossing the street," my actual congruent, and hence valid, crossing the street will be right (in addition to being valid) if the type "crossing the street"

[15] The Greek original: "Ἦ καὶ περὶ τῶνδε, ὦ Σώκρατες, ἃ καὶ γελοῖα δόξειεν ἂν εἶναι, οἷον θρὶξ καὶ πηλὸς καὶ ῥύπος ἢ ἄλλο τι ἀτιμότατόν τε καὶ φαυλότατον, ἀπορεῖς εἴτε χρὴ φάναι καὶ τούτων ἑκάστου εἶδος εἶναι χωρίς, ὂν ἄλλο αὖ | ὧν ἡμεῖς μεταχειριζόμεθα, εἴτε καὶ μή;' 'οὐδαμῶς,' φάναι τὸν Σωκράτη, 'ἀλλὰ ταῦτα μέν γε, ἅπερ ὁρῶμεν, ταῦτα καὶ εἶναι· εἶδος δέ τι αὐτῶν οἰηθῆναι εἶναι μὴ λίαν ᾖ ἄτοπον" (Plato, *Parmenides* (a), 130c).

is qualified by a norm as obligatory or permitted; instead, my actual congruent, and hence valid, crossing the street will be wrong (in addition to being valid) if the type "crossing the street" is qualified by a norm as forbidden. And my actual crossing the street will be valid or invalid even with respect to apophantic sentences such as "It is lethal to cross the street" or "It is not lethal to cross the street." (Only a valid token of the type "crossing the street" can make these apophantic sentences true or false.)

The jurists, by limiting the application of "valid" and "invalid" to the tokens of obligatory and permitted types, endow these terms with a normative valence: A valid token of an obligatory or permitted type is fully right; an invalid token of the same type is, so to speak, a defectively right behaviour-token, a behaviour-token inadequate or unfit to serve the function of producing the normative consequences (Ought-effects) that legal norms attach to the valid instances of the type in question. Let us illustrate the point with two examples as follows.

(*a*) Anyone who validly pays taxes or validly makes a purchase holds a right behaviour-token (obligatory in the first case, permitted in the second) and does so without defect, such that this actual behaviour is not only right but also fit to produce Ought-effects, such as extinguishing someone's actual obligation to pay taxes and acquiring a right to property of the thing purchased.

(*b*) Instead, anyone who invalidly pays taxes or invalidly makes a purchase (as by overlooking to place a signature or stamp a seal) holds defectively a right behaviour-token. This actual—perhaps right but defective—behaviour is unfit to produce the Ought-effects that legal norms attach to the payment of taxes and to sales contracts respectively. It is inadequate because not fully congruent with the type set forth in a norm; it is inadequate precisely because invalid, an invalid (imperfect) token of an obligatory or permitted type. This is how, consciously or not, a jurist who deals in continental legal dogmatics will reason: The valid instances of an obligatory or permitted type are fully right; the invalid instances of an obligatory or permitted type are imperfectly right; the instances of a forbidden type are unworthy of the qualification "valid" or "invalid"—they are simply wrong.

I find it preferable not to ascribe any normative valence to the terms "valid" and "invalid," because it is on account of this valence, or partly on account of it, that these terms have come to be a source of misunderstanding.

2.2.2.2. Four Possibilities

One can well understand the jurists' concern with constructing theories that answer practical rather than theoretical needs, and with developing an equally practical terminology. Jurists use the terms "valid" and "invalid" to qualify only the tokens of obligatory or permitted types, and hence to establish whether or not these tokens produce the Ought-effects the normative legal

system connects with the instances of the types considered: The valid tokens of obligatory or permitted types produce the Ought-effects the normative legal system connects with those types; invalid ones do not, or they produce different Ought-effects.

But this need of the jurists can equally be answered by a use of "valid" and "invalid" that is devoid of normative connotations because based exclusively on the concept of type.

Ça va sans dire that only the valid (congruent) tokens of types set forth in norms produce the Ought-effects the normative legal system connects with the valid instances of such types. And in fact, the way I see the matter, this happens not only with the valid tokens of obligatory or permitted types, such as "paying your taxes" or "making a purchase," but also with the valid tokens of forbidden types, such as the type "committing theft."

It likewise goes without saying that the invalid (incongruent) tokens of the types set forth in legal norms do not produce the Ought-effects that legal norms connect with the valid instances of such types. I believe this happens not only with the invalid tokens of obligatory or permitted types, but also with invalid tokens of forbidden types, such as the type "committing theft": An incongruent (invalid) token of a forbidden type does not produce the legal Ought-effects the legal system connects with the congruent (valid) tokens of the same type.

But whether the invalid tokens of a given obligatory or permitted type, or even a forbidden one, produce other Ought-effects (Ought-effects other than those that legal norms connect with the valid tokens of those types) is a different question. Let us formulate this question as follows.

A type set forth and qualified in a legal norm as obligatory, permitted, or forbidden is thereby regulated by the legal norm. The valid tokens of a type normatively qualified as obligatory or permitted are right; the valid tokens of a type normatively qualified as forbidden are wrong: We will have *validly right* tokens in the first case and *validly wrong* tokens in the second. Also, the valid tokens of a type set forth in a legal norm will be assumed (believed) to produce Ought-effects in the reality that ought to be (in what is subjectively right or in what is objectively right: see Chapters 3, 6, and 7). And the Ought-effects of valid tokens will be the effects the normative[16] legal system attributes to validly right tokens (to valid instances of obligatory or permitted types) and to validly wrong tokens (to valid instances of forbidden types) respectively.

[16] The qualifier "normative" is meant to signal that there is at play here the so-called internal point of view: Section 8.1.3.2. But it is not necessarily the case that all those subject to a legal system should always adopt this point of view (cf. Sections 8.2.6.1 and 10.2.3). In short: Not all legal rules are norms, and those legal rules that *are* norms are not necessarily so for everyone who is subject to the legal system. And not all norms are legal norms (but this much is, I believe, an established fact).

With this said, we have in all two possibilities—or rather four, since each of the two branches turn into two further possibilities. And this all has to do with the so-called typicality of law.

Possibility one: valid tokens. A token is *valid and right* or it is *valid and wrong* with respect to the types set forth in given legal norms. It is valid and right with respect to types therein qualified as obligatory or permitted; it is valid and wrong with respect to types therein qualified as forbidden.

If the tokens of an *obligatory* or *permitted* type are *valid*, they will necessarily be right and will necessarily produce the Ought-effects that under a legal norm are to be caused by the valid tokens of this obligatory or permitted type. The Ought-effects in question will get produced either only in what is subjectively right (and hence will only affect obligations and rights; such will be the case if the valid, right tokens in question are facts, acts, or transactions: see Section 3.2), or they will get produced in what is objectively right (and hence will affect legal norms and their content; such will be the case if the valid, right tokens in question are sources of law: see Section 3.4) and then—indirectly—they will affect also what is subjectively right (where they will affect obligations and rights), but this only on condition that certain further events (facts, acts, or transactions) also occur in the reality that is.

If the tokens of a *forbidden* type are *valid*, they will necessarily be wrong and will necessarily produce the Ought-effects that, under a legal norm, are to be caused by the valid tokens of this forbidden type. The Ought-effects of a valid, wrong behaviour will get produced only in what is subjectively right (and hence will affect only obligations and rights).

Possibility two: invalid tokens. A token is *invalid* with respect to the types set forth in given legal norms but is valid with respect to the types set forth in other legal norms in the legal system; or a token is *invalid* with respect to all the types set forth in the norms making up the legal system (even if it is valid with respect to a type not set forth in any norm in the legal system).

If the tokens of an *obligatory* or *permitted* type are *invalid*, they will *not* produce the Ought-effects that, under a legal norm, are to be caused by the valid tokens of this permitted or obligatory type. And whether other normative consequences (Ought-effects) will follow from such invalid tokens, and if so what kind they will be, will depend on the normative legal system as a whole: It will depend on whether the same tokens, though invalid with respect to the permitted or obligatory type in question, are valid with respect to other types, meaning types described elsewhere—by one or more other norms in the normative legal system and therein qualified as obligatory, permitted, or forbidden.

Likewise, if the tokens of a *forbidden* type are *invalid*, they will *not* produce the Ought-effects that, under a legal norm, are to be caused by the valid tokens of this forbidden type. And whether other normative consequences (Ought-effects) will follow from such invalid tokens, and if so what kind they will be, will depend on the normative legal system as a whole: It will depend

on whether the same tokens, though invalid with respect to the type in question, are valid with respect to other types, meaning types described elsewhere—by one or more other norms in the normative legal system and therein qualified as obligatory, permitted, or forbidden.

I will make two examples: one of an invalid token of a permitted type, the other of an invalid token of a forbidden type.

(*i*) Article 1367 of the Italian Civil Code, on the interpretation of contracts, reads thus:

> In case of doubt, the contract or the individual clauses shall be interpreted in the sense in which they can have *some effect*, rather than in that according to which they would have none. (*The Italian Civil Code*, art. 1367; italics added)[17]

We can gather from this article that under the Italian Civil Code, behaviour-tokens that are invalid with respect to one type of contract can nonetheless be valid with respect to other types of contract. In particular, under the article in question, a behaviour-token (such as drawing up a contract) that invalidly instantiates one type of contract (as for a sale of goods) can nonetheless validly instantiate a different type of contract (as for renting this same good); in fact the interpreter, when in doubt, will be required to interpret the contract not in the sense by which the token of the two parties' drawing up of this text is invalid with respect to *all* types of contract (and hence carries no Ought-effects in what is subjectively right in the reality that ought to be), but rather in a sense by which the two parties' behaviour-token (their drawing up the contract) is valid with respect to some type of contract under the law (and hence can carry some Ought-effect in what is subjectively right in the reality that ought to be).

(*ii*) Article 56 of the Italian Penal Code, on attempted crime, reads thus:

> Anyone who does acts aptly directed in an unequivocal manner towards commission of a crime shall be liable for an attempted crime if the action is *not completed* or the event does not take place.
>
> A person guilty of an attempted crime shall be punished: [with imprisonment of from twenty-four to thirty years, if the law prescribes the penalty of death for the crime];[18] with imprisonment for not less than twelve years, if the punishment prescribed is life imprisonment; and, in other cases, with the punishment prescribed for the crime, reduced by one-third to two-thirds.
>
> If the offender voluntarily desists from action, he shall be subject to punishment only for acts *completed*, where these constitute in themselves [count as, I would say, meaning they are valid instances] a *different offence*.
>
> If he voluntarily prevents the event, he shall be subject to the punishment prescribed for the attempted crime, reduced by from one-third to one-half. (*The Italian Penal Code*, art. 56; italics and footnote added)[19]

[17] Clearly, "effect" here means "Ought-effect," that is, a normative effect. The Italian original: "Nel dubbio, il contratto e le singole clausole devono interpretarsi nel senso in cui possono avere qualche effetto, anziché in quello secondo cui non ne avrebbero alcuno."

[18] The death penalty has been abrogated in Italy for all crimes.

[19] The Italian original: "Chi compie atti idonei, diretti in modo non equivoco a commettere un delitto risponde di delitto tentato, se l'azione *non si compie* o l'evento non si verifica.

We can see from this article that, under the express statement of the Italian Penal Code, behaviour-tokens that are invalid with respect to one type of crime (invalid because not completed), and hence are not wrong under the legal norm wherein this type of crime is set forth, are instead valid with respect to other types of crime, and hence are wrong under the legal norms wherein these other types of crime (in particular, the type "attempted crime") are set forth.

In Paragraphs 3 and 1 of this Article 56 of the Italian Penal Code we find a clear distinction between "completed act" and "uncompleted act." A token's completeness with respect to a type, and especially with respect to a compound type (on compound types, see Section 2.1.5) is a requisite of the token's validity with respect to that type. It bears repeating here what was observed in Section 2.1.5, namely:

> A compound type is made up of two or more types, and these in turn can be compound or simple. A simple type is not made up of types: It is not susceptible of further subdivision.
>
> An actual state of affairs or event will be a valid token with respect to a compound type if, and only if, its components congruently instantiate all the simple types making up the compound type. A valid token of a compound type is itself compound: It is made up of two or more tokens, compound or simple. Moreover, an actual compound state of affairs or event will be a valid token of a compound type only if it reproduces in its structure whatever relevant order is found in that type.

There are two things we may appreciate in the light of the distinctions made in the foregoing passage: (*a*) a token's completeness with respect to a compound type stands as a requisite of the token's validity with respect to the same compound type, and (*b*) if the tokens of a type that is a component of a compound type are complete with respect to the component type, they can be valid with respect to this component type (cf. Section 6.4 on the referents of a norm).[20]

Il colpevole di delitto tentato è punito: [con la reclusione da ventiquattro a trenta anni, se dalla legge è stabilita per il delitto la pena di morte;] con la reclusione non inferiore a dodici anni, se la pena stabilita è l'ergastolo; e, negli altri casi con la pena stabilita per il delitto, diminuita da un terzo a due terzi.

Se il colpevole volontariamente desiste dall'azione, soggiace soltanto alla pena per gli atti *compiuti*, qualora questi costituiscano per sè un *reato diverso*.

Se volontariamente impedisce l'evento, soggiace alla pena stabilita per il delitto tentato, diminuita da un terzo alla metà" (italics added).

[20] For example, suppose subject *x* decides to kill subject *y*. If *x* succeeds, *x*'s acts will be completed with respect to the compound type "murder": The token will be valid with respect to this compound type. If *x*'s acts are aptly directed in an unequivocal manner toward killing *y*, but *x* does not succeed, *x*'s acts will not be completed with respect to the compound type "murder": *x*'s acts, that is, the token, will be only *partially* completed and *partially* valid with respect to this compound type; at the same time, *x*'s acts, that is, the token, will be *fully* completed and *fully* valid with respect to the type "attempted murder." Finally, if *x* voluntarily desists from killing *y*, some of *x*'s acts may be completed and valid with respect to a different type, such as the type "personal injury"; or else, none of *x*'s acts will be completed and valid with respect to any type set forth in the Italian Penal Code.

Indeed, we can gather from the same Paragraph 3 of Article 56, as exemplified a moment ago in footnote 20, that a completed act which is invalid with respect to a compound type as set forth in a penal law can validly instantiate a *different offence*, meaning a different type of crime, a crime set forth elsewhere in the Italian Penal Code, or it can validly instantiate a type that is not set forth by the same code or therein prohibited. A completed act that does not constitute a different offence is clearly a valid token of a type of behaviour not prohibited in the Italian Penal Code, and which may even be absent from the entire Italian legal system.

As has been observed already, all of what I have been describing thus far concerns the true sense of the so-called typicality of law.

2.2.3. Ought-Effects Are neither Valid nor Invalid

A further and important qualification is called for here.

Ought-effects are neither valid nor invalid. They simply happen to get produced or not get produced in the reality that ought to be. Their production is regulated by norms. Which means that norms establish (*a*) what Ought-effects must be and will be produced and (*b*) what type of Is-event the production of Ought-effects is conditionally connected with.

If the type with which a norm connects Ought-effects gets validly instantiated in the reality that is, then these Ought-effects will be produced in the reality that ought to be. Otherwise, they will not be produced.

It may not be inaccurate (even if it may be misleading) to say that the production of Ought-effects is an Ought-effect. But it will be inaccurate, as well as misleading (from my standpoint), to say that the non-production of Ought-effects is an Ought-effect. Even so, it is not regarded as an oddity to say that Ought-effects are valid, when what we mean is that they should be produced (or have been produced), or that Ought-effects are invalid, when what we mean is that they should not be produced (or have not been produced).

Indeed, it is standard practice in common parlance and in legal doctrine to say that the invalidity of a certain Is-event (in the reality that is) produces the invalidity of certain Ought-effects (in the reality that ought to be): It is usual to say that the Ought-effects that "should have been valid" (meaning that "they should have been produced if the causing Is-event had been valid") "are not valid" (meaning that "they have not been produced because the causing Is-event was not valid").

Thus, in reference to the game of soccer, people will commonly say of a goal (Ought-effect) that it is valid if the shot on goal (Is-event) was valid, and that the goal (Ought-effect) is invalid if the shot on goal (Is-event) was invalid (as when the ball is kicked from offsides). "Valid goal" is used here to mean "a goal has taken place in the reality that ought to be, i.e., a normative consequence, or

Ought-effect, has been produced which is a goal," and "invalid goal" is used to mean "no goal has taken place in the reality that ought to be, i.e., no normative consequence, or Ought-effect, has been produced which is a goal." The soccer norm here involved is that if a shot is executed validly with respect to a certain type (not from offsides, among other things) and the ball goes through one team's goalposts, then the other team must normatively earn one point (in the reality that ought to be which makes up the game of soccer).[21]

What in the common parlance of soccer is referred to as a question of "valid goal" or "invalid goal" is not a question of validity. It is rather a question of normativeness:[22] It is a normative question, a question concerning the reality that ought to be, meaning by this that a certain Ought-effect—scoring a point—must normatively take place in the reality that ought to be (if a certain type of Is-event has been validly instantiated), while it must not and will not take place in the reality that ought to be (if the same type of Is-event has been invalidly instantiated). (More on this in Section 8.2.4.)

Let it be emphasised that the production and non-production of Ought-effects depends on norms qua norms. It does not depend on any constitutiveness of norms, because no norm is constitutive qua norm. All norms are regulative and normative qua norms: They are regulative insofar as they qualify as obligatory, permitted, or forbidden certain types of behaviour; and they are normative insofar as they conditionally connect certain Ought-effects with certain types of Is-events (though not necessarily and so not always; cf. Chapters 6 and 7).

By contrast, validity and invalidity—a token's congruence or incongruence with a given type—depends on the type qua type that a token is brought under. It is types that are constitutive, not the norms, or rules, they are set forth in. A type, recall, may be set forth anywhere, even in an apophantic sentence. Types, wherever they are set forth, even in the reality that ought to be, are constitutive of the possibility that tokens (occurring in the reality that is, the only reality they can occur in) instantiate them validly (congruently) or invalidly (incongruently) in that same reality (the reality that is).

Hence Ought-effects are not themselves valid or invalid, despite the fact that norms make the production or non-production of Ought-effects in the reality that ought to be (in what is subjectively right and what is objectively

[21] Similarly, a legal norm on voting activities will say that if the vote is validly effected with respect to a certain type (with respect to a certain type of voting procedure), and if a candidate obtains a majority of votes, then this candidate must (normatively) become, say, mayor of New York.

[22] "Normativeness" does not seem to enjoy as much currency as "normativity" in legal-philosophical literature. And it is precisely for this reason that I have chosen to use "normativeness" to express the concept of norm adopted in this volume (cf. Chapters 6 and 7). For similar reasons I have chosen "efficaciousness" (rather than "efficacy" or "effectivity") for the specific efficaciousness of motives of behaviour, and in particular to designate the efficaciousness of a norm as a motive of behaviour as this concept is presented in this volume (cf. Section 6.6). On some uses of "normativity," see Paulson and Litschewski Paulson 1998.

right) dependent on the validity in the reality that is of the tokens of certain types of Is-events set forth in the same norms.

The production we are discussing here is of a peculiar kind: It is a *normative* production. So, unless stated in a norm (through the types with which Ought-effects are therein conditionally connected), this normative production cannot take place in the reality that ought to be (the only place where Ought-effects can take place).

Chapter 3

TAKING A DIVE INTO THE SOURCES OF LAW

3.1. Where to Jump in From

The distinction was introduced in Chapter 1 between the reality that ought to be and the reality that is. In the reality that ought to be a further distinction was made between what is objectively right (norms and their content) and what is subjectively right, meaning rights and obligations. What is subjectively right depends on the content of norms as well as on what this content refers to in the reality that is—to actual subjects (people), states of affairs, and events.

It was pointed out that the reality that ought to be and law, though they often get mixed up in the thought of various scholars, do not necessarily coincide.

In Chapter 2 we considered validity and presented it as a sort of "legal pineal gland" designed to guarantee the interaction between two heterogeneous realities: the reality that ought to be and the reality that is. By this connection I introduced my concept of "validity," a concept entirely severed from the concept of "norm" and based instead on that of "type."

In this chapter I will go into the details of the interaction between the reality that is and the reality that ought to be with regard to what is subjectively and what is objectively right respectively. In the former connection, I will present a reconstruction of the legal-dogmatic theory of facts, acts, and transactions (declarations of will) as valid Is-events which cause Ought-effects in what is subjectively right (Section 3.2). In the latter connection, I will comment on the theory of the sources of law as valid Is-events (facts, acts, and especially declarations of will by the sovereign) which cause Ought-effects in what is objectively right (Sections 3.4 through 3.6).

3.2. Facts, Acts, and Transactions as Valid Is-Events Which Cause Ought-Effects in What Is Subjectively Right

3.2.1. Generalia

The Is-events that cause Ought-effects in what is subjectively right are distinguished into facts, acts, and transactions (*Geschäfte* in German) or declarations of will. The idea is that these events are valid tokens of types described in, and not forbidden by, legal norms: They are valid and right tokens of these types, and norms attach to them Ought-effects, namely, the birth, modification, or extinction of rights and obligations among subjects under the law (normative production and typicality of law: Section 2.2).

The distinction between facts, acts, and transactions has long been received in civil-law legal literature. In particular, the theory of *Rechtsgeschäft* developed within 19th-century German legal dogmatics and was then received into a number of civil-law countries, but not in common-law countries. Various English renditions of the term *Rechtsgeschäft* have been attempted, among which some using the term "transaction" and others the expression "declaration of will." I adopt here "transaction" even if the term is not fully satisfactory. And we will see, further, that the expression "declaration of will" traditionally appears in the *definiens* of *Rechtsgeschäft*: It therefore cannot be used to also translate the *definiendum*.

All events occurring in the reality that is, and which are valid and right tokens (valid with respect to types qualified in the normative legal system as obligatory or permitted), are Is-facts broadly understood, provided the normative legal system attaches to them Ought-effects that take place in what is subjectively right.

In the tradition of civil-law legal literature, Is-facts broadly understood are distinguished into Is-facts strictly understood and Is-acts broadly understood. Further, Is-acts broadly understood divide into Is-acts strictly understood, on the one hand, and transactions, on the other. Following is a diagram laying out the distinctions just made.

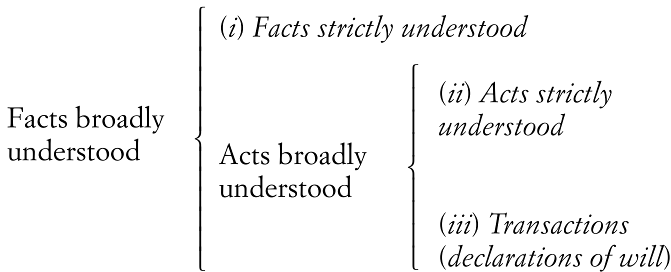


Figure 1: *Facts, acts, and transactions, or declarations of will*

You may like or dislike this redundant distinction: I happen to dislike it. But still, it is a component of the legal dogmatics of civil law.

3.2.2. Is-Facts Strictly Understood

Is-facts strictly understood (item (*i*) in Figure 1 above) are events in the reality that is to which the reality that ought to be (norms) attaches Ought-effects (which effects take place in what is subjectively right in the reality that ought to be), whether or not these events are voluntary human actions. In other words, if human will bears no relevance to the validity of the Is-events to

which a norm attaches the production of Ought-effects, then—from the standpoint of legal dogmatics—an Is-fact will be an Is-fact strictly understood whether or not it is a voluntary human action.

An example of an Is-fact strictly understood that causes Ought-effects in what is subjectively right is a person's death.

A person's death is an event in the reality that is, wherein it can occur through human will (deliberate killing or suicide or killing by voluntary action not intended to kill) or independently of human will (as the result of failing health, for instance, or of a fatal accident). In either case, whether human will is involved or not, the death-token validly instantiates the type "death" and carries several Ought-effects in what is subjectively right in the reality that ought to be: Some of the deceased person's rights and obligations will become extinct and some will transfer to other people; the deceased person's right to life will become extinct, for example, whereas the property rights (unless otherwise specified in a valid will) will transfer to relatives.

3.2.3. Is-Acts Strictly Understood

Let us turn to item (*ii*) of Figure 1 (introduced in Section 3.2.1): valid Is-acts strictly understood.

In the tradition of civil-law literature, Is-acts broadly understood are those events in the reality that is which are voluntary human actions.

From the standpoint of civil-law dogmatics, a human action can be voluntary in two senses: a general sense, in which "voluntary action" means "conscious action," and a specific sense, in which "voluntary action" means "conscious action carried out with the conscious intention of producing certain Ought-effects."

Is-acts strictly understood are voluntary human actions to which the reality that ought to be (norms) attaches Ought-effects (which effects take place in what is subjectively right in the reality that ought to be) whether these acts are voluntary human actions in the general or the specific sense of this expression. In other words, whether an act is voluntary in one or the other of the two senses just specified bears no relevance to the validity of the Is-acts to which a norm attaches the production of Ought-effects; hence, from the standpoint of legal dogmatics, an Is-act will be an Is-act strictly understood (not a transaction or a declaration of will) whether it is voluntary in the general or the specific of the two senses of "voluntary."

An example of an Is-act strictly understood causing Ought-effects in what is subjectively right is the finding of a treasure, a treasure being "any movable thing of value, hidden or buried, of which no one can prove he is owner" (*The Italian Civil Code* art. 932, par. 1).[1]

[1] The Italian original: "Qualunque cosa mobile di pregio, nascosta o sotterata, di cui nessuno può provare d'essere proprietario."

The finding of a treasure is an event belonging to the reality that is, where it can take place through human will in the general or the specific of the two senses specified above, i.e., finding a treasure without any intention of becoming its rightful owner, or finding the same treasure intently, in the effort to become its rightful owner.

In either case (and this is the reason why, from a legal-dogmatic standpoint, the act in question is an Is-act strictly understood) the act of finding a treasure has the same Ought-effect in what is subjectively right in the reality that ought to be; that is, it causes in behalf of the finder the birth of a right of ownership to the treasure.[2]

3.2.4. Transactions, or Declarations of Will

Let us finally look at item (*iii*) of Figure 1 (introduced in Section 3.2.1): transactions, or declarations of will.

Transactions are Is-acts in the reality that is which are voluntary human actions in the specific of the two senses specified in Section 3.2.3: They must produce and will produce Ought-effects (in what is subjectively right in the reality that ought to be) if, and only if, they are voluntary in this specific sense.

No token will be valid with respect to any type of legal transaction unless it gets instantiated with the specific intention of producing the Ought-effects (in what is subjectively right) attached to this type by the norm wherein the same type is set forth.[3]

A legal transaction (*Rechtsgeschäft* in German), as Bernard Windscheid (1817–1892) defined it, is a private declaration of will that aims to produce a legal (Ought-) effect. Scores of scholars have worked on this definition, bringing refinements and adding qualifications to it. Francesco Messineo (1886–1974), for example, defines a transaction as a private statement of intention aimed at producing certain legal (Ought-) effects that the legal system recognises and guarantees so long as the desired effects are congruent with their pursuer's intention and are lawful.[4]

[2] The Ought-effects in what (within the reality that ought to be) is subjectively right will be different according as the finder is or is not the owner of the estate where the treasure is found. But we need not enter into this further detail.

[3] But compare Article 1367 of the Italian Civil Code as quoted in Section 2.2.2.2.

[4] Following are the textual definitions given by Windscheid and Messineo: "Rechtsgeschäft ist eine auf die Hervorbringung einer rechtlichen Wirkung gerichtete Privatwillenserklärung. Das Rechtsgeschäft ist Willenserklärung. Es wird der Wille erklärt, daß eine rechtliche Wirkung eintreten solle, und die Rechtsordnung läßt diese rechtliche Wirkung deßwegen eintreten, weil sie von dem Urheber des Rechtsgeschäfts gewollt ist" (Windscheid 1900, vol. 1, 266–7); "Negozio giuridico è [...] una dichiarazione di volontà [...], o un complesso di dichiarazioni di volontà [...] dirette alla *produzione* di dati *effetti giuridici* [...] che l'ordinamento giuridico *riconosce e garantisce* [...] *nei limiti* della corrispondenza, o congruità, fra essi e la volontà che li persegue e in quanto si tratti di effetti *non-illeciti*" (Messineo 1943, 204–5).

An example of an Is-transaction causing Ought-effects in what is subjectively right is a contract, namely, "the agreement of two or more parties to establish, regulate or extinguish a patrimonial legal relationship among themselves." An example of a contract is a sale, namely, an agreement "having as its object the transfer of the ownership of a thing or the transfer of other rights in exchange for a price" (definitions found in Articles 1321 and 1470, *The Italian Civil Code*).[5]

In conclusion, Is-facts, acts, and transactions are events in the reality that is which cause Ought-effects in what is subjectively right in the reality that ought to be: They will bring about, modify, or extinguish rights and obligations among subjects under the law (provided they are valid tokens of a type of Is-event set forth in, and not forbidden by, what is objectively right in the reality that ought to be: Section 2.2.2.1).[6]

3.3. Distinguishing Ought-Effects in What Is Subjectively Right from Ought-Effects in What Is Objectively Right

As stated in Chapter 1, what is *objectively* right is the content of a norm, that is, a type, insofar as it is qualified as obligatory, permitted, or forbidden by this norm. The content of a norm is a necessary but not a sufficient condition of what is *subjectively* right. What is subjectively right (obligations and rights) does presuppose norms and their content, but it also presupposes that the content of these norms has referents in the reality that is.

For example, the norm not to smoke in public places sets down through its content what is objectively right on the question of people smoking in public places: It is objectively right not to smoke in public places. This norm continues to be a norm even if no one is presently frequenting any public place, and even if no public places exist. The burden here is precisely that the content of a norm, even in default of any referent in the reality that is, is what is objectively right.

Instead, what is subjectively right with regard to smoking in public places requires that two conditions be satisfied: A norm on smoking in public places needs to exist in the reality that ought to be, and one component of the

[5] The Italian original: "Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale" (art. 1321). "La vendita è il contratto che ha per oggetto il trasferimento della proprietà di una cosa o il trasferimento di un altro diritto verso il corrispettivo di un prezzo" (art. 1470).

[6] As the reader will have noticed, I speak on some occasions of Is-events causing Ought-effects and on other occasions of Ought-effects a norm attaches to Is-events validly instantiating a type set forth in the same norm. These two formulations are used here interchangeably. The first echoes the concept of legal causality, which has a tradition of its own in civil-law legal dogmatics (cf. Zitelmann 1879, 225–9—Ernst Zitelmann, 1852–1923). In the Anglo-Saxon world this idea is referred to by speaking of "operative facts": cf., in Volume 5 of this Treatise, Sartor, Section 20.2.4.

norm's content (a type of event or state of affairs, i.e., the conditioning type of circumstance set forth in the norm; see Section 6.3) needs to have referents in the reality that is (in the example, there needs to be at least one person who shows up in a public place). If, and only if, both conditions are met, something subjectively right will subsist in the reality that ought to be with regard to smoking in public places. Indeed, a possible formulation of the norm that forbids smoking in public places is as follows: "If someone is in a public place, then there will be for this person, because of his or her stay in this public place, an obligation not to smoke."

A person showing up in a public place is a valid Is-fact that produces Ought-effects in what is subjectively right. There will be, for the person showing up in a public place, an obligation arising in what is subjectively right in the reality that ought to be: an obligation to refrain from smoking. The obligation to refrain from smoking incumbent on people in public places belongs to the reality that ought to be: It belongs to what in this reality is subjectively right. Instead, the fulfilments (right behaviours) and non-fulfilments (wrong behaviours) of this obligation belong to the reality that is.

The facts, acts, and transactions illustrated in Section 3.2 are events in the reality that is. And, provided they are valid tokens of a type of circumstance (see Section 6.3) specified in what is objectively right in the reality that ought to be (in the content of norms), they will cause Ought-effects in this last reality. These Ought-effects, as has already been observed, are the birth, modification, or extinction of rights and obligations among subjects under the law. They will be Ought-effects bearing *only* on what is subjectively right in the reality that ought to be, and will not affect what in this same reality is objectively right (the content of norms).

Indeed, we may well imagine that in a given period what is objectively right (the content of legal norms) does not undergo any change, and that at the same time several Ought-changes occur in what is subjectively right (in legal rights and obligations among subjects under the law) through the action of valid Is-facts, acts, and transactions (declarations of will). Let us assume, for example, that nothing changes in Italian family law (what is objectively right) over a period of twenty years. Even then, during this same period numerous Ought-changes will be taking place in what is subjectively right in the ambit of Italian family law (in legal relations, rights, and obligations among subjects under the scope of Italian family law). These Ought-changes have taken place through the action of valid Is-facts, acts, or declarations of will, such as births, deaths, marriages, divorces, and adoptions. In the meantime, nothing has changed in what is objectively right; that is, nothing has changed in the content of the norms making up Italian family law.

What is objectively right (the content of norms) does not change through the action of Is-facts, acts, or transactions, but only through the action of other Is-causes that are different, though not heterogeneous, from the Is-facts,

acts, and transactions considered in Section 3.2. These other Is-causes are likewise valid tokens of types described in and regulated by legal norms (by what is objectively right in the reality that ought to be), and yet are designated by a special name: "sources of law."

The sources of law as Is-events are the ways or causes by which the law comes into existence or is modified or extinguished. The sources of law produce Ought-effects in what is objectively right; that is, they cause the birth, modification, or extinction of legal norms.

The Ought-effects caused by the sources of law bear on the content of norms, that is, on what is objectively right, but as a matter of course, any change in what is objectively right also bears through this last, and so indirectly, on what is subjectively right—on legal rights and obligations among subjects under the law—provided that the content of the new or modified norms has referents in the reality that is.

3.4. Sources of Law as Valid Is-Events (Facts, Acts, and Declarations of Will) Which Cause Ought-Effects in What Is Objectively Right

Through the action of valid Is-events other than those treated in Section 3.2—as through the implementation of a legislative enactment procedure—Ought-effects and changes can be obtained in what is objectively right (in norms and their content). Let us look at Italian family law, to stay with the example given in the previous section. Ought-changes can be made to the minimum age for marriage, or to the conditions for divorce, to the rules of adoption, etc. These changes in what is objectively right, in the content of norms, will affect what is subjectively right as well, if referents of the norms subsist in the reality that is.

The cause (Is-cause) behind the effects (Ought-effects) produced in what is objectively right (in norms and their content)—and indirectly, if at all, in what is subjectively right (in legal rights and obligations) among actual subjects under the law—will be the occurrence in the reality that is of a source of law in one of the senses of this expression: It will be, for example, the occurrence in the reality that is of the valid implementation of a formal enactment procedure (like legislation whose Ought-effects are statutory legal norms), or again it will be the performance and occurrence of a series of acts and facts (for example, the performance of practices and the occurrence of beliefs whose Ought-effects are customary legal norms).[7] Legislation has often been considered a declaration of will, such as the will of the sovereign or of Parliament (see Sections 3.5 and 3.6).

[7] Shiner's Volume 3 of this Treatise is on the sources of law: Chapter 2, in particular, is on legislation, and Chapter 4 on custom. In the same volume, Chapter 7, by Rotolo, is on the sources of law in systems of civil law. Section 1.3 of Peczenik's Volume 4 is on the sources of law, as is Section 25.2 of Sartor's Volume 5.

Let us make a summary as follows.

The valid Is-events that cause Ought-effects are sources of law if their Ought-effects take place primarily in what is objectively right (in norms and their content) and only indirectly in what is subjectively right (in legal rights and obligations) among the subjects under the law who are referents of the norms whose content has been affected.[8]

By contrast, the valid Is-events that cause Ought-effects taking place only in what is subjectively right are not sources of law: They are the Is-facts, acts, and transactions dealt with in Section 3.2. Their Ought-effects affect only what is subjectively right, and so only legal rights and obligations among actual subjects under the law. The Ought-effects resulting from these valid Is-events do not affect norms and their content: They do not affect what is objectively right.

The foregoing distinction suggests a few practical considerations.

The people in power can change what is objectively right in the reality that ought to be by implementing certain enactment procedures, and this way—and so indirectly—they can change as well what is subjectively right (if what is objectively right has referents in the reality that is). This is so because the people in power have access to the sources of law, namely, to the ways or Is-causes by which the law (legal norms) comes into existence or is modified or extinguished. And in particular they have access to the valid implementation of formal enactment procedures: They have the capacity or competence to validly implement these procedures (sources of law), whose types are specified in what is objectively right in the reality that ought to be (in the content of norms; see Section 7.3).

Ordinary citizens, on the other hand, can change only what is subjectively right: legal relations, rights, and obligations among themselves. This they do by means of valid Is-events, or Is-causes, accessible to them: through facts, acts, and transactions (declarations of will) which they are competent to validly realise, or in the capacity of validly realising, but which are not sources of law, or sources for what is objectively right.

Ordinary citizens have at their disposal only three ways of changing what is objectively right: They can push ahead with the formation of a custom (a sluggish process, alas!); or they can attempt to exert influence on the people in power (by redirecting their votes as they see fit, by lobbying, by launching media campaigns, and so on); or, in the extreme, they can make a Lockean appeal to heaven, that is, they can start a revolution (Locke 1948, Sections 241–3—John Locke,1632–1704).

[8] Except that penal norms, among others—if they become harsher—cannot be applied retroactively, at least in an advanced legal system.

3.5. Sources of Law as Ought-Effects (in What Is Objectively Right) Caused by Sources of Law as Valid Is-Events

In this section I will consider how the expression "sources of law" takes on interwoven meanings, thereby becoming a source of misunderstanding. Indeed, few expressions in legal usage are as ambiguous as "sources of law," and the reason rests with the constituent terms "source" and "law," for these are often used in different senses, so that the expression "sources of law" likewise comes to have a variety of meanings.

In civil-law countries, such as France, Germany, Italy, and Spain, we find the expressions *sources du droit*, *Rechtsquellen*, *fonti del diritto*, and *fuentes del derecho*. In England, and in the other common-law countries, the expression equivalent to the ones just listed is "sources of law."

"Source" in French and English, *Quelle* in German, and *fonte* and *fuente* in Italian and Castilian mean "origin of a watercourse." "Source," in French and English alike, derives from French *sourdre*, meaning to "spring up," "gush out," or "spout," from Latin *surgere* ("to spring up"). *Quelle* derives from Old High German *quellan* or *quaellan* and also means "to spring up" or "to gush out." Italian *fonte* and Castilian *fuente* derive from Latin *fons*, which the ancients connected with *fundere*, meaning "to pour."

All these terms, in their respective languages, are used to refer not only to the origin of a watercourse, but also, and figuratively, to the origin or cause of a variety of effects in the physical and cultural worlds, or to the place from which something is drawn (the way water is drawn from a source). Thus, historians understand the sources of history to be the writings and other evidence (such as the ruins of the Parthenon in Athens) from which they extract information on the happenings of the past. In a sense analogous to this last, the expressions *sources du droit*, *Rechtsquellen*, *fonti del diritto*, and *fuentes del derecho* designate the so-called sources for the cognition of law, that is, the documents from which law is extracted, what in English legal language are more simply called "repositories of law."[9]

As to *derecho*, *droit*, *Recht*, and *diritto*, in relation to English "law," I should simply reiterate what was already stated in Sections 1.2 and 1.3, that is: The Castilian, French, German, and Italian terms mean "the law" or "the right," or both, depending on context; while in English, "law" bears no linguistic kinship with "right." Moreover, in civil-law countries the distinction between "what is objectively right" (*objektives Recht*, and its equivalents in civil-law countries) and "what is subjectively right" (*subjektives Recht*, and its equivalents in civil-law countries) plays the important role illustrated in the previous sections.

Let us take up, against this background, the interweaving of figures of speech by which "sources of law" comes to signify both (*i*) "valid Is-events,

[9] On sources for the cognition of law, see, in Volume 3 of this Treatise, Rotolo, Section 7.1.

which occur in the reality that is, and cause Ought-effects in what is objectively right (in the reality that ought to be)" and (*ii*) "Ought-effects in what is objectively right (in the reality that ought to be) caused by valid Is-events occurring in the reality that is." By way of an illustration, I will use a couple of Italian examples.

Let us consider the definition of "sources of law" put forward by a logical-empiricist jurisprudent, Giacomo Gavazzi.

> What is meant by sources of law is the facts and the acts (the manifestations of will) through which norms in a legal system are created, changed, and extinguished. (Gavazzi 1970, 91ff., 22; my translation)

This definition of "sources of law" is interesting especially because it is akin to the definition of Is-facts, acts, and declarations of will provided in Section 3.2: It suggests that the sources of law are Is-events to be considered along with facts, acts, and declarations of will. On Gavazzi's definition, the sources of law are law-creating activities: They are the ways or causes by which the law comes into existence or is modified or extinguished; and, in particular, they consist in either the implementation of a formal enactment procedure that brings about statutory legal norms or in the performance and occurrence of a series of acts and facts that bring about customary legal norms.

An inconsistency seems to arise from Gavazzi's definition, for the following reason. He understands statutory laws to be sources of law. But statutory laws are not law-creating activities: They are themselves a kind of created law. To be sure, the valid implementation of a legislative enactment procedure is a sequence of facts and acts meant to create legal norms, like statutory laws, and so it properly may be called a "source of law" according to Gavazzi's definition of this term. But this does not make statutory laws the same as the valid implementation of the legislative enactment procedure through which they are brought about.

But then, again—on a different consideration—Gavazzi is not really wrong, because he is simply following a consolidated polysemous use of the term "sources of law" (*fonti del diritto* in Italian). As evidence of this, consider the Italian Civil Code, whose provisions—let us assume—are authoritative beyond any doubt, at least from the point of view of the Italian legal system.

Article 1 of the Preliminary Provisions to the Italian Civil Code falls under the heading "Indication of the Sources," and it reads as follows:

> The following are sources of law: (1) statutes; (2) regulations; (3) corporative norms; (4) usage.[10] (*The Italian Civil Code*, art. 1; footnote added)[11]

[10] Item 3 refers to Fascist guilds ("corporazioni") and is no longer in force. "Usage" is to be understood as "custom" in the sense of "customary law."

[11] The Italian original: "Sono fonti del diritto: (1) le leggi; (2) i regolamenti; (3) le norme corporative; (4) gli usi."

The first three items just listed are enacted law, while the fourth is customary law and hence is not the result of an enactment. Articles 2 through 9 of the same Preliminary Provisions to the Italian Civil Code show that there are specific ways of enacting law, meaning by this the implementation of a formal procedure by given persons or bodies; for instance, a legislative procedure to make statutes (statutory laws). Such is not the case with customary law, whose way of coming into existence is based not on any formal procedure, but on acts and facts not fixed formally in advance, that is, on practices and beliefs that develop and take hold over time.[12]

None of the four items listed above under the heading "Indication of the Sources [of law]" is the implementation of a formal enactment procedure (I am referring here to items 1 through 3) or the performance and occurrence of a series of acts and facts (I am referring here to item 4). Instead, the first three items are the Ought-effects of the implementation of formal enactment procedures, and the last item is the Ought-effect of the performance and occurrence of a series of acts and facts. The four items are kinds of legal norms: Ought-effects caused in what is objectively right (in the reality that ought to be) by way of law-creating activities (by way of Is-acts or facts occurring in the reality that is). The only feature the four items have in common is that all are law: They are *kinds* or varieties of legal norms in the legal reality that ought to be.

Plainly, the different kinds of law are brought about in different ways (by different Is-causes): For example, statutes (statutory legal norms) are brought about by way of legislation, and custom (customary legal norms) by way of practices and beliefs. Still, "sources" seems a plausible name not so much for the *outcomes* as for the ways or causes—implementations of procedures, as well as for other facts and acts—by which those outcomes are produced in the reality that ought to be.

"Sources of law" is indeed the metaphorical name for the set of ways (the set of Is-causes) by which law is brought out. And the metaphorical name for this set has been transferred and made to apply to the kinds of law

[12] With custom we cannot pin down the exact moment of its coming into existence. But we can do so with statutory law, because statutory law is the result of the implementation of a formal enactment procedure. In the Italian system of law, the implementation of this procedure comes to an end with a specific formal step that takes the name of promulgation, by which a statutory law comes into existence. By contrast, a custom is not enacted, nor is it brought into existence by the implementation of a formal procedure. Independently of my characterisation of existence of a norm and being-in-force of a norm (see Sections 6.2 and 6.5), it is also doubtful in current continental legal doctrine whether with customary law we can distinguish the moment of its coming into existence from that of its coming into force. In civil-law systems, statutory law makes possible the distinction between these two moments: Statutory law comes into *existence* in the moment of its promulgation and comes into *force* only after a period (called *vacatio legis*) has elapsed since its publication in an official journal.

brought out in such ways: "Sources of law" (metaphorically equivalent to the "*ways* or causes—Is-events—by which the law comes into existence or is modified or extinguished") stands for "*kinds* of law" (legal norms in the reality that ought to be). And this is a metonymy: a metonymy superimposed on a metaphor.[13]

The sources of law float and drift, so to speak, between the reality that is and the reality that ought to be. As causes, they are Is-events occurring in the reality that is. As effects they are Ought-events taking place in the reality that ought to be.

Be that as it may, the moral of the sermon is that if you will allow a metonymy into the hands of a jurist, the jurist will fashion out of it a theory, written in figurative language, in which it is shown that the law (what is objectively right) is what *he* or *she* thinks it is. It just so happens, too, that jurists belong to committees appointed by the lawmaker to draft laws, including those laws regarding the sources of law, as is the case with Article 1 of the Preliminary Provisions to the Italian Civil Code. If the jurists, in their committees, succeed in bringing their figures of speech into agreement, their metaphorical (figurative) terminology will be carried over into the bills of law which the lawmaker will turn into statutes. At this point come the philosophers and the jurisprudents, who will work on the jurists' doctrines *sic et simpliciter*, or they will work on the jurists' doctrines insofar as these are transformed into statutes: That is, in the final analysis, they will be working on those figures of speech previously spoken of, which have in the meantime taken on the authority of "scientific" legal doctrines, or even of statutory law. The philosophers and jurisprudents will, depending on their philosophical and metatheoretical leanings, add their own speculations to the metonymies and metaphors so worked out, stratified in books of legal dogmatics, and finally transformed into statutes. This way, law and (linguistic) disorder concur in giving shape to the reality that ought to be which people share in a given society (cf. Sections 15.2.5, 15.3.2, and 15.3.4).

[13] A caveat is in order here. In this chapter I use "outcomes" to designate Ought-effects (Ought-effects produced by Is-causes) because I am working within an ideal reconstruction of the legal-dogmatic tradition of civil-law countries. In this tradition, the law belongs to the reality that ought to be: Emblematic in this respect is Hans Kelsen's theory of law (cf. Chapter 14). But, as we will see in Sections 8.2.3 and 8.2.4, it is necessary to draw the distinction between Is-outcomes and Ought-outcomes. Thus, for example, the Is-outcome of a valid implementation of a legislative procedure is a text of law; the Ought-outcome of this implementation (in the sense of "Ought-outcome" specified here) is the coming into existence, modification, or extinction of a legal norm.

3.6. The Sovereign Normative Will as the Source of Positive Law in the Natural-Law School and in German Legal Positivism Alike

3.6.1. Two Glorious Examples

In the previous sections I went into the details of the interaction between the reality that is and the reality that ought to be with regard to what, in this reality, is subjectively right and what is therein objectively right. In the former connection I presented (Sections 3.2 and 3.3) a reconstruction of the civil-law legal-dogmatic theory of facts, acts, and transactions (declarations of will) as valid Is-events that cause Ought-effects in what is subjectively right. In the latter connection I discussed (Sections 3.4 and 3.5) the theory of the sources of law as valid Is-events that cause Ought-effects in what is objectively right.

Both of these theories—call them (*a*) the theory of the sources of law, and (*b*) the theory of facts, acts, and transactions, or declarations of will—are aimed for the most part at attributing to human will and to norms (human will belonging to the reality that is, norms belonging to what is objectively right in the reality that ought to be) the role of concurrent causes in creating (modifying or extinguishing) what is right by positive human law.

As we will see in Section 4.4, in the history of legal thought the word "positive," or "posited," when made to refer to law and what is right, means "laid down," or "determined by enactment or convention."

The interaction between human will and norms is handled through the mediation of the legal pineal gland, meaning validity, which gets predicated of Is-events in the reality that is with respect to types set forth in the content of norms, meaning types set forth in what is objectively right in the reality that ought to be. Will and normativeness are concurrent causes, each singly necessary yet capable only by their joint action of creating, modifying, or extinguishing what is objectively or subjectively right by enactment or convention; and of the two—will and normativeness—it is normativeness that enters as a determining cause.

Theories (*a*) and (*b*) are voluntaristic (they are will-theories)[14] as well as normativistic. And they both assign to validity the crucial role of interfacing between the two worlds of Ought and Is, between the reality that ought to be and the reality that is. In fact validity—the crucial, indeed the essential pineal gland (validity as described in Chapter 2)—partakes of both worlds: It partakes of the Ought (the reality that ought to be) because the types in question are types set forth in norms (both theories ask the jurist to ascertain the validity of tokens whose types are types set forth in norms); and it partakes of the

[14] In specific cases both theories come up against problems or find themselves forced to admit exceptions in regard to the role of will: Theory (*a*) in regard to custom, theory (*b*) in regard to Is-facts strictly understood.

Is (the reality that is) because that is where these tokens occur (in other words, the tokens whose validity the jurist, in both theories, is asked to ascertain belong to the reality that is).

Let me recall two glorious examples of the normativist-voluntaristic theory of what is right by virtue of human-posited legal norms. (What is right by nature, or natural law, is a different matter, on which see Section 4.3.)

One example is the natural-law theorist Hugo Grotius and the other the legal positivist Hans Kelsen. Despite appearances to the contrary, Kelsen's theory of positive law bears an interesting resemblance to Grotius's theory of positive law: Both are theories that in a similar way claim a normative status for the law enacted through human will.

Kelsen in a way picks up Grotius's legacy with regard to the normativeness of positive human law: Both scholars cultivate the dualism between Is-causes and Ought-effects and explain in a similar way the interaction between the reality that is and the reality that ought to be. To account for this interaction, and secure the primacy of the reality that ought to be over the reality that is, they both presuppose a (hypothetical) basic norm: Grotius presupposes the norm *pacta servanda sunt* (*cum juris naturae sit stare pactis* [...] *neque vero alius modus naturalis fingi potest*: see Section 3.6.2, and the excerpt from Grotius in footnote 19 in that section); Kelsen presupposes a hypothetical *Grundnorm*. Neither of these norms is a positive (posited, enacted, or conventional) norm: Each is in its own way a presupposed norm. Further, both are designed to explain the normative character of the sovereign's will and the binding force of positive law—of what is right by virtue of human-posited legal norms: They are the grandmother of positive human law (Section 4.2.4).

Grotius and Kelsen stand as giants in the history of legal thought. As the mythical Atlas was condemned to support the celestial vault on his shoulders, the two great jurisprudents appear to be condemned to the titanic undertaking of sustaining on their shoulders the normativeness of positive legal systems—of the law enacted through acts of human will and yet conceived as a per se subsisting and binding reality that ought to be.[15]

3.6.2. The State of Nature and the Promise

If we are to consider the account that 17th- and 18th-century natural-law theories give of the way a sovereign creates (or modifies or extinguishes) what is objectively right—the way the sovereign's will, declared by issuing com-

[15] In Parts Two and Three of this volume I will try my best to do for both—for Grotius and Kelsen—what Heracles did for Atlas (I will try to substitute them provisionally in holding up the celestial vault), and, like Heracles, I will do so only for a while (though not in exchange for three golden apples).

mands,[16] creates (modifies or extinguishes) per se binding positive legal norms—we will have to consider, however sketchily, the state of nature, the promise, and the social contract as expounded in these theories.

The state of nature is a hypothetical prelegal condition that humans live in before forming a society. Some natural-law theorists understand the state of nature as an anarchic condition of disruption and battling of all against all (Thomas Hobbes, 1588–1679); some envision it as a condition of peace, serenity, and happiness (Jean-Jacques Rousseau, 1712–1778); and others still as a condition marked by uncertainty and risk (John Locke).[17]

Karl Olivecrona sums up Grotius's conception of the state of nature as follows:

> In the state of nature there were no rights, properly speaking (no *facultates morales*) either over persons or over things […]. Everybody was free. The right of property did not exist; it was subsequently introduced through the human will.
>
> Nevertheless, according to Grotius everybody had his proper share which belonged to him. This was the *suum*. It comprised his life, limb, and liberty. To deprive somebody of anything pertaining to the *suum* was *iniustum*. […]
>
> When everybody possessed original freedom, how then could a right be established over the individual? How could he become subject to the moral power, the *facultas moralis*, of another person?
>
> There was only one way to achieve this: an act of will on the part of the individual himself. He could voluntarily submit himself to the moral power of someone else. (Olivecrona 1971, 278–9, 281)

The act of will through which one or more persons submit to others is the promise. Under a promise, the promisor—the person making the promise—declares a will (recall declarations of will as discussed in Section 3.2.4) by which he or she shall give something to another person, or else shall do or abstain from doing something for this person: The promisee is the person to whom the promise is made.[18]

Grotius presents the promise to do something (*promissio faciendi*) as analogous to transferring property.

> Our right over our own actions is equivalent to our rights over things. Therefore, we can transfer a right over our own actions to another person as well as we can transfer the right of property. The effect is similar (*perfecta promissio, ... similem habens effectum qualem alienatio dominii*).

[16] A distinction can be made between commands that are in themselves norms and commands that rather *produce* norms. But we need not develop this point any further here. I use the expression "declared by issuing commands," and do so with a purpose, which is to signal that the voluntarism of theories of positive law (theories set out by natural-law scholars and legal positivists alike) sometimes wavers between a declaratory voluntarism and an imperativist one.

[17] In this Treatise, see, on natural-law theories and the problem of the transition from a *status naturalis* to a *status civilis*, Volume 2, Rottleuthner, Section 3.2.1.4, in the frame of the natural foundations of law.

[18] Grotius, *De jure belli ac pacis libri tres* (a), II, 11.

> Thus it appears that in promising to do something, as for instance to pay a sum of money, one desists from the power of decision over this action; it is conferred on the other party. In so doing, one alienates a part of one's liberty: An *alienatio particulae nostrae libertatis* takes place. It is a *moral* power that is transferred. The promisee now has a moral power over the promisor as regards the action promised. This action is no longer subject to the free will of the promisor. He is morally bound to execute it when required by the promisee. (Olivecrona 1971, 284–5)

Through a promise, the promisor confers on the promisee the normative power to order the promisor what to do. The promisee's orders create obligations that bind the promisor (this is the sense in which the power in question is normative). By issuing commands, the promisee exerts the same power over the promisor that the latter had over his or her own behaviour before this behaviour became the object of a promise. This newly acquired power is a *particula libertatis*, a portion of freedom that through a promise the promisor has transferred to the promisee.

A social contract (an act of will like that of a promise) confers part of one's freedom to a sovereign. Like a promisee in relation to a promisor, the sovereign acquires a power that originally rested with the subjects who have entered into the contract. Some natural-law theorists contend that the contract is only a *pactum subjectionis*, a compact of submission to a sovereign; others say that this *pactum subjectionis* is preceded by a *pactum unionis*, a compact of union among consociates.

In any case, the commands the sovereign issues qua sovereign come from the power conferred on him or her through the social contract. This is why the sovereign's command is normative.

In the case of a promise, the promisee issues binding commands on the basis of a *particula libertatis* transferred to him or her through a promise made by the promisor: This is the reason why the promisee's commands create obligations binding upon the promisor. In like manner, the sovereign's commands create norms that bind the subjects who have entered into a social contract (and who are actual addresses of the sovereign's commands); that is so because, in commanding, the sovereign uses the power transferred to him or her by those who have entered into the social contract. What is right by virtue of human-posited legal norms is the content of the sovereign's normative will, namely, the content of the set of commands issued by the sovereign, which commands are binding per se and so carry the force of norms.

The reader will have recognised in the foregoing summary on the promise and the social contract an early version of the theory of declarations of will and, more generally, the theory of Is-facts, acts, and transactions that cause the birth, modification, or extinction of rights and obligations (cf. Section 3.2). What is interesting to point up here, however, is that the social contract creates Ought-effects not in what is subjectively right but in what is objectively right. The social contract creates a competence norm, a norm establishing a sovereignty (or supreme authority) that obligates us to obey as legal

norms the sovereign's commands. Hence, the sovereign's commands are sources of law in the sense specified in Section 3.4: They are Is-events (declarations of will) that create human-posited legal norms. The competence norm created through the social contract is, in turn, the topmost norm in the system of positive law.

The theory of positive law set out by the fathers of the natural-law school is clearly voluntaristic and normativistic at once. Human-posited laws are legal *norms*. They are Ought-effects in what is objectively right in the reality that ought to be which come by way of Is-causes: by way of sovereign commands, or declarations of will, validly occurring in the reality that is.

Grotius descries the source of positive law (*jus in civitate positum* or *constitutum*) in the norm of conduct *stare pactis*, a norm of natural law from which springs, through the social contract, the competence norm "Everyone must obey what gets established by those on whom authority (*potestas*) has been conferred through the social contract."

Again, since it is a rule of the law of nature [since it is right by nature: *cum juris naturae sit*] to abide by pacts [*stare pactis*] (for it was necessary that among men there be some method of obligating themselves to one another, and no other natural method can be imagined), out of this *source* the bodies of municipal law have arisen [*ab hoc ipso fonte jura civilia fluxerunt*]. For those who had associated themselves with some group, or had subjected themselves to a man or to men, [...] had either expressly promised, or from the nature of the transaction [*ex negotii natura*] must be understood impliedly to have promised, that they would conform to that which should have been determined [*constituissent*], in the one case by the majority, in the other by those upon whom authority [*potestas*] had been conferred. (Grotius, *De jure belli ac pacis libri tres* (b), Prolegomena, 15–16; italics added)[19]

In the following section I will briefly compare the conception of positive law of the natural-law school as expressed in Hugo Grotius and Samuel Pufendorf (1632–1694) with the conception of positive law of German legal positivism.

3.6.3. What Divides and What Unites the Natural-Law School and German Legal Positivism

Let it be stressed that the distinction is rarely drawn between the natural-law theories' conception of what is right by nature (by natural law) and the natural-law theories' conception of what is right by virtue of human-posited legal norms (what is right by positive law). Yet the distinction is worth making, for the following reason.

[19] The Latin original: "Deinde vero cum juris naturae sit stare pactis, (necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest) *ab hoc ipso fonte jura civilia fluxerunt*. Nam qui se coetui alicui aggregaverant, aut homini hominibusve subjecerant, hi aut expresse promiserant, aut *ex negotii natura* tacite promisisse debebant intelligi; secuturos se id quod aut coetus pars major, aut hi quibus delata potestas erat constituissent" (Grotius, *De jure belli ac pacis libri tres* (a), Prolegomena, 15–16; italics added).

The history of law and philosophy describes natural-law theories as rationalistic and German legal-positivist theories as voluntaristic.

Natural-law theories are described as rationalistic because the main strand of them—the rationalistic strand considered in Section 4.3.4—typically understands nature as divine and human reason and natural law as the law of reason available to humans. By contrast, the natural-law theories' conception of positive law is kept mostly out of sight when natural-law theories are described as rationalistic.

German legal-positivist theories, for their part, are described as voluntaristic on account of their conception of positive law. Indeed, the natural-law conception of German legal positivism consists in disclaiming natural law: When German legal-positivist theories are described as voluntaristic, the description will necessarily regard these theories' conception of positive law, because there is no legal positivist conception of natural law.

This being the case—and it plainly is the case—the opposition between natural-law theories and German legal-positivist theories, when cast as one of rationalism versus voluntarism, springs from an ambiguity concerning what is relative to what: Natural-law theories (the main strand of them) are rationalistic relative to natural law; German legal-positivist theories are voluntaristic relative to positive law.

Since there is no conception of natural law in German legal positivism (there is rather, more simply, a rejection of natural law), the only possible comparison between natural-law theories and German legal-positivist theories is a comparison between their theories of positive law. What we can do—indeed what we should do—is consider what conception of positive law is maintained by natural-law theories, even among those natural-law scholars who are clearly rationalistic relative to what is right by nature. In fact, natural-law theories do have a conception of human-posited legal norms, of positive law, and one that is comprehensive and fully articulated. More interesting still, this conception is voluntaristic (it is a will-theory), even in those natural-law scholars who are rationalistic relative to natural law.

Hence, the result to be had from the only possible comparison between natural-law theories and German legal-positivist theories can only be that the conventional opposition between these two orientations of thought is untenable when it comes to the concept of positive law, for both orientations are voluntaristic with regard to human-posited legal norms.

More than that, the voluntaristic conception of positive law found in German legal positivism flows from the voluntaristic conception of positive law found in the natural-law school. In German legal positivism and in the natural-law school alike, positive law is conceived as the will of the sovereign or the state. German legal-positivist theories developed the conception of positive law as the sovereign's will that they got from natural-law theories of positive law (see Berolzheimer 1905, § 4—Fritz Berolzheimer, 1869–1920—; Pound 1910, 29—Roscoe Pound, 1870–1904—; Fassò 2001, vol. 3, 40–57, 176–212; Olivecrona 1971, Chapter 1).

Natural law is another thing.

The voluntaristic conception of positive law (both in natural law and in German legal-positivist theories) is imperativist, for it takes the "sovereign's will" to mean the "sovereign's commands," understood as commands that are binding per se: commands that are norms or that produce norms in the reality that ought to be. Imperativeness, a distinguishing trait of positive law, amounts to obligatoriness; that is, to the normativeness, Ought (*das Sollen*), or binding force of positive law. The term "imperativeness" derives from Latin *imperium*, which historically—in Roman law, and hence in *jus commune*,[20] as well as in modern natural-law theories—is understood as the power to issue commands (norms) that are binding per se, or commands that produce norms, and also the power to exact compliance with such commands by the use of force, a qualification typical of archaic Roman law.[21]

The voluntaristic theory of positive law held by German legal positivism takes on the traits of a theory under which the state is the sole source of law in that the sovereign and the state are the same thing. German legal positivism, though it has no place for natural law, does set up a duplication of reality into a reality that is (*das Sein*) and a reality that ought to be (*das Sollen*). In this, German legal positivism sides with natural-law theories of positive law, since both understand the sovereign's commands as binding per se, namely, as norms residing in the reality that ought to be.

Here it will be worthwhile to note down a few points.

As was observed in Section 3.6.2, natural-law theories base the binding force of the sovereign's commands on a social-contract doctrine—on the promise by which an *alienatio particulae libertatis* is given effect to. The sovereign's commands must be complied with because the sovereign commands the people by using their own power: the power the people initially had over themselves and then delegated or entrusted to the sovereign through a social contract (*pactum unionis*, *pactum societatis*, *pactum subjectionis*).

Grotius writes, "cum juris naturae sit stare pactis [...] ab hoc ipso fonte jura civilia fluxerunt": "Since it is right by nature to maintain pacts [...], from this very source has flowed what is right among citizens [municipal law]" (my translation) (cf. Section 3.6.2).

A contract theory of this sort made it difficult for natural-law theorists to account for God's power over humans. Indeed, if the lawgiver issues commands by virtue of a power the people delegate to him through a promise (a

[20] With the Latin expression *jus commune* the medieval glossators designated Justinianian law, which was understood as "universal law (*ius commune*, as against the *ius proprium* of the *civitates*)" (Fassò 2001, vol. 1, 182–3; my translation). *Jus commune* emerged in the late 11th century and its fortune lasted several centuries; it was taught at schools of law all across Europe. Cf. Fassò 2001, vol. 2, 294–5, and, in Volume 7 of this Treatise, Padovani, Chapter 2, Errera, Chapter 3, and Pennington, Chapter 4.

[21] On *imperium* in Roman law, see Guarino 1975, 19, 33, 40, 63, 103, 155.

pactum unionis or *pactum subjectionis*, or both), we may be led to think by analogy that God's power over humans results from a trust, a delegation of power that humans have endowed God with—humans placing power in God's hands. Clearly, this solution was theologically unacceptable. So Pufendorf offered the following solution.[22]

God has endowed humans with the freedom of action. The power that humans have over themselves derives from God. But God has not handed all his power to humans: He kept for himself the power to govern humans.

The *imperium* of humans over other people subject to them—the moral power of the human sovereign to issue commands and thereby produce legal norms that are binding per se on other humans—is conferred on human sovereigns through voluntary submission by people who have entered into a social contract. By contrast, the *imperium* of God is original. And in fact the power of humans over themselves is a concession of God: It is the portion of freedom that God bestowed on humans when he created them.

By rejecting natural law and the social contract, equating the sovereign with the state, and retaining the normativistic conception of positive law by which the state's commands are norms or produce norms that are binding per se on their addressees, German legal positivism justified the state's power over its citizens by way of a theory similar to that which Pufendorf had put forward to justify God's power over humankind.

Recall that the absolute monarchs of the European states in the modern age were sovereigns by the grace of God: by divine concession or authorisation, if we want to add some juridical colour. The sovereigns, in their turn, would grant some powers or rights to the citizens. The citizen bore no original powers. Individual freedoms and legal rights were authorisations (*Berechtigungen*) or concessions that the sovereign granted to his subjects (cf. Chapter 14 on Kelsen's use of *Berechtigung*). Even with the advent of constitutional monarchies, constitutions were *octroyées*, or given by concession. Hence the monarchs were qualified as sovereigns by the grace of God *and* by the will of the nation.

The constitutional state, or *Rechtsstaat* (literally, the state founded on what is objectively right), is itself founded on positive law: The state limits its own binding power through the positive law it itself lays down, such that the source of the state's binding power is kept within the state. This in roughly the same way as, on Pufendorf's theory, the source of God's power to bind humans remains with God himself, and if there were any sense in which the power granted by God to humans could be considered a limitation of God's power, this limitation would still have been self-imposed (and hence, in the final analysis, would not have been a limitation at all).

[22] As this solution is brought into relief in Olivecrona 1971, 17–8; cf. Pufendorf, *De jure naturae et gentium*, 1, 6, 12.

This is the sense in which the theory whereby the state is the sole source of law becomes integral to the normativistic voluntarism of 19th-century legal positivism in German countries.

Having done away with the natural-law theory of the social contract, a theory under which the state's will is the will of all consociates, German legal positivism needed a plausible account of the state's binding will—of its sovereignty or *imperium*, the normative power of those who govern in a society. In this effort, some German legal positivists, consciously or not, attributed to the state an original power in a way similar to what Pufendorf had done with respect to God.

Chapter 4

THE PROBLEM OF THE MATRIX

4.1. The Matrix of Normativeness as the Ultimate Source of What Is Right by Virtue of Human-Posited Norms

In this chapter the problem of the foundation of the binding force of positive law—and hence of what is objectively right by virtue of norms posited through human will, that is, by enactment or convention—will be brought under the purview of the wider problem of the matrix of normativeness (the matrix of all norms).

The problem of the binding force of positive law, whatever linguistic formulation we find it expressed in, is the problem outlined in Section 3.6.1 with reference to Grotius's and Kelsen's normativistic will-theories of positive law—only, we can recast it now from the vantage point of the wider problem of the matrix of normativeness.

I will line out this problem proceeding, by way of example, from the work of an Italian scholar, Giorgio Del Vecchio (1878–1970), the foremost legal philosopher of the first half of the 20th century in Italy. A neo-Kantian scholar, he states that

> generally speaking, the source of law is human nature, that is, the spirit that shines from within individual consciences and so enables and forces them to understand, along with their own personalities, the personalities of others. (Del Vecchio 1965, 258; my translation)[1]

This definition may baffle readers enough to warn them that almost anything can be made to fall under the catchall rubric "source of law." Del Vecchio is striving to make this a high-toned expression, for he means to say that the law resides in the critical conscience of human beings as persons who recognise one another as equals: Hence, he is moved by a noble end.

Setting down this noble end does not seem at first to make Del Vecchio's definition of any use in simplifying the matter addressed, if we ascribe to "source of law" the meaning illustrated in Sections 3.4 and 3.5. But Del

[1] Cf. Kant 1991, 56 (translation by Mary Gregor): "Thus the universal law of Right [...], so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law." The German original: "Also ist das allgemeine Rechtsgesetz: handle äußerlich so, daß der freie Gebrauch deiner Willkür mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne" (Kant 1914, 231). Kant's teensy little word *Rechtsgesetz*, literally "the law of right," contains a guidepost useful to anyone translating *objektives Recht* and *subjektives Recht* into English (cf. Chapter 14) and seeking orientation when faced with the disconcerting *das Recht*: Is it "law" or "what is right"? Mary Gregor translates *Rechtsgesetz* aptly as the "law [*Gesetz*] of Right [*Rechts*]."

Vecchio's definition *will* prove to be of help if we note that he implicitly means by "source" "the ultimate source," and that he is writing in Italian: He writes *fonte del diritto*, where *diritto*, as was stressed in Section 1.2, means not only "law" but also, and in this case primarily, "what is right." So Del Vecchio is looking to find and define "the ultimate source of what is right by positive law, namely, what is right by virtue of human-posited legal norms." This ultimate source will be the *matrix* of normativeness—the matrix of all norms understood as per se binding rules belonging to the reality that ought to be.

A matrix is "what makes something be what it is": The word derives from Latin *mater*, meaning "mother," and also "womb," a "place where something is generated," "that which gives origin or form to a thing"; consider, for example, the matrices used to print banknotes.

Hence the question at issue is: "What makes something be right?" The answer will be: "A norm." Here, a second and most important question arises: "What makes something be a norm?" Del Vecchio replies, "human nature, that is, the spirit that shines from within individual consciences."

Del Vecchio was not the first scholar to make this an issue and give it the answer just mentioned. We will see shortly some well-known passages in which Cicero addresses the same problem as Del Vecchio, in a manner no less engagé than Del Vecchio's: Cicero addressed it as the problem of *fons legum et juris*.

And in the 20th century again the problem—which I suggest calling the problem of the "matrix of normativeness as the ultimate source of the binding force of positive law, and hence of what is right by virtue of human-posited legal norms"—is clearly present in Lon L. Fuller, among others; he, too, frames it as a problem of "sources of law":

> The term "sources of law" is ordinarily used in a much narrower sense than will be attributed to it here. In the literature of jurisprudence the problem of "sources" relates to the question: Where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will be commonly listed: statutes, judicial precedents, custom, the opinion of experts, morality, and equity. In the usual discussions these various sources of law are analysed and some attempt is made to state the conditions under which each can appropriately be drawn upon in the decision of legal controversies. Curiously, when a legislature is enacting law we do not talk about the "sources" from which it derives its decision as to what the law shall be, though an analysis in these terms might be more enlightening than one directed toward the more restricted function performed by judges.
>
> Our concern here will be with "sources" in a much broader sense than is usual in the literature of jurisprudence. Our interest is not so much in sources of law*s*, as in sources of law. *From whence does the law generally draw not only its content but its force in men's lives?* [viz., What is the matrix of normativeness as the ultimate source of the binding force of positive law?]
>
> This problem is, of course, intimately connected with the ancient debate between two opposing schools of legal philosophy, that of legal positivism and that of natural law. (Fuller 1976, 43; italics in original on first occurrence, added on second occurrence)

The sources of law, insofar as they are understood as the matrix of normativeness and hence as the ultimate source of what is right by positive law, will depend in the final analysis on the ethical, metaphysical, philosophical, and religious commitments of those who deal with the question. Of course each scholar regards his or her vision or belief as the final, decisive benchmark for what is right, and also for what is right by positive law: Each scholar finds therein the matrix of all true norms, of the law to be obeyed per se as distinguished from just any command that we accept to comply with out of expediency. And different scholars, according as they follow one or another ethical, religious, or even methodological line of thinking, will assume different things to be the matrix of normativeness, of *true* norms, and hence the ultimate source of what is right by positive law (by virtue of human-posited legal norms).

As we will see, Cicero uses the adjective "true" to qualify a norm as accordant (*congruens*: see footnote 6 in this chapter) with the matrix (or arche-*type*) of normativeness. In the history of legal thought this adjective, "true," gets replaced, consciously or not, with the adjective "valid" to qualify norms in the same way (as accordant, or congruent, with the matrix of normativeness). One place where we find this replacement made, consciously or not, is in Kelsen. Throughout this volume I make my case against this use of "valid" and "validity," suggesting an alternative understanding of these terms as well as of the term "norm" (Chapters 2, 3, and 6 through 9, and Sections 2.2.3, 7.1, and 8.2 in particular).

Natural-law theories find in nature the matrix of normativeness. The ultimate source of what is right by positive law is nature, so that what is right by nature overrides what is right by law when the two do not conform.[2]

Thomas Aquinas, for example, holds that *lex* (a term that in this case I would render as "norm") is derivative of Latin *ligare*, meaning "to bind," and that the reason for this derivation (of the word *lex*) is that a *lex* is binding (*obligat*). *Lex humana* (the human norm) must come from *lex naturalis* (the natural norm) in order to be binding. And where it does not, it will not be *lex*, *sed legis corruptio*, as Augustine had previously expressed himself: It will be a corruption of *lex*—or, in the translation I suggest (cf. Section 13.7), the forgery of a norm—and so it will not be binding. It will not be a true norm, I should comment, so its content will not be what is objectively right (see Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 1; q. 95, a. 2, and Augustine, *De libero arbitrio*, I, 6, 15).

[2] What nature itself is will in turn depend on the conceptions espoused by those who believe in natural law. The foremost Italian idealist philosopher, Benedetto Croce (1866–1952), ruthlessly wrote that natural law boils down to "the ideas that writers and professors in haphazard manner lump together" (Croce 1909, 341; my translation). In subsequent editions of the same work (*Filosofia della pratica: Economica ed etica*), and in the same passage, Croce softens his judgement: Natural law becomes "the abstract ideas of writers and professors" (Croce 1957, 336; my translation). The flow of time makes milder the asperities of the rugged ridges, and also those of the thoughts of humans.

The Latin *lex*, contrary to Aquinas's opinion, is derivative of Latin *legere* (*legein* in ancient Greek), meaning "to say." Thus, as previously in Roman law, *lex* is a verbal formula properly so called, oral or written. Aquinas's etymology of *lex* is mistaken, but the substance of his conception stands unaffected: It retains the basic features just outlined. What is (objectively) right is the content of *lex*. The content of *lex humana* (of the human norm) is right if *lex humana* comes from *lex naturalis* (from the natural norm), failing which *lex humana* will not be a norm but the forgery of a norm (a false norm) and its content a forgery of what is right (see Chapter 13).

Among the best-known statements on nature as the matrix for normativeness is a statement that Cicero gives us in *De legibus*.[3] Following is an excerpt from the Loeb translation (with square brackets added to indicate the Latin expressions for which I would rather have a different English translation). Here I will reiterate how in several contexts even the Latin *jus* is best translated as "what is right" (or "the right") rather than as "law," in analogy to what was observed in Sections 1.2 and 1.3 with regard to *droit*, *Recht*, *diritto*, and *derecho* (cf. Chapters 12 through 14).

> The origin of Law and Justice [the source of norms and of what is right: *fons legum et juris*] can be discovered [. . .] not [...] from the praetor's edict, as the majority do now, or from the Twelve Tables [...], but from the deepest [...] philosophy. (Cicero, *De legibus*, I.v.16–7)[4]

> Law [for Latin *lex*, which I feel is better served here by "norm"] is the highest reason [*ratio*; cf. Section 13.7], implanted in Nature, which commands what ought to be done and forbids the opposite. (Cicero, *De legibus*, I.vi.18)[5]

In *De re publica* Cicero offers one of his most famous passages. Following is the Loeb translation (with square brackets added to indicate the Latin expressions for which I would rather have a different English translation).

> True law [here, the true norm: *vera lex*] is right reason [*ratio*; cf. Section 13.7] in agreement with nature; it is of universal application [it is spread among all people: *diffusa in omnes*], unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law [this norm: *huic legi*], nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations [from this norm: *hac lege*] by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws [a different norm, in the singular: *alia lex*] at Rome and at Athens, or different

[3] See, in this Treatise, the presentation and framing of Cicero provided in Volume 6, Chapter 6, Section 2, by Inwood.

[4] The Latin original: "Fons legum et iuris inveniri potest [. . . n]on ergo a praetoris edicto, ut plerique nunc, neque a duodecim tabulis, ut superiores, sed penitus ex intima philosophia" (Cicero, *De legibus*, I.v.16–7).

[5] The Latin original: "Lex est ratio summa insita in natura, quae iubet ea, quae facienda sunt, prohibetque contraria" (Cicero, *De legibus*, I.vi.18).

laws [a different norm, in the singular: *alia lex*] now and in the future, but one eternal and unchangeable law [one norm: *lex*] will be valid [here, "valid" is the translator's addition; it does not figure in the original Latin text] for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law [of this norm: *legis huius*], its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment. (Cicero, *De re publica*, III.xxii.33)[6]

In the excerpts quoted, Del Vecchio, Aquinas, and Cicero present what they consider to be the matrix of normativeness—of all true norms—and hence the ultimate source of what is right by positive law, the final foundation of the duty to obey human-posited legal norms. When this foundation is lacking, a law, however enacted, and by whomever, will not be a true norm, but rather the forgery of a norm (*legis corruptio*).

4.2. A Problem of Authenticity

4.2.1. Orthogonal Norms and Straight Rules

In Section 1.3 norms were distinguished from their content (what is objectively right), meaning that what is objectively right is right because it is the content of a norm: What is objectively right is right inasmuch as it is made obligatory, permitted, or forbidden by a norm.

As was noted in Section 4.1, Aquinas says that if *lex humana* (the norm posited by human beings) should fail to come from *lex naturalis*, it will not be *lex* (it will not be a norm), but *legis corruptio*. From this point of view, not all norms that, *prima facie*, are norms are really such, and hence not all the contents of *prima facie* norms are what is objectively right.[7] One might be tempted to say that what is objectively right (the content of norms) precedes norms, that norms presuppose what is objectively right, and that a norm that is such *prima facie* is a true norm only if its content is what is objectively right.

[6] The Latin original: "Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat; quae tamen neque probos frustra iubet aut vetat nec improbos iubendo aut vetando movet. Huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres eius alius, nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus, ille legis huius inventor, disceptator, lator; cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia, quae putantur, effugerit" (Cicero, *De re publica*, III.xxii.33).

[7] There are several places in this volume in which I will have the occasion to use *prima facie* as synonymous with "at first sight" (leaving out of account the specific use of it by W. D. Ross found in Ross 1930, esp. 18–20, 28, and Ross 1939, esp. 84–6; on this, see Vida 2003, esp. Chapters 3 and 4). Compare, in Volume 4 of this Treatise, Peczenik, Section 1.2.2, the use suggested for *prima facie* and *pro tanto* in the context of defeasible norms.

But I find it more appropriate to say that, in the final analysis, the relationship between norms and their contents remains unchanged. It is not a content that makes a norm, by preceding this norm and making it binding; rather, it is the norm, as something binding per se, that shapes its own content, thereby making this content objectively right. Properly viewed, the question we are considering is not that of the relationship between norms and their content. We are rather considering a different and prior question, a question of authenticity, namely, What is the matrix of normativeness, of true norms? And hence, What is ultimately the source of what is right by virtue of human-posited legal norms?

I will clarify my view on this question as follows.

The words "norm" and "rule" have a peculiar origin: They designate tools that serve to make things straight. *Norma* in Latin designates the carpenter's square: A *norma* is used to make right angles. "Rule," from Middle English and Old French *riule*, from Latin *regula*, means "straight stick," or "ruler"; and "rule" itself is used synonymously with "ruler," as in "a carpenter's rule": A *regula*, or rule, is used to draw straight lines. The carpenter's norms and rules (meaning the tools) make right—norms make orthogonal and rules make straight—that which they shape. It is required for this task to be performed that the carpenter's squares (norms) be truly square and that straight sticks, or rulers (rules), be truly straight. The squareness of squares (of norms) and the straightness of rulers (of rules) depend in turn on the matrix in which the squares and rulers have been moulded: It depends on the master die from which they have been reproduced.

In a similar way, any theory of the source of law as the ultimate source of what is right by virtue of human-posited legal *norms* is a theory of the matrix of normativeness—of the master die where true norms come from.

What is right is made right by a norm that contains it: It is the content of a norm insofar as this content has been qualified normatively as obligatory, permitted, or forbidden. Norms make right their own contents. But this is not enough, say natural-law theorists, and more generally those who mean by "source of law" "the ultimate source of what is right by virtue of human-posited legal norms." For it will also be necessary that norms, in turn, be true norms (just as the carpenter's norms and rules must themselves be truly square and straight respectively). The squareness of norms and the straightness of carpenters' rules come from the matrix of norms and of rules: The normativeness of human-posited legal norms (and hence the ultimate source of what is objectively and subjectively right by virtue of these norms) comes from, and is guaranteed by, the matrix of true norms (more on this in Section 13.7).

The natural-law theorists agree in assuming that the matrix of true norms (per se binding rules) is nature, even if they disagree on what nature is: the will of God, biological instinct, human or divine reason, the cosmic order, and so forth (Section 4.3).

Other scholars find the matrix of true norms not in nature (they are not natural-law theorists, therefore), but in other things, like the spirit of the people (*Volksgeist*), the sovereignty of the state, the *Führerprinzip*, or the emancipation of the proletariat; or again, returning to the peculiar matrix that Kelsen conceived for the true norms of positive legal systems (a peculiar matrix because understood as methodological), they find it in a presupposed basic norm (though of course Kelsen says, not "true norms," but "valid [*gültige*] norms"; see Kelsen 1934, 72; Kelsen 1960, 214).

This way we are brought back to what was previously noticed: The source of law—when understood as the matrix of normativeness, of true norms—will depend in the final analysis on the ethical, metaphysical, philosophical, and religious commitments of those who deal with the question. Of course each scholar regards his or her vision or belief as the final, decisive benchmark for what is right, and also for what is right by positive law: Each scholar finds therein the matrix of true norms, of the law to be obeyed per se as distinguished from just any command that we accept to comply with out of expediency. And different scholars, according as they follow one or another ethical, religious, or even methodological line of thinking, will assume different things to be the matrix of normativeness—of all true norms—and hence also the ultimate source of what is right by virtue of human-posited norms.

Let us go back now to the analogy with the matrices used to print banknotes.

We use banknotes—broadly, money—to *measure* the market value of goods and pay for them. Similarly, we use norms (the types of behaviour they set forth as normatively obligatory, permitted, or forbidden) to *measure* whether actual behaviours in social life are right or wrong. Money works like norms in a sense. If money is to fulfil its function, it must be true money: If it does not come from the matrices of a central bank, it will not be true money (valid money in Kelsen's sense), but the corruption (forgery) of money; it will be false money and so will be of no use in measuring the market value of goods and paying that price. Similarly in the case of norms: If norms are to fulfil their function, they have to be true norms. Their function is to state what is objectively and what is subjectively right (in the reality that ought to be) and hence to serve as the carpenter's rules (*regulae*), as instruments for measuring whether actual behaviours (in the reality that is) are right or wrong.

Aquinas is exemplary in this regard: *Lex quaedam regula est, et mensura actuum*; "a norm is a kind of rule, and a measure for acts" (Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 1; my translation) where "measure" means a unit used for stating the measure of something: its size, quantity, or degree, for example.

Aquinas's definition of *lex* I will come back to in Chapter 13, where I discuss the distinction between what is right and what is just.

Norms cannot be true norms—just as money cannot be true money—unless they come from a matrix: They must come from the matrix of normativeness, which matrix will therefore also be the ultimate source of what is right by virtue of human-posited norms. What this matrix consists of is, again, a different matter, a question that is being debated and discussed by schools of ethics and religion and on different methodological approaches (the list is not exhaustive, though; one might also throw in metaphysics, anthropology, astrology, and so on).

And yet the Problem of the Matrix subsists and is here to stay. A central problem in legal philosophy, we often find it treated in conjunction with the sources of law because, implicitly or explicitly, it gets considered and qualified as the problem of the *ultimate source* of what is right: Cicero, we have seen, presents it as the problem of *fons legum et juris*, of the source of norms and of what is right. But the point is not always stated clearly enough that the problem of the matrix—independently of the words it is expressed in: "mother," "archetype," "source," *fons*, or what have you—is not the same as the problem of the sources of law as understood in legal dogmatics, and as discussed in Section 3.4. Let me elaborate on this point in the next section.

4.2.2. A Few Qualifying Remarks

In Section 3.4 we discussed the *ways* by which law is produced, its *modes* of production: the sources of law. That is, we discussed the Is-events (such as the implementation of a legislative procedure) through which to create laws, or legal norms, meaning Ought-effects in what is objectively right.

In this chapter, instead, we are discussing the problem of the matrix of normativeness, a problem understood as that of guaranteeing the *authenticity* or *veridicality* of human-posited norms understood as "instruments for the measurement of what is right." These instruments of measurement, these norms, however produced, will not be authentic or true unless they come from a matrix, from a master die.

The ways or modes of producing laws (legal norms) are *procedures*, while the matrix of true norms might be said to be a *premise.* Which therefore makes for a misleading use, that is, using the same noun, "source," to designate both (*a*) the premise and (*b*) the procedure. But, even worse, as was seen in Section 3.5, "source" is used to also designate what might be called (*c*) the *conclusions*: It is even used to designate the kinds of legal norms (Ought-effects) that are the Ought-outcome of the valid implementation of lawmaking procedures.

And this misleading use of the noun "source" is likely to generate confusion all the more so that we are using "valid" to qualify the noun "source" in the three acceptations just mentioned, (*a*), (*b*), and (*c*). Indeed, given that it is common practice to use the same noun, "source," to designate (*a*) the

premise, (*b*) the procedure, and (*c*) the conclusion—all three—and the modifier "valid" to qualify the congruent execution of (*b*), the procedure, as well as to qualify (*c*), its conclusion (normative outcomes, legal norms), why then should we not want to use the same modifier, "valid," to also qualify (*a*), the premise, that is, the matrix of normativeness? Maybe we are already doing so. As did Kelsen (Kelsen 1946, 111; 1960, 219) with regard to his matrix of normativeness—the presupposed basic norm. And Hart perspicuously objected to it (Hart 1961, 245; cf. Section 8.2.5).

The validity of the performance of a procedure does not guarantee that the norms produced are true norms, just as the validity of the performance of an inferential procedure does not guarantee the truth of the conclusions drawn. Human-posited legal norms are true norms if they come from the matrix of normativeness and they do so through validly performed procedures.

Notice that procedure, in the analogy just made, introduces a further element that contributes to making distinct (and making necessary the distinction between) the problem of the matrix of normativeness, on the one hand, and the problem of the sources of law, on the other.

Where the relationship between the matrix of normativeness and human-posited legal norms is concerned, the procedure at work is that by which human-posited legal norms are derived from a *non-posited matrix* (as happens in natural-law theories and in Hans Kelsen's theory of the presupposed basic norm).

By contrast, the procedure discussed in Section 3.4, on the sources of law, is the procedure by which human-posited legal norms are derived from other, likewise human-posited legal norms.

As was seen in Section 3.4, human-posited legal norms derive from (are created by) other human-posited legal norms through an interaction occurring between these norms and Is-events or Is-acts (sources of law) validly obtaining or validly performed in the reality that is. It can reasonably be assumed that this way of deriving human-posited legal norms from other human-posited legal norms is roughly the same in every human-posited legal system.

When instead, as in this chapter, we have to do with the provenance of human-posited legal norms from a non-posited matrix, the way of deriving the former from the latter will depend on the conceptions that each thinker has of the non-posited matrix and of its relationship to human-posited legal norms: The way of deriving human-posited legal norms will change (and may change considerably at that) according as the matrix is understood to be the voice of conscience, the power and love of God, the spirit of the people (*Volksgeist*), the *Führerprinzip*, the emancipation of the proletariat, the presupposed basic norm, and so on, and according as each such matrix is conceived this way or that by those who uphold it. Even circumscribing our attention to nature as the matrix of true norms (of per se binding rules), for example, we will find different conceptions (which see Section 4.3).

My treating the Problem of the Matrix as a problem of authenticity or veridicality may still leave my readers with some doubts ("O you of little faith!" Luke 12:28). Hoping to dispel these doubts, I will adduce two examples in addition to those given in Section 4.1: One for anyone of Muslim faith, with the Koran (in Section 4.2.3), and the other for anyone of Christian faith (in Section 4.2.4).[8]

4.2.3. Umm al-Kitāb*: The Mother of the Book, or the Matrix of the Koran*

Mr. Saddam Hussein, on the occasion of Gulf War I (1991), declared that the battle for Baghdad would be the Mother of All Battles (*Umm al-Hurub*).[9] We all learned of this solemn declaration from the news media, and many understood him to mean that from the battle for Baghdad all subsequent battles would originate. But I wondered why ever Mr. Hussein would have wanted to make a solemn public declaration if its meaning is the meaning just mentioned. It is plausible that Mr. Hussein spoke those words because, to him and to the audience they were addressed to, they had a deeper and more important meaning: There was maybe a sacred or religious allusion in those words. Mr. Hussein did not simply want to say that the battle for Baghdad would give way to all subsequent battles. If so, what battles was he thinking about? Are we to include the conflicts between Protestants and Catholics in Ireland, for example? And if so, why? On the basis of what causal link? And what about battles past, at Waterloo, for example? No. There had to be another meaning to Mr. Hussein's solemn declaration: The Battle for Baghdad was to be the *matrix*, the *archetype*, the official benchmark against which we were to establish the authenticity or falsity of any standard (rule or norm) that has ever been held up, or will ever be held up, for measuring, judging, or deciding whether a battle is really such and truly deserves the name "battle." Further, Mr. Hussein—however much he may be a man of learning and intelligence—could not have invented such an idea by his own wits, out of whole cloth. Besides, if this idea had been a mere invention of his (and hence an idea whose meaning he alone could appreciate in full), what point would there have been to making it the object of a solemn declaration addressed to the people of the Arab world and to the whole of Islam? The audience would have been hard put to seize the dense and deep meaning of an extravagant invention by the rais. If we are to make sense of Mr. Hussein's proclamation, we will have to look for and find something common to him and the public he

[8] And in this last regard, since I have already considered Aquinas, I will consider a thinker of protestant faith, Grotius, who was Calvinist, and who in particular adhered to the Arminian sect, engaged in conflict with the Calvinist sect of the Gomarists.

[9] Another version is *Umm al-Maarik*. A mosque built in Baghdad and completed in April of 2001 was so named (MacAskill 2002).

was addressing, something of great meaning to both, or something sacred to him (at least officially) as well as to the addressees of the declaration.

It turns out that this conclusion does have some basis, in the Koran, in that there is a heavenly matrix—it is called *Umm al-Kitāb*, literally "the mother of the Book"—and this matrix is the matrix of the Koran.

Of course I have no evidence that Mr. Hussein, when he was speaking of *Umm al-Hurub*, was making this mental association with *Umm al-Kitāb*. Nor do I know if U.S. government officials have questioned Mr. Hussein on this matter, or even if they intend to. What I do know for sure is that *Umm al-Kitāb* is the mother (in the sense of "matrix") of the Book, and that the Book is the Koran.[10]

Let us, therefore, go back in time to the 6th and 7th centuries. According to Islamic tradition, the Koran (*Qur'an*) was recounted (communicated orally) in Arabic by the Archangel Gabriel, who, chosen by Allah, revealed it to Muhammad (ca. 570–632). The matrix of the Koran that Gabriel revealed to Muhammad remained in heaven: It is called the Mother of the Book (*Umm al-Kitāb*), and it is the matrix of all the Korans circulating on Earth.

The contents of the Koran range from the image of Allah, powerful and merciful, to the rules of cult and to moral and legal norms. The content of the Korans that circulate on Earth is what is objectively right—but it is so only on the condition that these Korans be true Arab Korans coming from the matrix. Muhammad learned the Koran by heart from the Archangel Gabriel, and spread the word preaching to his disciples. This way, the verses of the Koran, which Muhammad knew by heart and recited, in addition to being memorised in the brains of his disciples, gradually found their way in writing: Thus came on this Earth the first written Koranic text, which was placed here to be of help to human memory.

But this first written Koran is not the Mother of the Book (*Umm al-Kitāb*): It is not the matrix of the Koran. The matrix of the Koran, the archetype, is in the heavens. To Muslims, every Koranic word is divine, eternal, and irreplaceable because there exists—prior to the Koran revealed to Muhammad and then transcribed by his disciples—the archetypical celestial Koran just mentioned, the *Umm al-Kitāb*, or Mother of the Book, which is kept in the heavens, in the Preserved Table (*Lawḥ Maḥfūẓ*): "By the Luminous book! / We have made it an Arabic Koran that ye may understand: / And it is a transcript of the archetypal Book, kept by us; / it is lofty, filled with wisdom" (*The Ko-*

[10] *Umm al-Kitāb* occurs in *The Koran*, 3: 7; 13: 39; 43: 4 (different expressions to be compared with these occur in 52: 2–3; 56: 78–9; 80: 13–6). Among the English versions of the Koran, see that by J. M. Rodwell (1808–1900) and edited by Ernest Rhys (1859–1946) (listed in the bibliography and cited in the text—when necessary—as *The Koran* (a)) and that by A. J. Arberry (1905–1969) (listed in the bibliography and cited in the text—when necessary—as *The Koran* (b)). On the Koran and Islamic Law, see, in Volume 2 of this Treatise, Rottleuthner, Section 3.1.2.3, in the frame of the religious foundations of law.

ran (a), 43: 2–4). "Yet it is a glorious Koran, / Written on the preserved Table" (*The Koran* (a), 85: 21–2).

J. M. Rodwell knowingly translates *Umm al-Kitāb* ("the Mother of the Book") as "archetypal Book" in the *Koran*, 43: 3 (*The Koran* (a), on page 135 of his translation): "Archetypal Book" is equivalent to my "Matrix of the Book." Further, he is careful enough to point out in a footnote that the translation should literally read "Mother of the Book."[11]

There are English translations other than Rodwell's that do not display the same accuracy—an example being A. J. Arberry's, *The Koran* (b). Here the reader is left without explicative remarks, such as we find in Rodwell. In addition, Arberry renders *Umm al-Kitāb* as "Essence of the Book," which does not give us the literal meaning, "Mother of the Book," or the metaphorical meaning, "Matrix (or Archetype) of the Book."[12]

In *The Koran* (b), 13: 39, Arberry again provides reductively a translation of *Umm al-Kitāb* as "Essence of the Book." Rodwell's version of *Umm al-Kitāb* is, again, much better and more cognisant:

> What He pleaseth will God abrogate or confirm: for with Him is *the Source of Revelation* [*Umm al-Kitāb*]. (*The Koran* (a), on page 337; italics added)

It will be noted that Rodwell not only shows here he is clearly bearing in mind that *Umm al-Kitāb* ("Mother of the Book") has the sense of "Matrix of the Book." He also chooses, not "archetype," as he does for other occurrences of *Umm al-Kitāb*, but "source."

I find it fitting in this regard to refer the reader to the passage by Cicero quoted in Section 4.1 (Cicero, *De legibus*, I.v.16–7): Here Cicero uses the Latin *fons* ("source" in English) in the expression *fons legum et juris*, where, as has been pointed out, there is at play precisely the sense of "matrix."

[11] The reader will notice that Rodwell numbers the Koranic verses differently than I do (cf. footnote 12 in this section); here, Rodwell identifies the verse as 5, and I as 4. This difference is due to the fact that I find more appropriate the verse numbering used by Alessandro Bausani (1921–1988); cf. *The Koran* (c). The difference between Rodwell and Bausani concerns the way the *verses* are numbered within the traditional order established for the Koranic suras. A different matter is the order of the suras themselves. Indeed, Rodwell attempted a chronological reordering of them: He provides a correspondence between the suras as traditionally ordered and the suras as arranged in his own translation.

[12] Arberry renders *Umm al-Kitāb* as "Essence of the Book" in translating *The Koran*, 3: 7 (3: 5 in Rodwell's numbering), *The Koran*, 13: 39 (13: 39 in Rodwell's numbering as well) and *The Koran*, 43: 4 (43: 5 in Rodwell's numbering) (see *The Koran* (b), pages 45, 244, 505). "Essence of the Book" may work only for *The Koran*, 3: 7 (3: 5 in Rodwell's numbering), for it is written in this passage, "He it is who hath sent down to thee 'the Book.' Some of its signs are of themselves perspicuous;—these are the basis of the Book [*Umm al-Kitāb*]—and others are figurative" (*The Koran* (a), page 386): We have here the distinction between "signs of themselves perspicuous" and "figurative signs." Hence, in this passage, *Umm al-Kitāb* ("Mother of the Book") may be so interpreted as to mean "the Essential Part of the Book" rather than "the Matrix (or Archetype) of the Book" (Rodwell himself, after all, uses here "the basis of the Book"). This reading does not instead apply to *The Koran*, 13: 39 and 43: 4.

4.2.4. The Great-Grandmother of Positive Human Law

It was stated in Section 3.6.1 that the norm *stare pactis* in Grotius and the *Grundnorm* (basic norm) in Kelsen are the grandmother of positive law (of human-posited legal norms).

This statement is conceptually true with regard to Kelsen, and conceptually as well as literally true with regard to Grotius.

Also, there is this further difference between Kelsen and Grotius. In Kelsen the basic norm is the grandmother of positive law and as well the matrix of normativeness, and hence the ultimate source of what is right by human-posited legal norms. In Grotius, instead, the norm *stare pactis*, though it is the grandmother of positive law, is not also the matrix of normativeness. In Grotius the matrix of normativeness, namely, human nature, boasts a higher degree of nobility: It is the great-grandmother of positive law. Indeed, says Grotius, on positive human law and its lineage,

> the very nature of man, which even if we had no lack of anything would lead us into the mutual relations of society, is the *mother* of the law of nature. But the *mother* of municipal law is that obligation which arises from mutual consent [the social contract]; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the *great-grandmother* of municipal law. (Grotius, *De jure belli ac pacis libri tres* (b), Prolegomena, 16; italics added)[13]

Grotius, the father of modern natural-law theory, is thus saying that the mother of natural law is human nature, which therefore could be said to be the great-grandmother of positive human law: This is so because the mother of positive human law is a competence norm (*ipsa obligatio*; cf. Section 7.3) produced through the social contract (*ex consensu*).

The social contract is a valid Is-event (in the reality that is). It is a *Rechtsgeschäft* (a declaration of will, and properly a kind of promise: cf. Sections 3.2.1, 3.2.4, 3.6.2, and 10.2.6) whose type is set forth in a natural norm, **n**, *stare pactis* (or *pacta servanda sunt*), that attaches to this type an Ought-effect (in the reality that ought to be), and this Ought-effect (*obligatio*) is in turn the competence norm **c**, "It is binding per se to obey (type of action) the sovereign's commands (type of circumstance)."

By this way of descending from the matrix of normativeness—from human nature—this competence norm, **c**, draws its binding force (*vim*) from the natural norm of conduct **n**, *pacta servanda sunt* (cf. Sections 7.2 and 8.2.1): The natural norm of conduct **n** makes it so that, through it, the posited (or positive) competence norm comes from human nature itself. From human nature the posited (or positive) competence norm **c**, institutive of sovereignty, gets its very

[13] The Latin original: "naturalis juris mater est ipsa humana natura, quae nos etiamsi re nulla indigeremus ad societatem mutuam appetendam ferret: civilis vero juris mater est ipsa ex consensu obligatio, quae cum ex naturali jure vim suam habeat, potest natura hujus quoque juris quasi proavia dici" (Grotius, *De jure belli ac pacis libri tres* (a), Prolegomena, 16).

character of a norm (the power of a norm, *legis virtus*, in Aquinas's words: cf. Sections 13.4 and 13.7). Hence, human nature is the matrix and great-grandmother of the human legal norms posited through the sovereign's commands.

Let us turn now to the question framed in Section 3.6.1: the kinship between Kelsen and Grotius.

With the idea of mother (or matrix), Grotius gives us in outline form a genealogical vision, a pedigree conception, of the binding force or normativeness of positive law. Human nature is the great-grandmother whence descends a grandmother (natural law, and specifically the natural legal norm of conduct *pacta servanda sunt*), whence descends a mother, the posited (or positive) competence norm "It is binding per se to obey the sovereign's commands" (a norm created through a valid Is-act, a transaction: the social contract),[14] whence descends a daughter: the derivative positive law, or human legal norms, posited through the sovereign's commands.

This 17th-century outline by Grotius makes an easy fit with Kelsen's 20th-century *Stufenbau* and its peculiar methodological matrix of normativeness, meaning the *vorausgesetzte Grundnorm*, the presupposed basic norm, the matrix for the reality that ought to be (*das Sollen in einem objektiven Sinn*, whose content is *das Recht in einem objektiven Sinn*: what is right in an objective sense, the only sense that Kelsen admits for *das Recht*; cf. Section 14.5), and hence the matrix for the constitution as a legal competence norm posited (*gesetzte*) by humans, and—moving further down in the genealogy—for the laws enacted by the legislature, for the government's administrative and bureaucratic rules, and finally for individual norms, such as the judge's rulings.[15]

4.3. Nature as the Matrix of Normativeness

4.3.1. A Traditional Starting Point

Some Sophists (5th century B.C.),[16] the way Plato presents them, distinguished what is right by nature (*phusei dikaion*) from what is right by law (*nomōi dikaion*), even if what is right by nature they saw in different ways: as the superiority of the strongest (in Callicles, for example) or the equality of men (in Hippias and Antiphon, for example).[17]

[14] Cf. Section 3.2.4, on the declaration of will and the transaction: *Geschäft* in German; *negotium* in Latin, the term Grotius uses in *De jure belli ac pacis libri tres* (a), Prolegomena, 15–6.

[15] On *Sollen in einem objektiven Sinn*, see Section 5.1, footnote 2 and Section 14.5, footnote 19. On Kelsen's *Grundnorm*, see, in Volume 2 of this Treatise, Rottleuthner, Section 4.1, in the frame of the internal foundations of law.

[16] The Sophists were exponents of the New Learning: This is how the movement they belonged to is called by Gagarin and Woodruff in Sections 1.4 and 1.5 of Volume 6 of this Treatise.

[17] On Callicles, see Plato, *Gorgias* (a), 38–39, 483b–484a. On Hippias, see Plato, *Protagoras*, 24, 337b. On the Sophist Antiphon, see DK 87b 44, b2, a–1–4. See, in Volume 6 of this Treatise, Gagarin and Woodruff, Section 1.3.

At the outset, in Greek thought, this distinction covered more than law: In several fields the question was whether certain things had come about by nature (*phusei*) or by human convention (in either of the two ways: *nomōi* or *thesei*), or custom (*ethei*). In Plato's *Cratylus*, for example, the question is discussed whether or not language is given by nature (*phusei*). And it is stated therein that names are formed not by nature but either by convention (*nomōi*) or by habit or custom (*ethei*) (Plato, *Cratylus*, 384d).[18]

Aristotle in turn wrote that the things which concern what is congruent (suitable) and right (*ta de kala kai ta dikaia*) spawn so much a divergence of opinion (*diaphoran*), and so much open the way to error, as to give us reason to believe that they are what they are by convention (*nomōi*) and not by nature (*phusei*).[19]

It has long been the practice in the history of the philosophy of law to cite, as Aristotle does,[20] the Greek dramatist Sophocles (ca. 496–406 B.C.), and

[18] About 550 years after Plato, Aulus Gellius (ca. A.D. 130–ca. 180), *Noctes atticae*, X, IV, 1–4, speaks of Publius Nigidius (1st century B.C.). Under the title "Quod P. Nigidius argutissime docuit nomina non positiva esse, sed naturalia" ("How Publius Nigidius with great cleverness showed that words are not arbitrary, but natural"), he reports, "Publius Nigidius in his *Grammatical Notes* shows that nouns and verbs were formed, not by a chance use, but by a certain power and design of nature, a subject very popular in the discussions of the philosophers; for they used to inquire whether words originate by 'nature' or are man-made." The Latin original. "Nomina verbaque non positu fortuito, sed quadam vi et ratione naturae facta esse, P. Nigidius in *Grammaticis Commentariis* docet, rem sane in philosophiae disceptationibus celebrem. Quaeri enim solitum aput philosophos, φύσει [by nature] τὰ ὀνόματα sint ἢ θέσει [by position]."

[19] "The subjects studied by political science are Moral Nobility and Justice [in my translation, what is congruent (or suitable) and what is right: *ta kala kai ta dikaia*]; but these conceptions involve much difference of opinion and uncertainty, so that they are sometimes believed to be mere conventions and to have no real existence in the nature of things" (Aristotle, *The Nicomachean Ethics*, 1094b, 14–7). The Greek original: "Τὰ δὲ καλὰ καὶ τὰ δίκαια, περὶ ὧν ἡ πολιτικὴ σκοπεῖται, πολλὴν ἔχει διαφορὰν καὶ πλάνην, ὥστε δοκεῖν νόμῳ μόνον εἶναι, φύσει δὲ μή."

[20] "Let us now classify just and unjust actions [*dikaiōmata*, or "right actions," in my translation, and *adikēmata*, or "unright actions," "wrongs," in my translation] generally, starting from what follows. Justice and injustice [in my translation, right things and unright things: *ta dikaia kai ta adika*] have been defined in reference to laws and persons in two ways. Now there are two kinds of laws, particular and general. By particular laws I mean those established by each people in reference to themselves, which again are divided into written and unwritten; by general laws I mean those based upon nature [*ton kata phusin*]. In fact, there is a general idea of just and unjust in accordance with nature [in my translation, right and unright by nature: *phusei dikaion kai adikon*], as all men in a manner divine, even if there is neither communication nor agreement between them. This is what Antigone in Sophocles evidently means, when she declares that it is just [in my translation, right: *dikaion*], though forbidden, to bury Polynices, as being naturally just [*phusei dikaion*; in my translation, "right by nature"]: 'For neither to-day nor yesterday, but from all eternity, / these statutes live and no man knoweth whence they came'" (Aristotle, *The "Art" of Rhetoric*, 1373b, 1–2). The Greek original: "Τὰ δ' ἀδικήματα πάντα καὶ τὰ δικαιώματα διέλωμεν, ἀρξάμενοι πρῶτον ἐντεῦθεν. ὥρισται δὴ τὰ δίκαια καὶ τὰ ἄδικα πρός τε νόμους [δύο], καὶ πρὸς οὕς ἐστι, διχῶς. λέγω δὲ νόμον τὸν μὲν ἴδιον τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἑκάστοις ὡρισμένον πρὸς αὐτούς, καὶ τοῦτον τὸν μὲν ἄγραφον τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν. ἔστι γάρ, ὃ

specifically his play *Antigone*, to exemplify the deontological superiority of what is right by nature, meaning natural law, over what is right by statute or convention, meaning the positive law made by humans.[21]

The protagonist in the tragedy, Antigone, performs a burial rite over her brother, Polynices, who has died in battle fighting Thebes.

By so doing, Antigone infringes a decree issued by the king of Thebes, Creon, who has denied burial rites to Polynices for his role in bringing arms against the homeland. Antigone is brought before the king, who asks her whether she has dared to break his decree, and her reply is

> Yea, for these laws were not ordained of Zeus, / and she who sits enthroned with gods below, / Justice [in my translation, the Right: *Dikē*], enacted not these human laws. / Nor did I deem that thou, a mortal man, / Could'st by a breath annul and override / the immutable unwritten laws of Heaven. / They were not born to-day nor yesterday; / they die not; and none knoweth whence they sprang. (Sophocles, *Antigone*, vv. 450–7)[22]

Antigone is sentenced to death. She faces up resolutely to this sentence because she knows that in flouting Creon's orders she has stood by what is truly right.

The historiography of legal philosophy is traditionally of the view that Antigone's words anticipate the dualism inherent in natural-law theories, meaning the dualism consisting in the superiority and superordination of what is right by nature over what is right by law, such that what is right by law is not truly what is right if it fails to conform to what is right by nature: Nature—I should want to comment—is the matrix of normativeness and hence the ultimate source of what is right.

Let us see, then, how we can understand what is right by nature as consisting in the content of the unwritten norms that Antigone invokes.

First, the norms invoked by Antigone can be construed as divine norms, established by the normative and eternal will of God, since Antigone explicitly contrasts Creon's decrees with God's *agrapta kasphalē theōn nomima* ("the immutable unwritten norms of the gods"; my translation).

According to this construction, those who see Antigone's behaviour as accordant with what is right by nature, and who in nature see the matrix of

μαντεύονταί τι πάντες, φύσει κοινὸν δίκαιον καὶ ἄδικον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ᾖ μηδὲ συνθήκη, οἷον καὶ ἡ Σοφοκλέους ᾽Αντιγόνη φαίνεται λέγουσα, ὅτι δίκαιον ἀπειρημένον θάψαι τὸν Πολυνείκη, ὡς φύσει ὂν τοῦτο δίκαιον· / οὐ γάρ τι νῦν γε κἀχθές, ἀλλ᾽ ἀεί ποτε / ζῇ τοῦτο, κοὐδεὶς οἶδεν ἐξ ὅτου φάνη." On justice in Aristotle see, in Volume 6 of this Treatise, Miller, Sections 4.4 and 4.6.

[21] On Sophocles's *Antigone*, see, in Volume 2 of this Treatise, Rottleuthner, Section 3.1.1.3, in the frame of the mythological foundations of law. For an analysis of Antigone's and Creon's reasoning, see, in Volume 5 of this Treatise, Sartor, Section 4.3.

[22] The Greek original: "Οὐ γάρ τί μοι Ζεὺς ἦν ὁ κηρύξας τάδε, / οὐδ᾽ ἡ ξύνοικος τῶν κάτω θεῶν Δίκη / τοιούσδ᾽ ἐν ἀνθρώποισιν ὥρισεν νόμους· / οὐδὲ σθένειν τοσοῦτον ᾠόμην τὰ σὰ / κηρύγμαθ᾽, ὥστ᾽ ἄγραπτα κἀσφαλῆ θεῶν / νόμιμα δύνασθαι θνητὸν ὄνθ᾽ ὑπερδραμεῖν. / οὐ γάρ τι νῦν γε κἀχθές, ἀλλ᾽ ἀεί ποτε / ζῇ ταῦτα, κοὐδεὶς οἶδεν ἐξ ὅτου ᾽φάνη."

normativeness (of the reality that ought to be), will thereby have identified nature with the will of God (on which see Section 4.3.2).

There is also a second angle, one involving a strain, from which to interpret Antigone's behaviour. The key element here is that Antigone buries her own brother's mortal remains, and that she is driven to this act by the mysterious call and strength of her bloodline. Antigone's nature in the character of a sister—as a woman whose compassion and piety draws her close to her kinfolk—brings out the instinct that drives her to perform the due rite, which takes precedence over manmade laws and makes her accept the punishment that will befall her if she goes through with her decision. According to this construction, those who in Antigone's behaviour see a behaviour accordant with what is right by nature, and who see nature as the matrix of normativeness (of the reality that ought to be), will thereby have identified nature with a kind of biological instinct, an instinct that brings forth Antigone's behaviour (on which see Section 4.3.3).

Thirdly, on a different interpretation, those who in Antigone's appeal to unwritten norms see her conscience speaking can take Antigone's inner voice to be her reason: Her inner voice stands for human reason, and human reason overrides other aspects of human beings and human life (including conventions and manmade laws), thereby binding Antigone and calling on her to bury Polynices's body. This way, those who in the content of the norms invoked by Antigone see what is right by nature identify nature, understood as the matrix of normativeness (of the reality that ought to be), with human reason itself (on which see Section 4.3.4).

The last two interpretations of Sophocles' text do involve a strain. But it is not my intent here to carry out a philological and reconstructive analysis of Sophocles' tragedy. Rather, I am using Sophocles' *Antigone* (so often regarded as one of the prime expressions of the opposition between what is right by nature and what is right by law) to line out the features of three main ways in which nature—understood as the matrix of normativeness and as the ultimate source of what is right—has been variously conceived by different thinkers: nature as the will of God, as biological instinct, and as reason.

There is at least another (fourth) conception of nature—understood as the matrix of normativeness and as the ultimate source of what is right—a conception that traces back to Calcidius's commentary to Plato's *Timaeus* (a work that Calcidius, 4th century A.D., also translated into Latin). On this conception, nature is equated with the cosmic order (see Section 4.3.5).

In all the conceptions just outlined, what is truly right is only what is right by nature, or it is what is right by positive law, but here only on the condition that this last thing (what is right by positive law) comes from what is right by nature.

4.3.2. Nature as the Will of God

Although the voluntaristic version (the will-theory) of what is right by nature crops up at several places in the history of ethical and legal thought, it yields to the rationalistic version. The conception of nature as God's will is going to be focal to religiously inspired thinkers: In a veritably religious spirit, they will place God's will at the top as the matrix of the reality that ought to be (the matrix of normativeness, of true norms), and hence as the ultimate source of what is right.

Let us take, for example, William of Ockham.

Ockham says that nature is the will of God, and God has the power to turn evil into good, and vice versa: Hence human behaviour will be right or wrong according as it conforms with or runs contrary to God's precept, and that precept may do an about-face, but its content is always what is objectively right. God can make it so that murder, fornication, and offending God's name should become right things. God can therefore modify nature, and consequently what is right by nature. Even so, manmade law must always come from what is right by nature and from any such modifications of it as God may decide, because God's will is the matrix of normativeness (of the reality that ought to be, of true norms) and the content of his will is always what is right by nature.

> Although the "hate of God," "theft," and "adultery" are qualified as bad—as are acts that under the common law [*de communi lege*] are similar to them—because carried out by persons who by divine precept are bound to the contrary conduct, [...] these terms do not designate such acts in any absolute sense, but rather by implying [*connotando*] or getting us to understand that the author of the same acts is obligated by divine precept to hold the opposite behaviour: [...] Whereas if these acts [hating God or committing theft or adultery] were to be commanded by God, then their authors would not be bound to the opposite behaviour, and then also, these acts would not in consequence be called "theft," "adultery," and so forth. (Ockham, *Quaestiones in Librum Secundum Sententiarum* (a), q. 19; my translation)[23]

[23] This is the Latin original in its wider context (enclosed within angle brackets is the original corresponding specifically to the translation in the run of text): "<Licet odium Dei furari adulterari habeant malam circumstantiam annexam et similia de communi lege quatenus fiunt ab aliquo qui ex precepto divino obligatur ad contrarium>: sed quantum ad esse absolutum in illis actibus possunt fieri a Deo sine omni circumstantia mala annexa: Et etiam meritorie possunt fieri a viatore si caderent sub precepto divino sicut nunc de facto eorum opposita cadunt sub precepto divino. Et stante precepto divino ad opposita eorum non potest aliquis tales actus meritorie nec bene exercere: quia non fiunt meritorie nisi caderent sub precepto divino. Et si fierent a viatore meritorie: tunc non dicerentur nec nominarentur furtum adulterium odium etc. quia <ista nomina significant tales actus non absolute: sed connotando vel dando intelligere quod faciens tales actus per preceptum divinum obligatur ad oppositum>: et ideo quantum ad totum significatum quod nominibus talium nominum significant circumstantias malas: et quantum ad hoc intelligunt sancti et philosophi quod ista statim nominata convoluta sunt cum malicia. <Si autem caderent sub precepto divino: tunc faciens tales actus non obligaretur ad oppositum et per consequens tunc non nominaretur furtum adulterium etc.>" (Ockham, *Quaestiones in Librum Secundum Sententiarum* (a), q. 19). This is not the only version of this passage by Ockham. See, for example, Ockham, *Quaestiones in*

The binding force of manmade law lies in its conformity to what is right by nature understood as a means through which God conveys to humans the content of his binding (normative) will (cf. Fassò 1964, 94, 98–114, 116, 133). When understood as God's will—as divine power, God's sovereign power as moral power—nature becomes the matrix of normativeness (of the reality that ought to be, of true norms), and hence the ultimate source of what is right.

It will be for the historical part of this Treatise to describe and assess the bearing of the conception of nature as God's will (nature understood as the matrix of the reality that ought to be, of true norms), its bearing on Hebrew and Christian thought, for example. My only purpose in this volume is to fix the essential theoretical features of this conception.[24]

4.3.3. Nature as Biological Instinct

The variant that identifies nature with animal and human instinct, that is, with biological nature, is referred to as "naturalistic."

This conception is wholly different from the previously considered voluntaristic and religious conception, in both content and outlook. Even so, it interestingly shares with it some analogous theoretical consequences.

Indeed, if nature (understood as the matrix of the reality that ought to be, of true norms) is taken to be the instinct of all animate beings, then what is right by nature will become the content of the most powerful decisions or actions, in much the same way as it does in Ockham's voluntaristic view, but with one fundamental difference: Where nature is instinct, the power referred to is de facto power, a natural force that belongs to our biological nature; not so where nature is God's will, for here the power referred to is a moral power.

Ulpian (170–228) characterised what is right by nature (*jus naturale*) as

> that which nature has taught to all animals; for it is not a law [*jus*] specific to mankind but is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law [*istius juris*]. (Ulpian, *The Digest of Justinian*, I, 1, 1, 3)[25]

Librum Secundum Sententiarum (b), q. 15, "Solutio dubiorum," 3–24: In the manuscript found in this edition, the words "licet odium Dei furari adulterari" are replaced with "licet odium, furari, adulterari," where "odium" is not followed by "Dei."

[24] On early Jewish and Christian legal thought, see, in Volume 6 of this Treatise, Miller, Chapter 7. On Ockham, see, in Volume 6 of this Treatise, Lisska and Tierney, Chapter 13, Sections 13.3 and 13.4.

[25] The Latin original: "Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri" Ulpian is discussed in this Treatise in Volume 6, Section 10.1, Banchich, and Volume 7, Stein, Chapter 1.

If what is right by nature is *quod natura omnia animalia docuit*, then nature, as the matrix of normativeness (of the reality that ought to be, of true norms), is understood in the biological sense.

The naturalistic conception of what is right by nature had been, long before Ulpian, expressed by some Sophists.

As has been noted, the Sophists distinguished what is right by nature (*phusei dikaion*) from what is right by law (*nomōi dikaion*). And Callicles, as Plato presents him in *Gorgias*, holds that nature shows us that the better and the abler should rightly prevail upon those who are inferior to them, the way it happens among animals and among states.[26]

What is right is—here, too—the content of the most powerful decisions and actions: "Might makes right," a conception that implies a right of domination and supremacy of the stronger over the weaker. To be sure, the weaker can band together and subdue the stronger, issuing manmade laws designed to neutralise the stronger and keep them under control. But the content of these laws of the weaker will be contrary to what is right by nature, and hence will not be what is right: The laws of the weaker are not norms, but the forgery (*corruptio*) of norms, if we are to apply the term considered in regard to Augustine and Aquinas; cf. Section 4.1.

The historical bearing of the naturalistic conception of what is right by nature will be discussed in the historical part of this Treatise. But I will briefly mention here a variant of this conception.

Benedict de Spinoza (1632–1677) works out a pantheistic identification of God and nature. This identification yields a conception of what is right by nature effectively conveyed in the following passage of his *Tractatus Theologico-Politicus.*

By *the right* [*jus*] and ordinance of nature, I merely mean those natural laws [*regulas naturae*] wherewith we conceive every individual to be conditioned by nature, so as to live and act in a given way. For instance, fishes are naturally conditioned for swimming, and the greater for devouring the less; therefore fishes enjoy the water, and the greater devour the less by *sovereign natural right* [*summo naturali jure*]. For it is certain that nature, taken in the abstract, *has sovereign right* [*jus summum habere*] to do anything she can; in other words, *her right* [*jus naturae*] is co-extensive with her power. The power of nature is the power of God, which has *sovereign*

[26] "But I believe that nature itself reveals that it's a just thing [a right thing, I should say: *dikaion*] for the better man and the more capable man to have a greater share than the worse man and the less capable man. Nature shows that this is so in many places; both among the other animals and in whole cities and races of men, it shows that this is what justice [in my translation, the right: *to dikaion*] has been decided to be: that the superior rule the inferior and have a greater share than they" (Plato, *Gorgias* (b), 483d–484). The Greek original: "Ἡ δέ γε, οἶμαι, φύσις αὐτὴ ἀποφαίνει αὐτό, ὅτι δίκαιόν ἐστι τὸν ἀμείνω τοῦ χείρονος πλέον ἔχειν καὶ τὸν δυνατώτερον τοῦ ἀδυνατωτέρου. δηλοῖ δὲ ταῦτα πολλαχοῦ ὅτι οὕτως ἔχει, καὶ ἐν τοῖς ἄλλοις ζώοις καὶ τῶν ἀνθρώπων ἐν ὅλαις ταῖς πόλεσι καὶ τοῖς γένεσιν, ὅτι οὕτω τὸ δίκαιον κέκριται, τὸν κρείττω τοῦ ἥττονος ἄρχειν καὶ πλέον ἔχειν" (Plato, *Gorgias* (a), 483d–484).

right [*summum jus*] over all things; and, inasmuch as the power of nature is simply the aggregate of the powers of all her individual components, it follows that every individual has *sovereign right* [*jus summum*] to do all that he can; in other words, the *rights* of an individual [*jus uniuscujusque*] extend to the utmost limits of his power as it has been conditioned. (Spinoza, *A Theologico-political Treatise*, XVI, 200; italics added)[27]

In several contexts the Latin *jus* is best translated as "what is right" (or "the right") rather than as "law," in analogy to what was observed in Sections 1.2 and 1.3 with regard to *droit*, *Recht*, *diritto*, and *derecho* (Chapter 13). R. H. M. Elwes's just-quoted English translation of Spinoza supports my point of view on this matter. The italics and square brackets added in the foregoing quotation are meant to draw the reader's attention to a variety of uses of *jus* by Spinoza and of "right" by Elwes. For instance, on the first occurrence, *jus* means "the right," "what is right," whereas on the last occurrence it means "a right," and in order to make clear this sense of *jus*, Elwes has wisely adopted the plural form "rights."

4.3.4. Nature as Divine and Human Reason

The rationalistic version of what is right by nature was discussed in Section 4.1 with regard to Aquinas and Cicero, and in Section 3.6 with regard to Grotius. In this version, what is right by nature is the content of the norms inherent in human (and divine) reason understood as human (and divine) nature. I will only add a few remarks here.

The reality that ought to be is a spiritual, ideal, and moral reality. With Hugo Grotius and Samuel Pufendorf the classical natural-law school uses the very terms "moral entities," "moral faculties," and "moral bonds" (*entitates morales*, *facultates morales*, and *vincula moralia*). Natural norms are conceived of as a class of norms that reason sets forth and that even stand above God, or at least will partake of God's nature, in that God cannot turn good into evil, or vice versa: God cannot change what is objectively right, just as he cannot make two and two not add up to four. In this conception, norms—understood as law that is binding per se—precede power. Moral power, as well as

[27] The Latin original: "Per Jus et Institutum Naturae nihil aliud intelligo, quam regulas naturae uniuscujusque individui, secundum quas unumquodque naturaliter determinatum concipimus ad certo modo existendum et operandum. Ex. gr. pisces a Natura determinati sunt ad natandum, magni ad minores comedendum; adeoque pisces summo naturali jure aqua potiuntur, et magni minores comedunt. Nam certum est, Naturam absolute consideratam jus summum habere ad omnia, quae potest, hoc est, Jus Naturae eo usque se extendere, quo usque ejus potentia se extendit. Naturae enim potentia ipsa Dei potentia est, qui summum jus ad omnia habet; sed, quia universalis potentia totius Naturae nihil est praeter potentiam omnium individuorum simil, hinc sequitur, unumquodque individuum jus summum habere ad omnia, quae potest, sive, jus uniuscujusque eo usque se extendere, quo usque ejus determinata potentia se extendit" (Spinoza, *Tractatus Theologico-Politicus*, XVI, 258). On Spinoza see Riley, Volume 8 of this Treatise.

God's power, depends on the binding force of the norm of reason. In the words of Grotius:

> The law of nature [what is objectively right by nature: *jus naturale*], again, is unchangeable—even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; for things of which this is said are spoken only, having no sense corresponding with reality and being mutually contradictory. Just as even God, then cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically [*intrinseca ratione*; cf. Section 13.7] evil be not evil. (Grotius, *De jure belli ac pacis libri tres* (b), I, 1, X)[28]

Note here that this conception is quite at variance with Ockham's conception, whereby God's will can turn good into evil, and vice versa.

It will be for the historical part of this Treatise to describe and assess the bearing of the conception of nature as divine or human reason (nature understood as the matrix of the reality that ought to be, of true norms). My only purpose in this volume is to fix the essential theoretical features of this conception.

4.3.5. Nature as the Cosmic Order

Calcidius translated into Latin and commented Plato's dialogue *Timaeus*. His comment is five times longer than *Timaeus*, and it is thanks to this commentary and translation that *Timaeus* was known to the Middle Ages, unlike what happened with all the other Platonic dialogues (cf. Fassò 2001, vol. 1, 94). Calcidius's comment and Latin translation of Plato's *Timaeus* became popular with the medieval scholars, especially with the 12th-century school of Chartres in France; and it led some of these scholars to a sort of pantheistic naturalism and a conception of what is right by nature wherein nature is understood as cosmic order and harmony (cf. ibid., 199).[29]

In *Timaeus*, Plato depicts the natural world, meaning the universe, as an animate being governed by an Intelligence that imparts to it a harmonious order consisting of proportional relations among its different parts. Calcidius considers Plato's *Timaeus*—of itself a work on metaphysics—as a work on ethics, a kind of complement to and completion of Plato's *Republic*, and finds that as the *Republic* is concerned with what is right in the human world, so *Timaeus* is concerned with what is right in nature—nature understood in its totality, meaning the universe.

[28] The Latin original: "Est autem jus naturale adeo immutabile, ut ne a Deo quidem mutari queat. Quanquam enim immensa est Dei potentia, dici tamen quaedam possunt ad quae se illa non extendit, quia quae ita dicuntur, dicuntur tantum, sensum autem qui rem exprimat nullum habent; sed sibi ipsis repugnant: Sicut ergo ut bis duo non sint quatuor ne a Deo quidem potest effici, ita ne hoc quidem, ut quod intrinseca ratione malum est, malum non sit" (Grotius, *De jure belli ac pacis libri tres* (a) I, 1, X). On Grotius see Riley, Volume 8 of this Treatise.

[29] Some scholars hold that Calcidius's work lapsed out of circulation for a long time and resurfaced only in the 12th century (Moreschini 2003a).

Thus, as Calcidius writes, Socrates limned, in Plato's *Republic*, "a kind of image of a city governed by just customs and norms." And "since it became clear that the justice concerning things human had been looked for and found" in Plato's *Republic*, "but there remained to be done an investigation into natural fairness," Socrates entrusted this task to Timaeus, Critias, and Hermocrates, and they accepted.[30]

Calcidius proceeds with these words:

> Ex quo apparet in hoc libro [in *Timaeus*] principaliter illud agi: contemplationem considerationemque institui *non positiuae sed naturalis illius iustitiae atque aequitatis*, quae *inscripta* instituendis legibus describendisque formulis tribuit ex genuina moderatione substantiam. (Calcidius, *Timaeus a Calcidio translatus commentarioque instructus*, § VI, on page 59; italics added)

The translation of this Latin passage by Calcidius is delicate in several respects. Note, in particular, Calcidius's use of *inscripta*. *Inscriptus* is a tricky Latin word: If understood as a past participle of *inscribo* it means "inscribed," and the like, but if understood as an adjective it will take on quite a different meaning, that is, "unwritten." In the quoted passage by Calcidius, *inscripta* is to be understood as an adjective:[31] Calcidius is discussing a natural justice and fairness that are *unwritten* (cf. *agrapta nomima* in Sophocles' *Antigone*: Section 4.3.1); he is not speaking of a natural justice and fairness somehow and somewhere inscribed or embodied. Calcidius, in the sentence in question, is referring to *naturalis justitia atque aequitas*, and he states that these (unwritten) entities confer on the laws to be established and on the procedures to be defined the substance of a genuine government.

[30] Here is the Latin original in its wider context (enclosed within angle brackets is the original corresponding specifically to the foregoing translation): "Nam cum pridie Socrates decem libris omnibus de re publica disputasset, ad quem tractatum non ex principali causa sed ex consequenti descenderat—siquidem cum de iustitia quaeri coeptum fuisset quam definierat Thrasymacus orator eam esse quae huic prodesset qui plurimum posset, Socrates contra docuisset immo eam potius quae his prodesset qui minimum possent—, ut illustriore uteretur exemplo, si eam non in unius hominis ingenio sed in urbis alicuius populosae frequentia populari scrutaretur, <imaginem quandam depinxit urbis quae iustis moribus institutisque regeretur> et conuenienti legibus felicitate frueretur contraque, si quando degenerasset ab institutis, quam improspera esset ei ciuitati quamque exitiabilis mutatio morum futura. <Igitur cum in illis libris quaesita atque inuenta uideretur esse iustitia quae uersaretur in rebus humanis, superesset autem ut naturalis aequitatis fieret inuestigatio,> huius tanti operis effectum quod ingenio suo diceret onerosum Socrates, Timaeo et Critiae et Hermocrati delegandum putauit atque illi munus iniunctum receperunt" (Calcidius, *Timaeus a Calcidio translatus commentarioque instructus*, §§ V–VI, on page 59; italics added; my translation in the run of text).

[31] The *in-* in *inscriptus* stands for *ab-*, with *inscriptus* equivalent to the Greek *agraphos*, meaning "unwritten." Cf. *Thesaurus linguae latinae editus iussu et auctoritate consilii ab academiis societatis usque diversarum nationum electi*, Volume VII, s.v. "Inscriptus," 1850, 65. Moreschini 2003b, 119, erroneously translates *inscripta* into Italian as *incarnandosi*, from *incarnarsi*, "to become embodied."

I provide below my own English translation of this passage by Calcidius.

It is clear from this that the main purpose of this work [Plato's *Timaeus*] was to undertake an analysis and consideration not of *positive justice and fairness*, but of natural justice and fairness [*naturalis illius justitiae atque aequitatis*], which last, being unwritten [*quae inscripta*], confers on the laws to be established and on the procedures to be defined the substance of a genuine [authentic, true] government. (Calcidius, *Timaeus a Calcidio translatus commentarioque instructus*, § VI, on page 59; my translation; italics added)

Calcidius concludes as follows on the relation between *Republic* and *Timaeus*:

In the same way as Socrates, in discussing justice as practised by human beings, introduced an ideal model of political organisation among citizens [*effigiem civilis rei publicae*], so Timaeus [...] sought to investigate that justice which divinity practises toward itself in what might be called the common city and political organisation of this sensible universe. (Calcidius, *Timaeus a Calcidio translatus commentarioque instructus*, § VI, on pages 59 and 60; my translation)[32]

4.4. The Origin of the Term *Jus Positivum*

The next-to-last passage by Calcidius, as quoted in the previous Section 4.3.5, is important because, among other reasons, there occurs in it the expression *non positiuae sed naturalis illius iustitiae atque aequitatis*. And this Latin expression by Calcidius is thought to be the origin of the term *jus positivum*. As Fassò writes,

It is from this very passage in Calcidius's comment to *Timaeus* that legal language acquired the adjective "positive" as a modifier of "law." Latin writers would use *positivus* in opposition to *naturalis* to express the Greek antithesis of *thései* and *phýsei*, which in the Hellenistic age had come to replace the older antithesis of *nómoi* and *phýsei*, indicating the opposition between what is manmade, on the one hand, and what is natural, on the other (*thésis* is, in Latin, *positio*, and *positivus* thus rendered literally the concept expressed by the dative *thései*). But this use of *positivus* is rarely attested and, more than that, never occurs in connection with ethics or law prior to Calcidius. Calcidius, it was noticed a moment ago, applies the word to justice and this way suggested to the medieval writers who read his comment the coinage *ius positivum*. (Fassò 2001, vol. 1, 94; my translation; the transliterations from the Greek are by Fassò)[33]

[32] Here is the Latin original in its wider context (enclosed within angle brackets is the original corresponding specifically to the translation in the run of text): "<Perindeque ut Socrates, cum de iustitia dissereret qua homines utuntur, induxit effigiem ciuilis rei publicae, ita Timaeus Locrensis> ex Pythagorae magisterio, astronomiae quoque disciplinae perfecte peritus, <eam iustitiam qua diuinum genus aduersum se utitur in mundi huius sensilis ueluti quadam communi urbe ac re publica uoluit inquiri>" (Calcidius, *Timaeus a Calcidio translatus commentarioque instructus*, §§ V–VI, on pages 59 and 60; italics added). See the considerations and information found in this Treatise, Volume 6, Marenbon, Sections 11.1.1, 11.1.2, and 11.3.3.

[33] Fassò points out that there are only two occasions on which the opposition between *thesei* and *phusei* is expressed as one between *positivus* and *naturalis*: The first is in the 2nd century A.D., with Aulus Gellius, who does so with reference to names (see footnote 18 in this chapter); the second is in the 5th century A.D., with the rhetor Fortunatianus (*Ars rhetorica*, II, 3), who does so with reference to places (Fassò 2001, vol. 1, 94, footnote 37).

With Calcidius, then, the expression "positive justice," *justitia positiva*, can be found to trace back to the 4th century A.D.

It is with Justinian's (A.D. 482–565) compilation that the expression *legem ponere*, meaning "to lay down a law," makes its first appearance as a legal term.[34]

Abelard (1079–1142) almost certainly drew inspiration from Calcidius—even if only in regard to this terminological question—in coining (for the first time in the history of legal parlance) the expression *jus positivum*. Specifically, Abelard says *Jus quippe aliud naturale, aliud positivum dicitur*.[35] I provide below the text by Abelard:

> However, in matters of justice one must not only not stray from the path of natural justice, but one must also not stray from the path of positive justice. *Indeed, one right is called natural, another positive*. Natural right is what reason [*ratio*; cf. Section 13.7], which is naturally in everyone and so remains permanent in all, moves us to perform, such as to worship God, to love parents, to punish evildoers, and the observance of these is so necessary for all that without them no merits suffice.
>
> The right of positive justice is what is instituted by men to safeguard utility or uprightness more securely or to extend them, and is based on custom alone or on written authority, for example, the punishments of vengeance or the sentences of judges in the examination of accusations. For with some people there is the custom of duels or of hot iron, but with others the oath is the end of every controversy and every discussion is committed to witnesses. So when we must live with others we must also hold to their institutions which we mentioned, just as we hold to natural rights. (Abelard, *Dialogue of a Philosopher with a Jew and a Christian*, 119–20; italics added)[36]

[34] Cf. Olivecrona 1971, 7–8, with reference to Gagnér 1960, 209, 207 (Sten Gagnér, 1921–2000), where there are mentioned two occurrences from the *Codex* (II, 58, 2 pr. and III, 1, 13 pr.) as well as the equivalent expression, *legem condere* (in *Codex* I, 14, 12, 3). Ullmann (1961, 122ff.) (Walter Ullmann, 1910–1983), points out several places in Justinian's *Novellae* where the expression *legem ponere* occurs.

[35] See Kuttner 1936, 730 (Stephan Kuttner, 1907–1996); cf. Olivecrona 1971, 7–8. On Abelard, see in Volume 6 of this Treatise, Marenbon, Section 11.3.

[36] The English translation quoted is by Pierre J. Payer. Here is the Latin original (in its wider context (enclosed within angle brackets is the original corresponding to the translation in the run of text): "<Oportet autem in his, que ad iustitiam pertinent, non solum naturalis, verum etiam positive iustitie tramitem non excedi. *Ius quippe aliud naturale, aliud positivum dicitur*. Naturale quidem ius est, quod opere complendum esse ipsa, que omnibus naturaliter inest, ratio persuadet et iccirco apud omnes permanet, ut Deum colere, parentes amare, perversos punire, et quorumque observantia ita omnibus est necessaria, ut nulla umquam sine illis merita sufficiant.

Positive autem iustitie illud est, quod ab hominibus institutum ad utilitatem scilicet vel honestatem tutius muniendam vel amplificandam aut sola consuetudine aut scripti nititur auctoritate, utpote pene vindictarum vel in examinandis accusationibus sententie iudiciorum, cum apud alios ritus sit duellorum vel igniti ferri, apud alios autem omnis controversie finis sit iuratum, et testibus omnis discussio committatur. Unde fit, ut, cum quibuscumque vivendum est nobis, eorum quoque instituta, que diximus, sicut et naturalia iura teneamus.> Ipse quoque leges, quas divinas dicitis, vetus scilicet ac novum testamentum, quedam naturalia tradunt precepta, que moralia vocatis, ut diligere Deum vel proximum, non adulterari, non furari, non homicidam fieri; quedam vero quasi positive iustitie sint, que quibusdam ex tempore sunt accomodata, ut circumcisio Iudeis et baptismus vobis et pleraque alia, quorum figuralia vocatis precepta. Romani

Abelard's coinage passed into legal language, and in particular into the language of the canonists (Fassò 2001, vol. 1, 198).

quoque pontifices vel sinodales conventus cotidie nova condunt decreta, vel dispensationes aliquas indulgent, quibus licita prius iam illicita vel e converso fieri autumatis, quasi in eorum potestate Deus posuerit, ut preceptis suis vel permissionibus bona vel mala esse faciant, que prius non erant, et legi nostre possit eorum auctoritas preiudicare. Superest autem nunc, ut post considerationem iustitie ad reliquas duas virtutis species stilum convertamus" (Abelard, *Dialogus inter Philosophum, Iudaeum et Christianum*, 2218–2248, at pages 124–5; italics added).

Part Two

The Reality That Ought to Be: A Monistic Perspective. Norms as Beliefs and as Motives of Behaviour

Ἀμὴν γὰρ λέγω ὑμῖν,
ἐὰν ἔχητε πίστιν ὡς κόκκον σινάπεως,
ἐρεῖτε τῷ ὄρει τούτῳ· μετάβα ἔνθεν ἐκεῖ,
καὶ μεταβήσεται,
καὶ οὐδὲν ἀδυνατήσει ὑμῖν.

For verily I say unto you, If ye have faith as a grain of mustard seed,
ye shall say unto this mountain,
Remove hence to yonder place; and it shall remove;
and nothing shall be impossible unto you.

(Matthew 17:19)

Our beliefs guide our desires and shape our actions. The Assassins, or followers of the Old Man of the Mountain, used to rush into death at his least command, because they believed that obedience to him would insure everlasting felicity. Had they doubted this, they would not have acted as they did. So it is with every belief, according to its degree. The feeling of believing is a more or less sure indication of there being established in our nature some habit which will determine our actions. [...] Belief does not make us act at once, but puts us into such a condition that we shall behave in some certain way, when the occasion arises.

(Charles Sanders Peirce, *The Fixation of Belief*, 1877)

Chapter 5

THE MOTIVES OF HUMAN BEHAVIOUR

5.1. Summary of Part One and Brief Considerations on Some Legal-Philosophical Orientations

Let me reiterate that what I presented in the previous chapters is not my own conception of the reality that ought to be (of what is objectively and what is subjectively right) and of its interaction with the reality that is. I was rather presenting my reconstruction of the conception still current, implicitly or explicitly, in the legal way of thinking in civil-law countries, a way of thinking that has taken shape over the centuries under the influence of natural-law theories first, and of German legal positivism thereafter.[1] German legal-positivist theories in particular, though they deny the existence of any natural law, inherited from natural-law scholarship much of their conceptual apparatus (which took the name of German legal dogmatics), and the legal doctrine of civil law is still proceeding under the lingering influence of this apparatus. Hans Kelsen, the foremost legal theorist of the culture of civil law in the 20th century, sharply criticised some aspects of 19th-century and early 20th-century continental legal dogmatics, yet wound up instead giving us a more effective, compelling, and sophisticated restatement of German legal positivism (see Kelsen 1934, 39ff.; Kelsen 1960, 134–5; Pattaro 1982, XLIIIff.).

The conception underlying the tradition of civil-law legal dogmatics is a sort of dualistic ontology: The reality that is and the reality that ought to be are heterogeneous with respect to each other, but are equally real; law belongs fully to the reality that ought to be. And in fact, we also find (occasionally in Kelsen, for example) the idea that law may be, in the final analysis, the only reality that ought to be, or at least the only dweller in this reality.[2]

[1] Of course we can go back in time. See Section 1.1, footnote 4, and Chapters 11 and 12.

[2] Kelsen calls the reality that ought to be the "Ought in an objective sense" (*Sollen in einem objektiven Sinn*, not to be confused with *Recht in einem objektiven Sinn*, "what is right in an objective sense": see Section 14.5, footnote 19). And he calls "Ought in a subjective sense" (*Sollen in einem subjektiven Sinn*, not to be confused with *Recht in einem subjektiven Sinn*, "what is right in a subjective sense") every other expression of normativeness that is not law. He argues, further, that every subjective sense of Ought—for example, justice—is reducible to the Is, meaning by this the temporary and ephemeral interest or will of individual human beings. It follows from Kelsen's framing of this question that only law resides in the Ought in an objective sense, or, in my words, in the reality that ought to be. This reality transcends the temporariness and randomness of every other expression of normativeness that (individual) humans may exteriorise as expressions of their internalised reality that ought to be. These expressions, it was just noted, get explicitly reduced by Kelsen to individual will and interest, and hence to the Is, to manifestations of the reality that Is. Cf. Kelsen 1989, 4ff.; Kelsen 1991, 2, 26ff. See Pattaro 1982, XLIIff.

The reality that ought to be reproduces itself by its own force in the two dimensions it is made up of (what is objectively and what is subjectively right); it does so depending on the tokens that happen to validly instantiate, in the reality that is, the types specified in what is objectively right in the reality that ought to be (Chapter 3).

Inhabiting what is objectively right in the reality that ought to be are general and abstract norms: These norms are general and abstract because they contain types of circumstance and types of action (which they qualify as obligatory, permitted, or forbidden), and all types (*Tatbestände*) are by definition general and abstract (Sections 2.1.2 and 2.2.1).

By contrast, inhabiting what is subjectively right are obligations and rights, as well as other normative subjective positions, and these get ascribed to subjects (people) in the reality that is. What is subjectively right also belongs to the reality that ought to be, no less so than norms—no less so than what is objectively right. But, in this reality, what is subjectively right occupies the bottom layer, so to speak, which, in contrast to what is objectively right (the top layer), is neither general nor abstract.

What is objectively right and what is subjectively right belong equally to the reality that ought to be, but only what is subjectively right can be said to be, in a sense, individual and concrete, since it is necessarily linked—by way of the legal pineal gland: by way of legal validity—to the reality that is. Indeed, obligations, rights, and other normative subjective positions get ascribed to subjects (people) who live in the reality that is, and these are actual and hence individual and concrete subjects.

Further, the obligations and rights that people have under the law are bound up together; they interlace in a web of legal relations: These, too, belong to what is subjectively right (in the reality that ought to be), and likewise get ascribed to individual and concrete subjects (people) who live in the reality that is. Those subjects to whom obligations get ascribed are duty-holders; and those subjects to whom rights get ascribed are right-holders. As human beings, duty-holders and right-holders live in the reality that is, but as duty-holders and right-holders they hold obligations and rights stationed in the reality that ought to be: in what, in this reality, is subjectively right.

Philosophy of law and general jurisprudence, in civil-law and common-law countries alike, have reacted in different ways to the reifying ontology underlying the legal-dogmatic tradition of continental Europe (the doctrine of which I provided an ideal reconstruction in the four chapters leading up to here, bringing out some of its crucial aspects and criticising some of its specific assumptions).

To begin with, there have been, and there still are, large tracts of legal and legal-philosophical thought that merely tolerate, or yield to, the hypostatising ontology (reification) of this conception, a conception that, it bears pointing out, affords or can afford theoretical and practical advantages (see, in Volume

5 of this Treatise, Sartor, Section 3.3). One place where we can see this passive tolerance or acceptance is in the properly legal-dogmatic work of outstanding jurists looking to attain not so much critical metatheoretical objectives as practical-theoretical objectives that consist in reconstructing legal institutes or in dealing with the problems that come up in the interpretation of legal texts. Among the Italian jurists who pursue this line is Francesco Carnelutti (1879–1965) (see Carnelutti 1951).

Second, something along these lines can also be found in philosophers of law and jurisprudents who follow in the tradition of analytical philosophy and hence adopt and practise rigorous and critical methods and approaches. These scholars simply consider obsolete the normativistic conception of law, a conception rife with reifications, and, leaving it entirely out of account, treat the problems of normativeness critically but from a language-analysis standpoint, thereby not ascribing any normative valence to the concepts of "norm," "ought," "binding force," and "validity," and—in the final analysis—ignoring as unworthy of attention the normative and deontological valence attributed to these concepts by other scholars, likewise philosophers or theorists of law, whom we might call traditionalist. The analytically oriented scholars I am thinking about seem to be of a mind to entrust to the sociology of law and to ethics the task of figuring out normativeness in the sense just explained. Among the Italian scholars who manifest this attitude is Riccardo Guastini (see, for example, Guastini 1998 and 2004).

Third, there have been, and there still are, scholars in legal philosophy and general jurisprudence (some of them scholars of great value) who have explicitly theorised a reifying ontology with regard to law, norms, and the Ought versus the Is. One valid token of this type of scholar is Georges Kalinowski (1916–2004) (cf. Kalinowski 1965 and 1969).

Fourth, there have been, and there still are, scholars who cannot be understood as advocating a hypostatising ontological view, but who have theorised a dualism that might be qualified as transcendental or phenomenological, or in any of a number of other ways. Among the scholars who have put forward conceptions that fit this description are some exponents of contemporary natural-law theory (broadly understood) as well as of German legal positivism: Witness Sergio Cotta (2004), in natural-law theory in Italy, and Hans Kelsen, the foremost champion of this dualism in German legal positivism.

Fifth, we have orientations of thought that I would call empiricist-reductionist. The analytical jurisprudence that traces back to Bentham and Austin is emblematic in this respect, for it seeks to reduce the concept of an obligation to that of a threat of punishment, the concept of a norm to that of a command issued by those endowed with the actual power to obtain obedience in society, and the concept of law to that of a set of such commands.

Sixth, but not least important in rank, we have monistic orientations that are non-reductionist: The exponents of these orientations do not admit of any

dualism between the reality that ought to be and the reality that is, and in particular they do not admit of a reality that ought to be that is heterogeneous to the reality that is at the same time as it enjoys an ontological status on a par with the reality that is. But they also maintain that it is impossible, or at least inadequate, to give an account of law (or of morals or religion—of the practical sphere, in short) without recognising that normativeness strictly understood (in a Kantian or a Stoic sense, to make two familiar examples) plays a fundamental role in individual lives as well as in the life of society. Among these orientations of thought we have Scandinavian legal realism. These orientations do not understand normativeness in a Kantian or a Stoic sense, to be sure, but in their view we can appreciate, through a psychological and sociological account, that normativeness strictly understood (duty for its own sake) acts as a driving force in the minds (brains) and behaviours of human beings—in their social interaction, in their forms of social exchange—and is a crucial, indeed an essential element without which group life would not be a possibility.[3]

The legal philosophy I myself am putting forward can be understood as falling within the last of the orientations mentioned. In the second and third parts of the present volume I will expound a conception of norms (of the reality that ought to be) and of law worked out from within the legal-philosophical framework just referred to. In particular, I will look at norms and legal systems as part of the broader phenomenon of culture and human personality; and norms—herein lies their crucial importance—I will consider in a strict and strong sense as a powerful motive of human behaviour, a basic structural component of the individual and social identity of every man and woman. In what follows I will discuss motives of behaviour (Sections 5.2 through 5.4), with a special focus on norms (in Chapters 6 and 7). I will thereafter occupy myself with law as interference in the motives of human behaviour. I will discuss law in its necessary and important connection and interweaving with normativeness (Chapter 8 and Section 9.6) and with power and influence (Sections 9.4 and 9.5); and there is also, in some cases, a connection with suggestion and charisma (Section 9.3). In treating the law's linkage with motives of human behaviour (with norms, needs, interests, and values), I will have something to say on a classical topic of contemporary jurisprudence, namely, law and language, especially with regard to the distinction between norms (as intrapsychic motives of behaviour) and directives (as linguistic communicative phenomena), a distinction that needs emphasis (Sections 8.1.3, 8.2.3, and 9.2). Finally, in Chapter 10 the law in force is presented as an ambiguous intertwining of normativeness and organised power.

[3] See the works of Axel Hägerström, Karl Olivecrona, and Alf Ross referred to in Chapters 8 and 10.

5.2. Encoding of Behaviour-Types: Human Personality and Culture

I will understand a behaviour-type as a set of one or more types of action conditionally connected with one or more types of circumstance. Actual behaviours are behaviour-tokens, meaning examples or instances of behaviour-types. It may be that a given type of action is connected with different conditioning types of circumstance (the concept of type was introduced in Section 2.1).

A type of action can get more or less deeply and more or less consciously encoded by an acting person, who either inherits it with his or her genetic code (witness the type "suction" in babies) or acquires it by interacting with and adjusting to his or her environment and fellow beings. Or again, and this is more likely to be the case, the acting person develops the type of action by means of both innate factors and acquired factors.

Depending on the instantiated type of circumstance, an acting person performs one type of action rather than another, provided that he or she has a reason, or rather a motive, for acting accordingly (see Section 5.4).

Like the type of action performed, its relevant type of circumstance gets more or less deeply and more or less consciously encoded by the acting person, who in fact usually memorises the former as conditionally connected with the latter, and the two as parts of a whole (the whole being a compound type). A close analysis would be useful (though not here and now) that will take us deeper into the relation between the current concepts of "personality" (defined below) and "memorisation" (as referred to here), on the one hand, and the concept of "background" as offered by Searle (1995), on the other.

Human personality includes memorised types, among which behaviour types. Indeed human personality is a

> relatively stable and organised system, structure, or complex of intra-psychical components, such as perceptive and cognitive modalities, need patterns, affective ties, motivational drives, and attitudes that develop in individuals as their biological endowment interacts [...] with their biographical experiences, with the social systems they are situated in, and with the culture they are exposed to. It is usually the case that some personality components are absent from the individual's consciousness, that is to say, they operate at an unconscious or semi-conscious level. So conceived, personality is a structure that predisposes individuals to act and react in certain ways [*by performing certain types of action*] depending on the situation they find themselves in [*depending on the type of circumstance that gets instantiated*]. (Gallino 2000, s.v. "Personalità," 482; my translation)

In an acting subject's personality, the genotype is usually distinguished from the phenotype. The genotype is

> the whole set of sub-chromosomal particles—called genes—that have self-reproductive functions in living organisms, and which a living organism inherits from its parents together with the mutations that may have taken place during hereditary transmission. (Gallino 2000, s.v. "Genotipo e Fenotipo," 318; my translation)

The phenotype is the whole set of

> characteristics that a living organism displays at a certain point in its lifecycle. (Ibid., my translation)

The phenotype is not just the acquired component of personality: It is the outward personality

> an individual actually displays as the outgrowth of the additive or interactive relation or covariance that holds between this person's genetic makeup or genotype and the environment or environments where he or she has developed up to that moment. (Ibid., my translation)[4]

As I would put it, the phenotype is a genotype in which culture has been injected, as it were, or in which a given culture (one or more cultural environments) has been memorised, and in several respects internalised. Of course memorisation and internalisation are long processes, and may even take a lifetime for certain things. I distinguish "internalisation" from "memorisation" and relate the former to beliefs, and to other components of human personality that can be analytically identified as motives of human behaviour (see Section 5.4).

Culture includes types that are constructed by humans. Manmade reality takes in natural (physical and chemical) reality to the extent that this last gets constructed by humans, that is, framed in types belonging to human culture and personality; manmade reality also takes in social reality, but this reality is, so to speak, entirely constructed by humans (see Sections 15.2 and 15.5). In the above acceptation, culture

> represents the *social reality* on a particular level, a level interdependent with that of interaction (the level of the social system), on the one hand, and with the level of personality, on the other, but analytically independent from them. (Gallino 2000, s.v. "Cultura," 185; my translation; italics added)

5.3. The Conditional Connection between Types of Action and Types of Circumstance. Habits and Practices

A behaviour-type, whether encoded, or memorised, in human brains or described elsewhere, is a compound type comprising at least two types (in turn susceptible of being compound or simple): a type of action and a relevant

[4] There are other definitions out there: They vary slightly in the details, but these differences need not be discussed for the purposes of this volume. Thus, for example, we have a definition of genotype as "the genetic constitution of an organism. The genotype determines the hereditary potentials and limitations of an individual from embryonic formation through adulthood. Among organisms that reproduce sexually, an individual's genotype comprises the entire complex of genes inherited from both parents" (*The New Encyclopaedia Britannica*, s.v. "Genotype"). The phenotype is the sum of "all the observable characteristics of an organism, such as shape, size, colour, and behaviour, that result from the interaction of its genotype (total genetic inheritance) with the environment" (*The New Encyclopaedia Britannica*, s.v. "Phenotype").

conditioning type of circumstance. A behaviour-type results from one or more types of action conditionally connected, in a human brain or in any description, with one or more types of circumstance. We may have a given type of action connected with different conditioning types of circumstance alternative to one another. Or we may have simple types of circumstance common to all the alternative compound types of circumstance a given type of action is connected with.

A type of circumstance is relevant in several respects. Thus, for example, "walking" (type of action) "on hot coals" (type of circumstance) is different, with respect to the type of circumstance, from "walking" (type of action) "on velvet" (type of circumstance). Again, the type of action "walking" cannot be performed when connected with a type of circumstance that makes it impossible to be standing on one's feet: You cannot walk on any bank that is at or above ninety degrees, or on water (making allowance for outstanding exceptions: "So when they had rowed about five and twenty or thirty furlongs, they see Jesus walking on the sea, and drawing nigh unto the ship: and they were afraid"; John 6:19).

This kind of relevance—pertaining to the type of circumstance—we can see pointed up, when it comes to law, in the Latin dictum *Nemo ad impossibilia tenetur* ("Nobody is bound to do what cannot possibly be done"), and also in Celsus's (1st–2nd century) version, *Impossibilium nulla obligatio est* ("There is no obligation to do anything which is impossible") (Celsus, *The Digest of Justinian*, vol. 2, L, 17, 185).

A conditioning type of circumstance can itself be a behaviour-type, or another event-type (a period-type, for example: This type will get validly instantiated by time periods) or a type of state of affairs. Let us assume, for example, that the type of circumstance "being in danger" is a condition for the type of action "calling for help": Being in danger can be the outcome of either a state of affairs (for example, my home being on fire) or a behaviour (for example, an armed criminal chasing me).

From the assumption previously made that a behaviour-type is necessarily compound (it is composed of at least one type of action and one type of circumstance) it follows that a congruent or valid token of a behaviour-type will be a valid performance of the type of action (which in the behaviour-type is conditionally connected with the type of circumstance) only if a token of the relevant type of circumstance has congruently or validly occurred.

It is important not to mistake a type of circumstance, which a type of action is conditionally connected with, for the motive (cause or reason) that prompts a person to perform that type of action when a relevant type of circumstance gets instantiated.

As a fencer, for example, I will perform a certain defensive move (type of action) when my opponent attacks me in a certain way (my opponent's attack being a token of a certain type of circumstance). It does not follow from this,

however, that I will defend myself, or do so with the same defensive move, every time an opponent attacks me in the way specified.

I will only defend myself, or defend myself with that defensive move, if some motive prompts me to do so: I may, for example, want to win the match, in which case I will perform the type of action appropriate to the type of circumstance instantiated by my opponent. But I will not always be motivated to defend myself, or to defend myself appropriately, and may in fact want to avoid that: which, for example, might be the case if I am training and want to let my opponent have the pleasure of a successful lunge, or if I have accepted money for a fixed match.

In such cases I will not perform the above-mentioned type of action, despite the relevant type of circumstance having been instantiated by my opponent: For lack of motive, I will not perform the type of action.

In other words, the instantiation of a type of circumstance is a sufficient condition for an acting person to perform a type of action connected with it, but only if a motive for performing this type of action subsists that prompts the acting person to act.

Let me introduce the term *usus agendi*: This is a legal term sourced from medieval Latin; I will use it to also introduce "custom" (Sections 6.1 and 6.6). A *usus agendi* (a habit or practice) is the consistent and uniform performing of a given type of action whenever a certain type of circumstance gets instantiated. With *usus agendi* (habit or practice), one can metaphorically speak of a law of inertia, but only so long as the acting subject's motives do not change. The acting person performs the type of action that he or she usually performs whenever a certain type of circumstance gets validly instantiated, unless new motives intervene that modify the course of his or her usual behaviour.

I will assume that a habit is individual whereas a practice is collective.

5.4. Needs, Interests, Values, and Norms

In current English a motive is usually taken to be a reason for a certain course of action, whether conscious or inconscious; a reason, in turn, is understood as a cause of or motive for a belief, action, etc. "Reason" is usually preferred for referring to the cause behind an action; still, I prefer "motive," for it prevents possible allusion to *rational* motives of behaviour. Indeed a cause for acting need not be rational: It can be nonrational or even irrational, and yet be very efficacious as a motive of action. Which does not prevent a motive of action, such as an interest or a norm, from being a reason, too, meaning a *rational* motive for acting in a certain way.[5]

[5] I would rather speak of motives of behaviour than of reasons for behaving this way or that. To better appreciate this preference of mine the reader can refer to Raz 1999, 18ff., where Raz explains why he would rather speak of reasons of action than of motives of action. In sum,

Motives of behaviour are the causes (*causae agendi*) that prompt a living organism to perform a certain type of action whenever a relevant type of circumstance gets validly instantiated. The motives of human behaviour lie in the acting subject's personality (which see Sections 5.2, 15.2.5 and 15.3) and may be summed up as follows.

(*i*) The acting person's needs, or what this person *believes* his or her needs to be (*opiniones necessitatis*).[6] Any action this person carries out to satisfy a need of his or hers is *teleologically* oriented. Need is

> the absence of certain material or immaterial resources objectively or *subjectively* [*this is where belief steps in*] necessary to a given (individual or collective) subject whose aim is to achieve a state of greater wellbeing, efficiency, or functionality—or of less uneasiness, inefficiency, or dysfunctionality—relative to his or her present state. (Gallino 2000, s.v. "Bisogno," 72–3; my translation; italics added)

The italics and especially the annotations in square brackets are meant to show where and how the belief-component makes its way, at least implicitly, into the standard sociological notion of "need."

(*ii*) The acting person's interests, or what this person *believes* his or her interests to be (*opiniones utilitatis*). Any action this person carries out to serve an interest of his or hers is *teleologically* oriented. Interest is a

> complex inclination, attitude, or disposition an individual or a collective subject assumes in relation to an object or state of affairs whose achievement, realisation, or preservation the subject *judges* [*this is where belief steps in*] to likely improve or protect his or her situation, which disposition is assumed upon *evaluating* how this situation compares in relation to that of other subjects [...] and also upon evaluating whether it can spontaneously change in the future. Such a disposition includes (a) the subject *focussing his or her attention* on specific objects or states,

Raz prefers "reasons of action" because he sets up his research in terms of what had best be done or what one ought to do; it follows that a motive of behaviour can be, and often is, a belief, but a belief can be mistaken or incongruent with what had best be done or what ought to be done. Thus, for example, if I am coming to pay you a visit because I believe that you are at home, but you are not actually there, the motive of my behaviour is my belief, but because my belief was wrong I had no reason to come and pay you a visit. As Raz observes, reasons serve, among other things, to justify a behaviour, whereas motives serve, among other things, to explain a behaviour. Now, Raz is concerned with reasons that justify behaviours; I, instead, am concerned with the motives that cause and explain behaviours: I am concerned with *causae agendi*. Indeed, I am interested here in clarifying and explaining the causal factors that will account for the "enduring and settled" character of law, or, as I say, of the "law in force" (Chapter 10). (It is a different question whether these causal factors are necessary, sufficient, concurrent, complementary, or overlapping factors.)

[6] I indulge here and in what follows in disquisitions on certain Latin expressions connected with *opinio*, because there hinges on this term the definition of *legal custom* as handed down to us over the course of the centuries. Cf. Section 6.1.

either present or possible; (b) the subject more or less consciously and rationally *choosing* an object or state and not others; and (c) the subject's *intention* or *impulse* to take action aimed at acquiring the object or at realising (or preserving) his or her favoured state of affairs. (Gallino 2000, s.v. "Interesse," 381–2; my translation; italics added)

The italics and the annotations in square brackets are meant to show where and how the belief-component makes its way into the standard sociological notion of "interest."

(*iii*) The acting person's values, the values the acting person *believes* in (*opiniones boni*). Any action this person carries out to give effect to a value of his or hers is *teleologically* oriented. Value is the

conception of a state or condition (one's own condition or someone else's) or of oneself in relation to other objects or subjects, which can include nature and supernatural beings. This state or condition is *viewed* [*this is where belief steps in*] by an individual or a collective subject as especially desirable [or as an end in itself, that is, as desirable per se] or as something that must be achieved or preserved, and it becomes the basis on which the individual *assesses* the appropriateness, adequacy, efficacy, and dignity of his or her own actions and of the actions of others. (Gallino 2000, s.v. "Valore sociale," 708; my translation; italics added)

The italics and the annotations in square brackets are intended to draw the reader's attention to the role of the belief-component in the notion at hand.

(*iv*) The acting person's norms, the norms the acting person *believes* in (*opiniones vinculi*). Any action this person carries out to abide by a norm of his or hers is *deontologically* oriented. This feature of norms—their being deontologically oriented—makes them peculiar motives, at least in comparison with the other motives just defined.

A norm is the belief that a certain type of action must be performed anytime a relevant type of circumstance gets validly instantiated. This must unconditionally be so, that is, regardless of any good or bad consequences that may stem from the performance in question (I will come back to norms in the following chapters).

Different motives of the same kind (e.g., different needs) or of different kinds (e.g., a need and a norm) can concur in bringing about a certain token of a certain type of action (when a certain type of circumstance gets validly instantiated), or they can conflict and lead a person to perform one action rather than another. In this connection, we can distinguish the efficaciousness from the inefficaciousness of a motive as the cause explaining why a certain type of action has been performed, and compare such efficaciousness or inefficaciousness with that of other causes which may have concurred in drawing out the action in question or intervened to thwart it (on the efficaciousness of norms as motives of behaviour, see Section 6.6).

Let us return now briefly to the relationship between motives of behaviour and beliefs.

Physiological needs (nutritional, evacuative, and sexual needs, for example) are rooted in the organism's biochemical makeup—in the acting person's genotype. At the phenotypical level, however, these needs may well differ from one person to another: They are satisfied and controlled in different ways depending on the habits and beliefs an individual has acquired through socialisation processes (they depend, therefore, on the culture the individual participates in). For this reason, I speak generally of needs, including physiological needs, as *opiniones necessitatis*: beliefs about one's own needs. We act based not only on reality as it is (on the brute reality of our needs), but also, and sometimes for the most part, on what *we believe* to be the reality of our needs (on what we believe our needs to consist in). Some needs will have to be specifically understood as beliefs, and that is the case with social needs, such as the need for affection, trust, recognition, and prestige. Indeed, social needs, more so than physiological needs, manifest themselves differently in different cultures.

Interests, and to a greater extent values and norms, are rooted in the acting person's phenotypical level, much more so than needs: At first they are acquired by assimilation and internalisation from the cultural environment through processes of social interaction and of primary and secondary socialisation (see Section 15.2.5); and then they may evolve through personal revision.

I submit that motives for acting are socially constructed cultural realities (or at least they are so in large part). By this I mean that needs (or at least social needs), interests, values, and norms are "posited" by the beliefs of individuals, whose personalities are in turn shaped by the social construction of reality: by the *soziale Schaffung der Wirklichkeit* that phenomenological sociology, symbolic interactionism, interpretive sociology, and ethnomethodology have brought to the forefront of research on human behaviour.

Among the many definitions of "belief" that have been formulated in the history of thought, I should like to recall the following, each of which has specific advantages that I will point out before introducing it, or that I will italicise for emphasis in the quotations.

Edmund Husserl (1859–1938) qualifies as *doxisch* or "belief characteristic" the characteristics specific to belief, and as *thetisch* the commitment proper to a belief, in that each belief posits the reality of its object:[7]

As noetic characteristics related to correlative modes of being—"*doxic*" or "*belief-characteristics*" [*doxische*]—we find perceptual belief and, sometimes, to be sure, perceptual certainty, really inherently included in intuitive objectivations, e.g., in those of normal perceptions as "attentive perceptions;" corresponding to <perceptual certainty> as its noematic correlate belonging to the appearing object is the being-characteristic: "*actual.*" The same noetic or noematic

[7] *Doxisch* comes from Greek *doxa*, meaning "opinion"; and *thetisch* comes from the Greek verb *tithemi*, meaning "to posit."

characteristic is shown by "certain" representation, by every sort of "*sure*" mindfulness of something which was, or is now, or which will be in the future (as in the case of anticipated expectation). They are *being*-"*positing*," "*positional*" [*thetische*] acts. (Husserl 1982, 249–50)[8]

Among Husserl's contemporaries, we should not fail to mention Charles Sanders Peirce, whose words can hardly be underestimated, so balefully topical are they:

Our beliefs guide our desires and shape our actions. The Assassins, or followers of the Old Man of the Mountain, used to rush into death at his least command, because they believed that obedience to him would insure everlasting felicity. Had they doubted this, they would not have acted as they did. So it is with every belief, according to its degree. The feeling of believing is a more or less sure indication of there being established, in our nature some habit which will determine our actions. [...] *Belief does not make us act at once, but puts us into such a condition that we shall behave in some certain way* [type of action], *when the occasion arises* [type of circumstance]. (Peirce 1998, 5.371–5.373, on pages 230–1; italics added)

More than a century before the two authors just recalled, David Hume (1711–1776) had given us a clear-cut description of belief as "something felt by the mind, which distinguishes the ideas of the judgement from the fictions of the imagination." Belief provides ideas with "more weight and influence; makes them appear of greater importance; enforces them in the mind" as "*the governing principle of our actions*." Belief "lies in some sentiment or feeling […] which *depends not on the will*, nor can be commanded at pleasure"(Hume 1957, § V, 2; italics added).

In our day, the concept of belief has been used quite interestingly by Searle and others who have dealt with the ontology of institutional reality (Searle 1995).[9]

In sum, a belief is our commitment and adhesion to an idea, and so also the trust we place in this idea by our acceptance or rejection of it: A belief is the internalisation of an idea. For example, the atheist's conviction that God does not exist is as much a belief as the believer's conviction that God does exist. Which of these beliefs is true is a different issue. Both will affect the way the individuals who believe in them behave.

[8] The German original: "Noetische, auf Seinsmodi korrelativ bezügliche Charaktere—'*doxische*' oder '*Glaubens*-charaktere'—sind bei den anschaulichen Vorstellungen z.B. der in der normalen Wahrnehmung als 'Gewahrung' reell beschlossene Wahrnehmungsglaube und, des näheren, etwa die Wahrnehmungsgewißheit; ihr entspricht als noematisches Korrelat am erscheinenden 'Objekt' der Seinscharakter, der des 'wirklich.' Denselben noetischen, bzw. noematischen Charakter zeigt die 'gewisse' Wiedervergegenwärtigung, die '*sichere*' Erinnerung jeder Art an Gewesenes, an jetzt Seiendes, an künftig sein Werdendes (so in der vorerinnernden Erwartung). Es sind Seins-'*setzende*' Akte, '*thetische*'" (Husserl 1976, 239).

[9] See also, among others, Lagerspetz 1995 and Lagerspetz, Ikaheimo, and Kotkavirta 2001.

Chapter 6

NORMS AS BELIEFS

6.1. The Concepts of Norm and Custom

As was anticipated in Chapter 5, a norm is, on my view, a motive of behaviour: It is the belief (*opinio vinculi*) that a certain type of action must be performed, in the normative sense of this word, anytime a relevant type of circumstance gets validly instantiated. This must unconditionally be so, regardless of any good or bad consequences that may stem from the performance in question. My concept of norm is *deontologically* oriented. It presupposes that the believer consciously or unconsciously ascribes a normative character to the deontic modalities (obligatory, permitted, and forbidden) set forth in the norms he or she believes in: What this person believes to be objectively right is the type of action qualified as obligatory, permitted, or forbidden in the norm under the conditions specified in the type of circumstance the type of action is connected with in the norm.[1]

I might also say that norms are rules or standards conceived or experienced as binding per se (and in this sense my concept of norm is deontologically oriented). Rules or standards that are not conceived or experienced as binding per se are not norms: They are rather, broadly speaking, rules or standards of prudence. Thus, rules or standards will be norms depending on the attitude or beliefs of the person who takes them into consideration: They will be norms if held to be binding per se; otherwise they will be, in a broad sense, rules or standards of prudence.

The concept of "rule of prudence" is, unlike the concept of "norm," *teleologically* oriented (cf. Kant 1913, B 834). Since rules or standards of prudence are teleologically oriented, we can determine their rationality: We can assess the adequacy of the means dictated by the rule in order that we may reach the end the rule refers to. Not so with norms the way I characterise them. Norms are deontologically oriented and so are independent of ends. As motives of behaviour, norms drive us to hold a behaviour regardless of any ends we may have and of the consequences the same behaviour may lead to.[2]

[1] Deontic modalities are standardly taken to be interdefinable; I will therefore confine myself—in the *definiens* of my characterisation of "norm"—to setting down the expression "*ought* to be (or must be) performed."

[2] As I said in Section 5.4, I would rather speak of motives of behaviour than of reasons for behaving one way or another, this to underscore that rationality does not necessarily characterise motives of behaviour. This, I believe, is especially true in the case of norms. A cognitive model for the adoption of normative beliefs is developed in Volume 5 of this Treatise, Sartor, Chapters 9 and 10.

It suffices, for a type of behaviour to be a norm, that at least one person believes it to be a norm. However, the norms of greatest interest to us here are, of course, the norms shared by a plurality of people making up a group or a society. It will of course be for empirical enquiry to go and see—in a given group or society—which types of behaviour and which rules or standards are believed to be norms and by whom and how widely.

Let me now use "norm" to introduce "custom."

If the motive for performing a type of action consistently and uniformly—the motive behind a habit or practice—is the belief that performing this type of action will be due per se (*opinio vinculi*) every time a given relevant type of circumstance gets validly instantiated,[3] then the habit or practice we have before us is a custom. Custom, as I characterise it, is a habit or practice (a *usus agendi*: see Section 5.3) whose motive is a norm.

Where legal customs are concerned, the *opinio vinculi* (or norm) is traditionally referred to as *opinio* (belief) *juris seu (atque) necessitatis*. The Latin noun *jus*—just like German *Recht*, French *droit*, etc.—means (not only "law" but also) "what is right" (cf. Section 1.3, and especially Sections 13.1, 13.2, and 13.7), so that *opinio juris* may be translated as "the belief that it is right" to perform a certain type of action whenever a certain type of circumstance gets validly instantiated.

6.2. The Existence of a Norm Presupposes at Least One Believer (Doxia)

A norm, like any other belief, cannot be internalised except in someone's mind, so it exists qua norm only in minds (or in brains, if we so choose to express ourselves). A rule or a standard that no one believes to be binding per se is not a norm in the sense I ascribe to this term. The existence of a norm is the existence of a belief **n** in a believer *b* who considers the performance of a certain type of action to be due per se when a relevant conditioning type of circumstance is validly instantiated. Hence the existence of a norm presupposes that at least one person believes it to be binding per se (namely, per se obligatory, permitted, or forbidden) that a certain type of action be performed anytime that a relevant type of circumstance gets validly instantiated. No norm can exist without belief, so if something is a norm there must be at least one subject in whom it is a belief.

This view will not find favour with those who assume that there are norms independently of anyone believing in them. Still, it is obvious that even if there were something like a per se binding norm, this something would not and could

[3] Even with custom I may without inconsistency call "validly instantiated" the tokens of the type of circumstance a type of action is conditionally connected with. This is so because my characterisation of validity as congruence with a type holds no matter where this type is set forth, and so even if the type is not set forth in any enacted law.

not be a motive of human behaviour if no one believed it to be binding per se: Even if one assumes that norms exist apart from anyone believing them to be binding per se, this person will have to acknowledge that there is no point in taking norms to be motives of human behaviour if no one believes in them. If one assumes not only that there are norms per se binding, but also that he or she knows at least one such norm, this person will by his or her own assumptions meet the requirement for treating this norm as a motive of human behaviour.

The expressions "believer in a norm" and "believer in **n**" will be used frequently in this volume and must be handled with care. They presuppose the point of view of "believers," of those people who—because they believe the performance of a certain type of action to be binding per se anytime a relevant type of circumstance gets validly instantiated—are said to believe in a norm in the following sense: They believe that whatever it is that makes the relevant type of action binding *per se*, this thing is independent of anybody's beliefs. But in the terminology introduced in this work, the word "norm" is properly applied only to the relevant psychological states of the people here referred to as "believers," so that these people should rather be described as "holders of" a norm than as "believers in" a norm. That is so, of course, because they will not usually equate a norm they believe in with one of their own psychological states.

Philosophically sophisticated believers will gesture to some spiritual or ideal entity of sorts. But even naive believers will typically refuse to reduce to mere psychological states the norms they believe in. As for me, since I *do* equate the norms I happen to "believe" in with my own psychological states, I am convinced that these norms will cease to exist when I will.[4]

This, however, does not prevent me from sincerely believing it to be binding *per se* that the types of action (rules or standards) involved in the norms I believe in be performed anytime the relevant type of circumstance gets validly instantiated. I cannot declare belief-independent the norms I believe in, as do naive believers and philosophers more metaphysically oriented than I am; still, I regard these norms as norms that are not at my disposal in the crucial sense that it is not (psychologically) in my power to modify at will the norms I believe in.

We should notice, having identified norms with certain psychological states of individuals—with their normative beliefs—that it proves convenient to apply the term "norm" not only to individual beliefs, but also to such normative beliefs as are shared by different individuals. This is so because numerically different beliefs of numerically different individuals will often have the same content. And just as it seems natural to say that numerically different

[4] Which of course does not mean that I could not be survived by many people who will continue to believe in the same norms I believe in, meaning that they will continue to hold beliefs that are generically identical to (have the same content as) the ones I happen to hold.

beliefs having the same content are in a sense the same belief, so it seems natural to say that numerically different norms having the same deontic content are in a sense the same norm.

I use the term "norm" to refer to a deontic propositional content believed by at least one person to be normative: I will say that a deontic propositional content is a norm (and hence that a norm exists) when this content is believed by at least one person. This person is a believer in the norm. The believers in a norm have a particular psychological state which I characterise as a norm, or normative belief. Let me reiterate: People who believe in a norm (and so have a normative belief) may view what they believe in (the deontic propositional content they believe to be normative) as having a non-empirical existence, namely, an existence independent of anybody's beliefs. This idea is misguided, I submit: Normative deontic propositional contents do not designate any non-empirical reality, nor do they have any independent reality of their own. The only way a normative deontic propositional content can exist is by being believed to be normative—by being a norm in the sense previously indicated.

I shall call "doxia" the existence of a norm **n** in a subject *s* who is a believer *b* in **n**. Doxia is the internalisation of **n** by an *s* who is thereby a *b* in **n**.

With regard to a belief in a norm, some prefer to say "acceptance" rather than "internalisation." (A case in point is Hart: He does so especially in reference to officials, saying that they "accept" rules of recognition, or norms, in my terminology; Section 8.1)[5] Still, I prefer "internalisation," for consider: A believer *b* requires a given behaviour of me because *b* has internalised a norm **n** under which I must perform that behaviour; I, on the other hand, am not a believer in **n** (I have *not internalised* **n**), and yet *accept* to act in accordance with **n**, because I think it is in my best interest to do so in order to avoid a given punishment, for example. Further, an internalisation will not always be conscious, or determined by reasoning; it is rather often unconscious and determined by the emotions. "Acceptance," on my understanding, currently carries a different range of meanings and presupposes, more so than "internalisation," that a conscious rational calculus stands behind it.

I shall call "adoxia" the nonexistence of a norm **n** in a subject *s* who is a nonbeliever *nonb* in **n**. Adoxia is the non-internalisation of **n** by an *s* who is thereby a *nonb* in **n**.[6]

[5] Cf. Hart 1961, 97–9, 107, and Hart 1997, *Postscript*, 250, 255. See also, in Volume 5 of this Treatise, Sartor, Chapter 10.

[6] The terms "doxia" and "adoxia" are coinages based on ancient Greek *doxa*, meaning "opinion": Aristotle holds that a *doxa* entails a *pistis*, that is, a belief. It was his view that opinion (*doxa*) implies belief (*pistis*), because no one can have an opinion without also believing it true (Aristotle, *On the Soul*, 428a, 20). Aquinas, following Augustine, claimed that believing is thinking with assent (*credere est cum assensione cogitare*), a claim he made, along with a series of qualifications, in treating of faith as a theological virtue (cf. Aquinas, *Summa Theologiae* (a), 2.2, q. 2, a. 1).

The distinction should be noted between the person *b*, who is a believer in a norm **n**; the person *d*, who is believed to be an actual duty-holder under **n**; and the person *r*, who is believed to be an actual right-holder under **n**. Consider, for example, the norm "The well-off must aid the needy": A well-off person who believes in this norm will be at the same time a believer *b* in **n** and an actual duty-holder *d* under **n**. This, however, will not always be the case. Indeed, any *b* in **n** who is not well-off will not at the same time be a *d* under **n**; and any *d* under **n** who is not a *b* in **n** is tautologically and necessarily a *d* under **n**—although he or she is a nonbeliever in **n**—in the view of those who are believers in **n**.[7]

Hence, a believer *b*, a person in whom a norm **n** exists (doxia), may or may not be a duty-holder or a right-holder, or a combination of the two, under the norm **n**. Likewise, a nonbeliever *nonb*, a person in whom a norm **n** does not exist (adoxia), may or may not be a duty-holder or a right-holder, or a combination of the two, under the norm **n** (cf. Section 10.2.3).

6.3. The Conditionality of the Content of a Norm: The Type of Action and the Type of Circumstance. More on What Is Objectively Right

The content of a norm is compound: It is a compound type, composed of at least one conditioning type of circumstance and one type of action conditionally connected with it. The type of action is qualified as obligatory, permitted, or forbidden and will as such be believed to be binding per se (what is objectively right) if the type of circumstance gets (validly, congruently) instantiated.

To appreciate the importance of the type of circumstance relative to the type of action conditionally connected therewith in the content of a norm, consider that the type of action will be believed to be binding per se (as obligatory, permitted, or forbidden: what is objectively right) *only if* the type of circumstance gets validly instantiated. In the result, what is objectively right can in a sense be said to depend, as what is objectively right, on the type of circumstance.

Recall the previous example of a norm **n**, "The well-off must aid the needy." Here:

(*i*) "The well-off [...] the needy" is the description of the type of circumstance, and in particular of the possible duty-holders and right-holders;

(*ii*) while "aiding" is the description of the type of action that at least one believer believes to be binding per se (in this case, obligatory) upon the well-off (the duty-holders), and whose performance the same believers believe to be a right of the needy (right-holders).

[7] I shall use the letters '*d*' and '*r*' enclosed within single quotation marks to refer to possible duty-holders and right-holders and the letters *d* and *r* without quotation marks to refer to actual duty- and right-holders under the type of circumstance described in a norm **n**. The same holds in other cases; for example, '*s*' stands for a possible subject and *s* for an actual subject.

With the norm **n**, the conditioning type of circumstance is given an extremely simple description: It is described only with reference to possible duty-holders '*d*' and possible right-holders '*r*'. This simplicity raises no problems when the conditioning type of circumstance is itself simple, so that its description, however simple, is exhaustive, as is the case with norm **n**. But in many cases, and especially in the law, the content of a norm is scattered in several different texts each of which describes only in part the norm's content, and this is particularly true of the conditioning type of circumstance. A complete description of a conditioning type of circumstance needs to state all the conditions the type of action is connected with.

Suppose the well-off are believed under **n** to be bound to aid the needy unless the well-off are in failing health: This exception will have to be included in the relevant type of circumstance conditioning the type of action described in **n**—the type "aiding"—which, on my characterisation of norms, is binding per se (what is objectively right: This type will be normatively obligatory, permitted, or forbidden; here, obligatory) every time the conditioning type of circumstance gets validly and hence fully instantiated (of course this requires that the type of circumstance be exhaustively described).

It is one of the jurist's chief tasks to reconstruct exhaustively a norm's relevant type of circumstance, to make it complete for each case in which the norm's type of action is called into play as conditioned by the type of circumstance. Aggravating, extenuating (mitigating), and exempting factors in law are examples well known to any lawyer: These are part of the conditioning type of circumstance relative to a given type of action, namely, the type of circumstance on whose basis a given type of action or several alternative types of action are believed to be binding per se, or what is objectively right.

Consider the provisions which make forbidden the type of action "stealing," and which make this same type of action a type of circumstance on whose basis a thief must be sentenced to a prison term (by instantiating the type of action "sentencing someone to a prison term"). The number of years in prison to be inflicted will vary depending on the circumstances in which a theft is committed: Thus, we will have aggravating factors (as with theft committed or organised with a high degree of planning and sophistication), extenuating or mitigating factors (as with petit larceny), or exempting factors (as with theft under necessity).

A skilled jurist is expected to give an exhaustive reconstruction of the following.

(*a*) The type "stealing." What looks at first sight like a plain type is in reality amazingly complex and involves a considerable number of legal provisions describing the components that concur in framing the type "theft." Indeed, the type "theft," if understood as "a person taking possession of the movable property of another for the purpose of deriving benefit from it for himself or

for others," makes it necessary to characterise a number of further types, such as "possession," "movable property," and the like.

(*b*) A number of other types that will integrate aggravating, extenuating (mitigating), and exempting factors. Here the jurist will have to characterise such things as "theft committed or organised with a high degree of planning or sophistication," "petit larceny" and "under necessity" (as examples of aggravating, mitigating, and exempting factors respectively). These further types will concur or be alternative to one another in an exhaustive description of the type "stealing." Indeed, as noticed a moment ago, this type is at the same time a forbidden type of action and a type of circumstance which the type of action "sentencing someone to a prison term" is conditionally connected with.

(*c*) The types for a number of actions branching out from the central nucleus "sentencing someone to a prison term" and differing from one another as to the length of the prison term. The jurist will then have to take the types branching out from the central nucleus "sentencing someone to a prison term" and connect each with a relevant conditioning type of circumstance as worked out in the reconstructions referred to in (*b*).

It bears repeating that the type of circumstance is of crucial importance to the content of norms, for it states the conditions under which the type of action is binding per se (what is objectively right). This crucial importance proves all the more evident when the conditioned type of action is ethically, politically, or economically consequential or sensitive. Indeed:

First, the conditioning type of circumstance singles out and characterises the cases in which the conditioned type of action is believed to be binding per se (obligatory, permitted, or forbidden: what is objectively right), that is, binding regardless of how desirable its performance is and whatever the pleasure or pain, the advantage or damage, that may result.

Second, any valid occurrence of the conditioning type of circumstance engages the believers' *opinio vinculi* about the conditioned type of action and makes the norm a concretely operative motive of behaviour (*causa agendi*) in those duty-holders who are at the same time believers in the same norm (see Section 6.5).

The crucial importance of the conditioning type of circumstance can be appreciated by considering penal and competence norms.

With penal norms, consider that from a believer's standpoint, the type of action "sentencing someone to death" and the type of action "convicting someone to a short prison term" are equally binding per se (what is objectively right). In either case, if the conditioning type of circumstance gets instantiated, the type of action must be performed irrespective of the desirability of its performance, and whatever the pleasure or pain, the advantage or damage, that will result. In other words, when it comes to normative force, there is no difference between the two beliefs—that "sentencing someone to death" is binding per se (what is objectively right) and that "convicting some-

one to a short prison term" is binding per se (what is objectively right)—other than the difference between the types of circumstance which the two types of action are conditionally connected with; for instance, committing a crime against humanity, in the first case, and committing tax fraud, in the second.

To better appreciate this point, imagine the converse case, in which the type of circumstance for sentencing someone to death (type of action) is committing tax fraud (type of circumstance) and the type of circumstance for sentencing someone to a short prison term (type of action) is committing a crime against humanity (type of circumstance). It is not hard to encounter in the history of humanity, or in present times, penal norms in which the type of action "sentencing someone to death" is conditionally connected with a type of circumstance that is disproportionate from the standpoint of a civilisation based on liberal principles. We have recent examples reminding us that in the world there are norms which people believe in, and under which it is binding per se to sentence people to death (women in particular) by stoning (type of action) for adultery (conditioning type of circumstance).[8]

With competence norms, consider that the type of action always consists in obeying (Sections 7.3, 8.2.1, and 9.6). The type of circumstance singles out those cases in which the type of action "obeying" is believed to be binding per se (what is objectively right) as well as it specifies who is to be obeyed, and on what matters, and how these persons' directives are to be issued.

On my characterisation of norms, believers, and competence norms (Section 7.3) the type of action "obeying" is believed to be binding per se (what is objectively right), that is, binding regardless of whether its performance is desirable or not and whatever the pleasure or pain, the advantage or damage, that may result. A directive enacted by validly instantiating the type of circumstance described in a competence norm can be of little consequence (witness "Don't cross the street!") or dramatically unsettling (as in "Give all your belongings to the needy, leave your loved ones behind, and follow me!").[9]

The issuance of both directives will be valid instances of the type of circumstance specified in a competence norm that at least one believer has internalised. In this case, someone who believes in the competence norm will be-

[8] In reality, stoning (type of action) as punishment for adultery (type of circumstance) is applicable to men as well, according to the *sharia* (though not all Islamic countries apply the *sharia*), even if the punishment is inflicted almost exclusively on women. Further, the convict, in preparation for the punishment, is buried in the ground, except that women are buried up to the chest and men only to the waist: The convicts who manage to flee will have their life spared, and women, of course, because they are buried so much deeper into the ground, manage to flee only rarely, if at all. Stoning is applicable to men for other crimes, too, such as sodomy and the rape of a minor.

[9] "Jesus said unto him, 'If thou wilt be perfect, go and sell that thou hast, and give to the poor, and thou shalt have treasure in heaven: and come and follow me'" (Matthew 19:21).

lieve both directives to be equally binding per se (and their content to be equally right: what is objectively right), despite the fact that their import is enormously different. Again, the only difference between the two beliefs, as far as their normative force is concerned, is that between the types of circumstance the type of action (here, "obeying") is conditionally connected with.

6.4. The Referents of a Norm: Being a Duty-Holder (Deontia) or a Right-Holder (Exousia). More on What Is Subjectively Right

I shall say that something is a referent of a given type description (or type representation) if, and only if, it validly instantiates one or more types that are described therein.

Given a type, any actual object *t* will either be or not be a valid token of this type, and any actual object *t* will either be or not be a referent of the description of this type, according as *t* is or is not a valid token of this type. The phrase "one or more types" points to the fact that we may have tokens partially instantiating compound types as well as tokens fully instantiating types, either simple or compound. Likewise, we may have tokens that are partial referents of compound type descriptions as well as tokens that are full referents of type descriptions, either simple or compound (cf. Section 2.2.2.2, point (*ii*), on attempted crime as described in Article 56 of the Italian Penal Code). In what follows, however, I will specify whether something is a partial or a full instantiation (a partial or a full referent) of a certain type (type description) only where strictly necessary to prevent misunderstandings.

As to norms, we saw in Section 6.3 that their content is a compound type involving at least one relevant conditioning type of circumstance and one type of action conditioned by it. So an object (person, event, action, state of affairs) will be one of the referents of a norm in case it is a valid token of one of the types described in the norm's content.

States of affairs, events, or other actual entities, like persons, are referents of the description of a type of circumstance insofar as they are valid tokens of this type of circumstance.

An actual action is a referent of the description of a type of action insofar as the action is a valid token of the type of action.

But notice the following.

The conditionality of the content of norms (Section 6.3), better yet, the normative character of the relationship of conditionality that holds between the type of circumstance and the type of action set forth in a norm, implies the following: (*a*) the valid instances of the type of action occurring in the absence of valid instances of the type of circumstance do not (and cannot) count as compliance or noncompliance with the norm, and (*b*) the valid instances of the type of action occurring in the presence of valid instances of the type of circumstance will necessarily count as compliance or noncompliance with the

norm, meaning they will be either valid and right tokens or valid and wrong tokens of the type of action (see Section 2.2.2.2).

The type of circumstance set forth in a norm is instantiated by valid tokens independently of obedience or disobedience to the norm (even if this instantiation can consist in obeying or disobeying another norm). The type of action set forth in a norm is instantiated by valid tokens that count as obedience or disobedience of that norm (on the concept of obedience, see Sections 6.7 and 6.8) if, and only if, the relevant type of circumstance, too, has been validly instantiated.

Given a norm **n**, "The well-off must aid the needy," the relevant type of circumstance ("the well-off [...] the needy") will get validly instantiated only when we have actual well-off and actual needy people. Here no obedience to the norm **n** is entailed with respect to the well-off or with respect to the needy.[10]

The type of action "aiding" gets validly instantiated not only when actual well-off people actually aid actual needy people (in which case the valid instantiation of the type of action "aiding" entails obedience to norm **n**), but also when, say, actual needy people actually aid actual well-off people (in which case, however, the valid instantiation of the type of action "aiding" counts neither as compliance nor as noncompliance with norm **n**).

Given a norm **n**, any actual subject *s* will either be or not be a referent of **n**; likewise, any actual action will either be or not be a referent of **n**.

Any *s* who is a referent of **n** will be either a duty-holder *d* or a non-duty-holder *nond* under **n**.

I shall call "deontia" the situation in which one or more subjects *s* who are referents of **n** are *d*s under **n**. Deontia is the normative subjective position (what is subjectively right) by which the subjects *s* are actual duty-holders under **n** (according to those who believe in **n**). Here, the conditioning type of circumstance makes reference to the subjects *s* as duty-holders under **n**. For example, given the norm **n**, "No one can bear arms in public places," anyone in any public place (this being a valid Is-event: a legal fact as characterised in Section 3.2) will be an actual duty-holder under **n**: This person will be under an obligation not to bear arms, and "deontia" expresses his or her normative subjective position (what is subjectively right) as an actual duty-holder under **n**.

It might be said—using the language introduced in Part One to reconstruct the foundations of legal-dogmatic thought in civil-law culture—that in this section I am treating of valid Is-causes (or Is-facts or acts; in the example, finding oneself in a public place) that produce Ought-effects in what is subjectively right (in the example, an obligation not to bear arms).

[10] And if norms other than **n** make it obligatory to become needy or to become well-off, then a valid instantiation of the type "the well-off [...] the needy" will entail obedience to these other norms, provided that the relevant type of circumstance set forth in these other norms has in turn been validly instantiated.

I shall call "adeontia" the situation in which one or more subjects *s*, whether or not they are referents of **n**, are not *d*s under **n** (they are *nond*s under **n**). Adeontia is the normative subjective position (what is subjectively right) by which the subjects *s* are not actual duty-holders under **n**. Here, the conditioning type of circumstance will either make no reference at all to the subjects *s*, or it will make reference to them but not as duty-holders under **n**.

Keeping to the previous example—the norm **n**, "No one can bear arms in public places"—anyone who is not in any public place will be an instance of adeontia: These people will be non-duty-holders with respect to this norm. This is so because no one who is not in any public place is a referent of the norm **n**, a norm that makes it forbidden per se to bear arms in public places. Should this norm read instead, "No one except law-enforcement officers can bear arms in public places," any police officers in any public place will be referents of the norm **n**, but not duty-holders under this norm. Even as referents of **n**, they will be instances of adeontia with respect to **n**.

Any *s* who is a referent of **n** is either a right-holder *r* or a non-right-holder *nonr* under **n**.

I shall call "exousia" the situation in which one or more subjects *s* who are referents of **n** are *r*s under **n**. Exousia is the normative subjective position or situation in which the subjects *s* are actual right-holders under **n** (according to those who believe in **n**). Here, the conditioning type of circumstance refers to the subjects *s* as actual right-holders under **n**. For example, given the norm **n**, "All newborn humans must be kept alive and nourished," every newborn baby (the new birth being a valid Is-event: a legal fact as characterised in Section 3.2) will be an actual right-holder under **n**: This baby will have a right to life and nourishment, and "exousia" expresses his or her normative subjective position (what is subjectively right) as an actual right-holder under **n**.

It might be said—using the language introduced in Part One to reconstruct the foundations of legal-dogmatic thought in civil-law culture—that in this section I am treating of valid Is-causes (Is-facts; in the example, the birth of a baby) that produce Ought-effects in what is subjectively right (in the example just made, the right to life and to nursing ascribed to the baby).

I shall call "anexousia" the situation in which one or more subjects *s,* whether or not they are referents of **n**, are not *r*s under **n** (they are *nonr*s under **n**). Anexousia is the normative subjective position or situation in which the subjects *s* are not actual right-holders under **n**. Here, the conditioning type of circumstance will either make no reference at all to the subjects *s*; or it will refer to them but not as actual right-holders under **n**.[11]

[11] The terms "deontia" and "adeontia" are coinages based on ancient Greek *deon*, meaning "duty"; "exousia" and "anexousia" are based on ancient Greek *exousia*, meaning "power" or "faculty."

No actual subject *s* who is not a referent of **n** can be a *d* or an *r* under **n**: *s* necessarily is a *nond* and a *nonr* under **n**, because *s* is not a referent of **n** (*s* is not under the scope of **n**).

Any actual subject *s* who is a referent of **n** will have one of these capacities or competencies under **n**: *d* and *nonr*, *r* and *nond*, *d* and *r*, or *nond* and *nonr*. From here on out I will be expressing these qualifications, and others like them, by way of an ampersand. So, in the examples just made, I will say of these capacities under **n** that they qualify a subject as a *d*&*nonr*, an *r*&*nond*, a *d*&*r*, or a *nond*&*nonr*.

6.5. The Being-in-Force of a Norm: Being a Duty-Holder and a Believer (Nomia). The Not-Being-in-Force of a Norm: Being a Duty-Holder and a Nonbeliever (Anomia)

The being-in-force of a norm **n** or its not being-in-force can be predicated exclusively of the actual duty-holders *d* under **n**. In other words, deontia is a necessary though insufficient condition for a norm **n** to be in force and for it not to be in force.

If an actual duty-holder *d* under a norm **n** (deontia) is a believer *b* in **n** (doxia), then the norm **n** will be in force in *d*. I shall call "nomia" the being-in-force of a norm. The nomia or being-in-force of a norm is the coexistence of doxia and deontia in the same person, who will then be a *b*&*d* with respect to **n**.

If an actual duty-holder *d* under a norm **n** (deontia) is a nonbeliever *nonb* in **n** (adoxia), then the norm **n** will not exist (adoxia) in this *nonb*&*d* (to whom the norm refers: deontia), nor will it be in force in the same *nonb*&*d*. I shall call "anomia" the not-being-in-force of a norm **n** in a person *d* under **n** who is a *nonb* in **n**. The anomia, or not-being-in-force, of a norm **n** is the coexistence of adoxia and deontia in the same person, who will then be a *nonb*&*d* with respect to **n**. Indeed, actual duty-holders *d* under **n** will not necessarily be nomic with respect to **n**: There can exist *nonb*&*d*s, that is, actual duty-holders under **n** who are nonbelievers in **n** and are therefore anomic with respect to **n**.

Likewise, believers *b* in **n** will not necessarily be nomic with respect to **n**: There can exist *b*&*nond*s, or adeontic believers, who are not actual duty-holders under **n**, and who therefore can be neither nomic nor anomic with respect to **n**. If a norm **n** exists in a believer *b* (doxia) who is not a duty-holder under **n** (adeontia), then **n** will exist in *b* (doxia) but cannot be in force or not in force in the believer *b*, because this person is a *nond* under **n** (adeontia). To put it otherwise: The being-in-force of a norm **n** (nomia), and the not-being-in-force of a norm **n** (anomia), cannot be predicated of persons who are not actual duty-holders *d* under **n.** Adeontia precludes both nomia and anomia (more on this in Section 10.2.3).[12]

[12] "Anomia" comes from Greek *nomos*, meaning "norm," in combination with the

A disclaimer here is that the concept of "a norm being in force in a person," as characterised in this section, does not apply as such where the being-in-force of law is at issue (see Sections 10.1 and 10.2.4).

6.6. The Efficaciousness and Inefficaciousness of a Norm: Abiding and Deviant Duty-Holders. The Whited Sepulchres and the Jesuits. Efficacious Norms as a Subset of Effective Norms

A norm **n** can be a motive of behaviour (*causa agendi*) that is efficacious or inefficacious only with the actual duty-holders *d* under **n** who are also believers *b* in **n**, that is, with *b*&*d*s (those in whom the norm **n** is in force: nomia).

As is known, "efficaciousness," "efficacy," "effectivity," and "effectiveness," as well as their antonyms ("inefficaciousness," "inefficacy," etc.) and their adjectival forms ("efficacious," "effective," etc.), are terms on which general jurisprudence (at least in civil-law countries) has debated and is still debating extensively with reference to the concept of validity, among other things.

To make things clearer here, in what follows I will use "efficaciousness" and its derivatives to signify that a norm is abided by qua norm (norm as *causa agendi*). The same holds for the other motives of behaviour (needs, interests, and values) when they are specifically *causae agendi*; Thus, for example, if a given need is the motive why I hold a behaviour, it will be said to be efficacious with respect to that behaviour.

"Effectiveness" and its derivatives I will use instead to signify that a rule or standard (or a set or system of rules or standards) is complied with *whatever motives* may stand behind this practice, and so without entering into any such motives. In short, I restrict the use of "efficaciousness" and "inefficaciousness" to say that a motive of behaviour (*causa agendi*) functions or does not function as a cause of behaviour. The use of "effectiveness" and "non-effectiveness" I circumscribe to say that a certain rule or standard of behaviour is or is not complied with, independently of the motives—needs, interests, values, or norms (cf. Chapter 5)—out of which such compliance or noncompliance occurs. "Effective," on my understanding of this term, is equivalent to "practised" (see Section 6.8), which makes efficacious norms a subset of effective, or practised, norms.

Note in this regard that there is an ambiguity latent (and maybe even inevitable) in the discourse of jurists and jurisprudents. Saying that a legal norm or a normative legal system is effective will say little or nothing about the moti-

privative prefix *a*-, meaning "not" or "without." "Nomia" likewise contains the root *nomos*, but without the privative prefix. In the social sciences, "anomia" is usually defined as the "lack or absence of norms regulating the social behaviour of individuals or communities (groups, associations, organisations)" (Gallino 2000, s.v. "Anomia," 30; my translation).

vating efficaciousness of legal norms qua norms or of the legal system qua normative system. This ambiguity recoils on us and widens when it comes to characterising the law in force, because "law in force" does carry normative connotations and implications, and yet, despite this fact, we are accustomed to speaking of "law in force" on condition that the law is effective without specifying (or being able to specify) in what proportion the efficaciousness of norms—as against the efficaciousness of other motives of human behaviour—concurs in determining the effectiveness of a legal system (cf. Chapter 10).

Nomia (a norm's being in force) is a necessary condition for both the efficaciousness and inefficaciousness of a norm. Hence, a norm **n** cannot be efficacious or inefficacious with the subjects in whom it is not in force. That is, with (*i*) the actual duty-holders *d* under **n** who are nonbelievers *nonb* in **n** (anomia, *nonb*&*d*), (*ii*) the believers *b* in **n** who are not actual duty-holders *d* under **n** (doxia-adeontia, *b*&*nond*), and (*iii*) the subjects who are neither believers *b* in **n** nor actual duty-holders *d* under **n** (adoxia-adeontia, *nonb*&*nond*). It is only in a broad sense (and in a way inappropriately, given my characterisation of efficaciousness) that in case (*ii*), doxia-adeontia, norm **n** may be said to be efficacious with respect to those believers in **n** who are not duty-holders under **n**: Because of **n**, those who believe in **n** will be likely to take a normative censorious attitude (preventive or repressive social control) toward those people they understand to be actual duty-holders *d* under **n**. This qualification on the use of "efficaciousness of a norm" serves only the purpose of terminological clarification. It does not in any way detract from the fundamental importance of the censorious normative attitude taken by adeontic believers in the play of the law in force (cf. Sections 10.2.1 and 10.2.2).

I shall call "abiders" the actual subjects *b*&*d* (believers in **n** and duty-holders under **n** in whom **n** is in force: nomia) who *on this motive* (*causa agendi*) practise **n** (efficaciousness of **n** in *b*&*d*s). Abiders display the habit or practice (*usus agendi*) of obeying **n** *because* they are nomic with respect to **n**. To put it otherwise, if a norm **n** is efficacious, then the *b*&*d*s (those in whom **n** is in force) will be abiders: They will practise **n** because they believe in **n**. Also, their *usus agendi* is a custom in that it is *caused by a norm* (*opinio vinculi*) (see the end of Section 5.3 and Section 6.1).

I shall call "deviants" the actual subjects *b*&*d* (believers in **n** and duty-holders under **n** in whom **n** is in force: nomia) who do not practise **n** (inefficaciousness of **n** in *b*&*d*) despite the fact that they believe in **n**. Deviants do not display the habit or practice (*usus agendi*) of obeying **n** despite their being nomic with respect to **n**. To put it otherwise, if a norm **n** is inefficacious, then *b*&*d*s (those in whom **n** is in force: nomia) will be deviants: They will not practise **n** *despite* their belief in **n**.[13]

[13] A notion of deviance analogous to the one here advanced was held by Abelard with regard to sin: "Sin, it seems, lies in the disparity between what a person does and what he

Nomia (a norm's being in force) is a necessary condition for being an abider as well as for being a deviant.

If deviance (the violation of **n** by a *b&d* with respect to **n**) becomes a habit or practice, it can sorely try the being-in-force of **n** (nomia) in a *b&d*. In particular, it can work against the existence of **n** in *b&d*: It can undercut *b&d*'s belief in **n** (*b&d*'s doxia), which belief is a necessary and, where coupled with deontia, a sufficient condition of nomia (of the being-in-force of **n**). However, if a *b&d* regards as deviant any habit or practice of his or hers that does not conform to **n**, *b&d* will continue to believe he or she is under an obligation to comply with **n** even after violating **n**: *Video meliora proboque, deteriora sequor* (Ovid, *Metamorphoses* VII, vv. 20–1: "I see the best things and approve of them, and yet I follow the worst"; my translation). Here, even if norm **n** is violated, it will still exist and be in force in *b&d* as long as *b&d*, though a deviant, believes it binding per se to comply with **n**.

In the social sciences, "deviance" is defined as

a verbal or nonverbal act, behaviour, or expression by a recognised member of a collectivity, regarded by most members in that collectivity as a more or less serious practical or ideological departure from or violation of certain norms, expectations, or beliefs they either understand to be legitimate or adhere to in practice: the more this act, behaviour, or expression aggrieves people's sense of offence, the stronger their reaction to it. (Gallino 2000, s.v. "Devianza sociale," 217; my translation).

This idea of deviance stems in part from

the Jewish-Christian conception of the traitor and to a lesser extent of the sinner. In so early a conception lies what a main strand of contemporary sociology sees to be the chief traits of deviance: the community's sense of offence, or of betrayed trust, which prompts and warrants a reaction, and the consequences this breach of trust entails for the deviant's personality. The traitor was a member of a group, operated in the group for a long time and abided by its norms, and broke these norms out of either weakness or self-interest, but cannot bear to stray from them and for this reason is grievously anguished by his or her act. These traits have often been depicted in the mythic-legendary figure of Judas. (Ibid.; my translation)

In sum, a norm **n** exists only in believers *b* in **n**; it is in force only in actual duty-holders under **n** who are also believers in **n** (it is in force in *b&d*s); *b&d*s are the only persons who can be abiders (efficaciousness of **n**) or deviants (inefficaciousness of **n**), and they will necessarily be either the one or the other (nomia is a necessary condition for both the efficaciousness and inefficaciousness of a norm), unless they are whited sepulchres in the sense presently to be explained.

The peculiar case of whited sepulchres is that of a *b&d* who *would be* a deviant (The spirit is willing but the flesh is weak: "Watch and pray, that ye

believes God commands." On the topic of Abelard on sin I am indebted to Marenbon, Volume 6 of this Treatise, Section 11.3.2.

enter not into temptation: The spirit indeed *is* willing, but the flesh *is* weak"; Matthew 26:41) were it not that he or she is driven to comply with **n** out of motives other than **n** (out of needs, interests, or values).

On the characterisation of conformism provided below, in Section 6.7, these *b&d*s cannot be said to be conformists, and that because they believe in **n** (as true conformists do not). But then in a strict sense they cannot be said to be abiders, either, because even though they believe in and practise **n**, they practise **n** out of motives other than **n**. Finally, they cannot, strictly speaking, be said to be deviant: They would be deviant if they did not practise **n**. I will say that these *b&d*s are whited sepulchres. This is how Jesus called the Pharisees: "Woe unto you, scribes and Pharisees, hypocrites! for ye are like unto whited sepulchres, which indeed appear beautiful outward, but are within full of dead *men's* bones, and of all uncleanness" (Matthew 23:27).

The whited sepulchres are false abiders: They are believers who seem to be abiders and claim to be abiders but are not, because motives other than their belief in **n** are the real motive of their compliance with **n**. The situation with whited sepulchres is that norms are actually practised but are not efficacious: These norms *are* obeyed, but not qua norms, and that even if they are believed in qua norms.

A different matter is the Jesuits. I happen to esteem them (cf. the end of Section 10.2.4), but to their detractors they come across as nonbelievers who pretend to be believers, and when they practise a norm they come across as conformists (Section 6.7) who pretend to be abiders, while they are merely practising *nonb&d*s. Cf. Pascal (1623–1662), *Les Provinciales*: *Septième Lettre*, 1928a, and *Neuvième Lettre*, 1928b.

6.7. In the Case of Anomia, a Norm Can Be either Obeyed (Conformism of Duty-Holding Nonbelievers) or Not Obeyed (Nonconformism of Duty-Holding Nonbelievers), but It Cannot Be Efficacious or Inefficacious

As mentioned, a norm **n** that refers to actual duty-holders who do not believe in **n** cannot be efficacious or inefficacious with them, either. It will nevertheless be either obeyed or not obeyed by such *nonb&d*s (actual duty-holders under **n** who do not believe in **n**).

In the former case, **n** is obeyed (*usus agendi*) out of motives other than **n** (out of need, interest, or values, or in virtue of a norm other than **n**). These motives will cause *nonb&d*s to comply with **n** despite the fact that they do not believe in **n** and therefore do not consider themselves to be duty-holders under **n**. Any such habit or practice (*usus agendi*) displayed by *nonb&d*s will not be a custom, because it is not caused by **n** (see the end of Section 5.3 and Sections 6.1 and 6.8).

I shall call "conformists" the actual duty-holders *d* under **n** who obey **n** (who display the *usus agendi*, the habit or practice, of obeying **n**) despite their

being nonbelievers in **n** (despite their being anomic with respect to **n**). By definition, conformists obey **n** out of motives other than **n** (out of need, interest, or values, or in virtue of a norm other than **n**).

A norm **n** that is obeyed out of conformism is practised but *cannot* be efficacious or inefficacious. Even so, it will be effective (cf. Section 6.6).

I shall call "nonconformists" the actual duty-holders *d* under **n** who do not obey **n** (who do not display the *usus agendi*, the habit or practice, of obeying **n**), because they are nonbelievers in **n**: They are anomic with respect to **n**. By definition, nonconformists violate **n** (i.e., they are *d*s under **n** and do not obey **n**) but are not deviant, because they are nonbelievers *nonb* in **n**, that is, they are anomic with respect to **n**, which is not in force in them.

Anomia—as the position of someone being a *nonb*&*d*—is a necessary condition of conformism as well as nonconformism.[14]

6.8. Practising Duty-Holders and Non-Practising Duty-Holders

A norm **n** can be obeyed or violated only by a person who is competent (in the capacity) to comply or not comply with **n**, and therefore only by an actual duty-holder *d* under **n**, whatever motive (need, interest, value, or norm) stands behind this obedience or violation. By definition, a norm **n** can be practised or not practised only by the subjects *s* who are actual duty-holders *d* under **n**. And a *d* will be either a *b*&*d* or a *nonb*&*d*.

I shall qualify as "practising" the actual duty-holders *d* under **n** who display the *usus agendi*, the habit or practice, of complying with **n**, whatever motive (need, interest, value, or norm, including the same norm **n**) accounts for their practice. If this practice is a custom—if it is caused by **n**—then **n** will be practised and efficacious (and the practising *b*&*d*s will properly be abiders). If the same practice is not a custom—if it is caused by motives other than **n** (the practising duty-holders *d* under **n** are either conformists or whited sepulcres)—then **n**, though practised (and hence effective: Section 6.6), will be inefficacious.

I shall qualify as "nonpractising" the actual duty-holders *d* under **n** who do not display the *usus agendi*, the habit or practice, of complying with **n**, whatever motive (need, interest, value, or norm) accounts for the fact that they do not comply with **n**. If such noncompliance is a case of deviance, then **n** will be non-practised as well as inefficacious. If this noncompliance is a case of nonconformism, then **n**, though not practised, will not and cannot be efficacious or inefficacious.

A *nond* can either be a *b*&*nond* or a *nonb*&*nond* (actual *nond*s under **n** are either believers *b* in **n** or nonbelievers *nonb* in **n**). In either case *nond*s are nei-

[14] It is a matter of taste whether it is preferable to say that "conformists" and "nonconformists," in the sense specified, should rather be called "opportunists" and "non-opportunists."

ther practising nor nonpractising subjects under **n**—nor could they be—because they are not actual duty-holders under **n** (they are *nond*s under **n**): **n** does not refer to them as duty-holders, so they are not competent to either comply or not comply with **n** (they are not in that capacity).

Chapter 7

HOW NORMS PROLIFERATE IN HUMAN BRAINS

7.1. Subsuming Valid Tokens under a Type of Circumstance and Producing Derivative Norms from the Type of Action Conditionally Connected with the Type of Circumstance

It was discussed in Section 6.3, with regard to the content of norms, how an important role is played by the type of circumstance a type of action is conditionally connected with (a type of action whose performance will be believed to be binding per se anytime this condition is met). A conditioning type of circumstance determines the ethical, political, or economic import of the content of a norm by singling out and defining the conditions under which the type of action set forth in the norm is believed to be binding per se (per se obligatory, permitted, or forbidden: what is objectively right), that is, binding regardless of how desirable its performance is and whatever the pleasure or pain, the advantage or damage, that may result.

Now I will consider another aspect of the role played by the valid tokens of the type of circumstance described in a norm **n**: their role as multipliers of norms in the brains of believers (a multiplication that starts from **n**). Every token that validly instantiates the conditioning types of circumstance set forth in the norms a believer has internalised specifies and multiplies these norms, and through this process the believer may come to build up a normative system.

In principle, every valid token of the conditioning type of circumstance produces new norms in every believer in **n**. In practice, the amount of such multiplication will equal the amount of valid actual tokens that each believer recognises as instances of the conditioning type of circumstance set forth in **n**.[1]

Norms existing in the brain of a believer easily multiply into derivative norms by illative processes of subsumption and inference. And the multiplication process by which a derivative norm is produced is the same whether a

[1] In reality, a great many officials; scholars; advisors; divulgers; professionals in various fields regulated by norms, and in particular by legal norms (fields such as education, healthcare, sports, labour, and taxes); interest groups; media owners; and suchlike all do an enormous amount of work with regard to norms in general, and with regard to legal norms in particular. Then, too, officials impose on believers (and also on nonbelievers) the outcome of their work, or they propose it, and professionals will even sell it. In the final analysis, the believers need these multitudes of people to help them uphold their beliefs and put them into practice. Nonbelievers (despite their position as nonbelievers) need these multitudes of people, too: in their case to put into practice beliefs (norms) held by others, which they can hardly elude, and which they are forced to conform to (conformism; Section 6.7), if not out of inclination or conviction (belief), certainly because pressed into it, making a virtue out of necessity (cf. Chapter 10).

believer proceeds from norms of conduct or from competence norms. In either case:

(*i*) Actual states of affairs or events in the reality that is validly instantiate (are valid tokens of) the conditioning type of circumstance set forth in a norm **n** existing in the brain of a believer *b* (in *b*'s reality that ought to be; cf. Section 15.3.4).

(*ii*) The valid tokens are subsumed by the believer under the conditioning type of circumstance with which a type of action is connected, and under which the believer believes the same type of action to be binding per se (what is objectively right).

(*iii*) From the type of action set forth in **n** and from the valid tokens subsumed under the type of circumstance set forth in **n** the believer infers derivative norms **n1**, **n2** ... **nn**.

The derivative norms **n1**, **n2** ... **nn** are specifications of the norm **n** in what concerns the type of circumstance described in **n**.

Since the specifications **n1**, **n2** ... **nn** are shaped by those tokens that happen to validly instantiate the type of circumstance set forth in **n**, how many new derivative norms **n1**, **n2** ... **nn** we will have with respect to norm **n** will depend, among other things, on the type of circumstance set forth in **n**. Thus, the norm requiring that we give a present (type of action) for birthdays (type of circumstance) will produce fewer derivative norms than a norm requiring that we give a present (type of action) for un-birthdays (type of circumstance).[2]

[2] "Evidently Humpty Dumpty was very angry, though he said nothing for a minute or two. When he *did* speak again, it was in a deep growl. / 'It is a—*most*—*provoking*—thing,' he said at last, 'when a person doesn't know a cravat from a belt!' / 'I know it's very ignorant of me,' Alice said, in so humble a tone that Humpty Dumpty relented. / 'It's a cravat, child, and a beautiful one, as you say. It's a present from the White King and Queen. There now!' / 'Is it really?' said Alice, quite pleased to find that she *had* chosen a good subject, after all. / 'They gave it me,' Humpty Dumpty continued thoughtfully, as he crossed one knee over the other and clasped his hands round it, 'they gave it me—for an un-birthday present.' / 'I beg your pardon?' Alice said with a puzzled air. / 'I'm not offended,' said Humpty Dumpty. / 'I mean, what *is* and un-birthday present?' / 'A present given when it isn't your birthday, of course.' / Alice considered a little. 'I like birthday presents best,' she said at last. / 'You don't know what you're talking about!' cried Humpty Dumpty. 'How many days are there in a year?' / 'Three hundred and sixty-five,' said Alice. / 'And how many birthdays have you?' / 'One.' / 'And if you take one from three hundred and sixty-five, what remains?' / 'Three hundred and sixty-four, of course.' / Humpty Dumpty looked doubtful. 'I'd rather see that done on paper,' he said. / Alice couldn't help smiling as she took out her memorandum-book, and worked the sum for him: 365 – 1 = 364. / Humpty Dumpty took the book, and looked at it carefully. 'That seems to be done right—' he began. / 'You're holding it upside down!' Alice interrupted. / 'To be sure I was!' Humpty Dumpty said gaily, as she turned it round for him. 'I thought it looked a little queer. As I was saying, that *seems* to be done right—though I haven't time to look it over thoroughly just now—and that shows that there are three hundred and sixty-four days when you might get un-birthday presents—' / 'Certainly,' said Alice. / 'And only *one* for birthday presents, you know. There's glory for you!' / 'I don't know what you mean by "glory,"' Alice said. / Humpty Dumpty smiled contemptuously. 'Of course you don't—till I tell you. I

The proliferation of derivative norms in a believer proceeds from previously internalised norms of conduct and competence norms alike. But in this latter case, the proliferation is particularly lush and noticeable, because (in principle at least) tokens of the conditioning type of circumstance can be validly realised at will or on purpose (by those who are in the capacity of doing so) in greater numbers than in the case of norms of conduct. To put it otherwise, the range, variety, and diversity of tokens admitted by the type of circumstance set forth in a competence norm will in principle be much greater than it is with the type of circumstance set forth in a norm of conduct. Also, the newness of the derivative norms with respect to the norm **n** they are inferred from is particularly visible and consequential when **n** is a competence norm.

In Section 7.2, I will provide an example of a believer's normative system developed from norms of conduct only. In Section 7.3, I will provide an example of a believer's normative system developed from both norms of conduct and competence norms.

7.2. Proliferation from Norms of Conduct. Static Systems and Dynamic Systems

Consider the norm of conduct **n**, "The well-off must aid the needy": This norm exists in me, a believer *b* in **n**; it is part of my internal reality that ought to be, the outcome of social interaction and of primary and secondary socialisation (see Section 15.2.5).

It turns out that one person, Rob, is a man of means, and that two other persons, Frances and Loretta, through unfortunate events, come to find themselves in a state of need. If I assume that, following these events, the conditioning type of circumstance set forth in **n** has validly been instantiated twice (it has actual valid tokens in one *d*, Rob, and two *r*s, Frances and Loretta), then my assumption will in a technical (and a legal) sense be a subsumption.[3]

meant "there's a nice knock-down argument for you!"' / 'But "glory" doesn't mean "a nice knock-down argument,"' Alice objected. / 'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' / 'The question is,' said Alice, 'whether you *can* make words mean so many different things.' / 'The question is,' said Humpty Dumpty, 'which is to be master—that's all'" (Carroll 1982, 189–90; Lewis Carroll, 1832–1898).

[3] "To subsume, in philosophical language, is properly to bring an individual under a genus, or class [in my usage, a type]. Thus we have a subsumption, for example, in making the minor premise of a classic syllogism of the type 'All men are mortal. / Socrates is a man. / Socrates is mortal.'

Accordingly, jurists call subsumption our bringing a concrete fact, a historical event, under the type [*fattispecie astratta* in the original] set forth in a legal provision or, more generally, a legal norm. […] Thus, for example, we can consider the major premise, as expressed in a legal provision, 'Anyone who should with specific intent kill another person shall be punished for it.' Now, not until we have ascertained so-and-so's belonging to the category [or type, in my usage]

Having subsumed the two above-mentioned tokens under the conditioning type of circumstance set forth in **n**, I—as a ratiocinating believer *b* in **n**—will infer from **n** two other norms of conduct: **n1**, “Rob, a duty-holder *d*, must aid Frances, a right-holder *r*, who is now in a state of need,” and **n2**, “Rob, a duty-holder *d*, must aid Loretta, a right-holder *r*, who is now in a state of need.”

The normative universe that I hold to (my internal reality that ought to be) as a believer *b* in **n** now comprises three norms, namely, the primitive (and parent) norm **n** and the derivative norms **n1** and **n2**: All three are norms of conduct. This is a small normative system (a small reality that ought to be), and it will change by subsumption and inference depending on whether there are valid actual tokens (states of affairs or events) in the reality that is which instantiate the conditioning type of circumstance set forth in **n**, or which will cease to be valid actual tokens instantiating this type of circumstance; in other words, depending on whether there exist valid tokens or referents of the type of circumstance set forth in **n** or whether this type of circumstance is no longer instantiated by any such valid tokens.

Should Loretta cease to be in a state of need, and hence her circumstances no longer be a valid instance (token) of the conditioning type of circumstance set forth in **n**, there will have been an Is-event in the reality that is, and **n2** will consequently become extinct, or cease to exist in my internal reality that ought to be, in the ratiocinating believer which I am, and so will Rob’s duty toward Loretta. My small normative system has thus been reduced to **n** and **n1**.

Should Loretta become needy a second time, this would be another Is-event in the reality that is, and my normative system will consist of **n**, **n1**, and **n2.1**. For **n2** ceased definitely to exist in a previous moment, when Loretta improved her circumstances. When Loretta becomes needy for the second time, a new norm comes into existence: This norm—**n2.1**—will be different from **n2** because of the different period in which it exists in my brain.

Should Loretta again cease to be in a state of need, so that her circumstances cease to be a valid instance (token) of the conditioning type of circumstance set forth in **n**, there will have been an Is-event in the reality that is, and **n2.1** will consequently become extinct, or cease to exist in my internal reality that ought to be, in the ratiocinating believer which I am, and so will Rob’s duty toward Loretta. My small normative system has thus been reduced again to **n** and **n1**.

If trouble, in the reality that is, should befall another person, Herta, who comes to find herself in a state of need, the conditioning type of circumstance set forth in **n** will be instantiated by a further valid token, and my normative system (my internal reality that ought to be) will accordingly expand (by subsumption and inference) with a new norm of conduct, **n3**, “Rob, a duty-

of those who have killed someone with intent (minor premise = subsumption) can we conclude that so-and-so falls subject to that penalty” (Lazzaro 1971, 975–6; my translation).

holder *d*, must aid Herta, a right-holder *r*, who is now in a state of need." My small normative system becomes **n**, **n1**, and **n3**.

Primitive norms—and so other beliefs, such as a belief in God—can take years, even decades, before human brains can internalise them through socialisation processes. But once a human being internalises a norm **n**, **n** will proliferate as the believer subsumes valid actual tokens under the conditioning type of circumstance set forth in **n** and infers derivative norms **n1**, **n2** ... **nn** from **n** and from the tokens subsumed under the type of circumstance set forth in **n**.

As has been noted already, the amount of such proliferation will equal the amount of valid actual tokens that are taken (by the believer) to instantiate the conditioning type of circumstance set forth in **n** (Section 7.1). And the rate of proliferation will run parallel to the time it takes for such tokens to occur in the reality that is and be known, plus the time needed for the believer to subsume them under the conditioning type of circumstance set forth in **n** and to infer derivative norms in his or her reality that ought to be.

Although legal doctrine has often come close to appreciating that this is how norms proliferate in believers (by subsumption and inference), it has never grasped this mechanism fully, nor has it provided a clear account of it. Good attempts at just such a solution are the theory of legal facts, acts, and transactions (declarations of will) productive of legal Ought-effects (see Section 3.2)[4] and the concept of subsumption as applied to the so-called judicial syllogism.

To expedite matters, suppose Loretta never ceased to be needy. Here, the norms of conduct previously introduced (the primary norm **n** I internalised through socialisation processes, and the derivative norms **n1**, **n2**, and **n3**, which I, a believer in **n**, have produced by subsumption and inference) can be considered to make up an extremely stripped-down internal reality that ought to be or normative system as follows: **n**, **n1**, **n2**, and **n3**. There are four norms contained in my head (in my reality that ought to be, a reality situated in my brain): One of these is a primary and parent norm, and the remaining three are derivative norms, which in relation to the primary norm occupy a lower level.

But the normative system of a believer *b* is hugely more complex than this fourplex case admits.

For in the first place, as mentioned, and keeping to my own range of beliefs, **n** can produce within me, not three but many derivative norms, as many as are the tokens that in the reality that is validly instantiate the conditioning type of circumstance set forth in **n**, in what concerns both duty-holders and right-holders. Further, the reality that is can have many cases in which these many valid tokens cease to be, as well as many recurring valid tokens and new

[4] We can also fruitfully bring to bear the theory of sources of law here, but then we will have to bring it into analogy with the theory of legal facts, acts, and transactions (declarations of will), as was done in Section 3.4.

cessations of each of these many valid tokens of the conditioning type of circumstance set forth in **n**.

If my brain is well informed and working, it will produce, repeal, and reproduce a variety of derivative norms by subsumption and inference.

More than that, my brain is not one in which socialisation processes have driven only the norm **n**, "The well-off must aid the needy." Some people are full of resources, and others are full of norms: I myself am full of norms. Other people are full of compulsive neuroses, and these, as neuronal states of affairs, are phenomena not entirely unlike normative beliefs.[5]

Coming back to myself, I have internalised a number of primitive norms in addition to **n**: **g**, "It is per se obligatory not to take other people's movable property"; **h**, "It is per se obligatory to yield to women and the elderly on the street"; **i**, "It is per se obligatory not to have sexual relations with minors or with unconsenting adults"; and so on. The type of circumstance described in **g**, **h**, and **i** will in principle have the same chances of being validly instantiated by tokens (which in turn may cease to be and then occur again) as did the type of circumstance set forth in **n**.

Thus, each of my primitive norms will engender, in my internal reality that ought to be, several other derivative norms depending on the tokens which validly take place in the reality that is and instantiate the conditioning type of circumstance set forth in the same primitive norms.

My normative system initially comprised four norms: the primitive norm **n** and the derivative norms **n1**, **n2**, and **n3**. Lastly, to these four norms I added three other primitive norms: **g**, **h**, and **i**. Most readers will appreciate that, though my norms have grown to seven, they are still only a drop in the bucket. I could not in truth reckon how many norms currently fill my normative universe (or reality that ought to be): certainly more than seven, especially where they refer to others as duty-holders and to myself as the person (a right-holder) entitled to ask that such duty-holders perform what they ought to.

The fathers of systematic natural-law theory—Christian Wolff (1679–1754) among them—did attempt to tally up the norms existing in their normative universes, in an effort to make these norms more accurate and to lay them out neatly. But the resulting normative systems took shape *a priori*, namely, independently of any conditioning type of circumstance getting actually and validly instantiated by tokens occurring in the reality that is, and instead would usually get derived, *continuo ratiocinationis filo*, directly from the types of action set forth in norms of conduct. Given, for example, the norm of conduct "It is binding per se to be kind to ladies," the fathers of systematic natural-law

[5] We have a lightly amusing example in the 1997 film *As Good as It Gets*, produced and directed by James L. Brooks, in which Jack Nicholson plays the part of a man full of compulsive neuroses: These last were his most obsessive norms, and decisive for his behaviours. Cf. Section 15.4.

theory would derive from this norm in the abstract—independently of states of affairs or events occurring in the reality that is—such further norms of conduct as "It is binding per se to take off one's hat before a lady," "It is binding per se to bow when inviting a lady to dance," "It is binding per se to refrain from using foul language before a lady," and of course "It is binding per se to refrain from punching a lady in the face." None of the norms now made to derive hypothetically from "It is binding per se to be kind to ladies" require or presuppose that any valid tokens occur which instantiate the conditioning type of circumstance set forth in this norm, nor is it required that such tokens be subsumed under the same type of circumstance. The believer infers the derivative norms, *continuo ratiocinationis filo*, proceeding exclusively and in the abstract from the type of action "being kind":[6] *per modum conclusionum*, to use the words of Aquinas (*Summa Theologiae* (a), 1.2, q. 95, a. 2).

For this reason—because they are derived *a priori*—these normative systems may be classed as static normative systems (using Kelsen's terminology).[7]

[6] Cf. Wolff 1969, §§ 39, 43, 44. The examples just made are mine, not Wolff's. The reader may want to look at pars III ("De imperio et obligationibus atque juribus inde nascentibus": "On sovereignty, and on the obligations and rights that spring therefrom." On the Latin term *imperium*, see Section 3.6.3, footnote 21.), sectio I ("De imperio privato": "On private sovereignty"), caput II ("De Matrimonio, seu societate conjugali": "On matrimony, or the conjugal society"), § 854 ("De obligatione generis humani conservandi et coitu licito": "On the obligation to preserve the human race and the licit coitus"), to see how Wolff deduces, *continuo ratiocinationis filo*, the details of what a correct sexual conduct between spouses should be like. In § 39 Wolff writes, "*Lex* dicitur regula, juxta quam actiones nostras determinare obligamur. Vocatur autem *naturalis*, quae rationem sufficientem in ipsa hominis rerumque essentia habet." ("A norm [*lex*] is said to be a rule in accordance with which we are obligated to determine our actions. A norm [*lex*] is said to be natural when it finds its sufficient reason in the very essence of men and things.") In § 43 Wolff sets out as follows his *principium generale Juris naturae*: "*Lex naturae nos obligat ad committendas actiones, quae ad perfectionem hominis atque status ejusdem tendunt, et ad eas omittendas, quae ad imperfectionem ipsius atque status ejusdem tendunt.*" ("The natural norm [*lex*] obligates us to perform those actions that tend to the perfection of man and of man's condition, and to omit to perform those actions that tend to the imperfection of man and of man's condition.") Wolff goes on with these words: "Atque hoc *principium Juris naturae* generale ac universale est, ex quo continuo ratiocinationis filo deducuntur omnia, quae Juris naturae suae, prouti ex sequentibus abunde elucescet." ("And this principle of what is right by nature [the law of nature] is general and universal, and from it is deduced, following a continuous line of reasoning, all that by its own nature is right, as clearly emerges from what follows.") In § 854, Wolff, proceeding upon the *principium generale Juris naturae* (§ 43), and following a continuous line of reasoning (*continuo ratiocinationis filo*), comes at his conclusions in regard to the sexual behaviour of spouses. I will not get into this detail, for this book may end up in the hands of minors. If you want to find out more, you know where to find the original, in Latin. The English translations in this footnote are mine.

[7] Kelsen presents the following example of a static normative system: "For example, the norms 'you shall not lie,' 'you shall not cheat,' 'keep your promise,' and so on are derived from a basic norm of truthfulness. From the basic norm 'love your neighbour,' one can derive the norms 'you shall not harm others,' 'you shall help those in need,' and so on" (Kelsen 1992, 55). The German original: "Die Normen etwa: du sollst nicht lügen, du sollst nicht betrügen, du

By contrast, normative systems that develop as I have shown them to develop are systems that get inferred *a posteriori* from norms of conduct according to a process as follows.

Let us take the primitive norm "The well-off must aid the needy." This norm sets forth the type of circumstance "someone being well-off, plus someone else being needy"; every valid token of this type will get subsumed thereunder and stated as the second premise of a syllogism; so we might have, in the example, "Rob is well-off and Francis is needy"; in conclusion, the type of action "aiding" (conditionally connected in the primitive norm with the type of circumstance "someone being well-off, plus someone else being needy") will, by inference, become normatively required with respect to anyone who has actually and validly instantiated the type of circumstance: We will therefore have produced, by inference and *a posteriori*, the derivative norm "Rob (being well-off) must aid Francis (for she is needy)."

Normative systems, as I present them, are therefore clearly dynamic (in Kelsen's terminology again: cf. Kelsen 1934, 62–3; Kelsen 1960, 198–200) because they get inferred *a posteriori*. And unlike what happens in Kelsen's theory, both systems, as I have constructed them here, are dynamic: those derived from norms of conduct (in this section) and those derived from competence norms (in the following section).

In my understanding, a normative system is static when, given a type of action believed to be binding per se under certain conditions, any other type of action included in that type of action will also be assumed to be binding per se under the same conditions. For an illustration we can go back to the example adduced a moment ago, the norm "It is binding per se to be kind to ladies": From the type of action set forth in this norm, "being kind," four other norms of conduct were derived *a priori* (their types of action being "hats off," "bowing," "no foul language," and "no punching"); that is, they were derived independently of any valid tokens occurring or not occurring that would instantiate the type of circumstance ("having a social exchange with a lady") set forth in the initial norm which the type of action ("being kind") is conditionally connected with.

In my understanding, again, a normative system is instead dynamic when, given a norm **n**—whatever type of action is therein set forth, and whether **n** is a norm of conduct or a competence norm—no derivative norms can be inferred from **n** unless valid tokens obtain or occur in the reality that is which instantiate the conditioning type of circumstance set forth in **n**, and unless these tokens are subsumed under the same type of circumstance. The dyna-

sollst dein Versprechen halten usw., leiten sich ab aus einer Grundnorm der Wahrhaftigkeit. Auf die Grundnorm: du sollst die anderen Menschen lieben, kann man die Normen zurückführen: du sollst einen anderen nicht verletzen, du sollst ihm in der Not beistehen usw." (Kelsen 1934, 63).

mism, on my characterisation of dynamic systems, does not result solely from the reality that ought to be, but from this reality *and* from the fact of certain states of affairs obtaining—or certain events occurring—in the reality that is: Dynamic normative systems cannot be but *a posteriori*.

7.3. Proliferation from Competence Norms

A clear-cut distinction exists in legal literature between norms of conduct and competence norms. The distinction is fundamental even though from a conceptual point of view it is not so radical as most people claim, since competence norms are ultimately themselves norms of conduct.

The content of a norm of conduct is a compound type. Thus, a norm of conduct can contemplate any type of action (such as "not killing," "not stealing," or "shaking hands with one's right hand"), a type of action that will be believed to be binding per se anytime a relevant type of circumstance should get validly instantiated.

A competence norm is a norm of conduct whose type of action always consists in obeying. The type of circumstance with which a competence norm connects this type of action specifies who or what the obedience is to be given to (more on this in Section 8.2.1).[8]

Civil-law dogmatics identifies a kind of norm of conduct called a renvoi-norm. A renvoi-norm remits to external standards or methods the determination of its type of action. Imagine the following examples: "The well-off must aid the needy to the extent established by local usage" or "to the extent suggested by the charity programs set up by parish priests." In these cases the determination of the type of action "aiding" is remitted to external standards or methods.[9]

A competence norm is itself a renvoi-norm: It remits the determination of its type of action, "obeying," to qualified directives that are provided by the valid tokens (valid instances) of the conditioning type of circumstance set forth in the same competence norm.

Let me draw on the Bible for an example of a competence norm.

> And it came to pass after these things, that God did tempt Abraham, and said unto him, Abraham: And he said, Behold, *here* I *am*. [2] And he said, Take now thy son, thine only *son* Isaac, whom thou lovest, and get thee into the land of Moriah; and offer him there for a burnt offering upon one of the mountains which I will tell thee of. [3] And Abraham rose up early in the morning, and saddled his ass, and took two of his young men with him, and Isaac his son, and clave the wood for the burnt offering, and rose up, and went unto the place of which God had told him. [4] Then on the third day Abraham lifted up his eyes, and saw the place afar off.

[8] A good overview on competence norms in the contemporary debate can be found in Spaak 1994 and 2003.

[9] There are at least a broad and a narrow meaning of "standard." Here I use "standard" in its broader sense (which takes in the narrow sense). On this question, see Pattaro 1988.

[5] And Abraham said unto his young men, Abide ye here with the ass; and I and the lad will go yonder and worship, and come again to you. [6] And Abraham took the wood of the burnt offering, and laid *it* upon Isaac his son; and he took the fire in his hand, and a knife; and they went both of them together. [7] And Isaac spake unto Abraham his father, and said, My father: and he said, Here *am* I, my son. And he said, Behold the fire and the wood: But where *is* the lamb for a burnt offering? [8] And Abraham said, My son, God will provide himself a lamb for a burnt offering: so they went both of them together. [9] And they came to the place which God had told him of; and Abraham built an altar there, and laid the wood in order, and bound Isaac his son, and laid him on the altar upon the wood. [10] And Abraham stretched forth his hand, and took the knife to slay his son. [11] And the angel of the Lord called unto him out of heaven, and said, Abraham, Abraham: And he said, Here *am* I. [12] And he said, Lay not thine hand upon the lad, neither do thou any thing unto him: for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only *son* from me. [...] [13] And Abraham lifted up his eyes, and looked, and behold behind *him* a ram caught in a thicket by his horns: and Abraham went and took the ram, and offered him up for a burnt offering in the stead of his son. [14] And Abraham called the name of that place Jehovahjireh: as it is said *to* this day, In the mount of the Lord it shall be seen. (Genesis 22:1ff.)

Abraham was an abiding nomic believer; in particular, he believed in and abided by the competence norm "It is binding per se to obey (type of action) God's every command (type of circumstance)."

The conditioning type of circumstance is validly instantiated through a token when God orders Abraham to sacrifice his only and beloved son, Isaac. Abraham, though painfully and tragically affected by what is to come, subsumes this token, God issuing an order, under the conditioning type of circumstance set forth in the competence norm (which Abraham has deeply internalised) and infers the norm "It is binding per se that I sacrifice Isaac to God," a derivative norm of conduct under which he is himself the actual duty-holder.

Abraham is driven to obey the derivative norm of conduct not because he believes its content ("sacrificing Isaac") to be binding per se (in fact he would consider the opposite content, "not sacrificing Isaac," to be binding per se), but because he believes obedience to God's commands (competence norm) to be binding per se (binding irrespective of their content), and "sacrificing Isaac" is the content of a command issued by God.

God's issuing an order drives Abraham to action because that is a valid token of the conditioning type of circumstance set forth in the competence norm which Abraham has internalised through socialisation processes (cf. Section 15.2.5), and on account of which he believes it binding per se to obey God's commands, meaning that he understands these commands to create norms.

Notice that the issuing of the subsequent order, "Lay not thine hand upon the lad, neither do thou anything unto him," is also a token which validly instantiates the type of circumstance set forth in the competence norm "It is binding per se to obey (type of action) God's every command (type of circumstance)."

The sequence of God's two orders is similar, in a way, to what happens with the second instantiation of the type of circumstance set forth in the first

norm of conduct considered in Section 7.2: This sequence is similar to the sequence of tokens "Loretta being in a state of need" and its cessation, "Loretta no longer being in a state of need (having found her way out of her troubles)." Indeed it might be said—in the manner of a voluntaristic theory—that with Abraham, God first wanted Isaac sacrificed and then no longer wanted this sacrifice. Or again it might be said—on the mental-reservation theory that is part of the voluntaristic theory of law—that God never wanted Isaac sacrificed in the first place, and that Abraham could learn of God's mental reservation only upon receiving God's second order, "Lay not thine hand upon the lad, neither do thou anything unto him."[10]

From the standpoint of a non-voluntaristic theory, however, a difference does exist between the two conditions Loretta finds herself in (being needy and being no longer needy) and the two orders that God directs at Abraham ("Sacrifice Isaac" and "Do not lay your hand on the lad"). In Loretta's case, a valid token of the type of circumstance occurs and then ceases to be; in God's case, two successive valid tokens of the type of circumstance occur, and the second token is incompatible with the first. We could say that with God's two valid orders the second somehow cancels out the first, causing it to cease to be. However, this is not the more appropriate way to explain what happens here: What we can say, actually, is that it is impossible to comply with both orders, because they are incompatible, and that Abraham no longer considers God's first order to be normative. The reason why he no longer considers it normative is a different matter having to do with the competence norm internalised by Abraham (a matter that jurists deal with under the heading "implicit abrogation").[11]

In conclusion, a competence norm is a norm of conduct: It is a renvoi-norm of conduct whose peculiar type of action consists in obeying anytime the type of circumstance "issuing directives, texts, or messages" gets validly instantiated. These directives, texts, and messages provide a content (or different contents at different times) for the type of action "obeying." The type of circumstance found in a competence norm sets forth who will issue the directives, texts, or messages to be obeyed; when, how, and on what matters these persons may do so; or even how the messages to be obeyed should be surmised from certain events or states of affairs. In ancient Rome, for example, people would not take momentous initiatives unless they had considered

[10] Even to this day there can still be found, under Article 116 of the German Civil Code (*Bürgerliches Gesetzbuch*), a provision made for mental reservation: "A declaration of intention is not void by reason of the fact that the declarant has made a mental reservation of not being in favor of the declaration made. The declaration is void if made to a person who is aware of the reservation" (*The German Civil Code*, art. 116). The German original: "Eine Willenserklärung ist nicht deshalb nichtig, weil sich der Erklärende insgeheim vorbehält, das Erklärte nicht zu wollen. Die Erklärung ist nichtig, wenn sie einem anderen gegenüber abzugeben ist und dieser den Vorbehalt kennt."

[11] On this, see, in Volume 5 of this Treatise, Sartor, Section 5.3.

the auspices drawn from birds' flights or animal entrails: It was the norm that they should act in keeping with the message drawn from such auspices. This was a competence norm: If the type of circumstance set forth therein was validly instantiated by birds' flights or by animal entrails, then these tokens would—by way of their valid instantiation—cause their supposed message to be viewed as normative, and to be complied with on this motive. The types of circumstance specified in competence norms are institutive of authority (Section 9.6). Indeed, obedience is due to the directives of authority, and in ancient Rome the authority of the gods or of fate was revealed through the auspices drawn from birds' flights or from animal entrails.

Let us now get back to my personal reality that ought to be, as introduced in the previous section. My normative system was developed proceeding solely from norms of conduct: It is made up of four primitive norms of conduct (**n**, **g**, **h**, and **i**) and three derivative norms of conduct (**n1**, **n2**, and **n3**).

Let us now add just one competence norm, **o**, to my personal normative system and observe how the system will become much more complex.

I will not say that my competence norm **o** is the same which Abraham believed in, the naive "It is binding per se to obey (type of action) God's every command (type of circumstance)." I am living in the 21st century, in a hyper-developed society where technology and science are pervasive: I am a rationalist, practical-minded believer, so my competence norm **o** will rather be a sophisticated "It is binding per se to obey (type of action) the most visited Internet horoscope (type of circumstance)." Therefore, let us now add to my personal normative system the primitive competence norm **o**, "It is binding per se to obey (type of action) the most visited Internet horoscope (type of circumstance)."

The most visited Internet horoscope—I take such horoscopes to be the highest authority—issues the directive **l**, "The well-off must give up all sexual activity and replace it with yoga exercises." Directive **l**, insofar as it proceeds from the most visited Internet horoscope, validly instantiates the conditioning type of circumstance set forth in **o**.

In turn, the conditioning type of circumstance set forth in **l** ("someone being well-off") finds a valid actual token in Rob.

Rob, whom I already hold to be bound per se to aid the needy, will come to think that it may be more convenient to be needy than wealthy. Rob's reasoning, however, is not deontologically oriented: It is not a normative reasoning. It is rather a utilitarian line of reasoning, teleologically aimed at furthering his own wellbeing.

Unlike Rob, I am a believer in **o** and will reason normatively by subsumption and inference as follows.

(*i*) Subsumption. The issuing of directive **l** is a valid token of the conditioning type of circumstance set forth in competence norm **o**: It is a directive validly issued by the most visited Internet horoscope.

(*ii*) Inference. It is binding per se to obey directive **l**; that is, **l**, too, is a norm: Its type of action ("giving up all sexual activity and replacing it with yoga exercises") will have to be performed whenever its conditioning type of circumstance ("being well-off") gets validly instantiated.

(*iii*) Subsumption. Rob's being well-off is a valid token of the conditioning type of circumstance set forth in **l** (which to me is a norm).

(*iv*) Inference. "It is binding per se that Rob give up all sexual activity and replace it with yoga exercises." This is a derivative norm of conduct, and I will call it **l1**.

My personal normative system—the reality that ought to be which I have internalised—now comprises ten norms: **n**, **n1**, **n2**, **n3**, **g**, **h**, **i**, **o**, **l**, and **l1**.

Of them, **n**, **g**, **h**, and **i** are primitive norms of conduct; **n1**, **n2**, and **n3** are derivative norms of conduct coming by subsumption and inference from the primitive norm of conduct **n**; **o** is a primitive competence norm. Let us look now at **l** ("The well-off must give up all sexual activity and replace it with yoga exercises"): First, this is a directive whose issuance is subsumed under the type of circumstance set forth in the competence norm **o**; second, in consequence of this subsumption we have (in addition to the major premise, "It is binding per se to obey the most visited Internet horoscope") the minor premise "**l** is a directive validly issued from this horoscope"; third, it follows, by inference from these two premises, that **l** ("The well-off must give up all sexual activity and replace it with yoga exercises") comes to also be a derivative norm of conduct. As for **l1**, this is in turn a derivative norm of conduct inferred from **l** upon subsuming Rob's being well-off under the type of circumstance set forth in **l**.

The believers whose normative systems contain at least one competence norm will thereby be equipped with an inferential engine with which they can develop and diversify their reality that ought to be faster than without such an engine, provided, however, that the same engine is fed by directives, or texts, or otherwise by qualified messages whose issuing validly realises (performs or instantiates) the conditioning type of circumstance set forth in the competence norm. By virtue of this norm-derivation process, a norm, be it a norm of conduct or a competence norm, can *create* derivative norm (norms of conduct or competence norms) and as such can be called the *parent norm* of these derivative norms (cf. Section 8.2.6.1). Once an inferential engine of this sort gets installed in the brain of a believer, we can say that authority (the generalised other: Section 15.3.4) has been therein installed.

Norms are strictly speaking individual phenomena because—granted that they exist—they exist in people's brains, even though the same people internalise them from their family, social environment, and culture. The external sociocultural world moulds people's personality and generalised other and their reality that ought to be, and does so reaching into the deeper strata of personality (cf. Section 15.3.4).

The norm-derivation processes—whereby we subsume valid tokens under conditioning types of circumstance and infer derivative norms from other norms (norms of conduct or competence norms)—are individual processes, too, and the personal normative systems (the reality that ought to be) these processes produce and develop in believers are likewise, strictly speaking, individual. But again, these individual norm-derivation processes take place in society, and the individual normative systems—the reality that ought to be they produce in human brains—are embedded in social settings that control these systems and cause them to be widely shared among the members of society (see Sections 8.1, 15.3, and Chapter 10). That a competence norm can be a parent norm to derivative norms of conduct as much as to derivative competence norms is intuitive. But note that a norm of conduct can be a parent norm to derivative norms of conduct (cf. Section 7.2) as much as to derivative competence norms; such is the case with the norm of conduct "Promises must be kept" (*Pacta sunt servanda*), for example, which can be a parent norm to norms of conduct as much as to competence norms (cf. Section 3.6.2).

Part Three

Family Portraits. Law as Interference in the Motives of Behaviour

The damaging attacks upon a prevalent system of Absolute Idealism that had degenerated into an academic orthodoxy, which were launched almost simultaneously early in the present [20th] century by Hägerström and his followers in Uppsala and by Moore and Russell in Cambridge, occurred in complete isolation from each other. Again, the development of various forms of what I will call "non-predicative" analysis of deontic and evaluatory sentences in the indicative, which began in England and the USA *between the First and the Second World War and has been pursued with such energy by so many able writers ever since, was initiated and has continued in complete ignorance of Hägerström's somewhat earlier and extremely thorough version of the same type of theory. Lastly, the "anti-metaphysical" evangelicism, which may perhaps now be described as the last word but two in much Anglo-Saxon philosophy, was anticipated, unknown to its English and American protagonists, by Hägerström in the slogan "*praeterea censeo metaphysicam delendam esse*."*

(C. D. Broad, *Memoir of Axel Hägerström*, 1964)

Hägerström was throughout his life essentially a highly religious and a highly dutiful man. He arrived, indeed, at what many would regard as a "nihilistic" analysis of morality and of religion. But, unlike many "analytic" philosophers, he had at any rate first-hand religious experience and first-hand experience of moral conflict and of acting from a sense of duty in face of serious obstacles, as the factual basis for his analyses. And, in spite of his "nihilistic" theories, he continued to the end to value genuine religion and genuine morality as springing from the deepest roots in human nature and bearing the finest flowers in human life.

(C. D. Broad, *Memoir of Axel Hägerström*, 1964)

Chapter 8

NO LAW WITHOUT NORMS

8.1. Family Portraits. A Normativistic Gallery: Axel Hägerström, Karl Olivecrona, and H. L. A. Hart 1961

8.1.1. A Caution for All Visitors

The kind of normativism maintained by the Uppsala School—a normativism occurring in similar terms in Hart 1961[1]—I have always considered to be the most satisfactory and adequate, the way I understand norms and their role in the machinery of law: Jerzy Wróblewski (1926–1990) used to tell me, "Enrico, Scandinavian legal realism is no longer cultivated in Scandinavian countries. It is now cultivated in Italy, with you." This was not necessarily a compliment (even if it was Jerzy's intention to make one). It may also be a token of commiseration, as in: "This malefic legal-philosophical trend, Scandinavian legal realism, has finally and fortunately disappeared from Scandinavia. But now a madman in Bologna, Italy—Enrico Pattaro—is regrettably pushing forward with the reckless ideas advanced by the Uppsala School."

Be that as it may, I feel comfortable in making the five points illustrated in the following Sections 8.1.2 through 8.1.6.

8.1.2. A Critique of Voluntarism in Favour of Normativism

Axel Hägerström developed a convincing critique of the voluntaristic theories of law, and showed that they give no satisfactory account of the idea of Ought (what throughout this volume I am calling "the reality that ought to be")[2] and

[1] The normativist Hart who appears in this gallery is Hart 1961, from which I will quote. What transpired since 1961—i.e., Dworkin's criticism of Hart, the replies made to Dworkin by several scholars, and Hart's *Postscript*, published posthumously in 1994 (Hart 1997), along with the ensuing debate (in the *Postscript* Hart makes important revisions to the views expressed in 1961)—resulted in a perceptibly modified picture. For this reason, the portrait of Hart chosen for this gallery is the portrait of him in 1961. I will comment in Section 8.3 on the modified picture as handed down to us by Hart in the *Postscript*.

[2] Hägerström's critique applies to exponents of different kinds of legal voluntarism. A few examples are Thomas Erskine Holland (1835–1926), Otto Friedrich von Gierke (1841–1921), Georg Jellinek (1851–1911), Rudolf Stammler (1856–1938), and John William Salmond (1862–1924). Cf. Hägerström, *Är gällande rätt uttryck av vilja?* of 1916 (an English translation of this paper appears in Hägerström 1953b, by C. D. Broad (1887–1971), under the title "Is Positive Law an Expression of Will?" The original Swedish version can be found in *Rätten och viljan: Två uppsatser av Axel Hägerström*, edited by K. Olivecrona: Hägerström 1961). The collection of writings by Hägerström, *Inquiries into the Nature of Law and Morals* (Hägerström 1953a), translated by C. D. Broad, and edited by Karl Olivecrona, is very useful, but it unfortunately

more generally of the factors in virtue of which a legal system stands, and stands through change, and operates—is in force—among a given people in a given territory.

Hägerström combined his metaethical and meta-juridical noncognitivism (his sharp criticism of the reification of the ideas of "norm," "obligation," "rights," "binding force of law," and the like) with a fecund understanding of the central role of the ideas of "norm," "obligation," "rights," and "binding force of law" in social life. Hägerström does not confine himself to a sociological and operative characterisation of norms; he also enters into an analytical determination of them, a conceptual definition, which he arrives at through an attentive logical and psychological scrutiny of the concepts of command and duty. There are reflected in this scrutiny the main tenets of Hägerström's theory of reality and of knowledge.[3]

Axel Hägerström's "antimetaphysical" philosophy proved much more open and farsighted in its approach to ethical and juridical questions than did logical empiricism,[4] and at the same time it foreshadowed some important and largely influential views that H. L. A. Hart would successfully maintain some forty years later in his 1961 *Concept of Law*.

In 1955, six years before publishing *The Concept of Law*, Hart brought to the public his evaluation of Hägerström's work, presenting Hägerström as a forerunner, so to speak, of his own normativism:

There is [in Hägerström's work] a most original examination of the character of those fundamental constitutional rules to be found in every legal system which specify the legislative organ and what must be done if valid enactments are to be made by it. Hägerström shows that the terminology of will or command used by legal positivists leads to neglect of the special character of such fundamental or basic rules; either the legal positivists will treat the commands of the person having the *de facto* power as law and so will neglect the fact that in any but the most extreme despotism such commands will only rank as laws if they comply with antecedent constitutional rules as to the manner and method of enactment; alternatively recognizing the importance of these fundamental constitutional rules the legal positivist falsifies their character by treating them as commands or "expressions of the will" of members of the community. But no one has ever willed or commanded that what the King in Parliament enacts shall be law; it is a rule (of

contains a few mistranslations that have contributed to making Hägerström's thought difficult to understand—a thought whose prose, to make matters worse, is in its original language not infrequently recondite. Some of these mistranslations I mention in Pattaro 1974, 80–104. I have sometimes found it necessary to avoid Broad's translation.

[3] Cf. Pattaro 1974, 29–66. Hägerström devotes to this scrutiny much of his chief work on the philosophy of law, *Till frågan om den objektiva rättens begrepp. I. Viljeteorien* (Hägerström 1917, translated in Hägerström 1953a as "On the Question of the Notion of Law: The Will-Theory," a title I would rather see translated as "On the Problem of the Concept of What Is Objectively Right. I. The Will-Theory"), and he also devotes to it a series of posthumously published lectures (Hägerström 1963).

[4] Logical empiricism, in its initial phase at least, stopped short and developed only the critical and trenchant side of analytical reflection on ethics and law. This was not the case with Hägerström and the Uppsala School (Pattaro 1974, 58ff.).

course much vaguer than this verbal formulation suggests) which has come to be accepted and rests on a whole mass of heterogeneous factors such as tradition, inertia, patriotism, fear. To compare fundamental rules of this kind to commands or acts of the will is, an "anthropomorphization" and is as absurd as supposing "that a moral climate depends on a popular resolution to maintain it." This is *a real contribution* to the elucidation of the feature which Kelsen considered was at the root of all legal systems and which he termed the *grundnorm*. (Hart 1955, 372–3; italics added on second occurrence, in original on all other occurrences)

So then, if I am a madman, I feel like I am in good company.

8.1.3. Norms versus Commands

8.1.3.1. Diversity among the Contextual Requirements

There are, in Hägerström's view, crucial differences between norms and commands (cf. Section 9.3). Among these differences, in my restatement of them, are those illustrated in Sections 8.1.3.1 through 8.1.3.4.

There need not be, in order for a norm to work (as a motive of behaviour, I should add), any special relationship between the person "issuing"[5] the norm and those the norm applies to. By contrast, a command—meaning a directive that is effective due to suggestion—does require such a special relationship between issuer and receiver: "With commands, the imperative expression [literally, the commanding expression] works through a special relation of the receiver to the commanding person" (Hägerström 1917, 115; my translation).[6]

Norms are not commands but "independent imperatives" in the sense that Olivecrona ascribes to this expression (Olivecrona 1939, 42ff.).[7]

Hart, too, would emphasise that the contextual requirement for a command to be effective is a "face-to-face situation," where a relationship obtains

[5] This is the usual form of expression, even if, properly speaking, norms cannot be issued, or enacted (cf. Section 8.2.4).

[6] The Swedish original: "Vid befallningen verkar befallningsuttrycket genom mottagarens säregna relation till den befallande." Cf. Hägerström 1953c, 193. In my terminology, in Hägerström's thought, and in the thought of Olivecrona (Section 9.3), a command is a directive that is effective due to suggestion. Hägerström dedicates Chapters 4 through 8 of *Till frågan om den objektiva rättens begrepp* to a characterisation of commands as clearly distinguished from norms. Hart entitles Chapter 2 of *The Concept of Law* "Laws, Commands and Orders," where he distinguishes, among other things, orders supported by threats (a topic I treat in Section 9.4) from commands (especially the commands of military authorities; Hart 1961, 19–20). Hart enters into this analysis to draw in the ensuing chapters (and similarly to Hägerström) a clear distinction between "rules," on the one hand, and "commands" or "orders," on the other. That Hart 1961, 132–7 (in a section devoted to the varieties of rule-scepticism) should discuss American legal realism at length without even making any mention of Scandinavian legal realism (which last he knows well: cf. Hart 1955; 1959; 1961, 10, 233, 235, 240, 243) is perfectly coherent with his acknowledgment that Hägerström and Olivecrona give a real contribution to a satisfying conception of normativeness. Cf. Section 8.1.6.

[7] Olivecrona published two editions of *Law as Fact*, the first in 1939 (Olivecrona 1939) and the second in 1971 (Olivecrona 1971). In reality we have to do here with two different books.

between giver and recipient, a relation consisting of a "mere temporary ascendancy" of the former over the latter.[8] Norms, on the contrary, do not require any face-to-face situation: Their characteristic is to be "standing," "persistent," "enduring and settled," and that independently of any relation between issuer and receiver (Hart 1961, 23 and 24). It is worth noticing, with "standing" as used by Hart, that Olivecrona writes of laws (in Swedish) that they are *fristående imperativer* (literally equivalent to the English "freestanding imperatives"): He means by this Swedish expression what he calls "independent imperatives" in his English writings (Hart 1961, 21, 23, 24; Olivecrona 1939, 42ff.; Olivecrona 1966, 132ff.).

Hart, under the heading "Scandinavian legal theory and the idea of a binding rule," notices the following about the normativism of the Uppsala School:

> The most important works of this school, for English readers, are Hägerström (1868–1939), *Inquiries into the Nature of Law and Morals* (trans. Broad 1953) and Olivecrona, *Law as Fact* (1939). The clearest statement of their view on the character of legal rules is to be found in Olivecrona [...]. His criticism of the predictive analysis of legal rules favoured by many American jurists (see op. cit., pp. 85–88, 213–15) should be compared with the similar criticism in Kelsen, *General Theory* (pp. 165ff., "The Prediction of the Legal Function"). It is worth inquiring why such different conclusions as to the character of legal rules are drawn by these two jurists in spite of their agreement on many points. (Hart 1961, 233)[9]

8.1.3.2. What Is Objectively Right: The Internal Point of View, a Point of View Internalised in the Brains of Believers, and Which Manifests Itself in Their Use of a Typically Normative Language

With norms, but not with commands, the required action is regularly "represented as the *right* or *correct one* under the given circumstances" (Hägerström 1917, 74; my translation; cf. Hägerström 1953c, 144, and Hart 1961, 56–7).[10]

With norms, there is in the mind of those a norm applies to (if they are believing duty-holders, I should add: nomia, Section 6.5) a "consciousness of an obligation [*ett medvetande om skyldighet*]" to do the required action, because this action is the right one, and this consciousness is connected with a feeling of duty. Let me stress here, against so many misinterpretations of Hägerström's thought, that what is crucial in his conceptual characterisation

[8] Oliverona called this temporary ascendancy by a more specific name, "suggestion": "Austin's definition of a command is mistaken. He says: 'If you express or intimate a wish that I shall do or forebear from some act, and if you will visit me with evil in case I comply not with your wishes, the expression or intimation of your wish is a command.' The *suggestive* character of the command is overlooked. Instead Austin lays stress on *threats*, which are often added to the command but must be distinguished from the command itself" (Olivecrona 1939, 213).

[9] An attempt to carry out the inquiry Hart refers to may be found in Pattaro 1966, 1968, 1971, 1974, and 1982.

[10] The Swedish original: "Handlingen föreställes reguliärt som den *rätta* eller *riktiga* under föreliggande omständigheter" (Hägerström 1917, 74).

of norms is the consciousness of an obligation (*ett medvetande om skyldighet*); also very important is the feeling of duty, because norms as motives of behaviour depend for their efficacy on the intensity of this feeling, but then Hägerström does not identify norms with any attendant feeling of duty: He refers to norms not as feelings of duty, but as states of a consciousness of duty or as ideas of norm. (Whether he is right or wrong in making this claim is a different matter.)

And it is on this conception of norm that Hägerström bases the distinction between norm and command, a distinction that he considers essential to our understanding of the legal phenomenon (as Hart does too, writing some time later than Hägerström; we saw in Section 8.1.2 how Hart appreciates the work of Hägerström). There is not a consciousness of a duty in the case of the recipient of a command, even if this person experiences feelings of conative impulse and of internal compulsion similar to the feelings of duty experienced by someone having a consciousness of an obligation. This consciousness (this belief) is what from the internal point of view (in Hart's terminology) makes the difference between norm and command in an agent who acts from a norm versus an agent who acts from a command (Hägerström 1953c, 193; cf. Hägerström 1917, 116).

With reference to a norm, but not with reference to a command, people (the believers, in my terminology: doxia, Section 6.2) use a peculiar kind of apophantic sentence: They state the existence of an obligation, or duty, as in "Holding this behaviour *is* my duty [*denna handling* är *min plikt*]" or "I *am* under an obligation to act thus [*jag* är *pliktig att så handla*]" (Hägerström 1953c, 132; cf. Hägerström 1917, 64–5).

In a similar vein, Hart would write that when we have a norm (a "rule," in Hart's usage), its matter-of-fact existence finds its characteristic expression in the use of normative language in sentences like "I (You) ought to [...]," "I (You) must do that," "That is right," "That is wrong" (Hart 1961, 54, 55, 56).

Someone looking to have a grasp of the conception of norms that Hägerström developed in the second decade of the 20th century will find it quite helpful to compare this conception with the theory of the generalised other that Hans Gerth and Charles Wright Mills presented in 1953 following in the wake of George H. Mead (1863–1931). I will get to this theory and give it a brief statement in Sections 15.3.2 and 15.3.4.

8.1.3.3. Universalisability of Norms (Catholodoxia)

People (the believers, in my terminology: doxia, Section 6.2) take it for granted that norms, but not commands, hold for everyone within a given group.

As Hägerström puts it, "it may be so that, in my conception [as a believer], a certain action belongs to this system [to the reality that ought to be, in my usage] given the situation I find myself in. But I will always believe that the same action, given the same situation, would be the right one [*det rätta*] for anyone else

whose individual profile is the same as mine [literally, for anyone "with the same individual determination": *med samma individuella bestämdhet*]" (Hägerström 1917, 85, my translation; cf. Hägerström 1953c, 157).[11] Whence the moral indignation and disesteem for people who fail to perform the right action.

As Hart puts it, when a rule exists, a certain behaviour is regarded "as a general standard to be followed by the group as a whole" (Hart 1961, 55).

In these and other like passages, Hägerström and Hart make at least an implicit reference to universalisability (which in Section 10.2.1 I call catholodoxia).

8.1.3.4. Justified Reaction to Transgression (Dikedoxia)

Hägerström says that, with norms, the idea of obligation makes people (the believers, in my terminology: doxia, Section 6.2) regard it as right to coerce the duty-holder to perform the behaviour he or she has omitted to perform (a behaviour that was due), and as an obligation for the duty-holder to submit to such coercion. This is so because the idea of obligation makes people regard the performance the noncompliant duty-holder is coerced to as a performance equivalent (*ekvivalent prestation*) to the right action the duty-holder was under an obligation to perform and did not.[12]

[11] The Swedish original: "Det må så vara, att det enligt min uppfattning hör till detta system ett egenartadt handlande under den för mig föreliggande situationen. Men alltid menar jag därvid, att för en annan person med samma individuella bestämdhet och i samma situation skulle samma handlande vara det rätta" (Hägerström 1917, 85). Ibidem, 116: "Men i det befallningsuttrycket blir antaget som real bestämning hos ett handlingssystem, blir idéen om ett visst handlande såsom det för annan person i ett föreliggande fall rätta möjlig, och befallningsuttrycket verkar vid idéens inträdande en viljeimpuls äfven i afseende å annan persons handlande, framträdande i sådant som den moraliska indignationen och rättskänslans kraf *och gifvande ett medvetande om skyldigheten för annan person att så handla*" (italics added). Here is Broad's English translation: "But, in so far as the expression of command is taken as a real property of a system of conduct, the idea becomes possible of a certain action being the right one for another person in a given case. Here the expression of command produces a conative impulse in reference to another person's action, when the idea of its rightness occurs. And in such cases the conative impulse manifests itself as moral indignation and the demands of the sense of justice [of sense for what is right: *rättskänslans*], and *it gives rise to a consciousness of an obligation on the part of the other person to act this way*" (Hägerström 1953c, 193; italics added). The italicised words in the English translation can prove ambiguous: It might be questioned whether "on the part of the other person" should logically attach to "consciousness of an obligation" or only to "an obligation." If the reference is to "consciousness" we can take this to mean that there arises *in the other person* a consciousness of an obligation to act in such and such a way. In the Swedish, instead, Hägerström is saying that there arises in *me* a consciousness of an obligation for the other person to act in such and such a way. Thus, the difficulty in reading Hägerström (whose language is univocal on this occasion) is compounded, in translation, by an ambiguity of expression that may cause the reader to misinterpret.

[12] There is a difference between "right coercion" and "just coercion." Cf. Section 10.2.2.

As Hart puts it, when a rule exists, not only do we have a convergence or identity of behaviours within the group, but also deviations from standard behaviour are regarded "as lapses or faults open to criticism," and that criticism is not just "in fact made, but deviation from the standard is generally accepted as a *good reason* for making it." In other words, criticism is considered "legitimate or justified" (Hart 1961, 54–5, 112).

With commands, in contrast, any coercion attached to disobedience will be considered to be merely a fact without normative qualifications.[13]

8.1.4. In What Sense Can a Norm Be Said to Exist (Doxia)

Hart states that "if a social rule is to exist *some* at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record" (Hart 1961, 55; italics added). He also finds that the statement that someone has or is under an obligation implies the *existence* of a norm (of a "rule," in Hart's usage): "There is involved in the existence of any social rules [social norms] a combination of regular conduct with a distinctive attitude to that conduct as a standard" (Hart 1961, 83).

[13] The Swedish original: "Vidare för pliktidéen med sig, att underkastelsen under ett tvång, som framstår som ekvivalent prestation till ett uraktlåtet rätt handlande, kännes såsom något, hvartill man är skyldig, vare sig det gäller en själf eller andra. Är en gång, såsom fallet är vid pliktidéen, befallningsuttrycket vordet en real bestämning hos ett handlingssystem, öfverföres det på det tvång, som fattas som ekvivalent med det uraktlåtna handlandet i enlighet därmed. Då verkar också i ett föreliggande fall idéen om tvångets rätthet en viljeimpuls mot detsamma—en känsla af skyldighet i afseende å detsamma och därmed också föreställning om real skyldighet. För befallningsmottagaren såsom sådan står det med befallningen i fall af olydnad förbundna tvånget blott som ett faktum, hvars verkningar i afseende å honom själf han söker komma undan så mycket som möjligt. I afseende å andra blir tvånget för honom af betydelse endast genom särskilda intressen, positiva eller negativa" (Hägerström 1917, 116–7). This is Broad's translation, with square brackets added to suggest, for certain Swedish terms, translations different from Broad's: "Moreover, the idea of duty carries with it the thought that submission to a compulsion [coercion: *tvång*], which appears as an equivalent reparation [performance: *prestation*] for an omitted right action, is something obligatory, whether it concerns oneself or another. Once the expression of command has become a real property of a system of conduct, as happens in the case of the idea of duty, it is transferred to the compulsion [coercion: *tvång*] which is regarded as equivalent to the omission to act in accordance with that system. So in any actual case the idea of the rightness of the compulsion [the rightness of coercion: *tvångets rätthet*] produces a conative impulse towards it, *viz.*, a feeling of obligation in regard to it and, along with this, also an idea [representation: *förestallning*] of real obligation. For the recipient of a command as such the compulsion [coercion: *tvång*] which is attached to the order, in case of disobedience to it, is merely a fact, whose consequences as regards himself he seeks to avoid so far as may be. In reference to others compulsion [coercion: *tvång*] is significant for him only through his special interests, positive or negative" (Hägerström 1953c, 194).

Regular conduct is the external aspect of norms. Instead, the attitude of regarding conduct of this type as a standard is the internal aspect of norms (it is a belief, as I would put it). The internal aspect is that which makes the difference between norms (rules, in Hart's usage) and habits (in Hart's usage). Social rules and social habits would seem to be joined by their external aspect (a regular conduct) in that both are social. Or, more appropriately perhaps: The regular conduct is qualified by the internal aspect (a normative attitude) where rules are involved but not where habits are involved.[14]

Note that in civil-law literature the distinction is traditionally made in legal custom between, on the one hand, the external, material aspect of it, meaning regular conduct (*usus agendi*), and, on the other, the internal, spiritual, or psychological aspect, meaning the normative attitude to the conduct in question (the *opinio juris seu necessitatis*)—in my terminology, the belief that it is binding per se to hold the behaviour in question. (See the definition of "custom" provided in Section 6.1.)

We need to be clear on the use of the term "psychological" in speaking of norms. In my use, the word "psychological" serves to make two points, one in the negative and the other in the positive: (*a*) in the negative, norms do not have a reality of their own (for example, a reality outside of space and time, à la Kelsen; cf. Section 14.6, or a reality *in rerum natura*, roughly in the manner of natural-law theories), and (*b*), in the positive, norms exist in human brains, minds, psyches, or souls.[15]

In the *psyche* of people, and hence from a *psychological* point of view, there are feelings, of course, but not only that: There are also the will, beliefs, and ideas (even hypostatised ideas); there is *ett medvetande om skyldighet*, "a consciousness of an obligation," as Hägerström says in discussing the state of mind of those who (in Hart's usage) *accept* a norm. These ideas, says Hägerström, result from a combination of *föreställning* ("representation") and a *viljeimpulse* ("conative impulse")—a phenomenon occasioned in us through social conditioning (cf. Section 15.2.5). And again, the feelings of restriction or compulsion connected with this phenomenon are not in themselves norms, but are rather a typical, and important, accompaniment to them (cf. Section 8.1.3.2, and Pattaro 1974, 138–40).

In Section 6.5, on nomia, I made the distinction between abidance and deviance, a distinction relevant to the *efficaciousness* that norms (beliefs) have on believing duty-holders. Norms exist (doxia), and nomia subsists, in the abiding duty-holder no less than in the deviant duty-holder (each of these two

[14] My conception of the distinction between norm, habit, and practice, and the terminology I use to express this distinction (a terminology different from Hart's), is specified in Section 6.1.

[15] The last two words ("minds" and "souls") are perhaps less crude than the first; but then, even Hart lets in a "putting into the *heads* of ordinary citizens" in discussing the "accepting of rules by the populace" (Hart 1961, 59; italics added).

characters to be understood according to the definitions of them already provided). The greater or lesser efficaciousness of norms as motives of behaviour in nomic subjects will depend on the different contexts surrounding the believing duty-holder and on the competing motives of behaviour (or temptations, in the teaching of the Church) that these contexts will cause the duty-holder to have to deal with or to address. Now, in these cases a norm's efficaciousness on a believing duty-holder will depend on the greater or lesser force of the duty-holder's sense of duty.

8.1.5. Constitutional Norms (Hägerström and Olivecrona) and the Rule of Recognition (Hart)

Hägerström's and Olivecrona's distinction between commands and norms, as well as Hart's later distinction between commands and rules, is meant to show that law, as a system of social guidance and control, cannot be given an account without having recourse to the concept of "norm," and specifically to a concept of norm as Hägerström, Olivecrona, and Hart (1961) understand that concept (and as I do, too, following in their footsteps; but recall that Hart uses "rule," not "norm," to express this concept).

A different matter, at least in part, is the question whether the existence of a modern, complex municipal legal system is based on the existence of an ultimate and supreme rule of recognition, a rule serving the function that Kelsen assigned to his presupposed basic norm (in which regard, as is known, a wide debate has developed that was set off by the criticism that Ronald Dworkin addressed to Hart). Here I take up briefly Hart's rule of recognition only to state a parallel between what he maintains with reference to it and what Hägerström and Olivecrona maintain with reference to constitutional norms. The comparison is designed to confirm that in the line of thought represented in the family portrait of my normativistic gallery there can be no law without normativeness: No law without norms, as the title to this chapter reads (even if norms are not enough: see Chapter 9).

Let us take what Hägerström writes about a hypothetical society based on commands versus another based on norms and compare this account in broad strokes with how Hart similarly imagines things to be if a hypothetical King Rex ruled through habitually obeyed commands rather than on the basis of an actually internalised competence norm (an "accepted rule of recognition," in Hart's usage).

The continuity and persistence of law, as well as legal limitations on legislative power, belongs only to a society based on norms: No such continuity and persistence is possible in a society based on commands (Hägerström 1917, 117–22; cf. Hägerström 1953c, 194–201; Hart 1961, 50ff., 56ff., 97–8).

As Hägerström observes, in every case of state domination (*herravälde*; cf. the German *Herrschaft*: Section 10.2.5), making exception for pure despotism

and mob rule, the persons who wield de facto *power* have above them rules endowed with an ideal force (*över sig regler med ideell kraft*; these kinds of rules are competence norms as I characterise them: Sections 7.3, 8.2.1, and 9.6), so that on the basis of these norms alone, or in accordance with them, exercise of de facto *power* can take place (Hägerström 1961, 76; cf. Hägerström 1953b, 34–5).[16]

Norms precede de facto *power*, if we understand *power* as an actual ability to determine people's behaviour, an ability based neither on suggestion nor on an actual or potential recourse to punishment and reward. As private individuals making claims on other individuals must appeal to the law (to what is right, as I would say; cf. the Swedish *rätt*) if they want to have their rights realised, so the political authority must seize on the existing constitution if the regulation of social relations the same authority sets up is to carry any force in society (Hägerström 1961, 72; cf. Hägerström 1953b, 30).[17]

Olivecrona observes, in the lead of Hägerström, that the effectiveness of legislation "results in the first place from the general reverence in which the constitution is held." In virtue of such an attitude toward the constitution, people are predisposed to obey. It is only necessary to tell them how they have to behave. They will obey on condition that they are told to do so in the proper form, that is, in accordance with the constitution's competence norms. People will obey if they are told to do so by those who, like the lawgivers, are

[16] From here on out in this section I will italicise the word *power* because, if I want to avoid misleading the reader on the scholars I refer to, I will have to use it in a sense equivalent not to that specified in Section 9.4 (where I discuss the concept of "power" in the sense currently attributed to this word in sociology), but to that specified in Sections 7.3, 9.6, and 10.2.6 (where I discuss, instead, the concept of "authority"). Indeed, the *power* Hägerström and Olivecrona refer to is a *de facto* power which the people vested with a position of authority have on believing duty-holders (nomia: Section 6.5), in that duty-holders are believers (doxia: Section 6.2), i.e., they have internalised a competence norm. In my use of "power" (Section 9.4), instead, a use that falls in line with sociological usage, this word designates the power to compel people by threatened evils or promised rewards.

[17] The Swedish original: "Är det icke så, att likaväl som den enskilde i sina fordringar på andra enskilda för att kunna realisera sina rättigheter mäste åberopa sig på gällande rätt, måste också den politiska auktoriteten vid sina regleringar av samhälleliga förhållanden stödja sig på bestående konstitution, för att de skola få kraft?" (Hägerström 1961, 72). Here is Broad's English translation of this passage: "Is it not true that, just as the private individual must appeal to the positive law [to valid law, or law in force: *gällande rätt*] when making claims on other individuals if he is to get his rights [in order that his rights may be realised: *för att kunna realisera sina rättigheter*], so too must the political authority base himself on [seize on: *stödja*] the existing [subsisting: *bestående*] constitution in making his regulations for social relationship *if those regulations are to have the force of law?* [in order for those regulations to have force?: *för att de skola få kraft?*]" (Hägerström 1953b, 30; italics added). This translation may prove ambiguous, especially in the final italicised excerpt, because here Hägerström speaks of the conditions under which regulations will have force (*kraft*), i.e., will be internalised as motives of behaviour (to put it in my words).

in a key position "to use those formalities, which, considering the psychological situation in the country, are required in order to give practical effect" to laws (Olivecrona 1939, 52–7, 173ff., 218ff.; cf. Sections 3.4, 7.3, and 9.6).

It is not a de facto *power* of the authorities that creates norms; on the contrary, it is the existence of norms (in people's brains, I should add) that creates and preserves the authorities' de facto *power* (the ability just mentioned). Constitutional norms on the exercise of *power* are the actual basis of an actual *power*, and not vice versa. Certain people, because they are placed in a position of authority in accordance with the constitution's competence norms, have a de facto *power* to determine other people's behaviour.

Legislators enact laws that are complied with and courts pronounce rulings that are carried out (in this sense legislators and courts both possess actual *power*, in that both succeed in getting done what they request), and they are able to do so because they act as legislators and judges in accordance with the constitution's competence norms, and because the citizens at large have internalised these norms as binding per se. The citizens comply with laws and rulings, not because there is somebody's personal command or will behind laws and rulings, but because these last are enacted and pronounced in accordance with the constitution's competence norms (Hägerström 1917, 117–8; cf. Hägerström 1953b, 194–6).

Similarly to Hägerström, Hart would maintain forty years later that only the existence of norms (rules, in his usage) can account for the continuity of *power*, the persistence of laws despite the fact of changing legislatures, and the legal limitations on legislative *power*: There is specified in the accepted rule of recognition who has the right to enact laws and who is entitled to succeed to a legislator; there is also specified that the laws are in force regardless of the legislator's personal history; and there is specified, too, which forms and limits are to be observed for certain enactments to become law.

These fundamental rules, as Hart also calls them (Hart 1961, 59, 61, 149–50), have a factual existence. Hägerström calls them constitutional rules (*konstitutionella regler*; cf. Hägerström, 1961, 72), and also fundamental norms, or again norms on the exercise of *power*.

Legislators accept and acknowledge these norms when they enact laws in accordance with them. So do courts when they apply laws passed in accordance with these norms. So do experts when they advise ordinary citizens on the basis of the laws enacted in compliance with these norms. So do ordinary citizens when they acquiesce in the laws and rulings of legislators and courts, and in the opinion of experts such as jurists, practitioners, and scholars—in the opinion of legal doctrine, or *scientia juris* (Hart 1961, 50ff., esp. 59–60, 60ff., 64ff., 97ff; cf. Pattaro 1974, 178–200).[18]

[18] *Scientia juris* is Peczenik's term for legal doctrine or legal dogmatics; in fact, it is the title he chose for Volume 4 of this Treatise.

Hart speaks in this regard not so much of constitution (Hägerström and Olivecrona do) as he speaks of rule of recognition (more specifically, he speaks of rules of recognition, change, and adjudication; Hart 1961, 92ff.), which he understands to be the best replacement for Hans Kelsen's puzzling presupposed basic norm.

8.1.6. Misinformation about Scandinavian Legal Realism

There is still, in the world of legal philosophy and general jurisprudence, a relapse into misinformation with regard to Scandinavian legal realism. Here is an example from 2001:

> Some positivists like Austin and the Scandinavian Realists are *reductionists*. For them, law is explained by social facts in the sense of being reducible to social facts. Austin reduces law to power and habits of obedience. The Scandinavian Realists reduce law to predictions of untoward consequences in the event of non-compliance. Hart explicitly rejects all reductive accounts because they define out of existence, in the sense of having no room for, an essential feature of law, namely the internal point of view. [...] All positivists embrace the Social Fact Thesis, the claim that while law is a normative social practice it is made possible by some set of social facts. Positivists differ from one another with respect to (1) the relevant social facts and (2) the relationship between those facts and law. Austin advocates a reductive account in terms of power and habits: the Scandinavians are reductionists in terms of predictions. (Coleman 2001a, 116)

Hart 1961, instead, wrote this on the position that Scandinavian legal realism takes with regard to the reduction of law to predictions.

> What then is the crucial difference between merely convergent habitual behaviour in a social group and the existence of a rule of which the words "must," "should," and "ought to" are often a sign? [...] In the case of legal rules it is very often held that the crucial difference (the element of "must" or "ought") consists in the fact that deviations from certain types of behaviour will probably meet with hostile reaction, and in the case of legal rules be punished by officials. [...] It is obvious that predictability of punishment is one important aspect of legal rules; but it is not possible to accept this as an exhaustive account of what is meant by the statement that a social rule exists or of the element of "must" or "ought" involved in rules. To such a predictive account there are many objections, but one in particular, which characterizes a whole school of legal theory in Scandinavia, deserves careful consideration. [...] We see that rules are involved in this activity in a way which this predictive account leaves quite unexplained. For the judge, in punishing, takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender. He does not look upon the rule as a statement that he and others are likely to punish deviations, though a spectator might look upon the rule in just this way. (Hart 1961, 10)

And indeed Olivecrona—to whom Hart 1961, 10 and 233, refers as an important advocate of anti-predictivism—wrote the following in 1939 about the predictive account that Arthur L. Corbin (1874–1967) provides of normativeness as it takes shape in the concept of "a right."[19]

[19] Arthur L. Corbin contributed to American legal realism. Cf. Twining 1973, 27–34; Fisher, Horwitz and Reed 1993, 80–1; Rumble 1968, 189–90. On American legal realism, see also (but with no mention of Corbin) Summers 1982.

As an example of the confusion between the right and the actual possibility of bringing a successful action may be cited the essay "Conditional Rights" by Arthur L. Corbin in the Law Quarterly Review 44 (1928). [...] "[...] Both Right and Privilege express juristic concepts and denote a jural relation, because both, when used with respect to two persons, *are predictions* (my italics) of societal conduct in accordance with a rule of uniformity. — — As defined above, to say that you have a Right against me means that on the existing facts we can predict with reasonable certainty that you can get societal aid to control my conduct."

The identification of *rights* with *predictions* is an obvious mistake. What we mean by a right is definitely not what we mean by a prediction. If different persons made different predictions about the same case, would there be as many different rights? Do the law-givers make predictions about the actions of the judges when they lay down rules about how rights are to be acquired, transferred etc.? Certainly not. They *regulate* the future actions of the judges. Nor do the judges make predictions when they "determine rights." The judgment cannot be a prediction about what the judge is going to do in the case! Without doubt we mean by rights something other than predictions. Perhaps the right may be the *facts* on which predictions of this sort are reasonably based? No. These facts are many and of varying character. They include the content of the law, the facts constituting a legal title, the personalities of the witnesses and judges, the ability of the advocates, the economic position of the parties etc. etc. What we have in mind when speaking about rights cannot be this mass of heterogeneous facts. Actually we mean that the right is *created* by certain facts within this group, viz. those which make up the legal title. (Olivecrona 1939, 213–4)

Further, there is in Olivecrona 1971, 27–62, a perspicuous outline of the various orientations that had been labelled "legal positivism," or that had so labelled themselves. He distinguishes among these orientations the English theory, the French theory, and the German theory and different meanings of the term "legal positivism." A discussion has been underway for the last few decades in the Anglo-Saxon area on some major developments in legal positivism, and several distinctions have been drawn, such as that between inclusive and exclusive legal positivism (see, in Volume 4 of this Treatise, Peczenik, Sections 4.3 and 4.4, and, in Volume 11, Postema, who treats the topic more extensively). Olivecrona's outline seems to come of use in connecting this current debate with its historical antecedents.

Finally, I suspect that some scholars base their judgment of Scandinavian legal realism on Hart's 1959 review of Alf Ross's *On Law and Justice* (Ross 1958, published as a translation of *Om Ret og retfærdighed. En indførelse i den analytiske retsfilosofi*, of 1953; see Ross 1971). Indeed, Hart's review is quite critical, and justifiably so in many respects, though not in all. Thus, the title of the review, "Scandinavian Realism," may have led some hurried readers to attribute to the Uppsala School en bloc the criticisms that Hart in reality addresses only to Alf Ross, and that not fully with reason.

True, Hart starts out in his review by grouping together Hägerström, Lundstedt (1882–1955), Olivecrona, and Alf Ross as taking an antimetaphysical approach. This collective judgment can in fact apply in different ways to each of these scholars. But the predictive conception of law is attributed only to Alf Ross, and certainly not to Hägerström and Olivecrona, as Hart himself clearly and thoroughly illustrates on more than one occasion: These

clear and correct evaluations on the part of Hart I already referred to in this chapter.

It must be observed, further, that Ross's predictive theory needs to be analysed and assessed more carefully than Hart does. Certainly, Ross upholds a predictive theory (in my opinion a theory that goes off course), but his predictive theory is concerned with legal doctrine, not with norms.[20] Ross attributes a predictive function to legal doctrine because he is looking to make legal doctrine scientific, in line with the criteria of scientificity set out by logical empiricism as requisites for empirical science.

Proceeding upon this premise, Ross argues legal doctrine to be made up of predictions about the judgments that will be handed down by the courts. Notice that Ross finds this brand of legal doctrine to be ultimately concerned with the country's valid law (the law in force in the territory of that country), and "valid law" he understands to be a "shared *normative ideology* of judges when they act in the role of judges" (Ross 1958, 75; Ross 1971, 90; cf. Section 10.2.4, footnote 35). Ross's concept of the judges' normative ideology does not seem to me to fall too far from Hart's concept of the internal aspect of rules and especially of his rule of recognition—with Hart's ascription of the internal point of view to the officials within a legal system when they act in their role as officials.

These qualifications, all counted up, seem to point of necessity to the conclusion that Hart's review of Ross's *On Law and Justice* gets inattentively and improperly used by some of its readers to gain an overall idea (a misguided idea) of Scandinavian legal realism as a whole, and that in certain respects Hart could himself have been more accurate in his review of Ross's book: For example, and to begin with, he could have chosen a more specific title, a title more tailored to his topic and to the object of his review (namely, Alf Ross, rather than the whole of Scandinavian legal realism); and in the second place, he could have worked out more faithfully the details of his account of Ross's predictivism.

Certain aspects of Hart's normativism I will come back to in Section 8.2.6 (devoted to qualifying the use of "validity" in legal discourse) and in a more focused way in Section 8.3, devoted to the "considerable modifications" (Hart 1997, 255) that Hart's *Postscript* brings to Hart 1961. I will come back to Ross and Hart in Section 15.4.

[20] Cf. Pattaro 1966, esp. 1036–50. In his predictive theory of legal doctrine, Ross is influenced not by the Uppsala School, but by certain general conceptions of science of a logical-empiricist cast. It is interesting to note that in the 1950s there was another great jurisprudent working under the influence of logical empiricism, Norberto Bobbio, who likewise undertook to make legal doctrine scientific (in line with the canons of logical empiricism): Bobbio 1950a and 1950b. The two scholars were unaware of each other's contemporaneous attempts in the 1950s. They each had the same objective, and although they pursued it in different ways, neither attempt escapes criticism fully. Ross's and Bobbio's attempts are critiqued in parallel in Pattaro 1978. Cf. also Pattaro 1993.

8.2. A More Targeted Reckoning with "Validity" in Legal Discourse

8.2.1. The Broad and the Narrow Sense of Competence Norms and Norms of Conduct

In a broad sense, all norms, including norms of conduct, may be understood to be competence norms insofar as their content sets forth one or more agent-types (irrespective of whether the agents are duty-holders or right-holders under these norms). And, also in a broad sense, all norms, including competence norms, may be understood to be norms of conduct insofar as their content sets forth one or more behaviour-types (irrespective of whether these behaviours are obligatory, permitted, or forbidden under these norms).

In a narrow sense, on the other hand, a competence norm is a peculiar norm of conduct, one whose type of action is "obeying." And it is a peculiar renvoi-norm of conduct because its type of action ("obeying") is meant to be determined through a renvoi to the content of directives that are validly issued (or through a renvoi to the content of validly enacted texts, regardless of whether this is the content of directives properly so called; on these, see Section 9.6), this by instantiating the type of circumstance set forth in the same competence norm (Section 7.3).

In a narrow sense again, and in consequence, a norm of conduct is any norm whose type of action is something other than "obeying."

Of course norms of conduct in a narrow sense and norms of competence in a narrow sense both require obedience, requiring duty-holders to perform the type of action they are under an obligation to perform every time the type of circumstance set forth in the same norms gets validly instantiated. But only competence norms require duty-holders to perform the type of action "obeying," and that when directives are issued (or texts enacted) in a certain way, thereby validly instantiating the type of circumstance set forth in the same competence norms.

Let us look, for example, at the *stricto sensu* norm of conduct **n**, "Under the circumstances that a person is well-off and another person needy, the former must aid the latter." Here, the type of action is "aiding," and the well-off are required to obey **n**: They are required to perform the type of action "aiding" every time the type of circumstance set forth in **n** gets instantiated by valid tokens.

Let us look now at the *stricto sensu* competence norm **o**, "Under the circumstances that you are driving and a traffic warden gives you a directive, you must obey, provided that the directive is issued in such and such a way." Here, the type of action is "obeying," and drivers are required to obey. They are required to perform the type of action "obeying" every time the type of circumstance set forth in **o** gets instantiated by validly issued directives: In the example, drivers are required to obey the directives validly issued by the traffic warden.[21]

[21] Clearly, the type of circumstance set forth in competence norm **o** will establish not only

It follows from the above that any type of action that a duty-holder is under an obligation to perform ("eating," "drinking," "smoking," etc., or "abstaining" from these actions) is the type of action pertaining to a *stricto sensu* norm of conduct, provided that this type of action is not "obeying" in the sense just clarified.

Even the type of action "refraining from obeying" is not a type of action pertaining to a *stricto sensu* competence norm, but one pertaining to a *stricto sensu* norm of conduct. Let us look, for example, at norm **e**, "Under the circumstance that you are a child and someone other than your parents gives you a directive, you must refrain from obeying." This norm is, in a narrow sense, a norm of conduct; it is so because its type of action ("refraining from obeying") is not intended to be determined through a renvoi to the content of directives validly issued by instantiating the type of circumstance set forth in the same norm. Indeed, the type of action "refraining from obeying" is already determined: It does *not* get determined by the content of directives that are valid tokens of the type of circumstance.

8.2.2. On the Function of a Valid Slap

Validity and invalidity can be predicated of anybody's behaviour, and of course of the behaviour held by agents who are *duty-holders* under a norm.

With a *stricto sensu* competence norm, for example, validity and invalidity can be predicated of the compliant behaviour held by those who are under an obligation to perform the type of action "obeying" (obeying the directives issued or the texts enacted by the people described in the type of circumstance set forth in the same competence norm). And with a *stricto sensu* norm of conduct, validity and invalidity can be predicated of the behaviour held by those people who are under an obligation to perform the type of action "aiding," for example, as set forth in the same norm of conduct (such is the case with the well-off aiding the needy), or even, as was just observed, they can be predicated of the behaviour held by those people who are under an obligation to perform the type of action "refraining from obeying," as set forth in another norm of conduct.

Validity and invalidity can also be predicated of the behaviour held by agents who are *not* duty-holders under a norm that refers to them.

With a *stricto sensu* competence norm, for example, validity and invalidity can be predicated of the behaviour held by those people referred to in the type of circumstance (set forth in the same competence norm) as "the issuers of di-

formal limits to the traffic warden's mode of issuing directives (as by requiring this person to wear a uniform or bear some other markers by which to be recognised as a traffic warden), but substantive limits as well. Thus, a directive, however much issued by a traffic warden in uniform, will be invalid by virtue of its content if it should require a driver to do a triple somersault, and the driver will consequently be under no obligation to obey.

rectives or the enactors of texts that have been or will be issued or enacted in accordance with certain procedures" (the issuer and the enactor may not be under any obligation to issue directives or enact texts). And with a *stricto sensu* norm of conduct, for example, validity and invalidity can be predicated of the behaviour held by those people referred to in the type of circumstance (set forth in the same norm of conduct) as, say, people who have slapped other people.

Indeed, the slappers are not duty-holders: There is no obligation to slap anyone. By contrast, anybody who gets congruently (validly) slapped is under an obligation to turn the other cheek, precisely because the type of circumstance "getting slapped," *though nonobligatory*, has been validly instantiated: "But I say unto you, That ye resist not evil: But whosoever shall smite thee on thy right cheek, turn to him the other also" (Matthew 5:39).[22]

8.2.3. The Metonymic Validity of Legal Directives and Texts of Law

On my characterisation of validity as a token's congruence with a type, every type is constitutive of the possibility of being or not being validly instantiated by actual tokens; and each congruent instantiation of a type is a valid token of that type. That is, each congruent instantiation of a type *counts as* a token of that type: "To be a valid token of a type" and "to count as a token of a type" are to me synonymous expressions.

Turning to behaviours specifically, I will say that an actual behaviour validly performs a type if it has the necessary and sufficient characteristics to be considered a congruent instantiation, or happy performance, of that type. And if a behaviour-type is a compound type consisting of at least one conditioning type of circumstance and one conditioned type of action, an actual behaviour will be a valid token of this compound type if it congruently performs the type of action when the relevant type of circumstance has been validly instantiated.

Moreover, each type of behaviour is constitutive of the capacity, or competence, of those persons who are valid tokens of the type of acting person set forth in the behaviour-type. This capacity, or competence, is irrespective of whether the type is set forth in a norm. And if the type *is* set forth in a norm, this capacity, or competence, is irrespective of whether the type in question is a conditioning type of circumstance or a type of action. Further, if the type in question is a type of action, this capacity, or competence, is irrespective of whether the type is qualified as obligatory, permitted, or forbidden. And, last but not least, when one performs congruently a type of action forbidden under a norm, this valid performance, though it is a wrong, is like-

[22] Plainly, there can be, at least under given circumstances, an obligation to refrain from slapping others (and that would be a welcome obligation), and also an obligation to punish those who do not refrain from slapping others (and that too may be a welcome obligation). But the norm considered in the run of text is not the one from which these two obligations derive.

wise a valid token of that type: Indeed, the validity of the performance is a necessary condition for the performed action to be wrong (typicality of law; cf. Section 2.2.2.2).

Turning to language specifically, I will say that a sentence can be a valid or an invalid token of the type "directive." In Section 9.2 I will characterise the type "directive sentence": With respect to this type, an actual sentence will be a congruent or incongruent, a valid or invalid, token of a directive; it will count or will not count as a directive. For example, a directive issued by a sender forced to issue it against his or her will is nonetheless, with respect to *that* type, a fully valid directive: which see point (1) of Section 9.2.

In the context of law, however, a directive issued by a sender forced to issue it against his or her will, will not, as a rule, be a valid directive (let us imagine, for example, a directive issued by a traffic warden forced to it by a gunman). This is so because in the context of law, with competence norms and the directives or texts issued or enacted in accordance with the type of circumstance set forth in a competence norm, the terms "valid" and "invalid" apply specifically to *activities* that congruently (validly) or incongruently (invalidly) instantiate a type of issuance or of enactment; and this type (in private law and public law alike) usually has this characteristic, among others: That the issuance or enactment activity of agents (private persons or officials) should not be forced but freely performed.

In brief, as was observed in Section 2.1.1, a token's validity depends on a type: on the type with respect to which we predicate its validity, i.e., its congruence with that type. Thus, the type "directive" as characterised in Section 9.2 does not necessarily coincide with the type "directive" as characterised by other scholars (like Alf Ross, *Directives and Norms*, 1968) or with the type "directive" as this type may be characterised in the law of different legal systems.

Further, and importantly, I am making here a matter-of-fact claim to the effect that we *usually* find in legal systems characterisations of types of issuance of directives or types of enactment of texts (where "issuance" and "enactment" designate types of activities) rather than find types of directives or types of texts (where "directives" and "texts" designate types of sentences or of sets of sentences). It follows that the directives and texts in question are the outcomes (Is-outcomes) of these activities (Is-activities), and outcomes are best kept analytically separate from the activities by which they are produced.[23]

Nothing prevents us from saying that in legal discourse "valid" and "invalid" apply to legal directives (or texts), so long as these are validly issued or enacted. But here, to be more precise, we should say that "valid" and "invalid" apply to legal directives or texts *metonymically*: These terms apply to legal directives or texts that have been validly *enacted* through actual *activi-*

[23] See, for example, Alf Ross's distinction between interpretation as activity and interpretation as outcome (or result) (Ross 1958, 117; Ross 1971, 139).

ties that congruently instantiate the type of circumstance (a type of procedure, for example) set forth in a competence norm; this type will usually be, as a matter of fact, a type of activity rather than the type of sentence or of text resulting from (outcome) an instantiation of the same type of activity.

In other words, we ought to bear in mind that with legal directives, or texts (in their interaction with competence norms: Section 9.6), what we are looking at is not the congruence of a text (or directive) with a type of text (or directive), as this type is characterised in Section 9.2 of this volume, for example. Rather, we are usually looking at the congruence of an actual activity with a type of issuance or enactment (with a type of procedure, for example). A legal text, or directive, needs to be enacted (or issued) congruently (validly) with respect to the type of procedure set out in a legal competence norm regulating the enactment (or issuance) of legal texts, or directives.

For this reason, a legal text (or directive: an Is-outcome) will only be *metonymically* valid or invalid. In fact it will be so depending on whether its enactment (or issuance: an actual activity) is a valid or an invalid token of a given type of issuance or enactment activity.

The same does not hold with legal norms (we will see this in Section 8.2.4): Legal norms are neither valid nor invalid, not even metonymically. Norms cannot be issued or enacted, properly speaking, because they are not the outcomes (Is-effects) of certain Is-events or activities. Norms are rather the Ought-effects (or Ought-outcomes) resulting from other norms in combination with the performance of certain Is-activities that validly instantiate a type of circumstance set forth in these other norms. And, as we will see, it does not matter in this regard whether we characterise norms as beliefs (which is how I view norms: Chapter 6) or as Ought-effects in what is objectively right (which is how legal norms are characterised in the tradition of civil law; cf. Sections 2.2.3 and 3.4).

8.2.4. The Slippery Slope of Validity. Norms Cannot Be Issued, or Enacted

Of course, even with the type "norm" we can say that certain actual things are valid or invalid tokens of it (as happens in the case of a sentence-token with respect to a type of directive: see Section 8.2.3).

Thus, given my characterisation of the type "norm" (norms as beliefs and as motives of behaviour: Chapter 6), we may properly ask whether a certain token is valid or invalid with respect to this norm-type; and given any other norm-type—the type "norm" as characterised by Hans Kelsen, for example, or the type "rule" as characterised by Ronald Dworkin—we may properly ask as well whether a certain token is valid or invalid with respect to it. Thus, it will be appropriate to ask, with respect to the type "norm" as characterised in Chapter 6, whether the belief that we should stop walking if a black cat crosses our trail is a valid token of this type, or whether Jack Nicholson's com-

pulsive neuroses in the film *As Good as It Gets* (Chapter 7, footnote 5) are valid tokens of the type "norm" as characterised in Chapter 6 of this volume.

But, again, this is not the sense in which "validity" and "invalidity" are used in legal discourse. Indeed, jurists, when they use these terms, intend to refer instead either to (*a*) the congruence or incongruence of a token of activity with a type of activity (the congruence or incongruence of an actual issuance or enactment of a text, or directive, with a type of issuance or enactment procedure) or to (*b*) the specific existence or coming into existence of norms (or of other Ought-effects, such as obligations and rights), or the lack thereof, in the reality that ought to be. These two senses of "validity" and "invalidity"—senses (*a*) and (*b*)—I will come back to shortly in this section.

Suppose, on the other hand, that we choose to qualify legal norms as metonymically valid or invalid, just as we did in the previous Section 8.2.3 with legal directives, or texts. In this case—if we keep to my view of derivative norms as illustrated in Chapter 7—we should want "validity" and "invalidity" to designate the logical correctness or incorrectness of the inference processes by which a believer infers derivative norms from the norms he or she has previously internalised.

However, when jurists discuss "valid norms" in line with the sense *they* ascribe to this expression, they do not usually intend to refer to the formal correctness of a piece of reasoning.

Besides—on my view of derivative norms as illustrated in Chapter 7—the validity or invalidity of the issuance or enactment of legal directives, or texts, does not affect the logical correctness (or validity) of the inferential process by which a believer infers derivative norms: The valid or invalid enactment or issuance of a directive, or text, will affect *only* the truth value of the second premise under which (in this inferential process) a directive, or text, is subsumed as validly enacted or issued in accordance with the type of circumstance set forth in a competence norm. The truth or falsity of the premises carries over into the truth or falsity of the conclusions, but it does not undermine the logical correctness of the inferential process. In fact, the truth or falsity of the premises carries over into the truth or falsity of the conclusions on condition that the inferential process from premise to conclusion is carried out correctly from a logical point of view.

Those people who believe in a competence norm will come to believe (through the subsumption and inference process presented in Section 7.3) that the valid Is-activities through which metonymically valid directives, or texts, are enacted produce new norms in the reality that ought to be. Hence, it could somehow and figuratively be said of directives, or texts, validly issued in accordance with the procedures provided in the type of circumstance set forth in a competence norm that these directives, or texts, produce or cause derivative norms—derivative beliefs—in those who believe in the competence

norm: Validly enacted directives, or texts, *produce illative effects* in believers (cf. Sections 9.2 and 9.6).

The type of circumstance set forth in a competence norm is, qua type, constitutive of the possibility of the performative capacity and activity of the persons described therein as agents or performers (where performative activity = "issuing directives, or enacting texts, in a certain way," as by following a certain procedure). And in the opinion of a believer in a competence norm, the type of circumstance, as set forth in such a norm, will be institutive as well of the normative capacity and activity of the persons described therein as agents or performers (where "normative activity" = "valid issuance of directives, or texts, in a way that creates derivative norms"). A believer in a competence norm will find it binding per se for an actual duty-holder to obey (type of action) the directives issued, or the texts enacted, if directives, or texts, are validly issued, or enacted, by certain agents or performers in accordance with certain procedures (type of circumstance). This way, the performers who validly issue directives or enact texts, do affect the believer's personal normative universe (or reality that ought to be) by modifying or abrogating his or her norms or adding new ones.

But this subsumption and inference process does not make derivative norms valid, not even metonymically (Section 8.2.3): It does not make valid the illative effects produced in the believer's brain.

Through the illative processes of subsumption and inference illustrated in Sections 7.3 and 9.6, the believers in a competence norm will come to internalise derivative norms whose content is the same as the content of directives issued or texts enacted validly, in accordance with the type of circumstance set forth in the competence norm. So, too, the believers will regard any valid performance of the type of circumstance set forth in the competence norm as being a normative activity: an activity that in a sense creates norms. From the standpoint of a believer, let me reiterate, the conditioning type of circumstance set forth in a competence norm is not only *constitutive* of certain agents' *performative* capacity (competence) to *issue* directives, or to *enact* texts; it is also *institutive* of these same agents' *normative* capacity (competence) to *create* norms by issuing directives, or enacting texts.[24]

After all, as has been observed, in the legal-dogmatic tradition of civil-law scholarship, a legal norm is an Ought-effect in what is objectively right in the reality that ought to be, an Ought-effect whose occurrence will depend on whether a source of law has been *validly* implemented in the reality that is (Section 3.4). The reason why people so often use "valid" and "invalid" to qualify norms, too, is perhaps near at hand.

[24] On this sense of "institutive," compare MacCormick 1974 and, in Volume 2 of this Treatise, Rottleuthner, Section 2.7.

Only *valid* tokens (and hence only *validly issued* directives, or *enacted* texts, where these are concerned) can be subsumed under a type of circumstance set forth in a norm (and hence under a type of circumstance set forth in a competence norm, where directives, or texts, are concerned). The result of this subsumption is the second premise of the reasoning by which a believer infers that an Ought-effect has occurred in the reality that ought to be (Chapter 7).

Now then, in the tradition of civil-law legal dogmatics the word "validity" did go through a shift of meaning: from one sense, (*a*) "congruence of a token with a type of circumstance" (with which a norm connects normative consequences, or Ought-effects, i.e., the production of new norms), to another sense, (*b*) "the coming into existence of a normative consequence, of an Ought-effect, of a new norm in the reality that ought to be" (in consequence of the congruent, or valid, instantiation of a certain type of circumstance).

Presumably, the shift is caused by the fact that, in the standard view, an Is-event valid in sense (*a*) produces Ought-effects. Thus, even the Ought-effects so produced—and derivative norms in particular—have come to be called valid. This is another sense of "valid," sense (*b*), which differs from sense (*a*) and is misleading (Section 2.2.3).

Hart (1961, 105–6), when he replaced Kelsen's *Grundnorm* with his own rule of recognition, took care to underscore that only intra-systemic norms (rules) can be said to be valid or invalid. So now we have to go one step further with respect to Hart. That is: Only intra-systemic *directives*, or *texts*, can be said to be valid or invalid (metonymically, as was seen in Section 8.2.3); not so norms, even intra-systemic *norms*.[25]

To be sure, there are intra-systemic directives, or texts, and intra-systemic norms as well. But only the former can be said to be valid or invalid, albeit metonymically.

Intra-systemic derivative norms do bear an important connection with metonymically *valid* intra-systemic directives, or texts (see Section 9.6), but this does not allow us to equate or confuse the former with the latter, either in general or with specific reference to the possibility of qualifying them as valid or invalid. Norms and directives (or texts) are two different things: They are motives of behaviour and linguistic sentences respectively. A norm whose existence is a matter-of-fact existence *can neither be valid nor invalid* (Hart 1961, 106–7), be it a primitive norm directly internalised from the social environment or a derivative norm as illustrated in Section 7.3.

[25] Hart, in reality, like many other scholars, uses "valid" and "invalid" in senses (*a*) and (*b*) alike without apparently realising that two different meanings are involved. On sense (*a*), see Hart 1961, 30, 32, where Hart speaks of "valid exercise of legal powers"; on sense (*b*), see Hart 1961, 144, where he speaks of "valid rules." Kelsen (1934, 1946, 1960), instead, should be credited for never switching between the two meanings: He uses "valid" only (and consistently) in sense (*b*), which, of the two, is the sense I reject.

The use of "validity" in sense (*b*) would not need any exemplification, so widespread is it. Still, the prime example of it cannot go unmentioned: We have it in the work of Hans Kelsen, one of our two giants of normativism (Section 3.6.1). Here is a passage from Kelsen:

By the word "validity" we designate the specific existence of a norm. When we describe the meaning or significance of a norm-creating act, we say: By this act some human behavior is ordered, commanded, prescribed, forbidden, or permitted, allowed, authorized. If we use the word *ought* to comprise all these meanings, as has been suggested, we can describe the validity of a norm by saying: Something ought to, or ought not to, be done. If we describe the specific existence of a norm as "validity," we express by this the special manner in which the norm—in contradistinction to a natural fact—is existent. The "existence" of a positive norm—that is to say, its "validity"—is not the same as the existence of the act of will, whose objective meaning the norm is. (Kelsen 1989, 10)[26]

I will now give a telling example of the shift from "validity" in sense (*a*), i.e., "a token's congruence with a type," to "validity" in sense (*b*), i.e., "existence of an 'ought,' and so of a norm in the reality that ought to be." The example is offered by the other of our two giants of normativism (Section 3.6.1), Hugo Grotius: It comes out in the form of a test, so to speak.

In a same passage (*De jure belli ac pacis libri tres* (a), II, 11, VIII) Grotius uses "validity" in sense (*a*), and he uses "efficacy" (meaning "normative efficacy") to express, instead, sense (*b*), which today is improperly attributed to "validity" as well:

Materiam promissi quod attinet, eam oportet esse, aut esse posse in jure promittentis, ut promissum sit *efficax*. Quare primum non *valet* promissa facti per se illiciti: quia ad illa nemo jus habet, nec potest habere. (Grotius, *De jure belli ac pacis libri tres* (a), II, 11, VIII; italics added)

The foregoing is Grotius's original Latin text. If we go and read it in Francis W. Kelsey's (1858–1927) English translation of it, the shift from sense (*a*) to sense (*b*) of validity is already there, alas, ready to be handed to readers who prefer English to Latin. Kelsey, in translating the passage just quoted, uses "valid" to render both *efficax* and *valet*. So he writes:

[26] The German original: "Mit dem Worte 'Geltung' bezeichnen wir die spezifische Existenz einer Norm. Wenn wir den Sinn oder die Bedeutung eines normsetzenden Aktes beschreiben, sagen wir: Mit dem fraglichen Akt wird irgendein menschliches Verhalten befohlen, angeordnet, vorgeschrieben, geboten, verboten; oder gestattet, erlaubt, ermächtigt. Wenn wir, wie im Vorhergehenden vorgeschlagen, das Wort 'sollen' in einem Sinne gebrauchen, der alle diese Bedeutungen umfaßt, können wir die Geltung einer Norm dadurch zum Ausdruck bringen, daß wir sagen: irgendetwas soll oder soll nicht sein oder getan werden. Wird die spezifische Existenz der Norm als ihre 'Geltung' bezeichnet, so kommt damit die besondere Art zum Ausdruck, in der sie—zum Unterschied von dem Sein natürlicher Tatsachen—gegeben ist. Die 'Existenz' einer positiven Norm, ihre Geltung, ist von der Existenz des Willensaktes, dessen objektiver Sinn sie ist, verschieden" (Kelsen 1960, 9–10).

In order that a promise may be *valid* [where Grotius writes *efficax*, meaning productive of normative effects], the subject of it ought to be either actually or potentially under the control of the promisor. In the first place, then, promises to perform an act which is in itself illegal are not *valid* [*non valet*]; for no one has, and no one can have, a right to do anything that is unlawful. (Grotius, *De jure belli ac pacis libri tres* (b), II, 11, VIII; italics added)

In this passage, Grotius is speaking of an Is-event (and specifically a declaration of will) that, if it *valet*—if it is a *valid*, or congruent, token of the type "making a promise"—it will then be *efficax*; that is, it will produce the Ought-effect (an obligation incumbent on the promisor) that the norm on promises conditionally and normatively connects with any valid instance of the type of circumstance "making a promise."

More specifically, Grotius remarks that a promise to do something illicit is not valid (*non valet promissa facti per se illiciti*); that would be the case with promising something that is not and cannot be within what is subjectively right for the promisor (*esse, aut esse posse in jure promittentis*). Under these circumstances, a promise will not be valid (*non valet* in sense (*a*) of "valid") and hence will not be efficacious (*efficax*); that is, it will not produce Ought-effects (in sense (*b*) of "valid," an improper and misleading sense, a sense obtained when we use the word "valid" rather than the expression "normatively efficacious").

The same concept can also be expressed in terms of people's capacity to make a promise.

Let us first consider sense (*a*). Having the legal availability of what we promise to give or do is a requisite for our capacity to make promises (cf. Section 2.1.6). Hence, a promise made by someone who, having no such availability, lacks the capacity to make this promise will be an invalid, or incongruent, promise. This person's seeming act of promising will not validly instantiate the type "making a promise"; it will not count as a promise: It *non valet* in sense (*a*) of "validity."

And now consider sense (*b*). The question of the normative consequences of a promise is instead a different matter. It is not a question of Is-event validity. It is a question of normative production of Ought-effects which either occur or do not occur in the reality that ought to be, according as a given type of circumstance has been validly or invalidly instantiated. That gives us the connection between the validity of Is-events—"validity" in sense (*a*)—and the creation of Ought-effects, in which regard the term "validity" is usually and improperly employed in the misleading sense (*b*) (cf. Sections 2.2.3, 8.2.5, and 8.2.6.1).[27]

Norms, in conclusion, whether they are conceived of as Ought-effects (Sections 3.3 and 3.4) or as beliefs (Chapters 6 and 7), are not enacted.

[27] Grotius, after all, is well aware that "nemo plus juris transferre potest quam ipse haberet" ("No one can transfer greater rights to someone else than he possesses himself") (Ulpian, *The Digest of Justinian*, L, 17, 54).

Legal norms as Ought-effects are created (in what is objectively right in the reality that ought to be) by valid Is-events occurring in the reality that is: For example, by the valid implementation of a type of enactment procedure (Section 3.4). But what gets enacted through a valid enactment (say, a valid implementation of a type of enactment procedure) is not an Ought-effect: It is a legal text. And a legal text is not in itself a norm: It will not be an Ought-effect even if its enactment takes place validly. In the legal-dogmatic tradition of civil law, the enactment of texts will have the virtue of creating norms having the same content as the enacted texts if (and only if) the enactment is valid with respect to a type of enactment with which a competence norm connects the coming into existence of new norms in the reality that ought to be. Thus, even on this conception norms are not enacted, or issued, strictly speaking: They are rather *created* by other norms—call them parent norms; cf. Sections 7.3, 8.2.6.1, footnote 32, and 10.2.1—in concurrence with the valid instantiation of certain types of circumstance the same parent norms set forth.

I am simply arguing, with regard to this legal-dogmatic tradition, that it is inconsistent to use "valid" to qualify as congruent (and "invalid" to qualify as incongruent) certain tokens with respect to a given type of circumstance if at the same time we use "valid" or "invalid" to affirm or deny that certain Ought-effects did take place and do exist in the reality that ought to be (Section 2.2.3).

This inconsistency is a source of confusion. An actual Is-enactment is correctly qualified as valid or invalid. But Ought-effects are neither valid nor invalid: They will rather get produced (or created), if the Is-enactment is valid, or they will not get produced (or created), if the Is-enactment is invalid.

Legal norms as beliefs (meaning norms as I conceive of them: see Chapter 6) cannot be enacted, either. They can only be driven into a human brain by the sociocultural environment (see Section 7.2 and Section 15.2.5 for primitive norms), or they can be inferred by a believing human being from another norm (a norm already in existence in the believer's brain) in conjunction with the subsumption of a valid token under the type of circumstance set forth in this other, preexisting norm (Chapter 7 and Section 9.6). If the preexisting norm is a competence norm, and the type of circumstance therein contained is a type of enactment, the directives, or texts, that get validly enacted with respect to this type of circumstance will lead the believer to infer that the content of these directives, or texts, is binding per se. This way—by becoming an object of belief—the content of a validly enacted directive, or text, becomes a norm (on my characterisation of norms) not by enactment, but by subsumption and inference (Section 7.3).

8.2.5. Validity in Its Traditional Sense as a Source of Misguided Legal Normativism: Validity, Law in Force, and Normativeness

In conceptions of law still in use today, "valid law" and "law in force" are used pretty much interchangeably.[28] And the question concerning the effectiveness of law is treated with an intentional, and remarkable, simplification: Kelsen's theory of law is paradigmatic in this respect and still very influential.[29]

I think it seriously misleading to use the expressions "valid law" and "law in force" synonymously (especially if we understand "valid" to mean "binding per se" or "normative," as Kelsen does, though with the best methodological intentions, receiving a use, often uncritical, that is widespread among jurists). But it is also true that the current sense in which a legal system is in force cannot realistically be identified with the sense in which a norm is in force on my characterisation of a norm's being in force (Section 6.5). Therefore, I will not maintain that law is in force in the same sense in which norms are.

Law, meaning a legal system, cannot be found to be an entirely *normative* system, a system made up entirely of norms in the sense in which I understand "normative" and "norm." Nor can this be realistically maintained in any sense, even in Kelsen's, in which normativeness is understood to designate a hypostatised Ought: *das Sollen in einem objektiven Sinn* (see Sections 5.1, footnote 2, and 14.5, footnote 19).

We will have to take into account what follows.

(*a*) Existing norms (doxia: Section 6.2) and norms in force (nomia: Section 6.5) are, on my characterisation, an essential component of law, but this does not entail that all law is norm-based, or made effective through norms.

(*b*) Only on this characterisation, and on characterisations similar to it (which see the normativistic gallery in Section 8.1), are norms an essential fac-

[28] This is true not only in English but also in Italian, with the equivalent expressions "diritto valido" and "diritto in vigore."

[29] Kelsen, like other scholars, operates under an anti-psychologistic prejudice. His position is that "a statement concerning the efficacy of law so understood is a statement about actual behavior. To designate both the valid norm and the idea of the norm, which is a psychological fact, by the same word 'norm' is to commit an equivocation which may give rise to grave fallacies. However, as I have already pointed out, we are not in a position to say anything with exactitude about the motivating power which men's idea of law may possess. Objectively, we can ascertain only that the behavior of men conforms or does not conform with the legal norms. The only connotation attached to the term 'efficacy' of law in this study is therefore that the actual behavior of men conforms to the legal norms" (Kelsen 1946, 40). Certainly, there is little we know about the psyche and the human brain even today: All the more so in Kelsen's day, at the time this passage was written. Still, it strikes me as curious that, with commendable methodological rigor, scholars of Kelsen's intellectual stature should disdain to advance hypotheses and speculations about little-explored or barely explorable objects in the real world (I am referring here to the psyche and the human brain) and should at the same time make so bold as to hypothesize a presupposed basic norm, and to speak of posited legal norms as norms existing outside of space and time and endowed at that with a binding force that is neither psychological nor moral.

tor (cause) of the law's being in force. Otherwise stated: Norms are essential to law only if they are in themselves motives of behaviour, which they will be if they are the peculiar beliefs illustrated in Chapter 6 (and in Chapter 7 with regard to their proliferation) and so exist or are in force in people's brains generally, as well as (and in a sense especially) in the brains of people who hold official positions in society.

If legal norms exist or are in force (in any sense of these terms) only in the brains of some philosopher or in God's mind—but not in society—they will not be motives of individual and social behaviour, and this society's legal system will not subsist or be persistent, enduring, or settled, to use Hart's words (Hart 1961, 24; cf. Section 8.1.3.1).

(*c*) Norms are a necessary but not a sufficient condition for a society and its system of law to exist or be in force. For this to happen, it will be necessary to have concurrent conditions (causes, factors) other than existing norms and norms in force (in the sense illustrated in Sections 6.2, 6.5, and 9.6): It will be necessary to have power, influence, and some forms of charismatic or media suggestion, and to a certain extent the fulfilment of the basic needs, interests, and values (Sections 5.4 and 9.3 through 9.5) of the people the legal system applies to.

(*d*) What was summed up at point (*c*) can hardly have anything to do with Kelsen's conception by which there are two conditions for a legal system to be valid, or to exist. Kelsen's two conditions are that a fundamental or basic norm be presupposed (*conditio per quam*) and that the legal system be as a whole effective (*conditio sine qua non*) (Kelsen 1946, 110, 118–9).

In addition to all the differences between my understanding of "norm," "validity," "being-in-force," and the like, and Kelsen's understanding of "norm," "validity," and the like, there is this further and crucial point of difference: Kelsen's conception entails, through its presupposed basic norm, that law is entirely made up of norms (that the legal system is entirely normative: cf. Chapter 14). I, instead, do not believe that a thesis so framed can realistically be maintained.

Even Hart's theory of the rule of recognition, a rule expressly designed to replace Kelsen's presupposed basic norm (cf. Hart 1961, 245), proves difficult to realistically maintain: It does so in proportion as it entails that law—even if only on the part of the officials—is entirely made up of norms, meaning that all the officials accept it, from an internal point of view, with a normative attitude whereby the legal system is conceived of as entirely made up of guiding or binding standards.

I illustrate in Chapters 6 and 7, and in Section 9.6, some of the ways in which existing legal norms and legal norms in force qua norms (on my understanding of these terms) play an essential role in enabling a society and its system of law to exist and function (and in particular in enabling the legal system to be in force, in the sense of "a legal system's being in force" illustrated in Chapter 10).

But in Sections 9.3 through 9.5 other factors will be considered (suggestion, charisma, power, and influence) that concur with norms—an essential concurrence indeed—in enabling a society and its system of law to exist and function (and in particular in enabling the legal system to be in force, in the sense of "being in force" illustrated in Chapter 10).

8.2.6. Going beyond Hart in Treating the Relationship between Validity and Normativeness in Law

8.2.6.1. Intra-Systemic Norms

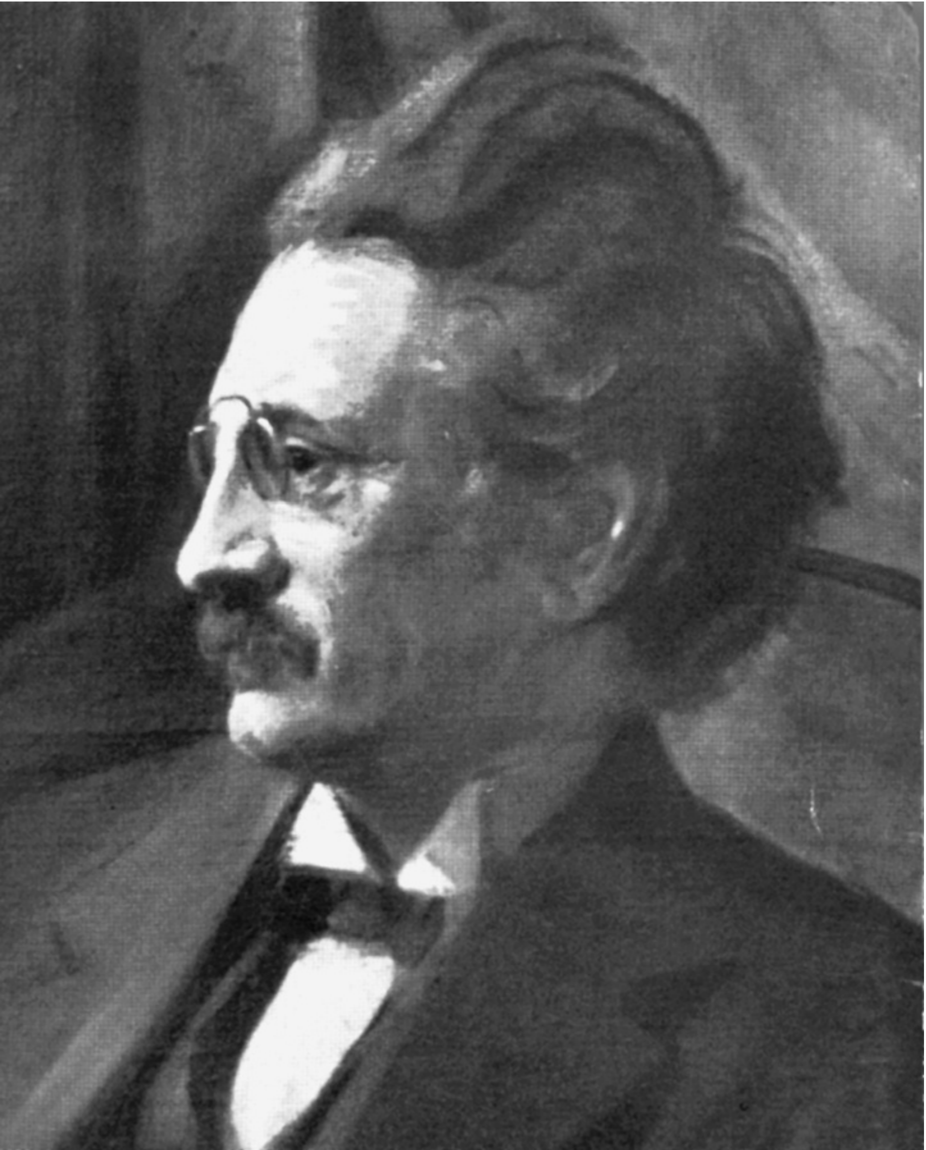
(*a*) I admit—and Hart admits as well—that there can be norms of conduct in no way dependent upon competence norms: In simple prelegal systems and international law (which Hart understands as a set, but not a system, of "obligatory rules," "binding rules," or rules having a "binding force": Hart 1961, 221ff., 230) there can be, in Hart's terminology, "primary rules of obligation" in no way dependent upon any "secondary rule."[30] These primary rules have the same kind of factual existence as that of the rule of recognition.

> In the simple system of primary rules of obligation [...] the assertion that a given rule existed could only be an external statement of fact such as an observer who did not accept the rules might make and verify by ascertaining whether or not, as a matter of fact, a given mode of behaviour *was generally accepted as a standard* and was accompanied by those features which, as we have seen, distinguish a social rule from mere convergent habits. It is in this way also that we should now interpret and verify the assertion that in England a rule—though not a legal one—exists that we must bare the head on entering a church. If such rules as these are found to exist in the actual practice of a social group, *there is no separate question of their validity to be discussed* [...]. *Once their existence has been established as a fact we should only confuse matters by affirming or denying that they were valid* [...]. (Hart 1961, 106; italics added)[31]

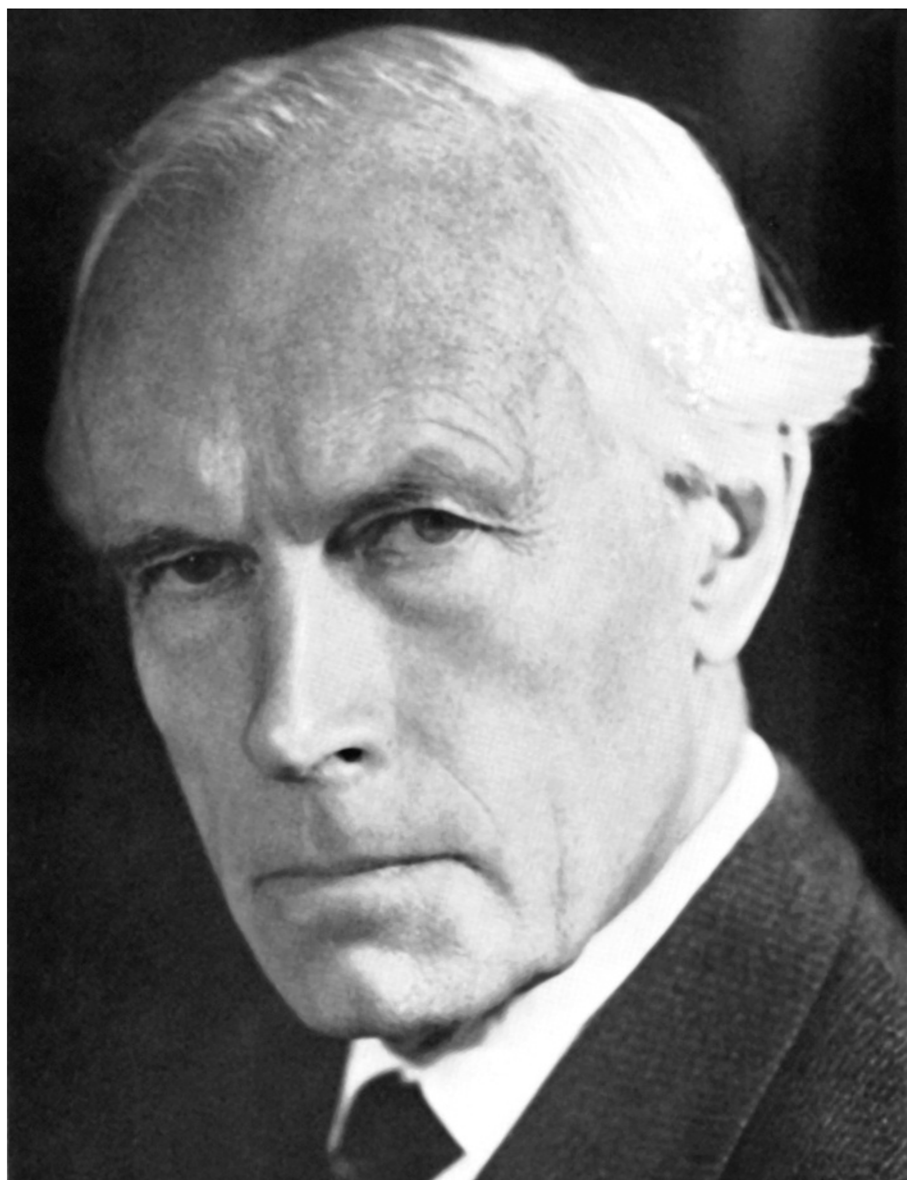
Compare this other statement that Hart makes with regard to international law:

[30] Here is Hart's distinction between primary and secondary rules: "We shall [...] show why law may most illuminatingly be characterized as a union of primary rules of obligation with [...] secondary rules." The secondary rules "may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained [rule of recognition], introduced, eliminated, varied [rule of change], and the fact of their violation conclusively determined [rule of adjudication]." The rule of recognition "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts" (Hart 1961, 91, 92).

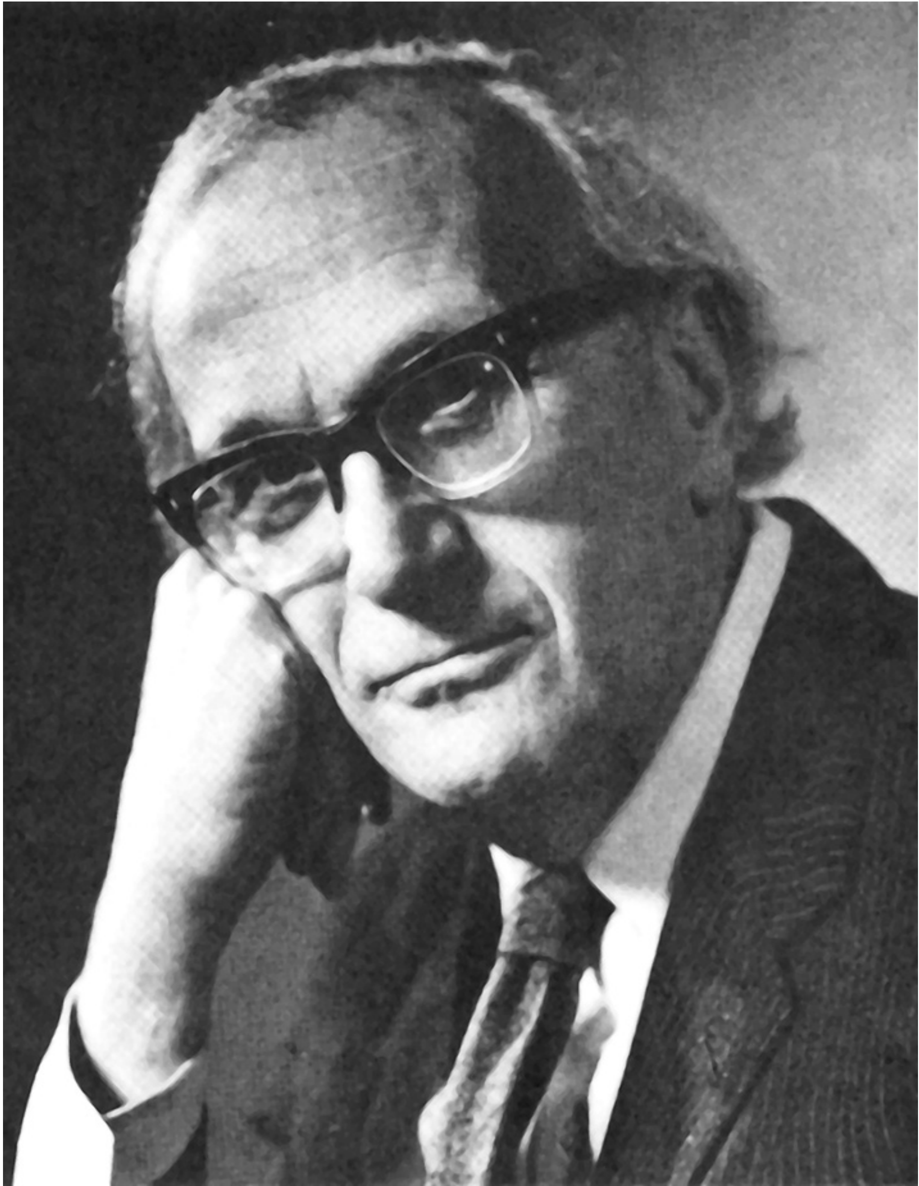
[31] It is interesting to note here how Hart 1961 does not use the term "binding" until page 110.



Axel Hägerström (1868–1939)



Karl Olivecrona (1897–1980)



H. L. A. Hart (1907–1993)

Though, in the simpler structure, the validity of the rules cannot thus be demonstrated by reference to any more basic rule, this does not mean that there is some question about the rules or their *binding force or validity* which is left unexplained. It is not the case that there is some mystery as to why the rules in such a simple social structure are *binding*, which a basic rule, if only we could find it, would resolve. *The rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such.* (Hart 1961, 230; italics added)

We have to do here, in my terminology, with primitive norms of conduct internalised directly from the social environment: I call *primitive* norms (be they norms of conduct or competence norms) those norms which exist in the brain of a believer and which the believer has not derived from other norms already in existence in his or her brain, but which he or she has internalised from the social environment. As for the terminology of the question, there is no kinship of meaning between my use of "primitive" and Hart's use of "primary."[32]

Hart uses the word "rule" to designate both the secondary rule of recognition, whose existence is a matter-of-fact existence, and those primary rules of obligation whose existence does *not* depend on any power-conferring rule or on any rule of recognition, and which have the same matter-of-fact existence as secondary rules of recognition. As Hart states, neither the former nor the latter can be valid or invalid (Hart 1961, 106–7), but they will be "binding, if they are accepted and function as such" (Hart 1961, 230).

(*b*) At the same time, Hart uses "rule" to also designate other primary rules of obligation: the intra-systemic primary rules of obligation, whose "existence" or "validity" depends on a power-conferring rule (i.e., a secondary rule of recognition). These intra-systemic rules—according to Hart, and à la Kelsen—have a specific existence referred to as "validity," an existence that is

[32] On my view, norms (primitive or derivative) can dynamically beget a system of norms. When this happens, we can distinguish the former group of norms (those that beget the system) from the latter (the norms that are begot in the system), calling them "parent norms" (Section 7.3) and "derivative norms" respectively. In the light of this distinction, all primitive norms can be parent norms but not derivative norms; by contrast, derivative norms (as such never primitive but always derivative) can be parent norms in addition to being derivative norms: They are so (they are parent norms) when they give place to systems or subsystems of norms (cf. Chapter 7). Thus, for example, the constitution of the University of Bologna is a derivative norm of the Italian law on universities. It is so to those who believe the Italian law on universities to be normative, and these people—by going through the subsumption and inference process described in Chapter 7—will come to believe the constitution of the University of Bologna to be likewise normative. At the same time, this constitution functions as a parent norm: It does so in relation to the legal normative subsystem regulating the University of Bologna. (The Italian term *statuto*, as in the expression "statuto dell'Università di Bologna," does not mean "statute." It rather designates the institutive act, or charter, of an institution, such as a university, foundation, or municipality. The English term "statute" does not strike me as suited to express this meaning, and it is for this reason that I have chosen to go with "constitution." An example of this use can be found with the International Association for Philosophy of Law and Social Philosophy, IVR – *Internationale Vereinigung für Rechts- und Sozialphilosophie*, which so calls its own charter: a "constitution.")

different from that of both varieties of rules mentioned under the previous point (*a*).

The essential point here is that Hart, in reality, takes up from Kelsen the ill-suited and confusing equivalence between "validity" and "binding force," an equivalence I reject. It is hard to see why we should bring into play two concepts of "binding rule," or "obligatory rule": On the one hand we have the concept whereby the binding force, obligatoriness, or normativeness of a rule consists in a complex matter-of-fact situation having an internal as well as an external aspect, and that is the case with Hart's social rules, as Hart considers the rules of primitive societies, the rules of international law, the church-goers' rule, and the rule of recognition;[33] on the other hand we have the concept whereby the binding force, normativeness, or obligatoriness of a rule is a question of formal validity à la Kelsen (Hart understands this to be the case with intra-systemic rules of municipal law). I see no way to bring "validity" and "normativeness" into agreement except by proceeding in the manner illustrated in Sections 2.1.1, 3.2 through 3.4, 7.1, and 9.6.

From my point of view, Hart's intra-systemic primary rules of obligation, which Hart admits as amenable to the qualification "valid" or "invalid" (see, in contrast, Section 8.2.4), are not necessarily rules, if we mean by "rule" what I mean by "norm" (Chapter 6) and what Hart means by "rule" in referring to those rules I spoke of in this section under point (*a*) (which rules have a matter-of-fact existence). More clearly stated, Hart's intra-systemic rules of obli-

[33] "The internal aspect of rules is often misrepresented as a mere matter of 'feelings' in contrast to externally observable physical behaviour. No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may often have psychological experiences analogous to those of restriction or compulsion. When they say they 'feel bound' to behave in certain ways they may indeed refer to these experiences. But such feelings are neither necessary nor sufficient for the existence of 'binding' rules. There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought,' 'must,' and 'should,' 'right' and 'wrong.' These are the crucial features which distinguish social rules from mere group habits" (Hart 1961, 56). Certainly, as Hart writes (and as Hägerström, too, can be made out to say: Section 8.1.4), "there is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion." But then we are left to decide—in regard to the acceptance of, and critical reflective attitude to, the patterns of behaviour which Hart speaks of when he describes the internal point of view of norms—what the nature of this acceptance and critical attitude is, or what dimension they belong to: Do they belong to the psyche, to the human brain? Or do they not? And if they do not belong there, in what sense are they an *internal* aspect, over against an external one? I already expressed in Section 8.2.5 my qualms about Kelsen's anti-psychologistic bias. I will discuss the matter at greater length in Section 15.4. Hägerström, for his part, denies any identification between the idea of duty and the sense of duty: cf. Hägerström 1917, 60–4; Hägerström 1953c, 127–32; Pattaro 1974, 133–40 and 140–78.

gation are not, from my point of view, necessarily "normative rules," "binding rules," "obligatory rules," "rules endowed with a binding force," or whichever linguistic formulation one chooses to express the concept.

In what concerns the point presently under discussion, instead, Hart's intra-systemic primary rules of obligation, which Hart admits as amenable to the qualification "valid" or "invalid," are, from my point of view, metonymically valid legal directives, or texts, meaning directives or texts validly enacted by instantiating the type of circumstance set forth in a competence norm (cf. Section 8.2.3).

It is a different matter whether these metonymically valid directives, or texts, lead to the birth of derivative norms in people's brains (Sections 7.3, 8.2.4, and 9.6).

The process leading from metonymically valid directives, or texts, to derivative norms can take place only in those people who believe in a competence norm and hence subsume under the type of circumstance set forth in the competence norm the valid enactment of directives, or texts, and infer derivative norms from the competence norm and from the metonymically valid directives, or texts, subsumed under the second premise of a reasoning: There can be no derivative norms (or rules) without believers (doxia: Section 6.2).

At any rate, as has already been observed, even from a believer's point of view it cannot be said that derivative norms are valid or invalid, because they more simply do or do not *exist*, either in the reality that ought to be (if the believer adopts the general conception of civil law, as reconstructed in Part One of this volume), or in the believer's brain (on my characterisation of norms as specified in Chapters 6 and 7, a characterisation not much different from Hart's 1961 account of the varieties of de facto existing rules, as outlined in the present section under point (*a*)).

One of the biggest differences between Hart 1961 and me is that Hart is looking to characterise *social* rules at a single stroke (from the external and the internal point of view), whereas I am characterising norms in *individual* persons (in roughly the same way as Hart characterises social rules). The question what it means for an obligatory rule (in Hart's language) or a norm (in my language) to be social is, as I see it, a further question, and one different from the question what it means for something to be an obligatory rule (in Hart's language) or (in my language) a norm existing in the brains of individual believers. This approach of mine is, I believe, methodologically safer than Hart's and more likely to yield better results.

What is lacking in Hart's conception of intra-systemic primary rules of obligation (which rules depend on a power-conferring rule or a rule of recognition) is, on the one hand, the distinction between enacted directives (or texts) and norms (Section 8.2.4) and, on the other, a reconstruction of the subsumption and inference process whereby a believer in a competence norm (Hart seems to hold that all officials, with but a few exceptions, are believers)

derives new norms—new derivative norms of conduct, or even new competence norms—from the valid enactment of a directive, or text (valid with respect to the type of circumstance set forth in the competence norm: Sections 7.3 and 9.6).

It is well to reiterate that "valid" and "invalid," contrary to what Hart claims, can be predicated, and metonymically at that, only of validly enacted directives (texts, statutes, regulations, etc.) and not of the derivative norms inferred by believers (cf. Section 8.2.3). And this holds equally true with believers (internal point of view) and nonbelievers (external point of view): The difference between the ones and the others consists in the fact that believers—through the process illustrated in Sections 7.2 and 7.3—will infer Ought-effects, and derivative norms in particular, whereas nonbelievers will make no such inferences.

Using the terms "valid" and "invalid" to qualify, metonymically, directives or texts of law (or of laws, if by "laws" we mean "texts of law") is appropriate from the internal point of view (that which Hart speaks of) as well as from the external point of view because, on my redefinition, "validity" means "congruent instantiation of a type" and bears no necessary connection with normativeness. In Hart's view, instead, judgments of validity belong only to the internal point of view. Hart, further, like many other scholars, incurs the previously indicated ambiguity of using "validity" in an undeclaredly double sense (senses (*a*) and (*b*) as specified in Section 8.2.4). He uses "valid" to designate both the congruence of an actual activity with a type of procedure (an enactment procedure, for example) and the existence of intra-systemic obligatory rules: To designate different, and indeed heterogeneous, things, namely, the congruence of Is-activities (in the reality that is) with certain types of activity and the existence of Ought-entities (in the reality that ought to be) (cf. Section 2.2.1).[34]

Hart rightly objects to Kelsen's concept of a "presupposed basic norm," and writes,

> It is important to see precisely what these presupposed matters are, and not to obscure their character. They consist of two things. First, a person who seriously asserts the validity of some *given rule of law*, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a *particular statute*, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications. (Hart 1961, 105; italics added)

[34] Cf. footnote 25 earlier in this chapter, where I indicate some pages in Hart 1961 where we find Hart speaking of the "valid exercise of legal powers" (for congruence) and "valid rules" (for existence).

In this passage Hart uses interchangeably "given rule of law" and "particular statute." That is, he conflates into a single thing the idea of acceptance of statutes as norms (as obligatory rules) and the idea of ascertainment and acceptance of statutes as belonging to the statutory law of a given country (an acceptance that I do not understand as necessarily implying any acceptance of a statute as a norm, or as an obligatory rule). And he speaks of validity without distinguishing between the two cases.

Recall in this regard the distinction between (*i*) the Is-outcome of the valid implementation of a procedure and (*ii*) the Ought-outcome of the valid implementation of a procedure. The Is-outcome of the valid implementation of a procedure (which outcome may be a statute, a legal directive, a text of law, etc.) can be said to be metonymically "valid" or "invalid." Instead, the Ought-outcome of the valid implementation of a procedure (which outcome, in the case presently under consideration, will be a derivative norm inferred by a believer: internal point of view) does not admit of any qualification as "valid" or "invalid" (cf. Sections 2.2.3, 8.2.3, and 8.2.4).

Besides, only in case (*i*) is reference to the actual practice sufficient of itself to determine whether a criterion is employed in the general operation of the system: We can conduct statistical inquiries and quantitative studies, or we can simply get a "journalistic" idea of what the country's legal practice is. Not so in case (*ii*): Here, it will not suffice to refer to a mere (unqualified) practice.

Hart writes that

> we only need the word "validity," and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; *it can neither be valid nor invalid* but is simply accepted as appropriate for use in this way. (Hart 1961, 105–6; italics added on second occurrence)

We have to take this statement one step further: That is, we need to go beyond Hart. And "going beyond Hart" means at least two things.

On the one hand it means confining the use of "valid" and "invalid," understood in a metonymical sense, to legal directives, texts, and statutes, thereby abandoning all qualifications of validity for norms and everything we conceive of as normative, this in order not to pollute with normative connotations the precious concept of validity as a token's congruence with a type (cf. Section 2.2.3).

On the other hand, "going beyond Hart" means introducing the concept of a "norm's existence" to refer to the existence of intra-systemic primary rules of obligation as well, and that *only* in the sense of "existence" in which Hart says of the secondary rule of recognition (and of other kinds of norms as indicated under the foregoing point (*a*)) that "its existence is a matter of fact" (Hart 1961, 107). My purpose here for introducing this concept of a "norm's

existence" is to refer not only to those primary rules of obligation that are found in simple prelegal societies, in which there exists no secondary rule of recognition (see the previous point (*a*) in this section), but also to those intra-systemic primary rules of obligation that are found in advanced municipal legal systems (systems equipped with rules of recognition, says Hart) and that in my terminology are derivative norms: They are norms because believed to be such, and derivative because obtained by subsumption and inference (cf. Chapter 7). In other words, my purpose is to refer to norms as beliefs in the brains of believers (doxia; cf. Section 6.2) and, even more important, in the brains of believing duty-holders, in which norms (so conceived) can operate as motives of behaviour, as *causae agendi* (nomia and abidance; cf. Sections 6.5 and 6.6).

Hart, too, sometimes speaks, almost absentmindedly, of norms (or rather, "rules," in his usage) as motives of behaviour:

> They [most people] may indeed obey, from a variety of *motives*: some from prudential calculation that the sacrifices are worth the gains, some from a disinterested interest in the welfare of others, and some because they look upon the *rules* as worthy of respect in themselves. (Hart 1961, 193; italics added)

Of course, intra-systemic derivative norms are such not in all consociates but only in those consociates who are believers and in those who are nomic. (From these consociates' internal point of view, rules, in Hart's words, are "worthy of respect in themselves"; in my words, they are believed to be binding per se.) These intra-systemic derivative norms are extremely important—they are so despite the fact that their existence among consociates carries the limitations just mentioned, and that this matter-of-fact existence may turn out to be only a scattered existence among the members of a society.

Intra-systemic derivative norms are important with respect to three kinds of subjects: (1) believers, even believers who are not duty-holders, because these norms (through the subsumption and inference process illustrated in Section 7.1) prompt them to have attitudes of normative censure toward other believers, whom they consider to be heterodox, paradoxic, or heretic believers, if it comes to that (cf. Section 10.2.1); (2) non-practising duty-holders (whether deviant or nonconformist; cf. Sections 6.6, 6.7, and 10.2.2), because these norms (through the same subsumption and inference process) may elicit a reaction against them on the part of believers and abiding nomic people; and (3) believing duty-holders (nomia; cf. Section 6.5), because these norms (through the same subsumption and inference process) prompt these people to hold behaviours of abidance (cf. Section 6.6) or, should they become deviant, to have attitudes of self-censure, remorse, and the like.

These intra-systemic derivative norms concur powerfully in making settled, lasting, and enduring the law in force as illustrated in Chapter 10; they do so directly and by way of the norm-proliferation effect illustrated in Chap-

ter 7, and even more so by way of the specific proliferation effect proper to competence norms (Section 7.3), especially manifest in the ultimate competence norm ("ultimate" is how Hart qualifies his rule of recognition), a norm institutive of authority (Section 9.6); and they also do so in conjunction with the suggestion exerted by the media, with the influence exerted by significant others (cf. Section 15.3.4), and with organised power (cf. Sections 9.3 through 9.5 and 10.1).

(*c*) If we take a closer look at Hart's internal point of view—especially where Hart concedes that we will find this point of view not only among officials, but also among ordinary citizens when the legal system is in good health—we will see clearly how Hart 1961 welcomes a strong conception of normativeness. And this fact is particularly important in view of what will be said in Section 8.3 on the changes that Hart comes at in the *Postscript*, with respect to Hart 1961, becoming conventionalist on the question of normativeness in law.

Hart proceeds as follows with regard to the ordinary citizen, the citizen making up the bulk of the population:

> Instead, he may think of the rule only as something demanding action from *him* under threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations. (Hart 1961, 112)

Hart here is talking about what I have called conformism (Section 6.7), a topic that Hägerström also treats profusely when he looks at the difference between a society governed by norms and a society governed merely by commands backed by a threat of punishment (cf. Sections 8.1.3 and 8.1.4).

Hart wraps up and reiterates:

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which *private citizens need* satisfy: They may obey each "for his part only" *and from any motive whatever*; though *in a healthy society* they will in fact *often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution*. The second condition must also be satisfied by the officials of the system. They *must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses*.[35] Of course it is also true that besides these there will be many primary rules which apply to officials in their merely personal capacity which they need only obey. (Hart 1961, 113; italics and footnote added)

[35] Cf. Section 10.2.1, on "orthodoxia," "catholodoxia," "heterodoxia," "paradoxia," and "heresy."

This last statement by Hart will look strange unless we admit (as I do) that the internal point of view typical of judges and the other officials may consist in the hypocrisy of the whited sepulchres (Section 6.6). Indeed, when judges and officials at large are sincere believers, they will have to be that way not only in their official capacity, but also when they act as private citizens. At any rate, Hart comes to the following conclusion:

> The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour. We need not be surprised at this duality. It is merely the reflection of the composite character of a legal system as compared with a simpler decentralized pre-legal form of social structure which consists only of primary rules. *In the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules.* But where there is a union of primary and secondary rules, which is, as we have argued, the most fruitful way of regarding a legal system, the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone. *In an extreme case the internal point of view with its characteristic normative use of legal language ("This is a valid rule") might be confined to the official world.* In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system. (Hart 1961, 113–4; italics added)

8.2.6.2. The Difference between Criteria and Rules as a Difference between Types and Norms

Let us now take things up from point (*b*) of the previous Section 8.2.6.1, on intra-systemic norms, and consider in some detail the interaction between the secondary rule of recognition and intra-systemic primary rules of obligation as this interaction is described in Hart. We will do so by paying special attention to the terms he brings into play to this end. According to Hart,

> wherever such a rule of recognition is accepted, both private persons and officials are provided with *authoritative* criteria *for identifying primary rules of obligation*. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases. In a very simple system like the world of Rex I [...] *the sole criterion for identifying the law* will be a simple reference to the fact of enactment by Rex I. [...] In a modern legal system where there are a variety of "sources" of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include [reference to] a written constitution, enactment by a legislature, and judicial precedents. (Hart 1961, 97–8; italics added)[36]

[36] The interpolation introduced with the last pair of square brackets ("reference to") may perhaps be so obvious as to be unnecessary. But, given the doubt, I felt safer making it anyway: Someone might be in disagreement.

I have italicised for emphasis two terminological uses by which Hart effects a conflation similar to the one pointed out in the previous section: In this case he is conflating two concepts between which I feel a distinction is necessary. I have also italicised for emphasis a qualification I find perplexing and telling.

Let us begin with the qualification. It consists in the adjective “authoritative.” This adjective should be reserved—in a strict sense, at least in my terminology—for people invested with authority by a competence norm (by a power-conferring rule or a rule of recognition, in Hart’s terminology), and for these people’s enactments.

Maybe in Hart’s terminology, “authoritative criteria” somehow means “criteria believed to be per se authoritative, or binding.” This interpretation seems to me to be supported by the context in which “authoritative” occurs. Hart (1961, 97; italics added) writes: “Wherever such a rule of recognition is *accepted*, both private persons and officials are provided with *authoritative criteria for identifying primary rules of obligation*.” In my view, these criteria are authoritative only for those who accept them as authoritative, and they are authoritative because accepted as authoritative: Those who accept them as authoritative somehow come to believe them to be binding per se (in the sense specified in Chapter 6; and criteria that are believed to be binding per se are norms); also, in keeping with my terminological choice, I prefer the expression “per se binding types” to “per se authoritative criteria.” And, moreover, a criterion like the one that Hart indicates as “enactment by Rex I” is in my terminology a type of circumstance contained in a competence norm (Sections 5.3, 6.3, 7.3, 8.2.1, and 9.6).

Undoubtedly, a criterion that is *not* authoritative or binding—as is the case with any non-authoritative or non-binding type (any type not set forth in any norm; and norms are in the brains of believers)—does serve nonetheless, and in full, for believers and nonbelievers alike, the constitutive function of making possible valid tokens, and this criterion will be used according to its right use to distinguish tokens that are valid (congruent) with respect to it from tokens that are invalid (incongruent) with respect to it (cf. Sections 2.1.1 through 2.1.6 and 2.2.2).[37]

It is just as doubtless, however, that a criterion that no one believes to be authoritative per se, or a type that no one believes to be binding per se, cannot bring forth (in anyone who does not believe in its authoritativeness or bindingness, therefore) the process, described in Chapter 7, by which derivative norms are inferred. We can now consider, in the light of this premise, Hart’s conflation of two different concepts.

[37] Of course, you cannot use a type that you do not know, a type that is unavailable to you. So if you qualify a token as valid or invalid with respect to a type, you are using to that end a type encoded in your brain. But this type that you are using will enable you to qualify tokens as valid or invalid even if it is not encoded as the content of a norm you have internalised.

In the passage just quoted, and elsewhere, too, Hart's phrasing implies one conflation between "secondary rule of recognition" and "criteria" and another conflation between "used for the identification of primary rules of obligation" and "for identifying the law." Both conflations, I believe, are best avoided.

Now then, in my view, neither criteria nor law is normative per se, if not with anyone who holds it to be normative. Indeed, criteria I understand to be types independently of any norms or rules that may contain them (Chapter 2). And law I do not understand to be entirely normative, that is, normative with everyone (nor even do I understand it to be normative with every official): Law is normative only with those people who, in one way or another, have internalised it as normative; that is, law is normative only with believers; and with each believer, it is normative only in those parts of it (in certain statutes rather than others, for example) that the believer in question believes to be normative (cf. Sections 9.5.2, 9.6, and 10.2.1).

Criteria, even if they are held to be non-normative, can well serve the function of identifying the law, whether the law is held to be normative or not. The function is that of identifying either the law in books[38] (metonymically valid statutory law) or such law as is effective on account of the intertwining (described in Chapter 10) of normativeness and organised power. Which of the two kinds of law we end up identifying will depend on the criteria we use. But here, with both kinds of law, the criteria used serve the function of identifying the law whether the law is normative or not: The criteria do not as such affect the normativeness or non-normativeness of the law identified with them, much less do they determine such normativeness or non-normativeness (unless these criteria are the content of a norm believed in by the people who use them).

Hart's undifferentiated use of "rules" and "criteria," on the one hand, and "primary rules of obligation" and "law," on the other, supports me in my view that the following two conceptual distinctions had best be maintained.

On the one hand, we have the distinction between types (whether set forth in norms or elsewhere) and norms (or obligatory rules, in Hart's terminology) whose existence is a matter of fact.

On the other hand, we have the distinction between norms (or rules, in Hart's terminology) and law. In my view, the law rests on norms, that is, on de facto existing and binding rules as just characterised using Hart's terminology specifically to that end. Norms contribute crucially and powerfully to the law's functioning and persistence; they are a necessary condition of the law's being in force as this concept is characterised in Chapter 10. They are not, however, also a sufficient condition for the law's functioning, persistence, and

[38] As is known, the expression "law in books" was brilliantly treated by Roscoe Pound in opposition to "law in action"; cf. Pound 1910.

being in force; and this implies that law is not made up exclusively of norms (or made effective or in force exclusively by virtue of norms: Section 10.1), and that law is not entirely normative, either with the bulk of the population or with the officials.

The secondary rule of recognition serves at once two functions that must be kept conceptually distinct.

The importance of this distinction can be appreciated, for example, when we have to do with the question of the implementation of enactment procedures. Let us see how so.

The rule of recognition, considered as a provider of criteria, serves to identify in a cognitive sense certain directives, or texts, as metonymically valid tokens of certain types, or as modes of enactment by which law is produced (Is-outcome, i.e., texts of law). Here the type of circumstance set forth in the rule of recognition is considered only qua type. And its constitutive and cognitive function in identifying metonymically valid law (or texts of law) is performed independently of whether the rule of recognition is held to be normative, or binding per se; that is, independently of whether the same type is held to be the type of circumstance contained in a competence *norm* (a power-conferring *rule*: internal point of view).

When, instead, the secondary rule of recognition is not only considered a provider of criteria, but is also accepted as a normative rule (internal point of view) prescribing obedience to the law (texts of law) identified on the basis of the same criteria, it serves this further function with respect to believers: with respect to those people who believe the rule of recognition to be a competence norm that is binding per se (or authoritative, in Hart's terminology). The function—given the contents of directives and of texts enacted validly with respect to the type of circumstance set forth in the rule of recognition—is to drive the believers in the rule of recognition (understood as a competence norm: as a normative, authoritative rule) to believe by subsumption and inference (Chapter 7) that the contents of these directives or enacted texts are per se binding derivative norms. Here, the type of circumstance set forth in the rule of recognition functions normatively as well, because the rule of recognition is held to be binding per se, i.e., it is held to be a competence *norm*: It serves to produce normative illative beliefs, in a causal-psychological sense (and through the subsumption and inference process described in Sections 7.3 and 9.6), and it may involve the reification or hypostatisation of the contents of such beliefs.

Hart introduces with these words the internal point of view:

> The use of *unstated rules of recognition*, by courts and others, in identifying particular rules of the system *is characteristic of the internal point of view*. Those who use them in this way thereby manifest their own *acceptance* of them as *guiding rules* and with this attitude there goes a *characteristic vocabulary* different from the natural expressions of the external point of view. (Hart 1961, 99; italics added)

It seems clear to me here that Hart is using "rules" in the sense in which I use "norms": Significant in this regard is his use of "guiding" to qualify "rules." It may be that my interpretation of Hart's thought is mistaken. What is certain—if I am allowed to enter briefly into autobiographical detail—is that on my reading, Hart's 1961 account of the existence of a norm from an internal point of view has since been lending support to the concept of norm I came at from reading the works of Hägerström and Olivecrona, a concept that is presented and developed in this volume as well.

Observations similar to those previously made—on the importance of the two conceptual distinctions (between types and norms and between norms and law): on the bearing these distinctions have when we consider the functions of the implementation of enactment procedures, for example—are warranted as well by the way Hart brings the external point of view into play in opposition to the internal point of view. He does this as follows:

> This *attitude of shared acceptance of rules* is to be contrasted with that of an observer *who records ab extra the fact that a social group accepts such rules* but does not himself accept them. The natural expression of this external point of view is not "it is the law that ..." but "In England they recognize as law ... whatever the Queen in Parliament enacts ... ." The first of these forms of expression we shall call an *internal statement* because it manifests the internal point of view and is naturally used *by one who, accepting the rule of recognition and without stating the fact that it is accepted*, applies the rule in recognizing some particular rule of the system as valid. The second form of expression we shall call an *external statement* because it is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it. (Hart 1961, 99; italics added on first, second, and fourth occurrence; in original on third and fifth occurrence)

In view of the matter discussed in the following Section 8.3—namely, whether Hart 1961 intended to provide a conventionalist account of the internal point of view of norms—I should call attention in the first instance to what Hart 1961 says, in the excerpt just quoted, on those who adopt the internal point of view: This is someone "who, accepting the rule of recognition and *without stating the fact that it is accepted*, applies the rule in recognizing some particular rule of the system as valid." This remark (from Hart 1961) would seem to settle the question: Those who adopt the internal point of view do not do so stating its general acceptance on the part of others. And the reason why they do not state this acceptance, I should comment, is this: Those who adopt an internal point of view (those who believe in a norm) do so (they believe in a norm) precisely inasmuch as they do not make their normative attitude (their belief) dependent on the behaviours or attitudes (beliefs) of other people—precisely inasmuch as their acceptance of a norm cannot correctly be explained by way of a conventionalist account of norms.

In my terminology I would say that those who adopt the internal point of view and make internal statements believe the criteria with which to identify the law to be authoritative or binding per se, in that they believe it to be bind-

ing per se to obey anything that these criteria mark out as binding per se. To put it otherwise, the criteria of validity—when viewed from the believer's standpoint, the internal point of view—are twofold: They are not only criteria with which to determine whether a certain actual item (e.g., a text, statute, directive, or regulation) has been validly or congruently enacted with respect to a certain type of enactment, and hence whether this item is part of the law of the country in question; they are also the type of circumstance with whose valid instances a norm a believer believes in (here, a competence norm, the secondary rule of recognition) connects a per se binding type of action—in this case, since we have to do with a competence norm, it will connect the type of action "obeying" (cf. Section 8.2.1).

And I would also say, on the other hand, that those who adopt, instead, the external point of view and make external statements adopt the aforementioned criteria (which criteria other people, the believers, believe, from an internal point of view, to be types of circumstance with which a competence norm connects the per se binding type of action "obeying") without understanding them to be types of circumstance with whose valid instances there is connected an obligation to obey. The nonbelievers (external point of view) use the same criteria used by believers,[39] but as mere criteria (not as types of circumstance specified in a competence norm): They use these types neutrally as criteria with which to determine whether the law's modes of production have actually taken place validly with respect to these criteria. In nonbelievers—once they have identified a certain token as congruent with that type, or criterion, or valid with respect to it—there is not any going any further: There is not any proceeding to the subsumption of valid tokens under the type of circumstance in order to infer derivative norms (but at most to infer derivative and, in their view, non-binding laws), this because in the brains of nonbelievers there is encoded a type ("type" as criterion for identifying the law of the land) but there is not internalised any per se binding norm (or belief) requiring obedience to this law. And hence, in the brains of nonbelievers, there is no proceeding to the inference of derivative norms, as happens instead in the brains of believers (internal point of view).

On judges and officials, as distinguished from ordinary citizens, Hart also says what follows:

[39] The type used by believers and nonbelievers is roughly the same type in the same sense in which the type of circumstance used by believers is the same type among believers. The presence or absence of a normative qualification of a shared type (in any possible meaning of "shared") can, however, involve differences even in the mere judgment of validity (congruence) that through that type believers and nonbelievers alike apply to certain tokens. The believing and the nonbelieving duty-holder will both turn to a tax lawyer to find out what the country's (metonymically) valid law is, but the believing duty-holder will do so in order to comply with his or her duties as a taxpayer; the nonbelieving duty-holder, to commit fiscal evasion or avoidance and conceal it as effectively as possible.

Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system. (Hart 1961, 112–3)

In my opinion, the existence or being-in-force of a legal system in a given country requires organised power and norms (cf. Chapter 10), and as Hart observes, it requires in particular that norms be *critically*, that is, consciously, present among officials and judges. But the critical concern of judges and other officials with norms can also be, in a measure not too small, a pretended concern.

The hypocrisy of officials plays a role (first among these officials are the politicians, in their institutional roles, and then come the judges; but there is also the hypocrisy of university professors, just so that we do not discriminate): The role that hypocrisy plays is that of contributing to keeping the legal system in existence, or in force. The whited sepulchres and the Jesuits (cf. Section 6.6), along with sincere believers, play a role that, with a little bit of cynicism (or, in this case, a little bit of realism à la Niccolò Machiavelli, 1469–1527), I feel must be recognised by us, the jurisprudents.

I think that if we (the jurisprudents) did not acknowledge this fact we would ourselves, in our official capacity as scholars, be acting in the manner of whited sepulchres or Jesuits, rather than in the manner of sincere believers in some professional norm that drives us to state things as they are (or as we think they are) vis-à-vis stating things as we'd like them to be.

8.3. Hart's *Postscript* Compared with Hart 1961: An Abjuration of Normativeness in Law

8.3.1. Hart's Masterpiece of 1961

We considered in the foregoing Sections 8.2.5 and 8.2.6 a few problems that Kelsen's theory of validity brought upon the "realistic" normativism ("realistic" à la Hägerström and Olivecrona) characterising Hart 1961. In particular, we considered the two concepts of existence of a norm adopted in Hart 1961.

Hart 1961 admits and theorises (*i*) the factual existence of extra-systemic norms of conduct and competence norms: the primary rules of obligation of prelegal societies, the binding or obligatory rules of international law, the nonlegal rules of churchgoers (males must bare their heads in church), and, last but not least, the rule of recognition.

At the same time, Hart 1961 admits and theorises (*ii*) the existence of intra-systemic norms of conduct and competence norms in advanced systems of municipal law; and he does so equating the existence of these norms with their validity, à la Kelsen. We have to do here with a notion of existence of

norms that, in Kelsen and Hart alike, is formal at the same time as it implies the normativeness, obligatoriness, or binding force of these norms, except that in Hart, unlike what happens in Kelsen, the existence-as-validity of the norms in question does not occur outside of space and time, but within the officials: within their internal point of view.

With his distinction between the two modes of existence of norms—modes (*i*) and (*ii*)—Hart 1961 puts an end to the two main traditions of 19th-century legal positivism: on the one hand, the empirical legal positivism which flourished in Great Britain under the powerful push of Bentham and Austin (analytical jurisprudence), and which spread most prominently in the common-law countries of Europe and North America and, on the other hand, the formalistic legal positivism which flourished in continental Europe under the powerful push of German legal dogmatics (in the stretch from Pandectism to *Begriffsjurisprudenz*, or conceptual jurisprudence,[40] and to *Allgemeine Rechtslehre*, or general theory of law,[41] and its 20th-century sublimation in Hans Kelsen's pure theory of law), and which spread especially in the civil-law countries of Europe and Latin America.

Having dismissed Austin's reductionist voluntarism (whereby a legal norm is equated with a habitually obeyed, or else enforced, command), and having dismissed Kelsen's normativistic reductionism (whereby a legal norm is equated with an *objektives Sollen* that is presupposed whenever the legal system is on the whole effective; cf. Chapter 14), Hart 1961 presents a fresh legal positivism, centred on the notion of social rule, a notion which breaks free of Austin's concept of norm as a habitually obeyed command as much as it breaks free of Kelsen's concept of norm as an objective and hypostatised Ought, but which at the same time satisfies the requisites of empiricalness and sociality (the requisites that Austin's theory was designed to satisfy) as much as it satisfies the requisites of the *prinzipielle Verschiedenheit* (Kelsen 1911, 8), the essential difference between Ought and Is (the requisites that Kelsen's theory was designed to satisfy).

The two reductionisms are overcome with elegance, softness, and careful critical analysis. Hart's rule of recognition—a social rule factually existing in the previously recalled sense (*i*) of "existence of a norm"—is explicitly designed to replace the "general habit of obedience" of analytical jurisprudence as much as it is designed to replace the presupposed basic norm of the pure theory of law.

In the 1970s Hart's idea of social rule drew the heeling criticism of Ronald Dworkin,[42] a criticism framed within the context of a more general challenge

[40] The German *Jurisprudenz* should properly be rendered as "legal science."

[41] But see the terminological qualification made in Section 1 of the Preface to this volume.

[42] Of course Dworkin's was not the only criticism of Hart, but it certainly was the most important, and the one by which the legal-philosophical debate on Hart stood most affected. Cf. Dworkin 1996, 1986a, 1986b. See, among other critics, MacCormick 1981 and Raz 1999.

to Hart's new legal positivism. This challenge, in the exposition of it found in Hart's *Postscript*, focuses on six main topics. The third of them is what Hart calls "the nature of rules."

8.3.2. Hart the Iconoclast: The Postscript*'s Destruction of the 1961 Portrait*

As Hart himself points out in his *Postscript* (published posthumously in 1994), the challenge that Dworkin puts him to consists of a wide range of criticisms "urged [...] in many of the seminal articles collected in *Taking Rights Seriously* (1977) and *A Matter of Principles* (1985), and in his book *Law's Empire* (1986)" (Hart 1997, 239). And, according to Hart, these criticisms involve six topics as follows: (*i*) the nature of legal theory, (*ii*) the nature of legal positivism, (*iii*) the nature of rules, (*iv*) principles and the rule of recognition, (*v*) law and morality, and (*vi*) judicial discretion.[43]

The six topics around which Dworkin builds his critical challenge to Hart are interconnected, to be sure, but here I will concern myself only with the question of normativeness (topic (*iii*)), for it is with regard to this question that I found a placement for the portrait of Hart 1961—and I intend to keep it there; and it is with regard to this question that I will want to consider the changes that take place from Hart 1961 to Hart's *Postscript*.[44] Indeed, from Hart's *Postscript* reply to Dworkin's criticism, there emerges—in what concerns the nature of rules—a complex abjuration of the legal normativeness maintained in Hart 1961. Following are the main points made in Hart's *Postscript* on the question in issue, along with my comments to these points.

(1) Hart speaks of his "original account of social rules" (1961) as no longer corresponding to the new account of them that he is about to provide in the *Postscript*. He finds that "some of Dworkin's criticism" to his original account of social rules "is certainly sound and important for the understanding of *law*" (italics added).[45]

[43] Cf. Hart 1997, 239ff., 244ff., 254ff., 263ff., 268ff., 272ff.

[44] As was to be expected, all the topics treated in Hart's *Postscript* touched off a wide debate in the world of legal philosophy: Exemplary in this regard is Coleman 2001b (with contributions by Joseph Raz, Timothy A. O. Endicott, Nicos Stavropoulos, Jules Coleman, Scott J. Shapiro, Andrei Marmor, Benjamin C. Zipursky, Kenneth Einar Himma, Stephen R. Perry, Brian Leiter, Liam Murphy, and Jeremy Waldron) and the December 2003 issue of *Ragion Pratica* (edited and with an introduction by Cristina Redondo, with essays by Mauro Barberis, Bruno Celano, Pierluigi Chiassoni, Enrico Diciotti, Riccardo Guastini, Mario Jori, Massimo La Torre, Claudio Luzzati, and Vittorio Villa). In Volume 11 of this Treatise, Gerald Postema devotes ample discussion to Hart, his critics, his *Postscript*, and the ensuing debate, especially in the English-speaking world and with reference as well to the different kinds of legal positivism.

[45] "Some of Dworkin's criticism of my original account of social rules is certainly sound and important for the understanding of law, and in what follows here I indicate the considerable modifications in my original account which I now think necessary" (Hart 1997, 255).

I wonder which aspects of law Hart is referring to here, since he is about to state that his practice theory "remains as a faithful account" of *law*, and he also states that in consequence of Dworkin's criticisms, he now holds his original practice theory to be no longer applicable to *morality*.[46]

It would be wrong to think that in the *Postscript* Hart retains his original theory of rules (his 1961 theory) and only restricts its application to law. Quite the contrary: The original theory changes radically in the *Postscript*. Here, in his *new* account of social rules, Hart narrows the range of application by excluding morality from it. And his reason for doing so is precisely that he has changed, not his 1961 account of morality, but his 1961 account of *social rules*, and his new account of social rules (as found in the *Postscript*) is not applicable to morality: It is applicable only to "conventional social rules which include, besides ordinary social customs (which may or may not be recognized as having legal force), certain important legal rules including the rule of recognition," says Hart in the *Postscript* (Hart 1997, 256). I say that this new account is not applicable to law, either, in contrast to the 1961 account of social rules, which was applicable to *both* morality and law (according to Hart 1961). The reason why I understand the new (*Postscript*) account of social rules as not applicable to law either is that conventional rules are not norms (per se binding rules)—and there cannot be law without norms, a point on which I am in agreement with Hart 1961.[47]

(2) Hart writes in the *Postscript*, "In what follows here I indicate the *considerable modifications* in my original [1961] account which I *now* think necessary" (italics added) and he declares that his 1961 account of social rules

[46] "My account of social rules is, as Dworkin has also rightly claimed, applicable only to rules which are conventional [...]. This considerably narrows the scope of my practice theory and I do not now regard it as a sound explanation of morality, either individual or social. But the theory remains as a faithful account of conventional social rules which include, besides ordinary social customs (which may or may not be recognized as having legal force), certain important legal rules including the rule of recognition, which is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts" (Hart 1997, 256).

[47] I am not denying here that many legal rules are effective because they are conventions, rather than because they are (believed to be) norms; and after all, I include conformism among the possible kinds of obedience to law: Section 6.7; cf. Sections 9.3 through 9.5). What I do deny is that a legal system can be in force (Chapter 10) and enduring and settled (Section 8.1) if at least a part of the population, and in particular a significant part of the officials, has not internalised as norms (by conviction) a significant amount of the laws making up the legal system. This is also the view of Hart 1961, who in fact criticises John Austin's theory of the law as a set of habitually obeyed commands in a society: He made this criticism on the basis of arguments quite similar to those used by Hägerström and Olivecrona before him. The conclusion these arguments lead to is encapsulated in the title of the present chapter, "No Law without Norms," a slogan that applies equally well to Hägerström, Olivecrona, Hart 1961, and, last and least, to me.

"is, as Dworkin has claimed, defective in ignoring the important difference between a consensus of *convention* manifested in a group's conventional rules and a consensus of independent *conviction* manifested in the concurrent practices of a group" (Hart 1997, 255).

It is this distinction between a consensus of convention and a consensus of independent conviction—a distinction made by Dworkin in *Taking Rights Seriously* and later reiterated and expanded upon in *Law's Empire*[48]—that plays a crucial role in getting Hart to change, in the *Postscript*, his 1961 account of social rules, a change from which flows, in the *Postscript*, his abjuration of normativeness in law.

In fact, Hart's new account of social rules as presented in the *Postscript*—a conventionalist account—has little do to with normativeness. And it is in consequence of giving up normativeness that Hart's *new* account of social rules, as presented in the *Postscript*, cannot be applied to morality. What does instead still apply to morality (even after the *Postscript*) is Hart's 1961 *normativistic* account of rules.

(3) In the *Postscript* Hart maintains that his original (1961) "account of social rules is, as Dworkin has rightly claimed, applicable only to rules which are conventional," and he characterises conventional social rules as follows, by setting them against concurrent rules (an example of concurrent rules is the rules making up a group's shared morality):

> Rules are conventional social practices if the general conformity of a group to them is part of the *reasons* which its individual members have for acceptance; by contrast merely concurrent practices such as the shared morality of a group are constituted not by convention but by the fact that members of the group have and generally act on the same but independent *reasons* for behaving in certain specific ways. (Hart 1997, 255–6; italics added)

This passage is important because Hart adopts in it Dworkin's distinction between conventional rules and normative (concurrent) rules, a distinction worked out for the specific purpose of critiquing Hart's theory of social rules.[49] The passage is important for another reason, too: Hart's adoption of this distinction (in the *Postscript*) is intended to relocate law within the sphere

[48] It is *Law's Empire* that Hart refers to in the sentence just quoted (Dworkin 1986, 114ff., 135ff., 144ff.; cf. Dworkin 1996, 53).

[49] "A community displays a *concurrent* morality when its members are agreed in asserting the same, or much the same, *normative* rule, but they do not count the fact of that agreement as an essential part of their ground for asserting that rule. It displays a *conventional* morality when they do. If the churchgoers believe that each man has a duty to take off his hat in church, but would not have such a duty but for some social practice to that general effect, then this is a case of conventional morality. If they also believe that each man has a duty not to lie, and would have this duty even if most other men did, then this would be a case of concurrent morality" (Dworkin 1996, 53; italics added).

of conventional rules and to reserve for morality alone the sphere of concurrent rules—truly normative rules, as I would call them.

The internal aspect of rules is retained in Hart's *Postscript*, but here it is characterised in two different ways designed to account for the different nature of the two kinds of social rules, conventional and normative (concurrent), in line with the distinction made in the foregoing passage of the *Postscript*. In this passage, the internal aspect of the two kinds of social rules—two heterogeneous kinds—comes into play where Hart speaks of the reasons (I would say the motives) the individual members of a group have for their acceptance of these rules.

According to Hart's *Postscript*, the group's general conformity to conventional rules is a component (an essential component, I should say) of the motives (Hart says reasons) the individual members of the group have for their acceptance of them. In other words, the fact of the group's general conformity to rules plays a crucial role in the internal point of view—in the attitude the individual members of the group take toward these rules.

Not so in the case of normative (concurrent) rules: According to Hart's *Postscript*, the reasons (I would say the motives) the individual members of the group have for their acceptance of these rules do *not* consist in the group's general conformity to them. In fact it would seem that the reasons for the individual members' acceptance of concurrent rules *cannot* consist in the group's general conformity to them. Quite the contrary, the reasons the individual members of the group have here for their acceptance of rules is rather, in every individual member, independent of the practice of the other individual members of the group, and the reasons for acceptance of rules are the same for every individual in the group. And *this* reason—this motive—consists in the internal aspect as characterised in Hart 1961: The internal aspect of concurrent rules is the distinctive critical attitude that Hart 1961 ascribed, not only to people practising certain legal and prelegal rules, like the (legal) rule of recognition, the (legal) rules of international law, and the (prelegal) rules of obligation of prelegal societies, but also to people practising the rules of morality. This internal aspect (of 1961) is a distinctive, critical, truly normative attitude that in the *Postscript* Hart wants to ascribe *only* to people practising the rules of morality, and no longer to people practising the legal and prelegal rules just mentioned.

Why is that so?

Because—I say—Hart, in consequence of Dworkin's criticism, has come to appreciate that the internal point of view by which in 1961 he characterises both the law and morality results in a strict, strong, or true normativeness not susceptible of being conceptually distinguished into different species of normativeness: a moral normativeness and a legal one, for example, the latter being heterogeneous from the former, and for this reason separate from it.

Normativeness and morality, as Dworkin configures them, tend to mix and conflate; so, unless we keep the rules of law heterogeneous from the rules of morality (that is, from norms, or normative rules), the ones will end up implying the others and jeopardising the thesis of the separation of law and morality. Ironically, it was Dworkin himself who showed Hart the escape route; he did so with his distinction between a social morality made of conventional rules (a conventional morality) and a social morality made of normative rules (a concurrent morality). In the light of this distinction, the escape route is the following: Law is made of conventional rules (of conventions) and morality of normative rules (of norms).[50] There is a sense in which Dworkin not only showed Hart the escape route, but forced him to *take* that route.

Indeed, there is not a decisive objection against considering concurrent morality to be social, on a par with conventional morality: both are equally social insofar as they are generally practised by the members of a social group. The difference between the two moralities, both of them socially practised, is the motive (or reason, in Hart's usage) why people practise them: Conventional morality is something that people practise because they see it generally practised in the social group; concurrent morality, in contrast, is something that they practise because they see it as their duty to do so (so, even though a concurrent morality is generally practised, this fact does not figure into the motives, or reasons, that cause people to follow this practice).

I believe that even though Hart 1961 went quite far in stressing the social dimension of rules (he did so on account of a misplaced anti-psychologism that I will return to in Section 15.4), he gave in reality a normativistic characterisation of rules (as I hope to have shown in Section 8.1) by placing emphasis on their internal point of view, or aspect—and this normativistic characterisation applied equally to legal and moral rules (a view that takes Hart 1961 not too far from the positions of Hägerström and Olivecrona). The rules that Hart speaks of in 1961 are in any case normative concurrent rules in what concerns their acceptance, be it the officials' acceptance of the rules of law, the acceptance of the rules of morality by those who share a given morality, or the acceptance of the prelegal rules of a primitive society by the members this society.

Dworkin ascribes to Hart 1961 what he calls the "social rule theory" (Dworkin 1996, 51). Dworkin understands the social-rule theory he ascribes to Hart to be in any event a conventionalist theory: I do not agree on this point, because, as was previously shown, and as Dworkin, too, admits, "social" is not equivalent to "conventional," so that it is possible to have social moralities that are normative and concurrent rather than conventional. Dworkin adds that the conventionalist social-rule theory he ascribes to Hart can take a strong version or a weak one: The former claims to give a conven-

[50] Cf. footnote 49 in this section.

tionalist account of *all* rules (be they legal or moral); the latter it does *not*. According to the weak version of the social-rule theory,

> it is simply *sometimes* the case that someone who asserts a duty should be understood as presupposing a social rule that provides [the grounds, reasons, or motives] for that duty. For example, it might be the case that a churchgoer who says that men must not wear hats in church must be understood in that way, but it would not follow that the man who asserts the duty not to lie must be understood in the same way. He might be asserting a duty that does not in fact depend upon the existence of a social rule. (Dworkin 1996, 52)

Further, in *Taking Rights Seriously*, Dworkin is not categorical in maintaining that Hart 1961 adopts the strong conventionalist version of the social-rule theory: He observes that Hart's conventionalist social-rule theory lends itself to be interpreted as either strong or weak. Ultimately, however, Dworkin maintains (erroneously, in my opinion, or maybe with some provocation) that what Hart 1961 writes in the parts relevant to this question indicates that Hart 1961 adheres to the strong conventionalist version of the social-rule theory (Dworkin 1996, 52). I should reiterate that Hart 1961, despite what he later writes in the *Postscript*, does not adopt a conventionalist social-rule theory, either strong or weak. What he does adopt is instead a normative social-rule theory (rather than a conventionalist one): As I just said, "social" is not equivalent to "conventional," and a social-rule theory can very well characterise as normative the rules concurrently practised in a social group (and this is what Hart does in 1961).

A moment ago, in regard to Dworkin's opinion of Hart 1961, I said that Dworkin was mistaken in his opinion, or that maybe he expressed it with an intent to provoke. I fancied for a minute what Dworkin's attacks on Hart might look like if they were the skilful moves of a chess player. In the metaphor of chess, had Hart fallen for the ruse that had been devised, replying that, contrary to what Dworkin was insinuating, his social-rule theory was framed in reference not to conventional rules but to concurrent normative rules (which is how I view Hart 1961), Dworkin would have checkmated him. That is, Dworkin would then have been able to show that—if that was the case: if Hart was in fact referring not to conventional social rules but to concurrent normative social rules—Hart's thesis of the separation of law and morality would have been undercut.

I do not know whether Hart was a good chess player, but certainly he showed the makings of one: He saw through the ploy, pondered at length, and then, in the *Postscript*, withdrew in defence in the manner I am illustrating in these pages: Hart took the escape route that Dworkin had shown to him, a route he was forced to take if he was to avoid being checkmated on the thesis of the separation between law and morality.

Consider that if Hart had not chosen to take this escape route (an escape route that he was in reality forced to take, in the sense just explained) and had instead claimed and reasserted the normative character he ascribed to so-

cial rules in 1961 (by admitting that in *The Concept of Law* he was presenting rules of a social, normative, concurrent kind), he would have had to come to a very embarrassing conclusion: the conclusion—to paraphrase the title to the present chapter—whereby there is no law without morality.[51] Hart was evidently unwilling to come to this conclusion. For this reason he took the escape route shown to him by Dworkin: In the *Postscript*, Hart says that his social-rule theory was already conventional in 1961 (if he had said that it was normativistic, he would have had to forsake the separation of law and morality); in the *Postscript*, he implicitly argues his 1961 theory of social rules to be the weak version of the conventionalist social-rule theory (whereas Dworkin had argued it to be the strong version). The weak version admits of individual normative rules (accepted as normative by individual people) and of social normative rules (concurrently accepted as normative by the generality of the members of a social group). Neither of these normative rules (individual rules on the one hand, social but concurrent rules on the other) has anything to do with conventional rules: They are the stuff of which morality is made, individual morality as well as social morality. And a social morality made up of normative rules is evidently a normative and concurrent social morality.

In the *Postscript*, Hart weakens and indeed does away with his original (1961), normativistic account of the internal point of view where the law is concerned. In the *Postscript*, Hart retains his original (1961), normativistic internal point of view to characterise morality, and for the law he conceives a new internal point of view *different* from that which he described in 1961 as characterising the law as well. In the *Postscript*, Hart conceives for the law—for legal rules, including the rule of recognition—a would-be normativistic account of the internal point of view: a conventionalist account. Conventions may be called rules, but they are not norms: They do involve an internal point of view, but not a normative one.

I am not dealing in any essentialism here: The word "rule" takes many meanings. There are rules of prudence, for example. I am trying to make an

[51] The title to this chapter is "No Law without Norms." If normativeness is identical to morality, one must come to the conclusion just indicated. This conclusion might be complemented by paraphrasing as well the titles of Chapters 9 and 10 of this volume, so that not only is there "no law without morality," but also "morality is not enough" and "the law in force is an ambiguous intertwining of morality and organised power." Conclusions of this kind are not embarrassing for those who, like me, and unlike Hart, admit among moralities the moralities that are irrational and iniquitous from the standpoint of a critical and enlightened morality (such as I think Hart, Dworkin, and I by and large share): These moralities are irrational and iniquitous but are moralities nonetheless, just as many legal systems are irrational or iniquitous but are legal nonetheless. Hart, strangely, from my point of view, upholds the second thesis but rejects the first. Examples of irrational or iniquitous moralities are taboo moralities, Nazi and racist moralities, and the morality of terrorism, and I will briefly return to them in Section 15.4.

unambiguous use of the terms I call into play. So, in this effort, I am using "norm" to designate not just any rule, but only those rules that are normative. And, on my characterisation of norms (Chapter 6), a conventional rule is a rule but not a norm.

The social rules that Hart speaks of in 1961 are characterised as having a peculiar internal aspect in addition to an external one—and such are the (prelegal) rules of obligation in prelegal societies, the obligatory (legal) rules of international law, the churchgoers' (nonlegal) rule (males must bare their heads in church), and, last but not least, the (legal) rule of recognition that judges and officials use in advanced municipal law to decide what are to count as valid intra-systemic rules, where "valid," in Hart's 1961 usage, means "rules endowed with binding force" (cf. Section 8.2.6).

Rules as characterised by an internal normative attitude—the believers' belief, the distinctive internal point of view, or acceptance, in the sense of Hart 1961—are a different thing from so-called conventional rules: They are norms. For this reason, the portrait of Hart appearing in my normative gallery next to Hägerström's and Olivecrona's is Hart 1961.

8.3.3. Summing up on Hart 1961 and on Hart's Postscript

Hart's main purpose in the *Postscript* is to safeguard the separation between law and morals. In response to Dworkin's criticisms, he puts his own conception of legal normativeness through a serious revision. And this revision, I submit, is designed to preserve the separation between law and morals, relegating the law to the sphere of the conventional (as Dworkin characterises this concept, beginning with *Taking Rights Seriously* up until the more elaborate exposition found in *Law's Empire*) and reserving the normative dimension for morals, this precisely for the purpose of not jeopardising the separation between law and morals.

Indeed, there are two readings that we can make of the considerable modifications that Hart says he wants to make in the *Postscript* by restricting the scope of his social-practice theory of 1961 in reply to Dworkin's criticisms.

Here is the first reading. Hart says in the *Postscript* that his practice theory of rules was already conventionalist as of 1961, but that he had not at that time realised it: He came around to that realisation only after Dworkin's criticism. On this reading, Hart maintains in the *Postscript* that he had implicitly and half-consciously been a conventionalist from the outset, and that precisely because of this half-conscious way of being conventionalist, he had not realised that the conventionalism of his practice theory of rules could not work as an account of morality. Having become fully aware of this fact with Dworkin's criticisms, Hart, on this first reading, maintains, and remains true to, the conventionalistic setup of 1961, but this only in what concerns the law; and, in consequence of the newly acquired consciousness owed to Dworkin, Hart

informs us that in 1961 he was wrong to draw morality, individual and social, into his conventionalist practice theory of rules.

The second reading. Hart was not conventionalist in 1961: His practice theory of rules was not conventionalist with regard to law or with regard to morality. The practice theory of rules was rather normativistic, in a sense of "normativism" incompatible with "conventionalism," and it was normativistic with regard to law as much as it was normativistic with regard to morality. In the light of this second reading (the reading I find to be the correct one) Hart realised in his *Postscript*, in consequence of Dworkin's criticisms, that it is somehow misguided to make normativeness a genus distinguished into two species, i.e., a legal and a moral normativeness. If that is the case—and I think it is—Hart must give up his thesis of the separation between law and morals, at least on some interpretations of it; and in so doing he would yield to the more crippling of the criticisms that Dworkin levels at him and at his "soft" positivism.

Hart cannot, however, part with his thesis of the separation between law and morality.[52] If he did, he would undermine his entire theoretical construction. He would have to recast *all* of the six positions described in the *Postscript* as the six targets of Dworkin's criticism to his legal positivism. He would have to give up, or at least radically revise, not only the two positions that he does in fact radically refashion (the position on the nature of rules, where law is concerned, and that on the distinction between rules and principles), but also the four other positions described in the *Postscript* as the targets of Dworkin's criticism, namely, the position on the nature of legal theory, on the nature of legal positivism, and on the separation between law and morality, of course, and maybe even on judicial discretion.[53]

Instead, Hart's defence against Dworkin's criticism of Hart's 1961 account of social rules proceeds, in the *Postscript*, in the peculiar way illustrated in the previous Section 8.3.2, a way through which Hart subtracts moral rules from inclusion among rules as he characterises them anew in the *Postscript* (as conventional rules). If, indeed, Hart had accepted Dworkin's criticism in the sense of accepting that legal rules and moral rules are normative in the same way, he would have had to also give up, or at least radically revise, the thesis of the separation between law and morals.

In conclusion, Hart 1961 presents, I believe, a normativistic account of the practice theory of rules, characterised as it is by Hart's construction of the so-called internal point of view, a construction emerging from Hart's treatment

[52] It is undoubtedly out of conviction that he cannot do so, a conviction developed and reinforced over the course of decades.

[53] The remark holds true of Hart's overall theory (his "soft" positivism comprehensively understood), and that mainly because of the wide reception that Hart 1961 makes of Kelsen's theory of the validity, or binding force, of intra-systemic legal rules.

of primary rules of obligation in prelegal societies, of obligatory or binding rules in international law, of the nonlegal rules of churchgoers (nonlegal but normative nonetheless, I should say), and, last but not least, of the rule of recognition shared by officials and in particular by judges in advanced systems of municipal law.

In Hart 1961 these rules, as well as the rules of morality, individual and social, are normative rules, not merely conventional ones. Legal and moral normative rules have in common, in Hart 1961, the peculiar, distinctive, critical internal point of view (thus, for example, the ones and the others carry the same normative language); and they are instead distinguished from each other, according to Hart 1961, by those characteristics that he found to be specific to moral rules: The "four cardinal [...] features which collectively serve to distinguish morality not only from legal rules but from other forms of social rule" (Hart 1961, 169) are "importance," "immunity from deliberate change," the "voluntary character of moral offences," and a characteristic "form of moral pressure" (Hart 1961, 169–76).

Leaving aside the mere acquiescence in rules on the part of the bulk of the population, a mere acquiescence that, as such, does not constitute a normative attitude, we can distinguish in Hart 1961 five varieties of rules, and all of these rules, independently of Hart's terminology of 1961, are to be understood as normative under the same kind of normativeness. These five varieties of rules are as follows:

(*a*) The intermediate rules in the legal system. These rules Hart qualifies, in the manner of Kelsen, as "valid," as legal in the strict sense, though not explicitly as "normative." Hart, further, says clearly that these rules entail normative statements of the kind "I (You) ought to [...]," "I (You) must do that," "That is right," "That is wrong" (Hart 1961, 54, 55, 56).

(*b*) The rule of recognition. This rule, according to Hart 1961, though normative (to use my terminology), cannot be qualified as valid. Nor can it be regarded as "law strictly so called" (pages 107–8); rather, it is "legal" in a broad sense and exists as a matter of fact. Further, Hart 1961 finds that those parts of the rule of recognition that limit legislative power and are not "laws strictly so called" (Hart 1961, 108) are not "conventions," either, this in contrast to Dicey's (1835–1922) distinction between the law of the constitution and the conventions of the constitution.[54]

[54] "The rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.

The one set of rules are in the strictest sense 'laws,' since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the courts; these rules constitute 'constitutional law' in the proper sense of that term, and may for the sake of distinction be called collectively 'the law of the constitution.' The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct

(*c*) The rules of a prelegal society, a society whose only rules (according to Hart 1961) are rules of conduct, meaning that there are no competence rules in these societies. These rules are prelegal, and hence are nonlegal (even in a broad sense they cannot be said to be legal, as is the case, instead, with the rule of recognition). Further, no validity can be predicated of them (just as no validity can be predicated of the rule of recognition), and they have—on a par with the rule of recognition—a matter-of-fact existence, unlike the intermediate rules in the system. Finally, they are normative, in my terminology: They are so at least as much as the rule of recognition, and maybe even more so, for they impose obligations, which the rule of recognition does not, on Hart's account of it.

(*d*) The rules of international law (Hart 1961 regards these as rules pertaining to a kind of law which is indeed sophisticated, but which in certain respects is primitive because devoid of a rule of recognition). These rules have in Hart 1961 the same status as the rules considered under the foregoing point (*c*). Further, Hart explicitly and repeatedly writes that they are binding (Hart 1961, Chapter 10).

(*e*) Moral rules. Hart 1961 finds these to be normative (in my terminology), on a par with the four varieties of rules just listed, and says they can actually impose obligations in a strict sense. Moral rules are not legal, and they can be qualified with respect to legal rules by the characteristics or requisites that Hart 1961 singles out in the second section of Chapter 8 and in Chapter 9 (Hart 1961, 163–76, 181–208). Hart 1961 distinguishes moral obligation from legal obligation, and he also says that there exists a conventional morality next to critical morality (Hart 1961, 181, 188–9).

So the characteristic common to the five varieties of rules described above, as found in Hart 1961, is that they have the same kind of normativeness or bindingness. What instead make them different from one another are features other than their normativeness or bindingness, or, without any change in substance, and using Hart's more nuanced terminology (though Hart uses "binding rule" in the case of international law), features other than their being rules toward which there is "a critical reflective attitude" that "displays itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought,' 'must,' and 'should,' 'right' and 'wrong'" (Hart 1961, 56).

In 1961 Hart did *not* give a conventionalist account of social rules: If he had, he would already have denied at that point (in 1961) that morality can be

of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution,' or constitutional morality" (Dicey 1959, 23–4).

explained by way of his account of social rules, this for the same reason that led him to make this denial in the *Postscript*, namely, to avoid jeopardising his thesis of the separation between law and morality.[55]

[55] On one occasion Hart 1961 takes up an example of conventional rule, and he qualifies it precisely as conventional. The example is "the rule of the road"—meaning drivers keep left or drivers keep right—an example that turns up frequently in the current debate on conventional rules. Here is Hart in his own words: "It is important to notice that the dominant status of some easily identifiable action, event, or state of affairs may be, in a sense, *conventional* or artificial, and not due to its 'natural' or 'intrinsic' importance to us as human beings. It does not matter which side of the road is prescribed by the rule of the road, nor (within limits) what formalities are prescribed for the execution of a conveyance; but it does matter very much that there should be an easily identifiable and uniform procedure, and so a clear right and wrong on these matters. When this has been introduced by law the importance of adhering to it is, with few exceptions, paramount; for relatively few attendant circumstances could outweigh it and those that do may be easily identifiable as exceptions and reduced to rule" (Hart 1961, 130; italics added). I should like to recall, incidentally, that this concept of conventional rule (independently of the terms that may express it) is already clearly stated in both Aristotle and Aquinas (Aquinas taking it up from Aristotle): Aristotle refers to it when discussing *nomikon politikon dikaion* (as he does in *Nicomachean Ethics* 1134b) and Aquinas when discussing a peculiar kind of *jus positivum* (as he does in *Summa Theologiae* (a), 2.2, q. 57, a. 2) (see Section 13.5). By way of a conclusion, I will recall some more trivial information on the use of "convention" in Hart 1961. The term "convention" and its derivatives (such as "conventional") occur an overall twenty-five times in Hart 1961, including the occurrence cited a moment ago in this footnote. The other twenty-four occurrences (of "convention" and "conventional") can be grouped into five senses sorted according to application. Thus we have sense (*i*), the conventional use of words, or of categories, or of the manner of advancing a claim, this sense occurring eleven times, on pages 3, 4, 5, 40, 107, 124, 210 (four occurrences on this page), and 247 (there is also on this page one occurrence of sense (*v*)); sense (*ii*), conventional etiquette, a sense occurring once, on page 186; sense (*iii*), the sense exemplified through Article V of the Constitution of the United States, a sense occurring once, on page 71; sense (*iv*), conventional morality, a sense occurring once on page 181 and then another time on pages 188–9; and sense (*v*), the constitutional limits set on legislative activity (cf. the foregoing point (*b*) in the run of text), a sense occurring twice on page 68, three times on page 108, twice on page 242, once on page 247 (where we also have an occurrence of sense (*i*)), and once on page 259. In fine, it is perhaps curious to note that in the *Postscript*, unlike what happens in *The Concept of Law*, Hart never uses the expression "conventional morality"; instead, "convention" (and its derivates, such as "conventionalism") occurs twenty-five times (exactly as many times as it does in *The Concept of Law*).

Chapter 9

BUT NORMS ARE NOT ENOUGH. THE INTERACTION BETWEEN LANGUAGE AND MOTIVES OF BEHAVIOUR

9.1. From Norms to Propositions: The Analytical Emasculation

Language-oriented philosophy, in its glorious stretch from logical empiricism to ordinary-language philosophy, has experienced an important season even in connection with the philosophy of law—and that even in Italy, where it yielded, from 1950 onward, significant results which I account myself to be directly indebted to. The two scholars at the forefront of this orientation in legal philosophy in Italy were Norberto Bobbio and Uberto Scarpelli (1924–1993), and I will be writing about them in Volume 11 of this Treatise, on the subject of legal philosophy in the 20th century.[1]

Analytical legal philosophy has often coupled with Hans Kelsen's legal positivism, taking up his conceptual apparatus. Kelsen's legal positivism is not only voluntaristic but also normativistic (see Chapter 14). Its normativism presents two aspects, among others: One of these I judge positively, the other negatively. What I find to be the positive aspect consists in the importance Kelsen attributes to norms as Ought (*das Sollen*, and hence to normativism in a strong acceptation): Without an idea of norms as Ought we cannot, in my opinion, have an adequate account of the legal phenomenon. The negative aspect of Kelsen's normativism consists in the way he conceives the status of norms: He understands them to belong to a dimension (ultimately a spiritual dimension) which he explicitly describes as endowing norms with an existence outside the realm of space and time.[2] His normativism, though it turns proudly against natural-law theories, is in a sense—like these theories' normativism—at once too strong and too weak. It is too strong because it tends more or less latently to reify norms (cf. Section 5.1); it is too weak because it does not treat norms as motives of human behaviour and therefore completely fails to render

[1] One recent book, published in English and edited by Mario Jori and Anna Pintore, collects essays by exponents of the analytical approach to legal philosophy in Italy (Pintore and Jori 1997). The contributions in the book are by the following scholars: Anna Pintore, Norberto Bobbio, Uberto Scarpelli, Giovanni Tarello (1934–1987), Enrico Pattaro, Gaetano Carcaterra, Amedeo G. Conte, Alfonso Catania, Giacomo Gavazzi, Giorgio Lazzaro, Letizia Gianformaggio (1944–2004), Riccardo Guastini, Luigi Ferrajoli, Mario Jori, Andrea Belvedere.

[2] "Die Norm als solche, nicht zu verwechseln mit dem Akt, in dem sie gesetzt wird, steht—da sie keine natürliche Tatsache ist—nicht in Raum und Zeit" (Kelsen 1934, 7). "The norm—not to be confused with the act by which it is posited—does not as such reside in space and time, since it is not a natural fact." (my translation).

norms in the fundamental role they play (along with other factors) as pillars of the subsistence of each legal system, of its being in force in the literal sense (cf. Chapter 10).[3] (See Pattaro 1982.)

Clearly, no analytical philosophy of law, whether it is logical empiricism or ordinary-language philosophy, could welcome the negative, reifying "metaphysical" aspect of Kelsen's normativism. And in fact there was no such reception. Regrettably, however, this lack of reception produced a situation where, as we might say, the baby was thrown out with the bath water: The good (the idea of norms as Ought) was thrown out with the bad (with the metaphysics).

Briefly stated, and with some simplification, analytical philosophy of law has often held—though for the most part only implicitly, which see Section 5.1—that it can account for the legal phenomenon without implying any idea of norm as Ought, this by replacing the "metaphysical" idea of norm (as conceived in the legal-dogmatic tradition of civil-law culture) with a concept of norm as a directive (or prescriptive) sentence or as the propositional content of one.

Now, there is certainly much to gain from treating legal norms as prescriptive propositional contents, or at any rate as linguistic entities (for example in law and logic and in the theory of legal interpretation).[4] But then, on the other hand, we will not get anywhere treating legal norms from an exclusively linguistic-analytic point of view if we want to account for the way norms enter into the functioning of the legal system, that is, if we want to explain the role of norms as motives of human behaviour. (And there is no way to explain the machinery of law without such an account: Section 8.1.) If legal norms were

[3] Kelsen, instead, treats power (punishment) as a motive of behaviour. From this point of view he describes law as a specific social technique. See Kelsen 1934, 28–33; Kelsen 1946, 15ff., 24ff.; Kelsen 1957a; Kelsen 1960, 31ff.

[4] See, for example, by Riccardo Guastini, a fine and recent work (Guastini 2004, 99ff.) in which norms are considered precisely to be propositions resulting from the interpretation of the sentences making up normative texts. This approach is felicitous when it comes to working out a theory of the interpretation of normative texts. But why should we call them "normative"? Is it because they are made up of sentences? I don't think so. Is it because in making interpretations of them we end up with propositions? I don't think so. Is it because the sentences and propositions in question do have the character of being normative? I don't think so, and I don't like it: They will be normative only for those people who believe them to be normative. Does Guastini believe them to be normative? It may be that some of them are not held to be normative by anybody. There remains the problem of considering norms to be motives of behaviour. In the final analysis, the object of an enquiry into the interpretation of texts of law (that is how I prefer to call them) is different from the object of an enquiry into the motives that drive people to hold behaviours compliant with the law. Ultimately, we might use "norm" to refer neither to the sentences and propositions the theory of interpretation is concerned with nor to that peculiar motive of behaviour I am concerned with in this volume under the name "norm." The things referred to with "norm," however, continue to be different. Both are worthy of investigation. Shall we stipulate new and separate names to refer to them separately?

merely the propositional contents of enacted texts, that is, mere linguistic entities, they would not and could not be motives of human behaviour.

There has been, in philosophy of law in Italy, a lot of discussion on the uses and effects of language. All this discussion has proved quite fruitful. However, when language is recognised as performing not only (*a*) indexical-illative functions and (*b*) representative-semantic functions, but also (*c*) directive-conative functions, many caveats will have to be introduced that are not always introduced. Indeed, while the functions under (*a*) and (*b*) are strictly linguistic and communicative, those under (*c*) are not, in that they can only be fulfilled with the determinant concurrence of nonlinguistic factors like needs, interests, values, *and norms*, in my understanding of norms, which implies precisely that they are nonlinguistic entities (Sections 9.3 through 9.6).

There is a crucial difference between functions (*a*) and (*b*), on the one hand, and function (*c*), on the other. Functions (*a*) and (*b*) are fulfilled—inevitably in a sense—with any successful linguistic communication: with words conveyed and understood. Function (*c*), in contrast, cannot be fulfilled by means of a mere successful linguistic communication: with words conveyed and understood. Words are not of themselves sufficient causes for driving a receiver to hold one behaviour rather than another. A successful linguistic communication is a necessary condition respecting which the language *can* produce conative effects, but it certainly is never a sufficient condition for obtaining them. If language is to produce any conative effects in a receiver, successful linguistic communication will have to happen with the concurrent operation, in the receiver, of motives of behaviour, or *causae agendi*, as referred to in Sections 5.2 through 5.4; and these causes are not linguistic causes.

Motives of behaviour are not linguistic entities but intrapsychical components of human personality, and without their operation no linguistic entity (utterance, proposition, or propositional content) would be able to elicit a conative effect. It would be impossible, without the operation of such motives, to drive a receiver to hold one behaviour rather than another: to guide and control individual and social human conduct.

Among the motives of behaviour with which the language must interact in order to bring out conative effects in a receiver are norms as beliefs (Chapters 6 and 7). It is here—especially with competence norms—that we have the crucial interaction between validly enacted directives, or texts, and norms preexisting in the brains of believers, an interaction already discussed in Section 7.3, and which I will return to in Section 9.6, with reference to the concept of authority, among others.

The interaction between linguistic communication (of itself insufficient to cause any human behaviour) and motives of behaviour other than norms—needs, interests, and values—will instead become the focus of Sections 9.3 through 9.5, on suggestion, charisma, power, and influence.

But before that, in the following Section 9.2, I will say something on linguistic communication strictly understood—the above-mentioned functions (*a*) and (*b*)—and further explain my concept of directive use of language with reference to the above-mentioned function (*c*).

9.2. Indices, Symbols, and Conative Effects. Directives

Indices are tokens of types that are components of compound types.

If we perceive a token of a component type we are not perceiving a full compound token of the compound type. Even so, depending on the circumstance, we will be led to think of the full compound type. For example, if we have encoded in our brain the compound type "fire producing smoke," then, upon perceiving a token of smoke, we may be driven to think "fire producing smoke," despite the fact that we are perceiving no token of fire. And, depending on the circumstance, we may be driven as well to believe (illative effect of perceiving a smoke-token) that there actually is fire behind the smoke.[5]

Here I made an example of a nonlinguistic index: a perception of a token of smoke driving the perceiver to believe that there is fire behind the smoke. But there are linguistic indices as well.

Words and linguistic utterances stand for something other than themselves: They are symbols. For example, the word "smoke" is a symbol—it stands for the thing called smoke—and that independently of our actually seeing or smelling any smoke. The concept of "symbol" must be kept analytically distinct from the concept of "index," despite the fact that, as we will see shortly, several functional connections obtain in the language between symbols and indices. Thus, it would be improper to reduce the symbol "smoke" to an index of the thing called smoke, much less to an index of the thing called fire; by contrast, our seeing or smelling smoke does function as an index of fire.[6]

Nevertheless, linguistic signs, though they usually work as symbols (a function we will look at shortly), work as indices (symptoms or clues) as well, and have an illative effect on the receivers, getting them to believe that a larger something else actually subsists: something of which the received linguistic signs are a component.

[5] So many illations! Or so many *prolēpseis*, to use the term the Stoics and the Epicureans used with regard to genera and species (types: Section 2.1), since, through these, sense data get anticipated by the mind (indeed, *prolēpsis* means "preconception," or "anticipation"; Diogenes Laërtius, *Lives of Eminent Philosophers*, VII, 1, 54).

[6] Cf. Deacon 1997, 71ff. There are affinities and analogies between my concept of "type" and Deacon's concept of "icon," who borrows it from Peirce and adapts it to his neurobiological research on language and the brain. It is my opinion that in treating some linguistic problems, and some epistemological problems, too, philosophers, epistemologists, and legal philosophers should begin to take into account—in ways relevant to their lines of research—some of the recent advancements made in the neurosciences.

For example: If a listener, *X*, while attending a lecture, mutters "How long is this going to take?" *X* will have made, consciously or not, an indexical use of the language; given the circumstances, *Y*, the person sitting next to *X*, will not understand *X*'s words to be a request for information, but rather a token of the type "grumble"; and "grumble"—in *Y*'s experience of lectures, lecturers, and listeners—is a component type of the compound type "boredom producing grumbles." Hence, "How long is this going to take?" will lead *Y* to conclude that *X* is getting bored. This conclusion is a belief arising in *Y*'s brain: It is an illative effect resulting from *Y*'s perception of *X*'s uttering of the linguistic expression "How long is this going to take?" in the given circumstances (cf. Pattaro 1978, 57–86).

Neither *X*'s boredom nor the object of the belief produced in *Y* (the belief about *X*'s boredom) is a linguistic entity. "How long is this going to take?" is, in contrast, a linguistic utterance, but one that has worked as an index rather than only as a symbol.

Consider now another example.

My written words "Consider now another example" will be understood by you, the reader, as a directive (an invitation, a suggestion) rather than as an apophantic sentence. "Consider now another example" is a token of the imperative mood, and "imperative mood" is a component type of the compound type "The imperative mood serves the function of expressing directives." The linguistic expression itself is an index enabling the receiver (you, the reader) to understand (illative effect) that the sender (myself) has issued a directive. In virtue of your linguistic competence, you (the receiver) are in a condition to understand (or make the illation) that I (the sender) have written down a directive as opposed to, say, an apophantic sentence, and you will therefore form a belief (illative effect) about the use of language I made in writing "Consider now another example."[7] And the object of your belief is a linguistic state of affairs or event, namely, my directive use of "Consider now another example."

The uses referred to here are the uses of language, and they must be ascribed to the sender. The effects referred to are the effects of linguistic communication, and they take place in the receiver. These uses and effects are uses and effects of linguistic signs, be they considered qua indices (which is what I am doing here) or qua symbols (which is what I will be doing shortly).

Thus, a receiver acquainted with the sender's language will understand whether a directive was issued (directive use of language) or, say, an apophantic sentence (apophantic use of the language). The receiver's coming to understand the kind of use the sender made of the language results from the indexical functioning of linguistic signs, and it sufficed that linguistic com-

[7] The fact that indices operate at a subliminal level (as unconscious routines) in producing illative effects in the receiver bears no relevance to the nature of the indexical-illative process being described.

munication took place for this result to obtain; in other words, it sufficed to have linguistic competence on the receiver's part. What is essential here is that the discursive context, the linguistic signs used, or the linguistic moods (for example, the imperative rather than the indicative) provide enough linguistic indices to enable a receiver to conclude that the utterance received is used by the sender directively (rather than, say, apophantically).

Of course, in the reality of communication the indexical and the symbolic functions of language are intertwined, and the linguistic context interacts with the nonlinguistic context. But in analysis, the distinction must be made between "indexical" and "symbolic" as well as between "linguistic" and "nonlinguistic" (as we will see shortly, with regard to the so-called conative effects of language).

On the basis of this sketchy survey, and for the purpose of examining the directive use and conative effects of language, I distinguish four kinds of indices as follows.

(*i*) Nonlinguistic indices that cause nonlinguistic illative effects. They are (perceptions of) tokens of nonlinguistic states of affairs or events that elicit beliefs (illative effects) concerning nonlinguistic states of affairs or events. Such is the case with one's perception of smoke, which leads the perceiver to think of "fire producing smoke" and to believe that there actually is fire under the smoke. In this case there is no linguistic communication: The index (smoke perceived) is a nonlinguistic token that causes a belief (illative effect) whose object is a nonlinguistic state of affairs or event (fire burning under the smoke).

(*ii*) Linguistic indices that cause nonlinguistic illative effects. They are (perceptions of) language-tokens that elicit beliefs (illative effects) concerning nonlinguistic states of affairs or events. For example, the receiver's perception of "How long is this going to take?" will be an index for the receiver that the sender is getting bored; in other words, given the circumstances, and the receiver's experience with lectures, lecturers, and listeners, this utterance will be perceived as a token of the type "grumbling" encoded in the receiver's brain as a component type of the compound type "boredom producing grumbles."

(*iii*) Linguistic indices that cause linguistic illative effects. These are (perceptions of) language-tokens that elicit beliefs (illative effects) concerning linguistic states of affairs or events: That is the case with "Consider now another example." In consequence of the reader's linguistic competence, the reader's perception of "Consider now another example" becomes an index to the fact that these words are being used in a directive sense.

(*iv*) Concurrence of linguistic and nonlinguistic causes producing linguistic and nonlinguistic illative effects. There are cases in which sentences give effect to an interweaving of the indexical-illative processes specified under points (*ii*) and (*iii*) above.

If, for example, I were to say, "My car travels at a top speed of 300 kilometres an hour," a receiver would rely merely on his or her linguistic competence to un-

derstand and believe that this is an apophantic sentence. Here we have an indexical-illative process based on my using the indicative mood, just as under point (*iii*) the indexical-illative process was based on my using the imperative mood.

But if the receiver will believe my apophantic sentence to be the fruit of braggery, this belief will not depend only on my use of the indicative mood. It will also, and especially, depend on the receiver's experience with cars and with the boastful attitudes of car owners talking about their own cars in this or that circumstance. As under point (*ii*), so here this experience of the receiver is not merely a linguistic competence: It is experience of life, a competence with the world, so to speak. Given that an apophantic sentence, considered in itself, is either true or false, the belief which the receiver comes at with regard to the sender's bragging (illative effect) will depend not on the receiver's linguistic competence, but on his or her competence with the world. The receiver's belief will depend on *nonlinguistic* states of affairs or events and will be a belief about *nonlinguistic* states of affairs or events, such as my braggery and the actual top speed of my car.[8]

It is current to speak of linguistic uses, functions, and effects. But effects presuppose causes. This is why—as I stressed in Section 9.1—I think it relevant to draw a distinction between linguistic and nonlinguistic causes as well as between linguistic and nonlinguistic effects.

There are only nonlinguistic causes and nonlinguistic effects in the indexical-illative process under (*i*): A token of smoke is a nonlinguistic index that causes an illative effect in a person who perceives the smoke and therefore comes to believe that there is also fire. There is neither language nor communication involved in this process. Further, the object of the belief produced in the receiver is a nonlinguistic state of affairs or event.

In the indexical-illative process under (*ii*), we have instead a linguistic index (the utterance "How long is this going to take?") that brings forth a nonlinguistic illative effect. In this case there is communication between sender and receiver, and the object of the belief produced in the receiver is a nonlinguistic state of affairs or event: The effect of the communication consists in the receiver of the utterance—on account of his or her experience of the world—being driven to believe that the sender is getting bored.

In the indexical-illative process under (*iii*), we also have a linguistic index (my sentence "Consider now another example") that brings forth a linguistic illative effect (in you, the receiver). In this case, and from this specific angle, we are communicating through linguistic indices, as sender and receiver were doing in the previous case. But unlike the previous case, the object of the belief produced in the receiver (you, the reader) is a *linguistic* state of affairs or event, and the cause of this belief is the receiver's linguistic competence: The

[8] A receiver's coming to believe an apophantic sentence to be true or false is a nonlinguistic illative effect brought about by nonlinguistic causes.

effect consists in the reader recognising and believing that the sentence "Consider now another example" is used in a directive sense.

Finally, in the indexical-illative process under (*iv*), we have a linguistic cause (the apophantic sentence "My car travels at a top speed of 300 kilometres an hour") that brings forth both (*a*) a linguistic illative effect (as under (*iii*)) and (*b*), in conjunction with nonlinguistic causes, e.g., the experience of the world the receiver has with cars and drivers, a nonlinguistic illative effect (as under (*ii*)), e.g., the effect consisting in the receiver's belief that my statement is a piece of braggery.

In Sections 9.3 through 9.6 I will consider *linguistic causes* (such as directives or enacted texts) that bring forth, in a determinant concurrence with *nonlinguistic causes* (motives of behaviour), those peculiar kinds of *nonlinguistic effects* that we call conative effects.

In the remainder of this section I will consider instead the *directive use of language* as conceptually distinct from other uses of language with which this directive use intertwines in the practice of communication.

Linguistic symbols have for the most part a representative (descriptive) use. Representative linguistic symbols stand for something other than themselves. They have a meaning or sense: "To represent (or describe)" means, metaphorically, "to provide a picture of in words."

I shall call "semantic effect" the linguistic effect that an item of representative linguistic communication will elicit in a receiver acquainted with the language used by the sender when the two are speaking the same language.

On the mainstream view, sentences (such as "The Sun is red" and "Paint the Sun red") are the minimum units of communication—which makes it so that only the set of representative linguistic symbols making up at least one sentence will have any meaning for a receiver, producing semantic communicative effects on this person.[9] On this conception, single linguistic symbols (such as "Sun" and "red") have meaning (they produce semantic communicative effects on a receiver) only within the sentence whose semantic communicative effect they concur in determining (for example, "Paint the Sun red," whose semantic communicative effect comes by way of the joint action of "Paint," "the," "Sun," and "red"). Which is to say that the part makes little or no sense outside the whole: Only the whole makes sense, whereas the part is meaningful only within the whole it concurs in determining.

The semantic communicative effect a sentence is suited to elicit in a receiver (one acquainted with the language the sentence is cast in) is usually referred to as "propositional content." If the sentence is an apophantic sentence, the semantic communicative effect it is suited to elicit in a receiver will be referred to specifically as "proposition," and this proposition will be either true or false.

[9] See in this regard, in Section 2.1.1, the distinction between phrastic and neustic and their joint occurrence in sentences, such as apophantic or deontic sentences.

I shall call "directive" the expressions that in a given language are used to prescribe; and I will call them "directives" quite independently of any conative effect that, *in conjunction with nonlinguistic causes*, they contribute to producing in a receiver.

I shall call "conative" the linguistic expressions that—quite independently of their uses: apophantic, directive, etc.—contribute, *in conjunction with nonlinguistic causes*, to eliciting a conative effect in a receiver.

A receiver acquainted with the sender's language will understand whether a directive was issued or, say, an apophantic sentence about a state of affairs or an event (indexical use and illative effects of linguistic signs: in this section at point (*iii*)). What matters here is that, through the discursive context, the linguistic signs used, or the moods (for example, the imperative or the indicative mood), a linguistic expression provides enough indices to enable a receiver to conclude whether the expression is used directively, apophantically, or in others ways.

This understanding of linguistic signs by a receiver—when these signs work as indices to the way they are used (to their linguistic use)—is what I call an *illative effect* produced through linguistic communication.

Of course, the receiver will also understand what behaviour the directive is prescribing, as well as under what circumstances this behaviour must be held. This understanding of linguistic signs by a receiver—these signs work as symbols of something other than themselves: They stand for this something else—is what I call the *semantic effect* of linguistic communication.

If someone speaks to me in Japanese and in this language orders me to do something, I will not be able to understand that directive expressions are being issued (no illative effect will obtain in me concerning the kind of use of linguistic signs the sender is making, despite all the linguistic *indices* contained in the sender's utterance), nor will I understand what I am being ordered to do (no semantic effect will obtain in me despite all the linguistic *symbols* contained in the sender's utterance): There will be no communication between us. Even so, the sender is formulating (in Japanese) directives capable of having illative and semantic communicative effects (and possibly conative effects, if motives for acting subsist) in those familiar with Japanese.

I shall make five claims about directive language.

(1) An expression formulated through interpersonal linguistic signs (symbols) used directively (in a natural language or in the Morse alphabet, for example) will be a directive even if its sender has no directive intention. This may be the case, for instance, with a directive that one issues because coerced to do so. If well formulated, this directive stands as a directive even if the sender has been forced to issue it against his or her will.

(2) Formulating a directive using linguistic expressions (in Italian, Japanese, Morse alphabet, etc.) containing linguistic indices and symbols, as such abstractly capable of producing illative and semantic linguistic-communica-

tive effects, is a linguistic requirement meeting which the directive becomes linguistically adequate, and without which there would be no directive.

(3) For a directive to qualify as such it need not be cast in a language the receiver is acquainted with, nor need the receiver receive and understand the directive.

(4) Formulating a directive in a language the receiver is acquainted with, and the receiver actually receiving and understanding the directive, are requirements of communication satisfying which the directive becomes fit to produce *linguistic* effects: These effects will be illative, when caused by linguistic signs fit to work as indices (so that the receiver will recognise the sender's utterance as a directive), as well as semantic, when caused by linguistic signs fit to work as symbols (so that the receiver will ascribe to the directives a propositional content).

Still, even without communication, and without its characteristic effects as just mentioned, a linguistic expression used directively, in the sense specified in (1) and (2), is a directive under my definition of this term.

(5) Lastly, though directives are formulated for the most part to bring forth conative effects, even the production of such effects, that is, the directive being complied with, is not a requirement for a linguistic expression to rank as a directive in my characterisation of directives. Nor could things be any different, because, as was noted in Section 9.1, linguistic communication, even if as such successful, does *not* of itself have the power to elicit conative effects in a receiver, prompting this person to hold one behaviour rather than another. Is a directive use of the language sufficient for a linguistic expression to yield a conative effect and prompt the receiver to action? The answer is no.

If a directive is to have a conative effect on a receiver, a sender will have to do more than use the language directively, and neither will it suffice to have successful communication (i.e., communication that conveys meaning, makes sense, gets a message across). In other words, the linguistic expression the sender uses to this end will have to be more than indexically adequate (or be recognisable as a directive), as well as it will have to be more than symbolically adequate, representing clearly what behaviour it requires and under what circumstances.

The sociopsychological phenomenon which is a language shared by senders and receivers, as well as successful communication between them, is a necessary and sufficient condition for there to be produced between these subjects *linguistic-communicative effects*, that is, linguistic-illative and linguistic-semantic effects. But the same does not hold for conative effects, because conative effects are *nonlinguistic effects*: Although my perception and understanding of a linguistic expression addressed to me can concur in producing conative effects in me, this production of conative effects requires in the first place *nonlinguistic causes* that move me to action. In other words, it requires the subsistence of motives of behaviour (as they are illustrated in Chapters 5 and 6 and Sections 9.3 through 9.6).

To stay with the example previously adduced, if I am spoken to in the Japanese language, I will understand nothing of what is said to me, and that because I have never learned to speak Japanese. But I will understand if I am spoken to in Italian, because through a learning process, my brain has been adequately predisposed to this language: If I am ordered to do something in Italian, I will understand that a directive has been addressed to me (linguistic illative effect caused by the linguistic indices contained in the directive), and I will also understand its content, that is, the type of action I am required to perform and the circumstances under which this performance is required of me (linguistic semantic effect caused by the linguistic symbols contained in the directive). But when it comes to actually experiencing a conative impulse, and then obeying the order, or being moved to act in accordance with the directive addressed to me, there are other causes that must come into play, and these are nonlinguistic causes. They are not a part of the sociopsychological conditioning I have undergone as a speaker of the Italian language. What I end up doing will depend on my motives of behaviour as illustrated in Chapters 5 and 6 and Sections 9.3 through 9.6.

Certainly, a linguistic expression can contribute, in conjunction with nonlinguistic causes, to producing a conative effect. It can contribute to eliciting in a receiver an impulse to act, even if, on the one hand, the sender's use of the language was not directive and, on the other, the receiver knew perfectly well that no directive had been issued.

The expressions "effective directive" and "linguistic expression that contributes, in conjunction with nonlinguistic causes, to carrying a conative effect" coincide only in part: All effective directives are linguistic expressions that contribute to carrying a conative effect, but not all linguistic expressions that contribute to carrying a conative effect are directives, because we have linguistic expressions used non-directively (they are not directives) that nevertheless contribute, in conjunction with nonlinguistic causes, to bringing out conative effects.

Thus, suppose I am making my way home and someone unacquainted with me should casually tell me—using non-directive (but, say, apophantic) linguistic expressions—that the house just around the corner is burning. In this case, knowing that it is my house around the corner, I will start running as fast as I can to reach the place where the house is burning. The stranger's linguistic expression was not directive, yet it still elicited in me a conative effect because of my *interest* in the fate of my house (interest being one of the motives of human behaviour).

Now then, a linguistic expression can have conative effects, bringing them forth when—in conjunction with the linguistic expression that has been issued—there is, too, a nonlinguistic cause or a motive (a need, interest, value, or norm) that will move the receiver to action. Besides, language, as we will see in Sections 9.3 through 9.6, is an excellent means by which to interfere—

in conjunction with an appropriate nonlinguistic cause—in other people's behaviour.

9.3. Language That Bypasses the Motives of Behaviour: Suggestion and Charisma

Suggestion is, in a psychological and technical sense, a sort of intrusion on the personality of another. Under the force of suggestion, an agent complies, in the absence of the critical thought that would normally be operating in him or her, with a directive the agent receives.

A classic and emblematic instance of suggestion is hypnosis: Given the appropriate techniques and conditions, the hypnotist can intervene directly in the hypnotised person's brain and give orders that will simply be obeyed.

Suggestion may have to be accounted for by considering the phenomenon of internalisation. In deep hypnosis, for example, the hypnotist can give orders which the subject internalises under a trance and will carry out upon regaining full consciousness, or even later than that, and without ever realising an order had been issued (an example is Emmy von N.'s, as related by Sigmund Freud, 1856–1939).[10]

Suggestion concerns us here not so much in connection with hypnosis: It may rather concern us in connection with phenomena like occult persuasion, subliminal perception, and propaganda intrusion by pervasive media like television (video games and the Internet, whose overuse seems to cause dependence), all of which affect human behaviour on a mass scale and they concur in determining the law in force (Section 10.2.4). Like all suggestion, this kind is one that its addressees are uncritically subjected to.

Moreover, there is a kind of suggestion that operates during primary socialisation through the orders, behaviour, and examples provided by the mother and father figure. This kind of suggestion plays a key role in getting underway in children the shaping of the so-called generalised other (Sections 15.2.5 and 15.3.4), which brings together a number of primitive norms (the reality that ought to be) internalised from the social environment (Section 6.2).

[10] "[While doing hypnosis] I jotted down a few words on a piece of paper, which I handed to her saying, 'You will pour me a glass of red wine today at noon, just as you did yesterday. And when I will raise the glass to my lip you will say, "Oh, would you please fill my glass, too?"; I will then reach for the bottle, and at that point you will exclaim, "No, thanks, I'd rather not!" And then you will look through your purse and pull out this piece of paper, on which these very words are written.' This happened in the morning; a few hours later the scene took place exactly as I had preordained it to happen, and with so much naturalness as not to draw the attention of any of the many people present. She looked visibly conflicted as she asked me to pour the wine—in fact she never drank wine—and then, having countermanded that request with evident relief, she slipped her hand in her purse, pulled out the piece of paper, and read from it the words she had just spoken, at which point she shook her head and looked at me in amazement" (Freud 1952, 139–40; my translation).

Legal philosophers and jurisprudents have been little inclined to consider suggestion as a psychological mechanism through which a receiver is moved to action.

Axel Hägerström and Karl Olivecrona considered suggestion to explain the efficacy of orders and commands, arguing against the widespread, and mistaken, or at least naive, opinion that law is made up of commands. Subsequently, H. L. A. Hart developed arguments similar to Hägerström's and Olivecrona's to criticise Austin's conception of law, whereby law is made up of orders or commands (Section 8.1). Hägerström and Olivecrona's criticism of the reductionism of the analytical jurisprudence of Austin, Salmond, and their epigones was sharp, and it used arguments similar to those that Hart would later use in his own criticism.

Here are a couple of examples of the kind of suggestion that prompts people to action when commands become effective with them.

Suppose that danger should suddenly befall a group of people on a mountain-trail outing. A strong character would in this circumstance give orders that others will obey "automatically," by virtue of the power of suggestion that prevents any other decision from taking hold of the addressees' minds (example by Karl Olivecrona).

Something like this occurs in people who have been subjected to special training based on repetition, a case in point being the order "March!" issued in the appropriate context, as during a military parade: The parading soldiers will mechanically obey the order simply upon perceiving it (example by Axel Hägerström).

Suggestion does not seize on the needs, interests, values, or norms the addressee has internalised: It bypasses them. It bypasses the motives that may drive a person to action, and in fact it will make these inefficacious by acting on the brain directly. Suggestion requires an appropriate relation to exist between the receiver and the sender, such that the receiver becomes especially receptive to the sender's orders (as in the cases previously considered; cf. Section 8.1.3.1).

The receiver will act from an order or command because, in the given context, he or she will be impervious to all other stimuli or motives—even to internal ones, such as depend on personal needs, interests, values, or norms. This person will be temporarily unable to take initiatives and will therefore be receptive solely to the sender's orders.

It is essential not to mistake suggestion, which involves orders and commands in the specific sense just considered, for other ways of interfering in other persons' personality (as through power, influence, and authority: Sections 9.4 through 9.6), whereby receivers are presented with orders or commands broadly understood (with directives) that impel them to action by seizing on their personal needs, interests, values, or norms.

Also bearing on suggestion is charisma, which notion originated from magical-religious beliefs and later came under the focus of political sociology

(witness Max Weber), with some scholars in this area applying the concept of charisma to political leaders, widely perceived as charismatic by masses of people needing to believe and obey, and so sent off to fight. Examples of charismatic leaders are Lenin (1870–1924), Mussolini (1883–1945), Hitler (1889–1945), Mao (1893–1976), and Perón (1895–1974) and his wife Evita (1919–1952). Suggestion is also exerted by demagogues, agitators, and all those who spearhead uprisings and rouse crowds to action.

With the decline of the secular influence and power of religion, contemporary charismatic leaders no longer claim the legitimacy of their rule to be founded on a privileged relation with a deity, or on any extraordinary faculties granted to them by this deity. The place of divine investiture is taken by an appeal to such elements as the myths of national identity and revolution; the recovery of local tradition, invested with liberating and progressive powers [...]; the fight against imperialism; and the construction of a new model for society: All embody goals, destinies, final outcomes, and new horizons that sometimes only the leader and his closest aides seem privy to, such that only they know for certain the road to those places. By and large, a secular and rational observation of the charismatic components of contemporary political systems cannot but confirm the age-old association between charisma and absolutism or totalitarianism. (Gallino 2000, s.v. "Carisma," 99; my translation)[11]

A close linkup between suggestion and law obtained in oral and preliterate societies, when humans had already developed the faculty of speech, but had only their brains as repositories in which to encode the information acquired: They had no writing or documents for the function of storage.

Karl Olivecrona deals with the oral communication of law and the way the law was inculcated in the brains of the members of the earliest Scandinavian civilisations (see Olivecrona 1942).

A fine and engaging scholar of preliterate societies, Eric A. Havelock (1903–1988), whom I will return to in Chapter 12, built in his works a model with which to account for the way oral messages get communicated in these societies and make their way into the common store of their languages: Especially important in this regard are the messages intended to preserve the *nomos* and *ethos* (the norms and customs) of preliterate Greek civilisation. Havelock brought into focus, among other things, the hypnotic effect—and hence the suggestion—exerted by rhythm in the language and enunciation of reciters, chanters, and songsters, who, like Homer (whomever this name corresponds to), were the repositories of what is right in preliterate Greek society.

Oral doctrine can persist as such only when framed in statements which are immune to change, a condition achievable by placing the diction within rhythmic patterns which require the words to maintain their given order. [...] But how persuade the memory to conserve this rhythmic order?

[11] The recent cases of suicide bombing should make one reflect that Gallino's opinion on the decline of religious charisma in public affairs, though perhaps plausible until some time ago, is unfortunately no longer entirely true. Gallino's general statement on the association between charisma and totalitarianism holds true, but the ills of religious charisma have again become a current affair.

[...] In its primary manifestation as employed in culture, rhythm arises in physical motions of parts of the human body. [...] In parallel with these motions, the arms and legs can be mobilized to produce rhythmic movements which harmonize with the vocalic sounds, whether the result is identified as gesture or as dance. Such motions are then supplemented by material instruments from which a fresh set of sounds can be manufactured in rhythmic order by the application of hand or mouth [...]. Of all the tools invented by our species, these were not the least important. [...] A drum and fife band passing down the street, the great operatic aria for which the audience has been waiting, the exaltation produced by a massed choir, the summons of the jazz band which draws us to the dancing floor, the compulsive spell of a rock and roll concert—all these invite a response on the part of the listener which he may find irresistible: It is noteworthy that in normally literate societies it is in particular the young and the semiliterate whose responses to these performances can become instinctive. What is perhaps peculiar to the pleasures of rhythm as distinct from those of the biological functions is that they are pleasures intensified by participation in group activity. Hence their ability to set in motion the *mechanisms of mass suggestion*, which can in extreme cases lead to *hysteria*. (Havelock 1978, 38–40; italics added)

It is no accident that mass demonstrations, for or against war, for or against globalisation, and so forth, take forms similar to those described by Havelock. Nor are the accompanying rave processions—with the music blaring—simply a sign of stupidity or of a misconceived spirit of folk tradition.

To place cultural information in the memory, a difficult task, preliterate societies indulged in a marriage between the rhythms of song, dance, and instrument on the one hand and the rhythms of contrived statement on the other. So the act of memorization, which alone can support the tradition and make it effective, is converted into submission to a spell, which by the employment of effects *almost hypnotic* can engrave upon the memory the required body of doctrinal information. (Havelock 1978, 40; italics added)

9.4. Language That Overwhelms the Motives of Behaviour: Power

A typical example of a conative effect of the language that seizes on interests—the interests of people at large or of those who receive a directive—is a directive backed by a threat of punishment for noncompliance or by the promise of a reward for compliance (or a threat and a promise compounded): Thus we have a punitive sanction on the one hand and a sanction as premium on the other. A sanction (punishment or reward) implies that someone should intervene in people's behaviour by threatening punishment and promising rewards: The interveners must be in the condition to actually do so, or at least must be reputed to have this ability.

Specifically, the problem is to see what considerations the receivers of the directive will make: whether they fear the punishment and value the rewards; whether they believe that a punishment will actually flow from noncompliance and a reward from compliance; and whether, in a comparative assessment, they believe that the cost of compliance is outweighed by the benefit of avoiding punishment or of the reward that comes with compliance.

The threat of a punitive sanction and the promise of a reward are efficacious if the people so addressed hold a behaviour they would not otherwise as

a rule hold, regarding such behaviour as not accordant with their own needs, interests, values, and norms.

In the social sciences "power" is distinguished from "influence" and "authority." "Power" is defined as

> the ability of an individual or collective subject, A, to purposely and not accidentally achieve certain aims in a specific sphere of social life: Power is A's ability to impose his or her will in that sphere despite any opposition that may come from another subject or subjects, B, or any active or passive resistance from B; this ability is based on A's possession and threatened (and sometimes actual) use of means that can in some measure damage something which belongs to B, including B's estate, affections, repute, payments due, relations with others, and intellectual and physical freedom, and even B's physical integrity. (Gallino 2000, s.v. "Potere," 505; my translation)

Where power is involved, the directive provides its receivers with a description of the type of action conditioned by the type of circumstance and required when these circumstances occur, and with a description of the sanction (punishment or reward) that will be made to flow from noncompliance or compliance with the directive. In the case of law, power cloaks itself with normativeness (see Chapter 10).

As for internalisation, it will be noted here that the actual and consistent dealing out of awards, and even more so of punishments (especially the more severe and taxing forms of punishment), will change people's personality: It will change the needs, interests, values, and norms (the generalised other and the reality that ought to be: see Section 15.3.4) that people have internalised in the course of life.

The reeducation camps conceived by totalitarian regimes (Communist regimes in particular, since Nazi camps were outright extermination camps) constitute empirical evidence: Except in a few cases, the survivors came out *converted* in the literal sense of this term.

Further, the discipline based on dispensing rewards and punishments to subjects in their childhood will act, concurrently with the child identifying with his or her parents (or with significant others), to determine the basis of the child's moral conscience: It will determine the child's unconscious internalisation of norms, a phenomenon leading to what psychoanalytic theory refers to as the "superego," and which I call the reality that ought to be.

In law, power, influence, and authority interlock in a number of ways.

9.5. Language That Affects the Motives of Behaviour: Influence

9.5.1. Influence Affecting Needs, Interests, and Values

People behave habitually (by a *usus*) in ways they deem good (or advantageous, and the like) and avoid the behaviour they deem bad (or disadvanta-

geous, and the like) relative to their needs, interests, and values, and they do so without others having to intervene and impel them to behave thus.

Nonetheless, directives can intervene, and usually do intervene, in the operation of needs, interests, and values. Parents, teachers, editorialists, propaganda people, political analysts, and economists, and even talk-show hosts (and comely show hostesses) intervene with advice and recommendations as to what is suitable (convenient or opportune: from a teleological standpoint, therefore), for example by saying, "Hold behaviour *x* (it is convenient, good, bad, or better to hold this behaviour) as opposed to behaviour *y*; in fact *x* will serve the need, interest, or value you want to realise because, as you will doubtless appreciate …"

These directives (advice or recommendations), in addition to describing a type of action with its conditioning type of circumstance (a compound type), will serve an important function by affecting the receivers' needs, interests, and values. The directives concur in giving rise to or reinforcing a belief—an *opinio necessitatis*, *opinio utilitatis*, or *opinio boni*—thereby giving effect to the phenomenon that social-science theorists have called "influence," as distinguished from "power" and "authority."

The theory of the so-called significant others (we will get to it in Section 15.3.4) has developed in various ways the topic of influence.

"Influence" is defined as follows:

> An individual or collective subject, A, exerts influence on—and so affects—another individual or collective subject, B, when B's behaviour or action (or even B's attitudes) appears to undergo a change with respect to its initial or expected course, whether in response to one or more acts by A, including A expressing an opinion or belief; or as a consequence of B highly esteeming a particular ability or trait of A, even if manifested unintentionally; or again in response to any arguments that A may advance to persuade B to do or not do something, as by calling attention to social values or norms which B holds to (but which A need not believe in). These changes in B's conduct may come about even without the means wherewith A may cause harm to B, or without A giving explicit commands [directives, I would say] that B would be bound to obey: in other words, without A exerting any power or any authority on B. (Gallino 2000, s.v. "Influenza," 361; my translation)

In the law, a changing interplay occurs between influence, power, and authority.

9.5.2. Influence Affecting Norms

In the case of nomia, duty-holders have internalised a norm; hence, if the conditioning type of circumstance specified in the norm has been instantiated, and unless stronger motives of action intervene, they will behave habitually (by a *usus agendi*: here, properly, a custom) in ways that instantiate the conditioned type of action, and will do so without others having to intervene and impel them to behave thus (Sections 6.5 and 6.6).

Nonetheless, directives can intervene, and usually do intervene, in the operation of norms: Parents, teachers, editorialists, ethicists, etiquette specialists, and people versed in the law, and even talk-show hosts (and comely show hostesses) intervene with advice and recommendations as to what is right (from a deontological standpoint, therefore), for example by saying, "Hold behaviour *x* (it is right to—you must—hold this behaviour) as opposed to behaviour *y*; in fact *x* accords with your duty because, as you will doubtless appreciate …"

These directives (advice or recommendations), in addition to describing a type of action with its conditioning type of circumstance (a compound type), will serve an important function with respect to the receivers, by affecting norms. The directives concur in reinforcing a belief: an *opinio vinculi* (a norm), thereby giving effect to the phenomenon that social-science theorists have called "influence" (see Section 9.5.1), as distinguished from "power" and "authority."

Here, too, we will have to take into consideration the theory of the so-called significant others (Section 15.3.4).

In the case of influence affecting a norm, the directive is effective because it replicates and reasserts the content of a norm already in force in the receivers. Nomic receivers obey the directive that has been issued; they do so not only because they receive it by an influential personage, but also, and in a sense primarily, because the directive reactivates or brings back into focus a norm they have already internalised, a norm they already believe in.

Consider well-off people who have internalised the norm "The needy must be helped out by the well-off": If they hear a popular TV show host issuing the directive (advice or recommendation) whereby the needy must be helped out by the well-off, they will act from that directive, not because they feel they must comply with a show host's directive, but because the directive expresses a call—it calls the receivers' attention to a type of behaviour they already, on their own account, believe to be due per se.

This is not to say the show host's directive yielded no effect: It had a conative effect on the receivers because (and if) it reactivated in them a preformed attitude, which is their *opinio vinculi* concerning the type of behaviour common to the preexisting norm (the norm already in force in the receivers) and the intervening directive.

An application of this concept can be appreciated in the Latin saying *Jus quia justum* ("What is right is right because it is just").

In the law, a changing interplay occurs between influence, power, and authority.

In law, in particular, influence sways opinion (belief, *doxa*) through legal doctrine (legal dogmatics, *scientia juris*: see Peczenik, Volume 4 of this Treatise), especially when this doctrine is the *communis opinio doctorum*, that is, the belief (*doxa* or *dogma*) that the most esteemed legal scholars currently share (see Section 10.2.1 and Section 10.2.4 at point (*ii*)). The academic doc-

trine imparted by teachers and professors (the importance of education is sometimes underestimated), and given wide currency with the legal-doctrinal books and journals available to judges, legal practitioners, and bureaucrats, plays a crucial role in exerting what might be called "legal influence." Consider, to make another example, the so-called legal opinions solicited from jurists of note to decide whether or not a legal action is worth pursuing.

9.6. Language That Modifies the Internalised Reality That Ought to Be: Authority (Integration between Norms and Validly Enacted Directives or Texts)

Authority, influence, and power are different ways of interfering in the motives of people's behaviour, and must therefore be kept conceptually distinct. But in law they are strictly interlocked, acting jointly to make law an enduring, effective, and objective reality that ought to be no less cogent for humans than is brute reality (especially with regard to those people who are *not* in positions of authority or power; see Chapter 10).

In the social sciences, "authority," as distinguished from "power" and "influence," is defined as the

> faculty to issue binding commands that lay down obligations [I would say *metonymically valid directives that drive derivative norms into believers*; cf. Sections 7.3 and 8.2.3] or that otherwise prompt one or more subjects within a group to act in a certain way, which faculty the members of this group collectively attribute to one or more individuals on the basis of these individuals' traits or status or position. Essential to this definition of authority is that the group under consideration should in the main either tacitly or explicitly recognise the usefulness or necessity of a situation in which some issue commands [*directives*] or have the right to issue commands [*directives*] aimed at guiding the conduct or actions of those within the group—*nothing without such recognition can be referred to as authority*. Authority ought not to be mistaken for a form of power, which is rather the capacity to impose one's will on someone else despite any resistance that may come from the latter. Authority can strengthen or validate the use of power, but is nevertheless distinguished from power: There are as many forms of authority without power as there are forms of power without authority. By association, the individuals or groups the aforesaid faculty has been attributed to are commonly labelled authorities, and are occasionally referred to as such even when no collective recognition obtains. (Gallino 2000, s.v. "Autorità," 58; my translation; italics added)

The route of authority exerts significant weight on the working of law.

In the case of authority, a validly enacted directive exerts illative and conative effects on a believing receiver. What happens here is that a sender, by issuing a directive, validly instantiates the conditioning type of circumstance set forth in a competence norm previously existing, and possibly in force, in the receiver (see Sections 6.2, 6.5, and 7.3).

As we know (Section 8.2.1), the content of a competence norm consists in "obeying" (type of action) "directives issued in certain ways by certain people" (conditioning type of circumstance set forth in the same norm).

Suppose that I believe in a norm (I have internalised and encoded it in my brain) and this is the competence norm **n**, "Drivers on public roadways must obey road signs, traffic signals, and the hand signals (directives) of police officers." Looking from the window of my house, I see a traffic light turn red—I will then be thinking to myself, "Traffic must now and there come to a stop!" This is a new norm, **n1**, that has arisen in my mind. I have derived it by subsuming the light turning red (a kind of directive) under the conditioning type of circumstance set forth in the competence norm **n**, and by inferring **n1** from the type of action "obeying" (set forth in the competence norm **n**, in which I am a believer) and from the valid token ("the light turning red," expressive of a directive) that I have subsumed under the type of circumstance set forth in the same competence norm ("drivers, plus a stoplight turning red on a public roadway").

The light turning red is the valid issuance of a directive, and so a directive that believers receive and perceive as producing a new derivative norm.[12]

If, as a believer *b* in the competence norm **n**, I myself happen to be driving in traffic—a circumstance which makes me, too, an actual duty-holder under **n**—then **n** will be in force in me (nomia), with the consequence that when the stoplight turns red I will be thinking to myself not only **n1**, "Traffic must here and now come to a stop!" but also **n2**, "*I* must now stop here!" The norms **n1** and **n2** have now been internalised by me and are encoded in my mind (and as such exist: doxia): They have entered into my internalised reality that ought to be (into my internalised normative system) by means of the stoplight turning red, because the stoplight turning red is a valid token (and, in a sense, the valid enactment of a directive) of the conditioning type of circumstance set forth in the competence norm **n**. Further, the norm **n2**, in addition to existing in me (doxia: Section 6.2), is in force in me (nomia: Section 6.5), because I am not only a believer *b* in **n2**, but also a duty-holder *d* (deontia: Section 6.4) under **n2**; and, in consequence, I will be experiencing a conative impulse to obey **n2**, and I will do so (abidance), except by virtue of a stronger motive (need, interest, or value) that may prevail in me, egging me on to deviance (Section 6.6).

[12] The traffic-light example can also be interpreted as presupposing in me, the believer, what might be called a multiple norm of conduct: "If the light is red, you must stop; if it is green, you must proceed; if it is yellow and you can stop, you must do so; if it is yellow and you cannot stop, you must proceed." That the norm **n**, which I have internalised, may be interpreted as a multiple norm of conduct in the sense just specified bears out my view (Section 7.3) that competence norms are peculiar norms of conduct. It may also be said that these multiple norms of conduct are borderline between *stricto sensu* competence norms and *stricto sensu* norms of conduct as I understand them (Section 8.2.1), and that they confirm what was maintained in Section 7.1, namely: The mechanism by which derivative norms get produced from primitive norms is the same for both norms of conduct and competence norms. Whichever way we choose to consider the norm **n** which I have internalised with regard to traffic signals—as a multiple norm of conduct or as a competence norm—the three alternative types of circumstance that we assumed to be included in **n** ("red light," "green light," "yellow light") are the issuance of directives which prescribe different types of action.

Competence norms single out plural and complex authorities. It is usual in advanced legal systems to have three kinds of authority: legislative, executive, and judicial.[13] Each of these divide further into different authorities whose characteristics depend on the various competence norms on which they are based.

To stay with the example of road traffic, a stoplight is in its own circumscribed way an authority of an executive kind (and if the example seems dubious, consider a traffic warden).

[13] It is standard usage to qualify these as powers rather than as authorities. But here I understand "power" and "authority" in a different, more specific sense (as illustrated in Section 9.4 for "power" and in this section for "authority"), and I will therefore proceed on this basis.

Chapter 10

THE LAW IN FORCE: AN AMBIGUOUS INTERTWINING OF NORMATIVENESS AND ORGANISED POWER

10.1. Underscoring the Role of Force in Law in order to Avoid Misunderstandings with regard to Normativism

In this chapter I will attempt in outline to give an idea of the concurrence of, and interaction between, norms and the other factors dealt with in Chapter 9 when it comes to keeping a system of law in force in society, among the people of a certain territory.

In my normativist gallery of family portraits, Karl Olivecrona appears between Hägerström and Hart (Section 8.1). He deserves a special place in this gallery, not only because, like the two other outstanding scholars, he convincingly grasped the role of norms in law, but also because he provided a fine and convincing account of the role of force in law, that is, of the way in which force (organised power) concurs and interacts with norms in keeping a system of law in existence, or in ensuring its enduring and settled character, or, as I prefer to say, its being in force in society, among a people within a certain territory.

I agree with Olivecrona's account of the interplay between force and norms in keeping a legal system alive: I agree in holding that the pressure of organised power is largely at the origin of our internalisation of primitive norms (or reality that ought to be; cf. Sections 7.1 and 15.2.5), which norms we assimilate from our sociocultural environment beginning from childhood; I also agree in holding that the pressure of organised power (and of the sociocultural environment at large) is decisive in preserving and reinforcing doxia and nomia (Sections 6.2 and 6.5) in believers. With this said, it should also be noted that doxia and nomia—the existence and being-in-force of norms qua norms—play the essential and specific role in the machinery of law that was seen in Chapter 7 and Section 9.6, and they also play the roles we will consider in Sections 10.2.1 through 10.2.3. But yet the role of norms in law is clear in Olivecrona's works as well. Anyone reading what Olivecrona writes on force in law (which topic will take up the remainder of this section) will have to bear clearly in mind, for an adequate understanding, that what he writes on force in law is complementary (certainly not alternative) to what he writes on norms in law.

In this section, then, I will summarise Olivecrona's opinions on the role of force in keeping a system of law in existence (or, as I prefer to say, in keeping it in force) among a certain people in a certain territory.

In every society in which the machinery of law works at full capacity—and where in this sense the law is in force—force

is consistently applied through the official of the state, more particularly in three forms:—[*a*] police measures against disturbances, [*b*] infliction of punishment and [*c*] execution of civil judgements. In all three cases *physical violence or coercion is the ultimate expedient*. It is used not only to disperse dangerous mobs if need be and to keep the peace generally. It is also an unavoidable instrument in the regular application of criminal and civil law. In criminal law, *actual violence* against the person of the criminal is used in the form of the death penalty and imprisonment. Even in civil law *physical violence* is sometimes used against a person, as e.g. when a tenant is ejected from the premises by means of force and when imprisonment for debt takes place. [...] Physical force is resorted to in administrative law, also, when necessary. *In the whole field therefore, the provisions of the law are ultimately carried out by physical force or violence*. (Olivecrona 1939, 124–5; italics added)

No doubt, manifest and direct violence is kept mostly in the background, and the more this condition obtains, the more fluid and unhampered will be the working of the law in force (cf. Olivecrona 1939, 125).

This fact might lead one to think that violence is foreign to law, or at least that it plays only a role of secondary importance. But this conclusion, if drawn, would make for a "fatal illusion" (cf. ibid., 125).[1]

There is indeed a general tendency, more or less unconscious, to let the organised force of the law appear as something else than mere force. Its real character is largely obscured and this is done by means of metaphysical ideas and expressions. It is not bluntly said, e.g., that the function of the courts is to determine the use of force. Instead their function is said to be the "administration of justice" or the ascertaining of "rights" and "duties." Actually this is the same thing. The statements of the courts concerning rights and duties are imperative statements, through which the use of force by public officers is directed. But this fact is concealed or put in the background by the judgement's being wrongly interpreted as a judgement in the logical sense about existing rights and duties. (Ibid., 127–8; italics added)

Social life rests on the law as it is, on law as fact in the broadest sense, including the fact of organised force being used according to rules called law in the strict sense. This organised force is the backbone that keeps society standing: Society cannot do without it (cf. Olivecrona 1939, 136).

It is quite natural that the rules for the conduct of private persons are not formulated as rules of prudence, saying: If you want to avoid this or that sanction, you should do so and so. *The legislators do not want the public to abide by the law only from fear of the sanctions. It is desirable to create and maintain a feeling that the rules should be obeyed unconditionally.* (Olivecrona 1939, 132–3; italics added)

As Olivecrona writes, the illusion that norms of conduct "have an independent significance is ultimately based on the *belief* that they *really* and *objectively*

[1] There is, further, the tendency to forget that in every state there is not only the police force, but also the armed forces, and these "fulfil the role of a 'fleet in being' which is seldom used in open battle but nevertheless dominates the sea" (Olivecrona 1939, 126).

constitute those ideal rights and duties about which they speak [...]. The right exists—according to current opinion—as soon as the facts that are to give rise to it actually exist." This alleged effect of norms of conduct is illusory, Olivecrona observes, "since no rights or duties are really established through them" (Olivecrona, 1939, 133; italics added), if not in the belief of believers, I should add.

> The sole effect of the rules is their effect on the minds of people—the citizens and the officials concerned, causing them to act in a certain way. The ideas of rights and duties are used as means to describe the actions desired and also to work on people's feelings. *Only these ideas are realities*—the imagined powers and bonds called rights and duties *have no objective existence*. (Ibid., 133–4; italics added)

It should not be hard to see—with the extra help of the added italics—in what sense I find that the works of Olivecrona have inspired my conception of norms. Maybe I have gone one step further than he has, in just this sense: *I take beliefs seriously*. Which, however, in the final analysis, he does also—only, Olivecrona forcefully attacks *die Unwissenschaftlichkeit der Rechtswissenschaft* (the non-scientificity of legal science), as Anders Vilhelm Lundstedt does, too, and in a manner more impetuous than Olivecrona's (Lundstedt 1932–1936). Further, it seems to me that scholars of legal-positivist extraction are nowadays less pretentious and naif than their predecessors in Hägerström's generation and in that of the enfant terrible Lundstedt. What draws the sharp criticism of the exponents of the Uppsala School and elicits their anti-metaphysical overreaction is the conception of legal dogmatics as science advanced by the legal positivists of the late 19th and early 20th centuries, and especially by those scholars from civil-law legal culture most strongly influenced by German legal positivism.

Rights and duties, in the just-quoted words of Olivecrona, cannot be said to have an objective existence. And yet they do have an objective existence,[2] and even Olivecrona recognises that they do have an existence, though he does not understand this to be an objective existence. Rights and duties, I maintain, have an objective existence as beliefs in the brains of the bulk of the population, and especially in the brains of officials. It is not fully accurate to say that "the sole effect of the rules [of norms] is their effect on the minds of people." We should more accurately say that norms *are*, or *exist*, in the minds (brains) of people: Norms are there as beliefs and motives of behaviour (Chapter 6), and they work *and proliferate* in the brains of people in the manner illustrated in Chapter 7 and Section 9.6.

But at any rate, as Olivecrona observes, it is hard to fancy, at least in the modern world, a society not founded on organised force: Nothing without such force would be truly certain, not even our life and limb, or—I should add—beliefs that norms, duties, and rights exist.

[2] The objectivity of the psychological aspects of the internal point of view is a question I will come back to in Section 15.4 in regard to Searle's ontology of the I, an ontology I agree with.

> The *hidden reserves of hate, of lust for revenge, and of boundless egoism* would break through in a destructive way if not held in check by the presence of force, immeasurably superior to that of any single individual or any private combination. *Men need taming in order to live peacefully together. But taming on such a great scale as is required here presupposes unconquerable force.*
>
> Nor could the distribution of property be maintained without the help of force. One need not have seen much of the desperate struggle for gain, for wealth or for bare subsistence even, in order to appreciate the necessity of force to keep up the boundaries between mine and thine. [...] But it is not only in a capitalistic society that force is required for the maintenance of property relations. Even if all property were "vested in the state," i.e. put under the direct control of officials, organised force would be indispensable. The officials would certainly not be able to maintain their control unless they were backed by overwhelming force. (Olivecrona 1939, 136–7; italics added)

The immediate effect of using force consists only in inflicting sufferance upon a number of people, by imprisoning them, depriving them of this or that property, or subjecting them to some other kind of punishment. These punishments will, further, afford satisfaction for other people, assuaging their vengefulness, and that by securing payment of the money owed to them or by satisfying some other claim that they are pressing. These effects of the use of force matter, of course, to the people directly concerned, to be sure, but "it is a great mistake to suppose that the social significance of organised force is exhausted with these immediate effects" (Olivecrona 1939, 140), for that would amount to "turning the whole matter upside down" (ibid., 140). The uniform and persistent use of force has far-reaching consequences that go well beyond the effects felt by those directly involved (Olivecrona 1939, 140).

If we are to measure the true social bearing of organised force we will have to look beyond the single punishments inflicted. We will have to look at the general effects that force has on the community as a whole, on everyone's behaviour in the community. The immediate effects of the single punishments executed look relatively unimportant when measured against the social pressure the existence of organised force exerts on the minds of people at large (ibid., 141).

> The general consciousness of the fact that irresistible force is regularly and conscientiously applied according to the law has a far-reaching effect on our whole conduct of life. It forms one of the basic elements on which we build our whole existence. *Every single person must take the constant use of force—which is wholly independent of his own wishes—into account, just as he must take into account the climatic conditions of the country, or the means of subsistence which it offers.* To disregard the law completely—and the law would be nothing but inane words if force were not applied according to its provisions—would be as foolish as dressing on the latitude of Stockholm in the manner of the natives in the islands of the Pacific. We reflect on the matters as little as we reflect on the necessity of wearing adequate clothing. The necessity makes itself felt so imperiously that there is on the whole no room for a choice. This unbending pressure on millions and millions of people, keeping their actions within certain boundaries, is of infinitely greater importance for the community than the immediate effects of the sanctions applied. The sufferings of some thousands of criminals, the transfer of property in a number of cases from debtors to creditors, is a small matter in comparison with the fact that people in general abstain from the action labelled as crimes, pay their debts, etc.

For several reasons this indirect influence of organised force is easily overlooked. [...] *One reason for this shortsighted view is that we do not regard fear of the sanctions as our essential motive for lawful conduct.* (Olivecrona 1939, 141–3; italics added)

But still, such fear is never completely absent from our relation with the law, even if it is not the immediate motive of our behaving in accordance with the law. Just consider, for example, how preoccupied parents are with instilling obedience into their children. Do they adopt that line only out of moral concerns? Isn't there a decisive role that fear plays, our fear of the dire consequences of unlawful conduct? How much care we must exercise to earn for ourselves a decent tenor of life and a good reputation! (cf. Olivecrona 1939, 146–7).

Fear of the sanctions is certainly not without importance for our conduct. *This does not, however, imply that we live under an ever-present sense of fear of the legal force. The psychological situation is normally of another kind. The human mind has a marvellous adaptability. It is intolerable to live under the stress of constant fear. Consciously or unconsciously we try to avoid it by adjusting ourselves to the prevailing conditions.*

In order to avoid the burden of fear, we have not only to abstain from unlawful acts, which would bring the police or the bailiff on our track. It is also necessary to exclude even the *thought* of such actions. This is a very important fact. If we let the mind play with tempting acts (e.g. of enrichment or revenge), involving breaches of the law, fear also is evoked, since the idea of a sanction, executed with irresistible force, is connected with the idea of law-breaking. Fear raises itself as a barrier against a law-breaking. *But we cannot go on harbouring ideas of law-breaking and at the same time combating them with fear. This would have a disruptive influence on the personality*. We simply cannot do so in the long run without endangering our mental health. The internal cleavage would prove too much. Therefore the dangerous wishes must be excluded from our mind. If we do not entirely succeed in doing this, they are at least relegated to the sphere of the day-dreams more or less completely cut off from our every day activities.

Thus it is explained how fear of sanctions can have a dominating influence on our conduct without being actually felt. It stands at the door of the mind, ready to enter at the same time as the unlawful wishes. Peace of mind is retained only if both remain outside. We seek peace instinctively and on the whole with success as far as this point is concerned. Such is our psychological construction. Fear is not effectively excluded only by calculations about the possibility of getting off with impunity. Some uncertainty is always connected with such calculations. A secure peace of mind with regard to the law must therefore presuppose that the mind is thoroughly freed from thoughts which are apt to call up our fear of sanctions. (Olivecrona 1939, 147–8; italics added on first, third, and fourth occurrence; in original on second occurrence)[3]

[3] "Needless to say, this result can only be attained under specific conditions. Above all, there must be some generally accepted reasons why the sanctions are inflicted just for the actions in question. Otherwise, the exclusion of the dangerous thoughts cannot be successfully achieved. *An internal cleavage of mind takes place. On the one hand the unlawful acts appear in a tempting light or people may even be driven to commit them from reasons of hate or pride or other feelings. On the other hand actual fear of the sanctions stands in the way.*

When the situation is of this kind among considerable sections of the community the regime may adequately be called *terroristic*. Such a régime is characterised by the fact that fear of sanctions is the immediate and dominating motive for lawful conduct. It is well known how strict and unrelenting a terroristic régime must be if it is to be at all effective. Fear is insufficient as a barrier unless it is sustained by very drastic and unflinching menaces. Success on such lines

Olivecrona's opinions, as expressed in the passages just quoted, seem to be very much compatible with those expressed by scholars who study the social self, Gerth and Mills, for example, whose approach I illustrate in Sections 15.3.2 and 15.3.4, and that especially with regard to the all-pervasive importance of organised force in the law, a force that from a sociopsychological standpoint has far-reaching effects on the population at large: These effects go beyond the single individuals who in fact fall subject to them (i.e., the people who have transgressed the law and are reached by the state's coercive apparatus) and operate in the human mind even at a subliminal and unconscious level.

10.2. The Law in Force

10.2.1. Orthodoxia and Catholodoxia. The Normative Social Control on Believers: Dogmas, Heterodoxia, Paradoxia, Heresy

It will be interesting to recall that legal doctrine is also called "legal dogmatics."

"Dogma" derives from ancient Greek *dogma*, which, like *doxa*, means "opinion": Both are noun forms of the verb *dokein*, whose first meaning is "to seem" and the second "to believe." The main difference between *dogma* and *doxa* is that the former more frequently than the latter means "an opinion belonging to a doctrine, to a body or system of teachings," and hence, "a tenet."

Dogmas are those beliefs that are believed to be orthodox by the officials of a given group or society, or by those who are significant others for a believer (cf. Section 15.3.4). "Orthodoxy" ("orthodoxia," if we are to be consistent with "doxia," as introduced in Section 6.2) means "upright (erected, established, settled, or approved) opinion."[4]

Diverging opinions about the interpretation of the types of action and of circumstance set forth in a norm can engender the suspicion of heterodoxy (heterodoxia) among those who uphold the diverging opinions. Indeed, a distinction can be drawn between the orthodox and heterodox opinions that believers hold. Here, "orthodoxia" can be taken to mean "established or ap-

is, however, always uncertain and dearly bought. *The price must needs be not only the sufferings of those who are hit by the sanctions. It must also include an undermining of the mental stability of the population which results in a consequent weakening of the structure of the state.*

There is probably never to be found a régime which for a long time is terroristic through and through. Such a state of things would be untenable. In fact the usual situation in what is called a *reign of terror* is, that the bulk of the law, especially the fundamental rules of civil and criminal law, are accepted without fear's being felt as the immediate motive for obeying them. Only in respect of some part of the law, e.g., political matters, has fear this function, and then vigorous efforts are always made to reduce its importance *by means of propaganda*" (Olivecrona 1939, 148–50; italics added).

[4] The term "orthodoxia" is composed of the ancient Greek terms *orthos*, meaning "upright," and *doxa*, meaning "opinion or belief."

proved opinion or doctrine" about the content of a given (legal) norm or normative (legal) system, and "heterodoxia" can be taken to mean "opinion other than orthodoxia," and hence "unorthodox or disapproved opinion, or doctrine about the content of a given norm, or normative system."

What I call "paradoxia" is instead an unexpected, incomprehensible, or absurd opinion or belief: A paradox is a belief that fails to be in chorus with the mainstream beliefs of a group or society; it is a strident opinion, one that jars with the other voices in the chorus.[5]

Heterodoxia and paradoxia can give rise to heresy: to an opinion that stands so much in contrast with orthodoxia as to be reputed by officials, and by significant others, to be a wilful and persistent rejection of the dogmas about the content of a norm or normative system the believers believe in. In other words, and etymologically, heresy is a choice alternative to those implied by the norms fostered by the officials.[6]

Since anyone who believes in a norm believes that, given certain circumstances, it is binding per se to perform a certain type of action ("per se" meaning irrespective of how desirable this performance may be, and whatever the pleasure or pain, the advantage or damage, that may result from it: Chapter 6), it follows that believers believe that the same holds for them, too, if they themselves are duty-holders under such a norm. The reader may recognise here the topic of universalisation dealt with by R. M. Hare, among others, and which I referred to with regard to Hägerström and Hart (cf. Hare 1952, 151ff.).[7]

I will call "catholodoxia" the assumption by which a belief of ours has a universal character: We might so call the similar assumption found in Hägerström and Hart (Section 8.1.3.3). Catholodoxia is a belief in the universality of one's own beliefs.[8] Norms are typically universal or catholodox beliefs.

It will serve us in good stead—if we are to grasp analogies and avoid misunderstandings—to bear in mind what "catholic" means according to the Catholic Church. "Church," to begin with, means

> a convocation or an assembly. It designates the assemblies of the people, usually for a religious purpose. *Ekklēsia* is used frequently in the Greek Old Testament for *the assembly of the Chosen People before God*, above all for their assembly *on Mount Sinai where Israel received the Law*

[5] The term "paradoxia" is composed of the ancient Greek terms *para*, meaning "contrary to," and *doxa*, meaning "opinion or belief."

[6] "Heresy" comes from the Greek noun *hairesis*; the verb *hairein* means "to take," middle voice of *haireisthai*, "to take for oneself," "to choose."

[7] The subject index in Hare 1952 does not list the term "universalisability" or any terms analogous to it: Even so, the topic is treated from page 151 to page 162. In subsequent works Hare threw the term "universalisability" into relief by making it official as an entry in the subject index: cf. Hare 1963, 228 and Hare 1982, 242.

[8] The term "catholodoxy" is composed of the Greek terms *katholou* (universal) and *doxa* (belief).

and was established by God as his holy people. By calling itself "Church," *the first community of Christian believers recognized itself as heir to that assembly*. In the Church, God is "calling together" his people from all the ends of the earth. The equivalent Greek term *Kyriakē*, from which the English word *Church* and the German *Kirche* are derived, means "what belongs to the Lord." (*Catechism of the Catholic Church*, § 751; italics added on second, third, and fourth occurrence; in original on all other occurrences)

Moreover, we have "catholic" as a modifier of "church." In this use "catholic" means

"universal," in the sense of "according to the totality" or "in keeping with the whole." The Church is catholic in a double sense:

[*a*] The Church is catholic because Christ is present in her. "Where there is Christ Jesus, there is the Catholic Church." In her subsists *the fullness of Christ's body united with its head*; this implies that she receives from him "the fullness of the means of salvation" which he has willed: correct and complete confession of faith, full sacramental life, and ordained ministry in apostolic succession. The Church was, in this fundamental sense, catholic on the day of Pentecost and will always be so until the day of the Parousia.

[*b*] The Church *is catholic because she has been sent out by Christ on a mission to the whole of the human race*: "All men are called to belong to the new People of God. This People, therefore, while remaining one and only one, is to be spread throughout the whole world and to all ages in order that the design of God's will may be fulfilled: he made human nature one in the beginning and has decreed that all his children who were scattered should be finally gathered together as one ... The character of universality which adorns the People of God is a gift from the Lord himself whereby the Catholic Church ceaselessly and efficaciously seeks for the return of all humanity and all its goods, under Christ the Head in the unity of his Spirit." (*Catechism of the Catholic Church,* §§ 830–1; italics added)

Catholodoxia, on my characterisation, sometimes comes with the ontological assumption—properly, a reification or hypostasis—that the object of one's belief subsists of itself, independently of what anyone believes. When coupled with this ontological assumption, catholodoxia in reference to norms leads one to believe in the reproductive automatism of the reality that ought to be, with the consequence, among others, that *ignorantia juris non excusat* ("ignorance of legal norms is no excuse").[9]

There is a sense to *ignorantia juris non excusat* when "catholodoxia" is coupled with the just-mentioned hypostasis concerning the reality that ought to be. This way of thinking is of great help—and indeed essential—to the working of any legal system, but not so plausible if we do not assume at least implicitly that the law is made up of norms and if we do not reify the system of law as something (a reality that ought to be) existing and operating of itself.

In Chapter 7 the dynamics inherent in the norms internalised by a believer were considered in connection with the valid occurrences (tokens) and ceas-

[9] "You cannot readily be excused on account of your ignorance of the law, if, after having passed the age of twenty-five years, you rejected the estate of your mother; for your application for relief will be too late" (*Codex Iustinianus* (b), I, 18, 2). The Latin original: "Cum ignorantia iuris excusari facile non possis, si maior annis hereditati matris tuae renuntiasti, sera prece subveniri tibi desideras" (*Codex Iustinianus* (a), I, 18, 2).

ing valid occurrences of the conditioning type of circumstance found in parent norms (competence norms and norms of conduct alike) making up the believer's normative system.

The valid occurrences and ceasing valid occurrences of the conditioning type of circumstance set forth in a norm **n**, whether this is a norm of conduct or a competence norm, take place at times $\mathbf{t}_1$, $\mathbf{t}_2$, …, $\mathbf{t}_n$. It does not follow from this that a believer *b* in **n** will come to know of the valid occurrences and ceasing valid occurrences of the conditioning type of circumstance set forth in **n** at the same time as such valid occurrences and ceasing valid occurrences take place: It may in fact turn out that *b* should never come to know of any such valid occurrences and ceasing valid occurrences.

The question is what consequences follow from the hiatus that separates the valid occurrences of the conditioning type of circumstance specified in **n** from *b*'s awareness of such occurrences, or even from *b*'s total unawareness of the flow of events affecting the valid occurrences of the conditioning type of circumstance specified in **n**.

More to the point, we will have to ask how these consequences affect the existence and being-in-force of the norms **n1**, **n2**, ..., **nn** that can be made to derive from the type of action contained in parent norms (in norms of conduct or in competence norms) after a valid token takes place which can be subsumed under the conditioning type of circumstance found in the respective parent norms (but which for the time being is not so subsumed, for lack of awareness on *b*'s part).

The most plausible answer to this unawareness problem is that previously identified as the reification of the normative legal system. And this reification depends on the believer's beliefs (be they clearly defined or confusedly present in him or her): That is, on whether *b* thinks that the flow of events resulting in valid tokens (of the conditioning type of circumstance specified in the norms which *b* believes in) generates derived norms independently of *b*'s conscious subsumptions and inferences, or whether *b* does not think this to be the case.

The former view—by which norms are generated independently of anyone believing them to exist—has gained more currency in the law than the view that denies such independent existence. We can appreciate this fact by noting that court rulings, for example in Italy, are prevalently found to have a declarative status: It is assumed that courts do not create rights and duties, but ascertain their existence, which is why court judgements are retroactive.

Indeed, on occasion catholodoxia leads believers to impute norms to a single superior subject, or at least to a collective subject: the Sovereign, the People, the Nation, the State (each of which is, so to speak, the embodiment of a shared reality that ought to be). Catholodox believers are inclined to hold that their normative system exists independently of their beliefs or of other people's beliefs, and that it so exists—it exists normatively—and develops or changes for everybody independently of anybody's awareness or belief: It is a per se sub-

sisting and "auto-poietic" reality that ought to be.[10] Catholodox believers consider this system to be subsistent per se and imputable to a superior or a collective subject (or to both), like God, Nature, the People, the Class, the State, or the Sovereign. Where the law is concerned, all such superior or collective subjects, historically appealed to in different ages and under different conceptions, have been variously called into play as the "pillars" that prop the legal system.

The previously quoted definition of the qualifier "catholic" provided by the Catholic Church's official catechism, as well as Rousseau's idea of a *volonté générale* (see the excerpt quoted in Section 10.2.6), should be of help in understanding the presently discussed hypostasis or reification of a reality that ought to be.

But then catholodoxia, strictly speaking, needs no reifications, or hypostases, like those just mentioned: All it needs is a universalisation of norms in the terms suggested by Hare. It is no accident that Hägerström, with his conception of constitutional norms, and Hart after that, with his conception of the social rule of recognition, attributes to norms in law the essential function of accounting for change in the system in its continuity.

10.2.2. Dikedoxia. The Normative Social Control on Duty-Holders: The Idea of Just Coercion

The believers and the nonbelievers in a norm **n** can either take up or not take up a censorious attitude toward those duty-holders *d* under **n** who do not practise **n**.

Censurers will exert pressure, or social control, aimed at having duty-holders under **n** validly perform the type of action required under **n** every time the conditioning type of circumstance is validly brought about.

Those censurers who are *b*s in **n** will exert pressure on *d*s under **n**, and will do so out of a belief that obedience to **n** by *d*s is obligatory.

Those censurers who are *nonb*s in **n** will pressure *d*s under **n**, not by virtue of norm **n**, but because other motives (needs, interests, or values, or norms other than **n**) urge them to exert such pressure.

"Social control" is defined in sociology as the

> set of mechanisms, responses, and sanctions that a group devises and employs in order to prevent an individual or collective subject from deviating [diverging] from a norm of behaviour, or in order to check any deviance [difformity] already underway, so as to have the subject resume a line of behaviour that conforms to the norm, or again to prevent deviance [difformity] from repeating itself or spreading to other subjects. [...]
>
> Processes and forms of social control exist not only in all societies, but also across all strata of each society: in all kinds of groups and associations, in political parties and labour unions, in

[10] "Auto-poietic"—from Greek *autos*, "self," plus *poiein*, "to do or make"—is a term successfully brought into circulation in sociology by Niklas Luhmann. The term is used here independently of Luhmann's use of it.

corporate settings, in youth gangs and street gangs, in criminal organisations, and so on; nor can we say that social control at one level is the specific outgrowth of social control at the societal level as expressed in a penal code. A group of revolutionary extremists, for instance, will either disregard or challenge the social control exerted in the society the group works against, but it will nevertheless subject its members to forms of social control whose function is to secure the norms the group has set down and to advance the aims it is trying to achieve. Such social control can be studied using instruments substantially analogous to those used elsewhere. (Gallino 2000, s.v. "Controllo sociale," 172, 174; my translation)[11]

In the law, social control is brought to bear on difformity, that is, on deviance and nonconformism (Sections 6.6 through 6.8), by the officials and in particular by the judiciary and military apparatuses (Section 10.1).

When social control is held to be just, or even objectively right, that is, due per se, we have before us a phenomenon I will call "dikedoxia."[12]

We can distinguish varying degrees of intensity of dikedoxia depending on whether dikedoxia entails the justice of social control or, in a stronger version, its obligatoriness, but also depending on the kind of social control found to be just or, in a stronger version, obligatory.

Thus, in the stronger version, dikedoxia occurs when, in a believer *b*, a norm **n1** exists that sets forth a particular type of behaviour. Indeed, the conditioning type of circumstance described in **n1** is that an actual duty-holder *d* under **n** not obey **n**; the conditioned type of action described in **n1** is that *d* (the person who has failed to obey **n**) should be forced to comply with **n**. Dikedoxia may also entail that *d* should be subject to punishment either in every case or at least in those cases where *d* does not comply with **n** even when forced to do so.[13]

A case in point: If I, a believer *b*, believe in **n**, "You must not steal," it would not be unusual for me to also believe in **n1**, "If you have stolen something, you must return it, and if this is no longer a possibility, because you are no longer in possession of what you stole, a penalty should be inflicted on you," or also, in a stronger version, "A penalty should be inflicted on you in any case, even if you *can* return the stolen property and you actually do so." But with this last implication—the infliction of a punishment—there come into play further ideas that differ from the idea by which it is just, or even obligatory, to force rioters to comply with the norm **n** with which they are under an obligation to comply (in the case considered, it is just, or even obligatory, to force the thief to return what was unduly abstracted). These further ideas relate to the justice, or even the obligatoriness, of punishment understood in the strict sense as infliction of a sufferance (*infra*).

[11] My square brackets are meant to remind the reader that my concept of "deviance" is narrower than Gallino's; cf. Sections 6.6 through 6.8.

[12] "Dikedoxia" I have formed blending the Greek term *dikē*, meaning "what is right" (see Sections 12.2.3 through 12.2.5), with the term "doxia" (introduced in Section 6.2).

[13] On dikedoxia and Chisholm's (1916–1999) paradox, see Section 11.3.3.

According to Heraclitus (ca. 540–ca. 480 B.C.), if the Sun should stray from its course, then the Erinyes—the officials working for *dikē* (*dikēs epikouroi*)—would force the Sun back to where it should be: on its course. This example by Heraclitus—taken up apart from any of the interpretations given of it, which I will not enter into—is a classic and oft-cited example of what I call dikedoxia (DK 22 B 94).

Dikedoxia is entailed by doxia, namely, by the existence of a norm (Section 6.2): by the belief that the content of a norm is what is objectively right. And dikedoxia justifies the use of force as follows.

The idea that (given a valid token of a certain type of circumstance) a certain type of action is what is objectively right connects with the idea whereby it is just (*rättvis*) that someone who behaves unrightly (*orätt*) or simply fails to behave rightly (*rätt*) (this person omits to perform the right type of action) be forced into a performance equivalent (*ekvivalent prestation*) to the token of right action that this person failed to carry out (Hägerström 1917, 100–1).[14]

The right type of action is the type of action that "must be" and that for this reason must be performed. It is objectively right, for example, that property owners should not be deprived of the property they own; consequently, we must quell every impulse of ours that may egg us on to appropriate others' property. When people fail to carry out the right action, they will have to hold another behaviour equivalent to the behaviour they ought to have performed. For example, if we take someone else's property we will have to give it back. If we do not spontaneously carry through the performance equivalent to the right action we failed to carry out (where the equivalent performance is in a sense a succedaneum of the right action), then it will be just to exact such equivalent performance coercively: For example, it will be just to force the thief to return the stolen property.

In the foregoing example, the idea of an equivalent performance as a right or due performance comes in as the liaison by means of which the idea of a just coercion is connected with the idea of what is right. The idea that people must return any property they unduly appropriate and the idea that this course of action is justly enforced when not undertaken spontaneously appear against the background of another idea, and this—in the example just made—is the idea of an owner's right, of an owner's rightful claim to others' respect for his or her property: What is right, the rightness (*rätthet*) of returning the property, and what is just, the justice (*rättvisa*) of exacting this action coercively, can be said to rest on the very same norm that sets forth what is objectively right—in the example considered, in the norm that forbids theft and in the norms that make it obligatory to respect others' property.

[14] Cf. Pattaro, 1974, 242ff., where there is illustrated, among other things, the difference between a "just coercion" and a "right coercion" (cf. Section 8.1.3.4) to perform an action that was the right action and that the duty-holder failed to perform.

The linking idea is that of an equivalent performance: Coercion is rendered just on the basis of this idea. Right behaviour is—or rather was—the behaviour we had to hold but failed to hold. Hence, the right behaviour *now* is to perform another behaviour equivalent to the one we omitted. It is therefore just to force people to perform this behaviour (equivalent to the original right behaviour) if they fail to do so spontaneously—here coercion is just because designed to have people do their duty (cf. Hägerström 1917, 100ff.).[15] (The relationship between "right" and "just" is treated in Chapter 13 with reference to Aquinas's concepts of *justitia* and of *jus* as what is right—*quod est rectum*—toward others).

I mentioned theft but no longer spoke of punishments. Indeed, I simply referred to the (coercive) restitution of stolen property. This is because punishment is different from a coercion to carry out a right action we have omitted to carry out, as well as from a coercion to carry out an action *equivalent* to the right one we omitted to carry out (an equivalent action that we omitted to carry out, just as we omitted to carry out the right one to begin with). To stay with the example of theft, punishing a thief to a certain number of whippings or to a certain number of years in prison is not the same as or equivalent to the right action the thief omitted to carry out: It is not equivalent to "refraining from stealing" (this, in principle, is true even from the standpoint of the owner of the stolen property), and hence is not equivalent, either, to the equivalent performance ("returning the loot"), which, too, the thief may omit to carry out.

A punishment, strictly speaking, cannot be equivalent to any right behaviour that was not held. Putting a thief in jail is not the equivalent of this person having respected others' property, because jailing does not return the stolen property to its rightful owner, nor does it compensate this person for the loss incurred. So, too, an execution of capital punishment inflicted upon a murderer is not equivalent to this person having respected other people's lives, because it will not bring the murdered person back to life. In the strict sense, only returning stolen property is equivalent to the right behaviour the thief ought to have had; and only bringing the murdered person back to life is equivalent to the right behaviour the murderer ought to have had. And yet it is a commonly held belief that inflicting a punishment, and hence a sufferance, for certain criminal acts is what is just, or even obligatory.

Even so, despite this belief, the question of the justification of punishment is different from the question of the justice or the obligatoriness of coercing others to hold the right behaviour that was not held or a behaviour equivalent to the right behaviour not held. The idea of an equivalent performance—the

[15] See also Hägerström's *Naturrätt i straffrättsvetenskapen?* (Hägerström 1920) and *En straffrättslig principundersökning* (Hägerström 1939), two essays that sharply criticise the prevailing doctrine.

liaison between the idea of an objectively right type of action and the idea of justly forcing people to perform a type of action equivalent to the right one they failed to instantiate—is not equipped to account for the idea of the justice of a punishment (the justice of inflicting a sufferance).[16]

Clearly, there come into play—with the justice of punishment—ancestral attitudes that are exclusively human and divine. These attitudes set humans and divinity apart from beasts: Only God (cf. Lombardi Vallauri 1992) and humans are vengeful and avenging. There comes open here an important chapter in the history of ethical thought, which chapter has developed along two well-known and fundamental lines: *Puniatur quia peccatum est* ("Let punishment be inflicted because sin has been committed": retributivist theory) and *Puniatur ne peccetur* ("Let punishment be inflicted so that sin is no longer committed": deterrence theory).[17]

10.2.3. The Characters of the Play, the Play of Characters

In the previous sections of this chapter some questions were taken up that had been developed in Chapters 5 through 9. It was seen in summary in these sections that norms are essential to the existence and functioning of law (to the law's being in force), but that it is misleading, and may even be mystifying, to maintain that law is made effective by norms alone (Section 10.1); power, meaning organised force, works in conjunction with norms as an element essential to social life and to the legal system that governs social life and keeps it under control. The admixture of normativeness and force, when not explosive,[18] is a necessary and highly effective glue of social cohesion (cf. Section 10.2.5), as concerns the relations among norm-believers who share the same belief (orthodoxia and cathodoloxia, Section 10.2.1) and as concerns the relations between (believing or nonbelieving) duty-holders and believers (dikedoxia, Section 10.2.2).

[16] I am not sure how it works in English, but in Italian it is certain that "punishment" (*punizione*, *pena*) does not carry the same immediate emotive efficacy as "sufferance" (*sofferenza*). Punishment does not touch us: It is something objective and abstract (something whose dueness falls on the top layer of the reality that ought to be); it may happen to others but not to us. Sufferance, instead, does touch us: It is close to us, concrete; we imagine it to be something that may affect us, too (it does not carry normative connotations).

[17] On retributive and deterrent conceptions of punishment, see, in Volume 6 of this Treatise, Stalley, Chapter 3, Sections 2, 5, and 6, with regard to Plato in *Protagoras*, *Gorgias, Republic,* and *Laws*; also in Volume 6, see Lisska, Chapter 12, Section 7, in connection with Aquinas.

[18] Consider the cases of minorities who are believers and heretic (heretic in the sense illustrated in Section 10.2.1) as well as compact, joined by strong cohesion, and who will stop at nothing. There are countless, however diverse, examples in contemporary times: the phenomena of the Red Brigades in Italy, Basque terrorism in Spain, Ecoterrorism in various parts of the world. In reality, we can draw on many current examples of terroristic fanaticism. On fanaticism as a degeneration of moral normativeness, see Kant as quoted in Chapter 15, footnote 44.

In this section and the next I will make some comments on the question of the ambiguous intertwining of normativeness and organised power.

In this section I present a brief analysis of the positions of subjects, which positions I call "characters of the play in the game of the law in force." These characters are not equivalent to the traditional normative subjective positions in law that have been the object of important analyses tracing back to Wesley Newcomb Hohfeld (1879–1918).[19] My characters play the game of law in force, and so in treating them I must take into account not only duty-holders and right-holders, but also norm-believers (who in turn may or may not be duty-holders and/or right-holders). Taking into account the norm-believer component is interesting for various reasons. For example: This taking into account of the norm-believer relativises normativeness (as in the question, Duty-holder and right-holder in whose opinion?); it underscores the fact of people sharing or not sharing norms, or normative beliefs; it underscores, too, the social consequences of the phenomena just listed.

In the next section (Section 10.2.4) I will consider the referees or umpires in the game of the law in force (the judges) as well as some categories of fans or concerned spectators who—from different positions and in different ways: as legislators, as jurists (*scientia juris*), as interest or pressure groups—work to steer the course of the game of the law in force as well as the referees themselves, the judges.

Let us begin, then, with the characters of the play and the play of characters in the game of the law in force.

Wherever norms exist—among the members of a group or of a society—the basic characters of the play are the six simple characters indicated in Chapter 6, namely: the believer *b* in **n** (doxia); the nonbeliever *nonb* in **n** (adoxia); the actual duty-holder *d* under **n** (deontia); the actual subject *nond*, who is not a duty-holder under **n** (adeontia); the actual right-holder *r* under **n** (exousia); and the actual subject *nonr*, who is not a right-holder under **n** (anexousia).

If a pair consists of two basic, or simple, characters played by the same subject *s*, and these two characters stand in contradiction with respect to the same norm **n**—meaning that the positions of *s* relative to **n** are of doxia and adoxia, deontia and adeontia, or exousia and anexousia—then this pair will obviously be inconsistent. The same subject *s* cannot personate any of the following three pairs: (1) *s* being at the same time a believer *b* and a nonbeliever *nonb* in **n**, (2) *s* being at the same time an actual duty-holder *d* and a non-duty-holder *nond* under **n**, or (3) *s* being at the same time an actual right-holder *r* and a non-right-holder *nonr* under **n**.

[19] The greatest sophistication over Hohfeld's traditional positions, as found in Hohfeld 1964a and Hohfeld 1964b, was achieved by Kanger (1924–1988) and Lindahl: Kanger 1971 and 1972; Lindahl 1977. See also Alexy 1986. On normative subjective positions, see, in Volume 5 of this Treatise, Sartor, Chapters 19 and 22.

By contrast, each of the six basic, or simple, characters introduced in Chapter 6 (*b*, *nonb*, *d*, *nond*, *r*, *nonr*), if they are not in contradiction with respect to the same norm **n** when played by the same subject *s*, they will be compatible, and their joining in different ways brings out eight compound characters who, with respect to the same norm **n**, actually play the game of the law in force. Given a legal norm **n,** any member of a given social group can play any of the following compound characters with respect to **n**, but no more than one such compound character at any one time: (*i*) *b*&*d*&*r*, (*ii*) *b*&*d*&*nonr*, (*iii*) *b*&*nond*&*r*, (*iv*) *b*&*nond*&*nonr*, (*v*) *nonb*&*nond*&*r*, (*vi*) *nonb*&*d*&*r*, (*vii*) *nonb*&*nond*&*nonr*, and (*viii*) *nonb*&*d*&*nonr*. Thus, making allowance for a few qualifications that I will be making at the end of this section, whenever a norm **n** of the kind “Debtors must pay what they owe to their creditors” gets internalised within a group or society, it will be possible to assign *any* member of the group or society (and not just those who have internalised the norm) to a definite place in the following three-dimensional diagram.[20]

The compound characters (*i*) through (*iv*), each of whom includes the component-character believer *b* in **n**, are positioned on the corners of the bottom square of the cube of the law in force, this because believers prop up the system (here, the legal norm **n**). Nonbelievers (*nonb*s) in **n** are instead positioned on the corners of the top square, because nonbelievers are propped up within or by the system (here, again, with respect to the legal norm **n**).

These positionings are clearly a matter of taste: They might very well be turned upside-down or the positions rearranged at random around the cube’s eight corners. But I have a ranking of my own, which I illustrate as follows: (*i*) *b*&*d*&*r*, i.e., *doxia-deontia-exousia*; (*ii*) *b*&*d*&*nonr*, i.e., *doxia-deontia-anexou-*

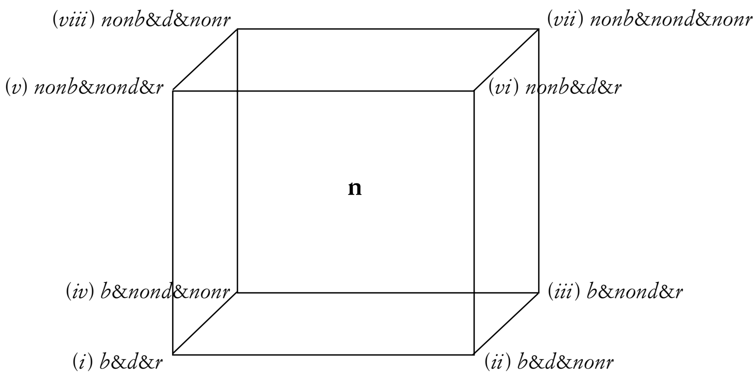


Figure 2: *The cube of the law in force*

[20] I am indebted to Giorgio Volpe for suggesting this cube-shaped diagram to represent my eight compound characters.

sia; (*iii*) *b*&*nond*&*r*, i.e., *doxia-adeontia-exousia*; (*iv*) *b*&*nond*&*nonr*, i.e., *doxia-adeontia-anexousia*; (*v*) *nonb*&*nond*&*r*, i.e., *adoxia-adeontia-exousia*; (*vi*) *nonb*-&*d*&*r*, i.e., *adoxia-deontia-exousia*; (*vii*) *nonb*&*nond*&*nonr*, i.e., *adoxia-adeontia-anexousia*; (*viii*) *nonb*&*d*&*nonr*, i.e., *adoxia-deontia-anexousia*. Each of these eight is a compound character in the play of the law in force. If there is a sense to my ranking it is to set up among the compound characters a hierarchy based on the criterion of normative force.[21] Thus, consider, for example, the following two compound characters a subject can play relative to **n**.

The subject who plays character (*i*) with respect to **n** is at once a believer, a duty-holder, and a right-holder with respect to **n**: This subject plays the strongest normative character with respect to **n** and hence the strongest normative character in favour of the stability and permanence of the law in force—of the normative force of the law in force. And this subject plays character (*i*) not only in relation to himself or herself, but also in relation to the other subjects who believe in **n**, in that they play characters (*ii*) through (*iv*); and—even more important—the same subject plays character (*i*) in relation to subjects who do *not* believe in **n**, in that they play characters (*v*) through (*viii*). These last four nonbelieving subjects need to be propped up with respect to **n** within the system of the law in force, while the first four subjects prop up this same system with respect to **n**. More accurately, like the compound characters (*ii*) through (*iv*), the compound character (*i*) includes the component-character believer *b* in **n** (doxia), and in virtue of this inclusion exerts normative social control on believers (in the cube, the subjects personating the compound characters (*i*) through (*iv*)): The social control exerted in this case consists in orthodoxia and catholodoxia as discussed in Section 10.2.1.[22] Further, like the compound character (*iii*), the compound character (*i*) includes, in addition to the component-character believer *b* in **n** (doxia), the component-character right-holder *r* under **n** (exousia), and in virtue of this further inclusion exerts a specific, and strong, normative social control on duty-holders (in the cube, the subjects personating not only (*i*), but also the other compound characters, (*ii*), (*vi*), and (*viii*)): The social control exerted in this case consists at its most extreme in dikedoxia as discussed in Section 10.2.2.

Instead, the subject playing the compound character (*viii*) with respect to **n** is at once a nonbeliever, a duty-holder, and a non-right-holder with respect to **n**: This subject plays the weakest character with respect to **n** and hence the weakest character in favour of the stability and permanence of the law in

[21] Of course "normative force" is to be understood here in the light of my conception of "norm" as a motive of behaviour (Sections 5.4, 6.1, 6.2, 6.5, and 6.6).

[22] Clearly, a believer can exert control even over himself in the form of orthodoxia or cathodoloxia. Thus, he can ask himself whether his belief is subject to heterodox influences (orthodoxia), just as he can ask himself whether he is impartially bringing his belief to bear on everyone, friend or enemy (cathodoloxia). Compare, on dikedoxia, the following footnote 23 in this chapter.

force, and especially in favour of the normative force of the law in force. This subject, as a nonbelieving duty-holder, will need to be driven to comply with **n** out of motives other than **n**. More precisely, he or she will need to either be converted into believing in **n**, or at least will need to be induced to be a conformist with respect to **n** (cf. Section 6.7). This will be the normative attitude the compound characters (*i*) through (*iv*) will have toward (*viii*).

Let us now look analytically at the eight compound characters making up the cube of the law in force.

(*i*) *Doxia–deontia–exousia*. Here, an actual subject *i* is a *b*&*d*&*r* with respect to **n**.

Doxia. Since *i* believes in **n** (doxia: Section 6.2), *i* will be predisposed to support and maybe even foster **n** in consequence of **n** existing in him or her. Hence *i* will take a normative censorious attitude toward those people who in his or her view are actual duty-holders under **n** (deontia: Section 6.4) and do not practise **n** (Section 6.8). This can happen with any *d* under **n**, and hence, in our cube, with (*i*) as well as with (*ii*), (*vi*), and (*viii*).[23]

Deontia. Since *i* is a duty-holder *d* under **n** (deontia: Section 6.4), *i* will be predisposed to abide by **n** in consequence of **n** being in force in him or her (nomia: Section 6.5). In other words, *i* will be predisposed to perform the type of action set forth in **n**, which he or she believes to be under an obligation to perform. This is so provided that the type of circumstance with which *i* conditionally connects the type of action in **n** gets validly instantiated. If other motives (needs, interests, or values, or norms other than **n**) should act on *i* and work against **n**, they will not prevent **n** from being in force in *i*, but they can make **n** inefficacious in *i* (deviance: Section 6.6).

The normative censorious or repressive attitude that *i* may take toward the people who in his or her view are *d*s under **n**—as *i* believes he or she is—will likely be stronger if and to the extent that *i* not only believes in **n**, but also abides by **n** (efficaciousness of **n**: Section 6.6).

Exousia. Finally, since *i* is a right-holder *r* under **n** (exousia: Section 6.4), *i* will be predisposed, in consequence of **n** existing in him or her (doxia: Section 6.2), to make specific normative claims on other subjects who in his or her view are non-practising *d*s under **n** (Sections 6.8 and 6.4): *i* believes he or she is entitled to sue these subjects because they are *d*s in relation to *i* specifically; and *i* will consequently take a *strong* normative censorious attitude in demanding that they obey **n**. This can happen under **n** with any *d* other than *i* and hence, in our cube, with (*ii*), (*vi*), and (*viii*).[24]

[23] On my characterisation of norms, a subject *i* who is deviant will very well be able to have a normative censorious attitude toward himself, too, up to the extreme point of self-punishment or of turning himself in for the crimes committed (dikedoxia).

[24] Clearly, the idea presented in the previous footnote 23—someone turning himself in for

(*ii*) *Doxia–deontia–anexousia*. Here, an actual agent *ii* is a *b*&*d*&*nonr* with respect to **n**.

Doxia. Since *ii* believes in **n** (doxia: Section 6.2), *ii*, though a *nonr* under **n** (anexousia: Section 6.4), will be predisposed to support and maybe even foster **n** in consequence of **n** existing in him or her. Hence *ii* will take a censorious attitude toward those people who in his or her view are actual duty-holders under **n** (deontia: Section 6.4) and do not practise **n** (Section 6.8). This can happen with any *d* under **n**, and hence, in our cube, with (*ii*) as well as with (*i*), (*vi*), and (*viii*).[25]

Deontia. Since *ii* is a duty-holder *d* under **n** (deontia: Section 6.4), *ii* will be predisposed to abide by **n** in consequence of **n** being in force in him or her (nomia: Section 6.5). In other words, *ii* will be predisposed to perform the type of action set forth in **n**, which he or she believes to be under an obligation to perform. This is so provided that the type of circumstance with which *ii* conditionally connects the type of action in **n** gets validly instantiated. If other motives (needs, interests, or values, or norms other than **n**) should act on *ii* and work against **n**, they will not prevent **n** from being in force in *ii*, but they can make **n** inefficacious in *ii* (deviance: Section 6.6).

The normative censorious or repressive attitude that *ii* may take toward the people who in his or her view are *d*s under **n**—as *ii* believes he or she is—will likely be stronger if and to the extent that *ii* not only believes in **n**, but also abides by **n** (efficaciousness of **n**: Section 6.6).

Anexousia. Finally, since *ii* is a *nonr* under **n** (anexousia: Section 6.4), *ii* will not be predisposed, in consequence of **n** existing in him or her (doxia: Section 6.2), to make specific normative claims on other subjects, even if in his or her view they are non-practising *d*s under **n** (Sections 6.8 and 6.4): *ii* will not believe he or she is entitled to sue these subjects; and *ii* will consequently not take the strong normative censorious attitude that only a subject *b*&*r* (in our cube, only characters (*i*) and (*iii*)) can take toward those people he or she believes to be not only *d*s under **n**, but also *d*s under **n** in relation to him or her specifically.

(*iii*) *Doxia–adeontia–exousia*. Here, an actual agent *iii* is a *b*&*nond*&*r* with respect to **n**.

Doxia. Since *iii* believes in **n** (doxia: Section 6.2), *iii*, though a *nond* under **n** (adeontia: Section 6.4), will be predisposed to support and maybe even foster **n** in consequence of **n** existing in him or her. Hence *iii* will take a normative censorious attitude toward those people who in his or her view are actual

a crime he has committed—is something we may very well conceive. But, from a legal point of view, we cannot say that someone can sue himself or herself.

[25] Cf. footnotes 22 through 24 in this chapter.

duty-holders under **n** (deontia: Section 6.4) and do not practise **n** (Section 6.8). This can happen with any *d* under **n**, and hence, in our cube, with (*i*), (*ii*), (*vi*), and (*viii*).

Adeontia. Since *iii* is a *nond* under **n** (adeontia: Section 6.4), *iii* will not be predisposed, in consequence of **n** existing in him or her (doxia: Section 6.2), to perform the type of action set forth in **n**. If other motives (needs, interests, or values, or norms other than **n**) should act on *iii*, they can induce *iii* to perform the type of action set forth in **n** despite the fact that *iii* believes he or she is not under any such obligation.

Exousia. Finally, since *iii* is a right-holder *r* under **n** (exousia: Section 6.4), *iii* will be predisposed, in consequence of **n** existing in him or her (doxia: Section 6.2), to make specific normative claims on other subjects who in his or her view are non-practising *d*s under **n** (Sections 6.8 and 6.4): *iii* believes he or she is entitled to sue these subjects because they are *d*s in relation to *iii* specifically; and *iii* will consequently take a *strong* normative censorious attitude in demanding that they obey **n**. This can happen with any *d* under **n**, and hence, in our cube, with (*i*), (*ii*), (*vi*), and (*viii*).

It will be noted, en passant, that experience shows that we are more inclined to believe in our own rights and in other people's duties toward us than in our own duties and in other people's rights in our regard.

(*iv*) *Doxia–adeontia–anexousia.* Here, an actual agent *iv* is a *b*&*nond*&*nonr* with respect to **n**.

Doxia. Since *iv* believes in **n** (doxia: Section 6.2), *iv*, though a *nond* and a *nonr* under **n** (adeontia and anexousia: Section 6.4), will be predisposed to support and maybe even foster **n** in consequence of **n** existing in him or her. Hence *iv* will take a normative censorious attitude toward those people who in his or her view are actual duty-holders under **n** (deontia: Section 6.4) and do not practise **n** (Section 6.8). This can happen with any *d* under **n**, and hence, in our cube, with (*i*), (*ii*), (*vi*), and (*viii*).

Adeontia. Since *iv* is a *nond* under **n** (adeontia: Section 6.4), *iv* will not be predisposed, in consequence of **n** existing in him or her (doxia: Section 6.2), to perform the type of action set forth in **n**. If other motives (needs, interests, or values, or norms other than **n**) should act on *iv*, they can induce *iv* to perform the type of action set forth in **n** despite the fact that *iv* believes he or she is not under any such obligation.

Anexousia. Finally, since *iv* is a *nonr* under **n** (anexousia: Section 6.4), *iv* will not be predisposed, in consequence of **n** existing in him or her (doxia: Section 6.2), to make specific normative claims on other subjects, even if in his or her view they are non-practising *d*s under **n** (Sections 6.8 and 6.4): *iv* will not believe he or she is entitled to sue these subjects; and *iv* will consequently not take the strong normative censorious attitude that only a subject *b*&*r* (in our cube, only characters (*i*) and (*iii*)) can take toward those people

he or she believes to be not only *d*s under **n**, but also *d*s under **n** in relation to him or her specifically.

(*v*) *Adoxia–adeontia–exousia*. Here, an actual agent *v* is a *nonb*&*nond*&*r* with respect to **n**.

Adoxia. Since *v* does not believe in **n** (adoxia: Section 6.2), *v* will not be predisposed by **n** to support or foster **n**, this in consequence of his or her lack of belief in **n**. Hence *v* will not take a normative censorious attitude toward any subject who is believed by somebody other than *v* (in our cube, by characters (*i*) through (*iv*)) to be an actual duty-holder *d* (deontia: Section 6.4) and who does not practise **n** (Section 6.8): *v* will take a censorious attitude only if motives other than **n**—needs, interests, or values, or norms other than **n**—induce him or her to do so.

Adeontia. Since *v* is a *nond* under **n** (adeontia: Section 6.4) and a *nonb* in **n** (adoxia: Section 6.2), *v* will not be predisposed by **n** to perform the type of action set forth in **n**.

Exousia. Finally, although *v* is assumed by somebody other than *v* (in our cube, by characters (*i*) through (*iv*)) to be a right-holder *r* under **n** (exousia: Section 6.4), *v* does not himself or herself believe in **n** (adoxia: Section 6.2) and for this reason will not be predisposed by **n** to make any sincere specific normative claims on other subjects who, in the opinion of characters (*i*) through (*iv*), are *d*s under **n** (deontia: Section 6.4). Thus, if *v* sues them, it will be out of motives other than **n**; *v* will consequently not take the strong normative censorious attitude that only a subject *b*&*r* (in our cube, only characters (*i*) and (*iii*)) can take toward those people he or she believes to be not only *d*s under **n**, but also *d*s under **n** in relation to him or her specifically.

(*vi*) *Adoxia–deontia–exousia*. Here, an actual agent *vi* is a *nonb*&*d*&*r* with respect to **n**.

Adoxia. Since *vi* does not believe in **n** (adoxia: Section 6.2), *vi* will not be predisposed by **n** to support or foster **n**, this in consequence of his or her lack of belief in **n**. Hence *vi* will not take a normative censorious attitude toward any subject who is believed by somebody other than *vi* (in our cube, by characters (*i*) through (*iv*)) to be an actual duty-holder *d* (deontia: Section 6.4) and who does not practise **n** (Section 6.8): *vi* will take a censorious attitude only if motives other than **n**—needs, interests, or values, or norms other than **n**—induce him or her to do so.

Deontia. Although *vi* is assumed by somebody other than *vi* (in our cube, by characters (*i*) through (*iv*)) to be a duty-holder *d* under **n** (deontia: Section 6.4), *vi* does not himself or herself believe in **n** (adoxia: Section 6.2) and for this reason (anomia: Section 6.5) will not be predisposed by **n** to perform the type of action set forth in **n**. If other motives (needs, interests, or values, or norms other than **n**) should act on *vi*, they can induce *vi* to perform the type

of action set forth in **n** despite the fact that *vi* does not believe he or she is under any such obligation.

Exousia. Finally, although *vi* is assumed by somebody other than *vi* (in our cube, by characters (*i*) through (*iv*)) to be a right-holder *r* under **n** (exousia: Section 6.4), *vi* does not himself or herself believe in **n** (adoxia: Section 6.2) and for this reason will not be predisposed by **n** to make any sincere specific normative claims on other subjects who, in the opinion of characters (*i*) through (*iv*), are *d*s under **n** (deontia: Section 6.4). Thus, if *vi* sues them, it will be out of motives other than **n**; *vi* will consequently not take the strong normative censorious attitude that only a subject *b*&*r* (in our cube, only characters (*i*) and (*iii*)) can take toward those people he or she believes to be not only *d*s under **n**, but also *d*s under **n** in relation to him or her specifically.

(*vii*) *Adoxia–adeontia–anexousia*. Here, an actual agent *vii* is a *nonb*&*nond*&*nonr* with respect to **n**.

Adoxia. Since *vii* does not believe in **n** (adoxia: Section 6.2), *vii* will not be predisposed by **n** to support or foster **n**, this in consequence of his or her lack of belief in **n**. Hence *vii* will not take a normative censorious attitude toward any subject who is believed by somebody other than *vii* (in our cube, by characters (*i*) through (*iv*)) to be an actual duty-holder *d* (deontia: Section 6.4) and who does not practise **n** (Section 6.8): *vii* will take a censorious attitude only if motives other than **n**—needs, interests, or values, or norms other than **n**—induce him or her to do so.

Adeontia. Since *vii* is a *nond* under **n** (adeontia: Section 6.4) and a *nonb* in **n** (adoxia: Section 6.2), *vii* will not be predisposed by **n** to perform the type of action set forth in **n**.

Anexousia. Finally, since *vii* is a *nonr* under **n** (anexousia: Section 6.4) and a *nonb* in **n** (adoxia: Section 6.2), *vii* will not be predisposed by **n** to make any specific normative claims on other subjects.

Note, in passing, that experience shows that it is not necessary to be a believer in a norm **n** in order to sue someone. Human egoism suffices of itself, independently of normative beliefs, to foment disputes that end up in the courts. Which last will have to issue rulings, and they will not always (not necessarily) issue them in favour of the party against whom a suit has been brought without any normative or legal grounds or basis, and with the awareness on the plaintiff's part that such a ground or basis is absent.

(*viii*) *Adoxia–deontia–anexousia*. Here, an actual agent *viii* is a *nonb*&*d*&*nonr* with respect to **n**.

Adoxia. Since *viii* does not believe in **n** (adoxia: Section 6.2), *viii* will not be predisposed by **n** to support or foster **n**, this in consequence of his or her lack of belief in **n**. Hence *viii* will not take a normative censorious attitude toward any subject who is believed by somebody other than *viii* (in our cube, by

characters (*i*) through (*iv*)) to be an actual duty-holder *d* (deontia: Section 6.4) and who does not practise **n** (Section 6.8): *viii* will take a censorious attitude only if motives other than **n**—needs, interests, or values, or norms other than **n**—induce him or her to do so.

Deontia. Although *viii* is assumed by somebody other than *viii* (in our cube, by characters (*i*) through (*iv*)) to be a duty-holder *d* under **n** (deontia: Section 6.4), *viii* does not himself or herself believe in **n** (adoxia: Section 6.2) and for this reason (anomia: Section 6.5) will not be predisposed by **n** to perform the type of action set forth in **n**. If other motives (needs, interests, or values, or norms other than **n**) should act on *viii*, they can induce *viii* to perform the type of action set forth in **n** despite the fact that *viii* does not believe he or she is under any such obligation.

Anexousia. Finally, since *viii* is a *nonr* under **n** (anexousia: Section 6.4) and a *nonb* in **n** (adoxia: Section 6.2), *viii* will not be predisposed by **n** to make any specific normative claims on other subjects.

By way of a conclusion, I will return briefly to the problems of consistency indicated at the beginning of this section, on pages 223–4.

As I have said, if a pair consists of two basic, or simple, characters played by the same subject *s* and these two characters stand in contradiction with respect to the same norm **n**—meaning that the positions of *s* relative to **n** are of doxia and adoxia, deontia and adeontia, or exousia and anexousia—then this pair will obviously be inconsistent. The same subject *s* cannot personate any of the following three pairs: (1) *s* being at the same time a believer *b* and a nonbeliever *nonb* in **n**, (2) *s* being at the same time an actual duty-holder *d* and a non-duty-holder *nond* under **n**, or (3) *s* being at the same time an actual right-holder *r* and a non-right-holder *nonr* under **n**.

Notice, however, that the incompatibility with respect to **n** specified at point (1) depends only on one and the same subject, *s*, who will either believe or not believe in **n**; not so in the case of the incompatibilities with respect to **n** specified at points (2) and (3). Indeed, whether a subject *s* will be a *b* or a *nonb* in **n** depends exclusively on whether he or she believes in **n**. In contrast, whether the same subject *s* will be a *d* or a *nond*, or an *r* or a *nonr*, under **n** depends not only on whether *s* believes in **n**, but also—and independently of his or her personal belief in **n**—on whether other subjects believe in **n**.

Suppose that *s* is a *nonb* in **n**, but is a *d* under **n**, and that *s* is a member of a social group, say a group of 1,000 people including *s*. If *s*, though a *nonb* in **n**, is still a *d* under **n**, we can gather that at least one member of the group is a *b* in **n**, and that at most 999 members of the group are *b*s in **n**: Clearly, the dictum holds in principle whereby *tot capita*, *tot sententiae* (so many heads, as many beliefs). The incompatibilities specified at points (2) and (3) with regard to *s* under **n** (*s* being at the same time a *d* and a *nond*, or an *r* and a *nonr*, under **n**) will be such relative to each *caput* and each *sententia* singly considered, that is,

relative to each believer *b* in **n**, and to each belief in **n**, whether only one member of the social group to which *s* belongs is a believer or 999 members of the same group are believers (*s*, recall, is by hypothesis a nonbeliever).[26]

Note, too, in regard to points (2) and (3), that the content of a single norm **n** can entail plural positions for a duty-holder *d* and plural positions for a right-holder *r*. Thus, the same subject *s* may in fact with respect to **n** at the same time be a *d* and a *nond*, but that with reference to different obligations imposed by **n** on *s*; or the same subject *s* may in fact with respect to **n** be an *r* and a *nonr*, but that with reference to different rights ascribed by **n** to *s*. For reasons of brevity, I have not in the foregoing pages developed the possible implications of cases such as this one, even if in practice these cases are rather commonplace.[27]

Also, I distinguished in Section 6.4 between those subjects who are referents of a norm and those who are not, and it follows from this distinction that a subject can in different ways be a non-right-holder or a non-duty-holder. This, too, is a distinction I have not applied or developed in the foregoing pages.

10.2.4. Who Is to Say What Is the Law in Force: The Judges as Managers of What Is Subjectively Right (Dikaspoloi)

Let us imagine that each of us can choose without veils of ignorance which of the eight compound characters presented in the previous section we prefer to find ourselves playing in the game of the law in force given the scene of culture and society into which we have been thrown by fate (cf. Section 11.1). Even then, once we are thrown into one scene rather than in another (for example, in 16th-century China or in 15th-century Italy), what law will *actually* be in force for each of us, in the scene we have been thrown into, will not depend on us, despite the privilege we have exercised.

As to attempting to change the law, we might try to change the law in books. And even confining ourselves to the law in books, we can reasonably expect our attempt to have some measure of success only if (or at least, especially if) we are in the key position of legislators; otherwise, it will be no easy task to achieve this result (which in any event concerns the law in books, but not necessarily the law in force, a point already made): This much we saw in treating the sources of law (Section 3.4).

[26] Let us enter into greater detail by considering a case of this sort. We have, out of 1,000 people, 999, all of them *b*s who believe in a norm **n** and who believe that the remaining person—*s*, a nonbeliever *nonb* in **n**—is a duty-holder *d* under **n**, even if this last person does not believe in **n** and so does not believe he or she is a duty-holder under **n**. It will not be unlikely, in this situation, that many of the 999 believers *b* in **n** should believe this norm to have an objective existence independently of their beliefs, and that by so doing they reify **n**.

[27] For example, an owner's right and duties will be different and multiple depending on the good owned: depending on whether this good is movable or immovable, potentially hazardous or not, or of artistic value or not, or even whether this good is mineral, vegetable, or animal.

But, then, whatever the law in books is, who decides what is the law in force? What language does the law in force speak? Who is *la bouche de la loi*, the mouth of the law?

Les juges, replied Monsieur Charles Louis de Secondat Baron de La Brède et de Montesquieu (1689–1755): "The national judges are no more than the mouth that pronounces the words of law, mere passive beings, incapable of moderating either its force or rigour" (Montesquieu 1980, book XI, chap. 6).[28] And he was right.

True, Montesquieu can be criticised for this claim, by way of the argument that it is impossible to be la *bouche de la loi*: It is impossible not to have interpretation in the actual practice of law; it is impossible not to have interpretation find its way into the law in action. This criticism may seem sound and plausible. But then even Monsieur Montesquieu's claim needs to be interpreted. And my interpretation is this: "The judge is *la bouche de la loi*" is an analytic truth.

"The judge is *la bouche de la loi*" does not mean that the judge refrains from interpretation. Quite the contrary: It means that *la loi* has no other *bouche* than the judge's, just as the oracle has no other voice than the Sibyl's, or that of another *more or less inspired* agent who is in charge of pronouncing the response to the concrete cases presented to the oracle.

The law sets forth types: It is general and abstract (see Section 2.1.2). Further, the law, if conceived normatively, belongs to the higher level of the reality that ought to be: The law sets forth what is objectively right (see Section 1.3). The interaction between the reality that ought to be and the reality that is gets mediated by the validity or invalidity (congruence or incongruence) of the events occurring in the reality that is with respect to the types set forth in what is objectively right in the reality that ought to be. Finally, what is objectively right gets concretised, actualised—it becomes a daily affair—in what is subjectively right. What is subjectively right, too, partakes of the reality that ought to be, even though, as we know, it occupies its bottom layer (Section 1.2). It is a concrete reality that ought to be—a reality lived by people living in this world: cf. Section 14.6—because it gets ascribed *by* actual people (by judges, for example) *to* actual people (to litigants, for example), whether or not the ones or the others, or both, are believers.

Hence the question is: Who is it that *inspires* the ascriber?

Unless we believe in some mysterious entity, such as that which inspires the Sibyl, we will have to concede that the judge is inspired by the environment, by the society and culture he or she lives in, which concur in shaping the law in force of which the judge is the mouth.

[28] The French original: "Les juges de la nation ne sont [...] que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur" (Montesquieu 1862, book XI, chap. 6). On Montesquieu, see, in Volume 2 of this Treatise, Rottleuthner, Section 3.2.1.1, in the frame of the natural foundations of law, and Volume 8, Riley.

Let us reread Montesquieu by placing his previously quoted words in context, and let us try to tag to the word *lois* the expression *en vigeur* ("in force"). We will realise then that Montesquieu is not denying the fact of the interpretation of judges. Rather, he is affirming the "analytic truth" whereby the judges cannot provide anything but a law they themselves interpret—a biased interpretation at that—according to the social conditioning which the judges inevitably stand affected by.

So writes Montesquieu, then:

> The great are always obnoxious to popular envy; and *were they to be judged by the people, they might be in danger from their judges*, and would, moreover, be deprived of the privilege which the meanest subject is possessed of in a free state, of being tried by his peers. […]
>
> It is possible that the law, which is clear-sighted in one sense, and blind in another, might, in some cases, be too severe. But as we have already observed, *the national judges are no more than the mouth that pronounces the words of the law* [in force], mere passive beings [*êtres inanimés*], incapable of moderating either its force or rigour. […]
>
> *It might also happen that a subject* entrusted with the administration of public affairs may infringe the rights of the people, and *be guilty of crimes which the ordinary magistrates either could not or would not punish*. But, in general, the legislative power […] can only […] impeach. But before what court shall it bring its impeachment? Must it go and demean itself before the *ordinary tribunals*, *which* are its inferiors, and, *being composed*, moreover, *of men who are chosen from the people* as well as itself, *will naturally be swayed by the authority of so powerful an accuser*? No: In order to preserve the dignity of the people, and the security of the subject, the legislative part which represents the people must bring in its charge before the legislative part which represents the nobility, who have neither the same interests nor the same passions. (Montesquieu 1980, book XI, chap. 6; italics added)[29]

[29] The French original in its wider context (enclosed within angle brackets is the original corresponding specifically to the translation in the run of text): "Quoique en général la puissance de juger ne doive être unie à aucune partie de la législative, cela est sujet à trois exceptions fondées sur l'intérêt particulier de celui qui doit être jugé.

<Les grands sont toujours exposés à l'envie; et, *s'ils étoient jugés par le peuple, ils pourroient être en danger*, et ne jouiroient pas du privilége qu'a le moindre des citoyens dans un État libre, d'être jugé par ses pairs.> Il faut donc que les nobles soient appelés, non pas devant les tribunaux ordinaires de la nation, mais devant cette partie du corps législatif qui est composée de nobles.

<Il pourroit arriver que la loi, qui est en même temps clairvoyante et aveugle, seroit, en de certains cas, trop rigoureuse. Mais *les juges de la nation ne sont*, comme nous avons dit, *que la bouche qui prononce les paroles de la loi* [en vigeur], *des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur*. […] Il pourroit encore arriver que quelque citoyen, dans les affaires publiques, violeroit les droits du peuple et feroit des crimes que les magistrats établis ne sauroient ou ne voudroient pas punir. Mais, en général, la puissance législative> ne peut pas juger; et elle le peut encore moins dans ce cas particulier, où elle représente la partie intéressée, qui est le peuple. Elle <ne peut> donc <être qu'accusatrice. Mais devant qui accusera-t-elle? Ira-t-elle s'abaisser devant *les tribunaux* de la loi, *qui lui sont* inférieurs, et d'ailleurs *composés de gens qui*, étant peuple comme elle, *seroient entraînés par l'autorité d'un si grand accusateur*? Non: il faut, pour conserver la dignité du peuple et la sûreté du particulier, que la partie législative du peuple accuse devant la partie législative des nobles, laquelle n'a ni les mêmes intérêts qu'elle, ni les mêmes passions.>

C'est l'avantage qu'a ce gouvernement sur la plupart des républiques anciennes, où il y avoit cet abus que le peuple étoit en même temps et juge et accusateur" (Montesquieu 1862, book XI, chap. 6; italics added).

It should emerge from the italicised expressions that the judge Montesquieu is talking about is the mouth not of the law in books, but of the law interpreted and shaped by the milieu the judge operates in. It is a law in force which (regrettably, as Montesquieu suggests) the judge cannot shrink away from. This law has incorporated itself within the judges; it has entered into their brains—where it is in force. For this reason, the judges, inanimate beings (*êtres inanimés*), far from being able to control this law, fall subject to it: They pronounce those words that this law dictates to them such as it gets interpreted, shaped, and maybe even biased in the milieu in which they operate.[30]

The concretisation of what is *objectively* right into what is *subjectively* right cannot take place and apply to us without somebody—a manager—attending to this task. There is needed somebody in charge of what is subjectively right, at least when anything having to do with what is subjectively right is or may be controversial. And the things having to do with what is subjectively right are of at least five different kinds: (*a*) the content of norms (what is objectively right in the reality that ought to be); (*b*) actual states of affairs and events in the reality that is; (*c*) the question whether these last (actual states of affairs and events in the reality that is) have to do with types set forth in what is objectively right in the reality that ought to be; and if they do, (*d*) what these types are; and (*e*) the question whether the same actual states of affairs and events are congruent or incongruent, valid or invalid, tokens of these types.

As we will see in Section 12.2.3, so early as in Homer's time, *dikē* (what is objectively right) gets restored, and the *dikai* (what is subjectively right) get administered by the *dikaspoloi* (the managers of what is subjectively right: cf. Section 12.2.4). And their verdict or pronouncement constitutes in any event what is subjectively right, the law in force in the concrete case.

Of course we are all in a sense free to call "law in force" whatever we think the law in force is or should be, and to hold that something is not law in force unless it possesses certain characteristics. Questions arise when other subjects enter the scene (or rather other compound characters, as presented in the previous section), especially people of position, meaning those people who exert authority, power, and influence—in a word, domination—in society, and so have more say than others as to what counts as law in force (cf. Sections 9.3 through 9.6).

[30] Students of Montesquieu have different views on the famous passage about the *bouche de la lois*. Thus, it will be necessary to also take into account other passages of Montesquieu, as well as, among other things, the role he assigned to aristocracy. These questions fall beyond the scope of this volume. And in any case, the mere fact of suggesting a kind of court rather than another, a composition of it rather than another, shows of itself that even the most aseptic conception of the judge's role presupposes (explicitly or implicitly) that the judge cannot be anything but the *bouche de la lois* in the sense just specified, that is, of the *lois* in force as the outcome of the cultural and social conditioning of the environment the judge belongs to.

Here, with some simplification, we can distinguish four classes of people (each of which can be regarded as a social group within the social system).

(*i*) Those who understand it as their job to enact the law that must be in force in society. This social group comprises lawmakers and other government authorities that produce law in books.[31] Let us say that these people try to translate their ideals of earthly justice into enactments, and whenever possible into norms, on my understanding of "norm" (lawmakers need believers who believe their enactments to be or to create norms).

(*ii*) Those who understand it as their job to say what the law in force is by explaining its content. These people figure they are explaining, stating, and describing what the law in force is, but in fact they are prescribing and suggesting by argumentation what should be applied as law in force. In this social group are professors of law, and more generally all those who study the law and are practised in it, namely, jurists, who are capable of exerting a specific influence in this respect.[32]

(*iii*) Those who use force to exact compliance with the directives they themselves enact, believing that this way they are obeying and enforcing the law in force (cf. Section 10.1), and whose meaning they themselves explain and state. In this social group are enforcement authorities, especially judges:[33] From different angles the group can also be seen to include public-administration officials (bureaucracy) and, when necessary, the state's military apparatus.

"Bureaucracy" is

> the public offices and functionaries entrusted with executing the acts established or regulated by a state's central power and providing administrative control for such execution; both functions are to be discharged impersonally, on the basis of preset standard criteria, and for all subjects who fall within given general categories [...].
>
> A surveillance bureaucracy, as is the Italian bureaucracy, will display the characteristics specific to both caste bureaucracy and patronage bureaucracy. [...]
>
> A political class seeking to expand and strengthen its domination can effect bureaucratic buildup on purpose, and without regard to what public administration technically requires, as has been typical of Italy before and after 1945 [...].
>
> The resistance that bureaucracy puts up against all forms of change stems from different processes that integrate to transform what are means—offices, hierarchies, operative procedures, and norms—into ends, thereby refashioning all political problems into administrative problems [...]. These norms, procedures, and offices often undergo a sort of *sanctification* [...] effected by functionaries; this way, the functionaries' more technical activities tend to become untouchable. (Gallino 2000, s.v. "Burocrazia," 79, 81, 82; my translation)

(*iv*) Those elements that can exert and do exert influence on the three groups above. This fourth class is better understood as that of interest groups

[31] Cf., in Volume 3 of this Treatise, Shiner, Chapters 2 and 9, and Rotolo, Section 7.2.

[32] Legal dogmatics, or *scientia juris*, which see Section 9.5.2 and Peczenik's Volume 4 of this Treatise.

[33] On judge-made law, see Volume 3 of this Treatise, Shiner, especially Section 2.3.

and includes corporations, political parties, labour unions, associations, financial groups, media people, and so on.

The expression "interest group" designates social groups like

> economic and professional groups, ethnic and religious groups, the people engaged in any one sport or recreational activity, sectors of social classes and social strata, those active in any one sector of the economy, or the workers employed in any one industrial, or farming, or service sector, the residents of any one area or local community or city section, and the members of a minority group, all which groups mobilise and take action specifically aimed at defending or furthering their primary and secondary interests against the rest of society and the state. To effectively pursue these ends, the members of an interest group will usually create sundry forms of association and organisation framed as active instruments with which to achieve representation within the political or the economic system as well as to build a bargaining position, exert pressure and influence, and gain power. Sometimes interest groups will seek to have a direct hand in governing society, but for the most part they prefer to act from outside the constitutional framework. Such groups as labour unions, trade associations, industry alliances, and chambers of commerce are themselves interest groups when they take in all the members whose category they represent; otherwise they act as the associative and organisational apparatus within an interest group that has more members than they have and that can occasionally comprise more than one apparatus. A political party usually embraces or represents several interest groups; conversely, there are interest groups that support more than one political party. (Gallino 2000, s.v. "Gruppo di interesse," 330–1; my translation)

When the matter is the law in force (legal directives, or texts, and norms in force), we will have to ask: Law in force (legal directives, or texts, and norms) according to whom? In whose opinion or belief, or in accordance with whose wishes? In connection with which of the social groups singled out above? The lawmakers? The jurists? The judges? Interest groups? And if so, which interest groups?

It may be that the aforesaid social groups advance compatible opinions about which legal directives and norms are law in force—as such to be applied *by* force, if necessary—but this will not necessarily be the case.[34]

Judges hold a special position with respect to lawmakers, jurists, and interest groups.

Lawmakers issue directives, laws, and the like and trust judges to recognise as law in force the texts the lawmakers themselves enact (namely, the law in books).

Jurists explain and illustrate what they think the law in force to be, and count on judges to heed them, out of deference to *scientia juris*, or legal dogmatics (this law we may perhaps call "doctrinal law" or "scientific law," using an expression of Savigny's—Friedrich Carl von Savigny, 1779–1861; cf. Section 15.5).

Interest groups exert pressure, mostly on lawmakers and judges, and on jurists as well.

[34] As is clear, and as has already been pointed out, there is at play here not only the question what directive or legal text is in force, as such to be applied *by* force, if necessary, but also the broader question what *interpretation* of a directive or legal text is in force, as such to be applied *by* force, if necessary.

On one account, judges are understood to lie in a state of passivity, because they are entreated with different kinds of requests coming from lawmakers, jurists, and interest groups. But again, unless a revolution interposes, judges apply the law in the sense that they use force to exact compliance with what *they* understand the law in force to be (and with what the demands addressed to them by lawmakers, jurists, and interest groups lead them to believe the law in force to be).

The expression "sources of law" suggests (at least in civil-law systems) that there are people, such as the lawmakers, whose job it is to make (or enact) the law that must be in force in society, and others, such as the judges, who apply the law in force (when citizens fail to comply with the lawmaker's statutes out of normative beliefs or out of conformism); it also suggests that those who apply the law in force, such as judges, must keep to enacted law, and to a certain hierarchy which the different sources of law are set in.

Hence, in theory, those who make law (the lawmakers) hold a higher-level position relative to those who apply the law (the judges): Those who make law "decide" what law must be in force in society; those who apply the law "obey" the other group.

In practice, however, because those who apply the law, and judges in particular, can use force (they have the law enforced), the two positions are not so marked out. And when conflict arises, it is those who enforce the law who decide which legal enactments (directives, texts of law, and the like) and which norms, and on what interpretation, are the law in force, as such to be applied *by* force, if necessary.

Lawmakers making laws, jurists studying law, and interest groups—using such means as suggestion (the media, propaganda, etc.), influence, and power—all work (most often successfully) to have an effect on judges deciding what the law in force is, thereby deciding what law is to be applied *by* force, if necessary.

Lawmakers, jurists, and interest groups are not, however, themselves in a condition to use force to apply and exact compliance with what they consider to be the law in force. Hence the law in force is what judges (and officials capacitated to take coercive measures) understand as law in force: It is what they apply as law in force, as such to be applied *by* force, if necessary.

It follows from this that in deciding what legal enactments and norms are to be applied, if necessary by *force*, and on what interpretation, if lawmakers, jurists, judges, and interest groups should advance conflicting opinions, the opinion that will actually override the others—the one that matters (principle of effectiveness)—will be the judges' opinion.

A disclaimer is in order here. The view just outlined is not that law in force is whatever judges believe to be law, and so apply as law, if this is taken to mean that judges take decisions based on their whims and interests. This can happen, to be sure. But by and large the likelihood of it happening is no greater among judges than it is in any other social group in which people hold

positions of authority or power. The view advanced here is rather that the law in force is what judges believe to be law, and so apply as law, because judges belong to a social group whose position in the social system, and especially within the state, gives them the last say in deciding what is law in force.

The "last say" that judges have is not necessarily their personal, spur-of-the-moment opinion qua individuals: It is rather the set of legal beliefs current among judges as a social group. The social group of judges is part of the same social system (the state) that also takes in the social groups of lawmakers, jurists, and interest groups; hence, the legal and normative beliefs that judges come to have are largely informed by the opinions the other groups in the social system have, and this influence is proportional to the power and influence the latter groups exert.

Judges, though subject to such conditioning, are convinced, in good faith for the most part, that the law they apply is the law in force as it objectively exists. What they actually apply, instead, are enactments (directives, or texts) and norms, whose content they contribute to shaping: They do so by interpreting, integrating, and especially applying the content of these enactments and norms to the behaviour of citizens. Judges, in their capacity as the official agents of social control, will consider the actual behaviours of citizens to be valid or invalid with respect to the types they (the judges) assume to be set forth in law. At the same time, judges will assume the behaviour of citizens to be right or wrong, a qualification that presupposes, but does not coincide with, its qualification as valid or invalid (cf. Section 2.2.2). And the behaviour they consider wrong, they will censure and repress.

It is not a play on words to say that the question of the law in force has to do with the force of the law in force, meaning by this last expression all factors that concur in determining the force of the law in force: not only norms (Chapter 8 and Section 9.6), but also organised power and the other factors considered in Sections 9.3 through 9.5 and 10.1. All these factors concur in making it so that judges—whose role is to decide what the law in force is in the actual controversies brought before them—should actually believe the law in force to be normatively and objectively what they find it to be. Or these factors will concur in making it so that judges should at least pretend they believe this to be the case, behaving, in this event, as whited sepulchres or as Jesuits (cf. Section 6.6).

Alf Ross has argued convincingly that the law in force is the judges' "normative ideology" (Ross 1958, 75ff.).[35] One of the strongest points in support

[35] "The mental process by which the judge decides to base his decision on one rule rather than another is not a capricious and arbitrary matter, varying from one judge to another, 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" (Ross 1958, 75; italics added). The Danish original: "Den mentale proces hvorigennem dommeren når frem til at basere sin afgørelse på just denne regel fremfor en anden, ikke forløber lunefuldt og vilkårligt, vekslende fra dommer Per til dommer Poul, men er bestemt af indstillinger og forestillinger, *en normativ*

of Ross's opinion is the twofold position that judges enjoy: When controversies arise, judges make the institutional decision as to what is the law in force, the law that is to be applied, if necessary *by* force; at the same time, judges detain the use of force—they govern the law-enforcement apparatus (police, the prison system, etc.) over which the state has a monopoly.

I would only add to Ross's just-mentioned opinion the qualification previously made: It is not strictly necessary that all judges be believers, that they belong to the bottom square of the cube of the law in force presented in Section 10.2.3. It suffices that they be whited sepulchres or Jesuits. What is necessary, in other words, is that they *act* as if they were believers.

Whether it is preferable that judges be sincere believers, whited sepulchres, or Jesuits is a different matter, and up for discussion.

Experience and history teach (or rather have taught me, who am a naughty pupil) that excess of belief, of normativistic zeal, is pregnant with risk; that whited sepulchres are people devoid of humanity; and that—all things considered—Jesuits are the least worst people we can hope to have to do with when others are playing the character of judge in our regard: the character of manager of what for us personally is subjectively right (our obligations and rights) when we stand trial or are even remotely affectible by the outcome of a trial.[36]

10.2.5. The Law in Force as Domination (Herrschaft)

On the whole, law is domination (*Herrschaft*), even when such domination is, as we might hope, liberal and democratic, as against totalitarian, authoritarian, or tyrannical. "Domination" is defined in the social sciences as

> a relation built on the superordination or superiority of one individual or collective subject, A, upon one or more individual or collective subjects—B, C, etc.—in a social system that embraces A, B, C, etc., such that, *despite appearances to the contrary*, A controls to A's advantage [or furthers A's plans or visions of society by controlling] the distribution of the material and nonmaterial resources the system as a whole either produces or acquires: Under this relation, A also controls the political processes affecting such distribution, using to this end, and in combinations gauged to the situation, different forms and amounts of power, authority, influence, and other means suited to conditioning both *the behaviour and the conscience* of the dominated subjects, in much the same way as the mechanisms of socialisation and social control do, effectively preventing B, C, or others from escaping this distributive framework or modifying it to a degree unacceptable to A, and effectively bringing them to recognise the framework in force as legitimate. (Gallino 2000, s.v. "Dominio," 249; my translation; italics added)

Human beings can rely on actual experience (knowledge by acquaintance) to relate to the reality that surrounds them. But there is only so much actual ex-

ideologi, der på ensartet måde er præsent og virksom i danske dommeres sind, når de handler i deres kald som dommere" (Ross 1971, 90; italics added).

[36] Note in passing that what I maintain on the relationship between normativeness and fanaticism (cf. Section 15.4) evidently applies to judges too.

perience each person can have in relation to the whole of past and present states of affairs and events and of the future states of affairs and events susceptible of being predicted. Beyond actual experience, the only mediums available with which human beings can understand the reality around them is knowledge by description, abstract knowledge acquired through concepts or types.[37]

This is so with type descriptions given in apophantic sentences (sentences that express propositions that are either true or false), as well as with type descriptions given in deontic sentences or directives (sentences that express propositional contents that cannot be true or false).

The reality that is, abstractly described in apophantic sentences expressing propositions (such as are either true or false), is in an important sense independent from authority, power, influence, suggestion, and charisma (which can indeed shape the content of apophantic sentences designed to describe and state the reality that is, but which cannot shape this same reality). For this reason, when comparisons are possible, the actual reality that is prevails upon false or manipulative propositions (modelled by authority, power, and influence) and shows them to be false or manipulative, this on Karl Popper's (1902–1994) falsification principle (Popper 1983, 78ff.).

By contrast, the reality that ought to be is largely, if not completely, contingent on authority, power, influence, suggestion, and charisma, that is, on domination. Still exemplary in this regard is Hans Gerth and Charles Wright Mills's *Character and Social Structure: The Psychology of Social Institutions*, dating to 1953 (Gerth and Mills 1961). The title of this work is in itself significant; the contents I will get to in Section 15.3.

The action of authority, power, influence, suggestion, and charisma on the propositional contents, would-be propositions, or type descriptions designed to move people to action—as are the types described in deontic sentences, in directives, or contained in norms (normative beliefs), which cannot be true or false—consists not only in modelling such propositional contents, would-be propositions, or type descriptions, but also in making them actual: in determining the tokens (the actual behaviours) that validly perform such types.

This is done officially (in the courts, for example, or through bureaucracy: Section 10.2.4) by qualifying as valid or invalid the behaviour-tokens, and as we know, where these are assumed to be invalid, they will not produce (see Section 2.2 and Chapter 3) the Ought-effects that the reality that ought to be (the law) attaches *only* to the tokens that *validly* instantiate the types in question. And where behaviour-tokens are assumed to be not only valid but also wrong (precisely inasmuch as they are valid; see Section 2.2.2)—that is, where they are assumed to depart from what is objectively right (deviance, anomia, nonconformism)—the authority, power, influence, suggestion, and charisma, in sum, the

[37] The distinction between knowledge by acquaintance and knowledge by description I use in the sense expounded by Russell (1992).

law in force with all its components and means, will intervene to censure and change deviance and nonconformism, if necessary using force to this end.

There are two salient features of law: heteronomous normativeness—implied by authority—and effectiveness, requiring organised power or force.

The normativeness of law is heteronomous because it depends largely on authority: *Jus quia jussum*; "What is right is right because prescribed." I welcome this Latin expression: It serves to point out that directives and texts validly issued by a sovereign authority do bring about heteronomous derivative norms in the brains of believers (Sections 7.3 and 9.6)—norms that no artifice, however elegant, can retrace to the addressees' autonomy, despite the fact that the addressees of the authority's directives or enacted texts do believe in the competence norm institutive of the sovereign authority.

Ne m'en voulez pas, monsieur Rousseau. I cannot agree with you: *Vous vous êtes trompé*. And on account of your error, full of good faith, ingenuity, and idealism, a great many simple-minded people have been led astray.

Vous dites: "La volonté générale est toujours *droite*." You say: "The general will is always *right*."[38] This conclusion proceeds on a misunderstanding with regard to the promise and the social contract. I will come back to this question in Section 10.2.6.

The effectiveness of law depends partly on the efficaciousness that heteronomous norms have on believing duty-holders (cf. Sections 6.5 and 6.6) and partly on force: not only on force as the means of last resort with which to decisively resolve conflicts, but also, and most importantly, on force understood as the compelling social environment without which there would not be any peaceful social life, not even relatively peaceful.

We may try to soften through our culture the compelling force embedded in our social environment, or we may try to do so through critical and enlightened ideas as well as through political wrangling. But despite recurrent contrary illusions (anarchism, Marxism, etc.), the law, the state, and the ambiguous intertwining of norms and organised force by which they are characterised cannot be abolished, if not at the cost of putting an end to all kinds of social coexistence (cf. Sections 10.1 and 15.3.3).

If we are to briefly describe the being-in-force of the state's legal system, it will be as follows.

As a relatively effective normative system, the state is a set of social relations and of processes and structures that guide, give shape to, stabilise, and regulate the most varied activities of a people, in the economic sphere as in the political, familial, cultural, educational, and religious sphere. The social relations between husband and wife, parent and child, teacher and student, entrepreneur and factory worker, tenant and landlord (whether this last person is a private citizen or a public entity), soldier and officer, and a thousand other relations, *bear the deep imprint of the norms the state consists of and exists in*. Their *effectiveness*, however relative, *is due in*

[38] The English translation and the French original are from Rousseau 1980, II, 3, and Rousseau 1817, II, 3, respectively; italics added.

large part to the near-absolute power wielded by the state to enjoin respect for the norms which come from it, or which are received into it; *but it is due in no less measure to the adhesion the same norms are an object of on the part of those who are subject to them*, and to the consensus with which these subjects welcome the decisions of the political class. This adhesion and consensus are in turn the product of the influence exerted by the politicians, and by the intellectuals who serve them, either directly or through mass communication; the same adhesion and consensus is also the product of the authority conferred on politicians and on those who hold offices in the administrative-judicial apparatus; it is the product of the mechanisms of patronage the ones and the others use to turn to their own advantage the will of electors, interest groups, associations, and enterprises.

If we want to explain both the effectiveness of the state's normative system and its loss of effectiveness, it will then prove essential to couple the *objective* elements of power to the *subjective* elements of authority, influence, and patronage. It is the coming together of these objective and subjective elements that constitutes the state's real domination over the members of society, such as permanently and effectively controls their conduct. When the subjective elements disappear, the objective elements—crude power—will not by themselves suffice to secure such control, or rather they will secure it, but only temporarily or under exceptional circumstances, or by exacting heavy tolls […].

All contemporary states are without exception more extended than they were at their outset, meaning that they now intervene to control and dominate public and private life, as well domains like education and the economy, under more aspects than they used to […].

The state's overall greater force and extension has generally not been used to bring greater oppression and exploitation to bear down on the subordinate classes, to be sure, and has often been used, rather, to decrease such exploitation and facilitate the historical process of emancipation—but none of this does anything to remove the state's relentless presence, designed to interpose assistance and control alike, even in the life of the subordinate classes, nor does it prevent the state's oppressive and repressive potential, now used in several societies to advance civilisation, from being readily used at some future time for purposes contrary to progress.

The phenomenon we must look at is not the use this instrument is put to, but rather the boundless power it has been endowed with. And it will be hard to rebut the claim that *the state as a morally and politically "ambiguous" instrument* has never been so powerful as it is in capitalistic and socialistic societies alike. (Gallino 2000, s.v. "Stato (Sociologia dello)," 641–2, 642–3, 643; my translation; italics added)

10.2.6. On Authority, Autonomy, and Heteronomy

In Section 10.2.5 I maintained that there are two salient features of law: One is heteronomous normativeness, which flows from authority, and the other is effectiveness, which requires normativeness, and at the same time it requires organised power, or force. Also, I called Rousseau to account in regard to the first feature: With some impertinence on my part I imputed to his ingenuousness and idealism the pitfall which I explain below and which so many people have fallen into.

I will now present a few arguments in support of my basic objection to theories that, like Rousseau's, can prove misleading in having the concept of individual autonomy tie up too closely with that of promise and, in the arena of politics, with that of the social contract, justifying by this device a certain ignis fatuus: an illusion and excessive optimism about the compatibility between autonomy and delegation, or conferral of power.

The arguments concern the concept of promise implied in the account of the social contract offered by various 17th- and 18th-century natural-law theories (cf. Section 3.6.2).

If the object of a promisor's promise is "obeying" ("I will obey your commands"), then the directives the promisee issues to the promisor so as to have the promisor maintain the promise made are heteronomous with respect to the promisor, despite the fact that making a promise—here, entering into a social contract—makes the promisor the source of the promisee's sovereign authority.

Granted, if a promisor's promise is a valid instance of the type of circumstance set forth in the norm on promises (**n**, "Promises must be kept") and the promisor believes in this norm (doxia), then any promise validly made by the believing promisor will, by the subsumption and inference process illustrated in Chapter 7, lead to derivative norms in the promisor's reality that ought to be.

Thus, if I, a believer in the norm on promises **n**, make the promise "I will quit smoking when you will ask me to," or also, for something of a provocative example, "I will kill myself when you will ask me to,"[39] and you ask me to quit smoking or to kill myself, I will then believe that there is now a new norm **n1**, "I must now quit smoking," or **n2**, "I must now kill myself." Further, I will have to admit that the norms **n1** and **n2** are autonomous in my regard because their content is stuff that *I* have decided, not someone else.

But suppose now that I make the promise "I will obey your every command": I will thereby have lost my autonomy.

Of course if I am a believer in the norm on promises, my last promise, like any other promise, will produce in me the belief that I am now under an obligation to keep my promise. And the promisee's issuing of directives to me will set off in me the subsumption and inference processes illustrated in Sections 7.3 and 9.6, and these processes will have me believe that the promisee's issuances have produced new norms which I believe to be per se binding on me (nomia: Section 6.5).

But there is a point that holds only in the case of promises like "I will obey your every command." And the point is the following. It is true that everything happens through *my* promise, and that *my* beliefs are to account for my normative conclusions, and that the promisee's directives create (in me, as a believing promisor) new norms under which I am a duty-holder. But it is false that these new derivative norms may be ascribed to my autonomy. Let us see why.

We need to be careful with norms that derive from the norm on promises ("Promises must be kept"). These derivative norms, depending on the content of the promise from which they flow, may come in either of two forms: as norms of conduct in the strict sense ("No smoking," for example) or as com-

[39] Or, for a more likely and topical example, let us imagine a doctor promising a patient to perform euthanasia on him or her if and when the patient should make that request.

petence norms in the strict sense, whose peculiar type of action is "obeying."[40] It all depends on the content of the promise.

If, as a believing promisor, I promise to perform a type of behaviour different from "obeying" (I might promise I will quit smoking when you will ask me to, for example, or commit suicide when you will ask me to), my promise will lead to a norm of conduct in the strict sense. And the content of this norm of conduct will be a type of action as I have determined it—ab ovo and in full—through the content of my promise. In this case, therefore, the content of the promisee's directive ("Quit smoking now," or "Commit suicide now") will effectively be traceable to my autonomy as a promisor having decided these types of behaviour in the first person.

If instead I promise, as a believing promisor, to perform the type of behaviour "obeying" ("I will obey your every command"), then my promise will lead to a competence norm in the strict sense. Of course, this competence norm is definitely one I have decided in autonomy, but what in this case I have autonomously done through my promise is transfer my freedom and autonomy to the promisee. This transfer takes place in the reality that ought to be (or, which amounts to the same, it takes place in the brains of the believers in the norm on promises), and it does so precisely in virtue of the mechanism proper to promises and to the inferential process illustrated in Chapter 7 and Section 9.6.

Recall Grotius's *alienatio dominii* as the paradigm for *alienatio particulae libertatis*.

> A perfect promise [...] has an effect similar to alienation of ownership. It is, in fact, an introduction [*via*, better translated here as "way," "mode," or "means"] either to the alienation of a thing or to the alienation of some portion of our freedom of action. (Grotius, *De jure belli ac pacis libri tres* (b), II, 11, IV)[41]

If and to the extent that I promise to obey the directives received from the promisee, I will have transferred my autonomy to the promisee, and my autonomy will thereby, and tautologically, have changed into my "heteronomy": My autonomy will have become the promisee's "autonomy" in laying norms on me. Indeed, the valid directives that drive derivative norms into my brain are such that the types of action each time so required of me by the promisee will have been determined and decided by the promisee, not by me. The promisee will issue directives that are heteronomous to the promisor and bring about in the promisor's brain heteronomous derivative norms.

If autonomy amounts to deciding for yourself which directives, laws, or types of action you will believe to be binding per se, then, as happens with the

[40] On this distinction, see Section 8.2.1.

[41] The Latin original: "Perfecta promissio est, similem habens effectum qualem alienatio dominii. Est enim aut via ad alienationem rei, aut alienatio particulae cuiusdam nostrae libertatis" (Grotius, *De jure belli ac pacis libri tres* (a), II, 11, VI). Cf. Section 3.6.2.

social contract, any promise that creates a *stricto sensu* competence norm will necessarily lead to heteronomous directives and derivative norms.

It is a question of degree, and it depends on our political opinion, whether this conclusion holds true even in the event that a social contract should set up not only formal restraints but also substantive ones limiting the matters on which the sovereign promisee can validly issue or enact directives or texts of law.[42]

Competence norms are useful, and quite likely necessary as well, but—if I may indulge in a truism—they are at the same time risky. It is purely by reason of an ideology that they get reduced to the autonomy of the person required to obey them. There is no need to mention here the well-known cases of legitimately elected dictators. Bureaucracy makes a fine-enough example. Bureaucrats live and thrive on competence norms: I have never known of anyone who has felt autonomous dealing with bureaucracy; even ministers and heads of state (a crowd I mingle with habitually) do not feel autonomous in that respect, despite the fact that they are formally in a position superordinate to that of bureaucrats (see Section 10.2.4).

Rousseau's theory of the general will traces the sovereign's decisions to the citizens' autonomy.

"The general will is always right" (Rousseau 1980, II, 3) ("la volonté générale est toujours droite"; Rousseau 1817, II, 3) and, further, "an act of Sovereignty [. . .] is not a convention between a superior and an inferior, but a convention between the body and each of its members. [...] So long as the subjects have to submit only to conventions of this sort, they obey no-one but their own will" (Rousseau 1980, II, 4).[43]

[42] On this point, my political opinion, at least the main features of it, can be gleaned from the previous sections on law in force and especially on law and domination.

[43] Here are Rousseau's words in their wider context: "From the very nature of the compact, every act of Sovereignty, i.e., every authentic act of the general will, binds or favours all the citizens equally; so that the Sovereignty recognises only the body of the nation, and draws no distinction between those of whom it is made up. What, then, strictly speaking, is an act of Sovereignty? It is not a convention between a superior and an inferior, but a convention between the body and each of its member. [...] So long as the subjects have to submit only to conventions of this sort, they obey no-one but their own will; and to ask how far the respective rights of the Sovereign and the citizens extend, is to ask up to what point the latter can enter into undertakings with themselves, each with all, and all with each" (Rousseau 1980, II, 4). The French original: "Par la nature du pacte, tout acte de souveraineté, c'est-à-dire tout acte authentique de la volonté générale, oblige ou favorise également tous les citoyens; en sorte que le souverain connoît seulement le corps de la nation, et ne distingue aucun de ceux qui la composent. Qu'est-ce donc proprement qu'un acte de souveraineté? Ce n'est pas une convention du supérieur avec l'inférieur, mais une convention du corps avec chacun de ses membres. [...] Tant que les sujets ne sont soumis qu'à de telles conventions, ils n'obéissent à personne, mais seulement à leur propre volonté: et demander jusqu'où s'étendent les droits respectifs du souverain et des citoyens, c'est demander jusqu'à quel point ceux-ci peuvent s'engager avec eux-mêmes, chacun envers tous, et tous envers chacun d'eux" (Rousseau 1817, II, 4).

Part Four

In Search of Confirming Others

Ὦ πέπον, εἰ μὲν γὰρ πόλεμον περὶ τόνδε φυγόντε
αἰεὶ δὴ μέλλοιμεν ἀγήρω τ᾽ ἀθανάτω τε
ἔσσεσθ᾽, οὔτε κεν αὐτὸς ἐνὶ πρώτοισι μαχοίμην
οὔτε κε σὲ στέλλοιμι μάχην ἐς κυδιάνειραν·
νῦν δ᾽ ἔμπης γὰρ κῆρες ἐφεστᾶσιν θανάτοιο
μυρίαι, ἃς οὐκ ἔστι φυγεῖν βροτὸν οὐδ᾽ ὑπαλύξαι,
ἴομεν, ἠέ τῳ εὖχος ὀρέξομεν, ἠέ τις ἡμῖν.

Ah friend, if once escaped from this battle we were for ever to be ageless and immortal,
neither should I fight myself amid the foremost, nor should I send thee into battle
where men win glory; but now—for in any case fates of death beset us,
fates past counting, which no mortal may escape or avoid—
now let us go forward, whether we shall give glory to another, or another to us.

(Homer, *The Iliad*, XII, vv. 322–8)

Death, alas, is not vague, or abstract, or difficult to grasp
for any human being. It is only too hauntingly real, too concrete,
too easy to comprehend [...].
Myth, warranting the belief in immortality, in eternal youth, in a life
beyond the grave, is not an intellectual reaction upon a puzzle,
but an explicit act of faith born from the innermost instinctive
and emotional reaction to the most formidable and haunting idea.

(Bronislaw Malinowski, *Myth in Primitive Psychology*, 1926)

*Nur wenn im Sein eines Seienden Tod, Schuld, Gewissen, Freiheit
und Endlichkeit dergestalt gleichursprünglich zusammenwohnen wie
in der Sorge, kann es im Modus des Schicksals existieren,
d. h. im Grunde seiner Existenz geschichtlich sein.*

Only if death, guilt, conscience, freedom, and finitude reside together equiprimordially
in the Being of an entity as they do in care, can that entity exist in the mode of fate;
that is to say, only then can it be historical in the very depths of its existence.

(Martin Heidegger, *Sein und Zeit*, 1927)

Chapter 11

THE REALITY THAT OUGHT TO BE AS FATE

11.1. Consciousness of Death, Anxiety, and Self-Defensive Creation of Myth

The expression "reality that ought to be" may well be a coinage of mine, but what it expresses—something like a pragmatic and vital nonsense (Malinowski, *infra*—Bronislaw Malinowski, 1884–1942)—is not. Nor was it invented by Hans Kelsen, even if he was its foremost 20th-century theoriser and built on *das Sollen* a daring cathedral of crystal, sophisticated, glorious, and fragile. Finally, the idea of the reality that ought to be was not invented by the jurists, either, despite the fact that they have been handling it for centuries, not always consciously or with due care.

A number of traits distinguish humans from minerals, plants, and animals, such as their brain's huge memory capacity, their advanced learning skills, an advanced ability to choose, and self-consciousness. This last trait implies a consciousness of time—of past, present, and future—and so of death, and the anxiety incident to that consciousness. The idea of the reality that ought to be is, I believe, an outcome of the anxiety that humans experience when they become conscious of the ineluctability of death.

The idea of the reality that ought to be comes in conjunction with the idea of fate, the normatively necessary order of *heimarmenē*—of what has been allotted and must happen. The fate common to all human beings is the fate of death (*koinou thanatou meros*). *Heimarmenē* connects up with *anagkē* as well, whose meaning, "necessity," also nests in itself the Is-Ought dualism.

The reality that ought to be is a primeval belief that has been passed down through the millennia, gone through hundreds of interpretations and versions, and intermingled with feelings of compulsion savouring of tragedy and, when sublimated, of nobleness. This belief speaks of ineluctability, transgression, and punishment: a transgression as terrible as the original sin, a punishment as inexorable and unavoidable as death and hell.

At the outset of Greek civilisation, the reality that ought to be appeared in Homer's epic, in the poets' mythical cosmologies, in the doctrines of the Mysteries, in the mottoes of the Seven Sages, and in the poets' ethical-political reflection, and it later evolved in the works of the philosophers: for example, in the Stoic doctrine of *orthos logos* (literally, "upright reason").

There are other ancient Greek terms besides *heimarmenē* and *anagkē* that refer or allude to the reality that ought to be or have to do with it; among them, *moira* (whose derivation is the same as that of *heimarmenē*), *aisa*, *dikē* and *themis*, *kosmos*, *tukhē*, and *khreōn*. These terms are polysemous, but at least some of their meanings express the normative necessity of the reality that

ought to be and of fate. *Aisa*, for example, means "part," or "portion," and specifically "the allotted part"; *kat' aisan* (or *en aisēi*) means "conforming to the established norm," or "conforming to fate"; *huper aisan* (or *par' aisan*) means "beyond the established norm," or "beyond fate" (cf. Section 11.3.2).[1]

We can now reconnect fate with anxiety and with the peculiar necessity of the reality that ought to be.

The philosophical sense of "anxiety" was handed down to us less than two centuries ago, in 1844, by Søren Kierkegaard (1813–1855), in his *Begrebet angest*:

> When it is stated in Genesis that God said to Adam, "Only from the tree of the knowledge of good and evil you must not eat," […] the prohibition induces in him anxiety, for the prohibition awakens in him freedom's possibility. What passed by innocence as the nothing of anxiety has now entered into Adam, and here again it is a nothing—the anxious possibility of *being able*. […] Only the possibility of being able is present as a higher form of ignorance, as a higher expression of anxiety, because in a higher sense it both is and is not, because in a higher sense he both loves it and flees from it.
>
> After the word of prohibition follows the word of judgement: "You shall certainly die." Naturally, Adam does not know what it means to die. On the other hand, there is nothing to prevent him from having acquired a notion of the terrifying, for even animals can understand the mimic expression and movement in the voice of a speaker without understanding the word. If the prohibition is regarded as awakening the desire, the punishment must also be regarded as awakening the notion of the deterrent. This, however, will only confuse things. In this case, the terror is simply anxiety. Because Adam has not understood what was spoken, there is nothing but the ambiguity of anxiety. The infinite possibility of being able that was awakened by the prohibition now draws closer, because this possibility points to a possibility as its sequence ["consequence" seems more fitting to me: *Følge*]. (Kierkegaard 1980, 44, 45)[2]

The root of anxiety is existence as possibility. Unlike fear and other mental states relating to determinate things, anxiety does not relate to any specific

[1] Again: *kakēi aisēi* means "with baleful fate"; *aisa moi esti* means "it is my fate." I will return to *heimarmenē* and *moira* in Section 11.2 and to *dikē* and *themis* in Section 12.2. *Kosmos* means "order"; *eu kata kosmon* means "suitably," "in good order." *Tukhē* means "fate" (where context determines whether it is good fate or bad fate). *Khreōn* also means "fate," "fatality," "necessity"; *tou khreōn meta* means "by force of fate"; *es to khreōn ienai*, "to meet fate, death."

[2] The Danish original: "Naar det saaledes hedder i Genesis, at Gud sagde til Adam: 'blot af Kundskabens Træ paa Godt og Ondt maa Du ikke spise' […]. Forbudet ængster ham, fordi Forbudet vækker Frihedens Mulighed i ham. Hvad der gik Uskyldigheden forbi som Angestens Intet, det er nu kommet ind i ham selv og er atter her et Intet, den ængstende Mulighed af at *kunne*. […] Kun Muligheden af at kunne er der som en høiere Form af Uvidenhed, som et høiere Udtryk af Angest, fordi det i en høiere Forstand er og er ikke, fordi han i en høiere Forstand elsker og flyer det.

Efter Forbudets Ord følge Dommens Ord: da skal Du visseligen døe. Hvad det vil sige, at døe, fatter naturligviis Adam slet ikke, hvorimod der jo Intet er til Hinder for, hvis man antager det sagt til ham, at han har faaet Forestillingen om det Forfærdelige. Selv Dyret kan jo i denne Henseende forstaae det mimiske Udtryk og Bevægelsen i den Talendes Stemme uden at forstaae Ordet. Dersom man lader Forbudet vække Lysten, saa maa man ogsaa lade Straffens Ord vække en afskrækkende Forestilling. Dette forvirrer imidlertid. Forfærdelsen her bliver kun Angest; thi det Udsagte har Adam ikke forstaaet, og her altsaa kun igjen Angestens Tvetydighed. Den uendelige Mulighed af at kunne, som Forbudet vakte, rykkes nu nærmere ved, at denne Mulighed udviser en Mulighed som sin Følge" (Kierkegaard 1991, 43).

thing: It is the pure feeling of possibility. Humans on Earth thrive on possibility, in that possibility is the mode of the future, and humans live projecting themselves into the future.

In Kierkegaard's words, the nothing of anxiety signifies fate.

> If we ask more particularly what the object of anxiety is, then the answer, here as elsewhere, must be that it is nothing. Anxiety and nothing always correspond to each other. [...] But what then does the nothing of anxiety signify more particularly in paganism? This is *fate*. [...]
>
> *Fate is* precisely *the unity of necessity and the accidental*. [...] A necessity that is not conscious of itself is *eo ipso* the accidental in relation to the next moment. [...] Whoever wants to explain fate must be just as ambiguous as fate. And this the *oracle* was. However, the oracle in turn might signify the exact opposite. So the pagan's relation to the oracle is again anxiety. (Kierkegaard 1980, 96, 97; italics added on first, second, and third occurrence; in original on fourth and fifth occurrence)[3]

What Kierkegaard refers to as "the accidental" in fate corresponds, in my own terminology, to the events in the reality that is. What he refers to as "the necessity" in fate (in combination with "the accidental") corresponds, in my terminology, to the normative must of Ought-consequences: This "necessity" is the reality that ought to be as conditionally and normatively (fatally) connected with the types of circumstance that happen to get instantiated in the reality that is. Sin and guilt express the ambivalent necessity of the reality that ought to be.

[3] The Danish original in its wider context (enclosed within angle brackets is the original text corresponding specifically to the translation in the run of text): "<Spørge vi nu nærmere, hvad Angestens Gjenstand er, da maa der svares her som allevegne, den er Intet. Angest og Intet svare bestandigen til hinanden.> Saasnart Frihedens og Aandens Virkelighed er sat, er Angesten hævet. <Men hvad betyder nu nærmere i Hedenskabet Angestens Intet? Det er *Skjebnen*.>

Skjebne er et Forhold til Aand som udvortes, den er et Forhold mellem Aand og et Andet, som ikke er Aand og som den dog skal staae i et aandeligt Forhold til. Skjebne kan betyde lige det Modsatte, da den er en Eenhed af Nødvendighed og Tilfældighed. Dette har man ikke altid paaagtet. Man har talt om det hedenske Fatum (dette igjen forskjelligt modificeret i den orientalske og den græske Opfattelse) som var det Nødvendigheden. En Rest af denne Nødvendighed har man ladet blive tilbage i den christelige Anskuelse, hvor den kom til at betyde Skjebnen: det Tilfældige, det i Retning af Forsynet Incommensurable. Dog forholder det sig ikke saa; thi <*Skjebne er* netop *Eenhed af Nødvendighed og Tilfældighed*.> Dette er sindrigt udtrykt derved, at Skjebnen er blind; thi den, der gaaer blindt frem, gaaer ligesaa meget nødvendigt som tilfældigt. <En Nødvendighed, der ikke er sig selv bevidst, er *eo ipso* i Forhold til det næste Øieblik Tilfældighed.> Skjebnen er da Angestens Intet. Den er Intet, thi saasnart Aanden er sat, er Angesten hævet, men ogsaa Skjebnen, da Forsynet netop ogsaa derved er sat. […] I Skjebnen har da Hedningens Angest sin Gjenstand, sit Intet. I Forhold til Skjebnen kan han ikke komme, thi i samme Øieblik som den er det Nødvendige, er den i næste Øieblik det Tilfældige. Og dog er han i Forhold til den, og dette Forhold er Angesten. Nærmere kan Hedningen ikke komme Skjebnen. Det Forsøg, Hedenskabet gjorde derpaa, var dybsindigt nok til at kaste et nyt Lys derover. <Den, der skal forklare Skjebnen, maa være ligesaa tvetydig som Skjebnen. Det var *Oraklet* ogsaa. Men Oraklet kunde igjen betyde lige det Modsatte. Hedningens Forhold til Oraklet er da igjen Angest>" (Kierkegaard 1991, 89–90; italics added on first, second, and third occurrence; in original on fourth and fifth occurrence).

The concepts of guilt and sin in their deepest sense do not emerge in paganism. If they had emerged, paganism would have perished upon the contradiction that *one became guilty by fate*. [...]

The concepts of sin and guilt posit precisely the single individual as the single individual. There is no question about his relation to the whole world or to all the past. The point is only that he is guilty, and yet he is supposed to have become guilty by fate. (Kierkegaard 1980, 97, 98; italics added)[4]

After Kierkegaard, it was Martin Heidegger (1889–1976), seventy-seven years ago, that made anxiety the linchpin of a crucial philosophical analysis of the human condition, in his *Sein und Zeit*, 1927. In Heidegger, as in Kierkegaard, there is a path that leads from anxiety to our consciousness of death to the idea of fate and the Ought—of the unavoidable must of the reality that ought to be.

Dasein's Being reveals itself as *care*. If we are to work out this basic existential phenomenon, we must distinguish it from phenomena which might be proximally identified with care, such as will, wish, addiction, and urge. Care cannot be derived from these, since they themselves are founded upon it. (Heidegger 1962, 227)[5]

Anxiety is anxiety in the face of death, and it must not be confused with fear in the face of one's demise.

Death is the possibility of the absolute impossibility of Dasein. Thus death reveals itself as that *possibility which is one's ownmost, which is non-relational, and which is not to be outstripped* [*unüberholbare*]. As such, death is something *distinctively* impending. [...]

[4] The Danish original in its wider context (enclosed within angle brackets is the original text corresponding specifically to the translation in the run of text): "<Begrebet Skyld og Synd kommer ikke frem i dybeste Forstand i Hedenskabet. Forsaavidt det skulde komme frem, da vilde Hedenskabet gaaet til Grunde paa den Modsigelse, at *Een blev skyldig ved Skjebnen*>. Dette er nemlig den høieste Modsigelse, og i denne Modsigelse bryder Christendommen frem. Hedenskabet fatter den ikke, dertil er det for letsindigt i Bestemmelsen af Begrebet Skyld.

<Begrebet Synd og Skyld sætter netop den Enkelte som den Enkelte. Ethvert Forhold til den ganske Verden, til alt det Forbigangne er der ikke Tale om. Der er kun Tale om, at han er skyldig, og dog skal han blive det ved Skjebnen>, altsaa ved alt det, hvorom der ikke er Tale, og han skal derved blive Noget, der netop hæver Begrebet Skjebne, og dette skal han blive ved Skjebnen" (Kierkegaard 1991, 90–1; italics added).

[5] The German original in its wider context (enclosed within angle brackets is the original text corresponding specifically to the translation in the run of text): "Als eine solchen methodischen Erfordernissen genügende Befindlichkeit wird das Phänomen der *Angst* der Analyse zugrundegelegt. Die Herausarbeitung dieser Grundbefindlichkeit und die ontologische Charakteristik des in ihr Erschlossenen als solchen nimmt den Ausgang von dem Phänomen des Verfallens und grenzt die Angst ab gegen das früher analysierte verwandte Phänomen der Furcht. Die Angst gibt als Seinsmöglichkeit des Daseins in eins mit dem in ihr erschlossenen Dasein selbst den phänomenalen Boden für die explizite Fassung der ursprünglichen Seinsganzheit des Daseins. <Dessen Sein enthüllt sich als die *Sorge*. Die ontologische Ausarbeitung dieses existenzialen Grundphänomens verlangt die Abgrenzung gegen Phänomene, die zunächst mit der Sorge identifiziert werden möchten. Dergleichen Phänomene sind Wille, Wunsch, Hang und Drang. Sorge kann aus ihnen nicht abgeleitet werden, weil sie selbst in ihr fundiert sind>" (Heidegger 1929, 182).

Dasein does not, proximally and for the most part, have any explicit or even any theoretical knowledge of the fact that it has been delivered over to its death, and that death thus belongs to Being-in-the-world. Thrownness into death reveals itself to Dasein in a more primordial and impressive manner in that state-of-mind which we have called "anxiety." [...] Anxiety in the face of death must not be confused with fear in the face of one's demise. *This anxiety* is not an accidental or random mood of 'weakness' in some individual; but, as a basic state-of-mind of Dasein, it *amounts to the disclosedness of the fact that Dasein exists as thrown Being towards its end*. (Heidegger 1962, 294, 295; square brackets in original on first occurrence; italics added on third and fourth occurrence)[6]

Resolute anxiety frees the human being from possibilities that are not authentic; it makes the person free *for* death and takes *Dasein* (the individual human being) into the simplicity of its fate.

Anxiety arises out of Being-in-the-world as thrown Being-towards-death. [...] But anxiety can mount authentically only in a Dasein which is resolute. *He who is resolute knows no fear; but he understands the possibility of anxiety as the possibility of the very mood which neither inhibits nor bewilders him*. Anxiety liberates him *from* possibilities which 'count for nothing' ["nichtigen"], and lets him become free *for* those which are authentic. (Heidegger 1962, 395; square brackets in original on last occurrence; italics added on first occurrence, in original on second and third occurrence)[7]

[6] The German original in its wider context (enclosed within angle brackets is the original text corresponding specifically to the translation in the run of text): "Als Seinkönnen vermag das Dasein die Möglichkeit des Todes nicht zu überholen. <Der Tod ist die Möglichkeit der schlechthinnigen Daseinsunmöglichkeit. So enthüllt sich der *Tod* als die *eigenste*, *unbezügliche*, *unüberholbare Möglichkeit*. Als solche ist er ein *ausgezeichneter* Bevorstand.> Dessen existenziale Möglichkeit gründet darin, daß das Dasein ihm selbst wesenhaft erschlossen ist und zwar in der Weise des Sich-vorweg. Dieses Strukturmoment der Sorge hat im Sein zum Tode seine ursprünglichste Konkretion. Das Sein zum Ende wird phänomenal deutlicher als Sein zu der charakterisierten ausgezeichneten Möglichkeit des Daseins.

Die eigenste, unbezügliche und unüberholbare Möglichkeit beschafft sich aber das Dasein nicht nachträglich und gelegentlich im Verlaufe seines Seins. Sondern, wenn Dasein existiert, ist es auch schon in diese Möglichkeit *geworfen*. <Daß es seinem Tod überantwortet ist, und dieser somit zum In-der-Welt-sein gehört, davon hat das Dasein zunächst und zumeist kein ausdrückliches oder gar theoretisches Wissen. Die Geworfenheit in den Tod enthüllt sich ihm ursprünglicher und eindringlicher in der Befindlichkeit der Angst>. Die Angst vor dem Tode ist Angst 'vor' dem eigensten, unbezüglichen und unüberholbaren Seinkönnen. Das Wovor dieser Angst ist das In-der-Welt-sein selbst. Das Worum dieser Angst ist das Seinkönnen des Daseins schlechthin. <Mit einer Furcht vor dem Ableben darf die Angst vor dem Tode nicht zusammengeworfen werden. *Sie* ist keine beliebige und zufällige 'schwache' Stimmung des Einzelnen, sondern, als Grundbefindlichkeit des Daseins, *die Erschlossenheit davon, daß das Dasein als geworfenes Sein zu seinem Ende existiert*>" (Heidegger 1929, 250–1; italics added on fifth and sixth occurrence).

[7] The German original in its wider context (enclosed within angle brackets is the original text corresponding specifically to the translation in the run of text): "Die Furcht hat ihre Veranlassung im umweltlich besorgten Seienden. Die Angst dagegen entspringt aus dem Dasein selbst. Die Furcht überfällt vom Innerweltlichen her. <Die Angst erhebt sich aus dem In-der-Welt-sein als geworfenem Sein zum Tode.> Dieses 'Aufsteigen' der Angst aus dem Dasein besagt zeitlich verstanden: die Zukunft und Gegenwart der Angst zeitigen sich aus einem ursprünglichen Gewesensein im Sinne des Zurückbringens auf die Wiederholbarkeit.

Fate (*Schicksal*)—consciously, authentically, and resolutely chosen—has to be distinguished from destiny (*Geschick*).[8]

Only Being-free *for* death, gives Dasein its goal outright and pushes existence into its finitude. Once one has grasped the finitude of one's existence, it snatches one back from the endless multiplicity of possibilities which offer themselves as closest to one—those of comfortableness, shirking, and taking things lightly—and brings Dasein into the simplicity of its *fate* [*Schicksals*]. This is how we designate Dasein's primordial historizing, which lies in authentic resoluteness and in which Dasein *hands* itself *down* to itself, free for death, in a possibility which it has inherited and yet has chosen. (Heidegger 1962, 435; square brackets in original)[9]

Martin Heidegger achieves an *amor fati*, that which Friedrich Nietzsche (1844–1900) writes of: "My formula for greatness in the human being is *amor fati*: that one wants to have nothing else, not ahead, not behind, not in all eternity. Not merely to endure the necessity, still less to dissemble it—all idealism is mendaciousness in the face of necessity—but to *love* it" (Nietzsche 1969, 295; my translation).[10]

Amor fati is acceptance—indeed a conscious and resolute choosing—of the ambiguous necessity (of the reality that ought to be) that is inevitably

<Eigentlich aber kann die Angst nur aufsteigen in einem entschlossenen Dasein. *Der Entschlossene kennt keine Furcht, versteht aber gerade die Möglichkeit der Angst als der Stimmung, die ihn nicht hemmt und verwirrt*. Sie befreit *von* 'nichtigen' Möglichkeiten und läßt freiwerden *für* eigentliche>" (Heidegger 1929, 344; italics added on first occurrence, in original on second and third occurrence).

[8] Heidegger's excellent translators, J. Macquarrie and E. Robinson, observe that "the English-speaking reader would perhaps be less troubled if he were to read that the irresolute man can have no 'destiny'" rather than no "fate." Yet "Heidegger has chosen to differentiate sharply between the words 'Schicksal' and 'Geschick,' which are ordinarily synonyms. Thus 'Schicksal' ([...] 'fate') might be described as the 'destiny' of the resolute individual; 'Geschick' ([...] 'destiny') is rather the 'destiny' of a larger group, or of Dasein as a member of such a group. [...] The suggestion of an etymological connection between 'Schicksal' and 'Geschick' on the one hand and 'Geschichte' ([...] 'history') and 'Geschehen' ([...] 'historizing') on the other, [...] is of course lost in [the English] translation" (Heidegger 1962, 436, footnote 1).

[9] The German original in its wider context (enclosed within angle brackets is the original text corresponding specifically to the translation in the run of text): "Je eigentlicher sich das Dasein entschließt, d. h. unzweideutig aus seiner eigensten, ausgezeichneten Möglichkeit im Vorlaufen in den Tod sich versteht, um so eindeutiger und unzufälliger ist das wählende Finden der Möglichkeit seiner Existenz. Nur das Vorlaufen in den Tod treibt jede zufällige und 'vorläufige' Möglichkeit aus. <Nur das Freisein *für* den Tod gibt dem Dasein das Ziel schlechthin und stößt die Existenz in ihre Endlichkeit. Die ergriffene Endlichkeit der Existenz reißt aus der endlosen Mannigfaltigkeit der sich anbietenden nächsten Möglichkeiten des Behagens, Leichtnehmens, Sichdrückens zurück und bringt das Dasein in die Einfachheit seines *Schicksals*. Damit bezeichnen wir das in der eigentlichen Entschlossenheit liegende ursprüngliche Geschehen des Daseins, in dem es sich frei für den Tod ihm selbst in einer ererbten, aber gleichwohl gewählten Möglichkeit *überliefert*>" (Heidegger 1929, 384).

[10] The German original: "Meine Formel für die Grösse am Menschen ist *amor fati*: dass man Nichts anders haben will, vorwärts nicht, rückwärts nicht, in alle Ewigkeit nicht. Das Nothwendige nicht bloss ertragen, noch weniger verhehlen—aller Idealismus ist Verlogenheit vor dem Nothwendigen—, sondern es *lieben*."

proper to every human being: It is the resolute acceptance of *dikē brotōn*, of what is objectively right for mortal beings (see Section 12.2.3).

> Fate is that powerless superior power which puts itself in readiness for adversities—the power of projecting oneself upon one's own Being-guilty, and of doing so reticently, with readiness for anxiety. As such, fate requires as the ontological condition for its possibility, the state of Being of care—that is to say, temporality. *Only if death, guilt, conscience, freedom, and finitude reside together equiprimordially in the Being of an entity as they do in care, can that entity exist in the mode of fate*; that is to say, only then can it be historical in the very depths of its existence. (Heidegger 1962, 436–7; italics added)[11]

Heidegger and Nietzsche's *amor fati* seems to me to be significantly prefigured so early as in the Homeric poems, and in particular in the clear and poignant words that Sarpedon speaks to Glaucus in *The Iliad*. There is, in Sarpedon's words, in a unique manner as compared with the repetition of the same formula in other places of Homeric epic (*The Iliad*, IV, vv. 257–64, vv. 341–7; VIII, vv. 161–3), a clash between an easily imaginable and keenly (and painfully) imagined immortality—the immortality of the gods—and the certain mortality of humans, an *unüberholbare* mortality (insuperable; it cannot be outstripped): This fate is chosen head-on, countered, in a sense challenged (or rather, it is we who accept the challenge that our fate as mortals throws at us) in the game of chess of life, a game that death has already insuperably won *ab origine* (cf. Bergman 1956).

Here, then, are the words that Sarpedon speaks to Glaucus:

> Ah friend, if once escaped from this battle we were for ever to be *ageless* and *immortal*, neither should I fight myself amid the foremost, nor should I send thee into battle where men win glory; but now—*for in any case fates of death beset us*, fates past counting, which no mortal may escape or avoid—now let us go forward, whether we shall give glory to another, or another to us. (Homer, *The Iliad*, XII, vv. 322–8; italics added)[12]

Anxiety is "the state-of-mind which can hold open the utter and constant threat to itself arising from Dasein's ownmost individualised being," meaning the threat of death. The human being "finds itself *face to face* with the 'nothing' of the possible impossibility of its existence" (Heidegger 1962, 310). In

[11] The German original: "Schicksal als die ohnmächtige, den Widrigkeiten sich bereitstellende Übermacht des verschwiegenen, angstbereiten Sichentwerfens auf das eigene Schuldigsein verlangt als ontologische Bedingung seiner Möglichkeit die Seinsverfassung der Sorge, d. h. die Zeitlichkeit. Nur wenn im Sein eines Seienden Tod, Schuld, Gewissen, Freiheit und Endlichkeit dergestalt gleichursprünglich zusammenwohnen wie in der Sorge, kann es im Modus des Schicksals existieren, d. h. im Grunde seiner Existenz geschichtlich sein" (Heidegger 1929, 385).

[12] The Greek original: "Ὦ πέπον, εἰ μὲν γὰρ πόλεμον περὶ τόνδε φυγόντε / αἰεὶ δὴ μέλλοιμεν *ἀγήρω τ᾽ ἀθανάτω* τε / ἔσσεσθ᾽, οὔτε κεν αὐτὸς ἐνὶ πρώτοισι μαχοίμην / οὔτε κε σὲ στέλλοιμι μάχην ἐς κυδιάνειραν· / νῦν *δ᾽ ἔμπης γὰρ κῆρες ἐφεστᾶσιν θανάτοιο* / μυρίαι, ἃς οὐκ ἔστι φυγεῖν βροτὸν οὐδ᾽ ὑπαλύξαι, / ἴομεν, ἠέ τῳ εὖχος ὀρέξομεν, ἠέ τις ἡμῖν" (italics added).

this sense, anxiety constitutes what Heidegger calls "Being-towards-death" (*Sein zum Tode*) meaning the human acceptance of death as "the ownmost, non-relational possibility, which is not to be outstripped" (ibid.).[13] Such an *unüberholbare* possibility gets resolutely chosen as an inevitable reality that ought to be: as the fate common to all human beings.

Not only philosophers, but also psychologists and psychoanalysts, and then neurobiologists, have tried to explain to us the all-pervasive nature of anxiety. But it is in myth that humans first hypostatised their anxiety of death, justifying it as a reality that ought to be (Heidegger can be said in the final analysis to have returned myth to us, having recast it in philosophical terms).

In an impassioned style, Bronislaw Malinowski tells us:

> Death, alas, is not vague, or abstract, or difficult to grasp for any human being. It is only too hauntingly real, too concrete, too easy to comprehend for anyone who has had an experience affecting his near relatives or a personal foreboding. If it were vague or unreal, man would have no desire so much as to mention it; but the idea of death is fraught with horror, with a desire to remove its threat, with the vague hope that it may be, not explained, but rather explained away, made unreal, and actually denied. Myth, warranting the *belief* in immortality, in eternal youth, in a life beyond the grave, is not an intellectual reaction upon a puzzle, but *an explicit act of faith* born from the innermost instinctive and emotional reaction to the most formidable and haunting idea. Nor are the stories about "the origins of rites and customs" told in mere explanation of them. They never explain in any sense of the word; they always state a precedent which constitutes an ideal and a warrant for its continuance, and sometimes practical directions for the procedure. (Malinowski 1976, 33; italics added)

The human consciousness of time and death poses questions and exacts answers, or rather justifications. Humans respond; they provide such justifications: What their science does not reach, they reach with their myths. Myth serves in human society a function radically different from that of science, to be sure, but this function is doubtless just as important as that of science, and perhaps even more important. Again: The reality that ought to be is something like a pragmatic, self-defensive, vital nonsense (a nonsense necessary to the survival of the human species) that plays a fundamental role in individual and social human life.

> Myth […] is not of the nature of fiction, such as we read to-day in a novel, but it is a living reality, *believed* to have once happened in primeval times, and continuing ever since to influence the world and human destinies. This myth is to the savage what, to a fully believing Christian, is the Biblical story of Creation, of the Fall, of the Redemption by Christ's Sacrifice on the Cross. As our sacred story lives in our ritual, in our morality, as it governs our faith and controls our conduct, even so does his myth for the savage.
>
> […] Myth […] is not symbolic, but a direct expression of its subject-matter; it is not an explanation in satisfaction of a scientific interest, but a narrative resurrection of a primeval real-

[13] The German original: "Die eigenste, unbezügliche und unüberholbare Möglichkeit [...]. *Die Befindlichkeit aber, welche die ständige und schlechthinnige, aus dem eigensten vereinzelten Sein des Daseins aufsteigende Bedrohung seiner selbst offen zu halten vermag,* [...] befindet sich [...] *vor* dem Nichts der möglichen Unmöglichkeit seiner Existenz" (Heidegger 1929, 264–6).

ity, told in satisfaction of deep religious wants, moral cravings, social submissions, assertions, even practical requirements. Myth fulfils in primitive culture an indispensable function: It *expresses, enhances, and codifies belief; it safeguards and enforces morality; it vouches for the efficiency of ritual and contains practical rules for the guidance of man.* Myth is thus a vital ingredient of human civilization; it is not an idle tale, but a hard-worked active force; it is not an intellectual explanation or an artistic imagery, but a pragmatic charter of primitive faith and moral wisdom.

[...] The *myth* comes into play when rite, ceremony, or a social or moral rule demands justification, warrant of antiquity, *reality*, and sanctity. (Malinowski 1976, 18, 19, 28; italics added on first, second, and fourth occurrence; in original on third occurrence)

Originally, the reality that ought to be was fate, the myth of fate, the living reality of fate: a believed-in reality that lives internalised in human minds (in human brains). The term "fate" derives from Latin *fatum*, past participle of *fari*, to "speak," and means "utterance," "oracle," and "destiny." Fate has been conceived in various ways, and these variants almost always bear, more or less distinctly, connotations that get subsequently attributed to the idea of a reality that ought to be, even when this last, having become an object of philosophical and scholarly enquiry, is treated without any reference to fate. Fate is:

(*a*) That which unavoidably befalls one. It happens, it cannot but happen; it must (normatively) happen.

(*b*) A divine agency by which the order of things is prescribed. Although humans possess no godly attributes, they can devote certain periods or things to certain activities, which therefore will have to be accomplished according to this predestination (see Section 3.6.2 on the promise). A predestination of this kind, if decided by the gods, will obviously have an overwhelming force and weight, the kind specified at the following point (*c*). (Compare Rousseau's concept of heteronomy as discussed in Section 10.2.6.)

(*c*) That which is inevitably predetermined. This may be a propitious (happy) fate or a nefarious (unhappy) one. One might be born to kill or be killed, to love or be loved, to suffer or delight. Surely, we are all born to die.

(*d*) A prophetic declaration of what must be, as given by an oracle. There is a sentence spoken by the oracle at Delphi to the messengers sent by Croesus that is often repeated in literature (cf. Homer, *The Iliad*, XV, v. 117; Hesiod [8th century B.C.], *Theogony*, v. 220; see Otto 1961, 358—F. Otto, 1874–1958): "None may escape his destined lot, not even a god" ("Τὴν πεπρωμένην μοῖραν ἀδύνατα ἐστὶ ἀποφυγεῖν καὶ θεῷ·") (Herodotus, *Histories*, I, 91); ("but not even God, they say, can grapple with necessity"; Plato, *Laws* (b), 5, 741a) ("ἀνάγχην δὲ οὐδὲ θεὸς εἰναι λέγεται δυνατὸς βιάζεσθαι"; Plato, *Laws* (a), 5, 741a).

(*e*) Death, destruction, or ruin. These are instances of doom—of a final end that is always unhappy or terrible, and brought about by fate.

It won't be easy for us to recognise the apparently nonsensical reality of myth if we are not believers and do not believe that faith *can* move mountains: "For verily I say unto you, If ye have faith as a grain of mustard seed, ye shall say unto this mountain, Remove hence to yonder place; and it shall remove; and nothing shall be impossible unto you" (Matthew 17:20).

I believe in the phenomenon of faith because we have evidence of it. And I conceive of this phenomenon as Malinowski understood myth, that is, as "a pragmatic charter of primitive faith and moral wisdom." Faith exists even if its object does not exist. Norms as beliefs are varieties of faith, though of course we must make allowance for all the differences and specificities that distinguish belief in a norm from faith in a divinity.

> The forms of myth which come to us from classical antiquity and from the ancient sacred books of the East and other similar sources have come down to us without the context of living faith, without the possibility of obtaining comments from true believers, without the concomitant knowledge of their social organization, their practised morals, and their popular customs—at least without the full information which the modern field-worker can easily obtain. Moreover, there is no doubt that in their present literary form these tales have suffered a very considerable transformation at the hands of scribes, commentators, learned priests, and theologians. It is necessary to go back to primitive mythology in order to learn the secret of its life in the study of a myth which is still alive—before, mummified in priestly wisdom, it has been enshrined in the indestructible but lifeless repository of dead religions. [...]
>
> There is no important magic, no ceremony, no ritual without belief; and the belief is spun out into accounts of concrete precedent. The union is very intimate, for myth is not only looked upon as a commentary of additional information, but it is a warrant, a charter, and often even a practical guide to the activities with which it is connected. On the other hand the rituals, ceremonies, customs, and social organizations contain at times direct references to myth, and they are regarded as the results of mythical event. (Malinowski 1976, 18–9, 29)

So early as 1,000 centuries ago, Neanderthal man was performing burial rites over the dead, and so was *Homo sapiens* some 400 centuries ago. As for *Homo sapiens sapiens*, meaning us, some 65 centuries ago we were building megalithic tombs in Brittany, a place we now visit as tourists, to take in the sights and capture them on film.

There is an allusion to the megalithic tombs of Brittany in the monolith that Stanley Kubrick (1928–1999) introduces us to in *2001: A Space Odyssey*, telling us of a journey to Jupiter. This film is a contemporary myth on the origins of humans, on death, and on humankind's resurrection in the form of a fetus in gestation among the stars—the birth of a new humanity.[14]

The year 2001 is behind us, writer and reader. *Homo sapiens sapiens* has not yet set foot on Jupiter. We continue to believe in funeral rites, and we continue to believe that after the Is-events of life (and the Is-event of death, which brings life to its conclusion), and consequent upon these events, there will be Ought-events in the reality that ought to be, Ought-effects in what is subjectively right with reference to each of us: Even in our day *Homo sapiens sapiens* believes that there must be an afterlife for each of us, since we all are duty-holders or right-holders referred to by the primeval reality that ought to be. Our afterlife will unfold the way it ought to depending on the conduct

[14] Kubrick's film was released in 1968, thirty-six years ago, and is based on a 1948 novel by Arthur C. Clarke entitled *The Sentinel* (Clarke 1996).

(valid Is-behaviour, right or wrong) we have had in the reality that is, in earthly life.

If we have died as Christians and in the grace of God, we can look forward to heaven and to an eternal contemplation of God. If we have died as Muslims and as sincere servants of God, there will be awaiting us a Garden of Bliss, serene and comfortable, free of sickness and intoxication, where we will be in the company of wide-eyed maidens. For God's sincere servants

> awaits a known provision, / fruits—and they high-honoured / in the Gardens of Bliss / upon couches, set face to face, / a cup from a spring being passed round to them, / white, a delight to the drinkers, / wherein no sickness is, neither intoxication; / and with them wide-eyed maidens / restraining their glances / as if they were hidden pearls. (*The Koran* (b), 37: 40–8)

If we have died as Hindus or as Buddhists, our soul will transmigrate (unless we succeed in attaining Nirvana, according to the teachings of Buddha, 6th–5th century B.C.):

> As in this body, infancy and youth and old age (come) to the embodied (self), so does the acquisition of another body. (*The Bhagavadgita*, II, 13)

If, on the other hand, our lives and deaths have been led beyond the norm (*huper moron*), or have swerved appreciably from what is right (*dikē*), another *dikē*, or restoration of what is right, will be awaiting us (see Sections 11.3.3 and 12.2.4).

Where Christians are concerned, there is a grand illustration of afterlife's reality that ought to be in the work of a universal genius of humanity: in *The Divine Comedy* of Dante Alighieri (1265–1321). This work represents the Christian myth of the afterworld with an orthodoxy comparable to what one finds in a treatise of Thomistic theology and is magnificently adorned with figures and symbols, some going back to pagan mythology.

Only humans practice the cult of the dead, produce myths, believe in some kind of afterlife, and conceive of an inescapable and normative force, necessitating and binding: the force of fate.[15]

Cult, every cult, and its every rite, connects with normativeness. Thus, normative beliefs were in all likelihood already in existence some 1,000 centuries ago in the brain of Neanderthal man. The symbolism of funerary practices transcends the sphere of individual and social needs. The use of red ochre, thought to have represented blood and life as far back as the oldest epoch of burial practice by Neanderthal man, is also a case of symbolism that transcends the sphere of individual and social needs. There is evidence of such a use in different prehistoric sites of the Lower Palaeolithic period (Facchini 1995,

[15] *La forza del destino*—an opera by Giuseppe Verdi (1813–1901), the libretto by Francesco Maria Piave (1810–1867)—went onstage on November 10, 1862, at Saint Petersburg's Imperial Theatre. The opera is based on *Don Álvaro, o La fuerza del sino*, of 1835, by Ángel de Saavedra (1791–1865): cf. de Saavedra 1986.

148ff., 192). Even prehistoric man, like modern man, has posed and turned to the problem of death as an ineluctable fate, this by virtue of the human capacity for abstraction and anticipation, and for projecting oneself into the future.

11.2. *Heimarmenē* and *Moira*: To Each His Own

"To each his own" is the formula I have chosen to explain the sense of *heimarmenē*. The Greek term *heimarmenē* comes from *meiromai*—"to divide into parts or lots," and hence "to allot"—from which comes *Moira*, meaning "lot," "allotted part," "task." The Moirai are the Fates, the three goddesses who weave the destinies of humans. *Heimarmenē* means "fate," the normatively necessitating action that the order of the reality that ought to be exerts on every single human in the world of the reality that is.

Normativeness resides in the concept of "part" (*meros* in Greek; see *mereo* in Latin), in the concept of one's due, to each his own: *Suum cuique tribuere*. Accordingly, the Latin definition of *justitia* is "constans et perpetua voluntas Jus suum cuique tribuendi" ("Justice is a steady and enduring will to render unto everyone his right": see Section 13.4). Compare "Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere" ("The basic principles of right are: to live honorably, not to harm any other person, to render to each his own") (Ulpian, *The Digest of Justinian*, I, 1, 10).[16]

The definitions of *justitia* found in the *Digest* and the *Institutions* present several analogies to Plato's definition of *dikaiosunē* as "doing one's own business," "τὸ τὰ αὑτοῦ πράττειν [...] δικαιοσύνη ἐστί" (Plato, *The Republic*, 433a–433b).[17] And Plato's definition of *dikaiosunē* is, in the final analysis, the definition of "what is right"(Section 12.2.3).

There is a *suum*—better yet, a *proprium*—that is common to all human beings: the fate of death (*koinou thanatou meros*).[18]

[16] Even in *Institutiones* (I.1) "iustitia est constans et perpetua voluntas ius suum cuique tribuens" ("Justice is the constant and perpetual wish to render every one his due"; *The Institutes of Justinian*, I, 1).

[17] "'Listen then' said I, 'and learn if there is anything in what I say. For what we laid down in the beginning as a universal requirement when we were founding our city, this I think, or some form of this, is justice. And what we did lay down, and often said, if you recall, was that each one man must perform one social service in the state for which his nature was best adapted.' 'Yes, we said that.' 'And again that to do one's own business and not to be a busybody is justice, is a saying that we have heard from many and have very often repeated ourselves.' 'We have'" (Plato, *The Republic*, 433a–433b). The Greek original: "'Ἀλλ', ἦν δ' ἐγώ, ἄκουε, εἴ τι ἄρα λέγω. ὃ γὰρ ἐξ ἀρχῆς ἐθέμεθα δεῖν ποιεῖν διὰ παντός, ὅτε τὴν πόλιν κατῳκίζομεν, τοῦτό ἐστιν, ὡς ἐμοὶ δοκεῖ, ἤτοι τούτου τι εἶδος ἡ δικαιοσύνη. ἐθέμεθα δὲ δήπου καὶ πολλάκις ἐλέγομεν, εἰ μέμνησαι, ὅτι ἕνα ἕκαστον ἓν δέοι ἐπιτηδεύειν τῶν περὶ τὴν πόλιν, εἰς ὃ αὐτοῦ ἡ φύσις ἐπιτηδειοτάτη πεφυκυῖα εἴη. Ἐλέγομεν γάρ. Καὶ μὴν ὅτι γε τὸ τὰ αὑτοῦ πράττειν καὶ μὴ πολυπραγμονεῖν δικαιοσύνη ἐστί, καὶ τοῦτο ἄλλων τε πολλῶν ἀκηκόαμεν καὶ αὐτοὶ πολλάκις εἰρήκαμεν. Εἰρήκαμεν γάρ." On the history of the Greek word *dikaiosunē* see Havelock 1969.

[18] "Seven captains at our seven gates / thundered; for each a champion waits, / each left

The Moirai provide humans at birth with good and evil. Clotho (the Spinner) is she who spins the thread of man's life; Lachesis (the Disposer of Lots) assigns to each man his fate; Atropos (She who cannot be turned) is the fury with the abhorred shears.

Also she [the Night] bare the Destinies and ruthless avenging Fates, Clotho and Lachesis and Atropos, who give men at their birth both evil and good to have, and they pursue the transgressions of men and of gods. (Hesiod, *Theogony*, vv. 216–20)[19]

Moira comes in as the powerful (*Moira khrataiē*; see Homer, *The Iliad*, V, v. 83, v. 629; XVI, v. 853; XIX, v. 410; XX, v. 477) that, in the manner of the personifications of death, seizes humans and makes them fall headlong into the night: "And down over his eyes came dark death and mighty fate" ("τὸν δὲ κατ' / ὄσσε / ἔλλαβε πορφύρεος θάνατος καὶ μοῖρα κραταιή"; "huiusque oculos occupavit purpurea mors et fatum violentum." See *The Iliad*, V, vv. 82ff.; XVI, vv. 333ff.; XX, vv. 476ff.; cf. XII, vv. 116) (cf. Otto 1961, 263–4).[20]

But in Homeric epic the Moira is not conceived of as a person but as an impersonal force—as fate.

Beyond the range of the formulas, the Moira is never thought of as a person, not in any living relationship, as happens, in contrast, with the lesser deities, such as Oceanus, Thetis, and Night. How strange that to this day it can still be said of the Moira that in Homeric times she gradually changed from an impersonal "force" to a personality, this just as Homer was doing precisely the opposite—getting her to manifestly shed her plastic life—even though she retained such plastic life in the popular mind. [...] And yet the Moira is only one—there is but one "fate." If we each have our "day of fate" (*morsimon hēmar*), we cannot be said to each have our own Moira. Moira is the law [*das Gesetz*] which stands above life and fixes and impresses each person's fate—our passing away, our death. [...] Thus, the ancient belief in the personal powers of fate gives place to the idea of an ineluctable order and fate that are given and that stand before the gods, who are alive and personal. It follows that the only consequence awaiting us after a violation of such a law is an upsetting of the order [*die Ordnung*]. (Otto 1961, 270–1; my translation)

behind his armour bright, / trophy for Zeus who turns the fight; / save two alone, that ill-starred pair / one mother to one father bare, / who lance in rest, one'gainst the other / drave, and both perished, brother slain by brother" (Sophocles, *Antigone*, vv. 141–7). The Greek original: "Ἑπτὰ λοχαγοὶ γὰρ ἐφ' ἑπτὰ πύλαις / ταχθέντες ἴσοι πρὸς ἴσους ἔλιπον / Ζηνὶ τροπαίῳ πάγχαλκα τέλη, / πλὴν τοῖν στυγεροῖν, ὣ πατρὸς ἑνὸς / μητρός τε μιᾶς φύντε καθ' αὑτοῖν / δικρατεῖς λόγχας στήσαντ' ἔχετον / κοινοῦ θανάτου μέρος ἄμφω."

[19] The Greek original: "Καὶ Μοίρας καὶ Κῆρας ἐγείνατο νηλεοποίνους, / Κλωθώ τε Λάχεσίν τε καὶ Ἄτροπον, αἵτε βροτοῖσι / γεινομένοισι διδοῦσιν ἔχειν ἀγαθόν τε κακόν τε, / αἵτ' ἀνδρῶν τε θεῶν τε παραιβασίας ἐφέπουσιν."

[20] The English translation of *The Iliad* is from the Loeb edition. Appearing within brackets is the Greek original (Loeb Edition) followed by its Latin translation by Stephan Bergler (ca. 1680–ca. 1740) as found in Bergler 1791–1792.

11.3. The Double Conditionality of Fate. *Huper Moron* at the Origins of Chisholm's Paradox

11.3.1. Kata Moiran*: In Accordance with the Norm*

First comes the fate established for us humans (our *moira*, or *aisa*), and then comes its fulfilment, meaning human action, or simply the unfolding of human events in accordance with what has been established: in accordance with the norm (*kata moiran, kata aisan*) assigned to each of us. In Homeric epic, human beings are all bound by fate: There is a type of circumstance; the consequence of death is conditionally connected with its instantiation (and hence with the time of its instantiation), and this connection is preestablished for each of us. Fate will be accomplished at a certain time when a certain type of circumstance gets actually instantiated; fate is conditionally connected with the valid instantiations of this type in the must-be of the reality that ought to be.

In what follows the reader will find five excerpts in which there are set in italics (in English, in the Greek original, and in Bergler's 18th-century Latin translation) the words expressing the connection by which fate will necessarily be fulfilled only when certain circumstances occur, and so only at the established time.[21]

(*a*) Helenus the Seer says to Hector:

Make the Trojans to sit down, and all the Achaeans, and do thou challenge whoso is best of the Achaeans to do battle with thee man to man in dread combat. *Not yet is it thy fate to die* and meet thy doom ["*ou gar pō toi moira thanein* kai potmon epispein"; "*nondum enim tibi fatum mori* et interitum attingere"]; for thus have I heard the voice of the gods that are for ever. (*The Iliad*, VII, vv. 49–53; italics added)

(*b*) Proteus the Immortal, servant to Poseidon, says to Menelaus:

For it is not thy fate ["*ou gar toi prin moira*"; "*non enim tibi antea fatum est*"] to see thy friends, and reach thy well-built house and thy native land, before that thou hast once more gone to the waters of Aegyptus, the heaven-fed river, and hast offered holy hecatombs to the immortal gods who hold broad heaven. (*The Odyssey*, IV, vv. 475–9; italics added)

(*c*) Hermes, turning to Calypso, says this of Odysseus:

For it is not his fate to perish here far from his friends, *but it is still his lot to see his friends and reach his high-roofed house* and his native land ["*ou gar hoi tēid' aisa philōn aponosphin olesthai*, / all' eti *hoi moir' esti philous t' ideein kai hikesthai / oikon* es hupsorophon kai heēn es patrida gaian"; "*non enim ei hic fatale est ab amicis seorsim perire*, / sed adhuc *ei fatale est amicosque videre, et pervenire / domum* in excelsam, et suam in patriam terram"]. (*The Odyssey*, V, vv. 113–5; italics added) (see also *The Odyssey*, V, vv. 36–42; V, vv. 206–10; V, vv. 286–90; V, vv. 343–5; IX, vv. 532–5)

[21] The Greek original and the English translation used for the five examples are from Homer, *The Iliad* and *The Odyssey* (Loeb Edition). Appearing within square brackets is the Greek original (Loeb edition) followed by its Latin translation as found in Bergler 1791–1792.

(*d*) Poseidon, turning to the other gods, says this of Aeneas:

For it is ordained unto him to escape, that the race of Dardanus perish not without seed [“*morimon de hoi est' aleasthai, / ophra mē aspermos geneē kai aphantos olētai / Dardanou*”; “*fatale vero ei est effugere, / ut ne sine prole genus et prorsus extinctum pereat / Dardani*”] and be seen no more—of Dardanus whom the son of Cronos loved above all the children born to him from mortal women. For at length hath the son of Cronos come to hate the race of Priam; and now verily shall the mighty Aeneas be king among the Trojans, and his sons' sons that shall be born in days to come. (*The Iliad*, XX, vv. 302–8; italics added)

(*e*) Apollo, on the walls of Troy, urges Patroclus to stand back:

Then would the sons of the Achaeans have taken high-gated Troy by the hands of Patroclus, for around and before him he raged with his spear, had not Phoebus Apollo taken his stand upon the well-builded wall thinking thoughts of bane for him, but bearing aid to the Trojans. Thrice did Patroclus set foot upon a corner of the high wall, and thrice did Apollo fling him back, thrusting against the bright shield with his immortal hands. But when for the fourth time he rushed on like a god, then with a terrible cry Apollo spake to him winged words: “*Give back, Zeus-born Patroclus. It is not fated* [“*khazeo, diogenes Patroklees: ou nu toi aisa*”; “*Recede nobilissime Patrocle: neque enim fatum*”], I tell thee, that by thy spear the city of the lordly Trojans shall be laid waste, nay, nor by that of Achilles, who is better far than thou.” (*The Iliad*, XVI, vv. 698–709; italics added)

11.3.2. The Possibility of Acting beyond the Norm: Huper Moron

In excerpts (*a*) through (*e*) of the previous Section 11.3.1, there is involved a norm, a *moira*, an *aisa*, a fate. And hence there is involved a type of circumstance: The fulfilment and accomplishment of fate is conditionally connected with the instantiation of this type of circumstance and so with the time of its instantiation.

But in other places of Homeric epic we find explicit word that human action and earthly events can take place beyond the norm, *huper moron*, beyond *aisa* or fate. In what follows, the reader will find four excerpts in which there are set off in italics the English, Greek original, and Latin words expressing the possibility of something happening beyond fate.[22]

(*i*) Zeus says, in answer to a question asked by Poseidon:

For if Achilles shall fight alone against the Trojans, not even for a little space will they hold back the swift-footed son of Peleus. Nay, even aforetime were they wont to tremble as they looked upon him, and now when verily his heart is grievously in wrath for his friend, I fear me lest even *beyond what is ordained* [“deidō mē kai teikhos *huper moron* exalapaxēi”; “vereor ne et murum *praeter fatum* evertat”] he lay waste the wall. (*The Iliad*, XX, vv. 26–30; italics added)

[22] In the four examples that follow, the Greek original and the English translation are from Homer, *The Iliad*, and *The Odyssey* (Loeb Edition). Appearing within square brackets is the Greek original (Loeb edition) followed by its Latin translation as found in Bergler 1791–1792.

(*ii*) Poseidon takes Aeneas to safety, and thereupon says to him:

Aeneas, what god is it that thus biddeth thee in blindness of heart do battle man to man with the high-hearted son of Peleus, seeing he is a better man than thou, and therewithal dearer to the immortals? Nay, draw thou back, whensoever thou fallest in with him, lest even *beyond thy doom* thou enter the house of Hades ["mē kai *huper moiran* domon Aidos eisaphikēai"; "ne et *praeter fatum* domum orci pervenias"]. But when it shall be that Achilles hath met his death and fate, then take thou courage to fight among the foremost, for there is none other of the Achaeans that shall slay thee. (*The Iliad*, XX, vv. 332–9; italics added)

(*iii*) Apollo enters Troy, preoccupied about its untimely downfall:

On this wise spake they one to the other; but Phoebus Apollo entered into sacred Ilios, for he was troubled for the wall of the well-builded city, lest the Danaans *beyond what was ordained* should lay it waste on that day ["mē Danaoi perseian *huper moron* ēmati keinōi"; "ne Danai everterent *praeter fatum* die illo"]. (*The Iliad*, XXI, vv. 514–7; italics added)

(*iv*) Ulysses is cast upon the reefs by the waves unleashed by Poseidon, in wrath for the blinding of Polyphemus:

Then verily would hapless Odysseus have perished *beyond his fate* ["*huper moron*"; "*praeter fatum*"], had not flashing-eyed Athene given him prudence. (*The Odyssey*, V, vv. 436–7; italics added)

11.3.3. The Fulfilment of the Second Condition: Huper Moron *Behaviour, the Violation of the Norm. Chisholm's Paradox*

It may happen that humans should behave beyond fate (*huper moron*), even if this is possible only in the negative. An *huper moron* behaviour will overcome or exceed the limits set by fate, and one who holds this behaviour will be said to be *skhetlios* and *atasthalos*: arrogant, excessive, extravagant.

In this case death, too, will come *huper moron*, like the behaviour that led to it: Death will come earlier and more grimly than what had originally been established, and in connection with a type of circumstance different from the one with which the Moira had originally connected it; that is, in connection with transgression and excess on the part of those humans who have behaved *huper moron*. "*Skhetlios* and *atasthalos* [...] denote persons or actions which exceed the bounds of what is allowable" (Havelock 1978, 183); the same idea is expressed in the words *exaisimos* and *aisulos*, which designate an action which exceeds the *aisa*, the due portion.

In relentless and dogged pursuit, the Moirai—who in this role are known as the Erinyes—will stay after the people who have overstepped the bounds of what is allowed and will lead them into catastrophe, precisely because these people have behaved wrongly, beyond the limits of fate, *huper moron*.[23]

[23] "Like many of the other characters in this grim and somber sphere, the Moirai govern a

An example of an *huper moron* behaviour is Aegisthus's. The question is presented through words that Zeus speaks to the other gods at the beginning of *The Odyssey*.

Look you now, how ready mortals are to blame the gods. It is from us, they say, that evils come, but they even of themselves, through their own blind folly ["*sphēisin atasthaliēisin*"; "*sua insipientia*"], have sorrows *beyond that which is ordained* ["*huper moron*"; "*praeter fatum*"]. Even as now Aegisthus, *beyond that which was ordained* ["*huper moron*"; "*praeter fatum*"], took to himself the wedded wife of the son of Atreus, and slew him on his return, though well he knew of sheer destruction, seeing that we spake to him before, sending Hermes, the keen-sighted Argeïphontes, that he should neither slay the man nor woo his wife; for from Orestes shall come vengeance for the son of Atreus when once he has come to manhood and longs for his own land. So Hermes spoke, but for all his good intent he prevailed not upon the heart of Aegisthus; and now he has paid the full price of all. (*The Odyssey*, I, vv. 32–9; italics added)[24]

As Walter F. Otto rightly observes,

this story brings out a question of vital importance. It is not just the inevitable lightning of fate that strikes in the realm of human existence. There also occur disasters that in the judgment of natural experience can be averted. These disasters become just as necessary and fatal the moment we humans commit actions already fraught with their consequences. A knowledge of these things could induce us to abstain from such actions [...]. Hermes appears to Aegisthus and clarifies for him the misadventure tied to his action; by going ahead and committing the action anyway, Aegisthus becomes blamable for his own fall. (Otto 1961, 266–7; my translation)[25]

That was myth.

Legal norms are likewise marked by a double conditionality. On the one hand we have norms of conduct (*legis virtus hac est: permittere, imperare, et vetare*), and on the other hand we have sanctioning or punitive norms—*legis virtus hac est*: not only *permittere, imperare, et vetare*, but also *punire*, punishing disobedience (cf. Modestinus [3rd century A.D.], *The Digest of Justinian*, I, 3, 7).

sacred order and implacably avenge the infractions committed against it. According to Hesiod, the Moirai and the Keres would stay close behind the infractions committed by humans and the gods, and would not find peace until the crime received the punishment it deserved" (Otto 1961, 261; my translation). "The Erinyes, also known as the Eumenides, are the Furies of Italic mythology, the daughters of Acheron and of the Night or, on a different account, the daughters of Gaea, born by the blood of Uranus or of Hades and of Persephone. There were three of them, Alecto, Megaera, and Tisiphone. They were punitive divinities, goddesses of the curse and vengeance that comes with war, pestilence, and discord, and, in the inner recesses of the spirit, with remorse. The offenders, especially assassins, would find persecution even after death. When they repented and purified their guilt, the Erinyes would become kindly, whence the name Eumenides (from Greek *Euméneia*, 'benevolence'). They were represented as having a gloomy and ghastly appearance, apparelled in a black, bloodied robe, and with serpents on the head in the place of hair" (Gislon and Palazzi 1997, s.v. "Erinni," 174–5; my translation).

[24] The Greek original and the English translation are from Homer, *The Odyssey* (Loeb Edition). Appearing within square brackets is the Greek original (Loeb edition) followed by its Latin translation as found in Bergler 1791–1792.

[25] On Aegisthus in Aeschylus's (525/524–456/455 B.C.) *Oresteia*, see, in Volume 2 of this Treatise, Rottleuthner, Section 3.1.1.2, in the frame of the mythological foundations of law.

The jurists, with their *scientia juris*, have known of this double conditionality of legal norms for centuries. Deontic logicians became aware of it about forty years ago: It was Roderick M. Chisholm who clearly framed the problem from the standpoint of deontic logic. He pointed out that some obligatory types of action (especially the type "punishing"), as set forth in a norm, **n1**, have this peculiar feature: The type of circumstance they are conditionally and normatively connected with consists in failing to comply with another obligatory type of action (such as "not killing"), a type set forth in another norm, **n**, and therein in turn conditionally connected with its own type of circumstance (such as "except for legitimate defence or in the event of war").[26] Anyone who kills *huper moron*, that is, in violation of norm **n**, thereby instantiates the type of circumstance set forth in norm **n1**: It is a normative consequence of this instantiation that the type of action set forth in **n1** must also be instantiated. The punishment of whoever violated **n**—of whoever acted *huper moron* with respect to **n**—must be inflicted. And this is a case of dikedoxia (Section 10.2.2).

In that mechanism lies Chisholm's double conditionality of norms, which in the final analysis is the double conditionality of fate as illustrated in this section.

With fate, the first conditionality is that which the Moirai establish between a certain type of circumstance and a certain time and manner of death: We have here an effect—death—that must normatively take place when the preestablished type of circumstance gets instantiated. The second conditionality is that by which the type of action consisting in the Moirai doggedly pursuing punishment and retribution depends on the valid instantiation of the type of circumstance "acting *huper moron* (beyond fate)": It depends on behaving in excess, beyond the norm, doing the wrong thing. Because of this double conditionality, the exceeder (the *atasthalos*) will be inflicted with an earlier, more atrocious death than that established by the Moirai at the time the same person was born.

In myth, the double conditionality of fate (of norms, in contemporary terms) opens a margin of action for humans, too, but a margin in the negative only.

The gods and the oracles know in advance the *huper moron* paths of human behaviours and the *huper moron* consequences that follow from excessive

[26] The logical and philosophical problems arising in connection with the double conditionality of duty (with primary norms of conduct and secondary norms of punishment, the latter understood in the language of civil-law jurists as rules for deciding the punishment to be applied in particular cases) have been studied in different respects, in such works as Chisholm 1963 and 1978. Cf. Artosi 2000; Vida 2001; cf., in Volume 5 of this Treatise, Sartor, Section 10.3.2, devoted to an examination of the role of sanctions in a game-theoretical framework.

or transgressive (*atasthaloi*) behaviours. They sometimes warn humans of such paths, so as to place humans in the condition of steering clear of the danger, but the advice is not always followed: Humans will at times refuse to accept the divine counsel or will misunderstand it (failing to grasp the meaning of the oracle's words). It is here that a negative margin of action opens up for humans, in that humans will be enabled to behave *huper moron*, wrongly, exceeding and overstepping the bounds of fate, thereby provoking by their own behaviour the *huper moron* consequences (i.e., the events beyond those originally inscribed in fate) that must normatively flow from the *atasthalon* behaviour held despite receiving the warning of the gods or the oracle.

Chapter 12

WHAT IS RIGHT IN HOMERIC EPIC

12.1. Homage to Eric A. Havelock

12.1.1. Why Havelock?

This chapter pays homage to Eric A. Havelock. I have not been fortunate enough to meet him in person or to correspond with him. But I have received from him three gifts I much appreciate.

(*i*) I found confirmation, in his thoughtful and finely crafted works, of my opinion about how misleading it is to translate the ancient Greek word *dikē* with "justice."

Indeed, if we accept the suggestion made in Chapter 1—using "what is objectively right" and "what is subjectively right" to convey the distinction between *objektives Recht* and *subjektives Recht* (and the equivalent distinctions in Castilian, French, and Italian)—we will come to see that although "justice" has taken root as the standard, historically settled translation of *dikē*, a more suitable rendition of this last word is, I believe, "the right," or rather "what is right."

(*ii*) Havelock, belying his reputation as a "revisionist heretic," did not object to the centuries-old (and in my opinion misleading) tradition of rendering the early Greek *dikē* as "justice." One might say that he left it to me to take this pleasure. He did so providing me with the best arguments I have ever come across in support of such an objection, even if he obviously did not have before him the problems introduced in Chapter 1 with regard to the concept of "what is (objectively or subjectively) right" as this problem may be reconstructed from within the legal-dogmatic thought of civil law, nor of course did he intend to concern himself with such problems.

Here is my take on the question. In ancient Greek culture the normative idea of "what is right" was originally expressed by *to dikaion*, from *dikē*. The usual translation of *dikē* as "justice" does not do *dikē* justice: It does not give *dikē* its due; it does not give *dikē* what ought to be given to it. *To dikaion*, in its most inclusive sense—especially with reference to behaviours—means "what is as it ought to be."

For centuries, philosophers and jurisprudents have been drawing the distinction, sometimes cast as an outright opposition, between natural law and positive law. It becomes evident why we should take *to dikaion* to mean "what is right" (rather than "what is just") if we consider that the distinction between *phusei dikaion* and *nomōi dikaion* ("what is right by nature" and "what is right by law," in my rendition of these Greek expressions) is thought to be

among the first in Western philosophy to have expressed the dualism between natural law and positive law.

The distinction between *phusei dikaion* and *nomōi dikaion* leads to the problem (discussed in Chapter 4) of the matrix of normativeness as the ultimate source of what is right. This problem emerges with the advent of philosophical reflection—not so the idea of what is right. This idea, like the idea of the reality that ought to be (Chapter 11) emerges in human culture long before human culture becomes capable of any philosophy, and indeed even before human culture becomes capable of writing. Further, a point not without consequence, it is uncertain whether the connection between the reality that ought to be and what is right emerges at once with the ideas so brought into relation, even if the connection between them can be detected so early as in myth.

(*iii*) The concept of norm (*nomos* and *ethos*) I have come to detect in Homeric epic, the way I understand it in Havelock's reading of it,[1] supports fully the way the concept of norm was characterised in Chapter 6, a concept I feel we are well advised to recover for an adequate understanding of the legal phenomenon.

What is of interest to me in this chapter is the concept of what is right as expressed in the ancient Greek *dikē* and its derivatives, such as *to dikaion*. But still, I will interpose a brief comment on *dikē* in mythology.

In mythology, Dike was a goddess—born to Zeus and Themis—and one of three Horae. Her sisters were Eunomia (the good order or legality) and Eirene (peace). Dike was also called Astraea and was said to inhabit the earth in the Golden Age; but then she was driven away from the earth by the sins of humans and she ascended to the heavens, finding her home in that part of the zodiac which is the constellation Virgo.

> And in a hymn an unknown poet [...] urges them—the daughters of the Night—to bring Eunomia along with her sisters Dike and Eirene. That explains why these three so often appear together with the other powers of order, along with the Erinyes and with the Horae, and especially with Themis. (Otto 1961, 261; my translation)

The meaning of *dikē*, according to Émile Benveniste (1902–1976), is what is right among the families of a tribe, while *themis* is what is right within a family (*genos*). Themis is of divine origin: It is the order (the reality that ought to be) established for the family (*genos*) by a king (*basileus*) whose origin is celestial and who draws inspiration from the gods. Where there is no *genos* and no *basileus*, there is no *themis*; the Cyclopes are uncouth, and so *athemistes*: They

[1] My reference here is to what Havelock calls the *nomos* and *ethos* of Homeric epic, referring as he does to what Milman Parry (1902–1935) calls "the way of life" of Homeric epic. An unlikely occurrence of *nomos* in Homeric epic is in *The Odyssey*, I, 3. The term occurring in this verse is thought to be, not *nomos*, but rather *nón*. Cf., in the Loeb Edition, page 2, footnote 1.

act without the sacred order of *themis* (Homer, *The Odyssey*, IX, vv. 106–15) (see Section 12.2.2).

> The root common to Sanscrit *ṛta*, Iranian *arta*, and Latin *ars*, *artus*, *ritus* designates "order" understood as the harmonious adaptation of the parts of a whole and does not have any juridic designation in Indo-European.
>
> The "law" [*la "loi"*] is *dhāman* in Sanscrit and *thémis* in Greek: It is literally the rule established by the gods (from the root **dhē*, "positing," "bringing into existence"). This rule defines *le droit* [what is objectively right] within a family: Thus *thémis* is contrary to *dikē*, which means "droit [what is objectively right] among families." (Benveniste 1969, 99; my translation)[2]

> The Latin *dico* and the Greek *dikē* impose a representation of a formulary *droit* [what is right] which determines, for each particular situation, that which must be. The judge—*dikas-pólos* in Homer—is the person who conserves the formulary and who with authority pronounces (*dicit*) the appropriate ruling. (Benveniste 1969, 107; my translation)[3]

In the following sections I will continue with *dikē* taking up Havelock and retracing the path he charted.

12.1.2. A Heresy Unaccomplished

The work I will mostly be referring to was entitled by Havelock *The Greek Concept of Justice: From Its Shadow in Homer to Its Substance in Plato* (1978). We can see that the term "justice" figures in the title, and it also turns up frequently in the text—more than 600 occurrences in all, counting "justice" and its derivatives—to designate *dikē* or its derivatives (*to dikaion* and the like). But then Havelock states clearly that the early *dikē*, in its core meaning, should be rendered not with "justice," but with "propriety" (some sixty occurrences of this term), "seemliness," or "correctness"—in a word, with "what is right" in the sense I ascribe to this expression in this volume.

The term "right" occurs about eighty times in the 300-plus pages of *The Greek Concept of Justice*. In thirty-two of these occurrences, the term is used to translate into English *dikē* and its derivatives, and on three occasions it figures in the very expression "what is right"—just what I wanted to see (detail provided in Section 12.2). In brief, Havelock shows that the core meaning of

[2] The French original: "La racine commune à skr. *ṛta*, ir. *arta*, lat. *ars*, *artus*, *ritus*, qui désigne l''ordre' comme adaptation harmonieuse des parties d'un tout entre elles, ne fournit pas, en indo-européen, de désignation juridique.

La 'loi' c'est en skr. *dhāman*, en gr. *thémis*—littéralement la règle établie (racine **dhē* 'poser dans l'existence') par les dieux. Cette règle définit le droit familial: ainsi *thémis* s'oppose à *díkē*, 'droit interfamilial.'" On *loi*, Section 1.2, footnote 7.

[3] The French original: "Le latin *dico* et le grec *díkē* imposent la représentation d'un droit formulaire, déterminant pour chaque situation particulière ce qui doit être. Le juge—hom. *dikas-pólos*—est celui qui a la garde du formulaire et qui prononce avec autorité, *dicit*, la sentence appropriée."

dikē in the Homeric poems is "what is right," and that *dikē* carries this meaning also in Hesiod, Solon, the Presocratics, Aeschylus, and Herodotus, and in Plato himself, with his *dikaiosunē*, which is *dikē* elevated to the status of *eidos*: of form, idea, or type.

Some scholars consider it something of a heresy (or at least a kind of revisionism) that Havelock should maintain what he maintains about the society the Homeric poems refer to—not the Mycenaean society, but that of the early Greek city-states (Section 12.1.3). Even more heretic, in some scholars' view, is Havelock's rejection of the traditional practice of tracing to Homer and the Presocratics (Havelock prefers to call them the Preplatonics, since the Presocratics are contemporaries of Socrates himself)[4] a number of philosophically fashioned ideas that, according to Havelock, are possible only from Plato onwards, from the time writing gets superimposed on merely oral and acoustic cultural storage, so as to allow the Greek language to develop a syntax (hitherto unseen) enabling a copulative use of the verb "be" (*einai*) rather than only an existential, or stative, use.[5]

But the further heresy—whereby *dikē* takes as its core meaning not "justice," but "what is right"—is one that Havelock falls short of proclaiming, even as he illustrates it with excellent examples, and in fact demonstrates it, I daresay. For example, he does not introduce this heresy in the title of the book he dedicates to *dikē*, or in the chapter and section titles this book is divided into.

To clarify matters, I will now provide two examples of the way Havelock speaks of *dikē*: one example apropos of Homer's *Iliad* and another apropos of Hesiod.

First example: apropos of Homer's *Iliad*. Havelock entitles Chapter 7 of *The Greek Concept of Justice* "The Justice [*dikē*] of *The Iliad*" (square brackets added). This he does after illustrating the role that epic plays in the preliterate societies described by Homer (not Mycenaean society, but that of the early city-states), the psychology of rhythmic memorisation in these societies, and the method and manner by which the Homeric storage of oral culture proceeds.

In Havelock's Chapter 7 the term "justice" and its derivatives turn up some forty times, and of the ten sections the chapter is divided into, four carry the term "justice" in the title. But then, in the last of these sections—Section 10, entitled "Procedure in Place of Principles," in which Havelock wraps up the analysis carried out in the chapter—he arrives at the conclusion that the

[4] See Havelock 1996, especially 15–22. This posthumous work by Havelock has been published in Italian but not in English. Yet thanks to the courtesy of Thomas Cole, I was able to look at the original English manuscript, entitled *The Preplatonic Thinkers of Greece: A Revisionist History*.

[5] For a critical assessment of *The Greek Concept of Justice*, see Gagarin 1980 (very balanced and fair); Gill 1980; MacIntyre 1980 (a harsh and irritated trouncing, which I do not understand).

justice of *The Iliad* is what is right (he does so without once using "right" or "rights" anywhere in the foregoing nine sections). Here he is in his own words:

> In sum, the "justice" of the *Iliad* is a procedure, not a principle or any set of principles. It is arrived at by a process of negotiation between contending parties carried out rhetorically. As such, it is particular, not general, in its references, and can be thought of either in the singular or in the plural—the "*right* of it" in a given case or "the *rights*" as argued and settled in one or more cases. (Havelock 1978, 137; italics in original on first occurrence, added on all other occurrences)

Havelock—given the nature and aims of his enquiry—is mainly interested in showing that Homer's *dikē* is not a principle. (Not until Plato's *dikaiosunē* will *dikē* become a principle). As for me—given the nature and aims of my enquiry into what is right—I am mainly interested in what Havelock does when he draws his final conclusions; that is, he states clearly that *dikē* means "what is right": *Dikē* means "the right of it" or it means "the rights." In the passage just quoted, Havelock sets "justice" within quotation marks to refer to *dikē*, perhaps on account of the style rules his publisher asked him to follow. But there may also be a further rationale guiding Havelock's use of "justice" within quotation marks in reference to *dikē*; that is, it may be that he is about to declare that *dikē* means, in reality, "the right."[6]

No one who should consider *The Greek Concept of Justice* by its index, or by its table of contents, or by the contents of its Chapter 7, or again by looking things up here and there, would be able grasp the important truth that Havelock effectively illustrates with regard to the core meaning of *dikē*. Again, it is not Havelock's prime objective to bring this core meaning to light. Rather, his objective is, depending on the occasion, to explain the sense of the transformation of Greek civilisation from preliterate to literate; or to explain how cultural storage can happen and how it can pass from generation to generation with the only device of oral language, and hence only in human brains, in which the information is encoded (considering that human brains are much more perishable and short-lived than written records); or to illustrate how our language and thinking changes as we pass from language as an exclusively oral and acoustic medium to language as a medium that is written and visual, too; and especially to show how—in view of the foregoing considerations—*dikē* becomes a concept and a principle only with Plato. I find Havelock convincing in the arguments he develops in his theory with regard to these points.

But our specific interest here is a byproduct of Havelock's enquiry—a byproduct of special value to us, but which Havelock may not have paid full attention to. Nor could he have been aware of its importance: *Dikē* (as it turns

[6] On page 192 Havelock (1978) himself writes that "to speak of the 'justice' of the *Odyssey* is perhaps allowable if the word is placed in quotation marks." And that is what he in fact does (cf. Section 12.2.4, page 291).

up in several texts and contexts of ancient Greek civilisation, at least until Plato) can be said to encapsulate in embryo some distinctions that we, instead, have picked up, with regard to the concept of "what is right," in dealing with the legal dogmatics of the civil-law tradition as this tradition has consolidated over the last two centuries.

That *dikē* takes "what is right" as its core meaning emerges more and more clearly as we proceed further and further into *The Greek Concept of Justice*. This finding is one of the products of Havelock's enquiry, a fruit that ripens as Havelock comes closer and closer to the point of drawing his conclusions: The fruit falls from the tree that Havelock himself grew and nurtured so that other, more important fruits would issue (and such fruits have in fact issued). Havelock seems to recognise the secondary fruit or byproduct of his enquiry, but he does not bring it to bear: He leaves this fruit to other people, to people who, like us, may be ready to accept it and invest it with the particular importance it deserves.

As was noted a few moments ago, not only in Chapter 7 of *The Greek Concept of Justice*, nor even with regard only to *The Iliad*, does Havelock put forward "propriety," "seemliness," "the right," "rights," or "what is right" as the best way to convey the core meaning of *dikē*: He does so also with regard to *The Odyssey*, as well as to Hesiod, the Presocratics, and Herodotus (and even Plato, in a sense) (see Havelock 1978, 309ff.).

But of these—here comes the second of the two examples I promised I would make—it is Hesiod that prompts Havelock to lay out with true crescendo the view whereby "right" and its derivatives are par excellence the terms with which to account for the field of meaning expressed in ancient Greek by *dikē* and its derivatives.[7] The crescendo I am referring to is the following.

> The Loeb version of Hesiod renders *dikē* in the singular variously as "right," as "justice," and as "punishment"; in the plural, as "judgments." The Penguin version allows itself a larger indulgence, using for the singular "right," "justice," "verdict," "punishment," and "law"; the plural becomes "judgments" and "law-suits," or else is omitted through paraphrase; the adjectives *dikaios* and *adikos* are taken to signify "an honest man," "a just man," and "a felon."
>
> Command of such flexibility may be thought commendable; the style of translation has been "improved." By adjusting translation to the variety of contexts in which the word is placed, the disjunction between the hexameters is smoothed out. But the intention of the poet and the difficulty he has in achieving it are masked by this procedure. What in effect he is trying to do is to define a "field of meaning"; he is not playing with a concept which has been delimited and hardened by the resources of literate definition. To substitute a variety of terms for the single one which is obsessing him is in effect to destroy his topic, to conceal the act of integration which he is performing upon those epic situations from which he is extracting the new "subject" of discourse. In oral speech, the sound is the sign of the meaning. If a sound

[7] Havelock looks at Hesiod's *Works and Days*, a poem 800 lines long: In just under 100 of these—a sort of poem within the poem—Hesiod presents to us what Havelock describes as a "concentrate of *dikē*" (Havelock 1978, 194; cf. Havelock 1966).

keeps repeating itself like a refrain, the effect is most faithfully rendered in another tongue if the refrain is imitated. The word "*right*," its plural, "*rights*," and its adjectives "*rightful*," "*righteous*," and "*unrighteous*" could in English achieve something of this effect. The variety of applications to which the word is subject goes back into English preliterate usage. Given the definite article, "the *right*" symbolizes an abstract principle, also indicated in the antithesis "*right*" versus "*wrong*." But pluralize it, and we get the "*rights*" and "*wrongs*" of a situation, which are more specific, as also is "the divine *right* of kings," identifying a source of authority which kings alone control. Again in the plural, to speak of "my *rights*" is to identify claims against individuals or communities as if these were pieces of property; the "*rights*" of a legal case symbolize the claims as argued and given verbal form. As adjective, "*right*" can indicate either correctness—"this is the *right* road to take"—or propriety—"this is the *right* thing to say under the circumstances"; as an adverb, the word describes movement in a straight direction—"keep *right* on going"; and, of course, it designates the "*right* hand" from the left, possibly a basic signification.

The Greek *dikē* and its correlatives perform a similar diversity of symbolic functions, which Hesiod is endeavoring to assemble into his "field of meaning." (Havelock 1978, 230–1; italics in original on first, second, third, and last occurrence; added on all other occurrences)

Thank you indeed, Mr. Havelock.

12.1.3. The Anthropology of the Homeric Poems: The Didactic Function of Epic in the Oral Civilisation of the Early Greek City-States

Havelock devoted himself persistently to the study of oral civilisations and to the language of archaic Greece. His chief work on *dikē* is intended to demonstrate that this symbol, like other symbols in use in preliterate societies, cannot express a concept or a principle before the advent of writing (until Plato, in the case of the Greek civilisation). Indeed language—at first oral, recited language memorised only in brains, and neither written nor read, because not recorded on documents—undergoes a radical transformation with writing as the medium by which our thought develops and finds expression.

According to Havelock, *The Iliad* and *The Odyssey* are a unique piece of documentation when it comes to the anthropological study of oral civilisations, and that for five reasons as follows.

(*a*) *The Iliad* and *The Odyssey* are oral compositions. They were composed in the 9th and 8th centuries B.C. and found their way into writing only subsequently.[8] They got transcribed exactly as they had been shaped in oral compo-

[8] "The Greek cultural experience as late as the period between 1100 and 700 B.C. was nonliterate" (Havelock 1978, 15). "No evidence is available for the use of Linear B after the fall of Mycenae, or for the introduction of the Greek alphabet at any date earlier than the last third of the eighth century B.C. [...] A condition of either nonliteracy or semiliteracy—depending upon the scholar's judgment—persisted in Greece to the middle of the seventh century" (Havelock 1978, 9). The Homeric poems travel across the centuries, forward and backward—a situation that depends on the findings and especially the hypotheses of the various scholars. The dates just cited, and those I will refer to in what follows, are those specified by Havelock. The latest hypothesis in this regard comes from Janko 1982 and Morris 1986. On this question, see the survey by Eva Cantarella (2002b, 376ff.). Cf. Morris 1986 and Janko 1982, 228–31. Cf.

sition within a "society free from any literate contact or contamination" (Havelock 1978, 339). We can see clearly the importance of this feature if we only consider what happens with a preliterate society (a society whose culture is based exclusively on human memory, rather than on written documents) the moment it should receive, for whatever reason, an entire system of writing, or even part of it, from outside sources: This society will inevitably, in putting this *foreign* system to use, deform the contents of the exclusively oral language proper to it (an exclusively oral language, and hence exclusively mental or cerebral in what concerns its memorisation).

(*b*) The society in whose oral tradition the Homeric poems were recited—as *living* and topical poems—was a politically and socially autonomous society, and as such it would continue to exist even after the advent of writing. It was therefore a society that "possessed a firm consciousness of its own identity" (Havelock 1978, 339). Again, we can see the importance of this second feature: Social or political forms that come in from without, and get superimposed on autochthonous forms before these last get recorded in writing, taint the preliterate culture that will then be transcribed. Instead, the culture of early Greece—as it has come down to us, orally at first, through Homeric epic, and then in the form of documents in which this epic was transcribed—is fully expressive of early Greek society, for this society preserves its autochthony, politically and socially, throughout the delicate period of transition from merely spoken language to spoken and written language.

(*c*) From the 10th or 9th century to the 7th century B.C., when the role of preserving the consciousness of a social identity was entrusted to oral language, oral language existed without exception as the only medium of documentation and collective memory. Having no conduit other than merely oral language, collective memory could not get stored except in the brains of the people making up the whole of society (Havelock 1978, 38ff., 106ff.). This lack of storage modalities (even autochthonous modalities) other than oral language makes it so that contents—the contents fixed in merely oral (mental, cerebral) linguistic forms—should, in this form, come through intact when the process of their transfer into written language gets underway.

(*d*) The transition from oral language to writing happened by way of written symbols invented by the very people who in preliterate society would communicate by oral language only (Havelock 1978, 218ff.). When anthropologists take notes and document their fieldwork in exclusively oral societies, they interpose not only the medium of writing, but also their own native language, in their reports on the contents of the preliterate society they are investigating. To put it the other way around, the language expressing these

Volume 6 of this Treatise, Gagarin and Woodruff, Chapter 1, Section 1, where the Homeric poems and the works of Hesiod are grouped together as composed around the end of the 8th century B.C.

contents of preliterate society is not only a different language than the investigator's, but also an exclusively oral language; the investigator's language is foreign as well as written. Instead, in early Greek society the transition from oral to written language comes by way of the native speakers of the society, and the interposition of another's written language (the anthropologist's) does not occur.

(*e*) Because the speakers of the early Greek language transcribed their own oral language in their own writing, they controlled in the first person the transcription process of sorting out the oral memory encoded in their brains, and therefore decided for themselves what contents would get transferred on nonhuman supports in writing (Havelock 1978, 221–32). When this "natural selection" of the oral contents of preliterate culture in the changeover to the written form is effected from within—by the members of the culture in question—it is better able than other methods to make sure that the screening reflects the topicality and vitality of the contents (hitherto exclusively oral) as these are entrusted to written documentation.

Homer, Havelock writes, was an instructor. His poems—what the *modern* reader understands to be poems—were in fact a store of oral directives. Or, as I prefer to say, they were a store of oral information on norms and other beliefs intended to shape personality, the generalised other, and the internal reality that ought to be (see Sections 15.2.5 and 15.3.4), thereby guiding the behaviour of the addressees of such epic. Homeric epic was primarily educative, and was anciently recognised as such: We have, in the Homeric poems, a teacher addressing an audience of people to be instructed, or of people who may need to have these instructions reinforced (by remedial work, we might say today). The Homeric poems are a "tribal encyclopedia" (ibid., 337; Havelock 1963, 66). The very first Homeric scholar, Theagenes of Rhegium (late 6th century B.C.), attributes didactic intentions to Homer. And he is followed in this by Xenophanes (ca. 570–ca. 478 B.C.) and Heraclitus. Both are poignantly critical of Homer and Hesiod: Heraclitus considers them to be "teachers of an immoral theology" (Havelock 1978, 5).

It is well known that Plato subjects Homer, Hesiod, and poetry at large to severe criticism, calling for its censorship and then for a complete ban. Plato, in his criticism of poetry, did not have the understanding of poetry that we have, but rather the understanding of it current in Homer's time and still current in the time of Plato himself: the conception of poetry as a teacher of life.

Plato claimed for philosophers, and for himself in the first place, the task of educating, more so than the youths, the philosopher-statesmen, who are the rulers (*oï arkhoi*) in the ideal form of government. Plato criticises the practice of centring education around the work of Homer and Hesiod (and around poetry at large), taking exception to the contents taught, as well as to the way these contents would be imparted (Plato, *The Republic*, 598d7–600d6; cf. Havelock 1978, 6–7 and Havelock 1963, Part One).

This didactic function that the philosophers (and Plato in particular) found objectionable was something that Homeric epic came to assume characteristically—almost by natural consequence—on account of the general preliteracy of the exclusively oral language in which and for which Homeric epic was composed. As Havelock suggests, "a condition of either nonliteracy or semiliteracy [...] persisted in Greece to the middle of the seventh century" (Havelock 1978, 9). Yet the first forms of social organisation that are considered to be among the achievements of ancient Greece took shape from 1100 to 900 B.C. There occurs in the span of two and a half centuries, from 900 to 650 B.C., "the genesis of that classical culture which becomes evident to documentary inspection only in the sixth and fifth centuries" (Havelock 1978, 9–10).[9]

In Chapter 4 of *The Greek Concept of Justice*, titled "The Society Reported by Homer," Havelock sets out to show that Homer, in *The Iliad* and *The Odyssey*, makes reference not to Mycenae (if not in a fantastical manner) but to the poleis. The account we have before us is in the first place an account of the institutional life of the poleis, or city-states. The Greek way of social life—the basic features of it—was already functioning and organised so early as the 9th century B.C. (Havelock 1978, 9–10).

> The towns of mainland Greece must be deemed already capable by the tenth century of supporting forms of social life which went well beyond the limits of village existence. At the level of technology, these communities were capable of forging iron, and presumably of smelting it, a feat beyond the competence of the Mycenaeans. Their activities in commerce and navigation may not have exceeded Mycenaean standards. Their temple architecture not later than the end of the eighth century can be shown to have anticipated in wood the conceptions and refinements of the archaic age now partially preserved for us in stone. In the realm of the arts, this period saw at its inception the invention and perfection of the geometric style of decoration, followed by the introduction of naturalistic motifs in the so-called orientalizing period, which began, appropriately enough, about the time that the Phoenician letters were put to Greek use. The same period fostered the verbal art of Homer. (Havelock 1978, 10)

All these things happened without the help of written documentation. Now, it can be said, with regard to Greek architecture and art from 900 to 650 B.C.,

[9] "If true, this raises a formidable question for the historian. It was precisely in these centuries that Greece invented the first forms of that social organization and artistic achievement which became her glory. Perhaps the start was slow, and from about 1100 to 900 the achievement did not amount to much. Archaeology has made evident the physical ruin of the Mycenaean palace-complexes, and it is usually deduced that with this went also the destruction of those political and social arrangements which had previously rendered commerce, art, and a settled way of life possible. Even this hypothesis of a totally dark age supervening upon the Mycenaean period has lately been questioned. Whatever the truth of it, there is no reason to doubt that, as has recently been emphasized, the centuries after 900 were 'dark' only in the sense that so much about them is unknown. If we consider the period from 900 to 650 as a chronological unit, it is obvious that we view in this period, however obscurely, the genesis of that classical culture which becomes evident to documentary inspection only in the sixth and fifth centuries" (Havelock 1978, 9–10).

that draftsmen could apply geometry without having to read, and that many skills were transmitted orally from father to son or from master to apprentice. But the Greeks' political organisation, their moral and social conscience, is something remarkably more refined and complex which, too, will have to be accounted for as a development within a preliterate society equipped only with an oral language (ibid., 11).

Havelock concludes as follows:

> In sum, the stories and episodes of both epics [the two Homeric epics] are fashioned in such a way as to take for granted a polity and life-style which are contemporary, meaning that they reflect Greek life as it was lived in the period when the poems assumed their final compositional form. The characters live and behave as people in that society would live and behave even though they often wear the fancy dress of Mycenaean legend. The institutions, the domestic proprieties, the military and maritime dispositions, the agriculture, the commerce, the architecture and art, and we may add the recreations, are those of the early maritime complex of Hellenic city-states, originating perhaps in the tenth century, but attaining their full development in the eighth and seventh centuries. The local geography, the agriculture, the commerce, the seafaring, the endemic warfare, the legalities of family and property, the citizen's identity, the oral procedures for decision making, all seem to be versions in embryo of the essential elements out of which the societies of Solon and Pericles evolved—adapting, enlarging, codifying, complicating, but never departing from them. Both the *Iliad* and the *Odyssey* reveal a veiled portrait of Greece in the historical period. That is why a citizen of Periclean Athens could still feel himself to be a "Homeric man."
>
> If the period thus reported in both epics was also nonliterate, we can reasonably expect, on the analogy of practices in other oral societies, that the epics will not confine themselves to story telling. They are likely to use the mythos as a vehicle of storage, a repository of the pragmatic values of their audience. The epics may constitute that enclave of contrived speech constructed according to the rules of oral memorization which oral societies find necessary for this purpose. For the performance of such a function, the Mycenaean fantasy could provide an essential support, giving to the cultural index a distance and a solemnity which the living memory would welcome. The mores of the present are transposed into the past; historical Hellenism becomes a prehistoric tradition. (Ibid., 87)

12.2. A Revisitation of Homeric *Dikē* in the Light of the Distinction among "Norms," "What Is Objectively Right," and "What Is Subjectively Right"

12.2.1. Premise

In the sections that follow I will take up again the notions of "norm," "what is objectively right," and "what is subjectively right" as presented in Chapters 6 (for "norm") and 1 through 4 (for "what is right"). I will try to see if and how these notions can be discovered to exist in Homer's epic, proceeding to this end on the basis of Havelock's reading of this epic. In some cases, though, I will be putting forward some interpretations of my own and laying them on top of Havelock's, or at least I will be putting to use the notions just referred to, fully aware in this that these are notions I have come at through my own understanding of "norm" and through an ideal and critical reconstruction of

the frame in which the concept of law has been developed within the tradition of continental legal dogmatics over the last two centuries.

12.2.2. Norms and Society

It will be recalled, to start with, that a norm (as characterised in Chapter 6) is the belief (*opinio vinculi*) that a certain type of action must be performed anytime a relevant type of circumstance gets validly instantiated. Further, norms are social: They are social insofar as they are beliefs shared in society, or at least within certain strata or classes of society.

Havelock informs us with Milman Parry of a known fact, namely, that the Homeric hero embodies a moral dimension, and that this dimension is

> stated as a set of obligations imposed by a corresponding set of social relations within which his life is lived. These are regulated by general rules of behavior. The ideal (a better term would be ethos) is not conceived a priori as a set of principles to which one aspires, but as a pragmatic response to the general rules which impose "responsibilities" and confer "rewards" for performance. (Havelock 1978, 9)

In these words we can recognise my own concept of norm, at least in embryo. We can recognise that the content of a norm is a type of action binding per se relative to certain conditioning types of circumstance—to certain types of social relations instantiated in the social reality of the Homeric hero (in his reality that is).

On Havelock's reading of Homeric epic, norms are the *nomos* and *ethos* (the way of life, in Parry's words) of the early Greek city-states.[10] And *nomos* and *ethos* are quintessentially normative in the sense of "norm" introduced in Chapter 6. They are a social reality that is, but at the same time they normatively must be: They are a socially constructed social reality that ought to be, the mores, the customary law of a preliterate society that operates without written laws (of course) and without any formal enactment of laws. (On social, or institutional, reality, see Sections 15.2.4 and 15.3).

There needn't be any enactment of laws for norms to exist: There need only be (for such an existence) social beliefs (*doxia* and *nomia*; Sections 6.2 and 6.5) and ways by which to preserve, confirm, and reinforce the sharing of beliefs in society, as well as ways by which to pass them down from generation to generation (cf. Sections 7.1 and 15.2.5, on primitive norms).

As Havelock notices, the Greek city-states were constantly at war with one another and spoke different dialects, to be sure, but they had a common language (at that time a merely oral language), as well as common deities and mythologies, common rituals and customs, and especially common beliefs:

[10] This independently of the terms occurring in the Homeric poems: see footnote 1 in this chapter.

The city-states shared "an assumption of social order and regulated usage [this is where belief steps in] shared by all who called themselves Hellens." Even the neighbouring barbaric peoples were aware of this state of affairs. "It was a culture, in fact," a culture summed up with greatest power of expression "in the two Greek words *nomos* and *ethos* in their earlier usage" (Havelock 1978, 11).

> The stories in the [Homeric] poems are told in such a way as to include a mass of directive information covering the nomos and ethos [covering norms, in the meaning I ascribe to this term], the life-style and its proprieties, appropriate to the society to which the poems are addressed and which was guided by them [...]. The poems constitute two major reports upon propriety [what is objectively right] both social and personal, practiced as a conservative ethic and implemented in a thousand specific proprieties. [...] They employ one regulative symbol which was to acquire special significance after Homer, and predictably so because of the way Homer used it. This was expressed in the Greek word *dikē* and its derivatives, a word not easy to render in strictly conceptual terms, but furnishing a prototype of what we might designate as Homeric "justice." (Havelock 1978, 13)[11]

But this prototype of Homeric justice is in reality *what is right*. Havelock says so himself:

> If justice be identified as the central principle of modern morality, conceptually defined, oral societies could get on very well without it. What they did rely on for cohesion—as does any society—was a set of proprieties, of general rules of behavior which in sum total constitute "*what is right*." (Ibid., 53; italics added)

As an oral encyclopedia, *The Odyssey* describes and recommends types of right Panhellenic behaviour: types of action believed to be per se obligatory, permitted, or forbidden relative to certain conditioning types of circumstance. We have here an international or intercity propriety, whereas the propriety described and recommended in *The Iliad* is, in Havelock's words, an "intracity" propriety. In a strict sense, propriety among cities was not legal: It was entrusted to a "moral" sentiment sanctioned and protected by religion. Intracity

[11] "Viewing the enclave of contrived speech performing its function in society, we may be tempted to describe its content as providing models, patterns, or paradigms of character and action suitable for imitation. [...] These words [...] might [...] induce us to believe [...] that [the tradition] offers ideal characters performing actions which follow the proprieties proper to the society which uses the tradition. To be sure, *propriety* and *seemliness* provide the best operative definition of oral mores—not so much a definition as a validation; the 'done thing,' to use a schoolboy phrase, is the 'right thing.' But it would be an error to draw the conclusion that what the agents actually do in the required narrative is itself governed by propriety. [...] Warfare as a subject of epic has mnemonic advantages, as does any hazardous enterprise. It follows that plots of memorized speech will offer heroes and sometimes gods who, so far from providing copybook models of approved action, will illustrate the proprieties by defying them. They will do this successfully for a time; the logic of the function of storage will, however, require that penalty be paid in the end, or redress achieved or balance restored" (Havelock 1978, 52–3; italics added).

propriety, in contrast, *was* legal, in that any controversy that might arise could find its legal solution in the agora, while no form of judicial authority existed with which to regulate international affairs.

The *Odyssey* is par excellence the oral encyclopedia of the maritime complex, encoding and reporting and recommending those patterns of pan-Hellenic behaviour [norms, in my understanding of "norm"] which also could protect interpolis traffic and enable the complex to work. [...] Yet the poem does not stop there. When upon Odysseus the stranger-guest there is superimposed Odysseus the impoverished beggar, the moralities of the story take us back within the walls of the polis. A second lesson is to be learned, aside from the international one. Any polis society contained both its rich and its poor. The poor need sustenance, and it should be given them when they ask for it. They also are free men and should be guarded against insult. This too is part of the nomos of the Greek polis, for without it community is threatened and the society may cease to be viable. (Ibid., 177–8)

A case apart, in *The Odyssey*, are the Cyclopes. The case is emblematic because the Cyclopes do not practise any "international morality" (any set of norms, or beliefs, as related and recommended in *The Odyssey*), and at the same time they are stigmatised in Odysseus's account because they do not have any legal propriety among themselves, either. They have no *themistes* or *dikai*: *Themistes* are norms; *dikai* (in the plural) are judicial procedures with which to decide what is subjectively right when controversies arise (see Sections 1.2, 1.3, and 12.2.4).

The Cyclopes do not have any form of associated life, even among themselves: They lived on the peaks of mountains in gloomy caves (wherein each Cyclops is a kind of autocrat or tyrant, making decisions not only for himself, but also for his women, children, and sheep). There is no polis among the Cyclopes, nor even is there any associated tribal life. The Cyclopes hold no meetings in the agora; they have no *themistes*, and in fact do not even know of any (or they know them scarcely: The assertion is different in different passages of *The Odyssey*). As was noted earlier, there can be no social norms without any shared normative beliefs: The Cyclopes are not believers, and hence—from Odysseus's standpoint: according to the norms he believes in—they are anomic (cf. Section 6.5). They are a group of anomic savages.

Thence we sailed on, grieved at heart, and we came to the land of the Cyclopes, an overweening and lawless ["athemistōn"; "nefariorum"] folk [...]. Neither assemblies for council ["agorai boulēphoroi"; "conciones consiliariae"] have they, nor appointed laws ["oute themistes"; "neque leges"] but they dwell on the peaks of lofty mountains in hollow caves, and each one is lawgiver ["themisteuei"; "*jus* autem dat"] to his children and his wives, and they reck nothing one of another. (*The Odyssey*, IX, vv. 105–15)[12]

Havelock translates *themistes* to "formularies," and *dikai* to "procedures":

[12] I am using the Loeb edition: Homer, *The Odyssey*, with an English translation by A. T. Murray. For each relevant expression there are added the Greek original and its Latin translation as found in Bergler 1791–1792, vol. 2. See also *The Odyssey*, IX, vv. 187–9; IX, vv. 213–5; VI, v. 120; VIII, vv. 572–6; IX, vv. 171–6; XIII, vv. 201–2.

> As in the *Iliad* [so also in the *Odyssey*], a distinction is implied between the precedents or formularies [*themistes*] on which oral memory must draw and their administrative application in a given procedure or an oral judgment […] of what the just [right] thing in a given case requires. (Havelock 1978, 180)

It is not clear what the relationship is between *themistes* and mores. The way I would put it, *themistes* provide, through their content, what is objectively right, namely, the content of mores (see Section 12.2.3). And it is through the procedures or oral judgments just referred to that the courts of the period administered and ascribed what is subjectively right (see Section 12.2.4).

> It is to be remarked that the epic voices an awareness that there is a connection between the existence of such procedures and the existence of human society as such—or more particularly, the agora society. The Cyclopes are not members of that kind of city-state. (Havelock 1978, 180)

12.2.3. Dikē *as What Is Objectively Right*

It will be recalled, to begin with, that on my characterisation of norms, what is objectively right is the content of norms at large: It consists of any type of action believed to be obligatory, permitted, or forbidden per se relative to a type of circumstance the type of action is conditionally connected to within a norm (Section 6.3).

In Homeric epic, what is objectively right is *dikē* (in the singular) understood as the set of the thousand proprieties found in the mores: in norms as shared beliefs that make up the skeleton of ordered social life (*eunomia*) in the early city-state. Havelock writes that *dikē*, in the singular, "comes close to indexing" a "rule of propriety," whereas *dikai*, in the plural, indicate the acts by which any violated proprieties are restored.

Dikai, in the plural, are what is subjectively right (cf. Section 12.2.4). They

> are, in fact, "proprieties" administered in given contexts [administered with reference to *actual* subjects among whom an *actual* controversy has arisen: Sections 1.3 and 12.2.4]. This kind of "justice" is simply the rule of conservation of existing mores, or the correction of a violation. It does not prescribe what in general the mores "ought" to be. (Havelock 1978, 181)

Havelock's understanding of *dikē* in the Homeric poems can lead to two lines of reflection—two lines which he is not bearing in mind, and which he may not be able to, either, because they fall outside his field of research.

Here is the first line of reflection.

In Havelock's *Greek Concept of Justice* we do not only find the distinction between the *dikai* as what is subjectively right (the *dikai*, in the plural, administered during trial; cf. Section 12.2.4) and *dikē* as what is objectively right (*dikē*, in the singular, as the content of norms or mores).[13] We also find the

[13] Of course we can only find this distinction if we are prepared to recognise it, since Havelock does not express it in these terms.

idea that *dikē* (in the singular) is what is objectively right *because* it is the content of norms: *Dikē* is the content of all norms, of all mores, simply as these exist in society. Indeed, Havelock observes that *dikē* does not prescribe what the mores ought generally to be, does not tell us what the content of mores (or norms) ought to be, does not fix these contents in advance, nor does it criticise (approve or disapprove) any of the contents of actual mores.

I made the same assumption in Section 1.3 of this volume, where I said that the content of norms is by definition what is objectively right, whatever such content may be. It is not the contents per se that are objectively right. Rather, what makes them such is the fact that they are the contents of a norm. Thus, for example, "You must *not* commit murder" and "You *must* commit murder" are equally what is objectively right if they are the contents of norms (cf. Section 4.2.1).

The statement that *dikē* does not prescribe what in general the mores *ought* to be is obvious from the standpoint taken in Sections 1.3 and 4.2.1: It cannot be otherwise if we translate *dikē* to "what is objectively right." Indeed, what is objectively right is the *content* of norms, and the problem of the content of norms may well be a problem of interpretation, but never one of justification. This last problem is the problem of the matrix of norms, of normativeness (the matrix of the reality that ought to be) as the ultimate source of what is right (Chapter 4). Only if *dikē* prescribed what in general the mores ought to be would it be possible to say that *dikē* is justice in one sense or another, as found in nature, for example, or in God, in the Gospel, or the Koran, or again in the emancipation of the proletariat, in the *Fürher Prinzip*, or in Rawls's *Theory of Justice* (Rawls 1999).[14]

In this case *dikē* would properly be the matrix of what is right; it would be the archetype by which to establish what is right.

There are at least two reasons why the *dikē* of the Homeric poems cannot be said to be justice: On the one hand, *dikē* is not a virtue (as are Plato's and Aristotle's *dikaiosunē* and Aquinas's *justitia*); on the other hand, *dikē* is not the matrix of the reality that ought to be, of normativeness (and hence of true norms).

The *dikē* of the Homeric poems is rather the content that socially believed norms happen to take. It is no more than what is right: In the common understanding of early preliterate Hellenic culture, *dikē* is not anything "greater," "higher," or "nobler" than what is straight, orthogonal, proper, or right,

[14] As we will see in Chapter 13, justice—at least in Aquinas—does not in reality prescribe. Prudential reason does prescribe (*epitaktikē esti*, as Aristotle says of *phronēsis*; cf. Aristotle, *The Nicomachean Ethics*, 1143a 2–3): It prescribes the means with which to achieve the ends apprehended and established by synderesis (and synderesis, too, belongs to practical reason). Justice, instead, is a moral virtue: Its subject matter is will, and it functions as the keeper of the effective and constant pursuit of what is right according to reason. On other conceptions, instead, the idea of justice connects with the idea justification, and of matrix.

whether "right" is understood as what is objectively right (as *dikē*, in the singular) or as what is subjectively right (as *dikai*, in the plural).

It is clear from what was said in Sections 12.1.1 and 12.1.2 that Havelock—despite his continued use of "justice" to translate *dikē*—wants to show, and does show, that *dikē* is not justice. This is so, he points out over and again, because Homeric epic is oral and not written, because it is not and cannot be philosophy, because the idea of justice as a principle is in point of fact absent in Homer and does not emerge in Greek culture until Plato (who, in expressing the idea of justice as a principle, uses not *dikē*, but *dikaiosunē*). So then, in conclusion, *dikē* must be some other thing: not justice, but what is objectively or subjectively right. And when it occurs in the form of the modifier *dikaios*, it is equivalent to the adjective "right": So *dikaios* is used in Homer to qualify as right a person or a thing.

Even the second line of reflection which Havelock's understanding of *dikē* (in the singular) in the Homeric poems can lead to is of great interest to us, and like the first line, it is something that Havelock touches on but does not develop. I will introduce it with his own words:

> This significance of the singular [*dikē*] offers a bridge to the understanding of a usage of *dikē* in the *Odyssey* which has often been needlessly severed from that of "justice" [yet Havelock, as has been noted, and wittingly or not, shows *dikē* to mean not "justice," but "what is objectively right"], almost as though we were dealing with two different words with perhaps common etymology but separate references. Seven examples of this usage can be pertinently reviewed. (Havelock 1978, 181)

Havelock is referring here to the problem arising in connection with the opinion of Rudolf Hirzel (1846–1917) and others (Havelock 1978, 353, endnote 2 of Chapter 10), and in particular with the opinion of Michael Gagarin (cf. Hirzel 1907; Gagarin 1973).[15] These authors claim that *dikē*, in seven passages of *The Odyssey*, means "characteristic," the passages in question being IV, vv. 690ff.; XI, vv. 217ff.; XIV, vv. 59ff.; XVIII, vv. 275ff.; XIX, vv. 36ff.; XIX, vv. 167ff., and XXIV, vv. 253ff.[16]

[15] The reader should see, by Gagarin, not only Gagarin 1973, but also Gagarin 1974.

[16] Following, for each of the seven passages, are the Greek original (Loeb edition, italics added to mark off the relevant Greek expressions) and Havelock's translation; in all seven, Havelock renders *dikē* as "justice":

(*i*) "Οὔτε τινὰ ῥέξας ἐξαίσιον οὔτε τι εἰπὼν / ἐν δήμῳ, *ἥ τ' ἐστὶ δίκη θείων βασιλήων·* / ἄλλον κ' ἐχθαίρῃσι βροτῶν, ἄλλον κε φιλοίη. / κεῖνος δ' οὔ ποτε πάμπαν ἀτάσθαλον ἄνδρα ἐώργει" (*The Odyssey*, IV, vv. 690–3): "Neither doing or saying to any man anything out of rule [*ex-aisimon*] / in the demos; the 'justice' of divine lords stands so [*esti*] / that one should hate this one of mortals and love that one—/ but he never once at all did any abominable thing [*atasthalon*] to a man" (ibid., as translated in Havelock 1978, 181; square brackets in original).

(*ii*) "Οὔ τί σε Περσεφόνεια Διὸς θυγάτηρ ἀπαφίσκει, / ἀλλ' *αὕτη δίκη ἐστὶ βροτῶν*, ὅτε τίς κε θάνῃσιν· / οὐ γὰρ ἔτι σάρκας τε καὶ ὀστέα ἶνες ἔχουσιν, / ἀλλὰ τὰ μέν τε πυρὸς

Havelock finds that, in these passages, "Homer's intention is not to give a series of definitions." And this much, I should say, is clear enough to everyone. "The various [seven] samples of *dikē* are not properties belonging to persons," Havelock adds. On this point, too, I agree.

Things become more interesting when Havelock puts forward his interpretation in the positive of the seven occurrences of *dikē* in question, all seven of which he translates to "justice," enclosing the word within quotation marks. Havelock finds that here *dikē* means

> standing procedures or behavior patterns which are accepted or expected. The reference is not to a characteristic, but to what one is supposed to do or feel or what is supposed to happen "in the case of lords, gods," and so forth; the genitive is one of reference, not of possession. *Dikē* indicates a code which is followed: Mortals lose their bodies at death, suitors ought to bring gifts, gods can throw magic light, old men should sleep soft. Such codes can be regarded either as "expected customs" (*nomoi*), or as "expected habits" (*ēthē*) [...], or as a combination of the two. It is significant that in most instances the code is stated by way of protest: It has been abrogated or challenged; it is being defended as the proper thing to expect. (Havelock 1978, 182)

κρατερὸν μένος αἰθομένοιο / δαμνᾷ, ἐπεί κε πρῶτα λίπῃ λεύκ' ὀστέα θυμός, / ψυχὴ δ' ἠύτ' ὄνειρος ἀποπταμένη πεπότηται" (*The Odyssey*, XI, vv. 217–22): "No, Persephone is not cheating you. / The 'justice' of mortals stands so / [*esti*]: they lose flesh and bones, which the fire consumes, and the / psyche takes wing and flies away" (ibid., as translated in Havelock 1978, 181; square brackets in original).

(*iii*) "Δόσις δ' ὀλίγη τε φίλη τε / γίγνεται ἡμετέρη· *ἡ γὰρ δμώων δίκη ἐστὶν* / αἰεὶ δειδιότων, ὅτ' ἐπικρατέωσιν ἄνακτες / οἱ νέοι"(*The Odyssey*, XIV, vv. 58–61): "Tiny and precious is the giving I can give; so stands [*esti*] the 'justice' / of servants who are continually afraid, when ruled by youthful masters" (ibid., as translated in Havelock 1978, 181; square brackets in original).

(*iv*) "Μνηστήρων *οὐχ ἥδε δίκη τὸ πάροιθε τέτυκτο·* / οἵ τ' ἀγαθήν τε γυναῖκα καὶ ἀφνειοῖο θύγατρα / μνηστεύειν ἐθέλωσι καὶ ἀλλήλοις ἐρίσωσιν, / αὐτοὶ τοί γ' ἀπάγουσι βόας καὶ ἴφια μῆλα, / κούρης δαῖτα φίλοισι, καὶ ἀγλαὰ δῶρα διδοῦσιν· / ἀλλ' οὐκ ἀλλότριον βίοτον νήποινον ἔδουσιν" (*The Odyssey*, XVIII, vv. 275–9): "This has not been the 'justice' of suitors as hitherto arranged, who want / to court a noblewoman in competition; it is they who bring the oxen / and sheep … and give gifts" (ibid., as translated in Havelock 1978, 181).

(*v*) "'[...] Ἦ μάλα τις θεὸς ἔνδον, οἳ οὐρανὸν εὐρὺν ἔχουσι.' / Τὸν δ' ἀπαμειβόμενος προσέφη πολύμητις Ὀδυσσεύς· / 'Σίγα καὶ κατὰ σὸν νόον ἴσχανε μηδ' ἐρέεινε· / *αὕτη τοι δίκη ἐστὶ θεῶν*, οἳ Ὄλυμπον ἔχουσιν […]'" (*The Odyssey*, XIX, vv. 40–3): "There must be a god inside—those who hold high heaven! / Hush! (replies his father) control your wits and do not ask questions; / this that you see is the present [*esti*] 'justice' of the gods who hold / Olympus" (ibid., as translated in Havelock 1978, 182; square brackets in original).

(*vi*) "Ἦ μέν μ' ἀχέεσσί γε δώσεις / πλείοσιν ἢ ἔχομαι· ἡ γὰρ *δίκη, ὁππότε πάτρης* / *ἧς ἀπέῃσιν ἀνὴρ* τόσσον χρόνον ὅσσον ἐγὼ νῦν" (*The Odyssey*, XIX, vv. 167–9): "You will endow me with sorrows even greater than possess me; (so is) / the 'justice' whenever from his native land a man has been severed a long / time as I (have) now" (ibid., as translated in Havelock 1978, 182).

(*vii*) "Βασιλῆϊ γὰρ ἀνδρὶ ἔοικας. / τοιούτῳ δὲ ἔοικας, ἐπεὶ λούσαιτο φάγοι τε, / εὑδέμεναι μαλακῶς· *ἡ γὰρ δίκη ἐστὶ γερόντων*" (*The Odyssey*, XXIV, vv. 253–5): "You have the likeness of a lordly man, / yet, a likeness to such a one as would bathe and eat / and sleep soft; for the 'justice' of the aged so stands [*esti*]" (ibid., as translated in Havelock 1978, 182; square brackets in original).

Again Havelock goes right on target, in my opinion. But again he is overcautious: Why is it that here, too, he translates *dikē* with "justice," quotation marks notwithstanding? Havelock, it must be noted, translates *The Odyssey* IV, vv. 690ff., not only in Chapter 10 (page 181) of his *Greek Concept of Justice*—where he translates to "justice" all seven of the occurrences of *dikē*—but also in Chapter 9 of the same book, on page 152, where *dikē* (as found in *The Odyssey*, IV, vv. 690ff.) is instead rendered as "the right."[17]

Havelock proceeds in Chapter 10 by writing:

> All this amounts to saying that it is "right" or "just" for gods or mortals or suitors or exiles to do so and so [...]. Homeric *dikē* remains faithful to that sense of social propriety which surrounds its legal usages. It symbolizes what one has a "right" to expect, what it is "just" to expect, of given persons in given situations. (Havelock 1978, 182–3)[18]

No, Mr. Havelock. That is not so. The two terms, "right" and "just," as you yourself maintain and demonstrate, are *not* equivalent: In the excerpt just quoted, you are caught between "justice" and "what is right," and struggle with both—with "justice," from which you cannot unfetter yourself, and with "what is right," which you cannot appropriate.

The solution actually seems simple to me, and ready at hand: Even in the seven excerpts from *The Odyssey* where the occurrence of *dikē* gives rise to the above-mentioned interpretive debate, *dikē* is the content of a norm: It is what is objectively right, meaning by this expression a type of action conditionally connected with a type of circumstance specified in the same norm, a norm properly to be understood as a socially shared normative belief. Havelock either knows this but does not state it outright (as in Chapter 10, on pages 181–2, where he translates *The Odyssey*, IV, vv. 691, and renders *dikē* as "justice") or he does not know it but states it absentmindedly (as in Chapter 9, on page 152, where he translates the same line in the same way with the

[17] Havelock's rendition of *dikē* on page 181 (italics added): "Neither doing or saying to any man anything out of rule [...] / in the demos; *the 'justice'* [*dikē*] of divine lords stands so [...] / that one should hate this one of mortals and love that one—/ but he [Odysseus] never once at all did any abominable thing [*atasthalon*] to a man" (*The Odyssey*, IV, vv. 690ff., as translated in Havelock 1978, 181; square brackets in original on fifth occurrence). Havelock's rendition of *dikē* on page 152 (italics added): "Neither doing nor saying to any man anything out of rule / in the demos, which is *the right* [*dikē*] of divine lords [...] to do—/ that one should hate this one of mortals and love that one—/ but as for him he [Odysseus] never once at all did any abominable thing [...] to a man" (*The Odyssey*, IV, vv. 690ff., as translated in Havelock 1978, 152).

[18] "The expectation, in order to be 'just' [right], must fit with the kind [type] of behavior that pragmatic common sense would view as normal in specific cases [types of circumstance], and therefore as *normative*, in the sense that the crazy-quilt variety of behavior patterns adds up to a total for the society which is socially cohesive and 'works.' It is not the index of a general rule of justice governing all human relations uniformly. This is shown quite strikingly in the first example, where the 'justice' [what is objectively right] that belongs to autocrats is contrasted with the evenhanded methods of Odysseus" (Havelock 1978, 183; italics added).

single exception of the crucial little word *dikē*, which on this occasion he renders as "the right").

Marked out in italics in what follows are the types of circumstance that *dikē* (what is objectively right) is referred to in the seven *Odyssey* passages in question: (*i*) *The Odyssey*, IV, v. 691, "what is objectively right *for divine lords* ["hē t' esti dikē *theiōn basilēōn*"]"; (*ii*) *The Odyssey*, XI, v. 218, "what is objectively right *for mortals* ["all' hautē dikē esti *brotōn*"]"; (*iii*) *The Odyssey*, XIV, v. 59, "what is objectively right *for servants* ["hē gar" *dmōōn* "dikē estin"]"; (*iv*) *The Odyssey*, XVIII, v. 275, "this has not been what is objectively right as hitherto arranged *for suitors* ["*Mnēstērōn* oukh hēde dikē to paroithe tetukto"]"; (*v*) *The Odyssey*, XIX, v. 43, "what is objectively right *for gods who hold Olympus* ["hautē ... dikē esti *theōn, hoi Olumpon ekhousin*"]"; (*vi*) *The Odyssey*, XIX, vv. 168–9, "what is objectively right *for a man who has been severed a long time from his native land* ["hē gar dikē, *oppote patrēs / hēs apeēisin anēr*"]"; (*vii*) *The Odyssey*, XXIV, v. 255, "what is objectively right *for aged persons* ["hē gar dikē esti *gerontōn*"]."

Of course neither Homer nor Havelock was thinking exactly in terms of "what is objectively right." But—I maintain—this was the sense in which the one used *dikē* and the other interpreted *dikē* in the seven excerpts from *The Odyssey* just listed, as happens in the other passages of Homeric epic where *dikē* occurs.

12.2.4. Dikai *as What Is Subjectively Right and Its Management, That Is,* Dikē *as the Restoration of What Is Right*

I find it fitting to convey the sense of *dikai*—in the plural, and as used in Homeric epic—with the expression "what is subjectively right": *Dikai* are the rights and obligations of actual subjects under the Hellenic mores described in Homer.[19]

In the society of the early city-state, the assembly (*agora*) did not legislate; it judged what is *subjectively right* (what is right in the concrete case) anytime a dispute or feud would break out, as happened between Achilles and Agamemnon. So, in this society, the *basileus* had among his prerogatives (as leader and lord) the all-important prerogative of being a manager-of-rights in his city (even if he is not necessarily the only manager-of-rights). Such was, for example, Odysseus in his Ithaca before setting off to fight in the war against Troy.

In Volume 6 of this Treatise, Section 1.1, Michael Gagarin and Paul Woodruff introduce us to law and legal procedure in early Greece and show

[19] Apropos of *dikai* Havelock writes, "These 'justices' administered in the plural by kings (archaistically) or by magistrates (realistically) are processes not principles, solving specifics, not applying general laws; they express themselves in negotiated settlement of rival claims. They operate to restore proprieties in human relationships. They are, in fact, 'proprieties' administered in given contexts" (Havelock 1978, 180–1). On the ancient Greek conceptions of rights, see, in Volume 6 of this Treatise, Miller, Section 4.8.

us that *dikē* is the term typically used, especially in the pre-philosophical period, to designate the legal procedure, process, and judgement represented, among other places, in Homer's epic and in Hesiod's works. Gagarin and Woodruff, on one side, and Havelock, on the other side, agree on this point.[20]

Havelock is of interest to us here because he gives us, in *The Greek Concept of Justice*, an ample and commented illustration of the way the public trials of the poleis would restore what is subjectively right whenever this thing (what is subjectively right) would become an object of dispute or would be disrupted.

In every society, literate or preliterate, the behaviour of individuals

> will interrupt and disrupt the web of custom and precedent by the self-motivated arrogance of personal decision or desire, anger or ambition, or even mere eccentricity. From time to time, the general rules will be broken: And very often their correct application in given cases will be doubtful, because of uncertainty created by competing claims. The nomos and ethos continually recalled and illustrated in Homeric narrative and rhetoric are *normative*. They state and restate the proprieties of behavior as these are assumed and followed. But the oral medium, in order to fulfill its complete function as the verbalized guide of the culture, will also be required to describe situations and frame statements which are *corrective* rather than merely *normative*, which, describing how the mores are abrogated, therewith describe also the means and manner whereby they are *restored*. The master symbol of this corrective process, which is also a procedure, is the Homeric *dikē* and its plural *dikai*. (Havelock 1978, 123–4; italics added on first, second, third, and fourth occurrence; in original on fifth and sixth occurrence)

Dikē also appears in *The Iliad* in the sense of redress, or restoration of what is subjectively right, when that has been disrupted, or at least has become an object of dispute. *Dikē* in this sense of the term is managed in public trials—sometimes making little headway, other times turning out in a full success—and it is on these last occasions that what is subjectively right gets effectively restored. The *dikaspoloi* were the managers-of-rights. (Havelock 1978 says "managers-of-justices" with *almost* perfect consistency: He allows at least one "managers-of-rights" to slip in, on page 99.) They would hold the sceptre during an assembly (*agora*) where a trial was held, and they protected the *themistes* under Zeus.[21]

[20] In Volume 6 of this Treatise, Section 1.1, there is to be found, in Gagarin and Woodruff's translation, the trial scene portrayed on Achilles' great shield (*The Iliad*, XVIII, vv. 497–508; the translation is also found in Gagarin and Woodruff 1995). See Eva Cantarella's analysis of this scene, and of various related problems, in Cantarella 2002a; cf. Gagarin 1986, 26ff.

[21] In Havelock's translation, they conserved the formularies in memory: "Now just as surely the sons of the Achaeans / carry and handle it [the sceptre], the managers-of-justices [...] [*dikaspoloi*: the managers-of-rights, in my translation] who also the / formularies [*themistes*] / under Zeus do conserve" (*The Iliad*, I, vv. 237–9 as translated in Havelock 1978, 129). For a comparative view, see the same passage (*The Iliad*, I, vv. 237–9) in the Loeb English version, in the Greek original, and in Bergler's Latin translation, with the original Greek terms (from the Loeb edition) and Bergler's Latin terms set off in italics: "Now the sons of the Achaeans that give judgement bear it in their hands, even they that guard the dooms by ordinance of Zeus." The Greek original: "Νῦν αὖτέ μιν υἷες Ἀχαιῶν / ἐν παλάμῃς φορέουσι *δικασπόλοι*, οἵ τε

The managers-of-rights work as professionals, but sometimes

> the litigant himself could act, for knowledge of oral formularies was to some extent general. So Achilles speaks and acts here [in the *Iliad* passage quoted in footnote 21 in this chapter], as Menelaus later does, in his own cause. The *skēptron*, a wooden club, serves less as a permanent badge of rank (except in Mycenaean memory) than as a signal that whoever is holding it commands the audience. (Havelock 1978, 351, endnote 6 of Chapter 7)

The feud between Achilles and Agamemnon is resolved in book 19 of *The Iliad* with *dikē* getting fully restored. This restoration is so expressed in the words of Odysseus, in the English and Latin translation provided by A. T. Murray and Bergler respectively:

> Thou mayest have nothing lacking of *thy due* [*dikēs*]. Son of Atreus, towards others also shalt thou be *more righteous* [*dikaioteros*] hereafter for in no wise is it blame for a king to make amends to another, if so be he wax wroth without a cause. (*The Iliad*, XIX, vv. 180–3; italics added)

> [Ut] ne *quid juris* [*dikēs*] mutilum habeas. / Atride, tu vero deinde *aequior* [*dikaioteros*] et in alium / eris. Haudquaquam enim indigne ferendum, regem / virum placare quando prior injuriam fecerit. (Bergler 1791–1792, vol.1, XIX, vv. 180–3; italics added)

Note how the Latin translator renders *dikēs* with *juris* and *dikaioteros* with *aequior*. Even *jus* takes “what is right” as its core meaning (cf. Chapter 13).

As was observed earlier, Havelock proceeds with near-perfect consistency in translating *dikē* and its derivatives with “justice” and its derivatives, and that never without quotations marks. We can also see this consistency in the just-quoted passage, where he translates not only *dikēs* to “of justice” but also *dikaioteros* to “more just,” also wrapped in quotation marks.[22]

Quotation marks—when they occur in uses other than those prescribed by some convention, as when quoting authors or defining the meaning of a term—are a symptom of a problem left unresolved. They are the defence put

θέμιστας / πρὸς Διὸς εἰρύαται· ὁ δέ τοι μέγας ἔσσεται ὅρκος”. “Nunc id [sceptre] Achivi / in manibus portant *judices*, quique *jura* / a Jove tuentur” (Bergler 1791–1792, vol. 1; italics added). Havelock makes the following observations with regard the *Iliad* passage just quoted: “The text incorporates two different nouns, *dikai* and *themistes*; [...] the text uses two different verbs meaning ‘manage’ (the root in *dikaspolos*) and ‘protect’ (*eiruatai*); [...] both *dikai* and *themistes* are pluralized; they symbolize some specifics of action or speech, not an abstraction; [...] *pros dios* does not mean ‘of Zeus’ but ‘under (the authority of) Zeus’; the *themistes* are not Zeus’s personal property, or even his creation, though he keeps an eye on them, or, more correctly, on their proper protection by the *dikaspoloi*” (Havelock 1978, 351, endnote 6 of Chapter 7).

[22] “You [Achilles] will not be left holding anything that falls short of ‘justice,’ [*dikēs*] / and you [Agamemnon] thereafter ‘more just’ [*dikaioteros*] on any other / ground as well / shall stand […], since it is no matter of reproach / that a *basileus* should appease a man in a case where one has been the first / to make trouble” (*The Iliad*, XIX, vv. 180–3, as translated in Havelock 1978, 132; square brackets added on second and fifth occurrence, in original on all other occurrences).

up by the problem's bearer, a bearer who is awkwardly aware of the problem, in that the solution, though not yet found, is felt to be near at hand. And Havelock is indeed awkwardly aware:

To speak of the "justice" of the *Odyssey* is perhaps allowable if the word is placed in quotation marks. There is no concept of justice in Greek epic, in our sense of that word. (Havelock 1978, 192)

It is fair to observe, at any rate, that these symptoms and defences are often accompanied with the genius of those they come from, and Havelock is no exception in this regard.

Lastly, even the verb *dikazein* means, in its turn, "to state the right." It is Havelock (1978, 352, endnote 12 of Chapter 7) who makes this annotation, when he refers us to H. J. Wolff (1946) and J. H. Kells (1960) (cf. Havelock 1978, 42–5).[23] In this endnote Havelock seems to welcome Wolff's translation of *dikazein* as "to state the right," even if in the running text, on page 134, he translates *dikasō* (*The Iliad*, XXIII, v. 579) as "I will do the justicing," taking care, however, to provide the original Greek term *dikasō*. For a comparative assessment, developed further in footnote 24 below, here is the Greek expression from *The Iliad* (XXIII, v. 579), followed by A. T. Murray's English translation and Bergler's Latin translation: "ei d' ag' egōn autos *dikasō*"; "Nay, but I will myself *declare the right*"; "Eja age ego ipse *dijudicabo.*"[24]

[23] Havelock's (1978, 373) reference to Wolff's work is rather infelicitous: He cites Wolff 1946 as "Judicial *Legislation* among the Greeks" instead of "The Origin of Judicial *Litigation* among the Greeks" (both italics added). So, too, he lists an incomplete title. Cf. Kells 1960.

[24] Havelock, in his translation of *The Iliad* XXIII, vv. 573ff., has Menelaus speak thus: "Lords and leaders of the Achaeans, [...] apply justice [*dikassate*] to this [...]. [...] No, I will do the justicing [*dikasō*] myself, without, I think, any risk of criticism; the justice [*dikē*] will be straight" (*The Iliad* XXIII, vv. 573ff., as translated in Havelock 1978, 134; square brackets in original on fifth and sixth occurrence). Following are the Greek original, the English translation by A. T. Murray, and the Latin translation by Bergler. The terms whose rendition is discussed are set in italics for emphasis: "᾿Αλλ᾿ ἄγετ᾿, ᾿Αργείων ἡγήτορες ἠδὲ μέδοντες, / ἐς μέσον ἀμφοτέροισι *δικάσσατε*, μηδ᾿ ἐπ᾿ ἀρωγῇ, / μή ποτέ τις εἴπῃσιν ᾿Αχαιῶν χαλκοχιτώνων· / ‘᾿Αντίλοχον ψεύδεσσι βιησάμενος Μενέλαος / οἴχεται ἵππον ἄγων, ὅτι οἱ πολὺ χείρονες ἦσαν / ἵπποι, αὐτὸς δὲ κρείσσων ἀρετῇ τε βίῃ τε.’ / εἰ δ᾿ ἄγ᾿ ἐγὼν αὐτὸς *δικάσω*, καί μ᾿ οὔ τινά φημι / ἄλλον ἐπιπλήξειν Δαναῶν· ἰθεῖα γὰρ ἔσται" (*The Iliad*, XXIII, vv. 573–80). "Come now, ye leaders and rulers of the Argives, *judge* ye aright betwixt us twain, neither have regard unto either, lest in aftertime some one of the brazen-coated Achaeans shall say: 'Over Antilochus did Menelaus prevail by lies, and depart with the mare, for that his horses were worser far, but himself the mightier in worth and in power.' Nay, but I will myself *declare the right*, and I deem that none other of the Danaans shall reproach me, for my judgment shall be just" (ibid.). "Sed agite Argivorum ductores et principes, / in medium utrisque *dijudicate*, neque in gratiam: / ne quando quis dicat Achivorum aere loricatorum, / Antilochum mendaciis opprimens Menelaus / ivit equam ducens; nam ei longe deteriores erant / equi, ipse vero melior armisque vique. / Eja age ego ipse *dijudicabo*, et me nullum puto / alium increpaturum Danaorum: rectum enim erit *judicium*" (Bergler 1791–1792, vol. 1; italics added on first and second occurrence).

12.2.5. "Right" and "Wrong" as Adjectives Used to Qualify Things and People

I already considered *huper moron* or *huper aisan* behaviours in Section 11.3.3. These behaviours are beyond measure—immoderate, in the etymological sense of this term, from Latin *modus* ("measure," "size," "limit," "manner," "harmony," "melody"): *Est modus in rebus* ("There is a measure in all things" Horace, *Satires*, I, 1, 106). They are unright, and in this sense wrong, behaviours.

Behaviours that are right, within bounds, correct (even politically correct) are *kata moiran* or *kata aisan* behaviours. And people who in Homeric epic are correct, or right, are *dikaioi*: They conform to proprieties, to the contents of norms, to what is objectively right.

For example: "Pisistratus hands a wine cup to the elder of the two visitors (Athene in disguise). Athene is gratified: Pisistratus "is a 'just [*dikaios*] man,' that is, he does the *right thing*" (Havelock 1978, 156; italics added); "So he spake, and placed in her hand the cup of sweet wine. But Pallas Athene rejoiced at the man's wisdom and judgment ["khaire d' Athēnaiē pepnumenōi andri *dikaiōi*"; "delectata est autem Minerva prudenti viro et *justo*"], in that to her first he gave the golden cup."[25]

People and behaviours that are incorrect, unright, wrong are said to be *exaisioi* and *kakoi*, *hubrizoi*: They overstep the bounds of propriety; they are exaggerated, eccentric, outlandish (*hubrizoi* is exemplified by Penelope's suitors, who with great villainy crowded her house to have her choose one of them as her new husband).

> The characters grouped round the house of Odysseus (aside from traitors), consisting of wife, son, and servants, political supporters, and finally Odysseus himself, are consistently represented or represent themselves as protesting against *wrongs* which are inflicted upon them. Their opponents, the suitors, with equal consistency are represented as the inflicters of *wrong*, not just as enemies. (Havelock 1978, 150–1; italics added)

Several moral formulas in Homeric epic contain the word *dikaios*: "right," in my translation (mostly "just" in that of Havelock, who observes that *dikaios* occurs in these formulas as "an epithet applicable to certain kinds of human beings").[26] In this regard, too, Havelock uses terms (here italicised for emphasis) that are welcome for the way they evoke the role of beliefs and the cultural nature of normativeness:

> Two epithets [are] constantly employed in both epics to indicate moral disapproval. They are *schetlios* [as transliterated by Havelock] and *atasthalos* [...]. They denote persons or actions which exceed the bounds of what is allowable. But what precisely is the allowable if it is not what

[25] English translation by A. T. Murray. Homer, *The Odyssey*, III, vv. 51–4; enclosed within square brackets are the Greek original and Bergler's Latin translation (Bergler 1791–1792, vol. 2), with italics added to mark off relevant terms.

[26] "The adjective may seem commonplace enough, but it is in the *Odyssey* that it seems to come into its own. Occurrences in the *Iliad* are rare" (Havelock 1978, 179).

is *deemed* seemly or appropriate, this being determined by the regular and recurrent patterns of behavior in the *culture*, whatever these may happen to be? (Havelock 1978, 183; italics added)

Havelock suggests that the above-mentioned moral formulas give place to an echo pattern in which the adjective *dikaios* may or may not occur, and even when it does not, its presence can still be felt implicitly. And he identifies eight ways in which the above-mentioned moral formulas permeate Homer's epic.

The first of these ways in which the echo pattern shows up is with the adjective *dikaios* not appearing: For example, in *The Odyssey*, I, v. 368, Homer "merely identifies" Penelope's "suitors pejoratively as committing *hubris*, [...], 'outrage' being only one possible rendering, though perhaps the least unsatisfactory" (Havelock 1978, 185, 190–1).

The second way in which this echo pattern shows up is with Homer introducing explicitly the adjective *dikaios* (ibid., 185, 187, 191). See, for example, *The Odyssey*, III, v. 133, where Nestor says that Zeus planned a painful return for the Argives, for they had shown themselves to be neither intelligent nor *dikaioi*.

In the third way, Homer "more significantly connects the commission of outrage with deliberate intention, giving it a psychological dimension," and the adjective *dikaios* does not appear, either, as it does not in the first way (ibid., 185, 188, 189, 191). See, for example, *The Odyssey*, XX, vv. 169–71, where Odysseus, in the guise of a beggar, turns to Eumaeus expressing the wish that the Gods avenge the abominable outrage which the suitors have had in another's house, showing no due portion of respect.

In the fourth way, Homer brings the outrageous and the *dikaios* together "in a formal antithesis, the 'outrageous' man being equated with the 'savage'" (ibid., 186, 191): Such is the case with the Cyclopes as previously considered in Section 12.2.2. Cf., for example, *The Odyssey*, IX, vv. 174–6.

In the fifth way, Homer "returns to purely pejorative idioms, linking *hubris* with *bia*, outrage with violence or physical aggression." Even here, as in the first and third way, *dikaios* does not appear (Havelock 1978, 187, 188, 191). See, for example, *The Odyssey*, XVII, vv. 561–73, where Odysseus, in the guise of a beggar, turns to Eumaeus saying that he will soon disclose all the truth to Penelope. But now is not the moment: Prudence requires waiting until nightfall, because the suitors' outrage and violence is too strong now.

In the sixth way, "*hubris* is retained as the negative term, but it is interesting that *dikē* will not do as the positive one. A metrical means for using it could have been devised if required. Instead, the term 'orderliness' (*eunomia*) is substituted" (ibid., 187, 191). Thus, in *The Odyssey*, XVII, vv. 483–7, one of the suitors turns to Antinous and says he should not have struck the beggar (Odysseus), for there may be concealed in him a divinity, who has come down to earth to witness the behaviour of men, their outrage and orderliness (*eunomia*).[27]

[27] Strangely enough, on page 187 Havelock translates *eunomia* as "lawfulness," whereas on

In the seventh way, Homer opposes the "right thing" (*to dikaion*) to violence, as each is embodied in speech (see Havelock 1978, 188, 189, 191; cf., for example, *The Odyssey*, XX, vv. 322–3): Havelock, without belying himself, renders *dikaios* as "just," and I—putting the lie to *him*, with his own arguments—render it as "right."

In the eighth way, Homer simply has Penelope oppose "the suitable and right thing" (*to kalon kai to dikaion*) to maltreatment of guests: Havelock, without belying himself, renders *dikaios* as "just," and I—putting the lie to *him*, with his own arguments—render it as "right" (Havelock 1978, 188, 189, 191; cf., for example, *The Odyssey*, XXI, vv. 312–3).

page 191 he keenly and convincingly suggests the translation "orderliness." "Lawfulness" is a standard translation but it is inappropriate because it merely suggests adherence to a rule: Indeed, there can be lawfulness under ill-framed laws. "Orderliness," in contrast, appropriately suggests things being in good order, and hence good laws.

Chapter 13

WHAT IS RIGHT, WHAT IS JUST, *RATIO* AS TYPE: *SANCTUS THOMA DOCET*

13.1. *Jus* in the History of the Idea of What Is Right

Like the terms *derecho*, *diritto*, *droit*, and *Recht* (as considered in Sections 1.2 and 1.3),[1] the Latin term *jus* means both "what is right" and "law," so even with regard to *jus*, when it comes to providing an English translation of it, we face an alternative between "what is right" and "law," or an ambiguity when *jus* carries both of these meanings. The meaning of *jus* in the Latin excerpt considered in Sections 4.1 and 4.3.3 is "what is right": We considered how Cicero, Spinoza, and others understand the matrix of normativeness (the matrix of the reality that ought to be), and hence the ultimate source of what is right by positive law.

According to Émile Benveniste, *jus* comes from Indo-European *yous*, meaning "the state of regularity or normality required by ritual rules" (Benveniste 1969, 113), and it expresses

> the Indo-European notion of conformity with a rule—of a requirement to be met—in order that an object (a thing or a person) be accepted, fulfil its office, and have all the effects pertaining to the latter. (Benveniste 1969, 119; my translation)[2]

Moreover, *jus*—like *derecho*, *diritto*, *droit*, and *Recht*—means "what is right" in the two senses introduced in Section 1.2: the sense "what is objectively right" (as happens in *jus naturale*, *jus civile*, and *jus gentium*) and the sense "what is subjectively right" (as happens in *jus libertatis*, *jus civitatis*, *jus sententiae dicendae*, and *jus retinendi*).[3]

[1] The ancient Greek term *dikē*, as it occurs in Homeric epic, was considered in Section 12.2, where we saw how in different contexts, and depending on inflection, it can take the meaning "what is objectively right" (*dikē*, in the singular) or "what is subjectively right" (*dikai*, in the plural).

[2] The French original: "La notion indo-européenne de conformité à une règle, de conditions à remplir pour que l'objet (chose ou personne) soit agréé, qu'il remplisse son office et qu'il ait toute son efficace" (Benveniste 1969, 119). On the concept of *jus* in Aquinas, see, in Volume 6 of this Treatise, Lisska, Section 12.8. Moreover, on the ancient Roman conceptions of rights, see, in Volume 6 of this Treatise, Miller, Section 6.6. On conceptions of rights in medieval canon law, see, in Volume 6 of this Treatise, Reid, Section 10.5.

[3] Michel Villey (1953–1954, 170ff.—Michel Villey, 1914–1988) argues perspicuously that in Roman law *jus* signified what is right with reference to the subjects, whether they were duty-holders or right-holders. Cf. Villey 1946–1947. See also the different positions of Giovanni Pugliese (1914–1995) in Pugliese 1953.

Over the centuries, authoritative translations of terms that are crucial in legal philosophy and general jurisprudence, as is the case with the Latin *jus* and the Greek *dikē*, have become firmly lodged in the major European languages, and yet these translations are unfortunately sometimes misleading not only with regard to the distinction between "law" and "what is right" (Sections 1.2 and 1.3 and Chapter 14) but also with regard to the distinction between "what is right" and "justice" (such is the case, in particular, with *dikē* in the Homeric poems, as we saw in Chapter 12).[4]

To be sure, "right" and "just" are often used interchangeably, each to signify the other. Even so, the two concepts must be kept separate, and it will be necessary to decide, by looking at the context, the sense in which the two words are used. Of course they may find a use so ambiguous that it becomes impossible to give them a specific meaning, even taking context into account. At any rate, now is the time to settle the question, at least for the purposes of this volume, of the distinction between "what is right" and "justice." I will do that in this chapter, making special reference to Aquinas and to his way of characterising *jus* and *justitia*.

There are of course many reasons for choosing Aquinas, one of them being his role as a liaison between Aristotelian and Christian thought: In the 13th century Aquinas represents a crucial anchor point in the continuity of the renewed development and vigour of Western philosophy. The circumscribed ambit of this volume—on law and the right—gives me a specific and additional reason for choosing Aquinas. Essentially, I will be referring to him even in treating the relationship among "type," "norm," and "what is right" (*ratio*, *lex* and *jus*: cf. Sections 4.1 and 4.2.1). There is in Aquinas an interweaving of *ratio*, *lex*, *jus*, and *justitia*. Multiple strands are plied together in this interweaving, but its chief ones are three: (*a*) reason (*ratio*: synderesis and prudence), which makes right what is right (see Sections 13.2, 13.7, and 13.8); (*b*) normativeness (*virtus obligandi*, the virtue of being binding: the binding power or force proper to *leges*, or norms; see Sections 13.4 through 13.7); and (*c*) virtuous action (*actus virtuosus*), meaning action that is voluntary, stable, and firm (*voluntarius, stabilis et firmus*; see Sections 13.3 through 13.6).[5]

[4] The deontological idea of rightness (of the right, what is right) is different from the axiological, teleologically oriented idea of justice (of the just, what is just). Indeed, it makes sense to say of a behaviour that it is right (correct) but not just (fair), and vice versa. The idea that if something is a norm it will be binding per se (duty for its own sake: Kant) determines the deontological idea of what is right, but not the axiological, teleologically oriented idea of what is just. Finnis (1980, 298) writes that "we must set aside as spurious the categorizations of a textbook tradition which divides all moral thought between 'deontological ethics of obligation' and 'teleological ethics of happiness or value.'" Finnis's invitation is pertinent if intended to say that in Aquinas the two aspects, the teleological and the deontological, interweave.

[5] It will be a good idea to note down right now two of the senses that *virtus* takes in Aquinas: we have (*a*) a broad sense, under which *virtus* means "characteristic that comes

13.2. Three Senses of *Quod Est Rectum*, or What Is Right. *Jus* as What Is Right (*Quod Est Rectum*) toward Others

We can construct out of the *Summa Theologiae* a distinction among three senses of *quod est rectum*, or "what is right." (The third of these senses is expressed by Aquinas with the Latin *jus*.) Let us look at them in turn.

(*i*) "Whatever can be rectified by reason [or made right by reason] is the matter of moral virtue, for this is defined in reference to right reason [*omnia quaecumque rectificari possunt per rationem, sunt materia virtutis moralis, quae definitur per rationem rectam*]" (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 8).[6]

Here, what is right (*quod est rectum*) is determined solely by reason (*ratio*): Reason makes right. All that can be made right by reason (*ratio*) is the subject matter (*materia*) of the moral virtues, and what is right (*quod est rectum*) is the objective (*objectum*) of the moral virtues. Still, no moral virtue is taken into account in determining this first, larger sense of "what is right" (*quod est rectum*): Only reason (*ratio*) enters into this determination.

We should want to make a note already of the distinction between "subject matter" (*materia* or *subjectum*) and "objective" (*objectum*). I will return to it in Sections 13.3 and 13.7.

(*ii*) The second sense of "what is right" (*quod est rectum* as made such by *ratio*) comes into play when making reference to one or another of the moral virtues and to its subject matter. It is irrelevant here which virtue we are making reference to: It might be the virtue of temperance, whose subject matter is desire, or the virtue of fortitude, whose subject matter is anger, or again the virtue of justice, whose subject matter is the will of the acting person in regard to his or her actions and insofar as these actions affect other people.

This second sense of "what is right" (*quod est rectum*) is narrower than the previous but is still a broad sense: Its narrow, and proper, sense is that specified under the following point (*iii*).

(*iii*) This third sense of "what is right" (*quod est rectum* as made such by *ratio*)—its strict sense—comes into play when making specific reference to the moral virtue of justice (*justitia*), whose subject matter is the *will* of the acting

through in a causal power" (thus, for example, the sun has the *virtus* of heating the bodies it sheds light on, and here *virtus* is a causal power); and then we have (*b*) a narrow sense (we might call it a technical sense), under which *virtus* means "attitude" (*habitus* in Latin, *hexis* in Greek), as is the case with the moral virtues, such as fortitude, temperance, and justice.

[6] Aquinas himself refers to Aristotle's *Nicomachean Ethics*, and to this passage in particular: "Virtue [*aretē*] then is a settled disposition of the mind [an attitude: *hexis*] determining the choice of actions and emotions, consisting essentially in the observance of the mean relative to us [*mesotēti ousa tēi pros hēmas*], this being determined by principle [reason: *logōi*], that is, as the prudent man [*phronimos*] would determine it" (Aristotle, *The Nicomachean Ethics*, 1106b–1107a). The Greek original: "Ἔστιν ἄρα ἡ ἀρετὴ ἕξις προαιρετική, ἐν μεσότητι οὖσα τῇ πρὸς ἡμᾶς, ὡρισμένῃ λόγῳ καὶ ὡς ἂν ὁ φρόνιμος ὁρίσειεν."

person in regard to his or her actions and insofar as these actions *affect other people*.

This strict sense of "what is right" (*quod est rectum*) is specifically expressed by the term *jus* (Sections 13.3 and 13.7).

What is right (*quod est rectum*) is invariably made right by reason (by *ratio*): Nothing is made right if not by reason. But where moral virtues other than justice are concerned, it is made right with respect to the acting person only. Instead, where the moral virtue of justice is concerned, it is made right (by reason: by *ratio*) with respect as well, and indeed in the first instance, to such other people as find themselves affected by the acting person's action.

Aquinas says it in this way:

> The other virtues [the virtues other than justice] perfect man in those matters only which befit him in relation to himself. Accordingly that which is right [what is right: *quod est rectum*] in the works of the other virtues, and to which the intention of the virtue tends as to its proper object [objective: *objectum*], depends on its relation to the agent only. (Aquinas, *Summa Theologiae* (b), 2.2, q. 57, a. 1)[7]

> Man's dealings with himself are sufficiently rectified [made right] by the rectification of the passions by the other moral virtues [the moral virtues other than justice]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 2)[8]

> The other moral virtues [the virtues other than justice] are chiefly concerned with the passions, the regulation of which [their rectification: *rectificatio*] is gauged entirely by a comparison with the very man who is the subject of those passions, in so far as his anger and desire are vested with their various due circumstances. Hence the mean in such like virtues is measured not by the proportion of one thing to another, but merely by comparison with the virtuous man himself, so that with them the mean is only that which is fixed by reason [*secundum rationem*] in our regard [*quoad nos*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 10)[9]

But where justice is concerned, says Aquinas, man's

> dealings with others need a *special* rectification [*rectificatio*], not only in relation to the agent, but also in relation to the person to whom they are directed [*ad quem sunt*]. Hence about such

[7] The Latin original: "Aliae autem virtutes perficiunt hominem solum in his, quae ei conveniunt secundum seipsum; sic ergo illud, *quod est rectum* in operibus aliarum virtutum, ad quod tendit intentio virtutis quasi in proprium objectum, non accipitur nisi per comparationem ad agentem" (Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 1; italics added).

[8] The Latin original: "Actiones quae sunt hominis ad seipsum, sufficienter rectificantur, rectificatis passionibus, per alias virtutes morales" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 2).

[9] The Latin original: "Aliae virtutes morales [virtues other than justice] principaliter consistunt circa passiones; quarum rectificatio non attenditur nisi secundum comparationem ad ipsum hominem, cujus sunt passiones; secundum scilicet quod irascitur, et concupiscit, prout debet, secundum diversas circumstantias; et ideo medium talium virtutum non accipitur secundum proportionem unius rei ad alteram, sed solum secundum comparationem ad ipsum virtuosum: et propter hoc in ipsis est medium solum secundum rationem quoad nos" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 10; cf. a. 8).

dealings there is a *special* virtue, and this is justice [*justitia*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 2; italics added)[10]

Now the reason [*ratio*] can rectify not only the internal passions of the soul, but also external actions, and also those external things of which man can make use. And yet it is in respect of external actions and external things by means of which men can communicate with one another, that the relation [the ordainment: *ordinatio*] of one man to another is to be considered; [...] since justice [*justitia*] is directed [ordained:[11] *ordinetur*] to others, it is not about the entire matter of moral virtue, but only about external actions and things, under a certain special aspect of the object [according to a special type of objective: *secundum quamdam rationem objecti specialem*], in so far as one man is related [*coordinatur*] to another through them. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 8)[12]

In this excerpt, and in truth in other excerpts as well, the Fathers of the English Dominican Province have translated the Latin *ratio* to "aspect." But in this case, and in others similar to it, "aspect" is ill-suited, and *ratio* is better translated as "type," "schema," "concept." It is important for us in this volume to detect this sense of *ratio* in Aquinas's *Summa Theologiae* because, as we will see, this sense corresponds to a great extent to the sense attributed to types in Section 2.1. This point I will come back to in Sections 13.7 and 13.8.[13]

13.3. *Jus* as the Objective of Justice: *Justitia Est Rectitudo Causaliter Tantum*

Justice, unlike any of the other virtues, ordains us in those matters that affect others; it entails a sort of *equality*, and, as the name suggests, it makes one

[10] The Latin original: "Sed actiones, quae sunt ad alterum, indigent speciali rectificatione, non solum per comparationem ad agentem, sed etiam per comparationem ad eum, ad quem sunt: et ideo circa eas est specialis virtus, quae est justitia" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 2).

[11] In the pages that follow, *ordinare*, *ordinari*, and *ordinatio*, as these words occur in *Summa Theologiae* (a), I will translate as "ordain," "be ordained," and "ordainment" respectively. This may be something of a stretch, but it helps to convey the idea of preordination or foreordination (taking into account as well the preordaining that God effects with the *lex aeterna*).

[12] The Latin original: "Possunt autem per rationem rectificari et interiores animae passiones, et exteriores actiones, et res exteriores, quae in usum hominis veniunt: sed tamen per exteriores actiones, et per exteriores res, quibus sibi invicem homines communicare possunt, attenditur ordinatio unius hominis ad alterum [...]; [...] cum justitia ordinetur ad alterum, non est circa totam materiam virtutis moralis, sed solum circa exteriores actiones, et res, secundum quamdam rationem objecti specialem; prout scilicet secundum eas unus homo alteri coordinatur" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 8).

[13] The reader should also refer in this regard to Volume 6 of this Treatise, Lisska, Chapter 12, esp. Sections 12.3 and 12.4. Here Lisska shows clearly how the theory of Platonic archetypes or forms, as received in the Middle Ages by way of Plotinus (A.D. 204/205–270) and Augustine, bears importantly on Aquinas's conception of *lex aeterna*, and consequently on his conception of *lex naturalis*. Lisska speaks of a theory of natural kinds in Aquinas. I prefer to speak of types, this on account of the role that in this volume I have assigned to "type" and to the concept I want this term to express.

thing adequate (*justari*) to another. What is right in acts of justice is what is right in regard to others before being so in regard to the acting subject (it is *justum*, *quod respondet secundum aliquam aequalitatem alteri*).

It is proper to justice, as compared with the other virtues, to direct man in his relations with others [to ordain man in those things that affect others: *ut ordinet hominem in his, quae sunt ad alterum*]: because it denotes a kind of equality, as its very name implies; indeed we are wont to say that things are adjusted [*justari*] when they are made equal [or adjusted: *adaequantur*], for equality is in reference of one thing to some other. [...] the right [*rectum*] in a work of justice [*justitiae*], besides its relation to the agent, is set up by its relation to others [*per comparationem ad alium*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 57, a. 1)[14]

Something is said to be just insofar as it partakes of the rectitude of justice. The objective of justice is to attain *justum*, or, which Aquinas says amounts to the same thing, to attain *jus*. And this objective, *jus*, consists in what is right with respect to others.

A thing is said to be just [*justum*], as having the rectitude of justice [*rectitudinem justitiae*], when it is the term [*ad quod terminatur*] of an act of justice [...]. [...] justice has its own special proper object [objective: *objectum*] over and above the other virtues, and this object [objective: *objectum*] is called the just [*justum*], which is the same as *right* [*jus*, the strict sense of "what is right"]. Hence it is evident that right [*jus*, the strict sense of "what is right"] is the object [objective: *objectum*] of justice [*justitiae*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 57, a. 1)[15]

The word *jus* ["right," the strict sense of "what is right"] [...] was first of all used to denote the just thing itself [*ipsam rem justam*], but afterwards it was transferred to designate the art whereby it is known what is just [*quid sit justum*], and further to denote the place where justice is administered [*in quo jus redditur*, where *jus* expresses the strict sense of "what is right"], thus a man is said to appear *in jure*, and yet further, we say even that a man, who has the office of exercising justice [*justitiam facere*], administers the *jus* [*jus redditur*] even if his sentence be unjust [*iniquum*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 57, a. 1)[16]

The just man, Aquinas remarks, quoting Isidore of Seville (ca. 560–636), is said to be just because he keeps custody of *jus*, of what is right toward others: *Justus dicitur, quia jus custodit*.

[14] The Latin original: "Justitiae proprium est inter alias virtutes, ut ordinet hominem in his, quae sunt ad alterum: importat enim aequalitatem quamdam, ut ipsum nomen demonstrat, dicuntur enim vulgariter ea quae adaequantur *justari*, aequalitas autem ad alterum est: [...] rectum vero, quod est in opere justitiae, etiam praeter comparationem ad agentem, constituitur per comparationem ad alium" (Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 1).

[15] The Latin original: "Justum dicitur aliquid, quasi habens rectitudinem justitiae, ad quod terminatur actio justitiae, [...] specialiter justitiae prae aliis virtutibus determinatur [...], secundum se objectum, quod vocatur *justum*: et hoc quidem est jus; unde manifestum est, quod jus est objectum justitiae" (Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 1).

[16] The Latin original: "hoc nomen *jus* primo impositum est ad significandum ipsam rem justam: postmodum autem est derivatum ad artem, qua cognoscitur quid sit justum: et ulterius ad significandum locum, in quo jus redditur; sicut dicitur aliquis *comparere in jure*: et ulterius dicitur etiam, quod jus redditur ab eo, ad cujus officium pertinet justitiam facere, licet etiam id, quod decernit, sit iniquum" (Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 1).

The act of justice in relation to its proper matter and object [its proper subject matter and *objectum*, or "objective"] is indicated in the words, *Rendering to each one his right* [*jus suum unicuique tribuens*], since, as Isidore says (*Etym.* x), *a man is said to be just because he respects the rights* [...] *of others* [where "rights" is *jus*, in the singular]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 1)[17]

The just man keeps custody of *jus*, of what is right toward others, for the moral virtue of justice endows him with a virtuous will (*voluntas*), a will that is conscious, stable, and firm (*sciens*, *stabilis*, and *firmus*; cf. Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1).[18] Indeed "*justice is a habit* [an attitude: *habitus*; *hexis* in Aristotle] *whereby a man renders to each one his due* [what is *subjectively* right: *jus suum*] *by a constant and perpetual will*" (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 1).[19]

Note how in the foregoing passages, *jus* has quite appropriately and consistently been translated by the Fathers of the English Dominican Province as "right."

In Article 4 of the same Quaestio 58 of Pars 2.2 of *Summa Theologiae* (b), Aquinas specifies as follows the relationship between the virtues and their subject matter, on the one hand, and the subject matter specific to justice, on the other.

The subject of a virtue [its subject matter: *subjectum*] is the power [*potentia*] whose act that virtue aims at [is ordained to: *ordinatur*] rectifying [*rectificandum*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 4)[20]

Note the use of the verb *ordinari*—the passive voice of the Latin verb *ordinare*—expressing the concept of something being so ordained as to achieve a certain end or objective, or so arranged as to bring out that result (cf. Section 13.2, footnote 11). The subject matter of a virtue is that power (*potentia*) whose act the same virtue is ordained (*ordinatur*) to rectify, or make

[17] The Latin original: "Actus justitiae per comparationem ad propriam materiam [subject matter], et objectum [objective] tangitur, cum dicitur: *Jus suum unicuique tribuens*: quia, ut Isidorus dicit in lib. 10. Etym. (*ad lit. I*): *Justus dicitur, quia jus custodit*" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1).

[18] "In order that an act bearing upon any matter whatever be virtuous, it requires to be voluntary [*voluntarius*], stable [*stabilis*], and firm [*firmus*], because the Philosopher says (*Ethic.* ii. 4) that in order for an act to be virtuous it needs first of all to be done *knowingly* [*sciens*], secondly to be done *by choice*, and *for a due end* [*eligens et propter debitum finem*], thirdly to be done *immovably* [*immobiliter*]" (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 1). The Latin original: "Quod aliquis actus circa quamcumque materiam sit virtuosus, requiritur quod sit voluntarius, et quod sit stabilis et firmus; quia Philos. dicit in 2. Ethic. (*cap. 4.*), quod ad virtutis actum requiritur, primo quidem quod *operetur sciens*: secundo autem quod *eligens, et propter debitum finem*: tertio quod *immobiliter operetur*" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1).

[19] The Latin original: "justitia est habitus, secundum quem aliquis constanti, et perpetua voluntate jus suum unicuique tribuit" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1).

[20] The Latin original: "Illa potentia est subjectum virtutis, ad cujus potentiae actum rectificandum virtus ordinatur" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 4).

right. The objective to which every moral virtue gets ordained is that thing which is right (what is right: *quod est rectum*) for the act of that virtue's subject matter. Since the subject matter of justice is the will behind those actions by which the agent affects other people, the objective to which justice is ordained is what is right in those actions that affect other people. The *subject matter* of justice is the will behind the agent's action, this to the extent that this action affects other people. Hence, the *objective* to which justice is ordained is the rightness (in the sense of "what is right") of an agent's acts of will to the extent that this agent's actions affect other people.

Aquinas circumscribes to the practical sphere—to action—the subject matter (*subjectum*) of justice as against the theoretical sphere: Justice is a *moral* virtue.

Justice does not aim at directing [is not ordained to direct: *non ordinatur ad dirigendum*] an act of the cognitive power [*actum cognoscitivum*], for we are not said to be just [*justi*] through knowing something aright [*recte*]. Hence the subject of justice [its subject matter: *subjectum*] is not the intellect or reason which is a cognitive power [*intellectus, vel ratio, quae est potentia cognoscitiva*]. But since we are said to be just [*justi*] through doing something aright [*aliquid recte agimus*], and because the proximate principle of action is the appetitive power [appetitive force: *vis appetitiva*], justice must needs be in some appetitive power [appetitive force: *vis appetitiva*] as its subject [subject matter: *subjecto*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 4)[21]

The appetitive force (*vis appetitiva*) which is the subject matter of justice is the will. In the words of Aquinas:

The appetite is twofold; namely, the will which is in the reason [*voluntas, quae est in ratione*], and the sensitive appetite which follows on sensitive apprehension [*appetitus sensitivus consequens apprehensionem sensus*], and is divided into the irascible and the concupiscible [...]. Again the act of rendering his due [*quod suum est*] to each man cannot proceed from the sensitive appetite, because sensitive apprehension does not go so far as to be able to consider the relation [*proportionem*] of one thing to another; but this is proper to the reason [*proprium rationis*]. Therefore justice cannot be in the irascible or concupiscible as its subject [its subject matter: *subjecto*], but only in the will [*solum in voluntate*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 4)[22]

[21] The Latin original: "Justitia autem non ordinatur ad dirigendum aliquem actum cognoscitivum: non enim dicimur justi ex hoc quod recte aliquid cognoscimus; et ideo subjectum justitiae non est intellectus, vel ratio, quae est potentia cognoscitiva: sed quia justi in hoc dicimur quod aliquid recte agimus, proximum autem principium actus est vis appetitiva, necesse est quod justitia sit in aliqua vi appetitiva sicut in subjecto" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 4).

[22] The Latin original: "Est autem *duplex* appetitus; scilicet *voluntas*, quae est in ratione; et *appetitus* sensitivus consequens apprehensionem sensus, qui dividitur per irascibilem, et concupiscibilem, ut habitum est in part. 1. *(q. 81. art. 2.)*: reddere autem unicuique quod suum est, non potest procedere ex appetitu sensitivo: quia apprehensio sensitiva non se extendit ad hoc, quod considerare possit proportionem unius ad alterum; sed hoc est proprium rationis; unde justitia non potest esse sicut in subjecto in irascibili, vel concupiscibili, sed solum in voluntate" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 4).

In conclusion, says Aquinas, "justice is rectitude, though not by essence, but only as a cause, in that justice is an attitude according to which somebody acts and wills rightly" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1; my translation. The Latin original, emphasis added: *Neque etiam justitia est* essentialiter *rectitudo, sed* causaliter *tantum, est enim habitus, secundum quem aliquis recte operatur, et vult.*).[23]

The conception of justice as *virtus ad alterum* is closely bound up with the peculiar rational nature of will:

> The will is borne towards its object [objective: *objectum*] consequently on the apprehension of reason [*rationis*]: wherefore, since the reason directs one thing in relation to another [reason ordains one thing to another: *ratio ordinat in alterum*], the will can will one thing in relation to another [the will can will one thing as ordained to another: *voluntas potest velle aliquid in ordine ad alterum*], and this belongs to justice. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 4)[24]

What is right (*jus*) is the objective of the virtue of justice, yet justice does not make right what is right; it does not determine *jus*—rather, it causes people to pursue it.

13.4. The Justice of Human-Posited Norms (*Justitia Legalis*) Presupposes the Constant and Perpetual Just Will of the Ruler Who Has the Community in His Care

A norm, as I describe norms in Section 1.3 (where I reconstruct the civil-law tradition of legal dogmatics), contains a type, or rule, and makes this type right by qualifying it as obligatory, permitted, or forbidden. In Aquinas's words, a rule (*regula*)—in my words, a type specifying what is right—becomes the content of a *lex* (of a norm) when a *lex* subsists in the sense of meeting the requirements stated in the definition of *lex* found in *Summa Theologiae* (a), 1.2, q. 90, aa. 1 and 4: "Lex quaedam regula est, et mensura actuum, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur: dicitur enim lex a ligando, quia obligat ad agendum": "A norm is a kind of rule, and a measure for acts by which one is induced to act or is held back from acting: Indeed *lex* [norm] is so called from *ligare* [to bind], because it obligates one to act" (Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 1; my translation).[25]

[23] In the translation of the Fathers of the English Dominican Province: "Justice is the same as rectitude, not essentially but causally; for it is a habit [an attitude: *habitus*] which rectifies the deed and the will" (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 1).

[24] The Latin original: "Voluntas fertur in suum objectum consequenter ad apprehensionem rationis; et ideo quia ratio ordinat in alterum, voluntas potest velle aliquid in ordine ad alterum: quod pertinet ad justitiam" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 4).

[25] This is the English translation by the Fathers of the English Dominican Province: "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for *lex* [in my translation, "the norm"] [...] is derived from *ligare* (to bind), because it binds one to act" (Aquinas, *Summa Theologiae* (b), 1.2, q. 90, a.1).

In Aquinas's words again, *lex* is "quaedam rationis ordinatio ad bonum commune, ab eo, qui curam communitatis habet, promulgata": A norm is "an ordainment which reason makes to achieve the common good, and which is promulgated by him who governs the community" (Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 4; my translation).[26]

And here is Aquinas's general definition of *lex*, in which there occur all the essential elements of *lex*, including its promulgation (*promulgatio ipsa necessaria est ad hoc, quod lex habeat suam virtutem*: the *virtus obligandi*):

A norm [*lex*] is imposed on others in the manner of a rule and a measure [*per modum regulae, et mensurae*]. Rules and measures are imposed by application: They are applied to those things that need to be ruled and measured. Therefore, if a norm [*lex*] is to obtain a binding power [*virtus obligandi*]—which power is proper to norms [*proprium legis*]—it will have to be applied to those people who are to be ruled according to it [*qui secundum eam regulari debent*]. Such application is effected as follows: The norm is promulgated and thereby made known to those people to whom it is to apply, so that promulgation is itself necessary if a norm is to have its power [*quod lex habeat suam virtutem*]. So from the four points previously mentioned we can gather a definition of norm [*legis*]: A norm is nothing other than an ordainment of reason [*rationis ordinatio*; cf. the Greek *taxis*] promulgated by him who has the community in his care. (Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 4; my translation)[27]

At the same time, as we have seen, Aquinas presents his definition of justice by drawing on Aristotle:

The definition of justice mentions first the *will*, in order to show that the act of justice must be voluntary; and mention is made afterwards of its *constancy* and *perpetuity* in order to indicate the firmness of the act. [...] *justice is a habit* [an attitude: *habitus*; *hexis* in Aristotle] *whereby a man renders to each one his due* [what is *subjectively* right: *jus suum*] *by a constant and perpetual*

[26] This is the English translation by the Fathers of the English Dominican Province: "An ordinance of reason for the common good, made by him who has care of the community, and promulgated" (Aquinas, *Summa Theologiae* (b), 1.2, q. 90, a. 4).

[27] The Latin original: "Lex imponitur aliis per modum regulae, et mensurae: regula autem, et mensura imponitur per hoc, quod applicatur his quae regulantur, et mensurantur; unde ad hoc quod lex virtutem obligandi obtineat, quod est proprium legis, oportet quod applicetur hominibus, qui secundum eam regulari debent: talis autem applicatio fit per hoc, quod in notitiam eorum deducitur ex ipsa promulgatione; unde promulgatio ipsa necessaria est ad hoc, quod lex habeat suam virtutem. Et sic ex quatuor praedictis potest colligi definitio legis: quae nihil est aliud, quam quaedam rationis ordinatio ad bonum commune, ab eo, qui curam communitatis habet, promulgata" (Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 4). On every occurrence in this passage, *virtus* takes the meaning "causal power" as specified under point (*a*) in footnote 5 of this chapter. This is the English translation by the Fathers of the English Dominican Province, a translation I feel is off course at a few crucial points: "A law is imposed on others by way of a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force. Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for [*ad*] the common good, made by him who has care of the community, and promulgated" (Aquinas, *Summa Theologiae* (b), 1.2, q. 90, a. 4).

will: and this is about the same definition as that given by the Philosopher (*Ethic*. v. 5) who says that *justice is a habit* [an attitude: *habitus*; *hexis* in Aristotle] *whereby a man is said to be capable of doing just actions* [the right thing: *tōn dikaiōn* in Greek] *in accordance with his choice*. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 1)[28]

Aquinas specifies that *perpetua* can take two meanings as a modifier of *voluntas*:

The will may be called perpetual in two ways. First on the part of the will's act which endures for ever, and thus [in this first way] God's will alone is perpetual. Secondly on the part of the subject [on the part of the objective of the will: *ex parte objecti*], because, to wit, a man wills to do a certain thing always [and so the objective remains unchanged], and this is a necessary condition of justice [and this is required for the type "justice": *et hoc requiritur ad rationem justitiae*]. For it does not satisfy the conditions of justice [the type "justice": *rationem justitiae*] that one wish to observe justice in some particular matter for the time being, because one could scarcely find a man willing to act unjustly in every case; and it is requisite that one should have the will to observe justice at all times and in all cases. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 1)[29]

The definition of justice as a constant and perpetual will (perpetual in the second sense just specified) applies as well to the ruler: to the person who has the community in his care. Justice presides over norms in the sense that it presides over the will of those who have the power to create norms (*leges*). The ruler of a community will promulgate just norms (*leges*) on the twofold condition of possessing the right reason and the virtuous will: On the one hand, where reason is concerned, the ruler must have at hand the rules dictated by legislative prudence (by *legispositiva*, *nomothetikē*, norm-positing prudence: cf. Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 1); on the other hand, where the will is concerned, the ruler must be possessed of justice, that is, of a conscious, stable, and firm will that will sustain him consistently in promulgation,[30] and hence in transforming the rules dictated by prudence into binding norms, into *leges* having *legis virtus*, or *virtus obligandi* (cf. Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 4; see also footnote 5 in Section 13.1 and footnote 27 in this section).

[28] The Latin original: "In definitione justitiae primo ponitur *voluntas*, ad ostendendum quod actus justitiae debet esse voluntarius: additur autem de constantia et perpetuitate ad designandam actus firmitatem; [...] *justitia est habitus, secundum quem aliquis constanti, et perpetua voluntate jus suum unicuique tribuit*: et quasi est eadem definitio cum ea, quam Philos. ponit in 5. Ethic. *(cap. 5.)* dicens 'quod justitia est habitus, secundum quem aliquis dicitur operativus secundum electionem justi'" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1; italics added on second occurrence).

[29] As I have indicated in my square brackets, the English translation fails to capture, here too, the sense of Aquinas's words, and in particular his sense of *ratio* as "type." The Latin original: "Voluntas potest dici perpetua *dupliciter*: *uno modo* ex parte ipsius actus, qui perpetuo durat: et sic solius Dei voluntas est perpetua: *alio modo* ex parte objecti, quia scilicet aliquis vult perpetuo facere aliquid, et hoc requiritur ad rationem justitiae; non enim sufficit ad rationem justitiae, quod aliquis velit ad horam in aliquo negotio servare justitiam, quia vix invenitur aliquis, qui velit in omnibus injuste agere: sed requiritur, quod homo habeat voluntatem perpetuo, et in omnibus justitiam conservandi" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1).

[30] A will that will sustain him perpetually in the second sense of "perpetual" as specified a moment ago in the words of Aquinas: *Summa Theologiae* (a), 2.2, q. 58, a. 1.

These *leges* will not be *leges*, but rather *legum corruptio*—they will not be norms but the forgery of norms—if they should come to be at variance with *lex naturalis*, that is, with their matrix in the sense specified in Chapter 4 (and Section 4.1 in particular).

In Pars 1.2, q. 96, a. 4, Aquinas explains the ways a *lex* can be unjust:

Laws [norms: *leges*] may be unjust in two ways: first, by being contrary to human good [...]—either in respect of the end, as when an authority imposes on his subjects burdensome laws [norms: *leges*], conducive, not to the common good, but rather to his own cupidity or vainglory;—or in respect of the author, as when a man makes a law [a norm: *legem*] that goes beyond the power committed to him;—or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws [norms: *leges*]; because, as Augustine says (*De Lib. Arb.* i. 5), *a law* [a norm: *lex*] *that is not just, seems to be no law* [norm] *at all.* Wherefore such laws [norms: *leges*] do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right [*juri suo*], according to Matth. v. 40, 41: *If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him other two.*

Secondly, laws [norms: *leges*] may be unjust through being opposed to the Divine good: such are the laws [the norms: *leges*] of tyrants inducing to idolatry, or to anything else contrary to the Divine law [the Divine norm: *legem*]: and laws [norms: *leges*] of this kind must nowise be observed, because, as stated in Acts v. 29, *we ought to obey God rather than man.* (Aquinas, *Summa Theologiae* (b), 1.2, q. 96, a. 4)[31]

13.5. In What Sense Is the Justice of Human-Posited Norms (*Justitia Legalis*) General

Note how in Pars 2.2, Quaestio 57, Articulus 2, and also in Pars 1.2, q. 95, a. 2, Aquinas discusses the justice of norms (*leges*) rather than the justice of individual human behaviours proper. This is important because the justice we are here interested in is the justice of *leges*, of legal norms, of the law insofar as it belongs to the reality that ought to be.

Following are the conditions satisfying which the human will can make *jus* ("what is right toward others"), and make *jus positivum* in particular ("what is

[31] The Latin original: "Injustae autem sunt leges *dupliciter*. *Uno modo* per contrarietatem ad bonum humanum [...]: vel ex *fine*, sicut cum aliquis praesidens leges imponit onerosas subditis, non pertinentes ad utilitatem communem, sed magis ad propriam cupiditatem, vel gloriam: vel etiam ex auctore sicut cum aliquis legem fert ultra sibi commissam potestatem: vel etiam ex *forma*, puta cum inaequaliter onera multitudini dispensantur, etiamsi ordinentur ad bonum commune. Et hujusmodi magis sunt violentiae, quam leges: quia, sicut August. dicit in lib. 1. de Lib. Arb. *(cap.5. parum a princ.)*, lex esse non videtur, quae justa non fuerit; unde tales leges non obligant in foro conscientiae, nisi forte propter vitandum scandalum, vel turbationem: propter quod etiam homo juri suo debet cedere secundum illud Matth. 5.: *Qui angariaverit te mille passus, vade cum eo alia duo: et qui abstulerit tibi tunicam, da ei et pallium. Alio modo* leges possunt esse injustae per contrarietatem ad bonum divinum: sicut leges tyrannorum inducentes ad idololatriam, vel ad quodcumque aliud, quod sit contra legem divinam: et tales leges nullo modo licet observare: quia, sicut dicitur Act. 4., *obedire oportet Deo magis quam hominibus*" (Aquinas, *Summa Theologiae* (a), 1.2, q. 96, a. 4).

right by position"). What guarantees the rightness of *jus positivum* is its compatibility with *jus naturale*; what guarantees its justice is the moral virtue of justice as applied to norms, i.e., the justice of human-posited norms (*justitia legalis*), which takes as its subject matter (*subjectum*) the will of the ruler, or lawgiver.

The human will can, by common agreement, make a thing to be just provided it be not, of itself, contrary to natural justice [*voluntas humana ex communi condicto potest aliquid facere justum in his, quae secundum se non habent aliquam repugnantiam ad naturalem justitiam*], and it is in such matters that positive right [what is right by position: *jus positivum*] has its place. Hence the Philosopher says (*Ethic.* v. 7) that *in the case of the legal just* [in Greek, *nomikon politikon dikaion*], *it does not matter in the first instance whether it takes one form or another, it only matters when once it is laid down*. If, however, a thing is, of itself, contrary to natural right, the human will cannot make it just [*si aliquid de se repugnantiam habeat ad jus naturale, non potest voluntate humana fieri justum*], for instance by decreeing that it is lawful [*liceat*] to steal or to commit adultery. Hence it is written (Isa. x. 1): *Woe to them that make wicked laws* [*leges iniquas*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 57, a. 2)[32]

Aquinas is not discussing here the justice or injustice of individual behaviours (*actiones* or *opera*: see footnotes 10 and 12 of this chapter); he is rather discussing the justice or injustice of human-posited norms (*leges*), of what has been set down (*statuatur*) or posited (*ponitur*) by those who have the community in their care.

Justice [*justitia*], as stated above (A. 2) directs man [ordains man: *ordinat*] in his relations with other men [*hominem in comparatione ad alium*]. Now this may happen in two ways: *first* as regards his relation with individuals [*ad alium singulariter consideratum*], *secondly* as regards his relations with others in general [*ad alium in communi*], in so far as a man who serves a community, serves all those who [*omnibus hominibus*] are included in that community. Accordingly justice in its proper acceptation [according to its type: *secundum propriam rationem*] can be directed [*se potest habere*] to another in both these senses. Now it is evident that all who are included in a community, stand in relation [*comparantur*] to that community as parts to a whole; while a part, as such, belongs to a whole [it is a part of the whole: *totius es*], so that whatever is the good of a part can be directed to the good of the whole [*quodlibet bonum partis est ordinabile* (can be ordained) *in bonum totius*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 5; italics added)[33]

[32] The Latin original: "Voluntas humana ex communi condicto potest aliquid facere justum in his, quae secundum se non habent aliquam repugnantiam ad naturalem justitiam: et in his habet locum *jus positivum*; unde Philos. dicit in 5. Ethic. *(cap. 7.)* quod 'legale [in Greek, *nomikon*] justum est, quod ex principio quidem nihil differt sic, vel aliter: quando autem ponitur differt': sed si aliquid de se repugnantiam habeat ad jus naturale, non potest voluntate humana fieri justum; puta si statuatur, quod liceat furari, vel adulterium committere; unde dicitur Isa. 10.: *Vae qui condunt leges iniquas*" (Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 2).

[33] On the English translation of *ratio* in this passage, see footnote 29 in this chapter. The Latin original: "Justitia, sicut dictum est [...], ordinat hominem in comparatione ad alium. Quod quidem potest esse *dupliciter*: *uno modo* ad alium singulariter consideratum: *alio modo* ad alium in communi; secundum scilicet quod ille qui servit alicui communitati, servit omnibus hominibus, qui sub communitate illa continentur: ad utrumque ergo se potest habere justitia secundum propriam rationem: manifestum est autem, quod omnes, qui sub communitate aliqua continentur, comparantur ad communitatem, sicut partes ad totum: pars autem id quod est, totius est; unde et quodlibet bonum partis est ordinabile in bonum totius" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 5).

From this point of view,

the good of any virtue, whether such virtue directs man [ordains man: *ordinantis*] in relation to himself [as in the case of temperance and fortitude], or in relation to certain other individual persons [as in the case of justice among individuals], is referable to the common good, to which justice directs [*ad quod ordinat justitia*]: so that all acts of virtue [the actions of all the virtues: *actus omnium virtutum*] can pertain to justice, in so far as it directs man [ordains man: *ordinat*] to the common good. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 5)[34]

On account of this all-inclusiveness, the justice of norms (*justitia legalis*) is called a general virtue (*virtus generalis*). Indeed,

since it belongs to the law [to the norm: *ad legem*] to direct to the common good [*ordinare in bonum commune*] [...], it follows that the justice which is in this way styled general, is called *legal justice* [the justice of norms: *justitia legalis*], because thereby man is in harmony with the law which directs [with the norm which ordains: *legi ordinanti*] the acts of all the virtues to the common good. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 5)[35]

And in regard to the all-inclusiveness of the justice of norms (*justitia legalis*), Aquinas distinguishes two ways in which the term "general" (*generalis*) can be made to apply to something. The first of these ways is by predication (*per praedicationem*).

Thus *animal* is general in relation to man and horse and the like: and in this sense that which is general must needs be essentially [*essentialiter*] the same as the things in relation to which it is general, for the reason that the genus belongs to the essence of the species [*quia genus pertinet ad* (pertains to) *essentiam speciei*], and forms part of [*cadit in*] its definition. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[36]

The second way in which the term "general" can be made to apply to something is *secundum virtutem*,[37] in the same way as a general cause (compare *causaliter tantum*: Sections 13.3 and 13.7) is general with respect to all its effects, as is

[34] The Latin original: "Secundum hoc ergo bonum cujuslibet virtutis, sive ordinantis aliquem hominem ad seipsum, sive ordinantis ipsum ad aliquas alias personas singulares, est referibile ad bonum commune, ad quod ordinat justitia; et secundum hoc actus omnium virtutum possunt ad justitiam pertinere, secundum quod ordinat hominem ad bonum commune" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 5).

[35] The Latin original: "Et quantum ad hoc justitiae dicitur virtus generalis; et quia ad legem pertinet ordinare in bonum commune, ut supra habitum est […]; inde est, quod talis justitia praedicto modo generalis dicitur *justitia legalis*; quia scilicet per eam homo concordat legi ordinanti actus omnium virtutum in bonum commune" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 5).

[36] The Latin original: "Sicut *animal* est generale ad hominem, et equum, et ad alia hujusmodi: et hoc modo *generale* oportet quod sit idem essentialiter cum his, ad quae est generale; quia genus pertinet ad essentiam speciei, et cadit in definitione ejus" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6).

[37] Here, *virtus* takes the meaning "causal power" as specified under point (*a*) in footnote 5. See also footnotes 27 and 58 of this chapter.

the sun, for instance, in relation to all bodies that are illumined, or transmuted by its power [*per virtutem ipsius*]; and in this sense there is no need for that which is *general* to be essentially the same [*idem in essentia*] as those things in relation to which it is general, since cause and effect are not essentially the same [*non est eadem essentia*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[38]

Now, it is in this last sense—as a causal power—that the justice of norms (*justitia legalis*) is said to be a general virtue (*virtus generalis*). The justice of norms ordains

the acts of the other virtues to its own end, and this is to move all the other virtues by its command [*quod est movere per imperium omnes alias virtutes*]; for just as charity may be called a general virtue in so far as it directs [*ordinat*] the acts of all the virtues to the Divine good, so too is legal justice [the justice of norms: *justitia legalis*], in so far as it directs [*ordinat*] the acts of all the virtues to the common good. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[39]

Justice, like charity, is a special virtue (special in the etymological sense of its being a *species*): It is so *essentialiter*, meaning in what concerns its essence. But in what concerns the production (or causation) of its own effects (here, just effects), justice is a general virtue. It is so not in the sense of its being a *genus*, but rather as a general cause (*causaliter*, *secundum virtutem*). Indeed, justice produces effects ordained to the common good, and produces them even on the actions of all the other virtues, which are *essentialiter* different from justice.

Accordingly, just as charity which regards the Divine good [*bonum divinum*] as its proper object [objective: *objectum*], is a special virtue [*specialis virtus*, with *specialis* understood in the sense of this word's derivation from *species*] in respect of its essence [*secundum suam essentiam*], so too legal justice [the justice of norms: *justitia legalis*] is a special virtue [*specialis virtus*, with *specialis* understood in the sense of its derivation from *species*] in respect of its essence [*secundum suam essentiam*], in so far as it regards the common good as its proper object [objective: *objectum*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[40]

Of course, the justice of norms (*justitia legalis*) is general principally in the ruler (in the prince: *princeps*). It is general not in the sense of its being a ge-

[38] The Latin original: "Ut sol ad omnia corpora, quae illuminantur, vel immutantur per virtutem ipsius: et hoc modo *generale* non oportet quod sit idem in essentia cum his, ad quae est generale; quia non est eadem essentia causae, et effectus" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6).

[39] The Latin original: "Justitia legalis [...] ordinat actus aliarum virtutum ad suum finem, quod est movere per imperium omnes alias virtutes: sicut enim charitas potest dici virtus generalis, inquantum ordinat actus omnium virtutum ad bonum divinum: ita etiam justitia legalis, inquantum ordinat actus omnium virtutum ad bonum commune" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6).

[40] The Latin original: "sicut ergo charitas, quae respicit bonum divinum ut proprium objectum [objective], est quaedam specialis virtus secundum suam essentiam: ita etiam justitia legalis est quaedam specialis virtus secundum suam essentiam, secundum quod respicit commune bonum, ut proprium objectum [objective]" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6).

nus, but because its effects invest as well, in the sense specified a moment ago, the actions of all the other virtues. In the ruler, justice is general in its being almost architectonic (*quasi architectonice*). In the people who are subject to the ruler, instead, the justice of norms (*justitia legalis*) is general in a secondary way, that is, in an administrative way, as it were (*quasi administrative*).

And thus it [the justice of norms] is in the sovereign [ruler or prince: *princeps*] principally and by way of a master-craft, while it is secondarily and administratively in his subjects. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[41]

Aquinas further generalises and relativises:

However the name of legal justice [the justice of norms: *justitia legalis*] can be given to every virtue, in so far as every virtue is directed to the common good [it is ordained to the common good: *ordinatur*] by the aforesaid legal justice [the justice of norms: *justitia legalis*], which though special essentially [*in essentia*] is nevertheless virtually general [general to the extent that it is understood as a causal power: *generalis autem secundum virtutem*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[42]

Aquinas can now draw the following conclusion:

Speaking in this way, legal justice [the justice of norms: *justitia legalis*] is essentially the same [*idem in essentia*] as all virtue [*cum omni virtute*], but differs therefrom logically [but as a type is different from it: *differt autem ratione*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[43]

This Aquinas's conclusion may seem sphinxlike. Maybe we can straighten it out, and remove the ambiguity, by noting how in the same place Aquinas writes that *genus pertinet ad essentiam speciei* (the genus pertains to the essence of the species). Let us consider these points: (*a*) *ratio* also takes in *Summa Theologiae* the meaning "type," or "species" (Sections 13.7, and 13.8); (*b*) the genus pertains to the essence of all its species; and (*c*) the different special virtues are part of the genus "virtue" in what concerns their *generic* essence as virtues; but (*d*) the special virtues are distinguished from one another by their *ratio*, i.e., by their *specific* types (they are special virtues, or virtues of different species, or types). If we take points (*a*) through (*d*) into account, we will be able to clarify Aquinas's passage as follows: The essence of the justice of norms (of *justitia legalis*) will be the same as that of all the other virtues to the extent that "essence" is referred to the genus common to all these virtues;

[41] The Latin original: "et sic est in principe principaliter, et quasi architectonice; in subditis autem secundario, et quasi administrative" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6).

[42] The Latin original: "potest tamen quaelibet virtus, secundum quod a praedicta virtute (speciali quidem in essentia, generali autem secundum virtutem) ordinatur ad bonum commune, dici justitia legalis" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6). The first two occurrences of *virtus* in this passage (*quaelibet virtus* and *a praedicta virtute*) carry sense (*b*) and the third occurrence (*secundum virtutem*) sense (*a*), causal power, as indicated in footnote 5 of this chapter.

[43] On the English translation of *ratio* in this passage, see footnote 29 in this chapter. The Latin original: "et hoc modo loquendi justitia legalis est idem in essentia cum omni virtute; differt autem ratione" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6).

it will be *different* from the essence of each of the other virtues to the extent that "essence" is referred instead to the species, i.e., the species or type (*ratio*) proper to the justice of norms.

Indeed, Aquinas refers the essence to the species as well; and in this sense he says that the justice of norms is different *per essentiam* from every other virtue.

> Every virtue strictly speaking directs [every virtue in keeping with its own type ordains: *secundum propriam rationem ordinat*] its act to that virtue's proper end: that it should happen to be directed [ordained: *ordinetur*] to a further end either always or sometimes, does not belong to that virtue considered strictly [it does not belong to that virtue in keeping with its own type: *hoc non habet ex propria ratione*], for it needs some higher virtue to direct it [*ordinetur*] to that end. Consequently there must be one supreme virtue [a superior virtue: *superior*] essentially distinct from every other virtue, which directs all the virtues to the common good [which ordains them (*ordinet*) in the common good]; and this virtue is legal justice [*quae est justitia legalis* (the justice of norms)*, et est alia per essentiam ab omni virtute*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 6)[44]

This is not to say that the justice of norms, because it is general, can do without the different virtues by which men are ordained with respect to particular goods (*particularia bona*). Further, included among these virtues is particular justice (*particularis justitia*), which ordains man with respect to those things that concern a single other person.

> Legal justice [the justice of norms: *justitia legalis*] is not essentially [*essentialiter*] the same as every virtue, and besides legal justice [the justice of norms: *justitia legalis*] which directs man [ordains man: *ordinat*] immediately to the common good [*immediate ad bonum commune*], there is a need for other virtues to direct him [to ordain him: *ordinant*] immediately in matters relating to particular goods [*immediate circa particularia bona*]: and these virtues may be relative to himself or to another individual person. Accordingly, just as in addition to legal justice [the justice of norms: *justitia legalis*] there is a need for particular virtues to direct man [*ordinant*] in relation to himself, such as temperance and fortitude, so too besides legal justice [the justice of norms: *justitia legalis*] there is need for particular justice to direct man [a particular justice that ordains man: *quae ordinet*] in his relations to other individuals [*particularem quamdam justitiam, quae ordinet hominem circa ea, quae sunt ad alteram singularem personam*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 58, a. 7)[45]

[44] On the English translation of *ratio* in this passage, see footnote 29 in this chapter. The Latin original: "Quaelibet virtus secundum propriam rationem ordinat actum suum ad proprium finem illius virtutis: quod autem ordinetur ad ulteriorem finem, sive semper, sive aliquando, hoc non habet ex propria ratione; sed oportet esse aliam superiorem virtutem, a qua in illum finem ordinetur: et sic oportet esse unam virtutem superiorem, quae ordinet omnes virtutes in bonum commune, quae est justitia legalis, et est alia per essentiam ab omni virtute" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 6).

[45] The Latin original: "Justitia legalis non est essentialiter omnis virtus, sed oportet praeter justitiam legalem, quae ordinat hominem immediate ad bonum commune, esse alias virtutes, quae immediate ordinant hominem circa particularia bona; quae quidem possunt esse vel ad seipsum, vel ad alteram singularem personam; sicut ergo praeter justitiam legalem oportet esse aliquas virtutes particulares, quae ordinent hominem in seipso, puta temperantiam et fortitudinem; ita etiam praeter justitiam legalem oportet esse particularem quamdam justitiam,

13.6. Prudence and Justice in the Judgments That Judges Are to Pass

If we look at the judgments and rulings of judges we will find the same interweaving of prudence and justice that is found in Aquinas with regard to *jus*: We saw this in Sections 13.2 through 13.5 and will see it again in Section 13.7. The *jus* treated in these other sections is primarily *jus* as what is *objectively* right, meaning the content of *leges*, or norms. The *jus* treated in this section, instead, is the *jus* found in the judgments and rulings of judges. We are therefore concerned here with what is *subjectively* right, with *jus* in the concrete case, the *jus* of duty-holders and right-holders, the normative subjective positions as actually determined, or rather declared, by the prudent and just judge: prudent because possessed of reason (intellectual virtue), just because possessed of that moral virtue which makes its subject matter (the will) conscious, stable, and firm in rendering to each his due (*jus suum*: see footnote 19 in this chapter). Let us not forget Aquinas's previously introduced list of the senses assumed by *jus* and *justitia*:

The word *jus* ["right," the strict sense of "what is right"] [...] was first of all used to denote the just thing itself [*ipsam rem justam*], but afterwards it was transferred to designate the art whereby it is known what is just [*quid sit justum*], and further to denote the place where justice is administered [*in quo jus redditur*, where *jus* expresses the strict sense of "what is right"], thus a man is said to appear *in jure*, and yet further, we say even that a man, who has the office of exercising justice [*justitiam facere*], administers the *jus* [*jus redditur*] even if his sentence be unjust [*iniquum*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 57, a. 1)[46]

There are, in regard to the judicial administration of what is subjectively right, some interesting observations that can be made on *sunesis*, *eusinesia*, *gnomē*, and other kindred concepts in Aquinas, who takes them up from Aristotle. But these observations we cannot here enter into. What we will consider, instead, are *judicium* (judgment), *judex* (judge), *jus* (what is right toward others), and *justitia* (justice). Here is Aquinas's own summary presentation of them:

Judgment [*judicium*] properly denotes the act of a judge [*judex*] as such. Now a judge (*judex*) is so called because he asserts the right (*jus dicens*) and right [*jus*] is the object of justice [its objective: *objectum*], as stated above (Q. 57, A. 1). Consequently the original meaning of the word *judgment* is a statement or decision of the just or right [*judicium importat ... definitionem vel determinationem justi sive juris*]. Now to decide rightly [well: *bene*] about virtuous deeds proceeds, properly speaking, from the virtuous habit [attitude: *habitus*]; thus a chaste person decides rightly [*recte determinat*] about matters relating to chastity. Therefore judgment, which denotes a right decision about what is just [hence judgement, which involves a right determination of what is just: *et ideo judicium, quod importat rectam determinationem ejus, quod est justum*], belongs properly to justice. For this reason the Philosopher says (*Ethic*. v. 4) that *men*

quae ordinet hominem circa ea, quae sunt ad alteram singularem personam" (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 7). In Pars 1.2, q. 96, a. 4, Aquinas explains the ways a *lex* can be unjust (see the end of Section 13.4).

[46] The Latin original is in footnote 16 of this chapter.

have recourse to a judge as to one who is the personification of justice [*sicut ad quandam justitiam animatam*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 60, a. 1)[47]

In rejoinder to an argument traceable to Saint Paul, Aquinas draws a parallel, on the question of judgment, between *donum sapientiae* and *virtus prudentiae*, on the one hand, and *regulae divinae* and *regulae juris*, on the other. Let us look at Aquinas's presentation of this parallel:

The spiritual man, by reason of the habit of charity [its attitude: *habitus*], has an inclination to judge aright [*recte*] of all things according to the Divine rules [*secundum regulas divinas*]; and it is in conformity with these that he pronounces judgment through the gift of wisdom [*ex quibus judicium per donum sapientiae pronuntiat*]: even as the just man pronounces judgment through the virtue of prudence conformably with the ruling of the law [with the rules setting out what is right: *sicut justus per virtutem prudentiae pronuntiat judicium ex regulis juris*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 60, a. 1)[48]

The Fathers of the English Dominican Province translate *regulae juris* to "rulings of law." They do so inconsistently, for *jus* they usually translate to "right."

In discussing judgment and the judge who issues it, Aquinas clearly brings back the idea of *justitia legalis* (the justice of norms), though not calling it by that name.

Justice is in the sovereign [in the ruler, or prince: *princeps*] as a master-virtue [as an architectonic virtue: *virtus architectonica*], commanding and prescribing what is just [*quod justum est*]; while it is in the subjects, as an executive and administrative virtue [*virtus executiva, et ministrans*]. Hence judgment, which denotes a decision of what is just [it entails a definition of what is just: *importat definitionem justi*], belongs to justice, considered as existing chiefly in one who has authority [*secundum quod est principaliori modo in praesidente*]. (Aquinas, *Summa Theologiae* (b), 2.2, q. 60, a. 1)[49]

Compare this against *Summa Theologiae* (a), Pars 2.2, q. 58, a. 6; and, in this chapter, compare Section 13.5, footnote 41.

[47] The Latin original: "Judicium proprie nominat actum judicis, inquantum judex est: judex autem dicitur, quasi *jus dicens*: jus autem est objectum justitiae, ut supra habitum est (*q. 57. art. 1.*); et ideo judicium importat, secundum primam nominis impositionem, definitionem vel determinationem justi sive juris: quod autem aliquis bene definiat aliquid in operibus virtuosis, proprie procedit ex habitu virtutis: sicut castus recte determinat ea, quae pertinent ad castitatem; et ideo judicium, quod importat rectam determinationem ejus, quod est justum, proprie pertinet ad justitiam: propter quod Philos. in 5. Ethic. *(cap. 4.)* dicit, quod homines ad judicem confugiunt, sicut ad quamdam justitiam animatam" (Aquinas, *Summa Theologiae* (a), 2.2, q. 60, a. 1).

[48] The Latin original: "Homo spiritualis ex habitu charitatis habet inclinationem ad recte judicandum de omnibus secundum regulas divinas, ex quibus judicium per donum sapientiae pronuntiat; sicut justus per virtutem prudentiae pronuntiat judicium ex regulis juris" (Aquinas, *Summa Theologiae* (a), 2.2, q. 60, a. 1).

[49] The Latin original: "Justitia in principe quidem est sicut virtus architectonica, quasi imperans, et praecipiens quod justum est; in subditis autem est tamquam virtus executiva, et ministrans; et ideo judicium, quod importat definitionem justi, pertinet ad justitiam, secundum quod est principaliori modo in praesidente" (Aquinas, *Summa Theologiae* (a), 2.2, q. 60, a. 1).

Aquinas specifies three requisites of just judgment: an inclination toward justice, serving to stay clear of perverted, unjust judgments; an authority legitimated to judge, so as to forestall usurpation; and *recta ratio prudentiae*, a rational capacity for knowing rightly, which capacity is proper to prudence, and which makes it so that judgment is not based on suspicion and is not rash:

> Judgment is lawful [*licitum*] in so far as it is an act of justice. Now it follows from what has been stated above (A. 1, *ad* 1, 3) that three conditions are requisite for a judgment to be an act of justice [*justitiae actus*]: first, that it proceed from the inclination of justice [*ex inclinatione justitiae*]; secondly, that it come from one who is in authority [*ex autoritate praesidentis*]; thirdly, that it be pronounced according to the right ruling of prudence [*secundum rectam rationem prudentiae*]. If any one of these be lacking, the judgment will be faulty and unlawful [*vitiosum et illicitum*]. First, when it is contrary to the rectitude of justice [*rectitudinem justitiae*], and then it is called *perverted* or *unjust*: secondly, when a man judges about matters wherein he has no authority, and this is called judgment *by usurpation*: thirdly, when the reason lacks certainty [*deest certitudo rationis*], as when a man, without any solid motive, forms a judgment on some doubtful or hidden matter, and then it is called judgment by *suspicion* or *rash* judgment. (Aquinas, *Summa Theologiae* (b), 2.2, q. 60, a. 2)[50]

As happens with other occurrences of *ratio* (some of which have been indicated in the previous pages), so on this occasion (in the closing lines of this last passage) the Fathers of the English Dominican Province fail to capture the sense of this word in context.

The Latin original is *quando deest certitudo rationis*; literally, "when there is not the certainty of *ratio*." The point here is, again, the meaning of *ratio*: Its meaning is "type," or "species" (*Tatbestand* in German, *fattispecie astratta* in Italian). Therefore, a sensible translation will be "there is no certainty as to whether the relevant type has been instantiated in the concrete case, as when one judges on doubtful or concealed things on the basis of some light conjecture (*propter aliquas leves conjecturas*)."

The English translation by the Fathers of the English Dominican Province shows that here they understand *ratio* to mean "reason" in the sense of "motive." Indeed, they write, "reason lacks certainty, as when a man *without any solid motive* forms a judgment on some doubtful or hidden matter" (italics added); and "without any solid motive" has no corresponding expression in the Latin original.[51]

[50] The Latin original: "Judicium intantum est licitum, inquantum est justitiae actus: sicut autem ex praedictis patet *(art. praec.)*, ad hoc quod judicium sit actus justitiae, *tria* requiruntur: *primo* quidem, ut procedat ex inclinatione justitiae; *secundo*, quod procedat ex auctoritate praesidentis; *tertio*, quod proferatur secundum rectam rationem prudentiae. Quodcumque autem horum defuerit, judicium erit vitiosum, et illicitum: *uno* quidem modo, quando est contra rectitudinem justitiae: et sic dicitur *judicium perversum*, vel *injustum*: *alio* modo, quando homo judicat de his, in quibus non habet auctoritatem: et sic dicitur *judicium usurpatum*: *tertio* modo, quando deest certitudo rationis; puta cum aliquis de his judicat, quae sunt dubia, vel occulta, propter aliquas leves conjecturas: et sic dicitur *judicium suspiciosum*, vel *temerarium*" (Aquinas, *Summa Theologiae* (a), 2.2, q. 60, a. 2).

[51] This translation looks rather more like a wild guess. Dear Fathers: five *Pater, Ave et Gloria*!

13.7. *Jus* (What Is Right toward Others) Is Made Right, in What Concerns Its Essence (*Essentialiter*), by the Type (*Ratio*) Contained in a *Lex* (Norm)

Let us start off by taking a second look at the passage from *Summa Theologiae* (a), 2.2, q. 58, a. 1:

> Justice is rectitude, though not by essence [*essentialiter*], but only as a cause [*causaliter*], in that justice is an attitude according to which somebody acts and wills rightly [*recte*]. (Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1; my translation)[52]

The Latin term *rectitudo* ("rectitude")—from the adjective *rectus*, "right," and from *rectum*, past participle of *rego*, whence comes *regula* (plain old "ruler" or "rule," the instrument for drawing straight lines)—connects up with the geometric-philological considerations made in Section 4.2.1 on "norm," as well as with the legal-conceptual byzantine considerations that will be made in Chapter 14 on *objektives* and *subjektives Recht* (cf. Section 14.3).

Even in Aquinas *rego* means "to rule": It does so in an acceptation of this Latin verb that ascribes to it a particular density of meaning, an acceptation that forms the basis of the idea of *lex aeterna*—the *aeternum conceptum* of *divina ratio*, the divine plan that *non concipitur ex tempore*. Divine Providence sets out the rules (*regit*) of the universe according to a design of reason that is right (*rectum*); at the same time, Divine Providence supports these rules with its just will (*justa voluntas*).

> It is impossible that God should will anything but what is of the type [*ratio*] of His wisdom. And the type of His wisdom is like the norm of justice, a norm in accordance with which His will is right and just. Hence, what He does in accordance with His will He does justly, as we, too, do justly what we do in accordance with the norm. (Aquinas, *Summa Theologiae* (a), 1, q. 21, a. 1; my translation)[53]

Again, the Fathers of the English Dominican Province fail to grasp the sense that *ratio* takes in context. They therefore avoid translating *ratio* and resort rather to a circumlocution (italicised in footnote 53) that is vague and does little service to the reader.

It might be said that Aquinas's palatable distinction between *essentialiter* and *causaliter* (a typically Scholastic distinction, as formulated in 2.2, q. 58, a. 1, the passage quoted before the last) gives to each his own (*suum cuique*

[52] The Latin original is provided in Section 13.3, and appended to it (in footnote 23) is its English translation by the Fathers of the English Dominican Province.

[53] The Latin original: "Impossibile est Deum velle nisi quod ratio suae sapientiae habet. Quae quidem est sicut lex justitiae, secundum quam ejus voluntas recta, et justa est. Unde quod secundum suam voluntatem facit, juste facit; sicut et nos, quod secundum legem facimus, juste facimus" (Aquinas, *Summa Theologiae* (a), 1, q. 21, a. 1). In the translation of the Fathers of the English Dominican Province: "*It is impossible for God to will anything but what His wisdom approves*. This is, as it were, His law of justice, in accordance with which His will is right and just. Hence, what He does according to His will He does justly: as we do justly what we do according to law" (Aquinas, *Summa Theologiae* (b), 1, q. 21, a. 1; italics added).

tribuit): It gives to *jus* that which pertains to *jus*, to *justitia* that which pertains to *justitia*, and to both that which pertains to both.

That which pertains to both is what is right (*quod est rectum*) toward others: What is right toward others pertains *essentialiter* to *jus*; while it is *causaliter tantum* that it pertains to *justitia*. Let us enter into this question.

Behind *jus* (inasmuch as *jus* is *essentialiter* what is right, or *rectitudo*, toward others) stands divine reason (and there also stands human reason, but only to the extent that there is in it a share of divine reason). Behind *justitia* (inasmuch as *justitia* is *causaliter tantum* what is right, or *rectitudo*, toward others) stands the virtuous will (rational will is the subject matter of justice), meaning a will (*voluntas*) that is conscious (*sciens*), stable (*stabilis*), and firm (*firmus*) (Section 13.3).

As a cognitive power, practical reason (*ratio practica*) consists in (*i*) synderesis, with regard to the apprehension of the principles of action (*principia operabilium*, which synderesis entrusts, as ends, to the moral virtues) and (*ii*) prudence, with regard to the means to the ends entrusted to the moral virtues. Synderesis entrusts ends to the virtue of justice (as well as to the other moral virtues), and these ends will be attained through the means, i.e., the rules, provided and set forth by prudence. In such a way, practical reason arranges people's relations and ordains them to the attainment of the ends entrusted to the moral virtues.[54]

[54] "Now, to a thing apprehended by the intellect, it is accidental whether it be directed [ordained: *ordinetur*] to operation or not, and according to this the speculative and practical intellects differ. For it is the speculative intellect which directs [ordains: *ordinat*] what it apprehends, not to operation, but to the consideration of truth; while the practical intellect is that which directs [ordains: *ordinat*] what it apprehends to operation. And this is what the Philosopher says (*De Anima* iii, [...]); that *the speculative differs from the practical in its end.* Whence each is named from its end: the one speculative, the other practical—*i.e.*, operative'" (Aquinas, *Summa Theologiae* (b), 1, q. 79, a. 11). The Latin original: "Accidit autem alicui apprehenso per intellectum, quod ordinetur ad opus, vel non ordinetur. Secundum hoc autem differunt intellectus speculativus, et praticus; nam intellectus speculativus est, qui quod apprehendit, non ordinat ad opus, sed ad solam veritatis considerationem: practicus vero intellectus dicitur, qui hoc quod apprehendit, ordinat ad opus. Et hoc est, quod Philosophus dicit in 3. de Anima [...], quod speculativus differt a practico fine; unde et a fine denominatur uterque, hic quidem *speculativus*, ille vero *practicus*, idest operativus" (Aquinas, *Summa Theologiae* (a), 1, q. 79, a. 11). "Now it is clear that, as the speculative reason argues about speculative things, so that practical reason argues about practical things. Therefore we must have, bestowed on us by nature, not only speculative principles, but also practical principles. Now the first speculative principles bestowed on us by nature do not belong to a special power [*potentiam*], but to a special habit [attitude: *habitum*], which is called *the understanding of principles*, as the Philosopher explains (*Ethic.* vi. 6). Wherefore the first practical principles, bestowed on us by nature, do not belong to a special power, but to a special natural habit [attitude: *habitum*], which we call *synderesis*" (Aquinas, *Summa Theologiae* (b), 1, q. 79, a. 12). The Latin original: "Constat autem, quod, sicut ratio speculativa ratiocinatur de speculativis; ita ratio pratica ratiocinatur de operabilibus; oportet igitur naturaliter nobis esse indita, sicut principia speculabilium, ita et principia operabilium. Prima autem principia speculabilium

Aquinas lays out elegantly as follows the relation that holds among the moral virtues (among which is justice), the ends of action, synderesis, and prudence:

Now, just as, in the speculative reason [*in ratione speculativa*], there are certain things naturally known [*naturaliter nota*], about which is *understanding* [rational intuition: *intellectus*], and certain things of which we obtain knowledge through them [*quae per illa innotescunt*], viz., conclusions, about which is *science* [*conclusiones, quarum est scientia*], so in the practical reason [*in ratione practica*], certain things pre-exist, as naturally known principles [*principia naturaliter nota*], and such are the ends of the moral virtues [*fines virtutum moralium*], since the end [*finis*] is in practical matters what principles are [what the principle is: *principium*] in speculative matters. (Aquinas, *Summa Theologiae* (b), 2.2, q. 47, a. 6)[55]

Natural reason [*ratio naturalis*] known by the name of *synderesis* appoints the end to moral virtues [*virtutibus moralibus praestituit finem*], [...] but prudence does not do this [...]. The end concerns the moral virtues, not as though they appointed the end, but because they tend to the end which is appointed by natural reason [*a ratione naturali praestitutum*]. In this they are helped by prudence, which prepares the way for them, by disposing the means [*ea quae sunt ad finem*]. Hence it follows that prudence is more excellent than the moral virtues, and moves them: yet *synderesis* moves prudence, just as the understanding of principles [the rational intuition of them: *intellectus*] moves science. (Aquinas, *Summa Theologiae* (b), 2.2, q. 47, a.6)[56]

To clarify the nexus among *ratio*, *regula*, and *lex*, I quote here two passages by Aquinas (1.2, q. 90, a. 1 and q. 95, a. 2) already discussed briefly in Section 4.2.1 and more extensively in Section 13.4.

"Lex quaedam regula est, et mensura actuum": "A norm is a kind of rule, and a measure for acts" (Aquinas, *Summa Theologiae* (a), 1.2, q. 90, a. 1; my translation).[57] Here "measure" designates a unit of measure, as for measuring the size, quantity, or degree of something.

nobis naturaliter indita non pertinent ad aliquam specialem potentiam, sed ad quemdam specialem habitum, qui dicitur *intellectus principiorum*, ut patet in 6. Ethic. *(cap. 6.)*. Unde et principia operabilium nobis naturaliter indita non pertinent ad specialem potentiam, sed, ad specialem habitum naturalem, quem dicimus *synderesim*" (Aquinas, *Summa Theologiae* (a), 1, q. 79, a. 12).

[55] The Latin original: "Sicut autem in ratione speculativa sunt quaedam ut naturaliter nota, quorum est intellectus, et quaedam, quae per illa innotescunt, scilicet conclusiones, quarum est scientia: ita in ratione practica praeexistunt quaedam, ut principia naturaliter nota: et hujusmodi sunt fines virtutum moralium: quia finis se habet in operabilibus, sicut principium in speculativis" (Aquinas, *Summa Theologiae* (a), 2.2, q. 47, a. 6).

[56] The Latin original: "Virtutibus moralibus praestituit finem ratio naturalis, quae dicitur synderesis, [...] non autem prudentia [...]. [...] finis non pertinet ad virtutes morales, tamquam ipsae praestituant finem; sed quia tendunt in finem a ratione naturali praestitutum: ad quod juvantur per prudentiam, quae eis viam parat, disponendo ea quae sunt ad finem; unde relinquitur, quod prudentia sit nobilior virtutibus moralibus, et moveat eas: sed synderesis movet prudentiam, sicut intellectus principiorum scientiam" (Aquinas, *Summa Theologiae* (a), 2.2, q. 47, a. 6).

[57] The Latin original is provided in Section 13.4, and appended to it (in footnote 25) is its English translation by the Fathers of the English Dominican Province.

There is no norm [*lex*] that is not just; hence, insofar as a norm [*lex*] takes after justice, to that extent it will take on the power of a norm [the virtue of being binding or of having a binding power, or force: *de virtute legis*, and *legis virtus* is *virtus obligandi*]: and in human things we say that something is just because of the fact that it is right [*rectum*] according to a rule of reason [*secundum regulam rationis*]; but the first rule of reason is the norm of nature [*rationis autem prima regula est lex naturae*] [...]; hence, every human-posited norm [*omnis lex humanitus posita*] will be of the type norm [*habet de ratione legis*] to the extent that it derives from the norm of nature [*a lege naturae*]: Indeed, if in some respects the human-posited norm is at variance with the norm of nature, then it will not be a norm, but the forgery of a norm [*non erit lex, sed legis corruptio*]. (Aquinas, *Summa Theologiae* (a), 1.2, q. 95, a. 2; my translation)[58]

Note how *ratio*, on its last occurrence in the foregoing passage—in the string *habet de ratione legis* (Aquinas, *Summa Theologiae* (a), 1.2, q. 95, a. 2)—means "type," whereas on other occurrences in the same passage, it means "reason," understood as a cognitive power (cf. Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 4).[59]

When *ratio* stands for "type," it may be translated as well, depending on context, to "essence," "plan," "idea," "form," "concept," "design," and the like.

There is one passage in this regard where Aquinas discusses *lex aeterna*. Let us look at this passage and see the various senses in which the term *ratio* figures in it.

[58] This is the Latin original in its wider context (enclosed within angle brackets is the original corresponding specifically to the translation in the run of text): "Sicut August. dicit in 1. de Lib. Arb. [...] <non videtur esse lex, quae justa non fuerit; unde inquantum habet de justitia, intantum habet de virtute legis: in rebus autem humanis dicitur esse aliquod justum ex eo quod est rectum secundum regulam rationis: rationis autem prima regula est lex naturae [...]; unde omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur: si vero in aliquo a lege naturali discordet, jam non erit lex, sed legis corruptio>" (Aquinas, *Summa Theologiae* (a), 1.2, q. 95, a. 2). The Fathers of the English Dominican Province provided this translation of the foregoing passage, which, too, is shown here in its wider context: "As Augustine says (*De Lib. Arb.* i. 5), *that which is not just seems to be no law at all*: Wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above (Q. 91, A. 2, *ad* 2). Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law" (Aquinas, *Summa Theologiae* (b), 1.2, q. 95, a. 2). Note how, in the passage just quoted, Aquinas makes this point about *justum* and "straight": In human things *justus* is said of that which is *rectus* (or "right") according to a rule of reason. *Justus* derives from *jus*. Recall on *legis virtus* (in my translation, "the power of a norm") that *legis virtus haec est imperare, vetare, permittere, punire*; "the force of a law" [the power of a norm, the way I understand *legis virtus*] is this: to command [obligate], to prohibit [forbid], to permit, or to punish" (Modestinus, *The Digest of Justinian*, I, 3, 7). On *virtus* as "characteristic that comes through in a causal power," see footnotes 5, 27, and 37 in this chapter.

[59] "Reason" as an intellectual faculty may occur as intuitive reason—like that of God or like human *intellectus* and synderesis (Aquinas, *Summa Theologiae* (b), 1, q. 14, a. 8)—or it may occur as human discoursive reason.

Now it is evident, granted that the world is ruled [*regatur*] by Divine Providence, [...] that the whole community of the universe is governed [*gubernatur*] by Divine Reason [by divine plans: *ratione divina*]. Wherefore the very idea [*ratio*, meaning "design," "schema," "type," or "plan"] of the government of things in God [*gubernationis rerum in Deo*] the Ruler of the universe, has the nature of a law [is of the type "norm": *legis habet rationem*]. And since the Divine Reason's conception of things is not subject to time but is eternal [...] therefore it is that this kind of law must be called eternal [*et quia divina ratio* (*ratio* meaning "rational intuitive cognitive power") *nihil concipit ex tempore, sed habet aeternum conceptum,* [...] *inde est, quod hujusmodi legem oportet dicere aeternam*]. (Aquinas, *Summa Theologiae* (b), 1.2, q. 91, a. 1)[60]

I do not agree with the way the Fathers of the English Dominican Province have translated the last lines of the foregoing excerpt. The Latin is *et quia divina ratio*, where *ratio* means "reason" understood as a cognitive power. And God's reason as cognitive power is intuitive reason, a concept akin to that expressed by the ancient Greek *nous*. God's reason as cognitive power *nihil concipit ex tempore, sed habet aeternum conceptum*, where *conceptum* means "concept," "design," "schema," "type," or "plan." The word *ratio* takes two meanings on its different occurrences in the excerpt just quoted: (*a*) "reason as rational cognitive power," which in God is intuitive rational power, and (*b*) reason as the "plan, "concept," "design," "schema," or "type" devised by reason in sense (*a*), or therein contained.

Also relevant to the meaning of *ratio* is the stimulating argument that Aquinas considers in Pars 2.2, Quaestio 57, Articulus 1, of *Summa Theologiae* (a). Aquinas attributes this argument to Isidore and so frames it that it seems to contrast his own thesis.

In this regard, a congruent reconstruction will require maintaining the distinction among three interpretations of the terms *jus* and *lex* according as they occur in (*i*) Isidore, (*ii*) Aquinas, or (*iii*) Isidore as quoted and interpreted by Aquinas. In case (*i*), *jus* means "law" and *lex* "statutory written law"; in cases (*ii*) and (*iii*), *jus* means "what is right toward others" and *lex* "norm," whether written or unwritten.

Aquinas's thesis, as we saw in Section 13.3, is that *jus* is the objective (*objectum*) of justice. In Isidore's *Etymologiae*, says Aquinas, we find instead the view that *lex juris est species*; hence—Aquinas proceeds—"a norm [*lex*] is the objective [*objectum*] not so much of justice as of prudence; indeed Aristotle, too, states that there is a legislative [*legispositiva*] part of prudence; therefore, what is right toward others [*jus*] is not the objective [*objectum*] of justice" (*Summa Theologiae* (a), 2.2, q. 57, a. 1; my translation).[61]

[60] The Latin original: "Manifestum est autem, supposito quod mundus divina providentia regatur, [...] quod tota communitas universi gubernatur ratione divina; et ideo ipsa ratio gubernationis rerum in Deo, sicut in principe universitatis existens, legis habet rationem; et quia divina ratio nihil concipit ex tempore, sed habet aeternum conceptum, [...] inde est, quod hujusmodi legem oportet dicere aeternam" (Aquinas, *Summa Theologiae* (a), 1.2, q. 91, a. 1).

[61] The Latin original: "*Lex* [the norm], sicut Isid. dicit in lib. 5. Etymol. *(cap. 3.)*, *juris est species*: lex [the norm] autem non est objectum justitiae [the objective of justice], sed magis

As was observed in Section 13.1, *jus*—just like *derecho*, *droit*, *Recht*, and *diritto*—can mean either "law" or "what is right," depending on context; and as I have just pointed out, *jus* in Isidore means "law" and *lex* "statutory written law" or "statute."[62]

In answer to Isidore's argument, Aquinas gives us an interesting passage on the relation between *lex* and *ratio*. In truth Aquinas, in this rejoinder, speaks more broadly of the relationship among *ratio*, *regula*, *justitia*, *prudentia*, *lex*, and *jus*. Here is this rejoinder translated into English.

Just as there preexists in the craftsman's mind a type [*quaedam ratio*] for the things that become external by his craft, which type is called a rule of art [*regula artis*], so there preexists in the mind a type [*ratio*] for the just work [*illius operis justi*] that is determined by reason [here, reason as cognitive power: *ratio*]. This type is almost a rule of prudence [*prudentiae regula*], and this rule, if formulated in writing, will be called a *lex.* For a *lex*, according to Isidore (*Etym*. v. 1), is a written statute [a *constitutio scripta*]. Hence, *lex* is not, properly speaking, the same as *jus* [what is right toward others], but is rather a type for what is right [*aliqualis ratio juris*]. (Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 1; my translation)[63]

prudentiae; unde et Philos. *legispositivam* partem prudentiae ponit *(lib. 6. Ethic. cap. 8.)*; ergo jus [what is right] non est objectum justitiae [the objective of justice]." This is the English translation by the Fathers of the English Dominican Province: "*Law* [*lex*], according to Isidore (*Etym*. v. 3), *is a kind of right* [*juris est species*]. Now law [*lex*] is the object not of justice but of prudence [*non est objectum justitiae* (the objective of justice) *sed magis prudentiae*], wherefore the Philosopher reckons *legislative* [in Greek, *nomothetikē*] as one of the parts of prudence [in Greek, *phronēsis*]. Therefore right [what is right: *jus*] is not the object of justice" (*Summa Theologiae* (b), 2.2, q. 57, a. 1).

[62] Aquinas quotes Isidore's text with an addition designed to set up the argument that Aquinas wants to reply to; the addition consists in "lex autem non est objectum justitiae sed magis prudentiae" and in the conclusion "ergo jus non est objectum justitiae," neither of which appears in Isidore. Further, Isidore uses *jus* in the sense of "law," and *lex* he uses not in the sense of "norm" but in that of "statutory written law," or "statute"; in fact, Isidore sets *lex* against *mos*, which he understands as designating customary unwritten law. Isidore divides "law" into *lex* (statutory written law, such as a *constitutio*, meaning "statute") and *mos* (customary unwritten law). If *jus* means "law," *lex* "statutory written law," and *mos* "customary unwritten law," then it clearly follows that *lex*, on a par with *mos*, is *juris species*—a type, or species, of law. Following is Isidore's Latin original followed by my English translation: "Ius [the term "law"] generale nomen est, lex [statutory law] autem iuris est species. [...] Omne autem ius [law] legibus [statutory laws] et moribus [customs] constat. Lex [statutory law] est constitutio scripta [a written statute]. Mos [custom] est vetustate probata consuetudo, sive lex non scripta [unwritten law]. Nam lex [statutory law] a legendo vocata, quia scripta est" (Isidore, *Isidori Hispalensis Episcopi Etymologiarum sive Originum*, V, 3). "Law [*jus*] is the noun for a genus [*jus generale nomen est*: *generalis*, from *genus*], and a statutory law [*lex*] is a type of law. [...] Indeed, all of law [*jus*] is made up of statutory laws [*legibus*] and customs [*moribus*]. A statutory law [*lex*] is a written statute [*constitutio scripta*]. A custom is a long-established practice: It is an unwritten statute [*lex non scripta*]. Indeed, *lex* [statutory law] is so called from *legendo* [reading], because a *lex* is written."

[63] The Latin original: "Sicut eorum, quae per artem exterius fiunt, quaedam ratio in mente artificis praeexistit, quae dicitur regula artis: ita etiam illius operis justi, quod ratio determinat, quaedam ratio praeexistit in mente, quasi quaedam prudentiae regula: et hoc si in scriptum redigatur, vocatur *lex*, est enim lex, secundum Isid. *(lib. 5. Etym. cap. 3.)*, *constitutio scripta*; et

In translating this passage, the Fathers of the English Dominican Province have rendered *ratio* as "expression" when they should have translated it as "type," "schema," "plan." See their English translation in this footnote.[64]

The connection between *ratio*, *regula*, *prudentia*, *lex*, and *jus* in Aquinas is a question of no small account.

In fact the argument by Isidore as Aquinas presents it in 2.2, q. 57, a. 1—with Aquinas's addition and conclusion as indicated in footnotes 61 and 62 of this chapter—is in certain respects a grounded argument. *Lex juris est species* (this expression appears in Isidore's original as well as in Aquinas's text): *Lex autem non est* objectum *justitiae, sed magis prudentiae* (this expression appears in Aquinas but not in Isidore). If we translate Isidore's fragment according to meaning (*i*) of *lex* and *jus*, and Aquinas's fragment according to meaning (*ii*) of *lex* and *jus*, we will have the following translation: "Statutory written law [*lex*] is a species of law [*jus*]"; "now, the norm [*lex*] is more an objective of prudence than of justice."

Aquinas uses *objectum* here, a term that does not figure in the original passage by Isidore that Aquinas develops in his own words in *Summa Theologiae* (a), 2.2, q. 57, a. 1. And, as I said in Sections 13.2 and 13.3, the term needs to be clarified. In fact when Aquinas discusses the moral virtues, he uses *subjectum* to refer to their subject matter (as I translate *subjectum* throughout this chapter) and *objectum* to refer to their objective (as I translate *objectum* throughout this chapter). Thus *justitia* takes will as its subject matter (*subjectum*), and as its objective (*objectum*) it takes *jus*, meaning "what is right toward others."

As we saw in Section 13.3, *jus*, in the sense just specified, is argued by Aquinas to be the *objectum justitiae*: the objective of justice. The burden is on

ideo lex [the norm] non est ipsum jus [what is right], proprie loquendo, sed aliqualis ratio juris" (Aquinas, *Summa Theologiae* (a), 2.2, q. 57, a. 1). It is an established fact that Aquinas accepts that there exist not only written *leges*, or norms, but also unwritten ones. Indeed Aquinas treats, among several *leges*, of *lex aeterna* and *lex naturalis*, and these are not written. Isidore, in turn, qualifies custom, *mos*, as *lex non scripta*; and this, I believe, bears out the view that we need to maintain the distinction among meanings (*i*), (*ii*), and (*iii*) of *lex* (along with those of *jus*) as specified a moment ago in the run of text.

[64] This is the English translation by the Fathers of the English Dominican Province: "Just as there pre-exists in the mind of the craftsman an expression [*ratio*] of the things to be made externally by his craft, which expression [*ratio*] is called the rule of his craft [*regula artis*: the pronoun specifying that this is *his* craft is absent from the Latin and best avoided in translation], so too there pre-exists in the mind an expression [*ratio*] of the particular just work [*illius operis justi*: "particular" cannot adequately translate *illius* here, because Aquinas is speaking of a type of just work, and "particular," which Aquinas does not use, conveys an idea of actualness, whereas types are abstract] which the reason determines, and which is a kind of rule of prudence. If this rule be expressed in writing, it is called a *law* [*lex*], which according to Isidore (*Etym*. v. 1) is *a written decree* [a written statute: *constitutio scripta*]: and so law [the norm: *lex*] is not the same as right [what is right: *jus*], but an expression of right [a type for what is right: *aliqualis ratio juris*]" (Aquinas, *Summa Theologiae* (b), 2.2, q. 57, a. 1).

him, in his rejoinder, and without letting go of the point that *jus* is the objective of *justitia*, to explain why and in what sense *jus* is not rather the *objectum prudentiae*: the objective of prudence. In other words, Aquinas will have to explain, in his rejoinder, how *jus* relates to *prudentia*, and relates to *prudentia* differently than it does to *justitia*.

Aquinas rejoins with analytical clarity.

Lex is not *ipsum jus*, *proprie loquendo, sed aliqualis ratio juris*. In my reading: *Lex* [the norm] is not, *properly* speaking, the same as *jus*, as what is right; it is rather a type (*aliqualis ratio*) for what is right. (I needed the italics on "properly" to put the accent on Aquinas's own qualification.)

I should want to explain this in my own words.[65] *Jus* is determined and made such—made right—by reason, that is, by *ratio* understood as a cognitive power. *Ratio* as cognitive power provides *juris rationes*: It provides types for what is right toward others. And these types (these *rationes juris*) will make up the content of a *lex*. A *lex*, i.e., a norm—a rule having the *virtus obligandi* (the power to bind: footnote 5 in this chapter)—will include these types in its content. It will set them forth as its content. Against this conceptual background, Aquinas says, and is justified in saying, that *lex* is not *ipsum jus, proprie loquendo, sed aliqualis ratio juris*: The norm is not properly speaking the same as what is right, but is rather a type for what is right.

At the same time, *jus* (what is right toward others) is the objective (*objectum*) of justice insofar as it is willed with a virtuous will (*voluntas*), a will that is conscious, stable, and firm (*sciens*, *stabilis*, and *firmus*: cf. Aquinas, *Summa Theologiae* (a), 2.2, q. 58, a. 1).

It is in this regard that we see revealed the full importance of one of the meanings of *ratio* brought earlier into relief in considering the passage by Aquinas on *lex aeterna* (footnote 60 in this section). Against this meaning of *ratio*—a *ratio*, or type, that preexists in the mind of the craftsman: That *in mente artificis praeexistit*—we can, and indeed should, evaluate what Aquinas states in Pars 1.2, Quaestio 95, Articulus 2, where he discusses the derivation of *lex humana* from *lex naturalis per modum determinationis*.

In illustrating the operation of the *modus determinationis*, Aquinas says that this *modus*

> is likened to that whereby, in the arts, general forms [*formae communes*] are particularized as to details [*determinantur ad aliquid speciale*]: thus the craftsman needs to determine the general form of a house [its *formam communem*] to some particular shape [*figuram*]. (Aquinas, *Summa Theologiae* (b), 1.2, q. 95, a. 2)[66]

[65] The Latin in this paragraph is not literally Aquinas's.

[66] The Latin original: "simile est, quod in artibus *formae communes* determinantur ad aliquid speciale: sicut artifex *formam communem* domus necesse est quod determinet ad hanc, vel illam domus figuram" (Aquinas, *Summa Theologiae* (a), 1.2, q. 95, a. 2; italics added).

In this excerpt Aquinas speaks of *forma*, which I understand as "type" (Section 2.1). But even in 2.2, q. 57, a. 1, in the penultimately quoted excerpt, in rejoinder to Isidore's argument, Aquinas refers to a type, or rather to two types: the type the craftsman needs to have in the mind to produce his craftwork and the type that those who act justly need to have in their minds to carry out just actions. Each of these two types Aquinas calls *ratio*.

As we saw, the first *ratio* he refers to as a "rule of art" (*regula artis*) and the second as a "rule of prudence" (*prudentiae regula*).

In rejoinder to Isidore's argument, Aquinas makes a call for analysis, a call similarly elicited in me by Searle with regard to forms and rules (see Section 2.1.4). This is the call to distinguish among "form" (meaning "type": *ratio*), "rule" (*regula*), and "norm" (*lex*).

Perhaps the subtleties involved in this threefold distinction do not bother Aquinas any more than they bother Searle. I believe we can hold in some way that both thinkers, depending on context, understand "type" to be interchangeable with "rule" (*regula*), or even with norm (*lex*), whether the concept in issue (type) is designated by the word "form," as in Searle (*forma* in Aquinas) or by the word *ratio* (in Aquinas again).

The term *ratio* can take at least four meanings in Aquinas:

(*a*) Cognitive power understood as intuitive reason. Here, where practical human reason is involved, *ratio* consists in synderesis, the practical equivalent of what in the theoretical sphere is *intellectus*. Synderesis identifies the principles of action and entrusts them to the virtues as ends to be attained (through virtuous behaviour on the part of humans).

(*b*) Cognitive power understood as abstractive reason, meaning the faculty we use in the ascending path of the cognitive process whereby we come at forms or types.

(*c*) The forms or types arrived at through the powers listed under (*a*) and (*b*).

(*d*) Cognitive power understood as discursive reason. Here, in the practical sphere, reason (*ratio*) presents itself as the intellectual virtue of prudence. Prudence provides the means with which to attain the ends identified through synderesis, so it provides rules or types of behaviour.

The meanings of *ratio* just listed connect up with the types and rules treated in Chapter 2 of this volume. This question is set now within a wider context, for we are concerned here with the relationship between "norm" (*lex*) and "what is right" (*jus*) as treated in Chapter 1 and taken up again in Section 4.2.1.

13.8. The *Redde Rationem* (the Day of Reckoning): *Ratio* as Type in the Rendition of the Fathers of the English Dominican Province

The English version of *Summa Theologiae* I used was by the Fathers of the English Dominican Province. It was first published in 1911 and was then revised in 1920 and reprinted in 1948; it was also reprinted in 1981 as part of the Christian Classics series. It is premissed by "On the Restoration of Christian Philosophy According to the Mind of Saint Thomas Aquinas, the Angelic Doctor" (*De Philosophia Christiana ad mentem Sancti Thomae Aquinatis Doctoris Angelici in Scholis Catholicis instauranda*), an encyclical letter given by Pope Leo XIII in Rome, at Saint Peter's, on August 4, 1879, the second year of his pontificate.

The Dominican Fathers, well aware of how *transit gloria mundi*, leave us clueless as to the identity of the author or authors of their translation. So I cannot know from that source what kind of division of labour was set up to carry through this great endeavour. I can only guess that the translation was done by many hands: In quoting the passages discussed in this chapter I have had to go back and forth between the Latin original and the corresponding translation provided by the Fathers, because I could not obtain from them a consistent and plausible English rendition of *ratio* according to the different senses in which this Latin term occurs in *Summa Theologiae*.

On some occasions, however, the Fathers do provide a translation of *ratio* that I judge plausible for one of the senses of this term. Abetted in my doggedness in wanting to know if the Fathers ever used "type" to render *ratio*, I eventually found 161 instances in which they do so.[67] Also, the Fathers, in translating Pars 1.2, q. 74, a. 7, offer a cautious and hardly explicative footnote to account for their use of "type" for *ratio*. This explanatory note is appended to the seventh of the following eight excerpts from *Summa Theologiae* (b) that I have selected for analysis from those listed in footnote 67. The reader will find below the Fathers' translation of these eight excerpts, accompanied with a few brief comments on my part. As usual, the corresponding Latin original is provided in the footnotes.

[67] My thanks for the abetting go to Corrado Roversi. Here are the places where the 161 occurrences of "type" appear as a rendition of *ratio* in the Fathers' translation of *Summa Theologiae* (I do not claim this list to be exhaustive): 1, q. 12, a. 8; 1, q. 14, a. 13; 1, q. 15, a. 2; 1, q. 15, a. 3; 1, q. 18, a. 4; 1, q. 22, a. 1; 1, q. 22, a. 2; 1, q. 22, a. 3; 1, q. 23, a. 1; 1, q. 23, a. 2; 1, q. 32, a. 1; 1, q. 44, a. 3; 1, q. 45, a. 6; 1, q. 45, a. 7; 1, q. 55, a. 2; 1, q. 55, a. 3; 1, q. 65, a. 4; 1, q. 84, a. 5; 1, q. 87, a. 1; 1, q. 89, a. 3; 1, q. 93, a. 2; 1, q. 93, a. 8; 1, q. 105, a. 3; 1, q. 106, a. 1; 1, q. 108, a. 1; 1, q. 108, a. 5; 1, q. 108, a. 6; 1, q. 108, a. 7; 1, q. 110, a. 1; 1.2., q. 74, a. 7; 1.2, q. 74, a. 8; 1.2, q. 74, a. 9; 1.2, q. 93, a. 1; 1.2, q. 93, a. 2; 1.2, q. 93, a. 3; 1.2, q. 93, a. 4; 1.2, q. 93, a. 5; 1.2, q. 102, a. 4; 1.2, q. 102, a. 5; 2.2, q. 2, a. 10; 2.2., q. 45, a. 3; 2.2, q. 173, a. 1; 3, q. 46, a. 7; 3 Suppl., q. 82, a. 3; 3 Suppl., q. 92, a. 3. There are also places in which the Fathers use "type" to translate terms other than *ratio*. Here are some of them: 1, q. 1, a. 10; 1, q. 15, a. 1; 1, q. 71; 2.2, q. 85, a. 1; 2.2, q. 173, a. 1; 3, q. 31, a. 3; 3, q. 33, a. 1; 3, q. 36, a. 3.

(*i*) "Whether there are ideas? [*Utrum ideae sint*]"

It is necessary to suppose ideas [*ideas*] in the divine mind. For the Greek word *Ἰδέα* is in Latin *Forma*. Hence by ideas [*ideas*] are understood the forms [*formae*] of things, existing apart from the things themselves. Now the form [*forma*] of anything existing apart from the thing itself can be for one of two ends: either to be the type [*exemplar*] of that of which it is called the form [*forma*], or to be the principle of the knowledge [*principium cognitionis*] of that thing, inasmuch as the forms [*formae*] of things knowable are said to be in him who knows them. In either case we must suppose ideas [*ideas*], as is clear for the following reason:

In all things not generated by chance, the form [*formam*] must be the end [*finem*] of any generation whatsoever. But an agent does not act on account of the form [*propter formam*], except in so far as the likeness [*similitudo*] of the form [*formae*] is in the agent, as may happen in two ways. For in some agents the form [*forma*] of the thing to be made [*rei fiendae*] pre-exists according to its natural being, as in those that act by their nature; as a man generates a man, or fire generates fire. Whereas in other agents (the form of the thing to be made pre-exists) according to intelligible being [*secundum esse intelligibile*], as in those that act by the intellect [*per intellectum*]; and thus the likeness [*similitudo*] of a house pre-exists in the mind of the builder. And this may be called the idea [*idea*] of the house, since the builder intends to build his house like to the form [*formae*] conceived in his mind. As then the world was not made by chance, but by God acting by His intellect [*per intellectum agente*], as will appear later (Q. 46, A. 1), there must exist in the divine mind a form [*forma*] to the likeness [*ad similitudinem*] of which the world was made. And in this the notion of an idea [*ideae*] consists [And in this consists the type (*ratio*) for an an idea (*ideae*)]. (Aquinas, *Summa Theologiae* (b), 1, q. 15, a. 1)[68]

Notice that in this passage the Fathers use "type" for the Latin *exemplar* and "notion" for the Latin *ratio*. The Latin *idea* and *forma* are correctly and consistently rendered in English as "idea" and "form."

(*ii*) "Whether ideas are many? [*Utrum sint plures ideae*]"

Now there cannot be an idea of any whole [a type (*ratio*) for any whole], unless particular ideas [types: *propriae rationes*] are had of those parts of which the whole is made; just as a builder

[68] The Latin original: "*Necesse est ponere in mente divina ideas. Ἰδέα* enim graece, latine forma dicitur. Unde per ideas intelliguntur formae aliarum rerum praeter ipsas res exsistentes. Forma autem alicujus rei praeter ipsam exsistens ad duo esse potest: vel ut sit exemplar ejus cujus dicitur forma, vel ut sit principium cognitionis ipsius, secundum quod formae cognoscibilium dicuntur esse in cognoscente.

Et quantum ad utrumque est necesse ponere ideas, quod sic patet. In omnibus enim, quae non a casu generantur, necesse est formam esse finem generationis cujuscumque. Agens autem non ageret propter formam, nisi inquantum similitudo formae est in ipso. Quod quidem contingit *dupliciter*. In *quibusdam* enim agentibus praeexsistit forma rei fiendae secundum esse naturale, sicut in his, quae agunt per naturam: sicut homo generat hominem, et ignis ignem. In *quibusdam* vero secundum esse intelligibile, ut in his, quae agunt per intellectum: sicut similitudo domus praeexsistit in mente aedificatoris. Et haec potest dici idea domus, quia artifex intendit domum assimilare formae, quam mente concepit. Quia igitur mundus non est casu factus, sed est factus a Deo per intellectum agente, ut infra patebit, *(q. 46. art. 1.)* necesse est, quod in mente divina sit forma, ad similitudinem cujus mundus est factus. Et in hoc consistit ratio ideae" (Aquinas, *Summa Theologiae* (a), 1, q. 15, a. 1).

cannot conceive the idea of a house [its species: *speciem*] unless he has the idea of each of its parts [unless he has the type proper to each such part: *propria ratio*]. So, then, it must needs be that in the divine mind there are the proper ideas of all things [the proper types (*rationes*) for all things]. Hence Augustine says (*Octog. Tri. Quæst*; *qu.* xlvi), *that each thing was created by God according to the idea proper to it* [the type proper to it: *propriis rationibus*], from which it follows that in the divine mind ideas [*ideae*] are many. Now it can easily be seen how this is not repugnant to the simplicity of God, if we consider that the idea of a work [*ideam operati*] is in the mind of the operator as that which is understood [*quod intelligitur*], and not as the image whereby he understands, which is a form that makes the intellect in act [*forma faciens intellectum in actu*]. For the form [*forma*] of the house in the mind of the builder, is something understood by him, to the likeness of which he forms [*format*] the house in matter. Now, it is not repugnant to the simplicity of the divine mind that it understand many things; though it would be repugnant to its simplicity were His understanding to be formed by a plurality of images [a plurality of species: *plures species*]. Hence many ideas [*ideae*] exist in the divine mind, as things understood by it; as can be proved thus. Inasmuch as He knows His own essence [*essentiam*] perfectly, He knows it according to every mode in which it can be known. Now it can be known not only as it is in itself, but as it can be participated in by creatures according to some degree of likeness [according to some mode of similitude: *secundum aliquem modum similitudinis*]. But every creature has its own proper species [*speciem*], according to which it participates in some degree in likeness [*similitudinem*] to the divine essence [*divinae essentiae*]. So far, therefore, as God knows His essence [*essentiam*] as capable of such imitation [*imitabilem*] by any creature, He knows it as the particular type [*propriam rationem*] and idea [*ideam*] of that creature: and in like manner as regards other creatures. So it is clear that God understands many particular types [*plures rationes proprias*] of things, and these are many ideas [*plures ideas*]. (Aquinas, *Summa Theologiae* (b), 1, q. 15, a. 2)[69]

On the whole, the translation by the Fathers of the English Dominican Province is not consistent. Thus, *ratio* is rendered five times as "idea" and twice as

[69] The Latin original: "Ratio autem alicujus totius haberi non potest, nisi habeantur propriae rationes eorum, ex quibus totum constituitur. Sicut aedificator speciem domus concipere non posset, nisi apud ipsum esset propria ratio cujuslibet partium ejus. Sic igitur oportet, quod in mente divina sint propriae rationes omnium rerum. Unde dicit Aug. in lib. 83. QQ. *(q. 46. post med.)* quod *singula propriis rationibus a Deo creata sunt*; unde sequitur, quod *in mente divina sint plures ideae*.

Hoc autem quomodo divinae simplicitati non repugnet, facile est videre, si quis consideret ideam operati esse in mente operantis, sicut quod intelligitur, non autem sicut species, qua intelligitur, quae est forma faciens intellectum in actu. Forma enim domus in mente aedificatoris est aliquid ab eo intellectum, ad cujus similitudinem domum in materia format. Non est autem contra simplicitatem divini intellectus, quod multa intelligat: sed contra simplicitatem ejus esset, si per plures species ejus intellectus formaretur.

Unde plures ideae sunt in mente divina, ut intellectae ab ipsa. Quod hoc modo potest videri. Ipse enim essentiam suam perfecte cognoscit: unde cognoscit eam secundum omnem modum, quo cognoscibilis est. Potest autem cognosci non solum secundum quod in se est, sed secundum quod est participabilis secundum aliquem modum similitudinis a creaturis. Unaquaeque autem creatura habet propriam speciem, secundum quod aliquo modo participat divinae essentiae similitudinem. Sic igitur inquantum Deus cognoscit suam essentiam ut sic imitabilem a tali creatura, cognoscit eam ut propriam rationem, et ideam hujus creaturae: et similiter de aliis. Et sic patet, quod Deus intelligit plures rationes proprias plurium rerum, quae sunt plures ideae" (Aquinas, *Summa Theologiae* (a), 1, q. 15, a. 2).

In the first paragraph of the excerpt we can read the distinction between "compound type" and "component types" as discussed in Section 2.1.5 and in Section 2.2.2.2 under point (*ii*).

"type." Further, *species* is rendered as "idea" on one occurrence and as "image" on another, and on a third occurrence it is correctly rendered as "species"; *idea* turns up five times and is correctly and consistently rendered as "idea"; *forma* turns up twice and is correctly and consistently rendered as "form."

For God by one understands [*intelligit*] many things, and that not only according to what they are in themselves, but also according as they are understood [*intellecta sunt*], and this is to understand the several types of things [*plures rationes rerum*]. In the same way, an architect is said to understand a house, when he understands the form [*formam*] of the house in matter. But if he understands the form of a house, as devised by himself, from the fact that he understands that he understands it, he thereby understands the type [*rationem*] or idea [*ideam*] of the house. Now not only does God understand many things by His essence [*per essentiam suam*], but He also understands that He understands many things by His essence [*per essentiam suam*]. And this means that He understands the several types of things [*plures rationes rerum*]; or that many ideas [*plures ideas*] are in His intellect as understood by Him. (Aquinas, *Summa Theologiae* (b), 1, q. 15, a. 2)[70]

Ratio turns up three times in the original of this passage and is correctly and consistently rendered as "type"; *forma* occurs once, correctly rendered as "form"; *idea* turns up twice, correctly and consistently rendered as "idea."

(*iii*) "Whether there are ideas of all things that God knows? [*Utrum omnium, quae cognoscit Deus, sint ideae*]"

As ideas [*ideae*], according to Plato, are principles of the knowledge of things and of their generation [*principia cognitionis rerum et generationis*], an idea [*idea*] has this twofold office, as it exists in the mind of God. So far as the idea is the principle of the making [*principium factionis*] of things, it may be called an *exemplar* [*exemplar*], and belongs to practical knowledge [*practicam cognitionem*]. But so far as it is a principle of knowledge [*principium cognoscitivum*], it is properly called a *type* [*ratio*], and may belong to speculative knowledge [*scientiam speculativam*] also. As an exemplar [*exemplar*], therefore, it has respect to everything made by God in any period of time; whereas as a principle of knowledge [*principium cognoscitivum*] it has respect to all things known by God, even though they never come to be in time; and to all things that He knows according to their proper type [*secundum propriam rationem*], in so far as they are known by Him in a speculative manner [*per modum speculationis*]. (Aquinas, *Summa Theologiae* (b), 1, q. 15, a. 3)[71]

[70] The Latin original: "Deus autem uno intellectu intelligit multa, et non solum secundum quod in seipsis sunt, sed etiam secundum quod intellecta sunt: quod est intelligere plures rationes rerum. Sicut artifex, dum intelligit formam domus in materia, dicitur intelligere domum: dum autem intelligit formam domus ut a se speculatam, ex eo quod intelligit se intelligere eam, intelligit ideam, vel rationem domus. Deus autem non solum intelligit multas res per essentiam suam, sed etiam intelligit se intelligere multa per essentiam suam. Sed hoc est intelligere plures rationes rerum, vel plures ideas esse in intellectu ejus, ut intellectas" (Aquinas, *Summa Theologiae* (a), 1, q. 15, a. 2).

[71] The Latin original: "Cum ideae a Platone ponerentur principia cognitionis rerum, et generationis ipsarum, *ad utrumque se habet idea, prout in mente divina ponitur*. Et secundum quod est principium factionis rerum, exemplar dici potest, et ad practicam cognitionem

Ratio occurs twice in the original of this passage and is correctly and consistently rendered as "type." *Exemplar* occurs twice, correctly and consistently rendered as "exemplar," whereas in a. 1 of the same *quaestio* it is rendered as "type." *Idea* occurs twice, correctly and consistently rendered as "idea."

(*iv*) "Whether providence can suitably be attributed to God? [*Utrum providentia Deo conveniat*]"

Since, however, God is the cause of things by His intellect, and thus it behooves that the type [*rationem*] of every effect should pre-exist in Him, as is clear from what has gone before (Q. 19, A. 4), it is necessary that the type of the order of things towards their end [*ratio ordinis rerum in finem*] should pre-exist in the divine mind: and the type [*ratio*] of things ordered towards an end [*in finem*] is, properly speaking, providence. For it is the chief part of prudence, to which two other parts are directed [to which they are ordained: *ordinantur*]—namely, remembrance of the past, and understanding of the present; inasmuch as from the remembrance of what is past and the understanding of what is present, we gather how to provide for the future. Now it belongs to prudence, according to the Philosopher (*Ethic.* vi. 12), to direct other things towards an end [to ordain them (*ordinare*) towards an end (*in finem*)] whether in regard to oneself—as for instance, a man is said to be prudent, who orders well [who ordains well: *qui bene ordinat*] his acts towards the end [*ad finem*] of life—or in regard to others subject to him, in a family, city, or kingdom; in which sense it is said (Matth. xxiv. 45), *a faithful and wise servant, whom his lord hath appointed over his family*. In this way prudence or providence may suitably be attributed to God. For in God Himself there can be nothing ordered towards an end [there can be nothing ordained (*ordinabile*) towards an end (*in finem*)], since He is the last end [*finis ultimus*]. This type of the order in things [*ratio ordinis rerum*] towards an end [*finem*] is therefore in God called providence. Whence Boëthius says (*De Consol.* iv. 6) that *Providence is the divine type* [*divina ratio*] *itself, seated in the Supreme Ruler; which disposeth all things*: which disposition may refer either to the type of the order of things towards an end [*ratio ordinis rerum in finem*], or to the type of the order of parts in the whole [to the *ratio* of this order]. (Aquinas, *Summa Theologiae* (b), 1, q. 22, a. 1)[72]

pertinet. Secundum autem quod principium cognoscitivum est, proprie dicitur ratio, et potest etiam ad scientiam speculativam pertinere. *Secundum ergo quod exemplar est, secundum hoc se habet ad omnia, quae a Deo fiunt secundum aliquod tempus. Secundum vero quod principium cognoscitivum est, se habet ad omnia, quae cognoscuntur a Deo, etiamsi nullo tempore fiant*, et ad omnia, quae a Deo cognoscuntur secundum propriam rationem, et secundum quod cognoscuntur ab ipso per modum speculationis" (Aquinas, *Summa Theologiae* (a), 1, q. 15, a. 3).

[72] The Latin original: "Cum autem Deus sit causa rerum per suum intellectum, et sic cujuslibet sui effectus oportet rationem in ipso praeexsistere, ut ex superioribus patet *(q. 19. art. 4.)*, necesse est, quod ratio ordinis rerum in finem in mente divina praeexsistat; ratio autem ordinandorum in finem proprie providentia est. Est enim principalis pars prudentiae, ad quam aliae *duae* partes ordinantur, scilicet *memoria praeteritorum,* et *intelligentia praesentium*; prout ex praeteritis memoratis, et praesentibus intellectis conjectamus de futuris providendis; prudentiae autem proprium est, secundum Philos. in 6. Ethic. *(cap. 12. circa med.)*, ordinare alia in finem, sive respectu sui ipsius, sicut dicitur homo prudens, qui bene ordinat actus suos ad finem vitae suae; sive respectu aliorum sibi subjectorum in familia, vel civitate, vel regno; secundum quem modum dicitur Matth. 24.: *Fidelis servus, et prudens, quem constituit dominus super familiam suam*. Secundum quem modum prudentia, vel providentia Deo convenire potest [...]. Nam in ipso Deo nihil est in finem ordinabile, cum ipse sit finis ultimus. Ipsa igitur ratio ordinis rerum in finem providentia in Deo nominatur. Unde Boet. 4. de Cons. *(pros. 6. paullo a princ.)* dicit, quod *providentia est ipsa divina ratio in summo omnium principe constituta, quae*

Ratio turns up seven times in this passage and is correctly and consistently rendered as "type."

(*v*) "Whether God has immediate providence over everything? [*Utrum Deus immediate omnibus provideat*]"

Two things belong to providence—namely, the type of the order of things [*ratio ordinis rerum*] foreordained towards an end [*provisarum in finem*]; and the execution of this order, which is called government. As regards the first of these, God has immediate providence [*providet*] over everything, because He has in His intellect the types of everything [*rationem omnium*], even the smallest; and whatsoever causes He assigns to certain effects, He gives them the power to produce those effects. Whence it must be that He has beforehand the type of those effects [*illorum effectuum in sua ratione*] in His mind. (Aquinas, *Summa Theologiae* (b), 1, q. 22, a. 3)[73]

Ratio occurs three times in the original of this passage and is consistently rendered as "type."

(*vi*) "Whether men are predestined by God? [*Utrum homines praedestinentur a Deo*]"

Hence, properly speaking, a rational creature, capable of eternal life, is led towards it, directed [*trasmissa*], as it were, by God. The reason [type: *ratio*] of that direction pre-exists in God; as in Him is the type of the order of all things towards an end [*ratio ordinis omnium in finem*], which we proved above to be providence. Now the type [*ratio*] in the mind of the doer of something to be done, is a kind of pre-existence in him of the thing to be done. Hence the type [*ratio*] of the aforesaid direction [*transmissionis*] of a rational creature towards the end [*in finem*] of life eternal is called predestination. For to destine, is to direct or send. Thus it is clear that predestination, as regards its objects [its objectives: *objecta*], is a part of providence. (Aquinas, *Summa Theologiae* (b), 1, q. 23, a. 1)[74]

Ratio occurs four times in the original of this passage and is correctly and consistently rendered as "type" on second, third, and fourth occurrence. On its first occurrence, instead, the Fathers render it, without justification, as "reason."

cuncta disponit. Dispositio autem potest dici tam ratio ordinis rerum in finem, quam ratio ordinis partium in toto" (Aquinas, *Summa Theologiae* (a), 1, q. 22, a. 1).

[73] The Latin original: "Ad providentiam *duo* pertinent, scilicet *ratio ordinis* rerum provisarum in finem, et *executio hujus ordinis*, quae gubernatio dicitur. *Quantum igitur ad primum horum, Deus immediate omnibus providet*, qui in suo intellectu habet rationem omnium etiam minimorum, et quascumque causas aliquibus effectibus praefecit, dedit eis virtutem ad illos effectus producendos. Unde oportet, quod ordinem illorum effectuum in sua ratione praehabuerit" (Aquinas, *Summa Theologiae* (a), 1, q. 22, a. 3).

[74] The Latin original: "Unde, proprie loquendo, rationalis creatura, quae est capax vitae aeternae, perducitur in ipsam, quasi a Deo transmissa. Cujus quidem transmissionis ratio in Deo praeexsistit; sicut et in eo est ratio ordinis omnium in finem, quam diximus esse providentiam. Ratio autem alicujus fiendi in mente actoris existens est quaedam praeexistentia rei fiendae in eo. Unde ratio praedictae transmissionis creaturae rationalis in finem vitae aeternae praedestinatio nominatur. Nam destinare est mittere. Et sic patet, quod praedestinatio, quantum ad objecta, est quaedam pars providentiae" (Aquinas, *Summa Theologiae* (a), 1, q. 23, a. 1).

(*vii*) "Whether the sin of consent to the act is in the higher reason? [*Utrum peccatum consensus in actum sit in ratione superiori*]"

The higher reason [*ratio superior*] *is intent on contemplating and consulting the eternal law* [the eternal types: *rationibus aeternis*],* as Augustine states (*De Trin*. xii. 7). But sometimes consent is given to an act, without consulting the eternal law [the eternal types: *rationibus aeternis*]: since man does not always think about Divine things, whenever he consents to an act. Therefore the sin of consent to the act is not always in the higher reason [*in ratione superiori*]. (Aquinas, *Summa Theologiae* (b), 1.2, q. 74, a. 7)[75]

Ratio occurs four times in the original of this passage: It is rendered as "reason" on two of these occurrences and as "law" on the other two.

Also, the asterisk after the first occurrence of "eternal law" refers to a footnote where (as mentioned at the beginning of this section) the Fathers of the English Dominican Province give a cautious and hardly explicative account of their use of "type" to render some occurrences of *ratio*. Here is the text of the footnote referred to by the asterisk (*Summa Theologiae* (b), Volume 2, page 923):

**Rationes æternæ*, *cf.* P. I, Q. 15, AA. 2, 3, where as in similar passages *ratio* has been rendered by the English *type*, because St. Thomas was speaking of the Divine *idea* as the archetype of the creature. Here the type or idea is a rule of conduct, and is identified with the eternal law (*cf.* A. 8, *Obj.* 1; A. 9).

(*viii*) "Whether the eternal law is a sovereign type existing in God? [*Utrum lex aeterna sit summa ratio in Deo existens*]"

Just as in every artificer there pre-exists a type [*ratio*] of the things that are made by his art, so too in every governor there must pre-exist the type of the order [*ratio ordinis*] of those things that are to be done by those who are subject to his government. And just as the type [*ratio*] of the things yet to be made by an art is called the art [*ars*] or exemplar [*exemplar*] of the products of that art, so too the type [*ratio*] in him who governs the acts of his subjects, bears the character of a law [it bears the type specific to norms: *rationem legis obtinet*], provided the other conditions be present which we have mentioned above (Q. 90) [as being proper to the type "norm": *esse diximus de legis ratione*. (This fragment was omitted by the translators.)]. Now God, by His wisdom, is the Creator of all things in relation to which He stands as the artificer to the products of his art, as stated in the First Part (Q. 14, A. 8). Moreover He governs all the acts and movements that are to be found in each single creature, as was also stated in the First Part (Q. 103, A. 5). Wherefore as the type of the Divine Wisdom [*ratio divinae sapientiae*], inasmuch as by It all things are created, has the character of art [the type for art: *rationem artis*], exemplar [*exemplaris*] or idea [*ideae*]; so the type of Divine Wisdom [*ratio divinae sapientiae*], as moving all things to their due end [*ad debitum finem*], bears the charac-

[75] The Latin original: "Ratio superior intendit rationibus aeternis inspiciendis, et consulendis, ut August. dicit 12. de Trin. *(cap. 7. in fin.)*: sed quandoque consentitur in actum non consultis rationibus aeternis: non enim semper homo cogitat de rebus divinis, quando consentit in aliquem actum; ergo peccatum consensus in actum non semper est in ratione superiori" (Aquinas, *Summa Theologiae* (a), 1.2, q. 74, a. 7).

ter of law [it bears the type specific to norms: *rationem legis*]. Accordingly the eternal law is nothing else than the type of Divine Wisdom [*ratio divinae sapientiae*], as directing all actions and movements. [...] And things, which are in themselves different, may be considered as one, according as they are ordained [*ordinantur*] to one common thing. Wherefore the eternal law is one since it is the type of this order [*ratio hujus ordinis*]. (Aquinas, *Summa Theologiae* (b), 1.2, q. 93, a. 1)[76]

Ratio occurs twelve times in the original of this passage and is rendered as "type" on the first through the fourth occurrence, as well as on seventh, ninth, eleventh, and twelfth occurrence; it is rendered, instead, as "characteristic" on fifth, eight, and tenth occurrence; the sixth occurrence of *ratio* is not translated at all. *Exemplar* occurs twice in this passage, correctly and consistently rendered as "exemplar." *Idea* occurs once, correctly rendered as "idea."

[76] The Latin original: "Sicut in quolibet artifice praeexistit ratio eorum, quae constituuntur per artem: ita etiam in quolibet gubernante oportet quod praeexistat ratio ordinis eorum, quae agenda sunt per eos, qui gubernationi subduntur: et sicut ratio rerum fiendarum per artem vocatur ars, vel exemplar rerum artificiatarum, ita etiam ratio gubernantis actus subditorum rationem legis obtinet, servatis aliis, quod supra *(q. 90.)* esse diximus de legis ratione: Deus autem per suam sapientiam conditor est universarum rerum; ad quas comparatur sicut artifex ad artificiata, ut in 1. habitum est *(q. 14. art. 18.)*: est etiam gubernator omnium actuum, et motionum, quae inveniuntur in singulis creaturis; ut etiam in I. habitum est *(q. 103. art. 5.)*; unde sicut ratio divinae sapientiae, inquantum per eam cuncta sunt creata, rationem habet artis, vel exemplaris, vel ideae: ita ratio divinae sapientiae moventis omnia ad debitum finem obtinet rationem legis: et secundum hoc lex aeterna nihil aliud est, quam ratio divinae sapientiae, secundum quod est directiva omnium actuum, et motionum. [...] ea autem, quae sunt in seipsis diversa, considerantur ut unum, secundum quod ordinantur ad aliquod commune; et ideo lex aeterna est una, quae est ratio hujus ordinis" (Aquinas, *Summa Theologiae* (a), 1.2, q. 93, a. 1).

Chapter 14

THE LAW AND WHAT IS RIGHT. HANS KELSEN UNDER SUSPICION

14.1. Prologue

Recall what was observed in Section 1.2: Translating *objektives Recht* to "law" and *subjektives Recht* to "right" would prove misleading to common-law and civil-law jurisprudents and jurists: It would not help toward improving their reciprocal understanding of those issues that are peculiar to each other's legal culture. The distinction between "what is objectively right" and "what is subjectively right" is not a distinction pertaining to the concept expressed by "law." It rather pertains to the concept expressed by "what is right" or "the right."

In civil-law literature one and the same word, the German *das Recht*, for example, can mean "the law" or "the right," or both, depending on context; and this word, *das Recht*, in expressions like *objektives Recht* and *subjektives Recht*, is used regularly to mean that the thing referred to is in some sense either objective or subjective. Now, this thing is not the law but the right, which for the reasons explained in Section 1.2 I suggest referring to with the expression "what is right."

As we saw in Chapters 1, 12, and 13, the examples in favour of this view are many and significant, not only for the noun *Recht* and its equivalents (*droit*, *diritto*, *derecho*) in the languages of several civil-law countries, but also for the Greek *dikē* and *dikai* as used in the Homeric poems with regard to what is objectively right and what is subjectively right, and for the Latin *jus* (we looked at several Latin authors on *jus*, with a focus on Aquinas in Chapter 13).

Still, it is not unusual to come across present-day English translations in which the distinction between *subjektives Recht* and *objektives Recht* (where German is concerned) is rendered with "objective law" and "subjective law"—or even "objective law" and "subjective right."

My suspicions about what may be one of the sources of these puzzling English translations fall on Hans Kelsen. I will now consider, beginning in the next section, the reasons and the arguments supporting these suspicions of mine.

14.2. Kelsen in the 1940s

Hans Kelsen consistently maintained in his works that the legal system, indeed every legal system, is made up entirely of norms. His pure theory is designed to purify legal normativeness not only of all ideological and political

contamination, and of all admixtures with sociology and psychology, but also of every parasitic notion that should nestle itself into it as a carryover from natural-law theories.

Having established that every legal system is made up entirely of norms, that *das Recht* is all normative—and having therefore emplaced *das Recht* entirely in the reality that ought to be (in *das Sollen*)[1]—Kelsen made it one of his theoretical objectives to reduce what is subjectively right to what is objectively right.

He pushed forward with this strategy even in the United States, when, upon transferring to Harvard, he entered into a thorough comparison and confrontation between his own pure theory of law and John Austin's analytical jurisprudence, which appeared to him to be the paradigm of Anglo-Saxon legal thought. In the preface to his *General Theory of Law and State*, of 1945, Kelsen announces what follows to his Anglophone audience.

> [(*a*)] When this doctrine is called the "pure theory of law," it is meant that it is being kept free from all the elements foreign to the specific method of a science whose only purpose is the cognition of law, not its formation. (Kelsen 1946, xiv)

> [(*b*)] *The legal order* determines what the conduct of men ought to be. It *is a system of norms*, a *normative order*. (Ibid.; italics added)

> [(*c*)] Only by separating the theory of law from a philosophy of justice as well as from sociology is it possible to establish a specific science of law. (Ibid., xv)

> [(*d*)] Like John Austin in his famous *Lectures on Jurisprudence*, the pure theory of law seeks to attain its results exclusively by an analysis of positive law. [...] In this respect, there is no essential difference between analytical jurisprudence and the pure theory of law. Where they differ, they do so because the pure theory of law tries to carry on the method of analytical jurisprudence more consistently than Austin and his followers. This is true especially as regards such fundamental concepts as that of the *legal norm* on the one hand, and those of the *legal right* and the *legal duty* on the other, in French and German jurisprudence *presented as a contrast between law in an objective and law in a subjective sense.* (Ibid., xv-xvi; italics in original on first occurrence, added on all other occurrences)

> [(*e*)] Just as the pure theory of law eliminates the dualism of law and justice and *the dualism of objective and subjective law* so it abolishes the dualism of law and State. (Ibid., xvi; italics added)

Excerpts (*d*) and (*e*) are telling indicia that any good state's attorney would produce in court to maintain that Hans Kelsen, with his *General Theory of Law and State*, helped to spread in common-law countries, and indeed in the entire

[1] Hans Kelsen is probably the clearest and most well-rounded of the scholars who maintain that they can arrive at a methodological matrix of the reality that ought to be, of norms, of the "Ought in an objective sense": *Sollen in einem objektiven Sinn*, not to be confused with *Recht in einem objektiven Sinn*, with "what is right in an objective sense" (Kelsen 1934, 66; Kelsen 1960, 45–6; cf. footnote 19 in this chapter). This matrix in Kelsen is the so-called presupposed basic norm. My arguments against the line adopted by Kelsen are set out in Pattaro 1982. On Kelsen and Grotius, see also Section 3.6.

Anglophone area, the opinion that "the law" is equivalent to "the right" ("what is right"), and that *objektives Recht* and *subjektives Recht* must be translated into English as "objective law" and "subjective law" respectively.[2]

This is how I fancy an arraignment might proceed on the part of a public prosecutor describing and charging Kelsen before an imaginary court.

Kelsen "was privileged to come to the United States and to work during two years at Harvard University. This opportunity he owes above all to the generous help of the Rockefeller Foundation" (Kelsen 1946, xviii). He was given considerable assistance "by the Bureau of International Research" (ibid.). He acknowledges that "the Committee on Translation and Publication of a 20th Century Legal Philosophy Series of the Association of American Law Schools" (ibid.) provided him with "the funds for the translation" into English of his German manuscript, a translation that was entrusted to a student of Axel Hägerström: Anders Wedberg (1913–1978).

This young man was only thirty years old when he did his translation for Kelsen, and was yet to become assistant professor (at Stockholm University). Hence Wedberg—on account of his dubious philosophical extraction (he had written in 1937 a dissertation on logical structure in the philosophy of Christofer Jacob Boström (1797–1866), whose dogmatic idealist philosophy prevailed in the 19th century in Sweden and influenced Hägerström's first philosophical credo),[3] and also on account of his youth and his still-modest academic position—certainly allowed Kelsen to influence him when it came to translating into English the legal terms that Kelsen had used in his German manuscript. Lastly, Kelsen (1946, xviii) declares that he revised Wedberg's translation of *General Theory of Law and State* himself; and that is quite plausibly how things went, especially with regard to the preface.

In short—our prosecuting attorney will conclude—it must be held beyond all reasonable doubt that Kelsen in person was the instigator behind the English rendition of *objektives Recht* and *subjektives Recht* with the two oxymorons "objective law" and "subjective law."[4] We do not know whether anyone before Kelsen committed a similar linguistic misdeed, but Kelsen did

[2] Note with regard to point (*d*) that Kelsen is explicit in stating that in French and German jurisprudence, "law in an objective sense" means "legal norm" and "law in a subjective sense" means both "legal right" and "legal duty." (This last is a point already discussed in Section 1.2.)

[3] Wedberg 1937. In the *Förörd* of this book Wedberg acknowledges in the first place his debt to his professor of philosophy at Uppsala University, Axel Hägerström, and also to *docenterna* Harry Meurling (1878–1938) and Gunnar Oxenstierna (1897–1939), under whose supervision he compiled his work. Wedberg has many words of thanks as well for Adolf Phalén (1884–1931), who in fact served brilliantly at Uppsala as chair of theoretical philosophy at the time when Hägerström was chairing practical philosophy, and finally for Einar Tegen (1884–1965). Cf. Pattaro 1974, 29–33, 37–9, 63–4, 75.

[4] But on at least one occasion there also appears in the *General Theory of Law and State* the expression "subjective right": One such occasion is on page 82, where the expression occurs next to "subjective law." Cf. footnote 6 in this chapter.

certainly commit it at Harvard in 1943–1944 with the English translation of the German manuscript of his *General Theory of Law and State*.[5]

14.3. A Few Other Contemporary English Translations of *objektives Recht* and *subjektives Recht*

The second edition of *Reine Rechtslehre* (1960) was translated in English before the first edition. We owe this translation, of 1967, to Max Knight, 1909–1993 (Kelsen 1989).

Even Knight, like Wedberg before him, almost invariably translates *objektives Recht* and *subjektives Recht* using "objective law" and "subjective law" (see, for example, page 125).[6] More than that, he sometimes changes the order of Kelsen's sentences and introduces in his English translation German expressions that do not appear in Kelsen's original (see, for example, Kelsen 1989, 125, and compare that with Kelsen 1960, 130).

Anyone who should read Max Knight's translation of the second edition of *Reine Rechtslehre* will notice remarkable differences from the German original. As far as I can tell, either of two things happened, or a mixture of them: Knight made a "free" translation of the second edition of *Reine Rechtslehre*, or Kelsen himself intervened in the course of Knight's translation and suggested changes with respect to the original German edition (which changes the translator does not, however, point out); or, again, the divergence between the German original and the English translation can be explained by taking into account the translator's free interpretation of the text in conjunction with the suggestions indicated to him by Kelsen. However that went, it may well be that Kelsen himself was not foreign to this mixup. In Knight's preface to his translation we can read what follows:

> This translation, carefully checked by the author, represents a compromise between a contents-conscious author and a form-conscious translator. Kelsen's immense experience with misinterpretations of his works as a result of "elegant" translations had to be the deciding factor when

[5] Anders Wedberg was an excellent scholar in the analytical tradition. Upon completing his first studies at Uppsala and Stockholm, he went to Princeton and Harvard, taught logic and philosophy at Cornell University from 1941 to 1943, and then served as professor of philosophy at Stockholm University from 1949 to 1975. A fine work from his scholarship is *Filosofins Historia*, a history of philosophy from ancient Greece to Ludwig Wittgenstein (1889–1951), published in Swedish from 1958 to 1966 and posthumously in English from 1982 to 1984 (Wedberg 1982–1984). He also translated into Swedish Wittgenstein's *Tractatus* and *Philosophical Investigations*. Last, but not least, Anders Wedberg's essay *Some Problems on the Logical Analysis of Legal Science* is among the sources of Hart's fortunate expressions "internal point of view" versus "external point of view" (Wedberg 1951, 252ff., 258ff.). Cf. Hart 1961, 244.

[6] Even in Knight's translation there occur cases of "subjective right," as on pages 129, 130, 168, and 171. Like Wedberg, Knight uses "subjective right" in the sense of "a legal right" as distinguished from "a legal duty" or "a legal obligation." Note, finally, that both translators use as well "a legal right" and "a right" in precisely this sense.

seemlingly repetitious or Germanic-sounding passages, expunged from or rephrased in an earlier draft of the translation as too literally mirroring the original, were restored. In view of the detailed Contents page an index was dispensed with. (Kelsen 1989, vi).

Kelsen, therefore, intervened in an earlier draft of the translation, and did so to make that translation more faithful to the original. Even so, the final translation fails in good measure to mirror the original: This discrepancy may be due to Knight or to Kelsen, or to both.[7]

The credit for finally making available to the English-speaking reader the first edition of Hans Kelsen's *Reine Rechtslehre* (Kelsen 1934) goes to Bonnie Litschewski Paulson and Stanley Paulson (Kelsen 1992). This translation came out in 1992: The original was published in German fifty-eight years earlier.

Even in the fine and faithful English translation of this work we have evidence of the difficulties involved in providing English equivalents of *objektives Recht* (or *Recht in einem objektiven Sinn*) and *subjektives Recht* (or *Recht in einem subjektiven Sinn*). The translators did what they could, and they worked out the following expressions: "objective law," "law—as objective law—," "law in (the) objective sense," "subjective right," and "law in (the) subjective sense" (Kelsen 1992, 37–46, 67). I will come back to this translation in Section 14.5, where I consider Kelsen's normativistic reductionism.

Allow me one last example here that seems to me to fall in line with the English translation of Kelsen 1934, except that this time around the translation is that of Alexy 1986.

Julian Rivers slips in these words on pages xxiii–xxiv of *A Theory of Constitutional Rights and the British Constitution*, an essay (Rivers 2002) that introduces his English translation of Robert Alexy's *Theorie der Grundrechte* (Alexy 2002):

There is a familiar distinction within German jurisprudence between objective law and subjective rights. (Rivers 2002, xxiii–xxiv)

That is not exactly so: The basic distinction is that between *objektives Recht* and *subjektives Recht*, in the singular ("what is objectively right" and "what is subjectively right"); and, in the light of this distinction, *subjektives Recht*, or *Recht in einem subjektiven Sinn*, refers not only to rights but also to obligations (Section 1.2).

It is not for us to decide whether a civil-law jurist or jurisprudent would be more puzzled at finding the distinction between *objektives Recht* and

[7] Further, the fact that Knight's last remark (in Kelsen 1989, vi) admits of at least two interpretations has me wondering whether the index was dispensed with by Kelsen himself or by Max Knight. It was not dispensed with in the French translation, of 1962 (Kelsen 1962) (which contains, among other things, an *Avant propos*, an authenticating piece, it might be said, penned by Kelsen himself), nor was it dispensed with in the Italian translation, of 1966 (Kelsen 1990). Lastly, both of these translations, the French and the Italian, do in fact mirror the German original more so than the English does.

subjektives Recht expressed (in English) as one between "objective law" and "subjective rights" or as one between "objective law" and "subjective law." Yet this latter rendition seems to be the lesser of the two evils because, in parallel to the German distinction, it uses the same noun ("law," however inappropriate this term may be) and specifies it with the modifiers "objective" and "subjective."[8] Civil-law jurists and jurisprudents can of course attempt a guess at what is the subject matter being referred to with these English expressions, and they can get it right if they are familiar with the kinds of clarifications made in Chapter 1 and in this chapter, among others.

As for scholars of common law, I wonder whether would they rather be more inclined to think that, luckily for them, the locutions "objective law," "subjective law," "subjective rights," and the like, are in the final analysis the literal translation found for abstruse coinages conceived in German conceptual jurisprudence (in the pejorative sense of the qualifier "conceptual"),[9] behind which, indeed behind the whole of civil-law legal culture, there is after all a Byzantine tradition[10] (here, too, in the pejorative sense of the qualifier "Byzantine"): These readers will be less inclined to venture a guess and attempt to understand what lies in concealment beneath the coinages offered to them than to thank God and Our Ladye the Common Lawe[11] for the fact that it is not in the end their job, nor is it within the scope of their academic interests, to deal with these vestiges from a Byzantine past, however much translated into English.

Cum de re constat, de verbis non est disputandum ("When the thing is clear, no discussion about words"): I agree with this dictum, but I am not completely sure that the thing here in question is clear. The things discussed in this chapter—but which actually were taken up beginning in Chapter 1, and indeed are treated in the whole of Part One, as well as in Chapters 12 and 13 of this volume—are some fundamental concepts of the legal-dogmatic tradition of civil law, a tradition that goes back further than German legal positivism: to natural law and ultimately to Roman law. These things, these concepts, may have been superseded by contemporary legal culture (even if I am not entirely convinced of this), but at least in an ideal reconstruction of the normativism of the legal-dogmatic tradition of civil law we should want to prevent any linguistic confusion (whomever it springs from, even Kelsen) from engendering confusion with regard to the underlying things or concepts, especially when different (however similar) cultural traditions—here, that of

[8] Cf. footnote 12 in this chapter.

[9] The term *Begriffsjurisprudenz* was coined in this sense by Philipp Heck (1858–1943).

[10] That of Justinian and Tribonian (ca. 475–545).

[11] The expression "ladye lawe" appears in a 1567 translation by Thomas Drant of Horace's Third Satire: "Thus, graunte you must, that feare of wronge, / set ladye lawe in forte" (Drant 1972, 166). The Latin original: "Iura inventa metu iniusti fateare necesse est" (Horace, *Satires*, I, 3, v. 111). Cf. Fassò 1982, 916.

civil law and that of common law—seem to be on a course toward a kind of fusion. Fusion is fine. Not so confusion.

Rivers makes an interesting remark: The adjectives "objective" and "subjective" are "made necessary by the ambiguity of the word *Recht*." An observation along the same lines is to be found in Hans Kelsen's second edition of *Reine Rechtslehre*, both in German and in the English translation (Kelsen 1960, 130–1; Kelsen 1989, 125): Maybe what we have here is a further indicium on which basis our public prosecutor would argue Kelsen's responsibilities.

In the second edition of *Reine Rechtslehre*, Kelsen observes with regard to the ambiguity of *Recht* that English, unlike German and French, has no need to bring into the equation the two adjectives "objective" and "subjective," for English can express the distinction in question by drawing on two nouns already at its disposal, namely (in Kelsen's opinion, an opinion I do not agree with: Section 1.2), "law" and "a right."[12] Here a question comes up: Why is it that those scholars who translate *objektives Recht* and *subjektives Recht* in English assuming that the first expression is equivalent to "law" and the second to "a right" should end up using as well the qualifiers "objective" and "subjective" (as in "objective law" and "subjective right")? If their assumption is correct (and I argue it not to be: Section 1.2), it will be superfluous, and ultimately a thing best avoided, to use the qualifiers "objective" and "subjective":[13] Law is

[12] This observation of Kelsen's is unfortunately omitted in Max Knight's nonchalant translation: "It is usual to oppose to the concept 'obligation' the concept 'right,' and to cede priority of rank to the latter. Within the sphere of law we speak of 'right and duty,' not of 'duty and right,' as within the sphere of morals, where greater stress is laid on duty; and we speak of a right as something different from law. But the right *is* law—law in a subjective sense of the word in contradistinction to 'law' in an objective sense, that is, a legal order or system of norms. In describing the law, the right is so much in the foreground that the obligation almost disappears; in German and French legal language, the same word, namely *Recht* and *droit*, is used to designate 'right' as well as 'law,' as a system of norms forming a legal order. Hence, in order to distinguish right and law, it is necessary to speak in German of *subjektives Recht* and *objektives Recht* (subjective law and objective law) or of *Recht im subjektiven Sinne* and *Recht im objektiven Sinne* (law in a subjective sense and law in an objective sense); and in French of *droit subjectif* and *droit objectif*" (Kelsen 1989, 125). This is Kelsen's German original; the italics show the observation that Max Knight omits to translate: "Der Rechtspflicht stellt man für gewöhnlich die Berechtigung als subjektives Recht gegenüber und rückt dabei dieses an die erste Stelle. Man spricht im Bereiche des Rechts von Recht und Pflicht, nicht von Pflicht und Recht (im Sinne der Berechtigung) wie im Bereich der Moral, wo jene mehr als dieses betont wird. In der Darstellung des Rechts steht die Berechtigung so sehr im Vordergrund, daß hinter ihr die Pflicht beinahe verschwindet und jene—in der deutschen und französischen Rechtssprache—sogar mit demselben Worte bezeichnet wird wie das System von Normen, das die Rechtsordnung bildet: mit dem Worte 'Recht,' 'droit.' Um mit diesem nicht identifiziert zu werden, muß die Berechtigung als 'subjektives' Recht, das ist also das Recht eines bestimmten Subjektes, von der Rechtsordnung, als dem 'objektiven' Recht, unterschieden werden. *In der englischen Rechtssprache freilich steht das Wort 'right' zur Verfügung, wenn man die Berechtigung, das Recht eines bestimmten Subjektes, zum Unterschied von der Rechtsordnung, dem objektiven Recht, dem 'law,' bezeichnen will*" (Kelsen 1960, 130–1).

[13] Of course the question would be out of place if the translator were writing on a meta-

law (objective by definition, as it were); a right is a right (subjective by definition, as it were).

14.4. The "Dualism" between *objektives Recht* and *subjektives Recht*: A Further Investigation into Kelsen

As was mentioned in the preceding section, the question of the "ambiguity of the word *Recht*" comes up in Kelsen before Rivers comes around to it in his essay. In Kelsen this question comes up in different formulations in the passage from the *General Theory of Law and State* to the second edition of *Reine Rechtslehre*, and also—and surprisingly enough—in the passage from the German original of the second edition of *Reine Rechtslehre* to Max Knight's translation of it.

Kelsen's first major work to appear in English was the *General Theory of Law and State*, published in 1945 (Kelsen 1946) as a translation of the corresponding German manuscript. In this case, then, the date of the English translation of Kelsen's work coincides with the date of the work's first edition.[14]

Kelsen's second major work to appear in English was the second edition of *Reine Rechtslehre*, published in German in 1960 and translated into English by Max Knight in 1967 under the title *The Pure Theory of Law*.

Lastly, the first edition of *Reine Rechtslehre*, markedly different from the second edition, was originally published in German in 1934, and only in 1992 was it given an English translation, by Bonnie Litschewski Paulson and Stanley L. Paulson.[15]

The 1934 *Reine Rechtslehre* (first edition) had not been conceived by Kelsen for an English-speaking audience, so in treating some questions common to all three of the works just listed, this work supplies a few more details than Kelsen 1946 and Kelsen 1960 as well as it omits to provide us with many others.

In the *General Theory of Law and State*, as well as in the English translation of the second edition of *Reine Rechtslehre*, the distinction between *objektives Recht* and *subjektives Recht* is almost invariably rendered with "objective *law*" and "subjective *law*." We will see shortly the context in which it is instead the expression "subjective *right*" that turns up.

linguistic level, that is, as in the case of the passage by Kelsen quoted in footnote 12, in a discussion not about concepts but about the terms (in German, French, etc.) that designate them. Besides, in this case, a translator seeking to render the distinction between *objektives Recht* and *subjektives Recht* (or that between *droit objectif* and *droit subjectif*) should use "objective right" versus "subjective right," thereby achieving a uniformity between the English, on the one hand, and the German, French, etc., on the other. As far as I know, this possibility is the only one that has not yet been explored.

[14] Kelsen had published an *Allgemeine Staatslehre* in German in 1925, but what he put out in 1945 is a different work.

[15] *Allgemeine Theorie der Normen*, published posthumously in German in 1979 (Kelsen 1979), was translated into English in 1991 by Michael Hartney (Kelsen 1991).

By contrast, in the 1992 English translation of the first edition of *Reine Rechtslehre* (1934), the distinction between *objektives Recht* and *subjektives Recht* is almost invariably rendered with "objective *law*" and "subjective *right*" (rather than with "subjective *law*"). Why?

The reason for this different terminological choice with respect to Wedberg's and Knight's translations may be that there developed in the meantime an awareness, among English-speaking scholars and in common-law milieus, of just how awkward it was to use "subjective law" (which in all likelihood was originally the chosen expression of Kelsen himself); and another reason may be that the development of the debate on human rights had in the meantime made English-speaking scholars more familiar with the original German expression, *subjektives Recht*, egging them on to work out for it "subjective *right*," which might be considered a more faithful or literal English rendition.

But what especially draws out our curiosity is the fact that there are passages in the English translation of the first edition of *Reine Rechtslehre* in which the translators use "*law* in (the) subjective sense" rather than "subjective *right*." Why do they do so? For some reason, the expression "subjective *right*" struck them as unusable in certain contexts. And—I maintain—the reason why they went with the different solution just mentioned is that Kelsen uses *subjektives Recht* to designate not only rights but also obligations (cf. Section 1.2).

14.5. Kelsen's Reduction of What Is Subjectively Right to What Is Objectively Right. A Textual Analysis (or Rather a Crossword Puzzle)

If we are to grasp the different nuances with regard to normativeness in the parlance of civil-law legal dogmatics, as well as the different conceptions of normativeness present in the tradition of civil-law legal thought (Kelsen's conception in particular), we will have to distinguish, I think, at least nine items, or concepts.

(*i*) "Law" (*das Recht*), understood as a legal order, or system, independently of any relations to the concept expressed by "the right" or "what is right," and hence independently of normative connotations.[16]

(*ii*) "The reality that ought to be (*das Sollen*)," understood in the manner illustrated in Sections 1.1 through 1.3.

[16] In this sense, "law" might be a mere Is (it might be found to pertain only to the reality that is). See, for example, the interesting theory of law worked out by Italy's foremost institutionalist, Santi Romano (1857–1947); he, too, incidentally, was an eminent professor in public law, as was Kelsen. Santi Romano's most widely known work is entitled *L'ordinamento giuridico* (1917; cf. Romano 1945), which in German would translate to *Die Rechtsordnung* (The legal order). But Santi Romano's *die Rechtsordnung*—his legal order—is not a system of norms; rather, as he writes, it is an institution or an organisation.

(*iii*) "What is right" (*das Recht*), understood in the manner illustrated in Sections 1.2 and 1.3, and as inclusive of the six items that follow.

(*iv*) "Norm" (*die Norm*), understood as the entity which belongs par excellence to the reality that ought to be, and which best expresses the sense of this reality.

(*v*) "What is objectively right" (*objektives Recht*), understood in a broad sense as referring to norms and their contents in the reality that ought to be (the top layer of the reality that ought to be: Section 1.2).

(*vi*) "What is objectively right" (*objektives Recht*), understood in a narrow sense as referring to the content of norms (Section 1.3).

(*vii*) "What is subjectively right" (*subjektives Recht*), understood in a broad sense as referring to all normative subjective positions, active and passive (both rights and obligations, for example),[17] which make up the bottom layer of the reality that ought to be (Section 1.2).

(*viii*) "What is subjectively right" (*subjektives Recht*), understood in a narrow sense as referring only to passive normative subjective positions in the reality that ought to be, and hence as referring to obligations but not to rights (Sections 1.2 and 1.3). Cf. Kelsen 1934, 46ff.

(*ix*) "What is subjectively right" (*subjektives Recht*), understood in a narrow sense as referring only to active normative subjective positions in the reality that ought to be, and hence as referring to rights but not to obligations: Sections 1.2 and 1.3. Cf. Kelsen 1934, 40ff., 46ff.

It is against this background that we should consider the previously mentioned charge levelled at Kelsen (Section 14.2). And we can test forthwith the use of the distinctions and qualifications just made by bringing them to bear in seeking to grasp his normativistic reductionism and to assess the terminology he chose ("objective law" and "subjective law") to render into English the distinction between *objektives Recht* and *subjektives Recht*.

(1) Kelsen sets *das Recht*—in both of its possible and different meanings: (*i*) the law and (*iii*) what is right—within (*ii*), the reality that ought to be, *das Sollen*. *Das Recht* is, according to Kelsen, entirely and exclusively a reality that ought to be. What was indicated under point (*i*), the law, must therefore flow entirely and necessarily into what is right as implied under points (*ii*) through (*ix*). This is Hans Kelsen's preliminary, first, and crucial normativistic reduction. The reality of the law is simply the same reality as what is right: It is the reality that ought to be.

(2) Kelsen, further, effects another and full normativistic reduction, a sort of Final Solution: He reduces the bottom layer of the reality that ought to be (what is subjectively right in a broad sense as characterised under point (*vii*)) to the top layer of the reality that ought to be (to what is objectively right in a

[17] On the use of "active" and "passive" in reference to normative subjective positions, see Section 1.3, footnote 13.

broad sense as characterised under point (*v*)). More precisely, Kelsen makes these three reductions: (*ix*) legal rights (*Berechtigungen*) reduced to (*viii*) legal obligations (*Rechtspflichten*), (*viii*) legal obligations to (*iv*) legal norms (*Rechtsnormen*), and (*iv*) *legal* norms[18] to (*ii*) the reality that ought to be (*das Sollen*). This last reduction is in truth already and preliminarily made in (1), where everything that is *legal*, in the sense of having to do with (*i*), the law, gets located within (*ii*), the reality that ought to be (in *das Sollen*).[19]

With these grand reductions in place, Kelsen, in his *General Theory of Law and State*, has *das Recht* translated to "the law," *objektives Recht* to "objective law," and *subjektives Recht* to "subjective law." What is amiss here is that "the law" and "what is right" ("the right") are equivalent in Kelsen's thought, but not all his English readers make the same equivalence. The fact that *das Recht* can mean "the law" or "the right," or both, and that Kelsen reduces the law to the right, suggests that the most appropriate translation of Kelsen's *das Recht* is not "the law," but "what is right," or "the right" (as happens with Hegel's *Philosophie des Rechts*);[20] and the most appropriate translation of *objektives Recht* and *subjektives Recht*, the way Kelsen uses these expressions, is not "objective law" and "subjective law" (as Kelsen writes in the *General Theory of Law and State*), but "what is objectively right" and "what is subjectively right" (see Section 1.2).

Kelsen's normativistic reductionism (as specified under the foregoing points (1) and (2)) may help explain, but does not justify, the English expressions he chose to use. This choice has in all likelihood played a role in spreading in the English language and in common-law countries the awkward English usages ("objective law," "subjective law") presently under discussion.

In the remainder of this section I provide some passages from Kelsen 1934, along with the corresponding passages from the 1992 English translation, plus a few comments on both based on the foregoing distinction among nine items, or concepts.

[18] It would be more appropriate to say "legal, objectively *valid* norms," keeping to Kelsen's understanding of validity (a conception of validity I do not agree with: Sections 2.1.1, 2.2.2, 2.2.3, 3.2, 3.4, 7.1, and 8.2.2 through 8.2.4).

[19] Besides, Kelsen distinguishes the *Sollen* (the reality that ought to be) in a subjective sense (*Sollen in einem subjektiven Sinn*, not to be confused with *Recht in einem subjektiven Sinn*) from the *Sollen* in an objective sense (*Sollen in einem objektiven Sinn*, not to be confused with *Recht in einem objektiven Sinn*): see Section 5.1, footnote 2. The *Sollen* (the reality that ought to be) in a subjective sense can be any non-legal *Sollen*, and Kelsen reduces it to *das Sein* (the reality that is): to will or interest. According to Kelsen, only the legal *Sollen* (*das Recht*) is the *Sollen* in an objective sense, namely, the objective reality that ought to be. And this objectivity is designated by Kelsen as "(legal) validity." Cf. Pattaro 1982, LXXVII–LXXIX. See Kelsen 1934, 66; Kelsen 1960, 45–6. Cf. also Kelsen 1911, 64–71; Kelsen 1946, 30–7, 47–9; Kelsen 1957b, 211ff., 229; Kelsen 1960, 7, 9, 17, 19, 20–3, 231; Kelsen 1979, 4, 21–2, 30–7, 47–9, 103ff., 124–5, 132ff., 239–40.

[20] Cf. Section 1.2 (and its footnote 8) and Section 4.1, footnote 1.

In the first edition of *Reine Rechtslehre*, Kelsen had already written the following:

Wenn die allgemeine Rechtslehre ihren Gegenstand, das Recht [Is this *das Recht* in the sense of "law," as specified earlier under point (*i*), or in the sense of "what is right," point (*iii*)? I believe we have to do here with concept (*iii*), to which Kelsen entirely reduces concept (*i*)], nicht nur in einem objektiven [concept (*v*)], sondern auch in einem subjektiven Sinn [concept (*vii*)] als gegeben behauptet, so verlegt sie damit schon in die Grundlage ihres Systems—und das ist der Dualismus von objektivem und subjektivem Recht [concepts (*v*) and (*vii*) respectively]—einen prinzipiellen Widerspruch. Denn sie behauptet damit, daß das Recht [*das Recht* as "what is right": concept (*iii*)]—als objektives [concept (*v*)]—Norm, Komplex von Normen, das heißt Ordnung [concept (*iv*)], und zugleich, daß es [*es*, referring to "das Recht": concept (*iii*)]—als subjektives [concept (*ix*)]—etwas davon [*davon*, referring to *das Recht als objektives*: concept (*v*)] völlig Verschiedenes, damit unter keinen gemeinsamen Oberbegriff zu Subsumierendes, nämlich: Interesse oder Wille sei. Dieser Widerspruch kann auch dadurch nicht aufgehoben werden, daß zwischen dem objektiven und dem subjektiven Recht [concepts (*v*) and (*ix*) respectively] eine Beziehung behauptet und dieses als das von jenem geschützte Interesse, der von jenem anerkannte oder gewährleistete Wille definiert wird. (Kelsen 1934, 40–1)

I provide for the reader's convenience my own translation of the foregoing excerpt: This translation is based on Kelsen 1992 (itself a translation of Kelsen 1934) and has been tailored to the specific needs of the textual analysis I am carrying out in this section.[21]

When general legal theory claims that its object of enquiry, *das Recht* [Is this *das Recht* in the sense of "law," as specified earlier under point (*i*)? or in the sense of "what is right," point (*iii*)? I believe we have to do here with concept (*iii*), to which Kelsen entirely reduces concept (*i*)], is given not only in an objective sense [concept (*v*)] but also in a subjective sense [*nicht nur in einem objektiven, sondern auch in einem subjektiven Sinn*: concept (*vii*)], it builds into its very foundation a basic contradiction, that is, the dualism between what is objectively and what is subjectively right [*der Dualismus von objektivem und subjektivem Recht*: concepts (*v*) and (*vii*) respectively]. For general legal theory is thereby claiming that *das Recht* [*das Recht* as "what is right," I would say here: concept (*iii*)]—insofar as it is objectively right [*als objektives*: concept (*v*)]—is norm, a complex of norms, a system [*Norm, Komplex von Normen, das heißt Ordnung*: concept (*iv*)], and is claiming at the same time that what is right [*es*, referring to *das Recht*: concept (*iii*)]—insofar as it is subjectively right [*als subjektives*: concept (*ix*)]—is interest or will, something altogether different from what is objectively right [*das Recht als objektives*: concept (*v*)] and therefore impossible to subsume under any general concept common to both. This contradiction cannot be removed even by claiming a connection between what is objectively

[21] From here on out, in providing selected passages from the first edition of *Reine Rechtslehre*, I will be using my own adaptation of Kelsen 1992. This adaptation will consist, for example, in substituting the original German (*das Recht*) or my own expressions ("what is right," "what is objectively right," "what is subjectively right") for the terms occurring in Kelsen 1992; these substitutions I will make whenever it seems necessary to bring to the reader's attention the terminological and conceptual details I am treating of; in particular, I will need to point out Kelsen's ambiguous uses of the term *das Recht* and the crucial passages in which Kelsen effects the normativistic reductionism I have been treating of. In any event, I will be providing—for the reader's convenience, and to *suum cuique tribuere*—the corresponding original German text of Kelsen 1934 as well as the English version of it by Bonnie Litschewski Paulson and Stanley Paulson (Kelsen 1992).

and what is subjectively right [*zwischen dem objektiven und dem subjektiven Recht*: concepts (*v*) and (*ix*) respectively], by claiming that the latter is defined as interest that is protected by the former, as will that is recognised or guaranteed by the former. (My adaptation of Kelsen 1992, 38; cf. Kelsen 1934, 40–1)[22]

The reader may notice the following about the passage just quoted: Concept (*i*) occurs once (in an ambiguous conjunction with concept (*iii*)); concept (*iii*) occurs three times (on the first of these three occasions it does so ambiguously in conjunction with concept (*i*)); concept (*iv*) occurs once; concept (*v*) occurs five times; concept (*vii*) occurs twice; and concept (*ix*) occurs twice. There is no occurrence of concept (*vi*) or (*viii*).

Those readers who should want to apply themselves to the crossword puzzle just introduced may give it a try by assigning concepts (*i*) through (*ix*) to the expressions occurring in the unadapted version of the passage just quoted (the passage is Kelsen 1992, 38; the unadapted version is quoted in footnote 22 of this section, where the relevant expressions are marked out in italics). The results obtained may then be compared against what I myself came up with working on the original German version (and on my English translation of it). This comparison would make it possible to detect all cases of convergence and divergence (between my own results and the reader's) as well as any undecidables. At any rate, these are the results I obtained working on the unadapted Kelsen 1992, 38, quoted in footnote 22: Concept (*i*) occurs three times, concept (*iv*) once, and concept (*ix*) three times; there is no occurrence of concept (*ii*), (*iii*), or (*v*) through (*viii*); four cases are undecidable, which happens when "objective" is used to modify "law."

In Section 24 of the first edition of *Reine Rechtslehre* Kelsen proceeds to his reduction *des subjektiven Rechts* (in the foregoing sense (*vii*)) *auf das objektive* (in the foregoing sense (*v*)).

In particular he argues the following:

Gerade an diesem Punkte setzt die Reine Rechtslehre mit ihrer Kritik der herrschenden Lehrmeinung ein, indem sie mit dem größten Nachdruck den Begriff der Rechtspflicht [where there is implicit the concept specified under point (*viii*)] in den Vordergrund stellt. Und auch

[22] Here is the 1992 English translation, unmodified save for the italics, which I have put in as an aid for the reader in spotting the concepts listed immediately after this footnote, in the run of text: "When general legal theory claims that its object of enquiry, the *law*, is given not only in an *objective sense* but also in a *subjective sense*, it builds into its very foundation a basic contradiction, that is, the dualism of *objective law* and *subjective right*. For general legal theory is thereby claiming that law—as *objective law*—is *norm*, a complex of norms, a system, and claiming at the same time that *law*—as *subjective right*—is interest or will, something altogether different from *objective law* and therefore impossible to subsume under any general concept common to both. This contradiction cannot be removed even by claiming a connection between *objective law* and *subjective right*, by claiming that the latter is defined as interest that is protected by the former, as will that is recognized or guaranteed by the former" (Kelsen 1992, 38; italics added).

in diesem Punkte zieht sie nur die letzte Konsequenz gewisser Grundgedanken, die in der positivistischen Theorie des 19. Jahrhunderts schon angelegt waren, aber nicht über verhältnismäßig bescheidene Ansätze entwickelt wurden. Sie erkennt in der Rechtspflicht [concept (*viii*) is implicit here] nur die Rechtsnorm [concept (*iv*)] in ihrer Beziehung auf das von ihr statuierte konkrete Verhalten eines ganz bestimmten Individuums, das heißt die individualisierte Rechtsnorm [concept (*viii*) as reduced to concept (*iv*)]; und sie emanzipiert den Begriff der Rechtspflicht [concept (*viii*) is implicit here] dadurch vollkommen von dem der Moralpflicht, daß sie ihn in der folgenden Weise interpretiert: zu einem bestimmten Verhalten ist ein Mensch insoweit rechtlich verpflichtet, als das Gegenteil dieses Verhaltens in der Rechtsnorm [concept (*iv*)] als Bedingung für einen als Unrechtsfolge qualifizierten Zwangsakt gesetzt ist. (Kelsen 1934, 47)

In this case—in the foregoing excerpt—the English translation (from Kelsen 1992) lends itself as is, without any modifications, to receive the qualifications introduced with the previously listed concepts (*i*) through (*ix*). Therefore, the English translation from Kelsen 1992, provided in footnote 23 below, bears the same comments inserted in the German original.[23]

The reader may notice how, in the passage just quoted, concept (*iv*) occurs three times and concept (*viii*) four times. There is no occurrence of concepts (*i*) through (*iii*), (*v*) through (*vii*), or (*ix*).

Kelsen also argues that

eine Berechtigung [concept (*ix*) is implicit here] liegt dann vor, wenn unter die Bedingungen der Unrechtsfolge eine auf diese gerichtete, in der Form einer Klage oder Beschwerde abzugebende Willensäußerung des durch den Unrechtstatbestand in seinen Interessen Verletzten aufgenommen ist. Nur in der Beziehung zu diesem individualisiert sich die Rechtsnorm [concept (*iv*)] zur Berechtigung [concept (*ix*) is implicit here], wird sie—in diesem von der Rechtspflicht [in one sense of *subjektives Recht*, i.e., its sense under concept (*viii*), different from *die Rechtspflicht*, concept (*viii*)] verschiedenen Sinne [*subjektives Recht*: concept (*iv*)]—subjektives Recht [concept (*ix*)], das heißt Recht eines Subjekts [concept (*ix*)], indem sie [*sie*, referring to *Rechtsnorm*: concept (*iv*)] sich ihm zur Geltendmachung seiner Interessen zur Verfügung stellt. Als Berechtigung [concept (*ix*) is implicit here] steht das subjektive Recht

[23] "At exactly this point, the Pure Theory of Law launches its critique of the received academic opinion by bringing the concept of *legal obligation* [*der Rechtspflicht*, where there is implicit the concept specified under point (*viii*)] emphatically to the fore. Here, too, the Pure Theory is simply drawing the obvious conclusion from certain basic ideas already expressed in nineteenth-century positivist theory but not developed beyond their relatively modest beginnings. The Pure Theory recognizes in legal obligation simply the individualized legal norm, that is, a legal norm (establishing [as obligatory] certain behaviour) in its connection to the concrete behaviour of a particular individual [*erkennt in der Rechtspflicht* (concept (*viii*) is implicit here) *nur die Rechtsnorm* (concept (*iv*)) *in ihrer Beziehung auf das von ihr statuierte konkrete Verhalten eines ganz bestimmten Individuums, das heißt die individualisierte Rechtsnorm*: concept (*viii*) as reduced to concept (*iv*)]. And the Pure Theory completely emancipates the concept of legal obligation [*Rechtspflicht*: concept (*viii*) is implicit here] from that of moral obligation by interpreting the former as follows: A human being is legally obligated to behave in a certain way in so far as the opposite behaviour is set in the legal norm [*Rechtsnorm*: concept (*iv*)] as the condition for a coercive act qualified as the consequence of an unlawful act" (Kelsen 1992, 43; italics added).

[concept (*ix*)] dem objektiven Recht [concept (*v*)] nicht als etwas von ihm Unabhängiges gegenüber; denn es gibt so etwas wie ein subjektives Recht [concept (*vii*)] nur, weil und sofern es das objektive Recht [concept (*v*)] normiert [concept (*iv*)]. Die Berechtigung [concept (*ix*)] ist überhaupt nur eine mögliche und keineswegs notwendige inhaltliche Gestaltung des objektiven Rechts [concept (*v*)], eine besondere Technik, deren sich das Recht [Is this *das Recht* in the sense of "law," as specified earlier under point (*i*), or in the sense of "what is right," point (*iii*)? I believe we have to do here with concept (*iii*), to which Kelsen entirely reduces concept (*i*)] bedienen kann, aber durchaus nicht bedienen muß. (Kelsen 1934, 48)

I provide for the reader's convenience my own translation of the foregoing excerpt: This translation is based on Kelsen 1992 (itself a translation of Kelsen 1934) and has been tailored to the specific needs of the textual analysis I am carrying out in this section.

An authorisation [*Berechtigung*: concept (*ix*) is implicit here] exists where an expression of will is included among the conditions for the consequence of an unlawful act, an expression of will that addresses this consequence and that is to be brought in the form of a complaint or claim by the party whose interests were violated by the unlawful act. Only in relation to its becoming individualised in an authorisation [*Berechtigung*: concept (*ix*) is implicit here] does the legal norm [*die Rechtsnorm*: concept (*iv*)] become what is subjectively right [*subjektives Recht*: concept (*ix*)]—in a sense which is different from that in which a legal obligation [*der Rechtspflicht*: concept (*viii*) is implicit here] is what is subjectively right [*subjektives Recht*: concept (*viii*)]—that is, the legal norm [*sie*, referring to *Rechtsnorm*: concept (*iv*)] becomes a subject's right [*Recht eines Subjekts*: concept (*ix*)], this to the extent that the legal norm [*sie*, referring to *Rechtsnorm*: concept (*iv*)] places itself at the disposal of a subject in order to enable the subject to advance his or her own interest. Understood as authorisation [*Berechtigung*: concept (*ix*) is implicit here], what is subjectively right [*das subjektive Recht*: concept (*ix*)] stands in relation to what is objectively right [*dem objektiven Recht*: concept (*v*)] not as something independent of and contrary to it; indeed, there can be something like a right [*ein subjektives Recht*: concept (*vii*)] only because and to the extent that what is objectively right [*das objektive Recht*: concept (*v*)] regulates it normatively [*normiert*: concept (*iv*)]. Authorisation [*Berechtigung*: concept (*ix*)] is quite simply one of several possible content forms that what is objectively right [*des objektiven Recht*: concept (*v*)] can take: It is therefore not a necessary content form; it is by no means a necessary way. It is one particular technique that *das Recht* [Is this *das Recht* in the sense of "law," as specified earlier under point (*i*)? or in the sense of "what is right," point (*iii*)? I believe we have to do here with concept (*iii*), to which Kelsen entirely reduces concept (*i*)] can, but need not, use. (My adaptation of Kelsen 1992, 44; cf. Kelsen 1934, 48)[24]

[24] Here is the 1992 English translation, unmodified save for the italics, which I have put in as an aid for the reader in spotting the concepts listed immediately after this footnote, in the run of text: "A legal *right* exists where an expression of will is included among the conditions for the consequence of an unlawful act, an expression of will that addresses this consequence and that is to be brought in the form of a complaint or claim by the party whose interests were violated by the unlawful act. Only in its connection to the violated party is the legal *norm* individualized as a legal *right*; in making itself available to a subject for the assertion of his interests, the *legal norm* becomes the *right of that subject*, that is, a *subjective right—law in a subjective sense* different from *legal obligation*. As *legal right*, *law in the subjective sense* is not independent of the *objective law*, for there is such a thing as a *subjective right* only because and in so far as the *objective law* normatively regulates it. The *legal right* is quite simply one possible way of shaping the content of the *objective law*; it is by no means a necessary way. It is one particular technique that *the law* can, but need not, use" (Kelsen 1992, 44; italics added).

The reader may notice the following about the passage just quoted: Concept (*i*) occurs once (in an ambiguous conjunction with concept (*iii*)); concept (*iii*) occurs once (in an ambiguous conjunction with concept (*i*)); concept (*iv*) occurs four times; concept (*v*) occurs three times; concept (*vii*) occurs once; concept (*viii*) occurs twice; and concept (*ix*) occurs seven times. There is no occurrence of concept (*ii*) or (*vi*).

Those readers who should want to apply themselves to the crossword puzzle previously introduced may give it a try by assigning concepts (*i*) through (*ix*) to the expressions occurring in the unadapted version of the passage just quoted. The passage is Kelsen 1992, 44; its unadapted version is quoted in footnote 24 of this section, where the relevant expressions are marked out for emphasis. (I have italicised in this unadapted version the expressions "law in a subjective sense" and "law in the subjective sense," which the translators use on exceptional occasions, straying from their otherwise consistent use of "subjective right": see *infra*.)

And, lastly, Kelsen adds that

> mit dieser Einsicht der Reinen Rechtslehre in das Wesen dessen, was man Recht im subjektiven Sinne nennt [concept (*vii*)], ist der Dualismus von subjektivem [concept (*vii*)] und objektivem Recht [concept (*v*)] aufgehoben. Das subjektive Recht [concept (*vii*)] ist kein vom objektiven [concept (*v*)] verschiedenes, es ist das objektive Recht [concept (*v*)] selbst, nur sofern es [*es*, referring to *das objektive Recht selbst*: concept (*v*)] sich mit der von ihm [*von ihm*, meaning *objektives Recht* (concept (*v*))] statuierten Unrechtsfolge gegen ein konkretes Subjekt richtet (Pflicht [concept (*viii*) is implicit here]) oder einem solchen zur Verfügung steht (Berechtigung [concept (*ix*) is implicit here]). (Kelsen 1934, 49)

I provide for the reader's convenience my own translation of the foregoing excerpt: This translation is based on Kelsen 1992 (itself a translation of Kelsen 1934) and has been tailored to the specific needs of the textual analysis I am carrying out in this section.

> With this insight into the essence of what is called what is subjectively right [*was man Recht im subjektiven Sinne nennt*: concept (*vii*)], the Pure Theory of Law eliminates the dualism between what is subjectively and what is objectively right [*von subjektivem* (concept (*vii*)) *und objektivem Recht* (concept (*v*))]. What is subjectively right [*Das subjektive Recht*: concept (*vii*)] is not different from what is objectively right [*vom objektiven*: concept (*v*)]; it is the same as what is objectively right [*das objektive Recht selbst*: concept (*v*)]; it is what is objectively right [*es*, referring to *das objektive Recht selbst*: concept (*v*)] only inasmuch as it turns against an actual subject with a consequence (a consequence established by what is objectively right itself [*von ihm*, referring to *objektives Recht* (concept (*v*)) *statuierten*]) of an unright (in this case there is a duty [*Pflicht*: concept (*viii*) is implicit here]), or it is at the disposal of this subject (and in this case there is an authorisation [*Berechtigung*: concept (*ix*) is implicit here]). (My adaptation of Kelsen 1992, 44; cf. Kelsen 1934, 49)[25]

[25] Here is the 1992 English translation, unmodified save for the italics, which I have put in as an aid for the reader in spotting the concepts listed immediately after this footnote, in the run of text: "With this insight into the essence of what is called *law in the subjective sense*, the

The reader may notice the following about the passage just quoted: Concept (*v*) occurs five times, concept (*vii*) three times, concept (*viii*) once, and concept (*ix*) once. There is no occurrence of concepts (*i*) through (*iv*) or of concept (*vi*).

Those readers who should want to apply themselves to the crossword puzzle previously introduced may give it a try by assigning concepts (*i*) through (*ix*) to the expressions occurring in the unadapted version of the passage just quoted. The passage is Kelsen 1992, 44; its unadapted version is quoted in footnote 25 of this section, where the relevant expressions are marked out for emphasis. I have italicised in this unadapted version the expression "law in the subjective sense," occurring twice, which the translators use on exceptional occasions, straying from their otherwise consistent use of "subjective right"; and I have also italicised "subjective right (*qua* legal right)." All these expressions used in translation can be explained by the fact that the translators have had to find some way of rendering into English the idea that the German *subjektives Recht* refers not only to legal rights, but also to legal obligations.

14.6. How What Is Subjectively Right, Having Been Pushed out the Front Door, Slips in through the Back Disguised as an Individualised Norm

We will see now that Kelsen fails in his reduction of what is subjectively right to what is objectively right (as these two expressions were specified earlier in Section 14.5, under points (*vii*) and (*v*) respectively). Kelsen mistakenly believes he has eliminated what is subjectively right (*subjektives Recht*) by reducing it to what is objectively right (*objektives Recht*). In reality, what he has pushed out the front door (what is subjectively right), creeps in through the back disguised as an individualised norm.

It was seen in Section 1.2 how in the expression *subjektives Recht* ("what is subjectively right"), the word *subjektives* ("subjectively") is taken to mean that there are actual people, or subjects, involved in what is right; the expression, in other words, is taken to mean that these subjects are the referents (Section 6.4) of a norm applicable to them: They are referred to by the content of that norm. The German expression *objektives Recht* ("what is objectively right") designates instead norms and their content, and that independently of whether these have any actual referents (or are applicable to any actual subjects) in the reality that is.

Pure Theory of Law eliminates the dualism of *objective law* and *subjective right*. The *subjective right* is not different from *objective law*; it is itself objective law. For there is a *subjective right (qua legal right)* only in so far as the *objective law* is at the disposal of a concrete subject. Similarly, the *legal obligation* (the other form of *law in the subjective sense*) is itself *objective law*, for there is a *legal obligation* only in so far as the *objective law* aims—with the consequence it establishes for an unlawful act—at a concrete subject" (Kelsen 1992, 44; italics added).

Further, as was observed in Section 14.5, with reference to items (*i*) through (*ix*), Kelsen reduces the law (item (*i*)) to a system of norms (item (*iv*)); and norms he reduces to *das Sollen* (to the reality that ought to be: item (*ii*)). Kelsen, further, is looking to reduce *subjektives Recht* (normative subjective positions: item (*vii*)) to *objektives Recht* (to norms and their contents, to what is objectively right: item (*v*)).

Also, when Kelsen speaks of *objektives Recht* in order to reduce to it the *subjektives Recht*, he is always speaking of an *objektives Recht* (norms and their content: item (*v*)) that has referents (Section 6.4) in actual subjects (actual duty-holders and right-holders, in the traditional understanding of them) in the reality that is. And he does so without distinguishing this case from the case—a very likely case—in which *objektives Recht* (norms and their content: item (*v*)) does not have any referent in any actual subject (in any duty-holder or right-holder, in the traditional understanding of them) in the reality that is.

Kelsen does not seem to realise that in so doing he is not objectifying the *subjektives Recht* by reducing it to the *objektives Recht*, but is rather subjectivising the *objektives Recht* by presenting it in its making reference and being applied to actual subjects (to actual duty-holders and right-holders): He does so in the hope of showing that there is no room for *subjektives Recht*, because the place the theories he criticises regard as occupied by *subjektives Recht* is in reality taken up in full by *objektives Recht*. From Kelsen's point of view, *subjektives Recht* would thereby find itself dissolved into *objektives Recht*.

But a subjectivised *objektives Recht* is precisely a *subjektives Recht*, because *subjektives Recht* is *objektives Recht* insofar as it gets subjectivised. This makes it so that the purported reduction of *subjektives Recht* to *objektives Recht* revolves around a self-contradiction: Kelsen shows the opposite of what he is looking to demonstrate.

Kelsen apparently cannot deny, and does not deny, that *objektives Recht* (norms and their content: item (*v*)) exists in the reality that ought to be (in the *Sollen*) even independently of whether norms and their content refer and apply to any actual subjects in the reality that is, and even independently of whether any such subjects actually exist. Kelsen, in his theory, does not and *cannot* do without general and abstract norms, i.e., norms having no referents in the reality that is.

Being it so that Kelsen does not, and cannot, forgo the *objektives Recht* (general and abstract norms and their content), and that, at the same time, there is no way of avoiding, from an analytical point of view, the distinction between (*a*) an *objektives Recht* having no referents in actual subjects belonging to the reality that is and (*b*) an *objektives Recht* that does instead have such referents, Kelsen found himself forced to introduce the notion of an individual, or individualised, norm understood as a particular case of general and

abstract norms (a particular case of *objektives Recht*), this in order to give an account of (*b*) as distinct, distinguishable, and to be distinguished from (*a*).[26]

On close inspection, individualised norms turn out to be none other than *subjektives Recht* (rights, duties, and legal relationships), now appearing under the new labels "individual norm" and "individualised norm."

Thus, by way of example, courts administer what is subjectively right, meaning such rights and obligations as exist in the reality that ought to be, which rights and obligations get ascribed to actual subjects (people), who in contrast dwell in the reality that is. We appeal to a judge when—given what is objectively right (the content of norms in the reality that ought to be), and given actual subjects (people) in the reality that is, to whom what is objectively right refers—a controversy arises over the question what rights and obligations should get ascribed, and to whom, in what is subjectively right.

The act by which a ruling is issued that administers rights and obligations takes place in the reality that is, and yet the ruling as an individual norm (just like the rights and obligations the ruling ascribes) exists only in what is subjectively right in the reality that ought to be.

As Kelsen states, *die Norm als solche steht nicht in Raum und Zeit*: "The norm does not as such reside in space and time" (Kelsen 1934, 7; my translation). And "what is subjectively right [*Das subjektive Recht*] is not different from what is objectively right [*vom objektiven*]; it is the same as what is objectively right [*das objektive Recht selbst*]; it is what is objectively right [*das objektive Recht selbst*] only inasmuch as it turns against an actual subject with a consequence—a consequence established by what is objectively right itself [*von ihm*, namely, *objektives Recht statuierten*]—of a wrong (and in this case there is a duty [*Pflicht*]), or it is at the disposal of this subject (and in this case there is an authorisation [*Berechtigung*])" (ibid., 49; my translation).[27]

Kelsen does not seem to realise that, this way, he gives us the best characterisation of what is subjectively right insofar as this thing (what is subjectively right) is distinguished from what is objectively right and not reducible to it; nor does he seem to realise that, far from reducing what is subjectively right to what is objectively right, he is setting things up for a reduction in the opposite direction—offering a reduction of what is objectively right to what is subjectively right; this holds at least when norms (what is objectively right) have

[26] Several admiring scholars have worked to illustrate the importance of Kelsen's theoretical innovation, the innovation that consists in introducing individual, or individualised, norms. This admiration has often depended on the misconception whereby Kelsen, through his notion of an individualised norm, would deal a fatal blow to the traditional doctrine of the distinguishing traits of legal norms, among which traits there proudly towered abstractness and generality.

[27] The German original: "Das subjektive Recht ist kein vom objektiven verschiedenes, es ist das objektive Recht selbst, nur sofern es sich mit der von ihm statuierten Unrechtsfolge gegen ein konkretes Subjekt richtet (Pflicht) oder einem solchen zur Verfügung steht (Berechtigung)" (Kelsen 1934, 49).

referents in actual subjects in the reality that is. In this sense, Kelsen ends up in self-contradiction.

An individual, or individualised, norm is a general and abstract norm as made to apply to actual subjects in the reality that is. Should these subjects—the referents of a general and abstract norm—change their condition, and no longer be referents of the type of circumstance (Section 6.4) set forth in the general and abstract norm, the general and abstract norm will not be affected as to what is objectively right in the reality that ought to be. The individual, or individualised, norms, instead, depend for their existence on this general and abstract norm, *as well as they depend* on there being valid subject-tokens instantiating the subject-types described in the type of circumstance therein set forth, and therefore cease to exist when these subject-tokens (duty-holders and right-holders) cease to be valid tokens of the subject-types described in the type of circumstance set forth in the general and abstract norm.

Indeed, as was seen in Section 7.2, given the general and abstract norm **n**, "The well-off must aid the needy," if it turns out that one person, Rob, is a man of means, and that two other persons, Frances and Loretta, through unfortunate events, should come to find themselves in a state of need, then the conditioning type of circumstance set forth in **n** will have been validly instantiated twice (with referents, i.e., actual valid tokens, in one *d,* Rob, and two *r*s, Frances and Loretta). In consequence of this double instantiation, there will exist (outside of space and time, according to Kelsen), in addition to the general and abstract norm **n**, the two individual norms **n1**, "Rob [a man of means] must aid Frances [now in a state of need]," and **n2**, "Rob [a man of means] must aid Loretta [now in a state of need]."

Should Loretta improve her circumstances and her state of need cease to be a valid instance (token) of the conditioning type of circumstance set forth in **n**, there will have been an Is-event in the reality that is, and the individual norm **n2** will consequently become extinct, or cease to exist in the reality that ought to be (in Kelsen's *Sollen*) or, more accurately, in what in this reality is subjectively right. This small normative system—conceived à la Kelsen as a system of general and abstract norms (in our example, the single norm **n**, a norm existing in what is objectively right in the reality that ought to be) and of individual norms (in our example, **n1** and **n2**: what is subjectively right in the reality that ought to be)—has thus been reduced to **n** (the general and abstract norm: what is objectively right in the reality that ought to be) and **n1** (an individual norm: what is subjectively right in the reality that ought to be).

Should Frances, too, improve her circumstances, such that her state of need ceases to be a valid instance (token) of the conditioning type of circumstance set forth in **n**, there will have been an Is-event in the reality that is, and **n2** will consequently also become extinct, or cease to exist in the reality that ought to be (in Kelsen's *Sollen*) or, more accurately, in what in this reality is subjectively right. This small normative system—conceived à la Kelsen as a

system of general and abstract norms (in our example, the single norm **n**, a norm existing in what is objectively right in the reality that ought to be) and of individual norms (in our example, **n1** and **n2**: what is subjectively right in the reality that ought to be)—has thus been reduced to **n** only (the general and abstract norm).

As should emerge from the illustration just made, Kelsen's individual norms replace for all intents and purposes the normative subjective positions of those who admit a bottom layer (*subjektives Recht*, what is subjectively right) of the reality that ought to be in addition to admitting a top layer (*objektives Recht*, what is objectively right).

Indeed, Kelsen's individual norms, not unlike normative subjective positions (*subjektives Recht*, what is subjectively right), require two conditions for their existence: They require the existence of (1) general and abstract norms (*objektives Recht*, what is objectively right, the top layer of the reality that ought to be) and (2) actual subjects in the reality that is who are referents, i.e., valid tokens, of the type of circumstance set forth in general and abstract norms. General and abstract norms (*objektives Recht*) do not require, for their existence in the top layer of the reality that ought to be, that condition (2) be satisfied: They will exist independently of whether there exist in the reality that is actual subjects who are referents, i.e., valid tokens, of the type of circumstance therein set forth (set forth in the same general and abstract norms). By contrast, individual, or individualised, norms require, for their existence in the bottom layer of the reality that ought to be (the only layer where they can exist), not only that condition (1) be satisfied, in the top layer of the reality that ought to be, but also that condition (2) be satisfied, in the reality that is.

In short, individual norms cannot, pace Kelsen, be counted among general and abstract norms: They cannot be placed within the *objektives Recht*, what is objectively right. Individual, or individualised, norms are not any different from normative subjective positions. It's six of one, half a dozen of the other—either way, we have to do with what is subjectively right.

Chapter 15

NATURE AND CULTURE

15.1. Summing up on My Confirming Others

The anthropologists, philosophers, philologists, and jurisprudents called into play in the foregoing Chapters 11 through 14—Malinowski, Kierkegaard, and Heidegger, on the connection between the ideas of reality that ought to be and of fate (Chapter 11); Havelock, on *dikē* in Homeric epic (Chapter 12); Aquinas, on *jus* and *justitia* as what is right *essentialiter* and *causaliter* respectively, and on *ratio* as type (Chapter 13); and Kelsen, on *objektives Sollen* and *objektives Recht* (Chapter 14)—have been making their way into this fourth, and final, part of the present volume as "confirming others":[1] They have been doing so in regard to my characterisation of normativeness, of the reality that ought to be, and of what is objectively and subjectively right, as well as in regard to other kindred notions presented in this volume (such as type-constitutiveness and nomia; Sections 2.1 and 6.5).

Other modern classic scholars are a rich source of inspiration for appreciating, on one hand (with Marx, for example), the role that socioeconomic conditioning plays in modelling individual personalities, and on the other hand (with Freud, for example), the complexity of the human psyche and the peculiar and striking unconscious components of our individual and subjective inner experiences. Further, sociopsychology has offered theories that can be brought to bear on the question of norms as born of the relationship between individuals and the social environments they live in. Thus, we are offered, among other things, three sets of hypotheses: (*i*) hypotheses about the ways beliefs and other components of culture propagate in society from one individual to another and are passed down from generation to generation (these propagations concern the human psyche, the internal point of view, and the subjective experiences of humans, none of which are on the whole amenable to external observation), (*ii*) hypotheses about the way the social environment moulds individual personalities and so makes them uniform, and (*iii*) hypotheses about the ways individual personalities concur in nurturing and keeping alive the society that moulds them, and even in constituting that society, in a sense.[2]

It is not within the scope of this volume to go back to such modern classic authors as Marx and Freud, or to Max Weber and Talcott Parsons (1902–

[1] On the meaning of the expression "confirming others," see Gerth and Mills 1961, 87, 94 (cf. Section 15.3).

[2] When speaking of the social environment we may distinguish in it various kinds of social formations, like groups, associations, organisations, and institutions. The current definitions of these terms are not always compatible.

1979),[3] even if these last two enjoy to this day a high standing with scholars who deal with what is known as the micro-macro link.

> The path toward linkage [between micro and macro] and the implied possibilities for theoretical synthesis were prepared by the earlier theorizing of Max Weber and Talcott Parsons. Their theories resist classification as either micro or macro. The current movement from reduction to linkage is inspired by the example set by these first great attempts at micro-macro synthesis, even when they do not follow the theories themselves. (Alexander et al. 1987, 3)

Indeed, it is rather with reference to the question of the micro-macro link that I will call into play two further contributions.

Distributed artificial intelligence (DAI) has recently been aimed at simulating and reproducing individual intersubjective relations and the micro-macro link. And the research done by some scholars in this field, such as Conte and Castelfranchi 1995, seems to me worthy of attention because it shows a theoretical concern with advancing a conception of normativeness similar to that illustrated in this volume. These scholars hold the view that only a normativeness of this kind, if implemented among artificial intelligent agents operating in multi-agent systems (MAS), can make it possible to effectively simulate social intercourse, group life, and the micro-macro linkage.[4]

Another contribution that I will bring into play is the venerable and lamentably forgotten psychosocial theory of "significant others" and the "generalised other." These concepts trace back to C. H. Cooley's (1864–1929) *Human Nature and Social Order* (Cooley 1922) and Georg H. Mead's *Mind, Self, and Society* (Mead 1934) and in the 1950s received further specification and development within an organic theory by Hans Gerth and Charles Wright Mills, a theory setting out the relation between individual character structure and social structure. These concepts (which I would assume to be of interest as well to scholars working in distributed artificial intelligence, on the approach of Conte and Castelfranchi) still retain a remarkable ability to explain the individual (internal) and the social (external) dimensions of the reality that ought to be and the linkup between these two dimensions, that is, between the micro and the macro.

Thus, the further scholars entering here as confirming others will be Conte and Castelfranchi (on account of the appreciation of the psychological aspects

[3] On Marx, see, in Volume 2 of this Treatise, Rottleuthner, Section 3.2.2. The reader will also find Weber taken into account, even if not in a dedicated section; rather, as Rottleuthner says in the preface to his volume, Weber is an ever-present inspirer and accompanies him throughout the volume in his critique of the mono-foundationalists (ibid., 11).

[4] With different nuances, the same approach is espoused as well by Giovanni Sartor (who treats these questions in Volume 5 of this Treatise, Chapters 9 through 11, though it seems to me that Sartor is less markedly normativistic than Conte and Castelfranchi) and by Antonino Rotolo, Guido Governatori, Jan Broersen, Mehdi Dastani, Zhisheng Huang, Joris Hulstijn, and Leendert van der Torre. Cf. Broersen et al. 2001; Governatori and Rotolo 2004.

of the internal point of view of normativeness which they show in their approach to distributed artificial intelligence and the multi-agent cyber-society) and Gerth and Mills (on account of their treatment of the concepts of "significant others" and "generalised other" and of the importance they, too, attribute to the internal point of view, to the individual character structure, and to its shaping by the social structure). I will expound their contributions in Section 15.3. But before that, in Section 15.2, I will discuss a few relevant preliminary questions, namely: culture, types, the social construction of reality and the construction of social reality, and, finally, norms as one of the core elements of socialisation, and hence of the formation of individual personality.

15.2. Eighteen Thousand Centuries of Culture

15.2.1. From Homo Habilis *to* Homo Sapiens Sapiens

We have entered the 21st century *post Christum natum*; that is, regardless of the calendars adopted in various cultures, the history of man on Earth (a history whose beginnings are conventionally made to coincide with the advent of writing) has been going on for some fifty centuries now. But that is a trifle thing compared to what went on before.

(*i*) 18,000 centuries (1,800,000 years) ago. *Homo habilis* developed the ability to knap stones, albeit on one side only: pebble-tool culture.

(*ii*) 10,000 centuries (1,000,000 years) ago. *Homo erectus* was moving on the hind limbs, and was also handling fire and knapping stones on either side (making double-edged tools called Acheulian). Great strides were made in the span of 8,000 centuries. A developed ability to construct and internalise types (among which behaviour-types) and coordinate them, as well as a great memory capacity (encoding in brains), was the mark of a superior culture. Ten thousand centuries ago, the culture of *Homo erectus* was already superior to that of any other animal species (including modern species).

(*iii*) 400 centuries (40,000 years) ago. It was so late that *Homo sapiens* came into Europe from Africa, where they made their first appearance (more than 100,000 years ago). Even *Homo sapiens* are not the human kind that populates Earth today, but their ability to construct and internalise types, and to coordinate them, in combination with their memory capacity (encoding in brains), further advanced culture relative to what *Homo erectus* had achieved. In this more-developed culture (a development attested by European finds dating back to 400 centuries ago) inventions were made, and stone, wood, and animal bones and teeth were being used to manufacture bows and spearheads for hunting as well as needles for threading. *Homo sapiens* also painted, burned animal fats in stone lamps, used fire to carve canoes out of tree trunks, and built rafts. Further, *Homo sapiens*—like Neanderthal man, a Palaeanthropus of more than 1,000 centuries ago—performed burial rites over the

dead. This fact gives us reason to believe that *Homo sapiens* (and perhaps Neanderthal man) practised rudimentary forms of customary law as well.

(*iv*) 240 centuries (24,000 years) ago. At this time came our first appearance on Earth. The humans that now populate Earth are *Homo sapiens sapiens*: That's us, the savants! Later, about 100 centuries ago, we started farming, and about 80 centuries ago we started domesticating goats and dogs, building houses using raw bricks, modelling clay, and building the first cities fortified by walls (Jericho). After this, prehistory began rolling into history: Sixty-five centuries ago we were building megalithic tombs in Brittany—evidence of religion and the cult of the dead—and heat-treating metals in Cilicia and Palestine.

(*v*) 50 centuries (5,000 years) ago. At this point came the wheel, the plough, the yoke, and the horizontal loom—and writing, with Sumerian cuneiform and Egyptian ideographic writing (hieroglyphs). The appearance of writing conventionally marks the beginning of history, about fifty centuries ago. But this does not yet mean that *Homo sapiens sapiens* lived so early as that in a literate society and enjoyed the advantage of a written culture.

In archaic Greek history, for example, preliterate oral culture continued until about twenty-seven centuries (or 2,700 years) ago: Hesiod lived in the 8th century B.C.; Homeric epic—a typical expression of oral culture—dates back to about twenty-nine centuries (2,900 years) ago. The Homeric poems were kept in memory, encoded in human brains, for about 250 years, at least through the 8th century B.C. (about 2,700 years ago), and they are thought to have been set down in written linguistic signs in the 8th century (cf. Section 12.1).

15.2.2. Culture Encoded in Human Brains and Culture Inscribed in Documents and Artifacts

What I summed up in the previous section is, at least in some part, basic schoolbook learning, and students tend to forget it the moment they leave school. But we can retrieve this learning, because it is encoded in different memory bases: in human brains, as well as on wood, stone, metal, paper, and digital supports.

The ability to make choices, and the actual choices made, enables humans to devote themselves to the acquisition of knowledge in different domains. This way, different individuals share the burden of learning, thereby cutting down hugely the amount of types to be encoded in each person's brain. With the advent of written culture, humans were enabled to transfer to other humans what they encoded in their brains, not only phonetically or with icons and graffiti, but through writing as well. Memories on nonhuman support make it possible for fellow humans and posterity to access and learn the token and type descriptions recorded on supports like wood, stone, metal, papyrus, and suchlike. With the advent of written culture, the amount of token and type descriptions (among which behaviour-type descriptions) accessible to all

humans becomes impressive, and the learning of the tokens and types recorded on these supports spreads among individuals, even if, on account of writing itself, actual access to such supports is selective.

Culture is a reality spread in a given society over human brains and on the nonhuman supports that humans have access to.

The individual cultures of different people are individual realities that share in culture as a social reality and concur in shaping it, even if social culture precedes the individual cultures of any newborn member of a given society, of course. As I noticed in Section 15.1, the relationship between individual and society is treated in the present day under the label "micro-macro." The individual agent is considered a micro-system, society a macro-system. The matter in question is the interaction between the individual and society (even if those who study the micro-macro problem will reject this reduction, be it conceptual or terminological). The effort is to identify and explain (*a*) the modes and mechanisms by which the individual adopts social attitudes and goals and (*b*) the reasons why the agent more or less consciously cooperates toward the achievement of common (social, institutional) objectives.[5]

A norm is a belief and a motive of behaviour (Chapter 6) that human agents receive from the outside (from the society they are born into and from the cultural environments they live in: from the macro-system). Human agents internalise norms in their brains (within the micro-system, which is what each individual is with respect to the macro-system he or she operates in). Internalisation makes it so that a norm—understood as a belief and as a motive of behaviour coming from the macro-system—becomes part of the individual micro-systems' personalities: of the individual personalities of human beings. These last, thanks to the internalisation of norms and of other motives of be-

[5] Here is how Jeffrey C. Alexander and Bernhard Giesen present the problem in their introduction to *The Micro-Macro Link*: "Although the micro-macro theme has entered sociological theorizing as a distinct and firmly established issue only in recent decades, its prehistory can be traced from late medieval thinking through postwar meta-methodological debates over science, epistemology, and political philosophy. We will argue that the micro-macro dichotomy should be viewed as an analytic distinction and that all attempts to link it to concrete dichotomies—such as 'individual versus society' or 'action versus order'—are fundamentally misplaced. Only if it is viewed analytically, moreover, can the linkage between micro and macro be achieved. During its intellectual prehistory, however, the very distinction between micro and macro was superseded by other conceptual oppositions. [...] Rather than confronting incompatible conceptions about the constitution of social reality, the theoretical arguments presented in this volume seek to discover empirical relations among different levels of social reality. This analytical differentiation of the micro-macro relation has generated a new level of interparadigmatic discourse and a new statement of the problem: The conflict over reduction is replaced by the search for linkage" (Alexander et al. 1987, 1–3). The other contributions to this volume are by Raymond Boudon, Peter M. Blau, Dean Gerstein, Niklas Luhmann, Reinhard Wippler, Siegwart Lindenberg, James S. Coleman (1926–1995), Hans Haferkamp, Randall Collins, Emanuel A. Schegloff, Edith Kurzweil, Karl Otto Hondrich, Niel J. Smelser, and Richard Münch.

haviour, concur with the other individual micro-systems (the other human beings who are part of a society) in securing the subsistence and functioning of the social and institutional macro-system, and in a broad sense the cultural macro-system, which they are all part of. The overall mass of types and beliefs that humans variously produce and memorise constitutes culture. Indeed, "culture" is our

> intellectual and material heritage: Almost invariably it is heterogeneous—some degree of integration may obtain; otherwise, internal antagonism prevails—and in the main it lasts through time, but does so undergoing continuous transformations that proceed at a changing pace and depend on the nature of its elements and on the epochs which come to pass. Such heritage is made up of (a) *values, norms, definitions, languages, symbols, models of behaviour* [behaviour-types], and mental and bodily techniques whose function is cognitive, affective, evaluative, expressive, regulative, and manipulative; (b) *the objectifications*, supports, and material and bodily mediums of the foregoing; and (c) the material means for the *social production* [viz., construction] and *reproduction* of humans. The entire production and development of this heritage is the outcome of social work and social interaction: For the most part it gets passed on and inherited from past generations, from within the same society and from without; only in part is it produced or modified by the living generations; and the members of society share it to varying degrees, or they access its various parts selectively, or even appropriate them under given conditions. (Gallino 2000, s.v. "Cultura," 185; my translation; italics added)

A characteristic of our present time is the fast pace of change, at least in cultures where information-and-communication technology has become deeply entrenched. Thus, it might be asked whether in some cases and some ways the generations of today can, in the course of a single lifetime, make leaps that in the past would have required the coming of several subsequent generations: A grandfather and a grandchild living today may not be sharing one culture as they would have shared it some fifty years ago. Further, we still have today, each copresent with the other, pebble-tool culture (in some parts of Africa) and information-and-communication-technology cultures (in developed countries).

Culture can be distinguished by area of interest as artistic, scientific, gastronomic, legal, and so on: Law is a part of culture; it is one such area. Culture can be distinguished by geographical area as American, French, Japanese, and so on. Further, distinctions are made according to the epoch involved: Thus we have prehistoric culture (as previously noted), ancient culture, modern culture, and so on. Still more distinctions are possible. Essential among these is the distinction between living cultures and dead cultures (a distinction, observe, analogous to the distinction between living languages and dead languages: Languages are of course an essential component of human culture).

The concept of life is relative, yet we do have a fairly clear-cut concept for the life of a human individual: This life is what a person does and becomes from birth to death. My personal culture will die with me. Should I leave any trace of it, it will survive me as dead culture for as long as a trace of it exists in

some memory bases, as in a human brain, or on wood, stone, paper, or other support. Someone might come along and bring my culture back to life, but this person would have to do more than just remember my culture; we would also have to see this person adopt many of the attitudes, and especially the beliefs, I have picked up in my lifetime relative to what I have learned and memorised. When people die the attitudes and beliefs they have internalised die with them, of course: Their personal cultures die with them (Alzheimer's disease prefigures in living beings the death of their culture and personality). The different cultures an individual takes part in—Italian, Japanese, legal, artistic, gastronomic, and whatnot—will doubtless undergo an imperceptible change when that person dies, but they will not die with him or her, this to the extent that there are people left who will carry those cultures on.

Another important distinction is the one previously referred to between culture encoded in human brains and culture borne on nonhuman supports, as on wood, stone, paper, or digital supports.

This distinction—between culture encoded in human brains and culture stored on nonhuman supports—does not in any way correspond to the distinction between living culture and dead culture. There is a great deal of living culture not encoded in human brains: This culture is largely stored on nonhuman supports (such as wood, stone, or paper), and only a small part of it will get internalised (by humans). This is due to the previously mentioned division of labour among humans and to the mounting trend toward strong specialisation that knowledge and practices are seeing. For example, the latest biotechnology research or a recent tax law is living culture, but is encoded in human brains (or therein internalised, if it comes in the form of beliefs) only by those specialists who deal in it in person. So the rest of us, the laypeople, will have no knowledge of it, or may have only a faint idea of it, and because we have not encoded (much less internalised) it, it cannot really guide or control our behaviour. We may, however, if driven by some motive, try to access it, and that by referring to specialists (who can transfer part of their culture orally) or to nonhuman supports (like the books written by these specialists), or again by getting different kinds of media access to information (as by reading books and watching films and educational programs).

Conversely, a certain amount of dead culture is encoded in human brains. The Athenian culture of the 5th century B.C. is dead and yet may be encoded in the brains of those scholars who are studying that culture today. Plainly, the language and culture that lived in the Athenian society of the 5th century B.C. are quite other than the language and culture of the scholars who study this language and culture today at, say, the Department of Ancient History at the University of Bologna. Here, what is living—what has been internalised and guides these scholars' behaviour (at least in their work as scholars)—is not ancient Athenian culture, but the research that they conduct, and this research is part of present culture in Italy and the world (in the 21st century).

Both of the distinctions mentioned, between living versus dead culture and between culture in human brains versus culture on nonhuman supports, as well as their combination, apply to law also. Norms, for instance, and so also legal norms, as I conceive of them—and as I am interested in treating them: as beliefs, and as motives of human behaviour—exist and are in force in individual human brains and are shared among the members of a given society in a way that cannot be essentially different from the way other kinds of culture exist in individual human brains and are shared among the members of a given society (cultures such as the arts and the sciences, which too can be said to be in force, but only in a sense).

15.2.3. Types and Memory

The reader will have noticed the kind of attention that from Chapter 2 onward I have been devoting to types and tokens in an effort to free the concept of "validity" from those of "norm," "rule," and the like.

Types—independently of the conceptions of them actually put forth from Plato to Aquinas to the neurosciences at their present stage[6]—play an essential role in shaping the relation between humans and the natural environment, among human beings themselves, and between nature and culture. I believe we can with good reason maintain that since prehistoric times the human brain has operated by making use of types. In prehistory, some 400 centuries ago or so, *Homo sapiens* was threading, burning animal fats, and carving canoes, and hence instantiating tokens of the types "threading," "burning animal fats," and "carving canoes." If these types are not innate, they got constructed at different stages in prehistory, by humans, and somehow got encoded in their brains, got therein internalised, and in this sense existed. And behaviour-types like "threading," "burning," and "carving" got repeatedly instantiated for millennia. They were, and still are, the very constitutive condition of the possibility of their instantiation through valid performances and actual behaviour-tokens.

I will not venture to guess when prehistoric humans began speaking, communicating with one another by way of articulated sounds, using meaningful oral-acoustic linguistic signs, or oral symbols. It might have been some 10,000 centuries ago, with *Homo erectus*; or 1,000 centuries ago, with Neanderthal man; or again 400 centuries ago, with *Homo sapiens* (but compare Edelman and Tononi 2000, 194ff.). Whichever it is, when the spoken word first appeared, that was the time when oral culture began—when the oral transmission of culture in time and space began, from human brain to human brain: Knowledge would no longer be limited to a knowledge by acquaintance (by direct experience), and would become progressively and especially a knowledge by description, eventually overbalancing the earlier kind of knowledge.

[6] Cf. footnote 7 in this chapter.

Linguistic descriptions of tokens and types, both, involve a complex process of elaboration of the experiential input.

Linguistic description and communication presuppose a culture. Human culture antedates not only history (whose beginning conventionally coincides with the invention of writing) but also the use of merely oral-acoustic linguistic signs, that is, the invention of the spoken word.

Anthropologists tell us that the emergence of human culture manifests itself in the following: (*a*) the ability of humans to suit to themselves, in a thought-out fashion, the environment they live in and to adapt conveniently to this environment; (*b*) language, by which humans enact communication with signs that make abstraction from concreteness and from the immediacy of their instinctive life; (*c*) the ability of humans to understand the natural world, whose behaviour they can predict and whose transformation they can guide; and (*d*) the human tendency toward greater and greater attainments of knowledge and volition (see Facchini 1995, 113ff.).

We have with *Homo habilis* the oldest intentional working of stone. With *Homo erectus* we have, in addition to pebble-tool industries and bifacial and flake industries, and at a more advanced stage yet, Levallois industries (see ibid., 141ff.). This industry is of great interest to us on account of this feature, among others: In the Levallois technique, the actual modelling of the stone does not begin until the shape the artifact is going to take has been outlined around the flake's nucleus; that is, until a type has been set out that the final artifact will instantiate. There is a biological continuity between humans and the animal world that justifies classifying the human species within the order of the primates. This continuity does not, however, rule out peculiarities of a biological kind. Thus, for example, so far no primates other than humans practise bipedalism. This is one of the earliest human behaviour-types, and it is constitutive of the possibility of its performance on the part of humans. Whether the type "bipedalism" is innate or constructed, countless performances of it have so far been instantiated in countless tokens since the time of *Homo erectus*.

In addition, the tools and products coming from human activity take on different meanings in the context of human culture. Manmade tools are never throwaway objects, as are the stones and sticks that primates use. They are preserved on account of the reuse that can be made of them: They have been made by humans as tokens of types and get used as such (as tokens of types) every time a situation comes up that in turn instantiates one type of circumstance rather than another.

Culture is the environment proper to the human species and to the personality of individual humans. Humans are born within cultures, where they grow up and live; culture shapes their relationships among themselves, as well as their relationship with the physical world, and hence it ultimately shapes their personality.

Social anthropology has called attention to the unique ability possessed by our species to take charge of our own development. Upon the genetic inheritance determined by previous natural selection we superimpose a process of cultural evolution under our own management, which becomes especially conspicuous as human society becomes urbanized. To explain how this works, there has been introduced the concept, borrowed from genetics, of cultural information placed in storage for reuse. As the biological information is encoded in the living cell, so cultural information is encoded in language. Human culture is not inherited but learned, and through language transmitted from generation to generation. (Havelock 1978, 11)

Havelock finds that it can be misleading to borrow the concept of "cultural information" from genetics, for that can cause one to think of some kind of document.

The metaphor of storage implies the existence of a material object that can be so treated. The term "information," though not necessarily referable to a documentary source, tends to carry this coloration. Encoding, another metaphor commonly employed by biologists and anthropologists, is explicitly referable to a written medium, a slip of paper, a punched card. Terms like program, system, and structure, applied to beliefs or institutions or customs characteristic of a given society, evoke the presence of objects which can be seen and touched. If these metaphors have become easy to accept, it is surely because the information upon which modern societies depend has become materialized. It exists as it is documented. The document, whether in circulation or on a shelf, whether book, pamphlet, report, card or code, rule or regulation, law or literature, philosophy or religion, is essentially information placed in storage and reused, corrected, enlarged, redrawn, read, and reread. (Ibid., 11–2)

Havelock, in this passage, as in much of his other work, is looking to mark the difference between written culture (or culture in any event fixed onto a document or artifact) and oral culture memorised in human brains and proper to preliterate societies. It will be interesting in this regard, with respect to human brains, to take note of the perspectives that have been suggested over the last thirty years by the neurosciences (these I will return to briefly in Section 15.4) on the questions that I have been treating since early on in this volume (beginning with Section 2.1) under the label "type and tokens" and that connect with the effort to explain the way memory works in the animal and human brain (see, for example, Deacon 1997, 60, on icons, indices, and symbols; see also, from a different angle, Edelman 1989, 72ff.; Edelman 1994, 91–3). Edelman, in his discussion of perceptual categorisation—against which we should compare the question of types and tokens—introduces the notion of maps as sheets of neurons. I also refer the reader to these authors for attempts at explaining memory in the frame of neurobiological knowledge at its present state of advancement.[7]

[7] This is how categorisation (typification) works according to the way Searle interprets Edelman's theory of it (the examples adduced are Searle's own; they are not found in Edelman): "Suppose an animal has acquired a perceptual category of cats [the type "cat"]. It acquires this category [this type] through the experience of seeing a cat and organizing its experience by way of the reentrant maps. Then the next time it sees a cat, and thus has a

15.2.4. What Is Mind? No Matter. What Is Matter? Never Mind. Social Construction of Reality and the Construction of Social Reality

The distinction between culture and nature is crucial. It is crucial but does not entail any ontological dualism between mind and matter. My conception of reality is monistic. Dualistic conceptions come up against insurmountable difficulties when they attempt to explain the relationship between mind and matter. Reality is either all mind or all matter. As to the word with which to refer to this one reality, I share the opinion that Bertrand Russell's grandmother reportedly expressed: "What is mind? No matter; what is matter? Never mind!" (Russell 1967, 45).

The very distinction between nature and culture is not natural but cultural. Even the notions of "nature" and "culture" are cultural. Is reality therefore all cultural? Never mind. What is entirely cultural is the typification, representation, and construction that humans make of natural as well as cultural reality, and their symbolisation and description of these realities by linguistic signs. What is also entirely cultural is the way humans treat or process natural and cultural reality. Typification, representation, construction, symbolisation, and description by linguistic signs are cultural realities. Culture is lodged in human brains, yet it is shared by different human beings in the same society.

But human beings and human brains are not themselves culture; they are nature: Through human culture they become *objects for humans*, as does physical and chemical nature in general. Humans are made an object of typification, representation, construction, symbolisation, description, discourse, communication, and suchlike by humans themselves. Human beings are objects of self-consciousness on their own part, and of consciousness on the part of others.[8] Our consciousness of ourselves (our self-consciousness) and of others, as well as of every other object, is determined in each of us by the culture of the society we live in. This phenomenon has been called "the social construction of reality" (Berger and Luckmann 1969).

similar perceptual input, it recategorizes [re-typifies] the input by enhancing the previously established categorization [typification]. It does this by changes in the population of synapses in the global mapping. It does not just *recall* a stereo*type* but continually *reinvents* the category of cats [the type "cat"]" (Searle 1997, 44; italics added on second occurrence, in original on first and third occurrence). Searle finds that the conception of memory that Edelman presents in *Bright Air, Brilliant Fire* (Edelman 1994) is among the most remarkable aspects of the book "because it provides an alternative to the traditional idea of memory as a storehouse of knowledge and experience, and of remembering as a process of retrieval from the storehouse" (Searle 1997, 44). I suspect the traditional idea of memory that Searle is referring to has been developed by scholars framing the problem in computational terms, or on the basis of studies in mathematics, logic, or set theory: Anyone who should instead address the problem of memory from a biological perspective will find it hard to subscribe to a rigid and mechanical conception of memory conceived on the model of a retrieval of objects from a repository.

[8] Here I am using "consciousness" in a generic sense.

Humans and their brains, as well as animals, plants, minerals, I, you, and the world at large—all these things may cease to be made an object of human attention, typification, and suchlike, thereby failing to be objects of human consciousness and of the culture that constitutes it. Even then, humans and their brains, as well as animals, plants, minerals, I, you, and the world at large, continue to be real—though of course only naturally, physically, chemically, brutely real. They would be naturally real even if no human brain were processing them—typifying, symbolising, or describing them, in much the same way as it was before the first humans began to make culture on the earth. And if all humans were to disappear from the face of the earth, we would be left with nature (physical and chemical matter), and with the artifacts of past human culture, to be sure, but the one and the other would cease to be objects of human consciousness and culture.

The distinction between culture and nature, then, remains crucial, but the ontological dualism of mind and matter does not hold: I cannot help being a monist (Section 15.4). And, as far as I am concerned, the choice between idealism and materialism[9] has been made final within the ambit of monism—this at least as far back as the late 19th and early 20th centuries, when Bertrand Russell fleshed out his "rebellion against idealism" (Pattaro 1974, 58ff.; see Russell 1960, 69ff.).

The decisive, and in many ways constitutive, importance of culture can hardly be stressed enough. Wherever, and to the extent that, our personality is not determined (or constituted) by our genetic endowment, it is determined (or constituted)—in a more oblique way—by culture: by our family, education, and working environment, by the pervasive contemporary media and society (cf. Sections 15.2.5 and 15.3.2). In a sense, each of us *counts as* a valid token of a certain type. It is interesting to note that in medieval Scholasticism culture was called *humanitas* (humanity), which translated the Greek *paideia* and means "education": Individual personality in human beings is determined by education (not only by their genetic endowment), which is imposed on them by the social environment. (There reemerges here the micro-macro problem as previously referred to, and which I will return to in Section 15.3.)

Culture precedes not only the advent of writing but also of merely oral language. Better still: As oral and written language develops, becoming more and more a constituent of culture, it plays an increasingly fundamental role in culture understood as the condition constitutive of the social construction of the reality that is and of the social construction of the reality that ought to be (see Chapter 1).

[9] On the sense in which I am willing to style myself a "materialist" (cf. footnote 8 of the Preface), see the qualifications made in Section 15.4 in the light of Searle's distinction between "eliminative reduction" (and reductionism) and "causal reduction" (and reductionism).

The Social Construction of Reality is the title of a book written by two sociologists (Berger and Luckmann 1969), and *The Construction of Social Reality* of a book written by a philosopher (Searle 1995).[10] The assonance between the two titles is clear, even though in the second book there is no reference to the first: In both, however, language is one of the main objects under scrutiny.

Language is crucial for the social construction of all human (cultural) reality. Human reality includes both (*a*) natural, or brute, reality, even if only to the extent that brute reality is the object of human treatment and consciousness (for brute reality precedes the consciousness that humans have of it), and (*b*) social, or institutional, reality, which exists only insofar as it is the object of human treatment and consciousness, for institutional reality does not precede the treatment and consciousness that humans have of it, in that it comes about and exists only as the *product* of human treatment and consciousness.[11]

The difference between brute and institutional reality can be expressed roughly as follows.

Brute reality. A cessation of every human treatment and consciousness will not imply a cessation of brute reality: It will only imply a cessation of the human treatment and consciousness of brute reality, and so only a cessation of the social construction of brute reality, that is, a cessation of only the cultural and institutional treatment of brute reality.

Institutional reality. A cessation of every human treatment and consciousness will imply a cessation not only of the social construction of institutional reality (of the cultural and institutional treatment of institutional reality), but also of institutional reality as such, for this reality subsists exclusively in individual human treatment and consciousnesses as socially determined.

"Social construction of reality" is defined as

> the set of interior and exterior dialectically interdependent processes wherewith human beings work out norms, values, moral codes, and institutions, that is, social relationships normatively regulated from the standpoint of action and legitimated from a moral and affective standpoint. These processes are imposed on the self and on others with such concreteness, firmness, and indifference to the individual's will and fate as is found in material reality [...].
>
> The social construction of reality [...] is neither a collective representation nor a form of social consciousness; rather, it is the very activity that produces the constrictions typical of both life in society and the individual's almost complete powerlessness before such constrictions, as is characteristic of the relationship between individuals and traditional local communities, on the one hand, and between the individual and the state, on the other. (Gallino 2000, s.v. "Costruzione sociale della realtà," 176–7; my translation)

[10] In 1984 Anthony Giddens came out with a book entitled *The Constitution of Society* (Giddens 1984). Even the label "constitution of society" gathers a certain amount of literature.

[11] In speaking of human reality I am not referring to human beings singly considered, but to the appearance and spread of humankind on Earth. Also, I use the expression "treatment and consciousness" because there are cases of human treatment of brute reality that introduces culture without humans being conscious or aware of that fact.

15.2.5. Norms in the Formation of Individual Personality. Socialisation and Normative Revolution (Metanoia)

We each initially assimilate norms from the sociocultural environment we live in, and which shapes our personality from the very beginning of our lives. Babies that are abandoned to themselves do not survive. If they do, that is because someone has cared for them. Making exception for cases like that of Mowgli—brought up by benevolent animals—human babies survive because they are reared more or less benevolently by other humans: by their biological families or by other human organisations. The family, or the social organisation that takes its place, models the deep structure of personality in babies, who develop this personality as they grow up, and as they enter adolescence and adulthood and interact in social environments other than the family, undergoing processes of adaptation and of critical revision.

The social construction of reality shapes individual personalities. In individual personality it forges the generalised other (Section 15.3.4). And in everyone's generalised other it determines the reality that ought to be.

The generalised other and the reality that ought to be are things that individuals internalise from the culture of the society they live in, and are therefore shared widely among these individuals (the members of a society). The generalised other and the reality that ought to be are individual phenomena insofar as they pertain to individual personalities. They are social phenomena insofar as they are shared by the members of the same society. It may be said that the generalised other belongs to our individual dimension in much the same way as *la parole* belongs to our individual dimension with respect to *la langue*, which essentially belongs to the social dimension. In a way, as our actual and individual *parole* presupposes our participation in *la langue* as a social phenomenon, so our actual and individual generalised other presupposes the culture in which we live:[12] The generalised other, the reality that ought to be, and norms all get internalised by us individually, but they each come from the sociocultural environments we live in.

Our assimilation of culture, and the formation of our social self (the generalised other, the reality that ought to be), depends for the most part on two processes that sociology calls "social interaction" and "socialisation."[13]

"Social interaction" is defined as

> the short- to medium-term relation that engages two or more individual or collective subjects and in the course of which each subject repeatedly changes his or her behaviour or social ac-

[12] Saussure's definitions of *langage*, *langue*, and *parole* can be found in the original in the text of ms 160 B as quoted in de Saussure 1970, n. 63, 385. Cf. de Saussure 1985, 25, 30–1.

[13] Again, sociologists and philosophers approach the same subject matter in different ways, and sometimes with different terminologies; as for the philosophers, see Lewis 1969, 88–96—David K. Lewis, 1941–2001; Lagerspetz 1995, 30–59.

tion in view of the other subject's behaviour or action, either after such action has taken place or before that time, by anticipating or imagining (whether correctly or not is beside the point) what the other subject might do, whether in reply to this person's actions or for other reasons. (Gallino 2000, s.v. "Interazione sociale," 378; my translation)

"Socialisation" is defined as the set of

processes through which an individual, throughout his or her life, develops the communicative competence […] and performance skills that make possible his or her psychophysical *survival* in a given culture, at a given level of civilisation, and amid different kinds of groups and organisations whose forms of exchange provide the means with which to acquire such competence and skills. The latter are thereby acquired in the course of social interaction with an indefinite number of groups (first among which is in most cases either a family or an organisation that can take its place in the early stages of development, when the child is physically and psychically dependent on others), and their mastery, achieved to a bare-minimum degree at first, is increased as certain conditions are met and is commensurate with the successive stages an individual goes through in a lifetime. (Gallino 2000, s.v. "Socializzazione," 590; my translation; italics added. See Berger and Luckmann 1969, 149–82)

Primary socialisation occurs in the early stages of the development of individual personality; secondary socialisation, in life's later stages; and "primary socialisation concurs in structuring longer-lasting and more deep-seated motivational drives than secondary socialisation" (Gallino 2000, s.v. "Socializzazione," 591; my translation). Socialisation leads the socialised person to have beliefs, among which are norms.

The omnipresence of norms in society at large and in all kinds of groups makes norms one of the core elements of socialisation. *The social norms that make up the family setting will mould the individual from the very earliest stages of development by channelling and to a certain extent determining his or her beliefs, representations, language, motivational makeup, and states of consciousness* […]. For this reason, and because a norm adhered to by a group exerts psychological pressure on the individual, many norms become an object of affective ties, some stronger than others, even when their rational, moral, and affective grounds are weak. (Gallino 2000, s.v. "Norma sociale," 459; my translation; italics added)

Some socialisation processes are specific: They are expressly aimed at shaping such character traits, habits, norms, and language as are relevant to behaviour in a specific social sphere, and they are also specific in that their content is obviously part of that sphere. Hence, specific socialisation is spoken of, for example, to refer to sexual, religious, moral, juridic, economic, professional, or political socialisation.

Through social-interaction and socialisation processes, the sociocultural environment shapes human personality and drives primitive norms (and other primitive beliefs) into the brains of individuals. Believers develop their normative systems from primitive norms through illative operations (described in Chapter 7 and Section 9.6) largely controlled by the social and institutional environment (Section 10.3): These systems are here understood as clusters of beliefs, primitive and derivative. They are the believers' reality that ought to be.

> No socialisation process would be possible if the individual's psychical structure were not sensitive to mechanisms that through forms of exchange, transaction, and interaction with the environment, and of adaptation to it, *produce personality traits*, need patterns, preferred modes of conduct, interpretive frameworks, and other like "products" brought forth as psychophysical states, both actual and dispositional, lasting and fleeting, profound and relatively superficial. Commonly reckoned among these mechanisms are the *differentiation/integration* of personality elements and of the map of cognitive, affective, and evaluative definitions that governs them; the *reinforcement/extinction* mechanism, founded on the law of effect whereby the subject will tend to reproduce all pleasure-yielding behaviour and abstain from all behaviour leading to privation; *inhibition*, through which the individual learns to postpone satisfying certain inner drives in view of the mediated or immediate consequences thereby entailed; the *replacement* of one source of pleasure with another; the *imitation* of role models, taken up from within the family at first and outside it afterwards; and lastly *identification*, which to a much greater degree than the previous mechanism *involves the deeper strata of personality*. (Gallino 2000, s.v. "Socializzazione," 591; my translation; italics added on first and last occurrence, in original on all other occurrences)

Primitive norms (and other primitive beliefs) originally driven into the human mind by the sociocultural environment can be as a matter of fact further shaped or revised by believers through personal processes of critical revision. Even dramatic changes occur, as with Saint Paul's conversion on his way to Damascus, and these are cases of metanoia:[14]

> [4] And I persecuted this way unto the death, binding and delivering into prisons both men and women. [5] As also the high priest doth bear me witness, and all the estate of the elders: from whom also I received letters unto the brethren, and went to Damascus, to bring them which were there bound unto Jerusalem, for to be punished. [6] And it came to pass, that, as I made my journey, and was come nigh unto Damascus about noon, suddenly there shone from heaven a great light round about me. [7] And I fell unto the ground, and heard a voice saying unto me, Saul, Saul, why persecutest thou me? [8] And I answered, Who art thou, Lord? And he said unto me, I am Jesus of Nazareth, whom thou persecutest. [9] And they that were with me saw indeed the light, and were afraid; but they heard not the voice of him that spake to me. [10] And I said, What shall I do, Lord? And the Lord said unto me, Arise, and go into Damascus; and there it shall be told thee of all things which are appointed for thee to do. [11] And when I could not see for the glory of that light, being led by the hand of them that were with me, I came into Damascus. (*Holy Bible–The Acts* (b) 22:4–11;[15] cf. ibid. 9:3–9)

[14] The term "metanoia" comes from Greek *metanoein*, meaning "to change one's mind," from *meta* ("after") plus *nous* ("mind"). But perhaps the concept may be rendered more effectively with the idiomatic expression "to have a change of heart."

[15] The Greek original: "Ὃς ταύτην τὴν ὁδὸν ἐδίωξα ἄχρι θανάτου δεσμεύων καὶ παραδιδοὺς εἰς φυλακὰς ἄνδρας τε καὶ γυναῖκας, ὡς καὶ ὁ ἀρχιερεὺς μαρτυρεῖ μοι καὶ πᾶν τὸ πρεσβυτέριον, παρ᾽ ὧν καὶ ἐπιστολὰς δεξάμενος πρὸς τοὺς ἀδελφοὺς εἰς Δαμασκὸν ἐπορευόμην, ἄξων καὶ τοὺς ἐκεῖσε ὄντας δεδεμένους εἰς Ἰερουσαλὴμ ἵνα τιμωρηθῶσιν. Ἐγένετο δέ μοι πορευομένῳ καὶ ἐγγίζοντι τῇ Δαμασκῷ περὶ μεσημβρίαν ἐραίφνης ἐκ τοῦ οὐρανοῦ περιαστράψαι φῶς ἱκανὸν περὶ ἐμέ, ἔπεσά τε εἰς τὸ ἔδαφος καὶ ἤκουσα φωνῆς λεγούσης μοι· Σαοὺλ Σαούλ, τί με διώκεις; ἐγὼ δὲ ἀπεκρίθην· τίς εἶ, κύριε; εἶπέν τε πρός με· ἐγώ εἰμι Ἰησοῦς ὃ Ναζωραῖος, ὃν σὺ διώκεις. οἱ δὲ σὺν ἐμοὶ ὄντες τὸ μὲν φῶς ἐθεάσαντο τὴν δὲ φωνὴν οὐκ ἤκουσαν τοῦ λαλοῦντός μοι. εἶπον δέ· τί ποιήσω, κύριε; ὁ δὲ κύριος εἶπεν πρός με· ἀναστὰς πορεύου εἰς Δαμασκὸν κἀκεῖ σοι λαληθήσεται περὶ πάντων ὧν τέτακταί σοι ποιῆσαι. ὡς δὲ οὐκ ἐνέβλεπον ἀπὸ τῆς δόξης τοῦ φωτὸς ἐκείνου, χειραγωγούμενος ὑπὸ τῶν συνόντων μοι ἦλθον εἰς Δαμασκόν" (*Holy Bible–The Acts* (a), 22:4–11).

Different and interesting cases have happened in Italy, at the end of World War II, for example, with the conversion of several million Fascists to antifascism (a number of Fascists converted to Communism directly); similarly, when the Berlin Wall came down, in 1989, several million Communists in Italy converted to social democracy and a number of them converted directly to some form of conservative libertarianism: It may be that some have lived long enough to go through both metanoias.

This kind of phenomenon is well known to sociopsychologists, and indeed its manifestations are not confined to Italy:

> Such "crises of conscience" have occurred several times in the course of Western history, for example, in cases of political revolutions and religious revivals and conversions. In fact, crises of this sort are quite widespread in contemporary society, in connection with totalitarian parties. (Gerth and Mills 1961, 98)

15.3. The Micro-Macro Link

15.3.1. Cognitive and Social Action: A Society of Minds

For two decades now, universities and research centres around the world have been working on a sacred experiment, or rather a very profane one:[16] They are trying to reproduce in cyberspace the social interaction and socialisation typical of human culture. Nonhuman and yet "intelligent" agents—the software products of artificial intelligence—are endowed with a capacity for reasoned action and reaction: They are made to meet on the Web and to act "on their own account" by taking decisions dependent on the twists and turns of their interchange (they will buy or sell wisely, for example); they will change their own attitudes toward *their* environment and their neighbours; they will count their fellow intelligent agents as more or less trustworthy or reliable; they will internalise beliefs; and so on.[17]

[16] The expression "sacred experiment" is sometimes used to refer to the experiment carried out in the 17th century by those Puritans who, in order to escape the persecution of the Anglican Church, migrated from England, crossing the Atlantic on the *Mayflower* and landing at what would later become Plymouth, Massachusetts. Here they sought to found a new society informed by the ideals of the English Congregationalist Calvinists, devoted to restoring—even in social practice—the relationship between man and God that had been severed after the original sin. Cf. Bonazzi 1970; Miller 1984.

[17] The 1995 book *Cognitive and Social Action*, by Conte and Castelfranchi, came out directly in English. In 1996 they put out their own Italian translation of it and entitled it *La società delle menti: Azione cognitiva e azione sociale* (The society of minds: Cognitive action and social action) (Conte and Castelfranchi 1996). It may be that the idea in so differentiating the two titles was to adapt to two mentalities: that of Anglo-Saxon readers, empirically oriented, and that of Italian readers and the Latin world at large, more inclined toward allusion and the literary style. The title to this section takes up the title chosen for the Italian edition of this work.

Most of the research done in this field has focussed for some ten years now on getting these agents to internalise attitudes of a merely *rational* sort. To this end, researchers have designed intelligent agents and their multi-agent societies by drawing on game theory, on sophisticated logics of preference and belief, on the prisoner's dilemma and other such refined brainteasers.

More recently, however, some of these researchers have come at the conclusion that mere rationality, for all its sophistication, will not of itself suffice to adequately reproduce, in the artificial world of cyberspace, human sociality, interaction, conflict, and culture properly so called: There is something lacking. In particular, stated in my own words, the intelligent agents of multi-agent societies seem to lack a social self endowed with an internal reality that ought to be: They lack norms as beliefs and motives of behaviour (Chapters 5 through 7) in the double dimension of the individual and the social, whereby the individual agent (micro-system) assimilates from the social environment (macro-system) the norms proper to the social environment itself; the agents draw these norms into their own self, and often do so irrationally, making these norms binding per se without having any rational motive for doing so.

This way, social norms become the internal motives for the individual behaviours of individual agents: These motives will be internal despite deriving from the social environment and being therefore in accord with it.

We do *not* have to do here with rules in a broad and generic sense, or with anything like conventional rules: These rules (because they are not norms as I characterise norms) explain, justify, and produce behaviour insofar as behaviour is the result of a criterion of functionality, cooperation, convenience, least effort and greatest result, maximin and minimax, and so on (cf., in Volume 5 of this Treatise, Sartor, Chapters 5 and 10). These rules in a broad and generic sense (these rational devices, different from norms as I characterise norms) are indeed at this present stage available to the intelligent software agents (or micro-systems) operating in the multi-agent societies (or macro-systems) of cyberspace: Software micro-systems (artificially intelligent agents) already have these rules built in them by their developers. What these individual digital agents and their brains are instead lacking—and what some of their developers say they need—are norms as internal motives of behaviour: norms as beliefs, akin to those that I have been characterising in this volume.

We aim to explore the role of the external (social) environment in the regulation of cognitive autonomous[18] agents' behaviours. In particular, the following issues are examined:

— how objective conditions and relations regulate social action, i.e., how they determine the agents' knowledge and motivations to act (their beliefs and goals);

— how an autonomous agent becomes an instrument for external forces (an instrument for other agents' needs and requests, as well as for social conventions, norms, laws, etc.).

[18] Of course, the autonomy in question is not political autonomy as discussed in Section 10.2.6, i.e., political autonomy vis-à-vis political heteronomy.

In other words, when, why and how do external demands *on* one given agent become goals of that agent?

We endeavour to show that cognition is a fundamental medium between individual action and external (social) forces, cognitive medium meaning the *mental* interpretation and processing of these external forces. (Conte and Castelfranchi 1995, v; footnote added; italics added on second occurrence, in original on first occurrence)

I have italicised "mental" because I do not understand Conte and Castelfranchi to be mentalists. Rather, as I will explain in outline in Section 15.4, I believe they use mentalistic terms for want of more-adequate terms not yet available, terms that cognitive science and the neurosciences will be supplying as research in these fields gains a better understanding of the workings of the human brain.

Add to this that what I will call "the irrational" (and which is customarily so called) will eventually, in my opinion, become explainable in terms of cause and effect. Therefore, "irrational" does not designate anything more indeterminate and uncontrollable than any other part of matter before it comes to be scientifically known, and governable by technique: "Natura enim non nisi parendo vincitur" (Bacon, *Novum Organum* (a), I, 3—Francis Bacon, 1521–1626) ("Nature is only subdued by submission"; Bacon, *Novum Organum* (b), I, 3).

After all, the world of subatomic particles was not behaving any differently before scientists first came to have an understanding of it. It may be that some phenomena now explainable in terms of subatomic particles were once explained in mentalistic terms, or also animistic ones. But if at that time there had been any materialist scholars around seeking to advance speculations, if not hypotheses, on the phenomenon in question, they would perhaps have found it necessary to do so using mentalistic, or also animistic, terms (if anything to be able to come across to others), even if these scholars were thinking not of minds or souls, but of certain kinds of matter, however finer than any observable matter. And maybe, by thinking that way, the same scholars were moving closer to the objects of their discourse (certainly more so than the animists), and further, they could get there by treading the right path.

AI [Artificial Intelligence] is essential for solving the *vexata quaestio* of the relationships between *psychology*, on the one hand, and economics, sociology and political science on the other. More generally, AI [Artificial Intelligence] is required in the treatment of the well-known problem of the micro-macro link. Only by representing (either formally or experimentally) agents' *internal mechanisms*, interactions and global functions can we have a chance to solve this problem in a non-speculative way. (Conte and Castelfranchi 1995, v–vi; italics added on second and third occurrence, in original on first occurrence)

I have italicised "psychology" and "internal mechanisms" for the same reason I italicised "mental" in the passage before that. Conte and Castelfranchi are not two 13th-century metaphysicists:[19] They are specialists in distributed arti-

[19] But then, as the reader may have noticed in Chapter 13, I hold *Sanctus Thoma* to be, in my regard, a confirming other.

ficial intelligence (DAI), as well as in psychology and cognitive and social science, and are attempting, by working from within these research fields, an integrated scientific approach to the ancient problem of the relation between individual and society (or, as they prefer to say, of the link between micro and macro). They deal

> with a paradox concerning social agenthood, namely the paradox of bounded autonomy. On one hand, the social world provides inputs to the agents' goals. On the other, social agents are autonomous, that is, endowed with the capacity to generate and pursue their own goals. How is it possible that an autonomous agent's goals be inputted from the outside? (Conte and Castelfranchi 1995, 1)

In seeking to find an answer to this problem, Conte and Castelfranchi undertake to

> explore the footprints that a multi agent system (MAS) (social system or macro-system) leaves not only on the behaviour of its component members, but also in their minds; to examine how a social system is embedded or incorporated into the behaviour of its members; to reconstruct how the social system works through its members. (Ibid., 2)

The paradox that Conte and Castelfranchi are concerned with, and the exploration they have entered upon, has become the focus of theories that they find to be less than fully satisfactory (as I do too), or at least incapable of solving the paradox at hand or of achieving the objective they have set themselves to (cf. Section 15.3.3).

On the other hand, the paradox that Conte and Castelfranchi are concerned with, and the exploration they have entered upon, has also been the focus of theories earlier than the ones identified by Conte and Castelfranchi as less than fully satisfactory, and these earlier theories seem congenial to the approach of Conte and Castelfranchi, as well as to my approach (which seems close to theirs). I think we should count among these earlier theories the one by Gerth and Mills, the most consistent investigation into sociopsychology to have been based on the concepts of "significant others" and "generalised other." I will start out in Section 15.3.2 by pulling this theory out of oblivion; I will then come back to Conte and Castelfranchi's normativistic approach (in Section 15.3.3) and finally draw a conclusion on Gerth and Mills (in Section 15.3.4). In this process I will be providing ample room and leeway for these scholars in their role as confirming others, but will at the same time be intervening myself by weaving into the narrative my characterisation of norms as presented in Parts Two and Three of this volume.

15.3.2. The Interaction between Social Structure and Character Structure

Gerth and Mills, in addition to drawing inspiration from Freud, C. H. Cooley, and George H. Mead, also bear in mind the psychiatric studies conducted by Harry Stack Sullivan (1892–1949) (see Sullivan 1955). So early as 1939 Mills

himself had called for a social psychology "which studies the *impact* of social structures and objects, of class biases, and technological changes upon the mind of an organism" (Mills 1939, 671; italics added).

The interaction between individual agents (character structure, or micro-system) and society (social structure, or macro-system) is schematically represented in the following diagram.[20]

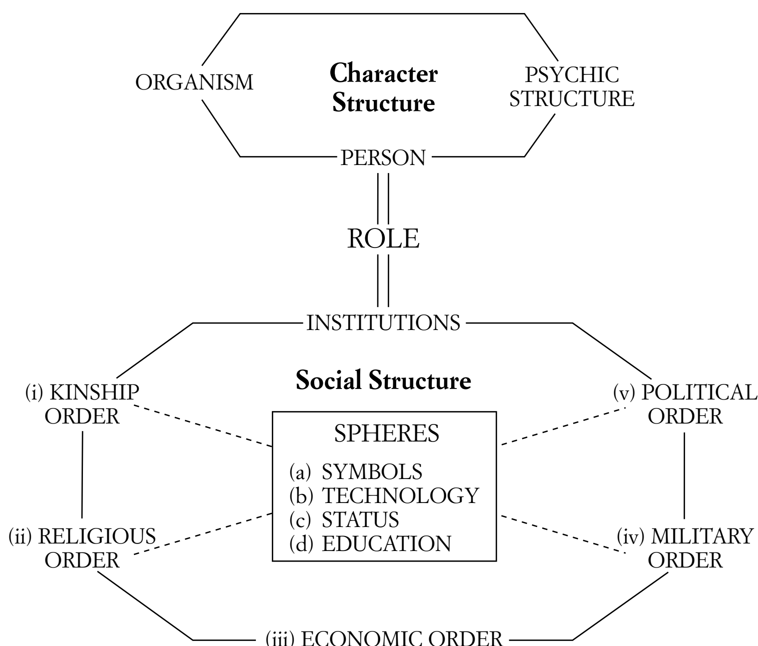


Figure 3: *Role is the bridge between social structure and character structure*[21]

[20] I will comment on the diagram by quoting Gerth and Mills themselves or by paraphrasing them, the primary aim being expository.

[21] This diagram is from Gerth and Mills 1961, 32. The caption and the letters are instead my own addition. Here are Gerth and Mills's definitions of "character structure" and "social structure." "*Character structure*, in our vocabulary, is the most inclusive term for the individual as a whole entity. It refers to the relatively stabilized integration of the organism's psychic structure linked with the social roles of the person. On the one hand, a character structure is anchored in the organism and its specialized organs through the psychic structure: on the other hand, it is formed by the particular combination of social roles which the person has incorporated from out of the total roles available to him in his society. The uniqueness of a certain individual, or of a type of individual, can only be grasped by proper attention to the organization of these component elements of the character structure" (Gerth and Mills 1961, 22). "A *social structure* is composed of institutional orders and spheres. The precise weight which each institutional order and sphere has with reference to every other order and sphere, and the ways in which they are related with one another—these determine the unity and the composition of a social structure" (Gerth and Mills 1961, 30–1, and Chapter 12).

The character structure (the individual human micro-system as an entity in its entirety) is determined by the joint action of organism, psychic structure (in a psychological sense: feelings, sensations, and impulses), and person (in a sociological sense: a combination of roles assimilated by an individual human agent by selection from the roles made available by society) (Gerth and Mills 1961, 10–22).

The term "human organism" refers to "man as a biological entity. The term invites attention to structural mechanisms and undefined impulses" (ibid., 21).

The term "psychic structure" refers to "the integration of *feeling*, *sensation*, and *impulse*."

These elements are anchored in the organism, but their specific integrations into emotions, perceptions, and purposes must be understood with reference to man as a person. (Gerth and Mills 1961, 22)

The term "person" refers to "man as a player of roles." With the term "person" Gerth and Mills then consider the human agent as a social actor and look to understand how a human agent so conceived stands affected by his or her own social acting and experience.

By his experience in enacting various roles, the person incorporates certain objectives and values which steer and direct his conduct, as well as the elements of his psychic structure. Viewing man as a person we try *to understand his conduct* in terms of motives rather than *to explain his behavior*, in terms of stimuli and responses, or as an expression of physiological constants in the organism. (Ibid.)

A social structure (a social human macro-system) is made up of institutional orders[22]—i.e., sets of institutions[23] serving similar objective functions—as well as of spheres,[24] meaning aspects of social behaviour.

The main kinds of institutional order brought to our attention in the diagram in Figure 3 are identified as follows: (*i*) the kinship order, composed of institutions that regulate and facilitate legitimate sexual relations as well as

[22] "An *institutional* order, as we shall use the phrase, consists of all those institutions within a social structure which have similar consequences and ends or which serve similar objective functions" (Gerth and Mills 1961, 25).

[23] "Just as role is the unit with which we build our conception of institutions, so institution is the unit with which we build the conception of social structure. There is more to a social structure than the interrelations of its institutions, but these institutions, in our view, do make up its basic framework" (Gerth and Mills 1961, 23).

[24] "There are several aspects of social conduct which characterize all institutional orders, the most important being: technology, symbols, status, and education. All orders may be characterized by technological implements, by the modes of speech and symbols peculiar to them, by the distribution of prestige enjoyed by their members, and by the transmission of skills and values. We shall arbitrarily call these 'spheres,' in contradistinction to 'orders,' because they are, in our view, rarely or never autonomous as to the ends they serve and because any of them may be used within any one of our five orders" (Gerth and Mills 1961, 29).

procreation and child rearing; (*ii*) the religious order, composed of the institutions within which the collective cult of one or more divinities is organised or supervised, generally on regular occasions and in established places; (*iii*) the economic order, composed of institutions serving to organise work, material resources, and the tools for producing and distributing goods and services; (*iv*) the military order, composed of the institutions under which legitimate violence is organised and supervised; and (*v*) the political order, composed of the institutions by which the distribution of power and authority within the social structure is obtained, maintained, or influenced (Gerth and Mills 1961, 26; cf. ibid., Chapters 8 and 9, on institutional orders and social controls).

The main spheres of social behaviour are identified as follows: (*a*) visual or acoustic symbols, such as signs, signals, emblems, ceremonials, language, music, and other forms of art (we would find it impossible without symbols to understand the behaviour of human actors, or how people's beliefs in the value of their symbols, and their use of them, can serve to support and justify the institutional order); (*b*) technology, consisting of tools, equipment, machinery, etc., serving to implement social behaviour; (*c*) status, consisting of the factors and means by which to distribute prestige, deference, and honour among the members of the social structure (each role, in any institutional order, can become the basis on which to lay claim to a status); and (*d*) education, consisting of the activities by which values and specialised knowledge are conveyed to those who have not yet acquired them (Gerth and Mills 1961, 29–30, and Chapters 5, 9, 10, 11, and 13).

The concept of role is crucial in Gerth and Mills' theory. They

> speak of roles as organized or instituted when they are guaranteed by authority. Thus, the cluster of roles enacted by the members of a household is guaranteed by "parental authority": The "head" of the household may use sanctions against infractions of the role pattern. Thus, employees are subject to the control of owners and managers; soldiers are subject to the authority of the commanding officer; parishioners stand under the jurisdiction of church authorities. Whatever ends the organized and interacting partners may pursue and whatever means they may employ, "authority" exists: and whenever a role configuration is so guaranteed or stabilized by a "head" who wields authority over the "members" who enact the roles, the configuration may be called an institution. (Gerth and Mills 1961, 23)[25]

On the subject of authority and making sure that the single members of a social group enact their roles, we should notice how Conte and Castelfranchi develop a theory of their own in regard to the "sovereign" and the "defenders of norms" (Conte and Castelfranchi 1995, 87f.), a theory that in my opinion can be made sharper (even though we should recall that Conte and Castelfranchi have specific objectives: They are concerned, as Gerth and Mills are not, with artificial rather than with human societies). Now, if I am not led

[25] It is interesting to compare these notions of social psychology with Karl Olivecrona's (quite compatible) observations on law and force (cf. Section 10.1).

astray by my limited competence with multiagent systems, it seems to be that Gerth and Mills give us theoretical instruments useful to the research that Conte and Castelfranchi are carrying forward. Thus, going back to Figure 3 (shown earlier in this chapter), we can appreciate that roles are so positioned in Gerth and Mills's diagram as to bridge between social structure, or macro-system (and institutions in particular) and character structure, or micro-system (wherein roles shape the person): What is specifically at play here is, therefore, the micro-macro link.

Further, I find it appropriate to connect roles more clearly with persons (individual agents, or micro-systems), this because individual persons enact roles in institutions, as well as because roles, or segments thereof, inasmuch as they are internalised by individuals, concur in determining the person in the individual character structure (in the micro-system). For this reason, I suggest modifying Gerth and Mills's diagram as shown in Figure 4 below.

Figure 4 illustrates more clearly how institutions (social structure, macro-system), which obviously belong to the social dimension, operate inevitably through individual characters (micro-systems) who, as persons, enact roles. This Figure 4 also illustrates how the person belongs to the individual dimension and consists in an internalisation of roles.

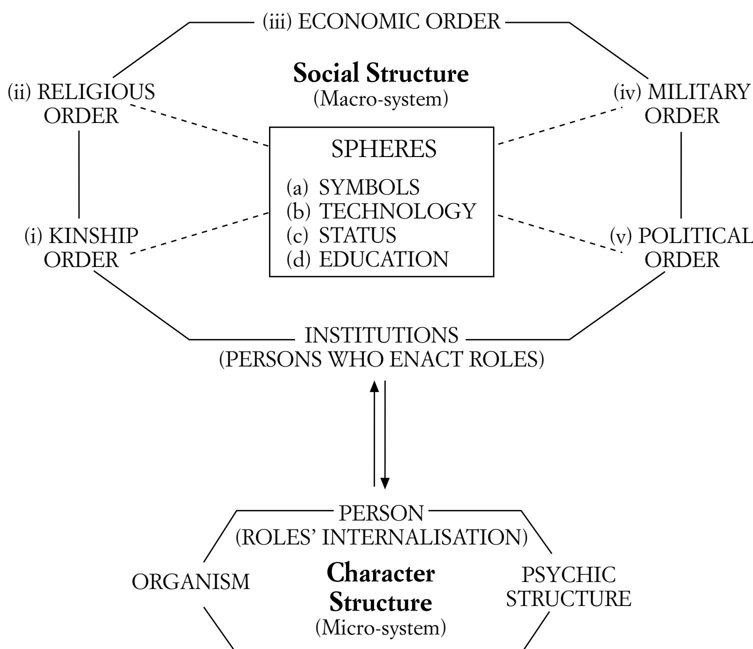


Figure 4: *Enactment and internalisation of roles*

In fine, I have placed social structure (macro-system) at the top level in Figure 4, and individual character structure (micro-system) at the bottom level. It is in the end a matter of taste: My taste, or rather, my sense of reality, instructs me to so express the predominance of social structure over individual characters.

The social structure (macro-system) necessarily includes human agents (micro-systems) in which the person-component enacts previously internalised roles. The character structure (individual human agents or micro-systems) presupposes the internalisation of roles in the person-component.

The social macro-structure goes through an evolution of its own, an evolution remarkably slower than that of the individual character structure, or micro-system, so much so that the social macro-structure can appear static by comparison. The individual character structure develops in relation to the social structure with extreme rapidity, a rapidity analogous to that of an embryo's development within the mother's womb (the mother can appear static by comparison, just like the social structure). The embryo's development is impressively dynamic as compared with the mother's development.

But this may not yet be the most fitting simile with which births, developing individual characters, and the passing of generations of individual agents (or micro-systems) might be compared with the social structure and culture they pass through—with its permanence. Individual character structures (or micro-systems) are moulded by culture, whose typically sluggish change they more or less consciously contribute to effecting. Individuals issue from institutions the way leaves bud forth from plants. They nurture institutions the way leaves nurture plants. They are produced by institutions the way leaves are produced by plants. What this is meant to convey, by analogy to individual human beings, is the time it takes for a leaf to bud, develop, and fall from a tree—the span of a season—against the lifespan of the tree itself, from its birth as a seed to the bud, to the sapling, to the fully developed tree, through the entire course of the tree's life, until the tree reaches its final decay: A process sometimes lasting several centuries.

15.3.3. Norms and the Mental Implementation of a Social System

The character structure—as far as the psychic-structure component and the person-component are concerned—is by and large the product of interpersonal situations, and the person consists of a combination of internalised roles. These roles are conditionally connected in the brains of individuals with certain types of circumstance, and people perform roles as these types get instantiated.

Consciousness involves our waking experience of such things, events, or states of affairs as are either external to us (and in this sense public: Thus, this page is public in that anyone can see it who is not subject to some physiological impairment) or internal to us (and in this sense private: Thus, my head-

ache is private in that my experience of it is confined to myself and is separate from everyone else's experience). Consciousness presupposes an object and a subject. The object is the internal or external thing, event, or state of affairs one is said to be conscious of. The subject is an individual character (or micro-system) that Gerth and Mills describe as having three components: organism, psychic structure, and person (Section 15.3.2).

What is of special interest to us here is that in self-consciousness, too, there is the person-component involved.

> In *self*-consciousness, or *self*-awareness [...], the person is also involved. Although our bodily feelings and our awareness of our toes, hands, and noses are involved in our image of self, or at least often color it with feelings and sensitivities, our total self-image involves our relations to other persons and their appraisals of us. (Gerth and Mills 1961, 80)

It seems to me that we have to do with roughly the same problem when treating (*i*) the interaction between character structure and social structure, in Gerth and Mills's treatment of this interaction; (*ii*) the link between micro and macro, in Conte and Castelfranchi's treatment of this link; and (*iii*) the relationship between individuals and society, the way I see this relation in norms as motives of human behaviour on the part of the individual agent, an agent who internalises norms (as beliefs in the brain) by variously assimilating them from the social environment.

And it also seems to me that there is, in a broad sense, the same approach to questions (*i*), (*ii*), and (*iii*)—an internalistic approach, one that brings into relief the internal point of view, the ontology of the I (Section 15.4)—in Gerth and Mills, in Conte and Castelfranchi, and in the kind of normativism adopted in this volume in the line connecting Hägerström, Olivecrona, Hart 1961, and myself (cf. Chapter 8).

Further, Conte and Castelfranchi, in their quest for normativeness, explicitly refer on several occasions to Hart 1961 (which they interpret not much differently than I do), as well as they refer to Alf Ross 1968 (Conte and Castelfranchi 1995, 77, 87–8, 93, 200, 201). They also refer to Edna Ullmann-Margalit, who in turn draws inspiration from Hart 1961 in treating the emergence of norms (Ullmann-Margalit 1977), and does so going "beyond mere conventions and norms of co-ordination" (Conte and Castelfranchi 1995, 75), without, however, achieving the supersession of what Conte and Castelfranchi call the *game-theoretical rational solution*. And for this reason Conte and Castelfranchi expressly refer to Ullmann-Margalit: They do so in looking to show (as they do in fact show) that her investigation, however important for their own research purposes, will not help toward attaining the concept of normativeness they are in quest of (a concept that I maintain is the same as that discussed throughout much of this volume).

Conte and Castelfranchi are obviously aware that "the idea that a social system and, more generally, the social environment are incorporated into the

characteristics of the agents involved, is not a new one." And they explain as follows, in summary, three main formulations of this idea.

(a) The *building through interaction* formulation, very popular in the 1960s, according to which the social systems are viewed as macro-uniformities produced by a mass of interpreted interactions (Berger & Luckmann 1966, Blumer 1969 [Herbert Blumer, 1900–1987]). Rules and norms are not imposed on the agents from the outside, but are negotiated by the interacting agents (Garfinkel 1967). Any social interaction, therefore, "effects a form of social organization" (Schegloff 1987: 207).

(b) The theory of the *social shaping of the mind*, implying that cognitive structures and processes are shaped by objective social and material conditions. This view, introduced in the 1930s by the Soviet school of psychology ([Lev S.] Vygotsky [1896–1934], [Alexei N.] Leontiev [1903–1979], [Aleksandr R.] Luria [1902–1977], etc.), has strongly influenced cognitive, developmental and social psychologists. From the 1970s, a large number of studies have been conducted (cf. [Michael] Cole et al. 1971, [Sylvia] Scribner 1975, Cole et al. 1978; cf. [Klaus F.] Riegel [1925–1977] & [John A.] Meacham 1975) into the impact of literacy and the school education system on cognitive development. Gradually, this view has led to a somewhat generic assumption of learning and cognition as necessarily social processes ([Lucy A.] Suchman 1987, [Lauren B.] Resnick et al. 1990).

(c) The hypothesis of the *mental implementation of the social systems*, which is closer to formulation (b), at least in its earlier version, than it is to formulation (a); it extends and enriches the theory of shaping, and claims that the social system not only shapes cognition by virtue of some sort of side-effect, but also influences directly, and sometimes even explicitly, the behaviour of its members by modifying their cognition. More explicitly, it is claimed that a social system achieves a purpose by means of its members' actions, and therefore through their minds. (Conte and Castelfranchi 1995, 3)[26]

With regard to the hypothesis of the mental implementation of social systems, Conte and Castelfranchi do not refer to any specific author or study, but rather declare that this hypothesis "is crucial for an adequate theory of the micro-macro link, that is, a theory of the connections between the macro-social systems and their members" (ibid., 3). In Gerth and Mills's *Character and Social Structure: The Psychology of Social Institution*, there is represented precisely a hypothesis (or theory) of this kind. In fact, so early as 1939, Mills writes that "what is needed is a concept of mind which incorporates social processes as intrinsic to mental operations" (Mills 1939, 672).

It is especially worthy of note here how Conte and Castelfranchi criticise what they call the "rational solution," and how they do so from their perspective as specialists in distributed artificial intelligence, looking at the role of normativeness in multi-agent systems. Indeed, I too, from my legal-philosophical point of view, and in relation to my investigation into the function

[26] Conte and Castelfranchi also refer to the studies on the micro-macro link done by scholars working from a phenomenological, ethno-methodological, critical, and hermeneutical perspective, the merits of which they acknowledge, but which they believe (for reasons we shall not enter into) fall short of offering adequate solutions to the problems involving the micro-macro link and normativeness as Conte and Castelfranchi frame these problems (Conte and Castelfranchi 1995, 4–5).

that norms have in the machinery of the law in force, share the kind of criticism they direct at this solution (cf. Section 15.4). Here is a sampling of the arguments that Conte and Castelfranchi produce against the "rational solution."

According to the theory of rationality, autonomous, self-interested decision-making is explained in terms of the **rational choice principle**, that is, in terms of the maximum expected utility. Given two options, a rational agent is expected to choose the one which ensures the maximum outcome compared with the relative probability of occurrence. This fundamental mechanism is essential for explaining decision-making processes, but it is neither the only, nor the primary motor of deciding systems ["motor" is indeed aptly chosen here]. Agents are *not* moved to action ["moved," aptly chosen] by the principle of maximum utility, although their actions are controlled by this principle. Actions are motivated by needs, desires, etc. ["motivated," aptly chosen]. In a word, they are directed towards realizing specific *goals* ["goals" is too narrow for me; indeed, norms are motives of behaviour that are not goal-oriented].

Conversely, in the theory of rationality, *the agent's goals* ["motives" would be better suited] *are ignored*. In AI [Artificial Intelligence] and cognitive science, the agent is a *planning* system, and goals are essential for explaining why and how actions are planned. But in the theory of rationality, agents are not seen as planning systems and their actions are explained directly in terms of the rational choice principle ([Ken] Binmore 1987, [R. Duncan] Luce & [Howard] Raiffa 1989, [Eric] Rasmusen 1990). In particular, in game theory, which can be defined as a theory of rationality applied to situations involving more than one agent, *the agents' social goals, the agents' reasons* ["motives" would be better suited] for actively engaging in social actions, are ignored. Therefore, while macro-social phenomena are allowed to emerge from the agents' choices, *the mental mechanisms of micro-interactions are taken for granted*. They always pre-exist and explain the macro-social level, but are never shown to be produced or influenced by it. Essentially, the *mental mechanisms* are considered irrelevant by game theorists for explaining rational social choice. (Conte and Castelfranchi 1995, 6; italics added on the last three occurrences)

The comments and italics added to the foregoing excerpt serve to mark out those words and expressions that I find to be especially congenial to the internalistic approach I myself adopt, as well as to point out certain improvements in this regard where I believe this approach is less adequately reflected. Thus, in this last connection, I italicised "the agent's goals are ignored" to indicate a delicate point in the view that Conte and Castelfranchi are fleshing out.

It is no accident, the way I see it, that Conte and Castelfranchi shift from the "agent's social goals" to the "agent's reasons." They seem to understand these two expressions as equivalent. But if "reasons" is equivalent instead to "motives"—as I believe it is in Conte and Castelfranchi (on reasons as motives, see Section 6.1, and footnote 2 in particular)—then "reasons" ("motives") will cover greater ground than "goals": Many goals, and maybe all goals, if adopted by an agent, become by and large motives of this agent's behaviour; but not every motive of human behaviour is a goal. Norms (which Conte and Castelfranchi treat in a way congenial to my approach) are motives that are not properly goals (see "deontological versus teleological" in Chapter 5); and it is this aspect of norms that the neurosciences will hopefully, some

time in the future, be able to shed light on, for example by working within the frame of neuropsychiatric research into the pathological phenomena referred to as "obsessive-compulsive disorders."

I am not advancing the hypothesis that the internalisation and existence of norms in human brains is a pathological phenomenon (along the lines of obsessive-compulsive disorders); I am rather speculating that norms—on account of the way they are internalised, and the way they exist in the human brain—are non-pathological phenomena of which obsessive-compulsive disorders are perhaps a cognate pathological-degenerative phenomenon. A few minimal arguments in support of this speculation come from the studies on, and experiences with, changing human personality by using drugs or violent or highly repressive treatments, especially on subjects, such as children and adolescents, whose personality is in process. Totalitarian regimes and religious sects have variously brought such methods to bear in seeking to model the moral (normative) conscience of their victims and acolytes (cf. Section 9.4).[27]

Significantly, Conte and Castelfranchi hold—and understandably so, judging from their perspective—that adopting a norm is a particular case of adopting a goal. But in reality they force norm adoption into their previously developed theory of goals and goal adoption (Conte and Castelfranchi 1995, 30–41). Conte and Castelfranchi's counting of norms among the motives of human behaviour is necessary and welcome but requires, in my opinion, that Conte and Castelfranchi modify their theory of goals and goal adoption to at least suit norms.[28] If norms—as I characterise them—bear any remote relation to obsessive-compulsive disorders, they will very likely not be adopted by individuals in the way that goals are adopted. The adoption of a goal requires making rational calculations (though not always, say Conte and Castelfranchi; these calculations may be conscious, but they may also be unconscious, as in the case of an unconscious routine); the adoption of a norm, in contrast, does not require making any rational calculations, at least not for the most part, according to my opinion. Our adoption of norms from the environment, or better yet, our assimilation or internalisation of them (norms understood as I do) implies rather the socialisation phenomena referred to in

[27] In addition to these cases, all of them belonging to history and to the chronicling of the domination of man over man, the reader can refer to the neurological-psychiatric literature on this subject: see, for example, Smeraldi 2003, where there is to be found a bibliography that covers the field extensively.

[28] "The general form of a prosocial action is based on goal adoption, i.e. one pursuing another's goal. More precisely, we define goal adoption as the process by which a given agent comes to have another agent's goal as his own [...]: *x adopts a goal of y's when x wants y to obtain it as long as x believes that y wants to achieve that goal*. In other words, *x* has a new goal as a result of goal adoption. He has it, (a) *as long as* he believes that *y* has it, and (b) in order for *y* to obtain it. Thanks to condition (b), the present notion of adoption excludes all cases in which one is led to have a new goal by others pursuing the same goal (imitation)" (Conte and Castelfranchi 1995, 31).

Section 15.2.5 and the subsumption and inference processes described in Chapter 7 and in Section 9.6.

At any rate, Conte and Castelfranchi effectively call our attention to the limits of the game-theoretical, rationalistic approach, which explains how the macro emerges out of the micro but does not instead explain how the micro derives from the macro; and they also bring out the "hypercognitive fallacy" that the studies applying artificial intelligence to the social sciences have inherited "from phenomenological, post-Wittgensteinian social theory" (cf. Conte and Castelfranchi 1995, 5, 18–20).

15.3.4. Internalising the Reality That Ought to Be: From Significant Others to the Generalised Other

Conte and Castelfranchi make explicit as follows their intentions and approach as compared against approaches and orientations different from theirs:

> Unlike scientists of rationality, we believe that cognition reflects and *embodies* in various ways objective pre-conditions, societal prescriptions and institutions, and reinforcing effects. (Conte and Castelfranchi 1995, 9)

What is needed, say Conte and Castelfranchi, is a theory of

> (a) how the macro-social system is implemented in the agents, and how it works through their minds. That is, a theory of:
>
> —*cognitive shaping*, or in other words, the reasons and processes by means of which the agents acquire beliefs and goals from external social sources;
>
> —*behavioural shaping*, especially the functional mechanisms of reinforcement;
>
> (b) how macro social phenomena may be derived from micro interactions. (Conte and Castelfranchi 1995, 9–10)

As has been anticipated, the theory that Gerth and Mills based on the concept of "significant others" and of "generalised other" provides, in my opinion, at least some clues to the answers sought by Conte and Castelfranchi—and does so with regard to points (a) and (b), both.

According to Gerth and Mills,

> man as a *person* [the person-component of an individual agent, or micro-system: cf. Section 15.3.2] (from the Latin *persona*, meaning "mask") is composed of the specific roles which he enacts and of the effects of enacting these roles upon his self. And society as a *social structure* is composed of roles as segments variously combined in its total circle of institutions. [...] From the sociological point of view, man as a person is a social-historical creation. If his view of his self and of his motives is intimately connected with the roles which are available to him and which he incorporates, then we may not expect to learn much that is very concrete about individual men unless we investigate a number of his specific roles in a number of varied social-historical settings. (Gerth and Mills 1961, 14)

It falls to the social scientist to show how the main ideas and beliefs current in a society, as well as its symbols and modes of communication, contribute to the formation, preservation, and efficacy of individual motives.

An individual agent's person-component is by and large a product of interpersonal situations. A person's integration with others—the roles this person acts out—is key to understanding that what constitutes an individual agent's person-component is the combination of the roles he or she acts out: A person is made up of the organised social roles he or she has internalised and enacts; language is the mechanism by which this internalisation occurs (Gerth and Mills 1961, 80, 83).

A role is an established model of personal conduct, that is, a model that we are expected to follow: "The roles a person plays thus integrate one segment of his total conduct with a segment of the conduct of others" (Gerth and Mills 1961, 83).

When we enter a new role and do not yet know what is expected of us, we take direction from other people's words of approval and disapproval and learn therefrom whether the moves we have made were right or wrong: The voiced expectations of others are what we use as our guide in instantiating a type of behaviour.

> When we have internalized the vocal gestures of others, we have internalized, so to speak, certain key features of an interpersonal situation. We have taken over into our own person the gestures which indicate to us what others expect and require. And then, we can make certain expectations of ourselves. The expectations of others have thus become the self-expectations of a self-steering person. The social control and guidance which the gestures of others provide have thus become the basis for self-control—and for the self-image of the person. (Gerth and Mills 1961, 84)[29]

Besides, the person—having learned to read—chooses models as well from among those he or she finds in the culture stored (written) on nonhuman supports (cf. Section 15.2.2).

When we reach adulthood, our self-image, however subject to some extent to the evaluations that other people make on specific occasions, will usually

[29] Let me observe en passant that there is something in these concepts that echoes the excerpts by Rousseau quoted in Section 10.2.6 on the interaction between the individual wills and the general will—but with this crucial difference. Rousseau says we can be proud of ourselves: The general will is our own, truest individual will. By contrast, these crude social psychologists, Gerth and Mills, do not get carried away by suggesting sentiments. They simply tell us the exact opposite of what Rousseau seems to be saying: Our own, truest individual will (the character structure) is the general will (the social structure) that moulds us. Three comments are in order here. First, if we are to seek out any 18th-century antecedent, we should say that Gerth and Mills follow in the wake not so much of the pre-Romantic Rousseau as in the wake of the pre-Positivist Montesquieu (cf. Section 10.2.4). Second, Gerth and Mills do not try to elicit emotions, yet they may inspire melancholy (as Kierkegaard and Heidegger in a sense do: Section 11.1). Third, quite independently of the first two comments, Gerth and Mills are right, or so I fear.

be strong enough to have an existence of its own. This autonomy[30] of our self-image rests on the long string of antecedent evaluations and expectations that others have expressed in our regard.

> The self-image which we have at any given time is a reflection of the appraisals of others as modified by our previously developed self. (Gerth and Mills 1961, 85)

Only when another's evaluation is in some way *significant* to us does it carry any weight in forming and maintaining our self-image. Quite likely, the first self-image a child will have of itself is the image its mother has of it, but as the child grows older there will be many and different *significant others* that come to bear.

The individual is not completely passive in taking some people rather than others as significant others. There are at least three criteria that we use in selecting significant others from whom to draw inspiration:

(*i*) *Cumulative confirmations*. The image we already have of ourselves, and which we value, induces us to select those people who confirm it or make it seem even more appealing. This process is self-reinforcing: The more we succeed in selecting as significant others those people who confirm our self-image, the more we will be induced in the future to seek out this kind of person as significant. So there is in our personal history a tendency to accumulate over time those people who support our self-image, who are willing to regard us in the way we want to be regarded: These people are our *confirming others* (Gerth and Mills 1961, 86–7).

(*ii*) *Selection by position and career*. In forming and maintaining a valued self-image, we will select significant others in ways circumscribed by our institutional position and by the positions we will assume over the course of a career. The range of possibilities allowed by any one position makes it so that the workings of this process are not mechanical (Gerth and Mills 1961, 87).

> The class and status positions of a person may thus be restrictions upon his *selection* of significant others, as well as determinants of the *degree and kind of significance* and of the *angles of refraction* which other persons of differing status may possess for the person of a given status position. (Ibid., 88)

(*iii*) *The confirming use of the intimate other*. If we find obstacles in our outward search of a confirming other, we may end up restricting our search to those confirming others with whom we are intimate. The circle of intimate others can become extremely tight, possibly coming down to a single significant other. In these cases, we will be trying to gauge our self-image entirely to the evaluations of this single particular other, thereby forming with this person a unit in isolation from the rest of society (Gerth and Mills 1961, 90).

[30] The autonomy in question is not political autonomy as discussed in Section 10.2.6, i.e., political autonomy vis-à-vis political heteronomy.

Our self-image is moulded by the attitudes that significant others take toward us: These attitudes become matter deriving from social experience, which matter we will experience anew and reprocess in evaluating our self-image. When internalised, these attitudes form our *generalised other*.

The experience of this generalized other—the experience of "conscience"[31]—is not the experience of a self-image; it is the experience of the appraisals of *others who are not immediately present*, but who, nevertheless, restrain or facilitate our own appraisals and images of our self. (Gerth and Mills 1961, 95; footnote and italics added)

The significant others are those people whose evaluations we heed and factor into our evaluations of ourselves. The authoritative others are significant others whose evaluations approve or disapprove of our actions and desires. The generalised other is what results from integrating the evaluations and values of our significant others and, even more so, of those significant others who are authoritative.[32]

In the generalized other, the appraisals of many particular others are organized into a pattern. The contributions of any particular other are fused with the contributions of these various others, and thus formed the generalized other. Accordingly, when the person performs an act that is out of line with expected norms he may experience a general disapproval of his self, which means that the generality of his significant and authoritative others expected an alternative act. He may not be able to locate and specify just which other forbids this act, for this particular other has become part of his generalized other. (Gerth and Mills 1961, 97; italics added)[33]

[31] The difference between "conscience" (i.e., the moral conscience) and "consciousness" is standardly so characterised. "Conscience can signify those very moral convictions persons cleave to most firmly and judge themselves by. Second, the notion may cover the faculty by which we come to know moral truths (assuming there to be such) and apply them to ourselves. Third, conscience can be said to concern the examination by a person of the morality of their desires, actions, and so on." (*Routledge Encyclopedia of Philosophy*, s.v. "Conscience," vol. 2: 579). "Consciousness," instead, is used in philosophy "for four main topics: knowledge in general, intentionality, introspection (and the knowledge it specifically generates) and phenomenal experience" (*Routledge Encyclopedia of Philosophy*, s.v. "Consciousness," vol. 2: 581).

[32] "The generalized other of any given person does not necessarily represent the 'entire community' or 'the society,' but only those who have been or who are significant to him. And some of those who have been significant others may not operate in the generalized other, but may have been excluded from awareness—a fact that is in line with the principia of selecting as significant those others who confirm the desired image of self" (Gerth and Mills 1961, 96).

[33] "If the others who have been most significant to a person have been very forbidding, the person may be burdened by feelings of unbearable guilt. In a restricting parental situation he may have incorporated a generalized other that is too narrow for the requirements of the later institutional world of business and pleasure, and he may not have been able to integrate the appraisals and expectations of later others which are more appropriate to his adult roles. With psychiatric aid the person may be able critically to review his internal behavior and escape his generalized feelings of guilt by specifying and recomposing the significance of particular others within his generalized other. He may be able to add (or even to substitute) the authority of the psychiatrist to his generalized other in such a way as to gain genuine independence for rational determination of self.

As new appraisals are added to older ones, and older ones are dropped or excluded from

Hägerström's theory of norms; Karl Olivecrona's theory of norms as independent imperatives (*fristående imperativer*: Section 8.1.3.1); Hart's 1961 rules, understood as having a matter-of-fact existence and as implying an internal point of view (at least insofar as they exist in single individuals in addition to existing in society: Section 8.2.6.1, point (*a*)); Alf Ross's conception of norms (initially expressed in *Om ret og retfærdighed*, of 1953—Ross 1971—and then better reformulated in *Directives and Norms*, Ross 1968, 78ff., 106ff.); and my own characterisation of norms as beliefs (Chapters 6 and 7) find a counterpart in the psychosociological theories of the social self: in the theory of the generalised other, for example, which is here being brought anew to the reader's attention. Neither the theory of norms presented in this volume nor the theory of norms as an objective system of modes of conduct (Hägerström) or as independent imperatives (Olivecrona) or as standing, enduring, and settled rules (Hart 1961) enters into any full reconstruction of the way the macro (society and its culture) is internalised in the micro (in the individual)—a reconstruction such as we find in Gerth and Mills. Even so, these theories recognise fully the phenomenon of internalisation (a phenomenon that Gerth and Mills attempted to reconstruct), and they recognise its importance. Hägerström was conducting his research much earlier than Gerth and Mills and so couldn't possibly have known of their theory, but it is also clear that Olivecrona, Hart, and Ross had no knowledge of it, either. For my part, I am content to mark the parallelism, the points of contact, and the affinities that can reasonably be said to exist between the theory of the generalised other and my own conception of norms, a conception I develop by following through on Hägerström, Olivecrona, and Hart 1961. I do not mean this to say that the theory of the generalised other, as I have summed it up, is the best theory with which to account for the normative phenomenon. I am rather saying that this theory is plausible, that the research line it follows—a line inaugurated by George H. Mead—is the right way to go in investigating the normative phenomenon, and that ultimately it will be for the neurosciences to conduct this investigation (Sections 15.3.3 and 15.4). I am also saying that, as I mentioned earlier, Gerth and Mills's theory is a theory concerned with the mental implementation of social systems: It is the kind of theory that Conte and Castelfranchi also aspire to.

In fine, our having a moral conscience entails not only that we have internalised roles variously assimilated from the social environment, but also that we have attained a degree of individualisation, which in turn requires a certain detachment from these roles, namely, a certain distance from the expectations that others express relative to them. Such a detachment and its accompanying

awareness, the generalized other normally changes. Such changes in the composition of the generalized other may occur as an aspect of the person's growing up or maturing" (Gerth and Mills 1961, 97–8).

individualisation occur throughout our career when expectations are directed at us that stand in mutual conflict or in conflict with our current circles of significant others. This individualisation of the self results from the variety and scope of the voluntary actions we undertake, and it implies that we actually have had the possibility to take an individual decision, and that others credit us as responsible for such personal choices.

> Personal or joint "responsibility" exists socially when the individual, as an individual or as a member of a group, is held accountable for his activities, in short, when his acts are ascribed to his self or his group. In a society where roles are quite stereotyped, this reality of alternatives, and such conceptions as personal responsibility, may not exist. Only if they do may a person come to address himself in an attempt to secure "consistency" and unity of self-image on the basis of self-expectations. There must be an area of voluntary action, which normally involves the perception of open alternatives or of conflicting expectations. The chances for an *individual* to emerge and to control himself by a generalized other are decreased as the variety of voluntary choices and decisions which confront persons diminish. (Gerth and Mills 1961, 100)

In a society in which we are offered only consistent roles and only so many choices, it is society itself that sees to it that our self is self-consistent: There will be no way that we can individually work at integrating our self because society has already done that for us. But in a society in which conflicting expectations come our way, and hence in a society where we have actual alternatives to choose from, we will each have to attain such a coherence and unity of the self with our own resources. In this effort we forge an identity: We take the different, conflicting expectations of significant others and work them into a coherent whole that becomes our generalised other (Gerth and Mills 1961, 100–1).

15.4. The Palingenesy of the Psychological Aspects of the Internal Point of View. Overcoming the Analytical Paradigm: Willard Van Orman Quine, John R. Searle, and the Neurosciences

I already dealt with the analytical emasculation in Section 9.1. This emasculation consists in reducing norms to propositions, thereby renouncing considering them as internal—psychological—motives of human behaviour.

In this Section I will deal more extensively with the anti-psychologism of analytical philosophy, with some negative consequences resulting from this attitude, and with the path taken as a way out of the paradigm of analytical philosophy, a path I feel needs to be pointed out, and which follows in the footsteps of Willard Van Orman Quine and others in the direction of the neurosciences.[34]

[34] Terms such as "anti-psychologism," "anti-mentalism," and "anti-internalism" have been used with importantly different meanings in a wide number of debates within the philosophy of logic and mathematics, epistemology, and the philosophy of mind. Here I will largely disregard

Since the latter half of the 1940s, the dominant Anglo-American philosophy—analytical philosophy—contributed widely to spreading an anti-mentalistic attitude, with Wittgenstein and Ryle (1900–1976), for example. Furthermore, philosophers working in the analytical tradition, conceiving their enquiries as enquiries of a conceptual sort, were mostly inclined to consider irrelevant, or at least to belittle, the importance that scientific hypotheses and the empirical discoveries of psychology and the social sciences bore for their work.[35]

What matter here are the consequences that this exclusionary attitude has had on the study of society and culture at large, and in particular on the study of law, morality, and politics. The paradigm of Anglo-American philosophy developed under the powerful influence of both logical empiricism and ordinary-language philosophy, and it manifested itself in a kind of a censorious attitude toward hypotheses on human individual and social behaviour when these hypotheses were argued by making reference to psychological, subjective experiences, or—as I should say in my approach and terminology—to human brains.

> The golden age of analytical philosophy in its different versions in the Anglo-American area came in the postwar period and lasted through the 1960s—a period of virtually uncontrasted academic dominance, in that the other philosophies, though present, took up marginal spaces in university teaching and failed to have a hold on the newer generations. The 1970s saw the end, not of analytical philosophy, or rather of the analytical philosophies, but of their dominance. (Restaino 1999, 913; my translation)

Ordinary-language philosophy takes hold in the United States in the 1950s and 60s, with different orientations internal to it, "but the analytical tradition itself, with all its internal divisions, is undoubtedly predominant in pretty much every department of philosophy and logic in American universities" (Restaino 1999, 915; my translation).

such differences and use those terms almost interchangeably to indicate a number of preclusive attitudes toward investigating inner subjective experiences in the study of normativeness, especially moral and legal normativeness.

[35] Bertrand Russell had this to say in 1959: "In English-speaking countries and especially in England, there is a new philosophy which has arisen, I think, through the desire to find a separate field for philosophy. [. . .] It would appear that philosophy is merely incomplete science, and there are people who don't like that view. They want philosophy to have a sphere to itself. That had led into what you may call linguistic philosophy, in which the important thing for the philosopher is not to answer questions but to get the meaning of the questions quite clear. I myself can't agree to that view, but I can give you an illustration. I was once bicycling to Winchester, and I lost my way, and I went to a village shop and said, 'Can you tell me the shortest way to Winchester?' and the man I asked called to a man in a back room and whom I couldn't see—'Gentleman wants to know the shortest way to Winchester.' And a voice came back, 'Winchester?'— 'Aye'— 'Way to Winchester?'— 'Aye'— 'Shortest way?'— 'Aye'— 'Don't know.' And so I had to go on without getting any answer. Well, that is what Oxford philosophy thinks one should do [...]. It's somebody else's business to give the answer" (Russell 1974, 15–6).

In England, on the other hand,

> the logical-empiricist orientation had been pushed into minority, sidelined—the chief, and virtually only, exponent still holding out was A. J. Ayer [1910–1989], with the emigree K. Popper propounding positions different from those fashioned in the manner of Carnap [1891–1970]. Coming up strong in the analytic tradition, inaugurated in England by B. Russell and G. E. Moore [1873–1958] in the early 1900s, was the well-known version of it that went by the name of "ordinary-language philosophy": The views held by the later Wittgenstein at Cambridge became predominant, and virtually exclusive, as did those of G. Ryle and, even more so, J. L. Austin, and their many colleagues and students at Oxford, among whom H. L. A. Hart, P. Strawson, R. M. Hare, P. Nowell-Smith, S. Toulmin, and many others. From the 1940s to the 1970s the analytical techniques of the Oxford school made up *the* philosophy of England par excellence. (Restaino 1999, 914; my translation)

Even in legal philosophy and in general jurisprudence there are traces of the preclusive negative effects of the anti-mentalism that characterised the academic paradigm of the 1950s and the ensuing decades (there have obviously been many positive effects as well, and more numerous than the negative, which came from analytical philosophy). Traces of this kind can be detected in the 1953 work of Alf Ross (Ross 1971), for example, in which these effects were caused by logical empiricism, as much as they can be detected in the work of H. L. A. Hart (1961), in which these effects were caused by ordinary-language philosophy.

Both of these scholars chose to attack the question of normativeness by bringing it into too close a connection with outward observable behaviour, and in the final analysis with outward, observable, linguistic behaviour. In different ways, they both found they could not deal with normativeness without taking into account the external point of view: They could not attempt to identify normativeness by considering it exclusively—however provisionally, and only for the purposes of analysis—from the internal point of view, that is (and I must stress, provisionally and for the sole purpose of analytical identification), without taking social behaviour into account.

Thus, in 1953 Alf Ross sought to connect the psychological aspect with the behavioural aspect of norms, and did so, under the influence of logical empiricism, by fashioning legal dogmatics after the scientific model that logical empiricism had worked out for the empirical sciences.[36] Ross drew from this

[36] Among the exponents of logical empiricism which Ross explicitly refers to in both *Law and Justice* (Ross 1958, 40, 112, 237) and the Danish original, *Om ret og Retfærdighed*, of 1953 (Ross 1971, 53, 132, 311, 320), are Victor Kraft (1880–1975) and Arne Naess. Mentioned, instead, only in the Danish original are Georg H. von Wright and Eino Kaila (1890–1958) (Ross 1971, 53). Of course the logical-empiricist literature that Ross draws inspiration from, even when he is not making any specific reference, is wide and varied: see, for example, the work of Moritz Schlick (1882–1936) and Herbert Feigl (1902–1988) (cf. Pattaro 1966, 1036ff.). After Alf Ross died, in 1979, I managed to have the University of Bologna acquire part of the personal collection of books that his heirs had sold to an antiques library in Copenhagen. Some of these books are greatly interesting because they carry Alf Ross's handwritten annotations.

model the principle of verification and the idea that the empirical assertions of science can all be understood, in a sense, to be predictive; he set this model right in the centre of legal dogmatics, despite the incompatibility between the two; this course led him to embrace a form of predictivism whereby legal doctrine—by stating the validity of a law (where "valid" is to be understood to mean that the law in question is in force: cf. Section 8.1.6)—takes the function of predicting the court's decisions.

Alf Ross expressly distinguished the psychological realism of the Uppsala School (in the sense of "psychological" illustrated in Section 8.1.4) from the behaviouristic realism of the American realists; and he declared as well his intention to attempt a synthesis between the two realisms, for behaviours (here, the verbal behaviours of judges) are observable; not so the normative ideology that judges adopt (in their brains, I should say) when they act in the role of judges: This normative ideology cannot be observed, because it is internal to the heads of the judges singly considered; in a word, it exists (Section 6.2) as a subjective experience (Section 10.2.4, footnote 35; cf. Pattaro 1966, 1047–8; Ross 1958, 73–4).

And there is a sense in which the preclusive attitude that analytical philosophy has had against psychology can be detected in Hart 1961.

Hart, concerned as he was to proceed in a methodologically safe way, chose—as Alf Ross had done in 1953, and yet differently from Ross—to anchor the internal aspect of norms to the external, observable social practice of the officials. Hart pursued in this sense the same objective that Ross had pursued, and for methodological reasons akin to Ross's, but he did so in a different way than Ross, because, among other reasons, his methodological concerns were rooted not in logical empiricism (as had been the case with Ross) but in ordinary-language philosophy. (Hart's methodological concerns can be explained by pointing to his attitude of caution, and maybe even of suspicion, toward psychologism.) So we see here Hart working out what has been called the social-rule theory; this he does against the backdrop of J. L. Austin's philosophy of language and of the reading of Wittgenstein that Peter Winch came at in the effort to provide an understanding of human and social behaviour.[37] But Hart 1961—fortunately, in my opinion—received as well the counterbalancing influence of Hägerström and Olivecrona, and that despite his ever-present anti-psychologistic caveats. As I attempted to show in Section 8.1.3, Hart recognised Hägerström's and Olivecrona's works (certainly not

See, for example, Schultzer 1938 (Bent Schultzer, 1904–1973), esp. Chapters 2 ("The Validity of Protocol Statements," 9ff.), 7 ("On Verification," 59ff.), and 8 ("On Objectivity," 69ff.): These chapters Alf Ross carefully underlined using two colours. A report on this acquisition by the Bologna University Department of Law has been published by Carla Faralli (Faralli 1984, 310–2).

[37] MacCormick 1981, 30. Cf., in Volume 11 of this Treatise, Postema.

Ross's works) as very important, if not fundamental, to an understanding of the functioning of the model of rules as compared with the model of commands and of habitual social obedience in describing and explaining the legal phenomenon.

Hart's soft positivism has earned it, on the part of Ronald Dworkin, the label "semantic sting" (Dworkin 1986a, 45ff.). And, on closer inspection, this description strikes at Hart's soft legal positivism where Hart fences in, circumscribes, and avoids looking into the psychological aspects of the internal point of view (even though Dworkin, in truth, requires so much as to have the internal point of view not only be explored and investigated, but also adopted by general jurisprudence, which in a way he counts among the sources of law).

The advantage that Hägerström and Olivecrona had over Alf Ross and H. L. A. Hart is that they did not operate under the influence of logical empiricism or of ordinary-language philosophy (clearly, in Hägerström's case this was so for chronological reasons). Their advantage is that, in undertaking to explain the functioning of a social phenomenon such as the law is—and specifically the normativeness of law—they did not fall subject to the anti-mentalistic preclusions of these philosophies. Clearly, the fact of these philosophies not influencing Hägerström and Olivecrona brought as well a disadvantage for them, in that they could not use or master (for better or worse) the refined conceptual tools that Ross and Hart could use: Ross thanks to his familiarity with logical empiricism, Hart thanks to his familiarity with ordinary-language philosophy.

The dividing line between internal and external—internal states of mind or processes versus external, observable behaviour—comes into play as well in this further way.

Rational thought (which, too, seems to me to pertain to the internal dimension of the human being: to the human brain) is not affected by the anti-internalistic preclusion, on the part of logical empiricism or on the part of ordinary-language philosophy, because rational thought, and especially logic and mathematics (both of them formal sciences: *Formalwissenschaften*), is considered in the analytical tradition as having an objectivity of its own that is independent of the human psyche.

So far, so good.[38] And, further, logical empiricism carried forward its faith in the formal sciences along with a parallel, equally unshakeable faith in emotivistic non-cognitivism in metaethics. The metaethical emotivism of logi-

[38] But then, on the other hand, I also believe, and believe to some degree with aprioristic conviction, that the neurosciences, by investigating the brain, may be able in the future to give contributions relevant to logic and to mathematics. Attempts in this direction have been made so early as the late 1980s (see Churchland 1986; Churchland 1989; Churchland 1995; Churchland and Sejnowski 1992), though I do not share the computational perspective these authors express.

cal empiricism certainly presented negative aspects tied to its radicalism.[39] And yet they certainly presented a positive aspect, too: They underscored the existence and importance of the irrational, emotive, psychological side of the human mind, even if they sometimes did so especially in an effort to shed light on what they judged to be its nonsensical character, a character they viewed as a hindrance to a correct understanding of individual and social human behaviour. (And next to this side they underscored the rational side, the side capable of rationally treating the empirical data of the external world, and the data on individual and social behaviour, where the external world in question is the human world.)

Naturally, the metaethical non-cognitivism and emotivism of logical empiricism was soon to be reacted against: This counter-reaction came from within the same cultural fold of analytical philosophy. Coming as it did from within analytical philosophy, the reaction against non-cognitivism and emotivism followed paths in one way very much understandable and in another rather puzzling. Indeed, rational thought (however much it may be rooted in the human brain, and hence be *in interiore hominis*) is considered objective in the analytical tradition (and in this tradition, again, the formal sciences are considered to be in a way more objective than the empirical sciences)—and on that account, the goal in analytical philosophy in its reaction to metaethical non-cognitivism and emotivism (two orientations characterising analytical philosophy from its very inception) became to recover for the rational dimension of human beings as great a quantity of morality and law as could be recovered, this precisely in order not to leave morality and law to the indeterminacy, subjectivity, and uncontrollability of emotions and psychological impulses. Even in this regard, I must remark: So far, so good.

But when this "rationalistic" and rationalising attitude (see Section 15.3.3) ends up disregarding that there exists, and in mass proportions, an irrational dimension of man, and so of morality and law, thereby refusing to concern itself with this dimension, then rationalistic neo-cognitivism in morality and law will again discriminate against the internal, psychological, and emotive dimension of man, insofar as this dimension cannot be treated from within an empirical approach or a practical rationality.[40]

Even in the field of artificial intelligence applied to the social sciences the limitations of hyper-rationalistic accounts of social behaviour have been perceived:

[39] See the survey in Oppenheim 1976. Obviously, traditionally cognitivistic metaethical theories, such as those religiously inspired, or those that trace back to some form of natural-law theory, took an immediate stand against the non-cognitivism and emotivism of logical empiricism.

[40] It is from the wellspring of analytical philosophy that rationalistic neo-cognitivism ripened, only to turn against it in rejecting some of its metaethical emotivistic aspects. Cf. Lewis 1969; Ullmann-Margalit 1977.

> A fundamental misconception has pervaded the social sciences, and is also reflected in the social studies carried on in AI [Artificial Intelligence]. It is a static, non-emergent view of micro-interactions. Social needs and capabilities are taken for granted, either because they are inherent in the structure of the situation investigated (think of game theory), or because they are built into the agents (think, again, of the strategic beliefs found in game theory and, more generally, in the theory of rationality). This statement may appear unwarranted given the impressive number of game-theoretic studies about the *emergence of co-operation*. However, co-operation and other positive social phenomena are considered as emergent macro-effects of micro-interactions, the latter being essentially taken for granted.
>
> An analogous consideration should be made with regard to the social studies conducted within the field of AI [Artificial Intelligence]. Over the last decade, AI [Artificial Intelligence] has certainly taken on a significant role within cognitive science and has usefully contributed to a general theory of intelligence and of cognitive processes. Unfortunately, this is not true of social studies in AI [Artificial Intelligence]. Indeed, none of HCI [Human-Computer Interaction], MAS [Multi-Agent System] research, and CSCW [Computer-Supported Co-operative Work] are good candidates for working out a general theory of the bases and reasons for social relations and interactions. (Conte and Castelfranchi 1995, 18)

The rationalising neo-cognitivism (also adumbrated in this description) is in my opinion purblind and ungainly. It therefore runs a serious risk of tripping over the enormous mass of human irrationality and falling flat, precisely because it refuses to see this irrationality and to take it into account.

Indeed, we sometimes take in our critical or rational morality a pride so blinding that we throw our uncritical morality out the window (we do not give to nonrational, not critically analysed components the attention that is due to them). It is a critical or an uncritical morality (or normativeness) that prevails among the bulk of the population?[41] At what age do young people on average pass from an uncritical to a critical morality? And when they—or rather, we—grow old, at what age do *we* on average lapse back from a critical to an uncritical morality? Where no critical morality exists, is there no morality at all? What about taboo morality,[42] Nazi or racist morality,[43] the morality

[41] For example, a morality as important and as widespread as the official Catholic morality is held by authoritative scholars to be "in radical contrast with the principles of ethical and juridical reason that are universally accepted at least in the West" (Lombardi Vallauri 1992, 328). Cf. also Lombardi Vallauri 2001, 95–149.

[42] For example, "it is typical of Hindu morality that Hindus shouldn't eat beef. The Mohammedans and the Jews say you mustn't eat pork, and there is no reason for that, it's just taboo" (Russell 1974, 63).

[43] The question is discussed in Hare 1963, 170–1, 219ff. "Let us suppose that there is a racialist the mainspring of whose racialism is a horror of miscegenation; and let us suppose that the source of this horror is not any belief about the consequences, social or biological, of miscegenation. [...] Let us suppose [...] that his grounds are [...] simply a horror of the very idea of a black man mating with a white woman [but note that the converse case—a white man mating with a black woman—would not be perceived to be as shocking]. This cannot be touched by any scientific or factual argument [...]. And it may well be true that, if miscegenation is to be prevented, it is necessary to have a rigid color bar [...]. If this is true, then it will be hard for us to argue with this man. He detests miscegenation so much that he is prepared to live in a police state in order to avoid it.

of terrorism and other fanatical moralities?[44] To say of these moralities that they are not moralities because they do not correspond to our rational, liberal, progressive moralities is to show that if our morality is a critical morality, our metaethical attitude, our philosophical and scientific approaches to moral and legal phenomena, is itself not fully critical.

In my opinion, what we experience in a strictly deontological way—as binding per se, or as normative, on my characterisation of norms—originates not in mere rationality (even when the contents of the norms we believe in make rational sense from many points of view), but to a great extent in some activity of the brain designated by mentalistic terms, such as "emotion" and "feeling"[45]

And he must be prepared for more than this. He must, if he is going to universalize his moral judgements, be prepared that he himself should not merely live in a police state, but live in it in the same conditions as he is now prepared to make the blacks live in [...].

Now it may be that there are people so fanatical as to be prepared for all these things in order to avoid miscegenation" (Hare 1963, 219–20).

[44] Kant had already defined fanaticism, or enthusiasm: "Now if we search we shall find for all actions that are worthy of praise a law [*Gesetz*] of duty which *commands*, and does not leave us to choose what may be agreeable to our inclinations. This is the only way of representing things that can give a moral training to the soul, because it alone is capable of solid and accurately defined principles.

If *fanaticism* in its most general sense is a deliberate overstepping of the limits of human reason, then *moral fanaticism* is such an overstepping of the bounds that practical pure reason sets to mankind, in that it forbids us to place the subjective determining principle of correct actions, that is, their moral *motive*, in anything but the law [*Gesetze*] itself, or to place the disposition which is thereby brought into the maxims in anything but respect for this law [*Gesetz*], and hence commands us to take as the supreme *vital principle* of all morality in men the thought of duty, which strikes down all *arrogance* as well as vain *self-love*" (Kant 1980, 327). This is Kant's passage in its German original: "Wenn wir nur wohl nachsuchen, so werden wir zu allen Handlungen, die anpreisungswürdig sind, schon ein Gesetz der Pflicht finden, welches gebietet und nicht auf unser Belieben ankommen läßt, was unserem Hange gefällig sein möchte. Das ist die einzige Darstellungsart, welche die Seele moralisch bildet, weil sie allein fester und genau bestimmter Grundsätze fähig ist.

Wenn *Schwärmerei* in der allergemeinsten Bedeutung eine nach Grundsätzen unternommene Überschreitung der Grenzen der menschlichen Vernunft ist, so ist *moralische Schwärmerei* diese Überschreitung der Grenzen, die die praktische reine Vernunft der Menschheit setzt, dadurch sie verbietet, den subjektiven Bestimmungsgrund pflichtmäßiger Handlungen, d. i. die moralische Triebfeder derselben, irgend worin anders, als im Gesetze selbst, und die Gesinnung, die dadurch in die Maximen gebracht wird, irgend anderwärts, als in der Achtung für dies Gesetz, zu setzen, mithin den alle *Arroganz* sowohl als eitele *Philautie* niederschlagenden Gedanken von Pflicht zum obersten *Lebensprinzip* aller Moralität im Menschen zu machen gebietet" (Kant 1956, A 152–3). The question of enthusiasm and fanaticism may receive further light by discoveries that I assume the neurosciences may make in the future on certain affinities between normativeness and obsessive-compulsive disorders, in the sense that these disorders may turn out to be degenerative forms of the neurological basis of normativeness (cf. Section 15.3.3, footnote 27).

[45] "Of course a great deal of taboo morality is entirely compatible with what one might call rational morality. For instance, that you shouldn't steal or that you shouldn't murder. Those are precepts which are entirely in accord with reason, but they are set forth as taboos; they have consequences that they ought not to have. For instance, in the case of murder it is considered that it forbids euthanasia, which I think a rational person would be in favour of" (Russell 1974, 62).

(and by philosophical terms such as "hypostasis" and "reification"), an activity that several scholars persist in not wanting to take into consideration when it comes to explaining morality or law.

If mentalistic terms are still in use today, this is not a good reason to leave out of consideration what these mentalistic terms can figuratively refer to. And if this thing exists, and a deeper knowledge of it is attained, the neurosciences will be able to, and will *have* to, designate it by new terms in order to avoid confusion. This kind of development—a terminological development, and sometimes a revolution in this regard—has consistently accompanied scientific advancements or revolutions in every domain of knowledge.

With regard to the investigation of the points identified at the beginning of Section 15.1, I believe it will be necessary to effect an integration of philosophical studies with scientific studies. As I said on that occasion, we get from sociopsychological theories three sets of hypotheses: (*i*) hypotheses about the ways beliefs and other components of culture propagate in society from one individual to another and are passed down from generation to generation (these propagations concern the human psyche, the internal point of view and the subjective experiences of humans, none of which are on the whole amenable to external observation), (*ii*) hypotheses about the way the social environment moulds individual personalities and so makes them uniform, and (*iii*) hypotheses about the ways individual personalities concur in nurturing and keeping alive the society that moulds them, and even in constituting that society, in a sense. I believe many objects of enquiry—among which (*i*), (*ii*), and (*iii*)—require philosophy to follow the path already indicated by Russell (a precursor) and Quine (a revisionist) and, in this day, by philosophers like Searle.

The sciences evolve. And cognitive science and the neurosciences, I believe, will say interesting things, in the coming decades, on those things that for the time being are being said by psychology and sociology in a more or less figurative way. In the remainder of this section I will try to illustrate the sense of these positions of mine that I am taking up.

I have been using, and will continue to use, in regard to analytical philosophy the words that Thomas Kuhn (1922–1996) used in regard to paradigms in science. In fact I do not believe that the history of philosophy has the privilege of eluding many of the characterisations (paradigm, maturity, normality, revolution) that Thomas Kuhn worked out in regard to the history of science.[46]

[46] In private conversation, Giorgio Volpe has drawn my attention to the fact that talk of paradigms is hardly appropriate when applied to a discipline like philosophy, the situation of which more closely resembles the condition of physical optics before Newton ("a number of competing schools and sub-schools, most of them espousing one variant or another of Epicurean, Aristotelian, or Platonic theory") than that of those disciplines which exhibit that "transition from one paradigm to another via revolution" which "is the usual developmental pattern of mature science" (Kuhn 1974, 12). I believe Volpe's objections to be grounded, strictly speaking. But in a broader sense, and retaining the mutatis mutandis clause, I also

Analytical philosophy has been a paradigm, and it still is, among certain scholars. And paradigms, according to Kuhn (1974, 23ff.), get articulated more through the work of epigones (some of them authoritative, and of outstanding scholarship) than through the work of precursors and revisionists.

Few people who are not actually practitioners of a mature science realize how much mop-up work [...] a paradigm leaves to be done [...]. Mopping-up operations are what engage most scientists throughout their careers. They constitute what I am here calling normal science. Closely examined, whether historically or in the contemporary laboratory, that enterprise seems an attempt to force nature into the preformed and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all. Nor do scientists normally aim to invent new theories, and they are often intolerant of those invented by others. Instead, normal-scientific research is directed to the articulation of those phenomena and theories that the paradigm already supplies. (Kuhn 1974, 24)

Under normal conditions the research scientist is not an innovator but a solver of puzzles, and the puzzles upon which he concentrates are just those which he believes can be both stated and solved within the existing scientific tradition. (Kuhn 1977, 234)

Even in the case of the paradigm represented by analytical philosophy (logical empiricism and ordinary-language philosophy), it is the precursors (Russell, for example), and some of the revisionists (Quine and Searle, for example), that we must look to in order to find the starting point from which to overcome the typically paradigmatic preclusions that make it impossible to enter deeper into the internal, psychologically considered point of view of the acting subjects performing individual and social human behaviours.[47]

Bertrand Russell had the occasion to say that "science is what we know and philosophy is what we don't know" (Russell 1974, 11).[48] The conception underlying this statement implies that from philosophy (our speculations on what we do not know) to science (proven scientific theories) there must be a relaying of objects of enquiry that proceeds with the advancement of time and of scientific research. If this relaying of objects is to happen (this is the teaching I draw from Russell's words), there must not be put up between the two research fields—the philosophical and the scientific—barriers too tall and in-

believe that some Kuhnian concepts can be applied to certain philosophical orientations that have held sway for long periods in certain countries: Witness medieval Scholasticism, German idealism in the 19th century in Europe (and into the mid-20th century in Italy), and analytical philosophy within the historical and geographical boundaries indicated.

[47] Insofar as this point of view is internal, is it made up of unobservable subjective experiences.

[48] "Well, roughly, you'd say science is what we know and philosophy is what we don't know. That's a simple definition and for that reason questions are perpetually passing over from philosophy into science as knowledge advances" (Russell 1974, 11). "My own view would be that philosophy consists of speculations about matters where exact knowledge is not yet possible" (ibid.).

flexible (preclusive barriers): There will have to be contacts between these two research fields, which contacts, when the time is ripe, will facilitate collaboration first and the relaying thereafter.

Positions not in any strict sense equal to the one expressed in Russell's statement, but from which we can draw teachings similar to the one I have drawn from Russell, are to be found in Willard Van Orman Quine so early as 1951.

First off, Quine, in his pragmatically inspired empiricism, has an unbiased conception of the objects of human knowledge as cultural posits. This version of his is perhaps excessively radical: Certainly—in my opinion—it serves an important therapeutic function with respect to preclusions and dogmas having their origin in a paradigm.

Physical objects are conceptually imported into the situation as convenient intermediaries—not by definition in terms of experience, but simply as irreducible posits comparable, epistemologically, to the gods of Homer. For my part I do, qua lay physicist, believe in physical objects and not in Homer's gods; and I consider it a scientific error to believe otherwise. But in point of epistemological footing the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conception only as *cultural posits*. The myth of physical objects is epistemologically superior to most in that it has proved more efficacious than other myths as a device for working a manageable structure into the flux of experience. (Quine 1980, 44; italics added)

Moreover, the abstract entities which are the substance of mathematics—ultimately classes and classes of classes and so on up—are *another posit* in the same spirit. *Epistemologically these are myths on the same footing with physical objects and gods, neither better nor worse except for differences in the degree to which they expedite our dealings with sense experiences.* (Ibid., 45; italics added)

Secondly, and consequently, Quine, like Russell, does not put up fences or wedge in unbridgeable heterogeneities between philosophy and science; least of all does he attribute to philosophy a position of preeminence over science, much less a foundational position with respect to it.

There have been philosophers who thought of philosophy as somehow separate from science, and as providing a firm basis on which to build science, but this I consider an empty dream. Much of science is firmer than philosophy is, or can ever perhaps aspire to be. I think of philosophy as continuous with science, even as a part of science. [...] I'm on the materialists' side. I hold that physical objects are real, and exist externally and independently of us. I don't hold that there are only these physical objects. There are also abstract objects: objects of mathematics that seem to be needed to fill out the system of the world. But I don't recognize the existence of minds, of mental entities, in any sense *other than as attributes or activities on the part of physical objects, mainly persons*. (Magee 1982, 143, 144; italics added)

We are aware of these things [mental states and events], and I'm not denying their existence; but I'm construing them, or reconstruing them, as activities on the part of physical objects, namely on our part. The fact that they are not observable, on the whole, from the outside does not distinguish them from much that the physicist assumes in the way of internal microscopic or sub-microscopic structure of inanimate objects. A great deal goes on that we do not observe

from the outside. We have to account for it conjecturally. [...] *A man senses and feels and thinks, and he believes this and that, but the man who is doing all this is a body, a living body, and not something else called a mind or soul.* Thus we keep our easy old mentalistic way of talking, while yet subscribing to materialism. [...] Behaviourism, mine anyway, does not say that the mental states and events *consist* of observable behaviour, nor that they are *explained* by behaviour. They are *manifested* by behaviour. *Neurology is the place for the explanations, ultimately.* (Magee 1982, 146, 147; italics added on first and last occurrence, in original on all other occurrences)

Behaviourism—such as is thought by some to be expressed by G. Ryle (Ryle 1975), among others—was one of the ways in which, in Searle's words, an eliminative reductionism was come at from within the paradigm of analytical philosophy, a reductionism that precluded investigations into the internal point of view and precluded as well internalistic approaches of any kind.[49]

Certainly, outward human activities and behaviours are amenable to observation and empirical experimentation, and are doubtless easier to treat scientifically if considered independently of what happens or what can be imagined to happen inside the human being: in the human brain. But none of this is reason enough to preclude oneself or to discourage others from taking into consideration the psychological aspects of the internal point of view in the effort to better understand individual and social human behaviour. This taking into consideration can proceed to the level that science and philosophy will allow: in the form of conjecture, in the form of speculation, or in the form of a cultural posit.

Over the last three decades, the baton relayed through the approach of Bertrand Russell and Willard Van Orman Quine has been picked up, among others, by John Searle, whom I credit for holding that the sciences relevant to the study of the mind are the neurosciences (rather than cognitive science: Lewis, Dennett).

Searle advances in regard to the relation between philosophy and science a vision quite similar to that of Russell and Quine, as presented with the passages previously quoted, and as I understand it in its therapeutic function.

[49] "The first of the great twentieth-century efforts to offer a materialist reduction of the mind was behaviorism—the view, presented by Gilbert Ryle and Carl Gustav Hempel [1905–1997], that mental states are just patterns of behavior and dispositions to behavior, when 'behavior' just means bodily movements which have no accompanying mental component. Speech behavior, for example, according to the behaviorists' conception, is just a matter of noises coming out of one's mouth. Behaviorism sounds obviously false because, for example, everyone knows that a feeling of pain is one thing and the behavior associated with pain is another. As C. K. Ogden [1889–1957] and I. A. Richards [1893–1979] once remarked, to believe in behaviorism you have to be 'affecting general anæsthesia.'" (Searle 1997, 137). It is controversial to interpret Ryle as a behaviourist, independently of Searle's opinion in this regard. Searle is on the whole persuasive in the critical arguments (Searle 1997, 135–76) he offers against behaviourism and functionalism understood as alternatives to psychology (Searle makes reference to Hilary Putnam and David Lewis). And the same goes for the computational hypothesis that Searle attributes to Daniel C. Dennett (cf. Searle 1997, 95–131; Searle 1980 and 1984).

> Because philosophy deals with framework questions and with questions that we do not know how to answer systematically, it tends to stand in a peculiar relationship to the natural sciences. As soon as we can revise and formulate a philosophical question to the point that we can find a systematic way to answer it, it ceases to be philosophical and becomes scientific. Something very much like this happened to the problem of life. It was once considered a philosophical problem how "inert" matter could become "alive." As we came to understand the molecular biological mechanisms of life, this ceased to be a philosophical question and became a matter of established scientific fact. It is hard for us today to recover the intensity with which this issue was once debated. The point is not so much that the mechanists won and the vitalists lost, but that we came to have a much richer concept of the biological mechanisms of life and heredity. (Searle 1999, 2069)

Allow me, while on the subject of Searle and the neurosciences, a digression that I will then bring concisely to fruition in regard to normativeness.

Searle writes these words on the topical question, a question of great import, whether the problem of consciousness is or should be an object of philosophy or an object of science:

> I hope a similar thing [the handing over of questions from philosophy to science, as exemplified in the foregoing quotation] will happen to the problem of consciousness and its relation to brain processes. As I write this it is still regarded by many as a philosophical question, but I believe with recent progress in neurobiology and with a philosophical critique of the traditional categories of the mental and the physical, we are getting closer to being able to find a systematic scientific way to answer this question. In which case it will, like the problem of life, cease to be "philosophical" and will become "scientific." (Searle 1999, 2069–70)

It seems to me that the problem of consciousness—phenomenal as well as psychological consciousness (cf. Chalmers 1996, Chapter 1)—concerns the psychological aspects of the internal point of view. These psychological internal aspects (psychological and internal in a broader sense than consciousness alone) include as well norms as beliefs and as motives of individual and social human behaviour.

Significantly, Searle takes a monist, anti-idealist stance; and in a manner that is especially interesting to us here, he is reductionist at the same time as he is non-reductionist: He is an upholder of causal reductionism, but at the same time, as I said a moment ago, he rejects eliminative reductionism (and so rejects behaviourism and computationalism, to make two examples). In this way, Searle—however much proceeding from within a monistic, and in a sense a materialistic approach, which I agree with—recognises in full the internal aspect (i.e., the ontology of the I: he so calls what I am here referring to as the psychological aspects of the internal point of view) as playing, not just a role, but a *crucial and determinative* role in enabling an understanding of individual and social human behaviour.[50] Searle's position is particularly interesting because it is monistic, and at the same time it retains and exalts the inter-

[50] An ontology of this kind is foreshadowed in Hägerström (albeit in a prose that is recondite). Cf. Hägerström 1964, 34ff.

nal aspect, the internalistic approach, and it serves the needs already served by psychologism (the approach that analytical philosophy ill-advisedly marginalised).

"Reduction" is actually a very confused notion and has many different meanings. In one sense you *can* reduce conscious states to brain processes. All our conscious states are causally explained by brain processes, so it is possible to make a *causal* reduction of consciousness to brain processes. But the sort of reduction that materialists want, an *eliminative* reduction, one which shows that the phenomenon in question does not really exist, that it is just an illusion, cannot be performed on consciousness [...]. Eliminative reductions require a distinction between reality and appearance. For example, the sun appears to set but the reality is that the earth rotates. But you cannot make this move for consciousness, because where consciousness is concerned the reality is the appearance. If it consciously seems to me that I am conscious, then I am conscious. And this is just another way of saying that the ontology of consciousness is subjective or first-personal. (Searle 1997, 212–3)

The idea that "where consciousness is concerned the reality is the appearance" has a parallel in the domain of norms as these are treated throughout this volume. Just as it makes sense to say that "if it consciously seems to me that I am conscious, then I am conscious," so it makes sense to say that if I believe a norm to exist, then that norm exists—whether I am conscious of my belief or unconscious of it. Just like the ontology of consciousness, the ontology of norms "is subjective or first-personal." I believe a norm to exist; hence, there exists a norm in my brain. A norm **n** exists insofar as there exists at least one believer *b* who believes in **n**.

Consciousness is a natural, biological phenomenon. It is as much a part of our biological life as digestion, growth, or photosynthesis.

We are blinded to the natural, biological character of consciousness and other mental phenomena by our philosophical tradition, which makes "mental" and "physical" into two mutually exclusive categories. The way out is to reject both dualism and materialism, and accept that consciousness is both a qualitative, subjective "mental" phenomenon, and at the same time a natural part of the "physical" world. Conscious states are qualitative in the sense that for any conscious state, such as feeling a pain or worrying about the economic situation, there is something that it qualitatively feels like to be in that state, and they are subjective in the sense that they only exist when experienced by some human or other sort of "subject." (Searle 1997, xiii–xiv; italics added)[51]

Searle finds it necessary to deny not only the plausibility of dualism, idealistic monism, and eliminative reductionism, but also that of materialism, precisely insofar as this last is an expression of eliminative reductionism. The distinction between "biological naturalism" and "materialism" could seem merely terminological, but it carries a deeper sense in the light of the reasons adduced by Searle, and presented in the foregoing quotation.

[51] "Consciousness is a natural biological phenomenon that does not fit comfortably into either of the traditional categories of mental and physical. It is caused by lower-level microprocesses in the brain and it is a feature of the brain at the higher macro levels. To accept this 'biological naturalism,' as I like to call it, we first have to abandon the traditional categories" (Searle 1997, xiv).

In attributing serious drawbacks to our philosophical tradition for its long practice, through the centuries, of setting "mental" against "physical," Searle is expressing in an articulated and argued manner the same concept that, in a figurative manner, I was seeking to express in Section 15.2.4 with all the humour of which Bertrand Russell's grandmother was capable: "What is mind? No matter. What is matter? Never mind!"

This is the path I have in mind with regard to monism, meaning that brand of materialism which implies a causal reductionism but not any eliminative reductionism, and so a reductionism that does not eliminate the psychological aspects of the internal point of view, but rather exalts them. It is a path in philosophy and in the neurosciences: In philosophy it spans from Russell to Hägerström, Quine, and Searle;[52] in the neurosciences, and as far as my understanding of this discipline goes, it proceeds along the perspectives from which Searle himself draws inspiration. Searle draws critical inspiration from the neurobiological perspectives of Francis Crick (1916–2004) (Crick 1995), Gerald Edelman, and Israel Rosenfeld (cf. Searle 1997, 21, 179).[53]

The neurosciences have now progressed to the point where we can address the problem of norms as motives of individual and social human behaviour "as a straight neurobiological problem" (to use the expression that Searle uses with regard to the mind-body problem in general).[54]

The traditional philosophical categories are obsolete and stand as roadblocks barring the way to a more adequate understanding of the internal psychological aspect of individual and social human phenomena.[55]

Searle keenly points out the "logical fallacy" undermining the censure against the internalistic approach:

Science is not used to dealing with phenomena that have a first-person ontology. By tradition, science deals with phenomena that are "objective," and avoids anything that is "subjective." In-

[52] It does so at least on my reading of Hägerström. He first developed a materialistic ontology of his own that is reductionist but not in the sense of an eliminative reductionism, and *then* he built on it his "psychological," internalistic theory of norms. The fact that Hägerström figures in this ideal line is not meant to suggest that I see him as playing as important a role in 20th-century philosophy as that which is commonly ascribed to the other scholars among whom I have grouped him. The inclusion is to be taken at face value: I am just placing him in that line of philosophical thought (cf. Pattaro 1974, 58–76).

[53] But on my understanding of the question, especially in what concerns language and knowledge, see also Deacon 1997.

[54] "In its simplest form, the question is how exactly do neurobiological processes in the brain cause conscious states and processes, and how exactly are those conscious states and processes realized in the brain?" (Searle 1999, 2073).

[55] Thus, the traditional philosophical categories stand as roadblocks barring the way to a "satisfactory explanation of the relation of neuron firings to consciousness. [...] Consciousness is, by definition, subjective, in the sense that for a conscious state to exist it has to be experienced by some conscious subject. Consciousness in this sense has a first-person ontology in that it only exists from the point of view of a human or animal subject, an 'I,' who has the conscious experience" (Searle 1999, 2074).

deed, many philosophers and scientists feel that because science is, by definition, objective, there can be no such thing as a science of consciousness, because consciousness is subjective. This whole argument rests on a massive confusion, which is one of the most persistent confusions in our intellectual civilization. There are two quite distinct senses of the distinction between objective and subjective. In one sense, which I will call the epistemological sense, there is a distinction between objective knowledge, and subjective matters of opinion. If I say, for example, "Rembrandt was born in 1606," that statement is epistemically objective in the sense that it can be established as true or false independently of the attitudes, feelings, opinions or prejudices of the agents investigating the question. If I say "Rembrandt was a better painter than Rubens," that claim is not a matter of objective knowledge, but is a matter of subjective opinion. (Searle 1999, 2074)

But in addition to the distinction between epistemically objective and subjective claims, there is a distinction between entities in the world that have an objective existence, such as mountains and molecules, and entities that have a subjective existence, such as pains and tickles. I call this distinction in modes of existence, the ontological sense of the objective-subjective distinction. (Ibid.)

Among the entities having an ontologically subjective existence in the sense just now specified in Searle's words are norms as these have been characterised in this volume.

The palingenesy of the psychological aspects of the internal point of view is now in the making. Of course there is not any speaking of a "psychological approach," or of an "internalistic approach," nor even of an "internal point of view."[56] The vocabulary is now rather that of "intentionality." Intentionality is the basic subject of cognitive science,[57] a science which "includes at least beliefs, desires, memories, perceptions, intentions (in the ordinary sense), intentional actions and emotions" (Searle 1999, 2075), and which includes, among beliefs, norms as characterised and treated in this volume. With regard to norms, so characterised as beliefs and as motives of individual and social human behaviour—characterised as entities belonging to the ontology of the I—I should emphasize a point which seems paradoxical but which in reality is grounded on a solid foundation:

[56] I sometimes have prudently borrowed this last formulation of Hart's (rather than the crude "brain") in order not to awaken the censure of analytical philosophy, still active, combative, and well equipped. See, for example, by P. M. S. Hacker, a leading authority on Wittgenstein's philosophy, and M. R. Bennett, former president of the International Society for Autonomic Neuroscience, the weighty defence of philosophy against the neurosciences that they make in *Philosophical Foundations of Neuroscience*, a book of about 500 pages (Bennett and Hacker 2003).

[57] "The rise of the new discipline of cognitive science has opened to philosophy whole areas of research into human cognition in all its forms. Cognitive science was invented by an interdisciplinary group, consisting of philosophers who objected to the persistence of behaviourism in psychology, together with like-minded cognitive psychologists, linguists, anthropologists and computer scientists. I believe the most active and fruitful general area of research today in philosophy is in the general cognitive science domain.

The basic subject matter of cognitive science is intentionality in all of its forms" (Searle 1999, 2075).

> *Where the ontology of consciousness is concerned, external behavior is irrelevant*. At best, behavior is epistemically relevant—we can typically tell when other people are conscious by their behavior, for example—but the epistemic relevance depends on certain background assumptions. It rests on the assumptions that other people are *causally similar* to me, and that similar causes are likely to produce similar effects. If for example you hit your thumb with a hammer, then, other things being equal, you are likely to feel the sort of thing I feel and behave the sort of way I behave when I hit my thumb with a hammer. That is why I am so confident in attributing pains to you on the basis of the observation of a correlation between stimulus input and behavioral output. I am assuming that the underlying causal mechanisms are the same. (Searle 1997, 204–5)

Borrowing Searle's words, I shall say, "That is why I am so confident in attributing norms to you on the basis of the observation of a correlation between stimulus input and behavioural output: I am assuming that the underlying causal mechanisms are the same." In the case of norms, the stimulus input may be a *perceived* token of a certain type of circumstance. Let us consider in regard to the question of one norm, **n**, existing in my brain and yours, the case considered by Hart 1961 (a case taken up by Dworkin 1996, and by Hart again in the *Postscript*), namely, the norm "Adult males must bare their heads upon entering into a church." Here, with this norm, the stimulus input is a *perceived* token of the type of circumstance "being an adult human male and entering into a church"; the behavioural output will be a token of the type of action "baring one's head," which you and I—both of us believers in the same norm (the norm relative to baring one's head upon entering into a church), and both of us entering into a church—will both instantiate because the underlying internal causal mechanisms are the same for you and me (cf. Sections 6.3 and 8.2.4).[58]

As was just said, then, the basic subject matter of cognitive science is intentionality, where intentionality includes all the kinds of internal aspects of human beings (the deprecated psychical states and events, such as beliefs, desires, memories, and perceptions). Now then, cognitive science, according to Searle, was itself paradoxically originally founded on a mistake: "The mistake was to suppose that the brain is a digital computer and the mind is a computer program" (Searle 1999, 2075). This mistake was an aspect of the rational solution of which we have already spoken, and done so to criticise it (in Section 15.3.3) together with Conte and Castelfranchi.

Searle himself contributed to demonstrating—from Searle 1980 onward—the inadequacy of the rational solution in this computational formulation of it. In our day, instead, according to Searle,

[58] Clearly, further information is needed in order to decide whether the motive you and I have for baring our heads upon entering into a church consists in the same norm **n**, a norm we have both internalised, or whether *my* motive for so behaving consists in norm **n** and *your* motive in your desire to avoid disapprobation (your interest in avoiding it: conformism, Sections 5.4 and 6.7). Such information might be garnered from an interview by a psychologist, for example. But then, problems such as these—seeking further information and ascertainment—may arise as well in the case of hitting your thumb with a hammer (the case Searle considers in the foregoing quotation).

what is actually happening in cognitive science is a paradigm shift away from the computational model of the mind and toward a much more neurobiologically based conception of the mind. [...] As we come to understand more about the operations of the brain it seems to me that we will succeed in gradually replacing computational cognitive science with cognitive neuroscience. Indeed I believe this transformation is already taking place. (Searle 1999, 2076)

Recent developments in the neurosciences (see Deacon 1997 and Edelman and Tononi 2000, among others) have opened new horizons that seem to bring back into the limelight ancient and venerable monistic (and, in a non-eliminative way, materialistic) intuitions. Nowadays, the neurosciences, after the decline of the psychoanalytic vogue and surge, a decline which they themselves helped to accelerate, are trying to bring back into operation a concern with the internal functioning of human beings—of their brains—in the effort to arrive at a better understanding of outward human activities and behaviours as well.

Edelman has not hesitated to bring back into play Arthur Schopenhauer (1788–1860) and his considerations on the self and on the identity between the subject of will and the knowing subject, this to draw the attention of scholars to the fact that it is methodologically unproductive, and may even be an error, to banish the "world knot" from a close enquiry that will imply a close cooperation between the neurosciences and philosophy:

The flattened dome of the sky and the hundred other visible things underneath, including the brains itself—in short, the entire world—exist, for each of us, only as part of our consciousness, and they perish with it. This enigma wrapped within a mystery of how subjective experience relates to certain objectively describable events is what Arthur Schopenhauer brilliantly called the "world knot." (Edelman and Tononi 2000, 2)[59]

15.5. A Few Closing Remarks That Go Back to What Is Right and Law: What Is Right by Nature and What Is Right by Law as Cultural Products

It was outlined briefly in Sections 4.3 and 4.4 how, for centuries, legal philosophers have been drawing the distinction, sometimes cast as an outright opposition, between natural law and positive law, or, as I prefer to say, between what is right by nature and what is right by law.

In our day, we too are in the habit of distinguishing what is made by nature from what is made by man: We speak of natural versus artificial diets, the products of nature versus the products of art, natural versus artificial or human-altered environmental equilibriums, natural versus artificial intelligence,

[59] This is the passage by Schopenhauer that Edelman and Tononi refer to: "But the identity of the subject of will and the knowing subject, in virtue of which identity (and necessarily so) the word 'I' includes and designates both, is the world knot, and as such is unexplainable" (Schopenhauer 1986, §42; my translation). The German original: "Die Identität nun aber des Subjekts des Wollens mit dem erkennenden Subjekt, vermöge welcher (und zwar notwendig) das Wort 'Ich' beide einschließt und bezeichnet, ist der Weltknoten und daher unerklärlich."

and so on. The distinction between what is natural and what is artificial is at once ancient and topical, and on the whole does not seem to present any *prima facie* difficulties: It is intuitive.[60]

Let us see if we can apply this distinction to law by affecting an air of ingenuity and naturalness ourselves; that is, by steering clear of the artifices which the philosophical debate has layered on the terms "natural law" and "positive law." In what sense can we say of law, or of a certain kind of law, that it is natural?

With humans, the distinction between nature and convention, or things artifactual, can be recast as a distinction between nature and culture. There are natural aspects and processes in human life and events: witness childbirth, the genetic makeup we inherit, and the biological and physiological traits of human existence. Other aspects of human life and events are largely cultural; they depend on human production. Examples are economics, technology, art, morality, and law—society at large (compare, in Section 15.2.4, the distinction between brute and institutional, or social, reality).

We can safely assume that law belongs to the cultural dimension of humans: That law is a human product and not a physical (material) or biological issue of nature. All law is the work of humans; it is positive, if we take "positive" to mean "produced or made by humans." But if law is entirely a human product, how can anyone argue that a "natural law" (*phusei*) exists in addition to positive law (*nomōi*)?

There may be one way in which this is possible. The qualification "natural" may befit spontaneous law, meaning the set of rules of coexistence that people in a society follow spontaneously, or rather by tradition. Something to this effect has been maintained by positivist conceptions (in the sense of philosophical positivism, not to be mistaken with legal positivism). Roberto Ardigò (1828–1920), an exponent of philosophical positivism in Italy, considered natural law to be "the more advanced social idealities that dawn from our social conscience," in distinction to positive law as set forth in statutes (Ardigò 1886, 159–60; my translation).

But even here, these social idealities, if they can be regarded as immediate, fresh, and spontaneous, and less institutionalised than state-enacted laws, are nonetheless a product of human culture: granted, a product less elaborate and sophisticated than others, but still a product of culture and society, not of nature.

Friedrich Carl von Savigny, the father of German legal historicism, underscored the distinction between customary law, doctrinal law (or scientific law, as he liked to say), and statutory law.[61]

Customary law is produced directly by the people, or by popular consciousness (by the so-called *Volksgeist*, or people's spirit, as Savigny would

[60] On my use of *prima facie*, see Section 4.2.1, footnote 7.

[61] On Savigny's theory of law, see, in Volume 4 of this Treatise, Peczenik, Chapter 5.

later say, taking up the term from a disciple of his, Georg Friedrich Puchta, 1797–1846): Customary law is a primitive, genuine, "natural" law which is the direct expression of social reality.

Doctrinal law is the work of jurists, whom Savigny represented as a sort of intellectual elite among the people: They are as close to the needs of society as the people are, and in addition to this, they have the knowledge and the technical and intellectual skills with which to produce a refined, sophisticated law. Doctrinal law is as genuine as customary law and more developed technically and scientifically: It is in fact the best kind of law, according to Savigny, because it is both rooted in the people's history and conceptually reworked to meet the needs of an advanced society.

Lastly, statutory law is produced by lawmaking bodies (like assemblies and parliaments) that are specialised and so in a sense severed from society's ongoing change. Statutory law, on Savigny's view, befits mature societies, and in fact is typical of societies whose legal framework is past its prime.

If we accept for a moment Savigny's model, nothing would prevent us from regarding statutory law (the law produced by a parliament or other lawmaking body) as artificial—made in the operations room, so to speak—and customary law (the law produced by the people "spontaneously") as natural. But here, too, customary law, and *a fortiori* the jurists' doctrinal law, is not natural law if that is taken to mean law "issuing from nature." Rather, customary law is produced by culture, by humans: It is conventional (in the broad sense of this term) as well as historical (and of course Savigny is well aware of this) (Savigny 1973, 102ff.).

Law is a part of culture and for this reason partakes of the reality and life that other cultural phenomena have, and that cultures have in general; so, too, it is housed in the same place, namely, in brains, or else—and in fact today for the most part—it is memorised on nonhuman supports that humans can have access to: on wood, stone (of which Rome's Twelve Tables are one example), paper, digital media, etc. (Section 15.2).[62]

As with dead cultures, dead law is not living law even if recorded on some kind of support. True enough, if dead law is so recorded it can become an object of study on the part of historians, but it becomes living law only when people in society, and especially the judges, believe it to be law and practise it as such: *opinio juris seu necessitatis*, with all the ambiguity this expression entails. Indeed, I restrict it to norms as I characterise norms (as the belief that a rule is binding per se under given circumstances; see Section 6.1). But then, as has been observed, when we get to the law in force (Chapter 10), the being-in-force of law does not coincide with the being-in-force of norms (as I characterise the being-in-force of norms: Section 6.5); rather, the being-in-force of law is an ambiguous interweaving of norma-

[62] The Twelve Tables were originally made of wood, and only later was stone used.

tiveness and organised power. So, how should we translate *opinio juris seu necessitatis* when we relate this expression to the law in force? *Opinio juris* we may translate as "our belief about what is objectively right." And how should we translate *opinio necessitatis*? As "our belief about what organised power makes necessary for us"? And how should we translate the monosyllabic *seu*?

There are formal criteria, for example in the Italian Constitution and in the Preliminary Provisions to the Italian Civil Code, designed to establish what is to count as "living" law in Italy. But if these criteria, though recorded on some kind of support (human or nonhuman), are not themselves invested with the ambiguous *opinio juris seu necessitatis* just mentioned, they will fail to be criteria that people believe in and act from, and consequently, so will the law they introduce. (They will fail in this respect at least partly or temporarily, in proportion as the belief in them as law fails to obtain.)

When law exists (presently there is a surplusage of it), it is a part of human culture. Human culture in turn is a part of reality, and reality is one. But human culture ceases to be reality when the human consciousness ceases whose content is that culture (Section 15.2).

We can look now at Savigny's fine pages previously referred to, seeing how they shadow forth a conception of law as culture. We can see in these pages how such a conception could be maintained, felicitously and with good reason, by one of the fathers of the modern tradition of civil law, indeed by the one who, perhaps better than the others, traced out the line that spans from the glorious roots of Roman law, and its elaboration by the Bolognan glossators, to the *culta jurisprudentia*. By way of a conclusion to this chapter and volume, I will let Savigny speak, then:

In the earliest times to which authentic history extends, the law [*das bürgerliche Recht*] will be found to have already attained a fixed character, peculiar to the people [*dem Volk*], like their language, manners [*Sitte*] and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people [*einzelne Kräfte und Thätigkeiten des einen Volkes*], inseparably united in nature, and only wearing the semblance of distinct attributes [*Eigenschaften*] to our view. That which binds them into one whole is the *common conviction* [*Ueberzeugung*] of the people [*des Volkes*], the kindred consciousness [sentiment: *Gefühl*] of an inward necessity, excluding all notions [*allen Gedanken*] of an accidental and arbitrary origin.

How these peculiar attributes [*Functionen*] of nations [*diese eigenthümlichen Functionen der Völker*], by which they are first individualized, originated—this is a question which cannot be answered historically. Of late, the prevalent opinion has been that all lived at first a sort of animal life, advancing gradually to a more passable state, until at length the height on which they now stand, was attained. We may leave this theory alone, and confine ourselves to the mere matter of fact of that first authentic condition of the law [*des bürgerlichen Rechts*]. We shall endeavour to exhibit certain general traits of this period, in which the law [*das Recht*], as well as the language, *exists in the consciousness* of the people [*im Bewußtseyn des Volkes lebt*].

This youth of nations [*der Völker*] is poor in ideas, but enjoys a clear perception [*ein klares Bewußtseyn*] of its relations and circumstances, and feels and brings the whole of them into

play; whilst we, in our artificial complicated existence, are overwhelmed by our own riches, instead of enjoying and controlling them. This plain natural state is particularly observable in the law [*im bürgerlichen Rechte*]; and as, in the case of an individual, his family relations and patrimonial property may possess an additional value in his eyes from the effect of association,—so on the same principle, it is possible for the rules of the law [*die Regeln des Privatrechts*] itself to be amongst the objects of popular faith [folklore: *zu den Gegenständen des Volksglaubens gehören*].

But these moral faculties [*jene geistigen Functionen*] require some bodily existence to fix them. Such, for language, is its constant uninterrupted use; such, for the constitution, are palpable and public powers [*die sichtbaren öffentlichen Gewalten*],—but what supplies its place with regard to the law [*bey dem bürgerlichen Rechte*]? In our times it is supplied by rules, communicated by writing and word of mouth. This mode of fixation, however, presupposes a high degree of abstraction, and is, therefore, not practicable in the early time alluded to. On the contrary, we then find symbolical acts universally employed where rights and duties were to be created or extinguished [*Rechtsverhältnisse entstehen oder untergehen sollen*]: It is their palpableness [*sinnliche Anschaulichkeit*] which externally retains law [*Recht*] in a fixed form; and their solemnity and weight correspond with the importance of the legal relations themselves [*der Rechtsverhältnisse selbst*], which have been already mentioned as peculiar to this period. In the general use of such formal acts, the Germanic races [*Stämme*] agree with the ancient Italic, except that, amongst these last, the forms themselves appear more fixed and regular, which perhaps arose from their city constitutions. These formal acts may be considered as the true grammar of law [*eigentliche Grammatik des Rechts*] in this period; and it is important to observe that the principal business of the early Roman jurists consisted in the preservation and accurate application of them.

We, in latter times, have often made light of them as the creation of barbarism and superstition, and have prided ourselves on not having them, without considering that we, too, are at every step beset with legal forms, to which, in fact, only the principal advantages of the old forms are wanting,—namely, their palpableness [*die Anschaulichkeit*], and the popular prejudice [general folklore: *der allgemeine Volksglaube*] in their favour, whilst ours are felt by all as something arbitrary, and therefore burthensome. In such partial views of early times we resemble the travellers, who remark, with great astonishment, that in France the little children, nay, even the common people, speak French with perfect fluency.

But this organic connection of law [*des Rechts*] with the being and character of the people [*des Volkes*], is also manifested in the progress of the times; and here, again, it may be compared with language. For law [*Recht*], as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency [*wie jede andere Richtung des Volkes*]; and this very development remains under the same law [*Gesetz*] of inward necessity, as in its earliest stages. Law [*Das Recht*] grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation [*Volk*] loses its nationality [*Eigenthümlichkeit*]. But this inward progressive tendency, even in highly cultivated times, throws a great difficulty in the way of discussion. It has been maintained above, that the *common consciousness of the people* [*das gemeinsame Bewußtseyn des Volkes*] is the peculiar seat of law [*des Rechts*]. This, for example, in the Roman law [*im Römischen Rechte*], is easily conceivable of its essential parts, such as the general definition of marriage, of property, etc. etc., but with regard to the endless detail, of which we have only a remnant in the Pandects, every one must regard it as impossible.

This difficulty leads us to a new view of the development of law [*des Rechts*]. With the progress of civilization, national tendencies [*alle Thätigkeiten des Volkes*] become more and more distinct, and what otherwise would have remained common, becomes appropriated to particular classes; the jurists now become more and more a distinct class of the kind; law [*das Recht*] perfects its language, takes a scientific direction, and, as formerly it existed [*lebte*] in the consciousness of the community [*im Bewußtseyn des gesammten Volkes lebte*], it now devolves upon the jurists [*so fällt es jetzt dem Bewußtseyn der Juristen anheim*], who thus [*nunmehr*], in

this department, represent the community [*das Volk*]. *Law* [*das Daseyn des Rechts*] *is henceforth more artificial and complex, since it has a twofold life; first, as part of the aggregate existence* [*Leben*] *of the community* [*ganzen Volkslebens*], *which it does not cease to be; and, secondly, as a distinct branch of knowledge* [as a distinct science: *als besondere Wissenschaft*] *in the hands of the jurists*. All the latter phenomena are explicable by the co-operation of those two principles of existence; and it may now be understood, how even the whole of that immense detail might arise from organic causes, without any exertion of arbitrary will or intention. For the sake of brevity, we call, technically speaking, the connection of law [*des Rechts*] with the general existence [*Lebe*] of the people [*mit dem allgemeinen Volksleben*]—the political element; and the distinct scientific existence of law [*des Rechts*]—the technical element.

At different times, therefore, amongst the same people, law will be natural law (in a different sense from our law of nature), or learned law, as the one or the other principle prevails, between which a precise line of demarcation is obviously impossible [*In verschiedenen Zeiten also wird bey demselben Volke das Recht natürliches Recht (in einem andern Sinn als unser Naturrecht) oder gelehrtes Recht seyn, je nachdem das eine oder das andere Princip überwiegt, wobey eine scharfe Gränzbestimmung von selbst als unmöglich erscheint*]. (Savigny 1975, 24–9; italics added; cf. Savigny 1973, 102–5)[63]

[63] Because this quotation is so long, I did not provide the reader with the entire original passage in German. However, I did insert (within square brackets) a number of terms and short excerpts from Savigny's original, this to enable the reader to have, at least in tidbits, an idea (and a taste) of Savigny's wording.

Appendix

ELEMENTS FOR A FORMALISATION OF THE THEORY OF NORMS DEVELOPED IN THIS VOLUME

by Alberto Artosi, Antonino Rotolo, Giovanni Sartor, and Silvia Vida[*]

1. Preliminaries

The aim of this appendix is to sketch a formalisation of some aspects of the theory of norms developed in this volume. In this regard, the appendix does not provide any new logical contribution: The purpose is simply to use some logical tools, standard in the literature, to reconstruct some concepts and definitions proposed, in particular, in Chapters 6 through 10.

Let us first define our formal language. Here it suffices that it consist of the language of classical first-order logic with variables x, y, z … and constants a, b, d … to denote agents belonging to a finite set G of agents, the identity symbol, and the following intensional operators and supplementary connectives:

- the obligation operator 'O'; this operator, as we shall see, will be indexed by agent variables and constants to express directed obligations (cf. Herrestad and Krogh 1995; 1996);
- the action operator 'Does_x', such that an expression like '$\text{Does}_x A$' means that the agent x brings about that A (cf. Santos and Carmo 1996);
- the operators 'Utters_x' and 'Proc_x' to express agents' generic actions of utterance and the speech act of institutional proclamation respectively (see Gelati, Governatori, Rotolo, and Sartor 2002a and 2002b; Sartor, Volume 5 of this Treatise, Chapter 23);
- the modal operators 'Know_x' and 'Bel_x' for the agent's knowledge and beliefs respectively (cf. Meyer and van der Hoek 1995);
- the binary connective '⇒' to represent normative conditionality (cf. Prakken 1997; Nute 1997);
- the binary connective '≡>' to capture the notion of typicality or normality (cf. Delgrande 1987);
- the unary temporal operators 'A' and 'E', which read "for all possible courses of future events" and "for at least one possible course of future events," respectively, and the binary temporal operator "until" 'U', such that

[*] Thanks are due to Guido Governatori for his comments on an earlier version of this appendix.

the expression 'A U B' means that A will be true until B is true (cf. Emerson and Halpern 1986; Schild 2000).

It is worth noting that we will not commit ourselves to adopting any specific logical characterisations of such notions: A number, and sometimes a plethora, of different axiomatisations are in fact available. The reader is thus recommended to consult at least the literature cited above for further details. It will suffice here to focus on some well-known properties that seem indisputable and, above all, required for developing the formalisation of the theory of norms proposed in this volume.

As is well known, a very minimal characterisation of the obligation operator is that it does *not* enjoy axiom **T**

$$\mathrm{O}\,A \rightarrow A \tag{1}$$

Of course, if A is obligatory, this should not imply that A is true.

On the contrary, the logic for the action operator 'Does' has to be characterised at least by the schema

$$\mathrm{Does}_x\,A \rightarrow A \tag{2}$$

since such an operator is meant to represent successful actions. In addition, the logic for 'Does' as well as that for 'O' is normally closed under logical equivalence:

$$\models A \equiv B \text{ entails } \models \mathbf{X}\,A \equiv \mathbf{X}\,B \tag{3}$$

where **X** stands for either O or Does_x. As understood in this volume, obligations, permissions, and prohibitions are interdefinable:

$$\mathrm{P}\,A =_{\mathrm{def}} \neg\,\mathrm{O}\,\neg\,A \tag{4}$$

$$\mathrm{F}\,A =_{\mathrm{def}} \mathrm{O}\,\neg\,A \tag{5}$$

Like 'Does', the operators 'Utters' and 'Proc' are action operators. An action of utterance is not in general successful. On the other hand, the notion of proclaiming is used to cover all those acts by which a subject makes a statement expressing a certain proposition, and this statement has the function of making this proposition true. However, even 'Proc' is not necessarily successful: $\mathrm{Proc}_x\,A$ is only an attempt to achieve A. Whether it will be successful or not, within a certain institution, linguistic context, or system, depends on whether the institution, the linguistic context, or the system contains (implicitly or explicitly) a rule that guarantees its effectiveness. In addition, the logics for 'Utters' and 'Proc' are closed under logical equivalence.

The main difference between knowledge and belief is often as follows: If the agent x knows that A, then A is true, whereas this does not apply for beliefs. In other words, only 'Know_x' enjoys the schema **T**. Intuitively, it may be said that knowledge implies belief:

$$\text{Know}_x A \rightarrow \text{Bel}_x A \qquad (6)$$

As regards normative conditionality, we have different options depending on the approach we want to adopt. For example, we can view '$\Rightarrow$' as either a monotonic or a non-monotonic link. A great part of the recent literature focuses in particular on the second alternative, since it is widely acknowledged that normative reasoning is basically defeasible (cf., e.g., Nute 1997; Prakken 1997). In general, conditional logics for modelling normative reasoning are characterised by different axiomatisations. Most of them do not adopt any explicit or unrestricted form of detachment of the consequent. Here a (restricted) form of detachment will be adopted. However, since no explicit reference is made in this volume to the notion of defeasibility (but see Treatise Volume 5)—and there is no requirement here for the essential use of other formal properties of $\Rightarrow$—the logical behaviour of normative conditionality looks more like that of material implication.

Now to the binary connective '$\equiv>$'. An expression like '$A \equiv> B$' means that, normally, B is true whenever A is true. This exemplifies a typicality-based notion of plausible consequence which is often characterised within the framework of default reasoning. Here, we are not required to provide any axiomatisation for this connective. The same applies to the temporal operators we have introduced above, for which it is sufficient to assume that

$$\text{E} A =_{\text{def}} \neg \text{A} \neg A \qquad (7)$$

In addition to that, in both cases it is sufficient to bear in mind the intuitive meaning of these operators. The interested reader may refer to the relevant literature we have previously cited.

2. The Definition of "Norm"

According to the view expounded in this volume, the content of a norm can be expressed propositionally. In this regard, it may correspond to the description of one conditioning type of circumstance and one conditioned type of action; this last is qualified deontically as obligatory, permitted, or prohibited. In very abstract terms, a norm can thus be conceived of as a conditional structure stating that a given type of action ought to be performed if a certain type of circumstance occurs. In the present context, we shall confine our analysis

to the case in which the "ought" of the norm corresponds to the deontic operator 'O'. Thus, a norm **n** could be trivially represented as follows:

$$A \Rightarrow \mathrm{O}B \quad (8)$$

which is simply one of the usual representations of conditional obligation.

However, a crucial point of this volume's approach is that a norm exists qua norm if and only if at least one person believes it to be a norm (*doxia*): No type of action that no one believes to be objectively binding is a norm, and no norm can exist without belief; therefore, if something is to be a norm it must have at least one believer. Accordingly, the existence (definition) of a norm **n** as binding is strictly connected with the existence of a norm-believer *b*:

$$\mathrm{Bel}_b\ (A \Rightarrow \mathrm{O}B) \quad (9)$$

Trivially, the notion of *adoxia* (the nonexistence of a norm **n** in a subject *b* who is a nonbeliever) is rendered as follows:

$$\neg\ \mathrm{Bel}_b\ (A \Rightarrow \mathrm{O}B) \quad (10)$$

and, if applied to all agents in the group G, it corresponds to

$$\wedge_{b \in \mathrm{G}} \neg\ \mathrm{Bel}_b\ (A \Rightarrow \mathrm{O}B) \quad (11)$$

3. Duty-Holder (Deontia) and Right-Holder (Exousia). The Being-in-Force and Not-Being-in-Force of a Norm. Efficaciousness and Inefficaciousness of a Norm

As a second step, we will show how to give an account of the concepts of deontia and exousia: The former corresponds to the fact that one or more subjects are actual duty-holders under a norm **n**; the latter is related to the fact that one or more subjects are actual right-holders under **n** (Section 6.4). While the notion of deontia can be easily defined via the usual obligation operator (indexed by the agents who bear such an obligation), the same does not apply to the case of exousia. As is well known, the logical representation of normative positions such as rights, duties, etc., is one of the most discussed issues in contemporary logic of norms.[1] We will not enter here into a discussion of this problem. The interested reader is referred to Krogh 1997.

[1] Since the seminal contributions of Hohfeld are some of the authors who have worked on this issue S. Kanger, L. Lindahl, D. Makinson, I. Pörn, A. Jones and M. Sergot.

Following Herrestad and Krogh's (1995; 1996) approach (developed in particular to deal with the so-called directed obligations in contracts), the representation of normative relations between two subjects corresponding to the right/duty bilaterality requires

1. that the obligation operator be indexed by the subjects/agents who are the holders of such an obligation;
2. a distinction between two kinds of obligation: (a) a bearer-relativised ought-to-do obligation O_d on the agent *d* (duty-holder) to bring about a certain state of affairs *B* with respect to another agent *r* (right-holder); (b) a counterparty-relativised ought-to-be statement relative to *r* that *d* makes it so that *B* holds with respect to *r*.

In the spirit of Kanger-Lindahl-Pörn's tradition (see, in this Treatise, Sartor, vol. 5), this is the reason why a convincing account of such normative positions requires the introduction of the action operator 'Does' so that each subject involved in the right-duty relation also has the status of agent. When combined in a bilateral normative relation between two subjects *d* and *r*, deontia and exousia lead to the following formalisation:

$$(A \Rightarrow O_d \mathrm{Does}_d\, B) \wedge (A \Rightarrow O^r \mathrm{Does}_d\, B) \tag{12}$$

The first conjunct is an ought-to-do statement expressing that *d* has the obligation to perform *B* if *A* is given (deontia); the second conjunct corresponds to an ought-to-be statement saying that *r* requires *d* to perform *B* if the same set of conditions *A* occur (exousia). In addition, such expressions must be integrated by introducing the belief operator 'Bel' (Section 6.2). Notice that this operator may be indexed by subjects other than those involved in the normative relation. Let us consider the following case:

$$\mathrm{Bel}_a\, ((A \Rightarrow O_d \mathrm{Does}_d\, B) \wedge (A \Rightarrow O^r \mathrm{Does}_d\, B)) \tag{13}$$

Suppose there exists a subject *a* such that $a = d$ and consider the conjunct on the left side. This case corresponds to the being-in-force of a norm: If an actual duty-holder *d* under a norm **n** (deontia) is a believer (doxia), then the norm **n** will be in force in *d*.[2] In other words, this means that[3]

$$\mathrm{Bel}_d\, (A \Rightarrow O_d \mathrm{Does}_d\, B) \tag{14}$$

[2] Notice that the notions of adeontia and anexousia can be trivially obtained by negating the content of the corresponding obligations.

[3] In this perspective, it may be useful to also accept the schema $\mathrm{Bel}_x\, (A \wedge B) \rightarrow (\mathrm{Bel}_x\, A \wedge \mathrm{Bel}_x\, B)$.

Notice that this intuition may also be applied to right-holders. We can have the case of an agent r who is a believer in a norm as a right-holder:

$$\text{Bel}_r\,(A \Rightarrow \text{O}^r\,\text{Does}_d\,B) \tag{15}$$

or a situation where both a duty-holder d and a right-holder r, involved in a given normative relation, are believers:

$$\text{Bel}_d\,((A \Rightarrow \text{O}_d\text{Does}_d\,B) \wedge (A \Rightarrow \text{O}^r\,\text{Does}_d\,B)) \wedge \text{Bel}_r\,((A \Rightarrow \text{O}_d\text{Does}_d\,B) \wedge \wedge\,(A \Rightarrow \text{O}^r\,\text{Does}_d\,B)) \tag{16}$$

or, finally, a case where the right-holder is a believer and the ought-to-do obligation is believed in by a subject a who is not the actual duty-holder (or the other way around):

$$\text{Bel}_a\,((A \Rightarrow \text{O}_d\text{Does}_d\,B) \wedge (A \Rightarrow \text{O}^r\,\text{Does}_d\,B)) \wedge \text{Bel}_r\,((A \Rightarrow \text{O}_d\text{Does}_d\,B) \wedge \wedge\,(A \Rightarrow \text{O}^r\,\text{Does}_d\,B)) \tag{17}$$

Notice that this formalism enables us to represent all the subjective positions described in Section 10.2.3. By way of an example, let us consider first the case of doxia, deontia, and exousia. This may correspond to the formula $\text{Bel}_z\,(\wedge_{z,d \in \text{G}}\,(A \Rightarrow \text{O}_z\,\text{Does}_z\,B) \wedge (C \Rightarrow \text{O}^z\,\text{Does}_d\,D))$. On the other hand, a case of adoxia, deontia, and exousia can be represented as $\neg\,\text{Bel}_z\,(\wedge_{z,d \in \text{G}}\,(A \Rightarrow \text{O}_z\,\text{Does}_z\,B) \wedge (C \Rightarrow \text{O}^z\,\text{Does}_d\,D)) \wedge \text{Bel}_s\,(\wedge_{z,d \in \text{G}}\,(A \Rightarrow \text{O}_z\,\text{Does}_z\,B) \wedge (C \Rightarrow \text{O}^z\,\text{Does}_d\,D))$. The other cases may be trivially formalised according to the same policy.

Let us give now some brief suggestions for representing the notions of efficaciousness and inefficaciousness of a norm (Section 6.6). Recall that nomia is a necessary condition for both cases. In particular, a norm **n** is efficacious when a duty-holder under **n** practises **n** because she believes in it. A convincing account of efficaciousness depends here on the possibility of formalising a notion of "mental causality," since it is maintained that the behaviour of a duty-holder is caused by her normative belief **n**. This is a very hard task and we will not deal with it here. Let us just show how to represent something similar to the original idea.

A norm **n** is the cause of the behaviour A which is the content of the obligation in **n** and is related to duty-holders' *usus agendi* as a custom; this being so, it can be reasonable to say that A is the normal consequence of the fact that **n** is believed to be objectively binding by the duty-holders under **n**. If so, the notion of efficaciousness could be represented as follows:

$$(\text{Know}_x\,A \wedge \text{Bel}_x(A \Rightarrow \text{O}_x\,\text{Does}_x\,B)) \equiv> (\text{Does}_x\,B) \tag{18}$$

However, this analysis may be seen to be too weak. This holds in particular if the meaning of '≡>' is intended as a strict relation of relevance between the antecedent and the consequent. As is argued, for example, in Delgrande and

Pelletier 1998, the notion of relevance can hardly be defined by using a particular conditional (or other dyadic operators; for more details, see ibid.). Thus, a different option is to provide a meta-theoretical account of relevance. Accordingly, given a knowledge base Th, the proposition X is said to be relevant with respect to a conditional $Y \equiv> Z$ iff

$$Th \models Y \equiv> Z \tag{19}$$

and

$$Th \models X \wedge Y \equiv> \neg Z \tag{20}$$

With good approximation, this approach can be adapted to the definition of efficaciousness. If d's normative belief is a determinant and a necessary reason for d's complying with the deontic content of the norm, then we may assume that

$$Th \models \text{Know}_d A \equiv> \neg \text{Does}_d B \tag{21}$$

but

$$Th \models (\text{Know}_d A \wedge \text{Bel}_d (A \Rightarrow \text{O}_d \text{Does}_d B)) \equiv> \text{Does}_d B \tag{22}$$

Accordingly, if a custom is interpreted as the consistent and uniform performance within a group of the same type of action, a type set forth in a norm, it may be said to correspond to

$$Th \models \wedge_{d \in G} (\text{Know}_d A \equiv> \neg \text{Does}_d B) \tag{23}$$

but

$$Th \models \wedge_{d \in G} ((\text{Know}_d A \wedge \text{Bel}_d (A \Rightarrow \text{O}_d \text{Does}_d B)) \equiv> \text{Does}_d B) \tag{24}$$

However, a custom is rightly viewed as a law of inertia with regard to the uniform and *persistent* performance of a certain type of action so long as the acting subject's motives do not change. This means that "the acting person performs the type of action that he or she usually performs whenever a certain type of circumstance gets instantiated, unless new motives intervene to modify the course of his or her usual behaviour." If so, given

$$Th \models \wedge_{d \in G} (\text{Know}_d A \equiv> \text{A} \neg (\text{Does}_d B)) \tag{25}$$

or, alternatively,[4]

[4] In the first case, the occurrence of A has the consequence that, for all possible courses of events, the agent d does not perform a certain model of action. In the second case, such nonperformance holds at least for one possible course of future events.

$$Th \models \wedge_{d \in G} (\text{Know}_d A \equiv> \text{E} \neg (\text{Does}_d B)) \tag{26}$$

we also have

$$Th \models \wedge_{d \in G} ((\text{Know}_d A \wedge \text{Bel}_d (A \Rightarrow \text{O}_d \text{Does}_d B)) \equiv> \text{A} ((\text{Does}_d B) \text{ U}$$
$$((\text{Know}_d \neg A \vee \neg (\text{Bel}_d (A \Rightarrow \text{O}_d \text{Does}_d B))))) \tag{27}$$

Formula (27) means, in conjunction with (25) or (26), that *d*'s normative belief with regard to a certain type of action will be the motive for performing this action until *d* has such a normative belief and condition *A* is true.

Notice that, in all these cases the definition of inefficaciousness follows trivially. In addition, it is evident that any agent *d* characterised by (25)–(26) and (27), may be said to be an "abider" with respect to the norm '$\text{Bel}_d (A \Rightarrow \text{O}_d \text{Does}_d B)$'.

"Deviants," on the other hand, though norm-believers, are subjects who do not practise the model of action included in the norm. In this regard, we may have different formalisations. In a first case, given (25)–(26), we can state the falsehood of the conditional in (27), which may amount to saying that there exists at least one future course of events in which the agent *d* does not perform the type of action:

$$Th \models (\text{Know}_d A \wedge \text{Bel}_d(A \Rightarrow \text{O}_d \text{Does}_d B)) \equiv> \text{E} \neg ((\text{Does}_d B) \text{ U}$$
$$((\text{Know}_d \neg A \vee \neg (\text{Bel}_d(A \Rightarrow \text{O}_d \text{Does}_d B)))) \tag{28}$$

In a different perspective, we can simply state that the normative belief is in general irrelevant, namely, that

$$Th \models (\text{Know}_d A \wedge \text{Bel}_d (A \Rightarrow \text{O}_d \text{Does}_d B)) \equiv> \text{A} \neg (\text{Does}_d B) \tag{29}$$

Finally, let us focus on the notions of "white sepulchre," "conformist" and "Jesuit" (Section 6.6). In the first case, the agent practises a certain type of action, and believes in the bindingness of this type of action, but the motive of this practice is not this belief and amounts to another reason *X*. This idea can be expressed as follows:[5]

$$Th \models \text{Know}_d A \equiv> \text{A} \neg (\text{Does}_d B) \tag{30}$$

$$Th \models (\text{Know}_d A \wedge \text{Bel}_d (A \Rightarrow \text{O}_d \text{Does}_d B)) \equiv> \text{A} \neg (\text{Does}_d B) \tag{31}$$

[5] A different formalisation can be provided in which we state the grounds that lead one to distinguish between formulas (25) and (26). For the sake of simplicity, we will analyse only one case.

but

$$Th \models (\mathrm{Know}_d A \wedge \mathrm{Bel}_d (A \Rightarrow \mathrm{O}_d \mathrm{Does}_d B)) \equiv> \mathrm{E}\,((\mathrm{Does}_d B)\ \mathrm{U}\ X) \qquad (32)$$

Conformism, on the other hand, may be expressed as follows:

$$Th \models \mathrm{Know}_d A \equiv> \mathrm{A}\,(\mathrm{Does}_d B) \qquad (33)$$

and

$$Th \models (\mathrm{Know}_d A \wedge \neg\, \mathrm{Bel}_d (A \Rightarrow \mathrm{O}_d \mathrm{Does}_d B)) \equiv> \mathrm{A}\,(\mathrm{Does}_d B) \qquad (34)$$

Jesuits are nonbelievers who pretend to be believers in practising a certain norm. So, given

$$Th \models (\mathrm{Know}_d A \wedge \neg\, \mathrm{Bel}_d (A \Rightarrow \mathrm{O}_d \mathrm{Does}_d B)) \equiv> \mathrm{A} \neg\, (\mathrm{Does}_d B) \qquad (35)$$

we have

$$Th \models (\mathrm{Know}_d A \wedge \neg\, \mathrm{Bel}_d (A \Rightarrow \mathrm{O}_d \mathrm{Does}_d B) \wedge \mathrm{Utters}_d \mathrm{Bel}_d (A \Rightarrow \mathrm{O}_d \mathrm{Does}_d B))$$

$$\equiv> \mathrm{A}\,(\mathrm{Does}_d B) \qquad (36)$$

That an agent pretends to be a believer may be rendered by saying that such an agent declares to be one, and this public attitude, which conflicts with the agent's real belief, is decisive with regard to her practicing B.

4. How Norms Proliferate in Human Minds

Let us discuss how to formalise the process of proliferation of norms as described in this volume (Chapter 7 and Section 9.6). To illustrate this process, and to capture at least partially its dynamic character, we will focus on norms such as the following:

$$\wedge_{d \in \mathrm{G}} \mathrm{Bel}_b (A \Rightarrow \mathrm{A}\,(\mathrm{O}_d \mathrm{Does}_d B\ \mathrm{U}\ (\mathrm{Does}_d B \vee \neg A)) \qquad (37)$$

Formula (37) says that agent b believes that, under a certain condition A, and for all possible courses of events, it will be obligatory for any agent d to do B until this is performed by d or until A holds. This norm is an example of a *norm of conduct* whose bindingness is conditioned by the performance of the type of action set forth in the norm itself.

In this volume, concrete norms are generated by means of the standard mechanism of subsumption. Let us see a norm like this at work with an exam-

ple. Notice that, in addition to what we stated in Section 1, we have to assume the following property:

$$\mathrm{Bel}_x (A \Rightarrow B) \rightarrow (\mathrm{Bel}_x A \Rightarrow \mathrm{Bel}_x B) \tag{38}$$

Suppose we have a norm such as

$$\wedge_{d,r \in \mathrm{G}} \mathrm{Bel}_b ((\textit{well-off}\,(d) \wedge \textit{needy}\,(r)) \Rightarrow \mathrm{A}\,(\mathrm{O}_d\, \mathrm{Does}_d\, \textit{aided}\,(r)\ \mathrm{U}$$

$$(\mathrm{Does}_d\, \textit{aided}\,(r)) \vee \neg\, \textit{well-off}\,(d) \vee \neg \textit{needy}\,(r))) \tag{39}$$

A specific agent b believes that well-off people ought to aid needy people. Suppose that b knows that d is well-off and r is needy:

$$\mathrm{Know}_b\, (\textit{well-off}\,(d) \wedge \textit{needy}\,(r)) \tag{40}$$

On the basis of (6), we will have

$$\mathrm{Bel}_a\, (\textit{well-off}\,(d) \wedge \textit{needy}\,(r)) \tag{41}$$

from which, thanks to (38) and detachment for '⇒', we may infer

$$\mathrm{Bel}_b\, \mathrm{A}\,(\mathrm{O}_d\, \mathrm{Does}_d\, \textit{aided}\,(r)\ \mathrm{U}\ (\mathrm{Does}_d\, \textit{aided}\,(r) \vee \neg\, \textit{well-off}\,(d) \vee \neg\, \textit{needy}\,(r))) \tag{42}$$

namely, the agent b believes that it is obligatory for d to aid r. Of course, as soon as d aids r—or as soon as r is no longer needy, or d is no longer well-off—such an obligation, according to (39), will no longer hold.[6]

Now to the proliferation of norms via competence norms. In the spirit of this volume (Sections 7.3 and 9.6), a competence norm believed by an agent b may be represented as follows:

$$\mathrm{Bel}_b\, (\wedge_{l,d \in \mathrm{G}}\, (\mathrm{Proc}_l\, (A \Rightarrow \mathrm{A}\,(\mathrm{O}_d\, \mathrm{Does}_d\, B\ \mathrm{U}\ (\mathrm{Does}_d\, B \vee \neg A)) \Rightarrow$$

$$\Rightarrow (A \Rightarrow \mathrm{A}\,(\mathrm{O}_d\, \mathrm{Does}_d\, B\ \mathrm{U}\ (\mathrm{Does}_d\, B \vee \neg A))))) \tag{43}$$

Here, proclamation is meant to capture l's act of issuing a certain directive. On the basis of (43) and according to the analysis developed in this volume, l is empowered or has the authority to issue directives. Since this last is the content of agent b's belief, if we have

[6] If we had make this fully explicit we would have to express within the language state transitions and time instants. For these details, see Schild 2000.

$$\text{Know}_b\ (\wedge_{l,d \in \text{G}}\ \text{Proc}_l\ (A \Rightarrow \text{A}\ (\text{O}_d\ \text{Does}_d\ B\ \text{U}\ (\text{Does}_d\ B \vee \neg A)))) \tag{44}$$

we will also have

$$\text{Bel}_b\ (\wedge_{l,d \in \text{G}}\ \text{Proc}_l\ (A \Rightarrow \text{A}\ (\text{O}_d\ \text{Does}_d\ B\ \text{U}\ (\text{Does}_d\ B \vee \neg A)))) \tag{45}$$

which implies

$$\text{Bel}_b\ (\wedge_{d \in \text{G}}\ A \Rightarrow \text{A}\ (\text{O}_d\ \text{Does}_d\ B\ \text{U}\ (\text{Does}_d\ B \vee \neg A))) \tag{46}$$

As expected, (46) is nothing but a norm in the personal normative system of *b*.

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Will of God. See *Voluntarism* and also *Nature.*
Wrong tokens (valid and invalid). See *Reality that is* and also *Types and tokens.*

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 2

Foundations of Law

A Treatise of Legal Philosophy and General Jurisprudence

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 2

Foundations of Law

by

Hubert Rottleuthner

Law Faculty, Freie Universität Berlin, Germany

with a contribution by

Matthias Mahlmann

A C.I.P. Catalogue record for this book is available from the Library of Congress.

5 Volume Set:
ISBN-10 1-4020-3387-7 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-10 1-4020-3505-5 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3387-2 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3505-0 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York

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Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Printed on acid-free paper

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Printed in the Netherlands.

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A NOTE ON THE AUTHORS

HUBERT ROTTLEUTHNER, PhD in philosophy, is Professor of Sociology of Law, Freie Universität Berlin, Faculty of Law. His fields of interest encompass judicial research, the role of law and lawyers (judges, practitioners, law professors, corporate counsel, legislative counsel), efficacy research, Nazi law, law in the former East Germany (GDR), and the theoretical foundations of law. He is author of *Rechtstheorie und Rechtssoziologie* (Alber, 1981), *Einführung in die Rechtssoziologie* (Wissenschaftliche Buchgesellschaft, 1987), and *Steuerung der Justiz in der DDR* (Bundesanzeiger, 1994); he contributed the articles "Nazi Law" and "Class and Law" to the *Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2002); he is editor of *Recht, Rechtsphilosophie und Nationalsozialismus* (ARSP-Beiheft No. 18/1983).

MATTHIAS MAHLMANN, PhD in law, Assessor, Assistant Professor of Law, Freie Universität Berlin. Areas of research: public law, European law, philosophy of law, sociology of law. Publications include *Rationalismus in der praktischen Theorie* (Nomos, 1999); *Der Staat der Zukunft* (ed. with G. P. Calliess; Steiner, 2002); Katastrophen der Rechtsgeschichte und die autopoietische Evolution des Rechts, *Zeitschrift für Rechtssoziologie* 2000; Die Grundrechtscharta der Europäischen Union, *ZeuS* 2000; Law and Force: 20th Century Radical Legal Philosophy, Post-Modernism and the Foundations of Law, *Res Publica* 2003; The Liberalism of Freedom in the History of Moral Philosophy, *Archiv für Rechts- und Sozialphilosophie* 2003 (with J. Mikhail); Judicial Methodology and Fascist and Nazi Law, in *Darker Legacies of Law in Europe* (ed. Ch. Joerges and N. S. Galeigh; Hart, 2003); Heidegger's Political Philosophy and the Theory of the Liberal State, *Law and Critique* 14, 2003.

PREFACE

While working on this volume I was from time to time confronted with the usual question by my colleagues: what am I writing about? When I told them that—having worked at the "Institute for Foundations and Frontiers of Law" at the Free University Berlin—I was writing about what the Institute stands for, their reactions made clear that the topic of "Foundations of Law" is far from clear. Some expected an essay on basic concepts of law, others thought of moral or natural law foundations, one colleague even thought of foundations in the sense of philanthropic institutions. It should be evident, that this is not what I am writing about. However, observing the wide varieties of meaning given to "Foundations" it seems necessary to clarify at the start what this book is about and what it is not about. In the first part I shall distinguish various meanings of "foundations" of law: basic, fundamental concepts; the normative basis of law; epistemological foundations, etc. I shall deal with these "foundationalisms." Greater weight, however, will be given to what one might call explanatory foundations, i.e., sets of variables by which the origin, the development and the functions of law are sought to be explained. This presupposes that justification and explanation can be distinguished, which is not (yet) the case with mythological and religious foundations. The separation between justification and explanation takes place as soon as "natural" foundations are alluded to: external human conditions as well as human nature. And it is most clearly made in the grand theories that refer to economic, moral (in the sense of empirically given beliefs and attitudes), political and societal foundations.

The goal of exposing and discussing various foundationalist approaches is to criticize what could be called "mono-foundationalism," i.e., those theories that stress only one set of variables, e.g., "the" economy or "the" political power relations. Therefore, I discuss in detail "top foundationalists" like Marx and Engels with their theory of an economic "basis" and a legal "superstructure."

In the main I refer to the history of theories about law; in addition, however, one can find remarks on substantial issues like the development of Islamic societies or problems of transformation in former socialist countries.

Although I deal with a variety of foundationalisms this is not a post-modern piece that celebrates a cult of diversity and multiplicity. Rather, I share a multi-variate approach of the kind that can be found, e.g., in Max Weber. There is no special chapter on Weber; however, his writings will accompany us invariably in the critique of mono-foundationalists. As a "multi-foundationalist" Weber still claimed to explain law in its various dimensions

by referring to external variables. There is no great story to tell about historical steps and stages in foundationalist theories. Rather, there are developments, regressions, revivals. Does this suggest a post-modern point of view? Of course, one could be called upon to explain the development of theories on the explanatory foundations of law. However, I am not going to a meta-meta-discourse.

The reader will find many quotations from classical authors. This is a matter of hermeneutical fairness, which has the side-effect that this volume could also be used as an introductory text-book. Unfortunately the forms of citation requested by the editor of this series, e.g., Hegel 1991, might give the impression that Hegel wrote this book in 1991. When, instead, as you would see for the bibliography, the 1991 edition is of a book originally published in 1820.

My thanks go to Enrico Pattaro for his patient pressure and to his excellent Bologna staff. I am grateful for the linguistic assistance of Lester Mazor, for the discussions and the substantial contributions (partly included in this volume) by Matthias Mahlmann. Last, but not least, Angela Ludwig, Nora Markard and Karen Avetissian where helpful in preparing the manuscript.

Hubert Rottleuthner

Freie Universität Berlin
Law Faculty

Chapter 1

WHAT DOES "FOUNDATIONS" MEAN?

Those who seek for the foundations of something might be searching for a fixed basis, perhaps for an ultimate explanation; for determining grounds or causes; he or she looks for an origin, a beginning, for deeper strata, maybe even for an entity, the essence under or behind the phenomena. This investigation can move within hierarchical models: One drills into the depths or one even finds the "basis" up above, the foundations of religious or governmental authority for instance in God and his grace. Foundations are sought and established, however, also in historical dimensions. Political domination is traced back to a first sovereign, maybe to a mythical king, or to an initial contract, the better to avoid investigating into its historical dating. The basis of existing property relationships is seen in a first acquisition, in a first taking possession of unclaimed property, in a first tillage, etc. In all these models justification and explanation form an indissoluble mixture.

Concerning more particularly the foundations of law, we can find a quite trivial starting point—not in grand theories, but in the law itself. The German *Richtergesetz* (law for the judiciary) states in §5a for the first, academic phase of the study of law "compulsory subjects are the core fields of civil law, criminal law, public law and procedural law, including the implications of European law, of the methods of law and of its philosophical, historical, and social foundations." What did the legislator mean by these "foundations"?

1.1. Basic, Fundamental Concepts

By "foundations" one might mean fundamental, crucial elements that appear in a definition of the concept of law, or basic concepts that are used in order to explain important features or the "essence" of law.[1] One starting point often used in legal-theoretical elaborations is the notion of a norm, and this may be further divided into social norms and legal norms. Sometimes we find a sequence running from instinct—custom—convention—morality to law. We find the distinction between state law and customary law. In order to delineate the realm of legal norms usually the notion of physical sanction is introduced or of coercion issuing from a specialized legal staff. Via the distinction between primary and secondary rules or norms one can explain the hierarchi-

[1] This understanding of "foundations" can be found in Schäfer 1989—with further "basic" topics like positivism and natural law, application, interpretation, and improvement of the law. The Festschrift for Peter Landau collects, under the title "*Grundlagen des Rechts*" (Helmholz et al. 2000), contributions mostly devoted to legal history.

cal structure (the "*Stufenbau*") of a legal order. This leads to the distinction between legislation and adjudication as well. Alternatively, one can start with the differentiation between the social system and the legal system. Usually theories contain remarks on the aims or functions of law (or single legal norms), e.g., on social control, conflict resolution, orientation of expectations and actions, etc. The concepts coupled with law are almost innumerable. Among these "law and ..."-relations we find law and morality, law and state, law and politics, law and power, law and religion, law and economics, law and/as literature, law and social classes as well as law and social change/evolution. Or antithetic couplings like: law in the books/law in action, validity and effectivity (or efficacy), not to mention the classical one of natural law and positivism. Finally law is placed in the context of comprehensive theoretical concepts, mostly from general social theories, like social order, anomie, deviance, conflict, consensus, acceptance, legitimation, domination, authority, sovereignty, etc.

1.2. Basic Research

"Basic research," in contrast to "applied research," could mean, in the case of law, that the basic disciplines like history of law, philosophy of law and sociology of law are separated from the practice of law, which forms the focus of legal doctrine and practical advice. The delimitation sometimes is not so sharp, because the basic disciplines also claim to have a practical impact on legal reasoning, e.g., as an "interpretive and evaluative legal theory" (Dworkin 1986) or a "sociological jurisprudence" providing information that can be applied in legal practice.

1.3. Logical and Epistemological Foundations

Theoretical reconstructions of a legal system as a hierarchical order of norms often use the metaphor of a foundation that sometimes is also placed on the top of the order. Kelsen's "*Grundnorm*" transforms into an "apex norm." It is neither explanatory nor justificatory, but is rather understood as a necessary epistemological presupposition in order to interpret a social order as a legally valid one (see below sec. 4.1). And H. L. A. Hart's fundamental "rule of recognition" is interpreted by G. J. Postema to mean: "law rests, at its foundations, on a special and complex custom or convention" (Postema 1982, 166).[2] Dealing with the same topic, Hart's rule of recognition and his notion of a

[2] Cf. Hart 1961, chap. 6 ("The Foundations of a Legal System"). Postema's "foundationalist" article explains Hart's "rule of recognition" as falling midway between "social fact" and "reason for action." On epistemological "foundationalism" in general, see Chisholm 1982; Sosa 1991 and 1998.

rule in general, Stanley Fish (1989, 507) states: "the foundations of law are linguistic," thus shifting the focus to problems of interpretation. This is not what I shall discuss.

1.4. Moral or Legitimacy Foundations

Under the heading of "moral foundations" one might be treating with extra-legal sources for the binding or legitimizing force of legal norms. Why should one obey the law in general or comply with a particular legal norm? (In contrast to the empirical question: Why is law obeyed or not? Cf. Tyler 1990.) Why should, in particular, a judge apply the law or a specific rule? Or from the point of view of a legislator: Should a certain norm be issued? Is the legislator permitted and competent to do so? What are or should be normative restrictions upon a law-maker, in contrast to empirically restrictive conditions for the efficacy of norms? In general one would have to deal with reasons that can be given in order to justify a legal system/order or single legal rules as valid and/or obliging. Such patterns or criteria of justification could be described in their historical development without regard for their validity. One could also, from a moral or normative point of view, try and give reasons for such criteria (cf. Habermas 1992; Kriele 1994).

1.5. Historical, Genetic Foundations of Law

Another sense of foundations is to speak of historical conditions for the development of the characteristic features of a legal system or of law in general.[3] This entails trying to give answers to the following why-questions:

(a) Why is there normativity at all? How do norms evolve? Is there an evolutionary pattern starting from underlying behavioral regularities or instinct or egoistic calculi via → custom → convention → morality → law? Why does *law* exist in human societies—and not other normative orders? What are the conditions for the evolution of law in human societies? Is there an anthropological basis so that only in human societies (and not also in ape-societies) law can exist? An answer to the question about the historical, phylogenetical origin of law certainly depends on a definition of the concept of law. Of course, the definitions given should be applicable to some kind of historical evidence. So one could ask, e.g.: When was the "unity of primary and secondary norms" (H. L. A. Hart) established? When and where did the big bang of the "autopoietical" closure of the legal system take place (N. Luhmann)?

(b) Why does law develop in a certain way? In particular:

(c) What are the prerequisites for the development of a state monopoly of

[3] Schäfer (1989, 1–8) also contains remarks on the origin of law.

force, rudimentarily embodied in a "third" person or party that can issue obligatory decisions in case of a conflict and is capable of enforcing them? One can consider examples from ethnological research. Other examples, however, from societies that are torn by civil wars, guerrilla war(fare), etc. might be revealing as well.

(d) What are the foundations of the secularization of law (e.g., in the Occident, unlike the Islamic world), of the separation of state and church, of politics and creed?

(e) What are the general preconditions for the existence of the rule of law? (Recent examples might be: Columbia, CIS, countries with civil wars—Ulster, Balkans; see below sec. 3.2.1.4 on transformation of the state of nature.) What are the historical preconditions for the development and institutionalisation of principles of the *Rechtsstaat*, limiting political power by valid legal rules; for the relative autonomy of law, making it immune from economic or political instrumentalization? In order to approach these questions, one can look at the European tradition with its doctrines of natural law and social contract theories. Also currently one is faced with the difficulties of the transformation of formerly nominally-socialist countries into societies under the "rule of law."

(f) What are the preconditions for the development of a global official recognition of human rights? (cf. *infra*, sec. 3.2.1.3)

(g) Following another direction, one could finally take a look at the preconditions for an increasing erosion of legal etatism, considering the various countertendencies of globalization, supranational integration and, at the same time, regionalization. What are the legal losses in these cases? What might be the place of law in a decentralized, deterritorialized "Empire" (Hardt and Negri 2000), in which the fields of economics, politics, and culture are communicatively indistinguishable?

1.6. Extra-legal Foundations of Law

These various kinds of historical preconditions can be brought into a synchronous order under the systematic aspect of the *explanation* of certain legal phenomena—namely an explanation given by reference to extra-legal features. This might be what the legislator of the *Richtergesetz* had in mind. One might, then, refer to mythological, religious, moral, biological, anthropological, natural, economic, political, etc., foundations of law.[4] These "foundations" form a complex variety of variables by which an explanation can be given for different aspects of law: its origin, evolution, and function. "Law is the product of other social facts in the society in which it exists" (Cotterrell 1999, 40).

[4] In Nazi legal education there was also a lecture on "*Völkische* foundations of legal science," where *Volk* is to be understood as a racial unity.

1.7. Preconditions for the Efficacy of Law

From a genetic point of view this set of extra-legal variables often is used in order to explain the origin and evolution of law. Thus law has the status of a dependent variable. From an instrumental point of view, however, those extra-legal variables operate as preconditions for obedience to law and the efficacy of law, i.e., the realization of the aims of the legislator. What counted as genetic conditions for the evolution of law can also be interpreted as limiting conditions for the efficacy of legal regulations. So convention might be the basis upon which legal norms evolve and depend. But from an instrumental point of view, from the perspective of the legislator and the enforcement of legal norms, the conventional or customary orientation of the addressees plays the role of a set of restrictive conditions that have to be taken into account.

Given all the above possibilities, I want to make clear that when I speak in the following about foundations of law I generally mean

– empirical factors, variables, features that are referred to in order to explain the origin, the creation, the development of law and its content, and/or

– external conditions that have to be taken into account by a law-maker, i.e., restrictive conditions for the efficacy of law.

Chapter 2

THE EXPLANANDUM: WHAT IS LAW?

Before we look for extra-legal foundations of law we have to clarify what we mean by law, be it a dependent or an independent variable. Can we find foundations of law "in general"? Or do we have to restrict the analysis to particular legal norms? Do we refer to formally valid law or rather to efficacious legal norms and their functions? Are there similar foundations of the "law in the books" as for the "law in action"? Can we focus on the content of legal norms and on their forms as well? These are well-established systematic distinctions in legal theory. In addition, one could ask from a developmental point of view for the phylogenetic or anthropological foundations, i.e., preconditions of the existence of law in human societies. Furthermore, how did the separation of law from other rules, especially religious or moral ones, take place. Are there fundamental regularities in the historical development of law? With regard to recent times: What are the preconditions of the rule of law and of democracy? What are the foundations of human rights?

2.1. Normativism and Realism

To what are we referring, as law, when we discuss these issues? As a first step, before I begin with problems of how to define "law," I will recall the old debate on the "nature" of law between normativism and realism. Normativists conceive of law as a symbolic, linguistically represented entity with inherent normatively binding force. Their position is based on the experience of feeling obliged, being bound by "valid" norms. They privilege the perspective of an actor who consciously attempts to observe and/or apply given legal rules. In contrast, a realist stresses the objective, real, factual dimensions of a legal order. He or she refers to external events or circumstances existing in time and space, i.e., to "facts." Norms "as such" do not exist. There are observable facts like actors and their activities, organizations and institutional arrangements. Psychic or mental states also might exist. However, they must be accessible for an observer via external patterns of behavior. Intrasubjective knowledge (introspection) and first-person-statements must be replaced by intersubjectively testable propositions.

Realism, so it is said, reduces norms to facts ("law as fact"), but neglects the actor's point of view, i.e., the introspective experience of being bound, obliged by (legal) norms. Rather, realists share the "bad man's" view (Holmes) that looks at law as predictions of future (court) actions. But this, a normativist would reply, is not an adequate description of an internal, e.g., a judge's point of view. A normativist would state that norms exist independent

of being applied or observed. However, in what way do norms or rules "exist"? In the case of moral rules the answer is contestable. Some refer to their social practice or to their acceptance, others to their justifiability. In the case of legal norms the legal order itself implies the answer: Legal norms exist if they are valid, and their validity is constituted or is identifiable by legal norms of a higher order, e.g., if they are constitutionally created.

A normativist would hold that legal norms cannot be reduced to facts because both differ:

– in the way they are created (legal norms are created by "competent" actors according to other legal norms of a higher order; and this is not a way that, e.g., a computer is "materially" produced);
– in the mode of their existence (i.e., their validity in contrast to "things" or events in time and space);
– in the way we can gain knowledge of them, i.e., in their epistemological status. Facts might be observable from an external point of view by applying empirical methods; legal norms require an "understanding" of their particular normative meaning from an internal point of view.

A realist would doubt the meaningfulness of notions like competence, a hierarchy of norms as such, validity, or privileged access from an internal point of view. In what follows next I shall deal with these foundational issues of legal epistemology, before I turn to substantive and explanatory issues of the foundations of law.

2.2. Concept of Law and Theory of Law

In many writings on the concept of law there is a failure to distinguish between definition and theory. They deal with very complex theoretical questions, such as the origin and also the effects or the functions of law; but, they do not provide a definition which may work for pre-theoretical purposes, e.g., for the establishing of mutual consent about what might belong in the sociolegal universe of discourse. What are we talking about when we use the notion of "law"?

This confusion of theory and definition is well revealed in the Marxist-Leninist understanding of law. Here law is "defined" as:

The totality of norms (standards of conduct) determined or confirmed by the state which can be and will be enforced by public authority. They express the present will of the dominant class. Law is the fixation of existing property relations and of the social interactions generated by them. It protects and preserves these conditions. (Klaus and Buhr 1964, 463; my translation)

Law is the state-will of the dominant class whose content is ultimately determined by the material conditions of life. It is expressed by a system of universally binding rules which aim at in-

fluencing the social conditions, the realisation of which is guaranteed by public coercion. (Institut für Theorie des Staates und des Rechts der Akademie der Wissenschaften der DDR 1975, 88; my translation)

These definitions contain brief statements about the origin, the development, and the effects or functions of law. This is, however, what one would expect from a *theory* of law, or more exactly, from a sociological theory of law. Consequently, the question arises whether such a theory is empirically testable and if so, whether the theory will stand the test. One objection, e.g., might be that the multifarious functions of law are inadequately reduced to only one, e.g., the preservation of property relations in the interest of the ruling class.

Enumerating the functions of law "theoretically" (e.g., as social control, securing of expectations, solution of conflicts, providing legitimation, etc.) one always can ask if law really fulfils those functions and/or to which extent this might be the case. However, determining these functions presupposes first at all that we know how law can be identified as a set of rules as distinct from other kinds of rules.

Luhmann similarly mixes definition and theory when he "defines" law as structure of a social system based on a substantively, temporally and socially congruent generalisation of normative behaviour expectations (Luhmann 1972, 105; cf. *infra*, sec. 4.2). This is an abridged version of his theory of the origin of legal norms.

In contributions on the sociological concept of law, W. Krawietz (1988; 1989) characterises imperatives (commands), coercion (sanctions) or recognition as different structural elements of law, thus trying to establish a new definition of "law." By mentioning these three features or "factors," he alludes to the well known triad of the imperative or command theory of law, the sanctions theory and the recognition theory of law. By using these labels it is obvious that this is a *theoretical* approach and not a definition. Nevertheless, Krawietz attempts to use these theories in order to re-define the sociological concept of law. I understand these three "theories" in the sense that they attempt to give an answer to quite different questions (therefore, they do not have to necessarily contradict each other). I do not interpret these "factors" as constitutive elements of the "essence," or "nature," or "structure" of law. Instead, I understand at least two of them, i.e., the sanctions theory of law as well as the recognition theory, as theories containing different, empirically testable assumptions about the motivating power of legal rules, especially of the threats of legal sanctions.[1] These two theories claim that either legal norms are observed mainly because of the threat of sanctions or that the addressees "voluntarily" comply with the law. Therefore, both theories imply verifiable

[1] The "imperative theory" of law (Austin, Kelsen, et al.) claims that all legal norms can be reduced to imperatives or commands. This is a problem of definition concerning the *genus proximum* of law.

explanations of norm conforming behavior. These still sketchy explanations could be elaborated within the framework of research on the efficacy of law. But frequently the assumptions made within these theories are treated as necessary and essential statements about law which do not require any empirical proof.

Max Weber usually is treated as a prominent representative of the "coercion or sanctions theory" of law. He distinguishes between convention and law as two "social orders." According to his definition the validity of a legal order is guaranteed by the probability ("*Chance*") of coercion executed by a specialized staff (in contrast to a diffuse "disapproval" by a given group of persons in the case of convention).

> An order will be called
> (a) *convention* so far as its validity is externally guaranteed by the probability that deviation from it within a given social group will result in a relatively general and practically significant reaction of disapproval;
> (b) *law* if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation. (Weber 1978, 34)

An "order" in Weber's sense does not consist of behavioral regularities or "factual regularities *of* conduct" ("*Regelmäßigkeiten des Sichverhaltens*"), but of rules *for* conduct ("*Regeln für das Verhalten*"). "Factual regularities *of* conduct ('customs') can [...] become the source of rules *for* conduct ('conventions,' 'law')" (ibid., 332).

Weber's definition is wrongly criticised by T. Raiser (1999, 124) who maintains that Weber had seen coercion by a legal staff as the crucial motive for compliance with the law. This, however, Weber did not claim in giving his definition of a legal order. The question of motivation for norm conforming behavior—with which Weber dealt elsewhere—can only be answered by a substantive theory of the sociology of law. The framing of such a theory presupposes the solution of the question of definition, i.e., that legal rules can be demarcated from other kinds of rules, e.g., from conventional rules. It would be more accurate, therefore, to say that Weber presented a legal *concept* implying coercion, instead of a coercion *theory* of law. The use of the concept of coercion as one element of the definition of a legal order does not necessarily imply that the threat of sanctions is the main motive for the observation of legal norms.[2] It is one thing to identify legal rules in contrast to other social

[2] Weber clearly states that it is not the threat of sanctions that makes people comply with legal norms: "It is in no way inherent, however, in the validity of a legal norm as normally conceived, that those who obey do so, predominantly or in any way, because of the availability of such a coercive apparatus as defined above. The motives for obedience may rather be of many different kinds. In the majority of cases, they are predominantly utilitarian or ethical or subjectively conventional, i.e., consisting of the fear of disapproval by the environment"

rules, but quite another thing to answer the question why people obey legal rules thus identified. It is important to see, especially in the case of Weber, that one can use "coercion" as an essential element of the definition of law, and at the same time state that legal norms are not complied with because of the threat of sanctions, but because of, e.g., the "internalization" of conventional rules. Max Weber's typology of legitimate forms of domination ("*Herrschaft*") (charismatic, traditional, legal) is introduced in order to explain why people in general observe commands.

2.3. Concept of Law and Ideal or Idea of Law

Another misunderstanding of Weber's attempt to give a definition of a legal order lies in the critique (also presented by Raiser 1999, 124) that Weber's "value-free" concept of law confers legal validity upon every regulation issued by a state authority. Max Weber, however, offers a definition of law but does not intend to frame an ideal of law. A definition should allow the drawing of a distinction between the legal and the non-legal, between law and not-law, but need not distinguish between the legal and illegal (just and unjust law).

Kant's question "What is law?" aims exactly at the difference between "*iustum et iniustum*" with which—as Kant (1954, 33ff.) stated—one can embarrass legal scholars just as one can embarrass logicians with the question "What is truth?" Kant's aphorism—a standard quotation in treatises on the concept of law—is apt to be misleading since Kant does not intend to define what is to be understood by "law," but instead is attempting to establish an ideal of law by finding reasonable criteria for the just and the unjust. Kant's distinction between a "philosophical theory" of law that seeks the source of judgements in pure reason and an "empirical theory of law" does not correspond to the distinction between the ideal of law and the concept of law used in an empirical approach to law. Kant's so-called "empirical theorist of law" who is able to answer the question "*quid sit iuris?*" is not a sociologist or anthropologist of law but is actually employing a legal-dogmatic approach. He or she uses it to determine the content of positively valid law. This "empirical" treatment of law is not a sociological, but a legal-dogmatic one.[3]

Advocates of the theory of recognition of law shift from statements about the motives of why the law actually is obeyed to the formulation of an ideal of law by deploying the element of acceptance or consensus as a *normative* criterion by which the validity (in the sense of the legitimacy) of legal rules can be

(Weber 1978, 314). "A legal order is empirically 'valid' owing not so much to the availability of coercive guaranties as to its habituation as 'usage' and its 'routinization.' To this should be added the pressure of convention which, in most cases, disapproves any flagrant deviation from conduct corresponding to that order" (ibid., 332). See also ibid., 320, 324–5, 332–3.

[3] This false interpretation can be found in Krawietz 1989, 109ff.; but cf. Dreier 1986, 9.

assessed. They answer the Kantian question of which legal rules are just or unjust by saying: only those rules that are accepted or, rather, that are acceptable. This is an issue for the philosophy of law and not for the sociology of law.

To sum up: One should clearly distinguish between substantive aspects that concern a theory of law (e.g., why do people comply with a law: Because of the threat of sanctions; because of their voluntary acceptance?) on the one hand and methodological issues on the other such as the formulation of criteria that permit the identification and delimitation of legal rules. That is what the task of a definition is about.

Theoretical efforts require first and foremost a definition that allows the identification of *legal* rules in order to set them apart from other social rules. And all these efforts for theory as well as for definition should be separated from efforts for the formulation of an ideal law. A definition is neither true nor false. It can be more or less useful and appropriate to solve certain problems. The aim of a sociological definition of law is to determine the area and scope of socio-legal statements. The adequacy of a proposed definition can be judged according to its capacity for coping with this problem.

2.4. Actor and Observer—Internal and External Point of View

The distinction between a philosophical analysis of (ideal) law and a sociological treatment sometimes is labelled with the dichotomy of an internal and external point of view. Thus wrote Habermas:

> Without the view of law as an empirical action system, philosophical concepts remain empty. However, insofar as the sociology of law insists on an objectivating view from the outside, remaining insensitive to the symbolic dimension whose meaning is only internally accessible, sociological perception falls into the opposite danger of remaining blind. (Habermas 1996, 66)[4]

This kind of distinction between external and internal point of view, of external or internal statements, is crucial in the work of H. L. A. Hart (Hart 1961).[5] From his perspective this is so not only for the analysis of central legal concepts like "obligation," but beyond legal theory for disciplines concerned with social rules and thus for legal sociology.

The distinction of internal and external aspects is apparently used in two contexts in Hart's work:

[4] German original: "Ohne den Blick auf das Recht als empirisches Handlungssystem bleiben die philosophischen Begriffe leer. Soweit sich aber die Rechtssoziologie auf den objektivierenden Blick von außen versteift und gegenüber dem nur intern zugänglichen Sinn der symbolischen Dimension unempfindlich ist, gerät umgekehrt die soziologische Anschauung in Gefahr, blind zu bleiben" (Habermas 1992, 90).

[5] In the postscript to the second edition of *The Concept of Law* Hart distinguishes internal and external statements of law and internal and external aspects of law (Hart 1994, 254).

– First, in the context of the relation of a (single) actor towards social rules;
– Second, in the context of the relation of actor and observer.

An internal point of view is explained by the intrasubjective relationship of the actor towards the rules he/she is abiding by. To explain an external point of view an observer is included in the analysis, making it intersubjective. In what follows, I am going to elaborate this basic distinction further. I want to show that the distinction between an internal and external point of view can be used in both dimensions of intra- and of intersubjectivity. I will put greater emphasis on the second, social dimension.

2.4.1. Actor and Rules

a) Internal

Hart takes a stand against the kind of realism in legal theory that regards the meaning of rules as nothing but a prediction of conduct, e.g., of judges. Instead, he says that rules are guides of conduct. They are the basis of justifications and critique of decisions. Rules are a reference point for claims and demands, for social pressure in order to achieve conformity. An "internal point of view" is marked by "a critical reflective attitude to certain patterns of behaviour as a common standard" (Hart 1961, 56). Somebody characterized by such an attitude is behaving conforming to the rules. He or she accepts the rules and regards them as patterns of action orientation.[6] A "feeling" of obligation is—contrary to A. Ross—not necessary (ibid., 56, 86). That kind of psychologism is dispensable in an analysis of normative language (e.g., of "I/you have an obligation…") like that of Hart.

b) External

The "external point of view" is taken to be that of an observer who investigates the action of an agent only as it corresponds to underlying regularities and who formulates a prediction without regard to the understanding of the agents. (An example for this is the kind of investigation of the judiciary that tried to understand and predict judicial behavior by investigating the social background of the judges.) There are remarks by Hart referring to an actor who deals with rules differently than from an internal point of view. Such an agent does not accept them and does not use them as a standard for acting.

[6] "[…] to be concerned with the rules […] as a member of the group which accepts and uses them as guides to conduct" (Hart 1961, 86); "accept and voluntarily co-operate in maintaining the rules" (ibid., 88).

He/she shows conformity only to evade the negative sanctions imminent in the case of a breach of the rules. He/she considers thus regularities in the reaction after violations of the norm. "I am likely to suffer for it if…" is the respective first-person-singular remark.

> The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation. (Hart 1961, 88)[7]

2.4.2. Actor and Observer

The external point of view is usually not explained in term of the relation of an agent towards the rules he abides by, but in the relationship of an observer towards an actor following rules. This point of view is external because it neglects the subjective point of view of the actor and focuses on a description of the actor's behavior "in terms of observable regularities of conduct, predictions, probabilities and signs" (Hart 1961, 87; cf. ibid., 55, 88). "He (i.e., the observer) may merely record the regularities of behaviour on the part of those who comply with the rules as if they were mere habits, without referring to the fact that these patterns are regarded by members of the society as standards of correct behaviour" (ibid., 244). The external observer describes acting not according to the rules that are the internal basis of orientation for the actors, including the law applying officials, but as a regularity—perhaps in the sense of T. Geiger: Given a certain situation, a certain action is manifested (cf. Geiger 1964, 49).

One could call the relationship of observer and actor "internal," if the former would take account of the subjective orientation in his descriptions, explanations and predictions. This is neither the case for Hart nor for his critics. It required some argumentative efforts to clarify that an observer cannot only use a kind of description that solely relies on empirical correlations (regularities), but includes the subjective understanding of the actor as well. This seems to be self-evident for a sociologist who is familiar with interpretive sociology (e.g., in Max Weber) and the notion of a "participant observer"[8] which relativises the apparently clear dichotomy of observer and actor.

Neil MacCormick (1981, 33–40) decomposed the external point of view into an extreme external point of view and a less extreme, hermeneutical point of view. A hermeneutic observer knows cognitively about the subjective

[7] Ibid.: "reject the rules and attend to them only from the external point of view as a sign of possible punishment."

[8] A classic example of legal sociology is Lautmann 1972. Lautmann participated as a judge in legal proceedings. He also wrote a sociological protocol, leaving open the question when he acted as Dr. Jekyll and when as Mr. Hyde.

grounds for acting of the actors within a relevant group, without necessarily sharing volitionally their point of view, without sharing their personal commitments. He is informed about the legal situation without regarding it as an obligation. A descriptive use of rules, their use as information does not imply their acceptance. This yields a trichotomy of internal, hermeneutical and extreme external.

Hart (1983a, 14ff.) later accepted this trichotomy. He distinguishes between an internal perspective in the sense of the "'acceptance' of preferred patterns of conduct as guides and standards of criticism" and an external perspective meaning "recognition of their acceptance by others" (ibid., 14). A third perspective, that is not explained further, would be an extreme external perspective. This concession of Hart is not surprising. He allowed the observer in the first edition of *The Concept of Law* to do much more than just to state regularities and probabilities or give predictions. The distinction of "accepting a rule" and "stating the fact that it is accepted" appears already (Hart 1961, 99, 244).[9] In general, Hart's observer seems to know that rule guided behavior is subject to observation.[10] This behavior is only described *as if* it consists of nothing but regularities and correlations—in an act of conscious estrangement ("as if they were mere habits," cf. *supra*, 14). The more fundamental problem, how to determine by observation whether somebody is following a rule or whether the behavior is nothing but a regularity, is not a problem for Hart's observer.[11] The essential point of the external perspective for Hart is that the observer, unlike the actor, is not necessarily accepting the rules. "For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from the outside refer to the way in which they are concerned with them from the internal point of view" (ibid., 87). "Not accepting" does not mean for Hart as for MacCormick that the observer is against these rules. The observer takes rather a detached uncommitted stance towards them.[12]

The concept of "detached normative/legal statements," introduced by J. Raz (1979, 153ff.), criticising Kelsen, was taken up by Hart and MacCormick to clarify the hermeneutical point of view. An "uncommitted adoption" of the perspective of somebody following rules is possible. This perspective does not oblige somebody to accept these rules. Examples of such detached statements are the advice by a lawyer for his clients, the lecture of an academic about the

[9] The second kind of statement is a case of "external statement."

[10] Hart (1961, 96) describes as external "the view of those who do not merely record and predict behaviour conforming to rules." This implies a hermeneutical presupposition.

[11] In research, this problem emerges in societies lacking a developed legal order (in Hart's sense). Cf. *infra*, sec. 2.5.1.

[12] I am not sure about Hart. The external point of view is something he finds in members of a group "who reject its rules" (Hart 1961, 88). In any case, acceptance carries a positive connotation in Hart.

existing law or the Catholic being an expert on Jewish law who advices an uninformed Jew about an obligation.

Raz develops a different trichotomy of statements than the trichotomy of external, hermeneutical and internal:

– "Internal statements are those applying the law, using it as a standard by which to evaluate, guide, or criticize behaviour" (ibid., 154).[13]

– External remarks are concerned with empirical states of affairs like actions or attitudes related to law. "External statements about the law are statements about people's practices and actions, attitudes and beliefs concerning the law" (ibid.).[14] They are not the extreme-external remarks of Hart in the sense of pure regularities or correlations without concern for aspects of rule following.

– In addition, there are distanced remarks about the normative situation in the sense of information or legal advice: "non-committed normative statements," "detached statements or statements from the legal point of view" (Raz 1980, 236). These are not statements about opinions, attitudes or convictions about norms. For this third group Raz introduced the term "indirect normative statements" in contrast to direct normative or internal statements (ibid., 49).

MacCormick (1981, 40) introduced the distinction of

– "statement of a rule" in the sense of an informative statement of norms and

– "statement about a rule." Such a statement adds to the information about the norm a further empirically verifiable element, e.g., "it is improbable, that the norm *X* will be derogated soon." Or it contains an assertion that somebody is of the opinion that norm *X* exists. Such a statement (e.g., "In England they recognize…") both Hart as Raz took as an "external statement" (Hart 1961, 99). In such a statement no acceptance of a norm is expressed but something is asserted about the fact of acceptance.

Hart's initial dichotomy begins to become dubious. We have thus developed a distinction of statements that is at least fourfold.

– Internal: direct normative statements; committed normative statements; acceptance of rules that are a point of orientation for the actor;

– Hermeneutical: indirect normative statements; uncommitted, detached information; recommendations; "statement of a rule";

[13] "They are internal, fully committed normative statements"(ibid., 155).

[14] Or: Such a statement "does not commit the speaker to the normative view it expresses" (ibid., 153).

– Statements about facts related to norms: "statement about a rule"; about opinions, attitudes, convictions, actions, that are related to rules, e.g., their acceptance. The case of an external attitude of a (single) actor abiding by laws only because of the fear of sanctions belongs to this group of statements. This is because these kinds of statements are dependent on a prediction about the actions of the legal staff who are guided by rules.

– Extreme-external: statements about pure regularities, correlations, predictions of behaviour without reference to the internal point of view.

Hart apparently does not distinguish in his "postscript" (Hart 1994, 242ff.) between the second and third kind of statement. His "descriptive legal theory" is formulated from the point of view of a non-participating observer who describes the internal perspective of the agents from a morally neutral point of view. The agent's point of view consists in accepting the rule as an orientation for action and as a standard of critique. The observer does not accept the rules himself, but he can describe the fact of accepting a rule. Extreme-external statements are no longer part of the theory.

2.4.3. A Proposal: Scaling Internality

As the initial dichotomy has been dissolved, it seems reasonable to abandon the classification of different points of views or types of statements in order to develop as an alternative an ordinal scale. This would recognise different grades of "internality" (or "externality") in the relation between observer and actor—or to be more precise: of agents, who occupy different roles and positions in social interaction as regards to rules.

– A relation beyond the medium of language can be adopted as the beginning. The agent does not possess the faculty of language; the observer, who has the capacity to speak, is thus unable to enter into a communicative relation. This situation is found in the context of ethological research with primates. One can ask, for example, whether baboons, chimpanzees, etc. are following rules, in general, whether there is an ape-law (cf. Mahlmann 1999, 311ff.). One has to seriously ask the question in this context whether there is real rule following in these cases or mere regularities. Is linguistic symbolisation the precondition of abiding by a rule? When does—to use Hart's terminology—the observation of social "patterns of conduct" become the agent's use of these patterns as "guides to future conduct"? And what is it that an external observer is actually observing in this process?

– We introduce the capacity to use language for both the agent and the observer. They do not, however, actually have to communicate with each other. This constellation applies to the "understanding of foreign cultures" at an early stage, e.g., when anthropologists are investigating the rules of an un-

known tribe and are in the beginning only able to identify certain regularities. Or: What does a foreigner understand about behavior in Tokyo if he does not know Japanese?

– Further gradations of "internality" are significant for the social sciences at least in two dimensions: First, as to the choice of the descriptive frame of reference. An "external" description of actions consists in the use of concepts that are unfamiliar to the agent. One can, e.g., describe a trial in terms of symbolic interactionism, of role theory, of linguistics, etc. (This is not a description in the framework of correlation and probabilities.) One can analyse, too, on a higher grade of internality, the same actions by using the rules that are applied by the agents themselves. In these cases legal norms are used in a descriptive manner, e.g., if a trial is described in terms of the relevant procedural norms, actions appear as cases of application of rules. A problem for legal sociology consists—among others—in deciding to which degree the interpretations of the agents or even the exegetical endeavours of judges are part of the study. One thus uses to a smaller or greater degree knowledge about the norms and values of the actors. This perspective is an equivalent to the perspective of a hermeneutical observer (in the sense of MacCormick), who is cognitively concerned with the self-understanding of the relevant group without sharing their point of view, however, volitionally.

– A further gradation is the result of the choice between different methods of data collection. In empirical sociology a distinction is drawn between unobtrusive and obtrusive (non-reactive and reactive) methods. The researcher does not influence the object of scrutiny in the former case, e.g., analysing the content of texts or conducting (covert) observations. In the latter case the data collection itself causes certain reactions in the object of research, e.g., in the context of interviews and questionnaires. In this case there are communications between researcher and "object."

– We have spoken about rule following and acceptance in the context of the discussion of Hart's work. In the practice of sociology and criminology there is the problem of identifying and explaining the following of rules and their transgression. One has to decide whether the variable "norm compliance" simply to be interpreted as "norm corresponding behaviour" or whether internal motivation is to be a precondition (the actor complies with the norm *because of* the norm).[15] In the first case an observer is from an external point of view capable of determining whether there is rule-following or not.[16] The first version is preferable because it allows a clear distinction be-

[15] Compare Theodor Geiger 1964, 87 (my translation): "To act *in accordance* with the norm does not necessarily mean to *follow* the norm." ("In tatsächlichem *Einklang* mit der Norm handeln, heißt nicht notwendig: die Norm *befolgen*.")

[16] Cf. Opp 1973. On the theory of norm compliance, see ibid., 190ff. Opp (ibid., 192) prefers to define rule following as abiding by rules from the perspective of an observer.

tween the behaviour of the agent and his motives. A theory of norm compliance would contain variables to explain the dependent variable "degree of norm conformity." Some of these explanatory (independent) variables would be knowledge of the norms; identification with the aims of the legislator (this might be what is meant by "acceptance" in Hart); or the subjective assumptions about the probability and severity of sanctions. These variables would be—as far as the relations of agents and rules are concerned—a mixture of internal and external points of views. One can find out something about them only through communication with the agents.

– Within this social scientific communication further gradations are possible. The communication that usually takes place in survey studies (using questionnaires or conducting interviews) is usually wholly "external" or unilateral in the sense of a sheer, asymmetrical asking of opinions, convictions, etc. (This is known, too, from certain journalistic interviews.) The detached or uncommitted point of view in the sense of MacCormick or Raz disappears for a researcher to the degree that he/she conducts what has been called "action research."

– Given these insights the demarcation between neutral, "value-free" social research and strategic communication motivated by interests becomes obscure. A case of the latter kind of communication (which forms a part of MacCormick's and Raz's examples, too) is, e.g., the advice of an advocate to her client. She can give information about the probable outcome of a trial without accepting the result as right or just.

– A further step that truly leads to an internal relation between agent and observer consists in a communication between the two about the justification of norms and values. This is only possible if both are prepared to take the other's point of view. Such a commitment (that is not only cognitive any more) does not imply the acceptance of the values and rules of the other. In this internal relation the distinction of actor and observer is dissolved. Both act within a normative discourse. The attribute "internal" however, does not refer anymore to the individual relation of an agent towards guiding rules.

– I do not think the final step towards "internality" is necessarily a state of affairs where both actors agree in their normative orientations. This appears to demand too much harmony. An "attitude of shared acceptance of rules" (Hart 1961, 99) might be the result of the process. One might even take "acceptance" to be a very valuable state of affairs. This seems to be true for Hart. One should, however, not lose interest in normative dissent and reasoned divergent behaviour.

2.5. The Concept of Law—A Realist Approach

This scale of internality can be applied in order to clarify some traditional problems of the concept of law. There is a widespread inclination to enter

into an abstract discussion of "the" realist (sociological) concept of law in contrast to "the" idealist (philosophical) concept, of how the normative and empirical are dialectically interwoven, of the intricate relationship of is and ought, etc. The real need to give a definition of the concept of law to be used in empirical research, however, arises from the question whether certain observable patterns of behavior can be described as an act of following or violating a norm or of using it; and not only compliance with or using a norm in general, but especially: a *legal* norm. It is this context that the problem of what comprises an external description comes up. Is it sufficient to describe an action as being in accordance with a legal rule or must the observer, in addition, presuppose that the actor himself feels obliged or is oriented by the rule—and how can an observer find that out?

2.5.1. Regularities and Rules

This problem, however, rarely appears in conventional socio-legal research (i.e., in societies with an elaborated legal system). It typically arises in legal-anthropological research when a field-observer tries to find out which norms, and in particular which legal norms, exist in a group or in a whole society (level 2/3 on the scale of internality). The problem may also appear in the analysis of modern societies—if one studies them from the artificially alienated point of view of an anthropologist, i.e., if one does not simply rely on legal-dogmatic information about Acts of Parliament or if one does not only ask a "native" lawyer. As a field-researcher in modern societies one could, e.g., observe in the USA that people put their beer-cans, bottles of wine and whiskey into brown paper bags when they leave a liquor-store. When is a norm observed, when is a legal rule observed, where does only a habit or custom exist?

Two distinct questions have to be answered from the legal-anthropological point of view:

(1) Do our observations reveal merely a simple custom, a regularity in behavior, or is what we observe the following of or the use of a rule, of a norm?

(2) If a norm is followed (or transgressed or used) what kind of a norm is it: an ethical norm, a moral norm or a legal norm?

The second question deals with the classification or definitory delimitation of different kinds of norms or rules. The classification of custom / morality / law is also genetically used with a double meaning: first, phylogenetically (concerning the question how law came into this world and how it evolved), second, in relation to actual legislation—as if legal rules flow in a kind of a norm-cascade from custom and morality (cf. Geiger 1979, 170). This would

be again a *theoretical* attempt to explain the origin and evolution of law, but not a *definition* in the strict sense of a classificatory delimitation of various kinds of social norms. The solution of the genetic question requires that an answer be given to the question of definition first, i.e., the question of classificatory identification. Otherwise one could not know if one is speaking about legal rules at all.

An answer to the two above mentioned questions relevant in legal anthropology should consequently be found in observational studies: (1) the question of the delimitation of regularities and rules or norms, and (2) the question of the delimitation of different kinds of social norms. What kind of behavior and what behavioral sequences do we have to observe in order to say that there is a valid legal rule, and in order to state its content? Referring to the scale of internality, we can distinguish between a situation where no communication is possible, where the observer is restricted to "mere" observation and a situation where he or she can communicate with the "natives," e.g., by conducting interviews with them. But how trustworthy and reliable are their statements? Do these persons actually know that they are following a rule and which one it is? Who in a given society is competent to provide valid information?

We can speak of a norm as existing only if there is a violation that is followed by a sanction. And we can only speak of a legal rule if the sanction is enforced by a special person or group which displays at least rudimentary elements of a "legal staff." In this sense R. Lautmann defines "law" in a dictionary of sociology as "the sum of those behavioral rules the violation of which is sanctioned by an authorized instance (at least in a psychic manner, like indignation). This broad concept also can be used in the work of ethnologists" (Lautmann 1978, 626; my translation). And this concept—I would add—can also be used by lawyers of public international law and canonical law. The original problem, however, recurs on a higher level: How can we identify from an external point of view an "authorized instance"? Can we reduce "authority" or "authorization" to behavioral regularities, e.g., of obedience? Is it necessary to identify and to "understand" rules that confer competences upon certain persons and groups? Must these persons/groups and their activities be "accepted" by a majority of people—whose acceptance could not be reduced to mere regularities of compliance? In addition, the definition quoted above neglects the constitutive function of legal norms (cf. *infra*, 29–30).

The distinction between regularities and rules often is understood in the sense of a temporal sequence or as a genetic chain: First there were regularities of behavior, habits, customs, usage, etc. out of which rules of convention, morality and finally law evolved. In the beginning there were customs, then came customary law, and at the end positive, state law. Or, in general, first there were facts, then came norms. I already have quoted from Max Weber the statement: "Factual regularities *of* conduct ('customs') can [...] become

the source of rules *for* conduct ('conventions,' 'law')" (Weber 1978, 332).[17] But what does "source" here mean? Do rules evolve out of regularities? Can rules be qualified as regularities + a deontic operator? That means: to the expression of a regularity $x \rightarrow y$ via the "normative power of facticity" ("*normative Kraft des Faktischen*," G. Jellinek) an obligation-operator would be added: $x \rightarrow (O)y$. It is not clear whether Weber distinguishes regularities and rules, or: Custom, convention, law systematically and thus coexisting, or whether he means to arrange them as a sequence in temporal order.

> Law, convention, and custom belong to the same continuum with imperceptible transitions[18] leading from one to the other. We shall define *custom* (*Sitte*) to mean a typically uniform activity which is kept on the beaten track simply because men are "accustomed" to it and persist in it by unreflective imitation. It is a collective way of acting (*Massenhandeln*), the perpetuation of which by the individual is not "required" in any sense by anyone.
>
> *Convention*, on the other hand, shall be said to exist wherever a certain conduct is sought to be induced without, however, any coercion, physical or psychological, and, at least under normal circumstances, without any direct reaction other than the expression of approval or disapproval on the part of those persons who constitute the environment of the actor. (Weber 1978, 319)

This "continuum" could be interpreted as both a systematical and a temporal one. In another paragraph Weber clearly qualifies mere regularities as phylogenetically "primary," and in our sense as "foundational" for rules or norms. According to Weber, organically conditioned regularities, as a psychophysical reality, are "primary." "Binding" norms are based upon "natural" norms.

> We have no access, however, to the "subjective" experiences of the first *homo sapiens* and such concepts as the allegedly primordial, or even *a priori*, character of law or convention are of no use whatsoever to empirical sociology. It is not due to the assumed binding force of some rule or norm that the conduct of primitive man manifests certain external factual regularities, especially in his relation to his fellows. On the contrary, those organically conditioned regularities which we have to accept as psychophysical reality, are primary. It is from them that the concept of "natural norms" arises. The inner orientation towards such regularities contains in itself very tangible inhibitions against "innovations," a fact which can be observed even today by everyone in his daily experiences, and it constitutes a strong support for the belief in such binding norms. (Ibid., 321)

The approach which locates the foundations of law in a complex of facts out of which norms are generated can be found, as we shall see later in detail, in many authors. In Marx, e.g., a superstructure full of norms is built upon a factual, norm-free basis (cf. *infra*, 113–5). In Eugen Ehrlich so-called "facts of law" generate the living law (cf. *infra*, sec. 3.2.4.). And according to Theodor Geiger norms evolve out of factual "*Gebaren*" (Geiger 1964, 48ff.).

[17] "Everywhere what has been traditionally handed down has been an important source of what has come to be enforced" (ibid., 29).

[18] "It should thus be clear that, from the point of view of sociology, the transitions from mere usage to convention and from it to law are fluid" (Weber 1978, 325).

This point of view has become taken for granted, almost a truism. Therefore it is important to clearly point out distinct counter-positions. In Kelsen, e.g., is and ought (*Sein* and *Sollen*) form two original epistemological modes of perceiving the world (i.e., the neo-kantian "*Etwas*"). One cannot be reduced to another, neither systematically nor temporally. The "early" Luhmann introduced expectations as a basic category. They are facts; but there are originally two different modes of expecting: a cognitive and a normative one. Norms, and finally legal norms, evolve out of normative expectations. This leads to the strong phylogenetic assumption that norms and even law existed from the start (*ubi societas, ibi ius*):

> We are not returning to the popular thesis that there have been societies without law either in the history of mankind or even in crosscultural comparisons of the present (namely, those which do not have a coercive state apparatus). Rather, our functional concept of law makes it clear that law fulfils a necessary function in every meaningfully constituted society and must therefore always exist. The development of law is not to be understood as the step from the pre-legal to legal forms of societies, but as a gradual differentiation and functional independence of law. (Luhmann 1985, 82–3)

Later I shall return to the question of how law, i.e., according to Luhmann, "congruently generalized normative behavioral expectations" came into being (cf. *infra*, 100ff.). Luhmann's assumption comes from Parsons' critique of the utilitarian model of action. In a state of nature norms exist as soon as there are actions. There are no actions without norms, nor are there actions based merely on individual calculi of cost and benefit. In this context, however, it is revealing that also Economic Analysis (of Law) employs as a basic category not brute facts but preferences as evaluative dispositions. This comes close to Weber's *interessenbedingtes Handeln* which he *systematically* distinguishes as one type of "factual regularities of conduct" besides usage (*Brauch*) and custom (*Sitte*).

2.5.2. A Realist Approach to Legal Norms

It is only in the ethnology/anthropology of law—as mentioned before—that one typically has to cope with the problem of proving the existence of rules and, especially, that of legal rules, by using solely observational or interview techniques; this methodological restriction rarely exists in socio-legal research in modern societies. Here the sociologist of law relies on a simple juridical (i.e., the formal) concept of validity in studying, inter alia, the efficacy of law, in doing judicial research, investigating the mobilization of law, alternatives to legal conflict resolution, knowledge and opinion about law, etc. In societies with elaborated legal systems (in Hart's theory: One in which the distinction between primary and secondary norms is institutionalized) the sociologist of law reveals the legal state of this society not by observing "pure" behavior but, rather, the other way around: Starting from valid legal norms "in the books" he/she proceeds to examine the "law in action," i.e., observable activi-

ties of the application, following, violation and use of legal norms, including their social and natural conditions as well as their effects. The basic distinction underlying this type of investigation is the one between *normative* and *factual*—"factual" not as non-normative but as involving norm-related facts (cf. *infra*). Besides that, the sociologist of law also looks at the *informal* aspects of social and legally relevant activities in contrast to the *formal* aspects that could be revealed and described solely by applying the notions formed in legal norms.

2.5.3. Etatism versus Pluralism

The sociologist of law takes sides with the etatists by routinely using as a starting point of his/her investigation the juridical concept of validity orientated to the fulfilment of procedural requirements. In contrast, it is mainly legal anthropologists who argue in favor of a pluralist concept of law in which the existence of law is related to social (in any case pre- or extra-state) characteristics. But I think that even ethnologists or advocates of "legal pluralism" necessarily have to rely on statist features as significant elements of the concept of law, e.g., the rudimentary existence of legal personnel in the sense of a "third" who is not related to the conflicting parties and who can issue compulsory decisions or settlements.[19]

A "pluralist" or pure "social" concept of law (which would, of course, be a sociological, but not an etatist one) is confronted with insurmountable difficulties, as is shown in the classic attempt of Eugen Ehrlich (1936, 164). Ehrlich tried to introduce a pure "social" definition of "norms" and "legal norms" by distinguishing overtones of feelings and reactions in particular situations (cf. *infra*, 139ff. in detail). Usually, as a sociologist of law, one can etatistically refer to juridical criteria of validity in societies with elaborated legal systems (with explicit criteria of validity such as a "rule of recognition"; Hart 1961, 97ff.). Problems may crop up when one uses the concept of "customary law." But also in this case one has to refer to etatist elements: Customary "law" only consists of what has been recognized as such by the courts.[20]

2.5.4. Realism in Practice: Socio-Legal Research

Some scholars state that a realist treats law "as fact," in its "facticity" and not in its "normativity." A close analysis of the research practice of the sociology of law gives rise to doubts about this statement. Firstly, sociologists of law

[19] This is the definition of a "judge" (mediator) whose existence marks the first step in the development of law, according to Schwartz and Miller 1964.

[20] The notion of "customary law" is an interesting case of a temporal sequence (first there was customary law and then came "real" law) that clashes with a normative classification (is customary law valid or invalid?).

sometimes do analyse legal rules "as such," i.e., with no regard to their origin and social effects, just as linguistic entities that can be studied by using, e.g., methods of content analysis. If someone, e.g., tries to test the thesis that there has been an increase in normative regulations, one should count legal regulations "as such," independent of their social practice, their effects or impact. When discussing tendencies of materialization or proceduralization or decriminalization or changes in the typology of forms of legal rules we can for descriptive purposes restrict our analysis to legal rules without looking at the circumstances of their creation (here it might be sufficient to ascertain the date of their issuing) and at their effects.

Secondly, socio-legal research does not deal with law as a complex of facts ("law as fact"), it rather deals with *law-related facts*, i.e., with facts that have a reference to legal rules. These references are manifold, and therefore a clear cut delimitation of the socio-legal domain is almost impossible (but also normally not necessary). When a realist talks about law-related facts he/she makes "external statements" in the sense of J. Raz (cf. *supra*): "External statements about the law are statements about people's practices and actions, attitudes and beliefs concerning the law" (Raz 1979, 154). Or what N. MacCormick (1981, 40) called a "statement about a rule." Correctly speaking, it is not a statement about a rule as such; rather it is a statement about facts that are related to rules/norms. These facts can be manifold:

– There is the issuing, the enactment of a legal rule (and its legislative history with processes of influencing the legislator, etc);
– There is the application, interpretation and enforcement of legal rules (and also further effects of these activities);
– There is the following, violation and circumvention of legal rules and their effects;
– There is the employment, the use, the thematization and mobilization of legal rules (in civil law-suits, reports to the police, etc.);
– There are opinions about legal norms and institutions; there is knowledge about them; there are beliefs concerning legal rules and legal institutions (e.g., trust in them).

These facts consist of different *actions*, activities (also communication, interaction), and they all are differently related to legal rules. Additional norm-related elements are *actors* on different levels of aggregation (persons, groups, organisations, institutions). Their expectations are investigated, their beliefs, opinions of, their knowledge about legal rules and legal institutions, i.e., certain *psychological dispositions* in reference to "law." All these elements are not "law" itself, but they are related to law, to law as a set of norms. Law, therefore, is not "reduced" to certain facts, but a large amount of facts is multifariously related to legal rules. A realist has to "understand" the meaning of these

legal rules; therefore a certain degree of legal education might be wholesome for him/her. But as a sociologist or a psychologist he or she does not hermeneutically aim at statutory interpretation the way a jurist does.

In contributions on the concept of law we can find two strategies of coming to grips with this notion. One strategy consists of giving a *genus proximum*, i.e., a generic term, according to the traditional way of defining a concept. Thus law is—in a first step that should be followed by determining the *differentia specifica*—defined as a set of norms, as a social order, as a set of facts (Olivecrona 1971), as a system, as a social structure, as a (communicative) medium, as art (Bagnall 1996), game (Ost 1988; Arnauld 2003), communication,[21] etc. Here we find a connection between theory and definition (which I had separated *supra*). In choosing a *genus proximum* of law one has to analyse the theoretical consequences of a choice among these options. What happens in constructing a comprehensive theory in which law plays a prominent role when one makes a conceptual decision among the options mentioned above, e.g., whether to conceive of law as a system or as social structure? (Cf. *infra* on Luhmann, sec. 4.2.)

Following another strategy, the whole body of law is reduced to basic or ultimate elements out of which in reverse law in its totality can be extracted. Thus law, as a set of norms, is reduced to imperatives or commands (Kelsen), to certain psychological states (e.g., feelings as in Ehrlich's famous overtones, cf. *infra*, 139–40). Law is also defined by actors, persons and their social features, their roles and positions (e.g., the position of a compulsory deciding third person who is not related to the conflicting parties). Law was for purposes of definition reduced to certain statements, e.g., the predictions of future court actions. O. W. Holmes' famous definition of law should be understood in this way: "the prophecies of what the courts will do in fact" (Holmes 1952, 73). Unlike other legal realists Holmes does not identify law with (future) actions of the courts,[22] but rather with statements uttered in order to predict the future actions of the courts.

Such a reductionist strategy in the construction of theories might have—as I suggested before—a certain aesthetic charm and attraction. But it is not very helpful for empirical research. Here one deals with a great variety of elements that are multifariously related to all kinds of legal rules—unaffected by reductionist and other "purely theoretical" considerations like the presented ones.

[21] Nelken 1996; Van Hoecke 2002; Luhmann, the autopoietic one, regards legal communications as the basic elements of a legal system (cf. *infra*, 168).

[22] As in the definition given by Max Radin (1963, 15): "Since [...] our law is what courts will decide it is evident that we must base our prophecies on our knowledge of the courts."

2.6. Dimensions of a Legal Order

In describing a legal order from a realist point of view one can opt for an *actor's* frame of reference, alluding to persons, groups, organizations, institutions and their properties—or one can opt for an *action's* frame of reference. In this case one analyses the (norm-related) activities of the relevant actors, encompassing the results of these activities, namely the content of promulgated norms, of the decisions issued or of arrangements made, etc.

One could start at the top level with lawmakers, i.e., persons, groups etc. that are in charge of legislative activities, the issuing of legal norms. These activities not only result in rules; they are norm-related also in the sense that they are supposed to be performed according to the rules of issuing or of changing norms, in general, in accordance with competence rules that form a part of Hart's "secondary rules."

On a second level one deals with public officials, with what Weber called the "legal staff," i.e., persons, organisations etc. who are professionally in charge of the administration of justice, of norm application, interpretation and the enforcement of official rules and decisions. In a broad sense the legal staff also includes legal scholars (so far as they are professionally in charge of making norm-related interpretative proposals). The actions of judges, prosecutors, lawyers, policemen, bailiffs and state administrative bodies include decisions, interpretations, doctrines, enforcement activities etc.

On the societal bottom private individuals are located. The focus of analysis of this everyman's world lies in legally relevant social activities: rule abiding behavior or norm transgressions, in the use that is made of legal rules (use-rules), e.g., in making contracts, wills, establishing companies, etc. One can analyse their general knowledge, opinions, beliefs and attitudes about or towards legal norms and institutions.

From a developmental point of view the top level of lawmaking is the latest stage. Law, however, does not start at the bottom. It is only the establishment and societal mobilization of rudimentary forms of a legal staff that brings law into existence. On the bottom level as such law does not yet exist. I shall allude to this assertion *infra* in the discussion of Ehrlich's "pluralist" approach (cf. sec. 3.2.4).

2.7. Functions of Law

The manifold contributions that deal with the "functions of law" often are characterized by an ambiguity about what "function" might mean: Is reference made to the aims, the objectives of a legal order or is the analysis concerned with the real effects of legal norms and a whole legal order? In what follows I have collected a set of assertions that are made about the functions

of law arranged according to the three dimensions. In any case one should ask whether law really does fulfil these functions and to what degree.

1. For the lawmaker legal provisions serve as a means in order to achieve certain ends. The function of law consists in *social control*, social engineering or the steering of social processes. Law is efficacious insofar as the legislative ends are achieved. Its aims are reached mainly by prohibiting, prescribing or permitting a certain type of behavior, by the threat of sanctions or by offering incentives. Either the performance of the wanted behavior itself or, rather, the effects of this behavior contribute to the efficacy of the norms. This instrumental conception of lawmaking predominates nowadays.

2. Norms and also court decisions might fulfil a *declarative function*, i.e., they decree what type of behavior will be officially accepted or condemned—without associating this declaration with an instrumental claim, i.e., leaving aside the question whether the expected behavior really will be performed or whether the norm will or can be enforced. Legislation thus comes close to what often is pejoratively named “symbolic politics.” The legislator has demonstrated seriously his will to achieve the best. The German Constitutional Court stated in a decision concerning abortion legislation:

> The law not only functions as an instrument in order to steer social processes according to sociological knowledge and predictions; it is also a permanent expression of ethical—and in consequence—legal evaluations of human actions. The law should say what for the individual is right and wrong.[23]

3. Legal procedures in the field of legislation and of the administration of justice also might serve a *legitimation function* insofar as the formally correct issuing of norms or decisions accounts for their validity.[24] Decisions by legislative bodies and public officials in general are by and large accepted if the procedural prerequisites are fulfilled. According to Max Weber legality is the predominant mode of legitimation today.

4. An important function of law consists in the *limitation of political power*. Legal rules should not only be instruments in the hands of lawmakers that attempt to achieve certain aims. The lawmaker himself should be bound by legal rules. He or she should rule via law under the rule of law. At the collapse of socialist regimes legal scholars demanded, against the purely instru-

[23] Bundesverfassungsgericht 25.2.1975 (on § 218 of the German Penal Code), in: Neue Juristische Wochenschrift 1975, 580.

[24] From a detached point of view, validity means the existence of norms (in contrast to derogated or fictious norms). Validity, however, is also understood as the obligation to comply with a (valid) norm. Within our multidimensional model, one could ask then whether this obligation holds for the members of the legal staff only or whether “everyman” is obliged to obey the valid legal rules instead of reading them as informative predictions about future court decisions.

mental conception of law in Marxist-Leninist legal theory, the acknowledgement of law as "*Maß der Macht*" (measure of power or limit on power).

5. Traditionally the function of *conflict resolution*, or to put it more neutrally, the adjustment of trouble cases, is located on the level of the legal staff. This objective is derived from the very basic idea of law as a social institution designed to break the chain of private vengeance (cf. *infra*, sec. 3.1.2.1). According to Luhmann, law does not solve or reduce conflicts. Rather it multiplies conflict opportunities (Luhmann 1984, 518, 535). At the beginning of legal evolution, law probably was used to control the extreme outburst of public reactions in the face of an infringement of norms (ibid., 455), yet it now makes conflicts communicable. It serves the continuation of communication by other means (ibid., 511). On a pre-court level—"in the shadow of the law" (Mnookin and Kornhauser 1979)—the mere anticipation of a possible juridification of a conflict might have an appeasing function. In many cases, however, the thematization of law, the employment of lawyers or the threat to mobilize courts intensifies the conflict. The pacification of a dispute finally follows from the issuing of a binding decision that can be enforced if necessary by state power. The decision might be "accepted" because it was issued according to established rules

6. A core function of legal rules which is often neglected is their *constitutive role*. By performing certain actions correctly, i.e., in accordance with constitutive rules innumerable social facts are constituted. In this way positions, organizations, procedures, competences of the legal staff as well as of the legislative and administrative bodies are created. This happens without any threat of sanctions. The "sanction" of an incorrect use is not illegality but invalidity. In the social field the majority of positions is created by the (correct) use of legal rules: the position as a citizen, a student, an employer or an employee, as a spouse, etc. The use of legal "use rules" brings into existence all kinds of social institutional facts on the basis of which certain activities then become possible. One can create a corporation, one can institute a civil marriage with its rights and obligations, can write a last will, establish a worker's council, etc. These are activities that cannot be performed "naturally," as "brute facts" (like killing another person, living together as man and wife, etc.). What Pattaro calls "types" might be constitutive for the *description* of a "token" *as* a certain token, e.g., the labelling of an activity as murder according to the "type" in a norm of the penal code. This activity, however, is actually not constituted by the "type." The constitutive force of legal rules, i.e., their faculty to create new facts lies in acts performed according to what Neil MacCormick (1974, 102) has named "institutive rules" as the initial part of constitutive rules. If these institutive rules are used correctly (making a contract, a marriage, etc.), then "consequential rules" connect these institutional facts with certain legal consequences that form a part of the "meaning" of a contract, a marriage, etc. Law therefore is ubiquitous: Our roles, positions

and options in everyday life—in the workplace, in the family, as a consumer, tenant, etc.—are brought about by the correct use of institutive rules which together with the consequential rules constitute the social network of institutional facts. Once used these rules recede into the social background and our everyday attention is no longer focused on them.

7. In the realm of legally relevant social activities legal rules are rarely thematized; usually they are brought to our attention only if conflicts arise. In everyday life legal rules serve the function of *securing* (*normative*) *expectations*. They stabilize or strengthen our action orientation—but not by being present as a permanent object of our attention (although this might be the case in a jurist's mind), rather they operate as a safeguard in the background of almost every kind of social action (cf. Luhmann 1981, 269).

To repeat: It is always an open question whether these various functions actually will be fulfilled.

Chapter 3

EXTRA-LEGAL FOUNDATIONS OF LAW—VARIATIONS ON LEGALLY EXTERNAL FOUNDATIONS

While the distinction between an external and internal point of view of an (observing) actor and an (acting) observer was introduced on the level of intersubjectively related individuals, the following core part of this volume uses the distinction between external and internal with respect to the topic of the foundations of an entire legal system or legal order and its various dimensions. The analysis is conducted on a collective or holistic level. It combines a hermeneutic point of view, attempting to understand the authors to whom I refer, with statements of facts related to norms.

I start with extra-legal foundations through which the origin, the development, the effects, and functions of law might be explained. Basic "foundational" concepts will be introduced and elucidated in this context. Epistemological foundations will be dealt with briefly as far as the logic of explanation is concerned (cf. *infra*, chap. 7). Moral foundations form a part of extra-legal foundations in the sense of moral attitudes and beliefs (e.g., in the legitimacy of a legal order). I mainly treat them as an empirically observable set of variables, not within a normative discourse. However, there will be occasions in which the empirical and conceptual analysis necessarily leads to normative issues as such.[1] The whole collection of foundations may be incomplete; I do not claim to provide an entire overview. Nor can one find an obvious principle of how to arrange the foundational variations, neither historically nor systematically. At the end I shall try to propose a systematic scheme.

3.1. Transcendent Foundations of Law

3.1.1. Mythological Foundations of Law

The starting point appears to be historically remote. However, one has to bear in mind that myths are revived time and again. Apparently they are used to respond to fundamental needs of making sense of the world, of making intelligible natural as well as social conditions. (In fact, both are fused in a cosmological unity.) Often they narratively report about the origin of the cosmos, of social institutions, of norms, sometimes even about the origin of law. Greek tragedies will serve as an example.

[1] At the end of the Durkheim sec. 3.2.3.2 (3d) and in chapter 4 in the case of all three authors (Kelsen, Luhmann, Fuller).

3.1.1.1. On the Notion of Myth

The notion of myth is an ambiguous one.[2] In opposition to the *logos*, it has a negative connotation: It implies an untrue story, a lie (lat. *fabula*). On the other hand, myth is considered definitely to have a useful function. Employed for instruction, it unfolds circumstances in a narrative and (often picturesque?) graphic way. In its poetic character, it is not merely held to be aesthetically valuable. For the purposes of ethnography, the history of religion, and the study of antiquity—that is, for a scientific "mythology"—myth also serves as a valuable source for the explanation of humanity's phase of infancy (*infantia generis humani*). This positive aspect is sometimes overstated by explicitly anti-rationalist endeavours (e.g., of L. Klages) to revive myth as indispensable, particularly in modern times. According to A. Baeumler, myth is rooted in "timeless primeval times," in the "ancient origins of human soul." In a "disenchanted" modernity, myths are used in a functional way: Carl Gustav Jung's analytical psychology presupposes the continuing presence of myths and employs them as a key to dreams or for the specification of collective archetypes. An explicitly political application is propagated by G. Sorel ("social myth")—leading to Arthur Rosenberg's *Der Mythus des XX. Jahrhunderts* (published in 1930).

While the utilization of the term "myth" has grown almost ubiquitous, today, the negative connotations appear to predominate again. We recognize the legitimizing function of certain myths, lacking of course any transcendence. Partly, these represent collectively unrecognized patterns of interpreting the world. Partly, in a kind of belated *Priestertrugstheorie* (theory of deception by priests), a deliberate instrumentalization is insinuated, e.g., speaking of the Marxian "myth of revolution" or of antifascism as the "foundational myth" of the GDR (Zimmering 2000). Initially, this was the service the notion of ideology performed. Also in recent legal theory one can find the use of the notion of "myth": Peter Goodrich (1987, 77) declares the distinction between a core and a penumbra of meaning in legal concepts to be a "myth" that distracts from the insight that historical and particular "forms of life" determine the content of legal rules.

In the context of ancient Greek tragedy, in what follows, I will mean by a myth a narrative held to be true that reaches back to prehistoric, undated times (*in illo tempore*); that extends from the divine (or heroic) into the human sphere. As an explanation of the world's genesis, not only "physical" myths of creation are to be found, which interpret forces of nature animistically; there are also "ethical" myths: Narratives about the emergence of societal institutions and regulations. Consequently we encounter the Gods on the one hand as a personification of forces of nature, on the other hand as

[2] On modern "mythology," see Blumenberg 1971 and 1979.

a personification of ethical principles. In this sort of myth, the explanatory and the legitimatizing functions are not separated: A genetic-narrative explanation is connected with a legitimatization of the cosmos.

3.1.1.2. The *Oresteia* of Aeschylus

Aeschylus (525/4–456/5 B.C.) came to Athens in 468. Before, he had lived mostly in Syracuse, to which he returned in 458, the year his *Oresteia* was first performed in public.[3] For legal theory, particularly the third part of this *œuvre* is of relevance: *The Eumenides*.[4] It treats the establishment of a court, the Areopagus, to end a blood feud. Originally, the Areopagus—that is the "Hill of Ares" (*areios pagos*)—was the site where Ares had slain Halirrhotios, son of Poseidon, and where the trial of the Gods against him later took place. Also located on the Areopagus were the altars of the Erinyes. Thus, the place itself has a mythological origin. Now, its appellation becomes the name of a court.

In the *Oresteia*, the Gods are still active: Apollo incites Orestes to revenge the murder of his father; later on Athena appears and—coming from an even earlier layer of mythology—the Erinyes, as a chorus.

The narrative is formed by a series of bloody events: Agamemnon was killed by his wife Clytaemnestra and her lover Aegisthus, in fact at the behest of Apollo. Orestes faces the dilemma of being called upon to kill his mother to revenge his father. But the story reaches back even further. The line Orestes descends from is accursed. Tantalos, King of Lydia, first attracted the wrath of the Gods when he tried to delude them with a dish—which was nobody else but his cut-up son Pelops. The almost restored Pelops is then cursed by Myrtilos the charioteer after a dubious manoeuvre during a chariot race for Hippodameia, daughter of Pelops' adversary and father-in-law Oinomaos, King of Pisa in Elis.

Between the offspring of Pelops, who has by the time become King of Pisa in Elis, a network of sex & crime develops that makes modern spectacles look petty. The sons of Pelops, Atreus (King of Mycenae) and Thyestes, feud with one another bitterly (but only after having killed their half-brother Chrysippos together, which brought upon them a curse by Pelops). The wife of Atreus, Aërope, has cuckolded her husband with Thyestes. This leads to an unrelenting enmity between the brothers, which is fuelled even more by the Gods. Atreus kills the first three sons of Thyestes (and presents them to him, as it seems to have been quite traditional in his clan, as a dish). Thyestes asks an oracle for advice on how to take revenge. The only solution presented to

[3] A (different) version by Euripides ("Orestes") was put on stage in 408 B.C.

[4] The *Oresteia* of Aeschylus—"perhaps the greatest achievement of the human mind" (Algernon C. Swinburne, quoted in Meier 1993, 117)—is composed of three parts: "Agamemnon," "The Libation Bearer," ("Choephoroi"), and "The Eumenides."

him is to sire a son with his daughter who would then avenge him. Disguising himself with his daughter Pelopia, he begets Aegisthus, who shall grow up into a particularly sinister fiend. In the course of all this Uncle Atreus has married Pelopia, who then kills herself, when she gets word of the incest. Predictably, Aegisthus kills Atreus, whereupon Thyestes becomes King of Mycenae.

The sons of Atreus, Agamemnon (then King of Mycenae) and Menelaos (King of Sparta), marry the daughters of Tyndareos (previous King of Sparta), Clytaemnestra and Helena. As is well known, these will not prove to be particularly lucky marriages. Earlier, Clytaemnestra had been married to another Tantalos, this one a son of Thyestes, who had to be assassinated by Agamemnon first. When Agamemnon then goes to war against Troy, she decides to live with Aegisthus. Agamemnon himself finds a mistress in Cassandra whom he does not hesitate to bring home. Both, Agamemnon and Cassandra, are slain by Aegisthus and Clytaemnestra on their return. Agamemnon's son Orestes (who would later become King of Sparta, Argos, and Mycenae) then revenges his father by killing the couple Aegisthus and Clytaemnestra. This is the spine-creeping and ill-fated case history.

In this genealogy, it is not only the permanence of curse and revenge that is significant. This part of Greek mythology also allows us to draw some general conclusions. The transition from the Gods via the mythological king unto the heroes of the Iliad comes about in the form of a genealogic series which remains peculiarly timeless, at any rate at least undated. We are given, however, precise designations of space, that is, of the sovereign territories of the kings. But we are not told how old they became or when they lived. The definition of (dominated) space precedes the determination of time.

This is particularly significant when compared with the chronological narrative of the Old Testament. There the indications of the age of the individual generations are so precise, that one could later hit on the idea of calculating the exact day of Genesis on this basis.[5] By contrast, Greek chronology begins quite late; the Olympic Games have been dated only since 776 B.C.

This part of the Greek mythology is also a key to the relation between the Gods and Men—between transcendence and temporality: The Gods, especially Zeus, are still constantly present appearing in the most various non-human disguises—e.g., Zeus who, as a swan, begets Helena with Leda. But also humans experience a metamorphosis: For example, according to one record, Menelaos becomes immortal after his death and is admitted to the Elysian Fields. Again, the Old Testament can be seen as the contrast: Here, the one God stays bodily distant from Men; He is only present through his word. It is

[5] For example, Bishop James Ussher (1580–1656) assessed that Creation happened on 23 October 4004 B.C. (*Annalen*, published in 1650–1654); the Anglo-Saxon monk Beda (673–735) calculated 18 March 3952 B.C. (*De temporum ratione*, published in 725).

only in the New Testament that God becomes "flesh," that the "Son of God" walks on Earth, spreads the Gospel, sacrifices Himself, and is resurrected with the promise of the immortality of all human souls.

We return to the *Oresteia*: A never-ending bond of feud has been tied. "*Now force clash with force—right with right*" (The Libation Bearers, v. 448). Orestes, hounded by the Erinyes, claims that as instigator Apollo had promised him exemption from guilt and pain:

I say to my friends in public: I killed my mother,
not with a little justice. She was stained
with father's murder, she was cursed by god.
And the magic spells that fired up my daring?
One comes first. The Seer of Delphi who declared,
"Go through with this and you go free of guilt.
Fail and—"
I can't repeat the punishment.
What bow could hit the crest of so much pain? (Ibid., vv. 1024ff.)

The Delphic priestess sends Orestes to Athens where a tribunal is to be founded (Eum., vv. 83ff.).

The chorus of the Erinyes condemns Apollo's promise:

– You—child of Zeus—you, a common thief!

– Young god, you have ridden down the powers
proud with age. You worship the suppliant,
the godless man who tears his parent's heart–

– The matricide, you steal him away, and you a god!
– Guilt both ways, and who can call it justice? (Eum., vv. 150–5)

The Erinyes are concerned only to revenge crimes between blood relatives (that is, the killing of Clytaemnestra by Orestes), but not a crime between (not related) spouses (Agamemnon murdered by Clytaemnestra). Today, to give greater weight to kinship (between parents and children) in comparison to marital bonds may appear peculiar. But it is the protection of just this kinship that the ancient Titanic deities, the Erinyes, represent against the more recent Olympic Gods, Apollo and Athena. This is not about the pros and cons of the blood feud in general; it was none other than Apollo himself who imposed blood revenge against his mother on Orestes. But as it seems, Apollo does not take the blood feud as a principle, when he considers legitimate a blood revenge for a killing between non-related persons. For the more traditional Erinyes, however, a revenge for the assassination of one's spouse is out of question. The chorega: "That murder would not destroy one's flesh and blood" (ibid., v. 210; also ibid., v. 611).

Then, Athena appears (ibid., vv. 408ff.). The Erinyes charge her with the decision (v. 446). But Athena does not feel able to judge the case—quite as-

tounding for a goddess. According to tradition, Orestes has well expiated by bringing a blood sacrifice; but the Erinyes will not yield. They threaten to inflict great pain on the city if their will is not to be fulfilled. It is in this dilemma that Athena creates the Areopagus as an aristocratic institution:

But since the matter comes to rest on us,
I will appoint the judges of manslaughter,
swear them in, and found a tribunal here
for all time to come.

My contestants,
summon your trusted witnesses and proofs,
your defenders under oath to help your cause.
And I will pick the finest men of Athens,
return and decide the issue fairly, truly–
bound to our oaths, our spirits bent on justice. (Ibid., vv. 497ff.)

The trial begins with Apollo's intervention as a witness for Orestes:

I am the one who purged his bloody hands.
His champion too, I share responsibility
for his mother's execution.
Bring on the trial.
You know the rules, now turn them into justice. (Ibid., vv. 584ff.)

For this purpose, Apollo refers to his father Zeus as the highest deity:

This is his justice—omnipotent, I warn you.
Bend to the will of Zeus. No oath can match
the power of the Father. (Ibid., vv. 626ff.)

In response, the chorus attacks Zeus and emphasizes once again the mother's assassination by her son. Thereupon, Apollo falls back on a very special argumentation. He invokes the image of a mother reduced to a mere host for a guest.

The woman you call the mother of the child
is not the parent, just a nurse to the seed,
the new-sown seed that grows and swells inside her.
The *man* is the source of life—the one who mounts. (Ibid., vv. 666ff.)

"The father can father forth without a mother" (ibid., v. 673)—to which Athena herself is proof. What follows, is the "speech of foundation" of Athena:

And now
if you would hear my law, you men of Greece,
you who will judge the first trial of bloodshed.

Now and forever more, for Aegeus' people
this will be the court where judges reign.

This is the Crag of Ares, where the Amazons
pitched their tents when they came marching down
on Theseus, full tilt in their fury, erecting
a new city to overarch his city, towers thrust
against his towers—they sacrificed to Ares,
named this rock from that day onwards Ares' Crag.

Here from the heights, terror and reverence,
my people's kindred powers
will hold them from injustice through the day
and through the mild night. Never pollute
our law with innovations. No, my citizens,
foul a clear well and you will suffer thirst.

Neither anarchy nor tyranny, my people.
Worship the Mean, I urge you,
shore it up with reverence and never
banish terror from the gates, not outright.
Where is the righteous man who knows no fear?
The stronger your fear, your reverence for the just,
the stronger your country's wall and city's safety,
stronger by far than all men else possess
in Scythias's rugged steppes of Pelops' level plain.
Untouched by lust for spoil, this court of law
majestic, swift to fury, rising above you
as you sleep, our night watch always wakeful,
guardian of our land—I found it here and now.

So I urge you, Athens. I have drawn this out
to rouse you to your future. You must rise,
each man must cast his lot and judge the case,
reverent to his oath. Now I have finished. (Ibid., vv. 693–725)

Apparently, there is no consultation between the judges. They just hand in their voting stones. Before the polling, Athena awards the last vote to herself and votes for Orestes. An early traitor to the women's movement, she takes up the "anti-feminist" argumentation of Apollo:

No mother gave me birth.
I honour the male, in all things but marriage.
Yes, with all my heart I am my Father's child. (Ibid., vv. 751ff.)

And she decides: "Even if the vote is equal, Orestes wins" (ibid., v. 756)—and so it happens. Is the formation of law in the preservation of patriarchal power?

The Erinyes rage with fury. They want to stick to their "old law." Now, the recognition of the new court on the part of the losers is at stake. Repeatedly interrupted by a chorus wild with rage, Athena argues that the Erinyes were not actually losers, as the equality of votes showed clearly. She stresses the role of Zeus and of witness Apollo in the case. She promises to the Erinyes "glis-

tening thrones" (ibid., v. 818) in Athens; they would be in high honour; she assures them a seat of honour and considerable competences in Athens. "Theirs to rule the lives of men, it is their fated power" (ibid., vv. 942ff.). They would be in charge of the well-being of the city ("that Fury like a beast will never rampage through the land," ibid, vv. 991ff.).

Eventually, the Erinyes agree. Phylogenetically, this lays the foundations of the precedence of the *polis* over the *genos*.[6] On the world's stage there has now appeared a court that is formed by persons not related to the parties and that is vested with the competence to pass a binding judgement. The topos of the *Oresteia* can be translated into modern terms: The establishment of a court in a wider sense—that is, of the position of a third not related to the parties who can take and enforce binding decisions—can be seen as the beginning of law and state.[7] We will see the reasons for a similar step in the contractual *ius-naturale* doctrine: How is it possible to pass from the state of nature (*status naturalis*) into a civil state (*status civilis*)? In this sense, the state of nature and the social contract can be seen as a myth as well: as an undated (hi)story to explain and to justify a civil state, a competent State—without Gods, of course.

To the advantage of a better understanding of the text itself, let us consider its contemporary historical context. In the beginning, the Areopagus was an oligarchic institution. As members, Dracon had appointed the so-called Epithets, 51 judges elected from the nobility under the chairmanship of archon Basileus (an uneven number obviating a decision by the final ballot of a goddess). Competent for criminal jurisdiction, the court held meetings in five locations including the Areopagus. After the Constitution promulgated by Solon (ca. 640–559 B.C.) in 594, the Areopagus was formed by an indefinite (uneven or even?) number of meritorious former archons who held the office for life. Its jurisdiction was enlarged too. Now, the Areopagus also watched over the laws and their execution; it could lodge an objection against the Council and against the People's Assembly. Religious convictions and education were placed under its supervision.

It would be entirely inadequate to consider the ancient Greek tragedies solely as autonomous works of art. The political relevance of their performances and the political role of the poets can be evaluated by, e.g., visualizing Sophocles (497–407/6 B.C.) not only as a poet but also as a strategist in Perikles' surroundings. The latter had introduced a theatre tax (*Theorikon*) for the citizens of Athens—an early form of subsidies of cultural institutions, surely not for apolitical reasons.

[6] Cf. Wolf 1950, 410, 416. On Aeschylus, see ibid., 340–424; on the *Oresteia*, see ibid., 379ff.; and on the *Eumenides*, see especially 407ff. Of course, E. Wolf does not accept this evolutionist interpretation (ibid., 413). Considering the conflicting Gods' inability to recognise and enforce justice, he sees at work "supernatural powers," "a general dispensation of being," and "fate" (ibid., 415).

[7] Cf. *supra*, 24, with reference to Schwartz and Miller 1964.

The *Oresteia* of Aeschylus was performed in 458 B.C. (it brought him victory in the tragics' agon), two years after the competences of the Areopagus had been cut back by the reforms of Ephialtes (under the rule of Perikles). The democratic party had defeated the Oligarchs. The priority had shifted among the judicial organs of Athens, that is, the court of the Ephethetes (competent for non-premeditated homicide), the Areopagus (competent for murder, mixing of poison, bodily injury with intent to kill, and arson—but now no longer for the control of the civil servants), and the Heliaia, the people's court formed by 5,000 members elected yearly, with its dicasteries. The Areopagus retained only its function as blood court; it lost its competence to supervise legality.

This historical context seems to allow only one conclusion: The *Oresteia*, with its legitimatory creation myth of the Areopagus, has to be seen as a conservative, pro-aristocratic tragedy. Solely the end, describing the integration of the Erinyes into Athens's commonwealth, could also be seen as an apotheosis of contemporary Athens. Perhaps it is also possible to infer that Aeschylus wanted to reinforce the restriction of the Areopagus to a court's functions with this myth about its origin.[8]

It is not clear if the old competences were restored to the Areopagus after the Peloponnesian War (413–404). In the 350s, in his *Areopagiticos*, orator Isokrates pleads for a return to the old order characterized by a primacy of the Areopagus.[9] This court is said to have existed unto the times of Vespasian (Emperor from 69–79 A.D.).

Around A.D. 50, apostle Paul's second missionary voyage leads him also to Athens. There, on the Areopagus, he gives a speech containing criticism of the Athenians' polytheism. He has found an altar dedicated to "the unknown God." "Whom therefore ye ignorantly worship, him declare I unto you" (Acta Apost. 17, 23). And it is to be a harsh message:

> And the times of this ignorance God winked at; but now commandeth all men every where to repent: Because he hath appointed a day, in the which he will judge the world in righteousness by that man whom he hath ordained; whereof he hath given assurance unto all men, in that he hath raised him from the dead. (Acta Apost. 17, 30–1)

On the site once occupied by a court of mythological origin, the Last Judgement is eschatologically heralded—by the way, to resume our underlying

[8] It is not clear if the reforms undertaken by Ephialtes did not merely lay down a state that had evolved before. Cf. Welwei 1999, 91–5; on the *Oresteia*, see ibid., 95. The "supertemporal validity" of the exhortation for civil concord in the Eumenides which Welwei assumes does not, however, suspend from an interpretation in the historical context. On this point, opinions obviously diverge. Cf. Latacz 1993, 130: The *Oresteia* as a "caustic requital for the deprivation of the Areopagus by Ephialtes." Cf. Meier 1993, 368ff.; Knox 1992, 275; Podlecki 1966, 96–100; Marr 1993; MacLeod 1982, 126–7; Nicolai 1988; Flashar 1997. On the Areopagus, see de Bruyn 1995; Hall 1990 (also on research literature); Wallace 1985.

[9] It was the title of this speech that inspired John Milton's "*Areopagitica*" almost 2,000 years later, a criticism of the censorship law passed by the Presbyterian parliament in 1643.

(anti-)feminist subject, the Judgement through a man. Though this Judgement still seems to be a long time in coming, the patriarchy will find its institutionalization in the Christian church. Among the listeners on the Areopagus was a certain Dionysos (Acta Apost. 17, 34) who, converted by Paul, is said to have become the first bishop of Athens. As a member of the Areopagus, he was called Dionysos Areopagita.[10] He represents the early beginnings of an institutionalization of Christianity. Among the converted listeners was also a woman named Damaris. Of her we shall not hear any more.

The Supreme Court of today's Athens is called Areopagus. In this way, a myth continues as a present-day source of legitimacy.

3.1.1.3. Sophocles' *Antigone*[11]

Sophocles' *Antigone* (first performed in 442 B.C.) is not based on a myth any more; the gods no longer appear. They—especially Zeus and Athena, but also Eros and Aphrodite—still are worshipped and invoked by the human protagonists ("for Zeus' sake") and are referred to in support of one's own opinion. They serve for an explanation of earthly incidents: "the gods have righted once again our storm-tossed ship of state, now safe in port" (*Antigone*, Creon, v. 163). "[…] something more than natural at work," the chorus suspects (ibid., v. 278). A whirlwind is taken as a sign from the gods (ibid., vv. 454ff.). Athena is only present as an idol (ibid., v. 1185). But the gods are above all present through the "immutable unwritten laws of Heaven" (ibid., vv. 454ff.) to which Antigone refers. It was Hades who demanded the same treatment for everybody: A funeral for Eteocles as well as Polyneikes (ibid., v. 519; see also on Hades, ibid., v. 811). Creon points out that Hades was Antigone's only god (ibid., v. 777): "'tis labour lost, to reverence the dead" (ibid., v. 780). Haemon (Antigone's fiancé) reproaches Creon for abusing the law of the "gods below" (ibid., v. 749). Thus, every side instrumentalizes the gods for his or her own position. But then, how should the unwritten laws of the gods be revealed? What kind of an existence do these laws have? They might be perceivable through reason given to man—although apparently not to all men—by the gods themselves (ibid., vv. 683ff.). In so far, as this is so, the divine law is at the same time a law of reason. Against them, Creon asserts reasons of state as well as of his own authority (the state being the prince's property, ibid, v. 738; the holy dignity of the prince, ibid., v. 744).

[10] Around A.D. 500, a Christian published several important essays in Greek under that name, in which he treated above all the theory of God as the "*purposeless One.*" Since he pretended (bringing prestige to himself) to be the figure mentioned in the apostle's story, he later came to be called pseudo-Dionysios Areopagita.

[11] I quote from the translation of F. Storr 1956 and refer also to the translation of Richard Jebb 1962.

This kind of altogether unspecific reference to the gods is only possible because the gods themselves do not appear, do not intervene to express and to enforce their authentic position. They have not even revealed themselves in Holy Scriptures which could be subject to the exegetic efforts of human intelligence. Left alone by the gods, Antigone breaks into lament:

For succour, call on any man for help?
Alas, my piety is impious deemed.
Well, if such justice is approved of heaven,
I shall be taught by suffering my sin;
But if the sin is theirs, O may they suffer
No worse ills than the wrongs they do to me. (Ibid., vv. 920ff.)

The gods do not intervene, they do not protect Antigone, and they don't reprimand Creon. It is only Teiresias the prophet—apparently endowed by the gods with a special organ for reason—who manages to make Creon listen to reason again (ibid., vv. 988ff.) by threatening to bring the Erinyes into play. Creon himself, by contrast, had not been given a similar capacity by the gods. He interprets his delusion as divinely-ordained, a god smote him from above (ibid., v. 1272). The chorus' final appeal (ibid., v. 1350) that the reverence towards the gods must be inviolate, sounds a bit too much of a Sunday's sermon, if the gift of the gods can just as well be taken away by them.

Here, the "godless" conflict between man and his principles is at stake (according to Hegel: between the principle of State and the principle of Family). Creon stands for the undemocratic, etatist-authoritarian principle; Antigone defends the (family) law and the obligation to bury her brother; Haemon eventually speaks for the people (see ibid., v. 733: "The Theban commons with one voice say, No"—which causes Creon's mentioned justifications).

Where do law and justice come from in the Greek-Roman world, if the gods themselves—in particular Zeus—are everything but virtuous, at least according to our current tame standards? The world of the pre-Olympic as well as of the Olympic gods is characterized by quarrel and revenge, there is betrayal, rape and murder. That is to say, it displays very human traits. Athena, too, is not the goddess of virtue she is portrayed as in the *Oresteia*. During the Trojan War, she took sides for Ulysses, and also in the *Oresteia* her biased vote is decisive. By contrast, the Israelite's God is "the Just," He has imposed norms to be observed by the Israelites to realize the rule of God, despite all the problems of theodicy (e.g., in the case of the Sacrifice of Abraham and the life of Job). And Jesus spoke: "There is no one good but one, that is, God" (Mk. 10, 18; cf. Mt. 19, 17). This kind of moral purity is made possible by locating God as a transcendent being, remote from human affairs and understanding.

3.1.2. Religious Foundations of Law

In the abrahmitish religions, however, God establishes a visible and normatively rigid contact with mankind. The myth is in a certain sense timeless. In Greek mythology there are only undated successions of generations. The history in the Bible, however, unfolds in real time. A religious foundation of law is often found in the monotheistic religions based on written revelations.[12] A God absolutely transcending the world exists who is present among men by his creation, his laws, his son or his word.

The creation of a monopoly of (state) force can be reconstructed in the stories of the Old Testament. Elements are the interruption of vengeance by the mark of Cain, the canalisation of private revenge, the prerogative of divine retribution delegated to human institutions and the limitation of retribution by the *ius talionis*. The New Testament is much more reluctant to formulate principles of statepower and the law because of its eschatological tendencies. Christian doctrine, however, had ample opportunity to turn to the immanent problems of social order given the permanent postponement of redemption. St. Thomas Aquinas has—drawing from "the philosopher" (Aristotle)—formed the first great summary of the philosophy of law and the state. In Thomas' work explanation and justification of the *lex humana* are achieved by its subordination to the *lex aeterna*, *divina* and *naturalis*. In Islam, the last abrahimitish Religion, the top of the normative order is formed by a text derived from direct divine inspiration of the prophet delivered to him by the Archangel Gabriel. This text forms, together with the deeds and opinions of the prophet, the source—the narrative base of justification and in this sense the foundation—for Islamic law, the *sharia*.

I shall not deal with the relationship between law and religion in modern societies as a reflexive interaction, e.g., concerning questions of religious freedom, judicial treatment of religious controversies, tensions between religious organizations and the state, etc. (cf. on these topics, e.g., Ahdar 2000). Instead the focus lies on the "origin" of law as it is manifested in the religious sources. And because the following analysis will be restricted to the abrahamitish religions (Jewish, Christian, Islamic) this means: on holy texts. The God in question is not far away from the world, the laws are not Antigone's indeterminate, unwritten laws. In the monotheistic religions God reveals himself in specific holy texts. They are the authoritative, literally interpreted bases for argumentation. What these texts tell us is nevertheless an indiscriminate mixture of explanation and justification.

[12] Monotheism, however, is not necessarily connected with revelation through texts. What is presumed to be the first monotheistic religion—the religious system of Echnaton in Egypt, around 1400 B.C.—did not have any textual basis. The only God in this religion, Aton, revealed himself in the light of the sun. His only voice was Echnaton, the son of God; he did not form a congregation and had no successor. After his death, this religion disappeared.

3.1.2.1. The Process of Civilization in Jewish Law

The Jewish religion as one of the great monotheistic religions is distinguished by a transcendent god who has revealed himself to the world, to humanity (or certain chosen human beings), most importantly at Sinai and generally in the holy texts of the Thora with its legalistic and narrative parts. Most important in this respect are the Second book of Moses (Exodus) (more precisely Exod. 20 with the Ten Commandments[13]) and the other books of Moses containing detailed divine laws. The exegesis of holy texts remains a well-guarded tradition in the Mischna and Gemara, i.e., in the Talmud with its legalistic (Halacha) and narrative (Haggada) parts and in the Midrasch.

The idea of Jews as the chosen people, the covenant with God, forms a special connection of the divine and worldly sphere surmounting the absolute transcendence of the divine.[14] If the Jewish people, however, do not obey to the commands of God, terrible revenge is threatened (Lev. 26, 14ff.). In exchange for conformity God offers a "promised land" with holy places. Since the fall of the Temple, the Jewish religion—like Islam—knows no supreme institutionalized instance of belief like the Catholic Church. It does not, however, clearly separate state authorities and believers.

I do not want to give an overview of the development of the Jewish law and its interpretation. I want to refer to the "foundational" holy text and will try then to show its connection to a law for the world. The divine source of law is given—but how does the word of God establish itself in the world?

A fundamental step of the evolution of law seems to be—as we have seen in the discussion of the *Oresteia*—the limitation of revenge, illustrated by the neutralization of the Erinyes. This limitation of revenge is achieved by religious means in the Thora and afterwards through the canalization of revenge by means of the state. Revenge (*naqam*) has the function to re-establish a disturbed order. It is not to be practised endlessly and indiscriminately. By God's command the chain of vengeance is broken. Cain's mark is a stop sign:

> "I shall be a vagrant and a wanderer on earth, and anyone who meets me can kill me." The LORD answered him, "No: if anyone kills Cain, Cain shall be avenged sevenfold." So the LORD put a mark on Cain, in order that anyone meeting him should not kill him. (Gen. 4, 14–5)

A further interruption or limitation of revenge is the establishment of especially protected areas. They are spaces chosen by God (Exod. 21, 12–3), en-

[13] Van Seters 2002 argues that the Covenant Code (Exodus 20, 23; 22, 33) cannot be taken as the "foundation of Hebrew Law." In fact it comes later than the laws in Deuteronomy and the Holiness Code.

[14] The connection of God and the world is not only established by the Commandments, but by another legal instrument as well: a contract. Has God really made a contract with the Jewish people? Or did he make an offer the Jewish had to accept? Cf. Walzer, Lorberbaum and Zohar 2000.

tered for protection if somebody has committed manslaughter (Num. 35, 10ff.; Deut. 19, 4).

A limitation of private revenge also is achieved by limiting the group of people entitled to retribution. Revenge stops to be a right of everybody. Only some relatives are allowed to execute revenge, more precisely the closest male relative (Judg. 8, 18ff.).

There are many forms which distribute the competence of retribution between God and human beings. In principle God alone is entitled to take revenge. The retributive God acts as a judge. Punishment and vengeance are his privilege (the interpretation of Deut. 32, 35 and 41, according to R. 12, 19). The persons concerned can plead for retribution but cannot execute it themselves: "Oh LORD, thou God of vengeance, thou God of vengeance, show thyself" (Ps. 94, 1).

Man may pray to God and beseech him to take vengeance: "LORD, thou knowest; remember me, LORD, and come to visit me, take vengeance for me on my persecutors" (Jer. 15, 15). "O LORD of Hosts, thou dost test the righteous and search the depths of the heart; to thee have I committed my cause, let me see thee take vengeance on them" (Jer. 20, 12). One has to be patient and wait for God's vengeance. "Do not think to repay evil for evil, wait for the LORD to deliver you" (Prov. 20, 22).

God wants to take vengeance upon his enemies (Isa. 1, 24), or upon his own people (Jer. 5, 9). There is a day of God's retribution (Isa. 34, 8; 63, 4; Jer. 46, 10). One year of grace is followed by a day of reckoning (Isa. 61, 2). "See, your God comes with vengeance, with dread retribution he comes to save you" (Isa. 35, 4). The sinners that live well on earth will be destroyed in the end by God (Ps. 73).

Sometimes God permits a human being explicitly to take revenge. E.g., he allows Jephtah to take vengeance upon the Ammonites (Judg. 11, 36). But in exchange he has to keep his promise and sacrifice his daughter (or her virginity?). Sometimes God demands revenge, e.g., the retribution on the Amalekiterians (Deut. 25, 17ff). God's command, a command of complete extinction, has to be obeyed literally. Saul, who does not do that, is rejected by God and loses his dignity as a king (1 Sam. 15, 1ff.). God orders Moses to take revenge upon the Midianites. For this purpose an army shall be recruited from the Israelite tribes (Num. 31, 1ff.). A different affair is regulated without divine intervention: Saul has become guilty, because he tried to destroy the Gibeonites, even though the Israelites had sworn to keep on peaceful terms with them. The Gibeonites give up revenge, demand and receive, however, as retribution from King David seven male descendants of Saul (2 Sam. 21, 1ff.): The vengeance upon Abner remains without retribution. King David only curses the family and the descendants of the murderer (2 Sam. 3, 27).

The "appropriation" of revenge by the state is achieved by its delegation to human beings and more precisely to special institutions and people fulfill-

ing certain roles in society. God gives up the monopoly of vengeance. The "state"—even though rudimentary—takes his place.

A further step apart from this clarification of competences is formed by the limitation of the content of revenge. It has to be materially circumscribed; it has to be "proportionate." This is the core of the famous verse "eye for eye…" (Exod. 21, 23ff.; Lev. 24, 19ff.). In addition to that, collective responsibility is abolished. Guilt is imputed individually: "Fathers shall not be put to death for their children, nor children for their fathers; a man shall be put to death only for his own sin" (Deut. 24, 16).

The Old Testament, too, knows the duty of love, the commands of charity: Love your neighbor as you love yourself (Lev. 19, 17–8). Justice is the highest value in a religion of law like the Jewish religion. There are no saints, but there are people who are just. In the Old Testament Noah is one of the just. Therefore, he is chosen and remains alive, to enable a new beginning of creation (Gen. 6, 8–9). Abraham, too, is just and God knows that he will pass on this property to his children (Gen. 18, 19). According to Jewish tradition the world will exist as long as there are 36 anonymous, unknown just people ("lamedwownik" = thirty-six) in each generation. They are distinguished by their humility, modesty, limitless mercy and—most of all—by their ignorance of their status.

3.1.2.2. Christian Elements

The world as the creation of God has become a profane object to be used by human beings. Nature no longer is a field for polytheistic and mythological projections nor does it serve as the model of cosmic order. The Stoic law of nature, however, remains—as *lex naturae* for the external nature or *lex naturalis* for the human nature—a normative standard. (Human nature, however, is—most clearly in Augustine—divided into an original nature and, since the original sin, a fallen nature [*natura lapsa*].) The transcendence of God has been bridged not only by the creation of the world and the revelation of the Holy Book; what is more, God has become for a certain historical period of time a human being in Jesus Christ.

The foundations of Christianity were laid over the centuries as a composition of the reports on the messages and the life of Jesus, the additions of St. Paul that were included in the New Testament, doctrines of Christian scholars who referred to elements of Roman and Greek philosophers (mainly the Stoa, Plato and later) and after the reception via Islamic scholars, to Aristotle (the "*philosophus*" in Aquinas), and the autonomous decisions of the ecumenical councils after the establishment of an ecclesiastical organization.

"In consequence of the New Testament's eschatological withdrawal from the world" (Weber 1978, 829)[15] it is impossible to find an elaborate collection

[15] In the German original: *eschatologische Weltabgewandtheit*.

of (legal) norms for the transitory life on earth. Because of the Last Judgment soon to come, there are very few remarks on social justice, justice here below that can be found in the New Testament, e.g., compared to the multitude of provisions in the Old Testament.[16] Norms guiding our behavior here on earth can rarely be found. The Ten Commandments are still valid. The Golden Rule is renewed (Mt. 7, 12; L. 6, 31). In the Sermon on the Mount Jesus Christ demands not only charity to your neighbour but even to your enemy (Mt. 5, 43ff. in contrast to Lev. 19, 18; cf. also R. 13, 8). Jesus propagates reconciliation instead of vengeance. He favors a life in poverty and demands to give money to the poor. There is, however, compared to the Koran, no prohibition of alcohol.

The old prohibition of private vengeance remains (Mt. 5, 38ff.). It is God, and not mankind, who will overcome evil (R. 12, 19ff.), finally on Judgement Day (Heb. 10, 29ff.; Rev. 6, 10; 19, 2). The worldly empire or a Christian community, however, can be entrusted by God with executing punishment against the wrongdoers. On the empire as "*ekdikos*" cf. R. 13, 4: "For he [i.e., the reigning power] is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: For he is the minister of God, a revenger to execute wrath upon him that doeth evil" (On the community as a "revenger" cf. 2 Cor. 7, 11).

The most radical maxim against vengeance was stated by Jesus (Mt. 5, 39; similar L. 6, 29): "But I say unto you, That ye resist not evil: But whosoever shall smite thee on thy right cheek, turn to him the other also." The prohibition of vengeance is trumped by the obligation to love one's enemy. It is a long way from this maxim to the doctrine of a "preemptive strike" proclaimed by a Christian politician of our days.

Swearing is forbidden (Mt. 5, 34). To mention another of these rare norms: "This gospel of the kingdom shall be preached in all the world for a witness unto all nations" (Mt. 24, 14; cf. Mt. 28, 19) was interpreted as an obligation to proselytize.

Paul demands obedience to the worldly powers, which includes paying taxes (R. 13, 1–7). A Christian should not take an external point of view to state authorities. It is necessary to obey "not only for wrath, but also for conscience sake" (R. 13, 5; cf. on various kinds of obedience Col. 3, 18ff. "And whatsoever ye do, do it heartily, as to the Lord, and not unto men"; Col. 3, 23).

The New Testament prescribes rules concerning marriage and divorce. An absolute prohibition of divorce and re-marriage is proclaimed (Mt. 19, 3–8; Mk. 10, 2–9; L. 16, 18; R. 7, 2f.; 1 Cor., 7, 10–1, 39). The issue of monogamy is not clearly settled. Later interpretations understand the remarks of Jesus in

[16] The Old Testament (Exod. 22, 24/25; Lev. 25, 36; Deut. 23, 20) states that it had long been the practice among Christian communities to prohibit charging interest on a poor fellow-countryman; the same prohibition is generalized with reference to L. 6, 35: "lend, hoping for nothing again."

Mt. 19, 3–9 as a prohibition of polygamy; the explicit reference that he makes to Gen. 2, 24 and Gen. 1, 27 clearly shows that Jesus is speaking about divorce.[17] It was only after the institutionalization of a Christian church that monogamy became the exclusive form of marriage—with various exceptions (cf. the official permissions by Luther and Melanchton or after the Thirty Years' War): rather polygamy than divorce. The absolute prohibition of divorce was relativized in secular marriage law only during the last century in Catholic countries. Not to forget, the wife has to submit unto her husband (Eph. 5, 22–3; Col. 3, 18; 1 Pet. 3, 1).

The surrender of the hope of the Savior's imminent return and the turn to the worldly life took a long time. In the first centuries after Christ's existence on earth we regularly find movements of withdrawal from the world, e.g., in early monastic and other spiritual groups who searched for private access to God, as well as counter-movements that attempted to institutionalize a church on earth permanently. In A.D. 380 Theodosius I outlawed all religions except the Christian one thus accepting it as the sole official religion. At the same time Augustine (354–430) accomplished a decisive turn towards the world in Christian doctrine, dealing with matters of the *civitas terrena* (*vel diaboli*)—eschatologically orientated towards the *civitas Dei*—and questions of the organization of the church. While the first Fathers of the Church were radical pacifists, Augustine developed a doctrine of the *bellum iustum,* thus providing worldly authorities with opportune justifications. As a consequence of his doctrine of original sin, i.e., the inborn human concupiscence, he advocated the requirement of secular sanctions and *disciplina*.

The small set of norms that can be found in Christ's sermons and messages (and the additional counsels of St. Paul) were insufficient to guide everyday behavior down on earth nor could they be used to establish social institutions, including a "church." Hence after the turn to the secular world the lack of guiding rules was experienced not only as a normative deficiency, but instead it offered the opportunity for a wide scope of normative inventions. The rules of the Holy Book could be supplemented by recourse to traditions of antiquity, mainly Stoic philosophy and the Platonic tradition, later, and mainly via Aquinas, Aristotle.

Because of the complex foundations of Christian religion itself, i.e., the blending of disparate elements, it is difficult to find homogenous Christian foundations of law. In the Christian tradition we find a plurality of movements, groups, separations from the mainstream, etc.: Resistance to the institutionalization of a church and in favor of a personal access to God in mystical groups; movements against the pollution of the pure Biblical doctrine by external, even pagan elements (Luther's attack against Aristotle and his own

[17] The Old Testament accepts polygamy: see, e.g., Lev. 18, 18; Deut. 21, 15–17; on divorce, see, e.g., Deut. 24, 1–4.

principle of "*sola scriptura*"); mendicant orders that criticized by their way of living in poverty the worldliness of the church (e.g., the fight against simony); anti-authoritarian movements against a close liaison of church and state; pacifists who refer to the sermon on the mount—"Blessed are the peacemakers ..." (Mt. 5, 9)—and there are others who fight against evil in the name of justice, rather than peace (referring to, e.g., Apocalypsis ch. 19). This group includes some who even favor the use of state power to enforce justice on earth, which extend to military means (referring to R. 13).

Within the church and the official Christian doctrine law could be developed under the following conditions: institutionalization of a hierarchical organization; relative freedom from the Holy Book, i.e., no dogmatic restriction to a sacred text, thus enabling a rather autonomous development of Christian doctrine; engagement in worldly, especially economic and political affairs. This happened in the long struggle between the church and the secular *imperium.* The Bible does not offer a clear solution of the question: What are the things to be rendered unto Caesar and what unto God? (Mt. 22, 21 = Mk. 12, 17 = L. 20, 25) What was made out of the "two-sword-doctrine" that Pope Gelasius I offered in his letter of A.D. 494 with a strange reference to L. 22, 38? Did the secular emperor receive one sword as well as the church from God? Were both originally given to the church and then one transferred to the emperor? Does the emperor as a sinful human creature depend on the church for his salvation? New arguments were required to support interpretations of the dichotomy as a hierarchy or as existing in parallel.

The autonomous development of Christian institutions with a hierarchy of offices was accompanied by the elaboration of Canon Law (with the Decretum Gratiani about 1140 as the basis of the Corpus Iuris Canonici) that could serve as a model for secular law, esp. in the fields of procedural law and court organization. Canon law became one of the models for secular law on the road to rationality (Weber 1978, 829; Berman 1985). Theology and jurisprudence, however, were separate faculties within the European universities, permitting both the development of secular law, especially via the reception of the Roman law, and the elaboration of theological doctrines of justice and law. Another contribution of the Christian doctrine to secular law was asserted more recently, namely the idea of universal equality of men and of human dignity. Basic human rights are now based on the idea of human beings as God's image (with reference to the Old Testament, e.g., Gen. 1, 26–7; Psalm 8, 5–6). The words of the Bible bearing on the idea of universal equality—"There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus" (Gal. 3, 28)[18]—are contradicted, however, by the long tradition of slavery, crusades, colonialism, discrimination

[18] This idea is taken up by Hegel: "A human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc" (Hegel 1991, § 209).

against women, etc. in Christian countries, justified by representatives of Christian institutions. Only recently mutual recognition as autonomous individuals is interpreted to be a consequence of the commandment of love (apparently the love of your neighbour, not the love of God). Thus the Christian precept of love would form the foundation of law (Huber 1999, 203ff.).

Just a brief discussion of Aquinas, the most prominent theological scholar who intensively dealt with problems of justice and law, locating the foundations of human law in reference to Stoic elements and mainly to Aristotle (Aquinas, *Summa Theologiae* I-II, 90–105; II-II, 57–79). The well-known sequence of *lex aeterna* (including *lex divina*)—*lex naturalis*[19]—*lex humana* forms a hierarchical order of top-down-justification, with the lower levels "participating" in the higher ones, and of concretization via *determinationes* and *conclusiones*. This order can also be interpreted as a temporal sequence of norms because there must have existed before the *lex divina*, e.g., the Ten Commandments, unwritten laws of God to which Noah, the just, abided and laws that are known to pagan people who never had heard of the Holy Book (cf. R. 2, 14–5). Therefore, *lex aeterna* is not identical with *lex divina*. *Lex divina* contains the rules revealed by God in the Holy Book. They are written rules, i.e., given texts that can be interpreted, while *lex aeterna* forms an ideal object of human knowledge and *ratiocinatio*, a starting point for a comprehensive philosophical doctrine.

Aquinas defines *lex aeterna* as "Nothing other than the exemplar of divine wisdom as directing the motions and acts of everything" (*Summa Theologiae* I-II, qu. 93, art. 1 resp.).[20] Augustine, in contrast, said: "The true eternal law is the divine reason and/or the will of God commanding to preserve the natural order and prohibiting to perturb it" (*Contra Faustum* XXII, 27; my translation).[21] These different notions nourished a debate over centuries about the relationship between *ratio* and *voluntas* (reason and will) of God. The conflict between reason and will can be reconstructed as one about the limits of human capacities: Is the world an intelligible object of human knowledge, is it possible to justify and to explain all states of affairs or is there something that is not accessible to human understanding, which cannot be justified or explained in a rational way?

In Aquinas we not only find a hierarchical foundation of law—in which explanation and justification are not distinguished[22]—there is also a teleologi-

[19] The *lex naturalis*, revealed to human beings and then an object of rational knowledge, contains mainly rules from Stoic doctrines: One is to do good and avoid evil; *neminem laedere*, *suum cuique tribuere*, *honeste vivere*.

[20] "Nihil aliud est quam ratio divinae sapentiae, secundum quod est directiva omnium actuum et motionum."

[21] "Lex vero aeterna est ratio divina vel voluntas Dei ordinem naturalem conservari iubens, perturbari vetans."

[22] Here it is important to see that the Christian tradition makes no sharp distinction between explanation and justification. The two converge in God. The "natural" is the "correct" and "ens et bonum convertuntur."

cal argument that human law necessarily is orientated towards the realization of the *bonum commune* promulgated by those who have to care for the community.[23] And the legislator has to take into account the limits of the *conditio humana*. People must be able to abide by the legal rules and should not be put under excessive demands of a rigid morality (Aquinas, *Summa Theologiae* I-II, qu. 96, art. 2 resp). Hence, human law is conceived as separate from morality and religious injunctions as well.

3.1.2.3. Islamic Law[24]

It is not only since September 11, 2001 that the Islamic world has attracted the attention of the occident during recent decades. The revolution in Iran (1979), the long-standing Palestine conflict, the introduction of the *sharia* in Sudan, Nigeria, the Taliban regime, etc. were, in Western eyes, issues on which different cultural points of views have clashed. In our context I choose as a starting point the brief remarks that Max Weber made about Islamic law in his *Sociology of Law* (Weber 1978, 818–22). One may doubt the adequacy of his descriptive accounts; however, two distinctive features of Islamic law in contrast to the development of occidental law that Weber points out are still of interest:

(1) Only in the Christian occident did the separation between theocratic, sacred law and secular law take place. This stage of developmental differentiation has not been reached in Islamic states.

(2) In contrast to occidental law which arrived at the peak of formal rationality during the 19th century, Islamic law never has gotten beyond the lower stage of material rationality, if it has reached this level at all.

(1) Theocracy and Secularization, Religion and State

Islam forms the third and, according to its founder, final great monotheist religion based on a holy Scripture with which the Jewish-Christian tradition comes to an end. Muhammad is the last prophet in the succession of Adam, Henoch, Abraham,[25] Jacob, Joseph, David, Moses, Salih, Hud, Jesus (who was not the son of God), and John the Baptist.

[23] Law in general is defined as follows: “Law is nought else than an ordinance of reason for the common good made by the authority who has care of the community and promulgated” (Aquinas, *Summa Theologiae* I–II, qu. 90, art. 4 resp.). (“Nihil aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgate.”)

[24] Introductory literature: Schacht 1964; Coulson 1964 and 1969; Linant de Bellefonds 1965; Nagel 2001. A bibliography can be found in Makdisi and Makdisi 1995.

[25] Abraham and his son Ismael laid the basis of the Ka’ba with the Black Stone (*Hadjar al-Aswad*) (sura 2: 127). According to sura 3:67, Abraham was not a Jew.

The Koran is the immediate word of God revealed to Muhammad by the archangel Gabriel (sura 2:97), the "reliable spirit" (sura 26:193). It is not only a human report on the commands of God, on the history of Israel or the life and words of Jesus. A Christian can read the Bible as a human work written down during a certain historical period. He or she can make assumptions about the authors and their circumstances, bearing in mind time and place of origin. During centuries of exegesis sophisticated hermeneutic strategies and rules could be developed by the "people of the book" (as Jews and Christians are named in the Koran, e.g., sura 3:64). This reflexive relationship between text and reader could not develop in the case of the Koran. It is the unquestionable word of God, revealed in "*clear* Arabian language" (sura 26:195; cf. 16:103, 39:28). It should be orally presented (*Qur'ān* means reading, lecture). In its essence it cannot be translated into other languages.

Islamic law has its foundation in this incontestable holy book. The Koran contains, in contrast to the ambiguities of the New Testament, many detailed prescriptions for daily life and political and economic matters. It is only the hierarchy of sources of Islamic law, i.e., the *sharia* (= the way), that opens explicitly the way to more flexible interpretations. The *sharia* consists of the Koran itself; in addition: the *hadith,* the reports of Muhammad's comrades about his instructions and acts (finished two to three centuries after the death of the prophet). Presumably there exist about 600,000 *hadiths* of which by the authentic hadith collectors only some thousand are accepted as true. The s*unna*, the good custom, contains the sum of Muhammad's collected statements, decisions and acts; also included in the *sharia* is the consensual tradition of the legal experts (*ulemas*), what is called *idjma* and the *qijas*, i.e., deduction, analogies etc. for new problems and a kind of customary law, usages, conventions that are established in society. As a residual there remains some kind of discretion based on legal-religious expertise (*raj*).

There is no clearly defined realm of secular law (like in the occident and its autonomous development of canon law). The *sharia* embodies religious-moral obligations, rules for family life including matters of inheritance, contracts, property, taxes, criminal as well as procedural issues, administrative regulations, etc. It is a mixture of religious, moral, legal rules interpreted and applied by *ulemas* who are legal experts and, at the same time, leaders of the religious community (conducting, e.g., the Friday prayer). Judges (*kadis*) are trained in special branches of theological faculties (*medrese*), often associated to a mosque. As a consequence of the lack of differentiation within the normative material the *sharia* penetrates the whole life with a religious, cultic, legal, moral, conventional, ethical network. In an Islamic society there is no separation between religion, political power and social order.

Islam belongs to the state-founding religions. At the beginning we find a successful integration of five competing tribes in Medina (in 622 A.D.—the Christian calendar permitted) according to religious commands instead of tra-

ditional genealogical patterns. Islam implies a transtribale potential of integration (Ammann 2001). "And obey God and His Messenger and do not dissent together, lest you should fail and wither away. And persevere, for God is with the persevering" (sura 8:46). "If you dissent on anything, refer it to God and the Messenger, if you believe in God and the Last Day" (sura 4:59).

Allah and the prophet are the supreme arbitrators. Allah himself guards the holy commands (sura 15:9). Nowadays on earth there is no highest binding authority in religious matters (like the Pope for Catholics). The relationship between God and the individual Muslim is less mediated by ecclesiastical institutions as is the case for a Christian believer. Religious-moral-legal controversies therefore are rather an "everyman"-problem, rather than an issue resolved within a formal, mainly hierarchical order of competences.

Compared to Christian faith, Islam is much more worldly orientated. Muhammad was a secular emperor, a political leader, like Moses and unlike Jesus, leading holy wars (*ghazweh*), dominating a territory and founding communities on earth. The paradoxical thing, however, is that the Koran, and the *sharia* in general, does not contain provisions for the institutionalization of state authorities. Indeed, it is in fact the Catholic church that, leaving behind its eschatological origin, was able after its secular turn to develop patterns of a hierarchical structure that could be transferred to a secular state as a formal institution.

Weber has pointed out (cf. *supra*) that in the European tradition canon law was able to serve as a model for the rationalization of secular law. The occident, in addition, could revert to Roman law in particular to promote the development of private law. In Europe a parallel evolution of ecclesiastical and secular law and institutions could take place. Weber also has emphasized the separation of theological and legal education in the occident. In the Islamic orient there never were battles between state and religious groups nor among conflicting religious movements (e.g., between the Sunnis and Shiites or among the four sunnit legal schools) that led—like in Europe after the bloody religiously motivated civil wars of the 16th and 17th century—to a separation between state and religion, i.e., a neutralization of state authorities in religious matters and civil religious liberty. The fixation on a holy text and related sources together with a lack of a hierarchical organization that could issue binding provisions has impeded systematic lawmaking. Positive law as a separate context of meaning independent of the religious leadership could be created only occasionally.

What is lacking in Islamic law, despite the more worldly orientation of Muhammad's message, is a distinctive public law containing provisions that constitute and limit state competences, with procedural rules for the creation of binding decisions and the participation of the citizens. There are proposals for an Islamic constitution. The highest authority, however, in the Sunnit branch—the Al-Azhar university (which is a religious institution as well)—it-

self is in control only of uncertain and limited competences. And the constitution of the "Islamic Republic Iran" cannot with all its provisions be derived from the Koran and other holy sources. They do not provide anything for the determination of constitutional structures, procedures and competences.[26]

Islamic law emphasizes the values of the *umma*, i.e., the community of Muslims, and of the family as its core. Christian communitarists might be delighted (though probably not with the participation of the community in stoning an adulterous member). There is a peculiar relationship between perpetrator and victim (and the relatives) that restrains the state monopoly of sanctions: The perpetrator can purify himself by doing a good action. The victim (or the bereaved) can pardon the perpetrator, even preserve him from being executed. Taking justice into ones own hands reaches beyond the limits of preventive self-defence. "And surely those who defend themselves after being wronged, such shall have no way against them" (sura 42: 41).

The appreciation of the *umma* in constitutional matters leads to a diffuse relationship between an absolute monarch and his people, e.g., in Saudi-Arabia. Since 1992 there exists a "basic order for the government," allegedly founded on the *sharia.* The Koran prescribes "consultations" between ruler and ruled (sura 42:38 and cf. 3:159, 27:32). Insofar as the king himself appoints the members of the council (*Madjlis asch-Schura*) this model introduces a pseudo-democratic element according to the pre-constitutional ideal of the "good ruler."

The essential question in our context, which not only concerns the foundations of law in general, is whether the basic principles of the rule of law, of democracy and human rights can be realized on an Islamic foundation. Are they inherent elements of this religious base or is a radical secularization of law and the political order required, a separation and functional differentiation of law, politics and religion?

The case of modern Turkey indicates that a radical secularization of an Islamic society was only possible by dictatorial means. The developmental dictatorship of Atatürk imposed modern, Western structures upon a traditional Islamic society: with the abolition of the caliphate in 1924, the introduction and enforcement of a dress code, of the Christian calendar, the Latin alphabet. Western culture was adopted, e.g., in the school system, and Western codifications were introduced (besides many other codes, e.g., the Swiss ZGB in 1926). Religion is not a privatized matter but remains under state control. Turkey is an excellent example of the distinction between the law in the books and the law in action. The Western law cannot be interpreted as the "expression" of a popular spirit (the "*Volksgeist*"), a gradually developed culture. Rather it serves as an instrument in order to achieve a profound social change.

[26] In analogy, the basic principles of the Soviet state could not be derived from the writings of Marx and Engels.

A secular regime dominates a still Islamic society. Secularization is, in the background, guaranteed by military force, i.e., by the national security council which is nothing else but the institutionalization of a coup d'etat (the last one took place "unconstitutionally" in 1980). As in colonial countries the problem arises under what conditions this radical top down legislation can be efficacious. The societal, i.e., religious and cultural conditions are not the foundation of state law; rather they form restrictive conditions an authoritarian legislation has to cope with. If one looks only at the legal surface, the law in the books, e.g., from the point of view of the E.U. members, deliberating whether to admit Turkey or not, one might observe remarkable progress towards the principles of the rule of law, democracy, human rights and protection of minorities. But what about the law in action: Are these principles accepted and practiced in society, in communities and families, e.g., concerning the position and role of women? Not to mention the actual activities of the legal staff which can rarely be investigated.

The counter-tendencies of re-islamization of law and state in many countries during the last decades[27] are not only an expression of popular beliefs. Parts of family law and criminal law were renewed according to Islamic standards in Tunisia (1956), Morocco (1958), Iraq (1959), Libya (1972–1974). The whole body of Islamic law, the *sharia* was introduced in Iran (1979–1982), in the northern parts of Sudan (1991), in Afghanistan (1996) by the Taliban regime, and 1999 in the northern provinces of Nigeria. The revival of Islamic fundamentalism, at least in Nigeria, has no autochthonous "religious foundation." In this case it is obvious that a variety of reasons have contributed to the introduction of the *sharia*. It is an attempt to compensate for the loss of power of the Northern provinces that wish to participate in the wealth of the oil industry of the South. Jurisdiction according to the *sharia* permits the establishment of autonomous power structures in the North that can gain legitimacy by appealing to traditional sentiments of justice among the people, in particular in the fight against criminality. Islam can be presented as the religion of law and order. Thus re-islamization turns out as a way of instrumentalizing the religious "foundations."

(2) Why does Islamic law not reach the level of formal rationality?

Max Weber pointed out the relationship between secularization and rationalization. He insisted, however, on the religious foundations of secular processes: The rationality of secular law is derived to a considerable part from the

[27] A revival of "true" Islam took place so early as the 18th century, when the Wahabit movement and the Saudi family established a political regime in Arabia. Most Islamic countries adopted European models during the 19th century. The achievement of political autonomy during the 20th century often resulted in revitalizing parts of the *sharia*.

development of canon law; the "spirit of capitalism" has its roots in Calvinism. (But is there also a Calvinist foundation of civil law?) The occidental process of rationalization took place in many fields (economy, political organization, law, religion, art, etc.). In the realm of law Weber describes the development in different dimensions: according to the differentiation of legal categories (sacred/profane, criminal/civil/public law, formal/material, objective/subjective, etc.); according to the leading professions ("law prophets," legal honoratiores, lawyers with formal legal training) (Weber 1978, 882–3). And he theoretically constructs four stages of rationalization of lawmaking and lawfinding by combining two dichotomies: rational/irrational and formal/substantive (material) (ibid., 656–7).

formally irrational	no intellectual control, e.g., recourse to oracles
substantively irrational	concrete evaluation of a particular case on an ethical, emotional, political basis
substantively rational	decision according to ethical imperatives, political maxims
formally rational	a) adherence to external characteristics of the facts, sense data; casuistry b) logical interpretation of meaning; consistent complex of abstract legal propositions

The notion of "*khadi* justice" Weber uses in order to characterize the theocratic lawfinding in Islamic countries. This notion, however, appears again when he alludes to the English courts of justices of the peace and the German "popular justice of the jury" (*Geschworenengerichte*).[28] This way of administering justice is, according to Weber, extremely "informal," focused on material justice, opportunistic, unsystematic, lacking rational reasons.

Certain essential characteristics of Islamic organization, viz., the absence of [Church] Councils as well as of doctrinal infallibility [like that ascribed to the papal office], influenced the development of the sacred law in the direction of a stereotyped "jurists' law." Actually, however, the direct applicability of sacred law was limited to certain fundamental institutions within a range of substantive legal domain only slightly more inclusive than that of medieval canon law. However, the universalism which was claimed by the sacred tradition resulted in the fact that inevitable innovations had to be supported either by a *fetwa*, which could almost always be obtained in a particular case, sometimes in good faith and sometimes through trickery, or by the disputatious casuistry of the several competing orthodox schools. As a consequence of these factors,

[28] Weber 1978, 823, on *khadi* justice in Islamic countries; see ibid., 814, on *Geschworenengerichte* in England: "But the courts of justices of the peace, which dealt with the daily troubles and misdemeanors of the masses, were informal and representative of khadi-justice to an extent completely unknown on the Continent." On *Geschworenengerichte* in Germany, see ibid., 892.

together with the already mentioned inadequacy of the formal rationality of juridical thought, systematic lawmaking, aiming at legal uniformity or consistency, was impossible. The sacred law could not be disregarded; nor could it, despite many adaptations, be really carried out in practice. As in the Roman system, officially licensed jurists (*muftis*, with the *Sheikh-ül-Islam* at their head) can be called on for opinions by the khadis or the parties as the occasion arises. Their opinions are authoritative, but they also vary from person to person; like the opinions of oracles, they are given without any statement or rational reasons. Thus they actually increase the irrationality of the sacred law rather than contribute, however slightly, to its rationalization. (Weber 1978, 821)

In Weber's stage model *khadi* justice oscillates somewhere between the first and the third level. Similar depreciating statements can be found in more recent authors.[29]

Are logical interpretation and abstract thinking Greek to scholars of Islamic law? One can take that literally: Rational Greek philosophy, in particular the logic and metaphysics of Aristotle, were saved by Islamic scholars during the 9th–12th century for the medieval occident. Has this heritage been lost?[30]

How does Islamic law react to the pressure that is put on societies by economic modernization? Property law including commercial and corporation law has been codified in all Islamic states, following the western models, with the exceptions of Saudi-Arabia and Oman. In so doing *sharia* law is still respected in very subtle ways. In particular the prohibition of taking interest (sura 2: 275ff.) is interpreted rather as a provision against usury.[31] The prohibition of insurances is ingeniously integrated into stock-market and bank law. Instead of interest, models of participation in gains and losses are preferred. In order to comply with the religiously based prohibitions concerning pork, alcohol, pornography, gambling, armament, etc., special funds are established, listed in the Dow-Jones-Islamic-Market-Index. No banks, insurance and other such corporations are admitted that deal with the above mentioned goods—a small part of the business in these branches, however, is permitted (cf. Rodinson 1966).

Weber refers to a multiplicity of causes in order to explain the particular process of rationalization of law in the occident (Weber 1978, 882–3). Rationalization according to his stage model implies secularization. What were the

[29] See, e.g., Fikentscher 1975, 319, on the lack of rational means in legal argumentation. Experts in Islamic law contest this assessment.

[30] During the Christian crusades Muslims were horrified to see the invaders' use of ordeals (a clear case of formal irrationality in Weber's sense). Islamic procedural law admits oral and documentary evidence, and at that time admitted as well a restricted use of torture: Torture was more restricted than in Western Inquisition trials, and was used not so much to force confessions as to obtain substantial proof. Cf. Johansen 2001.

[31] Cf. the Cairo declaration of human rights in Islam, of August 5 1990, under art. 14: "Everyone is entitled to make legitimate profit, without monopolizing, defrauding or injuring others. In any case usury is forbidden."

conditions that could change the religious foundations or that could contribute to the rationalization of a separate secular law? Weber points out that economic conditions played an important role "but they have nowhere been decisive alone and by themselves." The "need for the purely formal certainty of the guaranty of legal enforcement" fosters formal legality. More important, however, were the tensions between the diverse political powers, e.g., the power of the *imperium* in relation to the powers of the kinship groups, the folk community and status groups, and generally the relations between theocratic and secular powers. In addition, the structure of the "legal notables" was significant for the development of law, a structure which also was largely dependent upon political factors.

I would add that in the Christian occident because of the eschatological character of the New Testament and the lack of detailed worldly provisions an autonomous secular law could be developed. Islamic law, in contrast, is in its roots more worldly orientated and at the same time permeated by religious and ethical considerations. Secularization of law in the Islamic world will not be brought about—if we extend Weber's explanation—solely by changing economic conditions. Political power relations as well as the structure of the legal-religious professions might be more significant factors.

According to Weber the pinnacle of formal rationality had been reached in continental *Begriffsjurisprudenz*. This achievement, however, was challenged by the demands of the free law movement and by legal ideologists of the labor movement.[32] While the claims of the free law movement can be interpreted in Weber's stage model as a regression to the level of material irrationality, the efforts of modern legal ideologists would be seen as an attempt to replace formal legality by substantive justice. Ethical norms should become more significant than juristic or conventional or traditional norms. According to Weber's model the recent Western human rights discourse, as a legal discourse, would also mean a step backward to the stage of material rationality. This stage, however, is achieved also in many parts of Islamic law in which "material" implies a compound of religious and ethical values. It is this stage at which, again according to Weber, the ineluctable and just as insoluble battle between the highest values takes place. These values do not only exist in an ideal sphere.

3.2. Immanent but Legally External Foundations of Law

3.2.1. Natural Foundations of Law

Foundations in the sense of extra-legal factors that could be used in order to explain the origin, the development and the given body of legal norms as well

[32] On the free law movement, see Weber 1978, 886–7, 894; on the legal ideologists of the labour movement, see ibid., 886.

as (extra-legal) conditions for the efficacy of law could be "natural" ones belonging to the environment, the extra-human sphere, like climate, the nature of the soil etc. By natural foundations one might also refer to human "nature," the internal sphere, which is the subject of biology or anthropology.

3.2.1.1. Natural, Extra-Human Foundations: Montesquieu

(1) The Approach

Montesquieu (1689–1755) is nowadays well known, or rather "honored" as a classic and thus reduced to an author who had written something about the English constitution, about the separation of powers and the role of the judge (as the mere "bouche qui prononce les paroles de la lois" with a social function "en quelque façon nulle"[33]). These quotations can be regularly found in pieces on Montesquieu. But one should not only read book 11, chap. 6 of the *Esprit des Lois*. What this book actually is about, is the attempt to give a more or less (rather less) systematic account of the travel reports of his time (Dodds 1929) mixed with references made to antique authors. These travel reports, the favorite bourgeois reading during the 18th century, produced a flood of information about foreign and rather exotic cultures. One reaction to them, besides extinguishing or colonializing them, was "to take the role of the other," i.e., describing one's own culture from the point of view, say, of a Huron American Indian. These are early contributions to anthropological studies of western societies, describing them from an external, somehow oblique perspective. And this is what Montesquieu did in his bestselling *Lettres Persanes* (published in 1721). Another reaction was, instead of producing an exotic thrill by talking about monstrous creatures and bizarre institutions, to describe and explain the variety of foreign cultures. And this Montesquieu did as well; and he did it in his *L' Esprit des Lois*. He collected multifarious features ("rapports") in order to explain the variety of social (and legal) institutions. He did not aim at justifying or criticizing them—like the natural law theorists, instead he attempted to explain them neutrally. This made him a precursor of modern sociology (Durkheim 1892; Cotta 1953). "In all this I only give their reasons, but do not justify their customs" (Montesquieu 1949, book 16, chap. 4).[34] In the first book he exposes the program of his analysis:

> Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: The political and civil laws of each nation ought to be only the particular cases in which human reason is applied.

[33] Montesquieu 1748, book 11, chap. 6 (the chapter on the English constitution). "Judges are no more than the mouth that pronounces the words of the law" (Montesquieu 1949, 159). "The judiciary is in some measures next to nothing" (Montesquieu 1949, 156).

[34] "Dans tout ceci je ne justifie pas les usages, mais j'en rends les raisons."

> They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.
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> They should be in relation to the nature and principle of each government: Whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.
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> They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: They should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.
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> This is what I have undertaken to perform in the following work. These relations I shall examine, since all these together constitute what I call the Spirit of Laws. (Montesquieu 1949, book 1, chap. 3)

Reading these paragraphs it becomes clear that Montesquieu does *not* draw important distinctions.

The notion of "law" is still ambivalent in Montesquieu, meaning laws of nature (natural laws or regularities) as well as laws of morality (or legal rules). This distinction to which we refer under the heading of Is and Ought was clearly introduced by David Hume (1711–1776) with whom Montesquieu corresponded.

And Montesquieu does not distinguish between the two types of "foundations": the genetic variables and, from an instrumental point of view, the restrictive conditions of the efficacy of legal regulations. Referring to these two types of factors or variables (genetic and restrictive) he explains on the one hand the creation and development of social institutions (including legal ones), on the other hand, he offers recommendations for a rational legislator who should take into account given and possibly restrictive conditions to which he should adapt in order to issue efficacious rules.

> If it be true that the temper of the mind and the passions of the heart are extremely different in different climates, the laws ought to be in relation both to the variety of those passions and to the variety of those tempers. (Montesquieu 1949, book 14, chap. 1)

> I do not deny that the climate may have produced a great part of the laws, manners, and customs of this nation; but I maintain that its manners and customs have a close connection with its laws. (Ibid., book 19, chap. 27)

Montesquieu is not a pure "naturalist" solely using natural variables in order explain human institutions. Among the genetic conditions (as well as the functional, restrictive ones) he mixes natural and human-made features. One could even identify a developmental sequence from natural and customarily determined to deliberately established institutions:

> Mankind are influenced by various causes: by the climate, by the religion, by the laws, by the maxims of government, by precedents, morals, and customs; whence is formed a general spirit of nations.

In proportion as, in every country, any one of these causes acts with more force, the other in the same degree are weakened. Nature and the climate rule almost alone over the savages; customs govern the Chinese; the laws tyrannize in Japan; morals had formerly all their influence at Sparta; maxims of government, and the ancient simplicity of manners, once prevailed at Rome. (Ibid., book 19, chap. 4)

But such an idea of a phylogenetic sequence of factors is not elaborated in Montesquieu.

(2) Counsel to the Legislator

In many chapters Montesquieu gives counsel to a rational legislator, i.e., one who attempts to issue norms that might be efficacious under given conditions. In the above mentioned programmatic paragraphs (ibid., book 1, chap. 3) he recommended:

– the laws should be adapted to the people for whom they are framed;
– they should be in relation to the natural conditions like climate, the quality of the soil, extent, number of inhabitants;
– they should be in relation to the mode of production (huntsmen, shepherds, trade and commerce etc.);
– they should have relation to the religion of the inhabitants;
– they should be in accordance with the degree of constitutional freedom;
– and the legislator should take into account the inclinations, manners and customs of the inhabitants, in general the "*esprit de la nation*" (ibid., book 19, chap. 5).

The legislator should not attempt to change manners and customs by legal norms. They should be modelled on new manners and customs.[35] But the legislator should not only adapt his legislation to given conditions. Sometimes legislative policy should also *counteract* "natural" tendencies. If the legislator cannot change the natural environment itself, e.g., the hot climate, he can have an impact on the social reactions to the environmental conditions.

Agriculture is the principal labor of man. The more the climate inclines him to shun this labor, the more the religion and laws of the country ought to incite him to it. (Ibid., book 14, chap. 6)

[35] "Laws are established, manners are inspired; these proceed from a general spirit, those from a particular institution: Now it is as dangerous, nay more so, to subvert the general spirit as to change a particular institution" (Montesquieu 1949, book 19, chap. 12). "We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws; this would have too much the air of tyranny: it would be better to change them by introducing other manners and other customs" (ibid., book 19, chap. 14).

There are countries where the excess of heat enervates the body, and renders men so slothful and dispirited that nothing but the fear of chastisement can oblige them to perform any laborious duty: Slavery is there more reconcilable to reason. (Ibid., book 15, chap. 7)[36]

It is then far from being true that to be incontinent is to follow the laws of nature; on the contrary, it is a violation of these laws, which can be observed only by behaving with modesty and discretion. […] When, therefore, the physical power of certain climates violates the natural law of the two sexes, and that of intelligent beings, it belongs to the legislature to make civil laws, with a view to opposing the nature of the climate and re-establishing the primitive laws. (Ibid., book 16, chap. 12)

Legislative adaptation to the "*esprit de la nation*" is limited by the basic principles of government:

It is the business of the legislature to follow the spirit of the nation, when it is not contrary to the principles of government; for we do nothing so well as when we act with freedom, and follow the bent of our natural genius. (Ibid., book 19, chap. 5)

Sometimes these principles are more important than the general spirit. But it is totally unclear in which cases the legislator should restrict his policy to the legal "reduplication" of the given manners and customs and when he should and could attempt to realize new aims.

(3) Explanations of Social Institutions

Counsel to the legislator is mixed with explanations of legislative activities. Variables that had to be taken into account from an instrumental point of view as restrictive conditions change their status and become explanatory variables.

Geographical factors play an important role as explanatory variables (cf. Kriesel 1968; Merquiol 1957): The *size of a country* might correlate with the type of political regime. Despotic regimes exist in large empires (in order to compensate for the long distance of communication and enforcement); monarchies one can find in medium size states and republics in small ones.

It is natural for a republic to have only a small territory; otherwise it cannot long subsist. (Montesquieu 1949, book 8, chap. 16)

A large empire supposes a despotic authority in the person who governs. It is necessary that the quickness of the prince's resolutions should supply the distance of the places they are sent to; that fear should prevent the remissness of the distant governor or magistrate; that the law should be derived from a single person, and should shift continually, according to the accidents which incessantly multiply in a state in proportion to its extent. (Ibid., book 8, chap. 19)[37]

[36] This leads to a moderate justification of slavery in Montesquieu (cf. Montesquieu 1949, book 15, chap. 8). But see ibid., book 15, chap. 1: Slavery is incompatible with non-despotic forms of government (i.e., monarchy, democracy, aristocracy).

[37] But there are exceptions: India is home to "an infinite number of petty states, which

If it be, therefore, the natural property of small states to be governed as a republic, of middling ones to be subject to a monarch, and of large empires to be swayed by a despotic prince; the consequence is, that in order to preserve the principles of the established government, the state must be supported in the extent it has acquired, and that the spirit of this state will alter in proportion as it contracts or extends its limits. (Ibid., book 8, chap. 20)

In Asia they have always had great empires; in Europe these could never subsist. Asia has larger plains [...]. Power in Asia ought, then, to be always despotic: For if their slavery was not severe they would make a division inconsistent with the nature of the country.

In Europe the natural division forms many nations of a moderate extent, in which the ruling by laws is not incompatible with the maintenance of the state: On the contrary, it is so favorable to it, that without this the state would fall into decay, and become a prey to its neighbors. It is this which has formed a genius for liberty that renders every part extremely difficult to be subdued and subjected to a foreign power, otherwise than by the laws and the advantage of commerce.

On the contrary, there reigns in Asia a servile spirit, which they have never been able to shake off, and it is impossible to find in all the histories of that country a single passage which discovers a freedom of spirit; we shall never see anything there but the excess of slavery. (Ibid., book 17, chap. 6)

It is not only the size of the country but also other morphological or topographical features that are important, e.g., whether it is an *island* or whether it is *flat* or *mountainous*. The *quality of the soil* may play an important role.[38]

These fertile provinces are always of a level surface, where the inhabitants are unable to dispute against a stronger power; they are then obliged to submit; and when they have once submitted, the spirit of liberty cannot return; the wealth of the country is a pledge of their fidelity. But in mountainous districts, as they have but little, they may preserve what they have. The liberty they enjoy, or, in other words, the government they are under, is the only blessing worthy of their defence. It reigns, therefore, more in mountainous and rugged countries than in those which nature seems to have most favored. (Ibid., book 18, chap. 2)

The inhabitants of islands have a higher relish for liberty than those of the continent. Islands are commonly of small extent;[39] one part of the people cannot be so easily employed to oppress the other; the sea separates them from great empires; tyranny cannot so well support itself within a small compass: Conquerors are stopped by the sea; and the islanders, being without the reach of their arms, more easily preserve their own laws. (Ibid., book 18, chap. 5)

The goodness of the land, in any country, naturally establishes subjection and dependence. […] Thus monarchy is more frequently found in fruitful countries, and a republican government in those which are not so. (Ibid., book 18, chap. 1)

Montesquieu became famous for his "theory of *climate*" (cf., e.g., Mercier 1953).

Upon the migration into Spain, the climate soon found a necessity for different laws. (Montesquieu 1949, book 14, chap. 14)

from causes that we have here no room to mention are rendered despotic" (Montesquieu 1949, book 16, chap. 10).

[38] On the role of the soil in general, see Montesquieu 1949, book 18, chap. 1ff.

[39] Again, we have an exception: "Japan is an exception to this, by its great extent as well as by its slavery" (Montesquieu 1949, book 18, chap. 5).

In this case there is a direct correlation between the climate and legislation. But in general there is no "automatic" correlation between climatic conditions and legal norms. Sometimes the aims of the legislator are achieved "naturally":

Regulations on the number of citizens depend greatly on circumstances. There are countries in which nature does all; the legislator then has nothing to do. What need is there of inducing men by laws to propagation when a fruitful climate yields a sufficient number of inhabitants? (Ibid., book 23, chap. 16)

In other cases the climate compels the legislator to issue certain confining regulations that might not be necessary under different conditions. Montesquieu takes his examples from the nice field of prohibition, still very much appreciated today:

The law of Mohammed, which prohibits the drinking of wine, is, therefore, fitted to the climate of Arabia: And, indeed, before Mohammed's time, water was the common drink of the Arabs. The law which forbade the Carthaginians to drink wine was a law of the climate; and, indeed, the climate of those two countries is pretty nearly the same.

Such a law would be improper for cold countries, where the climate seems to force them to a kind of national intemperance, very different from personal ebriety. Drunkenness predominates throughout the world, in proportion to the coldness and humidity of the climate. Go from the equator to the north pole, and you will find this vice increasing together with the degree of latitude. Go from the equator again to the south pole, and you will find the same vice travelling south, exactly in the same proportion.

It is very natural that where wine is contrary to the climate, and consequently to health, the excess of it should be more severely punished than in countries where intoxication produces very few bad effects to the person, fewer to the society, and where it does not make people frantic and wild, but only stupid and heavy. Hence those laws which inflicted a double punishment for crimes committed in drunkenness were applicable only to a personal, and not to a national, ebriety. A German drinks through custom, and a Spaniard by choice.[40]

[…] It is the variety of wants in different climates that first occasioned a difference in the manner of living, and this gave rise to a variety of laws. Where people are very communicative there must be particular laws, and others where there is but little communication. (Ibid., book 14, chap. 10)

Again there is a mixture of a genetic and an instrumental point of view. In this case climate is not the only independent variable. In addition he introduces as a consideration the degree of communication. Put in modern terms, Montesquieu applies "multivariate" models of explanation. And he also seems to be aware of what we would call now "intervening" variables, in this case it is religion:

The Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel is incompatible with the despotic rage with which a prince punishes his subjects, and exercises himself in cruelty. […] It is the Christian religion that, in spite of the extent of the empire and the influence of the climate, has hindered despotic power from being

[40] What do Germans do in Mallorca?

established in Ethiopia, and has carried into the heart of Africa the manners and laws of Europe. (Ibid., book 24, chap. 3)

The size of the empire together with hot climate foster despotic regimes—if religion does not intervene. But Montesquieu is not sophisticated enough to explain the correlation between extent + climate and religion.

In general Montesquieu does not employ developmental schemes in order to systematize the various countries. They are characterized without putting them into any rank order. But there is one famous paragraph in which Montesquieu sketches a theory of historical (including legal) progress according to the *mode of production*:

> The laws have a very great relation to the manner in which the several nations procure their subsistence. There should be a code of laws of a much larger extent for a nation attached to trade and navigation than for people who are content with cultivating the earth. There should be a much greater for the latter than for those who subsist by their flocks and herds. There must be a still greater for these than for such as live by hunting. (Ibid., book 18, chap. 8)

(4) Résumé

- Montesquieu mixes natural and normative (moral, legal) "laws."
- He mixes a genetic and an instrumental perspective, i.e., he uses natural conditions as explanatory patterns, and also as restrictive conditions for the legislator without distinguishing them systematically.
- The counsel to the legislator is rather opportunistic. It is not clear in which cases the legislator should simply adapt his rules to the given conditions (manners and customs) and when he should (and could) change them.
- Although Montesquieu starts his *Esprit* with some anti-Hobbesian remarks about human nature[41] they do not play any systematic role in his explanation of human institutions.
- He applies a plurality of natural, mental and socio-cultural variables that are not weighed according to their impact. There is also lacking the idea of a historical sequence of a growing predominance of man-made conditions for the explanation of human institutions and of a growing independence of the legislator from natural conditions.
- Nor does he classify the various societies according to an evolutionary rank order (as was done later with, e.g., the Tierra del Fuego Indians at the bottom and the Western Europeans on top). The idea of progress (*le progrès*) becomes dominant only after Montesquieu.[42]

[41] This is basically the faculty of conceiving of a Creator; he then enumerates four laws of nature: the quest for peace, the need to obtain food, the sexes' natural inclination for each other, and the desire to live in society (Montesquieu 1949, book 1, chap. 2).

[42] It was rather decline that he dealt with: *Considérations sur les causes de la grandeur des Romains et de leur décadence* (published in 1734).

(5) After Montesquieu

In the same year that *L' Esprit* appeared (1748) David *Hume* published his critique of the theory of climate.[43] Hume clearly distinguishes—in contrast to Montesquieu—between moral and physical causes. He provides many examples against the influence of natural causes, i.e., the "influence of air or climate." The logic is clear: Under the same or similar natural conditions one can find different "national characters" and under different natural conditions one can find similar characters or institutions. In the same country there exist synchronically different populations, e.g., Jews in their host country; likewise Europeans live without change of manners in their colonies. And also diachronically we can observe cultural changes within a constant natural environment: Ancient and modern Greeks are different, but not the climate in Greece. Similarities grow out of communication among nations. But there is one pattern that is constant in Hume as well as in Montesquieu: "people in the northern regions have a greater inclination to strong liquors, and those in the southern to love and women" (Hume 1875, 256). *Skol*!

Despite Hume's thorough critique, theories of climate remain a constant issue in the following decades, e.g., in Rousseau's *Contrat Social* (1941, III, 8). Among other variables (like expenditure of work, consumer customs, available food etc.) in Rouseeau climate plays an important role in explaining different types of government and also among the conditions a legislator has to take into account.

Gotthold Ephraim *Lessing* (1729–1781) established a theoretically continuous sequence in maintaining that states have "different climates, hence they have different needs and ways of satisfying them, hence they have different customs and manners, hence quite different moral philosophies (*Sittenlehren*), hence quite different religions" (Lessing 1956, 559; my translation).

Johann Gottfried *Herder* (1744–1803) mentions the "great Montesquieu" (Herder 1878, 371). However, he criticizes his geographic determinism: Without changing geographic conditions there are flowering periods as well as declines of nations as Montesquieu himself had shown in his analysis of the Roman Empire. Herder distinguishes in his *Ideas* internal and external factors, giving greater weight to internal, "organic" forces in contrast to external ones like climate (cf. Herder 2002, especially book 6 [originally published in 1785] on climate and other external conditions).

G. W. F. Hegel (1770–1831) explicitly deals in his *Lectures on the Philosophy of History* with the "Geographical Basis of History" (Hegel 2001, 96–120).

[43] *Of National Characters* (Hume 1875). This piece of writing acquired fame because of the footnote (ibid., 252) on negroes and their natural inferiority.

Contrasted with the universality of the moral Whole and with the unity of that individuality which is its active principle, the *natural* connection that helps to produce the Spirit of the People (*Volksgeist*), appears an extrinsic element; but inasmuch as we must regard it as the ground on which that Spirit plays its part, it is an *essential* and *necessary* basis. (Hegel 2001, 96)

And in § 3 of his *Grundlinien der Philosophie des Rechts* (1820) he again refers to the importance of natural foundations:

In terms of *content,* this right acquires a positive element through the particular *national character* of a people, its stage of *historical* development, and the whole context of relations governed by *natural necessity.* (Hegel 1991, § 3)

In a corollary to this paragraph he praises Montesquieu:

With regard to the historical element in positive right (first referred to in § 3 above), Montesquieu stated the historical view, the genuinely philosophical viewpoint, that legislation in general and its particular determinations should not be considered in isolation and in the abstract, but rather as a dependent moment within *one* totality, in the context of all the other determinations which constitute the character of a nation and age; within this context they gain their genuine significance, and hence also their justification. (Ibid.)

For Hegel the plurality of unweighed factors makes up a "totality." It was, however, not the aim of Montesquieu to use these factors as justificatory determinations ("*Bestimmungen*"). And insofar as Montesquieu stresses the necessity of natural conditions among the plurality of all his "*rapports*," this seems contrary to Hegel's assumption that the true basis of law, its foundation lies in free will:

The basis [*Boden*] of right is the *realm of spirit* in general and its precise location and point of departure is the *will*; the will is *free,* so that freedom constitutes its substance and destiny [*Bestimmung*] and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature. (Hegel 1991, § 4)[44]

The legal system is based on "spirit." It is the substantially free will that constitutes law, not one free of natural necessities, but mediating them into a "second nature." The totality of all the "*Bestimmungen*" is manifested in a collective, "objective" spirit—what Hegel sometimes calls the "*Volksgeist*," a term that will be used by Savigny and other members of the "Historical School" in order to denote the basis in which legal evolution finds its organic source.

The emancipation of the legal sphere from natural foundations in Hegel[45] caused some problems for the neo-Hegelian legal philosophers during the Nazi era. The dominant doctrine stated that "race" was an invariable natural

[44] See also: "The real fact is that the whole law and its every article are based on free personality alone—on self-determination or autonomy, which is the very contrary of determination by nature" (Hegel 1971, § 502).

[45] But he had problems justifying hereditary monarchy; cf. Hegel 1991, §§ 280–1 on the "immediate naturalness" of the monarch. On hereditary nobility, see ibid. § 307.

property, based in "blood." How should this natural category be transformed into a legal concept based on the "spirit"? "Blood must become spirit, and spirit must become blood, if one has to have a creative fortune."[46] In fact, no blood examination was conducted; instead the religious affiliation of parents and grandparents was administratively registered. In place of the invariable, quasi-natural element of "race" there was substituted the fact of the religious affiliation of the ancestors—which could not, because it was a historical fact, be changed.

The spirit of the laws in Montesquieu is an aggregation of quite diverse elements. Hegel found in it a genuinely philosophical viewpoint, that Montesquieu had interpreted social institutions as dependent moments "within *one* totality, in the context of all the other determinations." But this "totality" is quite arbitrarily composed. Hegel's objective spirit in contrast has itself developed through world history, producing its manifestations in law, religion, arts and philosophy.

It is the idea of a growing emancipation from the natural environment that leads to an end of the kind of theories of nature we find in Montesquieu. The impact of natural elements is seen as decreasing as the domination or control over nature grows. From the idealistic viewpoint domination means the development of a higher "spiritualized" reality. But in the first instance it is the transformation of the natural environment in order to secure the material reproduction of humankind by applying more and more sophisticated technological instruments within certain social institutions, thus producing a second nature. Ludwig Feuerbach and then in particular Karl Marx and Friedrich Engels put the objective spirit and "*Volksgeist*" on its materialistic, i.e., anthropological and economic feet. For them, the first premise of all human history is the physical organization of living human individuals and their relation to their natural environment. One has to start from the natural bases of human life and their transformation in the course of history through the production of the means of subsistence by which men indirectly produce their material life (Marx and Engels 1976b, 31; cf. Marx and Engels 1969a, 20–1).

Mankind produces its second nature by gaining more and more control over first nature. Hegel's objective spirit and his "*Volksgeist*" are substituted at the dawn of the modern sociological tradition by the concept of "society," which now operates as the mediating totality within which all dependent moments gain their genuine significance. 19th century theories still are full of natural explanations of a more or less monocausal type. Besides Social Darwinism, race becomes a key-variable in explaining the development of world history. Geopolitical writers like Friedrich Ratzel, Rudolf Kjellén and Karl Haushofer stress other geographic features. But at the same time a strictly so-

[46] My translation of Larenz 1935, 42: "Blut muß zu Geist, und Geist zu Blut werden, wo ein schöpferischer Wurf gelingen soll."

ciological approach develops, solely using social or societal variables in order to explain societal facts. This is the program of Émile Durkheim, who consistently dismisses natural variables from his explanatory tableau, e.g., in the case of explaining suicide rates:

> We must therefore seek the cause of the unequal inclination of peoples for suicide, not in the mysterious effects of climate but in the nature of this civilization, in the manner of its distribution among the different countries. (Durkheim 1951, 105)[47]

"Society" becomes the reservoir of explanatory variables. External natural variables—derived from the environment or from human nature as well—are relevant only insofar as they are mediated as sociologically relevant, as socially interpreted ones.

É. Durkheim dealt with Montesquieu intensively in his *thèse* of 1892, accepting him as a precursor of sociology (Durkheim 1892; 1960b). Durkheim finds a sociological perspective in Montesquieu insofar as he deals with "social facts" in a strict sense, i.e., facts that exist independent of individual consciousness, like law, customs, and religion. These "*faits sociaux*" are not representations of a subjective mind; instead they are produced by the social organism. Furthermore, Montesquieu focussed on social regularities, even though he did not clearly distinguish between laws of nature and moral laws. The warm welcome extended to Montesquieu within the tradition of sociological thought, however, serves as a prelude to the stress placed on the theoretical progress that separates the two. Durkheim points out that Montesquieu, contrary to what he claimed, criticized overtly social institutions (e.g., despotical regimes), instead of analyzing them neutrally, as normal social facts. Durkheim does not attack Montesquieu's environmental determinism. Quite the contrary, it is the idea of almost unlimited legislative sovereignty that is not well received. Durkheim points out that the characterization of societies via their forms of government (despotism, monarchy, aristocracy, republic) is inadequate. Montesquieu lacks a concept of society as well as one of progress.

It is always easy to trace back the chain of "founders" to even earlier "founders." So one of the founders of the sociology of law, Eugen Ehrlich, stated "In fact *L' Esprit des Lois* must be considered the first attempt to fashion a sociology of law" (Ehrlich 1915–1916). Again, as in Durkheim, this reverence is retouched with critical remarks. In *L' Esprit* the concepts of society, of evolution and development are lacking (Ehrlich no longer speaks, in 1915–1916, of progress). The main point, however, is the lack of a direct correlation between environmental factors and legislative policy. "The natural circumstances brought forward by Montesquieu, geographical configuration or climate, cannot have any influence on law except by operating on society, which in turn acts on law. Thus in order to discover the *social foundation of law* we

[47] See also ibid., 297ff., on natural variables in general.

must seek the very form in which it is engendered by society" (Ehrlich 1915–1916, 585). There is a level of primary law within a society out of which, via court decisions and legal doctrine, legislative acts grow. Montesquieu focuses on the final, legislative outcome without recognizing the law-generating role of social institutions.[48] Law does not originate from natural foundations; law is surrounded by a social environment.

(6) Recent Studies

Natural, extra-human conditions remain a standard topic in theories of society (or civilization or culture).[49] E.g., Karl August Wittfogel's theory of "hydraulic" cultures became quite famous.[50] Civilizations advanced early where a central organization had to coordinate problems of water supply and protection against high water (at the rivers like the Euphrates and Tigris, Indus, Hwangho, Yuan Jiang [Song Koi or Hong Ha], and Nile). Peasants were obliged by an expanding state bureaucracy to render services in order to erect huge levees, water reservoirs and a network of irrigation canals. In conjunction with the construction of embankments streets were built; commerce and cities developed accordingly.

Jared Diamond deals with an old Weberian question (Diamond 1997): Why did the occident—in Diamond's case this means Eurasia—succeed? Among other reasons it is the flora, together with a climate advantageous for the plants; there were animals that could be domesticated; hence the production of an economic surplus was possible very early; hence the establishment of a political class that was in charge of distributing and storing the surplus product; a class of craftsmen and mechanics could evolve that was not engaged in the direct production of agricultural subsistence. Later on other social conditions push the occident ahead, e.g., competition between European states. But the whole story does not provide a sufficient explanation of the peculiar European forms of state and law. The same holds for the global analysis of David Landes (1998) of the wealth and poverty of nations. The most recent attempt to employ a theory of climate in the explanation of historical developments can be found in Fagan 2000.

[48] Ehrlich, however, should have taken a closer look at these sentences, found in Montesquieu's *Esprit*: "Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal" (Montesquieu 1949, book 1, chap. 1).

[49] On climate, see Huntington 1924 and, in general, Glacken 1967.

[50] Wittfogel's *Study on Oriental Despotism* (1957) is the starting point of Fuller's study on the relationship between natural conditions and social ordering, with Fuller looking specifically at the organization of "managerial direction" (Fuller 1965). See also Fuller 1971, 163: "Other considerations of climate, geography, technology, culture, and past history have to be taken into account in the design of any legal system."

External nature became the object of increasing technological control. What are the consequences of the almost unlimited human domination of nature? What are the consequences for state and law today? We can recognize a revival of the old, 18th century theories of the importance of climate today: The menace of a drastic change in the climate and its consequences (global warming, desertification, scarcity of water supply, ozone hole, etc.) is not a matter of "first" nature. Rather, it is the result of the "second nature" deforming the first one.

3.2.1.2. Natural, Human Foundations of Law: Biology and Anthropology

Biology is a discipline composed of different sub-fields. It is systematic as well as evolutionary; it implies, to mention only some important topics, morphological classifications, observation of behavior, the analysis of tissue, cells and genes. In the following I shall focus the discussion of biological foundations of law on research in the fields of ethology and on genetic, evolutionary theories like sociobiology.

Foundations once again, here means both, natural, biological elements that can be used in order to explain the origin, the evolution and existence of human behavior and social institutions on the one hand, and natural, biological elements that form restrictive conditions for legislative policies on the other. A fundamental strategy in ethology,[51] i.e., the systematic observation of behavior, aims at discovering homologies between human and animal behavior. The idea is that a homology indicates a natural basis that human beings share with their pre-human ancestors, e.g., patterns of aggressive behavior. A second strategy consists in identifying universals of human behavior. The idea in this case is that behavioral universals can be found to exist independent of any particular kind of cultural or historical formation. The constant, the universal is the natural. Examples regularly mentioned are: hierarchical structures of societies, aggression, territorial exclusion, nepotism, coupling, hypergamy, incest taboo, killing taboo,[52] separation of in-group and out-group, mimic and gesticulative patterns, etc.

A third strategy to identify a natural substance, free of cultural disturbance, is the investigation of human beings that are not or not yet "normally" encultured: children born deaf and blind or infants.

The existence of homologies and universals is claimed on the level of observable behavior patterns. In addition to the observation of overt behavior, underlying biological strata are presupposed, like instinct or cerebral, neuro-

[51] See Gruter 1991 and Hof 1996; on the application of biology in the legal domain in general, see Rottleuthner 1985.

[52] Is there a biological basis to this taboo, when marriage barriers exist between individuals who have grown up in close relations?

physiological structures. Whatever might be gained for the explanatory power of the ethological model by adding this "foundation," when it comes to the explanation of law, its origin, its development and the existence of legal norms and institutions, this approach turns out to be quite limited. Besides the arbitrary selection of homologies from one species or the other—even among kinds of apes a choice must be made—the general problem is: Why do we need norms, particularly legal ones, in order to enforce universal regularities? In the case of norms not only do exceptions take place, but rather, transgressions must be possible. Norms do not serve as mere duplicators of natural regularities. Why should norms permit what is naturally given? Or should they channel natural regularities (e.g., aggression)? What kind of aggressive behavior should be prohibited, which kinds permitted or even rewarded? Why prohibit murder (or incest) if there exists a taboo against murder (and incest)? Who should count as a member of the in-group (kinship)? What should count as holding a higher social rank? What is the socially adequate form of coupling? If coupling is "naturally" given, should we prohibit polygamy; should divorce be permitted?

Again, we encounter the distinction between regularities (habits) and rules or norms. Some ethologists attempt to dissolve this dichotomy by introducing the notion of some kind of proto-norms that might exist in ape-societies. Hierarchical structures, limitations on aggressive behavior, demarcations of group membership, etc. might not exist as constant, universal patterns. Transgressions take place (and not only exceptions), which is indicated by consistently enforced sanctions. But does this prove the existence of rules?

And once again we can recur to the internal / external distinction. According to the scale of internality that I introduced above (cf. sec. 2.4.3) an ethologist is restricted to the first step: a non-communicative ascription of behavior patterns to his agent-object. According to a strict realist like Theodor Geiger this would be sufficient to detect the existence of rules.[53] H. L. A. Hart would insist on an internal point of view and this would require an actor endowed with language faculty, enabling him to use a normative language (e.g., "I am obliged ..."), not only a denotative one.[54]

The traditional approach of ethology mainly depended upon—as the biological basis of behavior—theoretical constructs like instinct or assumptions from cerebral physiology. During recent decades interest has shifted to genetics combined with evolutionary theories. This new approach became famous in the work of E. O. Wilson: Sociobiology (Wilson 1975; as a more recent contribution cf. von Rohr 2001). Here the theoretical, explanatory claim embraces almost every kind of social behavior and institutions. Our genetic

[53] See his realist translation of obligation as alternative effects (observance or sanctions) in Geiger 1964, 207ff.

[54] Cf. Mahlmann 1999, 311ff., with even stronger presuppositions.

equipment includes the faculty of calculating costs and benefits, of maximizing an outcome according to genetic preferences, i.e., mainly the maximization of the gene pool. On this genetic foundation the theory claims to explain individual actions or behavioral regularities as well as social institutions in terms of their function for the replication of the genes. The evolution of the human species is characterized by mutations, selections and adaptations that lead to an evolutionary fitness not of the individual, however, but of the genes. Hence, human beings rather operate as survival machines for the gene pool. It is not primarily individual egoism that contributes to evolutionary fitness. Rather, it is the kinship group that sets the standards of inclusive fitness. Therefore, nepotism is—from a genetic point of view—a natural, basic orientation in social life. Evolutionarily profitable is a kind of in-group morality, not a morality of universal, indeterminate altruism or charity. "Thou shalt love thy neighbour" would be in accordance with our genetic makeup, especially when the neighbour belongs to the kinship group. However, Jesus Christ's command "love your enemies" (Matt. 5, 44) would be contrary to it, against our "nature." Since, according to sociobiology, kinship relationships still form the basic structure of a society, one would have to conclude that we still live in a segmentary society—despite the high degree of functional differentiation.

Consequently, favorite topics in sociobiology are aggressive behavior against foreigners or members of out-groups in general and behavior patterns in close relationships like nepotism, marriage patterns,[55] e.g., hypergamy of women, divorce, killing of infants of a former breed, negligence towards stepchildren, fertility, i.e., the number of children. Maximal reproduction of the inclusive fitness of the kinship group does not necessarily mean a maximum of children. Our selfish genes aim at a possible maximum under given environmental conditions. This environment, however, is not only naturally given. What counts as cost and benefit is not a matter of the genetic structure adapting itself to natural conditions; it is always to be interpreted within a social setting. Therefore one should ask about the *social* costs and benefits of children. In order to explain the decrease in the number of children in Western societies a new "genetic" goal is introduced: It is no longer the enhancement of the descendants, rather, it is the improvement of the competitive competences of the children.

Sociobiologists do not analyse the structure of our biological makeup by employing means of genetic technology, rather they project the calculi, de-

[55] "A new marriage of the plaintiff, now in his 54th year, is undesirable at his age and runs afoul of the laws of nature" ("Die Eingehung einer neuen Ehe des im 54. Lebensjahr stehenden Klägers ist bei seinem Alter nicht erwünscht und entspricht auch nicht den Naturgesetzen"), from a 1943 decision by the Landgericht Berlin; quoted in Mammeri-Latzel 2002, 169. The German *Reichsgericht* (Supreme Court) declared the age difference of a couple—the wife was two years older than the husband—as against nature ("naturwidrig") (Reichsgericht, 17 May 1940, in: Deutsches Recht 1940, 1362). How would a sociobiologist argue in these cases?

rived from an economic theory of rational action, onto a genetic basis and the genetic basis echoes the rational calculi back accordingly. It is rather a difference in the *façon de parler* that distinguishes the economic approach of, e.g., Gary S. Becker from Richard Dawkins' genetic terminology (Becker 1976; Dawkins 1976). The rational calculus says aloud what the selfish genes only whisper. The problem is similar to the one that brain research has to cope with. Is it possible to correlate mental states of affairs or even types of behavior with certain cerebral states? Let us wait till sociobiologists working together with genetic engineers succeed in identifying a gene that is in charge of calculating the optimum number of children. Maybe they will be able, after a while, to produce and implant a gene that does not aim at maximizing quantity of descendents. No doubt, this M-gene (M for Malthus) will be a success on the Chinese market.

Biological approaches not only aim at explaining the origin, development and existence of behavior patterns and social institutions, including legal norms. They also point out restrictive conditions a legislator has to cope with. Ethologists as well as sociobiologists maintain that there are natural constraints, which limit the efficacy of legal norms. Human plasticity is not unlimited. The basic thesis is: Legal norms are efficacious in so far as they correspond to innate properties. But does this mean anything more than the traditional principle of "ultra posse"—a biological "posse"? Or, turned the other way around, can a high degree of inefficacy be explained by the fact that the legislator has misconceived the biological limits of human nature? How can one explain widespread delicts like the violation of alcohol prohibition,[56] shop lifting, fare dodging, black market work, tax evasion, etc.?

True enough, there is no unlimited plasticity in human nature. There certainly exist "architectural constraints" (Gould). Human beings cannot be conceived as a *tabula rasa* that can be acculturated in what way whatsoever. A sharp distinction between innate and achieved properties is not possible. Cultural learning takes place within given genetic, neuronal, physiological structures. The biological approaches, however, are totally insufficient inasmuch as their explanatory power is restricted to the analysis of rudimentary or proto-rules. The particular elements of a legal order (the formal requirements of legal norms; the unity of primary and secondary rules; competences; facilitating and constitutive norms; the basic principles of the rule of law, etc.) are not focussed upon at all as the explanandum of these approaches. And sociobiology can easily be translated into an (economic) theory of rational action by simply erasing the genetic *façon de parler*. Often the biological point of view can be reduced to the platitude that because human beings can do something, there must be a corresponding underlying biological capacity to do it.

[56] Compare Montesquieu's explanation (*supra*, 63).

Reflections on the inner nature of human beings were a standard theme long before a science of biology was created. Indeed, *Philosophical anthropology* had systematized everyday experiences of human nature, sometimes stimulated by observations of animal behavior as well. This branch of philosophy produced countless labels in order to specify peculiar properties of human beings (homo sapiens, homo creator, faber, loquens, ludens, oeconomicus, sociologicus, viator etc.). It has played with fantasies of an "*Übermensch*" and has urged against idealistic abstractions the fact that men have to reproduce themselves materially.

A basic insight of philosophical anthropology at least since the 18th century is the openness of human beings. They are neither determined by their natural environment nor by their own natural properties. Man is "the animal whose nature has not yet been fixed"[57] (Nietzsche 1990, 88). He/she is by nature a cultural being ("*von Natur ein Kulturwesen*") (Gehlen 1993, 88).

Four relationships between anthropological and social features can be distinguished:

a) Enabling conditions. Upright walking, bipedy, opposite thumb are preconditions for a sophisticated use of tools, consequently for the development of technique. Cerebral structures and the larynx foster the development of language, consequently of human interaction.

b) There are conditions that stimulate development of social compensations; the lack of instinct orientations is, according to Gehlen, compensated by social institutions. The long period of breeding and rearing, the helplessness of the newborn makes socialization institutions necessary (family relationships in a broad sense); permanent sexual appetite might foster the formation of couples.

c) There are restrictive, containing conditions of human nature that make permanent habitation under extreme circumstances (altitude, temperature etc.) impossible. But they can, to a certain degree, be overcome by technical inventions.

d) Today the genetic equipment of human beings is becoming more and more at our disposal. Are there "natural" limits or rather only moral limits?

As far as law is concerned, social institutions—in general: a legal order—compensates for the lack of instinct-based action orientation. Human beings are in need of normative "leadership" (Gehlen). But this is only one part of the social function of law. On the basis of a "poor" physiological, i.e., instinctive makeup human beings cannot but produce their social order autonomously, as a "second nature." Law is not the immediate "expression" of interests, needs, instincts, desires. Rather it fulfils a constitutive function by enabling

[57] "Das noch nicht festgestellte Tier" (Nietzsche 1966, Aph. 62).

activities that do not have any equivalent on a physiological level. Law enables human behavior to be autonomous; it is constitutive for non-natural behavior: making contracts, establishing organizations, corporations, producing artificial persons, the state, etc. Sometimes law, and in particular penal law, is conceived of as a restraint of aggressive tendencies, necessary in order to canalize destructive drives and residual instincts. Thus from the "*Menschenbild*," i.e., basic anthropological assumptions, certain consequences for the understanding of a legal order are derived: law as a repressive order that restricts the *homo lupus*; law as an instrument of a paternalistic legislator who authoritatively provides patterns of action orientation; law as a Kantian order of mutual freedom for autonomous human beings.

Internal and external nature no longer appear pre-eminently in the role of restrictive conditions for legislative policy. Instead, increasing domination of nature leads to a reversal of perspective: The aim of the legislator today is to establish normative restrictions, rather than to permit the full range of options that would be technologically possible. As far as external nature is concerned, this is what environmental law is all about. Technological manipulation of our internal, genetic naturals are the object of new regulations. The maxim no longer is "should implies could," instead we have had to learn that we should not do everything that we could do.

3.2.1.3. The Cognitive Foundations of Law—An Introduction to the Mentalist Theory of Ethics and Law (*by Matthias Mahlmann*[58])

3.2.1.3.1. The Human Rights Culture and Its Philosophical Reflection

Many terrible things have happened in the 20th century. One of the rather positive developments, however, is the growth of a global human rights culture. The protection of human dignity, life, health, personal freedom, and equality forms a secular Decalogue that at least on the level of political deliberation hardly anybody questions. Furthermore, human rights are more and more at the core of the architecture of positive legal orders: They form the ultimate standard with which developed legal systems have to accord. A constitutional or supreme court often safeguards them.

Of course, there are contentious questions as to certain details of the content of human rights, and the positive catalogues vary in some aspects considerably. There are serious issues involved. But given the enormous heterogeneity of human culture and history, and the power, cruelty, and determination of

[58] The author would like to thank N. Chomsky, J. Mikhail, and H. Rottleuthner for comments on previous drafts. Parts of the material have been presented in talks at the World Congress of the International Association for Philosophy of Law and Social Philosophy 2001 in Amsterdam; at Hampshire College, Amherst, Mass.; and at the Political Science Department of the Freie Universität Berlin.

opposing forces, it is quite remarkable that something like a fragile consensus on the core of human rights actually developed which forms the basis of further debate and—ironically—often even the basis for the ideological cover-up manoeuvres of the perpetrators of human rights violations.

Given this development a question naturally arises: What is the basis of this remarkable moral consensus? Is there any at all? Is the security of beliefs in human rights nothing but a transparent veil, which covers badly vain illusions that do not stand the scrutiny of critical reflection? The philosophers disagree over this point. There are attempts by "cognitivists" to find a basis for rational moral argumentation for moral contents generally, and thus for the content of human rights, too. To these theorists moral judgements seem to be in their epistemological status comparable to scientific insights. These attempts have powerful and famous predecessors in the history of thought.[59]

But the contemporary mainstream view is different. It is widely assumed that there is no knowledge in the domain of ethics in the sense of insights gained in other fields of human understanding. The idea that moral judgements are somehow as verifiable as other propositions, e.g., of the natural sciences—an idea that inspired impressive intellectual endeavours in the past for thousands of years of thought—is for most philosophers nothing worth pursuing anymore. For them—to put it in Reichenbach's classical terms—this hopeful idea of truth in ethics, the "ethico-cognitive parallelism," has run its course. It led to nothing; it has to be given up as a leading heuristic idea (Reichenbach 1971, 52). The alternative is, from this point of view, non-cognitivism, which takes moral judgements as expression of some sort of subjective feeling of approval or disapproval of the situation considered or witnessed without any truth-value.[60]

This non-cognitive meta-ethical position has more or less set the framework of any ethical discussion today, and thus the framework of discussions about the foundations of human rights as well. Accordingly, to influential parts of scientific reflection, human rights have no universal, cross-cultural, intersubjective foundations. There is no truth about them to be discerned by the enquiring minds of human beings. Instead, dependent on the particular theoretical taste, arbitrary decisions of individuals or contingent cultural tra-

[59] Various systems of thought have endeavoured to achieve the aim of truth in ethics—from Platonist theories of grasping with moral judgements some pre-existing, metaphysical idea (Plato, *The Republic*, 508a3–509b7); to Kantian accounts of the commands of practical reason (Kant 1908, 15ff.); or Hegelian assumptions of morality and—on a higher level "Sittlichkeit" as an emanation of metaphysical "Geist" (Hegel 1821, §§ 1–4, 141, 151). For religious thinking, compare, e.g., Thomas Aquinas (*Summa Theologiae*, I–II, q. 19, 9; q. 91, 2): "Et talis participatio legis aeternae in rationali creatura lex naturalis dicitur." In my translation: "The participation in the eternal law by the rational creature is called the natural law."

[60] Compare, e.g., the formative contributions to this position by Ayer 1956, 107; Reichenbach 1971, 276ff.; Stevenson 1950 among others.

ditions are invoked by mainstream moral relativism to account for the content of human rights.[61]

The standard view of cultural relativism is well summarised by Richard Rorty in his Oxford Human Rights Lecture. The way forward for a moral culture is according to this view not paved by arguments appealing to rationality but by appeals to emotions. Rational Foundationalism is thus bad as it hinders humans pursuing the real task in moral debates, namely, "manipulating sentiments" (Rorty 1993, 122) by other more effective means,[62] e.g., by a "long, sad, sentimental story" (ibid., 133).[63]

On first glance Rorty's restatement of a widespread view hints at something obviously right. Massacring people is not only illogical. It is not only a contradiction against an abstract principle. It is something revolting, something that turns the stomach and creates a strong moral sentiment. The moral judgement "That is wrong!" after witnessing a massacre has a decisive emotional dimension that the theoretical judgement "That is wrong!" refuting the claim "2+2=5" has not. The emotional dimension of moral judgement is thus surely a truism that did—of course—not escape important thinkers of the past.

On the other hand, there seems to be something obviously wrong about Rorty's statement, too. Three shortcomings of Rorty's ethical sentimentalism come to mind. First, moral judgement is not just some feeling of aversion or approval but has a distinctive cognitive content. This cognitive content distinguishes (among other features of a moral sentiment) the aversion felt by witnessing a massacre and the aversion seeing a rotten dish. Secondly, moral philosophers have often observed that moral judgement is supervenient on facts—given a certain set of facts a certain moral judgement follows. If changes of the facts occur, the moral judgement changes as well. Thirdly, often (or—in historic perspective—perhaps mostly) human rights are not springing from the fertile womb of a majority culture forming the "malleable"

[61] This is of course only true as a rough approximation. The theories on the foundations of human rights are heterogeneous. One can distinguish theories of "absolute" or "objective" foundations of human rights from relativistic theories of these foundations. Examples of the former are Spaemann 1987, Gewirth 1996, Höffe 1992; of the latter Rorty 1993, Walzer 1996, Tugendhat 1993, Rawls 1993, to name just a few.

[62] Rorty 1993, 122: "The best, and probably the only, argument for putting foundationalism behind us is the one I have already suggested: It would be more efficient to do so, because it would let us concentrate our energies on manipulating sentiments, on sentimental education."

[63] These are familiar arguments from emotivism compare, e.g., Stevenson, more precisely his ideas of moral argument as "persuasive definition" with the consequence that all "moralists are propagandists" (Stevenson 1950, 334). In the general public these kinds of arguments might be regarded as less convincing. Nobody would have taken a Nazi seriously that had claimed in 1945—while facing the heaps of corpses of the Shoah—that the sole basis for the moral condemnation of these crimes by the rest of the world is just due to some kind of culturally relative emotional manipulation, based on a shrewdly devised "long, sad, sentimental story" about Jews and their suffering.

human nature into pro-human rights shape, but quite to the contrary, human rights are defended by individuals *against* the majority culture which mostly—taking the global perspective—pursues a quite different path. The origin of human rights thus seems to be rather the conscience of individuals than well-developed cultural patterns.[64] These observations clearly seem to capture important features of human morality. They indicate that moral sentimentalism as proposed by Rorty among others is not on the right track. Something deeper seems to be involved in moral judgement than some kind of "emotional manipulation" by a contingent cultural tradition.

The following remarks will try to show how an alternative account of the foundations of human rights from a *mentalist* point of view might settle these far-reaching issues. Given the outlined importance of human rights as a central feature not only of modern morality, but of modern legal systems, too, a mentalist theory of human rights is a crucial part not only of ethics but of a general theory of the law as well. These remarks are thus not merely meant as a contribution to the ethical understanding of human rights but as a general introduction to the basic assumptions, explanatory content and theoretical prospects of a *mentalist theory of ethics and law*.

One has first to consider the question what a *mentalist* theory of ethics and law actually means. The term *mentalist* might seem surprising concerning morality, as morality appears to be a *social*, not a mental phenomenon. But this intuition—even though buttressed by much of classical and recent theoretical thought—might be to a certain degree misleading. Morality is without doubt a social phenomenon insofar as it concerns at its core the relationship between human beings, but it is clearly a cognitive phenomenon as well: Morality is not a physical thing in the outside world, one cannot touch or see it, it is a normative order that humans create with and in their minds which then, in turn, has quite significant social consequences as it regulates their comportment towards others.[65] A mentalist theory of morality takes this fact of the

[64] Rorty (1993, 125) claims: "Outside the circle of post-Enlightenment European culture, the circle of relatively safe and secure people who have been manipulating each others' sentiments for two hundred years, most people are simply unable to understand why membership in a biological species is supposed to suffice for membership in a moral community." This claim is at least out of two reasons false: 1. It overlooks quite interesting phenomena—racism, slavery, or colonialism among others—which cast some doubt, that in "post-Enlightenment European culture" it is so self-evident that being human really means being part of the same moral community. 2. It overlooks the sometimes desperate attempts of people outside "post-Enlightenment European culture" to make the point that —even though being African, Asian, etc.—they still regard themselves as human beings and thus as part of the same moral community as the rest of the world.

[65] It might be true that as many theorists of moral cognition argue, moral concepts are somehow originally derived from social practises, see, e.g., Piaget 1986, Kohlberg 1984a and 1984b, Habermas 1983. But to answer this question one has to understand better the nature of moral knowledge. Only if one understands more clearly what properties the cognitive system

mental basis of morality seriously and asks: What is the nature of moral knowledge? Where does it derive from? What are its cognitive preconditions? What is its origin and use?

The same is true of the law. There are many differences between law and morality, and the differentiation of both is surely an important achievement of legal theoretical thought not to be abandoned.[66] But the law is no less than morality a normative order that is formed by and in the human mind. Legal rules might be written in statutes, constitutions, and the like, or might be derived from precedents or from normative customs. But the understanding and application of these rules is something that people do with their minds. It seems therefore not to be too far-fetched to ask for the law as well: What is the nature of legal knowledge? Where does it derive from? What are its cognitive preconditions? What is its origin and use?

In what follows, these questions are attempted to be answered from a particular theoretical point of view. The background assumption is that recent cognitive theory is basically on the right track arguing that empiricist thought, despite its great achievements for understanding the nature of human mind, was in certain crucial respects misled assuming that the human mind is a *tabula rasa*, a "white paper, void of all characters" (Locke 1823, book 1, chap. 1, § 2), an organ without inborn properties apart from a general learning ability. Instead it is assumed that human beings have a differentiated highly structured mind with a certain amount of inborn properties. A well-researched example is the language faculty as the basis of human language: Human beings have, from this perspective, a genetically determined ability to acquire language. One of the main reasons for this assumption is that—as linguistic scrutiny reveals—any human being acquires a rich and very complex knowledge of language far beyond the simple rules found in schoolbooks and grammars even though being exposed to only impoverished and limited experience.[67]

A promising theory of the mind must thus be a theory of these higher mental faculties that are the basis of these mental achievements. A first crucial distinction for the mentalist approach is the distinction of *competence* and *performance*: the performance being the actual behaviour shown, the competence

that generates moral judgement possesses, one can ask meaningful questions about the ontogenetic origin of this system. For a detailed discussion on some aspects of this question which casts some serious doubts on the widespread assumption of morality as an internalised system of knowledge derived from social practices, see Mahlmann 1999 and the remarks that follow.

[66] On the differentiation of law and morals compare Kant 1907, § C; Austin 1885, 171ff.; Habermas 1992, 143ff. Cf. also Hart 1983b, 54: "There are [...] two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism."

[67] Chomsky calls this the argument from poverty of stimulus, see, e.g., Chomsky 1986, xxvff.

the underlying and enabling faculty. The object of theoretical enquiry is this competence. The performance provides only data for constructing a theory about the mental faculty that generates this performance (Chomsky 1965, 4).

A second crucial distinction is the one between *operative* and *express* principles: Operative principles are the principles that are in fact governing the generation of a human act, e.g., the forming of a sentence. Express principles are the principles the agent thinks to apply. Operative and express principles need not to converge, as the agent might have quite erroneous ideas about what she is actually doing.

Generative Grammar claims that human beings possess a "universal grammar," an inborn faculty to acquire language. The exposure to language triggers together with this inborn faculty the acquisition of a native human language. These languages differ obviously on first view significantly from each other. But upon further scrutiny it turns out that the differences are nothing but variations of the same underlying principles.[68] From this point of view human beings thus speak in a deep sense all the same language. Generative Grammar is an empirical science. The principles of universal grammar are derived from empirical evidence.[69] The data for the theory construction are (among others) grammaticality judgements of native speakers.

One should take these findings very seriously. They have made linguistics a core discipline of modern theories of the human mind.[70] The relevance of these findings for the understanding of moral knowledge is obvious.[71] Human beings develop independently of other aspects of their mental development—e.g., to count, to discern faces—the ability for moral judgement. This ability is not limited to cases and situations similar to the ones encountered in their life, but is applicable to new situations different from anything experienced before. There is very much emphasis in philosophical debates on the differences of moral judgements, and these differences seem obvious enough. People disagree about abortion, research on embryos, or the just distribution of wealth in a community. But apart from these differences there are many common features in any moral order and further scrutiny could reveal that the much discussed moral differences might be, at least to a considerable degree,

[68] The technical means to account for the differences of languages are, e.g., "parameters" (Chomsky 1988, 62ff.).

[69] The notion "empirical evidence" is for sure highly contentious. It is not contested here that what counts as evidence is dependent on the theory developed.

[70] For an outline compare Jackendoff 1994; Pinker 1994.

[71] Accordingly, it spread to moral and legal philosophy as well. Rawls (1971, 46ff.) drew a linguistic analogy, much criticised afterwards and not pursued by him in his later work. Compare for a detailed discussion Mikhail 2000. Compare for innovative recent work on mentalism and ethics: Stich 1993; Bierwisch 1992; Harman 2000; Jackendoff 1999 and 2003; Hauser 2004; Mikhail, Sorrentino and Spelke 1998; Dwyer 1999; Mahlmann 1999—the latter with a discussion of mentalism and the law; Mahlmann and Mikhail 2003—on its position in the history of moral philosophy.

dependent on factors like the non-moral preconditions of moral judgement among other influences.[72] In consequence, the common view—taking the moral differences of people as the starting point of reflection—might have been led astray by nothing but the surface appearance of moral variety, under which some deeper features of a possibly universal human moral cognition are hidden. If this is true, it seems not far-fetched to take as a plausible heuristic hypothesis worth further study that a moral faculty generates moral judgement whose basic ruling principles are at least partly inborn and universal to the human species.[73]

To avoid misunderstandings: Mentalism has nothing to do with socio-biology or certain varieties of evolutionary psychology. It stands in marked contrast to it. To name just two important differences: First, mentalism is not adaptionist. It does not adhere to the view of some socio-biologists and evolutionary psychologists that the properties of human cognitive nature have evolved because they maximise reproductive success. Instead, it adheres to evolutionary pluralism (like Darwin himself) that takes a plurality of factors beyond adaption into account—like random variations without initial adaptive value, concomitants of adaptive variations or architectural constraints. Second, mentalism is not biologistic. It does not assert that the main purpose of human life is reproduction of the species or a certain set of genes. Quite to the contrary, it seems obvious that not only in art and science, but in morality and law as well, the most essential parts (say a value like human dignity) are concerned with the quality of human life and not its sheer biological reproduction.[74]

In consequence, from a mentalist perspective the scientific project of the Enlightenment—trying to come to terms with the origin of moral judgement

[72] If further study would confirm this impression, it would not be anything new. Frankena (1973, 110) observed: "It is not enough to show that people's basic ethical judgements are different, for such differences might all be due to differences and incompletenesses in their factual beliefs."

[73] Generative Grammar has developed to a complex theory of considerable explanatory power. It is evolving fast and new assumptions supersede others of the past. Its success for language and its implications for the general theory of the mind might make it plausible to approach problems of other cognitive domains informed by its research strategies. But it is important not to take its explanatory success as a real reason to be convinced of the explanatory power of the parallel assumption of a moral faculty in ethics. To assert this one needs independent reasons. The study of language can be a methodological and conceptual inspiration for the study of morals. But it cannot be a substitute for it. What may be true for language may not be true for morals. Possibly moral judgement is based on mechanisms completely different than the ones found in language. Possibly language is based on mechanisms partly inborn and morality is not. Whether that is so or not is an empirical question. To answer it, one therefore has to turn to an enquiry of morals on its own ground.

[74] For an extensive discussion of these matters compare Mahlmann 1999, 285, among others on the value of the distinction of ultimate and proximate causation. As an example for an evolutionary pluralist account of the evolution of language compare Hauser, Chomsky and Fitch 2002.

by basing it, in one way or another, on human (mental) nature—was not at all as funnily flawed as many modern and post-modern thinkers tend to believe. Quite to the contrary, by taking moral judgement as the operation of a mental faculty of the subject—be it a moral sense[75] or be it practical reason[76]—a level of understanding had been reached by enlightened thinkers that is surely not current today. In consequence, this project has to be taken up again, but with the new theoretical and conceptual means of the modern theory of the mind.[77] A *mentalist theory of ethics and law* does exactly that—certainly contrary to the powerful and dominating dogmas of the post-modern mainstream culture of contingency, relativism, and the modern contempt for the concept of human nature as a proper object of theoretical enquiry, but with the sceptical self-confidence of a developing science. It is thus a post-metaphysical heir to the ethical project of enlightenment.

Two last remarks before embarking on the more detailed discussion of the foundations of human rights from a mentalist perspective. To avoid confusion, some possible understandings of the question "Why do humans have human rights?" that is to be answered by the following remarks have to be clarified. The question can aim at three different things: Firstly (question 1): Why do *humans* have human rights? Framed like this, the question asks for an explanation for the choice of the *subject* of human rights. Why do humans belong to the personal scope of human rights? Why do humans have such rights and not stones, flowers or winds? Secondly (question 2), it can mean: Why do humans have human *rights*? Here the nature of a *right* is at stake in contrast, e.g., to a *duty* or a *habit* or a *factual possibility* to do something. And thirdly (question 3): Why do humans have *human* rights? In this form, the question aims at a justification of the content of the classical rights catalogues formulated since the 18th century. It asks: Where do these contents derive from? What is their origin? What is the legitimation of these contents? Why are they defended rather than others? Why are somehow liberty, equality and

[75] Compare Shaftesbury 1984 and 1987, Hutcheson 1971a and 1971c. For some comment compare Frankena 1955, Schrader 1984, Mahlmann 1999, 67ff. A predecessor of these theories in Renaissance thought is Cudworth's nativist account of morality, compare Cudworth 1976, posthumously published.

[76] Kant (1908, 34, 38) was critical of the moral sense theories because for him these theories did not provide the objective moral knowledge he was aiming for. But one might ask how Kant's theory of the moral law as a "fact of reason" or his nativist moral psychology (Kant 1907, 399–403) can be understood if not as a metaphysical version of a property of some kind of individual moral faculty.

[77] Mentalism does not fit neatly into the dichotomy of cognitivism and non-cognitivism. Unlike (classical) cognitivism, mentalism is internalist: the moral properties are cognitively ascribed to entities and not inherent in these entities independently from human cognition. They are on the other hand not just subjective preferences as (classical) non-cognitivism asserts. Rather, they are taken to emanate from a moral cognition that is uniform across the species.

human dignity at the core of these catalogues and not rather oppression, privilege and human humiliation?[78]

Questions 1 and 2 are very intriguing upon further reflection and merit close scientific scrutiny if something like a mentalist theory of law is to be developed which deserves the name of a theory but they are not very contentious in the respects of interest here. Take question 1: Nobody seems to disagree that people have rights and stones do not. To be sure, there are serious political, legal, and philosophical problems involved if the personal scope of a right is in question, e.g., whether animals have rights too and what they could be, or what legal entities—cooperatives, corporations, charitable funds, collectives, public bodies, etc.—can enjoy rights at all, and—if so—what kinds of rights that might be. But here these problems can be put to the side as it is generally taken for granted that at least people in principle can have rights—whoever might have rights beyond that too.

Concerning question 2, serious analytical work on a theory of the structure of rights has been conducted with partly very interesting findings possibly of great relevance for a general mentalist theory of the law.[79] But that rights exist and what is meant by this term is well enough understood to make further discussion here superfluous.

The really contentious question is 3 that asks what kind of rights people have. This question is the real issue in arguments about the foundations of human rights. Therefore question 3 will be the focus of attention in the remarks that follow.

Second, given this theoretical background, it is clear in which sense the following remarks are theoretical accounts of the foundations of law. They are not accounts of the concrete historical, social, economical, or religious influences on the content and development of the law. They concern anthropological foundations as they specify the properties of human cognition that are the mental preconditions of the possibility of law. These remarks investigate, furthermore, how these mental properties enter into the legitimation of human rights. The following account is thus a cognitive explanation of human justification of human rights. Whether this account has any normative implications beyond this explanatory intention, will be the last question considered.

[78] Even though, of course, historically, human rights catalogues had at least partly the function to secure some unjustified institutions—like slavery or the exclusion of women to take some classic examples. But to conclude from this that human rights are generally unable to achieve their universalistic aim—as is sometimes argued in post-modern theory with reference to the historic particularity of any human rights codification, see, e.g., Lyotard 1983, 208ff.—is very unconvincing. The way forward is not the abandonment of the instrument of human rights to avoid these pitfalls, but rather to abolish unjustified exclusions of people from the protection of human rights.

[79] For some illuminating discussion see Jackendoff 1999; Alexy 1985, 159ff. A classic analysis is Hohfeld 1917.

3.2.1.3.2. The Moral Faculty and Human Rights

There are surely many influences on the content of human rights—political, social, or historical. These contents, however, must be morally justifiable, too. A catalogue of human rights that is not morally justifiable is clearly not really a catalogue of human rights. Moral justification however is derived from moral judgement. Something is morally justified if a moral judgement renders it so. Thus, there is no theory of human rights without a theory of moral judgement as the origin of their legitimation. The question of the foundations of human rights leads to the question of the foundations of moral judgements.

As explained above, morality is a mental phenomenon. Moral judgements have many social consequences but they are not social in any comprehensible way of understanding this term. They are made by individuals at the occasion of some particular situation. More precisely they are the product of the minds of the judging persons processing some information about the situations, which demands an evaluation, and yielding a result: a moral judgement of some sort. This moral judgement is a mental event. The most natural starting point for the kind of mentalist enquiry pursued here are thus these concrete moral judgements. They are the data with which explanatory hypotheses of some kind are constructed.[80] To take a paradigm case of moral behaviour: (1) *The boy gives his banana to a hungry child.* This seems to be a straightforward case of an act that is morally good. It is an example of altruism. Before asking what properties of this event might render it morally good it is useful to distinguish *morally* good things from things that are *non-morally* good. Consider, e.g., (2) *The sofa is comfortable, spacious, well designed, and supports a healthy posture.* This sofa seems to be a paradigm case of a good thing. But it is clearly not a *morally* good thing. There are no morally good sofas as there are not morally good chairs, stones, or planets. This may seem banal but is a very interesting result: There is a differentiation between morally good entities and entities which are good but not morally so. And clearly whole classes of things cannot be morally good whereas others—like actions—can.[81] The things, which can have a moral value, are not either morally good or morally bad. Consider (3) *A child is hungry and eats a banana.* This is an action but one that is neither morally good nor morally bad. It is morally neutral. In consequence, one can conclude that one of three possible deontic statuses—morally good, morally bad, and morally neutral—are assigned by human cognition to a certain specified class of events—e.g., actions—that can be the object of moral

[80] Schlick pointed out that any empirically orientated approach of ethics has to turn to actual moral judgements as data. The question whether these data have empirical reality was rightly discarded by him as being senseless and uninteresting as these judgements are part of mental reality and thus of empirical reality. Compare Schlick 1984, 70ff.

[81] This is a familiar distinction of the philosophical tradition but one which escaped nevertheless the attention of some philosophers, see, e.g., Moore 1993, chap. 1, sec. 2, 3.

evaluation.[82] This is not a new but nevertheless interesting observation about human moral cognition, as there are no a priori reasons for this classification of events. In Kant's terminology: It is a synthetic, not an analytic truth. We can easily imagine a being for which all events fall into the moral domain, knowing no morally neutral events or for whom there is no moral sphere at all. The assignment of three deontic statuses to certain classes of events thus turns out to be a distinguishing empirical property of human moral cognition.

What are, however, the properties that render (1) a moral action? One could, e.g., consider objective qualities of the actions like "Conduciveness to the well-being of a person" as such a property. From this hypothesis, it seems that the fact that bananas have nutritional value accounts for rendering (1) morally good. But consider (4) *The child gives a banana to a hungry child, hoping it will suffocate devouring it too quickly.* Examples like this show that internal states of the agent, more precisely his intentions, are important for the assignment of a deontic status like "morally good" as in (4) the action has the objective quality of being conducive to the well-being of the person—the banana is as healthy as in (1), and only the greed of the other person might make it less so—but the action is nevertheless not morally good due to the underlying intention of the agent. Again, there is no a priori reason why this should be so. On the other hand consider (5) *The child gives poison to the other child wanting to help him into a better world.* This is clearly not a morally good action. Therefore, not only the good intention of a person can be decisive for the evaluation but the objective qualities of the action are of relevance too. Let us consider three more simple cases of moral judgement in addition to the cases discussed to formulate then a possible principle of moral cognition: (6) *The child gives its banana to a hungry ape*; (7) *The wind shakes the banana tree and a banana falls in the lap of the hungry child*; (8) *The child gives the hungry child a banana because it wants to get its action-man.*

(6) seems to be a clear case of moral behaviour. One might conclude in consequence that moral behaviour is not limited to human beings as proper objects of moral action but perhaps more generally to feeling beings. The event in (7) is not an example of a morally good tree. It is not an act by an agent but a lucky event. Apparently, some sort of agency is thus a precondition of something being morally good. (8) is not a morally good action. It is barter. One can in consequence conjecture that an egoistic interest in the action's result precludes its moral goodness. Considering the examples (1)–(8), one can tentatively take something like the following as a principle *P* governing the moral faculty, which one might call the Basic Principle of Altruism:

[82] These statuses appear to be related to the notions of obligation, permission, and interdiction, e.g., as one is obliged to do what is regarded as morally good. Possibly there are reasons to believe that one should start any explanatory account with the notions of obligation, permission, and interdiction. This is the way Mikhail 2000 tries to proceed.

Morally good is an action if
a) the agent acts with the intention to foster the well-being of a feeling being without regard to the non-moral interests of the judging person (either the agent herself or an observer) and
b) the action is conducive to the well-being of a feeling being.

To avoid misunderstanding: This principle is supposed to describe the operation of a human higher mental *competence*. It is not supposed to describe their actual moral *performance*. What people actually do is clearly dependent on many factors, which have nothing to do with their moral judgements. Non-moral motives like pursuit of wealth, recognition, or power have for example obviously perennial importance in this respect as well. Secondly, this principle is supposed to be an *operative*, not an *express* principle. It is about how people *do* judge morally, not about what they think the basis of their action is. They might, e.g., think that their moral judgements are based on the commands of god, on a utility calculation, the emotional manipulation of a long, sad, sentimental story, or the perception of a metaphysical idea. Whatever their theories in this respect are, is something irrelevant for what they actually do. Only the latter is the object of a mentalist enquiry into ethics and law.

This principle is by no means new or original.[83] Nevertheless it is not banal but quite to the contrary highly contentious as it contradicts the great amount of scholarly work denying the reality of altruism (e.g., Hobbes 1965). It clearly does not explain many cases of moral judgement but certainly covers some core cases as we have seen. The way ahead is thus not to abandon this formulated principle because it gives no comprehensive account of human moral judgement (what of course it does not) but to refine it, develop additional principles, exception and default rules, etc., to construct by and by a theory with greater explanatory power.[84] The situation is not different to other sciences, which start with simple principles, which are then in turn refined and elaborated by generations of scientific work. There is no reason to assume that scientific understanding of the moral judgement of human beings should be easier to obtain than scientific understanding in chemistry or physics. It thus seems to be plausible enough to assume that this principle hints in the right direction and captures some properties of the moral faculty, which somehow any theory of moral cognition has to account for.

Let us now shortly consider the question of the learnability of this principle. Can the hand of parents and society write it on the blank paper of the child's

[83] Compare, e.g., Hutcheson 1971a, 112, 137, 177. Kant (1908, n. 8) took explicitly the point of view that moral knowledge is equally the domain of any human being. For him moral philosophy has to clarify the foundations of morality, not to invent daring new moral conceptions. This seems to be a quite convincing view.

[84] For some attempts to account for the anti-utilitarian moral judgements of human beings compare Mikhail 2000.

mind? The answer seems to be intuitively yes. Do parents not labour hard to teach their children some regard for others? Is this not one of the most difficult tasks of teachers and other educational instances? Is this influence not to be continued during lifetime, e.g., by the powerful institutions of the law and the state keeping some social fabric intact against the onslaught of unfettered egoism? But this intuitive answer might be misleading. One widespread model of moral learning relies on the application of (physical, emotional, etc.) sanctions. It is, however, impossible even to teach the meaning of normative categories like "ought" or "obligation"[85] to children by sanctions as the point of these concepts is that they are not reducible to force and compulsion. In addition, one cannot teach the moral evaluation of a disinterested concern for others as being good and thus a core content of morality by (physical, emotional, etc.) sanctions. Learning by exposure to sanctions would obviously mean that this learning process is based on some sort of utility calculation on the side of the child to avoid these sanctions or—in the case of positive sanctions—to obtain them. It has been long clarified, however, that genuinely altruistic comportment never can be the result of such utility calculations. The result of utility calculations can only be altruistic behaviour if sanctions are probable (as in this case this behaviour yields benefits) and free riding if not (as there is no danger to incur any losses by egoistic behaviour).[86] Thus, a child would never acquire the moral appreciation of a disinterested concern for others just by sanctions. In consequence, it seems that the case for a nativist account of altruism is not as weak as it might seem on first glance as standard learning theories appear to be less satisfying than mostly assumed.[87] Thus, Kant might have been right to argue that one cannot teach morality through sanctions (Kant 1908, 152) but that one has to cultivate this given fact of human nature, e.g., by showing through examples that a moral life is a preferable choice (ibid., 154).

Given these reasons, the principle *P* is plausible enough and thus suffices for the present purpose, which is not to formulate a comprehensive theory of the moral faculty but to explore what this kind of theory could have as an impact for the theory of human rights. What consequences, then, has such a principle for a theory of the foundations of human rights?

This question shall be answered by looking at the example of those human rights that traditionally form the core of human rights catalogues—civil liberties.[88] Most modern human rights catalogues possess other rights—most importantly a principle of equality, often granting legal claims beyond the provision of equality before the law. They thus incorporate a principle that one

[85] Compare Mahlmann 1999, 184ff.

[86] For an overview about the arguments compare Wolf 1984, 34ff.

[87] For some proponents of such theories, see note 7 above.

[88] Rights that confer normative powers, e.g., to enter into a contract are here taken to be a subcategory of civil liberties. The same is assumed for procedural rights, e.g., to stand trial under due process of law.

might call the Basic Principle of Justice which is to treat equal cases equally if there are no good reasons for differentiation. Another group of rights are social rights to material benefits that raise questions of distributive justice. No mentalist account of these kinds of rights will be attempted here—not because mentalism in ethics and law has nothing to say about justice (quite to the contrary the opposite seems to be true) but because it is not necessary for the limited purpose of these remarks. The plausibility or implausibility of mentalism in ethics and law can be illustrated well enough by discussing one central group of rights on which in consequence the attention will be focussed in what follows now.

Given this limitation one can ask more concretely: What importance can such a principle have for the foundation of civil liberties of the classical catalogues, say, to take an example, the freedom of the press?

As we have seen, the content of human rights must be morally legitimate. They have to be morally good according to the moral judgement of human beings to be morally justified. As it is assumed that the principle *P* captures some properties of the moral faculty, it follows that those civil liberties are morally justified that are morally good according to the principle *P*. In one word: Morally good are those contents of civil liberties that are intended to foster the well-being of other feeling beings—more precisely *human* beings as *human* rights are in question—without concern for the interests of the judging person (or to put it differently—from a neutral or disinterested point of view) and that are objectively conducive to this end.

This result has two important consequences. Firstly, the content of human rights are thus dependent on assumptions about the needs of human beings. One can only address the question of what would be conducive to their well-being if one knows what human beings actually need. Thus, a theory of the foundations of human rights presupposes a theory of human nature that specifies what the human needs are.

However, the principles of the moral faculty together with a theory of human nature are not enough to account for the foundations of human rights. The reason is the following. Social circumstances vary in history. There is cultural, economic, technological, and political change. Human rights are always codified in such concrete historical circumstances. Thus, at least to a certain degree, their content depends on these circumstances. The freedom of the press is clearly senseless under a historical circumstance where there is no press as writing or printing has not yet been developed. Given this dependency of the content of human rights on concrete historical circumstances one has to know how the needs (determined by a theory of human nature) of human beings are best realized in the given circumstances. Thus, secondly, a theory of the realization of human nature in given historical circumstances (political, economical, cultural, etc.) is necessary for any account of the foundations of human rights too.

To clarify the non-moral preconditions of a theory of the foundations of human rights, we take up again the example of the freedom of the press. Consider the following case. Somebody holds, first, that human beings can not think for themselves, that they need guidance from an elite, that they are too weak to act responsibly on reasonable and moral grounds, and, secondly, that in consequence it is harmful for the society to have an open exchange about opinions on contentious issues so that some kind of educational or other variety of dictatorship is actually the best thing for the overall well-being of the community. This person has formed firstly, a special theory on human nature (a kind of pessimistic anthropology along the lines of Hobbes 1965, Nietzsche,[89] Gehlen,[90] or Skinner[91]) and secondly a particular theory of the realization of this nature under given historical circumstances, namely, an authoritarian one. Given these assumptions the freedom of the press is morally not good as it does not foster the well-being of human beings and is thus not justified.

Given a different kind of anthropology following, e.g., the lines sketched out by classical enlightened thinkers like Kant or W. v. Humboldt, holding that human beings are autonomous, responsible agents, acting—at least partly—on the ground of rational insight and moral judgement and a social theory that takes—given the fallibility of the human mind—competing opinions and free access to information as the best way to assure the due course of public affairs, the contrary is true. The freedom of the press is then morally good and thus justified.

It is important to notice that theories about human nature and about the realisation of human nature under given historical circumstances are theories about *facts*, not *values*. It is as much a factual question what needs human beings have as it is a factual question how these needs are best realised under given historical circumstances. These—unavoidable—factual assumptions form thus the non-moral preconditions of moral judgements about human rights.

Given these findings one can summarize that a civil liberty *A* (e.g., to run freely newspapers, to found unions, to own property, etc.) is morally justified,

[89] Nietzsche called man "das nicht festgestellte Tier," the animal without fixed properties. The context of this famous remark merits attention: Nietzsche is discussing the function of religions which in the hand of philosophers can be in his view quite useful as they can serve to consolidate the power of the strong over the weak, they are "Züchtigungs- und Erziehungsmittel," means to sanction and to educate (Nietzsche 1966, Aph. 62).

[90] Gehlen called man a "Mängelwesen," a "deficient being." The consequence is again authoritarian: Gehlen (1993, 59, 64, 450ff., 709ff.), with explicit reference to Nazi ideology, abolished in later editions of the highly influential work "Der Mensch." For some comments see Mahlmann 1999, 348.

[91] Skinner 1953 and 1972. "[Our culture] has, to a considerable extent, a concern for its own future. But if it continues to take freedom and dignity, rather than its own survival, as its principal value, then it is possible that some other culture will make a greater contribution to the future" (Skinner 1972, 181).

if *A* is intended to foster the well-being of human beings from a neutral or disinterested point of view and is objectively conducive to this end according to the best theory of human nature and the best theory of the realization of this nature under given historical circumstances.[92] In this case, the right to *A* is justified according to human moral judgement, generated by an inborn moral faculty uniform across the species. This is in a nutshell the mentalist account of the moral justification of core contents of classical catalogues of human rights.[93]

This kind of moral justification is, of course, not sufficient for a full justification of human rights both in the moral and the legal sphere if one considers concrete cases in which the rights of the various persons might collide and normative conflicts do arise. This is a well researched area not to be pursued in detail here. Some sketchy remarks might suffice. Both for moral and legal rights it is a truism that no right (apart perhaps the right to human dignity) is boundless: A full theory of the foundations of human rights implies, therefore, a theory of the justified limitations of human rights given the social character of human life. An obvious choice for the distribution of rights in a community is, e.g., the application of the basic principle of justice demanding equal treatment of equals and thus of limiting rights by the rights of others, or the application of the outlined principle of altruism with the result that one of the normative standards the limitations have to meet is that they foster the well-being of feeling beings according to the best theory of human nature and the best theory of the realization of human nature under given historical circumstances from a neutral point of view.[94] In addition, as familiar considerations reveal, there seem to be limitations to the possible limitations of rights as well—e.g., that any limitation has to be proportional or that it is not morally justifiable to use a human being as a means to some (public) end even for the protection of the liberty of others.[95]

[92] "Best theory" is not meant normatively. It just refers in accordance with usual practice in the theory of science to the theory with the greatest explanatory power.

[93] This account is not a variety of utilitarianism. The well-being referred to is not an aggregate good. It is the good of a somewhat idealized individual.

[94] Other types of rights have additional limits—rights to material benefits might be limited by the resources available in the community or by principles of distributive justice. Other limits might include the principle of "nemo ultra posse obligatur" as rights imply an obligation on the side of the addressee of the right. Love or sunshine might foster the well-being of any human being considerably. But there is surely no right to be loved or to sunshine. Another issue arising in a full theory of justification is the importance or weight of the matter concerned to exclude banalities from consideration.

[95] An example for this kind of reasoning is the following: The liberty of the individual is limited by the criminal code, that regulates the possibility of legal sanctions. These sanctions, however, are themselves limited by the principle of human dignity, that every person is an end in itself. Following this kind of reasoning, the German Federal Constitutional Court upheld lifelong imprisonment as a sanction imposed by the German criminal law for murder but held that the principle of human dignity of Art. 1 of the German Basic Law demands that any

What all this concretely means for the various possible constellations of collisions of different rights is a question mainly to be answered on a case-to-case basis, sometimes very hard indeed as the practice of human rights adjudication amply shows. The moral justification outlined of the content of the human rights considered above concerns thus what is traditionally called *prima facie* rightness as opposed to rightness *sans phrase*,[96] or rightness *all things considered*, or rightness *on balance* (Baier 1958, 102ff.).[97] This is however all that is needed for the question pursued—the question of the foundations of the justification of a human rights catalogue is normally posed as a question of *prima facie* rightness, not of rightness *sans phrase*—not surprisingly, as no abstract rights catalogue can solve all normative conflicts and thus provide rightness *sans phrase* for all possible cases in advance. Consequently, legal catalogues regularly give only a very abstract outline of what kind of limitations are possible. The independent question of the limitations of the *prima facie* rights has to be answered thus in a second step.

Another important question to be answered in this context is the question of *institutionalization*. Not every right that might be morally justified can become part of a positive legally valid rights catalogue, e.g., the right to be treated politely in everyday life. This is mainly due to pragmatic reasons. There are rights that have to be protected by political or informal social, not legal means.[98]

convicted person has to have the concrete possibility to regain her liberty, compare BVerfGE 45, 187ff. It is one of the many challenges for a mentalist theory to account for this kind of moral/legal reasoning.

[96] Ross 1930, 19: "I suggest 'prima facie duty' or 'conditional duty' as a brief way of referring to the characteristic (quite distinct from that of being a duty proper) which an act has, in virtue of being of a certain kind (e.g., the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant." In contrast, actual duties are duties to do one particular act in particular circumstances (ibid., 28).

[97] Compare for further comments Hare 1981, 38; Alexy 1985, 87.

[98] This leads to the question—why are rights institutionalized at all? What has a mentalist theory of ethics and law to say about this process of legal institutionalization? Are there new insights to be achieved by this approach in this respect, too? On the one hand, mentalism has nothing to add to traditional accounts of the institutionalization of legal orders. This common analysis takes different reasons to be at the basis of this process that generates positive laws like human rights catalogues. Among these reasons is first the uncertainty of moral codes—e.g., concerning the question who the subject of a right is, what content it has or who the addressee is. These problems bring about the need for written normative orders with all that this institutionally entails—e.g., somebody that generates these laws with legitimacy like a parliament or bodies that adjudicate legal rules like courts. Secondly, moral obligations have surprising power directing human action. Nevertheless, in many respects the pure moral motivation of human beings is clearly not enough to rely on. Thus, it is buttressed by law and more precisely by its threat of sanctions. Thirdly, any society does need norms that have no moral status but are just rules derived from pragmatic necessities—there is no deeper moral reason to drive on the right or the left side of the street but it is nevertheless a good idea to secure the traffic rules by the force of the law. Fourthly, institutionalization opens up the

3.2.1.3.3. The Properties of the Moral Faculty and the Problem of Justification

In linguistic theory the perennial aim seems to be to achieve explanatory adequacy of the developed theory. It is usually not asked whether human beings have a "good" or "right" language faculty. (Even though one might ask that, e.g., as regards to its utility for communication, etc.[99]) In moral theory the situation appears to be different. Here not *explanation*, e.g., through mentalism but *justification* of moral contents is the central aim. From this perspective one will question whether—even given an adequate account of the moral faculty—the principles that govern it are "good" and "right" ones in a normative sense.[100] Concerning human rights this question arises, too. The content of core human rights is, according to the analysis above based on a moral judgement generated by the human moral faculty, a theory of the nature of human beings and a theory of the realization of human nature under given historical circumstances. Concerning the normative component—the moral judgement—one might ask whether the judgements of the human moral faculty justifying certain contents of human rights are *themselves* morally justified: Is it justified that human beings take those contents of civil liberties as being justified that are intended to foster the well-being of human beings without concern for the non-moral interest of the judging person and are objectively conducive to this end? Why this? Why not something else?

So far nothing has been said about this problem of justification. Quite to the contrary, the principles governing the moral faculty have been explicitly taken as an empirically based account of a higher mental faculty, the moral faculty. As explained, the account was not about how human beings actually act morally in every day life, as the theory is not about moral performance but

possibility of rational choice of the content of norms ideally in a democratic procedure. Furthermore, it creates the possibility to adapt the written rules to social changes and concrete needs. Mentalism adds nothing to these familiar and quite convincing theoretical accounts of the institutionalization of the law. This is not surprising because it is not a theory of everything but a theory of a very concrete and determined research interest without denying the equally justified value of other research projects. It does serve, however, an important service to legal theory: It clarifies what the cognitive preconditions of legal orders are as has been shown in a rough sketch for the foundations of human rights. These are familiar remarks. Hart (1961, 90ff.) lists the following disadvantages of morality that entail the necessity to establish a legal order: 1) uncertainty, 2) static, 3) inefficiency. Habermas (1992, 147ff.) lists three advantages of legal orders: 1) compensation of cognitive uncertainty of moral orders, 2) compensation of motivational deficiencies, 3) clarification of the addressee of obligations. For some more remarks compare Mahlmann 1999, 213ff.

[99] On the notion of the perfection of language compare Chomsky 1995 and 2002.

[100] This problem is the problem of the "open question argument" of G. E. Moore against the "naturalistic fallacy" that whatever naturalistic account of "good" may be offered, it may be always asked, with significance, whether it is itself good; compare Moore 1993, 67. One might think of Frege's critique of psychologism in logic in this context as well.

about moral competence. But nevertheless a theory of the moral faculty is not a theory about what kind of moral faculty human beings *ought* to have but what kind of moral faculty (taken as a competence) they actually *do* have. It is thus not normative in the sense philosophers might expect it to be if it wants to be taken seriously as a theory that really tackles the core issue of moral philosophy instead of illegitimately sidestepping it: The question which moral judgements are *really* morally justified. The following remarks try to sketch out the possible paths for finding solutions to this problem, which is difficult and contentious indeed.[101]

There seem to be three possible answers to the question of last-order normative justification which might all appear rather surprising on first glance but which are without alternative upon closer reflection. The first leads to a notion of trust in the reliability of higher mental faculties (a), the second to questions of taste in choosing ways of life (b), the third to an assessment of general consequences for the agent if she follows the commands of the moral faculty (c). All of these three answers show that it is rational and well-justified to follow moral judgements generated by the moral faculty and thus, in consequence, to take those contents of human rights as justified which are justified according to the judgements of the human moral faculty. But these answers show too, that the question whether these moral judgements are themselves morally good cannot be answered. The pursuit of last order normative justification, foundationalism, or "Letztbegründung" is thus senseless.

a) One might wonder why it should not be possible to show that the properties of the moral faculty are morally good themselves, that it is right in a normative sense that human nature happens to have this faculty yielding these judgements. Endeavours of "Letztbegründung" or "foundationalism" aiming exactly at this are after all—from Platonism to discourse ethics—not unfamiliar to practical philosophy. They try to give last reasons why some moral beliefs are justified and others are not. Why should one abandon this enterprise? Could one not point out that it is morally good, e.g., to have a disinterested concern for others? Is it not possible to underline the moral value of this judgement? But this kind of argumentation would beg the question. It is circular. Why is altruistic acting really morally good—because it helps others? Why is humane acting really humane? The judgement about the moral worth of the principles governing the moral faculty is made according to exactly those principles of the moral faculty, which are the object of evaluation. The principles that govern moral judgement are those that determine the

[101] One might say with some reason that the central criticism against the linguistic analogy drawn by Rawls by various critics was that the justification of the judgements of the moral faculty would be an open question. See Nagel 1975; Dworkin 1975; Hare 1975; Daniels 1979; Williams 1985. For a comprehensive account and criticism, see Mikhail 2000. See also Mahlmann 2003 on these questions.

judgement whether it is morally good to have these principles in the first place.[102]

The situation is not different to other domains of human knowledge. Take the example of science: The question whether science is really science (and not just a system of errors) can only be answered by applying the principles that distinguish science from non-science in the first place. The mental faculties yielding science—"theoretical reason" to use a traditional term—assess in this case the scientific value of theoretical reason as the science yielding faculty. The question whether science is the right science would be answered scientifically—and thus in a sense, not at all. The answer would be circular and thus begging the question, which was asked in the first place, namely, whether theoretical reason is reliable, whether it is yielding insights or errors.

The only way out of this circle seems to be not to enter it in the first place by just trusting the reliability of higher mental faculties like the moral faculty or theoretical reason. To be quite clear: This means not to take a surprising path in moral and theoretical epistemology. To take again the example of science. Since the sceptical crisis of the 17th century anti-foundationalism is deeply incorporated in the scientific enterprise.[103] Since then it should be well understood that there is no way to determine whether human knowledge is "objective," or "real" knowledge about the world. Any theory answering this question is still a *human theory*. The reach and reliability of human theories is, however, exactly the point in question. Humans cannot determine the objectivity of their knowledge from a non-human point of view. But exactly this point of view beyond their reach is necessary to evaluate the merits of human theories if one strives to achieve "Letztbegründung" or a foundationalist account of knowledge. Nevertheless, even taking these limits into account, there is still the hope and trust that science and thus the mental faculties involved in this mental activity yield at least some valuable results about the world. This is achieved most importantly by constantly improving according to given human standards of understanding the theories of science. One exercises the higher human mental faculties because one is faced with the desire and need to gain some understanding of the world and these faculties are all human possess to pursue these projects even though it is clear that the understanding achieved

[102] This problem arises in one way or another for any ethical theory. Take Platonism. A Platonist might assert that a moral judgement p has a last-order justification because this judgement grasps a metaphysical idea. But why is the judgement that this moral judgement grasps a metaphysical idea *itself* justified? By another judgement that grasps the metaphysical idea of grasping a metaphysical idea by a moral judgement? Or take discourse ethics: The content of moral judgements is justified according to this theory if everybody in a free discourse could accept it. The question is here: How is it determined whether this condition is met? By another discourse? How is it determined whether this meta-discourse is meeting the condition of universal consensus on the existence of universal consensus on the content of moral judgement? By yet another discourse?

[103] See Popkin 1979, 129ff., for a concise overview.

is not "absolute" or "objective" knowledge in a foundationalist sense. It is *human* knowledge and as such the best we can hope for.[104]

The same reasoning applies to the moral faculty. Human beings use it faced with the desire and need to act as an individual morally, and to establish a social order that is morally justified, e.g., by regarding certain rights protecting human dignity, equality, and liberty as morally justified, and others perpetuating human humiliation, discrimination, and servitude as utterly illegitimate. One certainly has to think about one's judgements, clarifying their factual basis, trying to preserve consistency, assessing the influence of interests and passions, etc. In the last instance, however, one has to trust that this faculty does not lead us astray with these last order judgements as the alternative to this trust is not absolute justification (which is unattainable for human beings) but the abyss of moral disorientation. To say it again: There is no real reason for this trust. It is not in any deep sense justified. But there is no alternative, either. It is as impossible to determine whether what to human beings seems to be morality is Real Morality as it is impossible to determine whether what to human beings appears to be science is Real Science.[105]

b) Apart from this argument for trust in higher mental faculties due to a lack of rational alternatives there might be a second and third path for answering the question raised why one *should* follow the judgements generated by the moral faculty. These paths of justification point to consequences of acting according to the demands of the moral faculty that are good, but now understanding "good" in a non-moral sense. It turns out that the use of this faculty (as it is happens to be) is in the immediate and long-term non-moral self-interest of human beings.

Arguments of the former kind have a long tradition.[106] To take an example of enlightened thought not susceptible of too much naivety: Hume argued that the "immediate feeling of benevolence and friendship, humanity and kindness, is sweet, smooth, tender, and agreeable, independent of all fortune

[104] Popkin calls this view "constructive scepticism" defined as "the recognition that absolutely certain grounds could not be given for our knowledge, and yet that we possess standards of evaluating the reliability and applicability of what we have found out about the world" (Popkin 1979, 150). On the relevance of this observation for the naturalistic study of the mind compare Chomsky 2000, 76ff.

[105] The example of scientific judgement is arbitrary. One could use other examples to make the same point, e.g., the language faculty. One might ask, then, whether the grammaticality judgement of native speakers yields Real Grammaticalness or whether it is corrupted and thus misleading, so that the native speaker really speaks ungrammatically according to the standards of Real Grammaticalness. Philosophers and linguists had then the task to determine what Real Grammaticalness is (like philosophers trying to determine what Real Science or Real Morality is). But it seems obvious that this is in fact not a very promising research project.

[106] The reason is obvious, as Hume (1975, 279) remarked: "Truths which are pernicious to society, if any such there be, will yield to errors, which are salutary and advantageous." Thus, one better proves the advantageousness of one's assertions independently of their truth.

and accidents," and thus superior to other, non-moral desires (Hume 1975, 282). "What wonder then," Hume asked "that moral sentiments are found of such influence in life; though springing from principles, which may appear, at first sight, somewhat small and delicate?" (ibid., 275). To act morally—if this depiction is right—means thus to have a refined taste for the good aspects of a human life.

It might be a mistake to regard an argument which appeals to taste as a basis of choices between different actions as weak, open to irrationality, or even base. It seems, however, that when faced with the necessity of a moral act and a possible price to pay for it the motivation for acting morally despite the consequences derives—apart from the command of morality to act for its own sake—to a certain degree from an aversion against the emotional consequences of acting immorally (like shame, etc.) and positively from the wish to feel the austere but lasting satisfaction which is the result of moral acting. One might prefer the pleasure to be able to see oneself with some respect in the mirror in the morning to the often more material benefits of satisfying other primary desires. The seemingly base appeal to taste appears to be thus nothing but the attempt not to rape one's own nature in one of its possibly finest and most delicate parts. And as human beings share a common nature there is nothing subjective or irrational about this decision.

The consequence of these ideas could be regarded as a re-humanization of morality. From this perspective it seems that morality is not a harsh and pleasure denying cold and thus to a certain degree inhuman realm of duty but might be in fact the path to the gentle satisfaction of intimate human desires.[107] It would be obviously hypocritical to assert that human beings could ever be motivated mainly by moral inclinations and not mostly by other desires. But it seems that there is something to be found in the consequences of moral acting, the very special taste of preserved dignity, which perhaps is sometimes not appreciated enough.

Thus, there is a second way to answer the question why one should follow the judgements of the moral faculty: To give moral acting some modest room in ones' actions might lead to a quite agreeable form of life.

c) Finally, there seems to be a further line of argument for answering the question why one *should* follow the commands of the moral faculty. Morality might from this point of view lead to substantial long-term non-moral gains. The benefits to others, on the surface a neglect of one's own wishes, might be in fact in the long run highly beneficial to oneself.

[107] This, again, is not a new observation. As Hutcheson dryly remarked, commenting on Mandeville's selfish system with obvious bewilderment that moral acting could be regarded as necessarily unpleasant: "He has probably been struck with some Fanatick Sermon upon Self-denial in his Youth, and can never get it out of his head since" (Hutcheson 1971b, 169). Schlick's remarks on pleasure in ethics (though perhaps misleading in other respects) are another example of this quite human idea; compare Schlick 1984, 201.

To understand the main thought behind this line of argument is to recall W. v. Humboldt's insight that the unfolding of the various capacities of any individual is strongly dependent on the development of the faculties of others. The reason is the following: Every person is obviously capable of very limited things. Only a social fabric, which provides space for individual variety can realize at least partly, what human life could be about. Thus the prospering of others has at least two rather crucial advantages for any individual in comparison to widespread misery: Firstly, the developed abilities of others can trigger the individual's own development. Everybody who wants to perfect her musical abilities profits, e.g., from Mozart's achievements in this respect. Secondly, the developed skills of others can be the key to human potentials, which the individual cannot develop herself. Somebody who has no clue of writing music and does not aim to do so because her main interest is mathematics might be nevertheless quite thankful that somebody like Mozart made it (unlike many children of the third world) to his mature age and had the chance to do his work, as it is possible in consequence for everybody to enjoy the results now. This line of argument is of course not limited to great achievement of arts and sciences but quite to the contrary applicable to any human quality—from managerial skills to good cooking.

The result of this thought is a strong and entirely rational argument for solidarity as a precondition for a good individual life.[108] Other people are in this view not just limits to the liberty of an individual as in standard formulas of political philosophy but the precondition of its substantial realization. Without the enhancing benefits of the contributions of others to human life the options of actions of human beings are severely limited. In a community of human deprivation liberty is meaningless. Therefore, a person living at the expense of others reducing their possible contribution to human culture lives in fact at the expense of his own benefits.

To take an example: Many artistic, scientific, social, individual contributions by women have been barred in the past by social arrangements that offered no space for them. By enforcing these arrangements men have—seemingly profiting from comfortable patriarchal positions—deprived themselves of the chance to enjoy the possible fruits of these achievements. It was surely advantageous for many men to bar the female Titians from developing their talents while profiting from their workforce in the kitchen. But it deprived many people from significant profits of confronting themselves with their achieve-

[108] In Humboldt's words: "Durch Verbindungen also, die aus dem Inneren der Wesen entspringen, muss einer den Reichthum des andren sich eigen machen" (Humboldt 2002, 64ff.). In my translation: "It is through ties, therefore, rooted in the inner self, that each is enabled to participate in the richness of the other." Rawls has made some remarks on the good of the "union of social union" taking up Humboldt's thought of the rationality of solidarity. But he devalues his insights by—somehow inconsistently—asserting that this argument can not claim universal validity. See Rawls 1971, 520ff., 567ff.

ments. The benefits of the suppression of women—e.g., comfortable lives for generations of men—are surely not worth the price paid for that—e.g., the deprivation of human culture of most of the possible contribution by women.

This line of argument holds obviously as well for the denial of life-chances for other less privileged groups in societies and for the existence of powerful cultures at the expense of the less fortunate ones. All this might yield some primitive short term gain, but impoverishes human culture significantly in the long run.

Obviously, a moral faculty with principles like altruism seems very suited to foster a kind of humboldtian community, as it drives people with its gentle coercion of the human will to do what in the end is most profitable to all: to take a disinterested concern in the well-being of others.[109]

Thus, to sum up, the question, whether the judgements of the moral faculty *should* be followed can be answered in three ways:

(1) by a notion of trust that the moral faculty, like other higher mental faculties does not lead us completely astray (argument from trust in higher mental faculties);
(2) by pointing out that moral acting might fulfil one of human beings' most delicate desires (argument from taste);
(3) by pointing out the general advantages for the general well being of this course of action (argument from utility of solidarity).

Correspondingly, to the question whether human rights, which are justified according to human moral judgement, are *really* justified, the following three answers are possible. First, one can point out that there is no moral yardstick beyond the moral judgement of human beings. They have thus no alternative to taking the rights as morally justified which appear to be so from their human perspective as no other perspective is available to them. Human rights might not be justifiable for Martians, but they are surely justified for human beings. And this, it seems, is all that is sensibly required from a theory of the foundations of human rights.

Secondly, to follow the command of the moral faculty to protect human rights might be a good choice if one is demanding as regards to the pleasures of life: The implied moral acting possibly yields delicate pleasures preferable to those of alternative courses of action.

[109] The assessment of the worth of the humboldtian community fostered by a moral faculty governed by a principle of altruism is not a moral one itself as the agents following this kind of argument are motivated by their non-moral interests and not by a disinterested concern for others. Consider this case: "*A* gives the child a banana, because he likes her voice and wants her to continue to sing for his entertainment." This is not a moral act. Adequately, the rational choice of a humboldtian community is truly a rational, not a moral one.

Thirdly, the fostering of a human rights culture might be very advisable if one hopes for a human culture less maimed by destructive forces as in most epochs of the past as a precondition of a human life not equally impoverished. The disinterested concern for others embodied in human rights might well turn out to be the best path to a satisfying individual life.

Thus, it is quite rational—contrary to relativistic conclusions—to ask whether human beings have certain human rights or not. There are standards to decide this question. The rational enquiry, e.g., whether freedom of the press is a human right or not, needs not be given up in favour of telling a long, sad, sentimental story that is manipulating sentiments on suffering journalists. Its answer is provided by moral judgement and empirical theories about facts, more precisely about human nature (which is of course not as "protean" and "malleable" as Rorty among many others wants us to believe[110]—any suffering individual will bear witness for that) and its realization in society. If there are better reasons to believe that the freedom of the press helps satisfying the human need to understand and act upon reflection responsibly in political and other spheres under given historical circumstances it is justified. If not, it is not justified. In consequence, a rational discussion about the content of human rights is possible. Serious work of many people is rightly devoted to this task trying to develop a systematic and coherent order of human rights, which is applicable in concrete cases and generally justified according to the moral and rational standards that human beings are able to apply. Asking this question and conducting this work is important, as this seems to be the only way to improve the standards of human rights in the time ahead.

These results are, however, surely less than philosophers and other reflective people had hoped for when they embarked to discover the foundations of morality and more concretely of human rights. One might regard a mentalist theory of law and ethics therefore as a further step of the "Entzauberung," the destruction of the magic spell of the world as Weber described the effect of progressing science (Weber 1968, 612)[111] as it depicts the limits of human moral understanding and renders morality a human—no more, no less—affair. In any case, however, this result is not nothing. As shown, there are good reasons to take the moral judgements of human beings seriously. Thus, there are good reasons to take human rights which are justified by these moral judgements seriously and to make human rights—being as well justified as achievable for human beings—a firm basis of action. It seems that neither the

[110] Rorty 1993, 115: "We have come to see that the only lesson of either history or anthropology is our extraordinary malleability. We are coming to think of ourselves as the flexible, protean, self-shaping, animal rather than as the rational or the cruel animal."

[111] Even though this impression is to a certain degree misleading as the analysis of the higher mental faculties reveals a rather enchanting complexity of human mental nature.

consequences of this course of affairs for the individual agent nor for mankind at large would turn out to be detrimental at all.

3.2.1.4. Natural Law Theories—Problems of Transition

Looking back a century from Montesquieu's program, the character of the 17th century approach to a new natural law doctrine, especially the Hobbesian type, becomes clearer: It is already a non-theological approach, referring to human nature as the foundation of law and state solely. The assumptions about human nature, however, are made in a context of justification. No clear distinction between justification and explanation is made yet. In general, natural law doctrines that use the idea of a social contract attempt to give a justificatory answer to a problem of transition or transformation. It is not offered as an explanation of how societies were constituted historically. Rather, it is an answer to the question of how a *status naturalis* should be transformed into a *status civilis*. This basic question can be specified as taking place in three steps:

(1) How is the *status naturalis* qualified?
(2) How is the *status civilis* qualified?
(3) How should the transition from one status to the other take place?

Again, as in Greek mythology, a foundational story is told. This time, however, no God or Goddess would appear. Human beings are left alone with their natural properties (although perhaps with a belief in God). The path to a civil, legal state is not mapped out for the human creatures by a transcendent being.[112] Rather, the demand to leave the state of nature issues from negative projections of human nature in this brutish, anarchic state.

> Whatsoever therefore is consequent to a Time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short. (Hobbes 1965, I, 13)

Men can scarcely avoid having the desire to escape this way of life.

[112] In the Christian tradition, too, there exists the idea of a transition: from the state of nature, which is the state of the original sin (*peccatum originale*), to the state of salvation or justification. The transition is made possible by God's grace, manifested in Christ's sacrifice; but we may also achieve the same transition, at least to a certain extent, by individual effort.

(1) How is the *status naturalis* specified?

a) The *status naturalis* is negatively characterized by the lack of law, state, authority, domination, there is no sense of justice and there is no money. Only the "brute" nature of human beings is left: their passions, basic faculties, desires, drives, instincts. In the narrative of the state of nature anthropological properties, constants of human nature are all that is available: a drive for aggression or dominance, fear of death and the will to survive. On the other hand a longing for peace[113] and a social sense are ascribed to these socially uncorrupted creatures.

Do norms exist already in the state of nature? Of course, there are no legal norms, because their existence characterizes a civil state. Norms in the broader sense of more or less generalized normative expectations, however, do exist. There are kinship relationships as basic patterns of group formation. In some theories, e.g., in Locke, private property is assumed, albeit not (yet) protected by any kind of "officials." Original, unalienable rights are asserted that a state legislator in a future state is not permitted to restrict: life, liberty and the pursuit of happiness.

b) It is interesting to see where the images of the state of nature originate from. They are constructions for the sake of a theoretical foundation of a normative claim; however, they are not free from empirical allusions. In this sense these images are metaphors transferred from certain circumstances that an author of the 16th/17th century might experience. But how could one have any experience of "brute" human nature?

It is a well known argument that the experience of the religiously motivated civil wars of the 16th–17th century provided collectively shared images that became a central part of theories of the state of nature at that time. This source of images usually is ascribed to the theory of Hobbes.[114]

Other authors correlate the images of the state of nature with features of a nascent antagonistically organized market society dominated by egoistic, utilitarian orientations (cf. Macpherson 1962).

[113] Cf. the critique of Hobbes's *De Cive* in Montesquieu 1949, book 1, chap. 2.

[114] From a biographical point of view this makes sense. In his *Leviathan*, however, Hobbes is quite unclear on this point: He concedes that a war among private people never existed, while war among sovereigns has always existed. But if "particular men" would wage war like sovereigns, the misery of the state of nature would ensue: "But though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours; which is a posture of War. But because they uphold therby, the Industry of their Subjects; there does not follow from it, that misery, which accompanies the Liberty of particular men" (Hobbes 1965, I, 13).

The 16th and 17th centuries not only were times of religiously motivated wars. They were (starting at the end of the 15th century) a time of great discoveries. Montesquieu could use the travel reports that had been accumulated and collected at his time for explanatory purposes. The authors of the 16th and 17th century were well aware of reports about "primitive" societies and "natural" people. Sometimes these savages were imported to Europe for exotic entertainment.[115] Reports, unreliable stories and fantasies were used to paint a picture of the *status naturalis*. How the sovereign of a (European) *status civilis* should have to deal with real people living in an assumed state of nature in the New World was an issue dealt with by scholars of Spanish late scholasticism (Vitoria, Suárez et al.)

Still another experience—say, a Grotian experience—was the battle between European maritime states, expanding globally and hence demanding a *mare liberum*. These states lived in a *status naturalis* not yet pacified by international law.

Irrespective of the fictitious character of images of the state of nature, these metaphors play an essential role in the normative context of justifying the exit out of this unpleasant state or of justifying a *status civilis*.

(2) How is the *status civilis* specified?

If there were original rights in the state of nature, are they at the disposal of the state sovereign or is it the function of the state to preserve and expand these "natural rights"? Is the state bound by legal provisions? Is the sovereign *legibus absolutus* or is there a supreme rule of law? How far does state domination reach in civil and religious matters? Is there a right to resistance? Are the roles of *homme/bourgeois* and *citoyen* split?

[115] I will mention only a few names from a long line of great thinkers: Michel Montaigne (1992, Book 1, chap. 31.) Thomas Hobbes: "It may peradventure be thought, there was never such a time, nor condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of America, except the government of small Families, the concord whereof dependeth on naturall lust, have no government at all; and live at this day in that brutish manner, as I said before. Howsoever, it may be perceived what manner of life there would be, where there were no common Power to feare; by the manner of life, which men that have formerly lived under a peacefull government, use to degenerate into, in a civill Warre" (Hobbes 1965, I, 13). John Locke: "Thus in the beginning all the World was America, and more so than that is now; for no such thing as Money was anywhere known" (Locke 1960, § 49). Montesquieu (1949, book 1, chap. 2): Man in a state of nature "would nothing feel in himself at first but impotency and weakness; his fears and apprehensions would be excessive; as appears from instances (were there any necessity of proving it) of savages found in forests." In a footnote Montesquieu mentions a savage man found in the forests of Hanover who was carried over to England during the reign of George I. For less known writers, see Bitterli 1976; Kohl 1981.

(3) How does the transition to a *status civilis* take place?

The systematic problem of justification is twisted into an allegedly temporal sequence of two states (*status naturalis* and *civilis*): a temporalization of justification. To ask for the "origin" of the state does not mean its historical development but its legitimation. The transformation from one state to the other is mediated by a contract. Who are the participants in this constitutive contractual procedure? Do they submit to a newly established authority or do they transfer their rights with a proviso of countermand? The idea of a consensual contract does not necessarily lead to a democratic government. By a social contract a people can also surrender to an authoritarian regime (as in Hobbes). A common consensus manifested in a social contract forms the normative foundation of a legal order guaranteed by state authorities. Only a government that passes the test of the social contract can claim legitimacy. Despite the fictitious character of the social contract other types of legitimation are systematically excluded: State authority can no longer be derived from God's grace nor will it find its foundation in a military coup. Social contract theories replace religious or transcendent modes of legitimation with an immanent one. This is part of the process of secularization and "*Aufklärung*."

The doctrine of a social contract implies the idea of the "makebility" of a whole society. The problem, however, is to what degree will natural conditions, the external environment as well as anthropological constants, still have an impact on our decision about how to make a society. The reference to a "second nature" is ambivalent insofar as it indicates that the conditions we live in are man-made; at the same time, however, they are not at our free, collective disposition. They are still "nature." This is an issue Marx and Engels pointed out in maintaining the existence of objective laws of the development of human societies that operate *a tergo*, beyond human intentions. The societies that we live in have not been constituted consciously by a collective will. It is only the future, socialist society that will be formed according to human plans—not via a social contract, but after a revolution (and probably after a phase of dictatorship).[116]

Traditional Natural Law doctrine is based on fictions: A natural state is a fictitious one. We do not know the pure "nature" of *homo sapiens* (perhaps as "*homini lupus*"). A real social contract never was concluded in historical time and space. The homogeneity of the people joining in a contract for a historical second is a fiction as well. In modern social contract theories these fictions are made explicit as counterfactual, i.e., normative presuppositions. One can see this strategy, e.g., in J. M. Buchanan's (1975) stage theory: Starting with a state of nature characterized by egoism and inequality, contractual relationships for

[116] The idea of makeability is fundamental to European integration. Will the European Union be the result of social contracts and democratic participation, or rather of top-down administrative decision-making?

common advantage are established. As a third step a protective state with courts is introduced in order to stabilize the mutual expectations built in contracts. Finally a productive state with legislation will evolve. The most famous renewal of classical social contract theories surely is John Rawls' *Theory of Justice*.[117] There the initial state is, however, characterized by ignorance as far as our natural makeup and our social status is concerned. The original position is a state of veiled nature. Robert Nozick (1974) also deals in *Anarchy, State, and Utopia* clearly with the problem of transition or transformation: from a state of nature via (dominant) protective associations to a minimal state, and from the original acquisition of property to the existing state of holdings. It is an obvious piece of justification, by and large, of the existing property distribution. However, he does not construct a normative theory based on counterfactual presuppositions. Instead he claims historical evidence for justice in the original acquisition (mainly following Locke) and justice in transfer. What comes out is a ridiculous piece of history—especially given the history of slavery in the U.S. and how the American Indians were maltreated and "maltreatied" (considering the unjust treaties between U.S. authorities and Indian nations and the breaches of contracts). According to his third principle of justice ("rectification of injustice in holding") Nozick ought to have become a fervent counsel opposing the Bureau of Indian Affairs and supporting class actions by the descendants of American slaves.

What remains of the state of nature and the doctrine of a social contract beyond ideal constructions and historically blind theories? Real problems of transition today originate from attempts to establish the condition of the rule of law. What are the foundations, i.e., the preconditions for the establishing of a regime of the rule of law, maybe even further of democracy and the guarantee of human rights? Examples appear from many quarters: the transforma-

[117] Rawls 1971, 11: "Thus we are to imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty, assuming for the present that this choice problem has a solution, determines the principles of justice." "Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain" (ibid., 12).

tion of former socialist, totalitarian countries into liberal democratic societies (cf. Merkel 1999; Pribán 2002); states torn by guerrilla warfare (e.g., Colombia) with para-military groups acting without official authorization (this resembles the image of a state of nature in the sense of a civil war); South Africa after the fall of the Apartheid regime; states emerging from dictatorships (Spain, Argentina, Chile, etc.); Afghanistan after the Taliban, Iraq …

What were the aims of these transitional processes and how did they actually take place? In order to set up basic principles of the rule of law—like the separation of powers, independence of the judiciary, legality of state activities, protection of minorities, guarantee of basic rights, etc.—constitutional provisions had to be changed (e.g., elimination of the dominant role of the Communist Party or other organisations); new forms of political representation and competition were required (introduction of a multi-party system and new electoral rules). At the same time, however, the foundations of a civil society had to be established (freedom of association, in particular freedom of trade unions; freedom of speech, freedom and plurality of information). In general, new provisions for a rearrangement of economic structures were made, aiming at a market society. The economic system should provide sufficient revenue for state activities. Political consolidation not only took place on the level of constitutional and electoral measures. In addition, essential changes on a behavioral level were required in order to establish a legal culture.[118] A basic aim to be attained is the elimination of corruption in state offices, in general the strengthening of professional ethics, i.e., the formation of a legalistic attitude among the members of the legal staff, a special ethos (Max Weber's "*Amtsethos*") of those who hold offices, the understanding of law as a limit on political power and not only as an instrument to uphold the power of a given regime. And all this should be based on a democratic culture shared by the citizens.

What can we learn from these recent examples? A civil state, a state based on the rule of law is not created *ex nihilo*. In every case there existed a predecessor state the transformation of which often resembles the picture of emerging from an anarchic state of nature. Therefore regularly the problem arises of how to cope with the atrocities and injustices committed under the former state. People did not leave a classical state of nature in which the distinction between just and unjust had not applied, as in Hobbes' *status naturalis*:

> To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. (Hobbes 1965, I, 13)

[118] Linz and Stepan 1996 distinguish four levels of consolidation: constitutional, representative, behavioural, and a level of civil culture.

New bodies were designed for coping with the past (truth commissions, lustration tribunals). The issue of "transitional justice" became salient.[119]

These recent examples of state transformation show that the establishment of a regime based on the rule of law is not a matter of human nature from which the legal rules could be derived; instead it will be the result of a very complex learning process, the conditions of which are not deliberately constituted in the moment of a singular expression of the common will, i.e., a collective contract. The transition does not take place during the juridical instant of making a contract, but is a collective learning process that long endures. The idea of a contract played a certain role at the beginning of the recent state transformations, as we can see from the use of Round Tables, commissions, treaties between government and guerrilla groups, the German unification treaty between two states, etc. But these were only starting points for efforts that have not yet ended.

On the broader front, today the situation among states might be still described as a state of nature, considering the erosion of the validity of international law. UN resolutions are declared irrelevant. The International Penal Court is not accepted by all states. A state of nature reappears in the global fight against terrorism: There is no rule of law in Guantánamo. In Hobbes the civil state is not marked, as in Kant, by a civil court; instead it is a supreme power, today maybe a hegemonial global power that identifies its interests with the global law. Ought this to be the new foundation of a global legal order?

3.2.2. Economic Foundations of Law

3.2.2.1. The Economic Foundationalism of Marx and Engels: Basic Assumptions

The discussion of Natural Law Theories and the application of the basic idea of transition via a social contract to recent phenomena lead us away from "natural" properties to man made conditions in a society. We have seen in the paragraphs on anthropological foundations, and in particular in those on Marx and Engels, that in consequence of their physical organization men are able to modify their environment and they have to modify it in order to survive. The material reproduction of mankind leads to the production of a second nature, to the production of food and means of producing it, to the production of social relationships as an institutionalized framework for the mode of reproduction. Thus the economic foundations of a society are built.

The first premise of all human history is, of course, the existence of living human individuals. Thus the first fact to be established is the physical organisation of these individuals and their

[119] Cf. Elster 1998 and forthcoming; Kritz 1995; Krygier 1999; McAdams 1997; Misztal 1998; Offe 1996; Pogany 1997; Pribán and Young 1999.

consequent relation to the rest of nature. Of course, we cannot here go either into the actual physical nature of man, or into the natural conditions in which man finds himself — geological, hydrographical, climatic and so on. The writing of history must always set out from these natural bases and their modification in the course of history through the action of men.

Men can be distinguished from animals by consciousness, by religion or anything else you like. They themselves begin to distinguish themselves from animals as soon as they begin to *produce* their means of subsistence, a step which is conditioned by their physical organisation. By producing their means of subsistence men are indirectly producing their actual material life.

The way in which men produce their means of subsistence depends first of all on the nature of the means of subsistence they actually find in existence and have to reproduce. This mode of production must not be considered simply as being the production of the physical existence of the individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite *mode of life* on their part. As individuals express their life, so they are. What they are, therefore, coincides with their production, both with *what* they produce and with *how* they produce. Hence what individuals are depends on the material conditions of their production. (Marx and Engels 1976b, 31–2; cf. Marx and Engels 1969a, 20–1)

Marx, and Engels as well, are surely "foundationalists" par excellence. It was they who introduced the notion of an economic "basis" on which societal institutions—and prominently among them: law, as the "superstructure"—are based. Marx' famous Preface to his *Contribution to the Critique of Political Economy* summarizes in the lines of a woodcut his basic assumptions. Nevertheless, it is sufficient to set forth the essential assumptions and basic distinctions, e.g., between basis and superstructure (*Basis/Überbau*) or between existence and consciousness (*Sein/Bewußtsein*). The economic foundations, primarily the forces of production (*Produktivkräfte*) by which men reproduce themselves materially within the framework of the relations of production (*Produktionsverhältnisse*), determine the other social conditions, the so-called superstructure (*Überbau*): ideas, ideologies and social institutions like law and the state. Law, in any case, is a secondary, derived phenomenon. "It must not be forgotten that law has just as little an independent history as religion" (Marx and Engels 1976b, 90–1; cf. Marx and Engels 1969a, 63). The origin, development and the functions of law have to be explained by reference to extra-legal, mainly economic conditions, antagonism between the forces of production and the relations of production, and the given mode of production.

My inquiry led me to the conclusion that neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel, following the example of English and French thinkers of the eighteenth century, embraces within the term "civil society"; that the anatomy of this civil society, however, has to be sought in political economy. [...] The general conclusion at which I arrived and which, once reached, became the guiding principle of my studies can be summarised as follows. In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness.

The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness. At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or—this merely expresses the same thing in legal terms—with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure. In studying such transformations it is always necessary to distinguish between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic, or philosophic—in short, ideological forms in which men become conscious of this conflict and fight it out. Just as one does not judge an individual by what he thinks about himself, so one cannot judge such a period of transformation by its consciousness, but, on the contrary, this consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of production. No social order is ever destroyed before all the productive forces for which it is sufficient have been developed, and new superior relations of production never replace older ones before the material conditions for their existence have matured within the framework of the old society. Mankind thus inevitably sets itself only such tasks as it is able to solve, since closer examination will always show that the problem itself arises only when the material conditions for its solution are already present or at least in the course of formation. In broad outline, the Asiatic, ancient, feudal, and modern bourgeois modes of production may be designated as epochs marking progress in the economic development of society. The bourgeois relations of production are the last antagonistic form of the social process of production—antagonistic not in the sense of individual antagonism but of an antagonism that emanates from the individuals' social conditions of existence—but the productive forces developing within bourgeois society create also the material conditions for a solution of this antagonism. The prehistory of human society accordingly closes with this social formation. (Marx 1987, 262–4; cf. Marx 1969b, 8–9)

The basic assumptions concerning the development of law can be summarized in the following statements: Law evolves primarily out of factual economic conditions. The moving principle, the historical *movens* is the development of the forces of production (tools, instruments, machines, including human technological skills). The basic factors are pre-normative. Again we find the assumption that norms originate from facts, i.e., from the basic conditions of material reproduction. There is a legal lag. The superstructure, and among it the law, lags behind the advancing economic basis. Law even can become an obstacle, a fetter for the progress of the forces of production. This is the occasion were revolutionary changes of the superstructure take place.[120] In a socialist state still the performance principle will remain valid ("To each according to his achievements."), while in a later communist society everyone will earn according to his/her needs. Classes and class antagonisms will dissolve. Finally state and law will whither away (cf. *infra*, sec. 3.2.2.3).

[120] From a Marxist point of view one could apply this idea to the fall of the socialist states. Their institutional framework no longer allowed an efficient growth of the productive forces, especially in computer technology.

3.2.2.2. Critique

This foundationalist theory has to cope with five problems at least. Marx and Engels dealt with the first four problems which will be demonstrated by quoting the relevant paragraphs at length. However, I cannot find allusions to the final one.

(1) The Reception of the Roman law—How can one, in the framework of Marx' theory, explain the fact that similar law exists although the economic basis has changed essentially? Roman law developed and existed, according to Marx' classification of historical epochs, in a slaveholder society. Private Roman law, however, survived the stage of feudalism and was renewed in codifications during the capitalist era. A solution to this problem might be that only a small part of Roman law, i.e., the one concerning the exchange of commodities, was received, but not Roman family law nor penal law.

However, the real difficult point to be discussed here is how the relations of production as legal relations take part in this uneven development. For example the relation of Roman civil law (this applies in smaller measure to criminal and constitutional law) to modern production. (Marx 1986, 45; cf. Marx 1969a, 640)

Civil law develops simultaneously with private property out of the disintegration of the natural community. With the Romans the development of private property and civil law had no further industrial and commercial consequences, because their whole mode of production did not alter. With modern peoples, where the feudal community was disintegrated by industry and trade, there began with the rise of private property and civil law a new phase, which was capable of further development. The very first town which carried on an extensive maritime trade in the Middle Ages, Amalfi, also developed maritime law. As soon as industry and trade developed private property further, first in Italy and later in other countries, the highly developed Roman civil law was immediately adopted again and raised to authority. When later the bourgeoisie had acquired so much power that the princes took up its interests in order to overthrow the feudal nobility by means of the bourgeoisie, there began in all countries—in France in the sixteenth century—the real development of law, which in all countries except England proceeded on the basis of the Roman Codex. In England, too, Roman legal principles had to be introduced to further the development of civil law (especially in the case of movable property). (It must not be forgotten that law has just as little an independent history as religion.) (Marx and Engels 1976b, 90–1; cf. Marx and Engels 1969a, 63)

[...] that Roman law, modified to a greater or lesser extent, was adopted by modern society because the *legal* idea that the subject of free competition has of himself corresponds to that of the Roman *person* (not that I have any intention of enlarging at this juncture on what is a most important point, namely that the *legal* representation of certain property relations, though undoubtedly deriving from them, is not for all that, and cannot be, congruent with them). (Marx 1985, 317; cf. Marx 1964, 614)

Roman Law is the consummation of the law of *simple*, i.e., of precapitalist, *commodity production*, though the latter also embodies much of the legal system of the capitalist period. Exactly, that is, what our burghers *needed* at the time of their rise and, in accordance with local common law, did *not* get. (Engels 1995, 155; cf. Engels 1967c, 167)

If the state and public law are determined by economic relations, so, too, of course, is private law, which indeed in essence only sanctions the existing economic relations between individu-

als which are normal in the given circumstances. The form in which this happens can, however, vary considerably. It is possible, as happened in England, in harmony with the whole national development, to retain in the main the forms of the old feudal laws while giving them a bourgeois content; in fact, directly reading a bourgeois meaning into the feudal name. But, also, as happened in Western continental Europe, Roman law, the first world law of a commodity-producing society, with its unsurpassably fine elaboration of all the essential legal relations of simple commodity owners (of buyers and sellers, debtors and creditors, contracts, obligations, etc.) can be taken as the foundation. In which case, for the benefit of a still petty-bourgeois and semi-feudal society, it can either be reduced to the level of such a society simply through judicial practice (common law) or, with the help of allegedly enlightened, moralizing jurists it can be worked into a special code of law to correspond with such social level—a code which in these circumstances will be a bad one also from the legal standpoint (for instance, Prussian *Landrecht*). But after a great bourgeois revolution it is, however, also possible for such a classic law code of bourgeois society as the French *Code Civil* to be worked out upon the basis of this same Roman Law. If, therefore, bourgeois legal rules merely express the economic life conditions of society in legal form, then they can do so well or ill according to circumstances. (Engels 1990b, 392; cf. Engels 1969b, 301–2)

(2) The English development—Different legal cultures appear to be able to exist on the same or on a similar economic basis. In capitalist societies we find a common law tradition as well as a legal culture of the continental type. In this case a solution might be that even though differences in court organization, professionalization, types of legal argument, etc. do exist, the different provisions serve similar functions (e.g., as regards the mobilization of real property).

In England, the continuity of pre-revolutionary and post-revolutionary institutions, and the compromise between landlords and capitalists, found its expression in the continuity of judicial precedents and in the religious preservation of the feudal forms of the law. In France, the Revolution constituted a complete breach with the traditions of the past; it cleared out the very last vestiges of feudalism, and created in the Code Civil a masterly adaptation of the old Roman law—that almost perfect expression of the juridical relations corresponding to the economic stage called by Marx the production of commodities—to modern capitalist conditions; so masterly that this French revolutionary code still serves as a model for reforms of the law of property in all other countries, not excepting England. Let us, however, not forget that if English law continues to express the economic relations of capitalist society in that barbarous feudal language which corresponds to the thing expressed, just as English spelling corresponds to English pronunciation—*vous écrivez Londres et vous prononcez Constantinople*, said a Frenchman—that same English law is the only one which has preserved through ages, and transmitted to America and the Colonies, the best part of that old Germanic personal freedom, local self-government, and independence from all interference (but that of the law courts), which on the Continent has been lost during the period of absolute monarchy, and has nowhere been as yet fully recovered. (Engels 1990a, 294; cf. Engels 1963, 303–4)

(3) The relative autonomy of law—Legal development cannot sufficiently be explained by economic variables alone. There are other causes like power relationships, particular political class constellations (cf. Rottleuthner 2001), theories and even internal requirements of legal consistency. Economic variables can explain ultimately, or as Engels put it in the German original, in the last instance ("*in letzter Instanz*") the historical development of law. The given

social conditions emerge out of an interplay of multifarious factors. Engels clarified this point in a letter to Joseph Bloch that is worth a lengthy quotation:

According to the materialist conception of history, the *ultimately* determining element in history is the production and reproduction of real life. Other than this neither Marx nor I have ever asserted. Hence if somebody twists this into saying that the economic element is the *only* determining one, he transforms that proposition into a meaningless, abstract, senseless phrase. The economic situation is the basis, but the various elements of the superstructure—political forms of the class struggle and its results, to wit: constitutions established by the victorious class after a successful battle, etc., juridical forms, and even the reflexes of all these actual struggles in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogmas—also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their *form*. There is an interaction of all these elements in which, amid all the endless host of accidents (that is, of things and events whose inner interconnection is so remote or so impossible of proof that we can regard it as non-existent, as negligible), the economic movement finally asserts itself as necessary. Otherwise the application of the theory to any period of history would be easier than the solution of a simple equation of the first degree.

We make our history ourselves, but, in the first place, under very definite assumptions and conditions. Among these the economic ones are ultimately decisive. But the political ones, etc., and indeed even the traditions which haunt human minds also play a part, although not the decisive one. The Prussian state also arose and developed from historical, ultimately economic, causes. But it could scarcely be maintained without pedantry that among the many small states of North Germany, Brandenburg was specifically determined by economic necessity to become the great power embodying the economic, linguistic and, after the Reformation, also the religious difference between North and South, and not by other elements as well (above all by its entanglement with Poland, owing to the possession of Prussia, and hence with international political relations—which were indeed also decisive in the formation of the Austrian dynastic power). Without making oneself ridiculous it would be a difficult thing to explain in terms of economics the existence of every small state in Germany, past and present, or the origin of the High German consonant permutations, which widened the geographic partition wall formed by the mountains from the Sudetic range to the Taunus to form a regular fissure across all Germany.

In the second place, however, history is made in such a way that the final result always arises from conflicts between many individual wills, of which each in turn has been made what it is by a host of particular conditions of life. Thus there are innumerable intersecting force, an infinite series of parallelograms of forces which give rise to one resultant—the historical event. This may again itself be viewed as the product of a power which works as a whole *unconsciously* and without volition. For what each individual wills is obstructed by everyone else, and what emerges is something that no one willed. Thus history has proceeded hitherto in the manner of a natural process and is essentially subject to the same laws of motion. But from the fact that the wills of individuals—each of whom desires what he is impelled to by his physical constitution and external, in the last resort economic, circumstances (either his own personal circumstances or those of society in general)—do not attain what they want, but are merged into an aggregate mean, a common resultant, it must not be concluded that they are equal to zero. On the contrary, each contributes to the resultant and is to this extent included in it. (Engels 2001b, 34–6; cf. Engels 1967b, 463–5)

It is similar with law. As soon as the new division of labour which creates professional lawyers becomes necessary, another new and independent sphere is opened up which, for all its general dependence on production and trade, still has its own capacity for reacting upon these spheres

as well. In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is *consistent in itself,* and which does not, owing to inner contradictions, look glaringly inconsistent. And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of a class—this in itself would already offend the "conception of justice." Even in the Code Napoleon the pure logical conception of justice held by the revolutionary bourgeoisie of 1792–1796 is already adulterated in many ways, and in so far as it is embodied there has daily to undergo all sorts of attenuation owing to the rising power of the proletariat. Which does not prevent the Code Napoleon from being the statute book which serves as a basis for every new code of law in every part of the world. Thus to a great extent the course of the "development of law" only consists: first in the attempt to do away with the contradictions arising from the direct translation of economic relations into legal principles, and to establish a harmonious system of law, and then in the repeated breaches made in this system by the influence and pressure of further economic development, which involves it in further contradictions (I am only speaking here of civil law for the moment).

The reflection of economic relations as legal principles is necessarily also a topsy turvy one: It happens without the person who is acting being conscious of it; the jurist imagines he is operating with *a priori* principles, whereas they are really only economic reflexes; so everything is upside down. And it seems to me obvious that this inversion, which, so long as it remains unrecognised, forms what we call *ideological conception,* reacts in its turn upon the economic basis and may, within certain limits, modify it. The basis of the law of inheritance—assuming that the stages reached in the development of the family are equal—is an economic one. But it would be difficult to prove, for instance, that the absolute liberty of the testator in England and the severe restrictions imposed upon him in France are only due in every detail to economic causes. Both react back, however, on the economic sphere to a very considerable extent, because they influence the division of property. (Engels 2001a, 60; cf. Engels 1967a, 491–2)

The specific economic form, in which unpaid surplus-labour is pumped out of direct producers, determines the relationship of rulers and ruled, as it grows directly out of production itself and, in turn, reacts upon it as a determining element. Upon this, however, is founded the entire formation of the economic community which grows up out of the production relations themselves, thereby simultaneously its specific political form. It is always the direct relationship of the owners of the conditions of production to the direct producers—a relation always naturally corresponding to a definite stage in the development of the methods of labour and thereby its social productivity—which reveals the innermost secret, the hidden basis of the entire social structure and with it the political form of the relation of sovereignty and dependence, in short, the corresponding specific form of the state. This does not prevent the same economic basis—the same from the standpoint of its main conditions—due to innumerable different empirical circumstances, natural environment, racial relations, external historical influences, etc. from showing infinite variations and gradations in appearance, which can be ascertained only by analysis of the empirically given circumstances. (Marx 1998, 777–8; cf. Marx 1965b, 798–9)

(4) The feedback of superstructure, including the law, to the basis ("*Rückwirkung*," "*Wechselwirkung*")—There is more than only a one-way relation between the economic basis (as a set of independent variables) and the law (as a set of dependent variables). Legal provisions can have an impact on economic conditions. Marx shares as a scholar of the 19th century an expressive notion of law. Law is conceived of as an expression of an underlying substance, in Marx' case: the economic basis. There are only few places in which

Marx and Engels make remarks that take an instrumental point of view interpreting law as a means of social control and of steering economic processes.

Factory legislation, that first conscious and methodical reaction of society against the spontaneously developed form of the process of production, is, as we have seen, just as much the necessary product of modern industry as cotton yarn, self-actors, and the electric telegraph. (Marx 1996, 483; cf. Marx 1965a, 504)

Society gives rise to certain common functions which it cannot dispense with. The persons selected for these functions form a new branch of the division of labour *within society.* This gives them particular interests, distinct too from the interests of those who gave them their office; they make themselves independent of the latter and - the state is in being. And now the development is the same as it was with commodity trade and later with money trade; the new independent power, while having in the main to follow the movement of production, also, owing to its inward independence (the relative independence originally transferred to it and gradually further developed) reacts in its turn upon the conditions and course of production. It is the interaction of two unequal forces: On one hand the economic movement, on the other the new political power, which strives for as much independence as possible, and which, having once been established, is also endowed with a movement of its own. On the whole, the economic movement gets its way, but it has also to suffer reactions from the political movement which it established and endowed with relative independence itself, from the movement of the state power on the one hand and of the opposition simultaneously engendered on the other. (Engels 2001a, 59–60; cf. Engels 1967a, 490–1)

[...] the fatuous notion of the ideologists that because we deny an independent historical development to the various ideological spheres which play a part in history we also deny them any effect upon history. The basis of this is the common undialectical conception of cause and effect as rigidly opposite poles, the total disregarding of interaction; these gentlemen often almost deliberately forget that once an historic element has been brought into the world by other elements, ultimately by economic facts, it also reacts in its turn and may react on its environment and even on its own causes. (Engels 2003; cf. Engels 1968b, 98)

It is only after the establishment of the Soviet power that the model of basis and superstructure is turned around so that law is seen as an instrument to enforce the building of a socialist society.[121]

(5) The conceptual distinction between economic basis and legal superstructure—Is the basis, are material conditions really free of norms? Is law only an element of the superstructure? What happens in the case of a feedback of law on the economic basis? What about the constitutive role of legal norms?

[121] Cf. Stalin's "definition" of law: "The superstructure is a product of the base, but this by no means implies that it merely reflects the base, that it is passive, neutral, indifferent to the fate of its base, to the fate of the classes, to the character of the system. On the contrary, having come into being, it becomes an exceedingly active force, actively assisting its base to take shape and consolidate itself, and doing its utmost to help the new system to finish off and eliminate the old base and the old classes. It cannot be otherwise. The superstructure is created by the base precisely in order to serve it, to actively help it to take shape and consolidate itself, to actively fight for the elimination of the old, moribund base together with its old superstructure." (Stalin 1972, 5).

Can the relations of production be described without reference to (legal) norms?

In the paragraph from the Preface to the *Critique of Political Economy* (quoted *supra*, 108, from Marx 1987, 263; cf. Marx 1969b, 8), we should take a closer look at the sequence "[...] the material productive forces of society come into conflict with the existing relations of production or—this merely expresses the same thing in legal terms—with the property relations [...]." "Expresses" in this context means a linguistic expression, and not, as in the expressive model of law, expression of an underlying substance. What in the language of political economy is denoted as "relations of production," is called in legal language "property relations." These are two different ways of describing "the same thing." This would be a case of extensional identity and intensional difference. There are a few other remarks by Marx in which he extensionally identifies relations of production and property relations or in which "property" is used as a category belonging to the basis. I had already quoted from the following paragraph:

> [...] how the relations of production as legal relations take part in this uneven development [...]. (Marx 1986, 45; cf. Marx 1969a, 640)

Property plays the role of a basic category, a category that is part of the basis:

> Upon the different forms of property, upon the social conditions of existence, rises an entire superstructure of distinct and peculiarly formed sentiments, illusions, modes of thought, and views of life. The entire class creates and forms them out of its material foundations and out of the corresponding social relations. (Marx 1979, 128; cf. Marx 1973a, 139)

In the draft of the *Manifesto of the Communist Party* (1847–1848) Marx and Engels state that the bourgeois "ideas are products of the (existing) bourgeois production and property relations."[122]

Apparently Marx distinguishes between property and its "legal representation":

> that the *legal* representation of certain property relations, though undoubtedly deriving from them, is not for all that, and cannot be, congruent with them. (Marx 1985, 317; cf. Marx 1964, 614)

This relationship, however, is not explained. Property cannot be defined without making reference to norms. An adequate description of the basis requires normative and even legal notions. In order to characterize the different social formations (e.g., feudalism or capitalism), one has to apply legal terms, e.g., capitalist ownership, labor contract, etc. As a consequence, the scheme of basis and superstructure, as far as law is concerned, is flawed. The collapse of

[122] And they continue: "as your legal system is merely the will of your class elevated into law" (Marx and Engels 1976a, 577; cf. Marx and Engels 1969b, 610).

the socialist states and their replacement by capitalist structures made clear that a social order has its legal foundations. Therefore it makes sense to speak of the "legal foundations of capitalism" (cf. Commons 1959). Rules concerning property relations, the organization of market competition and corporations, industrial relations, a credit system, provisions for bankruptcy procedures, stock exchange and a bank system, etc. are constitutive for a whole societal formation. In addition to changes in the political structure, such measures were adopted and put into effect immediately after the downfall of socialist regimes which had theoretically claimed to be in step with the achieved state of the productive forces.

Nevertheless, still fruitful in Marx' theory of law, however, is the notion of a legal lag (in analogy to Ogburn's cultural lag). There are technological and medical innovations that, as a reaction, call for legal provisions (e.g., in the case of electricity; traffic facilities; communications media; computer technology, including the internet; genetic technology). However, those inventions and innovations take place within legally regulated and constituted fields (firms, research institutes, universities). The "economic" sphere, the exchange of commodities including labor force and firms in which they are produced and used are legally constituted. The means of production do not evolve in a non-normative state of nature. They belong to a normatively infiltrated second nature. Usually legal norms are issued in order to cope with negative consequences of technological inventions without affecting the inventions as such. However, it is interesting to look for examples of (legal) norms the aim of which was to prohibit the use of certain technologies (e.g., the use of guns in Japan during its isolation).

3.2.2.3. The Future of Law

Several times I have alluded to the "foundational" question of when law came into being. What are the phylogenetic preconditions of the very existence of law? Marx and Engels dealt with this question (cf. Engels 1990c and 1969a). However, they belong to the very few who raised the issue of the future *end of the law* suggesting the "withering away" of state and law. If we look at the preconditions that must be fulfilled in a future lawless epoch it might become clearer what the foundations of the existence of law and state might be, according to Marx and Engels.

On the one hand it is asserted that that the state will fade away quasi automatically as soon as class antagonisms will have ended. Free association will replace the previous class domination organized and stabilized by the state.

When, in the course of development, class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole nation, the public power will lose its political character. Political power, properly so-called, is merely the organized power of one class for oppressing another. If the proletariat during its contest with the bour-

geoisie is compelled, by the force of circumstances, to organize itself as a class; if, by means of a revolution, it makes itself the ruling class, and, as such, sweeps away by force the old conditions of production, then it will, along with these conditions, have swept away the conditions for the existence of class antagonisms and of classes generally, and will thereby have abolished its own supremacy as a class.

In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association in which the free development of each is the condition for the free development of all. (Marx and Engels 1976c, 505; cf. Marx and Engels 1969c, 482)

As soon as there is no longer any social class to be held in subjection; as soon as class rule, and the individual struggle for existence based upon our present anarchy in production, with the collisions and excesses arising from these, are removed, nothing more remains to be repressed, and a special repressive force, a state, is no longer necessary. The first act by virtue of which the state really constitutes itself the representative of the whole of society—the taking possession of the means of production in the name of society—this is, at the same time, its last independent act as a state. State interference in social relations becomes, in one domain after another, superfluous, and then dies out of itself; the government of persons is replaced by the administration of things, and by the conduct of processes of production. The state is not "abolished." It dies out. (Engels 1987, 268; cf. Engels 1968a, 262)

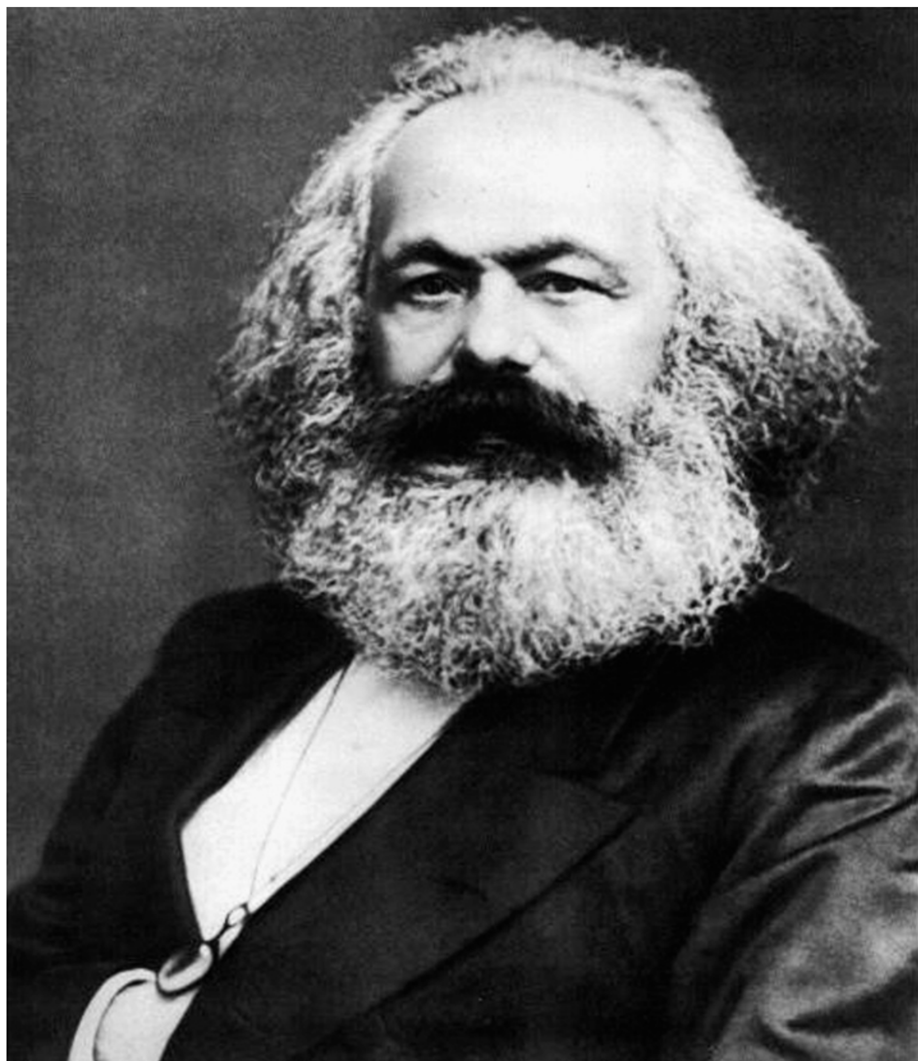
On the other hand there are rather drastic statements about the phase of transformation. As a lesson from the Commune in Paris (1870–1871) Marx postulated that the bourgeois state—that will not vanish silently—has to be smashed during a transformational period of the dictatorship of the proleriat (Marx 1989b, 131; cf. Marx 1966, 205). And Engels wrote later, on the occasion of Marx' death:

Marx and I, ever since 1845, have held the view that one of the final results of the future proletarian revolution will be the gradual dissolution and ultimate disappearance of that political organisation called *the State;* an organisation the main object of which has ever been to secure, by armed force, the economical subjection of the working majority to the wealthy minority. With the disappearance of a wealthy minority the necessity for an armed repressive State-force disappears also. At the same time we have always held, that in order to arrive at this and the other, far more important ends of the social revolution of the future, the proletarian class will first have to possess itself of the organised political force of the State and with its aid stamp out the resistance of the Capitalist class and re-organise society. This is stated already in the *Communist Manifesto* of 1847, end of Chapter II. (Engels 1989, 477–8; cf. Engels 1973, 344)

The stage of the dictatorship of the proletariat is, according to Marx/Engels and then Lenin, signified by the use of law as an instrument of overt state domination, even of terror, in order to suppress the old capitalist class. After that, law is used as an instrument to build up and to secure a socialist society.

The future of state and law in a communist society remained an open question. The answers range from the notion of the "withering away" of law and state to a "state of the whole people" in which law still serves administrative purposes. The thesis of the withering away of law and state was discussed in the Soviet Union after 1920. Under Stalin's domination this topic came to nought. In 1924 Eugen Pašukanis (who was executed in the 30s) published a book on the *General Theory of Law and Marxism* (Pašukanis 1980). He de-

Charles-Louis de Secondat, Baron de la Brède et de Montesquieu (1689–1755)



Karl Marx (1818–1883)

Émile Durkheim (1858–1917)

Max Weber (1864–1920)

nied the assumption that in hierarchical societies, economically based on slavery or a feudal system, state and law play a dominant role. According to his approach, law exists only in capitalist (market) societies with antagonistic interests of the owners of commodities. Preceding social formations are marked by pure, lawless domination. Hence, the existence of law, or the "legal form" as he says, presupposes (1) that a society is constituted by and large by isolated, "autonomous" owners of commodities who are integrated via the market, (2) that an antagonism of interests exists among these owners of commodities. This restricted notion of the preconditions, i.e., the foundations of law implies that law in a strict sense exists only in capitalist societies. Relationships between slaveholder and slave, between feudal lords and serfs are not legal at all. Rather, they are based on brute force. Legal relationships exist only among formally equal subjects. Therefore relationships between a capitalist and a paid worker are legal as long as both meet on the labor market. As soon as the worker enters the factory he is subjected to the "despotism of the capitalist" (Marx 1996, 337; cf. Marx 1965a, 351). The regulation of order within a factory is an act of private legislation, thus a piece of pure feudalism. According to Pašukanis' definition law will cease to exist if a society longer consists of isolated owners of commodities with antagonistic interests. Gradually, legal provisions will be replaced by technical regulations and plans—"the administration of things and the conduct of processes of production" (Engels 1987, 268; cf. Engels 1968a, 262)—the conduct of which must still be controlled, but rather in a medical-pedagogical way.

An utopian idea of the end of law that was more influential, at least in the philosophy of law, had been sketched by Marx in his *Critique of the Gotha Programme* (written in 1875, originally published in 1891). Bourgeois law measures people according to a standard of formal equality. Law is by necessity a law of inequality ("*Recht der Ungleichheit*") that cannot cope with the full variety of individual features. Even in a society in which the workers could determine the distribution of goods, they would be following bourgeois rules if the distribution would be exercised according to the achieved quantum of labor irrespective of individual features like age, marital status, number of children, etc. ("To each according to his achievements"). The dross of bourgeois law would be overcome only if the law would become "unequal." For Marx the end of equal law signals the end of law entirely. Then the need principle shall reign: "From each according to his abilities, to each according to his needs!" (Marx 1989a, 87; cf. Marx 1973b, 21). If the socio-economic conditions allow the application of the need principle there would no longer be law. This principle could be realized in a communist society, i.e., under conditions without class antagonism, in a society of "free associations," where no division of labor exists any longer, where the antithesis between mental and physical labor has vanished, after labor has become life's prime want and where no scarcity of goods ex-

ists according to the societal level of needs ("all the springs of common wealth flow more abundantly").

Marx apparently misunderstood the legal principle of equality. It is true, legal provisions cannot take every individual feature into account (which comes close to the classic *individuum est ineffabile*). Completely individualized justice by law is impossible.[123] The examples he mentioned, however, were during the last century accepted politically as legally relevant circumstances ("fact-types") and were "internalized" into labor law, social security law, tax law, etc.

3.2.2.4. Economic Analysis of Law

Marx' economic analysis can be used as a background in contrast to which the standard assumptions of neo-classical economics take on a sharp profile.

(1) A well known difference lies in the theory of value. Marx holds a theory of objective exchange value according to the amount of invested labor as opposed to a theory that explains market prices according to subjective preferences.

(2) While Marx assumes historical plasticity of anthropological needs and technological productivity (with an abundance of goods in the communist society relative to the collective needs), neo-classical economics is based on the assumption of an everlasting scarcity of goods and infinite needs. Therefore it is always necessary to form preferences among goods and to make choices.

(3) Marx' approach is holistic, dealing with structures, processes and collective mentalities. In contrast, neo-classical economics is characterized methodologically and in substance by an individualistic approach.

(4) The neo-classical approach normally is restricted to an analysis within the framework of given institutions, mainly those of market societies. Marx studied long term developments and revolutionary changes of economic structures or modes of production. Does the neo-classical theory yield any insights in other types of societies, e.g., those which do not have a money economy? What can it say about non-monetary costs of slavery or serfdom?

(5) Economic analysis attempts to be both, explanatory ("positive") as well as normative. The course to be taken depends on the use of standards of efficiency. One can either hold that people in general make choices according to standards of efficiency or one can state that they should do so. Marx, on the other hand, was very cautious about making evaluative or normative statements, programs and demands. Predictions on the basis of scientific knowl-

[123] Derrida (1992, 25) speaks in this sense of the "infinite 'idea of justice,'" which is quite other from the expression the U.S. president used—the "idea of infinite justice"—in his prelude to the Afghanistan war.

edge of historical laws should replace values and normative postulates. His normative claims, however, are concealed within scientific parlance.

Neo-classical economics has contributed substantially to the theory of law. Economic analysis of law,[124] however, has to cope with a fundamental problem. The basic assumption of self-interested maximization of preferences, the paradigm of rational egoism, and the explanation (and evaluation as well) of behavior according to standards of efficiency, i.e., mainly wealth maximization or willingness to pay, lead to the question of how individual preferences can form the foundations of law (cf. Kornhauser 1999). In Marx the crucial problem lay in the passage from the brute facts of the basis to the normativity of the superstructure. Economic analysis on the other hand starts with the evaluative and normative notion of preferences. They are not simple "factual" regularities of behavior, not just customs or habits. The problem, however, that economic analysis of law has to cope with could be framed by the categories of the individual and the general or the subjective and the objective. How can legal norms be *generated* on the basis of subjective preferences if legal norms or a legal order imply notions of obligation, duty, generality, objectivity? Do general norms "emerge" out of individual decisions? Is generalization the result of "aggregation"? One answer from the standpoint of the economic analysis of law is that particular cases present examples in which the judge can choose that rule which most promotes economic efficiency. Over time rules of this type will emerge. How can legal norms be *applied* by adjudicators according to standards of neutrality, impartiality—and not according to their private policy preferences? How does economic analysis apply to the behavior of legislators? Is it only the interest of maximizing power or of being re-elected that can explain legislative activities? And how does this approach apply to the behavior of public officials, in particular to that of the members of the legal staff? The problem is similar to that of the predictive theory of judicial behavior in legal realism. According to the self-concept of judges law cannot be reduced to a set of predictions of their own future actions. Likewise the basic professional doctrine of being bound by rules, precedents and principles is incompatible with a description of judicial behavior as purposive or goal orientated ("judicial consequentialism"). Private individuals also may share a detached attitude towards legal norms. They might from an external point of view "prudentially" calculate legal costs and benefits, i.e., the consequences of norm compliance and of non-compliance. Again the problem of the internal-external perspective comes up when we focus on the attitudes and the self understanding of those who feel obliged to conscientiously follow a legal norm.

[124] The classical writings in the economic analysis of law surely are Calabresi 1961, Coase 1960, and Posner 1973.

3.2.3. Moral Foundations of Law

3.2.3.1. Law and Morality

The relationship between law and morality is manifold. The starting point should be a definition, i.e., a conceptual distinction between both. As we have already seen in Weber, law was distinguished from convention (instead of morality) as an order "if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation" while the validity of a conventional order was externally guaranteed by the probability that deviation from it within a given social group would result in a relatively general and practically significant reaction of disapproval (Weber 1978, 34). What Weber calls "convention" is, in a conceptual context, treated by others as "morality." In the case of Durkheim, e.g., both, legal as well as moral rules, are defined as "rules of conduct that have sanctions" (Durkheim 1957, 2). Legal rules are determined and rather uniform; if transgressed sanctions are issued by specialized organizations. Moral rules, instead, have a nebulous and inchoate nature; they are backed by diffuse disapproval by public opinion.[125] In all these cases the distinction refers mainly to the way of sanctioning an infringement of rules, not to the content of rules (in the case of Durkheim it is in addition the formal character of preciseness).

In Max Weber's stage model of the development of law the moral and the legal domain are only separated at the level of formal rationality. Pure legality counts as the climax of occidental rationality. On the level of material rationality law still is impregnated with morality. Morality, however, also can be held to develop so that it reaches a formal, i.e., procedural stage, as in Habermas' approach (cf. Baurmann 1991).

Usually legal philosophers treat the relationship of law and morality as a normative one: The validity of law needs to be justified by moral standards. Legal norms or a legal order in general are valid only if they are capable of justification by meta-legal reasons (cf. Dreier 1991; Alexy 1992, 201). Scholars who are more realistically orientated, like Luhmann, argue that these meta-legal, moral standards are too diffuse as to be capable of conferring validity to a legal order. Since I have decided not to talk about "moral foundations" in the normative sense leading to some kind of natural law theory, I treat morality as a phenomenon of more or less shared convictions about right behavior and the good or virtuous life.

In socio-legal or legal anthropological writings morality often appears as a genetical foundation of law in a developmental chain of social orders. A temporal sequence is asserted like: custom—convention—morality—law. Th.

[125] Durkheim 1964, 79. A similar distinction between law and morality can be found in Geiger 1964.

Geiger argued against such a cascade of regularities and rules. According to him custom (“*Sitte*”), intertwined with religion, was the starting point out of which morality and law developed separately rather than in succession.

> Genetically, there is a close relationship between law and morality [...]. As systems of rule orientated behavior both have their common origin in custom, usage and convention. To this extent, embryonic morality and embryonic law coincide. In a primitive state, the life of a community is determined by accustomed forms of behavior, which are on the one hand backed by a religious taboo, on the other hand enforced against the individual by the community. In this state an internal as well as an external motivation leads to the observance of accustomed behavior. Thereafter, a process of polarization takes place separating more and more morality and law into two autonomous systems. (Geiger 1979, 170; my translation)

Geiger suggests a phylogenetical sequence. In the continuous process of legislation as well there is no recognizable moral base out of which legal norms evolve. Enacted legal norms are not a selection taken from underlying moral norms. Only occasionally do legal norms refer to moral ones.

On an ontogenetic level the development of legal consciousness and ideas of justice from general moral judgements has been studied (e.g., by J. Tapp following the writings of Piaget and Kohlberg; cf. Tapp and Kohlberg 1971; Tapp and Levine 1977).

Law also can be treated as being an observable indicator for discovering underlying states of social morality, e.g., in Durkheim, who used legal norms as indicators of social solidarity which, according to his methodological assumptions, cannot be directly observable (cf. *infra*).

Finally law could be understood, instrumentally, as a means to reinforce moral feelings and attitudes, thus strengthening the degree of social integration.

Concerning the last two issues—law as an indicator of “social solidarity” and law as an instrument of social integration—Durkheim has made essential contributions.[126]

3.2.3.2. Émile Durkheim

The sociology of Émile Durkheim (1858–1917) can be characterized, at least, by two peculiarities:

(1) The Approach

(a) Durkheim’s subject is long term developments in societies, distinguishing two great phases: from segmentary societies to industrial ones based on the division of labor. He thus reflected like many other scholars a basic collective

[126] On Durkheim’s theory of law, morality and religion, cf. Clarke 1976; Marra 1986; Gebhart 1993, 321ff.; Cotterrell 1999.

experience of the 19th century: the division of labor in society. The main problem that was raised by this new type of differentiation was social integration: What guarantees the coherence of a society? What is it that brings "social solidarity" about in a society that is dominated by contractual relationships on the market?

(b) In his methodology Durkheim emphasizes the autonomy of the "social" in contrast to the individual and the mental (psychic). As far as theoretical disciplines are concerned he draws a sharp distinction between sociology and psychology. Sociology has its own domain: social facts (*faits sociaux*), social actions in the sense of the society acting, and as one result of the "works of society"—social solidarity.

In both contexts, substantive as well as methodological, law is placed in a prominent position. For Durkheim, law, in particular codified private and penal law, is an instrument creating or ensuring (guaranteeing) social integration (later he stresses the similar role of religion). On the other hand law is a social fact par excellence. Here, the "social" crystallizes beyond any mental manifestation. Law exists outside the individual. As such it can be used in his developmental theory as an indicator for changes in fundamental social processes, especially within the forms of social solidarity.

(2) Law as an Indicator of Social Solidarity

Within the framework of his developmental theory Durkheim distinguishes "two great currents of social life to which two types of structure, not less different, correspond" (Durkheim 1964, 229). These two great currents are arranged in a developmental sequence: Initially, there is a similarity of collective consciousness. There are no autonomous individuals; the individual is absorbed by the collective. Social, moral, religious, and legal rules form one complex of indiscernible normativity (e.g., as we have seen, in Islamic societies where social life is religious life under the commands of the *sharia*). Law, particularly penal law, is embedded in an all-embracing collective morality. Many activities are controlled by public opinion and sanctioned by a more or less coherent community (ibid., 226).

The following phase is characterized by the division labor. It leads to a greater individualization; at the same time, however, to a more considerable interdependence among individuals. Moral rules tend to focus on professional activities. In contrast to the first phase in which the disapproval of offenses against public opinion dominated, now, in the second phase, misbehavior in the professional fields becomes the focus of public attention and sanctioning (Durkheim 1964, 226–7).

Both "currents" vary in the opposite direction (ibid., 229), i.e., a decrease in one aspect is accompanied by an increase in the other. The two currents

correspond to two forms of morality: The morality of segmentary societies, i.e., societies that are organized by kinship relationships, is constituted by shared faith. This type of morality is strong where the individual is not. Rules are practiced uniformly and observed without any argument. In contrast to this uniform morality, the morality in societies based on the division of labor depends on the autonomy of the individual. Individual decisions and private initiative are strengthened not without regard, however, to social liabilities. Moral rules are not focussed on a commonly shared way of life; rather they concern issues of professional ethics.

In his pertinent book *De la division du travail social* (1893) Durkheim dealt with the core problem of social integration. He sought the social bonds tying together a society increasingly based on the division of labor—he seeks its social solidarity. In order to make statements about the development of specific societies or to compare different societies it is necessary to classify different kinds of solidarity, i.e., to define them. Hence, the methodological problem arises of how to identify different types of social solidarity.

> But social solidarity is a completely moral phenomenon which, taken by itself, does not lend itself to exact observation nor indeed to measurement. To proceed to this classification and this comparison, we must substitute for this internal fact which escapes us an external index which symbolizes it and study the former in the light of the latter. This visible symbol is law. (Durkheim 1964, 64)[127]

This distinction between law and morality according to their epistemological status as an observable "external fact" and a not really measurable "internal fact" does not correspond to Kant's distinction between external and internal concerning the determination or motivation of actions. For Durkheim, law has a methodological function: It can be used as a well observable indicator for the moral state (which he believes is not observable) of a community or, in other words, for the kind of "social solidarity." Law renders possible access to the "internally" concealed moral phenomenon of social solidarity.

Today we would, in order to find out the moral state of a society, apply methods of empirical research, like interview techniques, etc., focussing, as the object of our research, on opinions and attitudes towards moral issues. However, from the point of view of a long term developmental study—and this is what Durkheim is interested in—this approach would be very limited.

Law is not the foundation of social bonds; rather it is, from a methodological point of view, the indicator that can be best observed in order to analyse "the social," i.e., the given forms of social solidarity.

[127] Durkheim uses the terms "fait interne" and "fait extérieur" (Durkheim 1960a, 28). Instead of "index" in the English translation I prefer the concept of an indicator because "index" has too many meanings, and "indicator" can be clearly used in the philosophy of science in reference to the relation between dispositional predicates and indicator sentences.

An observation is more objective the more stable the object is to which it relates. This is because the condition for any objectivity is the existence of a constant, fixed vantage point to which the representation may be related and which allows all that is variable, hence subjective, to be eliminated. If the sole reference points given are themselves variable, continually fluctuating in relationship to one another, no common measure at all exists and we have no way of distinguishing between the part of those impressions which depends on what is external and that part which is coloured by us. So long as social life has not succeeded in isolating itself from the particular events which embody it, in order that it may constitute itself a separate entity, it is precisely this difficulty which remains. As these events do not take on the same appearance each time nor from one moment to another and as social life is inseparable from them, they communicate to it their own fluctuating character. Thus social life consists of free-ranging forces which are in a constant process of change and which the observer's scrutinising gaze does not succeed in fixing mentally. The consequence is that this approach is not open to the scientist embarking upon a study of social reality. Yet we do know that social reality possesses the property of crystallising[128] without changing its nature. Apart from the individual acts to which they give rise, collective habits are expressed in definite forms such as legal or moral rules, popular sayings, or facts of social structure, etc. As these forms exist permanently and do not change with the various applications which are made of them, they constitute a fixed object, a constant standard which is always to hand for the observer, and which leaves no room for subjective impressions or personal observations. A legal rule is what is and there are no two ways of perceiving it. Since, from another angle, these practices are no more than social life consolidated, it is legitimate, failing indications to the contrary,[129] to study that life through these practises.

Thus when the sociologist undertakes to investigate any order of social facts he must strive to consider them from a viewpoint where they present themselves in isolation from their individual manifestations. It is by virtue of this principle that we have studied elsewhere social solidarity, its various forms and their evolution, through the system of legal rules whereby they are expressed. (Durkheim 1982, 82–3)

Durkheim quite simply states: "Law is enshrined in legal codes" (ibid., 71). Today, this would be an amazing statement for a legal realist or sociologist of law! However, considering the aim of Durkheim's restricted use of legal norms (as they are written in legal codes), his statement makes sense. We can interpret Durkheim's position as a kind of methodological etatism: Codified law can be used as an appropriate indicator of the underlying type of social solidarity.

[128] The concept of "cristallisation" can be found already in the early writings of Durkheim, e.g., in Durkheim 1975, 275 and in Durkheim 1970, 109.

[129] In a footnote he adds: "For example, one should have grounds to believe that, at a given moment, law no longer expressed the real state of social relationships for this substitution to be invalid." But when does one have grounds to doubt that legal norms do "no longer express the real state of social relationships"? The texts the norms are encapsulated in will not by themselves tell us whether the norms are being applied or observed, or how they are being interpreted. This is what is meant by the distinction between law in the books and law in action. Hence, sociologists of law call systematically into question the claim that formally valid rules are actually observed and effective. Durkheim is aware of this problem in his statement that social institutions and customs change the function of norms without changing their "nature" (Durkheim 1982, 120). The idea that legal institutions change the social function of norms, while the text the norms are expressed in remains unchanged, is developed in Karl Renner 1904 and 1929.

Indeed, social life, especially where it exists durably, tends inevitably to assume a definite form and to organize itself, and law is nothing else than this very organization in so far as it has greater stability and precision. The general life of society cannot extend its sway without juridical life extending its sway at the same time and in direct relation. We can thus be certain of finding reflected in law all the essential varieties of social solidarity. (Durkheim 1964, 65)[130]

Unlike Marx, Durkheim understands law not as a reflexion of the particular mode of production but of—one could say—a society's mode of morality. Law may not be the only observable manifestation of social solidarity. According to Durkheim, however, it is the one that mirrors the essential form of social solidarity and that is best available for us.

Our method has now been fully outlined. Since law reproduces the principal forms of social solidarity, we have only to classify the different types of law to find therefrom the different types of social solidarity which correspond to it. (Durkheim 1964, 68)

We have seen that in Durkheim it is a special type of sanction and a way of sanctioning that distinguishes legal norms from other kinds of norms. Therefore Durkheim classifies different types of law according to different types of legal sanctions (ibid., 68–9), and differentiates between:

– repressive law (penal law);
– restitutive or compensatory law (also "cooperation law," i.e., contract law, commercial law or family law).

Repressive law with retaliation as the rationale of sanctions is an expression of a homogenous collective consciousness threatened fundamentally by transgressions.

There exists a social solidarity which comes from a certain number of states of conscience which are common to all the members of the same society. This is what repressive law materially represents, at least in so far as it is essential. (Durkheim 1964, 109)

Restitutive law is much more differentiated by permitting a wide range of individual arrangements. Durkheim attributes repressive law to a society which is characterized by mechanical solidarity, restitutive law to one which is characterized by organic solidarity (ibid., 129ff.):

Law	repressive	restitutive
solidarity	mechanical	organic

[130] The term "reflected" is used here differently than in Marx, where the superstructure "reflects" (*wiederspiegeln*) the basis but does not indicate it; much less can it indicate an unobservable basis.

Now we can turn back to the "two great currents" with which we started. Through different legal glasses Durkheim can observe different forms of social solidarity. In societies with mechanical solidarity, associations are formed via "similarities": blood-relationship, affection to the homeland, ancestor-worship, tradition. Religious/moral beliefs are shared homogenously and are enforced by repressive law. The individual is rather an object within the society, not an individualized subject. There is no mobility of the "social molecules." In contrast, organic solidarity results from social differentiation, i.e., the division of labor. The social elements are not fixed mechanically but they fulfill various functions. They are interconnected via contractual agreement. Only societies with organic solidarity enable the development of free and autonomous individuals. Contracts alone, however, are not sufficient to obtain social coherence (cf. *infra*). According to Durkheim mechanical solidarity, indicated by repressive law, characterizes segmentary societies, i.e., societies composed of similar elements (often characterized as "primitive" societies). The clan forms the essential segment of this type of society. On the other hand organic solidarity exists in a complex and modern society with functional differentiation based on the division of labor.

Durkheim introduces a historical aspect by depicting both, mechanical and organic solidarity, as successive phases (in terms of the "two currents"). He recognizes the transformation from mechanical to organic solidarity in the gradual replacement of repressive by restitutive law. For Durkheim division of labor is the underlying *movens* (thereby coming closer to Marx).

Law	repressive	restitutive
solidarity	mechanical	organic
division of labor	simple (segmentary; clans)	complex (functional; role, groups)

One conclusion concerning the development of law is that law in so-called "primitive societies" was solely repressive. Penal law marks the early phase of the development of law. It is replaced and superimposed step by step by restitutive law responding to the "great currents of social life." Repressive law, however, does not vanish totally. Durkheim states: "As far as we can judge of the state of law in very inferior societies, it appears to be entirely repressive" (Durkheim 1964, 138).[131]

Because of his methodological preference for *written* law as a sociological source Durkheim is confronted with the problem that there is, by definition, no written law in illiterate societies. However, he attempts to prove his hypothesis

[131] On Durkheim's thesis of the phylogenetic primacy of penal law cf. Schwartz and Miller 1964; Baxi 1974; Schwartz 1974.

that penal law is the phylogenetic starting point of law by using—"as far as possible" (Durkheim 1964, 138)—sources of written law. Of course, the French school of the anthropology of law (Lévy-Bruhl 1910, 1921; Mauss 1923), influenced by Durkheim, did not restrict its studies to this "literal" approach.[132]

(3) Law as an Instrument of Social Integration

(a) The Problem of Social Integration

The different types of social solidarity represent different types of social integration. In particular Durkheim discusses theoretical approaches that deal with the problem of social integration of societies during the phase of organic solidarity, i.e., societies with contractual relationships as their structural element. He alludes to the tradition of the "social contract," first in Rousseau's version, then (and mainly) to Herbert Spencer's approach.

(i) The Theory of the Social Contract

Durkheim deals with social contract theories under the aspect of social integration, not, however, from the point of view of an ideal that would provide the justification or critique of given societies and states, nor does he deal with problems of transformation to a state of the rule of law, e.g. (cf. *supra*).

Here, Durkheim refers particularly to Rousseau. According to Durkheim, Rousseau's idea of a *Contrat Social* is irreconcilable with the notion of the division of labor. In a functionally differentiated society there is no homogeneity; instead we find a plurality of opinions according to the level of the division of labor.

> For in order for such a contract to be possible, it is necessary that, at a given moment, all individual wills direct themselves toward the common bases of the social organization, and, consequently, that each particular conscience pose the political problem for itself in all its generality. But that would make it necessary for each individual to leave his special sphere, so that all might equally play the same role, that of statesman and constituents. Thus, this is the situation when society makes a contract: If adhesion is unanimous, the content of all consciences is identical. Then, in the measure that social solidarity proceeds from such a cause, it has no relation with the division of labor. (Durkheim 1964, 201)

> Not only are there no societies which have such an origin, but there is none whose structure presents the least trace of a contractual organization. It is neither a fact acquired through history nor a tendency which grows out of historical development. (Ibid., 202)

[132] Even if Durkheim's methodological restriction appears odd today, we should still find it worthwhile to follow his line by relying solely on codified legal norms, this to analyze through these indicators a society's underlying "mode of morality" and its long-term changes. The results obtained, however artificially tethered by these methodological blinders, might then be validated on the basis of other material external to law.

Societies with a high level of division of labor are characterized by a lack of homogeneity, by a plurality of opinions, a "moral polymorphism" (Durkheim 1957, 7)[133] that makes a consensus shared by the whole society totally improbable.

(ii) Spontaneous Agreement as a Result of Individual Interests

Durkheim finds the idea of a spontaneous agreement resulting from individual interests in Spencer.[134] Both authors, Spencer as well as Durkheim, classify world history according to two stages. In contrast to Durkheim, Spencer differentiates between:

– Military societies in which, within a hierarchical order, imperatives are imposed top down.
– Industrial societies with "industrial solidarity," i.e., free exchange as the dominant mode of social interaction. The net of social solidarity is woven by the large quantities of spontaneous agreements of individual interests. Administrative law and state interventions decline. (Durkheim 1964, 219ff.)

Spencer and Durkheim agree in explaining the development from one stage to the other—in Durkheim: The development of societies from a segmental type to an organized type (ibid., 222)—as being caused by a growing division of labor. According to Durkheim, however, no society could be bound together only by contractual agreements.

Contrary to Spencer, Durkheim holds that it is not possible to integrate a market society only by the pursuit of the self-interest of isolated individuals. "There is nothing less constant than interest" (ibid., 204). In that case only temporary relations could exist.

> Society would be solely the stage where individuals exchanged the products of their labor, without any action properly social coming to regulate this exchange. (Ibid., 203)

No society could rest upon self-interest. There would be eternal hostility. Only occasional encounters would take place. Therefore another explanation for its coherence must be found, and social coherence has to be—normatively spoken—created in another way.

(iii) Durkheim's Own Version

In contrast to Spencer, Durkheim points out the relevance of the "social" for the creation of integration. When Durkheim speaks in this context of "social

[133] He also speaks of a "moral particularism," ibid., 5.
[134] On Durkheim's critique of Spencer in general, see Durkheim 1964, 200ff.

action," further explanation is required. In Durkheim "social action" doesn't mean—as we are used to use it today—an action that is orientated by an "ego" towards an "alter" in a relation of "double contingency" (Parsons), i.e., with their expectations and expectations of expectations.

Rather, society is conceived of as a particular subject to which actions can be ascribed ("acting society"). The actions of this social aggregate are particularly manifested or indicated in law. Law is not the result of individual acts nor of collective group acts; it is something distinct from experience at the personal, psychic level. In law the individuals are confronted with general and objective obligations; they experience an anonymous pressure.

Durkheim consequently distinguishes between individual and social acts. Again he finds a historical tendency in their interrelationship: The domain of individual acts increases relative to the realm of social acts. However, the correlation differs from the one between the quanta of repressive and restitutive law. Restitutive law increases at the expense of repressive law, while the amount of individual as well of social acts can expand at the same time. This additional evolutionary hypothesis Durkheim attempts to prove again by analyzing long term tendencies in the development of law in which social acts are represented. Law therefore is not only used as an indicator of the types of social solidarity—organic/mechanical—but also as an indicator of the extent of "social action."

> The obligations that society imposes upon its members, as inconsequential and unenduring as they may be, take on a juridical form. Consequently, the relative dimensions of this system permit us to measure with exactitude the relative extent of social action.
>
> But it is very evident that, far from diminishing, it grows greater and greater and becomes more and more complex. (Durkheim 1964, 204–5)

A special instance of social action is the State's action. Hence:

> There is no contradiction in the fact that the sphere of individual action grows at the same time as that of the State. (Ibid., 220)[135]

In contrast to Spencer, Durkheim assumes, e.g., that administrative law increases according to the level of social development (which implies a higher degree of individualization). Spencer's ideal state, being responsible only for adjudication and warfare, rather represents a primitive form of state. In fact the state had gained a lot of new functions like: new branches of courts, increase of the military sector, education, public health, public welfare, administration of (public) transport and of communication, statistical services, international relations, control of credit institutions (ibid., 221–2).

[135] "To be sure, it does not result in making the sphere of individual activity smaller" (ibid., 205).

Durkheim sometimes seems to associate "social action" with "social discipline" (ibid., 205) which also doesn't decrease. Social discipline can be imposed by repressive as well as by restitutive law. Their relative proportion might change but not the grand total of discipline. Or, as Durkheim puts it in another way: In the course of history "more life" grows, hence there is more discipline, though it is manifested in different forms. In general, the various rules determining behavior multiply.

(b) Private Law: The Extra-Contractual Foundations of Contracts

According to Durkheim individual and social (State) actions increase in correspondence with the division of labor; contractual relations as well as extra-contractual relations accumulate (which Spencer did not realize) (Durkheim 1964, 206). Durkheim attempts to demonstrate this double tendency in the case of private law,[136] especially in the field of family law. Marriage and adoption would lose more and more their private contractual character, instead gaining a public character. Guardianship and incapacitation become an object of stronger state intervention. Social control over how to create, to use, to dissolve or to change these obligations increases. "The reason lies in the progressive effacement of segmental organization" (ibid., 210). Clan and family as original segments of social life are absorbed by the "social mass" and merged in the "system of social organs" (ibid.). A family is no longer based on contracts; rather, it becomes a public institution.

This serves as a prelude to Durkheim's famous thesis of the extra-contractual foundations of contract (cf. Röhl 1978). This thesis can be unfolded via three basic assumptions of Durkheim:

– "The greater part of our relations with others is of a contractual nature" (Durkheim 1964, 213–4).
– "For everything in the contract is not contractual" (ibid., 211).
– "Every society is a moral society" (ibid., 228).

"*The greater part of our relations with others is of a contractual nature.*"

Starting from the indubitable fact of the division of labor, which is contractually consolidated in a social net, Durkheim agrees with the notion of a society based on a market economy. But as we have learned from his quarrel with Spencer, contractual relationships cannot guarantee permanent social coherence.

[136] Durkheim 1964, 206ff. His second example is administrative law; cf. ibid., 219ff. It would not be far-fetched to apply this assumption to the recent developments by which we have allegedly greater individualisation, flexibility, deregulation, etc., accompanied with increasing state activity.

"*For everything in the contract is not contractual.*"

Durkheim points out that "a contract is not sufficient unto itself, but is possible only thanks to a regulation of the contract which is originally social" (Durkheim 1964, 215). Only society can confer obligatory power to it. "As soon as we have made the first step towards co-operation, we are involved in the regulative action which society exercises over us" (ibid., 216). Although a contract implies an obligation based on the free will of a person, its consequences no longer depend on private autonomy. A contract is always subjected to rules that are the "work of the society" (ibid., 211).

> Even where society relies most completely upon the division of labor, it does not become a jumble of juxtaposed atoms, between which it can establish only external, transient contacts. Rather the members are united by ties which extend deeper and far beyond the short moments during which the exchange is made. Each of the functions that they exercise is, in a fixed way, dependent upon others, and with them forms a solidary system. Accordingly, from the nature of the chosen task permanent duties arise. Because we fill some certain domestic or social function, we are involved in a complex of obligations from which we have no right to free ourselves. There is, above all, an organ upon which we are tending to depend more and more; this is the State. (Ibid., 227)

The conditions of co-operation based on contractual agreement have to be made permanent. A contract includes more than what the parties figured out when the contract was concluded. Matters which were not anticipated by the parties are regulated by the State through the provisions of contract law. They determine what the parties didn't arrange: the normal standards of an equilibrium.

> A *résumé* of numerous, varied experiences, what we cannot foresee individually is there provided for, what we cannot regulate is there regulated, and this regulation imposes itself upon us, although it may not be our handiwork, but that of society and tradition. It forces us to assume obligations that we have not contracted for, in the exact sense of the word, since we have not deliberated upon them, nor even, occasionally, had any knowledge about them in advance. Of course, the initial act is always contractual, but there are consequences, sometimes immediate, which run over the limits of the contract. We co-operate because we wish to, but our voluntary co-operation creates duties for us that we did not desire.
>
> From this point of view, the law of contracts appears in an entirely different light. It is no longer simply a useful complement of individual conventions; it is their fundamental norm. Imposing itself upon us with the authority of traditional experience, it constitutes the foundation of our contractual relations. (Ibid., 214)

Official contract law increases in volume and complexity—both in terms of law which may be drawn upon by the parties as well as in terms of mandatory law. Contract law imposes obligations on individuals they haven't agreed upon. In such cases it becomes obvious what "the society" regulates in addition and sometimes to the contrary of what the parties have agreed upon. E.g., it determines:

– legal capacity to conclude a contract,
– terms of concluding a contract,
– obligations in fulfilling a contract,
– sanctions for non-performance,
– terms, such as duration,
– substantive limitations on freedom of contract (like *ordre public* or good faith),
– requirements of justice.[137]

The role of society is not, then, in any case, simply to see passively that contracts are carried out. It is also to determine under what conditions they are executable, and if it is necessary, to restore them to their normal form. (Durkheim 1964, 216)

Also as autonomous subjects of a contract we are absorbed in a net of obligations previously woven by the state. The extra-contractual foundations of contracts, according to Durkheim, lie mainly in statutory, i.e., state law. This legal base is supplemented by the pressure of custom: "Finally, besides this organized, defined pressure which law exercises, there is one which comes from custom" (ibid., 215).

The "basis" of a society is its moral constitution, its "social solidarity." Statutory law is not only, as an indicator, useful in identifying the mode of social solidarity. It also forms substantially, together with customs, the moral constitution of a society.

"*Every society is a moral society.*"

Obviously Durkheim was not content with the private law of his age. Sometimes the pathos of the moralist overwhelms a sober analysis of society. Durkheim states that altruism must remain the basis of a (moral) society. Living together means to strive for mutual understanding, to make sacrifices, to undertake strong and permanent commitments. No one can exist on his/her own. An individual receives everything from society that he/she requires (Durkheim 1964, 228). Cooperation in society needs its own morality which, according to Durkheim, has not yet been sufficiently deployed. He complains about the "amoral character of economic life" (Durkheim 1957, 12) and trusts, as a remedy, on the development of professional ethics; otherwise industrial society would sink into anarchy (ibid., 11).

For Durkheim a moral society has to be a just society, which becomes obvious in another of his great evolutionary assumptions in which he asserts a sequence from a "real contract" via a "ceremonial contract" and a "consen-

[137] And "just" means in Durkheim that what is so labelled has "social value" (Durkheim 1964, 215).

sual contract" to a "just contract": "It is not enough that the contract is based on consensus, beyond it has to be just" (Durkheim 1957, 207).

Economy may be the basis of a society; but what does "economy" imply? Marx wanted to analyze the economic basis, in particular the forces of production, as a set of brute facts, applying scientific methods. Morality and law were placed in the superstructure. According to Durkheim economic activities are deeply embedded in morality. For this reason he complains about the amorality of economic life and pins his faith on professional ethics. In this respect he differs not only from Marx but also from the psychology of preference-utilitarianism in modern economic theories. Recently, however, there is an increasing interest in problems of institutionalizing ethical standards in economic life (cf., e.g., Korff 1999).

(c) Penal Law: Crime and Punishment—Innovation and Integration

In the later works of Durkheim religion plays a larger role than law—in terms of the indicator function (now he says: "It is through a religion that we are able to trace the structure of a society"; Durkheim 1957, 160[138]) as well as in terms of the integrative function of religious faith. Durkheim already had sketched in his early work on the division of labor in society the close connection between law and religion with respect to their integrative function, pointing out the religious base of penal law.

As a starting point of his analysis of penal law, Durkheim stresses the "normal" character of crimes.

> From this viewpoint the fundamental facts of criminology appear to us in an entirely new light. Contrary to current ideas, the criminal no longer appears as an utterly unsociable creature, a sort of parasitic element, a foreign, unassimilable body introduced into the bosom of society. He plays a normal role in social life. For its part, crime must no longer be conceived of as an evil which cannot be circumscribed closely enough. Far from there being cause for congratulation when it drops too noticeably below the normal level, this apparent progress assuredly coincides with and is linked to some social disturbance. Thus the number of crimes of assault never falls so low as it does in times of scarcity. (Durkheim 1982, 102)[139]

Concerning the function of penal law Durkheim already had developed a concept which today would be referred to as "positive general prevention."[140] Criminal law is addressed especially to "normal" people, strengthening by its threat of sanctions and their enforcement their moral feelings as members of a

[138] Cf. Gebhart 1993, 392ff. on the close relation between sociology of religion and sociology of law in Durkheim. On this topic, see also Cotterrell 1999, 49ff., and the quotation from Geiger (*supra*, 121) on custom and religion as the phylogenetic foundation of morality and law.

[139] On the normal character of crimes, see ibid., 32, 98–9.

[140] On Durkheim's theory of criminal law, see Gebhart 1990.

norm-complying "in group" and excluding the deviant members of an "out group." Penal law fortifies the coherence of the "normals" in juxtaposition to the anomalous criminals. Social exclusion strengthens "social solidarity." Because of this basic function repressive law will be perpetuated in modern societies.

> Although it (i.e., punishment) proceeds from a quite mechanical reaction, from movements which are passionate and in great part non-reflective, it does play a useful role. Only this role is not where we ordinarily look for it. It does not serve, or else only serves quite secondarily, in correcting the culpable or in intimidating possible followers. From this point of view, its efficacy is justly doubtful and, in any case, mediocre. Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience. [...] We can thus say without paradox that punishment is above all designed to act upon upright people, for, since it serves to heal the wounds made upon collective sentiments, it can fill this role only where these sentiments exist, and commensurately with their vivacity. (Durkheim 1964, 108–9)

Along with the *integrative* function of *penal law* Durkheim ascribes an *innovative* function to *crimes*.

> Crime itself may play a useful part in this evolution. Not only does it imply that the way to necessary changes remains open, but in certain cases it also directly prepares for these changes. Where crime exists, collective sentiments are not only in the state of plasticity necessary to assume a new form, but sometimes it even contributes to determining beforehand the shape they will take on. Indeed, how often is it only an anticipation of the morality to come, a progression towards what will be! (Durkheim 1982, 102)

In a later article Durkheim stated two laws of the development of penal law (Durkheim 1899–1900). Here, the two aspects explicated above are linked together: the general development of social solidarity and the particular integrative function of penal law. Durkheim relativizes and specifies the general tendency that he had assumed in "*Division*," i.e., that repressive law is steadily replaced by restitutive law (without vanishing totally). Rather, according to the *law of quantitative change,* the severity of punishment is the greater the less developed a society is *and* the more the central power obtains an absolute character—by which he especially referred to the age of absolutism. The *law of qualitative change* implies that imprisonment becomes more and more the normal instrument of social control instead of corporal or capital punishment.

In Durkheim punishment is the symbolic expression of collective sentiments. The fact, however, that punishment becomes less severe does not mean that moral consciousness is losing its strength. Rather, the scope of what is defined as criminal is shifting. The growing emphasis that is put on crimes against individuals causes the problem that feelings run high not only for the victim, but that also the perpetrator arouses sympathy (whereas everyone could be affected by crimes against the collective and could easily exclude a deviant individual). This might serve as an explanation for the tendency toward mitigation of punishment.

(d) The Law of the Welfare State: Integration, Inclusion, and Exclusion

Durkheim clearly saw the interplay of exclusion and inclusion in the case of penal law. The exclusion of delinquents reinforces the collective sentiments of the "normals." In the legal domain the mechanism of exclusion and inclusion, however, extends far beyond the realm of penal law. In general, social statuses are constituted by legal norms that trigger a set of legal consequences. These norms are inclusive as well as exclusive. In the field of private law Durkheim mentioned, e.g., rules of legal capacity. What Durkheim did not see at that time, however, is the basic function of rules of citizenship (in the field of constitutional law, with the connected institutions of suffrage, conscription, tax liability, etc.) and of rules of "social citizenship" (in the field of welfare law).

In explaining the notion of "integration" we can distinguish between integration of an element into something more comprehensive and the integration of something as such, e.g., the level of integration of a society. Apparently the latter seems to be meant with "social integration." As to the rules of citizenship they define the elements which shall be deemed to be part of the whole state (and the parts that shall be excluded as well). However, they do not reveal anything about the level of integration of the state. The quantity of elements that may be included in a system doesn't necessarily reveal anything about the level of integration of the system. In order to find out something about the level of social integration one has to look at how others are *excluded* from the system. How does the system deal with foreigners, deviant persons, homeless people, etc.?

This mechanism of integration by exclusion is brought to a head in the case of "social citizenship." To what extent does inclusion in "normal" industrial life, as well as exclusion from it strengthen social integration? What degree of unemployment as an exclusion from the world of labor threatens social integration? Or isn't rather, by a high unemployment rate, pressure put on those who are (still) employed? Unemployment rates, however, do not reveal how unemployed people are treated. Are they excluded from the social net, are they put under pressure to "accept" whatever kind of work? Durkheim did not see at his time this core aspect of social integration. He considered the market economy as a place for the exchange of the products of labor, but he did not realize the special problems of the labor market. The integration of the vast majority still depends on their status in the labor market and the workplace. An earned income is the normal basis for social inclusion. Labor-related income (also in terms of household income or transfer income that is labor-related) is the source which guarantees reproduction, directly or indirectly. The most important social risks are absorbed or alleviated by labor-related systems of social security. The major part of the national revenue depends on employment and consumption. Finally, social acknowledgment still widely depends on labor-related status.

These different legal statuses could be arranged in a sequence (cf. Dimmel 2000) of full integration into the labor market (integration in the first sense)—inclusion in the system of the welfare state, implying all kinds of social security systems—exclusion of people who don't or cannot make use of social benefits and compensation (homeless people, persons involved in debt, with insufficient skills, persons addicted to drugs, prostitutes, victims of domestic violence, etc.).

What kind of a society would we want to live in? This is an essential question of the moral foundations of a society, in Durkheim's sense: Of social solidarity—how these statuses of integration, inclusion and exclusion should be legally defined and allocated. What is the due proportion among these statuses? Is mobility from one status to another possible? What is the result in terms of social integration given a certain constellation of those statuses? What are the consequences of an increasing "individualization" of social risks, of more "flexibility" and deregulation in the field of labor law and the law of the welfare state in general? Durkheim spoke of a quasi-religious cult of the individual. However, the erosion of the traditional structures of the welfare state in which social citizenship might be embedded does not lead to a new individual who could be an object of empathic admiration. Rather, the individual shrinks to a residue that is left when social structures dissolve.

3.2.4. Societal Foundations of Law: Eugen Ehrlich

Economic or moral foundations surely are social ones, in contrast to natural ones. One might speak of social or societal foundations in a narrow sense, in the sense of Eugen Ehrlich (1862–1922)—where societal means "non-etatist." Law in this sense is not a matter of the state or only in the last instance. Law, instead, is by origin and by its normal existence a matter of the society, of the societal associations.

> It is often said that a book must be written in a manner that permits of summing up its content in a single sentence. If the present volume were to be subjected to this test, the sentence might be the following: At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. This sentence, perhaps, contains the substance of every attempt to state the fundamental principles of the sociology of law. (Ehrlich 1936, *foreword*)[141]

In this famous introduction to his *Grundlegung der Soziologie des Rechts* Ehrlich announces a concept of the origin and development of law that nowa-

[141] And similar: "The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state but in society itself, and must be sought there at the present time. This may be said not only of the legal institutions but also of the norms for decision. From time immemorial the great mass of norms for decision has been abstracted from the social institutions by science and by the administration of justice, or has been freely invented by them; and legislation by the state, too, can generally find them only by following the social institutions and by imitating scientific or judicial methods" (ibid., 390).

days represents a standard version of a pluralist approach in legal theory in contrast to an etatist one.[142] Law, according to Ehrlich, emerges from social practice that is further developed by the judiciary together with academic legal scholars via *Entscheidungsnormen* (in the English translation: norms for decision) till the legislator (state) fixes them in written, codified norms (what Ehrlich calls "*Rechtssätze*" = legal propositions).

The very basis of normativity, according to Ehrlich, lies even deeper. Legal norms are founded in facts, in the "facts of the law" ("*Tatsachen des Rechts*"[143]), by which he means four types: usage, domination, possession, declaration of will (contract or testament) (*Übung, Herrschaft*, *Besitz*, *Willenserklärung* [*Vertrag und letztwillige Verfügung*]). Like many other authors (e.g., Marx or Geiger) Ehrlich believes in the norm-generating quality of facts.

> The state existed before the constitution; the family is older than the order of the family; possession antedates ownership; there were contracts before there was a law of contracts; and even the testament, where it is of native origin, is much older than the law of last wills and testaments. If the jurists think that before a binding contract was entered into, before a valid testament was made, there must have been in existence a legal proposition according to which agreements or testaments are binding, they are placing the abstract before the concrete. (Ehrlich 1936, 35–6)

Again, as in the case of Marx' "*Produktionsverhältnisse*," the question is whether these pre-normative facts are really non-normative. This is obviously not the case. The four types of "facts of the law" are shot through with norms, i.e., normative expectations, obligations, transgressions, and sanctions. Ehrlich falls prey to the doctrine of a fact → norm-sequence, i.e., that norms evolve out of facts.

Ehrlich is a clear exponent of a "bottom up"-approach of legislation and of legal development in general. State law, manifested in "legal propositions" ("*Rechtssätzen*"), is the final point of a development that starts with the societal "facts of the law," which become norms of the living law—"rules of action" living in the societal associations—then condensed by the legal staff cooperating with legal science into "norms for decision" ("*Entscheidungsnormen*")[144] that are systematized or rather certified by the legislator codifying them as "*Rechtssätze*." So we have the following sequence:

[142] On legal pluralism in general and its critique, see Galanter 1981; Griffiths 1986; Merry 1988; Chiba 1989; Teubner 1992; Tamanaha 1993; Roberts 1998.

[143] Ehrlich does not speak of "Rechtstatsachen" (legal facts). By legal facts one could understand facts that might be relevant and useful in the application of law, or simply facts (such as a courtroom proceeding) that can only be described by way of legal norms, and not by way of a non-legal descriptive frame of reference, adapted, e.g., from symbolic interactionism in the study of small groups.

[144] "Every norm for decision therefore is based primarily upon this inner order, i.e., the facts of the law, which create the order, upon the usages, which assign to each individual his position and his function in the association, upon relations of domination and possession, contracts, articles of association, testamentary dispositions" (Ehrlich 1936, 123).

– "facts of the law,"
– living law (norms living in the societal associations), rules of conduct,
– norms for decision (formulated, interpreted and applied by the legal staff in cooperation with legal science),
– legal propositions, i.e., written norms of the legislator.

The smallest units of a society in Ehrlich are not individual persons. Instead, he starts with societal associations ("*Verbände*") like families, economic associations, but also state administrative bodies. The great majority of conflicts can be resolved within these associations. For the remaining conflicts special institutions are established, e.g., courts that produce decision rules, that can be applied in future similar cases. They form the material for the sophisticated systematization and interpretation in the realm of legal dogmatics. Finally the state legislator transforms this body of norms to codified "*Rechtssätzen*," legal propositions.

Today, in a period of a predominantly instrumental understanding and development of legislation, it would be worthwhile to analyze cases that do not fit the picture of "top down" legislation. Are there codified norms that, more or less, confirm social rules of conduct and validate corresponding "norms for decisions" stated by the courts? In some instances this picture might still be adequate nowadays: Whenever the legislator reacts to new developments in society or to cases and decisions of courts. To give a few examples from German legislation: The law on standard contracts (*AGB-Gesetz*) is a systematization of court decisions that evolved out of conflicts about this type of contract. Another example might be the legal regulation of extra marital partnerships. There was a societal "forerunner," then came court decisions, finally the legislator reacted. *Lex mercatoria* might serve as another example for legal development beyond the nation state: It is a societal as well as a global phenomenon (cf. Teubner 1996a and 1996b). Such a model of a "bottom-up" evolution of law is the heritage of Ehrlich's early efforts. Ehrlich surely does not subscribe to an instrumental view of legislation. But he recognizes the increasing use of legislation in order to control societal processes.

> The legal proposition is not only the result, it is also a lever, of social development; it is an instrumentality in the hands of society whereby society shapes things within its sphere of influence according to its will. Through the legal proposition man acquires a power, limited though it be, over the facts of the law; in the legal proposition a willed legal order is brought face to face with the legal order which has arisen self-actively in society. (Ehrlich 1936, 202–3)

Ehrlich assumed that the pinnacle of this type of legislative intervention had been reached already. Apparently he could not predict what would happen since World War I.

The basis of law, according to Ehrlich, cannot be found in popular moral sentiments, e.g., in the "Volksgeist," as the Historical School believed.

The Historical School of jurisprudence has taken infinite pains to show how "customary law," or, to put it more accurately, legal propositions of "customary law," arise immediately in the popular consciousness. It is a vain endeavor. Lambert has shown conclusively that with the exception perhaps of legal maxims, legal propositions do not arise in the popular consciousness itself. Legal propositions are created by jurists, preponderantly on the basis of norms for decision found in the judgements of courts. (Ehrlich 1936, 175, alluding to Lambert 1903)

Because of the cascade of transformational steps running from the living law to "Rechtssätze," these codified legal norms cannot be used as indicators of popular morality or "social solidarity" in Durkheim's sense. There is no moral foundation of law in Ehrlich. There are facts that generate legal norms. These have to be distinguished systematically (and, one could assume, also genetically) from moral norms and other types of norms.

But how is it possible to *define* law strictly on a societal level without alluding to etatist features like the existence of a legal staff? This no longer is a question of theory (of the development of law) but one of defining the concept of law (cf. *supra*, sec. 2.2). Ehrlich, in introducing the notion of living law, subscribes to a non-etatist concept of law. Law is generated at the bottom of societal associations, evolving from the facts of the law. Law, according to Ehrlich, exists within the society, on a pre-state level. The famous etatist Kelsen doubted that what Ehrlich called "living law" can be named "law" at all:

With respect to the notion of "living law" which Ehrlich introduced, distinguishing it from positive law is untenable. It is evident that the "inner order of the behavior of people in society" is not "law" as long as this inner order is not applied by the organs in charge of the administration of justice, especially by the courts. This inner order might be valid as custom or morality, however, it becomes law only via its application by competent legal organs. This so-called living law may diverge from the substantively determined general norms of positive or customary law. To apply it, the organs in charge of the administration of justice, however, must be empowered to do so by valid positive or customary law—if only in the sense that the living law which they apply becomes law via the principle of legal force (*Rechtskraft*) incorporated in positive law. From this follows that the so-called "living law," if it is law, must be a part of positive law. Therefore, a distinction or even a contradiction between the two is not possible. (Kelsen 1979, 224; my translation)

How does Ehrlich proceed in establishing a strictly societal definition of law—separating it from other types of norms like moral ones, and without referring to etatist elements? (This societal definition would be, of course, a sociological one.)

Difficult though it may be to draw the line with scientific exactitude between the legal norm and other kinds of norms, practically this difficulty exists but rarely. In general anyone will be in position to tell without hesitation whether a given norm is a legal norm or whether it belongs to the sphere of religion, ethical custom, morality, decorum, tact, fashion, or etiquette. This fact must be made the basis of the discussion. The question as to the difference between the legal and the non-legal norm is a question not of social science but of social psychology.[145] The vari-

[145] This distinction is misleading. Social psychology is obviously a branch of social sciences.

ous classes of norms release various overtones of feeling, and we react to the transgression of different norms with different feelings. Compare the feeling of revolt that follows a violation of law with the indignation at a violation of a law of morality, with the feeling of disgust occasioned by an indecency, with the disapproval of tactlessness, the ridiculousness of an offense against etiquette, and lastly with the critical feeling of superiority with which a votary of fashion looks down upon those who have not attained the heights which he has scaled. Peculiar to the legal norm is the reaction for which the jurists of the continental common law have coined the term *opinio necessitatis*. This is the characteristic feature which enables one to identify the legal norm. (Ehrlich 1936, 164–5)

It is clear that Ehrlich attempts to offer a definition of legal norms, i.e., he attempts to separate them from other kinds of norms. He assumes that a distinction can be found by observing the feelings among the people, who intuitively "define" the various types of social norms. He distinguishes two situations in which these feelings are displayed: the feeling that is associated with a norm as such ("various overtones of feeling") and the feeling that is shown in the case of an infringement of a norm ("different feelings when we react to the transgression"). In the first case, however, he speaks only about legal norms, not the other types, and the corresponding feeling. Let us have a closer look at the quotation and its formal structure:

types of norms	norms *as such* release various overtones of feeling	*transgression* of norms → reaction: different feelings*
– legal norms	*opinio necessitatis*	→ revolt (*Empörung*)
Other types of norms:		
– religion	?	?
– ethical custom	?	?
– morality	?	→ indignation (*Entrüstung*)
– decorum	?	= indecency → disgust (*Ärgernis*)
– tact	?	= tactlessness → disapproval (*Mißbilligung*)
– etiquette	?	→ ridiculousness (*Lächerlichkeit*)
– fashion	?	= "not attaining the hights of fashion" → critical feeling of superiority (*kritische Ablehnung*)

* In parentheses I have added the original German expressions.

What does, firstly, the "opinio necessitatis"-reference imply? Ehrlich is often associated with the "doctrine of recognition," i.e., a theory that states that legal norms are valid if they are by and large accepted by their addressees.

(Fn. contd. from page 139) What Ehrlich means is that definitions are not the theoretical inventions of social scientists; instead, the relevant distinctions can already be found in the popular mind. The social scientist only has to observe the various feelings that become current among people.

The only point that supports this interpretation is the notion of "opinio necessitatis" that is combined with legal norms as such (not their infringement). But Ehrlich never would have adhered to a "strict" theory of recognition like the one that can be found, e.g., in Bierling:

Law in a juridical sense in general is what people living together in some community recognize mutually as a norm or rule of their relationships. (Bierling 1894, 19; my translation)[146]

Ehrlich rectifies this doctrine of recognition:

We must not conceive of this doctrine as Bierling did, as implying that the norm must be recognized by each individual. The norms operate through the social force which recognition by a social association imparts to them, not through recognition by the individual members of the association. (Ehrlich 1936, 167)

What Ehrlich means by "*opinio necessitatis*" is:

The legal norm regulates a matter which, at least in the opinion of the group within which it has its origin, is of great importance, of basic significance [...]. Only matters of lesser significance are left to other social norms. (Ibid., 167–8)[147]

Also the living law has to be enforced, primarily not by a legal staff but by the members of the social associations themselves (as soon as they experience a feeling of "revolt") backed by extra-legal norms. Social and economic force is imposed in order to strengthen the living law.

The truth is that the legal order always was based not on the threat of penal or civil sanctions but on social and economic pressure. People observe their legal duties, if external respect for them is required at all, because otherwise they are in danger of losing their social status, their office, their position, their job, their customers, their business connections, their credit, and, in the case of severe transgressions, that they are threatened with being ostracized from society. The everyday work of the courts generally is not directed towards the masses of the people, but against a relatively small group of pariahs and derelicts, as well as against insolvent people who are not responsible for their situation, i.e., against those who cannot be motivated by economic or social sanctions because they already are outside of society. (Ehrlich 1986, 186; my translation; German original published in 1913–1914)

Now to the second and more specific part of Ehrlich's definition: the different feelings in the case of a transgression of various kinds of norms. It's a definition, not a theory! Ehrlich states: If a norm is transgressed and revolt (or rather revulsion) is displayed, then it is/was a legal norm that has been transgressed. And not: Whenever a legal norm is transgressed, revolt will be dis-

[146] "Recht im juristischen Sinne ist im allgemeinen das, was Menschen, die in irgendwelcher Gemeinschaft miteinander leben, als Norm oder Regel dieses Zusammenlebens wechselseitig anerkennen." Ehrlich (1936, 167) refers to Bierling (and the translator mentions *Juristische Grundbegriffe* IV, S. 39–53, 68–105).

[147] By "Rechtsnorm" Ehrlich means, as we have seen, the norms of living law, in contrast to "Rechtssätze," which the legislator issues.

played. For this would presuppose that we already know that it is a legal norm. The first statement cannot be falsified; if revolt is not shown, it was not a legal norm. The second one only would be empirically testable if we knew how to define "legal norm" irrespective of possible reactions.

- We can easily see that the definition is incomplete in various aspects. Not only is there nothing said about feelings accompanying other kinds of norms besides legal ones—this is the first problem—, but there is also nothing said about the feelings in the case of transgression of religious norms and of ethical custom.
- Are these feelings observable? Ehrlich's etatist counterpart, Durkheim, holds that such overtones of feeling are not observable. They are not "societal facts," only internal, moral, psychic states of the mind of the people. Therefore he chooses legally fixed norms (what Ehrlich would name "*Rechtssätze*") as an observable indicator of the moral state of a society. In Durkheim written law is the indicator of underlying, unobservable collective moral sentiments. How would Ehrlich proceed in order to locate these feelings?
- There is no sharp distinction among the possible reactive "feelings"—neither from the point of view of an observer, and possibly not from the point of view of the (re-)actors themselves. If the living law has to be backed by extra-legal norms there must always exist a mixture of feelings among those who try to uphold the normative web of a society. Are they able to distinguish these graduations of feelings?

And now we must point out the significance, but slightly considered hitherto, of the extra-legal norms for the inner ordering of the associations. The statement that legal institutions are based exclusively on legal norms is not true. Morality, religion, ethical custom, decorum, tact, even etiquette and fashion, do not order the extra-legal relations only; they also affect the legal sphere at every turn. Not a single one of the jural associations could maintain its existence solely by means of legal norms; all of them, at all times, require the aid of extra-legal norms which increase or eke out their force. Nothing short of the cooperation of the social norms of every description can offer a complete picture of the social mechanism. (Ehrlich 1936, 55–6)

- Whose feelings are relevant? The feelings of the victim, of an observer, of other neutral persons? Must even a judge share a feeling of revolt in order to apply *legal* norms? And in this context: What about feelings in the case of "secondary rules"?
- It can be doubted whether there exists a high degree of homogeneity of reactions.
- From a methodological point of view one could argue, applying the criterion of adequacy of a definition, that Ehrlich's proposal is very remote from a "normally" accepted use of the term law.
- What is more, Ehrlich's definition is inconsistent with the frame of his theory of legal development: What is the relationship between feelings and

the "facts of the law"? What are the feelings of the elementary associations? Ehrlich uses individual feelings in order to distinguish between different types of norms. But if associations are the elementary units of society (and not individuals) what do these associations "feel"? In his definition Ehrlich shifts to a psychological account of law, while his substantive theory of legal development treats law as the structure of social associations.

The attempt to give a solely societal definition of law failed. In sum, as Kelsen put it, Ehrlich has exposed himself with his definitional attempt to *ridiculousness* without transgressing a norm of *etiquette* (Kelsen 1915, 862).

3.2.5. Political Foundations of Law

It is easy enough to say that everything is political. But what does it mean in different contexts, subtexts, hypertexts, paratexts, and, not to forget, texts? Obviously this is an occasion where subtle distinctions may be required. Therefore, the following chapter will be mainly an analytical piece.

3.2.5.1. Law and State

I start with the distinction (and the interrelations) between law and state and take a look back at what we have seen already concerning the state, as the political unit par excellence, and law.

- In contrast to a pluralist approach I have pointed out the necessity of etatist elements in the definition of law. It makes sense to refer to at least a rudimentary form of a legal staff (like Max Weber did) in order to distinguish legal norms or a legal order from other social norms or orders (like moral or conventional norms or orders).
- Also in describing the phylogenetic development of state and law it may be useful to have a close look at the decisive step from stateless societies or even lawless societies to those in which the role of a neutral third is institutionalized, i.e., the role of a person who is not related to the conflicting parties. Or if we hold, according to Luhmann (cf. *supra*, 23) that *ubi societas, ibi ius*, what does this imply for the origin of a state?
- Among the various functions of law we have attributed the instrumental use of legal norms to state authorities, to the state legislator who attempts to achieve certain aims by issuing legal provisions.
- On the other hand, activities of state authorities are regulated, controlled, and bound by law, especially by norms of the constitution. This is at the heart of a state governed by the rule of law.
- As far as the constitutive function of law is concerned it is clear that state organizations are, as "institutional facts," established by the correct use of

"institutive" legal provisions. Thus, this leads to the famous "identity thesis" of Kelsen: If law is the "form of state order" every state is a law-state.[148]

3.2.5.2. Law and Politics

A distinction between law and politics often is drawn based on the separation of *courts and legislature*. In Luhmann, e.g., courts operate as core elements of the legal system while legislation is located within the political system. Some like to draw distinctions, others like to blur them. Thus it is a popular game to show that court activities are not free of political elements and that politics does not take place outside of law.

- In general courts are passive, they depend on applications, claims or motions of people involved in a conflict; they cannot define and solve conflicts on their own. In the political arena, however, the definition and solution of problems is actively pursued. Nevertheless, highly controversial, political questions can be brought to courts, and not only to constitutional courts.
- Courts decide according to given criteria. In contrast the legislator sets the criteria to which the legal staff and other state agencies are expected to abide. The legislator, however, is himself bound by legal norms, in particular by those of the constitution. And courts, not only constitutional ones, might have in an unpredictable number of cases a wide scope of discretion.
- Courts decide about past events while the legislator attempts to anticipate the future effects of his efforts. Courts, however, are used to taking into account the possible impact of their decisions ("judicial consequentialism").
- Judges in courts have become professionalized, undergoing a special type of education that aims, inter alia, at neutralizing their social background and other personal traits. In contrast, politicians are permitted, even expected to declare and demonstrate their interested positions and points of view. Judges, however, often are recruited—appointed or elected—on the basis of their political preferences or membership loyalties. The independence of judges is itself a fundamental political value. As long as they share the attitudes of the political regime in power judges and the principle of independence are accepted. In case of a conflict between courts and the political power groups judges (as well as prosecutors) can be put under a Berlusconi-like pressure.

[148] Cf. Kelsen 1925, 44, 91, 109; 1928, 187; 1960a, 314f., 320. The German version of the identity thesis ("Jeder Staat ist ein Rechtsstaat") is misleading because it confers the value-laden attributes of the "Rechtsstaat" to every state. One should not mingle law as a constitutive mechanism for state power and law as limit to state power.

One can also discuss the various relationships between law and politics according to the three dimensions of a legal order that I previously distinguished (cf. *supra*, sec. 2.6, 27). Thus, within a legal order one can identify several political topics.

- On the level of legislation the life of law begins in political processes. Lawmaking may be bound by legal rules. Rules of competence and basic legal norms, however, cannot determine the content of the legislative output. Legal rules function as political instruments, i.e., they are issued, even in the case of symbolic politics, in order to achieve certain aims, including symbolic ones. There are also unintended results that count as political effects for which the legislator can be held responsible.
- The recruitment and promotion of members of the legal staff often is based on political decisions. Legal education as well the organization of exams can be put under the control of political bodies. Courts cannot exclude jurisdiction over political questions. They are expected to decide independently on legal grounds. However, the impact of political attitudes (of the "*Vorverständnis*") of the judges on the decisional outcome should not be neglected. A neutral, apolitical self-understanding of the judiciary does not deny the fact that court decisions can have a political impact on the society.
- In the third "everyman's" dimension political attitudes play an important role, of course, in voting behavior by which the legislative bodies are constituted or as far as the acceptance of legal rules and institutions is concerned. A fundamental legal culture is embedded in a general political culture.

3.2.5.3. Law and Power (Violence, Force)

It is power that forms the final foundation of law and of authority in general. The German notion of "*Gewalt*" is even more fascinating. Therefore Walter Benjamin with his *Kritik der Gewalt* is frequently alluded to. Fascinating is the notion of "*Gewalt*" for its multiple connotations. One can choose between violence or power or force—and perhaps also might, authority, sovereignty and domination.[149] The state has the monopoly of power (in German "*Gewaltmonopol*"). The police is, according to the model of the separation of powers, part of the executive power (in German: *exekutive Gewalt*) which can en*force* certain decisions (in German[y] it may do it with *Gewalt*). The notion of sovereignty as the apex of power implies the idea of ultimate indeterminacy: There are no further explanations possible, therefore no further foundations exist. Finally there is something that rests in itself. And the foundationalist is satisfied.

[149] On the other hand, Hannah Arendt's essay *On Violence* (Arendt 1970) is translated into German under the title "Macht und Gewalt."

The relationship between law and power, however, is quite a bit more complicated.

(1) Power as the Origin of State and Law

Power, so it is frequently maintained, is at the origin of state and law. State and law do not rest on a consensus or a contract. The creation of a new state, the invention of a legal code are the result of power conflicts which include the use of violence. Rudimentary legislation in ancient Rome or Athens is explained by struggles between groups in power and aspiring groups (like the *plebs* or the *hoplites*). The modern Turkish state is a recent example of, at least at its beginnings, a politically founded kind of modernizing dictatorship in opposition to an Islamic society.

Political power does not destroy law, rather, political power is transformed into law. Powerful social groups can cast their claims into legal forms. "Unusquisque tantum iuris habet, quantum potentia valet" (Spinoza 1973, chap. 2, § 8).[150] Or simply: "Might makes right."

In what is apparently a combination of a hierarchical and developmental model the origin of law and state is held to rest at the apex of a supreme authority, which issues commands from the top down (the reverse of Ehrlich's bottom-up model). The first, original establishment of political power took place without any "higher" legitimation. There were no rules according to which commands, as legal commands, were issued. This origin of only afterwards legally legitimate political power forms a central theme in Jacques Derrida's essay on the force of law: the "mystical foundation of authority" (Derrida 1992). His chain of great thinkers ranges from Montaigne, Pascal to Benjamin (and presumably himself). A deconstructivist turns out to be a foundationalist: In the case of law he claims to have identified its "mystical foundation"—in power. From Montaigne's *Essais* he quotes: "even our law, it is said, has legitimate fictions on which it founds the truth of its justice."[151] But this is only a side-note which Montaigne does not elaborate. That law operates legitimately on the basis of legal fictions is an insight that does not deserve too great notice. The notion of a "mystical foundation" Derrida finds in another chapter of the *Essais:*

[150] German literature abounds with this topic. Here is a small sampling: "Man hat Gewalt, so hat man Recht" ("One possessed of power is also possessed of the Right") (Goethe, Faust II, V); "Im Leben gilt der Stärke Recht" ("In life it is the right of the strong that gets validated") (Schiller "Die Weltweisen"); "Hast du die Macht, du hast das Recht auf Erden" ("If you have the power, you have the Right in this world") (Adelbert von Chamisso "Die Giftmischerin"). (My attempts at translation.)

[151] Derrida 1992, 12, quoted from Montaigne, *Essais*, book 2, chap. 12. Here I use the English translation in Derrida's text. (Montaigne's *Essais* first appeared in 1580.)

And so laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation (*fondement mystique*) of their authority, they have no other […]. Anyone who obeys them because they are just is not obeying them the way he ought to.[152]

Laws, paraphrases Derrida, are not obeyed because they are just but because they have authority. But what, then, is the foundation of their authority? What is the mystical foundation of their authority? Montaigne says that the authority of the laws is the fact that they are laws. One can make a mystery out of the "mystical" foundation, clouded in linguistic obscurity. In the passage, that Derrida elides "[...]," Montaigne, however, made explained the mystical foundation insofar as he maintains that laws are often made by fools, more often by men, who, in hatred of equality, have want of equity. By their irregularity and deformity the (French) laws lend a helping hand unto disorder and corruption. If there is any foundation of the laws, it is the irrational and amoral character of the legislators and judges as well.

Derrida started with quotations from Pascal's *Pensées* (1670). For there he found also the notion of the "mystical foundation," in *Pensées* no. 294:

One man says that the essence of justice is the authority of the legislator, another that it is the convenience of the king, another that it is current custom; and the latter is closest to the truth: Simple reason tells us that nothing is just in itself; everything crumbles with time. Custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of its authority. Whoever traces it to its source annihilates it.[153]

While Montaigne maintained that laws are obeyed (have authority) because they are laws, Pascal holds that it is mainly custom that makes people believe in justice. People abide by the law because it is law and nothing more. "Law was once introduced without reason, and has become reasonable" (Pascal 2000, no. 294).[154] Conformity, however, requires a belief in the truth or justice of the law. This belief has to become a custom, unquestioned as far as its source is concerned. If one would carry it back to its origin one would destroy this customary belief.

It is dangerous to tell the people that the laws are unjust; for they obey them only because they think them just. Therefore it is necessary to tell them at the same time that they must obey them because they are laws, just as they obey superiors, not because they are just, but because they are superiors. In this way all sedition is prevented, if this can be made intelligible and it be understood what is the proper definition of justice. (Pascal 2000, no. 326)

Pascal then moves somehow between custom—justice—force.

[152] Derrida 1992, 12, quoted from Montaigne, *Essais*, book 3, chap. 13.
[153] Pascal, *Pensées* 293 as translated in Derrida 1992, 11–2.
[154] In *Pensées* no. 325 Pascal criticises Montaigne explicitly: "Montaigne is wrong. Custom should be followed only because it is custom, and not because it is reasonable or just. But people follow it for this sole reason, that they think it just. Otherwise they would follow it no longer, although it were the custom; for they will only submit to reason or justice."

> Justice, force—It is just that what is just be followed, it is necessary that what is strongest be followed. Justice without force is impotent, force without justice is tyrannical. Justice without force is contradictory, as there are always the wicked; force without justice is accused of wrong. And so it is necessary to put justice and force together; and, for this, to make sure that what is just be strong, or what is strong be just [...]. And so it is necessary to put justice and force together [...]. And so, since it was not possible to make the just strong, the strong have been made just.[155]

Men have made it just to obey might. They have justified might: That is called just which men are forced to obey. The belief in the justice of the laws of the mighty becomes engrained in custom and thus peace as beneficent will of the sovereign will be secured.

This is nothing more than the interpretation of a classical text (rather remote from Derrida's way of exploiting it). The substantive questions, however, cannot be answered in this way: Is every state historically based on violence? Are constitutions written or designed on the battlefield? Are there states that are not founded on violence? Of course, one has to distinguish various forms of violence: civil revolutions, foreign military occupations (including colonization) and their obverse: the violent liberation from occupation or colonization. Are there historical instances of states constituted according to the social contract theories of classical natural law, i.e., based on consensus instead of violence? The state of nature is characterized by the predominance of the strong and the reign of force, it is "a state of violence and wrong, of which nothing truer can be said than that one ought to depart from it" (Hegel 1971, § 502). But how does this departure take place? The recent non-violent revolutions in Eastern European countries, their transformation from socialist states to liberal-capitalist states might be counter-examples that do not fit the model of universal violence as the origin of state and law. For those who appreciate metaphors one could renew the debate in 18th/19th century geology between volcanists and neptunists: Is the birth of dry land—similar to new states—caused by volcanic eruptions or does it take place in a long enduring process in which layer over layer settles to form a firm deposition?

Instead of turning to texts about or from historical instances, Derrida continues to forge the chain of great thinkers and, inevitably, arrives at Walter Benjamin and his *Kritik der Gewalt* (from 1921). Benjamin draws, as is well-known, a distinction between

(1) mythic violence that can be divided into
 - violence creating or founding law (*rechtsbegründende, rechtsetzende, schaltende Gewalt*),
 - violence maintaining law (*rechtserhaltende, verwaltete Gewalt*),

[155] *Pensées*, no. 298 as translated in Derrida 1992, 10–1. See also *Pensées*, no. 297, 299, 878 (Pascal 2000).

(2) divine violence, annihilating violence (*rechtsvernichtende Gewalt, reine Gewalt, waltende Gewalt*).

Legally permitted forms of violence according to Benjamin are:

- strikes that create and modify legal relations,
- *ius ad bellum* that creates new law,
- the death penalty (which rather is the symbol of the real origin of law).

This is surely not a complete list; what about prisons, family life, hospitals—not to forget "the despotism of the capitalist" (Marx 1996, 337; cf. Marx 1965a, 351), etc.? How is violence maintained and justified in these institutions?

Violence, "*schicksalhaft gekrönte Gewalt*" (Benjamin 1966, 51), is at the origin of law. This extreme foundationalist statement leads to several overgeneralizations in Benjamin. Thus he states—in the word of Derrida—that "every juridical contract, every *Rechtsvertrag* ('legal contract') is founded on violence. There is no contract that does not have violence as both an origin (*Ursprung*) and an outcome (*Ausgang*)" (Derrida 1992, 47). Therefore, the antithesis between violence or social contract as the origin of the state would not make sense if a contract itself is founded in violence. Furthermore, Benjamin maintains that if knowledge of the latent presence of violence in a legal institution vanishes then it will lapse. (Benjamin 1966, 53) It might be interesting to see whether one could find any empirical evidence for such statements. Derrida, as apodictically as Benjamin, states without any scruples as regards historical evidence:

The foundation of all states occurs in a situation that we can thus call revolutionary. It inaugurates a new law, it always does so in violence. (Derrida 1992, 35)

With such statements Derrida reveals himself to be a fervent, not to say violent, foundationalist. At the same time he is an expert at disguise. At the end we find him somewhere beyond foundationalism and anti-foundationalism.

Its very moment of foundation or institution (which in any case is never a moment inscribed in the homogeneous tissue of a history, since it is ripped apart with one decision), the operation that amounts to founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just or unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate. No justificatory discourse could or should insure the role of metalanguage in relation to the performativity of institutive language or its dominant interpretation. (Ibid., 13)

Since the origin of authority, the foundation or ground, the position of law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of "illegal." They are neither legal nor

illegal in their founding moment. They exceed the opposition between founded and unfounded, or between any foundationalism or anti-foundationalism. (Ibid., 14)

The words start to tumble and the mystical foundation of law vanishes into a misty opacity. Derrida, foundationalist and non-foundationalist at the same time, moreover is totally unclear about the notion of "*Gewalt*": He not only employs Benjamin's distinctions between "mythic" law-making violence (*rechtssetzende*) (which sounds ancient Greek to him) and law-preserving violence[156] (*rechtserhaltende Gewalt*) or between the founding violence of law and the "divine," law-annihilating violence (*rechtsvernichtende Gewalt*) (which sounds Jewish to him, Derrida 1992, 31), i.e., violence that destructs, destroys law. Furthermore he speaks of direct and indirect violence; physical and symbolic v.; exterior and interior v.; brutally or subtly discursive and hermeneutic v.; coercive or regulative v. There also is "the violence of language" (ibid., 48). And besides mythical violence there exists objectivist, representational, communicational, performative, interpretative v., etc. (ibid., 13, 60). Apparently, violence is everywhere and has many faces. Derrida seems to belong in a group of neo-apocalyptics in the tradition of Carl Schmitt, e.g., like G. Agamben, for whom the foundation of the state is the permanent state of emergency and concentration camps form the appropriate paradigm of state force (Agamben 1995).

A much more interesting and fruitful approach concerning the relation between power and law can be found in the writings and interviews of Foucault (1976; 1978; 1980; on Foucault and law in general cf. Hunt and Wickham 1994). Like Ehrlich he shares a pluralist approach: Power exists before the state and before state law came into existence. Power evolves bottom up, it is formed—as a kind of "living power," if I may say—in everyday fights, in strategic conflicts among social actors about competing aims. In this way a network of power relations is created on a societal level, in families, at the workplace, in social groups, etc. Foucault, according to his "microphysics of power," discards the etatist notion of centralized power according to which the state is either conceived of as the result of a collective contract or, in a Marxist version, as an apparatus conquered by a ruling group or class. There is no sovereign actor to whom supreme power can be ascribed.

I don't want to say that the State isn't important; what I want to say is that relations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the State. In two senses: first of all because the State, for all the omnipotence of its apparatuses, is far from being able to occupy the whole field of actual power relations, and further because the State can only operate on the basis of other, already existing power relations. The State is superstructural in relation to a whole series of power networks that invest the body, sexuality, the family, kinship, knowledge, technology and so forth. True, these networks stand in a condi-

[156] *Rechtsvernichtende Gewalt* is erroneously translated as "annihilating violence of destructive law" (Derrida 1992, 31).

tioning-conditioned relationship to a kind of "meta-power" which is structured essentially round a certain number of great prohibition functions; but this meta-power with its prohibitions can only take hold and secure its footing where it is rooted in a whole series of multiple and indefinite power relations that supply the necessary basis for the great negative forms of power. (Foucault 1980, 122)

At the very basis of society, forming the foundation of centralized power systems like the state, lies a whole series of societal power networks. These decentralized power relations emerge out of everyday conflicts. The (theoretical) question, however, is how these momentarily established asymmetrical relations can be generalized and temporally stabilized, i.e., "institutionalized." The problem in Marx was how to move from a non-normative basis to the superstructural norms of law, including property rights, and the state. In the case of Foucault we are confronted with the problem of how to move from interactions to institutions and a whole social order if, according to Foucault, neither physical violence nor ideology as a generalized media contribute to social integration. In his interactionist model "norms" only can play the role of strategic devices in order to deceive the other or to disguise one's interests. However, Foucault understands "norms" as imposed customs (which resembles to a certain degree Pascal's belief in the customary justice of law). But how to proceed from these customs to social institutions? This problem remains unresolved in Foucault (cf. Honneth 1986, 193ff.). Instead, his analysis shifts to historically established institutions that impose pressure, create customs, and produce social discipline. These institutions form a power-knowledge complex. As power is not concentrated in the state, so knowledge is not acquired solely in an academic, scientific realm. Rather, it is produced in institutions like schools, prisons, hospitals, and at the workplace. They operate not ideologically, not on a cognitive or moral level, but rather by getting access to the human body (what Foucault calls bio-politics).

(2) Power Destroys Law

In many cases violence and power are at the origin of state and law. However, there is another line in the tradition of thought concerning the relationship of power and law. The powerful do not create law, instead they break the law. Maybe this is what Benjamin meant by "*rechtsvernichtende Gewalt*." Thus the prophet Habakuk (1, 3–4) lamented:

Devastation and violence confront me; strife breaks out, discord raises its head, and so law grows effete; justice does not come forth victorious; for the wicked outwit the righteous, and so justice comes out perverted.

With the now proverbial formula "*Macht geht vor Recht*" ("might precedes right") Maximilian Graf von Schwerin condensed in 1863 a parliamentary speech of Bismarck. The idea is that an overwhelmingly strong power breaks,

even annihilates the formerly valid law without creating *ipso facto* a new legal order. In such a case legal norms are not observed or court decisions are disobeyed by those who are powerful enough not to fear any negative consequences. Law-annihilating powers rarely abolish the validity of an entire legal order. Rather, as in the case of the Nazis after having gained power in 1933, we find a concoction of using traditional legal forms, introducing new legal measures and applying brute force beyond all legal limits. In 2003 we can witness a hegemonial power that exempts itself from basic principles of human rights and international law. Decisions of the International Court of Justice are disobeyed in the name of national sovereignty,[157] principles of *Habeas Corpus* are invalidated in Guantánamo where indefinite detention of "illegal combatants" without a right to a hearing, and without a right to legal counsel is practiced,[158] new justifications for military intervention are introduced ("war against terror," "preemptive strike," "humanitarian" maybe even "democratic intervention"). Is this the annihilation of a traditional legal order, and nothing else, or is it the starting point for the creation of a new order of international law according to the interests of the new hegemonial power?

(3) Political Power that Uses Law

In the usual pattern of relations between political power and law we find a legally established regime using law as an instrument in order to achieve certain goals. Here it is not the origin of a legal order, which is in question; a legal order already exists and within its frame the state power issues legal regulations. The instrumental use of legal norms becomes the predominant conception.

(4) Restrictive Conditions: Factual Limits of State Power

The lawmaker, however, is confronted with two types of restrictions: factual and normative ones. Marx, following his non-normative approach, pointed out limits of state sovereignty that lie primarily in economic conditions. It is not the will of the sovereign in power that forms the foundation of law. Legal regulations are not based on his unalloyed volitions. He cannot achieve whatever he wants. Therefore, social conditions do not have their origin in a powerful, legally expressed will.

[157] Hans Kelsen (1920) points out that in international law the concept of state or national sovereignty is used to favour state law over international law when the two come in conflict. The powerful (in the sense of the mighty states) benefit from this device. They feel justified to ignore international law whenever it seems to get in their way.

[158] Obviously, this status is similar to the status of "Schutzhäftlinge" in the early Nazi concentration camps.

Society is not founded upon the law; this is a legal fiction. On the contrary, the law must be founded upon society, it must express the common interests and needs of society—as distinct from the caprice of the individuals—which arise from the material mode of production prevailing at the given time. This Code Napoleon, which I am holding in my hand, has not created modern bourgeois society. (Marx 1977, 327; cf. Marx 1968, 245)

State power and its law rests on the given material conditions of life. In order to express the "dominant" will (in fact, determined by such conditions) of a thus dependent "sovereign" in the form of law, universalization of this form is required.

If power is taken as the basis of right, as Hobbes, etc., do, then right, law, etc., are merely the symptom, the expression of *other* relations upon which state power rests. The material life of individuals, which by no means depends merely on their "will," their mode of production and form of intercourse, which mutually determine each other—this is the real basis of the state and remains so at all the stages at which division of labour and private property are still necessary, quite independently of the *will* of individuals. These actual relations are in no way created by the state power; on the contrary they are the power creating it. The individuals who rule in these conditions—leaving aside the fact that their power must assume the form of the *state*—have to give their will, which is determined by these definite conditions, a universal expression as the will of the state, as law, an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way. Just as the weight of their bodies does not depend on their idealistic will or on their arbitrary decision, so also the fact that they enforce their own will in the form of law, and at the same time make it independent of the personal arbitrariness of each individual among them, does not depend on their idealistic will. Their personal rule must at the same time assume the form of average rule. Their personal power is based on conditions of life which as they develop are common to many individuals, and the continuance of which they, as ruling individuals, have to maintain against others and, at the same time, to maintain that they hold good for everybody. (Marx and Engels 1976b, 328; cf. Marx and Engels 1969a, 311)

It is a question for empirical research, i.e., of socio-legal efficacy research, to analyze the factual limits a lawmaker has to cope with. The most salient restrictive conditions on the side of addressees of the norm are: lack of information, attitudes counter to the aims of the legislator, denial of legislative competence, sanctions not sufficiently severe, improbability of imposition of sanctions, and rewards for non-compliance (cf. Rottleuthner 1987, 54ff.).[159]

(5) Law as a Limit on Political Power

In addition, the lawmaker is confronted with normative limits. The state monopoly of power gains its legitimation from the idea that state power is bound by law. In Jewish law we found, as the basic norm of a legal order, the prohibition of private violence. An important step is added by the prohibition of

[159] Again, Turkey might be an interesting example of how an authoritarian, secular lawmaker is capable of changing substantially the social conditions of an Islamic society (cf. *supra*, 53–4).

violence between states in international law ("the gentle civilizer of nations"). Thus the state is externally peaceful and internally a powerful pacifier. In order to bring about internal peace the state is not permitted to instrumentalize law in an unlimited way. *Pax et iustitia* are the aims. A peaceful society can only exist if the state operates within a legal frame, according to pre-established criteria and procedures with predictable consequences and institutionalized competences. It is this subtle framework, not only the validity of a secondary rule of identification (Hart), that makes the difference between a state and a gunman.

The existence of (territorial, nation) states with a monopoly of power depends on various historical conditions that we only perceive in cases where state structures have collapsed. To mention only some of those conditions: the civilization and professionalization of warriors (in contrast to partisans, guerillas, para-military groups, warlords and private belligerents); the separation of internal and external control, i.e., of police and military forces; the distinction between a state of war and a state of peace; of war and the work for one's living (and not leading war in order to earn one's living); the distinction between (military) combatants and (civil) non-combatants; of war *inter nationes* and civil war. All these distinctions are becoming blurred in many places of the world nowadays (cf. also *supra*, sec. 3.2.1.4 on problems of transition).

(6) Political Power and Legitimation

From a normative point of view political power should not instrumentalize law at its discretion; it should act within a legal framework. Obviously, in our times, legality is not sufficient. In addition, political power requires legitimacy, and every regime attempts to present itself as legitimate. Max Weber drew the distinction between power (*Macht*) and domination (*Herrschaft*). The latter, in its various forms as charismatic, traditional or legal domination, is characterized by different modes of legitimation (affectual, traditional, value-rational, legal), while power refers to the brute fact that someone is capable of imposing one's will upon another. The predominant mode of legitimation today, according to Weber, would be the legal one. State activities can be interpreted and thus justified as procedures following legal rules.

However, legality per se no longer enjoys the presumption of legitimacy it once did after the experience of the 20th century, i.e., of the use that was made of law by criminal regimes. The discourse on human rights and their institutionalization in international agreements, national constitutions and constitutional courts is a response to this unceasing experience. By engaging in a human rights discourse we necessarily employ a normative frame of reference. Then power no longer *should* be the foundation of law and state. Instead, a basic structure of collective social identity and self-understanding, in the sense of Habermas (1992), becomes the framework of legal institutions. It will

no longer solely be a democratic, i.e., majority's consent at the origin that constitutes the validity of law in a classical sense:

> It is the people's support that lends power to the institutions of a country, and this support is but the continuation of the consent that brought the laws into existence to begin with. (Arendt 1970, 41)[160]

The problem rather today is how democratic structures (if they are established anyway) can be combined with human rights. Do political dilemmas emerge when majority decisions collide with human rights' demands? (Cf. Habermas 1996, 134, 481ff.; Alexy 1998; Oquendo 2002.)

3.2.6. Historical Foundations of Law

To make a long foundationalist journey short: Everything, except God, has its history (and even the Christian God became for a certain period of time a historical being). Why, then, is it important to point out the historical foundations of law? Is it necessary in order to "understand" law, i.e., legal norms, legal institutions, positions, activities, etc., to understand its history?

The maxim that one can understand something only if one knows its history is self-referential. In order to understand it we should know its origin and development. It was not the baby of 19th century historicism. It can be found earlier, e.g., in Nicolaus Hieronymus Gundling's *Vorbericht zu den winterlectionen* at the University of Jena in 1710. It then becomes a standard topic, e.g., in Savigny and the Historical School.[161] The scientific character of "Rechts*wissenschaft*" was derived from the fact that it could be understood as a branch of the historical sciences. During the 19th century for a couple of decades history, as a science, played the role of the leading science.

"Historical foundations" of law can mean both the phylogenetic origin of law and its further historical development (or legal evolution) as well. With assumptions about the phylogenetic *origin* of law I have dealt in the section on anthropological and biological foundations of law (including the question whether there might be something like ape law). We might identify as a very widespread assumption a model that starts with the origin of law in non-normative or pre-normative phenomena out of which in some way norms and finally legal phenomena evolve. A classical example is found in a quotation from Engels in which he suggests a sequence of repetitive activities—rules—custom—law—state organization—legislation—professional jurists:

[160] Arendt is referring to the 18th century picture of the Athenian *polis* and the Roman *civitas*.

[161] I am grateful to Reimer Hansen for these suggestions; cf. Hansen 1992, 8–9.; in Savigny it becomes a standard topic; cf. his opening article to the *Zeitschrift für geschichtliche Rechtswissenschaft*, Savigny 1815.

At a certain, very primitive stage of the development of society, the need arises to co-ordinate under a common regulation the daily recurring acts of production, distribution, and exchange of products, to see to it that the individual subordinates himself to the common conditions of production and exchange. This regulation, which is at first custom, soon becomes law. With law, organs necessarily arise which are entrusted with its maintenance—public authority, the state. With further social development, law develops into a more or less comprehensive legal system. The more complicated this legal system becomes, the more its terminology becomes removed from that in which the usual economic conditions of the life of society are expressed. It appears as an independent element which derives the justification for its existence and the reason for its further development not out of the existing economic conditions, but out of its own inner logic, or, if you like, out of "the concept of will." People forget the derivation of their legal system from their economic conditions of life, just as they have forgotten their own derivation from the animal world. With the development of the legal system into a complicated and comprehensive whole the necessity arises for a new social division of labor; an order of professional jurists develops and with these legal science comes into being. (Engels 1988, 380–1; cf. Engels 1969c, 276)

In Max Weber we found a continuum of usage, custom (i.e., unreflective perpetuated imitation, organically conditioned factual regularities of conduct) leading to rules for conduct as binding norms: namely, convention and law (cf. *supra*, 21–2, the quotations from Weber 1978, 29, 319, 321, 325, 332). Similarly Theodor Geiger (1979, 170; cf. *supra*, 121) established a sequence of traditional manners and customs (combined with religious taboos) out of which morality and law develop separately. Not to forget Pascal (*Pensées* no. 293) who located the "mystical foundation" of the authority of justice in custom (cf. *supra*, 147). Counterpositions might stress the original normativity of human action or the basically evaluative character of action orientation (normative expectations, preferences, etc.).

Developmental theories of law differ in their temporal range. Some theories are designed to cover the whole of human history = development of law, mainly applying stage models of evolution. Important steps or stages are, as we have seen in Jewish law: (1) The prohibition of private violence, primarily implemented by the institutionalization of the role of a "neutral" third who is not related to the conflicting parties. This marks the end of segmentary societies and the step to hierarchical state organizations. (2) The invention of writing. Written legal documents (laws, contracts, etc.) facilitate temporal stabilization and offer the possibility of interpretation. (3) The unity of primary and secondary rules (Hart), which permits the solution of problems of identification, application, and change of a legal order.

There are famous theories of legal evolution which adopt binary distinctions of stages: from status to contract (H. S. Maine); from repressive to restitutive law (É. Durkheim). More sophisticated is the model of Max Weber with different levels of rationalization and legitimation (cf. *supra*, 54ff.). Luhmann (the "old" one of 1972) employs a model of three stages (the law of segmentary societies, the law of hierarchical societies, and finally the law in a functionally differentiated society which is characterized by its "positivity").

The later "autopoietic" Luhmann would distinguish law before and after its autopoietc closure (whenever this event might have taken place in history). Other authors restrict their evolutionary analysis to shorter time spans, like Habermas (1981) with the *Rechtsstaat*, the welfare state and the democratic state.

From such historical models of legal development which refer to dates of "real" history one can distinguish systematic models which point out general *mechanisms* of legal evolution. Marx' model of economic basis and superstructure is the most famous one. Also Ehrlich's approach belongs to this type of systematic stage model starting with "facts of law" out of which law—living law, decision rules, and legal propositions—is evolving permanently. Both theories share, once again, the assumption of a pre-normative state that forms the basis of evolving normative, legal phenomena.

In all of these models, which form a long tradition in socio-legal theory, it is not an internal "logic" of law that brings about a new stage. Legal development depends on external conditions, be they natural, economic, moral, political, etc. Marx and Engels argued against a solely "internal," doctrinal analysis of legal development, which they found in the Historical School, in their famous sentence: "It must not be forgotten that law has just as little an independent history [*eine eigene Geschichte*] as religion" (Marx and Engels 1976b, 90–1; cf. Marx and Engels 1969a, 63).

History for Marx and Engels, in particular in their critique of the Historical School, was the leading science. For them historical analyses always implied a comprehensive point of view. History or tradition are composite variables, like culture in the sense of a traditional context of institutions, forms of collective life and thought. Of course, one also may speak of the cultural foundations of law. However, since law itself forms a part of culture, in the form of "legal culture," one has to ask whether a distinction can be drawn between general, extra-legal culture, and legal culture. This might cause problems as the notion of culture is employed in a diffuse, all-encompassing way. History/tradition include all the foundational elements that we have discussed before. Now they are brought into a temporal order, i.e., into diachronous sequences. This holds even for natural foundations, since nature also has its history. (It was only in Greek mythology that we encountered the phenomenon of totally undated events.)

The Marx-Engels thesis that law does not have its own, independent history found a serious rival in Max Weber. In his general account of legal development he accepts the importance of economic needs and interests. However, patterns of political organization and legally internal mechanisms might have an even greater impact on legal development. Economic conditions are not "expressed" automatically in legal forms. Legal institutions must be invented. Their invention depends on legal techniques and modes of legal thought.

> The mode in which the current basic conceptions of the various fields of law have been differentiated from each other has depended largely upon factors of legal technique and of political organization. Economic factors can therefore be said to have had an indirect influence only. To be sure, economic influences have played their part, but only to this extent: That certain rationalizations of economic behavior, based upon such phenomena as a market economy or freedom of contract, and the resulting awareness of underlying, and increasingly complex conflicts of interests to be resolved by legal machinery, have influenced the systematization of the law or have intensified the institutionalization of the polity. [...] All other purely economic influences merely occur as concrete instances and cannot be formulated in general rules. On the other hand, we shall frequently see that those aspects of law which are conditioned by political factors and by the internal structure of legal thought have exercised a strong influence on economic organization. (Weber 1978, 654–5; cf. also ibid., 687–8)

The peculiar differences between the Common Law system and continental law—the explanation of which caused some problems for adherents of the basis-superstructure-doctrine (cf. supra, sec. 3.2.2.2)—can only be explained by reference to "the internal structure and modes of existence of the legal profession" (Weber 1978, 889), i.e., the organization of legal training (in England: in the hands of lawyers) and the way how judges are recruited (in England: out of the group of lawyers) (cf. ibid., 889–92).

Therefore, cognitive and professional aspects of a legal system also have to be taken into account. Since they form elements of the legal system itself, one might accept them as evidence for an autonomous development of law. However, because Weber stressed the importance of other "factors" as well (mainly political and economic), it might be more appropriate to speak of a "relative autonomy" of the development of law.[162]

Another approach can be found on the general theory of hermeneutics. According to Gadamer texts implicate a particular historical impact ("*Wirkungsgeschichte*"). For him legal hermeneutics is the paradigm case for understanding in general, because legal texts as such exert a binding force (Gadamer 1965, 307ff.). The binding force of authoritative legal texts, however, is not a matter of some intrinsic, encapsulated quality that evolves autonomously in legal tradition. Legal texts, rather, are experienced quite differently according to social roles, institutionalized positions, and professionalized habits inside or outside the legal system. Attitudes towards legal texts will vary among actors and observers of the legal system, among judges (who are and feel bound by the law), lawyers, legal scholars, lay people, etc. There is no autonomous channel through which legal tradition speaks across time.

The most recent version of a developmental theory of law emphasizing the autonomous character of legal evolution was created by Niklas Luhmann. From general evolutionary theory he adapts the three basic mechanisms of evolution that can be extended to the realm of law: variation (by legal inven-

[162] On the notion of (relative) autonomy, see, among many others, Lempert 1988; Rückert 1988.

tions)—selection (e.g., via legislation)—stabilization (via legal dogmatics). In contrast to this almost universal applicability of evolutionary mechanisms, the development of the legal system, as a social system among others, follows its own logic. Other social systems, like the political or economic system, do not "determine" the content of law. There are only "irritations" from other systems that must be transformed, according to the internal legal code, into legally relevant events in order to become elements of the legal system and thus alter this system internally.

Thus ends the part on external foundations of law. I shall return to Luhmann's model in the next chapter in discussing the internal foundations of law.

Chapter 4

INTERNAL FOUNDATIONS OF LAW

In speaking about the external foundations of law, I was alluding mainly to thoughts and theories *about* law. Sometimes I inserted substantive considerations on the "real" development and functions of law (e.g., on law in Islamic countries; problems of transformation; law, morality, and the welfare state). A general and persistent problem of the various theories lies in their explanatory shortcomings. Some of the theoretical models seem to have lost explanatory power over the centuries. Thus, the historical foundations of foundational thinking themselves change: transcendent conceptions in which explanation and justification were not yet separated fell prey to secularisation; theories that gave great weight to natural conditions, as in Montesquieu, are undermined by tendencies towards growing control of our natural environment. Great theories that emphasize one set of factors, like economic or political ones, are insufficient in that they can explain only limited aspects of law. Mixed models, as in Weber, that apply multifarious factors leave open the question of how to determine their relative weight. Thus, it is not a surprise to find other theorists who point to legally internal variables in order to explain the development and functions of law. Law, then, would lead, to a certain degree, its own life. It would be nice and aesthetically satisfying if one could construct a sequence from external foundations that become more and more manmade to internal foundations. However, I am not going to tell a grand narrative about growing "internalization," in the tradition of the philosophy of history. Rather, I turn to three "internalists." Two of them, Kelsen and Luhmann, emphasize, albeit in different ways, the self-generating character of a legal order. The third one, Lon Fuller, "internalizes" the moral requirements of a legal order. Morality is no longer, as in Durkheim for example, an external societal foundation of law that is symbolized in the sediments of legal norms. It becomes an internal element of law that is required if law is to be capable of fulfilling its basic social functions.

4.1. Kelsen's *Grundnorm*

In his analyses of the structure and dynamics of a legal order Kelsen adapted from A. Merkel the notion of a "*Stufenbau der Rechtsordnung*," i.e., that the norms of a legal system can be ranked in a hierarchical order. Norms of a higher level form the "*Geltungsgrund*" of norms of a lower level, i.e., the normative basis of their validity. Thus an internal normative network is established in which legal norms are produced and changed. A legal system can be interpreted as a self-generating linkage of legal elements. Norms are created by (on the basis of) norms. The idea of a hierarchical order necessarily leads to a final

norm if one does not accept infinity or circularity. Kelsen marked the end of a normative regress with his well-known "*Grundnorm*" (cf. Kelsen 1960a, 46–54, 190ff., 202–39; Kelsen 1979, 208). The basis of its validity cannot be questioned any further (Kelsen 1979, 205). This apex norm consists of a conditional imperative: One should behave according to the prescriptions of a legal order or a constitution if the norms of a legal order or a constitution are in fact issued and if they are by and large efficacious (Kelsen 1960a, 219). The apex norm implies two validity-conditions (*Geltungsbedingungen*), namely, factual promulgation and efficacy; it is itself not the final validity-basis (*Geltungsgrund*).[1] Therefore the apex norm is not itself an element of a legal order, it is not an internal foundation of law. Rather, in Kelsen's Pure Theory of Law it plays the role of an *epistemological* presupposition, external to its object, which has to be made in order to describe a normative order as a valid legal order. The apex norm is not a positive norm. Without it, anyone could sit down and design a valid legal order—just for fun. With it there is "reality" instead of fantasy-law.

The basic idea that makes Kelsen an "internalist" is that law regulates its own creation. Norms of a higher level do not determine the content of norms of a lower level (Kelsen 1979, 355). They empower the addressee to issue a valid norm. The subjective meaning of a volitional act is transformed into an objective meaning if the act is authorized by a positive normative order, be it a moral or legal one (ibid., 204). This makes the difference between a volitional act of, say, a robber and of an agent of a legal (= empowered) organ.

The basic distinction in Kelsen's Pure Theory of Law is the one between Is and Ought. According to his Neo-Kantian approach this distinction is conceived of not as an ontological one. Rather, it forms the basis for his epistemological schism between *Seinswissenschaften* (empirical sciences) and *Sollenswissenschaften* (normative sciences). In the realm of *Sein* the laws of causality reign, while in the world of *Sollen* the elements are connected by ascriptive relationships (*Zurechnung*). Therefore no connection can exist between any of our external factual variables such as natural, economic, political, etc., conditions (except religious commands since they are norms!) and the purely normative world of law.[2] Since Kelsen was very strict in keeping

[1] In other contexts the *Grundnorm* simply states that people should behave in accordance with what is historically the first constitution. ("Man soll sich so verhalten, wie die historisch erste Verfassung bestimmt"; Kelsen 1979, 207.)

[2] Therefore a sociology of law cannot exist, for it would be based on an epistemological contradiction by which (legal) norms are linked in a causal network. This was the point of view from which Kelsen criticised Ehrlich's attempt (cf. Kelsen and Ehrlich 2003; Rottleuthner 1984). It must be noted, however, that Kelsen, especially in his critique of political ideologies (like "justice"), also contributed essentially to *Seinswissenschaften.* He later relativized his critique of Ehrlich: A sociology of law is possible if it restricts itself to facts. I have proposed *supra* (sec. 2.5.4) one way of dealing with legal norms in an empirical way by using the notion of "law-related facts," such as the enactment and application of norms, and hence by looking at events that (relate to law and) take place in time and space.

apart the two sciences, his critics happily engaged in demonstrating that Kelsen was not as puristic as he claimed to be. A favorite topic was the apex norm in which—so it was argued—Is and Ought are mixed together. The very basis of Kelsen's theory would be defectively designed because empirical conditions (promulgation and efficacy) are connected with an obligation (to abide by the legal order). This critique, however, misreads the character of the apex norm as a conditional imperative. Every standard norm of a penal code, e.g., connects empirical conditions (a "fact type" or *Tatbestand*) with an obligation directed to the legal staff (to issue legal consequences in case of ...):

$$A \rightarrow (\mathrm{O})\, B$$

The apex norm connects promulgation (P) and efficacy (E) with the obligation to act in conformity (C) with the legal order:

$$P \wedge E \rightarrow (\mathrm{O})\, C$$

The problem at the foundation of Kelsen's theory, therefore, is not the breakdown of his basic distinction. Rather, it is, very fundamentally, the problem of revolution, i.e., the establishment of a historically first constitution. Does this take place *ex nihilo*, out of a legal vacuum? How can transformation processes be described (both formally legal and informal), including losses and gains of legitimacy? The other problem that I am going to deal with in more detail lies in efficacy. While positive promulgation, as one part of the apex norm, might be easy to identify, the determination of efficacy, the other part, raises serious problems. Kelsen explained: A legal norm is valid "if it belongs to a legal order that is by and large efficacious, i.e., if the individuals whose conduct is regulated by the legal order in the main actually do conduct themselves as they should according to the legal order" (Kelsen 1960b, 268).

What does it mean to say that *a whole legal system* has to be efficacious as a criterion of the validity of this system and its elements, i.e., the single norms. Kelsen uses the term "efficacious" to refer to general compliance with the norms. However, this is what "effectivity" denotes. "Efficacy," in contrast, is attributed to a norm if the goals of the legislator are achieved. Norm compliance and goal achievement coincide only in cases of standard penal norms: By observing the prohibition of murder the aim of the legislator is attained at the same time. In many cases, however, the legislator uses norm compliance as a means in order to achieve a separate goal. Standard examples can be found in traffic regulations and in many other fields. Therefore it is important to distinguish effectivity from efficacy, or norm compliance from goal achievement respectively. From an empirical point of view it might be almost impossible to find out whether a whole legal order is by and large observed. Even compliance with the majority of rules to a certain degree is impossible to prove.

Compliance only with secondary rules, i.e., general application of them by the legal staff based on a legalistic attitude is not sufficient. Neither is a general acceptance, a broad belief in the legitimacy of the legal order. All these alternatives leave open the question of the *efficacy of a whole legal order.* And this question reads: What are the objectives of a whole legal order? Is it protection or security in exchange for obedience (Hobbes)? Is it the guarantee and enlargement of individual freedom (Kant)? Should a legal order provide people with the basic requirements of social orientation (Fuller; cf. *infra*)? How could consensus be established on this matter? And, one could add from an empirical point of view, how could any or all of these desirable states of affairs be operationalized intersubjectively? Who decides whether these goals are being achieved? Thus the foundational basic norm in Kelsen leads to fundamental moral issues about a legal order.

4.2. Luhmann's Autopoietic Theory of Law

The "early" Luhmann, the Luhmann of *Rechtssoziologie* (1972; cf. Luhmann 1985), began the construction of his theory with the distinction between cognitive and normative expectations. He does not follow the traditional paths that commenced with the schism of Is and Ought or of fact and norm, neither does he introduce norms, then legal norms in a sequence that originates in regularities and customs, then moves via conventions and moral rules to law. Cognitive as well as normative expectations are events determinable in space and time. They differ in the way how one reacts in the case of disappointments: Does one change the expectation (then it was a cognitive one) or does one adhere to one's expectation (then it is a normative one).[3] Norms can be defined as counterfactually stabilized (normative) behavioural expectations. The notion of law is introduced as congruently (i.e., in the temporal, objective, and social dimension) generalized normative (i.e., counterfactually stabilized) behavioural expectations. Finally, law is defined as structure of a social system:

> We can now define law as structure of a social system which depends upon the congruent generalisation of normative behavioural expectations. (Luhmann 1985, 82)

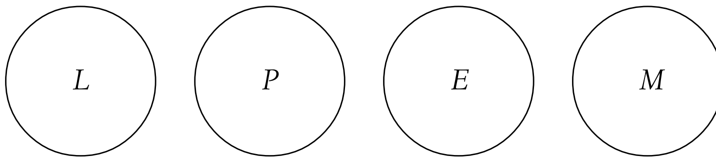
> Law must be seen as a structure that defines the boundaries and selection types of the societal system. Of course, it is not the sole societal structure; apart from law, we have to take account of cognitive structures, the media of communication, such as, for example, truth or love, and particularly, the institutionalisation of the scheme of societal system differentiation. However, law is essential as structure, because people cannot orient themselves toward others or expect

[3] A problem that one would have to deal with in empirical research is to provide a clear operationalization of this distinction. Normative expectations would entail all the feelings among which Ehrlich attempted to discriminate (like revolt, indignation, disgust, and disapproval). Cf. *supra*, 139ff.

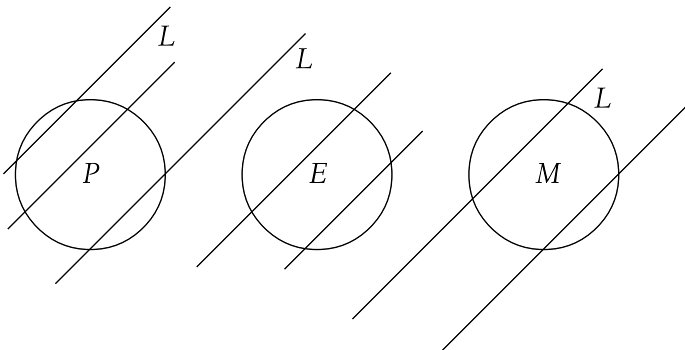
their expectations without the congruent generalisation of behavioural expectations. This structure has to be institutionalised at the level of society itself, because it is only here that we can build beyond preconditions and create those establishments which domesticate the environment for other social systems. It therefore changes with the evolution of societal complexity. (Ibid., 105)

Ehrlich, who discussed various overtones of feelings in the case of "disappointment," i.e., the transgression of norms, based his definition of law on psychic events; and so does Luhmann. Both are confronted with the problem of how to move from the psychic to the social—in the case of Ehrlich from feelings to social associations ("*Verbände*") that form, according to Ehrlich, the basic elements of a society; in the case of Luhmann from expectations to structure. In his case the problem lies in the still mysterious mechanism(s) of generalization. This approach to the design of a theory changes after Luhmann's autopoietic turn.

(1) Law now is conceived of as a *system*, i.e., the legal system, and no longer as (the) *structure* of a social system. The term "structure" is no longer used systematically. The legal system (*L*) is one among many other social (sub-)systems like the political (*P*), the economic (*E*), the military (*M*) one, etc.



The problem of theory construction can be formulated in the following way: Is it reasonable to conceive of law as a legal system or is it more reasonable to conceive of law as a structure penetrating the whole society? Or can law—at the same time—be conceived of as both?



This is a problem in which theory construction and definition come close together since one has to make a theoretically founded decision about what to choose as *genus proximum* of law: system or structure.[4] If one decides in favor of "structure" it will be easily accepted that law, infiltrated in the other systems, has regulatory power; while if one chooses the law-as-system version (and in particular the autopoietic one, as we will see) one runs into difficulties of how to *conceptualize* the impact of a legal system on other social systems.

(2) Law is a *social* system. Luhmann distinguishes types of systems: mechanical, biological, psychic, and social systems.[5] The latter are both "meaning systems" because they refer to the possible and the negative. Psychic systems consist of consciousness (including expectations?) as its key element; therefore persons are not elements of a social system. The four system levels cannot be reduced to each other, nor is one "foundationally" based on the other. They have to be conceived of differently. (Something like a sociologically oriented psychosomatics would be impossible.[6]) The focus of Luhmann's analysis lies on social systems. They are theoretically constructed according to levels of aggregation:

– starting with communication or interaction as basic elements,
– organizations,
– social sub-systems,
– and ending with society as *the* social system (or the world society).

Law now is introduced not via psychic states (like expectations) and their "generalization," but directly on the social level, i.e., as one of the social subsystems: as the legal system.

Like Kelsen, who denied a causal nexus between law (as a normative phenomenon) and natural, psychic, economic, political, etc., conditions (as empirical phenomena), so Luhmann excludes on the basis of his quasi-ontological stratification of systems a connection between sub-social systems and so-

[4] Cf. *supra*, 26. The problem of structure and system I am pointing out is different from the criticism that Bourdieu (1987, 816) directs at Luhmann: The proposition of Luhmann's systems theory that legal structures are "self-referential" "confuses the symbolic structure, the law properly so-called, with the social system which produces it." By this Bourdieu refers to the distinction between the symbolic order of law (structure) and the order of objective relations between actors and institutions (system) that characterizes a normativist and a realist approach (cf. *supra*, sec. 2.1.).

[5] This resembles old European versions of ontology. Still, Nicolai Hartmann distinguishes four "Seinsschichten"(Hartmann 1940): material, physical, psychic, and mental (*materiell*, *physisch*, *seelisch*, and *geistig*).

[6] A sociology of law was impossible for Kelsen in his disagreement with Ehrlich over the Is-Ought question (cf. Kelsen and Ehrlich 2003 and *supra*, 139, 162).

cial systems. This invites a reconstruction of my foundationalist overview in Luhmann's terms:

Luhmann's system levels	Our "Foundations"
mechanical	natural foundations (geographical, etc.)
biological	biological, anthropological, cognitive
psychic	psychic-moral
social	mythological, religious, economic, societal, political, historical

It is only between the other social (sub)systems (the religious, the economic, the political, etc.) and the legal system that interrelationships can be meaningfully stated. But what is their connection?

The problems of theoretically designing a possible nexus between social systems—we incessantly talk about theory construction, not about "reality," whatever this might mean in Luhmann—increase almost insurmountably as soon as the notion of autopoiesis is introduced and then attributed to the legal system.

(3) Law is an *autopoietic* social system. The basic idea is, and this certainly demonstrates Luhmann's conversion into an "internalist," that the legal system reproduces itself by permanently producing its elements according to its own internal "logic." The legal system is a self-generating linkage of legal elements. Law is created by law in a circle of self-reproduction. This idea of the self-reproduction of law connects Luhmann's theory, as a sociological version, to Kelsen's immanent, pure normativism. In both the foundation of law lies in law. There is no external foundation of law. In contrast to Kelsen, however, for Luhmann the foundation of law cannot be found by tracing a hierarchy of norms to its top, to an apex norm. Rather, the legal system is founded in a paradoxical circularity. "The foundation of law is a paradox, not an idea functioning as a principle" (Luhmann 1993a, 235; my translation).[7]

The autopoietic Luhmann pays less attention to the input-output-relations of systems and gives greater weight to the internal operations of the legal system. The legal system is autopoietically closed (when did this great event actually take place??). It is not totally closed: The legal system is normatively or operationally closed but cognitively open. Thus the distinction between normative and cognitive is reintroduced, no longer attributed to *expectations*, but in the distinction between cognitively open and normatively closed *systems*.

[7] "Die Grundlage des Rechts ist nicht eine als Prinzip fungierenden Idee, sondern eine Paradoxie." Luhmann 1993b draws on examples from 17th- and 18th-century social theory to explain this alleged paradox in regard to the origin of property rights. A sober analysis of the fashionable paradoxes-flood can be found in Röhl 1998.

What makes the legal system an autopoietic one? An autopoietically closed system can be characterized by its elements or units, by a particular code and by a specific function that cannot be achieved by other systems. In the case of the legal system we find as its units legal acts or legal communications.

> The legal system [...] consists only of communicative actions which engender legal consequences [...]. It consists solely of the thematization of [...] events in a communication which treats them as legally relevant and thereby assigns itself to the legal system. (Luhmann 1988, 19)

> Every communication that processes a legal-normative expectation[8]—in the context of law enforcement, provisions for legal conflicts, legal change—is an operation internal to the law. This communication, at the same time, defines the boundaries between the legal system and its context in daily life that gives rise to the thematization of a legally relevant question. (Luhmann 1999, 6; my translation)

The operations are orientated to a particular *code*, in the case of the legal system to the binary code of legal/illegal (not: valid/invalid). Every element that passes the distinction between legally relevant and legally irrelevant (or law and non-law) will be processed according to the bifurcation of legal/illegal.

The *function* of law consists only to a certain degree in social control, or social integration, or conflict resolution (Luhmann 1993a, 156ff.). According to Luhmann the specific function of law is the deployment of conflicts, "the exploitation of conflict perspectives for the formation and reproduction of congruently (temporally/objectively/socially) generalized behavioral expectations" (Luhmann 1988, 27). It consists in stabilizing normative expectations by regulating their temporal, objective and social generalization (Luhmann 1993a, 131).

Now it becomes clear, who "generalizes congruently": It is the courts that primarily fulfil this function by applying the code of the legal/illegal to conflicting claims that are brought into the forum. Luhmann gave the impression of using a non-etatist concept of law. However, it is mainly the courts that generalize behavior expectations and thus produce law.

How can the relationship between autopoietic systems be conceptualized if one does not accept a kind of autistic closure (if this transfer from the psychic level is permitted)? The two traditional issues of the sociology of law would require clarification in the light of the theory of autopoiesis: (1) the explanation of the evolution or development of law and (2) the impact of the legal system on other social sub-systems ("effects of law"). Does law have an "independent history" or is there a nexus between law and the extra-legal world? (On legal development in general cf. Luhmann 1993a, 243, 281.) Law develops according to its own logic. External events produce at most "irritations"; they cannot determine the internal state of affairs. Environmental information must first be transformed into legally relevant information within

[8] Can expectations as *psychic* states be processed in *social* communications?

the legal system. (This is as true as it is that when you eat a potato you don't become a potato.) In order to qualify connections that might exist Luhmann invented the notion of "structural coupling" (Luhmann 1993a, 441–2) by which common elements of distinct systems can be connected (the constitution in the case of the legal and the political system; contracts in the case of the legal and the economic system). Thus, the notion of structure returns to the stage as the great social connector.

From a functional point of view with respect to the impact of the legal system on other social sub-systems, again we find a radical scepticism regarding the steering capacities of law. There is no control, influence, or determination carried out by the legal system. Law, rather, circles around itself. Thus, the construction of a theory of autopoietic law (cf. in general Teubner 1989) causes problems on a purely conceptual level that are hardly manageable within the frame of this theory's design.

All of a sudden, however, "foundations" appear in Luhmann. As one might recall, Luhmann had explicated the concept of a norm by normative, i.e., in the case of disappointments, counterfactually stabilized expectations. Now he declares as a "foundation of law" the "general disposition to normatively expect normative expectations" (Luhmann 1993a, 147; my translation).[9] Law is to be differentiated (as a legal system) on the basis of the reflexivity of its operations (ibid.). There is no longer a paradox at the foundations of law! The organizations that issue binding legal decisions (*die Entscheidungsorganisationen des Rechtssystems*) must be embedded in a motivational legal culture (*motivationale Rechtskultur*). This kind of reflexive legal culture that normatively expects normative expectations (rather, a style of normatively expecting) forms the social foundation of its own activities (ibid., 148). Are expectations and collective motivations now at the foundations of law? This sounds a bit like Durkheim and his notion of collective moral sentiments. Elsewhere in his *Das Recht der Gesellschaft* Luhmann (ibid., 81–2) describes the social preconditions of a differentiated, operatively closed legal system. If a specific legal culture can be established law will not be susceptible to being used as a pure instrument of political power, not be open to corruption. The differentiation of the legal system is based on the independence of the judiciary, *Rechtsstaatlichkeit*, civil and human rights, and democratization of the political system. These highly improbable inventions of European legal history raise the question of the moral foundations of law.

4.3. Fuller's Internal Morality of the Law

Lon Fuller (1969a; 1969b) does not locate the moral foundations of law within a collective conscience of social solidarity as Durkheim did or a "moti-

[9] "Die allgemeine Bereitschaft, normatives Erwarten normativ zu erwarten."

vational legal culture," as in Luhmann. Rather, there exists an "internal morality of law," i.e., "the morality that makes law possible" (Fuller 1969a, 4, 33ff.). By law Fuller understands "the (purposive) enterprise of subjecting human conduct to the governance of rules" (ibid., 106). Therefore, the formal quality of the governing rules is at the focus of his analysis.[10] He finds no need to refer to external moral considerations. Law, instead, has its own morality as it fulfils its function of providing fundamental social orientation patterns. In this sense law becomes itself "foundational," i.e., it forms a fundamental prerequisite for social interaction.

Fuller has noted eight ways of failing to produce rules apt for guiding the subjects of a hypothetical lawmaker "Rex." Rules should be

(1) general,
(2) made known or available to the affected party,
(3) prospective, not retroactive,
(4) clear and understandable,
(5) free from contradictions,
(6) they should not require what is impossible (*ultra posse nemo obligatur*),
(7) they should not be too frequently changed,
(8) there should be congruence between the law and official action.

These "principles of legality" that come close to the prerequisites of the "rule of law" or the "*Rechtsstaat*" follow, with the exception of (2), from a "morality of aspiration" that operates with praise and disfavor, in contrast to a "morality of duty" that is based on accusation and blame.[11] It is not a social morality on which law depends (as in Durkheim). But the question is whether this internal morality of law is only a professional morality, i.e., a morality of the legal professions, including the lawmaker, or whether a more general acceptance in a society is required. Does the rule of law depend only on a shared legalistic attitude among the legal officials or must it be backed up by general acceptance? Do the eight prerequisites hold solely for "strategic action," in the sense of Habermas (1981), or do they form an essential part of "communicative action," facilitating mutual understanding?

Hart harshly reviewed the first edition of Fuller's *Morality of Law* (Hart 1965). Firstly he criticizes the very wide notion of a rule. What constitutes the difference between legal rules, moral rules, or rules of a game? In any of these cases a rulemaker can commit one or more of the eight failures. The thrust of

[10] The idea of the formality of legal rules has been elaborated in many contributions by Robert Summers (cf., e.g., Summers 1999 and 2001).

[11] The distinction between a morality of duty and a morality of aspiration corresponds to two types of scaling: nominal and ordinal (or rank) scaling. The same methodological distinction can be applied to the distinction between norms (which one can follow or not) and principles (which one can fulfil to a greater or a lesser extent).

Hart's critique, however, aims at the misconception that the fulfilment of the eight conditions, as best as the lawmaker can, would imply a moral value as such. Hart insists that not even the best performance by a lawmaker confers intrinsic moral value on his rules. Their moral value depends on the goals a lawmaker is aiming at. From a moral point of view, even very clear rules may be neutral. By promulgating clear and understandable rules one can also pursue evil goals (Hart 1965, 351–2). It is not only extremely vague norms that lead to moral grievances.[12] Moral value is implied only if one looks at the aims of the legislator that he or she wants to achieve by promulgating legal rules. Maximizing the effectivity of the "governance of rules" is not *per se* a moral issue—otherwise one could just as well speak of a morality of (successful) poisoning. The basic moral question a lawmaker must confront is whether the rules form a "contribution to human liberty and happiness" (ibid., 357). Are we speaking here of the goals of an entire legal order? (Cf. *supra*, 163–4) In any case, the aims of a legal order that have to be subjected to moral assessment lie beyond the "internally" optimal promulgation and administration of rules. Meeting the standards of an internal morality of law might indicate a high degree of effective action orientation; however, it leaves open the question of the direction in which human action is governed. Therefore, we are dependent on a morality that is external to law—provided that we do not limit the function of law solely to efficaciously (or effectively?) subjecting human conduct to the governance of rules.

[12] Racial norms in Nazi law, for example, became quite clear as soon as the attribute "Jewish" was made administrable. In contrast, the *Polenstrafrechtsverordnung* (1941) was normatively unlimited and served terrorist aims.

Chapter 5

ANTI-FOUNDATIONALISM

Whoever is considering the foundations of law has to face the critique of foundationalism in its extreme form, namely: anti-foundationalism.

A variant of anti-foundationalism in legal theory is rooted in ethno-methodology (cf. Wilson 1970a; 1970b). It can be understood as a radical critique of norm-Platonism. According to the norm-scepticism of this theory, legal rules do not exist independently, prior and with obligating force before an act of understanding such a norm. Rather, they are constituted in the context of a concrete situation of interpretation and application. This position was already taken by the radical labelling approach in criminology, perhaps even by the free law movement ("*Freirechtsbewegung*"), and is raised by more recent authors like Stanley Fish.[1] The "objectivity" of legal norms dissolves in situations of their interpretative and performative application. Legal norms do not exist before their application. "Legal norms develop only in and through the practice of their use" (Morlok, Kölbel, and Launhardt 2000, 18). They exist only in the sphere of communications. Law consists of arguments, interpretations and judgements that are not logically deduced from norms.[2] The application of law is singular, bound to a situation, variable and flexible. Legal sociology should abandon the distinction between "law in the books" and "law in action." The sole form of existence of law is "in action." Law is a social practice. Its validity consists of its being practised (ibid., 34).

The theory of the liquidation or the dissolution of legal norms is, however, in practice not as radical as it seems. Legal norms are manifested in texts after all. There is thus something like "law in the books." These norms are the object of interpretation. As a result the dissolution of legal norms happens in the context of their interpretation. Legal norms are found in texts that can be treated like other texts. This is the core idea of the "law as literature" movement (Levinson 1982). Texts—and thus legal texts as well—are vague; their meaning depends on context. Durkheim said, following the French tradition of non-interpretation ("*sens-clair-doctrine*"): "A legal rule is what it is and there are no two ways of perceiving it" (Durkheim 1982, 82). An ethnomethodologist, in contrast, would assert: There are no legal norms as such; there are only different ways of interpreting them. Seemingly obligatory, given

[1] Cf. Fish 1989, 342ff., on foundationalism and anti-foundationalism as two kinds of epistemology.

[2] We still have, or again have, wrong conceptions of the connections between (general) legal norms and (singular) judgements. The knowledge of the properties of deduction, conclusion, subsumption, syllogism, etc., seems to have gone lost.

texts are dissolved in interpretations and situations. In consequence, the distinction between legislation and adjudication that is bound by norms becomes untenable.

T. P. Wilson endowed a variant of the traditional sociological theory of action with the label "the normative paradigm." This paradigm takes as its starting point from an agent in a situation and a position (status) equipped with dispositions and expectations. The agent internalizes stable, relatively homogenous norms and values. As others do the same, interaction in a "shared culture" is possible. The competing model of an "interpretative paradigm" assumes interactions through which the interacting people encounter the role expectations of others and reinterpret them. Norms have no fixed meaning that could serve as the basis of orientation for a single agent. The meaning of norms dissolves in interaction, is continuously fixed and reformulated in specific contexts. Norms do not have the function of directing action. Actions, e.g., those of norm application, do not "follow" from norms. They are part of a process that is both inventive and interactive.

This position leads to a couple of fundamental problems:

(1) It takes speech acts as one of the smallest units constituting society. How does it, then, deal with higher levels of aggregation like "large scale," "complex" and "macroscopic social phenomena" (Wilson 1970a, 59, 74)? Do structures, regularities and institutions still exist for those who hold this position? How do the agents produce "repetitiveness, stability, regularity, and continuity" (ibid., 79)? Regularities in interactions are supposed to be creating structures. Social structures emerge somehow (repetitively?) from interactive practises. Things proved by everyday practise are assumed to "sediment" (Morlok, Kölbel, and Launhardt 2000, 33) within an institutional framework. What does this metaphor taken from geology mean?

(2) How is one to deal with a self-understanding of the agents that is based on normative Platonism, or on a cognitive, objectifying attitude towards norms that takes norms as (seemingly) fixed entities that are binding on the applier of the norm? In principle, it is one possible position within the "interpretative paradigm" to privilege the subjective perspective of the agents (Wilson 1970a, 76–7). This perspective, however, from the standpoint of an anti-foundationalist approach, is a form of "false consciousness." The subjective understanding of being bound by given norms can only be interpreted as a useful misconception. (This has been said before by Max Weber. Cf. Weber 1978, 894.)

(3) Such an approach excludes a priori the thought of non-textual foundations of norms since everything is speech and text ("*il n'y a pas de hors-texte*"). Social reality is reduced to a communicative, rhetorical "construction." Law, manifested in language, is reduced to linguistic utter-

ances used in interaction. How is society constituted on the basis of the smallest speech units? What is the constituting role of things not said or even unspeakable? If one asserts with Gadamer that Being understood is language then one has to admit the existence of quite a bit of Being that is not understood. How does one deal with speechlessness, with non-interaction, e.g., in scientific discourse by failure to quote, by the exclusion of some authors or arguments from the "universe of discourse"? It sounds nice to take consensus as a criterion for truth but on which exclusions from interaction might it be based?

(4) There is the possibility of singular actions not involving interaction, but still based on rules.

(5) How is one to deal with texts beyond face-to-face interactions, thus especially where historical texts are concerned? Concretely: With whom do I have to communicate to explain that the assertion of a historian is wrong that the idea of *bellum iustum* is an invention of sharp minded Dominicans, who created—facing in the 16th century the barbaric suppression of natives in South-America—the distinction of just and unjust wars? If I find this figure of thought already in Thomas Aquinas, in Gratian, even earlier in Augustine or in Cicero—in their texts—do I have then to establish a consensus with the librarian of the university library that these are really texts of these authors? (Do not forget: Scientific facts are derived from social processes and that social processes are determining what is true and what false [Morlok, Kölbel, and Launhardt 2000, 21, 31]—but which social processes?) Who guarantees that the translation is correct, if I do not rely on my humanistic qualification that has been certified after years of repetitive social processes consisting of asymmetrical interactions of teacher and pupil? Do I have to enter into a spiritual conversation spanning centuries? Does this historian have to agree with me—after a situated, inventive interaction with him that is open to the context? Or is there another authority that will signal me its consensus? Generally, how can one, in historical research, distinguish between facts and fictions (*res factae/res fictae*) (cf. Evans 1997).

(6) Interactions do not merely create their own context. They are already embedded in asymmetrical and constrained contexts. Why are there in legal proceedings the compulsions to decide, to give reasons, and to interpret? Where does the judge's "definitional power" derive from? Why are in legal proceedings judicial interpretations "exclusive"? How is the "pressure" of appeals created and what are the "structurally given problems of legitimacy" (Morlok, Kölbel, and Launhardt 2000, 42, 34–5)?

(7) What can be investigated? The research domain of such a perspective is the description of microscopic "applications" of norms. The emphasis is put on a perspective that underlines the aspects of the situation, its local, contextual, interactive, everyday, and rhetorical features. The problems

outlined above repeat themselves here. How to deal with higher levels of aggregation above interactions, e.g., organizations, institutions, structures, or social systems? Is there a non-normative *social* integration; are norms only applicable to the immediate social sphere? What about the social reality beyond language? Collective data, e.g., criminal statistics are reduced to their interactive meaning. One can only transform the talk about duration of proceedings, flood of legal proceedings, fear of criminality into micro-sociological events. What about the analysis of files? Are these only sedimentary interactions? Do data about the social background of lawyers say anything beyond the talk about them? Does one not have to abandon any mode of explanation recurring on variables that are external to interactions?

Chapter 6

GENERAL TENDENCIES

The compilation of very different kinds of foundations can be structured by the exposition of some systematic movements. Such movements do not have to match the course of history.

6.1. Secularization?

There is movement away from transcendental (mythological and religious) foundations of law towards immanent (secular) foundations. The Gods, the Divine vanishes from the world in general and it does so too in the world of the law. This is well illustrated by comparing the *Antigone* to the *Oresteia*. In later literary works referring to the antique subjects, the Gods are psychic phenomena (e.g., Sartre 1996).

Religious beliefs and their institutionalization in churches are treated merely as instrumental problems of the construction of states.[1] There is, however, no clearly linear process of secularization. A secularization of myths took place already in Greek philosophy (Nestle 1940). In comparison to that, Christianity is a transcendental regression—lasting for centuries. The foundation of law and justice as early as Plato is largely immanent and in Aristotle completely so. Aristotle does not need a religious foundation for morality, justice and law. This connects him to Kant from whom he is separated by a long religious interregnum. (There are other differences between them, of course, e.g., concerning the foundation of morality.) The reception of Aristotle brings the distinction between knowledge and belief to the forefront (e.g., in Duns Scotus) until both, the reawakened science of the 17th century and religion, begin emancipating themselves from his authority. Islam, too, experienced worldly rationalizations in the heyday of the science of Islam—ranging from Ibn Sina to Ibn Khaldun, from the 10th till the 15th century. Already in the late 14th century Ibn Khaldun (1332–1406) developed in his "al Muqaddimah"—long before Montesquieu—a theory of historical development, referring only to natural conditions; Allah does not intervene in world history. Immanence is not a characteristic of "modernity." Movements of re-fundamentalization also take place all the time—not only today, but for example in the 18th century through the Wahhabits in what is today Saudi-Arabia.

[1] For example, in Hobbes 1965, book 3. On the instrumental relation towards religion and church, see also Rousseau 1941, IV, 8, on civil religion. Long before Nietzsche, he found that "Christianity preaches only servitude and dependence. Its spirit is so favourable to tyranny that it always profits by such a *régime*. True Christians are made to be slaves" (Rousseau 1941, 120).

In Western Europe, too, a renewed secularization through humanism and enlightenment does not prevent the revival of religiously fundamental doctrines like neo-Thomism since the 19th century. Modern protestant theology propagates "*Entmythologisierung*" (Bultmann) in order to unveil God's message as such (*kerygma*) from its mythological origin. Artificial re-mythologizations, a new esotericism, and the revival of religious fundamentalism can seduce the observer to speak of a "post-secular" epoch (Habermas).

The development of the law, too, illustrates that Christianity with its sacred law was a kind of regression, a regression from a state of affairs that had achieved a high level of secularization, as in the case of Roman law. However, canon law later stimulated the progress of secular law.

Carl Schmitt formulated—as often over-generalizing—the thesis that all political concepts are theological concepts secularized (Schmitt 1922). That might be true for the concept of sovereignty. The principle of the equality of all human beings and of their dignity as something unalienable can be derived from their likeness to God.[2] The love of God realizes itself in mutual acceptance among human beings. Criminal Law, too, uses worldly transformations of religious notions of evil, the devilish, of guilt and punishment.

One ought to distinguish from these kinds of concepts religious formulas employed for secular purposes. This can take a rather moderate form as in Durkheim, who proposes using religion for the purpose of social integration if the law cannot guarantee such integration. In modern times the "sacralization of politics," i.e., an instrumental use of religion presupposes the autonomy of politics. Apart from that we regularly see a radicalization of political conflicts by their sacralization.[3] There are quasi religious wars against the "evil" ones. A crusade against the "axis of evil" is announced, or a Dschihad as "holy war" against the non-believers to create a divine order in a world of non-believers. The end of profanization leads to a war beyond state and law, to religiously motivated police actions outside the bounds of the international law of war.

Secularization has beyond its connotations in philosophy and the history of ideas a clear historical basis: the separation of the profane and secular; of state and church; of law, politics, and belief; the establishment of the primacy of the sovereignty of the state, including the transformation of clerical goods into secular ones, sometimes quite materially, e.g., of cloisters into schools, prisons, barracks, etc. Religion becomes a matter of the internal, individual belief, administrated by the institutions of a church separated from the state. Secularization implies pacification, neutralization of fundamentalisms that had collided in the religious civil wars. Today, it means the acceptance of *weltanschaulichem* and cultural pluralism.

[2] Gen. 1, 27: "So God created man in his own image; in the image of God he created him; male and female he created them."

[3] The Nazis used the religious rhetoric of salvation in propaganda (Hitler, casting himself as a Messiah, set out to defeat demonic powers); cf. Burleigh 2000.

6.2. Further Secularization of Explanations and Justifications—Internalization

Explanations and justifications also are secularized and humanized. Law is, in a first step away from metaphysical explanations, thought of as being dependent on non-human, natural, e.g. geographical circumstances; then on secular, natural-human conditions (state of nature). Reason ceases to be a faculty given by God (e.g., to discern the *lex naturalis*) and becomes a part of the anthropological constitution of mankind. Finally, the law appears to be dependent on circumstances that are man-made themselves, even though not voluntarily, e.g., dependent on historical, economic, and moral conditions. G. B. Vico, in his *Scienza Nuova* (published in 1725) no longer refers to supra-natural, cosmic forces. The world, with the interplay of all its elements, is man-made. In this tradition it becomes clear that religion also is a human invention (L. Feuerbach, K. Marx). Increasing control of nature by science and technology might lead this theoretical movement away from natural, given (geographical, biological) circumstances towards environmental conditions created by man himself. In this process, however, the limits of manipulation of nature and their unforeseeable consequences become clearer as well (from changes of climate[4] to the consequences of genetic intervention).

The movement towards immanent conditions is emphasized by the fact that for the explanation and justification of law internal circumstances increasingly are used. The developed importance of law can be embodied in such a movement because it is no longer conceptualized as the passive reflex of external circumstance. The stronger emphasis on principles immanent to the law, like the rule of law and the cognitive subtleties of judicial doctrine, might inspire the idea of greater autonomy of the law. We have seen, however, discussing Kelsen, Luhmann, and Fuller, that despite tendencies towards internalization a relation to external factors necessarily persists.

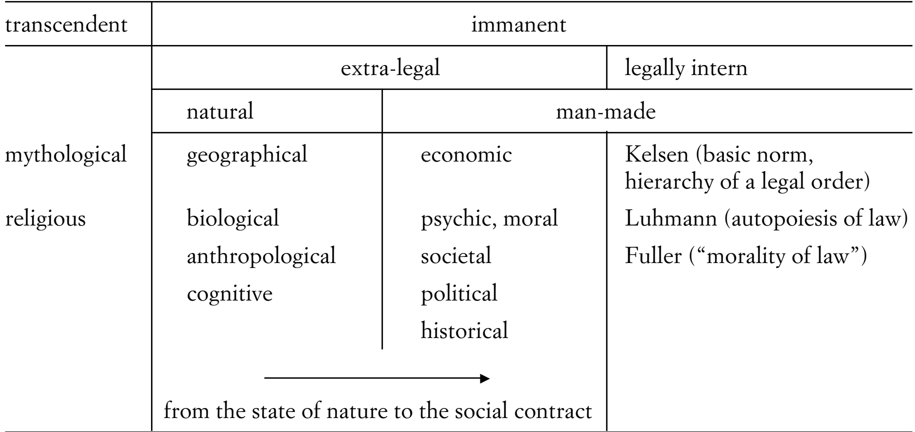
We are not able any longer to write a Hegelian history of the unfolding (“*Entfaltung*”) of reason starting from mythological and religious transcendence and leading to Kelsen’s or Luhmann’s immanence. No grand stage model would fit the real development of a world history of law and legal theories, e.g., following stages such as:

- from transcendental to immanent conditions,
- from external, natural to man-made conditions,
- from extra-legal to legally internal conditions.

None of these sequences can be shown to exist. Instead of a great developmental scheme to which the world history of foundationlisms happily con-

[4] The climate theories of the 18th century get oddly revived in the horror scenarios described by today’s science (global warming, rising ocean level, desertification).

forms I want to offer modestly a variety of “fundamentals” in a systematic (not a historical!) order:



transcendent	immanent		
	extra-legal		legally intern
	natural	man-made	
mythological	geographical	economic	Kelsen (basic norm, hierarchy of a legal order)
religious	biological	psychic, moral	Luhmann (autopoiesis of law)
	anthropological	societal	Fuller (“morality of law”)
	cognitive	political	
		historical	
	→ from the state of nature to the social contract		

Chapter 7

PROBLEMS OF EXPLANATION

Foundationalist thinking wavers between justification and explanation. They come together in myths and religion. Natural law theories of a social contract, too, deploy an only seemingly historical construction to disguise a primordial principle of normativity and legitimacy. In the 18th century, however, the distinction between facts and norms (Hume) and Montesquieu's motto—"I only give their reasons, but do not justify their customs" (cf. *supra*, 58)—becomes a scientific program. There are, however, again and again attempts to achieve justification or a critique of legal institutions on the basis of factual, e.g., biological or anthropological foundations. The ambiguity of "morality" seems to seduce one to mix empirically verifiable propositions about the origin and development of moral consciousness, about moral attitudes in the population or relevant groups, with moral postulates towards the state or legal order.

The separation of explanation and justification can be demonstrated by considering the particular methodological problems that arise by using extra-legal variables in order to *explain* the origin, development, and effects of legal norms. The problems of explanation can be systematically explicated by starting with a simple mathematical function.

(1) The fundamental decision consists in understanding law (however conceptualized in detail) as a dependent variable (y). As an independent (explaining, "founding") variable (x) any of our foundations would serve: $y = f(x)$.
(2) Given the manifold possible foundations, it is not far fetched to use a couple of independent, explaining variables. It is not only the economy, etc., that is determining the law. The enlarged, multi-variable function has then the following formula: $y = f(x_1, x_2, x_3, \ldots, x_n)$.
(3) The individual variables have to be weighted according to their explanatory power: $y = f(ax_1, bx_2, cx_3, \ldots, wx_n)$.
(4) There is always an unexplained residual factor (r), e.g., other so far unknown variables or faults in observation: $y = f(ax_1, bx_2, cx_3, \ldots, wx_n, r)$.
(5) The general problem of explanation consists in the under-determination by the various "foundations." They simply do not explain everything in law.[1]

[1] A similar problem of under-determination can be found in the innumerable attempts to draw conclusions from external human states of affairs to internal ones. Thus, there have been attempts to study specific localities to arrive at conclusions as to national character. Further examples are in astrology (conclusions are drawn from constellations to individual characters), physiology (from facial expression to personality traits), craniology (from the shape of the skull to character and intellectual traits), and recently brain research (from movement in certain regions of the brain to mental states of affairs). And finally comes the attempt to conclude from genes what makes a future genius.

One could, in addition, question the functional dependence in principle. *y* ("law") is not determined at all. It is "relatively autonomous." The development of norms—the creation of statutes, legal decisions, etc.—is not foreseeable because of the decisional or volitional character of the law. There are residuals that cannot be explained (nor justified). (This was an issue upon which *ratio* and *voluntas* were divided; cf. *supra*, 49). One can regard this as an expression of state sovereignty or autonomy in general.

(6) *y* is not only a dependent variable, *y* can operate as an independent variable: $x = f(y)$. The Marxist conception, that takes law to be principally determined, conditioned, dependent on an economic base, uses this perspective as the law is itself influencing the economic base ("*Rückwirkung*"). In the framework of an instrumental perspective this view becomes self-evident. Relevant in this context is the ubiquitous constitutive role of law in all social spheres, as well.

(7) Another problem results from this. Often *x* and *y* are apparently not distinct variables. The seemingly extra-legal "economic" foundations for example are themselves to a high degree legally determined. They are brought to the world by the correct use of legal provisions: an enterprise for example in a special legal form, a labour relation, a work council, etc. A well-known passage in Marx can be interpreted in this way. A certain state of affairs (in the sphere of the base) can be named differently: in the terms of political economy, e.g., as "relations of production," in the terms of the law "property." I dealt with this passage before (cf. *supra*, 113ff.):

> At a certain stage of development, the material productive forces of society come into conflict with the existing relation of production or—this merely expresses the same thing in legal terms—with the property relations within the framework of which they have operated hitherto. (Marx 1987, 261; cf. Marx 1969b, 9)

In consequence economic base and legal superstructure cannot be distinguished any more. There are just alternative modes of describing the world.

(8) Finally, the variable *y* ("law") is in a fact a very complex one. It contains, as we have seen (cf. *supra*, sec. 2.6), various dimensions. The theory of Donald Black, which aims at explaining the "behavior of law" on a very sophisticated level, splits the variable "law"—i.e., "governmental social control" (Black 1976, 2)—into the "quantity of law" and the "style of law." The "quantity of law" itself implies numerous elements like "the number and scope of prohibitions, obligations, and other standards to which people are subject, and [...] the rate of legislation, litigation, and adjudication. As a quantitative variable law is all of this and more" (ibid., 3). Therefore one has to decide what to explain: $y_1, y_2, y_3, \ldots, y_n$.

Chapter 8

SUMMARY

(1) There is no privileged set of variables, like *the* economy, that might be used in order to explain the various dimensions of law and the central issues of the origin, the development, and the functions and effects of this multi-dimensional law. Mono-causal models fail.

(2) There is no clear sequence of foundationalist approaches employing extra-legal factors in order to explain "law." Immanent conditions do not replace once and for all transcendent ones. We encounter secularization and re-sacralization, de- and re-mythologization. The explanatory power of extra-human and man-made conditions changes. Perhaps there is a tendency towards legally internal variables. However, the impact of legally external aspects remains.

(3) As far as the phylogenetic origin of law in general is concerned, but also the creation and change of legal norms, I have criticized on several occasions—e.g., in discussing Marx, Engels, Ehrlich, and Geiger—the idea of non- or pre-normative foundations of law, according to which there first existed a norm-free economic basis or "facts of law" or factual regularities out of which norms or rules, then legal norms emerge. Mythological as well as religious foundations are not free of norms (on the contrary: at their core are holy commandments). It is only in natural, extra-human foundations that we find a norm-free ensemble of variables (soil and climate, e.g.). However, rather than being applicable for explanatory purposes, they play the role of limiting conditions on human inventions.

(4) The general problem of the varieties of foundations lies in their explanatory under-determination. This fact can itself be explained by the basic features of a legal order, namely, according to our three dimensions, the political sovereignty of the legislator, independence (e.g., of the judiciary) and human autonomy in general. In creating law we do not establish external constraints that affect us as blind fate, as a *vis a tergo*. It is a decisive step in the enlightenment of mankind that social affairs become a matter of conscious arrangement. The idea of a social contract marks this step. We gain a reflexive attitude towards external conditions. Myths and religion become an element of tradition and culture out of which we can select or construct our collective identities. Re-mythologization or re-secularization lacks the substantive immediacy of their first appearance. It becomes transparent that they are artificial revivals. Human as well as extra-human nature no longer overwhelm us unreflectively. Instead, we face a complex of risk calculation and continuous intervention through which we can experience our limits—our technological as well as our

> moral-normative limits. Man-made conditions, like economic, moral, political ones, are no longer causal complexes that are "expressed" in legal norms and institutions. Rather, they become—from a consciously instrumental point of view—restrictive conditions for the legislator (this change of foundational conditions already could be found in Montesquieu). The core legal notion of citizenship, e.g., forms a self-constituted category the existence of which does not depend on external, natural conditions like race or "*Volk*" (as in the artificially regressive ideology of the Nazis). A nation of citizens is not the same as a "people" which is fated to share a common destiny; instead it is created in an autonomous process. This can be generalized: Law is created within its own processes (this is the truth of the "internalists"). It "depends" on its self-constitution. This comes close to Hegel's idea of law as the "realm of actualized freedom" (cf. *supra*, 66). However, how far freedom (and autonomy) really can be actualized still depends on external conditions that we must, as limiting conditions, take into account. It also depends on the normative limits that we agree upon.

What is left from our quest for foundations? The importance of limiting conditions on the efficacy of law, and the moral, constitutionally internalized foundations of law.

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 3

Legal Institutions and the Sources of Law

A Treatise of Legal Philosophy and General Jurisprudence

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 3

Legal Institutions and the Sources of Law

by

Roger A. Shiner
Department of Philosophy, Okanagan University College, Canada

with a contribution by
Antonino Rotolo

A C.I.P. Catalogue record for this book is available from the Library of Congress.

5 Volume Set:
ISBN-10 1-4020-3387-7 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-10 1-4020-3505-5 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3387-2 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3505-0 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York

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Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

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Printed in the Netherlands.

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A NOTE ON THE AUTHORS

ROGER A. SHINER taught for thirty-five years at the University of Alberta, Canada, and is now Professor of Philosophy at Okanagan University College, British Columbia, Canada. He is a Past President of the Canadian chapter of the IVR. He has held a Canada Council Killam Senior Research Fellowship, and several research grants from the Social Sciences and Humanities Research Council of Canada. His major publications are *Freedom of Commercial Expression* (Clarendon Press, 2003), *Norm and Nature: the Movements of Legal Thought* (Clarendon Press, 1992), and *Knowledge and Reality in Plato's Philebus* (Van Gorcum, 1974). He has also co-edited several books in the areas of political and moral theory, and ancient philosophy.

ANTONINO ROTOLO (PhD, Padua) is research assistant in legal philosophy at the University of Bologna Law Faculty. He is a member of CIRSFID (Centre for Research in History of Law, Philosophy and Sociology of Law, and Computer Science and Law) at the University of Bologna. He published two monographic volumes: *Identità e somiglianza: Saggio sul pensiero analogico nel diritto* (Clueb, 2001) and *Istituzioni, poteri e obblighi: Un'analisi logico-filosofica* (Gedit, 2002). He has also written several essays on the application of formal logic for modelling legal reasoning and on the relation between law and practical reason. He is Assistant Editor at *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* (Oxford, Blackwell).

PREFACE

Two individuals must be specifically thanked for their part in this project. I would like to thank Enrico Pattaro and Jerry Postema for the original invitation to take part in the Treatise. I have very much enjoyed the work, and have learnt a great deal from it. Enrico himself I would also like to thank, not only for his helpful comments on some of my early material, but also, and especially, for his exemplary leadership of the Treatise project, and the very hard work necessary to see it through to fruition. Jerry has read almost all of the book in draft form, and the beneficial effect of his sympathetic but critical comments cannot be underestimated. The book is much improved as a result. I must also express my gratitude to the other authors of the early volumes of the Treatise, Hubert Rottleuthner, Aleksander Peczenik and Giovanni Sartor, for many stimulating and helpful discussions of legal theory. Last, but by no means least, I must thank Antonino Rotolo for contributing to this book Chapter 7 on the sources of law in the civil law tradition. He has thereby allowed the reader to appreciate the topic of legal institutions and the sources of law from a wider perspective than I, with a background only in the common law, could provide.

The research on which the book is based has been supported by the Social Sciences and Humanities Research Council of Canada, through grant #410-98-1530, and I am grateful to the Council for their help. The grant enabled me to work some of the time in collaboration with two fine research assistants, Dale Dewhurst and David Hampton. Their combination of legal and philosophical expertise was of great value. David contributed background research to Chapter 3, and Dale to Chapter 8. Both of them worked on Chapter 5. That Chapter is an abridged version of a paper published as a jointly authored work by the three of us in *Ratio Juris* 16.1 (March 2003). The material is used here by permission of Blackwell Publishers. I am grateful to audiences at the Amintaphil meeting in Montreal in 1998 and at the American Society for Aesthetics meeting in Minneapolis in 2001 for their comments on draft versions of Chapters 6 and 9 respectively.

I am grateful to the Social Science Research Network for a fee waiver, which enabled me to subscribe to a number of their abstracts lists, and thus to keep up with recent relevant developments in the field. I am also grateful to Faith Peyton of the Inter-Library Loan section of the North Campus library at Okanagan University College, for the efficiency and friendliness with which she has in the last two years put up with an endless stream of requests.

I apologise to my children for all the time which I have spent glued to books, articles and keyboard. However, hearing one of them say proudly to a

friend, "My daddy's a philospher; he writes books" is some modest justification. My debt to my wife, Sharon Pfenning, is huge. Her support for this project been unconditional. As importantly, her unphilosophical practicality has been a constant and valuable reminder of the real world in which the law has its being, something which a person who aspires to write a work of theoretical jurisprudence like this one deeply needs.

Roger A. Shiner

Okanagan University College, Canada
Department of Philosophy

Chapter 1
INTRODUCTION

The topic of the sources of law is a traditional one in jurisprudence. Yet, remarkably, very little attention has been paid to the topic in recent analytical jurisprudence. Much contemporary analytical legal theory does not consider the notion of a "source of law" at all. There is no entry for the term in the indices of such central contemporary texts as Alexy 1989; Beyleveld and Brownsword 1986; Dworkin 1978 and 1986; Finnis 1980; MacCormick 1978. Other theorists mention the term and pass on. Raz, for example (see Raz 1979), characterizes his theoretical position as "the sources thesis," that every law has a social source. But he gives relatively little articulation of the concept of a source. Rather, he lays out the implications of such a thesis, leaving the term "source" intuitive and primary. Raz is defending a version of legal positivism. Others too mention the term simply as part of a defence of (Hart 1994; Waluchow 1994) or a critique of (Peczenik 1983; Soper 1984) legal positivism. There is no philosophical examination of the notion of a source of law outside of its use as a piece in the wider game of general theory of law. There is too much theory and too little description, to elucidate what it is to be a source of law.

Among legal doctrinal writers in the common law tradition, the position is reversed. The typical jurisprudence text also leaves the term "source" undefined and primitive; it focuses on classifying and describing "the sources of law" with little acknowledgment that important theoretical questions are begged. The issues are complicated. Gall 1990 reproduces four different taxonomies from four different general textbooks of English law, differences that it would be impossible to reconcile into one master taxonomy. Jolowicz 1963 and Allen 1964 give the fullest treatment, and their classifications are virtually identical. The sources of English law are said to be Custom, Precedent, Equity, Legislation, and Subordinate Legislation. But already that would not apply to Canadian law, whose sources include the Charter of Rights and Freedoms, and embody both provincial and federal jurisdiction. Nor would it apply to European Community Law (see Hartley 1994), or to the United States (see Atiyah and Summers 1987). Under the civil law, doctrinal treatises—legal dogmatics—have some role as a source as well as the code.

One response to this complexity (see Paton and Derham 1972) is to seek to classify the sources of law in a quite different way. Paton and Derham suggest abandoning the single question, What is the source of law?, and they ask instead three questions: What is the secret of the validity of law? Whence comes the material from which law is fashioned? What are the historical or causal influences, which explain why the law is now as it is seen to be? These

are indeed separate enquiries. The first, as I have noted, is part of the traditional general dispute about the nature of law. The last is a question for the social psychologists, for political and social historians (see the account given by Hubert Rottleuthner in vol. 2 of this Treatise). Paton's and Derham's own answer to the middle question consists of an analysis of the public and private interests, which the law furthers and protects: They treat the question as one about the content of law. But the issue is not obviously one about content.

We need therefore to re-focus analytical concern with the sources of law. We need to look again at why it is vital for jurisprudence to be clear about the sources of law, and about the differences between different sources of law.

Let us begin with a classic statement of the idea of a source of law: "the term 'sources' is here used to connote those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and, above all, compulsory" (Allen 1964, 1). Norms, or standards of behaviour, are of many kinds—maxims of manners and etiquette, statements of moral or legal duties, principles of successful horticulture, rules of sports and games, social conventions, methods of calculation, valid rules of logical inference, and so on. Legal norms are one sub-class of the class of norms. Some groups of norms are interlocking and so form systems. The rules of bridge, for example, presuppose each other; the game only makes sense if all the rules are observed. Some groups of norms exist only as the products of an institution, that is, are institutionalized—the constitution and rules of operation for a social club, for example. These two features of forming a system and being institutionalized may be combined, so that a group of norms may be said to form an *institutionalized normative system.* The term is Joseph Raz's (1975, chap. 4). The typical legal system—the Canadian legal system, for example—is a paradigm case of an institutionalized normative system. A norm counts as *a law*, rather than any other kind of norm, because it emerges from an institution—a governing legislature, example, or a court deciding a case. Laws and legal institutions also presuppose or outrank each other, and have common origins; laws form systems. Legal norms in this way differ from moral norms, even though they may have similar content. The law of contract could be abolished tomorrow by Parliament, and with it the legal obligation to keep a contract: The duty to keep promises would remain.

An enquiry, therefore, into the sources of law is an enquiry into one essential characteristic of law, into part of what makes law what it is and not another thing. Although the connection between being a law and being a norm of an institutionalized normative system is deep, and central to jurisprudence, the thought that it is in the nature of law to be a norm with an institutionalized source is analytically too simple, for two reasons. One reason is that there is an important theoretical division between what in this Treatise are called "strictly institutionalized sources of law" and "quasi-institutionalized sources of law" (see vols. 4 and 5 of this Treatise). The second reason is this. Of the

traditional common law sources, custom and equity may seem to fall outside the scope of this enquiry, as they are in the nature of the case not institutionalized. However, we can learn much about the notion of institutionalized sources of law, and *a fortiori* about the notion of a source of law itself, by considering seemingly non-institutionalized sources. It is important to ask what it is about such sources that entitles them, if they are so entitled, to be thought of as sources of law. Let me say more now about these two reasons.

This volume focuses on "*strictly* institutionalized sources of law." How should we capture the force of the "strictly," assuming for the time being that the notion of "institutionalized" is well enough understood? Here is the working definition of "strictly institutionalized source of law" for the purposes of this volume:

A law, or law-like rule, has a strictly institutionalized source just in case:
i) the existence conditions of the law, or law-like rule, are a function of the activities of a legal institution

and

ii) the contextually sufficient justification, or the systemic or local normative force, of the law, or law-like rule, derives entirely from the satisfaction of those existence conditions.

Clause (i) is intended to capture the idea of a "source" for a rule, and clause (ii) the force of the qualification "strictly." Two further comments are needed on this definition. The expression "law-like rule" is added to permit the possibility that certain forms of law less close to the paradigm of institutionalized sources of law might still qualify as strictly institutionalized sources of law.[1] It might be thought controversial whether the decisions of such sources are "laws" in some strict sense. Also, the term "contextually sufficient" is taken from Aleksander Peczenik (1983, 1; 1989, 156–7). Peczenik defines a contextually sufficient justification as one "within the framework of legal reasoning, in other words, within the established legal tradition, or paradigm." "Deep" or "fundamental" justifications, by contrast, are those from outside the framework of legal reasoning, such as justifications by moral reasoning. For Peczenik, strictly institutionalized sources would be a sub-class of contextually sufficient justifications, but not the whole class (1989, 157). I am concerned, then, in this volume with that sub-class.

Other sub-classes would include the forms of justification considered in Volumes 4 and 5 of this Treatise, as "quasi-institutionalized sources of law." Consider, example, coherentist justifications for legal claims. It might be that, within some jurisdiction, a legal claim is regarded as justified if in fact it is the one of competing claims, which coheres best with the existing body of justi-

[1] In Chapter 5, for example, I consider labour arbitration and mediation as possible strictly institutionalized sources of law. In Chapter 8, the claims of international law are examined.

fied claims within that jurisdiction. Neil MacCormick has argued for the validity of such coherence-based arguments within common law legal reasoning (MacCormick 1984, 46–7; 1978, 152–7, 233–40). Ronald Dworkin extended the idea to include coherence with principles whose postulation would make the legal system the best it could be (Dworkin 1986, 226ff.). Similarly, in most jurisdictions there are well-understood rules for the interpretation of statutes (Cross, Bell, and Engle 1995; MacCormick and Summers 1991). A distinction can be drawn between cases decided by the statutes "directly" and cases decided after the application of rules of statutory interpretation. The statute may be said to be a "strictly institutionalized source of law" in the first case, but a "quasi-institutionalized source of law" in the latter case. Both coherence and interpretation are analyzed by Aleksander Peczenik in Volume 4 of this Treatise. Similarly, there are a variety of modes of legal reasoning and argumentation. A distinction can be drawn between cases decided by the content of a legal source "directly" and cases decided after supplementation of the content of the legal source by one or more acceptable forms of legal argumentation. The source may be said to be a "strictly institutionalized source of law" in the first case, but a "quasi-institutionalized source of law" in the latter case. The analysis of forms of legal argumentation is undertaken by Giovanni Sartor in Volume 5 of this Treatise. By implication, then, my concern here is with potentially "direct" sources of law. I do not intend either now or later independently to define what is meant by "direct." The study of strictly institutionalized sources of law is the study of ostensibly "direct" sources of law.

This notion of "directness," even if it is now left merely intuitive, provides a handle on the second set of issues I distinguished above, the matter of the status of the traditional legal sources of custom and equity. Their claim to be sources of law at all rests on their capacity to decide legal cases "directly," and their claim to do so as "strictly institutionalized sources" rests on the character of their mode of functioning as sources. Custom and equity, including the special form they take in the case of international law, will turn out to be borderline examples of strictly institutionalized sources of law. But the importance of borderline cases lies in the refracted light they shed on the paradigm cases.

The decision to concentrate on contextual rather than deep justification for law limits in important ways the scope of the enquiry here into the sources of law. It is, however, consistent with, and even demanded by, the analytical approach, which I will also take. The focus of the volume will be only how sources of various kinds actually function analytically *within* legal systems. We will investigate in what way legislation, or precedent, or custom, directly generate validity for legal norms, or how it is that these sources are authoritative for legal decision-making. We are not going to investigate the ultimate sources of legal validity itself, if that is taken to be an enquiry into what moral values, or what political forces, or what historical antecedents led to a particular law being a part of the system of which it is a law.

The course of this volume will be as follows. The focus initially will be on the paradigm strictly institutionalized sources—legislation (chap. 2) and precedent (chap. 3). Then I will turn to those of the traditional sources of law, which have proved to be more controversial—custom (chap. 4) and subordinate legislation or delegation (chap. 5). In Chapter 6, the role of constitutions, especially charters and bills of rights, will be considered.

In these chapters, I will reflect my own particular legal and philosophical upbringing, as it were, in that the focus will be on the common law, and on sources of law within the common law legal tradition. The issue of the sources of law presents itself in a somewhat different guise within the civil law tradition. In the strict and formal sense of "source" that I have assumed in these chapters, not much except the enacted code counts as a source of law in the contemporary civil law. The debate over the sources of law nonetheless continues with vigour and vitality. It is important to complete the picture of strictly institutionalized sources of law by considering sources of law within the civil law. I am grateful to Dr. Antonino Rotolo for supplying a chapter (chap. 7) on this topic to this volume. The volume concludes with a chapter on the special topic of the sources of international law (chap. 8), and then a concluding chapter on the notion crucial to any analysis of legal sources of authority. It might seem strange to end, rather than begin, a discussion of strictly institutionalized sources of law with the concept of authority. However, I ask the reader to be patient, and to take Chapter 9 seriously once he or she arrives at that point.

Chapter 2
LEGISLATION

2.1. Introduction

I deal first with legislation as a source of law for a simple reason: Legislation appears intuitively as the paradigm source of law. As we shall see by the end of this chapter, this intuition needs careful handling if it is not to mislead the legal theorist. But it is an excellent starting-point. When we think of law in an ordinary, or pre-philosophical, context, we think of a set of rules controlling behaviour, which are stipulated in one place (the legislature) and applied in another (the courts). Laws presuppose law-makers. Laws tell us what to do, and so there must be some one person or body of persons who does the telling. In H. L. A. Hart's famous tale of the transition from a pre-legal to a legal world (Hart 1994, 91ff.), legislation plays a prominent part. For there to be law, we need a way of identifying which norms are legal norms; we need an agency to introduce new laws, or amend the ones that exist. Only when all this is in place, is there point to turning to the remaining issue of an agency for the settlement of disputes under these laws. The legislature is also deeply implicated in the central ways in which law differs from morality. Laws typically come into existence, are changed, or cease to exist at specific points in time, and as a result of the following of specific procedures. These are not features of moral norms, and as features of laws all typically occur as a result of legislative activity.

Legislation also, in the context of this volume, exemplifies most clearly the working definition of a strictly institutionalized source of law. The definition requires through clause (i) that the existence conditions of the law, or law-like rule, are a function of the activities of a legal institution. Exactly what it is for a norm to become enacted law is for it to the object of the appropriate activities of a specific legal institution, the legislature. Clause (ii) requires that the contextually sufficient justification, or the systemic or local normative force, of the law, or law-like rule, derive entirely from the satisfaction of those existence conditions. That condition is also clearly satisfied by legislation. Legislation is legally binding on courts and on citizens exactly because it satisfies the existence conditions to which clause (i) refers.

The term "appropriate" in the previous paragraph of course alludes to an important acknowledgment. It is not the factual existence of a certain institution, which matters, so much as the existence of a network of rules that define the institution, specify procedures for the enactment of legislation, and so forth. These rules are typically the constitutive rules of the legal order in question. They are part of what I shall call in Section 6.1.1 the "thin" sense of

"constitution." As theorists have emphasized (see for example Hart 1994, 110–7; Alexander and Sherwin 2001, 37–42), the foundation of these rules is typically agreement, whether of legal officials alone, or of officials and citizens, according to the particular theory proposed.

Subsequent chapters of this book make it clear that, even with the restriction to jurisprudential analysis and contextual justification that I have imposed on this essay, it would be a mistake not to acknowledge others sources of law than legislation. Courts—not only within the common law but also within the civil law—exercise legal-rule-making power. Customary law still has a place even in modern legal systems. Legislation as a source of law is expanded by consideration of delegation and constitutions as sources of law. As we shall see, these function as sources of law (to the degree that they do) in their own right. Theorists have been tempted then to say that courts perform a "legislative" function. While that idea obscures central differences between legislation and these other sources of law (see Fitzgerald 1966, 115–6), it does pay tribute to the paradigmatic status of legislation as a source of law.

Two qualifications, however, must be entered. First, Salmond underlines that such a privileging of legislation in the understanding of law is a modern idea: "[E]arly law is conceived as *jus* (the principles of justice), rather than as *lex* (the will of the state). The function of the state in its earlier conception is to *enforce* the law, not to *make* it" (Fitzgerald 1966, 124). Second, we must be careful about the distinction between positive law and legal positivism. The idea of "positive law" is almost as old as law itself. Classical Greece was well aware of the difference between written and unwritten law. The Greek verb used to denote law-making is the verb *tithenai*, which in its basic use means simply "to place." When later Latin writers, including and paradigmatically the medieval natural law theorists, came to develop their own vocabulary, they followed Greek practice and used to describe formal law-making the Latin verb *ponere*, whose basic meaning is also "to place," and whose past participle is *positus*. Hence the English term "positive law," which is found as long ago as the fourteenth century.[1] Positive law is simply law, which is formally enacted or laid down, as opposed to norms which may or may not properly be called "law" and which are unwritten and customary.

This brief excursus into etymology suggests, I want to say, two important things about the term "positive law." The first is that it does not belong to legal positivism; no-one becomes a legal positivist merely by acknowledging that there is such a things as positive law. Legal positivism, rather, is a jurisprudential theory, which identifies the whole of law with positive law (Shiner 1992, 5–9). The second point is that the prime function of the term "positive law," at least historically, is to mark a distinction between the norms identified as "positive law" and other norms which are believed also to deserve the

[1] See John Finnis's historical discussion in Finnis 1996, 195–6, 205–9.

name of “law”—standardly, norms of natural law, or of divine law, or of unwritten law. Legislation presents itself for that reason as the paradigm of law, since legislation is the paradigm of formally “placed” or enacted law. Still, the fact of enactment is one thing, its jurisprudential merits or demerits another, as one might put it.

In the remaining sections of the chapter, I will examine legislation more deeply, under three headings. First, I shall look more carefully into the definition of legislation itself, into concepts essentially connected with legislation, and into a brief comparison of legislation with other forms of law-making. Then I shall consider the relation between legislation as a source of law and the familiar common law doctrine of parliamentary sovereignty. Finally, I shall consider Jeremy Waldron’s complaint (Waldron 1999a) that contemporary legal philosophy does not take legislation seriously.

2.2. Legislation as a Source of Law

2.2.1. Sources of Legislation vs. Legislation as a Source of Law

One preliminary point must be made. When C. K. Allen turns to discuss legislation as a source of law, he begins first with the relationship between legislation and democracy (Allen 1964, 426ff.). He criticizes the simple idea of “sovereign and subject” that the concept of legislation seems to embody, and remarks—rightly, of course—that the relation between the state and its citizens in modern times is much more complicated. He discusses the idea of representative government, and how much leeway democratic principles seem to allow for independent action on the part of the representatives, noting that the technical minutiae of the law must assume some such independence. He considers briefly A. V. Dicey’s conundrum of whether the law creates or follows popular opinion. And so forth. Now, it is not that these are not important questions: In fact, we shall look at aspects of them in later sections of this chapter. However, from the analytic perspective, which I am adopting here, these are not questions about legislation as a source of law. They are more like questions about the sources of legislation itself. These forms of question are not reducible to one another: They must be kept distinct. Taking legislation seriously may indeed, as we shall see in Section 2.4 below, require looking at legislation in the context of democratic politics, and at the function of the legislature in a democratic political structure. But the way that legislation functions analytically within the institutionalized normative system that is a legal system is presupposed by such questions about the sources of legislation, proper or otherwise. This analytic focus must be kept in mind.

2.2.2. *What Counts as Legislation?*

"Legislation is that source of law which consists in the declaration of legal rules by a competent authority" (Fitzgerald 1966, 115). With due respect to the "competent authority" of Sir John Salmond, I find this definition of legislation to be too general to be helpful. As we shall see in Chapter 3, common law courts laying down rules of precedent "consist in the declaration of legal rules by a competent authority." Salmond goes on to say, in order to distinguish legislation from common law rules, that in legislation the rules are laid down by a legislator; this also is unhelpful. The notion of "legislation," or "statute," is in fact complex, as Enrico Pattaro has already valuably noted in this Treatise (vol. 1).

At a minimum, we have to distinguish between: i) acts of the legislature laying down rules of law, the class of which most familiar legislative acts consist; ii) acts of the legislature which do not lay down rules of law—for example, an act to ratify a treaty, or to change the appearance of the monarch on coins, or to change the interest rate on government savings bonds; iii) rules of law laid down which are not acts of the legislature, but still are enactments and not common law decisions—for example, a great deal of the apparatus of the modern regulatory state results from law-making outside of the legislature. All of these may be called "statute" or "legislation" in the broadest sense of these terms. In the context of a complex legal order such as the European Union, the general term "legislation" comprehends many different sub-categories of norm. There are regulations, laying down general rules binding both at the Union and Member State levels. Directives are binding, but only on specific Member States, and on Member States they are binding only as to the result, not the legal regime to bring about the result. (That is, legislation must be passed to achieve a certain result: But the form of the legislation or regulation fit to achieve this result is to be decided by individual member States themselves.) Decisions may bind either Member States or private parties. Recommendations and opinions are not binding at all. There are further cross-currents between these sub-categories: see Hartley 1994, 107.

2.2.3. *Codification vs. Consolidation*

"Many codifiers emphasize that one of their aims is to make the law simple and accessible, logically arranged and harmonious, certain and definite" (Paton and Derham 1972, 255). Two conflicting but deep pictures of law hold us captive. We seem to want there to be a right answer to every question of law, and so we want the written statement of the law to be such that every issue is covered in a clear and comprehensive rule. On the other hand, we value deeply the image of the judge as the person of perfect individualized judgment, who appreciates the subtle merits of the individual case independently

of the generalities of written law. Ronald Dworkin's well-known fantasy of Hercules the ideal judge taps into both these pictures, albeit (as I have argued elsewhere, Shiner 1992, chap. 7) in a confused and confusing way. The ideal of the perfectly codified law, which will generate all the right answers, is another version of these pictures. Any actual codification falls short of the ideal.

> No draftsman can altogether avoid such flaws as ambiguity, obscurity, or conflict of sections, and even if he could, new problems arise which could not possibly have been foreseen and new social philosophies become popular which are out of keeping with the basis on which the code is built. (Paton and Derham 1972, 255)

For all that, codification achieves two goals. It takes tangible steps towards the goals of simplicity, logical arrangement, certainty, and definiteness. The common law is well described as "essentially incomplete, uncertain, and unsystematic" (Fitzgerald 1966, 128).[2] Codification can take the accumulated and haphazard growth of individual statutes, individual common law decisions, and even customary law, and compose it into a "harmonious" whole. Second, codification may serve an important political purpose. As Frederick Schauer has shown (Schauer 1991, 158–62), in virtue of their necessary opacity to their background justification, rules are important devices for the allocation of power. "A decision-maker instructed to make rules according to a set of rules is thereby instructed not to consider certain facts, certain reasons, and certain arguments" (ibid., 158). A code in the nature of the case places much power in the hands of the codifier. In a context of democratic politics that might be important.

Codification, however, while pervasive in the civil law world, is rare in the common law. In Canada and elsewhere in the British Commonwealth, the criminal law is codified. In the U.S., the Uniform Commercial Code extensively regulates trade and commerce. But these are exceptions. Consolidation on the other hand is a normal legislative practice. As a body of statutory law grows, an aggregate of discrete statutes may come to resemble a body of common law in its incompleteness and uncertainty. Consolidation takes *those statutes* and makes them into a harmonious whole. Consolidation of a body of statutory law does not incorporate the existing common law; it only rationalizes existing statutes. It is also not properly regarded as an occasion for changing the law. "In cases where the meaning [of a statute] is doubtful, it is presumed, in the absence of evidence to the contrary, that the consolidation is not intended to change the law" (Paton and Derham 1972, 249). Moreover, "respect is still paid to prior [case law] decisions interpreting a section which is drawn into the consolidation" (ibid.).

As Salmond indicates (Fitzgerald 1966, 131), the on-going project of the American Law Institute to provide formal Restatements of different areas of

[2] Not that those features aren't the vices of the virtues of the common law: see chap. 3.

U.S. law is an interesting intermediate case. The several Restatements are unlike both statutes and codes in not being binding law, or rules of a formal rule-making source. On the other hand, they are treated with great respect by courts in the U.S. They are like codes and unlike consolidations, in that they aim to include existing common law as well as statute law. They are unlike both codes and consolidations, in that, especially in cases of conflict, the restaters exercise some independent judgment on what would be the preferable rule to have, separately from any degree of authority behind the rule.

2.2.4. Statutory Interpretation

I will pass here quickly over an essential aspect of legislation as a source of law, the matter of statutory interpretation. As we shall see also in Chapter 3, legislative rule-making differs from common law rule-making, in that, in the case of statutes, the exact wording of the statute is canonical. In a precedent-setting common law decision, a court may state the rule, which it finds in the case. But that wording is not in itself binding on future courts. However, when the legislature enacts a bill, exactly that wording and no other is written into law. As we have noted already, legislative draftsmen and -women are human; they cannot imagine every eventuality. Nonetheless, courts have no alternative but to confront the wording that was enacted.

There are many rules of statutory interpretation. It is not true that courts can make the wording of a statute mean anything that they want it to mean. As Waldron has noted, to the extent that law makes use of specific verbal formulations, it seeks to connect and associate itself as a social institution with another institution—the institution of natural language. In particular, the law seeks to associate itself with *whatever interpersonal determinacy there may be in natural language communication* (Waldron 1999a, 82–3). A recent standard treatise expresses the basic rules of statutory interpretation this way:

1. The judge must give effect to the ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
2. If the judge considers that the application of the words in their ordinary sense would produce an absurd result, which cannot reasonably be supposed to have been the intention of the legislature, he may apply them in any secondary meaning, which they are capable of bearing.
3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unregulated, unworkable or totally irreconcilable with the rest of the statute. (Cross, Bell and Engle 1995, chap. 3)

In addition, the judge may resort to a variety of other aids in construction and presumptions such as preservation of meaning throughout a statute, interpretation clauses embedded in a statute, rules of language itself, historical context, (more controversially) legislative history, presumptions against unclear changes, retrospective operation, and so forth. All these aids and presumptions are discussed in detail in Cross, Bell and Engle 1995, chaps. 5–7.

Principles of statutory interpretation of this sort are very much rooted in the language of the statute, and in the intention of the legislature as revealed by the language of the statute. In the U.K. the tradition of statutory interpretation is typically conservative in the sense of adhering closely to language and interpretive principles associated with language. In the U.S., on the other hand (see Atiyah and Summers 1987, chap. 4), the intention of the legislature may play a role independently of its embodiment in the language of the statute, and, more importantly, the underlying purpose of the statute also plays a role. In Canada, unsurprisingly, both influences are felt. In the case of ordinary statutes, the tradition of interpretation is closer to the U.K. But the Supreme Court of Canada has made it clear that where interpretation of the Canadian Charter of Rights and Freedoms is concerned, interpretation will be purposive (see Hogg 2002, chap. 33, sec. 7). A more general analysis of forms of statutory interpretation in different jurisdictions may be found in MacCormick and Summers 1991.

The issue of interpretation as applied to law, especially as regards the more linguistically free forms of interpretation, falls, in all its complexity, to be discussed by Aleksander Peczenik in Volume 4 of this Treatise. I will confine myself here to mentioning one example, the only serious legal case in which I have been personally involved. One important principle of statutory interpretation is that words shall mean the same throughout a given act, and its converse is that if there is a difference in wording, something different is meant. Two different sections of the Canadian Income Tax Act concerned circumstances under which allowances paid to separated or former spouses were a legitimate pre-tax deduction from income. The two sections were very slightly different in their wording (in 1982, anyway; the wording has been cleaned up since). Revenue Canada used this difference as a ground for discontinuing to permit deductions of certain forms of allowance under one section, which would have been permitted under the other. A large number of people were affected, including myself, and the sums of money involved were considerable. One taxpayer took the issue to the Supreme Court of Canada. The Court stated in a unanimous decision that the intent of each section was obviously the same, that the government had no ground for investing a slight change of wording with such significance, and (in polite legal language, of course) that the government should stop harassing innocent taxpayers and get on with something more important (*Jean-Paul Gagnon v Her Majesty the Queen* 86 DTC 6179 (1986)). A very satisfying result—words really can't mean anything the government wants them to mean.

2.2.5. Legislation and Common Law

Important contrasts can be drawn between the operation of legislation as a source of law and the other chief contemporary source of law within the common law, precedent. "The first virtue of legislation lies in its abrogative power" (Fitzgerald 1966, 125). It is as easy (or not, as the case may be) for legislation to abolish existing law as it is for it to create new law. As we shall see in Chapter 3, a common law precedent, once set, remains indefinitely as part of the law. It can only be distinguished—its effect mitigated by a process of ever-narrowing interpretation.

Legislation easily satisfies rule of law constraints on retroactivity. A statute is passed, and promulgated. It comes into effect at a specific point in time, and from that point in time onwards. In the case of a common law decision, however, the decision is applied immediately to the litigation in the course of which the decision arises, even if the decision is in some sense a new decision. This contrast can be exaggerated. The very idea of reasoning from precedent is that the new conclusion is a natural inference from existing cases, and so in some sense should not come as a surprise. But the common law cases, which typically find their way into adjudication, are so-called "hard cases," cases where the law speaks with an unclear voice, or with many voices. Thus there still is some element of retroactivity. On the other hand (cf. here Fitzgerald 1966, 127ff.), legislation is not always free of retroactivity. Legislation often needs interpretation. That interpretation will be conducted by a court, and applied by the court to the litigation before it in a manner which involves a form of retroactivity not much different from that in common law cases. Suppose that the tax case I mentioned above had gone against the taxpayer. Those of us affected by the decision might well have felt we were being judged retroactively. We had deducted certain expenses in good faith, believing on the advice of legal professionals that such deductions were lawful. The courts appear to have changed the rules after the fact.

Legislation is also essentially anticipatory, or pro-active—it sets the rules under which future legal cases will be decided prior to those cases occurring. Common law adjudication, by contrast, can only deal with cases—fact situations—which happen actually to be litigated. The common law court may deeply desire to change the law. But it cannot act until a suitable case occurs before it. "So far as precedent is concerned, a point of law must remain unsettled, until by chance the very case arises" (Fitzgerald 1966, 128). Finally, Salmond urges, legislation differs from case law in that legislation consists of "abstract propositions," rules stated in general terms, while precedent "is merged in the concrete details of the actual cases to which it owes its origin" (ibid., 129).

2.2.6. Legislation vs. Adjudication

The points in the previous section compared legislation with common law precedent as differing sources of law. But it is also possible profitably to compare legislation with adjudication as forms of regulation of social life. Such a comparison raises a different set of issues, since adjudication as a technique of regulation extends to more than just the domain of common law precedent, even though there is some overlap to the set of distinctions and the reasoning in support of them.

Regulating an area of life by means of legislative rule-making, as opposed to leaving it to adjudicative rule-making, brings certain benefits, especially in areas of economic and social policy. Iain Ramsay gives a number of reasons to defend such a view in the specific context of consumer protection legislation, but his analysis is readily extended to other contexts (Ramsay 1989, 74–5).[3] Ramsay's reasons are these. 1) Adjudication is focused on the rights and duties of the individuals before the court, not on the broad range of policies available on some given regulatory issue. 2) Courts have limited framework of remedies, compared to a legislature or an administrative agency. 3) Adjudication is piecemeal, and development of doctrine is incremental. 4) Courts are passive and reactive; they can only await appropriate cases. Litigation is ex post facto, and cases litigated are not necessarily representative of the underlying problem which regulation might be needed to address. 5) Fact-finding in adjudication is ill-suited to broad social facts and general policy issues, and there are difficulties in assembling behavioural science data in context of any given individual lawsuit. 6) Adjudication makes no provision for policy review or monitoring of compliance, and the only available feedback mechanism is another, follow-up lawsuit.

These points can be well illustrated by recent litigation over so-called freedom of commercial expression. The granting of constitutional protection to corporate advertising has led to many cases where courts have stepped in to invalidate regulatory schemes devised by legislatures. But the results have standardly been as unhappy from the point of view of good public policy as Ramsay's analysis predicts.[4] In order:

1) The U.S. Supreme Court in *Coors* (*Rubin v Coors Brewing Company* 115 SCt 1585 (1995), 1590–1) has great fun pointing out the tension between the government's desire to prohibit providing information about the alcohol content of beer on bottle labels, and its general desire in other areas of alco-

[3] He is summarizing a more extensive argument in Horowitz 1977, 34–56. I in turn am summarizing Ramsay. These advantages would be in addition to those mentioned by Waldron 1999a and discussed in Section 2.4 below.

[4] I summarize here an argument given at greater length in Shiner 2003, chap. 13, sec. 6. For criticism of the doctrine that commercial expression merits constitutional protection under freedom of expression provisions, see Shiner 2003, passim.

hol labelling and food labelling generally for more disclosure on the part of manufacturers. But such an *ad hoc* charge of inconsistency, while arguably sufficient to decide the specific case at bar, falls well short of a serious consideration of overall food and drug labelling policy.

2) The Supreme Court of Canada in *RJR-MacDonald* (*RJR-MacDonald Inc v Attorney-General of Canada; Imperial Tobacco Ltd v Attorney-General of Canada* [Indexed as: RJR-MacDonald Inc v Canada (Attorney-General)] (1995) 127 DLR (4th) 1) struck down central provisions of federal policy expressed in the Tobacco Products Control Act, but left nothing in its place. Even though the holding was far from the endorsement of tobacco advertising that its critics feared (Shiner 1995, 8–9), the federal government was left scrambling to draft replacement legislation. Only a welcome, and uncharacteristic, degree of reticence on the part of the tobacco manufacturers themselves prevented two steps backwards in this tactic of the fight to preserve the nation's health.

3) In the case of professional advertising by lawyers the U.S. Supreme Court in fact has developed over a twenty-five year period something like a detailed regulatory scheme. Arguably, this is due entirely to the contingencies of the large number of suits brought by parties with the energy, expertise, and depth of pocket to take them to the Supreme Court. Consider, however, the state of the doctrine in the early days of its development. Although the U.S. Supreme Court tried hard in *Bates* (*Bates v State Bar of Arizona* 433 US 350 (1977)), the earliest case, to lay down some general principles, still the case had to be decided on its particular facts. The Court could not rule in advance on solicitation in pursuit of associational freedoms, or on in-person solicitation, or on regulation of advertising of area of practice, or on fee advertising, or on direct-mail solicitation, until cases introducing those issues came before them. That took until 1988. Still other issues lay ahead—on advertising areas of specialty, and statutory waiting periods before initiating direct-mail solicitation. The Court eventually took eighteen years to develop incrementally an *ersatz* regulatory scheme, which a legislature could have done, and likely done better, in, say, one.

4) The U.S. Supreme Court appears to have taken *Wileman* (*Glickman v Wileman Brothers and Elliott Inc et al* 117 SCt 2130 (1997)) largely in order to resolve a conflict between two decisions in different circuits of the U.S. Court of Appeal (ibid., 2137) concerning compelled generic advertising within the agricultural industry. In *Wileman*, the Supreme Court upheld such a scheme in the case of fruit producers, departing from its usual pattern of protecting corporate advertising. *United Foods* (*United States v United Foods, Inc* 121 SCt 2334 (2001)), heard shortly after, offered the chance for the stars to reappear in their proper places in the constellation, as two judges from the *Wileman* majority changed sides to form a majority to reject a generic advertising scheme for mushroom producers. The holding was an exercise in distinguishing without a differ-

ence. Generic advertising exists throughout the agricultural industry. The Court can achieve reform, supposing reform to be needed, only by dealing with parts of the industry one by one as producers in any given part happen to bring litigation.

5) Struggles with social science data and evidentiary standards have taken place in both the U.S. and Canada. I will mention here a Canadian example. In the trial hearing of *RJR-MacDonald* (*Re RJR-MacDonald Inc and Attorney-General of Canada; Re Imperial Tobacco Ltd v Attorney-General of Canada* (1991) 82 DLR (4th) 449 (Que SC)), large amounts of data were presented by both the government and the tobacco manufacturers concerning the relation or otherwise between consumption of tobacco products and health disorders, and between tobacco advertising and consumption of tobacco products. Nonetheless, the trial judge laid down that "the connection [...] between health protection and tobacco advertising is tenuous and speculative" (at 512), and that "the evidence of a rational connection between the restrictions and the objective sought is deficient, if not non-existent" (at 515).[5] The Supreme Court was plainly perturbed by the issue. McLachlin J. (as she then was) took this finding to stand for the proposition that there was no *scientific* evidence for a link between tobacco advertising and consumption of tobacco products, but she took advantage of precedent to deem a causal relationship to exist "on the basis of reason or logic, without insisting on direct proof" (at 97). Such an approach essentially eliminates social science data from performing any argumentative role.

The case demonstrates the problems in trying to adjudicate via social science data. If huge amounts of data are presented, neither judges nor their clerks have the professional expertise to evaluate the data, and so the data cease to be able to perform the evidentiary function for which they were introduced. If modest amounts of data are presented, it is only to easy to claim that more could have been presented, and again the evidentiary role of the data is excluded. There is no serious doubt about the propriety of basing regulatory schemes on social science data, whether economic, or sociological, or psychological. Legislatures and regulatory agencies do it all the time. The irony is that courts are in no position to assess whether a legal standard they themselves have set—the proof of a rational connection between an objective and a social policy—has in any given case actually been met. Thus the legal decision as to whether it has been met cannot be made on the only grounds, which are relevant.

6) The story of *RJR-MacDonald* provides an illustration again of the weaknesses of courts as a regulatory mechanism. Important sections of the Tobacco

[5] The second time around, *JTI MacDonald Corporation et al c La procureure générale du Canada* 500-05-031299-975 (2002) (QSC), neither side took any chances. The stack of data provided was immense, and the number of intervenor briefs permitted extraordinary. Denis J's limiting his opinion to 196 pages is a remarkable feat in itself.

Products Control Act were struck down, leaving the government no choice but to develop a new statute to replace. This they did, the Tobacco Act. That Act has now been challenged again by the tobacco manufacturers (see n.12 above). It took four years for the previous case to reach the Supreme Court of Canada for a final determination, and doubtless the time-period will not change this time. In the meantime, the Act remains in force, which is fine if you agree with it, and frustrating if you do not.

Waldron rightly points out that theorists who disparage the factionalism of legislative politics in favour of what they see as the impartial and principled adjudication of courts are just being normatively idealistic about courts. What would happen, he asks, if we were just as idealistic about legislatures (Waldron 1999a, 32)? That is an important and interesting question, and I will return to this issue again in Section 2.4 below. For now, I want to underline that my argument in this section does not turn on being idealistic or otherwise about legislatures as opposed to courts. I am simply pointing out structural features as to which legislatures and courts differ, and indicating the consequences for the design of legal institutions that follow from these differences.

2.3. Legislation vs. Sovereignty

In the common law world, legislation as a source of law is historically and doctrinally linked with the idea of parliamentary sovereignty. I want in this section to examine this historical link further. I shall argue that, whatever the strength of the link historically, there is no link conceptually. The doctrine of parliamentary sovereignty is not an implication of the very idea of legislation as a source of law. There will be two threads to my argument. First, I shall show that the reasons for finding a conceptual link are inadequate. Then I shall deconstruct the temptation to find that there is a link.

The doctrine of parliamentary sovereignty is well put in the following comment:

> What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law, which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal. (*Cheney v Conn* [1968] 1 All ER 779, at 782, per Ungoed-Thomas J; quoted by Dias 1985, 88)

As Goldsworthy has pointed out (1999, 243–4), the doctrine itself is not properly regarded as either a matter of statute law or a matter of common law. Parliament did not enact a law that it should be supreme, nor is the doctrine judge-made law like a contemporary rule of precedent. Goldsworthy quotes with approval G. C. Winterton's statement that the doctrine of parliamentary sovereignty is "*sui generis*, a unique blend of law and political fact deriving its authority from acceptance by the people and by the principal institutions of

the state, especially parliament and the judiciary" (Goldsworthy 1999, 243; see Winterton 1996, 136). If such a practice of acceptance began to change, then we would say that the constitution of the country in question would also be changing. As we shall see in Sections 6.3–6.4, there is some evidence that in Australia and Canada, such a change has taken, or is taking, place. In the U.K. also, the passing of the Human Rights Act may well involve some modification of the doctrine, although Richard Edwards at least argues that so far courts are still deferring to parliament rather than taking the opportunities for independent development of doctrine that the Act provides (Edwards 2002). It is often assumed that parliamentary sovereignty only became established as a part of U.K. law in the nineteenth century, the period of its greatest jurisprudential advocate, A. V. Dicey (Dicey 1959). Goldsworthy (1999, passim), however, mounts a detailed historical argument that acceptance of the doctrine began as long ago as the sixteenth century. Allen dates the beginning to the end of the fifteenth century (Allen 1964, 445).

My perspective here is analytical and conceptual, not historical or sociopolitical. From the analytical perspective, Julius Stone draws the crucial distinction. In discussing the work of John Austin, who famously made the commands of a sovereign with unlimited power the centrepiece of his theory of law, Stone urges that we must distinguish "the sovereignty-concept in the logical structuring of law, and sovereignty as descriptive of power relations" (Stone 1968, 71ff.). What Stone has in mind is this. Sovereignty as descriptive of power relations is exemplified in the practice of acceptance in the U.K. that we have described. As a matter of fact, courts, legislators, and citizens alike acknowledge the supreme position of parliament—the legislature—as lawmaker. Courts and citizens follow the practice of regarding the legislature as the source of supreme legal power. The concept of sovereignty as an element in a proposed analysis of the necessary structure of law is different. The question then is, Is it possible to conceive of a legal system, which lacks a strictly institutionalized source of law of the form, which the doctrine of parliamentary sovereignty attributes to legislation? Is it possible for a legal system to exist, which does not recognize the supremacy of legislation?

The answer to this question seems clearly to be, Yes we can. As I have indicated, and will discuss further later, it is beginning to look as though Australia and Canada, both common law jurisdictions, have decided they may well be able to get along without a strong doctrine of parliamentary sovereignty. Canada in fact already departed from a strong version such as that found in the quote from Ungoed-Thomas J above, when in 1982 the Charter of Rights and Freedoms became part of the supreme law of Canada. The Charter imposes in the name of human rights limitations on what legislatures in Canada can enact. Yet the Canadian legal system is uncontroversially a legal system. As I shall remark in Chapter 6, the entrenchment of a charter or bill of rights imposing limits on legislative power is increasingly common in contemporary legal systems.

Why might one be tempted to think otherwise? Two possibilities suggest themselves. Both are suggested by Goldsworthy. First, he argues that, although it is not a logical or practical necessity that Parliament should have ultimate authority to decide what the law is, "it is a practical necessity that *some* institution have ultimate authority to decide any legal question that might arise, even if it is a different institution with respect to different types of questions" (Goldsworthy 1999, 261). The last clause acknowledges that, for example, in a legal system with a constitution and judicial review, it might fall to the Supreme Court of the jurisdiction to decide with finality constitutional questions. It might fall to the legislature, on the other hand, to decide finally economic questions, in the sense that duly enacted laws as regards economic policy are not reviewable by the courts.

The second argument I extract from Goldsworthy is this. In discussing judicial review, he comments that, in any legal system, at least one institution must ultimately be trusted to adhere to whatever principles are believed to limit its authority (Goldsworthy 1999, 278). It is a mistake, he believes, to argue for a wide scope for judicial review of legislation on the grounds that such review is necessary to ensure adherence by the legal system to fundamental principles of political morality. We must at some point just trust courts, or just trust legislatures, to respect fundamental principle.

On the face of it, both arguments fail as arguments for the necessity of a sovereign legislature. Even if finality as such is necessary for law, finality may be found in more than one place in a legal system. The decisions of a supreme tribunal are final within that tribunal's jurisdiction, and the tribunal may have powers of review over legislation. Much the same applies to the necessity of trust. Trust or acceptance at some point is needed, true. But it too may as well be bestowed on a supreme tribunal as on a legislature, or on each in equal proportion. So we still lack a sound reason for the necessity of a sovereign legislature.

Let us advance on the issue from a different direction. Joseph Raz argues that any legal system must have what he calls a "primary norm-applying institution"—an institution "with powers to determine the normative situation of specified individuals, which are required to exercise those powers by applying existing norms, but whose decisions are binding even when wrong" (Raz 1975, 136). However, he rejects the view that a legal system needs a primary norm-*creating* institution. The "existing norms" which the above characterization alludes to could perfectly well be either customary or norms which the norm-applying institution has itself already recognized by application. On this view, then, a legislature as a source of law is not necessary for a normative system to qualify as a legal system. If Raz is right, not merely is a sovereign legislature not conceptually necessary for law or legal system, any legislature at all is not necessary.

Raz's argument, however, is open to one immediate objection (cf. Waldron 1999a, 35). The argument does not mention a possibility that actually exists

anywhere. In every contemporary municipal legal system there is a legislature which functions as a source of law. To what extent can it be considered the task of legal philosophy to investigate conceptual possibilities that do not reflect empirical realities? But if Waldron's scepticism about the high abstractness of Raz's argument is justified, and justified precisely because of the standard role of legislatures in contemporary municipal legal systems, then conceptual space is apparently opened up for the implementation of Goldsworthy's two proposed "necessities" to be themselves necessarily applied to legislatures. I will explain.

Goldsworthy argues, in effect, that in any legal system there must be fundamental rules for decision-making finality, whatever the institution in the legal system in which such finality resides. He argues also that there must be in any legal system acceptance or trust of legal institutions as being themselves institutions, which understand and accept their role. Specifically, legislatures must be accepted as not invariably needing their decisions reviewed by courts for content. These two points may be combined with the failure of Raz's abstract argument that a legal system can be imagined which has no legislature. All three points combined seem then to offer a powerful argument, not only for the necessity of legislation as a source of law, but for legislation with (at least in some respects) a position as a supreme source of law. From there it is a short step, although not a logically necessary one, to the analytic necessity of a sovereign in any legal system.

The impression, however, is misleading. Clearly, from the point of view of where the actual centre of power is in any given legal system, it is clear that the centre does not have to be the legislature. Thus, if it is the case that in some given legal system, the legislature is accepted as sovereign, that will be a contingent feature of that system. The point of view of actual power does not help to appreciate analytically the role of legislation as an independent source of law. The point of view of abstract possibilities does not help either; standardly contemporary municipal legal systems do have legislatures, and legislation does function as an independent source of law. However, this independent functioning, combined with the need for finality in legal decision-making, and the need for sources of law, which rest on trust and acceptance, not derived validity, seem to forge an analytical connection between legislation and sovereignty. Acknowledgment of such a link must be rejected. The fact remains that Goldsworthy's two arguments on their own do not succeed. The failure of Raz's argument shows at most that a legislature in some form is necessary for law or legal system. It does not show that a sovereign legislature is necessary.

2.4. Taking Legislation Seriously

I have alluded already to Waldron's complaint that contemporary legal philosophy does not take legislation seriously. The tendency, attributed by

Waldron to the influence of legal positivism (Waldron 1999a, 44–5), is to regard the legislature as a "black box." All that matters is the fact of enactment; whatever goes into the constitution of that fact is irrelevant to legal philosophy.[6] A standard is not part of the law until it is enacted. It is not of interest to legal philosophy until it is part of the law. So the process of enactment is not of interest to legal philosophy.

There is a truth in this argument. Although the truth does not justify legal positivism, it provides positivism with some impetus. The truth is this: A standard is indeed not part of the law until it is enacted, or until it is acknowledged by a precedent-setting decision.[7] But the challenge to positivism is this. It does not therefore follow that what it is for the standard to be part of the law can be reduced to the fact of enactment. It may be that natural law theory is correct. Enactment is intimately connected to what makes something *positive law*; but we do not understand positive law unless we conceive of it as internally related in complex ways to natural law.

I am not going to explore these issues here; I have discussed them at length in Shiner 1992. Waldron's opposition to positivism's failure to take politics seriously has a similar shape to natural law theory. I do not say, "is a natural law theory," because his theory of legislation is also in a crucial respect different from natural law theory, as I will explain. For Waldron, taking politics seriously is necessary for *legal* philosophy, because law-making or legislation, a central focus of legal philosophy, cannot be properly understand unless it is seen as taking place in "the circumstances of politics." This idea, he says, is adapted from John Rawls' discussion of "the circumstances of justice" (Rawls 1971, 126–30), itself derived from David Hume (see for example Hume 1902, sec. 3, part 1, 183–92):

> The felt need among the members of a certain society for a common framework, or decision, or course of action on some matter, even in the face of disagreement about what that framework, decision, or action should be, are *the circumstances of politics*. (Waldron 1999a, 102; his emphasis)

We live in pluralist, diverse, and multicultural societies. We disagree about many things. Most importantly, we disagree about justice, about "what count as fair terms of co-operation among people who disagree about the existence of God and the meaning of life" (Waldron 1999a, 1). We will continue to disagree about these matters, even if some conclusion as to policy or action has been

[6] One might take this further. Differences between legislation and other forms of legal source are elided also, so that legal positivism becomes the thesis that "the existence and content of every law is fully determined by social sources" (Raz 1979, 46–7), and from then on the discussion concerns what follows from this generalization. I hope that this book does enough to show that differences between sources cannot be so easily overlooked.

[7] We will see in Chapters 4 and 5 to what extent custom and delegation as sources of law force any modification of the "truth."

reached. This ever-present disagreement among people who nonetheless need to decide or take action constitutes the circumstances of politics. Law is made, legislating takes place, in the circumstances of politics. It is our response to the circumstances of politics. No theory of legislation, and *a fortiori* no theory of law, can succeed if it does not take this fact about legislation seriously.

Waldron then develops his theory of legislation by showing how so many of the familiar features of contemporary legislatures fall into place, if legislation is seen as internally related to the circumstances of politics. Legislative assemblies are standardly large, with members in the hundreds. The underlying value here is democratic legitimacy. Our preference for large legislative assemblies has to do with seeing the law as the law of the land, or the law of a people. With legislation by popular assembly, law wells up from those who are subject to it, rather than being handed down to them from on high (Waldron 1999a, 52–66). The formality of procedure in a large legislative assembly stems from the need to respect diversity (ibid., 72ff.). The focus in legislation on specific canonical wording—both on which proposal is the subject of deliberation and debate, and which version of which proposal—is a way for the law in the circumstances of politics to associate itself with whatever interpersonal determinacy there may be in natural language communication (ibid., 39, 82–3). Voting (majority decision-making) involves a "commitment to give equal weight to each person's view in the process by which one view is selected as the group's" (ibid., 114). In short, "every feature of the majority-decision method that seems arbitrary can be defended as reasonable in the circumstances of politics, and indeed as expressive of perhaps the most robust conception of respect for persons that we are entitled to work within those circumstances" (ibid., 116–7).

Waldron's theory of legislation is opposed to the typical positivistic theory, in that, like natural law theory, it looks beyond the fact of enactment to the circumstances in which enactment takes place, the circumstances of politics, and to the values that such circumstances subtend. Enactment as a process seen in the large is rooted in the need for collective decision-making in the face of fundamental disagreement about not only the answer to some political question, but also the principles on which answers to such questions should be based. However, such a focus on disagreement is also exactly what distinguishes Waldron's theory from natural law theory, in that natural law theory will assume convergence on some particular principles and answers to political questions as proof of the proper working out of the natural law. It is not that natural law theory is absolutist and leaves no room for legitimate difference of opinion. Aquinas familiarly allows for human law to be related to the natural law "by way of determination of certain generalities" (*Summa Theologica*, I–II, q.95, a.2)[8] or "like implementations of general directives," to give Finnis's transla-

[8] *Summa Theologica*, I-II Q.95 A.2, Aquinas (1988), 59.

tion of the same passage (Finnis 1980, 284).[9] Murder is invariably wrong, but local variation in the manner of punishment is possible. But the range of possible "determinations" or "implementations" is still finite. Punishing murder by a $500 fine is not a permissible determination of the natural law. There is no room for the ultimacy of political disagreement embraced by Waldron.

I have alluded several times in this chapter already to the existence in many legal systems of powers held by the courts of judicial review of legislation. The topic of judicial review and its legitimacy from the point of view of political morality is a huge one, and will be discussed only superficially here. It is vital to distinguish between judicial review of legislation—in terms of its relation to principles of individual rights and freedoms as embodied in an entrenched charter or bill of rights—and judicial review on narrower jurisdictional grounds or on constitutional grounds that are not right-based. Courts as policing agents to make sure government administrative action remains within its legislatively-determined grounds is not at first sight problematic. It may become problematic, though, if courts help themselves to a wide range of so-called common law values to assist them in this policing.[10] The debate over the undemocratic or otherwise character of judicial review focuses primarily on the former kind of review, where review takes place against a background of principles of political morality.

Judicial review in this form does not lack for defenders in contemporary legal theory, even outside the natural law tradition. The most well-known in the anglophone world is likely Ronald Dworkin (1978; 1985; 1986; 1996; see also Freeman 1990). It follows, of course, from Waldron's position of taking legislation seriously that he is deeply suspicious of court-held powers of judicial review in this sense. The nub of his objection is as follows:

> When citizens or their representatives disagree about what rights we have or what those rights entail, it seems something of an insult to say that this is not something they are permitted to sort out by majoritarian processes, but that the issue is to be assigned instead for final determination to a small group of judges. It is particularly insulting when they [sc. citizens or their representatives] discover that the judges disagree among themselves along exactly the same lines as the citizens and representatives do, and that the judges make their decisions, too, in the courtroom by majority-voting. (Waldron 1999a, 15)

Here Waldron makes common cause, although on different grounds, with contemporary versions of legal realism such as Critical Legal Studies, Critical Race Theory, and feminist legal theory, all of who have urged the essentially partial and political nature of judicial review under a disguise of judicial independence and impartiality.[11] The difference between Waldron and these po-

[9] See Finnis 1980, 281–90 for the issue of *determinatio* generally.

[10] The issue in this form has been the subject of some recent spirited debate in the U.K. For both a survey and a contribution, see Elliott 1999.

[11] For more on these approaches to law, see Volume 11 of this Treatise.

litically radical theories of law is that the radical theories are, as Hart pointed out many years ago (Hart 1983, 126ff.), frustrated idealists about adjudication. When the reality of the "political" character of judicial decision-making hits home, despair follows. Waldron, by contrast, takes the "political" character of judicial decision-making as a given, and then wonders why we then need a second, undemocratic and unrepresentative level of "political" decision-making. I put "political" in scare-quotes, for the reason that, for Waldron of course, "political" is a term with positive, not negative, connotations. Politics celebrates democracy and diversity, as it should. If issues present themselves, which are at rock bottom political issues—issues about civic and public life on which disagreement among citizens is rife and persistent—then these issues should be settled by the political process itself. The role of law in politics is exemplified for Waldron by legislation, not adjudication. Legislation, not adjudication, takes rights seriously.

It may be said that charters and bills of rights represent the moral and political ideals of a people, and therefore that courts which seek to enforce these rights as limits on legislative action are as representative of the people as legislatures themselves. If I understand Waldron aright, in his view such a claim obscures this fact. Even if there is agreement on the ideals, which is not necessarily the case, it will be agreement at a high level of abstraction. At the level of concrete application to cases, disagreement will be rife among the people. Courts, for Waldron, are not the places to resolve such disagreements. We cannot settle this theoretical (and practical) dispute here.

2.5. Conclusion

I said at the beginning of this chapter that we would in it be led to see the complex character of the intuition that legislation is the paradigm source of law. Here is how we have, if we have, succeeded. Legislation stands firmly at the interface between the legal system as a normatively autonomous system, and wider political and social life in which the legal system is embedded. To adopt legislation as the paradigm of law, as Waldron's theory of legislation has urged, thus forces the legal theorist away from the autonomy of law towards its fundamental character as a social institution. Nonetheless, legislation presents in its starkest form the moment of transformation at which a norm changes from being a moral or social norm into a legal norm. Thus legislation forces the legal theorist away from the character of law as a social institution towards law as an autonomous institutionalized normative system. If legislation is the paradigm of law, it is a deeply unstable paradigm. That may well be an advantage, however, of legislation as a paradigm of law. As I have argued elsewhere (Shiner 1992, 323–6), law itself is a deeply ambiguous institution, a fact which legal theory must confront and not seek to capture in one all-encompassing theory.

The relation of legislation to sovereignty is similarly unstable. In the strong form in which the traditional doctrine of parliamentary sovereignty is held in the U.K., there is no necessary connection between legislation and sovereignty so understood. It is entirely conceivable, and entirely empirically so, that legal systems exist which do not subscribe to such an according of power to the legislature. On the other hand, the legislature embodies two important features of legal system, the need for finality of decision-making and the need for fundamental acceptance and trust on the part of citizens. Moreover, if the foundational values of the polity are those of democracy, the legislature is the most democratic of legal institutions. Thus some measure of sovereignty for the legislature seems inevitable.

Legislation as a source of law is the lynchpin between contextual and deep justifications of law, the point at which they are most separate as well as most connected. That is the paradox of legislation, a paradox that must be embraced rather than resolved, if the role of legislation in law is to be appreciated.

Chapter 3

PRECEDENT

The second of the classical or traditional sources of law is Precedent, expressed in the maxim *stare decisis et non quieta movere*, "to stand by what has been decided, and not to disturb what is still." Many questions, however, arise concerning exactly what it is to "stand by what it is decided." Reasoning from precedent is a distinctive form of reasoning: Is it truly distinctive, or can it be reduced to some other form of reasoning? Is it peculiar to the law, or is it merely that in the law reasoning from precedent takes a special form? Why employ this form of reasoning at all? What does it mean to say that a court is "bound" by precedent? Is such talk even meaningful? In this chapter, I shall proceed as follows. In Section 3.1, I will characterize the notion of precedent in general, without special reference to the law. Then in Section 3.2 I shall examine more closely how in fact the idea of precedent functions in the typical legal context as a source of law. Section 3.3 will say something about precedent and legislation. In Sections 3.4 and 3.5 I shall discuss issues that arise when trying to understand the bindingness of precedent, in the former looking at rule-scepticism and judicial comity, and in the latter at conventional bindingness and ruleness. In Section 3.6 I shall consider the justification of precedent.

3.1. A Characterization of Precedent

Frederick Schauer has offered as the "bare skeleton" of reasoning from precedent that:

> The previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y* if and when *X* again occurs. (Schauer 1987, 571; his emphasis)

Reasoning of this sort is not confined to the law (Schauer 1987, 572; Twining and Miers 1982, 268–9). Schauer gives the example of a seven-year-old child who argues that he should not have to wear short pants to school any more, because his older brother did not have to wear short pants any more when he reached seven. One might churlishly respond that the example is weak, because the child is just behaving, as we might say, "legalistically." But it would be hard to deal with every proposed non-legal example of reasoning from precedent in this way, and so Schauer's point may be acknowledged. In any case, as we shall see, the deployment of reasoning from precedent in the law is encrusted with so many special features peculiar to the law that it would not be surprising for there to be non-legal uses without such features.

The italicised phrase in the quote carries the weight of the point. In reasoning from precedent, a prior decision has weight simply from the fact of its having been taken; a hypothetical case of exactly the same profile would not have weight (Hurley 1990, 223). Suppose a court needing to decide whether the plaintiff should succeed in tort in recovering damages after being bitten by a neighbour's dog. The court has before it two arguments. One is that another court in the jurisdiction decided some years ago that, in exactly the same fact situation, the plaintiff should succeed. The other argument has the form: Suppose that the facts of the situation were thus and so; then the decision would be in favour of the plaintiff. When precedent is a source of law, the first argument is decisive; the second argument has little weight.

The point can be dramatized by the following image,[1] borrowed with thanks from Richard Bronaugh (1987, 224):

> I shall introduce the notion of what might be called *The Complete Book of the World's Legal Decisions.* This I imagine to be a book reporting all the legal decisions that there have ever been anywhere, any time.

The idea of precedent as used in characterizing precedent as a source of law is that the presence of a decision in the Complete Book is in itself of great significance. We will return again to the image of the Complete Book, as it is of expository value in more than one way.

Reasoning from precedent is thus in an important sense a content-independent mode of reasoning. By that I mean the following. Take again the case of the unfortunate person bitten by his neighbour's dog. There are good reasons for allowing him to succeed in tort—he has suffered needless harm; neighbours should look after their dogs, to prevent harm; friendly relations among neighbours is of value in itself; and so on. These reasons form a normative justification for a legal rule allowing recovery. But the reasoning which says that the person bitten should recover, because a decision allowing a person in such a situation to recover can be found in the Complete Book, is a piece of reasoning which does not pay any attention to that normative justification. The reasoning says, crudely: This was done once before, so it should be done again. Reasoning from precedent thus can be contrasted with what Schauer (1991, 77–8) calls "particularistic decision-making." In particularistic decision-making, the decision is "transparent" (Schauer 1991, 85) to the background normative principles relevant to the decision. The decision is simply a matter of applying the principles to the special facts of the particular case. In contrast, there are forms of decision-making in which decisions are not transparent to the background justifications. Rule-based decision-making is one such form (and Schauer's

[1] I am using the image for my own purposes, not for the purposes to which Bronaugh puts it in the article cited.

main concern in the book cited). In rule-based decision-making, the particular case is decided by application of the rule: In circumstances *C*, do *A*; these are circumstances *C*; so I shall do *A*. There is no reference directly to whatever the background normative justification might be for having a rule "In *C*, do *A*." It is a standing presumption of rule-based decision-making that there is some such background justification, but the justification plays no role in the actual decision to do *A*. I shall consider later whether decision-making according to precedent is just a form of rule-based decision-making. It is sufficient to note now that it shares with rule-based decision-making the feature that decisions according to precedent are not transparent to their background justifications. "Decide now fact situation *F* for *P*, because Court *C* has already decided fact situations like *F* for *P*" is not a form of reasoning that pays attention to why deciding for *P* in *F* is normatively justified.

The point may also be expressed as follows. Larry Alexander (1989, 5) identifies as one model of precedent what he calls "the natural model": Under this model the court in deciding a case gives prior judicial decisions the weight that those decisions carry independently of any formal requirement that precedent be followed. Alexander (ibid., 9) rightly goes on to point out that it is "misleading to label the method of the natural model of precedent as precedent following at all." The court simply takes what it thinks is the normatively correct decision without reference to the Complete Book, as it were.[2] For the same reasons, Schauer (1991, 83) regards supposed decision-making by rule in which exceptions to the rule can always be allowed at the point of actual decision-making not to be a form of rule-based decision-making at all.

Although as I have characterized it reasoning from precedent gives weight to the past, reasoning from precedent is not the same as reasoning from experience (Schauer 1987, 575-6). In reasoning from experience, "the facts and conclusions of the past have no significance apart from what they tell us about the present [...]. If we believe that the current case ought to be decided differently, no purely precedential residuum remains in the calculus." To rely on knowledge that a great judge decided a case a certain way, and then to decide it that way oneself, is reasoning from experience, not reasoning from precedent. In the case of reasoning from experience, the past has weight because of the substantive information it contains about how to decide in the present. In the case of reasoning from precedent, the past has weight just because it is the past. The Complete Book of legal decisions is not the Great Book of Nature.

Schauer (1987, 572–3) has also rightly emphasized that reasoning from precedent has the double aspect of being both backward-looking and forward-looking. With respect to the former, the decision looks back to what has

[2] Defenders of the natural model would include Michael Moore (1987) and Ronald Dworkin (1978, 110–5; 1986, 240–50). I have criticised Dworkin's view elsewhere (Shiner 1982, 103–15).

previously been decided and takes a cue from that. But also it is part of reasoning from precedent that each decision also sets a precedent; a decision on the basis of precedent looks forward to future decision-making. As Schauer happily puts it: "Today is not only yesterday's tomorrow: it is also tomorrow's yesterday" (ibid., 573).

Reasoning from precedent is an instance of so-called case-by-case reasoning. The person who has done most to elucidate the idiosyncratic character of case-by-case reasoning is John Wisdom (1957, 157–63; 1965, 130–8; 1991, passim). Wisdom regarded the law as the prime site for case-by-case reasoning. He described the process as follows:

> The process of argument is not a *chain* of demonstrative reasoning. It is a presenting and re-presenting of those features of the case which *severally cooperate* in favour of the conclusion [...]. The reasons are like the legs of a chair, not the links of a chain [...] it is a matter of the cumulative effect of several independent premisses, not of the repeated transformation of one or two. (Wisdom 1957, 157; his emphasis)

Wisdom (1991) argues, in fact, that case-by-case reasoning is the fundamental form of reasoning. He links this to the thought that, in case-by-case reasoning, a direct acknowledgment of similarities and differences occurs, such acknowledgment being the obverse of the "independence" of the premises alluded to in the above quotation. To see one case as the precedent for another is to see resemblances between them. While, as we shall see in the next section, the actual functioning of *stare decisis* in any given legal system involves local institutional rules, at the epistemological core of *stare decisis* is the seeing of similarities and differences.

It follows, in my view, that reasoning from precedent is therefore not the same as reasoning by analogy, at least on some standard accounts of analogical reasoning. The notion of analogy has its roots in ancient Greek mathematics, as a technical concept within mathematical reasoning. Even though contemporary writers acknowledge that analogical reasoning is not the same as deductive or inductive reasoning, still the assumption is made that in some sense a formal statement of the rules of analogical inference is possible (Alexy 1989, 281–4; Brewer 1996; Guest 1961, 190–7). The formalization may be extremely elaborate, as it is in Brewer (1996). Or it may be simply: *A* is like *B* in being *F*; *A* is *G*; so *B* is *G*—assuming that the relation between being *F* and being *G* can be appropriately underwritten. The whole point of case-by-case reasoning, however, as Wisdom understands it, is that the reasoning in principle has force independently of whether some scheme of formal rules can be constructed to rationalize it. In case by case reasoning, the reasoner by juxtaposing *B* to *A* ultimately invites the reader or hearer to see that *B* is *G*. That's all.

Of course, it is possible to interpret analogy in a wider sense, which does not include the requirement of rationalization. Postema, for example, uses

"analogy" in such an unrestricted way, emphasizing the difference between the case-by-case reasoning of the common law and formal reasoning (Postema 2002, 603–4). Then there is nothing objectionable about referring to reasoning from precedent as "analogical." The important thing is to recognize case-by-case reasoning, and therefore reasoning from precedent, for what it is, and to see how it differs from reasoning through formalities.

3.2. The Functioning of Precedent in Law

3.2.1. The Doctrine of Stare Decisis

Treating precedent as a source of law is, with good reason, held to be a distinguishing characteristic of the common law. In fact, one might be tempted to say that reasoning from precedent as a source of law is *the* distinguishing feature of the common law, were it not for the fact that even in common law jurisdictions precedent is of less importance than once it was. Not only the kind of concerns discussed in the previous chapter about the need to give primacy to legislation in a democracy, but also concerns about uniformity and codification have led to the introduction of statutory schemes to regulate areas of the law once governed only by precedent.

It is a commonplace that civil law systems do not recognize a doctrine of *stare decisis* (Merryman 1984, 22-3, 35-6, 46-7; Merryman, Clark, and Haley 1994, 937–74; Cross and Harris 1991, 10–9; Goodhart 1934). (Cf., in this volume, sec. 7.3.2.) Merryman gives as the prime reason for this lack of recognition what he calls "state positivism," the linked beliefs that law means primarily enacted law, and that the state through legislation should have a monopoly on law-making (Merryman 1984, 19–25). It is, though, almost equally a commonplace that this supposed rejection of *stare decisis* by the civil law is exaggerated (Merryman 1984, 47; Merryman, Clark, and Haley 1994, 949–51). There exists a widespread practice of in fact paying some attention to decisions in other cases, even though officially precedent is not a source of law.[3]

We will return to this matter shortly; for now, we will adhere to the official story. In common law jurisdictions, then, as distinct from civil law jurisdictions, precedent is a source of law, and the doctrine of *stare decisis* is observed. As adumbrated above, courts typically justify the decision they give in the case at bar by citing decisions taken in other cases. What, though, is a "case" in this sense?

> A case is the written memorandum of a dispute or controversy between persons, telling with varying degrees of completeness and of accuracy, what happened, what each of the parties did

[3] See also MacCormick and Summers 1997, chaps. 3–9, and Sections 5.2.3 and 8.2 of this book for other such practices.

about it, what some supposedly impartial judge or other tribunal did in the way of bringing the dispute or controversy to an end, and the avowed reason of the judge or tribunal for doing what was done. (Twining and Miers 1982, 266)

The typical common law professional library is a collection of statutes, treatises, and commentaries, and volumes of *case reports.* The centrality of the written (I include here of course, written electronically) word to the functioning of a doctrine of *stare decisis* is clear from the above characterization of a "case." To reason from cases in the law is to reason from written documents. While reference to precedent has existed for centuries in the common law, historians accept that the formal doctrine of *stare decisis* did not harden up until the latter part of the nineteenth century (Allen 1964, 187–235; Evans 1987; Postema 1987; Postema 2002, 595–7; Cross and Harris 1991, 10–9). (Cf. Lobban, vol. 9 of this Treatise.) The development and expansion of a formal system of reporting court decisions was essential to the hardening process. "Cases"—written memoranda of the kind characterized—now existed in a form which allowed them to be cited in legal argument.

By *stare decisis*, however, is not meant merely a practice of reasoning from decided cases. *Stare decisis* has evolved into a very specific practice of reasoning from decided cases, one that is in essential ways a *normative* practice. That is, *stare decisis* is a doctrine about how courts should reason, not one about how they do reason. The doctrine requires courts, when faced with a precedent of the appropriate sort in the appropriate circumstances, to decide as the precedent case requires. Understanding how precedent functions as a source of law is a matter of understanding these norms.

3.2.2. Binding vs. Persuasive Precedent

There is a central normative distinction is that between "binding" and "persuasive" precedent. If an existing case is for a court a *binding precedent*, then the decision in the precedent case is dispositive for the decision in the instant case. If an existing case is for a court a *persuasive precedent*, then the decision in the precedent case has some, maybe even considerable, weight for the decision in the instant case, but it is not as such dispositive. It is extremely natural, and in fact it is quite standard, to express the idea of binding precedent by using the modality of necessity: "Lower courts must follow the decisions of courts above them" (Cross 1977, 145); "A court must follow the precedents established by the court(s) directly above it" (Caminker 1994, 824); "The prior case [...] is one which must be followed in the subsequent case" (Goodhart 1934, 41). But it is not clear how the "necessity" here, and the metaphor of "binding," should be interpreted.

It is also clear that, with respect to the present analytical project of seeking to understand *strictly* institutionalized sources of law, that the concept of

binding precedent is the one we need. Consider again our working definition of "strictly institutionalized source of law":

A law, or law-like rule, has a strictly institutionalized source just in case
i) the existence conditions of the law, or law-like rule, are a function of the activities of a legal institution

and

ii) the contextually sufficient justification, or the systemic or local normative force, of the law, or law-like rule, derives *entirely* from the satisfaction of those existence conditions.

I have italicized the word "entirely": Here in the case of reasoning from precedent we can see it at work. With respect to persuasive precedent, what leads a court to "adopt the reasoning," as the idiom has it, of a court whose decisions it is not bound to follow will not be simply the fact that the decision is on point and was issued by the court in question. Instead, regard will be had to considerations that are fundamentally substantive, not formal—considerations of coherence, for example, or of policy. Christopher McCrudden has recently charted what he sees as a growth in the use by one national jurisdiction of case-law from another jurisdiction in the specific area of human rights law (McCrudden 2000), a matter of persuasive precedents only. McCrudden identifies (ibid., 516–27) ten different factors that seem to produce the persuasive influence of precedents from other jurisdictions. None of them have the character that the reasoning is adopted simply because of the court whose reasoning it is.

It is important to underscore that the downplaying of precedent as a source of law in civil law systems is a downplaying of *stare decisis*, the notion of *binding* precedent. Persuasive precedent plays a crucial role. Patrick Glenn has argued that persuasive precedent is especially suited, in fact, to the typical structure of a civil law system (Glenn 1987). Richard Bronaugh has argued that persuasive precedent plays an important role even in a jurisdiction which respects *stare decisis* (Bronaugh 1987). Persuasive precedents, unlike binding precedents, "cannot compel a regretted outcome"; they can only be found convincing, distinguished away, or ignored (ibid., 231). All the same, "persuasive precedents are powerful and fair instruments of invention because, when convincing, they will show ways in which—again rationally and in all fairness—the fetters of binding precedent can be slipped" (ibid., 247).[4]

I will leave the philosophical commentary on the notion of binding precedent until a later section: For the present, examples will have to suffice. It is generally acknowledged that the doctrine of *stare decisis* is strictest in the United Kingdom. Whatever the term "bound" means, as things now stand,

[4] See Sections 5.2.3 and 8.2 below for other instances of the role of persuasive precedents.

the English Court of Appeal is "bound" by decisions of the House of Lords: That is, if the House of Lords has decided a case with fact situation *F*, and decided that case for the plaintiff, say, then, if the Court of Appeal is faced with a case with fact situation *F*, it is then bound to decide for the plaintiff also. The U.K. Court of Appeal, however, is not "bound" by decisions of the Australian High Court, even if the High Court has been faced with and decided a case with the exact same fact situation. Nor is the U.K. Court of Appeal bound by decisions of the Supreme Court of Canada. The Court of Appeal may consider and take what inspiration it will from decisions of courts of another jurisdiction, but it cannot be "required" to follow those decisions. The Divisional Courts, the lowest level of courts in the U.K. hierarchy, are bound by decisions of the Court of Appeal. In Canada, a provincial Court of Appeal is bound by decisions of the Supreme Court of Canada, but not by a decision of a different provincial Court of Appeal. Courts of Queen's Bench in a given province are bound by decisions of the Court of Appeal in that province, but not by decisions of Courts of Appeal of other provinces. In the days of Empire, the Supreme Court of Canada and the High Court of Australia were bound by decisions of the House of Lords in London. But they threw off those chains in 1949 and 1978 respectively.

These examples illustrate what might be called *vertical* bindingness. This bindingness is something it only makes sense to speak of in relation to an institutional hierarchy of courts. Courts higher in the hierarchy establish by their decisions precedents for courts lower in the hierarchy. But *stare decisis* can operate "horizontally" as well. The U.K. House of Lords had said in *London Tramways* (*London Street Tramways v London County Council* [1894] AC 489) that it would always consider itself bound by its own decisions. That is, if the same fact situation came before it a second time, then the case would be decided again in exactly the same way. In 1966, however, the House of Lords issued a Practice Statement declaring itself willing to "depart from a previous decision when it appears right to do so" ([1966] 3 All ER 77). Analogously, the U.K. Court of Appeal had stated that it was bound by its own previous decisions (*Young v Bristol Aeroplane Co* [1944] KB 718). However, after the 1966 Practice Statement, Lord Denning MR made a strenuous attempt to have the Court of Appeal likewise declare that it would depart from previous decisions, an attempt which was only finally thwarted by the House of Lords in 1979 (*Davis v Johnson* [1979] AC 264). In Canada, there appears a general willingness of appellate courts to depart from their own previous decisions (Gall 1990, 281–4).

The idea of being bound to decide a case the same way is, despite what I have said, too simple. The idea of one Court being "bound" by another, or by its previous self, amounts to the more complex idea that it must *either* decide the instant case in the same way as the precedent case, or else *distinguish* the instant case from the precedent case. Distinguishing an instant case from a

precedent putatively binding upon it is an important function of common-law tribunals. Distinguishing is not to be regarded as something opposed to binding precedent but rather as part of that practice. Joseph Raz contrasts what he calls a "tame" view of distinguishing from a stronger view (Raz 1979, 185). According to the tame view, a court distinguishes a precedent case simply when it determines that the reason or rule dispositive of the precedent case does not apply to the instant case. According to the stronger view, some further conditions must be satisfied than simply a determination of non-applicability. The reason or rule said to be dispositive of the precedent case must be appropriately modified or revised so that it does not apply to the instant case. The non-applicability must be justified. As Brian Simpson puts it, "distinguishing is essentially a way of replying to arguments which are being rejected" (Simpson 1961, 150).

A further standard qualification to *stare decisis* is the notion of cases being decided *per incuriam*, "inadvertently." If the court in the instant case can show that the court in the precedent case overlooked some relevant legal material, a relevant statute or precedent, then it is relieved of the obligation to follow the previous decision. Clearly, if taken seriously, rather than used simply as a convenient escape clause, the burden of demonstrating such "inadvertence" is large. Cases of deeming a precedent to be *per incuriam* are exceedingly rare.

There is also an important legal distinction between *stare decisis* and *res judicata*. The doctrine of *res judicata* is the doctrine that, when a decision has been reached by a competent court on the merits of a case specifically as to the parties and issues in the case, those issues cannot be litigated again by those parties. Both *stare decisis* and *res judicata* have in common that, as a result of a decision in a previous case, some given decision must now be reached in the instant case. But the two doctrines are very different. Dias identifies four main differences between the two doctrines (Dias 1985, 126–7):

1) *Res judicata* applies to the decision in the dispute, while *stare decisis* applies as to the ruling of law involved.
2) *Res judicata* normally binds only the parties and their successors. *Stare decisis* [...] binds everyone, including those who come before the courts in other cases.
3) *Res judicata* applies to all courts. *Stare decisis* is brought into operation only by decisions of the High Court and higher courts.
4) *Res judicata* takes effect after the time for appealing against a decision is past. *Stare decisis* operates at once.

Lord Halsbury is generally regarded to have conflated the two doctrines when he famously stated (*Quinn v Leathem* [1901] AC 459, at 506) that "a case is only authority for what it actually decides." A precedent has force beyond the parties to the instant case.

3.2.3. The Ratio Decidendi *of a Precedent*

But how does a precedent have such a force? A lower court, when adjudicating a case, is bound by a relevant decision of a higher court in the same jurisdiction. But what makes the higher court's decision relevant to the case in the lower court? It is not just that the decision is one by the higher court. The decision has to be one by the higher court on the same issue. But how is that determined? The chief device for managing issues of relevance in the area of common law precedent is the notion of the *ratio decidendi* of a case, literally the "principle of the decision." The *ratio* (for short) is to be distinguished from an *obiter dictum*, an expression of opinion by a judge that is external to the dispositive reasoning.

The issue of what exactly it is that constitutes the *ratio* of a case is one that has been hugely debated by theorists of the common law. The debate is charted, and the different theories evaluated, most thoroughly by Cross and Harris (1991, 33–96). I will not review the debate here. Suffice it to say that the concept of *ratio decidendi* is complex and elusive. There are nonetheless some fixed points of reference.

a) The much-maligned comment of Lord Halsbury quoted above is correct to this extent: A case which functions as a binding precedent does so because of some point of law decided in the case, and not for a point not decided in the case. One typical source of *obiter dicta* in a case is comments by judges on points of law not at issue. Judges are in fact, and rightly, encouraged not to make such comments. But how is it to be ascertained what point of law is at issue?

b) Judges will frequently say what they take to be the point of law at issue in a case. But even so the *ratio decidendi* cannot be equated to any such statement. The words the judge uses do not have canonical force, unlike the words of a statute. In a case governed by statute, a court faced with a situation in which the application of the statute is unclear cannot disregard the wording of statute. They must instead seek to interpret the wording of the statute, and discern its applicability by such a process. In the case of a stated *ratio*, a later court is under no analogous obligation. It can legitimately state the *ratio* of the precedent case in different words than the judge(s) hearing the precedent case themselves used.

c) (More controversially, on my part) Despite the fact that the language of "rule" is standardly used as a characterization of the *ratio decidendi*, it can be misleading to describe the *ratio* of a case as a "rule." Neil MacCormick (1987, 179) has argued that a *ratio* is more properly speaking a "ruling." An interpretation of a statute given in a case may come to be a precedent for future interpretations; but it is not the "rule" in the case, the statute is. Moreover (and I will return to this later), it is frequently only clear after a series of future decisions that a precedent case stands for a given *ratio*. Once such a hardening

process has taken place, then talk of the "rule" in the original precedent case becomes appropriate. For all that, the case will have had a *ratio* at the time.

d) A.L. Goodhart (1931, 1–26) has famously suggested that the *ratio decidendi* of a case is constituted by the principle that derives from the *material facts* of the case. Goodhart is right to point out that, in the total fact situation of any actual case, some facts will matter from the legal point of view and some will not. That the accused was seen driving away from the bank at high speed moments after the robbery matters; that the accused was driving a Ford does not; unless matter of identification are at issue, in which case it might matter; and so on. Even if one recognizes that there will be some interdependence between the principle for which a case is thought to stand, and the facts of the case thought to be material, the advantage of Goodhart's approach—to have the concept of "material fact" drive the concept of *ratio*—is that it makes easier the preservation of the non-canonical character of the language of a common law legal opinion.

I introduced above Bronaugh's image of the Complete Book of legal decisions: As I said above, the image captures well the essential feature of precedent as a source of law that the mere fact of a decision having been taken carries weight. We can now see, though, that the operation of a system of binding precedent such as that in the United Kingdom is different from merely finding the decision in the Complete Book in several important ways. First, the mechanism of the *ratio decidendi*, however that notion is unpacked, means that the precedent case stands for—may in principle be a precedent for—more than its own peculiar facts. Thus it does not follow from a given peculiar fact situation in an instant case not being in the Complete Book that there is no legal precedent binding on the court in the instant case. Second, the bare notion of presence in the Complete Book does not yield the functionally important decision between binding and persuasive precedent. We need to supplement the Complete Book with descriptions of the institutional structure of systems of courts. Third, even within a hierarchical jurisdictional structure of the required type, the bare notion of presence in the Complete Book does not explain the role of the passage of time. It is not just that a case from the eighteenth century in England will not be a binding precedent in Canada; it will not necessarily be a binding precedent in England either. Despite these points, the image of the Complete Book captures valuable intuitions, and should not be abandoned.

3.3. Precedent and Legislation

Precedent is typically listed second after legislation as a source of law, because precedent is regarded as subordinate to legislation. Under the doctrine of parliamentary sovereignty (see sec. 2.3 above), legislation is the highest form of law. It is important, however, to be clear what "subordinate" means in this

context. It might be thought that the subordination of precedent to legislation threatened the capacity of precedent to function as an independent source of law. This is not so, and the distinctions necessary to appreciating the point have significance beyond this particular chapter. Legislation is superior also to custom and delegation. We will examine in Chapters 4 and 5 the degree to which this superiority affects the capacity of custom and delegation to function as independent sources of law.

There is an important conceptual distinction between subordination and derivation. One form of law is subordinate to another just in case, where the two conflict, one will always be regarded as superior. Precedent and custom are both subordinate to legislation in the sense that a statute can always alter the effect of a court decision and a custom can be rendered of no effect by a statute.

> Precedent is subordinate to legislation as a source of law in the sense that a statute can always abrogate the effect of a judicial decision, and the courts regard themselves as bound to give effect to legislation once they are satisfied that it was duly enacted. (Cross and Harris 1991, 173)

"Bound," they note further, means whatever it means when courts speak of being bound by a precedent, a concept we will try to elucidate in succeeding sections of this chapter.

It does not, however, follow from the fact that one form of law is subordinate in this way—subordinate due to the power of abrogation—that there is also subordination by derivation. One form of law is subordinate by derivation to another form of law—is derived from another form of law, in short—just in case the validity of the second form of law depends upon its relation to the first form of law. Delegation (the topic of chap. 5) is subordinate to legislation both by derivation and by the power of abrogation. Not only may the powers of an administrative agency be changed or abolished at any time by statute (subordination by abrogation). Until legislation is passed to create a Labour Relations Board, or an Environmental Protection Agency, there is nothing there, no body with the power to issue legally authoritative rulings (subordination by derivation). Indeed, as we shall see in Chapter 5, this feature of delegation makes it problematic as a source of law.

Precedent is clearly not subordinate by derivation to statute or legislation. The very notion, both historically and conceptually, of judicial reasoning from precedent is that it is "judge-made law." The substantive scope of judge-made law—law in the realm of common law precedent—far exceeds that of legislation. In many areas of the law, common law rules constitute all, or most, of the law that there is. The fact that precedent is subordinate by power of abrogation to legislation does not imply that it cannot function as an independent source of law: It clearly does so function in common law legal systems.

Theorists wedded to parliamentary sovereignty as a fundamental axiom of jurisprudence have heroically tried to deny this obvious fact. Famously, John Austin wrote that:

> When judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule that they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. [...] The rules that he makes derive their legal force from the authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. [...] Its sovereign will "that his rules shall obtain as law" is clearly evinced by its conduct, though not by its express declaration. (Austin 1954, 31–2)

Austin claims, that is to say, that precedent is subordinate to legislation by derivation, not merely by the power of abrogation. But to turn the power of abrogation into a positive grant of authority is just a mistake. As Hart (1994, 45–8) has vigorously argued, there certainly are such things as tacit orders, but the relation of the legislature to customary, including judge-made, law is not of that kind. Hart gives the example of a high-ranking officer in the military who is aware of orders being given by a sergeant, and does nothing to interfere with or countermand these orders. Then one might say that the officer has him- or herself tacitly given those orders. But two features are crucial to this case. One is that the officer is genuinely aware of the orders being given by the sergeant. That feature does not reappear in the case of precedent and legislation; the legislators are not similarly aware of all the decisions being given in the common law. Second, the officer and the sergeant are themselves in a hierarchical order, such that the officer has the authority to countermand or vary the sergeant's orders if he or she so chooses. It would beg the very question of legal theory here at stake to say that legislation and precedent are so hierarchically arranged.

There are of course complexities here: I will mention briefly three (for more detail, see Cross and Harris 1991, 173–82). First , suppose a case where a court applies a statute, not directly in that the fact situation is explicitly covered by the language of the statute, but by applying the normative import of the statute to a fact situation deemed analogous. What is the source of law here—the statute or the judicial decision? Even though the case is presented as covered by the statute, the source can more plausibly be said to be the court. Second, a judicial decision can be abrogated by a subsequent statute, while some deeper common law principle for which the case is thought to stand may survive as part of the common law. Third, while a judicial decision on the proper construal of the wording in a statute does constitute a precedent for future cases of the application of that statute, such a precedent is typically more subject to limitation or distinguishing than the normal case of common law precedents. In fact, even if the exact same wording occurs in another statute, the precedent may be rejected as authority for how to construe that other statute. These complexities, though, do not affect the fundamental point being made in this section, that, despite precedent being subordinate to legislation by the power of abrogation, still precedent is properly thought of as an independent source of law.

3.4. The Modalities of Binding Precedent

3.4.1. Precedent and Logical Necessity

Now that we have some grasp of how precedent functions as a source of law, it is time to assess some of the theoretical problems thereby raised. I shall consider first the central concept itself of "binding" precedent. The language of necessity is typical, but what kind of necessity is this? Is it indeed any kind of necessity at all, or is the language of bindingness simply illusory?

The first tempting account of the sense of "necessity" can be quickly dismissed. It is easy to show that the bindingness cannot be the necessity of logical entailment, or even of material implication. Philosophers, legal theorists, and judges have all despaired of shedding light on binding precedent by appealing to the notion of logical necessity. The reason is not hard to find. Logical rigour transports one with infallible directness from point *A* to point *B.* But in courts of law, the most interesting questions are as to whether one is at point *A* in the first place, or whether point *B is* the point at which one wishes to arrive. Thus, if it is true that pheasants are livestock if and only if they are kept and bred for the production of food (*Earl of Normanton v Giles,* [1980] 1 All ER 106), and if it is true that given pheasants were not kept and bred for the production of food, then those pheasants are not livestock. But logic alone will not settle whether the antecedents are true, and the truth-value of the antecedents, not propositional logic, will be dispositive of the case. The matter is elegantly put by Lord Diplock in commenting on the notorious creation ex nihilo by the House of Lords of the supposed common law offence of conspiracy to corrupt public morals (*R v Knuller (Publishing, Printing & Promoting) Ltd* [1973] AC 435, at 470, commenting on *Shaw v DPP* [1962] AC 220):

> My major criticism of the reasoning of the majority of this House in *Shaw's* case does not depend upon the charge having been one of conspiracy. That reasoning can be reduced to a single syllogism.
>
> Every agreement to do any act that tends to corrupt public morals is a crime at common law. *Shaw's* act of publishing advertisements for prostitutes soliciting fornication tended to corrupt public morals. Therefore *Shaw's* agreement to do that act was a crime at common law.
>
> In English law it is for the judge alone to determine whether the major premise in such a syllogism is true. The truth of the minor premise is a question for the jury, if there is any material upon which a rational being could hold it to be true. I do not criticize the jury's verdict in the instant case upon the minor premise. I deny the conclusion only because I am convinced that the major premise is false.

If the following of a precedent case is to be represented as a logical derivation, then the instant case and the precedent case must have identical legally relevant properties. The determination of the identity of this relevance must occur *prior to* determining the validity of the derivation. The derivation as such is therefore useless.

3.4.2. Precedent and Rule-scepticism

The rejection of logical necessity characteristically produces as an extreme reaction the second account of the necessity in binding precedent, that of rule-scepticism. For the sceptic, if the determination of relevant similarity comes first, then the idea of one court being bound to follow the decision of another makes no sense.[5] C. K. Allen has put this view well. He remarks that the judge is bound, not in the sense that the superior court imposes fetters on him; rather, he places the fetters in his own hand. "The humblest judicial official has to decide for himself whether he is or is not bound, in the particular circumstances, by any given decision of the House of Lords" (Allen 1964, 290). Likewise, Winston claims that any litigant can always raise the question of whether his case is an exception to a given rule (Winston 1974, 31).

The sceptical response is inadequate because it blurs significant differences between cases. I shall mention three different cases where it might seem plausible to speak of a court's "deciding for itself" or "placing the fetters in its own hand." It will be seen that even if we suppose that this language is plausible in these cases, they are very specialized cases; in this manner I will throw into relief the ordinary instances of courts using precedents so that the implausibility of describing those ordinary cases in Allen's sceptical terms is manifest.

I will present first an example from the U.K. Consider the position of Bristow J. in the High Court (a court at the lowest level in the U.K. hierarchy), hearing the case of *Miliangos* (*Miliangos v. George Frank (Textiles) Ltd* [1975] 1 QB 487). He was faced with incompatible precedents, each from a higher court and so with a claim to be binding on him. On the one hand, the House of Lords had decided fifteen years ago in *Havana Railways* (*Re United Railways of the Havana & Regla Warehouses Ltd* [1960] 2 All ER 332) that a judgment providing remedy for breach of contract must always be in sterling. On the other hand, the Court of Appeal had decided a few weeks before in *Schorsch Meier* (*Schorsch Meier GmbH v. Hennin* [1975] 1 QB 416) that judgment should be given in the creditor's currency. In the event, Bristow J. considered himself (at 492) bound to follow the House of Lords ruling independently of the merits of the case. But it could be argued by the sceptic that, since Bristow J. was also bound by the Court of Appeal's decision, his court being lower in the hierarchy than the Court of Appeal, it can truly be said that Bristow J. decided for himself to fetter himself to the House of Lords and not to the Court of Appeal. The difficulty with the skeptical reading of this example is that one could argue that the House of Lords and the Court of Appeal are not of equal authority, even though the High Court is separately bound by

[5] Such scepticism is characteristic of legal realism. For more on legal realism, see, in this Treatise, vol. 11.

each. The House of Lords outranks the Court of Appeal. Thus, arguably, the case fails as a proof of the thesis that judges fetter themselves in cases of precedent, because really Bristow J. did not have any choice—his obligation was to follow the House of Lords.

This feature vanishes in my second example, that of the position of State Supreme Courts in Australia in the late 1970's. An Australian federal statute, the Privy Council (Appeals from the High Court) Act (1975), banned further appeals from the High Court of Australia to the Privy Council in Westminster, and soon after in *Viro* (*Viro v R* [1978] 18 ALR 257) the High Court further declared itself not bound by decisions of the Privy Council. The question then arose of the position of State Supreme Courts if faced with a decision of the High Court conflicting with a decision of the Privy Council (Blackshield 1978, passim; Bale 1980, 265–71). The High Court themselves in *Viro* were not of one mind, but there was a strong tendency to say that the decision of the High Court should be preferred by the State courts. But a distinction must be drawn between the competence of the High Court to make this kind of announcement with respect to matters of federal law and with respect to matters of state law. In the latter case, it was doubtful whether the High Court could pronounce with authority. This created a situation in which, in theory, there could be conflicting decisions of two coordinate courts, the High Court and the Privy Council, and no greater formal authority from the perspective of a state court vested in one than in the other. A case before a State Supreme Court would then seem genuinely to require a choice; the court would decide for itself by which decision to be bound, if indeed one could speak of being "bound" at all (Blackshield 1978, 65). This precise situation in fact then arose, in the State Supreme Court of New South Wales. In refusing leave to appeal to the Privy Council in *NEMGA*, Moffitt P for the Court remarks that "since the High Court and the Privy Council are equal, States must make their own decision on the matter" (at 474). The Court declared that it would as a matter of principle consider itself bound by High Court decisions and not Privy Council decisions.[6]

In a case such as this, the initial appropriateness of Allen's characterization in terms of "choosing for oneself" is evident. The State court clearly feels the pressures to be bound by "law made in Australia," rather than in Westminster. But these pressures result from Australia's colonial past, and are historical; they are not a matter of the necessities of a hierarchical legal system. But then, my point is, one only has to consider how exotic and specialized these cases are. Take the normal case. Imagine a State Supreme Court, faced with a

[6] *National Employers' Mutual General Association Ltd v Waind & Hill No. 2* [1978] 1 NSWLR 466. In the Supreme Court of South Australia, likewise refusing leave, in *Australian Government Workers' Association v. Armstrong* [1980] 25 SASR 441, Mitchell J. quotes with approval Moffitt's argument in *Waind.*

case raising the issue of excessive force in self-defence. The Court is straightforwardly now bound by *Viro,* which sets the rule in Australia for that issue. *Viro* binds lower courts in Australia in the normal case in a way that cannot be appropriately described by Allen's character in terms of "choice."

My third example is again from Australia. Quite soon after *Viro*, the High Court heard *Atlas Tiles* (*Atlas Tiles Ltd v Briers* [1978] 21 ALR 129), a case which raised the issue of whether an award of damages for personal injury or wrongful dismissal should take into account the liability of the plaintiff to income tax on the lost income. The controlling case to that point had been the House of Lords' decision in *Gourley* (*British Transport Commission v Gourley* [1955] 3 All ER 796), according to which liability to taxation is to be taken into account. The High Court in *Atlas Tiles* took the opposite view. However, two years later, in *Cullen* (*Cullen v. Trappell* [1980] 29 ALR 1), the issue was re-heard by the full Court, and this time the rule in *Gourley* was upheld. Given the fact that the High Court in *Cullen* was bound neither by *Gourley* nor by *Atlas Tiles*, it having the power to overrule its own decisions, and given that either the rule in *Gourley* would be upheld or it would not, then again we seem to have a case where the Court genuinely could "decide for itself" which precedent to follow. As the highest appellate court in Australia, it would not be entirely appropriate to speak of the High Court as either donning or casting off its own fetters. But if we do wish to speak in these terms of the High Court's position in *Cullen*, such a phrasing only serves to make clearer the way in which it would not be appropriate to speak in those terms of the normal case of Allen's "humblest judicial official," or even for that matter the frequent position of less humble officials in Courts of Appeal and the like. That is, again, we can construct a very specific kind of case to which the language of free choice of alternatives is plausibly appropriate. But we have to postulate some very idiosyncratic circumstances to do that. Such language is highly inappropriate for the normal case.

I do not wish the thrust of my argument against Allen's scepticism about the bindingness of precedent to be misunderstood. I am simply offering a phenomenological description of the differences between cases. I am not claiming outright that Allen's description is straightforwardly true of the three cases cited, but not of other cases: Nothing crucial turns on that. I am simply claiming that the cases are different, and leaving alone the matter of the most philosophically perspicuous way to represent the differences.

3.4.3. Precedent and Judicial Comity

A *third* view about the bindingness of precedent would be, not that the sense of bindingess is discretionary for each judge on each occasion, but still that it is felt or subjective only, simply a matter of judicial "comity"—a matter of deference or respect, not of right or duty. The officials of common-law legal

systems simply operate the system that way. They consider themselves required to decide thus and so in such and such circumstances out of respect for other courts in the system. There is nothing else to be said about it. The bindingness of precedent is simply, in the words of Lord Scarman in *Duport Steel* (*Duport Steel Ltd et al v Sirs et al* [1980]1 All ER 529, at 551), a "self-denying ordinance," "a judicially imposed limitation." The view has been expressed academically by Dias (1985, 158–9), and also from the bench by Lord Denning (*Davis v Johnson* [1978] 1 All ER 841, at 853-7). On this view, the philosophical view to take is that there is no philosophical view to take, but only an empirical or sociological view. This view is not the same as Allen's, for it does not deny the existence of systematic rules of precedent. Rather, it offers a certain account of those systematic rules, an account that treats them as norms of courtesy, not of legal duty. All the same, the account is open to the same kind of objection as is Allen's—that is, that it does not fit the cases.

I take as my example some reasoning offered by Lord Denning. His position as Master of the Rolls made him the senior justice in the Court of Appeal. For several years after the 1966 Practice Statement by the House of Lords that it would no longer be bound by its own decisions, Lord Denning sought to bring the Court of Appeal to the same decision. He attempted to persuade his fellow judges in the Court to lay aside the rule the Court had adopted in *Young*'s case in 1944 that the Court would consider itself, with limited exceptions, to be bound by its own previous decisions. In *Davis* in 1978, Denning produced the following argument (853–7). He characterized the pre-*Young* situation as one where the Court held to rules of precedent as a matter of "judicial comity." In his view, the Court in *Young*'s case purported to make the matter one of the rule of law, not of mere comity. The 1966 Practice Statement in the House of Lords shows, Denning claimed, that this distinction between "matter of law" and "matter of comity" is in this context untenable:

> That [the 1966 Practice Statement] shows conclusively that a rule as to precedent (which any court lays down for itself) is not a rule of law at all. It is simply a practice or usage laid down by the court itself for its own guidance; and, as such, the successors of that court can alter that practice, or amend it, or set up other guidelines, just as the House of Lords did in 1966.

Therefore, Denning concludes, the Court of Appeal is in 1978 no more bound by the 1944 rule in *Young* than it was in 1944 prior to the rule in *Young* being announced by judicial comity. Before 1944, when the Court followed its own precedents, it did so simply out of respect for past colleagues. What appeared to be a change in 1944 was simply the reiteration of that pattern of respect. No new element of bindingness was introduced.

This argument is highly ingenious, but philosophically confused. To appreciate this, consider the response of the House of Lords to Denning's promotion of his point of view. In tone, it began with strident accusations of disloy-

alty (cf. Lord Diplock, *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, at 874; Lord Simon of Glaisdale, *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, at 822), and subsequently modulated through affectionate despair to reluctant but sincere admiration (cf. Lord Diplock in *Davis v. Johnson*, at 1137, 1139; Lord Scarman, *Duport Steel*, at 551). Note, however, the use by members of the House of Lords of modal concepts. In the House of Lords hearing of *Davis*, Lord Dilhorne uses "conclusively" (1146), and Lord Salmon "must" (1153). Lord Hailsham *(Cassell*, at 809) talks of the "necessity" for courts to observe the rules of precedent. It does not follow from the fact that the judiciary in the United Kingdom commit themselves to operating a system of binding precedent that therefore what it is for there to be operating in the U.K. a system of binding precedent is just this commitment. Nor does it follow from the fact that the use of modal concepts cannot be analyzed in terms of logical necessity that such use cannot mean more than a self-imposed norm of courtesy and respect. The House of Lords could issue its 1966 Practice Statement changing its procedures under the doctrine of *stare decisis* because the House is at the outer limits of the system. The Court of Appeal, however, is within the system. The system of *stare decisis* may indeed afford the Court of Appeal opportunities properly termed "choices," when, for example, there is no controlling House of Lords decision, or when the case for distinguishing is as strong as the case for following a precedent. But the fact that the decision in *Young*'s case from henceforth not to overrule precedents set by the Court of Appeal was a decision of the Court of Appeal itself does not put the Court of Appeal in the same position as that of the House of Lords as regards revising such a rule. The language of modalities brings that out, and the language of comity and custom disguises it. The normativity of precedent cannot be elided in favour of patterns of respect.

3.5. Precedent, Bindingness, and Ruleness

3.5.1. Precedent and Hart's Social Rules

One way to make a somewhat more robust representation of the modalities of precedent is by moving up from "comity" to "social convention" or "social rule." H. L. A. Hart's representation of a legal system as a system of social rules is well known (see, in this Treatise, vol. 11). There are two dimensions to the view of precedent embodied in it. First, what one may call the formal rules of precedent (e.g., the rule laid down in *Young*'s case) are, in Hart's theory, secondary rules founded on the social practice among officials to accept from the internal point of view these rules as binding upon themselves (Hart 1994, 87, 231). The talk of "disloyalty" is easily interpretable as reference to what Hart refers to as the "internal" aspect of rules, for on Hart's view that aspect is manifested in criticism of oneself and others (ibid., 55–7).

However, there seems initially to be no room in Hart's social rule theory for any account of the modal qualities of a system of binding precedent. By "necessary" we do not mean merely "regarded by officials as necessary"; the internal aspect gives us a concept only of accepted normative standards, not of standards that have normative force independence of acceptance.[7] Rules of logic are normative standards; but it would be a fallacy to conclude that therefore the internal aspect gave us logical modalities. The problem raised by the Denning position discussed above remains.

Consider remarks such as that by Lord Scarman (*Duport Steel*, at 552) that "the Court of Appeal in this case [...] strayed beyond the limits set by judicial precedent." Lord Scarman's point is that the Court of Appeal is bound by the rule in *Young*, even if it does not accept that it is bound. If the Court of Appeal's being bound by the rule in *Young* meant no more than that the Court itself had the internal point of view towards the rule in *Young*, Lord Scarman's comment would lose its point. What reason would there be then to claim, as the House of Lords did, that the Court of Appeal would still be so bound *even if it no longer* had the internal point of view towards the rule in *Young.* It is at this stage that appeal to the logical modalities is made, and it is here that more is needed than merely the assertion that legal rules are conventional or social rules.

Hart rightly rejects the rule-sceptic's argument that the open-texturedness of legal rules implies that legal rules have no bindingness at all (Hart 1994, 135). If a case falls clearly under a valid rule, then it is simply an error to argue that, because the rule is fuzzy at its penumbra, the court is not determinately bound in a case that falls under the core. All the same, Hart's own account of precedent is inadequate. In his famous 1958 paper on "Positivism and the Separation of Law and Morals," he expressed the moral of his doctrine of the penumbra to legal language as "man cannot live by deduction alone" (Hart 1983, 64)—that suggests that that is how man does live at the core. Hart's account here seems to amount to attributing to precedent no more than what Ronald Dworkin has called "enactment force" (Dworkin 1978, 111), the force the *ratio* would have if it were a clause in a statute. Dworkin contrasts "enactment force" with "gravitational force," the force that a precedent exercises through its material facts as interpreted by courts, rather than through the wording of any *ratio* (Dworkin 1978, 11–2: For an account more generally of the opposition between Hart's and Dworkin's theories of law, see, in this Treatise, vol. 11). As Hart lays it out, the *ratio* of the precedent case is formulable in certain language; that language applies to the instant case; therefore the appropriate disposition of the instant case follows by logic alone. This style of analysis will only work for the established core,

[7] I have discussed the problems in Hart's notion of acceptance elsewhere; see Shiner 1992, 160–83.

only for straightforward cases of precedent. *Ex hypothesi* when a case is a hard case, a penumbral case, there exists nothing that "binds" in the sense of "yielding a decision by mechanical deduction." Hart's account of adjudication in hard cases, as is well known, is that such decisions are discretionary—that courts, as Dworkin puts it, are "simply not bound by standards set by the authority in question" (Dworkin 1978, 32). Hart talks of "choices," a "rule-producing function," "legislative" or "creative" activity, a "law-creating power," the exercise of "a creative function" (Hart 1994, 124–47). One must certainly note his disclaimers that much of the daily operation of the law is not like this (ibid., 135). Nonetheless, this non-deductive element of the law is the source of its ability to suit the human predicament, and is therefore of paramount importance.

Hart also argues that the element of discretion does not mean that adjudication in penumbral cases is arbitrary:

> A judge exercising discretion chooses to add to a line of cases a new case because of resemblances that can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose that may be attributed to the rule. (Hart 1994, 126–7)

He continues later:

> Neither in interpreting statutes nor precedents, are judges confined to the alternatives of blind, arbitrary choice, or "mechanical" deduction from rules with predetermined meaning. [...] [Judges] often display characteristic judicial virtues [...] [including] a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be *demonstrated* that a decision is uniquely correct: But it may be made acceptable as the reasoned product of informed impartial choice. (Ibid., 204–5; his emphasis)

Nonetheless, Hart must think that *something* significant about penumbral adjudication is brought out by the use of terms like "discretion," "choice," "creation," etc. I can only interpret this as a denial of any constraint, bindingness, or obligation with respect to the *particular* gravitational force ultimately deemed dispositive. Consider Dworkin's paradigm example of *Spartan Steel* (*Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557). The defendant contractors negligently cut a cable supplying power to the plaintiff steel alloy manufacturers. The loss of power rendered of much lesser value the melt of metal currently in the furnaces. Spartan Steel also lost time while the furnaces were restored to proper operating temperature after the power outage occurred and was remedied. Spartan Steel claimed damages not only on the loss of value on the melt in the furnaces at the time, but also the loss of profit on the four melts it would have put in the furnaces had they been operating normally. This case was a hard case, as at the time under U.K. tort law plaintiffs could recover damages for loss conse-

quent upon physical damage, but not upon so-called "pure economic loss," i.e., loss not consequent upon physical damage. The House of Lords applied the existing doctrine, which went back to a precedent a hundred years old (*Cattle v Stockton Waterworks Co* [1875] 10 QB 453). It allowed Spartan Steel damages on the melt actually in the furnace when the power cable was cut, but not on the four melts lost while waiting for power to be restored and the furnaces to warm up. Edmund Davies LJ entered a spirited dissent in which he argued that the principles that underlay recovery of damages for negligence implied that pure economic loss should be as recoverable as loss consequent upon physical damage.[8] Lawton LJ gives the most conventional opinion, doing little more than apply the precedent by which he deemed himself bound. However, given all Hart's talk about "decision" and "discretion," on his terms, there would be no sense in which Lawton LJ was *bound* in *Spartan Steel* to see the resemblance between *Cattle* and *Spartan Steel* as decisive. He exercised discretionary choice in doing so. Perhaps he was *bound* to choose impartially, judiciously, with due attention to alternative possibilities. But he was *not bound* to decide for the defendants; that he *chose* to do.

Hart thus accepts for hard cases an essentially sceptical analysis of binding precedent, an Allen-type "rule." His scepticism may not be pure rule-scepticism, or rule-scepticism "all the way down." But it is still scepticism about the genuineness of the gravitational force of precedents. The use by Hart of the label "discretion" and his emphasis on "choice" indicates that he has not freed himself from the grip of mechanical jurisprudence as much as he thinks he has. How else to construe the idea that what faces a judge in a hard case is *genuinely a choice*, except in terms of the idea that demonstration is impossible (cf. the quote from Hart 1994, 204–5 above)? If this is right, then there is something odd about the notion of "reasoned choice." For if "reasoning" means "deductive reasoning," what seems to be given with "reasoned" is taken away from us with "choice." One might say at this point that "reasoned choice" is simply one of those illuminating paradoxes in philosophy, that the deep nature of penumbral adjudication can only be brought about by such a juxtaposition of clashing ideas. In an important way, as will be seen, this is absolutely right. However, tactical questions arise about the stage in the discussion of these problems at which the deployment of the paradox will be most effective. The argument of the remainder of this section may be taken as an argument that Hart deploys it too soon. His talk of discretion and choice has caused disquiet among opponents that his disclaimers have not removed. The reason is that his understanding of the nature of logic and of the notion of rule is too shallowly rooted in background understanding of these matters. If

[8] Even now, recovery for economic loss is still tightly circumscribed in the U.K., the U.S. and Canada, although more standardly recoverable in Australia and New Zealand. For a thorough analysis, see Feldthusen 2000.

we can deepen our grasp of the background, then the notion of "choice" will be purged of its troublesome connotations, and the paradox can do its therapeutic work.

3.5.2. Precedent, Wittgenstein and Rule-following

3.5.2.1. Wittgenstein and Following a Rule

I believe that a more promising way of understanding the distinctiveness of binding precedent is to be found in Ludwig Wittgenstein's ideas about rules and necessity. There are three essential elements to Wittgenstein's account of rules: (1) that the concept of a rule is compatible with the concept of a practice; a rule is neither an untouchable piece of language nor a mere agreement in opinion; (2) a rule is still a rule, even though it is not the case that all its future applications are determined by the language in which it is phrased; (3) even given this account of a rule, a concept of necessity is available. I shall deal with these in turn.

1. *Rule and Practice.* "Obeying a rule" Wittgenstein says, is *a practice* (Wittgenstein 1958, 202). "A rule stands there like a signpost. Does the signpost leave no doubt open about the way I have to go?" (ibid., 85). "A person goes by a signpost only in so far as there exists a regular use of signposts, a custom" (ibid., 198). Wittgenstein is asking us to reflect here on what really constitutes behaviour according to a rule. It is not simply that the rule says, "Do *X*" and *A* does *X*. My following the signpost to Vancouver is not a matter of the signpost pointing to the right and reading "Vancouver" together with my turning to the right. I must recognize that *this is* a signpost, and that *that is* the way the signpost is telling me to go. Those things are not given by the existence of the signpost and my right turn. They are a matter of my taking the signpost in a certain way. But what is the foundation of *that*? It is no kind of idiosyncratic decision on my part (cf. ibid., 199). Nor is it that the signpost itself tells me (ibid., 85). Rather, this is just the way that signposts function in our society. It is part of our form of life; it is a practice, a custom for us to behave that way. "It is not a kind of *seeing* on our part; it is our *acting* which lies at the bottom of the language-game" (Wittgenstein 1974, 204; his italics). He expresses the same idea in a fundamentally important distinction between "agreement in opinion" and "agreement in judgment," the latter glossed as "agreement in form of life" (Wittegenstein 1958, 241–2). The conscious deliberation and discussion of a jury will result in agreement in opinion. But our normal application of language to the world is not like that. We do not normally deliberate before calling red things red, cars cars, and courageous acts courageous. We learn as children to apply these terms naturally, and what we all naturally learn by this process is *how things are. This* agreement is an agreement in judgment. Our *judgments* are attuned to one another by natural

development, by inheriting a language and a form of life; it is not that our opinions become attuned to one another by deliberation.

2. *Rule and Determination.* Given that rules are practices, based on agreement in judgments, how then do rules determine their applications? It is tempting to think that a rule determines in advance how it is to be applied—that this is precisely what is meant by there being *a rule* about some matter. Without this antecedent determination, how can there be a rule? We have already noted that many of the problems both in understanding the bindingness of precedent stem from the need to make a separate determination of whether the instant case is, in the appropriate sense, "like" the precedent. Wittgenstein accepts this need. "The use of the word 'rule' and the use of the word 'same' are, says Wittgenstein, 'interwoven'" (Wittgenstein 1958, 225). That is, we do not understand a rule unless we understand what the rule will countenance as identical actions performed according to it. However, Wittgenstein also warns (ibid., 215-6) against the philosophical (and, I would add, practical) uselessness of using the identity of a thing with itself as a paradigm of sameness. This is to put at a more general level the inadequate idea, born of the hopeless quest for perfectly justified decisions, that a case is only a genuinely binding precedent for another case *exactly* like it. In this context of uncertainty, the determination of what counts as "the same case" for the purposes of a given rule comes about only from a *practice* of taking the rule that way. But this means that the rule is that practice. The rule *qua* piece of language does not determine what counts as the same thing; only the rule *qua* practice does that.

3. *Rule and Necessity.* One might feel inclined now to say the following. Wittgenstein may be right in the above two points about fuzzy-edged social rules such as the rules of etiquette or of morality. But the hard rules of logic and mathematics are different. Why should not law as a rigorous discipline aspire to be like the latter? And if it does, then will not the above two points be irrelevant?

Notoriously, Wittgenstein gives this same account of mathematical rules: "But then what does the peculiar inexorability of mathematics consist in? [...]. It is usable, and, above all, *it is used*" (Wittgenstein 1956, I.4; his italics). Later he writes:

We now draw attention to the fact that the word "inexorable" is used in a variety of ways. There correspond to our laws of logic very general facts of daily experience. They are the ones that make it possible for us to keep on demonstrating those laws in a very simple way (with ink on paper for example). They are to be compared with the facts that make measurement with a yardstick easy and useful. This suggests the use of precisely these laws of inference, and now it is *we* that are inexorable in applying these laws. Because we "*measure*"; and it is part of measuring for everybody to have the same measures. Besides this, however, inexorable, i.e., *unambiguous* rules of inference can be distinguished from ones that are not unambiguous, I mean from such as leave an alternative open for us. (Wittgenstein 1956, I.118; his italics)

There are various images that the notion of "binding" can be used to express, as there are various cases of inexorability. In one sense, a law binds only when it is unambiguous. We have seen how Hart's use of "discretion" and "choice" seems to presuppose such a sense. But that notion of binding does not illustrate anything deep about the operation of precedent, any more than taking deductive inference as the paradigm of inexorability reveals anything deep about the inexorability of mathematics.

Wittgenstein's account of mathematics and logical necessity depends on relating it to fundamental human practices such as counting and so-called natural deduction. The point of this is *not* to defend rule-scepticism in mathematics and logic. Rather, it is to show in what the character of being governed by inexorable rules consists. Wittgenstein does it by the well-known device of considering what could be said about one who wishes to continue the series 996, 998, 1000, ... by 1004, 1008, ... , and how such a one may be said to be ignoring a valid rule (Wittgenstein 1958, 183ff.; Wittgenstein 1956, passim). This account of what it is to follow mathematical and logical rules makes following such rules a *special case* of what it is to follow *any* rule. What is being marked by talk of "inexorability" is simply the peculiar relation of mathematical and logical rules to social practice and to "very general facts of daily experience" (Wittgenstein 1956, I.118). In the world we live in, calculating in the way we count is *the* way to calculate, to use numbers as they should be used. In a world suitably different, where very general facts of nature were different, this would not be so. But we are not in, and cannot conceive of, such a world.

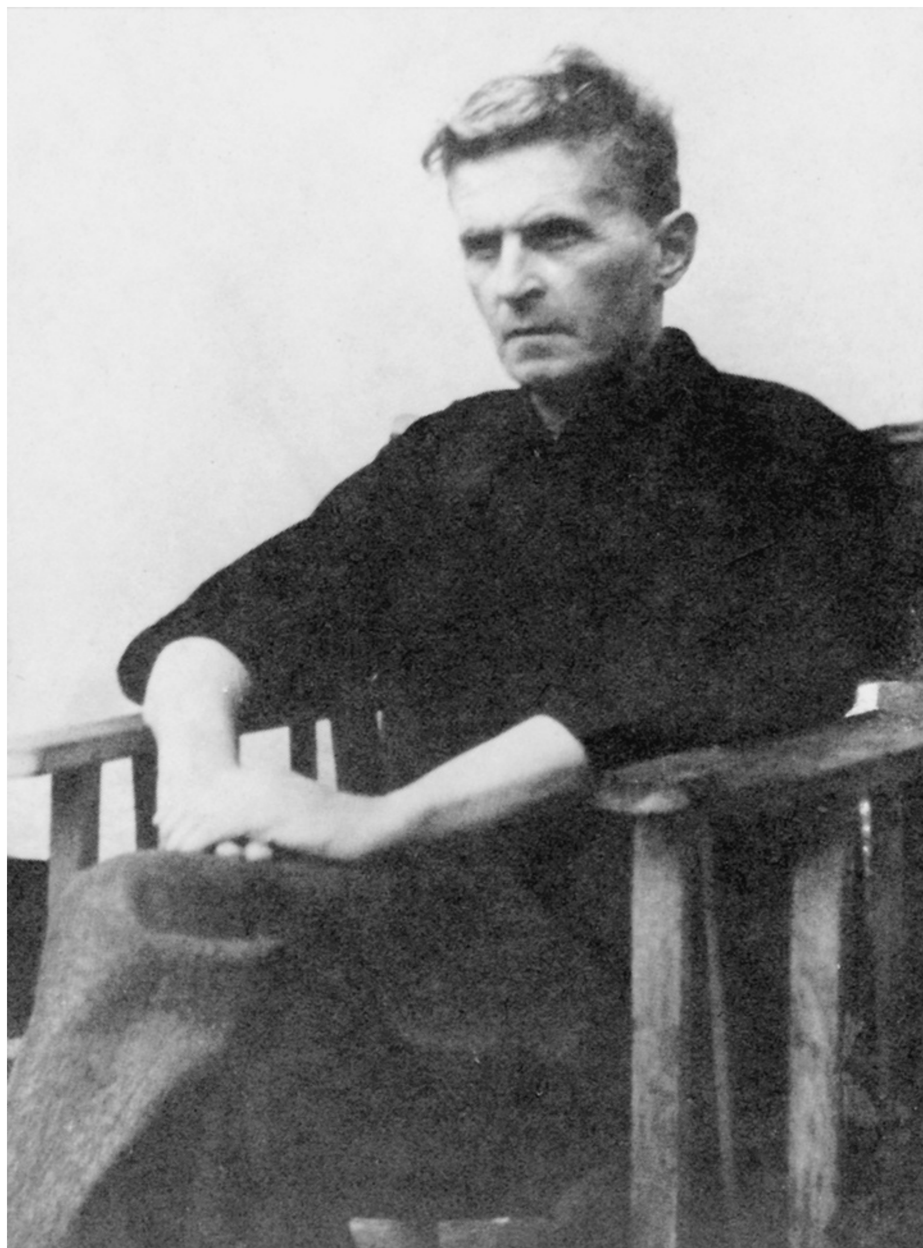
3.5.2.2. Precedent and Following a Rule

We must now apply these thoughts to a philosophical consideration of binding precedent.[9] I have three points to make. First, the purpose of introducing Wittgenstein's remarks about mathematics is this. Theorists considering binding precedent are pulled in different directions by conflicting intuitions. On the one hand, they sense the appropriateness of using modal language to characterize the requirements of *stare decisis.* On the other hand, they see clearly that legal rules are not like and do not function like the rules of mathematics or logic with respect to clarity and immutability, and moreover they see that legal inference, unlike mathematical or logical inference, is not "inexorable." In these circumstances, the second intuition generally wins the tug-of-war, and the modal language is either regarded as a naively optimistic projection or

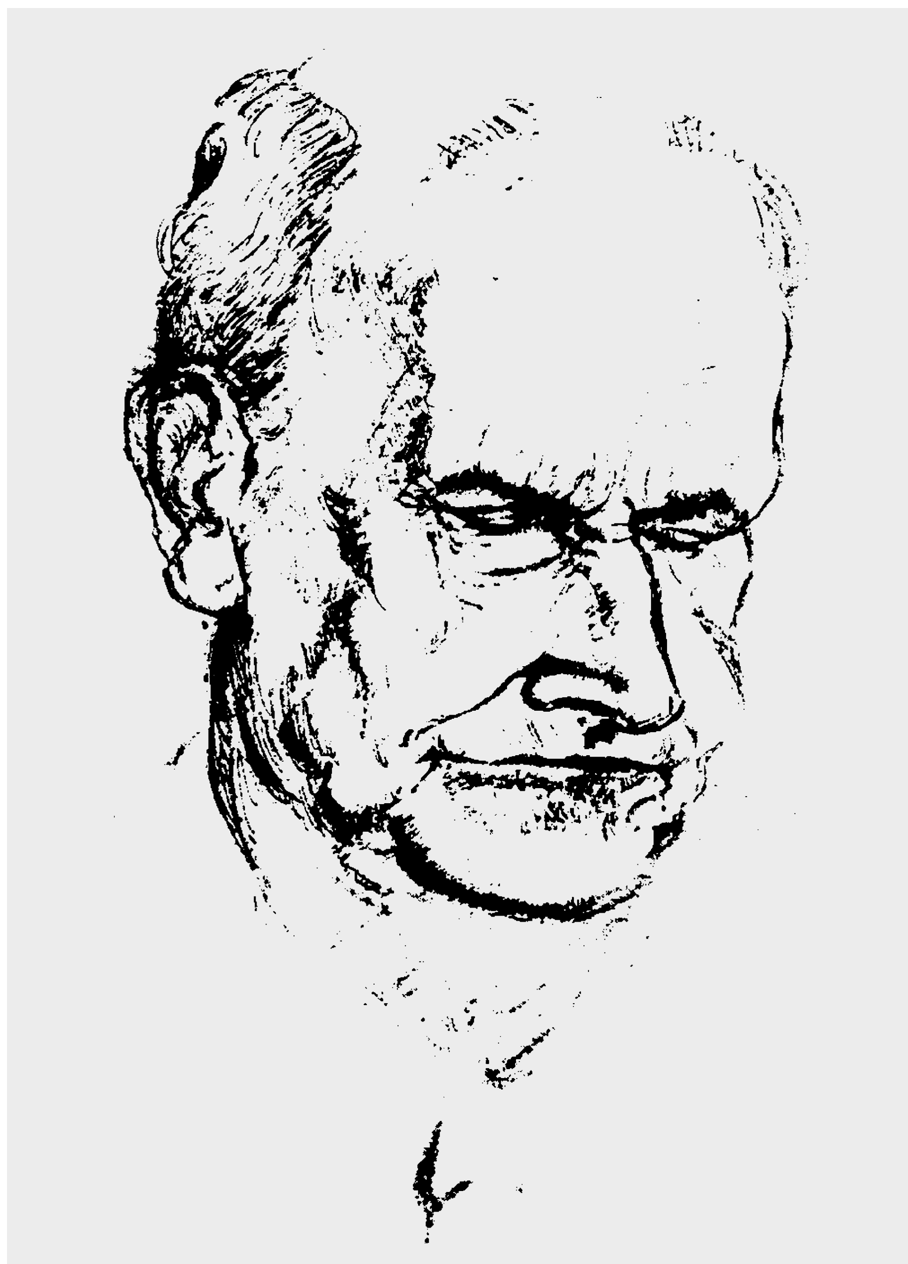
[9] The following comments are a revised version of points made some time ago (Shiner 1982). The application of Wittgenstein's ideas to law has also been explored by Brian Bix (1993) and Dennis Patterson (1999), although each says very little about precedent. See also the essays in Patterson 1992.

else the modalities are given a weak explanation in terms of "necessary to the English legal system" or judicial comity, along the lines referred to earlier. The point of introducing Wittgenstein's philosophy of mathematics and logic is to show that in fact there is *no* deep conflict between these intuitions. It is perfectly possible for modal language to be entirely appropriate even though there is also something important about a human activity brought out by calling it a practice. Only because a false picture of the inexorability of mathematics holds theorists captive are they tempted either to search for similar perfection in law or else to adopt various drastic strategies for coping with its absence.

Second, Wittgenstein's general account of rules shows that there really is no conflict either between something's being a matter of rule and a matter of practice. Yet frequently theorists discussing precedent proceed as though these notions are incompatible. Again, this is because of too abstract and idealized a picture of rules. This is quite explicit in some discussion (Rickett 1980, 144–6; Goldstein 1979, 388–9), but it also turns up in more subtle ways. Brian Simpson, for instance, stages a lengthy attack on the idea of the common law as a system of rules (Simpson 1973). I will mention two points where the wrong picture of rules influences him. He remarks (ibid., 86) that it is misleading to speak of judicial legislation. Part of his point here is very well taken—that when judges develop the common law in new ways they do not do so by conferring privileged status on a form of words, whereas that is the way that legislatures develop the law. As Charles Collier has commented, if a court decided in advance a case or question not before it, it would be accurate to call that an exercise of legislative power (Collier 1988, 774); deciding matters that are before the court is not legislating. However, Simpson then goes on to regard the non-legislative character of precedent as a reason for denying that the common law is a system of rules. Statute law is the nearest that law ever comes to being like logic or mathematics (and that is not *very* near!). The assumption underlying the thought that common law *rationes* are not like statutes, and therefore not rules, can only be that the rules of mathematics and logic are the ideal paradigms for what it is to be a rule. But that assumption is false, and so this reason for regarding the common law as a system of rules falls away. Shortly afterwards, Simpson derides the thought that the 1966 Practice Statement is a rule of precedent by saying, "one moment the House of Lords or the Court of Criminal Appeal is absolutely bound by its own decisions, the next moment it is not" (Simpson 1973, 87). Of course, the Practice Statement is absurd, if looked at in that way. However, events leading up to the Practice Statement are an essential part of the evolution of *stare decisis*, as are also events after it. The "black and white" aspect of the application of a rule is characteristic of the rules of mathematics and logic, and it is silly to imagine that legal rules have that characteristic also. But that is no reason to deny that they are rules; again, only bewitchment by the picture of logi-



Ludwig Wittgenstein (1889–1951)



Sir Rupert Cross (1912–1980)

Picture from: *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*. Ed. C. F. H. Tapper. London: Butterworths, 1981.
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cal and mathematical rules can make one to think that it is. As the story above (sec. 3.4.3) of Lord Denning's campaign to get the U.K. Court of Appeal to drop the rule in *Young*'s case illustrates, the practice and rules of precedent have a more powerful inertial force than can be made to deviate by one voice. It is not simply that other judges hold different opinions from Lord Denning; it is rather that the weight of the rules and the practice lie against him. They have a life independently of given particular judges, because of the values and goals the judges agree in judging them to represent.

Third, I submit that the Wittgensteinian account I am offering is the best way of accounting for a striking feature of the way cases actually function as precedents. The feature in question is alluded to by Lord Wilberforce in *Anns* when he remarks that the relevance of *Donoghue v Stevenson* to statutory bodies only became clear in *Dorset Yacht* (*Donoghue v Stevenson* [1932] AC 562; *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294; *Anns and others v London Borough of Merton* [1977] 2 All ER 492). (I feel like amending this to "it only became clear in *Anns* that it was already clear in *Dorset Yacht*," but that is by the way.) The feature remarked on is that the precise law for which a particular case is precedent will standardly only become clear after a line of subsequent cases has been decided. *Donoghue* laid down central principles of the law concerning negligence. For a long time, it was thought inappropriate to apply these principles to bodies created by statute. Later it was thought clear that in fact the principles did apply. With great decisions, such as *Donoghue*, the process of determining for what the case stands continues and continues. If we assume that "rule" and "practice" are complementary, this fact about great precedents is easy to understand and accept—for it is a direct manifestation of that complementarity. If we do not accept this view, then we get into unnecessary tangles. For instance, it is certainly true that, after *Hedley Byrne* (*Hedley Byrne & Go Ltd v Heller & Partners Ltd*, [1963] 2 All E.R. 575), a case in which a plaintiff was allowed to recover damages for economic loss consequent upon negligent misstatement, there was in U.K. law no absolute prohibition against recovery in tort for economic loss not consequent upon physical damage. But, given the wrong picture of rules, spurious questions come thick and fast. Does *Hedley Byrne* constitute simply a narrow exception to the so-called exclusory rule as regards pure economic loss, or does it show that there is no such rule? If the rule no longer exists, was it *Hedley Byrne* that put paid to it, or some later case in which the rule was further eroded? Despite the grist that these questions would seem to provide for the academic mill, they are questions that it is impossible and unnecessary to answer. The rule concerning recovery for economic loss is not reducible to any *ratio* in any one case, but is an organic practice that is still growing (Feldthusen 2000). Recognition of this fact does not require one to think therefore that speaking of rules here is a bad joke; rather, it requires sensitivity to the kind of rule we are dealing with.

Subsequent history has expanded the scope of *Donoghue*. But subsequent history can equally well reveal a precedent to stand for less than was thought. In *Stanley* (*Stanley v Georgia* 394 US 557 [1969]), Stanley was convicted under a Georgia state statute that prohibited the possession of obscene material. Striking down the statute, the U.S. Supreme Court boldly observed that the "right to receive information and ideas, regardless of their social worth, [is] fundamental to our free society" (at 564). Soon after *Stanley* was decided, it became clear that the obscenity industry could read the fine print of the decision, and lower courts followed them. As one trial judge put it, "if a person has the right to receive and possess this material, then someone must have the right to deliver it to him" (quoted in *US v Reidel* 402 US 351 [1971], at 355). *Reidel* was one of four cases in quick succession, testing various restrictions on the acquisition or importation of obscenity, in all of which the importer appealed to a supposed right to receive (*US v Thirty-seven Photographs* 402 US 363 [1971]; *US v Twelve 200' Reels of Super 8mm Film* US 413 123 [1973]; *US v Orito* 413 US 139 [1973]). The Court had to repeat time and time again that it did not mean what it said, that *Stanley* was all about (as indeed it was, bar the throwaway lines about a "right to receive") the freedom to possess the expressive material of one's choice in one's own home, and the error of government attempts to invade the home and the mind, a much more restricted issue than a grand "right to receive information."

Two further important contemporary attempts to correlate precedents and rules should be mentioned. Schauer claims that "what distinguishes reasoning from precedent from reasoning from rule [...] is the necessity in precedential reasoning of *constructing* the generalization/factual predicate that already exists in the case of a rule" (Schauer 1991, 183; his emphasis). A precedent case is never exactly the same as a case before the court. So the court has to construct the generalization about the precedent case that will bring the instant case under the precedent case. A rule just is a generalization of a certain kind, and thus will wear on its face whether the instant case falls under it. Schauer's point, if I understand him aright, is both subtly correct and subtly misleading.

A city ordinance forbids parking in front of fire hydrants; I park my car in front of a fire hydrant. A person who tries to argue that my situation is not covered by the rule, that a decision is involved in seeing that my case is covered by the rule, can only be taken to be playing some kind of philosophical game. On the other hand, consider the position of the court in *Hedley Byrne*, faced with the precedential rule ("rule," if you like) about no recovery of damages for pure economic loss. The defendant who negligently gave false information about the credit-worthiness of a client caused the plaintiff economic loss. The loss was indeed not consequent upon physical damage, since no physical interaction was at issue. The court in saying that the exclusionary rule did not apply to Hedley Byrne's situation had to construct ("construct," if you like) the generalization: "No recovery for pure economic loss not conse-

quent upon physical damage except where caused by negligent misstatement." Talk of "constructing a generalization" thus appears to have more applicability in the case of precedent than it does in the case of paradigm legal rules like statutes. It appears also to be a valid way of marking the distinction between reasoning from precedent and reasoning from rules. But that way, as we have seen, lies skepticism about the necessity of the system of precedent, and we have rejected such skepticism.

Schauer also, though, goes on to argue that there are going to be controls on the construction of generalizations. In his general discussion of rule-based decision-making earlier in the book (Schauer 1991, chaps. 3–5), Schauer has been at pains to point out how decision-making by rule depends on what he calls "entrenched generalizations." Such factors as natural kinds, culturally unbudgeable norms, classifications constitutive of language, and so forth exercise a great degree of control over how one individual can adapt language to their own pleasure. Schauer argues for analogous controls to exist in the case of reasoning by precedent. He reiterates the example, familiar from *Donoghue v Stevenson*, of the snail trapped in the ginger-beer bottle, and rightly says that we will find the assimilation of this case to others of adulterated consumer products "culturally, linguistically, and psychologically much easier" than an assimilation to a fox, say, caught in a steel trap (Schauer 1991, 186). He further comments that, although reasoning from precedent cannot be properly understood without attention to the role of weight, weight plays a role also in reasoning from rules (ibid., 187).

In a similar spirit, Barbara Levenbook introduces the concept of "exemplar force" (Levenbook 2000, 183ff.). The echo of Dworkin's notions of enactment and gravitational force is intentional. Levenbook rightly regards the use of precedent in the law as a form of example-setting which occurs outside the law as well, and, also rightly, says that exemplar force is independent of background justification (ibid. 188–98). She is aware, though, that more has to be said about how exemplar force operates, if it to be more than a label. She appeals to two notions, that of "social salience," and then, in the legal context in particular, the special role of officials and "the legal subculture" in creating and defining social salience (ibid., 211–23). Social salience functions in her theory analogously to entrenchment in Schauer's. The role of officials as distinctive contributors to social salience seems a more attractive way of explaining their role in the creation of the bindingness of precedent than an explanation in terms of comity.

In short,

> except for the fact that the lack of a canonical formulation of a factual predicate substantially increases the indeterminacy of the rule set forth in the precedent case (an indeterminacy that is compounded when multiple and extensionally divergent precedent cases are available), nothing about precedent-based constraint uniquely differentiates it from rule-based constraint. (Schauer 1991, 187)

Schauer seems to overlook how much the notion of entrenchment takes away what has apparently been given by the notion of construction. Schauer's account brings out that the difference between "mere" generalization and rule is no more, and no less, than the difference between generalizations that are constructed and generalizations that are entrenched. But if the "ruleness" of rules is properly explained by cultural entrenchment, so also is the ruleness of precedential reasoning. Precedential rules have to be "constructed," if you like, but that act is but a moment in a deeply-rooted on-going practice of rule-making, applying, and following.

At this point any residual disagreement between Schauer and myself will be a matter of seeing how both our two views are needed, to preserve a delicate theoretical balance. We are both at pains to reject the dichotomy of mechanical jurisprudence versus discretionary choice, even in hard, let alone easy, cases. Schauer, however, continues to believe that something important about reasoning from precedent is brought out by emphasis on indeterminacy and constructing generalizations, as differentiating reasoning by precedent and reasoning by rule. I prefer to emphasize what Schauer rightly calls the "ruleness" of reasoning by precedent, by arguing that some at least of the inclination to distinguish reasoning by precedent from reasoning by rule comes from an overly formalized view of what reasoning by rule is like. Ultimately, reasoning by precedent is what it is and not another thing. Its nature emerges from studying the interplay of theories, rather than from the correctness of one single theory.

3.6. The Justification of Precedent

3.6.1. Introduction

The doctrine of *stare decisis* is a fundamental feature of common law adjudication, even though it is true that the doctrine is observed less strictly elsewhere in common law jurisdictions than it is in the U.K. Established though it is, theorists have felt that the doctrine nonetheless needs principled justification. The difficulties are felt to arise from the fact that a court, when bound to adjudicate a certain way for reasons of *stare decisis*, will on occasion state that, but for the doctrine, they would have decided the case differently and that the other view seems normatively more attractive. "*Stare decisis* requires that courts conform their decisions to decisions reached by previous courts, and sometimes those previous decisions will have been unjust. *Stare decisis*, that is, sometimes requires courts to reach unjust decisions" (Peters 1996, 2033). Alexander thinks that analysis of precedent must focus on precedents that are "incorrect" in the sense of being governed by "principles of political morality" which were "misapplied" (Alexander 1989, 4). Precedent "demands that a court adhere to a prior decision that it believes to be wrong" (Kornhauser

1989, 65; see also Cross and Harris 1991, 3). As these commentators point out, *stare decisis* thus characterized seems paradoxical and greatly in need of justification—how can it be a morally justified requirement to do the morally wrong thing?

I believe that such a characterization of what is involved in *stare decisis* deeply misleads both as to the structure of reasoning from precedent itself and as to the perfectly appropriate questions about justification that do arise. I shall explain.

3.6.2. The Structure of Stare Decisis

The characterization of reasoning from precedent as paradoxical misleads as to the structure of such reasoning in the following way. Precedents through their *rationes decidendi* function as what Joseph Raz has called "exclusionary reasons" (Raz 1975, 35–48). Reasons for action that bear directly on what to do, and go into the balance of reasons, are first-order reasons. Reasons that are reasons for acting in relation to given first-order reasons are second-order reasons. These may be positive (reasons for acting on certain reasons) or negative (reasons to refrain from acting on certain reasons). Second-order reasons that function to exclude action on the basis of the first-order reasons that fall within their scope are exclusionary reasons. The reasons for action represented by the social facts of permissions or legal requirements are at least first-order reasons for action—that I promised to do *A*, or that the law requires me to do *A*, are each reasons for doing *A*. But these social facts are also second-order, exclusionary reasons, excluding from the practical reasoning reasons against doing *A*. Only so, claims Raz, can we explain the tension that arises when a person sees that performing *A* is warranted by the balance of reasons but performing *A* is forbidden by law. Conflicts between first-order ordinary reasons and second-order exclusionary reasons are resolved, not by the relative strength of the two competing reasons, but, as Raz puts it, by a general principle of practical reasoning which determines that exclusionary reasons always prevail (Raz 1975, 40). Note that Raz's view is actually less dramatic than this bald statement implies. There may be conflicts of weight between second-order reasons themselves. Moreover, exclusionary reasons have the dimension of scope; they exclude only first-order reasons within their scope. Thus by either route a given exclusionary reason may be defeated, and some action it ostensibly debarred thereby reinstated as the thing to do. The true principle is not, "Always act in accordance with exclusionary reasons," but "One ought, all things considered, always to act for an undefeated reason."

Raz's view is that in general the law functions as a system of exclusionary reasons (Raz 1975, chap. 5). I am not concerned with that broader issue here, but simply with seeing the formal rules of *stare decisis* as exclusionary reasons. The application of this account to *stare decisis* is as follows. Take a case where

a lower court is required to decide a case a certain way because of a controlling prior decision by a higher court. The effect of this requirement of *stare decisis* is that the substantive reasons which the lower court might otherwise have had to decide the case, say, in favour of the plaintiff are *excluded* from its reasoning, so that now it must decide in favour of the defendant. The effect of *stare decisis* is to change the array of reasons facing the court, rather than to add new reasons.

There is one immediate objection available to the above claim. Both Stephen Perry (Perry 1987; 1989) and Schauer (Schauer 1991, 88–93) have objected to Raz's story about legal requirements functioning as exclusionary reasons in the following way. They accept that the presence of a legal requirement—and the doctrine of *stare decisis* is in this sense a legal requirement although its norm-subjects are courts, not citizens—makes a difference to the balance of reasons. They claim, however, that it functions, not to exclude first-order reasons, but rather to alter their weight, to create a very strong presumption in favour of certain first-order reasons rather than others. As applied to the case of *stare decisis*, the thought is that the effect of a requirement to follow ("follow or properly distinguish," if you like) the precedent decision of a higher court is to add a great deal of weight to the substantive reasons embodied in the decision of the higher court, and thus alter the balance of the reasons facing the lower court. Perry refers to what he calls a "strong Burkean notion of precedent" ("Burkean," not because of any invocation of Edmund Burke's actual views, but because of a general notion of deference to the past): "A court is bound by a previous decision unless it is convinced that there is a *strong* reason for holding otherwise" (Perry 1987, 222).

The merits of the issue here are complex. I have given reasons elsewhere (Shiner 1992, 103-115) for preferring Raz's original view on this particular issue. Let me here focus on one of Perry's arguments that I have not previously addressed. One of his motivations for preferring his own "strong Burkean" account to Raz's "exclusionary reasons" account of precedents is that on his account, but not Raz's, the important feature is preserved of the lower court reasoning being to some degree, even if a very small degree, still transparent to the relevant substantive reasons. Perry's view is thus a very sophisticated version of the approach that seeks to relieve *stare decisis* of the burden of forcing courts to act immorally. Perry argues, with some plausibility, that overruling of precedent of the kind the U.K. House of Lords now permitted itself after the 1966 Practice Statement is best understood on his "strong Burkean" model (Perry 1987, 243–8). But, if that is true, then the point can be turned against the application of the "strong Burkean" account to *stare decisis* as a whole. For the House of Lords is in a different position in relation to its own past decisions from the position that lower courts are in relative to decisions of higher courts in a system of *stare decisis.* After the Practice Statement, only issues of background political morality are relevant to the deliberation of the House.

The fact that a given decision exists has weight simply out of whatever substantive weight its pastness represents, not for the formal weight of pastness itself. Other courts are in the position that the House was itself in before the Practice Statement. Perry refers to the House's former self-binding as an "extreme and somewhat aberrant" application of *stare decisis* (ibid., 247), but it is not; it is representative of the position of other courts than the House of Lords in the hierarchical U.K. jurisdiction.

Implicit in my previous remarks is the assumption that a common law *ratio* is an ordinary kind of legal rule, so that whatever may be said about ordinary kinds of legal rules may be said about *rationes*. But we have seen already that such an assumption is not entirely correct. Whereas rules embodied in statutes are given to courts to apply, common law *rationes* must to some degree be constructed. A court deciding a tort case about pure economic loss may seem, on the face of it, to be "given" the exclusionary rule, but this is not wholly so. The variation of the rule that took place in *Hedley Byrne* was regarded as quite acceptable—but no court would take it upon itself to vary the wording of a statute. Let us suppose that "indeterminacy" is the right term to use. The element of indeterminacy in reasoning from precedent, then, could be taken to weaken any claim of a common law *ratio* to function like a Razian exclusionary reason. How could a *ratio* exclude, it may be said, if it has to be confirmed by the court supposedly bound by it? Is not the "strong Burkean" account reinstated by this indeterminacy?

We have arrived again, I believe, at a point where definitive answers are elusive. I acknowledged in the previous section that it might be more appropriate to speak more loosely of the "ruleness" of common law *rationes*, rather than to speak of them directly as rules. The question is whether the "ruleness" of *rationes* is sufficient that it is more illuminating to think of them as exclusionary reasons than not so to think of them. The question cannot be definitively answered. I will, however, now go on to sketch an approach to the justification of precedent that presupposes the exclusionary reasons model. If that approach makes sense, then some further reason for the exclusionary reasons model will have been given.

3.6.3. The Justification of Precedent

There are many standard ways in the literature of seeking to justify *stare decisis*. Richard Wasserstrom, for example, lists certainty, reliance, equality, and efficiency (Wasserstrom 1961, 60–73). Fairness, in the sense of the maxim "Treat like cases alike" is regularly mentioned. More specific reasons are also adduced, such as the avoidance of delayed justice, the greater decision-making proficiency of superior courts, the desirability of uniform decision-making in the law (Caminker 1994, 843–55). Dworkin (1986, 24–6, 240–50) appeals to the value of integrity. Anthony Kronman (1990) appeals to tradition and re-

spect for the past as values in themselves. Gerald Postema (1997) neatly combines elements of both these views while rejecting each, in defending integrity as coherence with the past, but subsuming its value under justice as a characteristic of well-ordered historically extended communities. Some of these suggestions make more sense than others. For an effective critique of Kronman, for example, see David Luban (1991). For Caminker's own critique of the values mentioned above, see Caminker 1994, 856–64. For a sustained critique of consistency as a value in itself, see Peters 1996.

The issue I want to raise now is not whether these values succeed in the task of justifying *stare decisis.* Antecedently, it would seem unlikely that any single value or set of values would by itself or themselves justify *stare decisis.* It is more likely that these values contribute to the justification in complex ways with differing weights in differing contexts. The pressing question is how to understand the role that whatever values do justify precedent play in the process of justification.

Let us suppose that I have established a sufficiently robust, or even entirely robust, case for common law precedents functioning as exclusionary reasons. They then will cause, commensurate with that robustness, an opacity of the reasoning to the background reasons for having the rule in question. Consider again the rule against recovery for pure economic loss. The main reason for having such a rule is to avoid the social cost of excessive exposure to liability (Feldthusen 2000, 199–209). A lower court faced with a plaintiff whose plea amounts to seeking recovery of damages for pure economic loss does not have to consider whether the rule against recovery is a good rule; it just has to apply the rule. Let us suppose, though, that in the case in point, injustice was done to the plaintiff in question. In retrospect, to have lumped economic loss from negligent misstatement in with other cases of economic loss not consequent upon physical damage would have been unfair to plaintiffs in the position of Hedley Byrne. (And perhaps applying the rule caused unfairness to Spartan Steel as well; but that's for another time.) So the exclusionary rule prior to *Hedley Byrne* resulted in unfair treatment of some plaintiffs, and perhaps even now it also so results. How though to understand the relation between cases of specific unfairness and the exclusionary rule?

It is an inescapable feature of decision-making by rule that such decision-making is sub-optimal (Schauer 1991, 100ff.). Rules phrased in general terms will be over-inclusive, under-inclusive, or both, with respect to specific instances. We accept that, though, in order to achieve the advantages of decision-making by rules (Schauer 1991, 135–66). But if that is so, then in an important sense the plaintiff (to use a legal example) who is the victim of under- or over-inclusion is not treated "unfairly" or "wrongly." To claim that the decision was "unfair" to the plaintiff is to claim implicitly that the decision should have been taken particularistically—that is, without regard to the rule and the reasons for decision-making by rule. If you like, we can say that the

decision to disallow the plaintiff recovery was "counterfactually unfair." I mean: If the case had been decided particularistically, without reference to any antecedent rule, and decided on grounds of fairness, then the plaintiff would have recovered. But it is a mistake to think that therefore the actual decision under *stare decisis* was unfair.

I cited at the beginning Alexander's notion of the "natural model" for precedent. Alexander contrasts the natural model with what he calls the rule model of precedent (Alexander 1989, 17ff.). He suggests at the end of the article that the best model of precedent overall seems to be a two-level one. At the level of how reasoning from precedent plays itself out in the actual functioning of a common law legal system, the rule model is the best model. But still we can ask at the level of institutional design within background political morality: Should we institute, or maintain, a system of *stare decisis* as an essential mode of judicial reasoning? Here, Alexander argues, the natural model is correct. At this level, we should look at the particular system involved, and make sure that it can be justified for reasons of political morality (ibid., 48–56). It seems to me that Alexander is correct about this. The values that are arguably fostered by a system of *stare decisis* come in at the level of justifying having such a system at all. The system itself, however, insulates decision-making within the system from those values directly influencing the individual case, certainly at every level below that of the supreme tribunal of the system. To the extent that there is "indeterminacy" within the system at the lower court level—mechanisms of distinguishing precedent cases and the like—then there will be seepage of the background values into instances of decision-making in cases. But this seepage constitutes a feature of the rule model of reasoning from precedent, not its repudiation.

Chapter 4

CUSTOM

The third of the three traditionally main sources of law is Custom. The standard view of contemporary analysis is that the importance of custom historically is great, but, from the point of view of current legal practice, its importance is slight. This is so both in the common law and the civil law traditions. The only exception is in the case of international law, where customary law is still of great importance: The sources of international law will be considered separately in Section 8.4 below. Customary law is still important, of course, in communities where the mode of existence, application, and enforcement of binding social norms is primarily informal: The law, or "law," of such communities is not discussed here.

There is now not much controversy within the common law tradition concerning custom as a source of law. The reason, as we shall see below (secs. 4.2–4.3), is that, in addition to the minor importance from the point of view of legal practice, the common law rules as regards custom's functioning as a source are well established, and leave relatively little room for discussion. (But they do leave some room—see sec. 4.4 below.) As regards the civil law tradition, John Merryman comments that the amount of scholarly writing is out of all proportion to the importance of custom as a source. However, he comments also that the explanation of this phenomenon is clear—the need to justify treating as law something not created by the legislative power of the state.

> To give custom the force of law would appear to violate the dogma of state positivism (only the state can make law) and the dogma of sharp separation of powers (within the state only the legislature can make law). (Merryman 1984, 23)

I will focus in this chapter on custom within the common law. In Section 4.1, I will say something about the historical origins of custom as a source of law, and identify the prime sense of custom with which we are here concerned. In Section 4.2, I will set out the conceptual framework within which custom as a source of law is discussed. In Section 4.3, I will set out the rules according to which custom functions as a source of law. In Section 4.4, I will discuss the jurisprudential puzzles that are raised by the role of custom as a source.

4.1. Historical Foundations of Custom as a Source of Law

4.1.1. From Social Norm to Common Law

Custom is historically important, for the simple reason that "historically custom is the original form of law" (Jolowicz 1963, 198). It seems a frequently

occurring pattern of cultural diachronicity that a society, as it grows in size and complexity, proceeds from the situation where societal norms governing behaviour are acknowledged and applied by informal methods to one where the norms are created, identified, varied, and applied by formal institutions dedicated to such a purpose. H. L. A. Hart is well known for making this process of development central to his account of law (Hart 1994, 91–9). We need not, and arguably should not, join Hart in characterizing the process as one of passage from "primitive" to "developed" law. Familiarly we refer to the early stages of such a history as ones in which the norms are purely "customary." We need to remember the perspective from which contemporary legal theory uses such terminology. The law in the typical modern municipal legal system is a separate and specialized social institution, with a considerably degree of autonomy—certainly conceptual autonomy, and to a sizeable extent functional autonomy. The obverse to this fact is that we understand as "law" norms whose origin and operation occurs within this autonomous system. They are therefore not "customary."

In modern analysis, we seem to arrive at the notion of "customary law" as the designation for law that does not have status in the other, familiar institutional ways. But we should not be misled by the apparently simple idea that "custom was originally important as a source of law, but is not so now." One may put the point thus: Those who lived at the stage when their law was all customary would not have known that their law was all customary; they could not have had the notion of "customary law." It is only at a later stage of more advanced institutionalization of law that one can look back and see that once law was not so institutionalized. If we take the past history of our own society, the normative system on which phases of that society with only customary law were based performed the same task, and was of the same social significance, as our modern non-customary law. The same is true of contemporary societies that lack the familiar formal institutions of a modern municipal legal system.

In England, for example,[1] as S. F. C. Milsom observes, William the Conqueror "took over a going concern, one to which he claimed lawful title" (Milsom 1981, 11). There were already some trappings of formal legality centuries before the crucial period that most scholars have in mind when they speak of the historical importance of custom as a source of law. There were local courts, applying pre-existing rules, but the rules were not written down; they were the rules used because it was the custom to use those rules. The first significant stage in the evolution of England's common law legal system was that of the development of a tier of proceedings above the local level, that of the justice of the king. The "king's bench" travelled to different localities, and over time a level of normative discourse developed through these judges that was in common to many or all localities—the "common law," the

[1] I sketch here matters dealt with far more fully elsewhere in this Treatise: see Lobban, vol. 9.

general and not merely the local customs of the realm. "These judges did much to create a uniform common law" (Paton and Derham 1972, 195). The next stage was the centralization of the king's courts, and with centralization came specialization (Milsom 1981, 11–36, especially 25–7). With specialization came professionalization, and institutional autonomy. Custom represented a source of law, not in the sense that customary norms were directly applied by courts, but in the sense that customs were, to the extent that they were, judicially interpreted, and these independent judicial norms became the law.

Still, however, "it was long the received theory of English law that whatever was not the product of legislation had its source in custom. [...] The common law of the realm and the common custom of the realm were synonymous expressions" (Fitzgerald 1966, 189). Yet,

> it may confidently be assumed [...] that this doctrine did not at any time express the substantial truth of the matter, and that from the earliest period of English legal history the common law was in fact to a very large extent created and imposed by the decisions of the royal courts of justice, rather than received by those courts from the established customs of the community. [...] The identification of the common law with customary law remained the accepted doctrine long after it had ceased to retain any semblance of truth. (Fitzgerald 1966, 189–90)

The truth is, rather, that "the common law of England has long ceased to be customary law and become a body of case law instead" (Fitzgerald 1966, 206). "Assuredly [the Common Law] is not merely an agglomeration of spontaneous customary rules, unless we are to ignore the vital influence of judicial interpretation upon our law" (Allen 1964, 71). "[The theory that the common law was equivalent to social custom] was not really tenable even in Blackstone's day. The immensely greater part of the common law had already been elaborated by the decisions of judges—decisions which could not possibly have been mere applications of pre-existing custom" (Jolowicz 1963, 206).

4.1.2. General Custom and Local Custom

The question of historical fact when, if ever, social customs truly were sources of law in themselves we will leave to the historians. Analytically, we see at play in this (very) brief historical summary a distinction of prime importance for the topic of this chapter, that between "general custom" and "local custom." "General custom" means simply custom operative generally, across the land; "local custom" means custom operative simply locally, in a certain part of the land. For example, in the county of Kent in England, it was judicially noted as long ago as 1330 (*Sara de Richford's Case* [1330] YB 3 Ed 38 [Mich pl 12], quoted by Allen 1964, 614) that the inheritance law there differed from elsewhere in England: All sons shared equally in the case of intestate succession,

as opposed to the rule elsewhere that the eldest son inherited. As Milsom notes, this local exception survived in Kent until both rules were abolished by statute in 1925 (Milsom 1981, 11).

The historical process sketched above is essentially one of the judicially operated "common law" taking over and crowding out true "general custom of the realm." "The common law" as used now refers to the system of judge-made judicial precedents discussed in the previous chapter; it is primarily contrasted with statute law or legislation (see chap. 2 above). General custom could be a source of law only because it is equivalent to the common law and the common law is a source of law. But then in that case general custom is not a source of law; rather, the common law is. The common law is sometimes called "the custom of the courts" (Dias 1985, 187); "general custom" and "the custom of the courts" are equivalent. It follows then that "general custom is no longer at the present day a living and operative source of English law" (Fitzgerald 1966, 211), in the sense of an independent source, a source not reducible to any other kind of source, a source *proprio vigore*, by its own force or "vigour." "General custom now has no law-constitutive effect of its own" (Dias 1985, 193).

It follows further, moreover, that the issue at stake in this chapter is the extent to which, and mode in which, *local custom* continues to be a source of law *proprio vigore*. When theorists speak of custom as no longer being a significant source of law, they must be taken as making two separate points: General custom is not a source of law for the reasons cited above; local custom is not, or is not significantly, a source of law, for reasons relating solely to it. The truth of the claim about general custom can be readily conceded, and general custom will not further be discussed in this chapter. The truth of the second claim need not be conceded; it will now be investigated. Picture the form of the investigation this way. Imagine that there was a point (although whether there was, and if so when it was, is something on which historians do not agree) when there was only the written law or legislated rules, and pure social custom. Represent this state of affairs as a yellow circle with a blue band around it. Represent now the growth of judge-made, professionalized common law as the appearance and growth of a red band within the blue band. (And, if you like, expand the size appropriately of the blue band itself. Expand too the absolute size of the circle, to represent the ever-increasing role of law in our lives.) As the blue and red bands increase, the yellow contracts. The question is, Does the yellow ever disappear altogether? Or do there remain small spots of yellow still uncovered?

4.2. The Conceptual Framework for Custom

As noted, from now on by "custom" we will be referring to what has hitherto been called "local custom," as opposed to so-called "general custom." All the

same, there is room even within the category of custom so understood for further ambiguities. Here is Salmond:

> The term custom [...] has three distinct meanings of various degrees of generality:
> a) As including both legal and conventional custom;
> b) As including legal custom only, conventional custom being distinguished as usage;
> c) As including only one kind of legal custom, namely, local custom, as opposed to the general custom of the realm. (Fitzgerald 1966, 198, n. m)

By "legal custom" is meant custom that has the force of law, and thus is putatively a source of law. At this point in the analysis in this chapter, by "custom" we mean (c) in the above quotation. I will continue to use "custom" only in this sense. I will not use the term "usage" here, as it is found less frequently (a less common usage, as it were).[2] I need now to explain the difference between custom and conventional custom.

"A usage or conventional custom is [...] an established practice which is legally binding, not because of any legal authority independently possessed by it, but because it has been expressly or impliedly incorporated in a contract between the parties concerned" (Fitzgerald 1966, 193). Conventional custom "depends for its force on its acceptance and incorporation in agreements between the parties to be bound by it" (Jolowicz 1963, 214, n. 6). Conventional custom in this sense is still operative in the law of contract. As a recent textbook has it, "in some circumstances, and under rigorous conditions, a trade, business, or professional usage or custom may be incorporated by implication into a contract, and become one of its terms" (Fridman 1994, 483). The conditions are that the conventional custom be clear or certain, notorious, reasonable (including a lack of conflict with any existing legal provision), and "so generally acquiesced in by those in the particular trade, business, or profession that was involved in the contract that it may be presumed to form an ingredient of the contract" (Fridman 1994, 484; Fitzgerald 1966, 195–6; Allen 1964, 135–6). The example that established the force of conventional custom occurred at the end of the nineteenth century (Fitzgerald 1966, 217–11; Jolowicz 1963, 215–7). It concerned the law relating to negotiable instruments. A rule of common law existed that bills of exchange were negotiable by virtue of the custom of merchants, and the question then arose whether debentures payable to bearer were similarly negotiable. In 1873 the Court of Queen's Bench ruled (*Crouch v Crédit Foncier of England* [1873]LR 8 QB 374) that they could not be negotiable. Debentures were too recent an invention for there to have arisen a conventional custom concerning them; the existing presumption of the common law that they were not negotiable must therefore stand. In 1875, however, the Court of Exchequer Chamber ruled

[2] The term will reappear in Chapter 6, as part of the discussion of constitutional conventions—see 6.1.3 below. See Section 8.4.3 for usages in international law.

(*Goodwin v Robarts* [1875] LR 10 Ex 337) otherwise, and the custom of the negotiability of debentures was regarded as well established by 1902 (*Edelstein v Schuler and Co* [1902] 2 KB 144). The court in *Crédit Foncier* was applying the established rules of the common law (see sec. 4.3 below) concerning the standards for the legal force of custom. The ruling of the court in *Goodwin*, therefore, amounts to an acknowledgment that conventional custom may operate in derogation of the common law—that is, may supplant the common law. Salmond grants that this is so, with the important qualification that "the modern custom of merchants or of any other class of the community possesses [no] general authority to derogate from the common law, except so far as express agreement may derogate from it" (Fitzgerald 1966, 209). To permit conventional custom to override the common law in the absence of any formal contract or agreement would be make nonsense of the idea of common law. Conventional custom is *ex hypothesi* external to the common law. If the common law does not have enough normative force to override such external norms absent express agreement, then it would have no normative force at all.

I will not discuss further the case of conventional custom. However, we do need now to explore further the issue raised in the previous paragraph of the relation between custom and the two other prime sources of law, statute, and precedent. In Chapter 3, we have already noted the priority of statute over precedent; a common law rule cannot be applied in derogation of a statute (see sec. 3.3 above). I have also explained in Section 3.3 the important conceptual distinction between subordination by abrogation and subordination by derivation (ibid.). One form of law is subordinate to another just in case, where the two conflict, one will always be regarded as superior. Precedent and custom are both subordinate to legislation in the sense that a statute can always alter the effect of a court decision and a custom can be rendered of no effect by a statute (Cross and Harris 1991, 172). It is, however, doubtful whether a custom is subordinate to precedent in this sense. The "tests of the validity of a local custom are too deeply rooted in our law to be changed by judicial as opposed to parliamentary action" (ibid.).

It does not, however, follow from the fact that one form of law is subordinate in this way—subordinate due to the power of abrogation—that there is also subordination by derivation. Custom has some form of subordination to precedent, in the sense that the conditions under which customs are law *proprio vigore* are a matter of established rules based on precedent, even though the application of such rules in some given particular case may be such as to permit the legal force of local custom in abrogation of the common law. Cross and Harris are of the view that therefore custom cannot be an "ultimate principle" of the English legal system (ibid.). It remains to be seen (in sec. 4.4 below), however, whether they are correct here on the effect that the relationship of custom to precedent has on the claim of custom to be a source of law.

I have tried to do two things in this section. The first is to identify, among the variety of meanings of "custom," the one that concerns us here, as being the kind of custom that lays claim to being *proprio vigore* a source of law. That sense is local custom, not general custom, and not conventional custom. I have also tried to identify the constraints within which such custom operates as (subject to any qualifications resulting from our analysis in sec. 4.4) an independent source of law. These are that it so operates in its right and not only because of prior agreement, and that it operates within the constraints of i) being subordinate by the power of abrogation to statute, ii) up to but not beyond a certain point subordinate by the power of abrogation to precedent, and iii) in ways to be specified seemingly subordinate by derivation to precedent. I believe that even within these constraints a case can be made for custom as a genuine source of law, and will present such a case in Section 4.4.

4.3. The Common Law Rules for the Validity of Custom

As the previous discussion has implied, within the common law the conditions that a custom has to satisfy before it is acknowledged to be law are clearly established by precedent. Jurisprudential treatises reveal a high degree of unanimity on this topic, although there are variations in the detail of the discussion and in terminology. This section is therefore largely a matter of reporting, rather than analyzing, these conditions. The fullest account is offered by Allen (1964, 67–160, 614–32, especially 129–46). I will therefore follow his account here, noting accounts of other scholars as appropriate. Allen himself in turn largely follows the classic eighteenth-century account of Blackstone,[3] with emendations as appropriate. As Allen (1964, 129) remarks, "the primary function of modern judicial analysis is to examine the nature and reality of *existing* custom, not to invent new customs or arbitrarily to abolish those which are proved to exist in immemorial practice." "The chief purpose of these [sc. the common law rules] rules or tests is to determine whether the general and particular customs of our law are, *as a matter of established fact*, proved to be recognized social practice" (ibid.; all emphasis Allen's). The tests all "tend in one direction—proof of the actual existence and operation of the custom" (ibid., 130).[4] Allen outlines in all nine tests; let us simply follow his order of exposition.

First, he gives a pair of initial tests—that the custom be *exceptional*, an exception from the ordinary law of the land; that it be *limited*, to a particular class of persons or a particular locale. He regards these as two different ways of stating the same thing, that a custom not be in conflict with any statute or

[3] As do Jolowicz (1963, 208–13) and Paton and Derham (1972, 195).

[4] For the remainder of this expository Section 4.3 I will refer to Allen's text merely by page number, for convenience.

any fundamental principle of the Common Law (ibid., 130–1). If a custom were not exceptional, the controlling law would be the ordinary law of the land, not the custom. Custom cannot conflict with statute, in view of the supreme position of statute under the doctrine of parliamentary sovereignty. “If an Act of Parliament lays down that every pound avoirdupois throughout the kingdom shall be 16 oz., a local custom that every pound of butter sold in a particular market shall be 18 oz. is bad and unenforceable” (ibid., 131, referring to *Noble v Durrell* (1789) 3 TR 271, refusing to uphold the custom against the statute 13 & 14 Car II, c.26). Allen puts the point as regards precedent in the form of no conflict with “any fundamental principle of the Common Law,” because he accepts that, within specified tightly defined contexts, derogation of the common law is possible.

Then Allen gives six further tests, which he characterizes as “only various modes of weighing the evidence for and against the existence of alleged customs” (ibid., 133). These are:

1. *Existence from time immemorial.* This test amounts to a test of “continuous, and therefore certain, existence,” as opposed to “a mere habit, practice, or fashion that has exited for a number of years” (ibid., 133). The need for a practical operationalization of “time immemorial” is obvious: The form it takes in law is of some interest. It is defined as “from 1189 AD,” the first year of the reign of Richard I. That was the date fixed by the Statute of Westminster 1275 (Stat 3 Ed I, c. 41) for the bringing of writs of right. The writ would not lie unless the claimant or his predecessor in title had possession of the land since 1189 (Jolowicz 1963, 209).[5] This model was applied to the case of custom. Furthermore, “if a custom has existed for a long time and there is no actual disproof of it since 1189, then there is a strong presumption that it has existed from time immemorial, and unless any other objection can be made against it, it will be upheld” (Allen 1964, 134). The classic instance of this rule in operation is *Simpson*. I quote the headnote:

Appellant [Simpson] was charged under 5 & 5 Wm. 4, c.50, s.72 [a statute of the reign of William IV], with obstructing a public footway. He had put up a stall for the sale of refreshments at a statute sessions for the hiring of servants; this had been done for more than fifty years, and the statute sessions had been held before 5 Eliz., c.4 [a statute of Elizabeth I]. Appellant, thereupon, contended that he had a right by custom to erect his stall in the same way as at a fair, or, at all events, that he bona fide claimed such a right, and the justices’ [the local justices in the county of Lincoln] jurisdiction was therefore ousted.
Held [by the Court of Queen’s Bench], that the justices were right: for that, as the statute sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III [1327-77], there could be no such custom by immemorial usage as was claimed. (*Simpson v Wells* (1872) LR 7 QB 214)

[5] On writs of right generally, see Milsom 1981, 119–43.

2. *Continuance*. "Interruption within legal memory defeats the custom" (Allen 1964, 136). Note that the criterion applies to the claimed customary right; that is what must be continuous, not the use of the right. In *Wyld*, "a customary village right to hold a 'fair or wake' on the Friday in Whitsun week had not been exercised since 1875, but inasmuch as it had been confirmed as an 'ancient usage' by an Inclosure Act of 1799, it was held to have become a statutory right in perpetuity, which nothing short of an Act of Parliament could revoke" (*Wyld v Silver* [1963] 1 QB 169). Absent, however, such an independent confirmation of the existence of the right, if it has not been made use of for a long period of time, a presumption arises that there was no such right (*Hammerton v Honey* [1876] 24 WR 603, per Jessel MR). An open piece of land called Stockwell Green was leased in 1813, fenced in in 1816 and again in 1855 when the first fence had fallen into disrepair. The inhabitants of Stockwell thus has been excluded form the Green for a long time when in 1875 they claimed, unsuccessfully, a right by custom to use and enjoyment of the land.

3. *Peaceable enjoyment.* This is the expression used by Allen (1964, 136): so also Paton and Derham (1972, 195), Jolowicz (1963, 209–10). Others express the test as "enjoyment as of right"—cf. Dias (1985, 188), Cross and Harris (1991, 168), Salmond (Fitzgerald 1966, 200–1). The underlying idea is expressed by the maxim *nec vi nec clam nec precario*, neither by force, nor secretly, nor at will (or "by revocable licence"). A "custom" which "has only been wrested from the public by the strong hand is not a custom at all" (Allen 1964, 137). The same is true for a "custom" existing by revocable licence. An oyster fisherman was unable to get the courts to compel the City of Colchester to give him a licence to fish, even though the city had been in the habit of granting such licences for a fee since the time of Elizabeth I. There could not be any peaceable enjoyment or enjoyment as of right to such a licence, since it was solely within the discretion of the city to award such a licence (*Mills v Mayor, Aldermen, and Burgesses of Colchester* [1867] LR 2 CP 567).

4. *Obligatoriness.* The rule must be supported by the *opinio juris sive necessitatis*.[6] Those affected by the rule must regard it as obligatory; "the community in some way throws its force behind the particular rules" (Paton and Derham 1972, 193). Whether anticipating or following Hart's well-known distinction between "habit" and "rule," the latter duty-imposing and the former not (Hart 1961, 54–6; 1994, 55–7), Allen distinguishes habit and legal custom precisely in the sense of obligatoriness.

[6] For the important role of *opinio juris* in customary international law, see Section 8.4.3 below.

5. *Certainty.* "The court must be satisfied by clear proof that the custom exists as a matter of fact or legal presumption of fact" (Allen 1964, 138). This rule is "purely a rule of evidence" (ibid.). In *Wilson* (*Wilson v Willes* [1806] 7 East 121), the customary tenants of a manor who had gardens claimed a right by immemorial custom to carry away from the manorial wasteland "such turf covered with grass fit for the pasture of cattle, as hath been fit and proper so to be used and spent every year, at all times in the year, as often and in such quantity as occasion hath required" (quoting from the headnote). The claim was declared bad in law, on grounds *inter alia* of uncertainty. Lord Ellenborough CJ commented that "a custom, however ancient, must not be indefinite and uncertain: And here it is not defined what sort of improvement the custom extends to: It is not stated to be in the way of agriculture or horticulture: It may mean all sorts of fanciful improvements [...] a custom of this description ought to have some limit: But here there is no limitation to the custom, as laid, but caprice and fancy" (Allen 1964, 127–8). "When we are told that a custom must be certain—that relates to the evidence of a custom. There is no such thing as law which is uncertain—the notion of law means a certain rule of some kind" (Jessel MR, in *Hammerton*, at 603). Even though one may feel that at some level law is never "certain," still the certain existence of statute and well-founded common law rule provides a standard of certainty. There are tacitly accepted standards of evidence and of existence conditions. The purpose of this criterion is to say that such standards must be found also for the existence of customs.

6. *Consistency.* The claimed custom must be consistent with other customs. Clearly, if two customs *in pari materia*, in the same locality, and applying to the same persons, are incompatible, then one cannot be a true custom. Since the test gives no guidance as to which, Allen regards it as a test without much substance (Allen 1964, 139–40).

All the tests described so far are regarded as matters of fact for the jury (or other fact-finder) to decide. The final test that Allen considers is different. It is the important test of *reasonableness*. The test raises theoretical issues of some relevance to the present chapter, and I will discuss them in the next section. I note here simply how the test is officially supposed to go.

The rule is, not that a custom will be admitted if reasonable, but that it will be admitted unless unreasonable (Allen 1964, 140). As Allen points out, this difference matters, because "it seriously affects the onus of proof" (ibid.). The party who has proved the existence of the custom does not also have to prove its reasonableness; the party disputing the custom has to provide proof of its unreasonableness. Reasonableness is a matter of law upon which the court is to pronounce. Allen has made an extraordinarily thorough survey of the case law on reasonableness;[7] I rely on his survey here. He identifies four kinds of

[7] See the Appendix to Allen 1964, 614–32, in addition to the discussion *ad loc*, 140–6.

consideration that seem to feed into judgments on reasonableness as appropriate.

1) Sometimes "the question whether or not a custom is reasonable is indistinguishable from the question whether there is any evidence to go to the jury of its existence" (Allen 1964, 141). A rector claimed that by custom a fee of thirteen shillings was payable on the celebration of every marriage in the parish. He could show it had been so for forty-eight years, and argued that a presumption of immemorial antiquity was raised. His claim succeeded at trial. However, the Court of Exchequer Chamber (a precursor of the Court of Appeal) rejected this argument, on the grounds that, given the change in the value of money, thirteen shillings would have been a grossly unreasonable fee for such a service in the reign of Richard I (*Bryant v Foot* [1868] LR 3 QB 497). "Here it is plain that the Court was really deciding that in the reign of Richard I the alleged custom did not exist" (Allen 1964, 141).

2) Sometimes the ground for unreasonableness is that the custom is contrary to statute or to a fundamental rule of the Common Law. "Unreasonable" thus amounts to "illegal" (ibid.).

3) "A custom or usage must be notorious, and cannot avail against a party who did not know, could not be expected to know, and was under no duty to know of its existence" (Allen 1964, 142). This issue arises more frequently in the case of commercial or conventional customs, and especially where the claimed custom heavily benefits one side of the agreement only. The test appeals to an assumption of enlightened self-interest on the part of contractors; it assumes that, absent unequal bargaining power, a contractor would not agree to a bargain strongly against their self-interest. A custom which distributes benefits lopsidedly is thus presumptively a non-existent custom. Allen frames the test as based on "elementary considerations of fairness," and urges that in applying these considerations, the court is essentially saying that an unfair custom is no custom at all. With respect, I think Allen is conflating the now well understood difference between a definition of fairness which imports objective normative standards, and one which bases fairness on standards to which rationally self-interested persons may be assumed to consent. It does not follow automatically that an agreement which it is hard to suppose rationally self-interested persons making is an unfair agreement unless one simply defines "unfair" as "would not be agreed to by rationally self-interested persons."

4) "It is well settled that the time to decide the reasonableness of a custom is at the time of its origin" (Allen 1964, 143). All the same, Allen concludes that "in the great majority of cases in which an ancient custom has been held to be unreasonable in its origin, it will be found that the real reason for rejecting it is that it was originally, or is now (or both), contrary to a well-established rule of law" (ibid., 144). That is, courts should not take into account that the original reason has "died," that by contemporary standards the reason fails, except insofar as current settled law excludes such a reason.

Allen concludes from his examination of the tests for custom that "the general effect of these tests of custom in English law, however they be classified, is a strict method of proof of a custom's existence. [...] Custom, once indisputably proved, *is law*; but the courts are empowered, on sufficient reason, to change the law which it embodies" (ibid., 146; his emphasis). "Existing custom is therefore law: If it is not called in question, it operates as part of the general law of the land; If it is challenged, and is proved to exist as a local variation of the ordinary law, and further is not shown to violate an essential general legal principle, it is recognized by judicial authority as good law" (ibid., 151).

These are, in Allen's view, simply facts about how the English legal system functions—custom is, in the manner specified, a source of law in the system. I believe that Allen's conclusion can be sustained, but it is not without its objectors. I will now go on to discuss both the objections and other puzzles that are generated by the idea of custom as a source of law.

4.4. Puzzles Concerning Custom as a Source of Law

There are two main kinds of objection raised to custom as a source of law *proprio vigore.* One focuses on the role of reasonableness in the recognition of custom, and the other is grounded on the relation of custom to other sources of law. I will deal with these in turn. I will begin with the issue of reasonableness, since, even if the concerns here can be quieted, the second kind of objection will remain.

4.4.1. Reasonableness

The apparent difficulty here is pointedly put by Dias: "The introduction of reasonableness as a condition of the acceptability of local customs has virtually sapped them of vitality, for it is the courts who pronounce on what is reasonable" (Dias 1985, 189). But the difficulty is not as straightforward as Dias' bald assertion makes it seem. Dias is in fact conflating three distinguishable claims here. The *first* is the purely theoretical claim, that if courts' discretion in determining reasonableness was absolute, then custom could not be legally authoritative *proprio vigore*. The *second* is the analytical claim that the criteria courts use for reasonableness do amount to awarding courts discretion of that kind. The *third* is the empirical or institutional point that in the way that courts have applied reasonableness they have treated it as if they had complete discretion in its application. Dias's remarks imply that he would accept all three claims. However, the plausibility of each of these claims needs independent assessment.

The first can be readily conceded, and indeed is conceded even by those who disagree with Dias on the remaining two. Salmond says that reasonableness does not mean that "the courts are at liberty to disregard a custom when-

ever they are not satisfied as to its absolute rectitude or wisdom, or whenever they think that a better rule could be formulated in the exercise of their own judgment." "This," he continues, "would be to deprive custom of all authority, either absolute or conditional" (Fitzgerald 1966, 199). Cross and Harris agree: "If the courts took the view that [reasonableness] gives them a complete discretion to reject or uphold a custom according to their opinion of what is reasonable, there would be something to be said" for the view that custom cannot be a source of law (Cross and Harris 1991, 171). Custom could function as an independent source of law only if the reasonableness test for custom implied standards that constrained courts' discretion in judging the existence of legal custom.

To assess the remaining two claims, we need to invoke the important distinction elucidated by Wilfrid Waluchow (1994, 211–6) between "having discretion" and "exercising discretion." To say that a judge in some case "has discretion" is to make an analytical remark about the structural relationship between pre-existing authoritative standards and the decision that has to be taken in the instant case. Those standards do not determine the decision in the way that they would determine a decision for a case that unambiguously fell under them. The standards do not determine the decision at all once the matter has gone "beyond" their scope. Whether or not a judge has discretion in some case is therefore a structural property of a particular piece of adjudication. A judge exercises discretion when, whether entitled to or not, he or she believes that there are no standards controlling the decision, and so behaves as a judge who has discretion is entitled to behave.

A strong case can be made that, in the structural sense in play here, courts do not have discretion in applying the test of reasonableness, although there may be dispute over how it is that they do not have it. If Allen is right, and the reasonableness test amounts to a test of compatibility with fundamental principles of the common law, then those principles constrain the decision of the courts. Courts do not have discretion on what are fundamental principles of the common law. The common law itself dictates those principles. Still less do courts have discretion over reasonableness, where incompatibility with statute is a test of reasonableness. Salmond, however, objects to Allen's (in his, Salmond's, eyes) reducing reasonableness to lawfulness. Rather, he writes,

> the true rule is, or should be, that a custom, in order to be deprived of legal efficacy, must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of the expectations and arrangements based on its presumed continuance and legal validity. (Fitzgerald 1966, 199)

The kind of weighing of consequences Salmond recommends also would constrain application of the test of reasonableness.

Now, it may be true that judicial discretion in applying the test of reasonableness cannot be eliminated: There may well be a residual discretion that is

"weak" in Ronald Dworkin's sense (1978, 31–2). A decision may require the use of judgment by the decision-maker, where there are indeed standards relevant to the decision but it is unreasonable or impossible to express those standards in a sufficiently fine-grained way to determine the decision: Here the discretion is "weak." However, for the argument to go through that judicial application of the test of reasonableness is too discretionary for custom to be a source of law, the discretion involved has to be "strong" in Dworkin's sense. The decision-maker's discretion is "strong" where the decision is simply not controlled by standards set by the authority in whose name the decision is made (ibid.). Hart (1994, 45) comments that the tests for the fitness of a custom for legal recognition, insofar as they incorporate "such fluid notions as that of 'reasonableness' [...] provide at least some foundation for the view that in accepting or rejecting a custom courts are exercising a virtually uncontrolled discretion." The thought here is mistaken. Even if we properly substitute "have" for "are exercising," in accordance with Waluchow's distinction, the mere fact of discretion does not give any foundation for the alleged theoretical view. It is the strength of the discretion that would provide the foundation, not the fact that it is discretion.

What of the third claim, that in fact courts apply the test of reasonableness in a thoroughly discretionary way? The issue is difficult. Dias (1985, 189) and Paton and Derham (1972, 195) clearly believe that courts do apply the test in an unprincipled way. Even Allen, whose official view is, as we have seen, that the test of reasonableness is applied reasonably, comments that "customs establish themselves not because they correspond with any conscious, widespread necessity, but because they fit the economic convenience of the most powerful caste" (Allen 1964, 92). The notorious case *Johnson* (*Johnson v Clark* [1908] 1 Ch 303) is everyone's favourite example of unreasonable reasonableness. A married woman, in order to secure a debt on a promissory note, mortgaged to the creditor some property in which she had a life interest under her father's will. The conveyance was made without any separate examination of the wife—that is, as if she were an independent legal agent. The wife then sought to have the conveyance set aside, as being without separate examination void in law. The creditor in seeking enforcement of the conveyance averred a local custom under which real property held by the kind of tenure at issue here could be disposed of by a married woman without her separate examination. The court sided with the wife, on the grounds that the sort of power of independent management of property the purported custom allowed to a married woman was in itself enough to make the purported custom unreasonable. (Times have changed, but slowly: Even in the late 1960's in Canada it was not possible for a married woman to open a bank account without her husband's consent.)

I can think of two ways to proceed further, although I will leave each as an exercise to the reader. As I have noted, Allen's survey of the cases on reasona-

bleness is very thorough, and he is able to make consistent sense of the cases as supporting his view on the test of reasonableness. An opponent would have to make an equally thorough survey and show the appropriateness of a different narrative. Allen (1964, 145–6) and Salmond (Fitzgerald 1966, 199) draw attention to *Johnson* precisely because they believe it is not typical of the way that courts have applied the test of reasonableness. The challenge to opponents is to show that it is. I might say here that cases discussed by Allen hardly help him. Two days after they had decided in *Bryant* that 13 shillings would have been an unreasonable fee for conducting a marriage in the reign of Richard I, the Court of Exchequer Chamber, reversing the trial court who had now dutifully followed the lead of *Bryant*, ruled that 1 shilling would have been a reasonable fee for crossing a toll bridge in Richard I's reign, and upheld the lord of the manor's claim to exact the toll (*Lawrence v Hitch* [1868] LR 3 QB 521). On what historico-economic data the Court relied to differentiate thus, it did not explain.

The second possibility is this. As Salmond urges, justice itself has a strong interest in the principled constraint of the legal validity of custom:

> Had all manner of recent customs been recognized as having the force of local law, the establishment and maintenance of a system of common law would have been rendered impossible. Customary laws and customary rights, infinitely various and divergent, would have grown up so luxuriantly as to have choked that uniform system of law and rights which it was the purpose of the royal courts of justice to establish and administer throughout the realm. (Fitzgerald 1966, 203)

> The public interest requires that modern custom shall conform to the law, and not that the law shall conform automatically to newly established customs. (Ibid., 209)

The default position here is that the courts are acting judiciously, in accordance with the rule of law. To find that they are exercising strong discretion in their application of the reasonableness test is to find against this default position. Absent empirical proof, the default position stands.

4.4.2. Derivation and Abrogation

We return now to the distinction made above (sec. 4.2) between subordination by the power of abrogation and subordination by derivation, and the relevance of the distinction to the claim of custom to be *proprio vigore* a source of law. We can concede that, if it can be shown that custom is subordinate by derivation to other sources of law, then the case for it being a source in its own right is seriously, and possibly fatally, weakened. But I believe it can be shown, first, that the subordination of custom to other sources of law is subordination by the power of abrogation, and, second, that such a form of subordination does not affect the status of custom as a source of law.

The classic, and most radical, denial of custom as a source of law is found in John Austin. His view of laws in general, as is well known, is that laws are a

species of command, and specifically that they are general commands issued by a political superior (the sovereign) to political inferiors. The power of the sovereign is unlimited and supreme (Austin 1954, 214–5). Austin is too good a legal theorist not to see that intuitively not all laws seem to fit this blueprint, and in particular that customary law seemingly does not. The "admirers of customary laws," as he calls them, say that such laws "are not the *creatures* of the sovereign or state [...] they exist *as positive law* by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors" (ibid., 30; his emphasis). It follows, then, according to these theorists, that it would be wrong to say all laws are a species of commands. Austin mentions also the view that customary law is exclusively judge-made; as such, it would again constitute a potential counter-example to the claims that all laws are a species of command.

In responding to these objections to his Command Theory of law, Austin could go one of two ways. He has already delineated "a set of objects frequently but *improperly* termed *laws*, being rules set and enforced by *mere opinion*" (ibid., 11–2; his emphasis). He terms them rather "positive morality," and international law he allocates to this category. So one option for him, clearly, is to assign customary law also to this category—to deny, that is, that customary law is really law. The other is to find a way in which, contrary to appearance, customary law is really law because it is really commands of the sovereign. This is the route he chooses.

> Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit. Now when customs are turned into legal rules by the decisions of subject judges, the legal rules that emerge from the customs are tacit commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: And it, therefore, signifies its pleasure, by that its voluntary acquiescence, "that they shall serve as a law to the governed." (Ibid., 32; his emphasis)

Austin kills two argumentative birds with one stone in this passage. He elides the difference between statute and precedent, and also the difference between subordination by the power of abrogation and subordinate by derivation. He is able to start with a premise with which no-one will disagree—that customary law is subordinate to statute by the power of abrogation—and end up with a conclusion on a matter of some dispute. Customary law is indeed, but it is not law *proprio vigore*; it is law only because it is law in the dominant sense of a command of the sovereign. "Until recognized by the courts, customs are rules of positive morality only. When sanctioned by the courts, thus indirectly becoming commands of the sovereign, there is coincidence of positive law and positive morality" (Morison 1982, 75).

If Austin is right, the claims of customary law to be a source of law are without foundation. But Austin is not right. Hart's repudiation of the theory

of law as a system of coercive orders (Hart 1994, chaps. 2–4) is an important moment in the development of twentieth-century legal positivism, and is discussed more fully elsewhere (this Treatise, vol. 11). His approach generally is to fault Austin for failing to distinguish commands from rules, and for representing laws as commands, not rules. Customary law is subsumed under this general criticism (ibid., 64).

Specifically, Hart makes two criticisms of Austin's manner of dealing with customary law (Hart 1994, 44–8). The *first* is that, though it could be an express feature of some given legal system that customs were not regarded as law until they had been enforced by the courts, such a feature does not necessarily follow simply from the idea of customary law itself. Hart's reasoning, though, is unclear. He simply asserts that it does not follow, but does not explain why. He seems to presuppose two reasons. One is that the rejection of customary law as law unless it is enforced depends on a dogmatic assumption that only statute law is truly law; it would not be hard to charge Austin with making that assumption. The second is that, if in some given legal system courts have an uncontrolled discretion whether to apply customary rules in actual cases, then customs would not be law until they are applied. He considers again whether the test of reasonableness in English law for the legal force of custom amounts to acknowledging custom cannot be a source of law. Having two pages earlier (ibid., 45; see sec. 4.4.1 above) suggested that it does, here (Hart 1994, 47), he is more cautious, and says simply that the argument needs to be made.

I will return to this first argument shortly. The *second* argument against Austin's account of customary law is this. There are paradigms for when an order may properly be said to have been tacitly given: The right kind of context and background can be supplied. But the case of a custom existing for a long time and then being acknowledged by the courts to have legal force does not conform to these paradigms (ibid., 47–8). The argument is sound, but it does not materially affect the issue in this section. I have outlined the argument as applied to precedent in Section 3.3 above; I will therefore not say more here.

Despite Hart's promise (ibid., 48) to return to the topic of the legal force of custom, in fact he does not return explicitly to it. The topic disappears into the familiar general defence of a legal system as centrally a union of primary and secondary rules, bounded by an ultimate rule of recognition (see again, in this Treatise, vol. 11). It would seem to follow, then, that, for Hart, it would be a matter of the content of the ultimate rule of recognition of any given legal system whether in that system custom functioned as a source of law. Whether it did would be a matter of the content of the secondary rules of recognition of the system. He does not actually take a stance on the analytical issue of interest here—what a secondary rule of recognition would have to be like, to be a rule which recognized custom as a source of law. By implication, Hart suggests that

the facts of the English legal system and its treatment of custom do not decide the matter; they are open to different theoretical interpretations. But I think he is wrong.

Morison argues that Austin's actual view of custom is not correct even on the assumptions of his own theory:

> What if the courts have let it be known that they will recognize customs which are established to exist in particular ways, at least under certain conditions, and the sovereign has issued no counter-command despite this? It would seem that in such circumstances a custom that can be so established, and in fact meets the conditions, is positive law [...] even before it individually comes before any court. (Morison 1982, 75–6)

Morison presumably has the English legal system in mind; at any rate, the tests for the legal force of custom described above (sec. 4.3) fit his supposition. So the claim is this. Let us grant for the sake of argument that judge-made precedential rules are tacit commands of the sovereign, and so are law in the sense of Austin's theory. Suppose now that a previously unlitigated custom comes before the courts. They assess it according to the rules they have announced that they will employ in such cases, and they deem the custom in question to be a genuine custom with the force of law. Does this not show that *already* the custom had the force of law before the courts' declaration that it has? To announce that a custom qualifies as law because it fits previously announced standards for being law is not to be anointing it to be law from the point of the court hearing onwards; it is to acknowledge the custom already to be law.

Morison says that the example assumes Austin's own theory, I take it, because the example accepts that judge-made precedential rules are commands of the sovereign. But the example essentially refutes the theory. It shows that customs are, in the circumstances described, law *proprio vigore* and not simply because they are commands of the sovereign, whether tacit or not. This claim is further strengthened by a later argument Morison brings against Austin by way of showing inconsistencies in his theory, in his discussion of precedent. Austin takes the *ratio decidendi* of a case to be tantamount to a general command proceeding from the sovereign. The *ratio*, in virtue of its assumed extension to further cases in the future whose fact-situation beings them under it, represents an intimation from the sovereign that subjects should conform their behaviour to this *ratio*. The intimation is a tacit command of the sovereign (Austin 1954, 31–2; Morison 1982, 99). "If Austin was prepared to apply this argument to judicial precedent, it is difficult to understand why he was not prepared to apply it to other alleged sources of law, the claims of which he summarily rejects" (Morison 1982, 99).

Morison's point is very densely expressed. I offer the following reconstruction; even if I am wrong in attributing the elucidation to Morison, I offer to defend it as my own. The only actual command on stage is the decision by the

court in the instant case. (Again, we grant for purposes of argument that courts' decisions can be construed as commands of the sovereign.) The subject of that command is the parties to the litigation in question. However, any plausible account of precedent has to account for the forward-looking aspect of precedent.[8] Austin aims to achieve this by saying that one case can embody a general forward-looking command. But to say that is to put a later court in the position of simply declaring that the command relevant to the case before it has already been given; the precedent case has the power of law in itself, and independently of any series of commands which might be otherwise thought needed to produce a binding precedential rule. So we have here a model for how something can be law, relative to a case controlled by it, and control that case prior to and independently of any command actually being given in that case. The model, moreover, seems extendible now to the case of custom, and to show the way in which a local custom is law, if it is, before the courts are asked to adjudicate upon it.

The point to take away from the discussion of Austin is that *mutatis mutandis* custom is in no different a position than precedent as regards its claim to be a source of law. Both have in common that they are subordinate by the power of abrogation to statute. As Allen points out (1964, 152–3), both a precedential rule and a custom may be rejected as inapplicable, and as formulated in correctly or not established respectively. When a precedential rule is adopted as applicable to the case before the court, there is an "additive" (Allen's word) element, as there is when a custom is newly recognized. I have above parsed this as so-called "weak" discretion. In short, "I do not think it is open to reasonable doubt that when a court accepts and applies a custom, it does so not in the belief that it is introducing a new rule into the law, but in the belief that it is declaring and applying the law" (Allen 1964, 153). The only relevant difference, Allen adds, is one of "adjective law": Custom is subject to its own methods of proof, distinct from methods of proof for precedential rules.

Cross and Harris (1991, 171–2), while agreeing that custom truly is a source of law, still claim that the relation of custom to precedent is one of subordination by derivation, though not one of subordination by the power of abrogation. But their view should be resisted. For one thing, as they rightly point out (ibid., 172), although the tests of the validity of custom are judge-made and not statutory, they are "too deeply rooted to be changed by judicial as opposed to parliamentary action." This fact should already make one wary of talk of the derivative status of custom to precedent. Cross and Harris have in mind when they do so talk, of course, a different twist on the judge-made character of the tests for validity. They imagine a lawyer advising a client on the possible validity of a given custom; the lawyer, on being asked why he

[8] My hope is that the rule-based account I gave in Section 3.5 meets this demand.

based his opinion that a particular custom is law on the tests laid down in the cases, replies that these tests represent English law; the tests are derived from the cases. But two different "derivations" are being conflated here. On the assumption that the tests are valid because they are properly developed common law rules, then the tests are "derived from precedent"; they are subordinate in that sense to precedent, although one would not normally, I think, speak of the relationship between a precedential rule and the precedents on which it is based as "subordination." But it does not follow that the deployment of the tests to decide on the validity of some given custom implies that the validity of the custom, if it has it, is properly said to be "derived" from the tests. We may use the idiom, perhaps, that the tests determine the validity of the custom. But just so far the idiom is philosophically uninterpreted. It could perfectly well be, and in my view is so, that the tests are determining the custom already to have validity; they are not "determining the validity" in any ascriptive way—determining the validity in the sense that before the judicial decision the custom had no validity and after the decision it has validity. Cross and Harris are transposing the derivativeness of the rules from precedent on to the custom whose validity is ascertained by the rules; but this is just a mistake. Obviously, if a custom is to have legal validity, then the tests for its validity must be legal tests—they must have some grounding in legal materials, or legal doctrine. But the fact that the need for such grounding is met does not imply that the custom passing the tests so grounded cannot then function as an independent source of law. The tests are tests for recognizing when a custom is law, has legal validity *qua custom.*

As we will see in the next two chapters, this point about the difference between a legal grounding and subordination by derivation is relevant to other claims to be sources of law beside that of custom. I will consider, and answer, two further concerns which have been raised, to try to quell any remaining doubts about custom. The first worry is this. Even such a supporter of the independent validity of custom as Allen, not merely sceptics such as Cross and Harris, speak in the idiom of courts "believing" that they are declaring a validity that already exists, or "accepting" that they are doing so, "acting as if" they are doing so, "feeling bound" to acknowledge the custom as law. Such language, it might be said, is quaint self-deception, a relic of bygone days when custom really mattered as a source of law. Now, all that is happening is the exercise of discretionary choice by the courts as to whether they decide for or against any given custom. "So gradual was the process by which [courts] came to acquire their control that at no point of time in all that development were they themselves conscious of the change" (Dias 1985, 191). "Judicial control over their [sc. customs'] admission reduc[es] their law-constitutive potentiality to vanishing point" (ibid.). Well, who knows? The argument has to go one of two ways here. Either the story about self-deception has to be taken seriously as an empirical claim, in which case we take the matter

away from the analytical legal theorists and hand it over to the legal historians, to see what evidence there in fact is about legal officials' states of mind. Psychohistory of this sort is very difficult, and very specialized, and certainly not conducted by Dias in the passage referred to. Or the story has to be taken seriously as a disguised analytical claim about the internal relationships between components of the legal system such as statute, precedent, and custom. But I have taken it seriously in that way, and argued that the law-constitutive power of custom has not vanished.

The second concern is rather different, and certainly has the right form to be an objection within analytical jurisprudence. Jolowicz (1963, 218) raises the difficulty. As noted in Section 4.3 above, it is part of the case law concerning custom that, once a court has settled the question of law that the custom is reasonable, the matter of its existence is a question of fact to be settled by the jury or other fact-finder. "But if the existence of a custom is truly a question of fact, then the court's decision provides no binding authority for the future" (Jolowicz 1963, 218). How, then, can custom be a source of law if the validity of a given custom sets no precedent, has no effect on the future development of the law? The point is this. Take another famous case where a custom was acknowledged to be valid, *Mercer* (*Mercer v Denne*, [1905] 2 Ch. 538). Fisherman in Walmer, Kent had been accustomed to drying their nets on a piece of shoreline; the area was, however, in fact private land. The landowner attempted to have the fishermen removed, but they were able to argue successfully an immemorial custom of drying nets on that land. Suppose now that some suitable period of time later (fifty years, say), in the same situation—same piece of shoreline, fishermen drying nets, landowner trying to remove them—the matter is again before the courts. The fishermen cannot simply argue: "In 1905 we won, so we should win now in 1955." The purported custom in 1955 would be *de facto* a new custom. Though the existence of the custom in 1905 could be taken as shown, proof would have to be offered of peaceable enjoyment since that time, continuance since that time, compatibility with statute at that time, and so forth. In what sense, then, is the custom of drying nets on the foreshore in 1905 a source of law?

The answer to the puzzle is this—the net-drying custom was a source of law in 1905 in the sense that its legal validity as a custom was the source for the court's decision in 1905 to find in favour of the fishermen and against the landowner. It does not count either for or against the custom being a source in 1905 either that it is or that it is not a source in 1955. It does not count against custom being a source of law that it does not behave as a source of law in the way that a legal precedent behaves. (Remember Allen's comment quoted above about the differences between custom and precedent being matters of "adjective law.") Though a true statement, it would be an inadequate answer to Jolowicz to point out that *Mercer* can be taken to be a precedent for future interpretations of the concept of "reasonableness" as applied

to custom. His point is that *Mercer* cannot be taken as a source for assessing validity of other customs seemingly like it. *Mercer* would have no bearing on, say, fisherman repairing their boats on the foreshore of a private beach, even in 1905. That would not be true of a precedent case so similar in its fact-situation. But that's just how custom operates: That's all. Jolowicz's reluctance to accept custom as a source of law because it does not behave like precedent amounts to judging custom by alien standards. The case for custom functioning as a source of law *proprio vigore* would, it seems to me, be weakened, rather than strengthened, by its functioning in the same way as precedent.

I close this chapter by recalling a point made at the very outset. All this must be kept in perspective. If centrality to current legal practice is the touchstone, then it has to be acknowledged that custom is an unimportant source of law. But a treatise of jurisprudence is not a manual of current practice. Analytically, custom qualifies to be a source of law.

Chapter 5

DELEGATION

5.1. Introduction

In this chapter, I will consider the claims of delegation, or subordinate legislation, to be a strictly institutionalized source of law. By "delegation" is meant the following. It frequently happens that a legislative body will enact a broadly phrased regulatory framework, and then leave the administration and application to cases of that framework to a subordinate tribunal or system of tribunals. The subordinate body is thus a creature of legislation; it is not the original source of the legal norms that it administers and applies. On the other hand, the legislative rules in its charge are phrased in ways which ensures that the subsidiary body has a great deal of room in which to clarify the import of the legislative norms, to produce sub-norms, to develop procedures, and ultimately to adjudicate cases. Thus prima facie there is a good case to be made for seeing the subordinate body as an independent source of law. Such a case cannot be unqualified, simply because of the dependence of the subordinate body on the legislature. The dependence is a form of subordination by derivation. But the question here is whether such a dependence still leaves room for theory to consider delegation as a source of law.

In his discussion of delegation, C. K. Allen attributes to John Austin the view that subordinate legislation is a "bastard offspring," and a source of law "as it were, on sufferance" (1964, 4–5). Allen, surely correctly, diagnoses this (in his, Allen's, view) extreme response to subordinate legislation as consequent upon Austin's views of sovereignty and of laws as commands. Allen himself strongly defends the propriety of subordinate legislation as an independent source of law (1964, chap. 7). His reasoning is empirical and "realist"—subordinate legislation, especially administrative law, is such a large and an important part of the governmental mechanism of the modern state that it would be absurd to deny it to be a source of law. However, my enquiry here is theoretical, not empirical. Is there jurisprudential warrant to consider subordinate legislation an independent source of law? Allen's empirical evidence does not, as he thinks, decide the jurisprudential question, but it is relevant to the question. If one thinks, as Austin did, that subordinate legislation derives all of its legal authority from the original legislature, then it cannot be an independent source of law. But the legislation that sets up administrative tribunals typically does so by granting to them some significant measure of discretion to judge as they see fit without review. In that case, how can such tribunals not be an independent source of law?

The determination of whether delegation qualifies as a "strictly institutionalized source of law" breaks down into two separate but connected questions. The first is whether delegation, and specifically the two kinds of delegation I shall discuss, labour arbitration, and mediation, show a sufficient degree of institutionalization. Thus, a material issue in our enquiry will be the extent to which arbitrators', or mediators', decisions have contextual justifications. (See chap. 1 above for the working definition of "strictly institutionalized source of law," and its deployment of the notion of "contextual justification.") To the extent that the delegatee body operates within the institutional legal system, and not as an independent adjunct to the legal system, one has reason to characterize the body as "strictly institutionalized." The second question has to do with the extent to which a delegatee body is a "source of law." Here, attention must be paid to the manner in which decision-making powers are devolved onto the delegatee. There is a narrow ridge for analysis to tread. If the delegatee's decision-making discretion is too tightly circumscribed by the delegating authority, then it is more plausible to treat the delegating body, rather than the delegatee body, as a source of law. On the other hand, if the decision-making discretion granted by the delegating authority is extremely wide, including the possibility of a free hand in determining principles of decision-making, a different problem presents itself. It becomes more plausible to regard the equitable principles to which the delegatee body appeals and which it deploys as being the source of law, not the body itself, and not any entity which might qualify as "strictly institutionalized."

As Allen remarks, delegation to an administrative body set up by statute is ubiquitous in the modern regulatory state. Occupational safety and health, consumer and environmental protection, food and drug safety standards, regulation of gambling, regulation of alcohol and tobacco distribution and consumption, monitoring of capital markets, organization of national defence, and so on are all typically in the hands of such authorities. Legislatures set up such authorities, and define broadly their terms of reference, then leave the actual regulating in their hands. I have selected for detailed examination here, for no better reason than that of some personal familiarity, two paradigm examples of delegated authority, labour arbitration and mediation. In the analysis which follows, I will track plausible answers to both of these crucial questions.

5.2. Labour Arbitration

5.2.1. A Sketch of Labour Arbitration Law

All jurisdictions within Canada, federal and provincial, provide legislation that aims to govern the relations between employers and collective bargaining units (unions). For convenience I shall be relying upon the Alberta *Labour Relations Code* (S.A. 1988, c. L-1.2) throughout the remainder of this initial

sketch. While there are differences between the acts of the various jurisdictions, they are broadly similar in many important respects. These acts provide for the establishment of Labour Relations Boards to hear matters of dispute between collective bargaining units and employers (see *Labour Relations Code*, S.A. 1988, c. L-1.2, sec. 11), as well as arbitration boards to hear and resolve disputes arising from the interpretation, application, and operation of collective agreements. This form of arbitration is known as grievance arbitration, as opposed to interest arbitration. The focus here is upon the former.[1]

Most labour legislation requires that collective agreements have clauses that make provision for grievance arbitration during the term of the collective agreement. For example,

> 133. Every collective agreement shall contain a method for the settlement of differences arising (a) as to the interpretation, application or operation of the collective agreement, (b) with respect to a contravention or alleged contravention of the collective agreement, and (c) as to whether a difference referred to in clause (a) or (b) can be the subject of arbitration between the parties to or persons bound by the collective agreement.[2]

Labour legislation also typically restricts the access of the parties to the Courts. For example,

> 143. (1) Subject to subsection (2), no award or proceeding of an arbitrator, arbitration board, or other body shall be questioned or reviewed in any court by application for judicial review, or otherwise, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the arbitrator, arbitration board, or other body in any of his or its proceedings.
>
> (2). A decision, order, directive, declaration, ruling or proceeding of an arbitrator, arbitration board, or other body may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the originating notice is filed with the Court no later than 30 days after the date of the proceeding, decision, order, directive, declaration, or ruling, or reasons in respect thereof, whichever is later.
>
> (3). The Court may, in respect of an application pursuant to subsection (2), determine the issues to be resolved on the application, and limit the contents of the return from the arbitrator, or arbitration board to those materials necessary for the disposition of those issues. (*Labour Relations Code*, S.A. 1988, c. L-1.2, sec. 143)

[1] See *Labour Relations Code*, S.A. 1988, c. L-1.2, sec. 132–44, inclusive. In interest arbitration, the arbitrator(s) takes on a role in the bargaining process; in effect, making the terms, conditions and rules that the parties will abide by. Interest arbitration has more in common with mediation, which will be discussed in the next section. In grievance arbitration an agreement is already in place between the parties and the arbitrator(s) takes on an adjudicative role.

[2] See *Labour Relations Code*, S.A. 1988, c. L-1.2, sec. 133. The Alberta legislation also contains a "model arbitration clause" that shall be deemed to be part of any collective agreement that does not contain the provisions required under sec. 133. See *L.R.C., sec.* 134.

The institutional practice of labour arbitration that the foregoing legislation establishes consequently serves as a *surrogate* to the Courts for grievance matters arising from collective agreements between employers and bargaining units. That is, the issues are fully justiciable, but for independent reasons they are assigned for hearings to special tribunals, rather than to the regular court system.

To understand why labour arbitration is useful for the purposes of a jurisprudential investigation of "strictly institutionalized sources of law," it will be helpful to recite some of the typical "virtues" that are claimed for grievance arbitration. These are as follows:

(1) *Expertise of the Tribunal*. Tribunals of arbitrators, well-versed in labour issues, improve the quality of judgments.

(2) *Market Incentive.* Arbitration tribunals are agreed to and paid for by the parties (see, for example, *Labour Relations Code*, S.A. 1988, c.L-1.2, ss. 135–6). Presumably, arbitrators therefore have an incentive to work quickly, efficiently, cost effectively, and with fairness to all involved.

(3) *Speed and Cost.* Arbitration is supposed to be a faster and less expensive alternative to the Courts; largely because of (4) below.

(4) *Less Legalistic*, procedurally more informal.

(5) *Competence and Expertise of the Practitioners*. The representatives of the parties in these arbitrations (both lawyers and non-legal practitioners) tend to be knowledgeable and competent in the labour field. It should be noted that this is an area that has been very successfully "colonized" by lawyers specializing in the practice of labour law.

(6) *Settled System*. A substantial arbitration jurisprudence now exists that is (relatively) settled. Parties are now much less likely to do things that would result in grievance arbitration than they formerly were.

(7) *Law Reform*. Legislatures have shown scant interest in the reform of employment law. Arbitrators have developed a much fairer system of rules in this domain than would have been the case had such matters been left to the Courts.

I believe that some of these factors are explanatorily significant in establishing why arbitration practice constitutes a good example, first, of an "institutional source of law." I will say something about the restriction "strictly institutionalized" later.

On the one hand, *per* (3) and (4) above, we find an institutional process removed in important ways from the sources of law found in the Courts. Much of what I have to say about this will follow in the discussion below of

specific examples. For the moment though, I will simply note the following differences between arbitration tribunals and regular courts of first instance:

– Arbitrators have no plenary jurisdiction; the source of the arbitrator's power resides in the provisions of each collective agreement (expressed or implied), supplemented by relevant provisions of the appropriate labour legislation. That is, the jurisdiction of the arbitrator is limited by higher legal authority.

– Legislation is typically silent as to whether arbitrators are bound to follow common law. The Courts interpret this to mean that arbitrators are not bound to judge-made law as such, although legislation may authorize judicial review of arbitrators' decisions.[3]

– Legislation setting up arbitration tribunals typically provides for the dispensing of procedures and rules that one finds in the Courts.[4]

On the other hand, *per* (1) and (5) above, we find many legally trained and competent individuals engaged in all aspects of arbitration practice. For good or ill, labour arbitration has become legalistic. I suspect that this might explain factors (6) and (7) above. The practical upshot of this, for present purposes, is that many principles and rules that we find in the courtroom are now also emerging in arbitration jurisprudence, in some cases in spite of the assertion of independence from the courts. That is to say, the claim is not about the emergence of rules unique to arbitration tribunals. The claim is about the emergence of rules which may also be found in courts, in situations where the source of the rule cannot be the courts but can only be the arbitration tribunals themselves. The specific cases that I will go on to cite are examples of these. Since these examples have no "source" other than the practice of grievance arbitration—they are not provided for in legislation or mandated by the Courts—it seems plausible to regard them as arising from some source that is independent even if the result of delegation, and that is institutional in character.

The methodology in presenting the following case material, given the foregoing, will in each instance be the following:

(1) Identify the "emergent" principle of law visible in the arbitration:

(2) Establish that the institutional practice of arbitration has no prior commitment to the principle; e.g., adherence to the principle is not provided for in the source legislation or any other "traditional" source of law:

[3] See, *Re Manitoba Food & Commercial Workers Union, Local 832 and Canada Safeway Ltd* (1981), 120 DLR (3d) 42 (Man CA). I discuss this case further in the specific examples below.

[4] We find a good example of this in the rules of evidence (discussed in the specific examples). For an example of such statutory provisions see *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 141(2).

(3) Provide examples of the principle emerging within arbitration jurisprudence:

(4) Assess whether the emergence of the principle suffices to make arbitration tribunals independent "strictly institutionalized sources of law."

I will consider two sample principles: a) *res judicata* and collateral estoppel; b) *stare decisis* or adherence to precedent.

5.2.2. Res Judicata *& Collateral Estoppel*

5.2.2.1. Statement of the Principle

Res Judicata - This is the common law principle that a final judgment rendered by a court of competent jurisdiction on the merits of a case is conclusive as to the rights of the parties and their privies. As to them, the judgment constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.

Collateral (or Issue) Estoppel - This is the common law principle that a prior judgment between the same parties on a different cause of action constitutes an estoppel as to those matters in issue, or points controverted, where the same issues or points emerge in the subsequent action.

5.2.2.2. Status Under Arbitration Jurisprudence

It is generally acknowledged that arbitrators are not obliged by law to heed these common law principles.[5] The 1954 decision of arbitrator Bora Laskin (as he then was), in *Re Brewers' Warehousing Co Ltd and International Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink & Distillery Workers of America*, (*Local 278C* (1954) 5 LAC. 1797 (Laskin)) is often cited for the point that arbitrators are not obliged to adhere to *res judicata*:

> It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has

[5] There is one important aside here. Should the relevant labour legislation specify that arbitrators are so obliged, this would not be the case. This has been argued in respect of the *Canada Labour Code* in *Re Eastern Provincial Airways Ltd and International Association of Machinists and Aerospace Workers* (1984), 13 LAC (3d) 128 (Christie). In this arbitration it was argued that s.156(1) of the *C.L.C.6* mandated adherence by the arbitrator to the principle of *res judicata*. Section 156(1) states: "156(1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed by any court."

Arbitrator Christie interpreted the section as merely "a privative clause intended to limit review by the courts" (ibid., 135). The comparable privative clause in the Alberta legislation (ibid., s.143, *supra*), in any case, provides no such ambiguity on this point.

the clear conviction that the first award is wrong, it is its duty to determine the case before it on principles that it believes are applicable. (*Re Brewers' Warehousing Co Ltd and International Union of Brewery, Flour, Cereal, Malt, Yeast, Soft Drink & Distillery Workers of America, Local 278C* (1954), 5 LAC 1797 (Laskin), 1798)[6]

The proposition that arbitrators are not required to adhere to *res judicata* and collateral estoppel has also received consideration by the Courts. In a decision of the Supreme Court of Canada (*Re Manitoba Food & Commercial Workers Union, Local 832 and Canada Safeway Ltd* (1981) 123 DLR (3d) 512 (SCC)) the Court overturned a majority judgment of the Manitoba Court of Appeal and noted substantial agreement with the dissenting opinion of Justice Monnin in the Manitoba appeal. Justice Monnin noted that there was no statutory provision for *res judicata* in the relevant labour legislation. He went on to write of the applicability of *res judicata* and issue estoppel to grievance arbitration:

Parliament and the provincial legislators have devised methods to solve labour disputes mainly in order to avoid the rigidity and the time-consuming features of the court-rooms. The legislators thought that they had pushed these disputes out of the court-rooms. How wrong were they, since I are still too frequently dealing with them. Yet it would be adding salt to the wound if I were to bring into labour arbitration, all the rigid procedures of the court-rooms and the complex judge-made laws. I do not wish to be a party to such a revival, since Parliament has clearly indicated that it wished labour disputes to be solved by boards of arbitrators not necessarily familiar with or trained in legal principles. (*Re Manitoba Food & Commercial Workers Union, Local 832 and Canada Safeway Ltd* (1981) 120 DLR (3d) 42 (Man CA), 47)

The Justice concluded that,

[*R*]*es judicata* and estoppel have no place in the settlement of labour disputes by private tribunals or by boards of arbitration. It is a principle to be reserved for the court-rooms. (Ibid., 48)

It would seem, then, that these principles do not arise within the practice of arbitration tribunals as a result of decisions by authorities delegating powers to such tribunals. The institutional source of such principles within arbitration must lie elsewhere.

5.2.2.3. Emergence of the Principles

Arbitration jurisprudence nevertheless does reveal that arbitrators are prepared to apply *res judicata* and issue estoppel. The following two cases are illustrative of this.

(i) *Re Valdi Foods and United Food & Commercial Workers, Local 175* (1991) 19 LAC (4th) 114 (Kirkwood). In this case the union argued that the

[6] Interestingly, the decision is also cited for the point that it is generally a good idea for arbitrators to adhere to *res judicata*.

matter before the present arbitrator had already been decided on a previous arbitration and that *res judicata* should prevent the company from relitigating the matter. The arbitrator considered the applicability of *res judicata* and issue estoppel to grievance arbitration:

> The principle of *res judicata* is based upon the concept that if a claim has been decided, the parties to an action cannot raise the same claim as between themselves in another action in another forum. Similarly, the principle of issue estoppel has been applied where the particular issue raised by the parties in a case was determined by an earlier decision between the same parties on the same issue. These concepts prevent relitigation of the same questions [...]. The facts of the first arbitration were agreed to by the parties in an agreed statement of facts. Although an arbitration board is not bound by the decision of an earlier board, in the same manner as the courts, in my view if the parties had agreed on the facts for one arbitration, although there may be additional facts which may be relevant to a different hearing involving different issues, there is a heavy onus on the party who wishes to dispute those facts, to show why the facts as agreed by the parties should not be accepted at the second hearing. Neither party disputed the agreed statement of facts. (*Re Valdi Foods and United Food & Commercial Workers, Local 175* (1991) 19 LAC (4th) 114 (Kirkwood), 119–20)

The arbitrator noted that the company had no further evidence to add in this arbitration. Finding that the two matters involved the same parties, the same collective agreement, the same grievor, and the same facts, the arbitrator held that *res judicata* was applicable.

In concluding his decision the arbitrator offered some insight into the rationale for introducing *res judicata* and issue estoppel into arbitration. He wrote:

> The application of *res judicata* and issue estoppel deters parties from cherry-picking arbitrators, or having the same matter adjudicated before another in the hope of obtaining a different result. It provides a guide for the consideration of the outcome of future incidents, which creates certainty and a saving of costs that would be required to bring a multitude of unnecessary grievances to boards of arbitration. Furthermore, a duplicity of hearings can, in my opinion, be a breach of natural justice and an arbitrator must be loathe [*sic*] to encourage multiple grievances in circumstances which in the civil courts would be considered *res judicata.* (Ibid., 122)

(ii) *Re Pharma Plus Drugmarts Ltd and United Food & Commercial Workers, Local 175*, 1991, 20 LAC (4th) 251 (Barton). In this case the company involved argued that the matter before the arbitrator was the same matter heard by a previous arbitrator and that owing to *res judicata* the present arbitrator did not have jurisdiction to rehear the grievance. Arbitrator Barton began by considering the applicability of *res judicata* to grievance arbitration, noting that most arbitrators seem to accept that the doctrine does, apply although they do not agree on how it should be applied (*Re Pharma Plus Drugmarts Ltd and United Food & Commercial Workers, Local 175*, (1991), 20 LAC (4th) 251 (Barton), 252). He also noted that one of the sources of difficulty in applying the doctrine was the number of differing conceptions gathered together under the principle. He isolated two “broad” notions of *res judicata* that are common within arbitration jurisprudence. Under one of these interpretations, ar-

gued in this case by the company, when *res judicata* applies the arbitrator in a subsequent case loses jurisdiction. Under the other interpretation, argued by the union, the arbitrator retains the discretion to hear a case even if *res judicata* applies; for example, if the second arbitrator believes that the previous decision was "manifestly wrong" (ibid., 254).

Arbitrator Barton noted that he felt he did have the discretion to hear a second grievance that was "similar" to an earlier one, but he rejected the two "broad" notions of *res judicata* argued by the parties in the case (ibid., 254–5). The arbitrator took a more narrow stance on *res judicata*, one that he attributed to Arbitrator Christie in *Re Eastern Provincial Airways*:

> [A]rbitrator Christie indicated that it was good policy to follow earlier awards and that he might well apply the doctrines of *res judicata* in "same grievance—same grievor" situations [...]. Essentially these arbitrators feel that if the same parties try to reopen an earlier grievance by trying to bring a subsequent one to argue the same issue based upon the same parts of the collective agreement, on new facts but facts which are essentially the same as those resolved in the previous grievance, they should not be allowed to do so. (*Re Eastern Provincial Airways Ltd and International Association of Machinists and Aerospace Workers* (1984) 13 LAC (3d) 128 (Christie), 255)

On Arbitrator Barton's account, the application of *res judicata* to bar a grievance is a discretionary power of the arbitrator. It appears that where the cases are similar—similar enough for the doctrine to apply—but different in some material way, the arbitrator may elect to rehear the matter. If, however, the grievance is simply an attempt to relitigate, then on Barton's interpretation it is proper that the arbitrator invoke *res judicata* to bar the grievance. In the present case Arbitrator Barton found that the grievance was substantially the same grievance as had earlier been argued. He exercised his discretion to bar the grievance on the basis of *res judicata*.

5.2.2.4. Assessment

It is clear that arbitration tribunals form an important working part of that institution which is a modern municipal legal system in a country such as Canada. So the focus in our assessments must be on the concepts of "strict" and "source." As remarked above, in the working definition of "strictly institutionalized source of law," the force of clause (i) is to explicate the notion of "source," and that of clause (ii) the idea of "strict." Let us consider first, then, the applicability of clause (i). Is it the case that an arbitrator who decides a case by appeal to *res judicata* or collateral estoppel is producing a rule such that its existence conditions "are a function of the activities of a legal or quasi-legal institution," to quote from the working definition of "strictly institutionalized source of law" given above?

The phrase "a function" of course is capacious. One might ask, How could it not apply? How could a decision of an arbitration tribunal *not* be "a

function of the activities of a legal, or quasi-legal, institution"? In dispelling the scent of a too easy victory, we need to recall the context for the present enquiry. I am in the large considering the claim of *subordinate legislation* or *delegation* to be independent sources of law. If the "source" for the arbitrator's ruling is ultimately not the arbitrator himself, but the authority from which his ruling derives its power, then, in the technical sense at issue here, the arbitrator would not be a source of law. I have tried to show that, even though the delegating authority aims to restrict the applicability of the principle of *res judicata*, in fact this principle has emerged as an operating principle in labour arbitration. Thus the source of the principle, and thus of decisions which rest upon it, cannot be the delegating authority. It must be the tribunal or system of tribunals itself.

A further question might be raised. It does seem as though the arbitrator applies the principle through the exercise of discretion, but not only that—discretion in a particular circumstance, when an earlier decision is thought to be manifestly unfair (see *Re Pharma Drugs*, 254). If the source of the ruling is a perception of unfairness, does this not imply that external moral norms, rather than institutional constraints, form (an essential part of) the existence conditions for the rule? This is a reasonable question, and deserves a careful answer.

As Frederick Schauer has argued, rule-based decision-making arises always within some theory of justification and exists only relative to it (Schauer 1991, 86). But rules may bear two different relationships to the justification for the rules. If they are *transparent* to the justification, then they serve simply as ways for the justification to bear on cases that fall under the rules. In the case of conflict between the rule and the justification, the rule is discarded in favour of the justification. Schauer argues that such decision-making is really "particularistic" and not decision-making by rule at all (ibid., 77–8). A rule must be in some way, to some degree, *opaque* to its justification. That is, there must be cases of conflict between the rule and the justification where the rule is adhered to at the price of a less than maximally satisfactory result from the point of view of the justification.

On this analysis, then, in general, the arbitrator's discretionary ruling would have a non-institutional source if the decision were particularistic and fully transparent to its underlying justification. But one further refinement is needed. Recall again the distinction between *contextual* or *local* and *deep* justifications. For the source to be non-institutional, the ruling must be transparent to the underlying *deep* justification, not to the underlying local justification. Arguably, in fact, if the arbitrator rejects *res judicata* for reasons of manifest unfairness, the ruling is "particularistic" and transparent to its deep justification. As I suggested above (sec. 5.2.1.), the achievement of greater fairness is one candidate reason for setting up a system of labour arbitration tribunals, and so would constitute the deep justification for any given decision within

the system. Even if, as is quite possible, the setting up of the arbitration system by the legislature is not in practice particularistic—that is, the legislature decides to let the system keep on working as it is, even though it generates from time to time an unfair decision—still, discretionary decision-making by the arbitrator for reasons of fairness would show the arbitration system to be to that degree particularistic.

Consider on the other hand the reasons embedded in the above cases for adherence to the principle of *res judicata*: certainty, cost-saving, avoidance of forum-shopping, avoidance of breaches of natural justice, avoidance of conflict with civil courts, avoidance of inconsistency between decisions, avoidance of litigation by instalments, encouragement of finality. With the exception of breaches of natural justice, all these reasons are formal or procedural,[7] not substantive, and are local or contextual with respect to the system of labour arbitration tribunals. Thus a ruling that embodies adherence to the principle of *res judicata* relies primarily on local or contextual justifications of a formal kind, and is thus quite opaque to the deep justification of fairness. Of course, in adhering to *res judicata*, an arbitrator likely believes that they will also be adhering to principles of fairness, because of a background belief in the general fairness of the system of arbitration. But that background belief is not the local or contextual reason for the ruling.

I see, then, that the emergence within labour arbitration of adherence to the principle of *res judicata*, satisfies very largely clause (i) of the working definition of "strictly institutionalized source of law." I leave further assessment of the issue of external norms as sources until the end of the discussion of arbitration. Our analysis also now enables a straightforward approach to clause (ii) of the definition. Subject to the same kind of qualification, it is clear that the local or systemic normative force of the ruling derives from its status as a ruling from that source. It is possible that adherence to *res judicata* had not emerged within the system of labour arbitration. But, given that it has, rulings which apply the principle derive their normative force from their existence as rulings of the arbitrator or arbitration board. They do not derive it from the legislature that set up the system of tribunals, nor from their content as satisfying substantive principles of justice.

5.2.3. Stare Decisis

5.2.3.1. Statement of Principle

This is the principle by which courts stand by prior decisions and decline to disturb settled points (see chap. 3 for detailed discussion). It is a doctrine

[7] And even natural justice has partly to do with procedure, partly with substance. See Jackson 1979, chap. 1.

whereby when a court has once laid down a rule of law as applicable to a certain set of facts, it will adhere to that rule and apply it to all future cases where the facts are materially the same, regardless of whether the parties and other particulars are the same. Under this doctrine a decision will be binding precedent in the same court, or in courts of equal, or lower rank in the same jurisdiction, in cases where the very point is again in controversy.[8]

5.2.3.2. Status Under Arbitration Jurisprudence

Labour legislation does not provide for the application of *stare decisis* in the arbitration process.[9] Labour legislation *does* provide that the awards of arbitrators are binding on the parties to the dispute (*Labour Relations Code*, S.A., 1988, c. L-1.2, sec. 142), and the wording of some of these clauses has been the source of occasional confusion concerning the applicability of *stare decisis* and *res judicata*.[10] *Res judicata* is applicable when the very same parties (or one of them) are proposing to reopen issues already settled between those parties; it has to do with the finality of decision-making. *Stare decisis* is not confined so narrowly; it has to do, not with the finality of decisions, but with order within an on-going system of decision-making. The confusion is illustrated by *Re United Electrical Workers, Local 512, and Standard Coil Products (Canada) Ltd.* (1971) 22 LAC 377 (Weiler, Tate, Healy). The Board considered the interpretation of a holiday pay clause and then went on to note a previous award:

> [T]his interpretation was adopted by an earlier arbitration board between the same parties, in *Re U.E.W., Local 512, and Standard Coil Products (Canada) Ltd.* (1964), 15 LAC 197 (Lane); it has not been reversed in later negotiations between these parties, and considerations of *stare decisis* require that I follow it in this case. (*Re United Electrical Workers, Local 512, and Standard Coil Products (Canada) Ltd.* (1971), 22 LAC 377 (Weiler, Tate, Healy), 381)

In a "same grievor-same grievance" situation as we find in this arbitration, the applicable principle is that of *res judicata* and not *stare decisis.* It now seems

[8] This account is something of an oversimplification, but the complications do not affect the argument here. For example, the highest court in a jurisdiction possesses the capacity to overrule its own decisions, a power typically used sparingly. And in jurisdictions within a federal state like Canada or the United States there are issues of how the decisions of one province or state bear on those of another, problems not addressed here.

[9] See, for example, the Alberta *Labour Relations Code*, S.A., 1988, c. L-1.2, Division 22, dealing with arbitration.

[10] J. Weatherill suggests that such clauses introduce *res judicata* into the arbitration process. See Weatherill 1958, 323. This is not the interpretation adopted by the Courts—as discussed above. See *Re Manitoba Food & Commercial Workers Union Local 832 and Canada Safeway Ltd* (1981), 123 DLR (3d) 512 (SCC), adopting the dissenting opinion of the Manitoba Court of Appeal in *Re Manitoba Food & Commercial Workers Union Local 832 and Canada Safeway Ltd* (1981), 120 DLR (3d) 42 (Man CA).

clear that the provisions concerning bindingness alluded to above do not invoke *stare decisis.* Numerous arbitration awards, as well as court decisions, state that the doctrine of *stare decisis* has *no application* in labour arbitration matters. Previous awards on similar matters involving different parties do not bind arbitrators.[11] Weatherill discusses the effect that previous awards have in the resolution of later cases, and notes that *stare decisis* has no application in labour arbitration cases. He provides three reasons for this (Weatherill 1958, 324):

1. There is no legislative direction that *stare decisis* should apply.
2. Arbitrations are administrative and not simply judicial processes. The purpose is not to establish general principles but rather to solve immediate problems between the parties at hand.
3. Arbitrations are less formal than the courts. The purpose of the arbitration is to relate the collective agreement to particular fact situations.

5.2.3.3. Emergence of "Quasi-stare decisis" in Arbitration Jurisprudence

It would be an exaggeration to say that the principle of *stare decisis* as understood in the courts emerges within arbitration jurisprudence. Rather, something akin to the principle exists—an established practice of adhering to previous awards, which falls short of a binding requirement to do so.[12] I need to flesh out the particular kind of force the principle has within arbitral decision-making, if I am to use the status of the principle to help understand arbitration as a form of delegation.

Consider what is ostensibly possible within arbitration, given that the doctrine of *stare decisis* does not apply. An arbitrator could enter an arbitration, ask for submissions from parties as to the facts of the grievance, and ask for interpretations of the collective agreement that make no mention of previous awards. He could render an award that makes no reference to previous awards, even if representatives discuss such awards in their submissions concerning the interpretation of the agreement. The arbitrator could even adopt a contrary position to a large body of previous awards involving similar matters. The foregoing, however, does not typically occur within arbitration practice. If it did, arbitration would be no more than, in H. L. A. Hart's words, a game of "scorer's discretion," where the only rule is, "the score is what the scorer says it is" (Hart 1994, 142). In actual practice, serious consideration is given by arbitrators to previous awards involving similar matters. Awards frequently

[11] There are many precedents here: for two recent cases, see *Halifax (City) v Halifax Firefighters Association, I.A.F.F., Local 268* (1994), 132 NSR (2d) 1 (NS SC); *Canada Post Corporation v Canadian Postmasters and Assistants Association et al* (1994), 118 Nfld & PEI R 16 (Nfld SC).

[12] For other such "established practices," see Section 3.2 (civil law), 8.2 (international law).

contain lengthy discussions of such previous "authority"—so much so that the approach taken and the form of analysis seem comparable to what one finds in written court judgments.

If arbitrators do not have to follow, or even give serious consideration to, previous awards, but in fact do so, then we should ask why. There seem to be two broad types of reason. The first is normative guidance. Previous awards function as a normative information resource; they suggest viable solutions to matters at hand. Where the issues and facts are comparable, and where the arbitrator agrees with the reasoning of the earlier award, there is no need to review the matter again from the beginning.

But guidance alone does not give us anything approaching *stare decisis*. In a fully-functioning system of *stare decisis*, there must be some normative force that attaches to previous awards simply qua settled matters. The normative force of a past decision derives simply from the fact that it exists as a past decision (see sec. 3.1 above). In a system of *stare decisis*, a hypothetical case mentioned in argument even with exactly the same fact situation would not carry precedential weight, whereas such a case could provide no more and no less normative guidance than would an actual case with the same content. In the cases discussed below we find used in the reasoning considerations emphasizing the fact of settlement such as the need to reconcile conflicting awards, deference to "well established" precedent, and the desire to create a settled body of jurisprudence. Such expressions suggest that the awards of previous arbitrators on similar matters do carry not only normative force, but also more of such force than we would find if mere guidance were all that was provided. But care must be taken. The mere fact of an award having been made, while sufficient to create a binding precedent in the courts, does not seem sufficient to attach normative force to that award within labour arbitration. What else do we need here, and what reasons are typically given for needing it?

If we are to understand the precedential value or force of previous awards in arbitral practice we should consider features of the institution itself. Three features come to mind: the adjudicative nature of labour arbitration; the purpose of labour legislation, and the nature of the participants. Labour arbitrations, notwithstanding Weatherill's characterization of the proceedings as administrative, are adjudicative. They involve disputes between parties to a collective agreement. They are adversarial. Finally, arbitrators are to resolve the dispute by finding facts and interpreting the collective agreement in a manner that is fair. There is a concern that "justice is done." If the matters at issue are sufficiently close it is therefore no surprise that arbitrators will give serious consideration to previous awards—they are the products of the same process which, *prima facie*, should be fair and well reasoned.

The goal of labour legislation is harmony within industrial relations. Adherence to previous awards directly contributes to this goal in a number of

ways. First, the development of a settled body of jurisprudence provides parties with a firm footing for the interpretation of agreement provisions during the negotiation of collective agreements. Second, the existence of a settled body of jurisprudence discourages frivolous grievances and transgressions of the collective agreement. Finally, the presence of a settled body of jurisprudence provides all with the sense that the institution will treat similar disputes in a similar manner. Wide variance in arbitral awards would suggest that the arbitration process is arbitrary.

The nature of the participants is also a consideration. Most of those that represent parties in arbitrations are legally trained. Many arbitrators are also legally trained. I suspect that the biography of the participants has much to do with how they regard their role and how they will approach the use of previous awards as precedents. One must also consider that labour legislation provides that the parties to the arbitration select and pay for the arbitrator (*Labour Relations Code*, S.A., 1988, c. L-1.2, sec. 135 and 136). Let us assume that most settled arbitration represents a fair standard of interpretation. If an arbitrator consistently ignores such settled bodies of arbitration jurisprudence, if he acquires a reputation as a "wild card," then it is unlikely that he will find much opportunity to ply his trade. In this way the institutional structure itself as a matter of social psychology promotes adherence to something like *stare decisis.*

It is important to note that this reliance within arbitration on a form of *stare decisis* does not mean that arbitration as a site for sources of law must be classified under precedent and not delegation. First, as I have indicated, the form taken by *stare decisis* in arbitration is not identical to the form taken by that doctrine in paradigm precedential adjudication in common-law courts. Second, even if it were identical, there would still be a difference between the two cases. In the case of precedent as itself a source, the authority of a decision which derives from precedent is wholly explained by the reference to precedent. In the case of a decision by a labour arbitrator, a reference to past decisions can only provide part of the explanation for the authority of that decision. The legislation which set up the arbitration tribunal is also part of the explanation, as are other local characteristics of arbitration itself. Thus the independence of arbitration as a candidate source of law—delegation—is preserved.

I will now turn to discuss three specific cases.

(a) *Re United Steelworkers, Local 6350, and Canadian Industries Ltd* (1965) 16 LAC 270 (Little, Valentine, Hicks). This arbitration concerned the scope clause of the collective agreement. The issue arose when a company foreman performed work ordinarily performed by the grievor. The union contended that the company was thereby in violation of the provisions of the agreement setting out who the employees are and the work required by their classifica-

tions. The Board noted that considerable precedent exists in respect of this sort of matter. Referring to one of these decisions the Board went on to state:

That award was written over five years ago but I know of no award expressing a contrary view since that time. It is true that no board is bound by any previous award but it is our view that where a subject has been so thoroughly considered and reviewed over the years as this one has been and a uniform result is evident in the decisions *and that most companies and unions engaged in the collective bargaining process, including these parties, know of such jurisprudence and continually act with that knowledge*, a board would have to find exceptional circumstances to warrant reaching a different conclusion. (*Re United Steelworkers, Local 6350, and Canadian Industries Ltd* (1965), 16 LAC 270 (Little, Valentine, Hicks), 274; emphasis mine.)

This statement clearly reveals that more than mere guidance informs the use of previous authority in arbitration practice. The Board in this arbitration displays a concern to preserve a settled body of jurisprudence and suggests that this is important for the collective bargaining process. Having "settled" interpretations mean that parties know what to expect concerning the meaning of agreement provisions when they negotiate those provisions. Settled interpretations also have the effect of discouraging spurious grievances and overt transgressions of the agreement. For these reasons the adherence to previous authority promotes industrial harmony—a consideration that was underlying this Board's conclusion that "exceptional circumstances" must exist to warrant an award that goes against well-established authority.

(b) *Re British Columbia Telephone Company and the Federation of Telephone Workers of British Columbia* (1990) 80 CLLC 14, 047 (BC SC). In this case the company sought judicial review of an arbitral award. Among other grounds, the company submitted that "the arbitration board misconducted itself by adopting an erroneous test of invidiousness in comparison with one prior award as the basis of its decision to reinstate" (*Re British Columbia Telephone Company*, 237–8). The company contended that the Board improperly held themselves bound to an "invidious" comparison. The Court dismissed this argument, stating:

It is clear that the board did not hold that they were bound by the Thorpe case. There is no issue of *stare decisis* here. The only question is whether or not it was proper for the Board to look to the Thorpe case for guidance in determining the appropriate penalty to be imposed. Although the results of each case must depend on the specific facts, it is not an error in law to look to other cases based on similar facts for guidance. It is not necessary to decide each case in a vacuum. The issue in the Thorpe case was the same issue as that before the Board here. The parties in the Thorpe case, except for the grievor, were the same parties as in this case. Although the comparison of the cases may be "invidious," that does not make it an error of law. (Ibid., 241)

In this case we have an excellent example of previous awards construed as guidance. The Court notes that *stare decisis* is not at issue here. The Board did

not decide as it did *because* it felt itself *bound* to follow the earlier award, but rather because it agreed with the reasoning employed within the earlier award. The clarity with which mere guidance is emphasized in this decision only throws into relief the way that other cases imply more than mere guidance.

(c) *Re Health Labour Relations Association of British Columbia (Royal Columbian Hospital) and Hospital Employees' Union, Local 180* (1986) 24 LAC (3d) 359 (Kelleher, McDonald, Fradley). The case concerns a complicated situation of conflicting authority. The dispute itself concerned the rearrangement of shift hours, work areas, and days off for a number of hospital personnel. The parties in the dispute relied upon different interpretations of the relevant collective agreement provisions stemming from conflicting earlier awards.[13] The Board noted that while *stare decisis* has no application in arbitration earlier awards do have a "special significance" (*Royal Columbian Hospital*, 379). The Board, however, observed that in this grievance there was a problem in attaching "special significance" to an earlier award precisely because the earlier awards did not result in finality concerning the issue at hand. The awards diverged in their interpretations of the agreement and created a situation of conflicting authority. This was particularly troubling because both awards concerned the interpretation of the same provisions of the same collective agreement. Both awards also based their interpretations upon the same award, *Re Int'l Nickel Co of Canada Ltd*, a decision that the present Board regarded as stating the applicable principles with respect to the matter at hand. Both awards were thus, in this Board's opinion, entitled to equal deference; a situation conflicting with the aim of industrial harmony embodied within labour legislation (ibid.).

The Board went on to speak of the *Windermere* award relied upon by the Hospital as the "tie-breaker." Noting that in the *Windermere* award both parties merely sought a ruling on the specific facts, the present Board stated that the significance of the award did not rest upon its "precedential value based upon some principle of *stare decisis*" (ibid., 380).[14] The value of the *Windermere* award for the present Board was that of guidance. Like the present Board, the *Windermere* Board had to "reconcile" the conflicting *Royal Jubilee* and *Nanaimo* awards. The present Board, in the end result, agreed with the reasoning of the *Windermere* Board.

[13] The Hospital relied upon *Re Windermere Central Park Lodge and Hospital Employees' Union* (December 7, 1984, Weiler, unreported), a decision that adopted the reasoning in *Re Royal Jubilee Hospital and Hospital Employess' Union, Local 180* (November 14, 1978, Sherlock, unreported). The union relied upon *Re Health Labour Relations Assoc. of B.C. (Nanaimo Regional Hospital) and Hospital Employees' Union* (September 7, 1979, Larson, unreported).

[14] Note that this statement implies that in some instances previous awards *will have* precedential value under something akin to *stare decisis.*

This award presents us with a number of useful insights. First, we obtain a clear statement linking the precedential value of earlier awards to the goals of labour legislation. Second, we find a situation where the concern of the Board is to reconcile or resolve a conflict within arbitration jurisprudence. It is puzzling to think that this would be a serious issue if nothing akin to *stare decisis* operated within the arbitration context. If guidance were all that mattered, that could be found in the preferred earlier case; that case's own relation to other earlier cases would be irrelevant to whether it provided guidance in the instant case. Third, the Board makes some finer distinctions between awards that carry "industry-wide" precedential value, like *Royal Jubilee* and *Nanaimo*, and awards that are more fact-specific like *Windermere*. Again, why would such a distinction matter, if the issue were simply one of the nature and extent of the guidance which the previous case supplied to those deciding the later case?

5.2.3.4. Assessment

The idea of taking previous decisions merely as "guidance" creates a situation where the arbitrator's ruling is, in the terminology proffered above, transparent to the underlying substantive justification. If it had been the case that arbitration tribunals referred to previous cases only for guidance, then the difficulty in regarding arbitration as a strictly institutionalized source of law would be insuperable. As we have seen, though, more is involved than mere guidance. Nonetheless, to the extent that guidance is prominent among the reasons why arbitrators refer to previous cases, the status of arbitration becomes somewhat looser.

If I turn to the range of reasons given for the practice of adhering to past decisions, those reasons are not uniform. The preservation of an assumed fairness in the body of past decisions, and industrial harmony, are substantive, not formal, reasons. To the extent that there is direct reference to these values in the reasoning process, again arbitrators' rulings must be seen as transparent to their underlying justifications. But it is overwhelmingly the case that the reference to these values is not direct. Rather, reference is made in context to formal and procedural values such as the need to reconcile conflicting previous decisions, the appropriateness of respect for past decisions and for decisions of higher courts, the desire to provide certainty. It may be true that those formal reasons themselves are justified by the substantive values of fairness and industrial harmony. But in the context of arbitration they serve as a barrier insulating the decision-maker in the first instance from those background values. In accord, therefore, with the line of argument laid down in dealing with *res judicata*, to the degree that the appeal is in the first instance to formal values in arbitrators' rulings, to that degree there is a case for regarding arbitration as an independent source of law, and as a strictly institutionalized source.

5.2.4. Conclusion

With respect both to the principle of *res judicata* and to that of *stare decisis*, we have seen that neither function in arbitration in exactly the way that they do in judicial courts. These differences immediately weaken the case for regarding arbitration as a strictly institutionalized source of law. On the other hand, it is clear that in each set of cases we find a well-established practice of adherence to these principles, which immediately provides a case for regarding arbitration as a strictly institutionalized source. I also introduced one further complexity into the discussion concerning the very structure of decision-making by rules. It may be that the fundamental reasons for creating a system of labour arbitration tribunals have to do with values such as fairness, efficiency, social harmony. But there is a key difference between the case where the decision-maker directly appeals to such values, and the case where the decision-maker directly appeals to formal values internal to the system of arbitration, which formal values are thought to be instrumental in the realization of the background values. The former counts as a deep justification, whereas the latter counts as a contextual justification, despite the background presence of the deeper values. This latter I believe to be the case to a considerable degree in both the sets of cases I examined. In such cases, I argued, an arbitrator's ruling will satisfy clause (i) of the working definition of "strictly institutionalized source of law," in that its existence condition will be a function of the arbitrator's activities and not of the legislature or the society which values what arbitration brings. In addition, clause (ii) will be satisfied, because the local normative force of the ruling comes from exactly the fact that it is the arbitrator's ruling, and not from any background values the ruling is supposed to instantiate.

Such a qualified analysis is all that is possible with respect to arbitration as a source of law, and it does not give a categorical answer to the question whether arbitration is a strictly institutionalized source of law. The analysis only lays down considerations for and against an affirmative answer. I shall say something more about the value of such ambivalence in the concluding section of this chapter.

5.3. Mediation

5.3.1. Introduction

I turn now to consider mediation. Mediation constitutes a subset of the large range of procedures of dispute settlement that in the last few decades have become known as Alternative Dispute Resolution, or ADR. Non-institutionalized, or purely customary, methods of dispute settlement are in themselves of great antiquity. However, ADR as an approved adjunct to the formalities and

the institutions of a modern municipal legal system is a product of the last half of the twentieth century. The term "alternative dispute resolution" covers a large range of heterogeneous activities. Virtually all writing about ADR emphasizes this heterogeneity, and the futility of trying to look for bright lines and defining characteristics. Indeed, given that one major purpose of ADR is to escape the formalities of the standard courtroom and legal system, the heterogeneity is hardly surprising. Moreover, even though some landmarks and stable ground arise from the conceptual fogs and morasses, terminology is not wholly stable. There is therefore an element of stipulation to the terms and distinctions used here, but my intent will be clear enough.

The intent of ADR is to provide a more informal process for the resolution of disputes, one which is tailored more precisely to the needs and the context of individual disputants than the conventional court adjudication. ADR ideally allows the disputants to construct and agree on resolutions which suit their particular personalities and predicaments, thus creating not merely a feeling but a reality of empowerment. The variety of forms of ADR stand at different removes from conventional court adjudication on a continuum of formality and legalization. Three categories of ADR may be distinguished: 1) *Conventional* (parties are commanded/required to participate) and *Assisted* (parties are aided and/or judged by others); 2) *Consensual* (within parties' discretion to participate) and *Assisted* (parties are aided by others); 3) *Consensual* (within parties' discretion to participate) and *Unassisted* (parties act alone).

The first category contains a variety of procedures which are themselves quasi-judicial in character, or firmly linked to judicial proceedings. The kind of arbitration discussed in the previous section is one example of this category, as also would be mandated pre-trial conferences, private courts, and forms of mediation which specifically included provisions for referring the dispute to binding arbitration.

The second category contains mediation or conciliation. As Joanne Goss has put it:

> The mediator acts as a facilitator assisting the parties in communicating and negotiating more effectively, thereby enhancing their ability to reach a settlement. It is not the mediator's role to adjudicate the issues in dispute and indeed the mediator has no authority to do so. Mediation is not a process to force compromise, although compromise is an element of the process. (Goss 1995, 5)

The success of negotiations depends upon good communication and effective techniques. Often the parties are lacking in these areas. Also the parties can find it hard to focus on what is being said and the process in which it is said. The mediator ensures the parties are communicating effectively:

> Essentially, the focus of the mediator is on the process of communication and negotiation being utilized by the parties in their interactions. The mediator will interject to ensure that the most effective negotiation approaches are being taken and that, if there is room for an agreement, that agreement is reached. (Ibid., 5–6)

The mediator attempts to identify common ground, narrows the dispute to its basic elements, helps generate possible solutions, re-focuses the parties on the needs and interests that underlie what they want, and diverts them from their position based statements that seem appropriate to them but may not achieve their aims.

The third category, usually termed "negotiation," "involves discussions directly between disputing parties or their representatives which take place on a voluntary basis. A resolution to the dispute is reached only if all parties agree" (Goss 1995, 1). The parties work out their problems primarily on their own. They may speak confidentially to others (e.g., counsellors, family, friends) who can help them clarify their own positions and brainstorm possible resolutions, etc. Alternatively, the parties may have go-betweens that help them communicate their positions to the other parties but the go-betweens bring very little if any independent input into the substance or the process.

My strategy in this section is to focus on the second category primarily, with some attention at the end to the third. I have, as noted, talked about the first category in the previous section. In the case of the second category, we still have two important features which make mediation a possible instance of delegation as a source of law: a) the referral of the matter in dispute to mediation is authorized by legislation; b) the mediation process may result in a ruling which binds the parties. The main theoretical issue I shall explore is whether these features are sufficient to identify mediation as a strictly institutionalized source of law, and, if not, why not. Three aspects of the authority delegated to a mediator are salient: a) the extent to which the mediator can produce rulings which bind the parties; b) the extent to which the mediator's role is circumscribed by legislation; c) the extent to which there is a continuing institutional structure for the mediation process. I shall present examples which gradually weaken the connection with court adjudication, so that we can see the point at which it becomes no longer plausible to talk about a "strictly institutionalized source of law." My hope is that we can look back from this point and have a clearer view of the nature of such sources.

5.3.2. The Saskatchewan Farm Security Act

5.3.2.1. The Provisions of the Act

The first example I will consider is the role of mediation in the administration of the Saskatchewan Farm Security Act (*The Saskatchewan Farm Security Act*, S.S. 1988–89 c. S-17.1). The purpose of the Act is to give some protection to

farmers from too easily losing their land in foreclosure actions (and other similar actions against farm land) commenced by the banks (sec. 4).[15] To do this the Act makes all foreclosure actions subject to the restrictions and protections of the Act. These protections include mandated requirements for mediation to occur between the bank and the farmer, as well as sanctions against the parties if they fail to participate in the mediation process in good faith. The Act is procedurally very detailed, precise and complex. The following summary necessarily glosses over many details.

Section 11 of the Act stipulates that the court must give permission for a bank to proceed with a foreclosure action against a farmer. The court will only grant this order where the court considers it to be just and equitable; *and after* the bank has taken all the necessary steps to give notice, proceeded with mediation in good faith, and met its onus to prove that the farmer has no reasonable possibility of meeting his financial obligations or is not making a sincere and reasonable effort to do so.

Once the bank gives notice of its intention to apply for a section 11 order, the Farm Land Security Board's duties and the mediator's duties become relevant. First of all, after the Farm Land Security Board receives the notice that the bank is going to seek a section 11 order, the Board completes a written review of the financial affairs of the farmer. This review is then given to the farmer, the bank, and the assigned mediator (sec. 12(2–4)). After the mediator gets the Board's initial report, mediation is set up and the attempt is made to work out a settlement between the farmer and the bank. If the mediation is successful, an agreement is drawn up between the farmer and the bank, neither the section 11 application nor any other action against the land proceeds.

While the mediation is being conducted, the Act is silent on the procedure that must be employed by the mediator. Nor does the Act give the mediator any power to make a binding decision for the parties if the parties are unable to come to a decision on their own.

If the mediator feels that one or both of the parties is acting in bad faith during the mediation sessions, then the mediator may file a bad faith certificate with the Board (sec. 12(7)). Then, when the Board makes its final report, it will take notice of the bad faith certificate, and so will the court when making its decision about the justice and equity of granting a section 11 order. When no agreement is reached through mediation, whether for bad faith reasons or just because the parties could not agree even though they tried, the Board may meet with the farmer and the bank in order to prepare its final report to the court (sec. 12(11)).The act lists several things which the final report *shall* include and several things which it *may* include (sec. 12(12)): Any bad faith certificate issued by the mediator shall be included in the report.

[15] The Act applies to all mortgagees that have an interest against farmland; I refer to all such mortgagees as "banks" for simplicity.

If there was no bad faith in mediation, the court must listen to the bank's arguments and, of course, the farmer's counter arguments. The court *shall* also give primary consideration to the final report prepared by the Board; the court *may* consider any other relevant circumstances and make further inquiries as it deems fit. However, the fact that the court *shall* give primary consideration to the Board's final report does not mean that it is bound by that report.[16] If the section 11 order is granted, the bank proceeds with its foreclosure action. If the section 11 order is rejected, the bank will have to start the whole process over again after a year has expired.

If there was a bad faith certificate included in the Board's final report then, if the *farmer* had acted in bad faith, the court may grant the section 11 application (sec. 14). If the *bank* had acted in bad faith then the court's hands are partially tied depending upon what the farmer wants to do. If the farmer wants, the bad faith certificate against the bank gives the farmer a right to request supervised mandatory mediation. If the farmer makes this request the court *shall* order supervised mandatory mediation (sec. 15). The order can require further mediation of up to 60 days. In connection with the order the court may make any additional orders that it considers necessary to effect good faith mediation. If the bank still does not proceed in good faith, then, after the supervised mandatory mediation is done, and when the matter comes back to court, the court *shall* adjourn the bank's application for a further 180 days. After the 180 days the court could grant the section 11 order or dismiss it. And, if dismissed, the bank would have to start the whole process over again after waiting one year.

5.3.2.2. Assessment

This Act is a complex piece of legislation, its elaborate protection of the farmer reflecting the importance to the culture and economy of Saskatchewan of the agriculture industry. The features that interest me are a small portion of this complexity, but some understanding of the whole is needed to put those features in context. That the mediator proceeds by way of delegation from the court is clear. Let us consider the example in terms of the three salient features noted above. These issues will help us to see whether mediation under the Act can be considered both institutionalized and an independent source of law.

The first is the extent to which the mediator can produce rulings which bind the parties. In fact the power of the mediator to bind the parties is quite limited. The mediator can only facilitate the production of an agreement by the parties themselves. Such an agreement, if reached, would be binding on

[16] In *Rosetown Credit Union v Jensen* (1990), 87 Sask R 70 (Sask CA), and in *Bank of Nova Scotia v Elsaesser et al* (1990), 87 Sask R 269 (Sask CA), the Board's reports favoured the farmer and the court still granted the bank its s. 11 order.

the parties, but only because it is a form of contract authorized by the courts and the legislature. Absent an agreement to which both parties consent, the mediation process itself cannot produce a binding result. But the mediator is not wholly without power to issue a ruling which influences the outcome of the dispute. The mediator can issue a bad faith certificate, which must be taken note of both by the Board and by the court which takes the final decision on whether foreclosure can proceed. Such a certificate issued against the farmer automatically allows the bank to claim it has met its onus of overcoming the presumption of sincerity in trying to meet financial obligations on the part of the farmer. If issued against the bank, the certificate automatically gives the farmer a right to further mediation, with severe consequences for the bank if bad faith persists. These considerations suggest that the mediator under the Act can only be considered in a limited way a source of law. Some authority is delegated to the mediator to produce rulings with local normative force. But the force is not a binding force; the legally binding ruling will be issued by the court, and the court simply has the fact of the mediator's ruling before it as relevant evidence.

The second is the extent to which the mediator's role is circumscribed by legislation. While the overall goal of the Act is clear, and mediation must observe that goal, and the legislation specifies a set of facts about the financial situation of the farmer to be provided, still there is little else in terms of legislative content which directs the mediator. If the position that I took in discussing arbitration is correct, too little legislative guidance as much weakens the claim of a forum to be a source of law as does too much. The role of the mediator under the Act is directly transparent to the principles of a just and equitable solution of bank-farmer disputes. It is true that the Board and the court will focus on the formal fact of an agreement having been reached, if it is reached; but they will also focus as much if not more on the content of the agreement, their legislative charge being ultimately to maintain justice and equity in the relations between farmers and banks.

The third concern is the extent to which there is a continuing institutional structure for the mediation process. It is clear that, as far as concerns the mediation process under the Act, there is little if anything of institutional structure internal to the mediation process itself. At the level of the court charged with making a final and binding ruling, the institutional structures of the normal court process apply (cf., e.g., *Bank of Montreal v Abbott and R & P Grain Farms Ltd* (1990), 81 Sask R 64 (QB), following *Farm Credit Corporation v Dimmock* (1989), 81 Sask R 45 (QB)). Continuity and reliability may be provided by the experience and expertise of the mediator, but these are extra-institutional features. The mediator's report is submitted to the Board, which in turns reports to the court. The mediator's report thus simply has the status of a piece of evidence; it is not analogous to the report of a court case in a formal series of court reports.

5.3.3. The Alberta Human Rights Act

5.3.3.1. The Provisions of the Act

The Alberta Human Rights Act (The Alberta *Human Rights, Citizenship and Multiculturalism Act*, S.A. 1980 c.H-11.7, as amended) is another example of mediation under legislation. The purpose of the Act is to eliminate discrimination, hatred, or contempt, at least to the extent they are based on the enumerated grounds of discrimination (sec. 2). It prevents discrimination in the offering of goods and services (sec. 3), tenancy (sec. 4), equal pay (sec. 6), employment practices (sec. 7), etc. The function of the Alberta Human Rights Commission is to promote equality, etc., (sec. 16) and to hear discrimination complaints. In order to facilitate the hearing of complaints (and carry out its other powers under the Act) the Commission may make its own bylaws (sec. 16.1). Where the Commission receives a complaint the Director of the Commission first attempts to effect a settlement by means of conciliation or, if that fails, through the appointment of an investigator (sec. 19.1). While the conciliation or investigation is proceeding, the Director retains the power to dismiss a complaint if he/she feels it is without merit, if the complainant refuses to accept a proposed settlement that the Director considers fair and reasonable, etc. (sec. 20). When the investigator is conducting his investigation he is given several legal/quasi-legal powers to search premises, demand production of documents, etc. (sec. 20.1). If the object of the investigator's search refuses to give consent to the search the investigator can get an order from a provincial court judge to enable the search. (sec. 21).

If the Director dismisses a complaint, the complainant can appeal to the Chief Commissioner (sec. 22). If the parties could not settle, or the Director dismisses a complaint that the Commissioner thinks should proceed, the matter goes to a human rights panel (sec. 23). The complainant and the party alleged to have contravened the Act become "parties" in a "proceeding" before the panel (sec. 24).The parties are entitled to appear and be represented by counsel (sec. 26). Evidence may be given in any manner that the panel deems appropriate and the panel is not bound by rules of the law of evidence (sec. 26). The panel makes a binding decision on the matters before it, unless there is a question of law which arises during the proceedings, in which case the panel can refer the question of law to the courts (sec. 26–7). In making its decision the panel has the power to dismiss the complaint, make orders to ensure the discrimination ceases, order compensation, order costs, and so on (sec. 28). The decision of the panel is final and binding on the parties subject to a party's right of judicial review of the decision (sec. 31).The panel's order can be filed with the courts and enforced as an order of the courts (sec. 32). The panel's order may be appealed to the courts, who can confirm, reverse, or vary the panel's order, or remit it back to the panel with directions (sec. 33). The courts would generally interfere only if some appealable error were dem-

onstrated.[17] Finally, if a person obstructs the Commission they are guilty of an offence under the Act and liable to a fine of up to $10,000.00 (sec. 36.2).

5.3.3.2. Assessment

Here we have a forum and a proceeding which are like labour arbitration in that the forum is specifically set up by legislation to settle a certain kind of dispute. The Commission has the authority to decide the issue by a ruling binding on the parties, but its initial goal is always to mediate a settlement to which the parties consent. The "panel" before which a human rights dispute may end up functions in many ways like an arbitration tribunal, in terms of its decision-making powers. But there are important differences between the two examples. We saw in the case of arbitration that tribunals tended, despite the freedom given them not to do so, to adhere to the typical procedural rules of the courts. Grievance arbitrations tend to follow the same sequence of steps and the presentation of evidence is quite court-like with examination-in-chief and cross-examination for both parties. The Commission on the other hand acts more independently to create its own rules of operation. Both labour arbitration boards and the Commission have powers, and enforceable powers, of independent investigation. In the case of arbitration, however, the process is much more formalized. An independent investigation (called "taking a view") by the arbitrator must be accomplished in the presence of counsel/representative (see, *R v Fine et al, ex p Sheraton Ltd* (1968), 69 DLR (2d) 625 (Ont HCJ).). After both parties have led their evidence in a grievance arbitration their case is closed and it is then in only rare instances that further evidence may be introduced—even on the arbitrators' own initiative. Again, by contrast, the Human Rights Commission collects and processes evidence in a much more informal manner. Their investigations typically proceed without counsel being present. In fact at most stages of the Commission's work, lawyers are not involved, whereas labour arbitration is notorious for starting out with the intention of some measure of independence from the legal system, but having been "colonized" by the legal profession. The case law abounds with judicial rulings that impose procedural requirements upon boards/arbitrators: I have discussed some of them above. In the case of the Human Rights Commission, there are very few court cases in which the operation of the Commission has been reviewed, despite the courts having jurisdiction to do so.

Reviewing mediation within the operation of the Human Rights Act in terms of the three salient features noted above, we find as follows. With respect to the extent to which the mediator can produce rulings which bind the

[17] It has, though, been held that the appellate courts should examine the evidence anew and, if appropriate, make their own findings of fact. *Dickason v University of Alberta* [1992] 95 DLR (4th) 439 (SCC).

parties, the mediator as such has no power. Power resides in the hands of the parties themselves who may reach a consensual settlement, or in the Commission in its various manifestations. The Commission, through the Director, the Chief Commissioner, or the panel, can issue rulings to which the parties do not consent, but by which they are nonetheless bound. Thus to that extent the Commission in the exercise of its powers is far more of an independent source of law than is the mediator under the Saskatchewan Act. On the other hand, the Commission, by virtue of the very broad terms in which its jurisdiction is granted by legislation, and the considerable informality of its proceedings, operates very largely by equitable principles. Very little in the way of formal rules stands between the Commission's decisions and the standards the Commission applies. To that extent, the Commission's claim to be a source of law is weakened. With respect to the extent to which the mediator's role is circumscribed by legislation, the direction from the legislation is stated very broadly, and the discretion of the Commission large. Even though the Commission operates within a legal framework, it does so more independently of that framework than was the case with the mediator under the Saskatchewan Farm Security Act. With respect to the extent to which there is a continuing institutional structure for the mediation process, within the broad procedural framework defined by the legislation, the Commission has extensive powers to decide on its own procedures, and to act as informally as it wishes. To the extent that the Commission is set up by legislation, has a formal structure, and follows consistently procedural rules, there is a case for attributing to it an institutional structure. But informality and institutionality are uncomfortable allies; the degree of institutionalization is limited.

5.3.4. Other Examples of Mediation

I will mention briefly here some other examples of mediation, provision for which is expressly made in legislation, but in which the mediator has no formal, legal powers at all. In Alberta, for example, under the Hospitals Act (*Hospitals Act*, S.A. 1980 c. H-11 (sec. 43)), if there is a complaint against a hospital, the Minister of Health may authorize mediation; however, if the mediation is not successful the mediator simply prepares a report to the hospital board, Minister, and the relevant persons involved. In the case of several Acts regulating the professions—the Optometry Profession Act,[18] the Nursing Profession Act (*Nursing*

[18] *Optometry Profession Act*, S.A. 1983 c. O-10 (sec. 31). S. 31(3) reads: "(3)A person designated by the Registrar as a mediator may assist in settling a complaint made to the Registrar if the complainant and the person about whose conduct the complaint was made so agree, but if within 30 days from the date of receipt of the complaint, or a longer period agreed to by those persons, settlement of the complaint between those persons does not occur, or in the mediator's opinion is not likely to occur, the complaint shall be referred forthwith by the mediator to the Registrar." The wording of the other Acts mentioned is essentially similar.

Profession Act, S.A. 1983 c. N-14.5 (sec.60)), the Veterinary Profession Act (*Veterinary Profession Act*, S.A. 1984 c. V-3.1 (sec.27)), the Certified Management Accountants Act (*Certified Management Accountants Act*, S.A. 1987 c. C-3.8 (ss. 54–5)), the Chartered Accountants Act (*Chartered Accountants Act*, S.A. 1987 c. C-5.1 (ss. 54–5)), and others—the mediator's position is even weaker; he or she does not even prepare a report. If a complaint is lodged against a professional person, a mediator may be employed to reach a settlement acceptable to both parties. But the mediator has no powers if there is no settlement to which both parties consent. The complaint simply goes forward to the Chair of the Discipline Committee or other appropriate person, or group within the professional association itself. A further example would be the role of mediation under the *Divorce Act*, 1985 S.C. 1986, c. 4. Section 9(2) of the Act states that it is the duty of every barrister, solicitor, lawyer, or advocate to inform the spouses about the mediation facilities known to the lawyer that might be able to assist the spouses in negotiating their issues. In Saskatchewan, to insure that the lawyers have done this, Form 61, Petition of Divorce, in the Saskatchewan Queens Bench Rules of Court requires the lawyers to sign a statement certifying that they have complied with their obligation under section 9(2) of the Divorce Act. Schedule B, Form 1, of the Alberta Rules of Court has a similar statement of solicitor certifying compliance with section 9 of the Divorce Act by the lawyers in Alberta. In practice, if the lawyers had recommended mediation and some settlements were reached, such a settlement simply narrows the range of issues that go to trial (providing the agreements reached are reasonable and of a type that the court would approve). If the lawyers recommend mediation and the parties choose not to attend, or cannot settle anything, the court simply proceeds as it always would have, i.e., the fact that the parties tried mediation and failed has absolutely no bearing on the court process.

In these cases, it is quite clear that mediation under these conditions does not qualify as a source of law of any kind. The mediation is a practical adjunct to the relevant legal process, and any agreement that emerges from the mediation has binding force if and only if it has the consent of the disputing parties. Absent such agreement, the dispute passes on to settlement by the court system, which would function as the source of law.

5.4. Conclusion

I began this chapter by noting that the dominant view among legal theorists was to attribute an ambivalent position to delegation or subordinate legislation as a source of law. The survey of some typical examples of delegation has indicated that there is sound reason for the dominant view. It is not necessary to go as far as John Austin and believe that all law derives its normative power from sovereign command. The issue is simply a matter of relevant points of contrast between the primary examples of sources of law—legislation and precedent—

and delegation. For a body to which legal power has been delegated to be itself a source of law, a difficult and narrow path must be trod. If such a body has too much independent law-making power, then the case scarcely presents itself as one of delegation. If such a body has too little independent law-making power, then the case scarcely presents itself as one of a source of law. The example I have discussed of labour arbitration illustrates the difficulty well. The arbitration board does operate with some degree of independence from the court system, under powers granted it by legislation. Within the whole body of arbitration tribunals, practices such as *res judicata* and *stare decisis* have developed independently; these practices mirror, but do not derive their authority from, the courts. But there are clear limits to the independence—not merely in that individual decisions may be subject to review, but also that courts may lay down rules for future arbitration tribunals to follow.

Moreover, the claim of delegation to be a source of law is threatened from another direction also. The more specifically substantive the content of the enabling legislation, the less plausible it is to claim that the body to which jurisdiction is delegated is a source of law. However, such a danger rarely materializes. Enabling legislation is typically phrased quite generally in terms of the substantive principles to be employed. That fact, however, only creates a different danger. The more the body functions as a tribunal of equity, deciding each case on its merits by seeing it as an instance of general principles, the more plausible it is to view those principles as the source of law, rather than the body itself. The more that the body has advisory, rather than conclusory, powers, the less the body can be seen as a source of law.

In the end, there is no simple and straightforward answer to the question, Is delegation or subordinate legislation a strictly institutionalized source of law? Delegation is what it is, no more and no less. An affirmative answer to the question obscures important features of delegation—the way in which the powers of a body to which jurisdiction is delegated can still be circumscribed and limited by the regular court system; the extent to which such a body acts informally and equitably; the extent to which such a body may not have any final decision-making power. A negative answer to the question also obscures important features of delegation—the way in which a body to which jurisdiction is delegated has the power to develop independently rules, practices and procedures; the way that such rules, practices and procedures may take on a degree, even a high degree, of formalization; the way such a body has the power to produce rulings binding on the parties to the dispute before it. Finally, much more so than courts and legislatures themselves, bodies to which jurisdiction is delegated are heterogeneous in kind. Some bodies, in the way that they function, have more claim to be regarded as strictly institutionalized sources of law than do others. All the theorist can hope to do is to indicate in general terms how to go about making a case one way or the other in any given particular instance. I hope that I have fulfilled that goal here.

Chapter 6
CONSTITUTIONS

Standard jurisprudential discussions of sources of law make no reference to a, or the, constitution as a source of law. From the point of view of a society's daily life with the law, this seems remarkable. What has been called "the astonishing growth of constitutionalism that has taken place around the world in the last sixty years" (Gardbaum 2001, 707), "the global hour of the constitutional state" (Walker 2002, 317), "the phenomenon of judicial enforcement of human rights [...] accepted as axiomatic" (McCrudden 2000, 500), needs no emphasis. Decisions by Supreme or High Courts concerning the constitutional validity or otherwise of rules of law, especially legislation, are a familiar focus of political debate and dispute, especially when the protection of individual or human rights is at stake. The discourse of constitutionality and constitutional rights is endemic both inside and outside the formal institutions of the law. If the existence and application of constitutions and constitutional norms is so central to legal, political, and social life, how is it then that little or no attention is paid to constitutions as sources of law?

The quickest answer, of course, is that constitutions are in fact as such not sources of law. Constitutions are law, not sources of law. We shall see that there are tempting reasons to make such a response. The purpose of this chapter, however, is to argue that, despite the force of challenges to the hypothesis, there is yet room to take seriously the claim of constitutions to be sources of law. An understanding of strictly institutionalized sources of law that omitted the role of constitutions would be incomplete.

I will begin by clarifying some definitional issues in Section 6.1. Then I will offer in Sections 6.2–6.5 examples to make the case for constitutions as sources of law. In Section 6.6 I will offer some conclusions.

6.1. Definitional Issues

6.1.1. The "Thin" Sense of "Constitution"

The notion of "constitution" has more than one meaning. The notion may be characterized in a thin or formal way: "A body of rules, conventions, and practices which describe, regulate, or qualify the organization and operation of government" (Turpin 1995, 3); "the law that establishes and regulates the main organs of government, their constitution, and powers" (Raz 1998, 153); "the body of rules which determine the final repository of law-creating power, the procedures and the limits of the content of norms in [a] legal order" (Stone 1968, 203). This sense Raz refers to as a "thin" sense, and one such

that it is tautological that every legal system includes a constitution (ibid.). Stone comments likewise that, in that sense, "every legal order has a constitution, whether so-called or not, and whether in writing or not" (ibid.). Important though the thin sense is for understanding the foundations of a legal system, it does not contribute to the issue of constitutions as sources of law. It is worth noting why.

It might seem such pessimism is unjustified. Raz writes of constitutions: "They do not derive their authority from the authority of their authors. They are self-validating. They are valid just because they are there" (Raz 1998, 173). The underlying point is structural, and has been noted in different ways by other scholars. Schauer remarks that nothing can make a constitution constitutional or unconstitutional: "constitutions establish the grounds for constitutionality and unconstitutionality [...] they simply cannot themselves be constitutional or unconstitutional" (Schauer 1995, 145). Patrick Fitzgerald acknowledges that constitutional rules differ from ordinary legal rules in that their authority does not derive from some more basic legal rule (Fitzgerald 1966, 85). Another way of making the same point is to speak, as Larry Alexander and Emily Sherwin do (Alexander and Sherwin 2001, 58ff.) of "pre-constitutional," as opposed to "constitutional," rules. Their thought is that these rules are rooted in agreement or acceptance, as opposed to constitutional rules, which are rooted in what is already in some sense law.

If a constitution is unique among (bodies of) legal rules in being thus its own source of authority and self-validating, then seemingly it must just so far be functioning as a unique and independent source of law. There are competing spatial metaphors here typically used to elucidate this point.[1] One is the metaphor of the boundary to a plane figure. When a plane figure—a circle for example—is drawn, the line is not part of the circle; it is not inside or outside the circle, but it demarcates the circle—the circle does not exist without it. One may think of the constitution in the thin or formal sense of a legal system in this way. Along with this "boundary" metaphor goes the language of "inside" and "outside," and of limits. In recent times, the idea of a constitution delimiting a legal system as the boundary of a plane figure delimits that figure has been associated with legal positivism, and especially H. L. A. Hart's doctrine of the "ultimate rule of recognition" (Hart 1994, 105ff.). (See, in this Treatise, vol. 11.) Hart himself speaks more of gaps within the law than boundaries to the law. Ronald Dworkin emphasized the commitment of legal positivism to the thesis of the limits of law in his well-known critique of positivism (Dworkin 1978, 17), and positivists seem to have accepted it as a fair characterization (see, for example Raz 1972). A different spatial metaphor is embodied in thinking of a legal system as a hierarchy of norms with one single

[1] Note, though, that I have warned about the slipperiness of these metaphors elsewhere; see Shiner 1992, 310–21.

norm at its apex. Such a picture is associated with Hans Kelsen's doctrine of the Basic Norm (see Kelsen 1967, 193–220), although Hart also uses the image of tracking back the source of validity within a hierarchy of laws (Hart 1994, 107). These two spatial images are not so different from one another, in that a logical tree can easily be seen to form the shape of a triangle, a plane figure.

The point to note is that in either case an elucidation is offered of the idea of a constitution as self-validating. The relation between the limit of the circle and the inside of the circle, or between the top norm in the hierarchy and derivative norms, gives a picture of the way in which the legal status of other norms can be derived from the constitution. We also have at the same time a picture of why it cannot make sense to speak of the constitution as possessing its legal status in the same way, and thus apparently of how a constitution can be thought of as a source of law.

The difficulty with this line of argument is as follows. From the perspective of jurisprudential analysis, a distinction has to be drawn between an enquiry into the social, historical, and political sources of law,[2] and an enquiry within legal science as to the sources of law, an enquiry into the *legal* sources of law, as it were. Kelsen's struggles with the way in which his Basic Norm is a norm of the legal system both like and unlike other norms are familiar. Hart famously describes his ultimate rule of recognition in these terms, that it "exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria" (Hart 1994, 110). That is, the ultimate rule of recognition can only be described from the external, or socio-historical, perspective; the rule exists only as a practice. It follows, therefore, that changes in and evolution of the rule are the subject of politics, not of law, and the normative questions such changes might raise are questions of political morality and policy, not of law. Our concern here is with sources that function *legally* as sources, not with those that function politically as sources. The content of the ultimate rule of recognition for any given legal system, supposing we accept *pro tem.* that way of putting things, will tell us what are the sources of law in that legal system. It is not itself otherwise, nor can it be, one of those sources. The terminology of "self-validation" is important for drawing attention to the "boundary" character of the basic norm or ultimate rule of recognition. But it would be a mistake to think that self-validation implies a capacity to function as a source of law. The sense of "constitution" in which a constitution may function as a source of law is a different sense, and one to which I now turn.

[2] An enquiry such as that is conducted by Hubert Rottleuthner in vol. 2 of this Treatise.

6.1.2. The "Thick" Sense of "Constitution"

A quite different kind of characterization of "constitution" is substantive, not formal. Raz calls this substantive sense the "thick" sense of "constitution," and acknowledges that there will be different ways of spelling out this thick sense in different legal orders (Raz 1998). The "thick" characterization of any given constitution will involve reference, not only to the plain facts of legal structure and jurisdiction in the legal system of which it is the constitution, but also to the normative structural principles of the legal order in question. Even dictatorships, oligarchies, monarchies, military juntas, theocracies, and the like will have in some form "thick" constitutions—normative structural principles to do with the wisdom and omniscience of the Supreme Leader or Leaders, the appropriateness of deference to the same, the enduring validity and significance of the principles of belief and behaviour of a given religion, and so forth.

Raz himself suggests a combination of seven features to comprise a suitably "thick" constitution: a definition of the constitution and powers of the branches of government (the "thin" sense), long duration, a canonical formulation, legal superiority, processes of judicial review, entrenchment, principles of government generally held to express peoples' beliefs about how their society should be run (Raz 1998, 153–4). Louis Henkin lists: popular sovereignty, supreme law, political democratic theory and representative government, limited government, and separation of powers, respect for individual rights, institutions to monitor respect for constitution, self-determination (Henkin 1993, 535–6). James Tully offers a very different list, one which suggests how thing appear to the marginalized, not to the hegemonic sectors of society: the elimination of cultural diversity as a constitutive element, definition relative to a historical tradition, emphasis on legal and political uniformity, recognition of custom, identification with a specific set of European institutions, the identity of a state as a "nation," emergence at a founding moment and the support for democratic politics (Tully 1995, 62–70). Although these lists are not identical, they are familiar; even the unusual features on Tully's list are obverses of the familiar. The lists recite the content of the thick sense of "constitution" in liberal democracies. To have a constitution in this thick sense is to have a legal order that conforms to certain liberal-democratic norms of political morality, to a particular picture of a certain kind as to how legal orders *ought to be* constructed. Dictatorships, oligarchies, monarchies, military juntas, theocracies, and the like, would not have a "constitution" in this liberal-democratic thick sense, as they would lack one or more of the features in these lists.

The range of features in the previous paragraph represent a way of thinking about the design of fundamental legal and political institutions that is characteristically called "constitutionalism." The term seems to have come into existence in the form "constitutionalist" in the eighteenth century—first, descrip-

tively as a person interested in constitutions, and then normatively as a person supporting the principles of the French and U.S. Constitutions. But it evolved into a more general sense, including the form "constitutionalism," at the end of the eighteenth century and into the nineteenth as denoting a person or a theory opposed to popular democracy, a person of conservative or royalist sympathies. The term is thus rooted in the idea of opposition to the doctrine of parliamentary sovereignty, even though any connection to "royalist sympathies" is now wholly lost. The root idea survives today in the thought that the provisions of a constitution, especially one that contains a charter or bill of individual or human rights, function as a constraint on the sovereign power of the legislature. Constitutionalism is the contrary to parliamentary sovereignty, though not its contradictory, since the two do not exhaust the field.

The notion of a, or the "Constitution"—the sense in which people in the United States characteristically speak of "the Constitution," the "capital C" sense of "constitution"—is different yet again. The expression "the Constitution" here refers to a specific document, enacted or ratified at a certain time, amended at a certain time or times, and possessing a canonical written formulation. It is clear that not every legal system has a "Constitution" in this "capital letter" sense—famously, the United Kingdom does not. Canada does not either, even though there are two acts valid within the Canadian legal system with the name "Constitution Act," and sec. 52(2) of one of them essays a characterization of "the Constitution of Canada."

One further distinction needs to be drawn. The United Kingdom is famous (or notorious), not only for not having a written constitution, but also for not having a charter or bill of individual rights. (The situation has changed somewhat with the passing of the Human Rights Act (U.K., 1998, c. 42); the Act will be discussed shortly.) However, a constitution and a charter or bill of individual rights are not the same thing. Even in cases where written documents predominate in the constitution of a legal system, and even when there is one document specifically labelled "The Constitution," it may still be so that the constitution does not contain a formal charter or bill of rights. The Constitutions of New Zealand and Australia are examples; I will say something about the latter in Section 6.2.3 below. The pervasive discourse of liberal-democratic constitutionalism has made us familiar with the protection of individual rights through courts having the power to invalidate legislation by virtue of inconsistency with such charters or bills of rights. But judicial review need not take this form.

Even in the case where there is a bill of rights, courts may have different powers of judicial review with respect to such a bill. The New Zealand Bill of Rights was enacted in 1990. Sec. 4 of the Act, however, reads:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of this enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.

The force of the Act is limited to that of an interpretive principle.[3] The recent incorporation of the European Convention on Human Rights into U.K. law through the Human Rights Act arguably still protects parliamentary sovereignty from rights as constitutional trumps. The Act has, in Joanne Harrington's words, a "uniquely British structure" (Harrington 2000–2001, 107). The mechanisms for "giving further effect" (Human Rights Act, Long Title) to the European Convention are three-fold—a new rule of statutory interpretation, that legislation must be read and given effect in a way which is compatible with Convention rights; a power given to courts to declare formally that legislation is incompatible with the Convention, though such legislation remains valid and in force; a new statutory duty on the part of public authorities to comply with Convention rights. Clearly these mechanisms abridge hardly at all, if at all, the structural sovereignty of the U.K. Parliament. What long-term effect they may have on U.K. politics and judicial decision-making remains to be seen.

In Canada, the powers of courts in relation to the Canadian Bill of Rights (S.C. 1960, c.44; R.S.C. 1985, Appendix III) are quite different and much weaker from those in relation to the Charter of Rights and Freedoms (Part I of Schedule B to the Canada Act 1982, C. 11 (U.K.)). The Canadian Bill of Rights, for example, is silent on its effect on legislation deemed to be incompatible with its values, and in any case applied only to legislation of the federal government, not to that of provincial governments. It had to be decided whether the Bill was merely an instrument of statutory interpretation, or whether it embodied wider powers. In fact, the Supreme Court of Canada decided that the Bill had the effect of rendering inconsistent statutes "inoperative" (*R v Drybones* [1970] SCR 282). However, in part because of reluctance by courts to apply such apparently far-reaching powers in view of the Bill's status as just another piece of legislation, very few cases were decided under the Bill.[4] Now that the power to review and invalidate under the Canadian Charter of Rights and Freedoms is clear, Canadian courts have shown no such reluctance.

The Constitution of Canada is instructively complex and thereby instructively typical; it is therefore worth looking at some further detail. Canada as

[3] S.6: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

[4] The analysis of present judicial powers under the Bill is more abstract and technical than practical. For such an analysis, and a thorough one, see Hogg 2002, 32-3–32-9.

historically a Dominion of the United Kingdom was created in 1867 by the passing in the U.K. Parliament of the British North America Act (U.K., 30 & 31 Victoria, c.3). That Act created the Dominion of Canada as a federation of the then-existing provinces in British North America, and spelt out in detail the institutional structures of government and the distribution of governmental powers between the federal and provincial governments. This document was the primary formal, written source for constitutional law in Canada, although, imbued as Canada was, and still is, with the U.K. parliamentary tradition, Canada absorbed and retained many of the unwritten conventions of the U.K. constitution. In the early nineteen-eighties, the Liberal government of Pierre Elliott Trudeau strongly felt that it was no longer appropriate for the main constitutional document of Canada to be an Act of the U.K. Parliament in Westminster, with only that body capable of amending the same. Trudeau therefore set in motion the patriation of the Canadian constitution—the relocating of the power to adopt and amend a constitution for Canada from the Westminster parliament to the federal parliament in Ottawa. The U.K. parliament agreed to play its role in the patriation. Accordingly, it passed the Canada Act 1982 (U.K., 1982, c.11), which Act set out in its attached Schedule B The Constitution Act 1982 and specified that Act as having legal force in Canada (sec. 2), and declared in section 3 that no subsequent Act of the U.K. Parliament shall have force in Canada. The Constitution Act 1982 (Schedule B to Canada Act 1982 (U.K.)) contains as its first thirty-four sections the Canadian Charter of Rights and Freedoms, a statement of the fundamental rights and freedoms possessed by everyone in Canada. It also contains the procedure for constitutional amendment, and among other provisions renames the British North America Act as the Constitution Act 1867. The Act also contains these words:

> The Constitution of Canada includes (a) the Canada Act 1982, including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b). (Sec. 52(2))

There are some thirty documents covered under (b). Note, however, the use of the term "include": According to the conventions of Canadian statutory interpretation, the enumeration is thereby non-exhaustive. What else might be "included"? The Supreme Court of Canada has already ruled (*New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319) that the unwritten doctrine of parliamentary privilege, which includes immunity from legal proceedings for things said in parliament and (at issue in the case cited) the power to exclude "strangers" (here, a television broadcasting company), is "included" in the Constitution of Canada. It is not clear whether any further written documents are "included," although, as Peter Hogg points out (Hogg 2002, 1–8), some very important, arguably constitutional, documents are not in the specified list, including the Letters Patent of 1947 constituting the office of

Governor General (R.S.C. 1985, Appendix II, no. 31) and the Act establishing the Supreme Court of Canada (Supreme Court Act, R.S.C. 1985, c. S-26).

The champion of parliamentary sovereignty, the great British legal theorist A.V. Dicey, identified three characteristics of parliamentary sovereignty:

> first, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify as Act of Parliament, or to treat it as void or unconstitutional. (Dicey 1959, 91)

Dicey, borrowing terminology from James Bryce (Bryce 1901, vol. 1, chap. 3), infers from parliamentary sovereignty so construed maximal "flexibility" to the British constitution, as opposed to the "rigidity" of constitutions lacking these three features (ibid.). Stripped of their prejudicial rhetoric ("flexible" good, "rigid" bad), these terms do define a range on which constitutions can be located.

6.1.3. Constitutional Conventions

In Canada, then, notwithstanding a document labelled "The Constitution Act," the constitution includes far more than that document. Much the same will be true even of a legal system like the U.S. that has one single document labelled "the Constitution." For example, the Constitution requires (Art. I, sec. 7[2]) that legislation be passed in both the Senate and the House of Representatives. However, it frequently happens that the version of a given bill passed in one chamber differs to some degree large or small from the version passed in the other. Then a committee with members from both chambers is struck to iron out the differences so that the same bill can be presented for approval to both chambers. In modern times, this procedure is politically crucial. It is clearly part of the constitution of the U.S., yet it is not mentioned in the Constitution. Similarly, Art. I, sec. 1 roundly declares that "all legislative Powers herein granted shall be vested in a Congress of the United States." It is a reality of the modern regulatory state that in fact administrative agencies promulgate and administer the legal framework for a variety of aspects of life, especially commercial life. According to the letter of the Constitution, such exercise of legislative power by executive agencies is unconstitutional. Yet, "between 1937 and 1999, no federal statute was held unconstitutional by the Supreme Court because of an excessive delegation of legislative power to an executive agency" (Nowak and Rotunda 2000, 178, n.10), and the U.S. Supreme Court has recently again confirmed this approach (*Whitman v American Trucking Associations* 121 S Ct 903 (2001)). Thus a major plank of the structure of the modern U.S. is not stated in the Constitution. One could argue that it is there by interpretation of the Constitution, but it is a strange interpretation that makes a clause say the opposite of what it literally says.

These examples display the crucial distinction between what is colloquially called the "written" and the "unwritten" parts of a constitution. However, as Dicey rightly pointed out, "the true opposition [...] is between laws properly so called, whether written or unwritten, and understandings, or practices, which, though commonly observed, are not laws in any true sense of that word at all" (Dicey 1959, 420). In the same spirit, Mark Walters observes that "it is not the writing of written law that explains its normativity but its enactment by some legislative process; conversely, it is not the lack of writing of unwritten law that explains its normativity but its acknowledgment as law by some process other than enactment by legislative process" (Walters 2001, 95). Turpin notes that a "substantial part" of the U.K. constitution consists of common law rules, including the administrative law rules of *nemo judex in causa sua* and *audi alteram partem*, part of so-called natural justice (Turpin 1995, 80). Consider again the example of parliamentary privilege and the *New Brunswick Broadcasting* case. Parliamentary privilege is "unwritten," but was acknowledged by the Supreme Court of Canada to have legal force. Likewise, in the U.S. the legal force of the regulations promulgated by administrative agencies is not disputed.

On the other hand, it is a feature of parliamentary or quasi-parliamentary bodies in the common law world (down as far even as the governing Board of the school my children attend) to conduct business by Robert's Rules of Order. A breach of Robert's Rules, however, would carry no legal consequence; it would be regarded as a breach of a "maxim" or "precept" of "constitutional or political ethics" (Dicey 1959, 417). These understandings that are not law Dicey refers to as "conventions" (Dicey 1959, 418ff.), and the term is now widespread. Conventions have been usefully distinguished by Hogg from mere "usages" (Hogg 2002, 1–21); Turpin makes essentially the same distinction, but more awkwardly, between "higher-level" and "lower-level" "usages" (Turpin 1995, 87ff.). Conventions, Hogg suggests, are regarded as obligatory by the officials to whom they apply; a usage is a governmental practice that is ordinarily followed but not regarded as obligatory. He gives the example of the elevation to Chief Justice of Canada of the senior puisne judge of the Supreme Court of Canada; it is ordinarily done, but there have been exceptions. Hogg thinks, though, that from the point of view of constitutional *law* this distinction does not matter, since neither conventions nor usages are legally enforceable, in his view.

It follows that constitutional conventions cannot be sources of law in the sense of "source of law" at issue in this volume, since the transition from the convention to action is mediated by politics or ethics, not by law (Marshall 1984, 13ff.).[5] Consider again the patriation of the Canadian constitution in

[5] Constitutional conventions clearly can be "sources of law" in the historical or sociological sense alluded to above. Indeed, they are an important case of such "sources."

1982. The net effect of the proposed new constitution, especially the Canadian Charter of Rights and Freedoms in its application to provincial legislation, would have been to reduce the sovereign power of those legislatures. Nonetheless, the federal government appeared intent on going ahead with the patriation process without seeking the provinces' consent to the new constitution. The provinces challenged the federal government's power to do this. The Supreme Court was asked to rule both on whether there was a legal requirement under Canadian law for provincial consent, and whether there was a constitutional convention requiring provincial consent. The Court ruled (*Re Resolution to Amend the Constitution* [1981] 1 SCR 753: the *Patriation Reference* case) there was no *legal* requirement for provincial consent, but that there was a constitutional convention that "a substantial degree" (ibid., 905) of such consent be sought. They based this conclusion on the historical fact of provincial consent being sought in several other situations in the past when federal legislation affecting provincial powers was being proposed. Despite the Court clearly stating, however, that the convention was not a legal requirement, nonetheless, as Hogg points out, "as a matter of practical politics, the decision made it impossible for the federal government to proceed with its constitutional proposals without a 'substantial degree' of provincial consent" (Hogg 2002, 1–19), and indeed such consent was obtained. Hogg goes on to complain (ibid., 1–20) that, since the averred convention was just that, a convention with no legal force, the Court ought not to have ruled on whether such a convention existed and to have confined its rulings to matters of law. Marshall (1984, 17) by contrast thinks that a court decision recognizing a convention may be appropriately accepted as decisively settling a *political* (my emphasis) argument about the existence of a convention. This disagreement is a delicate question of the separation of powers in a democratic polity, and will not be settled here. The point is the political character of the decision by a government to act in accord with a constitutional convention; the government is not in law required so to act.

6.1.4. Prima Facie *Grounds for Constitutions as Sources of Law*

There are two kinds of consideration that seem to initial intuition to count in favour of constitutions as sources of law. One is a range of factors I shall call "institutional design"; the other is the factor of supremacy.

Institutional Design: Transnationally, constitutions are heterogeneous. It would be foolhardy to claim that everywhere and in every way constitutions function as independent sources of law. However, certain institutional arrangements favour the independent source thesis more than others.

Special Convention*:* It would seem to count strongly against a constitutional document as an independent source of law if in fact, like the Canadian or New Zealand Bills of Rights, the document is simply a bill passed in the

legislature like any other legislative enactment, with no more and no less legal status than any other such enactment. It would seem, on the other hand, to count for a constitutional document as an independent source of law if the document is approved, not in the legislature, but at some special constitutional convention, or by some special process of ratification, especially if such a convention or process involves wider social groups than members of the legislature or other political elites. I do not mean merely a referendum, for example, on a particular proposal that, if it passed, would give normative democratic legitimacy to what might otherwise be perceived simply as action taken by political elites. I mean the case where the approval of the convention, or success in the ratification vote, is essential to the subsequent legal status of the constitutional document.

Special Court: A distinction may be drawn between "centralized" and "decentralized" systems of judicial review under a constitution. A system is centralized "where a single court has the power to test the validity of legislative instruments" (Mtshaulana and Thomas 1996, 106). A system of judicial review is "decentralized," where it falls to any court to review the constitutional validity of legislation, subject to any constraints of a hierarchical jurisdiction. South Africa and Germany are "centralized" systems; the U.S. and Canada are not. It will also make a stronger case for a constitution as an independent source of law if judicial review is carried out by a court specially designated for that purpose, if judicial review is in that sense centralized. Although one might acknowledge that judicial deliberation is judicial deliberation wherever it is conducted, it is easier to differentiate deliberation to do with an independent source if the deliberative tribunal itself is differentiated.

The fact is, however, that the majority of legal systems have neither constitutions that in the present are the product of referenda, nor centralized systems of review, although entrenchment is common. It would substantially, and even fatally, weaken the argument of the chapter if the case for constitutions as sources of law had to rely on such locally restricted factors.

Supremacy: Sec. 52(1) of Canada's Constitution Act 1982 roundly declares: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

As Dicey's comment on the flexibility of the British constitution indicates, the provisions of a constitution need not be "supreme law," in the sense of being legally superior to legislation or rules of precedent. Legislation which is part of the U.K. constitution—the House of Commons Disqualification Act 1975, for example—is just that, a piece of legislation, not legally distinct from any other law. In the case of that Act, legislation is the relevant source. It may be urged against Dicey that aspects of the U.K. constitution are *de facto* entrenched and inflexible. Parliament will not change the defining characteristics of a parliamentary system of government, for instance. Dicey's response, I

suspect, would be to reiterate that Parliament has the legal power to effect even such a radical change as that. Whatever forces compel Parliament not to exercise this power are matters of politics, not of law. A supreme constitution, then, on the face of it, can be an independent source of law, independent of, because it is supreme over legislation and rules of precedent. If legislation can be invalidated through inconsistency with the constitution, then intuitively it would seem that the constitution must be in its own right a source of law.

The law designated as "supreme" can of course contain provisions that derogate from its supremacy. In Canada, for example, section 1 of the Canadian Charter of Rights and Freedoms states explicitly that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Supreme Court of Canada operationalized the "reasonable limit" test in the case of *R v Oakes*.[6] More cases litigated under the Charter are decided under section 1 than under the remaining substantive sections. It may be said that still the constitution is the source of law in a case decided under section 1, because section 1 is part of the constitution. But the rival candidate to the constitution as a source of law will be the legislation under review. If the standards of review are interpreted too deferentially, it will become difficult to insist on the constitution, rather than the legislation, to be the source of law.

These considerations apply even more forcefully in the case of section 33 of the Charter. This section gives parliaments both federal and provincial the power expressly to declare that a piece of legislation will continue in force notwithstanding a found violation of a Charter right or freedom. This "override" power has been very rarely used (Hogg 2002, chap. 36), which evidences political respect for the Charter. But its presence from the analytic point of view limits the supremacy of the Charter and thus its role as a source of law.

Both courts and commentators now in Canada have become enamoured of the metaphor of "dialogue" to characterize the relation of courts and legislatures under the regime of the Charter. The thought is that in Canada judicial review under the constitution and parliamentary sovereignty are not to be

[6] *R v Oakes* (1986) 26 DLR (4th) 200, 224–8. See also Hogg 2002, chap. 35. The test is as follows:

1) The objective of the limitation must be sufficiently important to warrant overriding a constitutionally protected right or freedom. As a minimum, it must represent a pressing and substantial concern.

2) The means employed must be reasonable and demonstrably justified. The assessment of this takes the form of a three-part test of proportionality: i) The measures employed must be rationally connected to the objective. ii) The measures should impair the freedom no more than is necessary to accomplish the objective. iii) The effects of the impugned limit must not be disproportionate to the importance of legislative objective sought.

thought of as opposites, but as complements. The true character of the Canadian legal system is law as the product of interaction between parliament and court. The metaphor, in the context of a defence of the role of the courts in reviewing and, if appropriate, invalidating legislation, goes back at least to Alexander Bickel, who speaks of a "colloquy" (Bickel 1962, 240) between the Supreme Court and Congress in the U.S.; Bickel's idea received scholarly endorsement even in the early days of the Canadian Charter (Bayefsky 1988, 157–62). The recent boost for the metaphor came from Hogg and Bushell (1997). They drew attention to the number of times that legislation invalidated by the Supreme Court of Canada was soon reintroduced in a form which attempted to respect the Court's concerns while equally pursuing the same legislative objectives. In the authors' belief, insistence on the priority of either constitution or legislation would obscure the constitutional significance of this interaction. The "dialogue" thesis of course has an empirical commitment that events properly called "a dialogue" have actually occurred, and it has been disputed on those grounds (Manfredi and Kelly 1999; Manfredi 2001, 176–81) and reiterated (Hogg and Thornton 1999). I am not concerned with the plausibility of the "dialogue" claim either empirically or normatively, but with its significance, if descriptively accurate, from the point of view of analysis. As long as it is possible for the parties to such a "dialogue" to be each independently sources of law, the derogation considered here need not foreclose the possibility that constitutions may be sources of law. The case, though, still has to, and will be, made.

6.1.5. The Fundamental Challenge

We are now in a position to appreciate the fundamental challenge to the idea of constitutions counting as in themselves an independent source of law. By "independent," I mean "analytically independent," not "doctrinally independent." By "analytically independent," I mean a source of a character that cannot be reduced by analysis to any other form of source. The challenge is essentially this: Notwithstanding what has been said in favour of constitutions as sources of law, constitutions can always be analytically so reduced.

Take again the case of Canada. Acts such as the Constitution Act 1982 and the Alberta Act (1905 (Can.), R.S.C. 1985, Appendix II, No. 21), which created the province of Alberta in 1905, were enacted as parliamentary legislation in the usual way, by the U.K. Parliament and the Canadian federal Parliament respectively. Thus, as far as concerns their status analytically as sources of law, arguably they belong to the genre of legislation. Legislation as a source of law has been discussed in Chapter 2 above; that the statute in question is an element of the constitution of some given legal system does not affect its analytical status as legislation. Likewise, with respect to those "unwritten" constitutional laws that fall into Dicey's category of "law properly so called,"

they can seemingly be regarded as common law rules of an unproblematic kind, operating through the mechanism of precedent. Precedent as a source of law has been discussed in Chapter 3 above. That the common law rule in question is an element of the constitution of some given legal system does not affect its analytical status a rule of precedent.[7] Conventions which are not "law properly so called" will not fall even within the scope of custom as a source of law, since conventions cannot be sources of law. The question may then be fairly raised: If, in considering constitutions as sources of law, we eliminate any element of a constitution which can be correctly parsed analytically as legislation, or as precedent, or as pure ethics, or politics, is there any residue? Only if there were in some plausible way such residue would it be possible to make a case for constitutions as analytically independent sources of law.

That there is, if there is, such a residue would only fulfil the just-stated necessary condition; it remains to be seen whether it is also sufficient. We can turn to Walters for a guide to the requirement of sufficiency. He talks of

> a challenge for judges [...] [of] identifying for the legal system a theory of fundamental law that somehow fits within the matrix of doctrinal, instrumental, and traditional assumptions that together define the character of the legal system; indeed, without this framework in law, the notion of fundamental law is liable to be consumed by its moral-political content, and any claim to its application as legal norm, as opposed to political sentiment, may collapse. (Walters 2001, 93)

Walters distinguishes between "fundamental law" and "foundational law" (ibid.). His notion of the "foundational law" for any given legal system is essentially the same as Hart's "ultimate rule of recognition," of "constitution" in the "thin" sense. Fundamental law, by contrast, is the law that provides the substantive basis for the legal system. In the present context, "fundamental law" will be the sum of all the sources of law for the system. The traditional sources of law possess the requisite kind of legal character. The task here will be to enquire whether the "residue," if "residue" there be, also possesses this character, also fits within the "matrix of doctrinal, instrumental, and traditional assumptions that together define the character of the legal system" so that the "notion of fundamental law" is not "consumed by its moral-political content."

I will now present several examples from recent developments in constitutional law in Australia and Canada. I believe these examples demonstrate ways that constitutions can be sources of law. I do not present these examples

[7] By using the term "rule" here and the term "principle" later, I do not mean to be either prejudging or taking a side in the strenuous debate in recent legal theory as to whether a maxim like *nemo judex in causa sua* is a legal "rule" or a legal "principle." I use "rule" here and "principle" later in a generic, pre-analytic sense. For my own views on the theoretical debate, see Shiner 1992, chaps. 1.6, 2.5, 7. (See, in this Treatise, vol. 11.)

solely in order to provide information about the institutional history of two specific legal systems. I present them in order to demarcate possibilities in analytic jurisprudential space.

6.2. The Supreme Court of Canada and "Reading in"

Mtshaulana and Thomas (1996, 107) distinguish between "preventive" and "repressive" review powers. A constitutional court has "preventive" powers if it can pass on the (in)validity of proposed legislation before it actually passes into law. A constitutional court has "repressive" powers if it can only (in)validate legislation after it has become law. The constitutional courts in France and S. Africa have "preventive" powers in this sense. The courts in Canada and the U.S. do not; their powers as regards constitutionality are simply "repressive."

The "repressive" power of a constitutional court is a blunt instrument. The court deliberates and declares a piece of legislation constitutionally infirm. That's it. Where there was once a law, there is now a legal gap. The gap may, of course, be more or less deep, and more or less consequential. In the famous case in which the Supreme Court of Canada struck down the section of the Canadian Criminal Code criminalizing abortion (*R v Morgentaler* [1988] 1 SCR 30), the "gap" left was filled by an array of existing provincial administrative regulations concerning the provision and funding of abortions, health as such being within provincial jurisdiction. This array is still the controlling legal regulation of abortion within Canada. The situation in the (equally famous, within Canada anyway) decision on the statutes of the province of Manitoba (*Re Manitoba Language Rights* [1985] 1 SCR 721) was different. The Act creating the province of Manitoba (Manitoba Act 1870, 33 Vict., c.3 (Canada)) stipulated that the acts of the Manitoba legislature be published in both English and French, but since 1890 this had very largely not in fact been done. The Supreme Court of Canada had no choice but to rule that all unilingual acts of the legislature were constitutionally invalid—a large and deep gap indeed. Out of respect for the rule of law, the Court suspended the operation of their decision for a year, to give Manitoba time to carry out the necessary translation.

The contrast between these cases shows the way in which a decision on constitutional validity takes place in a context, and the reviewing court must take that context into account. The device of "reading in" allows the Supreme Court of Canada to do that. I will explain. In the relatively early days of the Canadian Charter of Rights and Freedoms, the Court began to follow up on determinations of invalidity by "severing" the section(s) deemed invalid, so that the rest of the legislation would survive. The Court was willing, moreover, not merely to sever sections, but also to sever phrases—to edit, in effect, the language of the legislation, to correct putative failures of parliamentary

draughtsmanship. Once, however, the propriety of such "editing" became accepted as a remedial device for constitutional infirmity, "reading in" appeared to be the next logical step. Constitutional underinclusiveness could be cured in more ways than by excising language.

The case that launched reading in was *Schachter* (*Schachter v The Queen* 93 DLR (4th) 1 (1992)). Canada's unemployment insurance provisions allowed adoptive parents to assign parental benefits between father and mother as they wished after placement of the adopted child, but in the case of natural parents only the mother could claim parental benefits after the birth of a child. Schachter claimed that he as a natural father was discriminated against by these provisions, in violation of the equality guarantees in Section 15 of the Charter. Section 15 names certain specific grounds for discrimination that will result in invalidity, and the wording makes it clear that the list is non-exhaustive. So the Court had no difficulty in finding that unconstitutional discrimination had occurred. However, the issue then became one of a remedy. To strike down the section would then leave everyone without parental benefits, natural and adoptive parents alike. Lamer CJC for the Court noted the difference between a statute that gives a benefit or right to one group and one that gives a benefit or right to everyone except a certain group. It would be, he said, "an arbitrary distinction" to treat the former and the latter differently (ibid., 13). Reading in to compensate for wrong exclusion is therefore as reasonable as severing in the case of wrong inclusion, the latter being a fully accepted form of remedy granted by courts.

Had the Court actually in *Schachter* applied the remedy of reading in, the unemployment insurance regulations would have been deemed to grant equal parental benefits to both natural and adoptive parents. In the event, the federal parliament had already changed the regulations, equalizing them by reducing the level of benefits to both. The Court therefore declined to interfere further by actually granting in that case the remedy of reading in whose legitimacy it had established earlier in the decision. However, the Court did apply this remedy in later cases. In *Miron* (*Miron v Trudel* [1995] 2 SCR 418), the Court read in to Ontario automobile insurance regulations that accident benefits were payable to common-law spouses as well as legally married spouses, the former being unconstitutionally discriminated against by wording in the regulations which limited benefits to legally married spouses. More controversially, in *Vriend* (*Vriend v The Queen in Right of Alberta* 156 DLR (4th) 385), the Court read in sexual orientation as a ground for unconstitutional discrimination into the Alberta Human Rights Act,[8] an ordinary act of the Alberta legislature protecting citizens against discrimination by private parties. Delwin Vriend was a lab instructor at a Christian college in Edmonton; the college fired him as soon as he revealed he was gay. It is quite clear that sexual orien-

[8] Alberta Individual Rights Protection Act (R.S.A. 1980, c.1-2).

tation was consciously omitted by the Alberta legislature from the listed grounds of discrimination in conflict with the Act; Alberta is not known for openness to diversity. The Supreme Court declared the Act to be in conflict with the guarantee of equality in Section 15 of the Charter, and read in the words "sexual orientation" to the list of prohibited grounds for discrimination under the Act.

The *Vriend* case presents reading in as a source of law. Vriend had no legal ground for complaint under the Alberta Human Rights Act about his dismissal as the Act stood the time he was fired. The Alberta Human Rights Commission in fact dismissed his complaint on just those grounds. However, after the Supreme Court decision to read in sexual orientation, he did have legal grounds for complaint. His normative position under the law was changed; he had legal rights he did not previously have. My point here is not the political propriety (or otherwise) of the Supreme Court's adoption of reading in as a remedy for Charter violations. My point is simply the analytic one that adoption of such a remedy produces a new source of law, the constitution. It might be argued that "reading in" is simply a technique of statutory interpretation, and that the source of Vriend's equality right, for example, remains the statute. Such an objection does not account for the fact that Vriend's equality right was actually created by the Supreme Court of Canada decision. The Court was not interpreting the statute: It was changing it—a fact on which both the supporters and the opponents of the decision agreed! At some point in the future, perhaps, when reading in becomes as commonplace and as established as an interpretive canon such as *expressio unius exclusio alterius* ("the mention of one thing is the exclusion of another"), then there may be reason to say that reading in is a technique of statutory construction. As things now stand, I suggest, the practice is best construed as embodying a source of law.

6.3. The High Court of Australia and Implied Rights

Australia's constitution lacks any charter or bill of rights. A few specific rights are guaranteed in different sections; but the protection of the standard individual rights of liberal constitutionalism is left to Parliament and the common law. Nonetheless, in two cases decided at the same time (*Australian Capital Television Pty Ltd v Commonwealth of Australia* 108 ALR 577 (1992); *Nationwide News Pty Ltd v Wills* 108 ALR 681 (1992)), the High Court of Australia deemed that laws limiting political expression were constitutionally invalid in virtue of an implied guarantee of freedom of expression, at least in political matters. The Court pointed to the entrenchment via the Constitution of a system of representative government, and argued further that representative government could not function properly without freedom of political communication. Freedom of political communication could therefore be properly in-

ferred to be a constitutional right in Australia, and therefore legislation that interfered with that right properly invalidated.

These rulings provoked a huge storm of controversy, though it is true that "the scope and implications of the implied rights decisions were much exaggerated by proponents and critics alike" (Galligan 1997, 36). Although Gaudron J suggested that a wide range of rights might be inferable from representative government (*ACTV*, 652), and Toohey J seemed in a conference presentation soon after to dangle the prospect of a judicially-created "bill of rights" (Lee 1993, 614–5), it is quite clear in the opinions as a whole that only freedom of political communication was contemplated. This was confirmed two years later in *Theophanous* (*Theophanous v Herald & Weekly Times Ltd* 68 ALJR 713 (1994)). The right is even more restricted, in that it covers political communication only in relation to the specific structure of representative government embodied in the Australian Constitution, and does so in a negative fashion, creating a space for the exercise of freedom of expression rather than granting positive rights. Nor does the protection of free political expression necessarily apply if the law restricting it has other purposes (*Langer v The Commonwealth* (1996) 186 CLR 302; *Lange v Australian Broadcasting Corporation* (1997) 71 AJLR 818).

Despite the implied right of freedom of political communication being therefore a lot less dramatic than it originally appeared to be, the example is relevant to my analytic purposes here. The implied constitutional right is novel in the following way (cf. Lee 1993, 624–5). Two modes of making law by implication from the Constitution are unproblematic—to imply using established techniques of statutory interpretation, and, in the Australian context, to draw implications based on the federal structure of the Constitution. As Mason CJ put it, such implications "must be logically or practically necessary for the preservation of the integrity of that structure" (*ACTV*, 591). But the mode of implication under analysis is a third one, that certain citizen rights, although not in the language of the Constitution, are presupposed by features of the Constitution, such that those rights may be deployed to assess the validity of legislation. The Constitution then is a source of law in virtue of the features on which the implication is based. The written document as such is not the source of law. The structural constitutional principles of the legal order described in the document are the source.

6.4. The Supreme Court of Canada and Unwritten Constitutional Law

6.4.1. Unwritten Principles as Fundamental Law

The Supreme Court of Canada in three recent cases has spoken approvingly of the constitution of Canada as including "unwritten" principles. In itself, this thought is not controversial or interesting, as it would, for example, cover

the case of constitutional conventions, which I have already acknowledged to be irrelevant to our present concerns. The Court has, however, said of certain unwritten principles that they are part of Canada's "fundamental law" (*New Brunswick Broadcasting*, 384), and that is a more robust claim. As Walters analyzes it, the claim that *lex non scripta* is fundamental law involves three separate propositions.

The first is that there are certain legal norms properly regarded as *unwritten*. The second is the assertion that certain of these unwritten norms are, within the hierarchy of legal norms in a system, *supreme*. The third is the notion that the supremacy of unwritten law is *justiciable*, and that, therefore, judges may declare statutes repugnant to this unwritten law to be void and unenforceable (Walters 2001, 96).

As he points out, it is possible to accept the first of these propositions but not the second and third, or the first and second but not the third. The unproblematic acknowledgment of constitutional conventions amounts to assent to the first. More important is the matter of supremacy and justiciability. If unwritten constitutional principles are not supreme, and if they are not justiciable, then they cannot in any real sense be characterized as sources of law.[9] The three Supreme Court cases are all subtly different, and I will say something about them in turn.

6.4.2. New Brunswick Broadcasting

The *first* case is *New Brunswick Broadcasting*. I have already mentioned that it declares the unwritten principle of parliamentary privilege to be part of the fundamental law of Canada. McLachlin J (as she then was) accepts for the Court (at 374ff.) the argument that the privilege is part of the Canadian constitution, because the preamble to the Constitution Act, 1867 (the Act which founded Canada as an independent state) contains the claim that the then-existing provinces "have expressed their desire to be federally united" with a "Constitution similar in Principle to that of the United Kingdom." As McLachlin J comments, it is thereby implied that legislatures in Canada, including provincial legislatures, have the privileges which the U.K. Constitution acknowledges the Parliament in Westminster to have (at 375). While she warns that such unwritten principles should not be "freely imported" (at 376), she feels that the preamble, together with the restriction of such principles to those necessary for the proper functioning of a legislature, provide grounding for recognition of parliamentary privileges as part of "fundamental law." She also highlights the point already noted above (sec. 6.1.2), that sec. 52(2) of the Constitution Act, 1982 merely says that the Canadian Constitu-

[9] For the possibility of principles supreme but not justiciable, see the discussion of the *Quebec Secession* case below.

tion "includes" named documents, and thus that room is left for it also to "include" unwritten constitutional principles (ibid., 378).

Note that the argument here is not that the preamble is a supremely authoritative justiciable text: The Court had already denied to the preamble any enacting force or any role as a source of law (*Patriation Reference*, 805). The argument is that the preamble is not merely an aid to interpretation, but a sound legal basis for the assertion that, *in Canada*, the unwritten principle of parliamentary privilege is fundamental law. The unwritten principle is a source of law, and its legal status secured.

Note too that the broadcasting company's challenge to their being banned from the Nova Scotia House of Assembly was based in part on constitutional protection for freedom of expression under sec. 2(b) of the Canadian Charter of Rights and Freedoms. Janet Hiebert has characterized courts conducting judicial review under the Charter as "at the apex of an institutional rights hierarchy" (Hiebert 2001, 162). Yet, as James Kelly has argued (Kelly 2001, 340ff.), the Supreme Court has several times used the federal character of Canada as a "gatekeeper" (his expression) to turn aside Charter claims. So the Charter as such is not in itself supreme law in Canada. The novel twist in *New Brunswick Broadcasting* is that the Supreme Court ruled that the scope of the unwritten and "exterior" constitutional principle of parliamentary privilege is wider than the scope of the Charter: Charter rights under certain circumstances are overridden by it. The Court, in short, attributes to the principle of parliamentary privilege both supremacy and justiciability.

6.4.3. *The* Provincial Judges *Case*

The *second case*, the *Provincial Judges* case (*Manitoba Provincial Judges Association v Manitoba (Minister of Justice)* [1997] 3 SCR 3), concerned the status of the principle of judicial independence as applied to provincial court judges. These latter officials adjudicate in the lowest tier of Canadian courts, and are employees of the provincial government. They come nearest in Canada's common law system to the position of civil law judge, "a civil servant who performs important but essentially uncreative functions" (Merryman 1984, 37). However, they are still legal officials who preside over trials and apply the law to the parties before them. In the early 1990s, when cost-cutting was all the fashion, a number of provinces froze, or even rolled back, the salaries of their provincial court judges, and in a variety of other ways worsened their conditions of work. The judges in several provinces, and some defendants who considered themselves negatively affected by these changes, challenged these impositions by provincial governments as incompatible with the necessary independence of the judiciary from the government.

The Supreme Court thought it appropriate to settle all of these cases in one determination. Lamer CJC for the Court noted that, although the cases

raise a range of issues relating to the independence of provincial courts, [they] are united by a single issue: Whether and how the guarantee of judicial independence in sec. 11(*d*) of the *Canadian Charter of Rights and Freedoms* restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. Moreover, [...] they implicate the broader question of whether the constitutional home of judicial independence lies in the express provisions of the *Constitution Acts*, *1867 to 1982*, or exterior to the sections of those documents. (Ibid., 30)

Sec. 11(d) of the Charter grants to persons charged with an offence the right to a trial "by an independent and impartial tribunal," and the other Acts referred to make a variety of separate provisions concerning the appointment and working conditions of judges. However, provincial judges are not named explicitly in the non-Charter material, and the Charter would apply to them by implication only insofar as they adjudicated criminal cases. It would have been an enormous project, and probably not an achievable one, to try to settle each of the separate points raised in terms of simply the written sources. The Court decided that it was time to present a more deep-rooted and rational framework for dealing with the fundamental constitutional issue of judicial independence. The Court saw that, in order to develop such a framework, it had to look elsewhere than the patchwork of existing written provisions, and it did so, to sources "exterior" to those documents.

The Court's argument again relied heavily on the preamble to the Constitution Act, 1867, with its reference to a "Constitution similar in Principle to that of the United Kingdom." The Court saw that such an expression could be taken more broadly than simply an allusion to the doctrine of parliamentary privilege. In his opinion, Lamer CJC memorably (if floridly) referred to the preamble as "the grand entrance hall to the castle of the Constitution" (ibid., 78), through which unwritten principles which could be grounded in the preamble's commitment to parliamentary democracy would pass. They would so pass, because they are "recognized and affirmed" (ibid., 64, 77–8) by the preamble. The preamble "invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the [Constitution] Act can be given the force of law" (ibid., 69). The preamble "identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text" (ibid., 75). The principle of judicial independence, of course, meets the standard, and Lamer CJC goes on to lay out a complex scheme for adjudication in which judicial independence is at issue.

Lamer CJC also by implication takes up McLachlin J's challenge in *New Brunswick Broadcasting* that principles that are held to pass through the "grand entrance" of the preamble be not "freely imported." He spends a lot of time (ibid., 70–5)— time which McLachlin J in *New Brunswick Broadcast-*

ing did not spend—in showing how, in ordinary cases of constitutional and statutory interpretation, the kind of principle he has in mind has been deployed. He also acknowledges the force of the fact that judicial independence is embedded in statutory and constitutional materials (ibid., 75–7): His point as regards the matters at issue is that they are not covered by the existing written materials. It is therefore manifest that analytically he is pointing to the unwritten principle of judicial independence as itself the source for the various concrete determinations made in the case as to the challenges brought to the impugned provincial legislation.

It is true that Lamer CJC acknowledges the importance of considerations of legitimacy:

> There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost importance to articulate what the *source* of those unwritten norms is. (Ibid., 68; my emphasis)

I do not believe, however, that from the appropriateness of his remarks it follows that analytically the true source for the decisions in *Provincial Judges* is legislation and common law precedents. I take this passage to be of a piece with McLachlin J's concerns about "freely imported" principles. The term "source" at the end of the above quote is not being used in the technical sense of "ground of legal validity," but in the more diffuse sense of "ground for purposes of democratic legitimacy." The talk about "the premises of a constitutional argument" implies that the unwritten principles are the source, and I am defending here the correctness of such a view.

6.4.4. The Quebec Secession *Case*

The *third* case is the *Quebec Secession* reference case (*Reference re Secession of Quebec* [1998] 2 SCR 217). The government of the province of Quebec, a political party committed to the goal of a sovereign and independent Quebec, held a referendum in 1995 on whether to proceed to attempt to negotiate the secession of Quebec from Canada, and if negotiations failed, to declare independence anyway. The electorate in Quebec rejected the path of sovereignty by only a very narrow margin. The federal government had been trying to pretend that nothing of interest or importance was happening, but the narrowness of the margin woke them up to political realities. Accepting that the political aspirations of (at least a considerable number of) Quebecers for independence needed to be taken seriously, the federal government referred the matter of the legality of Quebec secession to the Supreme Court of Canada. The Court was asked (essentially: see 228 of the case report for the exact, and more elaborate, wording): (i) Can the government or legislature of Quebec ef-

fect the secession of Quebec from Canada unilaterally under Canadian law? (ii) Can the government or legislature of Quebec effect secession unilaterally under international law? (iii) If Canadian and international law conflict on this point, which prevails? The Court answered in the negative to (i) and (ii), and did therefore not address (iii).

The Court's decision talks again, and often, of the role of unwritten constitutional principles in the determination of issues like the ones before the Court. In view of the unquestionably political, and unquestionably politically charged and contested, character of possible Quebec secession and independence, the Court took great care both to identify certain matters as strictly legal, rather than political, and to emphasize that these matters were within its jurisdiction (at 228–39; see also Walters 1999, 377–9). The Court sought to define, as a matter of constitutional law, the legal framework for the possible secession of a province from the Canadian federation. The Court identified four principles as comprising this framework— federalism, democracy, constitutionalism and the rule of law, and respect for minorities (at 240)—and also spelt out some of the more specific steps that such principles subtended, especially a *legal* duty on the part of Quebec to negotiate secession, rather than declare independence unilaterally, and a *legal* duty on the part of the federal government and the other provinces also to negotiate if the people of Quebec clearly desired to leave Canada.

The Court speaks about these unwritten principles in (by now, in this chapter) familiar terms: "these principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based" (at 247); they "infuse our Constitution and breathe life into it" (at 248).

> Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood. (Ibid.)

And so forth. The remarks in this case, however, differ in one important respect from those in the two previous cases. Although the Court stresses that the application of these principles results in legal duties on the federal and provincial governments of Canada, the Court also adds a cautionary element. Having distinguished "the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions," the Court then comments that "judicial intervention, even in relation to the *law* of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme" (ibid., 270; the Court's emphasis). The Court stands for the place of constitutionalism and the rule of law in the mix of relevant constitutional principles; however, the democratic principle also has a role,

exemplified in the political character of the issues. The Court concludes that, in pursuit of the rule of law, it must develop the proper legal constitutional framework for possible secession, but then defer to the democratic principle:

> The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. (Ibid., 271).

As Walters points out (Walters 2001, 100), this is tantamount to saying that, with respect to justiciability, some unwritten constitutional principles are fully legal, supreme, and justiciable; others are fully legal and supreme, but not justiciable. The Court, as noted, speaks of the constitutional framework it develops as imposing duties (a "binding status"; ibid., 272), as having "serious legal repercussions" (ibid.) if ignored. The example the Court gives is that the international community may be slow to recognize a new regime that has not seceded within the framework specified (ibid., 272–3).

6.5. Conclusions

The message of the cases discussed above is that constitutions may function as sources of law, in the sense that legal rights and duties may follow from aspects of a constitution, such that their source cannot be reduced to other kinds of sources of law but must be the constitution. Unwritten constitutional principles function as sources of law—such principles are genuinely legal, are supreme, and, in some cases, are justiciable. The principles are unwritten, and so as a source are not reducible to written legislation; nor are they merely rules of precedent. The connection to legal materials that is required for the principles to be genuinely legal principles does not imply that those materials are the true source of law in the decision applying the unwritten principles.

Walters says of the principles in *Quebec Secession* that "although perhaps not common law in the pure sense, these unwritten constitutional rules may be called *common law constitutional* rules" (Walters 1999, 383). He does not explain what he means by "perhaps not common law in the pure sense," but an explanation may be offered. The principles are not "pure" common law principles, since they would not figure in any inventory of such principles. They are not principles with an existing pattern of observance by courts. It may be true to say that they are latent in the institutional history of Canadian constitutional law, but they lie well below the hitherto conscious surface of such law-making and law-applying. The Supreme Court of Canada brings them into consciousness. If terms like "common law" or "customary" are used in a wide sense, such that anything that is not a written enactment is

"common law" or "customary," then the unwritten constitutional principles we have been discussing of course qualify as "common law principles" or "customary principles." However, I have already shown in Chapter 4 above the disutility of such a wide meaning for the purposes of the present analytical project.

Even the idea of "common law constitutional rules" is misleading in the following way. A "common law rule" is one that is in actual use by officials of the system; the administrative law rules mentioned above (sec. 6.1.3) are examples. But, as I have noted, there is an important sense in which the constitutional principles the Supreme Court of Canada deploys in *Quebec Secession* to decide the case are not currently in use; they are the substrate of legal materials currently in use. To that degree, the ruling has a prospective dimension. If important constitutional cases continue to arise in which these principles will be wholly or partly dispositive, their novelty will wear off and they will then become genuinely "common law constitutional rules." Walters' characterization is predictive, rather than currently descriptive. The reduction of these principles to the same kind of source as rules of precedent fails.

How do such principles avoid the notion of fundamental law being "consumed by its moral-political content" (Walters 2001, 93; see sec. 6.1.5 above)? Walters himself suggests that the unwritten principles fall into two classes, "text-emergent" unwritten constitutional norms and "free-standing" unwritten constitutional norms (Walters 2001, 98). With respect, this does not seem to me correct. The idea of "text-emergent" principles Walters draws from the Court's reference to the need for constitutional principles to "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning" (*Quebec Secession*, 240). The idea of "free-standing" comes from the Court's reference to principles deriving from somewhere "exterior" (*Provincial Judges*, 64) to the written texts. However, the literal idea of "text-emergent" principles fits best with the process of implying a right from a specific constitutional document, as conducted by the High Court of Australia in the case of freedom of political expression (see sec. 6.3 above). Stephen Donaghue has argued, even, that the implications drawn by the High Court can be underwritten by applying well-understood rules for valid contextual implications in language (Donaghue 1996). Rather, the distinction the Supreme Court of Canada implicitly draws is between, on the one hand, unwritten constitutional principles to be derived from the U.K. constitutional tradition, in themselves "exterior" to Canadian law and entering Canadian law through the "grand entrance way" of the preamble to the Constitution Act, 1867, and, on the other hand, unwritten constitutional principles to be derived entirely from within the domestic Canadian constitutional tradition—which includes "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning." The terminology of "text-emergent" and "free-standing" obscures

the success of the Court's endeavour to link the supreme and justiciable unwritten constitutional norms it deploys to written law sufficiently closely that it can with a straight face speak of these norms as "legal," and not merely norms of political morality.

The underlying point is the same as that made in Chapter 4 (see 4.4 above) concerning the status of custom. As with custom, it does not follow that the rootedness of unwritten constitutional principles in statutory and precedential materials implies that the validity of the principles is properly said to be "derived" from these materials in the technical sense of subordination by derivation. Obviously, if unwritten constitutional principles are to have legal validity, then they must have some grounding in legal materials. Perhaps also, if the nature of the Canadian polity radically and sufficiently changed, governing bodies would abrogate the principles. In that sense the principles could be said to be at the present time subordinate by the power of abrogation to the legislature. But the fact that the need for such grounding in legal materials is met does not imply that the principles so grounded cannot then function as an independent source of law.

It remains to be seen how closely the constitutional sources I have identified fit the working definition of "strictly institutionalized source of law" being used in this volume. That definition is, recall:

A law, or law-like rule, has a strictly institutionalized source just in case
i) the existence conditions of the law, or law-like rule, are a function of the activities of a legal institution

and
ii) the contextually sufficient justification, or the systemic or local normative force, of the law, or law-like rule, derives entirely from the satisfaction of those existence conditions.

The rooting in legal materials that I have described satisfies the first part of this condition. The second is somewhat less straightforward; the amount of looseness will depend on the account given of the term "entirely" in this context. The Supreme Court of Canada in *Quebec Secession* at one point comments that "our law's claim to legitimacy also rests on an appeal to *moral* values, many of which are imbedded in our constitutional structure" (at 256, my emphasis). In the case of a true "strictly institutionalized source," it may be said, the normative force that is transferred from the source to the norms it endorses is not in any way mediated by the content of the source, but only by its satisfying formal conditions for being a source of that kind. It seems hard to represent unwritten constitutional principles in such a way. The values and principles enshrining them which we have discussed here—freedom of political expression, individual equality, democracy, respect for minorities, and so on—are principles to which the persons whose principles they are have as citizens made a

commitment. The prominence of those principles in the constitutional discourse—domination of the discourse, even—displays that commitment. The commitment itself, though, is not legal, but moral and political. It seems then to follow that this substantive commitment is the true source of law.

In assessing the force of this argument, it is important to grasp the following point. As I have argued at greater length elsewhere (Shiner 1992, 5–9), there is something in the world independently of legal theory that legal theory is the theory of, namely, *law*. Pre-philosophically, or pre-analytically, there are in the world laws, legal rules, legal doctrines, legal institutions, and legal systems. We would not be able to differentiate the entities the legal theorist is concerned to understand from other social institutions and practices unless they possessed certain observable features, nor would the term "law" have empirical reference, unless this were so. The salient features of this familiar social institution may be picked out by a recitation that simply gives them their standard ordinary names. A different level of discourse altogether is that of legal theory itself, which arranges, or orders, those features in a manner that to the theorist seems best to represent the institution of law. It is important to realize that the conflict between theories like legal positivism and natural law theory occurs at this second level, not at the first. Positivism can be represented as saying that an accurate recitation of the formal features of a legal system is all that one needs to do, in order to complete an adequate theoretical account of law. The natural law theorist can be represented as saying that an adequate theoretical account of law cannot be completed without understanding that there is an internal relation between law and the principles of political morality which lie behind it.

T. R. S. Allan has rightly commented that "in matters of constitutional significance, legal doctrine and political principle are inevitably interdependent and intertwined" (Allan 1993, 253). How should this comment be taken? It could be taken as a theoretical claim denying the exclusive right of either positive law or background political morality to be the determining source of law in constitutional matters, but there is little to substantiate such an interpretation. The comment functions best as a pre-analytic, or pre-philosophical, claim about just how it is at the outer limits of constitutional law. So taken, the constitutional cases I have discussed illustrate the force of the claim. The "existence conditions" to which we refer in clauses (i) and (ii) of the working definition of "strictly institutionalized source of law," when the character of constitutional law is at issue, are ones in which "legal doctrine and political principle are inevitably interdependent and intertwined." That is the result of our enquiry into constitutions as sources of law. To try further to differentiate and rank the part played by doctrine or by principle will be to move from pre-analytic description to theoretical contention.

To participate in such contention is not my aim here; my aim is rather to present what the contending parties are contending about.

Chapter 7

SOURCES OF LAW IN THE CIVIL LAW

by Antonino Rotolo [1]

7.1. Introduction. The Theoretical Framework: Basic Concepts on the Sources of Law in Continental Legal Doctrine

Despite the great many works which jurists devote to the sources of law—and which, as Roger Shiner observes in Section 1.1 of this volume, are cast in a legal-dogmatic perspective—recent analytical jurisprudence seems to largely ignore the theoretical relevance of this topic. And, with some exceptions, the same applies to the tradition of civil law. Other questions come to the centre of legal-theoretical investigation: the ontology and nature of law, the theory of normativity, law and morality, law and politics, legal epistemology, legal reasoning, and so on. This does not mean that the sources of law are completely disregarded, but perhaps that legal philosophers tend to treat this question from specific perspectives. To see this, we will take a quick look, by way of example, at three classic contributions to the general theory of sources: those of Hans Kelsen, H. L. A. Hart, and Alf Ross.

At some risk of being too schematic, we can say of the continental doctrine of the sources of law that it seeks to attain at least one of the following ultimate goals (cf. Guastini 1998):

(a) to identify the foundation of the binding nature of law;
(b) to state the criteria for the recognition of what is valid law;
(c) to define the conditions for norms to belong to the legal system and so the grounds for its unity;
(d) to provide formal and substantial criteria for changing legal systems, regulating such changes, and solving normative conflicts.

These aspects exhibit possible mutual connections, depending mainly on the philosophical approach adopted. Points (a) and (b) are closely linked if it is

[1] First of all, I am grateful to Roger Shiner for his methodological advices on how to frame this chapter with regard to the rest of this volume. I would like to thank Giorgio Bongiovanni for his helpful suggestions, especially in regard to Section 7.2. His works on the relation between constitutionalism and legal theory have been of great help to me in sketching out in a brief space the thorny question of the sources of law in contemporary constitutional systems. A note of thanks is also due to Mario Luberto: Much of what is said in Section 7.3 on private autonomy draws inspiration from his recent contributions on the matter. Last but not least, I would like to thank Silvia Vida, Andrea Morrone, Enrico Pattaro, Giovanni Sartor and Filippo Valente for having read an earlier version of this chapter. Of course, the author himself is solely responsible for any opinion or mistake contained in it.

argued that we must look at the effective grounds on which legal systems stand. This is to say that we cannot recognise what is law or arrive at its foundation unless we refer to social practices or to the conventions among officials which the law emerges from; at the same time, we must avoid reference to moral criteria and suchlike (in a broad sense, this can be understood to be the so-called Sources Thesis; Raz 1979). On the other hand, (a) and (b) may provide substantial grounds for the unity of legal systems, as well as determine patterns of change in the law and possible criteria—points (c) and (d)—for preferring certain norms to others. Thus, any sound theory under which the law ought to be entrenched in morality or justice (e.g., natural-law theory) should consider the implicit or explicit ways of choosing between conflicting norms and identifying the basic values that shape the law. Working in the opposite direction, (c) and (d) can also substantiate point (b) at least. Thus, a positivistic account of the law will typically define the notion of legal validity on the basis of criteria internal to the legal system, highlighting the normative procedures set forth within the system for changing the system. And so on.

As has been noted (e.g., in Pattaro 1994; cf. Guastini 1998), the notion of the sources of law is, on the face of it, ambiguous because it assumes what the law is and does not specify the meaning of the term "source." [2] My preliminary remarks accord with this conclusion. It is quite usual for continental legal doctrine to attempt to put some order into this variety of possible perspectives by distinguishing among at least three sources as follows (ibid.; cf. Bobbio 1994):

(1) sources for the validity of law;
(2) sources of lawmaking;
(3) sources for the cognition of law.

The first kind of source is meant to capture all those approaches that address the problem of the validity of legal norms and of the law in general. This view corresponds roughly to points (a) and (b) above. "Sources," or perhaps "source," means in essence "foundations," or "foundation" (which see Rottleuthner, vol. 2 of this Treatise; see, also, Pattaro, vol. 1). The second perspective is concerned with defining the procedures through which lawmaking proceeds. Here, the meaning of "sources" is connected with the types of act and fact that produce legal norms. The third and last approach listed focuses on the types of legal materials (mainly legal texts) resulting from any lawmaking process and through which (i) this process unfolds, and (ii) we can recognise what is valid law. As noted by Guastini (1998; see also Luberto 2001, 135) the distinction between (2) and (3) is of some theoretical use, but is often

[2] But this, for various reasons, is also acknowledged in such classic accounts of the sources of law as Kelsen's and Ross's. Cf. Kelsen 1967, chap. 5, sec. e; Ross 1958, chap. 3.

not so clear in concrete cases. This is because, in some legal positivistic views, for example, all lawmaking procedures need to be regulated or, at least recognised, by positive law—by posited legal norms—such that for any procedure there should exist a corresponding norm that can be "extracted" from a certain legal text. In this specific perspective, this conclusion seems to hold even if we apply to *any* system of statutory law the definition which Shiner provides of "strictly institutionalised sources of law" (see, in this volume, chap. 1), and which is adopted in this chapter: If the focus is made to fall on the systematic meaning of the sources—by referring to such "contextual and sufficient" criteria for the recognition of law as are provided by the legal system—then the distinction between sources for the recognition of law and sources of lawmaking will tend to be fuzzy.[3]

We will return this general distinction shortly. But let us first look at the way it works in three accounts of the sources of law that have now become classic and yet are still influential in continental legal doctrine: Kelsen's, Hart's, and Ross's. Their general theories of law are of course "universally" known, and for a survey of them the reader is referred to Volume 11 of this Treatise. That way we can focus here on those aspects of them that are directly relevant to the topic at hand. Indeed it will be seen presently how these theorists tend to associate the system of sources with the notion of source of validity, despite the fact that they all provide some analytical criteria for describing each legal source.

Hans Kelsen (1967, 221) argues that the "peculiarity of the law is that it regulates its own creation." This is central to Kelsen, who further observes that such regulation "can be done by a norm determining merely the procedure by which another norm is to be created […] [and] also by a norm determining, to a certain extent, the content of the norm to be created" (ibid.). Again,

> The relationship between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super- and subordination. […] The legal order is […] a *hierarchy of different levels of legal norms*. Its *unity* is brought about by the connection that results from the fact that the *validity* of a norm, created according to another norm, rests on that other norm, whose creation in turn, is determined by a third one. This is a regression that ultimately ends up in the presupposed basic norm. (Ibid., 221–2; italics added)

As noted by Zagrebelsky (1987, chap. 2), among others, if the law is analysed strictly in these terms, then any doctrine of legal sources will be doomed to play only a marginal role in describing the lawmaking process. Thus, it will no

[3] Note that Guastini 1998, in a slightly different perspective, proposes a different distinction, wherein, given points (2) and (3) above, the idea of a "source of validity" gets replaced with the notion of "normative authority," meaning by this the subjects empowered to create legal norms.

longer be so important in this case to establish in which sense legislation as such, for example, is a source. There is no sharp distinction in Kelsen's approach (1967, 233ff.) between the creation and the application of law: A norm is created by virtue of the application of a superior norm. What really matters, on this conception, is that a legal norm, whatever it is, be produced in accord with the hierarchical structure of the legal system. Any act or fact by which a norm gets created is a legal source if that norm is recognised by a valid norm in the system's hierarchy. Without such recognition, this act or fact will still be found to be a legal source on the *presupposition* that it produces objectively binding norms—as sometimes happens when courts apply customary law. Zagrebelsky's criticism is basically correct. But something must be added to it. In national legal systems, constitutions correspond in general to the "highest level of positive law" (ibid., 222). Kelsen, however, famously distinguishes between the "material" and the "formal" constitution. The material constitution consists of all norms that "regulate the creation of general legal norms." It concerns the constitutional matter of "law-making" and is intended in its broadest sense, since it "may be created by custom or by a specific act performed by one or several individuals" (ibid.). The formal constitution is a legal document which in turn can include norms regulating the lawmaking process (legislation), "but also norms concerning other important political subjects [and] regulations according to which the norms contained in this document may be abolished or amended [...] by a special procedure." The sense of these norms of constitutional revision, and perhaps of the formal constitution in general, is then that they "stabilize the norms designated [...] as 'material constitution'" (ibid.). It is *normal* on this perspective that "in the modern legal order" the creation of general legal norms "has the character of legislation," in the sense that the legal order institutes a special legislative organ: "Only in a democratic legislation are regulations required that determine the legislative procedure" (ibid., 225). In a similar vein, formal constitutions may confer a lawmaking power on administrative organs, too, or on the government "in the event of exceptional circumstances" (ibid., 229). Lawmaking, materially intended as the creation of general legal norms, can take specific forms of statutory law, such as ordinary statutes and ordinances. In Kelsen's terms, this is law in its formal sense, where the doctrine of sources does not necessarily get conflated with the notion of legal validity. Zagrebelsky's remark is still correct, however, in the sense that it falls in with Kelsen's following conclusions:

(a) "Legislation and custom are often referred to as the two 'sources' of [national] 'law'"; but
(b) "If international law is considered, then only custom and treaty can be considered to be the 'sources' of this law." On the other hand,
(c) "by 'source of law' may also be meant the [ultimate] reason for the validity of a law, [...] the basic norm of a legal order." But,

(d) if it is considered only the "the positive reason for the validity of a legal norm, [...] the constitution is the source of the general legal norms created by legislation and custom" (ibid., 232–3).

In other words, "according to a positivistic theory of law, the source of law can only be law" (ibid., 233). The conclusion is that the true meaning of the idea of legal sources is closely related with that of legal validity.

The notion of legal validity seems to enter as the key concept also in Hart's approach to the sources of law. Perhaps "it is not incidental that *The Concept of Law* should lack a chapter explicitly devoted the system of sources (a question treated in chapter 6 along with the *rule of recognition*)" (Luberto 2001, 148; my translation). The rule of recognition,[4] it is widely known, consists of a special kind of secondary rule: You can tell one by the fact that

> some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. (Hart 1994, 94; cf. MacCormick 1981, 22)

The role that this rule plays in establishing what, from the "internal point of view," is valid law ties in with this feature of it, that this rule "must be effectively accepted as a common public [standard] of official behaviour by its officials" (Hart 1994, 113). There is encoded in the rule of recognition the variety of formal conditions characterising the sources of law, such that this rule can, in combination with "rules of change" and "rules of adjudication" (ibid., 95–7), account for the lawmaking process. What on this conception comes to be the system of sources is in principle quite flexible because open to any recognised social practice by which binding law is found. Valid law can be retrieved "wherever such a rule of recognition is accepted," so that

> both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided [...] may take any one or more varieties of forms: These include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons; or to past judicial decisions in particular cases. (Hart 1994, 100)

Unlike what we have in Kelsen's theory, the hierarchy of legal sources is not exclusively upward moving, dependent on a superiority relation deriving from the mechanism of empowerment (cf. Luberto 2001, 149). The rule of recognition must contain criteria for solving a conflict between two rules, r_1 and r_2;

[4] The theoretical meaning of the rule of recognition is among the most debated questions of Hart's theory of law and cannot be treated here. The definition of its scope, especially in regard to the relation between law and morality, has recently set against each other what have come to be called the inclusive view (cf. Waluchow 1994) and the exclusive view (Raz 1979) of legal positivism.

and the norm that will prevail in this conflict, say r_1, may be recognised as superior to r_2 even if the validity of r_2 does not derive from r_1. As Hart observes, what is decisive here is the distinction between subordination and derivation in accounting for the hierarchy of sources (see, in this volume, chap. 3):

> Yet they [custom and precedent] owe their status of law, precarious as this may be, not to a "tacit" exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate place. (Ibid., 101)

This fact shows that the legal status of sources does not depend entirely on our recognition of them through a purely formal criterion in the manner of Kelsen. This conclusion does not, however, entail that the sources of legal validity are only a marginal element in Hart's approach. The trivial reason why this is so is that Hart's idea of validity is simply not that of Kelsen. In fact, Hart finds that

> in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity. (Ibid., 95)

In addition,

> the rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense, which we shall try to clarify, an *ultimate* rule. (Ibid., 105)

To Alf Ross now. There does not seem to be in Ross any linking of the theory of sources to the *ultimate* problem of legal validity. As Gavazzi observes (1965, xii), Ross argued consistently, from the very first time he turned to the sources of law, that his problem should not be confused with that of identifying the social grounds of law, or with that of determining the foundation of its bindingness. What matters is that "the source of law is, *according to a formal definition*, the reason for recognising something as law" (Ross 1929, 292; my translation, italics added).[5] Let us look, for example, at Ross's definition of legislation:

> Statute law is enacted law, that is, it has been created by a resolution made by certain human beings and therefore presupposes norms of competence which indicate the conditions under which this may take place. [...] All enactments by virtue of a competence is known by the common name of legislation. Taken in a broad sense legislation comprises not only the constitution (if written) and Acts of Parliament, but also all kinds of subordinate and autonomic enactments [...]: orders in council, statutory rules and orders, by-laws by local authorities, autonomic corporations, churches, etc. (Ross 1958, 79)

This definition, articulated by specifying the notions of procedural and material competence (ibid., 79ff.), accords with the requirement of a formal ap-

[5] "Rechtsquelle in formaler Definition bedeutet Erkenntnisgrund für etwas als Recht."

proach to sources. Ross, too, acknowledges, in Kelsen's lead, that the mechanism of empowerment—based on the role of competence norms in producing other norms—determines a regression along the normative degrees of the legal system. But, he argues, the way to go about identifying the ultimate norm that grounds the legislative process is not a question internal to the law; it is rather a subject of psychological or sociological investigation (ibid., chap. 3, sec. 16).

So far, so good. On closer analysis, however, it turns out that Ross's approach to sources is not independent from his view of the ultimate problem of legal validity. As is well known, his notion of validity tends to merge with that of effectiveness, insofar as the identification of what is valid law is made to depend, in Ross, on the possibility of predicting that such law will be the actual ground for the future decisions of judges (ibid., chap. 2). In line with his realistic approach, Ross maintains that

> "Sources of law" [...] are understood to mean the aggregate of factors which exercise on the judge's formulation of the rules on which he bases his decision. (Ibid., 77)

In this sense, Ross classifies sources as follows:

> By [the degree of objectification of the various types of source] I mean the degree to which [the sources] present the judge with a ready formulated rule; or conversely, the degree to which they present him only with material which is fashioned into a rule only after an active contribution of labour on his part. Accordingly, the scheme of classification will be:
>
> (a) the completely objectivated type of source: the authoritative formulations (legislation in the widest sense);
> (b) the partly objectivated type of source: custom and precedent; and
> (c) the non-objectivated, "free" type of source: "reason." (Ibid., 78)

This view does not in theory seem too "dangerous." Even if the sources of law are objective (psychological) factors of a kind, still we can articulate them analytically. But this conclusion, compatible with Ross's account of legislation, seems to be jeopardised by what, in line with his idea of validity, he says about precedent and custom:

> One cannot take it for granted that the doctrine of *stare decisis* reflects an actual situation to the effect that Anglo-American judges *feel* themselves bound to a higher degree by precedent than do their Continental colleagues. On the contrary, one might surmise that the Continental judge does not to the same extent as his Anglo-American colleague feel himself responsible for the development of the law, but will be inclined to leave to legislation any attempts at reform [...]. And the result might be that, as against the official ideology, he will *in fact* be less inclined to depart from precedent. (Ibid., 90; italics added)
>
> [The doctrine of custom]—as the doctrine of precedent—is an ideology, whose function it is to conceal the judge's freedom and law-creative activity. (Ibid., 97)

Ross's overall criterion for characterising the system of sources is based on his general view of sources as effective "causes" of the judge's decisions. Whence

the final impression that one gets: If the criterion for identifying the sources of law is based on their influence on the future decisions of judges, then any analytical characterisation of them—any way of determining the systemic or contextually sufficient conditions for their existence—will have only a marginal importance. In fact, any factor that, prima facie, looks legal will be good enough to be considered a source of law. No clear, definitive, or systemic criterion of recognition is provided in general, other than that this criterion must be a part of the "ideology of judges." Again, the ultimate notion of legal validity plays a determinant role in this regard.

These comments on Kelsen, Hart, and Ross—which parallel some of Shiner's preliminary remarks—may perhaps explain why continental legal theory has recently fallen short of providing a comprehensive and analytical account of the sources of law. Of course this falling short cannot be ascribed solely to the influence that leading theorists have exerted on subsequent approaches. There is something else involved. It is often the implicit or explicit claim of systems of civil law that they can establish by themselves what are to count as authoritative sources of law. The Italian civil code, for example, makes a statement to the effect that we are to regard as sources of law (roughly speaking) legislative statutes, regulations and ordinances, and customs.

This explicit enumeration is one way in which our legal system attacks the problem of sources (we will see that something of this kind is true of the constitution as well). In this sense, the system operates in such a way that the sources of law are institutionally authoritative when they are recognised as such within the legal system. On the other hand, it is clear that the bindingness of these explicit classifications of the sources has only a prima facie status (cf. Peczenik, vol. 4 of this Treatise). As has been pointed out (e.g., Guastini 1998), most "legal classifications" of the sources of law are quite often far from being comprehensive.

Given this contingent incompleteness of all (internal) legal classifications of sources, legal interpretation, whatever its normative level, seems to be among the decisive routes through which such classifications can be tested. The ultimate identification of the binding sources of law within continental legal systems requires interpretation, not least because the application of law makes it necessary to check if and why a certain norm is valid law (MacCormick 1978, chap. 3; cf. Wróblewski 1992). More generally, when we look at the sources of lawmaking, the recognition and subsequent systemic categorisation of the law often seems based on the interpretation and application of at least some basic norms that shape the legal system structurally. The alternative to this method is that of setting out criteria of recognition that are, in a way, external to the law. Of course, this question falls outside the scope of this chapter, since it concerns the so-called quasi-institutionalised sources of law and their relation to those sources that in this volume are identified as "strictly institutionalised" (see, in this Treatise, vols. 4 and 5).

As Shiner argues, the point is not to commit ourselves too strongly to any specific philosophical stance with regard to the continental theory of the sources of law. This open-ended approach is in principle very much a possibility since sources can be construed as the sources of lawmaking by which something is recognised prima facie as law or is codified in different ways within the legal system. In Shiner's words, it is a matter of looking "first [...] at how legal systems actually operate with the notion of authoritative source" (this volume, chap. 9), meaning that we will have to explain how sources work within the institution of a legal system.

Proceeding upon this basic assumption, I will block out, in what follows and in the remainder of this chapter, as neutral an account as possible of the notion of sources of law. The analysis will thus be focused on (i) the facts or events that are *typically* recognised as law-productive, and (ii) the systematic relations that hold between norms deriving from such facts or events—see points (c) and (d) above. In this perspective, the conceptual apparatus comes from a comparative approach to continental legal dogmatics (cf. Pegoraro and Rinella 2000, 2ff.). Notice that all the questions taken up here are given a treatment which may be viewed as problematic. A wider philosophical discussion would therefore be in order but would have to be rather involved, so I will confine myself to illustrating some basic concepts that give the "flavour" of the continental approach to the sources of law.

The doctrine of the sources of law is meant generally to describe the kinds of effect that result from creating, changing, or abrogating legal norms, these activities being the so-called sources of lawmaking. More precisely, there seem to result immediately normative provisions from sources that consist in issuing normative acts. The sources that in turn exhibit prima facie the structure of normative facts also provide a basis on which to identify normative types of behaviour (for a general account of this question with reference to customary law, see chap. 4; see also Pizzorusso 1999; Guastini 1998; for an overall perspective, see Pattaro, vol. 1 of this Treatise). The way the system of sources is articulated typically reflects the degree of complexity of the corresponding legal system, and ultimately the social contexts which this system is situated in (for an example of this thesis, see sec. 7.2 below). Even so—despite such dependence on context—we can still set out some basic distinctions with which to identify some kinds of sources.

Thus, when legal systems are not sufficiently stable—and their structure not yet consolidated—the lawmaking process sometimes gets shaped on the basis of rules that do not, strictly speaking, fall within the "legal" scope of the creation of law (cf. Guastini 1998; Modugno 2002). This makes it possible to single out, in distinction to the "legal" sources of law, what are called *extra ordinem* sources. These last are recognised as productive of legal norms on the basis of the effective role they play—especially at the decision-making level—in creating, changing, or abrogating existing legal norms.

A second element peculiar to continental doctrine is the distinction often drawn between act-based and fact-based sources (cf. Guastini 1998; Sorrentino 1997). This dichotomy looks at the qualifying circumstances under which legal norms are created. The main point is to establish whether or not these circumstances are such that lawmaking is the effect of an activity specifically designed to create, change, or abrogate legal norms (an activity that can be viewed as intentional, at least prima facie). This criterion does not of course apply to custom, and in the civil-law tradition it does not officially apply to precedent, either. The systemic meaning of act-based sources, on the other hand, is that they usually regard the effects of such lawmaking as is performed by organs empowered to create legal provisions. Constitutions, ordinary legislative statutes, regulations, and ordinances are all, in this sense, examples of act-based sources of law.

Another key approach by which we can gain an insight into the continental system of the sources of law is that which requires us to specify the "force" of legal norms—points (c) and (d) above. This approach basically connects up with the doctrine of the hierarchy of sources, which comes of use in solving normative conflicts within a legal system and, more generally, in identifying criteria of subordination or derivation among sources (which see chap. 2). A typical way to accomplish this task is by taking the superiority of one source over another to mean that the higher-order norm justifies the legal character of the lower norm and sometimes sets the limits of its normative content. Conversely, the subordinated source is found to be such in the sense that it implements sources superior to it in the hierarchy. As was noted with regard to Kelsen's doctrine, this is a formal characterisation of the notion of hierarchy based on the mechanism of legal empowerment and on the role of the so-called competence norms[6] (for a recent overview, see Spaak 2003).

This characterisation of the hierarchy of sources captures only one aspect of the question, however. As has recently been pointed out (Guastini 1998, 121ff.), there are other criteria of normative hierarchy that can be brought to bear. Thus, the hierarchical relation between two conflicting norms, n_1 and n_2, can be specified on the basis of a "material" criterion according to which n_1, for instance, should prevail by effect of a third norm n_3 that establishes the superiority of n_1 over n_2. Notice that this material superiority will usually find its counterpart in a formal superiority relation, since n_1 and n_2 can in theory be

[6] As observed by Guastini (1994, 213ff.), the rules that regulate the production of rules are classified under the general type "power-conferring rules." However, these last—which ascribe to a subject a normative rule-creating power—must be prima facie distinguished from: procedural rules—regulating the exercise of a certain normative power—, rules of competence—referring to the scope of a normative power—, rules about the content of rules, about the application of rules, and about conflicts of rules. In general, cf. Spaak 1994. On the constitutive character of power-conferring rules, cf. Ruiter 1993, and, in a logico-philosophical perspective, Rotolo 2002.

formally subordinated to n_3 (ibid., 122, 126–7). Looking at national legal systems, the combination of formal and material criteria often makes it possible to draw a distinction among constitutional sources; primary sources, such as standard legislation; and secondary sources, such as administrative regulations, ordinances, and so on (Sorrentino 1997). As we will see in Section 7.2, this distinction will not be so sharp in the event of a constitution that is "flexible." Flexible constitutions can be modified by standard legislation, so there is no decisive distinction here between constitutional and primary sources. This blurring of distinctions seems to be the natural consequence of the general thesis under which a source can be changed only by another source occurring on at least the same normative level, or—as Ross famously argued (1969)—only by a source superior to it in the hierarchy of the legal system.

There may also be criteria of hierarchy like the two that follow (Guastini 1998, chap. 11, sec. 1):

(a) Logical hierarchies. These proceed, in a broad sense, upon a metalinguistic basis to establish the superiority of one norm over another. Thus, a norm in which something is stated to be obligatory will be found logically inferior to the corresponding norm in which a sanction is established for violating the norm that sets the obligation. Similarly, an abrogating norm is superior to the norms abrogated by it. Notice that Guastini also brings into this category hierarchies based on the substantial competence established by different sources of law. Here, normative conflicts are solved on the following basis: Sources are found to sit higher in the hierarchy—in the formal or the material sense—when they fix in advance some substantial constraints upon the lawmaking process, such that other sources, whatever formal status they have relative to one another, are confined to regulating specific legal matters only. We will return briefly to this point in the next section.

(b) Axiological hierarchies. These are based on the substantial and constitutive value assigned to the content of those norms that stand highest in the legal system. This value assessment is mainly a matter of legal interpretation, to be sure, but some cases are structurally encoded in modern legal systems, in the so-called constitutional principles, for example. This too is a point we will return to in the next section.

7.2. Constitution and Legislation

7.2.1. The Historical Background: The Rechsstaat *and the Paradigm of Legislation in Continental Legal Doctrine*

The difference between the systems of common law and civil law is sometimes overemphasised, or perhaps taken for granted. One hears it said quite often that in the civil-law tradition the law is viewed as basically a codified and

statutory system of legal rules, and the sources of law as mainly written. And this perspective, it is widely known, seems to be very far from the idea of the law that has developed in Anglo-American legal culture. The analysis advanced by Roger Shiner in this volume shows that this distinction is still a useful conceptualisation when it comes to accounting for these different traditions and legal families (cf. Vanderlinden 1995; Zweigert and Kötz 1998).

At the same time, some of Shiner's arguments point out how these two kinds of legal system have now acquired a number of points of contact and similarities. As was noted only a moment ago, it is commonplace to say that continental law is based on the codification of the rules, whereas Anglo-American law is not: Codified law has not played in Great Britain or the United States the decisive role it played in continental Europe. In addition, there is quite a difference in the way the judiciary has been structured in the two contexts. Despite this, it is indisputable that both may be traced back to the basic political family of liberalism.[7] An analysis of this common philosophical root falls outside the scope of this chapter. In regard to the doctrine of the sources of law, it suffices to note here that legislation has been playing an increasingly important role in common-law systems (cf. Pegoraro and Rinella 2000, 16ff., 95ff.; but see Waldron 1999b). Not incidentally, as Shiner has pointed out, legislation has been considered a paradigm of the sources of law in the Anglo-American doctrine as well. Just to mention an example, the courts in the common-law judiciary are often required to use and interpret precedents also in the light of legislation (cf. Stein 1984, 92ff.).

So far, so good. But if the actual legal practices in common-law and civil-law countries sometimes seem to overlap, the respective systems of sources of law still diverge in the analysis provided of them by legal doctrine. The reason for this lies of course in the different traditions and diverse histories of legal institutions. In what follows I will provide the reader with a short outline of the historical roots of the idea that legislation is the paradigm of the sources of law in modern continental doctrine, especially as this idea results from 19th-century legal dogmatics. Many important changes have since occurred, but some concepts are still present today, perhaps in different forms, at least in parts of contemporary doctrine and especially in the practice of judges (Zagrebelsky 1992, 38).

A turning point in continental legal thought is the European process of codification and constitutionalisation that began in the late 18th century. It is a thorny enterprise to focus in so short a space on the reasons of this radical change (see Tarello 1976). This is due not only to the complexity of the philosophical and cultural grounds that have contributed to this process, but also on account of two historical facts. First, codification and constitutionalisation

[7] For a discussion of this kind, the reader can refer to the comprehensive analysis provided by the historical volumes of this Treatise.

did not take place in the European countries at the same time. Second, the constitutional codifications did not necessarily run parallel with a systematisation of other areas of law, such as civil and penal law (ibid.).[8] Even so, there is at least a strong conceptual key with which to account for the entire process.

It is indisputable that the 19th-century codes in Europe are strongly rooted in the great traditions of Roman law and *jus commune* (cf. Watson 1981). This is perhaps one of the main aspects that distinguishes the civil-law tradition from the tradition of common law. However, if the codifications may be traced back to these roots, they also made a step forward. The reaction was against the so-called legal particularism, namely, the lack of unity and coherence of the law (Tarello 1976, 28ff.): The system of civil and penal law was plural and fragmented relative to the unity the political authority. The ideals of the certainty and uniqueness of the law may be viewed as the underlying principles of the process of codification. In a nutshell, the paradigm of law was the code, meaning by this

> a book of legal rules organised by matters in a system, in force for [...] the entire state, binding for all subjects to the political authority of the state, issued and published by such an authority to abrogate the previous laws on those matters [...] and with the intent to persist for a long time. (Pegoraro and Rinella 2000, 50, my translation; see Tarello 1976)

This idea of the law seems to be compatible with at least two of the main features that characterise the notion of legal system as maintained by Raz (1979, 150ff.). According to Raz the legal system claims (a) "the authority to regulate every kind of behaviour," and (b) the "authority to regulate the setting up and application of other institutionalized systems by its subject-community" (ibid., 151). As we will see shortly, some remarks have to be made about the first of these general theses, especially as applied, for example, to the historical case of the doctrine of *Rechtsstaat*. But uniqueness and certainty are definitely central to understanding how the doctrine of the sources of law took shape in the 19th-century tradition of civil law. In general terms, this is the perspective that led to consider legislation as the paradigmatic source of law.

As I have alluded to, there are substantial differences with regard to how each country produced its systems of codes and how their respective legal schools viewed this process. French legal doctrine was perhaps the prototypical example of an approach embodying the paradigm of legislation, with its emphasis on the centrality of the democratic deliberative process and of the abstractness and generality of legal rules as the main institutional mechanism with which to protect the basic rights of the citizens. German codifications were not as smooth as in France. The Historical School of Savigny, Puchta,

[8] In France, for example, the emergence of civil and penal codes proceeded in close connection with the process of constitutionalisation. The same is not true, for example, of Austria and Italy.

and Hugo reacted against the French model and the unification of the laws of the *Länder*: Their claim is well known to be that the law should be the "organic" product of the *Volksgeist*, and hence should be customary and "scientific" at the same time (Wieacker 1967). Even so, a tribute to legislative positivism was later paid in Germany as well, though the BGB, for example, was mainly a product of the doctrine of *Pandektenrecht*, with a cautious scepticism towards the ideas of the rationality and abstractness of the law (Pegoraro and Rinella 2000, 52; cf. Sacco 1992).

Coherently with this historical background, the continental process of constitutionalisation unfolded in parallel with, and subsequently to, the development of a peculiar general theory of the state. Such a doctrine provided the conceptual framework within which legislation could play its role as paradigm of law. Again, France and Germany are worthy of special attention in this specific perspective. As is well known, French constitutionalism set the stage for subsequent constitutional experiences across much of continental Europe. The following points fix some of the characterising features of French constitutionalism (cf. Barbera 1998):

(a) Understanding the social body as a whole, the parts of which are made to work together; the whole is raised to its highest power according to the true idea of democracy; sovereignty of the people as represented by the *Assemblée legislative*;
(b) The doctrine of the separation of powers;
(c) The principle of legality "lex facit regem";
(d) Legislation as the prevailing source of law insofar as it produces written laws that are abstract and general; the judge as a mere "bouche de la loi."

This general view was later reframed and worked into the German *Allgemeine Staatslehre* at the end of the 19th century (Barbera 1998, 9–10). According to Gerber, Laband, and Jellinek, the state is nothing but a legal person whose will is expressed through legislation and whose power is limited by its own laws. As Zagrebelsky rightly points out (1992, 24ff.), the idea of *Rechtsstaat* was a reaction against the absolutism of the monarchy, and replaced it with another kind of absolutism: that of the state and of legislation. But if the French "empire of legislation" was strongly grounded on the sovereignty of the social body, the main role of the legislative process in Germany was to reach an equilibrium between the authorities of monarchy and of parliament (Böckenförde 1983). Despite the fact the *Rechtsstat* has been considered an open and formal notion—perhaps compatible with non-liberal perspectives (cf. Schmitt 1935)—it was rooted in a true liberal perspective. According to Zagrebelsky (1992), O. Mayer (1895) notes that the *Rechtsstat* was based on the centrality of legislation, and the statutes were the product of the deliberation of the representative parliament, with a clear emphasis on:

(a) the subordination of the administration to legislative power; (c) the subordination of basic rights to legislation only, and the prohibition incumbent on the administration against interfering with the exercise of such rights; (d) the role of independent judges to apply statutes in settling disputes between citizens and between citizens and the administration. (Zagrebelski 1992, 23; my translation)

At any rate, the French and the German models both embedded a clear subordination to legislation of all other sources of law. To understand this fact it may be helpful to also have a quick look at the corresponding notion of the rule of law in England. As is well known, the rule of law proceeded from a similar idea of limitation of political authority. Parliament was accordingly meant to protect liberties from any arbitrary claims of the monarchy. But the role of legislation in the English system of the sources of law was initially quite different. Parliament was a deliberative organ carrying much political weight, but it also played the role of a kind of supreme court of justice: The function of legislation was in a sense to complete existing law, meaning the common law.[9] This applied in particular to all cases in which the common law was not able to provide a just and satisfactory treatment of concrete cases. The existing law, in turn, was connected with the practice of the judiciary (Zagrebelsky 1992, chap. 2, sec. 2; cf. Kriele 1975; Ten 1993). Thus, although the entire English legal system was inspired by roughly the same core of liberal political values that obtained in continental Europe, it was designed differently with regard to the role of legislation and its relations with the other sources of law.

In continental legal doctrine the principle of legality, on the one hand, and the protection of liberties, on the other, have come together under the umbrella of the indisputable supremacy of legislation. As is known, legislative power was meant to regulate any conflicts between liberties and political authority. What resulted from this primacy—with regard to the structure of legal systems—was the uniqueness and systematic nature of law. It is also worth noticing that written constitutions, unilaterally conceded (*octroyées*) by the monarchies, did not affect this unifying criterion of the legal system since they were basically "flexible"—open to modification by ordinary legislative process.

The supremacy of legislation with regard to the opposition between administration and liberties has been articulated differently in France and in Germany. The French "monistic" model of parliamentarism—the *Assemblée legislative* as the unique organ representative of the nation (cf. Carré de Malberg 1931)—viewed all other political authorities as derivative of the legislative assembly. Any powers of the administration thus came by way of explicit acts of empowerment issued by the parliament. In this sense, the only true source of law was legislation. Things were slightly more complicated in

[9] For example, the parliamentary legislative process was constrained by the principle of due process as well as by the judiciary.

Germany, where, as mentioned, the constitutional order emerged from a compromise between the claims of the monarchy and the protection of the autonomy of citizens. In this perspective, administrative power did not follow directly from legislation but was limited by it (cf. Eichenberger 1982). This may lead one to think that German legal doctrine assumed the supremacy and not the uniqueness of legislation in the system of the sources of law, since legislation was meant to prevail only in the event of conflict with the administration. This is true but is not the whole story. A very influential doctrine by Laband (1911) and Jellinek (1887), among others, maintained that only the *Rechtssatz* is true law. In other words, they argued that the law should consist of rules whose main goal was to regulate the legal relationships between individuals as legal subjects within the legal system. The normative effect of such rules was therefore to create for people rights and corresponding duties, and so to create or modify these subjects' legal capacities. If that is the case, the scope of the law was to protect and regulate through legislation the domain of the private autonomy of citizens. The legal system claimed to regulate, not every kind of behaviour—as Raz maintains in his theory—but only the interpersonal dimension of human actions. To sum up, even in Germany the doctrine of the supremacy of legislation sometimes took the form of a theory in which legislation was understood as the unique "primitive" source of law (cf. Zagrebelsky 1987).

The foregoing account thus lines out briefly the constitutional setting that developed in parallel with the development of continental legal positivism—the philosophical perspective that essentially equates the law with positive law. This is a well-known aspect of the history of legal thought (see the historical volumes of this Treatise). Apart from that, there is a question that still requires at least a short comment. As Shiner acknowledges (see chap. 2), the paradigmatic character of legislation as a source of law can also be found in common-law doctrine. Despite the historical roots of the English concept of the rule of law, this concept, too, came to be associated in the 20th century with the idea of the sovereignty of Parliament (cf. Dicey 1959). But the supremacy of legislation never applied to common-law countries. Thus precedent, for example, though it may be subordinated to legislation, cannot be conceived of as a source of law deriving therefrom. Perhaps this historical fact is nothing but the counterpart of the theoretical conclusion advanced by Shiner in Chapter 2 about the unstable nature of legislation as a paradigm of the sources of law. Shiner is quite right in pointing out that legislation as a "strictly institutionalised source of law" makes sense even without appealing to the "sovereignty of the parliament": There is no necessary and stable conceptual relationship between the two claims. Legislation can be conceived formally by relating it to the idea of "enactment of statutes through a deliberative process." But this thesis has some historical exceptions in civil-law doctrine. As briefly outlined, the law has long been essentially equated with the statutes

enacted by a sovereign parliament, and this has been the theoretical perspective that provided a first liberal solution to the problem of the protection of the basic liberties of the citizens and of the limits of political authority.

7.2.2. The Change of Paradigm: Contemporary Constitutional Democracies

As adumbrated in the previous overview, the 19th-century system of the sources of law would often set up a hierarchical structure as follows (Pegoraro and Rinella 2000, 58): legislation, ordinances and administrative regulations, and custom. The criterion of hierarchy *lex superior derogat inferiori*—legislation prevails over regulations and regulations over custom—was mirrored in this simple makeup of the system of the sources of law.[10]

European legal systems changed radically during the 20th century. It may be useful, by way of an introduction to this change of paradigm, to focus roughly on the new legal status assigned to the basic rights. The *Rechtsstaat* adopted a perspective as follows:

(a) Rights exist insofar as the legislative power recognises and protects them;
(b) Rights are the consequence of the state's self-limitation; all citizens contribute democratically to political will-formation;
(c) The state's sovereignty is grounded on the idea of democracy.

In contrast, constitutional democracies in the 20th century are basically founded on the following statements or assumptions (cf. Zolo 2002):

(a) The people are sovereign;
(b) The fundamental rights are functionally independent of the control of standard legislative processes; accordingly, the protection of these rights is implemented by the constitutional review of legislation;
(c) There must be a dualism and equilibrium between democracy and rights; legislation should be so framed as to deal with public interests in a way that is compatible with, or neutral with regard to, the normative content of the fundamental rights.

With the regard to the system of the sources of law, this new perspective connects up closely with the different legal status acquired by constitutions: These are no longer "flexible" but "rigid." As is well known, the rigidity of the constitution means in essence that (Guastini 1998, 321ff.; Sorrentino 1997, 129ff.; Paladin 1996):

[10] This fact is still present in the Italian civil code (Preliminary Provisions, sec. 1), for example, where the authoritative sources of law are stated to be statutes, regulations, and customs. On this, see Paladin 1996.

(a) The constitution cannot be modified by means of standard legislation;
(b) The validity of statutory laws is subordinated to their conformity to the constitution.

The notion of conformity, as indicated at point (2) above, can be specified in two directions. Conformity means that statutory laws, on the one hand, ought to be issued and enacted in accordance with certain procedures set forth in constitutional (competence) rules, and, on the other hand, that they must exhibit a substantial compatibility with the basic values embedded in the constitution.[11]

Of course, the fact that "formal" (written) constitutions enjoy features (1) and (2) above places them, prima facie, on top of the hierarchy of sources of law. However, as Guastini rightly points out (ibid., 122; cf. Modugno 2002, 5), it is not entirely true that flexible constitutions do not exhibit any kind of superiority over other sources. As was noted earlier, hierarchical superiority can be characterised with respect to different criteria. If we invoke a formal criterion—a (secondary) rule setting forth the lawmaking process, e.g., a power-conferring norm, is superior to a rule issued in accordance with this procedural rule—then, quite obviously, constitutional rules, though included in flexible constitutions, can be superior to legislative statutes. In other words, constitutional rules may be the source (foundation) of validity of other legal rules. This point has a certain analytical interest, but it is marginal if applied to legal systems with rigid constitutions. In general, the formal character of the notion of superiority can play a decisive role only in approaches like that which we have with Kelsen's pure theory of law. It is argued in Section 7.1 that on this approach the system of the sources of law tends to vanish in favour of the idea that the superiority of norms depends on the dynamic aspect of legal systems, i.e., on the mechanism of empowerment that grounds the notion of legal validity. In fact, a legal system with a flexible constitution empowers the parliament to change any legal rule, including constitutional rules.

The change of paradigm in 20th-century Europe was determined by a number of reasons that, of course, are specific to the context of each country. It is outside the scope of this chapter to account for this historical development. But still, two aspects will have to be mentioned very roughly here. The first is World War II. As is well known, the experience of the Nazi and the Fascist regimes and their horrors marked a turning point in European history, forcing countries like Italy and Germany to rethink their own institutional structures. Framing "rigid" constitutions that include a core of basic values and affirm the inviolability of human rights was found to be the "legal answer" with which to ward off the risk of *Gesetzliches Unrecht* (Radbruch 1973; cf. Gozzi 1999,

[11] It can be argued here that the "rigidity" of constitutions is a matter of degree. The limits and procedures of constitutional revision in fact vary with each legal system. Cf. Guastini 1998, 325ff.

119ff.).[12] The second aspect, which can be traced back to the late 19th and early 20th centuries, corresponds to a complex combination of social factors. These may be summarised by focusing on the progressive emergence of a plurality of interests coming from classes and groups other than the middle class, whose interests had hitherto been expressed by the *Rechtsstaat* (cf. Irti 1979). The legal codes revealed their inability to deal with this pluralism of interests: Thus, in the effort to regulate labour and other social matters, legal measures were adopted whose nature was inherently contingent and far from the rational ideals of the abstractness and generality of law (Pegoraro and Rinella 2000, 56ff.).[13] This process has been argued to correspond to new trend towards the "decodification" of continental legal systems (Irti 1979).

This evolution of continental legal systems strongly affects the system of the sources of law. Despite a certain reluctance of legal doctrine to recognise the fragmentation of legislation, and more generally of the system of sources (cf. De Otto 1988), most constitutions during the 20th century make allowance for the needs of pluralism and distinguish accordingly a number of different kinds of statutory law (for a classification, see Guastini 1998). The system of the sources of law is thus enriched by nonstandard laws that cannot be abrogated by the standard legislative process, for example, even if they are not enacted following a standard procedure.[14] For these sources of law—which are often "atypical" since deviate from standard procedures of legislation (cf. Zagrebelsky 1987, 62-66; Modugno 2002)—, but perhaps for the entire system of the sources of law, any clear criterion of hierarchy seems be insufficient. The "segmentation" of statutory law, then, gets regulated by the constitutions by stating—explicitly, or by constitutional interpretation, or again through legislative integrations—criteria of substantial competence, specifying which source ought to be devoted to which matter needing legal treatment (cf. Sorrentino 1997; Paladin 1996). As Modugno has observed (2002, 103ff.), the proliferation of sources, each having its own competences and specific enactment procedures, makes less clear the classical relation of (hierarchical)

[12] It is also well known that this "legal answer" came parallel to a new discussion on the nature and the concept of law and on the law's relations with the idea of justice. An analysis of this question with regard to the role of constitutions is provided by Alexy 1992, among others.

[13] These are the beginnings of the process that would later lead to the continental model of the Welfare State (cf. Zagrebelsky 1992, 45ff.). Notice that in Europe the basic principles of the Welfare State had already been codified in the German constitution of 1919. However, the full realisation of this model would be had after World War II. Cf. Forsthoff 1964.

[14] Not to mention the development and growing importance of regional law. There is one recent reform worth mentioning in this specific perspective, a reform made by a constitutional revision (no. 3 of 18 Oct. 2001) of Title 5 of the Italian Constitution (cf. Rescigno 2003). A subsequent decision of the Italian Constitutional Court on this revision (no. 303/2003) emphasises the importance of the principle of subsidiarity, a principle that would make it possible to reach a flexible allocation of the legislative competences of national, regional, and local bodies (on which see Morrone 2003).

subordination between the so-called primary sources—essentially based on legislative power—and secondary-level sources, such as regulations—which come from other political and legal authorities. It is hard to say that the standard statutory law of the parliaments carries with it a general competence in regard to any legal matter. The competences of standard statutory law are very often defined only indirectly, that is, by way of a residual normative space not assigned to other sources of law (cf. Pegoraro and Reposo 1993; Pegoraro and Rinella 2000).[15] This does not mean that hierarchical criteria do not play any role in settling potential normative conflicts, but simply that such conflicts can be solved by combining different strategies. This scenario therefore consists of various types of conflicts where the principle of hierarchy sometimes applies, sometimes holds for only a certain legal matter, sometimes gets replaced by the criterion of material competence, and less often is neutral with respect to different sources competing to regulate the same matter.

As Zagrebelsky has observed (1992, 47f.), the scenario depicted a moment ago does not illustrate a temporary and merely contingent tendency of the law, but seems to be a structural consequence of the pluralism that is shaping contemporary legal systems. In this sense, the fragmentation of the system of the sources of law is not only a fact of some interest for legal historians, but is of great importance for legal theorists, too. Legal systems in the 20th century sometimes look like clusters of subsystems within which—this perhaps can be viewed as a bizarre consequence—the formal criterion of hierarchy comes again to be the main tool for solving normative conflicts (see Pegoraro and Rinella 2000, 60). The uniqueness of the legal system can no longer be taken for granted by referring to legislation. The supremacy of the constitution is hence the unifying principle to which legal systems tend and from which they come. This holds true in at least two perspectives (Guastini 1998, 312ff.). First, as the supreme source of law, the constitution includes norms on lawmaking and, more generally, power-conferring norms that (a) define constitutively the main organs of the state and (b) regulate and identify the main subordinate sources of law.[16] Second, there are embedded in the constitution basic principles assumed to make up a minimal and untouchable core of common values, rights, and general policies.

Of course none of this is to say that constitutions cannot be changed. Rigid constitutions do admit of revision (contrary to what happens with an entirely unchangeable constitution), even if they do so only in accordance with special

[15] This does not necessarily imply that parliamentary statutes are "residual" in terms of importance. Perhaps, the contrary is true, insofar as the other sources of law are confined to regulating specific legal matters. A notable exception of this indirect way of specifying legislation's competences is the French constitution, where the criterion of competence is applied directly to standard legislation.

[16] As argued in Guastini 1998, however, constitutions only rarely regulate all relevant constitutional matters; this means that they sometimes are lacking in providing a sufficient regulation for all sources that are functionally part of the legal system.

procedures (cf. Guastini 1998; Zagrebelsky 1987). But then, on the other hand, most continental constitutions recognise a core of basic principles. Let us look at Italy. The Italian constitution is not only rigid in the sense that standard legislation cannot change it. Some parts of the constitution cannot be changed even by the special procedures the constitution sets forth for its revision. This holds explicitly, for example, for the political makeup of the state, since article 139 makes it a prohibition to deviate from its republican (and democratic) form. Again, article 2 qualifies some basic rights as "inviolable," even if no explicit reference is made to the legal impossibility of constitutional revisions. Following some decisions pronounced by the Constitutional Court (e.g., no. 18/1982 and no. 1146/1988), Italian doctrine has identified in these rights a "strong core" of constitutional values. In this sense, the constitutional interpretation of the notion of "inviolability" implies a prohibition to effect any kind of revision (cf. Guastini 1998, 345ff.).[17] This second perspective, concerned with the basic values built into constitutions, shows how the change of paradigm in legal systems has been mirrored in the need to rethink as well the concept of law advanced by legal positivism. The contributions in this direction, by Dworkin (1978; 1986) and Alexy (1986; 1992), among others, lay stress on the role of legal principles as "constitutive" factors of legal systems and on the consequent relation between law and morality—and in this they have been found to provide a "neoconstitutionalistic" approach to the law (Bongiovanni 2001).

In summary, the constitutional level gets its supremacy both in unifying the system of sources of law and in providing a substantial foundation for the unity of legal systems. Constitutions seem to be a sort of meta-source of law.[18] But something needs to be added about this characteristic. As Zagrebelsky has noted (1992, 49–50), the supremacy of constitutions cannot be compared to the authority of legislation (better yet, to the sovereignty of the parliament)

[17] As observed in Guastini 1998, the character of these prohibitions is quite different from the "logical" impossibility of revision that applies, for example, to the constitutional revision of norms that regulate constitutional revision itself (cf. Ross 1969), or to constitutional changes that modify the "spirit" of the entire constitution (cf. Zagrebelsky 1987, 100ff.). The second argument, based on the "logical" prohibition that the power of constitutional revision be transformed into the power of framing a new constitution (constituent power), is strictly related to a systematic and "holistic" reading of the constitution, which seems to be a matter of degree. On the other hand, this second argument falls in line with the mentioned decisions of the Italian Constitutional Court on a "strong core" of values. Of course, the theoretical aspects of this question cannot be explored in this chapter.

[18] But, as previously noted, in regard to the former aspect, it must be noticed that constitutions only rarely provide a satisfactory and comprehensive regulation of all other sources of law (cf. Guastini 1998). This applies in particular for the so-called atypical sources (Pegoraro and Rinella 2000, 60ff.). Such regulations are sometimes referred to legislation. This poses the problem of the applicability of these legislative regulations when they regard sources of the same hierarchical level or, a fortiori, when they make more precise the normative content of the constitution. For example, questions like these are solved in Germany by appealing to the role of the Constitutional Court (*Grundgesetze*, art. 93).

in the *Rechtsstaat*. It would misleading to apply a schema that follows a linear top-down approach and simply replaces legislation with the constitution at the apex of the sources of law.[19]

What is the essential meaning assigned to the principle of the supremacy of the constitution, with regard to legislation, for example? Continental constitutional theory has provided a number of different answers to this question. Let me focus on Italy (cf. Bongiovanni 1997). We have here some suggestions that can be extended to other legal systems in continental Europe. It was mentioned earlier that constitutions consist at least of three kinds of legal norms: (a) norms regulating constitutively the organisation of the state and the formal structure of the legal system; (b) norms that recognise and confer fundamental rights, and that identify some basic values which ought to shape the legal system as a whole; and (c) "programmatic" norms that entrust the legislator and the public administration with working out and pursuing social and economic policies (Guastini 1998, 312ff.; cf. Kelsen 1945, 260ff.).[20] This classification of norms applies to the Italian constitution, in force since 1948. Italian legal doctrine has focused its attention on how the legal system, and especially legislation, can implement the programs set out in the constitution. The first leading opinion on this question came from P. Barile (1957; 1958; cf. Bongiovanni 1997, 75ff.). Barile recognised two basic directions through which constitutional programs should be realised. The first concerns the institutional role of the President of the Republic (and of the Constitutional Court), which is that of guaranteeing that the core of stable and permanent goals set out in the constitution be attained to the greatest extent possible. The second concerns majority's democratic exercise of its power to create laws which can implement constitutional programs, albeit only partially and contingently, and which may also be directed at goals not specified in the constitution (this also in virtue of the discretional character in principle assigned to the legislative power). On the other hand, the President and the Constitutional Court are viewed as the "guardians" of the constitution—they have to exercise their control over legislation. This does not only mean that the legislative lawmaking process must be compatible with constitutional goals (in addition to respecting fundamental rights): There can also be said to exist a core

[19] A counterexample of this supposed linearity of hierarchy is confirmed, for instance, by what is remarked in the previous footnote. In general, the hierarchical relation between constitutions and other sources of law is a basic principle stated by the constitutions themselves. However, as argued by Guastini 1998, it is a matter of fact that constitutions rarely provide a complete regulation for all the sources they recognise.

[20] The kinds of norms listed at points (b) and (c) above seem to be roughly in line with Dworkin's 1978 well-known distinction between principles and policies (cf. Bongiovanni 2001). However, this is a theoretical matter that cannot be explored here. See, in this Treatise, vol. 11. See also, Alexy 1986, where legal principles are defined as optimization commands (*Optimierungsgebote*), namely, "norms commanding that something be realised to the highest degree that is actually and legally possible" (Alexy 2000, 295).

of political goals that are "binding" upon all the constitutional organs of state. In other words, there should be a homogeneous line of policies with which to effect the development of the law. This approach is grounded on the theoretical distinction between "formal" and "material" constitution, well known in legal theory thanks to Kelsen's contribution (cf. Kelsen 1967, 221ff.). But Barile is referring here to Mortati's (1940) characterisation of this distinction, where the material constitution is understood to be the social and political order, the underlying foundation of the written (formal) constitution, which confers legal validity on the latter: The legal character of the formal constitution derives from "social forces which express a predominance over other forces and which share a core of interests and political values that hold authoritatively as the basis of the state" (Mortati 1967, 31, my translation; cf. Bongiovanni 1997, 77; Fioravanti 1990). This is the social and theoretical premise that justifies the assumption of the unity and homogeneity of the constitutional system with respect to its implementation through legislation.[21]

The foregoing is a roundabout way of arguing that the ideal of the "monism" of legislation—which is typical of the *Recthsstaat* and can be reframed within a monistic conception of the constitution—can survive only if social pluralism is going to play a limited role in shaping institutional dynamics directly. Only on this perspective can legislation be viewed as the main source of law, subordinate to the constitution and to its power of implementing supreme constitutional goals. This has been one classical reading of the Italian constitution, which in fact has been framed (and interpreted) bringing out the supremacy of legislation (Fioravanti 1995), such that (a) the judiciary is bound by the interpretation of legislative statutory law and (b) the tasks of the Constitutional Court were originally meant to be confined to the pathologies of the legal system (Mezzanotte 1979).

But, as previously noted, this top-down approach is misleading when it comes to understanding contemporary legal systems, for it still proceeds upon the assumption of the unity of the sovereignty of political power. The crisis of this model, along with recent approaches and the new reading given to constitutions in continental law, has had a strong effect on the doctrine of the sources of law. Constitutions are not viewed any longer as basic laws providing a dimension of "super-legality." In some cases, the focus of legal doctrine is on the "deconstruction" of all formal criteria for the hierarchy of sources and on the "deconstitutionalisation" of constitutional matters, in favour of an approach that systematises sources on the basis of their political weight and the "axiological relevance" of their content (Mezzanotte 1991, 51; Bongiovanni 1997, 88).[22]

[21] As noted in this regard (Bongiovanni 1997; Fioravanti 1995), political parties were meant to play a decisive role in the process of the unification of social and political interests.

[22] See Guastini 1998, on the distinction between the "constitution" and "constitutional matter."

Similarly, Zagrebelsky (1987) argues that the criteria of recognition and hierarchy of the sources of law be based on their political weight with regard to the process of integration of the pluralistic forces of contemporary societies. Even those hierarchies based on criteria of the substantial competence of sources are not so decisive as had been previously argued. A number of examples may be adduced here in Italy. I will only mention two cases briefly. The first is that some acts of government—though they are not act-based sources of law in the strict sense—exert all the same a substantial influence on primary sources of law, such as the legislative acts of regional and autonomous organs, whose supremacy is recognised on the basis of a criterion of competence. The second example has to do with the relation between the national legal system and EU law. Article 11 of the Italian constitution—which states, among other things, that international controversies cannot be resolved by recourse to war, and recognises the authority of international authorities and accordingly some limitations to the national sovereignty to ensure peace and justice among the states—has been made exception to by standard legislative acts aimed at implementing what has been established by international treaties. The rationale at work in both cases makes no reference to any criterion of hierarchy (even if a criterion of this kind could be applied to the second example at least), but is rather related to political arguments. But the picture is even more complicated than that. The character of the Constitutional Court's review of legislation is changing. Some of the court's recent decisions are framed, not to set down exclusively legal rules whose application is confined to the specific case at hand, but to advance legal principles as well as criteria for their subsequent application (Bongiovanni 1997, 90ff.; cf., in general, Bin 1992). This looks like a sort of revenge which, by judicial means, the constitution is taking on the discretional power of legislation.

What is, on balance, the upshot of this excursus? A first and obvious answer is that we have to acknowledge the definitive crisis of the monism of constitutions, and more generally of legal systems. The relevant questions are not "Where is the sovereign power?" "What is the supreme source of law?" but rather is "How can we make compatible a plurality of powers (and sources) and reach an equilibrium in the face of the pluralism of values and interests?" (cf. Fioravanti 1995). To put it briefly, continental constitutionalism is edging closer to the American concept of a pluralistic and balanced constitution, taking onboard its classical ideas of a plurality of institutional organs that attain an equilibrium through the mechanism of checks and balances. But it has been observed (Castiglione 1996; Preuss 1995; cf. Bongiovanni 2004, chap. 1), in line with what was previously argued, that this conclusion does not entail a focus only on the "negative limit imposed by constitution" (Castiglione 1996, 417). Constitutions embed enabling as well as disabling rules, the ones limiting political authority, the others opening new dimensions for political action (Holmes 1988). This basic assumption makes it possible to emphasise four

main tasks of contemporary constitutions (Preuss 1995; cf. Bongiovanni 2004, chap. 1): (a) limiting power, (b) authorising constitutional powers by defining dimensions of action (lawmaking process), (c) legitimising the political and the legal order, (d) attaining a social integration of pluralism.[23] These factors do not proceed in parallel but integrate one another to shape the entire legal system. If that is the case, Bongiovanni observes (2004), two dimensions coexist within contemporary constitutional systems: that of democratic (political) decision on which interests should contingently prevail, and that of the control of constitutional jurisdiction, whose starting point is the pluralism of values recognised in the constitution (cf. Gozzi 1999). This, therefore, is the "spirit" of contemporary constitutional democracies. There is search underway for a rational, but not a definitive, equilibrium between two opposing and constitutive aspects of legal systems—namely, the constitution, with its basic values, and legislation—such that democracy gets framed by the constitution as well. Maybe the intricate web of the sources of law sketched here is nothing but the natural consequence of this tension. The system of the sources of law looks metaphorically like one of the battlefields in which constitutional values confront the current plurality of interests. The weight of each source is now measured by substantial and political criteria, and perhaps even by axiological ones. The end of the story seems to be that the project of formally defining general hierarchies by which to rank the sources of law cannot succeed, at least if we take for granted the unity of the legal system.

7.3. Other Sources of Law

7.3.1. Some Notes on Private Autonomy and Precedent

As was briefly shown in Section 7.1, Kelsen's stance on the theory of the sources of law is quite peculiar. His basic assumption is that there is no clear difference between creating and applying law. In this sense, each law-applying act is also creative of law, in a development that proceeds from the apex of the legal system to its lowest level. It was previously noted how Kelsen's pure theory of law, because of this peculiarity of it, cannot really give us a significant account of the system of the sources of law. Still, a discussion of the approach gives us a chance to focus on important questions that go beyond Kelsen. In particular, his theory enables us to have a different take on some elements of legal dynamics that in continental legal doctrine are often not recognised as legal sources: We can conceive of these elements as ways through which the law shapes itself in the lawmaking process. Two examples, it is well known, are legal transactions and judicial decisions: Both are argued to pro-

[23] For a nicely crafted account of this fourth aspect, in relation to the nature of legislation, see Habermas 2003.

duce, in the law, individual norms conceptually distinct from the general and abstract norms that usually pertain to legislation and custom (Kelsen 1967, 233ff., 253ff.).

7.3.1.1. Private Autonomy

Let us consider the first of the two elements mentioned: legal transactions. The concept of a legal transaction (*Rechtsgeschäft*) comes to us by way of the 19th-century German doctrine of civil law, which makes it correspond to the notion of a "declaration of will" (*Willenserklärung*) roughly as follows: The law recognises the legal effects of specific capacities that are properly qualified as belonging to the sphere of "private autonomy" (cf. Windscheid 1900; Zitelmann 1879; Manigk 1907). This notion of a (declarative) power provides a general facility through which autonomous individuals can shape their own normative environment. If individuals are to be autonomous, they must go beyond the possibility of activating institutional connections between predetermined actions and predetermined results: They must be empowered to state what normative relations they want between them, and to produce these effects by virtue of this statement. The way to do this is by a declaration of will: The interested subjects state in an appropriate form the results they want to have, and the institution within which they are operating makes it so that exactly those results are had (usually on the assumption that certain conditions are met) (cf. Zweigert and Kötz 1998). Such an empowerment of individuals answers as well the needs of a complex self-organising society, where it is not possible to establish in advance all the normative relations that are to obtain between agents. In a society of this kind it must be left to agents themselves to decide what normative relations are appropriate to their needs or are required for the fulfilment of their tasks. As has been pointed out—notably, by Galgano (cf. Galgano 1999, chap. 2)—the notion of a legal transaction is in general quite debatable: It is a theoretical construction of 19th-century German legal dogmatics that finds no close counterpart in most present-day continental legal systems, since its aim was originally to unify within a single legal category different acts, such as contracts, wills, and marriage. Our focus will therefore be on the most typical of the forms by which the self-regulation of private autonomy occurs, that is, by contract. A contract is, roughly speaking, declarative act jointly made by two or more parties whose status will change by effect of the declaration they are making (for a comparative analysis, see Zweigert and Kötz 1998). Thus, the Italian civil code, article 1321, describes a contract as an agreement that two or more parties enter to create, regulate, or extinguish an economic jural relation between them. The parties can therefore bring forth new legal positions (creating new duties, powers, or rights); and they can extinguish these positions as well as transfer them from one party to another (as is the case with property rights). Note that the law does not estab-

lish what changes a contract will bring to the parties' legal positions: It is up to the parties themselves to establish such changes, and the law will in principle recognise their will, producing exactly those results which the parties state in their contractual terms. (The law can integrate and modify some of the results, however.) This also explains why single contracts cannot usually be classified as pertaining exclusively to the types of act (such as commissives and commands) typically singled out in theories of institutional acts. A single contract usually establishes at once new duties (for example, an obligation to pay a price), new rights (a right to be paid in the amount agreed upon, or to receive the goods paid for), a transfer of existing rights (to the property of the goods in question), and so forth. In fact, contracts put into focus a new dimension of autonomy—private or contractual autonomy—by which is meant the possibility of bringing into effect the legal effects the parties are seeking to bring into effect, simply by stating those effects. It must be observed in this regard that contracts are similar to legislation (as Kelsen 1992 observes, among others): The legal effects of an act of Parliament legislation are those effects which are stated in the act. We need not refer to a preexistent convention to determine what rules and legal positions an act of Parliament has brought into effect, since it is not any convention that establishes these effects, but the act itself. We need to look at the act's content—at what was declared by Parliament (there may be interpretative conventions, but these connect the words used in the act to certain meanings rather than directly to certain institutional results). This is the reason why Kelsen (ibid., 69ff.) assigns to private autonomy a special role between that of legislation—whose general norms are not suitable for bringing concrete legal relations directly into effect—and judicial decisions, which are conditioned by the violation of the legal norms that derive from a mutual agreement between parties (Luberto 2001, 167; Luberto 2000).

Despite this finding, the role of private autonomy as a source of law is often viewed as problematic in continental doctrine (cf. Luberto 2001, 2000). In truth, Kelsen, too, finds that the norms and normative contents the parties create by entering into legal transactions "are not independent legal norms," since the "ought" deriving from the act "is the subjective meaning of the legal transaction": Its objective meaning is given "if and so far as the legal order bestows this quality upon the fact; and the legal order [mainly legislation and custom] does this by making the establishment of the fact of the legal transaction, together with the behavior that is opposed to the terms of the legal transaction, the condition for a civil sanction" (Kelsen 1967, 256–7). The centrality and independence of legal transactions in lawmaking resulted from the "scientific" construction of the German Historical School and the doctrine of *Pandektensrecht*. In this perspective, the inherent and "natural" normative force of declarations of will ties in closely with the idea that legal categories should be abstracted from the law spontaneously shaped by the *Volksgeist*

(Savigny 1840). This would later find a rejection with the continental codifications and the subsequent state dimension assigned to the system of legal sources (cf. Galgano 1999, chap. 3).

Contemporary dogmatics often tends to be sceptical about private autonomy as a source of law. Much of Italian legal doctrine, for example, assumes that private autonomy is not properly a legal source. At least four reasons have been advanced in this regard (cf. Guastini 1998; Paladin 1996; Zagrebelsky 1987; Betti 1994; Scognamiglio 1969; for a different perspective, cf. Pegoraro and Rinella 2000). Acts of private autonomy are such that

(a) they are confined to producing individual and concrete norms *exclusively*;
(b) they create norms whose legal status consists simply in their autonomy, and whose prima facie bindingness—in contracts, for example—derives from the agreement of the parties; in this sense, they have no heteronomy, meaning by this the characteristic whereby a norm's addressors (or makers) are other than its addressees;
(c) they create norms whose bindingness does not apply *erga omnes*, but is confined *exclusively* to the parties involved in the transaction—legal transactions are a kind of legislation *inter partes*;
(d) the ultimate bindingness of their legal effects is grounded on authorising norms through which such effects are recognised, or else on norms wherein sanctions are set forth in the event of the parties' noncompliance with the terms of a transaction (this feature of acts of private autonomy accords with Kelsen's remark on the subjective and objective meaning of legal transactions).

We cannot explore here the variety of theoretical questions involved in the points just introduced, nor can we survey, even in part, the immense literature on these questions. Therefore, only a few short comments will be made. Arguments (a) through (d) above, closely connected, are basically in accord with the legal-positivistic view of the sources of law. Argument (a) does not generally provide a sufficient basis to argue against private autonomy as a source of law: If a norm *n* is individual and concrete but the act *A* that produces it is not legally derivable—i.e., the (material or formal) bindingness of *n* cannot be derived entirely from other sources as such—then *A* may be considered prima facie a true source of lawmaking. In fact, the assumption that the law must consist only of general and abstract rules is a positivistic thesis that seems to be confuted by at least some recent trends in legislation (see Zagrebelsky 1992), which of course is a source of law. The other arguments are more difficult to confute because, implicitly or explicitly, they regard the problem of the ultimate ground of the bindingness of norms as pertaining to the sphere of private autonomy. Points (b) through (d) seem to assume, perhaps to different

extents, a system of act-based sources whose prototypical model continues to be legislation, in the widest sense of this term. In addition, (b) and (d) proceed on the idea that we can define any formal criteria of hierarchy among sources: We can have a system in which the mechanism of empowerment is still central. One question, I believe, is the innovative character of act-based sources and their discretionary power in determining the content of the norms they produce. We can see this with legislation relative to the constitution: On the one hand, legislation proceeds formally under constitutional meta-rules of lawmaking; on the other, it can hardly be said to be entirely bound by the substantial content of these constitutional rules. The same is true of private autonomy relative to the norms that regulate it, and this feature of private autonomy makes it look like a legal source. Let us go further into this. Zagrebelsky (1987) was seen earlier to view sources as playing a new role in lawmaking in the process of political integration and pluralism. It has been acknowledged that acts of private autonomy, and contracts in particular, represent a typical form of bottom-up integration of social interests (ibid., 16). The way the argument goes, however, the legal sphere of these acts

> does not correspond to "political and legal dimensions" with a general scope (state, regional, local), but it is confined to the sphere of subjects who perform such acts. Therefore, for the act-based sources it is correct to say that there is no "third party" within the [normative] dimension assigned to them, insofar as no individual has the power to invoke her subjective position of non-inclusion or contrast with respect to the rules of these act-based sources. (Ibid., 16–7; my translation)

This being so, the basic aspect to be considered with regard to legal transactions is that they are binding only *inter partes*—which see point (c) above. This is a structural difference between legal transactions and the other act-based sources: Legislation, for example, is *formally* a source that, *as such*, holds *erga omnes*, while a contract is not structurally so. But this does not yet seem reason enough to exclude contractual autonomy from a classification of act-based sources of law, for this last is based on a stipulative definition.[24]

The positions briefly illustrated above are quite debatable. And if we come down to a more empirical level, we will find an exception to the standard view of contractual autonomy in the so-called collective contracts and agreements. This form of contract—typically concerned with labour relations and industrial law, and suitable as a legal tool in the welfare state—results from a collective bargaining that usually involves trade unions and employers' associations.

[24] The legal idea of private autonomy can be accounted for as well, from a very general perspective, in the light of a liberal (Kantian) idea of private autonomy, that is, by taking as foundational to it the basic value of individual choice and the fulfilment of a personal conception of the good, one of the underlying principles of modern constitutionalism. But a discussion on how this principle can affect the legal status of private autonomy falls outside the scope of this chapter.

The general goal of these agreements is ultimately to achieve (a) industrial peace over a given area and period of time and (b) to set up working standards, as for the distribution of work and rewards, as well as to provide guarantees on the stability of employment (cf. Daintith 1979; 1997, chap. 10). In Italy, these contracts often get formally constructed as acts of private autonomy whose bindingness is not *erga omnes* (cf. Luberto 2001, 169). But then, from a wider perspective, collective contracts have been argued to "acquire their general bindingness thanks to suitable norms that regulate lawmaking, or to the effective political weight of trade unions; in this second case, such contracts are to be considered sources *extra ordinem*" (Pegoraro and Rinella 2000, 15; cf. Daintith 1979). Italian legal doctrine has thus recognised this change of paradigm with regard to the legal nature of some forms of contractual autonomy. This is due in part to some decisions pronounced by the Italian Constitutional Court, which, on the basis of articles 36 and 39 of the Italian Constitution, has found that the terms of collective contracts are the main criterion by which to assess the fairness of the salaries paid to employees (cf. Pizzorusso 1977, 557). In this sense, the scope of these contracts goes beyond the bindingness of the parties involved, and takes on a clear *erga omnes* character (Zagrebelsky 1987, 247ff; cf. Paladin 1996).

7.3.1.2. Judicial Decision and Precedent

Kelsen was seen earlier to argue that there is no sharp distinction between creating and applying the law. Now, this argument can be brought to bear on the legal status of judicial decisions as well. In other words, even the judges' decisions—or rather, their provisions—are, in the light of the hierarchical mechanism of empowerment, nothing but individual and concrete norms that belong to the legal system:

> The creation of individual norms by the courts represents a transitional stage of the process that begins with the establishment of the constitution, continues via legislation or custom to the judicial decision, and leads to the execution of the sanction. (Kelsen 1967, 237)

Notice that Kelsen's remark about the objective meaning of the "ought" implied by individual norms applies to judicial decisions as well, since, ultimately, the judiciary is regulated by higher competence norms:

> This means that the *subjective* meaning of the act of such a decision need not yet be accepted definitely as its *objective* meaning. The subjective meaning of the act will become definitely its objective meaning only when the judicial decision has acquired the force of a final judgement: When it cannot be cancelled by a further procedure. (Ibid., 240)

Even so, as for the legal transaction, even judicial decision may be viewed as a lawmaking process, since it is productive of legal norms within the legal system. This idea is widely known to find support in, and run parallel to, the the-

sis by which judicial decisions have a constitutive character, despite the approaches that assume their declarative nature (ibid., 236ff.; cf. Kelsen 1991). In fact, "the court does not merely 'find' [...] the law whose creation had been previously entirely completed"; this is because the court "must decide the question whether the norm to be applied is constitutional," for example; further, given a fact submitted to court's decision, "it only by [the court's] ascertainment that the fact reaches the realm of law; only then does a natural fact become a legal fact" (Kelsen 1967, 237, 239). This Kelsenian tenet is at base epistemological: "Judicial decisions are constitutive because of the decisional, not cognitive, features characterizing judicial reasoning throughout all the differing phases of the judicial activity [...], and because of the decisional, not cognitive, features of the very result judicial activity yields: The norm of the case" (Mazzarese 1999, 256; for a critical discussion of this thesis, see also Bulygin 1995).

So framed, this question reformulates in broader terms the classical question of jurisprudence, Do judges create law? We cannot enter here into a full discussion of this question as such without also discussing the structure of judicial reasoning (which see Sartor, vol. 5 of this Treatise). But Kelsen's approach is still an excellent point to start from when looking to put some order among the variety of meanings assigned to the question whether judicial decisions are sources of law. The following outline is based on Guastini (1998, 100ff.):[25]

(a) Judges create law, and this activity is justified by theoretical considerations on the general structure of judicial reasoning;
(b) Judges create law only in certain circumstances, for example, in presence of gaps in the legal system;
(c) Some judges in the judiciary create law, or they do so only with regard to specific kinds of decisions;
(d) Some judges create law because this activity is recognised within the legal system (by an explicit meta-norm on lawmaking, for example).

Points (i) and (ii) require an investigation into the creative role of judicial interpretation. Point (iv) is surely central in discussing, from a legal-dogmatic perspective, the role of judicial decisions in the system of sources of law. Point (iii) is also relevant (even if this goes beyond the scope of Guastini's treatment of it) insofar the focus is on the basic analysis of continental legal systems and the way they actually work.

I will close this section with a brief note on Kelsen and on the role of judicial decision in continental legal dogmatics. Kelsen is well aware that, even if

[25] The enumeration that follows summarises a classification provided by Guastini. A few cases have been omitted for the sake of simplicity.

judicial decisions produce individual norms, this acknowledgment does not necessarily commit us to viewing such decisions as sources of law, at least not in the standard sense of sources. On this conception, judicial provisions are to be treated classically as binding precedents (for an overview of the concept, see, in this volume, chap. 3). But then Kelsen argues as follows (Kelsen 1967, 250ff.):

(a) "A court [...] may be authorized to create not only an individual norm [...], but a general norm"; "this happens when the judicial decision becomes a so-called precedent";
(b) "the formulation of the general norm may be done by the court that created the precedent; but can also be left to other courts bound by the precedential decision";
(c) at any rate, the similarity of two cases can be established "only on the basis of a general norm that defines the fact by determining its essential elements";
(d) "If the courts have to apply usually customary law, as in the sphere of the Anglo-American law, and if they, besides, have the authority to create precedents, a theory can [...] develop in such an area that all law is court-made law; that no law exists before the judge's decision: that a norm becomes a legal norm only because it is applied by the court";
(e) But the above conclusion is incorrect, since it does not distinguish "between the 'sources' of law that are legally binding and those that are not";
(f) The conclusion is that "a 'source' of law can be 'law' only because it is a peculiarity of the law to regulate its own creation," and so "the judicial decision is the continuation, not the beginning of the law-creating process."

On this reasoning, precedent acquires this peculiar feature, that looks like a decision whose bindingness holds *erga omnes*. But this understanding of precedent leads Kelsen to emphasise the centrality of the top-down process of specification of the legal system (law application as law creation), and hence to focus on the general structure of judicial reasoning.

In standard legal dogmatics, on the other hand, the nature of judicial decisions as legal sources is investigated by focusing primarily, not on the general structure of judicial reasoning, but on the recognised function that judges serve within the legal system.

Systems of civil law are commonly distinguished from systems of common law by noting that civil law has no rule of precedent, in that judicial decisions are not legally binding. This feature of civil law is accounted in large part by pointing out the general prohibition, in civil law, of what are called *arrêts de règlement*, meaning that the acts of the judiciary must focus exclusively on the merits of cases they are called to settle. This requirement is understood to

flow naturally from the doctrine of the separation of powers and is designed to materially subordinate judicial decisions to legislation (Marinelli 2002, 878; cf. David and Jauffret-Spinosi 1992; Merryman 1984). Judicial decisions turn out, in consequence, to be binding only *inter partes*, and not *erga omnes* (cf. Guastini 1998, 474–5).

This claim is well known, and true in principle, and yet precedents are now used widely in continental legal systems, too, with perhaps the exception of France (this volume, sec. 3.1; cf. Summers and Taruffo 1991; Kriele 1988; Sartor 1996; MacCormick and Summers 1997). This thesis is based on a comparative analysis of the practice by which judges justify and motivate their decisions, even if the emphasis falls on the appeal to previous judicial decisions as persuasive precedents (on the general distinction between binding and persuasive precedent, see, in this volume, chap. 3). Even so, precedents are acknowledged to play an *effective* role in lawmaking, a circumstance by which continental legal doctrine is sometimes prompted to revise the classical system of sources, by bringing into it precedent as a source that is "merely effective," *extra ordinem*, or "supplementary" with respect to legislation (Pizzorusso 1977, 534ff.; Taruffo 1999, 248).

This analysis is based on "empirical" considerations, and indeed we do find legal systems in continental Europe that seem to formally recognise some specific uses of binding precedent. German law, for example, provides for the possibility of submitting, to joint or higher courts, cases for which different interpretations of the same law have been adopted by the same or by different courts (cf. Marinelli 2002, 879). Similarly, the Italian legal system prescribes a uniform interpretation of the law, and the task of ensuring such uniformity is conferred upon the Corte di Cassazione, the highest court of appeals in ordinary jurisdiction (art. 65, I c., Ord. Giud.; Gorla 1990; see Guastini 1998, chap. 19). These examples are chiefly concerned with the formal bindingness of precedents in their interpretation by the courts. And I will return to this question presently. A significant example of true binding precedent is to be found in Spain, where the judicial practice of the Supreme Court (*Tribunal Supremo*) may result in true binding precedents if at least two equal decisions are pronounced on a similar matter (Coca Payeras 1980). The bindingness of these decisions pertains to their normative and material content and is unconnected with the task of guaranteeing a formal unity, meaning a uniform interpretation of the positive law.

The conceptions of "sources of law" thus far examined have been taken into account in different criticisms concerned with the qualification of judicial decisions as sources of law. Marinelli (2002, 905ff.), for example, considers the following points. First, many continental legal systems expressly prohibit using judicial decisions as precedents, and we often find it stated in these systems what are to count as binding sources within the system. But—it was previously observed—this prohibition does not prevent judicial decisions from

playing an effective role as precedents in the practices of the courts. And it was also seen how classifications of legal sources often prove to be far from complete. On a second level, the criticism proceeds on the assumption that the use of precedents in continental legal system is mostly persuasive. If it is, one can hardly confer upon judicial decision the status of a legal source. In fact, the appeal to precedents, though frequent, is "legally contingent," and its presupposed bindingness cannot be qualified within the hierarchical system of sources. In particular, persuasive precedents often draw their efficacy from other sources from which they get their normative force (in general, see Larenz 1979). We see this, for example, with precedents designed to secure a uniform interpretation of legislative statutes. Here, the decisions of the Italian Corte di Cassazione cannot be made out to be true precedents, since the function of harmonising the interpretation of legislative statutes suggests that the judges of this supreme court should be subordinate to legislation when it comes to deciding cases on their merits.[26] Marinelli concludes that the practices of looking to precedents generally takes different forms. Thus, we may see "a more or less hidden, or an explicit reference" being made to precedents, or a hint of discussion on them in judicial motivation, or again we may see them become "the entire basis of judicial justification" (ibid., 906). These objections are serious, to be sure, but they are not decisive. Of course, a widespread use of persuasive precedents is, at least prima facie, a contingent practice of legal systems. But the resulting difficulty encountered in placing precedents within the formal hierarchy of continental sources is sometimes overestimated, on the assumption that such insertion cannot be made without a *clear* hierarchy among legal sources. The need for a clear hierarchy (it was argued in Section 7.2) cannot be taken for granted: Sources are identified as well on the basis of their political weight in integrating plural interests, and the effective emergence of new authorities in lawmaking complicates matters in an unexpected way.

But there are other aspects to be considered. One element that seems to make a difference in civil-law versus common-law systems is this: In civil law, previous judicial decisions are rarely invoked by reference to specific leading precedents. The courts will rather often recall a series of judgements generically, since the "precedent takes the form of a *line* or *series* of cited judge-

[26] This question is still widely debated in Italian legal doctrine and cannot be taken up here. One point of discussion is article 101 of the Italian Constitution, where it is stated that the judges ought to be subordinated to legislation only. Reference is made here as well to article 111 of the Constitution, which provides, among the other things, for the possibility of appealing to the Corte di Cassazione in cases where the lower courts should "violate" the law. In this sense, the argument against finding the decisions of the Corte di Cassazione to be true precedent, is also presented as the argument that they are not binding *erga omnes*. See Marinelli 2002; Guastini 1998; Gorla 1990; Galgano 1994 as well as Pizzorusso 1990, and the literature cited there.

ments" (Summers and Taruffo 1991, 489). Here, the force of previous judgments is made to depend directly on the possibility that these judgments should fall within a certain line of judicial interpretation. Such is not necessarily the case at common law, where the precedential value of decisions can in theory rely on single and unique leading precedents (cf. Taruffo 1999, 250–1). This, of course, in not simply a matter of different styles of citing: The difference reflects the fact that the doctrine of *stare decisis* is not generally recognised in continental law. Accordingly, even the force and persuasive function of precedents connects with the degree of agreement among the courts in deciding on certain matters. On the other hand, binding and persuasive precedent gives us patterns of infinite nuances. For example, Sartor (1996) observes that the notion of binding precedent—as contrasted with persuasive precedent—is quite vague. In fact, the bindingness of precedents can be characterised according to different degrees of force. Precedents may be (cf. ibid., sec. 3; cf. Taruffo 1999)

(a) strongly binding: They ought to be applied without exception;
(b) formally binding: They ought to be applied, unless specific exceptions occur;
(c) defeasibly binding: They ought to be applied, unless substantial reasons may occur to argue against their application;
(d) not binding but supportive: They may be applied in arguing that certain cases have to be settled in conformity with past decisions;
(e) merely "illustrative": They provide some heuristic reasons to settle future cases, but such reasons must be balanced with contrary arguments.

The crucial type of precedents is that mentioned at point (c). In this regard, Sartor argues (ibid.), defeasible bindingness in turn can be articulated into a strong or a weak version. In the first case, a precedent ought to be applied unless the balancing of relevant reasons leads to conclude that the precedent is definitely unjust or inadequate. In the second, substantial reasons can make the precedent inapplicable, but such reasons "slightly" prevail over contrary arguments. This second case perhaps corresponds to the threshold beyond which past judicial decisions cannot be considered any more as true precedents. In fact, the bindingness of a precedent is such that the burden of proof is on those who argue to derogate from it. To do so, it is required to motivate this derogation. In this theoretical perspective, it is hard to say that the notion of (defeasibly) binding precedent, at least prima facie, is not adequate to account for some judicial practices in the civil law.[27]

[27] Similarly, the "infinite" number of degrees of force assigned to previous decisions leads also Taruffo (1999, 256ff.) to be sceptical about the sharp distinction between binding and persuasive precedent. The question cannot be simplified by establishing whether judicial

A second question is the retroactive character of precedents, since "the decision is applied immediately to the litigation in the course of which the decision arises, even if the decision is in some sense a new decision" (this volume, sec. 2.5). This retroactivity is taken to be a reason why we should reject precedent as a source of law, since there is integral to the legal tradition of continental Europe the principle that the law (usually, legislation) cannot be retroactive: Violating this principle makes the law more uncertain. Leaving aside all political arguments on the primacy of legal certainty over the flexibility of decisions, I agree with Shiner (ibid.) that this contrast is sometimes overstated: "The legislation is not always free of retroactivity," because it "needs interpretation." But then we should not fail to acknowledge that the question carries some weight in European law. There have been attempts to introduce in continental countries the Anglo-American practice of "prospective overruling," where judges—even if they are convinced that a certain line of precedent is best abandoned—still follow the same line for the sake of legal certainty, and rather declare in *obiter dicto* that it will be changed (Roselli 1999, 282ff.).

To conclude this section, I will say something on the way the role and practice of constitutional courts in civil-law countries affects the system of sources of law. My focus will be exclusively on Italy.[28] The function of the Constitutional Court's review of legislation may lead to judgments in which the court (a) accepts the request for judicial review and acknowledges the constitutional illegitimacy of some legal provisions (*sentenze di accoglimento*) or (b) rejects this request, finding that there is no violation of the constitution (*sentenze di rigetto*) (see Zagrebelsky 1988; Sorrentino 1997; Paladin 1991). The first kind of judgment ultimately determines the invalidity of the legal provisions submitted to the court's review. Some arguments may be developed here to qualify these decisions as sources of law (Pizzorusso 1977). Following Guastini (1998, 496ff.), we can say that *sentenze di accoglimento* are sources in that

(a) they are a sort of "negative legislation": Their effect is basically to "cancel" some legal provisions from the legal system;
(b) they may reinstate the validity of previously abrogated legal provisions;
(c) they are binding *erga omnes*.

decisions are binding, and hence whether they set a precedent. From a wider perspective, binding precedent is opposite to "examples," which do not exhibit any clear normative force, but are based on such factors as relevancy and utility. Examples are not "exemplary": They are not bound by criteria of vertical or horizontal bindingness among the courts, and they may also be used when they do not apply specifically to the matter at hand. In other words, the function of examples is mainly heuristic; they sometimes take the form of justifying reasons. On the different kinds of precedents in civil law, see also Wróblewski 1983.

[28] But similar remarks can be made to apply to other civil-law systems, since the question, as we will see, pertains as well to the general character of the constitutional review of legislation. See Pegoraro and Rinella 2000.

These remarks apply to all kinds of *sentenze di accoglimento*. But some of them, called *sentenze manipolatrici*, exhibit additional features. Indeed, they constitute a sort of positive legislation as well. One type of *sentenza manipolatrice* finds that legal provisions are constitutionally illegitimate when something is missing from them, and then declares positively what this "something" is (by way of a *sentenza additiva*). Other judgements declare the illegitimacy of a legal provision by stating that something in the provision needs to change, and by specifying what this "something" is (these judgements are called *sentenze sostitutive*) (Guastini 1998, 504ff.). In either case the judgement is, prima facie, law-creative. As Guastini observes (ibid.), much of Italian doctrine still does not view these judgements as sources of law, because they do not in theory produce law but are confined to ascertaining the normative content implicit in the constitution. On the other hand, it can be argued that since *sentenze manipolatrici* introduce new norms at the legislative level, and are binding *erga omnes*: They are true act-based sources.

Again, the impression is that it is all-important to investigate the creative character of legal interpretation and the nature of legal reasoning. For example, this is the general perspective adopted by Alexy (1989) and Kriele (1988; cf. Sartor 1996, sec. 6.2). Alexy argues that the foundation of the rule of precedent instantiates the discursive principle of universalisability. The rule of precedent states that similar cases must be dealt with in similar ways (treat like cases alike; unlike cases not alike): If so, the rationality of legal reasoning prescribes that burden of proof is on those who argue to derogate from past decisions. Similar theoretical remarks are developed by Kriele, who also maintains that binding precedents contribute to the certainty and coherence of legal systems. In both approaches, the emphasis is made on the value of the equality of judicial application of law, which is the necessary counterpart of the formal equality before the law. And, of course, this claim is crucial also in the civil-law systems.

7.3.2. Custom

Custom is traditionally viewed as the prototype of fact-based sources of law (cf. Paladin 1996; Sorrentino 1997; Guastini 1998; Modugno 2002; Pegoraro and Rinella 2000; in general, see Kelsen, 1967; Ross 1958; Aarnio 1987; Peczenik 1989). Following Kelsen (1945, 126ff.), legal customs can be said to exhibit some points of contact with private autonomy, since, as has been observed (Guastini 1998, 649; Celano 1995; cf. Pizzorusso 1977), they express a form of autonomous and decentralised lawmaking. In addition customs arise, at least in some cases, and to a certain extent, from the practice of those subjects who are at the same time the addresses of customary rules.

The problem, in very general terms, is to understand which factors are required for a custom to be considered true law. In other words, it is a question

of resting on some kind of basis for the normative (but also the legal) qualification of some social regularities and stabilised patterns of behaviour, since "consistent behavior in accordance with particular implicit rules does not indicate that people should so behave": "The principal issue is that one cannot derive an *ought* from an *is*" (Watson 1984, 561).

Here, a significant part of continental legal doctrine, though with different nuances and interpretations, still tends to adopt the traditional view by which the requirements for custom to be law are *usus* and *opinio juris seu necessitatis* (see, for Italy, Sorrentino 1997; Modugno 2002). As is well known, the historical roots of this view can be traced back to Roman law, in the *Justiniani Institutiones*, for example (I, 2, 9; translated in Watson 1984, 562): "Unwritten law is that which usage has approved. For long-practiced customs, endorsed by the consent of the users, take on the appearance of statute."[29] In this sense, we can distinguish between quantitative (material) and qualitative (psychological) elements in the formation of legal custom. The first requirement is that custom should exhibit the general, uniform, constant, and public reiteration of a certain social practice. The second requirement is the widespread and mutual belief (or conviction) that this practice is legally binding, and such that the effective compliance with this pattern of behaviour is accompanied by the "sense of fulfilling a norm" (Watson 1984, 563; cf. Larenz 1979).[30] I will return shortly on this specific view. For a better understanding of the theory of *opinio juris*, we will focus first on other conceptions of the legal character of custom.

With his usual lucidity, Bobbio (1994) has provided a comprehensive classification of the doctrines of customary law in continental legal tradition. We can distinguish among doctrines that ground customary law on the following

(a) the authority of the subject which such a law comes from;
(b) the qualification of the behaviour of the users, meaning by this the addresses of customary rules, even if it may be argued in general that the group of users includes as well those people who practise this behaviour;
(c) the legal character of the matters regulated by custom;
(d) the effective recognition of custom by judges;
(e) whether customary law is a part of the legal system as a whole.

The first kind of doctrine derives from the Roman tradition and says that custom is legal since it is the product of the people—the ultimate authoritative

[29] "Ex non scripto ius venit, quod usus comprobavit. Nam diuturni mores consensus utentium comprobati legem imitantur."

[30] As is well-known, this view is articulated in Allen 1964 by specifying that custom must be immemorial, reasonable, continuously observed, and, of course, believed obligatory. On this specific analysis, see, in this volume, chap. 4.

source of lawmaking. In this sense, the elements of *usus* and *opinio* must be integrated by also focusing on other aspects of the Roman legal tradition—where custom is defined as "tacit convention among citizens" (*tacit civium conventio*) or a "tacit will of the people" (*tacit voluntas populi*)—in the argument that customary law has the same legal dignity as written law (ibid., 23). This view gets reframed by the German Historical School, for example. Savigny (1840) opposes the view that custom becomes legally binding through voluntary acts by the people: Rather, such binding force comes naturally from the *Volksgeist*, which exists before any individual act accordant with custom. In this sense, the idea of *opinio juris* is closely related with the collective and spiritual dimension of the people. But "the validity of Savigny's view of custom [...] depends on the plausibility of his general theory of law, which current legal philosophers universally reject" (Watson 1984, 566; cf. Friedman 1973).

The second approach is, according to Bobbio (1994, 25ff.) the common meaning assigned the theory of *opinio juris seu necessitatis*. Here, it was mentioned earlier, the legal character of custom depends on the psychological attitude that people take towards a practice, which thus comes to be regarded as legally binding. This way of viewing the question is chiefly meant to confine the scope of custom to recognised and socially desirable practices, and to distinguish them from mere usage. But this theory has been widely criticised on account of its circularity: "On the one hand, it is argued that a legal norm of custom does not exist in absence of *opinio*; on the other, *opinio* presupposes that the legal norm already exists" (ibid., 27; cf. D'Amato 1971). Two solutions are possible on Bobbio's reconstruction. The first is that *opinio* is based on an error, on the false belief that a legal norm exists even if it does not (cf. Kelsen 1945). The second argument reduces the importance of *opinio* as not constitutive of the legal character of custom, but simply as evidence of its legal effectiveness *ex post* (but see Modugno 2002, 142). This general criticism of the doctrine of *opinio juris* has a variant. Watson (1984, 564ff.) argues that the problem of circularity becomes crucial in dealing with the notion of desuetude:

> A principal failing is that *opinio necessitatis* provides no mechanism to incorporate changing customs or to delete law which ceases to mirror common practice. One might try to resolve this inadequacy by postulating that the doctrine of desuetude is inherent in customary law. The doctrine of desuetude states that when a practice [...] ceases to be followed or recognized as law, it ceases to be law. At that stage, but not before, the road becomes clear for the creation of new customary law. Adherence to the new custom before the old customary legal rule becomes obsolete is a factor in making the old rule obsolete. However, under the doctrine of *opinio necessitatis*, overlapping practice does not create a new legal rule because the new practice was not followed in the "the general conviction of law." Thus, at the precise moment of desuetude, there is no law on the point at all. (Ibid., 563–4)

It has been observed that the problem of desuetude cannot be solved by applying the criteria with which to account for the abrogation of act-based sources. The key concept is not the formal validity of custom, but its effective-

ness. It is incorrect, on this view, to argue that a practice gets replaced by another, but, more realistically, that the same practice gradually transforms (cf. Sorrentino 1997, 200). This argument is reasonable and seems to weaken Watson's criticism. On the other hand, the burden of the proof is on those who maintain that desuetude derives from a gradual evolution of customs, since they have to describe analytically how this evolution takes place. At any rate, even if this general approach affects Watson's remark on the problematic nature of desuetude, it obviously does not overcome the circularity of the doctrine of *opinio juris*.

Another option is available in the face of this difficulty (Bobbio 1994, 27ff.): The legal character of custom depends on the specific kind of behaviour to which custom refers, a behaviour materially susceptible of legal regulation. It is crucial, from this perspective, to provide criteria for assessing the legal relevance of social practices. For example, as was seen in Section 7.2.1, we can extend the requirement, identified by 19th-century German legal doctrine with regard to legislation, that the law be focused on the interpersonal dimension of human actions. But this approach is as comprehensive as it is vague. In fact, as Bobbio observes, it does not enable us to understand why certain social rules are *effectively* legally binding, while others are not, despite the fact that the latter may concern the same dimension of human action as the former. It can be argued that the identification of relevant legal matters requires a systematic reading of the legal system as a whole. If we have general principles of positive law saying that some sphere of social action ought to be regulated, we then have a rational criterion by which to understand when a certain social practice may generate customary law. This variant seems acceptable because it goes beyond the generic identification of supreme and "external" goals assigned to the law. But even this view is not sufficiently precise (cf. Bobbio 1994, 29). The crucial point, from this general perspective, is to determine the essential character that turns into customary law *each social rule* that is recognised *ex post* as legal, a requirement that seems to go back to the general criteria previously looked at.

As Bobbio reminds us (ibid.), Alf Ross seems to go with the approach that identifies the specific legal character of certain practices in their susceptibility of legal regulation. Ross maintains that "a legal custom is simply a custom in a sphere of living which is (or which becomes) subject to regulation by law": *Opinio juris*, in particular, will not suffice, because "every custom, even the one which leads me to appear in suitable clothing, is felt as such to be binding" (Ross 1958, 93–4). But this is just one side of Ross's view. In fact, in line with what was said in Section 7.1, what he has in mind when he speaks of a custom becoming law is "that a sphere of living hitherto outside the field of law is subjected through the practice of the courts to regulation by law" (ibid., 93, note 5). The material relevance of a social matter is reflected in the *opinio juris*, which is nothing but the "expectation [...] that legal sanctions

are expected if the matter is brought before the courts" (ibid., 94). This being so, the role of courts is crucial, since it is admissible that, for practices that no one follows for a long time, "custom as source of law [...] leads to situations where the judge is motivated by a changed legal conception in the community" (ibid., 96). The necessary contribution of judicial recognition in recognising legal custom is typical of legal realism, for example (see Pattaro 1994, chap. 9). As is well-known, there are many variants of this approach, but all of them, each to a different extent perhaps, tend to focus on the constitutive function of judges in establishing whether a custom is a legal fact. On the other hand, and for different reasons, some kinds of legal positivism also seem to adopt a similar attitude. Bobbio (1994, 31) mentions Austin's theory of legal custom: On this theory, legal custom is considered in itself a process of law-formation that operates, indirectly, through the direct function judicial decisions. As Shiner points out, however, this mechanism does not tell the whole story, since Austin assumes the customary rules recognised by judges to be "tacit commands of the sovereign legislature" (see, in this volume, sec. 4.4). Watson (1984) likewise emphasises the crucial role of judges. Watson brings sociopsychological factors into the view that customary law, as law, is ultimately made by judicial decision. He, too, believes that *opinio juris* fails to provide sufficient criteria. In fact, "court decisions declare customary law even when (a) custom is uncertain (and there is no *opinio necessitatis*) and (b) there is no custom." On the other hand, and despite this last remark, it is usual to find that that "in societies where decision-makers treat customary behavior as law, there is also an attribution to the people of the power to make law by their tacit behavior," but "this law is created only when decision-makers officially recognize or accept it" (ibid., 571–2).

There is a number of possible criticisms against this view. The first is merely empirical and consists in noting that, in international law, the absence of a central and sometimes universally recognised authority places custom next to treaties as a primary source of law (cf., in this volume, chap. 8). Here, "some arguments have been made in support of emerging practices that conflict with obsolete provisions of public international law" (Parisi 2000, 4; cf. Kontou 1994). A second argument comes from Bobbio (1994, 31–2). He notes that some customary rules emerge from the practice of constitutional organs invested with a legal authority of their own (on this, see below). In addition, if judicial decisions are made out to be a necessary and sufficient condition for declaring a rule to be customary law (or rather for constituting a rule as such), then we won't be able to provide a ground for the obligatoriness of that rule: Judges are not obliged to apply custom for the trivial reason that custom is not a *legal* source. In general, as Peczenik observes,

> It is [...] important not to adopt a terminology which encourages one to ignore the spontaneous norm-creating activity of people. Only weak moral reasons support the conclusion that the

> courts and authorities have monopoly of creation of legally binding norms. […] Much stronger reasons support the contrary conclusion. […] [T]he custom of people may be relatively fixed, perhaps more so than the practice of the authorities. […] [A]n indirect democratic legitimacy of judicial and administrative practice is hardly superior to democratic legitimacy of popular consensus. (Peczenik 1989, 331)

Moreover,

> A more important complication results from the fact that one may regard the very source-norms, determining the legal status of *all* the sources of law, as a kind of custom. Existence of the source-norms involves a complex of human actions or dispositions to act whose description *strongly* supports them. (Ibid.)

This being so, it is self-evident that judges, and other officials with them, trivially serve the *declaratory* function of recognising customary law. Much more demanding is the task of arguing that judges truly create customary law (cf. Zagrebelsky 1987, 269, 280).

On the last of the approaches examined by Bobbio (1994, 33ff.), custom becomes law if it becomes a part of the legal system as a whole. Bobbio's analysis develops as follows. The first assumption is that custom consists of social rules that emerge, as always, from the general, uniform, constant, and public reiteration of certain social practices. There are, then, two main ways through which a rule becomes part of the legal system: "(1) by helping to constitute, or making possible, the function by which certain powers set up a sanctioning mechanism and (2) by providing these powers with criteria with which to settle conflicts of interest between group members (or between them and legal organs)" (ibid., 34; my translation). On this assumption, customary rules become legal when "(1) they contribute directly or indirectly to the formation of organs constitutive of the legal system and (2) they get used by these organs to settle social conflicts of interest" (ibid.; my translation). This approach does not seem to me to be much less vague than the previous ones. But then it does have its merits. As I understand it, its main purpose is to widen as much as possible the range of criteria with which to identify legal customs: In fact, we can adopt a unique and specific conception of customary law since, as Peczenik observes (1989), customary law also serves the function of providing the very source-norms of the system as a whole. Kelsen's view can be made to fall within this general approach, I believe, even if, as is well known, he does not qualify custom as the ultimate ground on which a legal system stands. It was noted in Section 7.1 that the generic activity of lawmaking corresponds to what is regulated by the material constitution, which in turn may have a customary or written form. In this second case, law creation is codified in the so-called formal constitution. Kelsen thus seems to admit the possibility that custom grounds the process of lawmaking. But the purity of his doctrine does not allow him to come to this conclusion. The following quotation summarises perfectly the way Kelsen's approach to custom locks in with his pure theory:

> Customary law may be applied by the law-applying organs only if they can be regarded as authorized thereto. If this authorization is not conferred by the constitution in the positive-legal sense […], then it must be *presupposed* that custom as a law creating fact is already instituted in the basic norm as the "constitution" in the transcendental-logical sense. This means: A basic norm must be presupposed which institutes not only the fact of the creation of a constitution, but also the fact of a qualified custom as law-creating fact. This is also so if the constitution of the legal community is not created by a legislative act but by custom, and if the law-applying organs are considered authorized to apply customary law. (Kelsen 1967, 226)

As expected, the basic norm is the key concept with which to also admit custom as a legal source (cf. Pattaro 1994, chap. 9). But it is still correct to say that Kelsen's view falls within the last approach considered by Bobbio, since the legal character of custom depends on its being effectively a part of the legal system.

What is the role of custom in continental legal systems? Customary law is widely recognised to play a crucial in a decentralised system such as international law (this volume, chap. 8; see Pegoraro and Rinella 2000; D'Amato 1971; Brownlie 1998; Janis 1993; Kontou 1994), but its weight within national legal systems is viewed as marginal (cf. Zagrebelsky 1987; Bobbio 1994; Paladin 1996; Guastini 1998; Pegoraro and Rinella 2000). Continental legal systems are mainly statutory, and legal dogmatics, often influenced by legal positivism, states the general principle that custom ought to be subordinated to legislation.

The distinction is often made, based on this principle, between the following (Pizzorusso 1988; for a different classification, see also Sorrentino 1997, 198–9):

(a) custom *secundum legem*, when positive legal provisions (typically legislative statutes) refer explicitly to customary rules;
(b) custom *praeter legem*, which applies to matters not regulated by any positive legal provisions;
(c) custom *contra legem*, which provides legal rules in explicit conflict with positive legal provisions (typically legislative statutes).

Modern systems of continental law recognise such custom as emerges within the scope of positive law—point (a) above. When custom regulates areas not regulated by statutes—point (b) above—its effective bindingness will depend on the different solutions and policies adopted in each legal system with regard to what is regulated. If a custom is in conflict with positive law—point (c) above—the law ought usually to prevail (cf. Pegoraro and Rinella 2000, 13). But it is quite possible for a custom *contra legem* may be effectively recognised as binding within a legal system. This may happen when, for example, a customary rule is used by a judge in settling a dispute. Here, the custom cannot be considered a "legal" source of law, but its effectiveness makes it a source *extra ordinem* (cf. Kelsen 1945, 119ff.; see also Guastini 1998, 650; Pizzorusso 1988; Paladin 1996, 391ff.).

Let us consider the legal status of customary law in the Italian legal system. The Italian Constitution does not provide any explicit regulation of customary law, with the exception of article 10, which finds that the legal system ought to be in accordance with such norms of international law as are universally (*generalmente*) recognised. This article is generally interpreted by the Constitutional Court as referring specifically to sufficiently stable and general custom at the international level. It is also viewed as prescribing the permanent implementation of international customary law in the internal system, though in keeping with the constitution's fundamental principles (cf. Paladin 1996, 396ff.). This constitutional provision pertains only to international law; the main regulation of internal customary law is set forth instead in the so-called Preliminary Provisions to the Italian Civil Code. Article 1 recognises custom as a legal source. From a strictly formal perspective—which may in theory take exceptions—basing the legal character of custom on this provision implies that customary law is subordinated to legislation, since its legal character is formally provided by a statute (Guastini 1998, 650). On the other hand, it is at least debatable that custom is legal only insofar as it is so recognised by positive law, for the simple reason that any legal classification of sources does not provide an ultimate ground for the existence or absence of a legal source. This holds in principle only in strongly centralised legal systems, where the independent status of customary law cannot be taken for granted. Aside from this question, it seems clear that custom *contra legem* is in principle rejected because article 15 allows legislative provisions to be abrogated only by subsequent provisions at the same legal level. In addition, article 8 states, with regard to matters covered by statutes and regulations, that here customs are binding *only* when reference is made to them (in the same statutes and regulations). This may be an argument in favour of the legality of custom *secundum legem*, of course. But there is also room for accepting custom *praeter legem* (ibid.; Paladin 1996). Custom *praeter legem* can play the important role of filling in the gaps of positive law. Article 12 of the Preliminary Provisions, it is true, indicates that legal gaps ought to be filled by analogy or by recourse to the general principles implicit in the system. But then, this article does not mention custom, and so can be made out to require that we refer to written sources only, or, where custom is not helpul, that we proceed by analogy or by reference to legal principles (Paladin 1996, 393): It is quite hard to defend the ideal of the completeness of legal systems.

The foregoing considerations suggest that written sources operate opposite to custom by a relation of mutual exclusion. The normative space left to customary law appears residual. But the relation between positive and material law is far from being so clear (Zagrebelsky 1987, 282ff.). Formal law is surely affected and influenced by the spontaneous formation of material law. This applies, for example, to the so-called constitutional customs—customs emerging from the practice of certain constitutional organs. In fact, the activity of

these organs is regulated mainly by power-conferring rules, which are often discretional in character and allow a number of possible material implementations (Esposito 1961; cf. Modugno 2002, 144ff.; Sorrentino 1997, 199f.; Guastini 1998, chap. 31). In general, material law should not be viewed as necessarily in contrast with formal law. Quite the contrary: Custom integrates positive law, for its interpretation is open to different outcomes. In addition, it is evident how custom shapes the normative content of the legal system: "Many of the constitutional transformations are performed by way of interpretation," or under the pressure of conventional usages (Zagrebelsky 1987, 283; my translation).

This conclusion perhaps indicates the general philosophical path to an understanding the role that social practices play in institutionalised systems. As has been said, the notion of custom seems able to capture the dynamic role that social action has in shaping the legal system. Here the ultimate problem is not explaining why custom has a normative nature. Social practices are in general rule-based activities, and in fact are inherently normative (on this general thesis, see Brandom 1994). The first thing, even in regard to the relation between formal law and social custom, is that we need to focus on how "principles of justice can emerge spontaneously through the voluntary interaction and exchange of individual members of the group." This being so, "relevance must be given to the statements and expressions of belief […] of the various players [...] individuals and states articulate desirable norms as a way to signal that they intend to follow and be bound by such rules" (Parisi 2000, 17, 18). In other words, we need to investigate how the normative coordination of individuals can become a basis for the spontaneous and uncoerced behaviour of the members of the group. The theoretical problem is to see whether these mechanisms can account as well for more-complex contexts where external (formal) contraints, such as legal institutions, influence, as well as are influenced by, these social dynamics (on this, see Sartor, vol. 5 of this Treatise). But, of course, these questions fall outside the scope of this chapter.

7.3.3. The Role of EC/EU Law: A Sketch

EC/EU law is a crucial factor in the recent evolution of European legal systems. As such, it plays an important role as well in the theory of the sources of law. This last issue is twofold, since it may be analysed with regard to the specific nature of EC/EU legal sources—for these are part of a distinct legal system—but also with regard to the peculiar relationship between European sources and national legal systems. The main purpose of this section is to account briefly for some well-known problems that concern this second aspect of the question.

The enactment and ratification of the institutive Treaties of Paris and Rome—and of subsequent Treaties, notably the Single European Act, the

Treaty of Maastricht, the Treaty of Amsterdam, and the Treaty of Nice—have affected the entire lawmaking process within member states. In fact, the development of European law has given increasing weight to the supranational legal order, thereby raising serious problems in the coordination of different levels of law-creation and legal decision-making (for an overview of the history of EC/EU institutions, see George and Bache 2001). In particular, several member states have been forced to promote initiatives of constitutional revision to align the principles of their constitutional orders with the normative and effective claims to the limitation of sovereignty stated in the treaties. This process has been made more urgent especially after the Treaty of the European Union (Treaty of Maastricht). This treaty marked a turning point in the process of European integration, since it was meant to go beyond the initial economic goals of the community by opening new dimensions of *political* integration. Thus, the German legal system, for example, subsequently recognised in explicit form some limitation to sovereignty, "though subordinating this limitation to the principles of democracy and the rule of law [...], subsidiarity and protection of fundamental rights," as likewise codified in the "strong core" of German Constitution (Pegoraro and Rinella 2000, 84; see *Grundgesetze*, art. 23). Similarly, the French Constitution requires the republic to contribute to exercising common competences within the framework of European Treaties (art. 88–1), authorises the transfer of legislative competences to EU institutions (art. 88–2), and prescribes that any legislative initiative inspired by EU acts is to be submitted to the parliament (art. 88–4) (Pegoraro and Rinella 2000, 84–5). Italy has long recognised the force and bindingness of European legislation by reference to article 11 of its constitution (cf. Zagrebelsky 1987; Sorrentino 1997; Guastini 1998; Modugno 2002). As noted earlier, this article states that Italy, "under equal conditions relative to the other states, authorises such limitations of its own sovereignty as are necessary to establish a legal order with which to ensure peace and justice among nations." The new article 117, reframed by a recent provision of constitutional revision (18 Oct. 2001, no. 3), codifies the specificity of EU law in this regard. Article 117 is thus meant to complete and integrate article 11, still viewed as the main constitutional ground for the force and bindingness of EU law within the Italian legal system (cf. Modugno 2002, 129–30).

The structure and functioning of the EU system is quite intricate. Even a brief account of it cannot be attempted here (cf. Kapteyn et al. 1998; Craig and De Búrca 1998; Shaw 2000; Vincenzi and Fairhust 2002; Peterson and Shackleton 2002; Nugent 2003). I will only provide the reader with a few basic notions necessary to put in focus the relationship between the EU and national legal systems. The main European institutions are the Council of Ministers, a legislative body composed by the heads of state and the foreign ministers of member states; the Commission, an executive body chiefly responsible for drafting legislation; the Parliament, consisting of directly elected repre-

sentatives of member states; and the European Court of Justice, entrusted with settling disputes on the interpretation and application of supranational legislation. In the system of EC/EU legal sources, the primary level of legislation is represented by the treaties. These provide European institutions with the power of generating secondary legislation, which consists mainly of regulations, directives, decisions, and recommendations. The structure of secondary EC/EU legislation is quite complicated. In general, the legislative process involves Commission, Parliament, and Council (see Kapteyn et al. 1998; Craig and De Búrca 1998). In particular, ever since the Treaties of Maastricht and Amsterdam, EU legislation has frequently adopted the so-called procedure of co-decision. Roughly speaking, this procedure requires the Parliament and the Council to contribute jointly to the deliberation, such that a provision is approved only when it obtains the agreement of the two bodies (cf. Crombez 1997; Crombez 2000; Laruelle 2002). This trend in EU lawmaking bears out the thesis that there exists no actual European legislator: One should properly speak of a European legislative process (cf. Wyatt and Dashwood 1993, 37). This remark—true in principle—seems based on the implicit adoption of a monistic view of legislation. But this approach cannot be applied any longer to national legal systems (see Section 7.2.2).

European legislation presents a general framework within which one can assess how EC/EU law affects the national systems of legal sources. So we have two levels: the general framework and the national systems. The question, then, is How can EC/EU law be qualified with regard to the legal status and force of treaties and secondary legislation within member-state systems?

Let us again take Italy as a case study with which to attack this question. It has been argued by Italian doctrine that EC/EU treaties properly constitute a legal system in principle distinct from the legal orders of the single member states (cf. Paladin 1996, 422ff.; Guastini 1998, 671ff.; Tesauro 1995). This apparently obvious statement carries with it a number of theoretical consequences if considered through the process by which European law gets implemented in member states. In theory, and despite some recently reiterated judgements by the European Court of Justice, EC/EU law, and its treaties in particular, can hardly be said to be in general self-executing. A self-executing treaty is such that it is binding (creating obligations and rights) upon all individual citizens or upon the subjects of the High Contracting Parties. EC/EU law, or part of it at least, is commonly thought to require execution by way of a specific lawmaking process that pertains to member states (Sorrentino 1997, 206–8). In this sense, specific internal legislative acts are aimed at making supranational provisions more precise and directly applicable. These acts have to implement EC/EU law within each national legal system. By contrast, as noticed a moment ago, the European Court of Justice has maintained that the treaties, though primarily addressed to the states, may carry legal effects for the citizens, too, either directly—by provisions specially framed to this end—

or indirectly (cf. Gaja 1995, 438ff.). On this view, EC/EU sources are provided with their own legal bindingness within national systems, too. Even so, the formal legitimacy and force of EC/EU law continues to find its main basis in articles 11 and 117 of the Italian Constitution, and in indirectly in the reference that national implementation acts make to the European treaties (Modugno 2002, 129–30; Sorrentino 1997, 205ff.; Guastini 1998, 673).

This being so, the question comes up, What is the hierarchical relation between supranational and internal legal sources? In theory, the hierarchy can be articulated by enumerating the competences that pertain to EC/EU law in accordance with the treaties (cf. Sorrentino 1996). Here, the limitation of national sovereignty stated article 11 of the Italian Constitution, for example, does not require that the sovereignty be fully given over to EC/EU institutions: Such limitation corresponds to the transfer of some material competences, with the additional constraint that supranational legislation must be compatible with the strong core of principles recognised by the constitution (Sorrentino 1997, 206). But this general view carries a number of exceptions. First, the specification of competences found in the treatises is often quite vague, thus allowing for a certain flexibility of interpretation. Second, the treaties often contain clauses that authorise a unilateral expansion of European competences. Such an expansion has been generalised with the Treatise of Maastricht, by writing into it the principle of subsidiarity, meaning by this that EU law may go beyond its formal powers when the action of member states is not sufficient to attain certain goals (Modugno 2002, 131; Sorrentino 1997, 207). All these things make the hierarchy based on competence quite unstable and fluid.

A close analysis of the legal character of national legislative implementation of EU law provides further evidence of the peculiar influence of EU law on the internal system of sources. Implementation laws are formally provisions of standard legislation. But they are also something else: They compete with standard legislation, sometimes derogating from the constitution as well (Sorrentino 1997, 208ff.; Guastini 1998, 675ff.). In keeping with the judgements of the Constitutional Court, Italian legal doctrine has recognised that such special provisions may be "stronger" than ordinary legislative statutes, since they implement treaties as well as articles 11 and 117 of the Italian Constitution. In other words, implementation provisions, though enacted as ordinary legislation, can be a reason for declaring the constitutional illegitimacy of other ordinary laws: When these last come in conflict with the implementation provisions, they violate EC/EU treaties directly, and the Italian Constitution indirectly (articles 11 and 117 of it). The treaties are thus external sources of law, and in becoming effective by taking the form of ordinary legislation, they are superior to other standard legislative statutes. But the matter is more intricate. Implementation provisions may be subject as well to the Constitutional Court's review, and hence can, in theory at least, be declared unconsti-

tutional if in violation of the basic principles of the system (Modugno 2002; cf. Zagrebelsky 1987).[31]

A full understanding of how EU law affects national systems of legal sources makes it necessary to focus as well on the secondary level of European legislation. In this regard, directives and regulations are, strictly speaking, the main legislative provisions to be considered in assessing the direct influence of EC/EU law on national systems (Tesauro 1995, 91; cf. Sorrentino 1997; Guastini 1998; Modugno 2002). The formal status of these legal sources was originally framed by the institutive treaties of the community, but subsequent integrations, amendments, and specifications were formulated at the level of primary legislation as well as by decisions of the European Court of Justice. In general terms, and as established by the institutive treaties, regulations have a general scope, and are binding and self-executing, so they do not formally need any national implementation to be enforced within member states. In this sense, in light of article 11 of the Italian Constitution, regulations are in all respects sources of primary-level legislation in the Italian legal system, since they are authorised to derogate from standard legislation (cf. Gaja 1995, 439ff.; Guastini 1998, 681). By contrast, directives are defined as programmatic provisions: They state general goals to be achieved, but do not specify how these goals are to be met or create direct obligations and rights in this regard. Directives, too, require formal implementation through national legislation insofar as they are primarily addressed to the states' constitutional bodies (cf. Prechal 1995). But the character of directives was later reframed. As noted earlier, ever since the Treaty of Maastricht was ratified, the European Court of Justice began to argue more and more often that EU law in general, and directives in particular, may carry a direct effect within national legal systems. This will be true to the extent that some directives may contain obligatory provisions formulated in clear and unconditional terms (cf. De Búrca 1992; Guastini 1998, 677ff.; Modugno 2002, 130f.). But on this principle, it must be noticed, EU regulations, too, though formally justifiable, are ultimately and concretely self-executing when likewise clearly and unconditionally formulated (Sorrentino 1996; Sorrentino 1997). The distinction between regulations and directives is therefore not so sharp: On the one hand, some directives are claimed to be self-executing if provided with clear terms of application; on the other, regulations are found to be specifically self-executing only if considered from a formal perspective (Sorrentino 1997, 207; Modugno 2002, 131; Pegoraro and Rinella 2000, 85).

We now have sufficient elements to go on with which to understand the legal complexities of the relation between EC/EU law and national systems.

[31] Here is may be argued, as Guastini does (1998, 675), that all implementing provisions are in theory illegitimate insofar as they violate the basic principle of the sovereignty of the people. This argument, if accepted, would undermine the internal legitimacy of all EU sources of law.

Our focus, again, will be on the Italian system. Here, we need to take a look more closely at how the Italian Constitutional Court changed attitude as the guidelines issued by the European Court of Justice kept coming out. The following illustration is from the lucid analysis of Modugno (2002, 132–36; see also Sorrentino 1997, 208–10). In a first stage, the Constitutional Court recognised the limitations of Italian sovereignty by applying article 11 of the constitution. But article 11, it is argued, cannot provide implementing provisions with any force additional to that of other legislative acts (decision no. 14/1964). Here, the criterion *lex posterior derogat priori* may be safely applied to solve conflicts between European and national provisions. This approach is recognised as unacceptable by the Court of Justice (case 6/64, 25/07/1964). In subsequent decisions (nos. 183/1973, 232/1975), the Constitutional Court states that any internal statute in contrast with European law violates article 11 indirectly; the court thereby ascribes a special legal force to European provisions. In particular, a national statute—if subsequent to a European provision with which it is in conflict—will have to be rejected through a constitutional review of legislation. This last opinion was later criticised by the Court of Justice: All ordinary judges must refrain from applying any national provision incompatible with European law, even without any official declaration of illegitimacy from the Constitutional Court (case 106/77, 09/03/78). Which court accepts this approach by recognising that European provisions have to take precedence over national statutes, even if constitutional review ought still to take its course whenever a basic constitutional principle has been violated, or when a national provision constitutes a permanent obstacle to implementing the treaties (no. 170/1984). A turning point came with decision no. 168/1991, with which the Constitutional Court explained in what sense European law takes precedence over national provisions. Prevailing supranational statutes do not really abrogate internal provisions but make them inapplicable. In other words, national laws incompatible with supranational laws are not invalid because a norm cannot be abrogated by another norm that does not properly belong to the legal system (Modugno 2002, 134; cf. Guastini 1998, 683–6). But the force of EU law is not of course unlimited. As noted, these limits—corresponding to the fundamental rights safeguarded by national constitutions—are still inviolable. Cognisant of this fact, the European Court of Justice has been working since the 1970s to define an “autonomous system of fundamental rights” that reflects what is already codified in the treaties and recognised by all national constitutions (Sorrentino 1997, 211). This process has led to the EU Charter of Fundamental Rights, adopted by the European institutions and endorsed by member states at the European Council held in Nice in December of 2000. On the face of it, the charter is nothing but a political declaration reaffirming a minimal core of rights that result from constitutions as well as from treaties and other supranational sources (but on this, see Castiglione and Bellamy 2002, 526–7). Clearly, a framework of this kind

will not suffice to eliminate structural and potential tensions between the national and the supranational levels (as noted, before the Charter of Fundamental Rights, in Sorrentino 1997). But then, initiatives like the one launched with the charter may contribute to an effective process by which the system of fundamental rights gets constitutionalised in the European Union. This fact can perhaps help us understand as well the future development and reading of the European constitution, currently in its drafting and discussion stage.

The legal force of supranational sources is thus closely related to the very possibility of a democratic legitimisation of the European Community and Union and of framing new constitutional assets for Europe. As MacCormick observes (1999, 126ff.), the starting point is the theoretical distinction between internal and external sovereignty: The former is traditionally based on identifying the core of internal sovereign power; the latter usually focuses on a state's authority to exercise autonomous control over its territory, independently of any other state or organisation. In both these respects, Europe is beyond the notion of a sovereign state. In theory, the EC/EU constitution is essentially complementary to that of member states: It is polycentric, "directed to its permanent self-transformation," and hence open to multilevel dimensions of legitimisation (Preuss 1999, 420–3). Massimo La Torre, among others, has recently provided an account of the major approaches in the literature to the problem of legitimising the European political and legal order (La Torre 2002). The first approach takes up what is called the functionalist view, which "avoids any centrality of the political agencies and of the role of the state," this by emphasising the functionally "intrinsic rationality and evolutionary force of societal and economic processes" (ibid., 67–8). A second alternative is intergovernmentalism, in which the European integration "is entirely relying on the traditional system of states' foreign policy in which each state aims at reaching its greatest possible profit and power and can incline to some sort of compromise and agreement if these are seen instrumental to the power interest" (ibid., 68). These two approaches are sometimes combined, as when functionalism is centred around welfare functions of "redistributive mechanisms driven by a thick concept of social justice": Since "citizenship is [still] strongly connected to the state, […] welfarism is hardly to be distinguished from intergovernmentalism" (ibid., 70). A third approach is "privatism," by which spontaneous "private law […] is the real constitution of a supranational integration process": The "integration here does not need a direct explicit intervention of governments and/or political agencies" (ibid.). A final option is the so-called regulatory model. It is "the result of a double strategy": On the one hand it gives us "a way out from the opposition between a classical concept of the liberal state, a night watchman with minimal competencies, […] and the welfare state taking the initiatives in the shaping of economic policies." In this sense, constitutionalism is considered the neutral "implementation of rational control over the emotional deliberation of

majoritarian assemblies and organs" (ibid, 71–2). Independent agencies are thus the efficiency-based counterpart of democracy as majority rule. All these models have a number of drawbacks (cf. ibid. 78ff.). Thus, some try to reformulate the regulatory model by combining the neutral efficiency of its procedures with the principles of justice derived from a discursive principle of universalisability (as La Torre himself seems to argue). From this ideal perspective, procedures instantiate—and ideally guarantee—the basic principle of democracy as well as the protection of the equal dignity of human beings. Others recognise the importance of the deliberative process but reframe it within the perspective of neo-republicanism (these approaches are illustrated in Bellamy and Castiglione 2002, 519ff., among others). The polycentrism of the European asset and the lack of a unitary centre of powers need to be shaped by a bottom-up participation of individuals and groups directly involved in the questions at hand. The main goal is then to reach an institutional equilibrium in the presence of a pluralistic setting. This equilibrium takes the form of political compromises and, when questions of principle are considered, must result from a true deliberative process.

The fluid, multilevel dimension of the European asset mirrors the complexities of EC/EU law and its relation with the national systems of sources of law. The polycentrism of law discussed in Section 7.2 may be argued to have some points of contact with the unstable nature of European law. Preuss (1999, 421) recognises this similarity, even if "the fragmentation and diffusion of power characteristic of the Community goes considerably beyond [...] contemporary statehood." Perhaps—considering pluralism and the challenge it poses—this difference can be made out to be in essence one of degree.

Chapter 8

INTERNATIONAL LAW

8.1. Introduction

International law suffers from what D. J. Harris wittily calls "the Austinian handicap":

> "Is international law 'law'?" is a standard sherry party question. Its sometimes irritating persistence is very largely the responsibility of John Austin. (Harris 1998, 6)

For Austin, familiarly, to qualify as law in the proper sense, a norm must be a command from a political superior—a sovereign—to a political inferior, and backed by a threat of evil in the even of non-compliance. What is "usually styled *the law of nations* or *international law* [...] consists of opinions or sentiments current among nations generally. It therefore is not law properly so called" (Austin 1954, 141–2). Austin is fundamentally correct in saying that international law does not qualify as law by his test for law. But Austin's test takes as a paradigm for law a system of municipal law.[1] On the face of it, therefore, there is no special reason why we should expect international law to satisfy the test. But then a different question arises: If international law is not law by Austin's test, and Austin's test is inappropriate, by what other, appropriate test for law might international law qualify?

At the end of *The Concept of Law* (Hart 1994, chap. 9), H. L. A. Hart examines international law as a test case for the theory of law as a system of social rules that he has developed in the rest of the book. Hart acknowledges international law to be different in form from municipal law. Municipal law is in the central cases characterized by a legislature, courts with compulsory jurisdiction and law-making powers, officially organized sanctions. International law lacks a legislature: Although there are fora where issues of international legality are discussed, such as the United Nations or the World Trade Organization, these fora do not have law-making powers. There are courts of international law, the International Court of Justice and the new International Criminal Court, but these courts do not have compulsory jurisdiction. The absence of coercive legal sanctions in international law (though not of the sanctions of brute power in international relations) is a commonplace. Hart concludes that international law is not law because it has analogies of *form* with municipal law. Rather, in his view, international law shares with municipal law analogies of function and content. International law performs in inter-

[1] Much has been written in analytical jurisprudence about whether even municipal legal systems satisfy Austin's test, but that is a topic for another time.

national relations the function of providing certainty and predictability in the normative framework, of resolving problems of coordinating action, often by rules that are in themselves morally indifferent. International law, like much of municipal law, performs a facilitating function, in constituting a network of norms by which states can conduct their affairs to their mutual benefit. International law has a similar repertoire of precisions and technicalities to achieve this goal as does municipal law, and as typically making distinctions and drawing lines where morality would not draw them. The key training for an international lawyer is training in municipal law. There is, Hart says, a "range of principles, concepts and methods which are common to both municipal law and international law, and make the lawyer's technique freely transferable from one to the other" (ibid., 237).

Hart wrote these words over forty years ago, and in the meantime the amount of formal legal apparatus operating at the level of international relations has considerably increased. Not the least interesting and relevant development are regional organizations of states, especially of the European Union, which has now in its own right a significant body of law, and has more the appearance of a distinct legal system than anything previous international body. It has also recently been argued that the World Trade Organization functions as a distinct legal system (Palmeter and Mavroidis 1998). There is now among the nations of the world a level of cultural, economic and practical interdependence that is unparalleled. Socio-legal scholars Ryan Goodman and Derek Jinks have argued that this interdependence amounts, if one uses standard sociological definitions of "institution," to an institutional "world polity," and that, so far from individual nation states being primitive and international organizations derivative, the sovereignty of individual states only makes sense as something carved out of this "world polity" (Goodman and Jinks 2003, 106–9).

Even if such a case for an international legal system is persuasive, we still cannot move from there immediately and quickly to an investigation of the sources of international law comparable to the above investigations of the sources of municipal law. We must confront the so-called

> voluntarist or consensual theory of the nature of international law, by which states are bound only by that to which they consent. [This theory] remains the one to which the International Court of Justice adheres and one from which, not surprisingly, states do not appear to dissent in their practice. (Harris 1998, 44)

States act as though they can relieve themselves of the burdens of an international agreement simply by declaring themselves no longer bound, and much time is spent negotiating and securing ratification for international agreements. It is said that voluntarism cannot be the whole story, for a newly created state would be regarded as immediately bounds by norms of international law even before explicit consent could be confirmed. As Michael Byers

explains (Byers 1999, 8), there is a truth to the idea that the origin of international law is in consent, even if consent is not enough to explain entirely the normative force that international law once created comes to have. Nonetheless, voluntarism has an intuitive appeal as a theory of the normativity of international law, which it would not have as a theory of the normativity of municipal law.

Ironically, what has seemed to many the most attractive up-to-date version of voluntarism shows the need for a precise understanding of voluntarism. In this theory, states are pictured as acting in the international realm wholly out of self-interest, and game theory is thought to provide the best modelling of such self-interested behaviour (see for example Goldsmith and Posner 1999, 2000). However, as Byers points out, the outcome of such an emphasis on states' action out of self-interest is the failure of voluntarism (Byers 1999, 6). It is very often in states' interest to act, even to apply power, within the framework of an institution or legal system. The very facilitating functions of legal norms that we alluded to above create a reason based on self-interest for developing legal structures, "because these structures create expectations of behaviour which reduce the risks of escalation and facilitate efficiency of action [...] [they] promote stability" (ibid.).

The contrast between municipal law and international law may be put succinctly (and therefore of course too simply) thus: In the case of municipal law, consent counts towards legitimacy; in the case of international law, consent counts towards validity. My thought is this. The working assumption of the project in this book has been that we can identify and analyze in a formal way the sources of law, and in particular the strictly institutionalized sources of law, in some tradition of municipal law independently of the material content of those sources (cf. Brownlie 1998, 1–2). We can determine whether a norm is a contextually justified or valid norm of a municipal legal system by determining whether it has a "source" in one of the senses discussed in the previous chapters of this book. We are enabled to do that in good part because we can identify what I referred to in Chapter 6 as the "thin" sense of the constitution for any given municipal legal system, the rule of recognition that gives formally the sources of law for that system. In the case of municipal law, then, consent is given, not to each legal norm taken individually, but to a political system in general that includes a legal system as a large part. That consent secures the legitimacy of the system; the validity of the individual norms of the system is secured by the sources of law.

That model cannot be applied in the case of international law, since the world legal order, in whatever sense that term is applicable, lacks a rule of recognition of that kind. Up to a point (and I shall elucidate further what point in secs. 8.4.3 and 8.5.2 below), the validity of individual norms of international law is given by states' consent to those very norms. We will see below how this thought plays out in the case of the two major sources of interna-

tional law, treaties and customary international law. There is nothing in the case of municipal law that corresponds to the rights of the persistent objector in customary international law (see sec. 8.4.2 below). It is possible for a state that persistently objects in the appropriate way to a norm of customary international law to be acknowledged not to be bound by the norm. But, however much I persistently object to the valid norm that requires me to wear a seatbelt when driving a vehicle, if I am caught ignoring the law, I have to face the consequences.

The project of this chapter, then, does suffer from an "Austinian handicap"—not that there is no sovereign to international law, but that there is no rule of recognition that will generate the sources of international law. The alternative might seem that we have to give up on the idea of strictly institutionalized sources of international law altogether. But it is too soon to conclude that the sources of international law can only be defined by their material content, whether we call that "morality," "natural law," or *realpolitik.* While we have to waver on how far the sources of international law are "strictly institutionalized sources" in the sense in play in this book, it will be clear in the end that one can validly speak in a formal way of the sources of international law. The "Austinian handicap" can be overcome.

8.2. Article 38

Discussions by legal scholars of the sources of international law invariably begin, as indeed they should, with Article 38 of the Statute of the International Court of Justice. It reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 59 reads:

The decision of the Court has no binding force except between the parties and in respect of that particular case.

An analysis of the sources of international law in the end amounts to an analysis of the meaning and import of Article 38, and the next three sections of this

chapter, subject to the qualifications noted in the next two paragraphs, constitute just such an analysis.

I am not going to discuss further Article 38(1)(d). Historically, jurisprudential writings by scholars such as Grotius and Suárez played a central role in the initial development of international law (see, in vol. 6 of this Treatise, Stone, chap. 14; Riley, vol. 8 of this Treatise). However, the current project is not historical, but analytical. As the amount of more (in some sense) institutional material grows—treaties, international conventions, rulings by the International Court of Justice, acknowledgment of rules of customary international law, and so forth—the relevance of informal subsidiary sources such as the writings of "publicists" falls away. While most scholars still assert that the importance of the writings of publicists should not be underestimated (a not wholly disinterested remark, since such persons would themselves typically be "publicists"), there is a general acknowledgment that these writings function only minimally as a source. A further point is that, to the extent that opinions of writers have force as a source of law, it is because their ideas get taken up into the general customary process of the formation of norms in international law. The writings do not function as an independent direct source.

As for judicial decisions, Article 59 declares that there is no rule of precedent in the International Court of Justice itself. The Court pats some attention to consistency as a value, but in its formal practice it follows the civil law, not the common law, approach to precedent (see secs. 3.2.1 and 7.3.1.2 above). However, Article 38(1)(d) covers more judicial decisions than just those of the Court. Brownlie (1998, 19–24) offers a detailed account of the variety of judicial decisions from municipal law and other international courts such as the European Court of Justice, and how these might bear on the matter of the sources of international law. While he designates a number of them as "important," still the importance of these as a source is indirect, and lies again primarily in their contribution to customary international law. Palmeter and Mavroidis have argued (1998, 400–7) that, within the WTO, even though the body officially follows Articles 38 and 59 of the ICJ Statute and has no formal doctrine of precedent, still the Appellate Body of the WTO treats both adopted reports of dispute settlement panels and its own prior decisions as *de facto* binding precedents.

Before proceeding to the analysis of Article 38(1)(a) to (c), I must still consider some preliminary questions about Article 38. The first question (cf. Brownlie 1998, 3; Hillier 1998, 64) is that Article 38 does not describe itself as a list of the *sources* of international law; it talks about the material that the Court shall bring to bear in the settlement of disputes. But why should the absence of the term "source" cause us to have concerns about whether what Article 38 lists are "sources"? In the earlier chapters of this book, nothing that we have examined as a source of law is labelled in some canonical document as a source of law. Hillier may be correct to say that "law is not necessarily

simply defined in terms of how courts decide disputes" (Hillier 1998, 64). His point, I take it, is that what it is for a norm to be a law is not necessarily for it to be a norm used by courts in deciding disputes. So, for example, a bill passed in parliament is a law, even if it is never applied in the settlement of a dispute by a court. But it is simply a mistake to infer from the fact that the sources of law sometimes produce norms that are not applied in courts that a list of norms that are to be applied by courts is not a list of sources of law. Brownlie's caution is based again on the fact that there is for international law no rule of recognition specifying sources, which, he assumes, we would need to have in order to be confident that Article 38 was a list of sources. Maybe so, but this point can be made. The practice of the International Court of Justice is to treat the materials identified by Article 38 as sources; the practice of scholars of international law when not in jurisprudential mode is to treat the materials identified by Article 38 as sources. Provided we are clear (and I hope that by the end of the chapter we will be) about the idiosyncratic character of the sources of international law, whether to use the term "sources" or not ceases to be an interesting question.

Second, it may be argued that Article 38 is not exhaustive as a list of supposed "sources" of international law (Hillier 1998, 64). Hillier, for example, is willing to consider as sources of international law not mentioned in Article 38 resolutions of international organizations, especially resolutions of the United Nations General Assembly; resolutions of regional organizations such as the Organization of American States or the European Union; the codifications of the International Law Commission; and finally so-called "soft law," "international instruments which, while not binding on states in the manner of treaty provisions, nonetheless constitute normative claims and provide standards or aspirations of behaviour" (Hillier 1998, 99). The difficulty with such a more capacious interpretation of the sources of international law seems to me this. As we will see in the analysis of customary international law in Section 8.4, an examination of the practice and attitudes of states is central to the project of proving this or that norm to be a norm of customary international law. Items in Hillier's list of non-Article 38 sources play an important role as evidence in such an examination. So the question reasonably arises, how would one distinguish between being a source of law and being (simply) material evidence for the existence of a norm of customary international law? After all, the "sources" listed in Article 38 also function as evidence in such an examination. The most straightforward answer to the question is, we mark the distinction thus—what is listed in Article 38 is a source of international law; what is not listed is not.

The third question about Article 38 is whether the listing of sources is intended to be hierarchical—after all, it is given a lexical numbering (Hillier 1998, 64; Brownlie 1998, 3–4). If we make normal assumptions about the contribution of *travaux préparatoires* in legal interpretation, the answer is defini-

tively negative. There is clear evidence (cf. Harris 1998, 23) that when the Statute was being drafted, the possibility of making the list hierarchical was explicitly considered and rejected. There is no analogue here to the priority of legislation over custom and precedent in common law sources.

More detailed examination of the meaning of Article 38(1)(a) through (c) will be deferred to the next three sections of this chapter. I shall close this section with a comment on Article 38(2). The reference to decisions *ex aequo et bono* might seem, and to some has seemed, as though it is an explicit declaration that principles of equity form part of the sources of international law. Brownlie argues persuasively that such would be a misinterpretation. In his view the "power of decision *ex aequo et bono* involves elements of compromise and conciliation" (Brownlie 1998, 26). That is, section (2) authorizes the Court, if invited to do so by the parties to a dispute, to function more as a mediator or arbitrator than as a court. That is, the Court has some discretion to form novel and unique solutions to disputes before it if asked to do so, rather than being required invariably to base its decisions on legal sources *stricto sensu*. As Brownlie also points out (1998, 25–6), it is not that equity in the familiar sense of fairness and reasonableness plays no role in international law decision-making:

> In the *North Sea Continental Shelf Cases*[2] the Court had to resort to the formulation of equitable principles concerning the lateral delimitation of adjacent areas of the continental shelf, as a consequence of its opinion that no rule of customary or treaty law bound the states parties to the dispute over the seabed of the North Sea. (Brownlie 1998, 26)

Article 38(1) (c) of the International Court of Justice Statute, however, in Brownlie's view authorizes the use of equitable principles in such circumstances, as such principles are prime examples of "general principles of law recognized by civilized nations." The use of equitable principles to decide cases in the absence of binding written law has been a feature of law since its beginnings (cf. Shiner 1994).

8.3. Treaties

A treaty has been provisionally defined by the International Law Commission as "any international agreement in written form, whether embodies in a single instrument or one or more related instruments and whatever its particular designation [...] concluded between two or more States or other subjects of international law and governed by international law" (quoted at Brownlie 1998, 608–9). Treaties are perhaps the source of law most familiar to the non-professional in the field. However, to the legal theorist, the propriety of regarding treaties as sources of law is more controversial. A treaty of the famil-

[2] ICJ Reports (1969) 3, 46–52.

iar kind—the North American Free Trade Agreement, for example, or the various foundational treaties of the European Union, or a particular lease-lend agreement signed between two States—are seemingly best interpreted on the model of a contract in municipal law. The contract/the treaty creates rights and duties for the signatory parties and only the signatory parties, and only to the extent specified in the contract/treaty itself. These rights and duties persist as long as, but only as long as, the contract/treaty remains in force. But it does not follow that to be a source of rights and duties—a source of legal obligation—is to be a source of law. A treaty as much as a contract binds only within a framework of legal norms that define the procedures for concluding and the properties of a binding contract. Those legal norms, rather than the treaty itself, constitute the applicable source of law (cf. Harris 1998, 45–6).

The force of this sceptical argument is in the first instance blunted by the fact that theorists distinguish between law-making treaties (*traité-loi*) and treaty contracts (*traité contracts*) (Brownlie 1998, 11–2; Degan 1997, 489; Hillier 1998, 64). The strongest candidates for being sources of law are the so-called law-making contracts; we shall consider them further shortly. But is it clear that, once these two classes of treaty have been distinguished, the sceptical view of treaty contracts is justified? Appeal is made to the well-known principle of international law *pacta sunt servanda*, agreements must be kept. The thought is that, unless the parties to a treaty subscribed to this principle, a treaty contract would be without normative force. This is not clear. Brownlie describes the principle as containing "a presumption as to the validity and continuance in force of a treaty" (Brownlie 1998, 620). Consider though the difference between (to return to my examples above) a lease-lend agreement and the North American Free Trade Agreement. Canada, let's say, agrees to lend South Korea $50m. on condition that in return Korea, apart from repaying the loan, uses the money to purchase two CAN-DU nuclear reactors as developed by Canadian government scientists for the nuclear power industry. Here we have the best case for a treaty with no status as a source of law. The treaty specifies concrete actions the performance of which fulfils the contract; these and no other actions the parties to the contract are bound to perform. NAFTA is different. It includes commitments to perform actions, but these are of a more diffuse and long-term kind—to admit goods of given kinds to cross borders without tariffs, to abstain from granting subsidies of certain kinds to industries of certain kinds, and so forth.

Suppose now that, under NAFTA, all is well for a while, but then some years down the road Canada, or the U.S., or Mexico decides to impose import tariffs or subsidize industries in violation of the Agreement. Now, it might make some sense to say that the principle of *pacta sunt servanda* comes into play to remind the State in question that they are a party to an agreement. But I use "remind" advisedly. When the U.S. Congress, for instance, passes a bill

giving subsidies of over $1bn. to the U.S. agricultural industries, what is the source of the norm “Give no subsidies” that, in the opinion of Canada and Mexico, the U.S. has failed to honour? Is it the principle *pacta sunt servanda*, or is it the North American Free Trade Agreement? It is plausible to say that it is the Agreement.

Moreover, what is the position of Canada, the U.S. and Mexico immediately after the signing of the Agreement? Are they right then bound by the norm, “Give no subsidies”? Surely they are. But if the function of *pacta sunt servanda* is to explain why years down the road States are continue to be bound, then it does not explain why they are immediately bound at the moment of signing. Brownlie implies by his use of “validity” in the above quote that, without the principle of *pacta sunt servanda*, an agreement like NAFTA would not be a valid treaty. That seems to me implausible. Even if, more plausibly, a framework of norms is needed for the creation of binding treaties, the rights and duties created by the treaties are in the first instance validated by norms internal to those treaties. To the extent, then that the sceptical argument against treaties contract as sources of law has force, it does so only with respect to certain kinds of treaties contract.

The idea of a law-making treaty is this. “Law-making treaties create *general* norms for the future conduct of the parties in terms of legal propositions, and the obligations are basically the same for all parties” (Brownlie 1998, 12; his emphasis). In Degan’s words, law-making treaties create “objective rights”; treaties contract create only “subjective rights” (Degan 1997, 489). Brownlie gives as examples the Hague Conventions of 1899 and 1907 on the law of war and neutrality, the Geneva Protocol of 1925 on prohibited weapons, and the Genocide Convention of 1948, as well as non-constitutional aspects of the United Nations Charter. The prohibition on genocide arising from the Convention is normatively binding generally. The prohibition is itself a norm that is constituted as law by the Convention.

The question can be raised, in what sense if any would non-parties to the Convention be bound by it? That question would require an answer in terms of the relation of the Convention to customary international law (to be explored in detail in the next section). In the *North Sea Continental Shelf Cases*, the International Court of Justice itself identified three such relations. It may be declaratory of custom at the time the treaty is adopted; it may crystallize custom through the agreement of States to the treaty; or States may signal their acceptance of it as custom by their practice after the treaty’s adoption. By any of these three routes, non-parties may come to be bound by the treaty, and only by one of these three routes. However, it does not follow as a result that parties to the law-making treaty are bound if and only if *they* see the treaty as so related to customary international law. What it is for the treaty to be law making is that parties to it are as such bound by its norms. It makes law for those parties.

We see already in the discussion of treaties what will be pervasive in this chapter—that the question of whether this or that instrument or practice or principle is genuinely a "source" for international law is not one that admits of a simple and straightforward answer. In the case of treaties, the best we can say is that three points emerge. In the case of treaties contract, those that conform most closely to a contract in municipal law have the least claim to be as such sources of law. Those that are agreements to perform or forbear certain actions, or to observe or forswear certain principles of action, over the long term have the best claim to be regarded as sources of law. In the case of law-making treaties, there is little reason to doubt that they function as sources of law, although insofar concerns their capacity to bind non-parties to the treaty, that will be because and only because of some appropriate relation to customary law.

8.4. Customary International Law

8.4.1. Introduction

This section will be the longest section of the chapter. The analysis to be given of custom as a source of international law is central to any discussion of the sources of international law, and the topic of customary international law is extremely complex. In this subsection, I shall deal with some preliminary matters.

First, what I called above the sceptical argument appears again, in an appropriately modified form. Whatever specification is given for the kind of "custom" that is a candidate for a source of law, it will be a specification of a pattern of behaviour (in some general sense), for that is just what a custom is. But then is that pattern, that custom, itself what makes some norm a norm of customary international law? Or is it just evidence that the norm is a norm of customary international law, and the acknowledgment by a court, say, what makes the norm a norm of customary international law? The dominant view among international law scholars is certainly that the sceptical account is wrong: Customary international law is so called because the custom is what makes some candidate norm into a norm of customary international law. I will assume the correctness of the dominant view here. One argument in its favour seems to me this. Scholars are able to lay out in some detail the *evidence* that international law itself regards as proof of the existence of the kind of custom that generates norms of customary international law (see, for example Brownlie 1998, 4ff.). To count the custom proved by such evidence to exist as now itself only evidence from which a norm of customary international law must be inferred, rather than as satisfying the criterion for the legality of such a norm, is to be guilty of confusion. This is one way in which customary international law stands to be compared with custom as a source of law in respect

of municipal law. As I said of custom in Section 4.4.2 above, "to announce that a custom qualifies as law because it fits previously announced standards for being law is not to be anointing it to be law from the point of the court hearing onwards; it is to acknowledge the custom already to be law."

Second, there are some important differences between custom in international law and custom in municipal law. One difference between custom in municipal law and customary international law I have already noted (sec. 8.2 above). Unlike custom in municipal law, customary international law is not related hierarchically to other sources of international law. A treaty does not automatically abrogate a norm of customary international law if they conflict. In fact (Byers 1999, 172ff.), it is possible for customary international law to constitute a reason for modifying the content of a treaty. Another difference is that there is no requirement in the case of a custom in international law that it exist "from time immemorial." A custom needs to be shown to exist only for so long as is necessary to prove the existence of the custom, whatever that time is (Harris 1998, 36).

8.4.2. State Practice

In the *North Sea Continental Shelf Cases*, the International Court of Justice specified the criteria for the existence of a customary rule of international law:

> Two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. (ICJ Reports (1969), 44)

These two conditions are known as the State practice condition and the *opinio juris* condition. The two conditions closely echo in spirit H. L. A. Hart's well-known account distinguishing (in his terms) habits and social rules (Hart 1994, 55–9). For Hart, a habit is merely a convergent pattern of behaviour; there is no question of any normative push towards conformity with the habit. In the case of social rules, there is such pressure. Social rules consist therefore of two elements: In addition to a convergent pattern of behaviour, there must also be what Hart called the "internal aspect," the stance towards the convergent pattern of those whose rule it is, which makes for there being a rule and not merely a habit. In this subsection we consider the former.

We can distinguish two issues in the analysis of State practice: What kind of practice, and in what way must it be "settled"? As for the first, there are no hard and fast rules, but clear examples can be given. Degan, for example, lists actions and attitudes of a State's organs within the limits of their competence; any national legislation or in a ministry of a ruling; a legislative act that is applied by competent State organs through their positive actions; a State's participation in bilateral and multilateral treaties; conventions on codification

and progressive development of a branch of international law; resolutions adopted by political organs of international organizations, such as the U.N. General Assembly; abstract and verbal statements of State representatives, their diplomatic correspondence if accessible, and their voting in international organizations, although governments in States change and the political objectives of a State change over time (Degan 1997, 156–61).

As for how settled a general practice needs to be, it is generally acknowledged that States' practice needs only to be general, not universal (Degan 1997, 182; Hillier 1998, 73; see also *North Sea*, par. 77). Moreover, more weight is to be given to the practice of States that would be materially affected by the candidate customary rule (*North Sea*, ibid.; Hillier 1998, 73; Harris 1998, 40). One important constraint on settledness is the acknowledgment of the rights of the persistent objector. It is possible for a State to escape being bound by a rule of customary international law, if they have publicly dissented from it in an appropriate way. The State must have objected from the early stages of the formation of the rule onwards, up to its formation and beyond. Also, the objections must have been made consistently. A would-be objector who picks and chooses when to object loses their objector's position. The burden of proof is firmly on the State who seeks to secure persistent objector status (Hillier 1998, 74, paraphrasing a decision of the International Court of Justice).

8.4.3. Opinio Juris

The second of the two criteria for the existence of a rule of customary international law is referred to as *opinio juris sive necessitatis*, or *opinio juris* standardly and for short. This factor is the analogue of Hart's "internal aspect" deployed to distinguish mere habits from social rules. In the current context, the factor is crucial for marking the distinction with respect to customary international law between a "custom" with normative implications and a mere "usage." This distinction repeats the similar distinction in municipal law (see sec. 4.1, sec. 6.1.3 above). "Usage" is comprised of "acts done out of courtesy, friendship or convenience," rather than out of a sense of obligation (Hillier 1998, 66), or acts carefully observed but not considered to be obligatory legal rules (e.g., ceremonial actions and actions of protocol) (Degan 1997, 162). The *opinio juris* is exactly this sense of obligation, the sense that action is accordance with a rule. It serves equally well, as Byers has pointed out (Byers 1999, 18, 130), to distinguish action guided by a rule from action in response to the exercise of power.

There are two questions that need to be explored further as regards *opinio juris*. First, what kind of material evidence shows that a state has the *opinio juris* towards some given norm? Second, scholars typically speak about the *opinio juris* as a "psychological" (Degan 1997, 163; Brownlie 1998, 7) or a

"subjective" (Byers 1999, 130; Hillier 1998, 75ff.) element. How are we to understand these terms?

With respect to the first question, the initial answer is straightforward. We are looking for a recurring and consistent pattern of behaviour, the kind of behaviour that would show acceptance of the obligatoriness of the candidate norm, rather than an understanding of the norm as simply a matter of "usage." But what kind of pattern? Now, there is no straightforward answer. For one thing, there are typically many different people at many different levels of government of each State that can have different and conflicting convictions. Also, there is a problem when the political systems in a country go under a profound change (e.g., the changes in Eastern Europe and Russia) (Degan 1997, 163). Action against self-interest is a clear instance of behaviour of the relevant sort (Hillier 1998, 71). It would seem plausible to suppose that there are equivalents at the level of international relations to the constituents of Hart's "internal aspect": Deviations from the supposed norm are regarded as open to criticism, and threatened deviations meet with pressure for conformity; deviation from norm acknowledged as a good reason for criticism; criticism of deviation acknowledged to apply properly to oneself (Hart 1994, 55–6). Action against self-interest has much to do with this third constituent.

A difficult aspect of the empirical proof of *opinio juris* has to do with acquiescence.[3] To what extent can a failure to act or speak count towards proof of *opinio juris*? Acquiescence is not equivalent to consent, but is "one of ways in which States may participate in the development, maintenance or change of rules of customary international law" (Byers 1999, 144). Harris claims that acquiescence is in fact the most frequent ground for determining states' acceptance of a norm (Harris 1998, 43). Acquiescence in international law is defined as "silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection" (Degan 1997, 348–9; Harris 1998, 43). Included in these "circumstances" is the important principle that "the party to which implied consent is imputed must first of all be in knowledge of facts in regard to which it abstained from protest" (Degan 1997, 353). The *Anglo-Norwegian Fisheries* case (*U.K. v Norway* ICJ Reports (1951) 116; see also Harris 1998, 375–81) provides an example. Norway used a distinctive method for defining its exclusive fishery zone, taking into account the ubiquity of fjords and sounds along the Norwegian coastline. Instead of the zone tracking the low-water mark all along the coast (the usual method), Norway drew straight lines across from outermost points of land, thus (in the case of larger fjords and sounds) including waters that would otherwise be outside the zone by the traditional method. Norway formally promulgated this "straight-line" method in a decree of 1935, which the U.K. later challenged.

[3] For a discussion of Hart's own struggles with acquiescence in relation to his concept of the internal aspect of law, see Shiner 1992, 160–82.

Norway presented evidence that it has in fact used this method since the middle of the nineteenth century without any international opposition. France had once questioned the decree, but accepted without demur Norway's assurance that the decree was lawful. The U.K. had not protested the practice for more than sixty years. The Court roundly rejected the U.K.'s claim that it did not protest the practice because it did not know about it. Since the U.K. had a material interest in its fishing fleet being able to fish in these waters, and in fact the fleet had never done so, the case also illustrates the significance of inaction against self-interest.

All the same, the general view of scholars seems to be that there are no hard and fast rules as to the material evidence required for proof of the "subjective" element of *opinio juris*. The International Court of Justice will look at each case on its merits and determine the kind of evidence appropriate for that case.

My second concern in this section is the interpretation of the terms "subjective" or "psychological" that are typically used to characterize *opinio juris*. Pictures infused with philosophical dualism of the mind as distinct from the body cast a long shadow here. Hillier, for example (1998, 81), argues that it is important to construe *opinio juris* as "subjective," not "psychological." It is for him not a matter of anyone's *beliefs*; rather, we should look at the *positions* taken by the organs of states. But why would "position" be thought to be an improvement over "belief"? Presumably, because positions are things that can be readily determined publicly, by looking at documents, speeches, and the like. Why, however, are not a state's beliefs open to inspection in the same kind of way? Don't we find out what the Canadian government "believes" about something by looking at documents, speeches, and the like? Similarly, Degan in the passage quoted about (1997, 163) comments that, since states do not have their own minds, we have to rely on what is said and done by the states' policy-makers. But is not such evidence equally evidence of a state's mind?[4]

In fact, I think Hillier's intuition that "subjective" is preferably to "psychological" as a term to describe *opinio juris* is correct, but not for the reason that "psychological" diverts one in the direction of hidden or non-existent minds. The *opinio juris* is "subjective," because it has in the end to do with how things are interpreted by states taken individually. That some given candidate norm of customary international law is the beneficiary of the *opinio juris* is not "objective," in the sense that the independent normative merits of the rule make it an obligatory rule. Rather, it is "subjective" in the sense that it is the independent acceptances of the rule as obligatory by individual states that makes it an obligatory rule—independent beliefs that the rule is obligatory, even, if you like.

[4] For more on how to think of the mentality of collective bodies such as states and organizations, see Ouyang and Shiner 1995.

However, it would be a mistake to suppose that these independent beliefs arise in a vacuum. As Byers cogently argues, the "subjective" element that is a crucial element in the determination of customary international law is best thought of as a matter of "shared understandings" among states:

> *opinio juris* itself represents a diffuse consensus, a general set of shared understandings among States as to the "legal relevance" of different kinds of behaviour in different situations. Only that behaviour which is considered legally relevant is regarded as capable of contributing to the process of customary international law. (Byers 1997, 19)[5]

The correct picture here is not of a number of independent states pressing voting buttons in secret to arrive at an aggregated vote. Rather, we have a continuous and evolving interchange of ideas and positions, which at some point stabilizes enough to constitute *opinio juris*.

It is true that, if such a view is correct, it will then be difficult to determine exactly when a mere usage has taken on through the development of the *opinio juris* the character of law. Again, though, Byers' account is insightful and persuasive. He argues that there are essentially two aspects to these "shared understandings." First, there is the shared understanding that develops with respect to some given candidate norm of customary international law. But underlying any such individual instance of *opinio juris* is a more important, because basic and enduring, shared understanding, the shared understanding, the *opinio juris*, as to the customary process itself (1997, 19; for the full account, 129–203). What holds international law together as a system, in Byers' view, is a shared commitment among states to developing international law by a customary process. Byers interprets the concrete norms of customary international law as beneficiaries of the *opinio juris* not so much in themselves taken individually, but because these are the norms that emerge from the customary process, which process itself is the prime beneficiary of the *opinio juris*.

Byers' view has the advantage of explaining what is otherwise somewhat distrusted by scholars. Brownlie suggests (1998, 7) that the International Court of Justice demands proof of *opinio juris* as a specific element separate from proof of states' converging practice only in a minority (albeit a "significant minority") of cases. It would then be easy to charge the Court with eliding the difference between customary norm and mere usage, and appropriating to itself a unilateral discretionary power to deem norms to be norms of customary international law. If Byers is correct, such a practice by the Court is defensible, in that states have by their shared understanding concerning the customary process precommitted themselves to the obligatoriness of norms that have widespread acknowledgment and are respected by the Court.

[5] See also Byers 1997, 148. For a more formal and thorough discussion of law as based on shared understandings, albeit focusing primarily on municipal law, see Shapiro 2002; Bratman 2002.

Byers' theory of customary international law as rooted in shared understandings among states as to the customary process is, in my view, valid as an articulation of the truth in voluntarism as a theory of international law (see sec. 8.1). Voluntarism demands too much if it requires specific consent, or even specific acquiescence, to each and every norm by which a state is bound. But voluntarism is correct to base the international legal order on subjectivity—subjectivity construed as a shared understanding of the kind described.

8.5. General Principles

8.5.1. General Principles of Municipal Law

Article 38(1)(c) talks about "general principles of law recognized by civilized nations" as a source for international law. To those who have a predilection of the appropriate kind, it is easy to see this subsection as licensing the legal deployment of principles of natural law. I do not intend to confront directly here such a reading, but neither do I intend to assume it. The natural law reading of subsection (c) derives impetus from the fact that, whatever such "general principles" are, they must be different from treaties and customary rules, for those are named as sources of law in subsections (a) and (b). So what else could they be but principles of natural law? Well, that question is not merely rhetorical. Even though the constraint is valid that "general principles" must be construed as naming a new source of law, other views on the meaning of the phrase are possible. In the majority of instances, justiciable disputes will be resolved by the application of treaties and norms of customary international law. Despite the grand wording of subsection (c), such "general principles" play a relatively minor role in actual international adjudication. We should still, though, investigate their nature.

Let me begin with one general and preliminary jurisprudential point. There has been much discussion in recent legal theory of the concept of a legal principle, stemming from Ronald Dworkin's claim[6] that legal positivism fails as a legal theory because it has no satisfactory explanation of what Dworkin called "legal principles." Defenders of legal positivism pointed out (cf. Shiner 1992, 76–80) that there were a number of ways that the idea of a "legal principle" could be appropriately filled out consistent with legal positivism's basic commitment to institutional sources of law. As we will see in the next paragraphs, many theories of the interpretation of subsection (c) of Article 38(1) are "positivistic" in such a sense. Although I am not going to defend positivism by picking one or more of these theories as correct, it is important to locate their commitments on the jurisprudential landscape.

[6] Dworkin 1978, passim and other writings: see also Volume 11 of this Treatise.

The most common "positivist" interpretation of subsection (c) is to take it as authorizing an international court to employ in adjudication general principles of a fundamental character of municipal law (Harris 1998, 49; Hillier 1998, 84; Brownlie 1998, 16). This is described as the "prevailing view" (Hillier 1998, 84). Instances of such principles that have been applied include the doctrine of *res judicata*, the natural justice principle of *nemo iudex in causa sua*, the principle that any breach of an engagement involves an obligation to make reparation, the right to bring class actions, the doctrine of corporate personality. The English principle of statutory interpretation *expressio unius est exclusio alterius* was held to be a "general principle" within the meaning of subsection (c), while the English rule that grants by a sovereign should be construed against the grantee was rejected as too peculiarly English (The *Abu Dhabi Arbitration* (1952) 1 ICLQ, 247; see Harris 1998, 50). In general, principles of evidence, procedure and jurisdiction are the strongest candidates for "general principles" in this sense of principles of municipal law that can be applied in international law (Brownlie 1998, 16).

As soon as we try to expand the interpretation of subsection (c) beyond this "prevailing view," difficulties arise. The first difficulty is this. Take the case of the doctrine of *res judicata*. There are complex issues in relation to the doctrine of whether a hearing in a municipal court between the same parties on the same issue counts as *res judicata* for the same issue and the same parties in an international court, and vice versa (see Brownlie 1998, 52–4). But the content of the doctrine itself is the same in international law as it is in municipal law. The municipal law doctrine of *res judicata* does not need to be massaged in order to be applicable in international law. On the other hand, take the principle of estoppel (*préclusion*), that a party is prevented by his own acts from claiming a right to detriment of another party who was entitled to rely on such conduct and has acted accordingly. Estoppel is a familiar principle of municipal law, with considerable case law or doctrinal exposition backing it. The case of international law is different. Brownlie confidently asserts that "the principle of estoppel undoubtedly has a place in international law" (Brownlie 1998, 158). He considers its application in the areas of territorial sovereignty (ibid., 158–9), nationality (ibid., 407–9), and agency (ibid., 645–7). However, it is clear from his analysis that, in the first place, the principle is far less developed than it is in municipal law, and, second, the principle operates at a high level of generality. "The 'principle' has no particular coherence in international law, its incidence and effects not being uniform" (ibid., 646). It would be wise not to overstate the "coherence" of the principle of estoppel in municipal law; even so, such scepticism about the principle would not be appropriate for municipal law.

It follows, then, that, to the extent that the principle of estoppel applies in international law, its judicial application is not going to be straightforward as would be that of the principle of *res judicata*. To the extent that it is not, it is

misleading to say that the "general principle" of estoppel in international law is just the principle of estoppel in municipal law in a different context. The principle undergoes some transformation when moved over from municipal law to international law. In what sense, then, is estoppel a "principle" of international law? Not simply in the sense that it is a principle of municipal law applied in a different context.

Theory is now in a quandary. Take a different example. One of Byers' recurrent themes is that customary international law contains four dominant principles—those of jurisdiction, personality, reciprocity and legitimate expectation (Byers 1999, 10 and elsewhere). "Legitimate expectation" is very close to being estoppel under a different name. Yet these "principles" Byers thinks are governing principles of customary international law with the backing of the "shared understandings" he talks about as the basis for customary international law. That is, these principles are sources of international law under the rubric of Article 38(1)(*b*), not (c). How could one make out the case that Byers is wrong, and that estoppel is a principle of international law in the manner of subsection (c), not subsection (b)? It is not clear.

One suggestion is that subsection (c) authorizes the application of "general principles" of municipal law not merely directly, as in the case of *res judicata* and the other examples above, but by *analogy*. Subsection (c) does not say that, of course; but can it be interpreted that way? Degan discusses this suggestion at some length (Degan 1997, 99–104). He is very dubious about the suggestion. He takes argument by analogy to be a specific and (relatively) rigorous form of argument. But so interpreted his view is that it would be hard to apply in the transfer from municipal law to international law. The two forms of law are sufficiently different that, even if the proposed norm is well established in municipal law, its "source and application in international law can be different," with in the end different meanings attached to the same term (ibid., 104). He mentions estoppel as an example. The more that one tries to compensate for these differences by appealing to the principle in a wide range of forms of law, the harder it will be to claim that application of the principle is justified under subsection (c). The reason why all this matters, of course, is that the application of a principle under subsection (c) is not constrained by the *opinio juris*. To authorize without the constraint of the *opinio juris* the use of a principle that to all intents and purposes is a principle of customary international law is to vitiate the *opinio juris* requirement, and thus to depart from the voluntariness constraint on the validity of norms of international law, however that constraint is to be interpreted.

Degan's own approach to subsection (c) is no less controversial. He argues that the subsection refers to "fundamental legal precepts that are a prerequisite for the existence and operation of legal order and are therefore common to all branches of law" (Degan 1997, 99). His list is very different from Brownlie's: (i) the right to existence, or preservation, i.e., survival; (ii) the

right to independence or sovereignty; (iii) the right to juridical equality, i.e., equality in law; (iv) the right to be respected; and (v) the right to international communications (Degan 1997, 84). He tries to insist later that "general principles of law must not be confused with the *rules of legal logic*" nor with equitable principles; "the general principles of law should not be entirely assimilated with the *use of analogy* in international law." The principles must be sought in the positive rules of municipal, international, transnational and supranational law—"the general principles of law thus derived, have little in common with *natural law*, except their very remote origin." "The general principles of law must therefore be considered to be *rules of positive law*. Their legal force ultimately rests on *implication*. We designated some of them as logical prerequisites for the existence of a legal order". "The general principles are, so to say, of *eternal character*. We must not be afraid of this conclusion, although it looks outrageous for a dogmatic positivist" (Degan 1997, 36–8; his italics).

It is not clear that Degan offers us here a jurisprudentially stable position. Degan's account of the institutional roots of "general principles" in municipal law and other settled law is so generous and capacious that it outstrips the kind of positivistic account of legal principle I alluded to above, in terms of, say, principles that are needed to bring coherence to settled law, or principles that are short-hand summaries of settled law. The reference to "precepts which are a prerequisite for the existence and operation of legal order" reminds us of nothing so much as Lon Fuller's doctrine of the inner morality of law (Fuller 1969, 33–41), the presuppositions of legal order. Fuller's view is generally interpreted, and was so intended by Fuller himself, as incompatible with legal positivism, and a form of secular natural law theory.

The moral of our analysis so far is that it is very difficult to interpret "general principles" as it occurs in subsection (c) more generously than as a reference to those general principles of municipal law that can be transferred over readily and without change of meaning to international law. More generous interpretations run the risk of authorizing principles that will lack the necessary voluntaristic backing to be available as principles of international law, however close or otherwise the connection to settled law.

8.5.2. Jus Cogens

The issue of voluntarism becomes more acute when we turn to the international law concept of *jus cogens*. The 1969 Vienna Convention on the Law of Treaties contains these provisions:

Article 53: A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of

States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64: If a new peremptory norm of general international law emerges, any existing treaty that is on conflict with that norm becomes void and terminates.

Such norms form the category of *jus cogens* (Brownlie 1998, 515–7; Harris 1998, 835–7; Byers 1999, 183ff.; Degan 1997, 216–34). Such norms as prohibitions on aggression, genocide, apartheid, slavery, and crimes against humanity are standardly given as paradigm examples of such norms. The essence of *jus cogens* is the inability to derogate. As we have seen, in the case of ordinary norms of treaty law or customary international law, derogation is permitted under defined circumstances. However, South Africa during the apartheid period achieved no success in persuading the rest of the world that it could legitimately position itself as an opponent of the norm against apartheid.

There is a jurisprudential puzzle, however, as to the source of such norms. Brownlie, Degan and Harris all regard *jus cogens* norms as simply instances of norms of customary international law, notwithstanding their peremptory character. A custom of the international legal order not only creates these norms as norms of customary international law, but also adds to them the special qualification of the status of peremptory norms. However, as Byers plausibly argues (Byers 1999, 187ff.), things cannot be so straightforward. Recall the claim that consent in some form must lie at the basis of all international law. Even if we interpret voluntarism in terms of a notion like Byers' of "shared understandings," still the truth in voluntarism must be respected. But then in that case how can the prohibition on derogation central to *jus cogens* be explained? If a norm has status of a norm of customary international law only through States' consent, how can it be binding on States independently of their consent? It is implausible to claim treaties as the source of *jus cogens*, since treaties do not bind universally, and treaties can be readily varied by their parties. General principles within the meaning of Article 38(1)(c) also seem an implausible candidate. However, the relatively minor role played by general principles within the meaning of subsection (c) in the actual practice of international law clashes with the powerful normative status of *jus cogens.*

Again, theorists with a predilection for natural law theory will quickly claim the source of *jus cogens* to be natural law. But it is worth considering whether a "positivistic" account may still be offered. Byers' own solution to the conundrum he has constructed concerning the sources of *jus cogens* relies on his "process" account of the consensual basis for customary international law. He accepts (1999, 190ff.) that in the end *jus cogens* should be seen as part of customary international law, but a distinctive part. In the case of a regular (i.e., derogable) norm of customary international law, the existence conditions for the norm (State practice and the *opinio juris*) are focussed primarily on the substantive content of the norm, rather than on its imperative character. In

the case of *jus cogens*, the substantive content and the imperative character must kept more firmly distinct. The special imperative character of *jus cogens* as peremptory and non-derogable can itself in its own right be the beneficiary of the customary process that Byers has identified as the voluntaristic basis of customary international law. His original puzzle concerning *jus cogens* as part of customary international law depended on not differentiating enough between substantive content and imperative character. If I understand Byers aright, his thought is this. There is nothing in the *process* by which norms of customary international law emerge to prevent the development of a States' practice and the *opinio juris* towards the status of being peremptory and non-derogable in the case of one or more norms of some given content. The status of being peremptory and non-derogable, as it begins to emerge (if it does, and it has), is the beneficiary of States' endorsement and consent. States will, if it is in their self-interest to do so, consent to, or acquiescence in, this distinctive imperative status for customary norms as it emerges. This is an instance of the customary process at work in essence no different from that that happens to the ordinary instances of norms of customary international law. If Byers is right, then, the source of *jus cogens* is properly to be subsumed under Article 38(1) subsection (b), not subsection (c).

8.6. Conclusion

It is clear from the above discussion that it is very difficult to give in the case of international law the kind of systematic account of the sources of law that is possible for municipal law. There may be good reasons, as we saw in Section 8.1, for thinking holistically of an international legal order. But the sources listed in Article 38 of the Statute of the International Court of Justice arguably do not function as sources in the same way as the sources of municipal law. Moreover, there is the further complicated issue of the role of the consent of States. While there are good reasons for suggesting, as theorists have done (see for example Hart 1994; Alexander and Sherwin 2001), that even municipal law must rest on a bedrock of acceptance, still consent has a functional role in international law that it does not have in municipal law. We should expect, then, that the issue of whether the Article 38 sources of international law are "strictly institutionalized sources" of law in the sense of this book will be a delicate matter.

Here is a reminder of the working definition of "strictly institutionalized source of law":

A law, or law-like rule, has a strictly institutionalized source just in case
i) the existence conditions of the law, or law-like rule, are a function of the activities of a legal institution

and

ii) the contextually sufficient justification, or the systemic or local normative force, of the law, or law-like rule, derives entirely from the satisfaction of those existence conditions.

The first clause requires that the existence-conditions of the norms of international law are a function of the activities of a legal institution. There are two ways to approach the possible satisfaction of this requirement. One is to examine the role of given particular institutions within the international legal order as a whole. The other is to consider whether the international legal order as a whole itself may be an "institution" of the appropriate kind.

The previous chapters of this book have shown that, in the case of municipal law, the first approach is the appropriate, and the successful one. However, the discussion in this chapter has revealed the difficulty of taking the same approach to international law. As I indicated in Section 8.1, decisions of the International Court of Justice do not have in themselves any rule-making force. Treaties impose rights and duties, but it is unclear whether a treaty itself counts as an "institution" in any relevant sense. There are many other institutions in the international legal order—The United Nations, the World Trade Organization, the International Labour Organization, and so forth—but these also have no rule-making power in the sense that any norms they promulgate are not directly and in themselves binding. They bind, if and when they do, because they are to all intents and purposes norms of customary international law.

In the case of the second approach, however, there is some prospect of success. Byers argues that the international legal order meets typical sociological standards for being an institution. It would, for instance, especially in its customary aspects, qualify as "an identifiable social convention which results from the convergence of patterned behaviour and actor expectation, and to which States conform without making elaborate calculations on a case by case basis" (Byers 1999, 147). Goodman and Jinks characterize institutions as "the normative, cognitive, and regulative environments in which organizations (and other actors) operate. Institutions thus structure the field of possible action and the ways in which organizations meet specific expectations" (Goodman and Jinks 2003, 107–8). They too are in no doubt that by such a criterion the international legal order qualifies as an institution.

Suppose, then, that we consider the international legal order as an institution, such that its norms exist as a function of its activities. Is it the case that clause (ii) of the working definition is also satisfied? The case would not be easy to make out. Take customary international law, and that element in it characterized above as a committed shared understanding of the customary process as a source of law. In one sense—a very abstract sense—a norm of customary international law is one simply because of the operation of the customary process as a source of law. It is not one because of its content. If we

could be content with such abstraction, then we could claim that customary international law functions as a strictly institutionalized source of law. But if we seek understanding of the way in which international custom functions as a source of law, we need to look far beyond such an abstraction. As Byers argues, at the level of customary international law the traditional distinction between international law as an autonomous science and international relations as a subdivision of political or social science disappears. The customary process at the foundation of international law is a point where international law and international politics merge. But if that is so, then it will be hard to claim that the systemic normative force of a law, or law-like rule, derives entirely from the satisfaction of institutional existence conditions. The "constitution" in the "thin" sense of the international legal order, in short, is a process, not an institution, even there is reason to say it is a process operated by an institution.

As with other chapters in this book, I will refrain from offering a final bottom-line judgment on whether the sources of international law are strictly institutionalized sources of law. They are as they are, and I have tried to show them as they are.

Chapter 9

AUTHORITY

I have to this point in this book used the term "authority" and cognate terms, but I have said nothing about how to understand the concept of authority in the context of an enquiry into legal institutions and the sources of law. That might seem extraordinary, and even perverse, for the following reason. Legal counsel pleading a case or advising a client, judges and other legal officials holding judicial hearings and issuing opinions and verdicts, legal scholars commenting on and analyzing legal decisions—all habitually talk about relevant legislation, or relevant case law, as being the "authorities" for the substantive legal claims that they make. It is of the essence of law as an institutionalized normative system[1] that legal decision-making be based on grounds that are *authoritative* within the normative system. An account of the sources of law, which made no reference to the concept of authority, would seem therefore bizarrely incomplete.

I do not aspire to such incompleteness, and will accordingly discuss the concept of authority in this chapter. However, there is an important methodological reason for leaving the discussion of authority until this point in the book. I shall explain.

The concept of authority in law may be considered in two quite distinct ways, ways which correspond closely to the distinction drawn by Aleksander Peczenik between "contextual" and "deep" justifications for legal decisions (Peczenik 1983, 1; Peczenik 1989, 156–7). I introduced this distinction in the first chapter, and will reintroduce it here. Peczenik defines a contextually sufficient justification as one "within the framework of legal reasoning, in other words, within the established legal tradition, or paradigm." "Deep" or "fundamental" justifications, by contrast, are those from outside the framework of legal reasoning, such as justifications by moral reasoning.

The distinction between contextual and deep justifications subtends a distinction between two different paths to establishing the authority of law, and specifically the authority of the sources of law. The first path would regard law as authoritative, if it is, because law meets the criteria (whatever they are) for being *deeply* justified. The second path would regard law, or a law, or a legal decision, as authoritative, if it is, because law, or that law, or that decision, meets the criteria (whatever they are) for being *contextually* justified. The working assumption of this book is the following. Given that its topic is within general jurisprudence, and is that of legal institutions and the sources of law, then the book must take the second of the two paths outlined above.

[1] For a legal system as an institutionalized normative system, see Raz 1975, chap. 4.

That is, our concern here is with authoritative sources of law in the sense of contextually justified sources of law. It is not with authoritative sources of law in the sense of deeply justified sources of law.

If, however, that is so, then an important issue of methodology arises. Should the articulation of the notion of authority so specified come before or after the detailed account of how different sources of law actually function within the on-going operation of legal systems? It is my fundamental belief, and one on which I have acted here, that the latter is the correct methodological choice. The content of the notion of authority at play in examining legal institutions and the sources of law from the perspective of establishing rules of contextual justification must be given by a detailed account of the way in which legal systems actually treat various sources of law as authoritative. The content of the notion can neither precede, nor regulate nor confine such an account. If you like, a satisfactory theoretical story about the contextual authority of legal sources must be "bottom up," not "top down." We cannot presume first legal positivism, or natural law theory, or legal realism, or any general theory of law, and then apply to legal institutions and the sources of law that theory. We have to lay high-level theory of that kind aside, and first look at how legal systems actually operate with the notion of authoritative sources. That examination then gives us our notion of authoritative source. We can use that notion, if suitable, then to test high-level jurisprudential theories, although I will not undertake that project here.[2]

In one sense, then, this chapter is redundant, for I have already shown how it is that sources of law have authority, how and why legal officials speak of the sources they employ as authoritative. I have done that, even though I have not used the term. But in another sense, this chapter is not redundant. For more can be said about how it is that the first two sentences in this paragraph say what is true, and that is the task I shall actually undertake in this chapter. My view is that contextual authority, if I may call it that, is a distinctive kind of authority. I will proceed to display it as such, and so give the account that this book needs of the authority of institutional legal sources, by comparing and contrasting contextual authority with other examples of authority both inside and outside the law. Contextual authority can only be displayed in context, and can only be philosophically illuminated by comparing and contrasting that context with other contexts.

9.1. Deeply and Contextually Justified Authority: First Thoughts

Discussions of the notion of authority in legal and political philosophy typically begin with the distinction between epistemic and normative authorities, or, in Joseph Raz's terminology, theoretical and practical authorities (Raz

[2] I have undertaken it elsewhere in Shiner 1992.

1986, 29, 52–3). Theoretical authorities are those who should guide belief, and practical authorities those who should guide action. The most commonly discussed kind of practical authority is political authority, the authority of the state. The most commonly discussed issue here is that of the justification of, or the legitimacy of, the authority of the state. The thought is that the state exercises coercive power over our lives—it makes certain kinds of conduct no longer optional, in H. L. A. Hart's famous phrase (Hart 1994, 6). Such coercive power needs to be justified. As Raz's "normal justification thesis" for political authority has it, it must be shown that

> the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly. (Raz 1986, 53)

The authority of a state, which meets this "normal justification" condition, is legitimate authority. It would be deeply justified authority. Legitimate authority is also sometimes called "de jure authority," as opposed to "de facto authority." De facto authority is possessed by a state, which simply as a matter of fact is able to use its coercive power effectively. An unjust state may possess de facto authority even if does not possess de jure authority.

But take now this concept of "de jure authority." "Jure" comes from the Latin word "jus," which is typically translated "right." It does not come from the Latin word "lex," which is typically translated "law." The idea of a difference between "jus" and "lex" is somewhat analogous to the difference between de jure authority and de facto authority. "Lex" signifies simply written law, law that has been enacted, law that is "on the books"—or, to use a more technical term, "positive law."[3] "Jus," however, signifies law that embodies some proper standard of political morality, which is why it is typically translated "right"; "jus" is a value-loaded concept. The notion of positive law is value-neutral; it is just a fact, if it is, that there is a law of a given content on the books in a given legal system.

Let me now continue by focussing on this notion of positive law. (In so doing, I am not adopting the legal theory known as legal positivism. The difference between legal positivism and its natural law opponents is not that one asserts and the other denies the existence of positive law. Rather, it is that, for the legal positivist, positive law constitutes the whole of law, while for natural law theory positive law is only part of law, natural law, and even divine law, being other parts.) Positive law is bound to have a prominent place in any theoretical account of law,[4] just because a legal system is an institutionalized normative system. Legal standards are normative—they impose duties or facilitate action. Legal norms form a system—they interlock and cohere in vari-

[3] "Positive" is derived from the Latin word used to mean, of laws, "enact."

[4] For more on the prominence of positivism, see Shiner 1992, 5–12.

ous ways, and are bounded in various ways. The system that legal norms form is an institutionalized system. That is, the origin, interpretation, and application of the norms occur—at least in the modern municipal legal systems with which readers of this book will be familiar—in a formal social institution created for such a purpose, and standardly are in the hands of officials formally entrusted with such tasks. Legislatures, courts, judges, counsel, and so on are all familiar aspects of a modern legal system. As I have argued elsewhere (Shiner 1998, 137), there is an important difference between art and law when it comes to institutional theories. An institutional theory of art is a revealingly paradoxical theory, foregrounding the externality of aesthetic standards to the work of art itself. An institutional theory of law, by contrast, states platitudes, and could be of value in philosophical disputes only to remind people of the familiar and obvious. Of course, since philosophical puzzlement is frequently engendered by over-elaborating and over-interpreting the obvious, reminders of the obvious have an important place. (For more on these issues of methodology, see Wisdom 1957, 16–101, 112–48; Wisdom 1965, chaps. 1, 6, 9, 11.)

The institutional and the systematic character of legal norms form the background to the notion of contextual legal authority in which we are interested here. Two separate points need to be made. *First*, the institutional character of a legal system means that there can be internal standards of acceptability or validity for legal norms. These internal standards may very well be, and typically are, standards which are "content-independent" in the sense of leaving open questions of the deep justification (if any) for those standards. The resulting validity of such norms is then to that degree arguably a matter of fact, not of value. If a norm gains legal validity as a result of institutional behaviour—say, enactment according to a certain procedure by Congress or Parliament—then that such behaviour occurred is a matter of fact. The kind of fact at issue has been called "institutional";[5] that the norm has been validated also, in the same way and to the same degree, a matter of (institutional) fact. *Second*, the systematic character of a legal system allows for sub-institutions within the legal system to be arranged in hierarchies. In Canada (roughly speaking), within each province there are Superior Courts and Courts of Queens Bench, both subject to the provincial Court of Appeal; each provincial Court of Appeal is subject to the Supreme Court of Canada. In the U.S. (*very* roughly), there are state Superior and Supreme Courts and federal District courts within states, all subject to the U.S. Courts of Appeal in the different circuits; these Courts of Appeal are subject to the U.S. Supreme Court. The effect of these hierarchies is that decisions in cases in lower courts are controlled in various ways by decisions on the same point in higher courts.[6]

[5] Cf. MacCormick and Weinberger 1986, chaps. 1–4, and the earlier philosophical literature to which they refer.

[6] The issue of binding precedent has been discussed in detail in Chapter 3.

The concept of an authoritative source then arises from these two features combined. Judges giving opinions in lower courts standardly refer to the decision of the higher court as "authority" for the case. "Authority" in this specific sense, then, means a source of controlling normative power within an institutionalized normative system, such that the existence of the power is a content-independent matter of institutional fact. By "legal authority" is meant further that the institutionalized normative system in question is a legal system. This is the concept of contextual legal authority that we have been assuming, and that the preceding chapters have been elucidating. It is just a plain matter of fact about how legal systems, as examples of institutionalized normative systems, operate, that this controlling normative power exists. It is a plain matter of fact about the typical municipal legal system that the institutional fact of contextual legal authority exists, and tales the form specified.

9.2. The Authority of Ancient Manuscripts

Let us leave for a while the idea of legal authority, and turn to look at some examples taken from literary studies. The first kind of example I want to discuss is taken from classical studies, though analogous examples could be found in the study of more modern literature.

Everybody knows that the familiar sentences and paragraphs in English (or other native language) that we get our undergraduate students to read when we assign Plato and Aristotle, are translations into English. Plato and Aristotle wrote in Greek, not English. But, they are translations of what? One would think, presumably, it is Plato's and Aristotle's own Greek. But things are not that simple. Some ancient papyrus books survive, and have been discovered in fact to contain segments of the writing of familiar ancient authors. In fact, though, the bases for our present knowledge of ancient texts are manuscript copies (the word is derived from *manus*, hand, and *scriptus*, written), made long ago from still earlier copies. The copying of copies clearly at some point would reach back to the original books, but the material is lost. Take Aristotle's *Physics*, for example. In his classic edition, Sir David Ross lists as leading sources for the text of the *Physics* seven different manuscripts ranging from the tenth to the fourteenth century in age, a translation into Arabic from the tenth century, a paraphrase from the fourth century, and commentators from the third and sixth centuries (Ross 1936, 102–3).[7] Out of these sources comes a text in the form dealt with by contemporary scholars.

Ross refers to these different manuscripts and so forth as "authorities" (ibid.). What is this use of "authority," and how does an ancient manuscript become an authority? The process of establishing a manuscript, or more frequently a manuscript tradition, as authoritative relies heavily on an editing

[7] All these dates are A.D.

process known as collation, a bringing together. Two manuscripts are systematically compared, letter by letter, and the differences between them carefully logged. From such a logging, it is possible to make inferences as to the relations between the manuscripts. Any given manuscript that survives today was created by being copied by hand from some existing manuscript. The copying process of course is not foolproof; that is why even now publishers send out proofs. Among the most common mistakes these copyists made (and we still do) are dittographies (writing a letter or word twice which is written only once in the original) and haplographies (writing a letter or word only once which is written twice in the original), and the well-known error of leaving out one of two lines which start or end with the same word. Now, if in collating two manuscripts, an error appears in one that is not in the other, the presumption is that the error-free manuscript is the earlier, and therefore more likely to be more authoritative as to what the original writer actually wrote. If two manuscripts contain pretty much the same set of errors, then the later one does not provide any independent support for the authority of the earlier. Ross refers to ancient commentaries on Aristotle's *Physics* as "sources." These provide some external control on later manuscripts in case where they quote Aristotle's own words. Since they were writing much closer to Aristotle's own time, the presumption is that they are more reliable as to what he originally wrote, even if they were themselves working from copies.

By this kind of collating, a picture can be built up of the independence or dependence of surviving manuscripts on each other. The more a given wording is attested to by manuscripts reasonably believed to be independent of one another, the more likely it is that such a wording is authentic. For whole stretches of text, there is unanimity or near-unanimity on the wording; without that, it would be hard to imagine our being able to say that we had the text of Aristotle at all. Such unanimity is at the core of the notion of an authoritative text of an ancient work.

The ground begins to soften where there are differences among manuscripts, which cannot be explained through collation as copyists' errors. The softening has two main aspects to it. The first is the copyists themselves. Some were copying-machines, as it were; but many were learned scholars in their own right not above introducing their own ideas as to what Aristotle must have been trying to say and their own choices among then-existing variant readings. The second is the contemporary editor him- or herself, in two ways—in that they too make choices among variant manuscript readings as to the one they think most likely to be authentic, and in that they too introduce their own emendations if they are convinced that no surviving manuscript can possibly be representing the original aright. Choice among variants and emendation clearly rely heavily on the editor bringing an interpretation to the text, whereas the other ways of establishing textual authority are interpretation-neutral. The conscientious editor, of course, and most of them are, will dis-

play in footnotes the main alternate readings to the ones chosen, and defend any original emendations. But still a process of interpretive choice is at work.

9.3. Interpretive Authority

Although my focus here is on the idea of textual sources as authoritative, let us continue for a moment with the notion of an authoritative interpretation. The notion is familiarly in play in the arts when we think of a performer interpreting a piece of music, or of a director interpreting a play or a legend. There are uninteresting parsings of the expression "authoritative interpretation." A musical performance may be termed "authoritative" when it is delivered with great confidence and panache, or when it happens to coincide with how the critic thinks the piece should be played. A more interesting parsing for our purposes is when the expression is used to assert that a particular performer's interpretation sets a new and high standard—a precedent, even—as to how the piece ought to be played, or when a director's interpretation sets a new and high standard for how a play ought to be staged.

The logic of interpretive judgments in art criticism, of course, is a huge and contested topic. In my view, which of course I cannot now defend,[8] is that, whatever degree of subjectivity there is in interpretive judgments, it is not complete. Such judgments are to a degree rationally answerable to features of the artwork being interpreted, and debate about the most preferable, or the most authoritative, interpretation is to that degree rational debate. When a critic backs up a claim of authoritative interpretation by pointing to the score, playing extracts from this performance and that performance, referring perhaps to the history books, and so on, they are providing logically appropriate support for the judgment of authoritativeness. True, such judgments do not attain the cogency of judgments of logical validity, or of plain empirical fact. There is still room for talk of interpretive choice, for determined maintenance of one's own view, and like supposed indicia of subjectivity. Nonetheless, many features of interpretive judgments, and a fortiori of judgments of interpretive authority, would have to be papered over and ignored before such judgments could be plausibly said to be wholly subjective and not rational.

It is important not to let go of this interim conclusion. We are going to begin shortly working back from claims of interpretive authority towards legal authorities and the authority of legal texts. The point from which the return journey starts is well inside any perimeter to rationality, which may be marked by claims that are wholly subjective. We shall want to use claims of interpretive authority as a contrasting case, but the point of the contrast does not rely

[8] Some indication of how I would defend the view may be found in Shiner 1978; 1988; 1996; 1997.

on the thought that these claims are not rational. Rather, it relies on identification of the kind of rationality they really do have.

9.4. Ancient Authorities Revisited

At the end of Section 9.2, I talked about two ways in which an element of interpretive choice entered in to an editorial decision about what wording is to be regarded as authoritative. Let us now lay aside those cases, and concentrate on the core notion of authority in play. Let us return to Ross and the *Physics*, and look at the more general picture of the manuscript tradition. Ross points out (Ross 1936, 105–7) that, unlike most cases, collation of the *Physics* manuscripts does not reveal clear family-trees. Rather, while there are "main branches" (he identifies three), the copyists of the extant manuscripts must have had others available to them at the time, and made use of them to introduce variants at the time of copying, leading to "constant criss-crossing between the main branches." No single manuscript or family, then, is the authoritative manuscript throughout. Different manuscripts must be considered authoritative for different stretches of the work; agreement between two or more of the main branches is crucial (Ross 1936, 115).

I want to emphasize two things about this notion of authority. First, note how grounded the notion is. Notwithstanding the role of copyist or editorial choice, there are stable criteria, applied through the operation of the process of collation between manuscripts themselves and between manuscripts and ancient commentators, for when a particular manuscript is authoritative as to the correct wording of the text of the *Physics*. The criteria are internal to the world of classical scholarship, and institutionalized to the extent that that world is institutionalized. There is a well-understood normative practice in place to ground the determinations of authoritativeness and authority.

Second, notice that the manuscript itself, the text itself, is the authority. In the case of the ancient commentators, scholars do speak of the commentator himself—Simplicius, or Themistius—as the authority for a given reading of the text. In the case of manuscript, the manuscript itself, usually either named after the place where it is preserved—the Vatican museum, for example—or given an arbitrary name of a single letter by the scholarly tradition, is the authority. No doubt, if in fact the names of copyists were known, and if there had been reasons for individuating particular copyists, things might have been different. But we have no such information and no such reasons, and scholars are quite comfortable with referring to manuscripts, or sentences in manuscripts, as authoritative.

9.5. Legal Authorities Revisited

How similar or different, now, is the notion of an authoritative legal text, or a court decision as an authority? First, note that there is a comparable kind of

anonymity with respect to legal authorities, an anonymity that leads to either the text of the statute or the text of the majority opinion in the case being regarded as authoritative. In the case of statutes, it is true that courts may refer to "Parliament" or to "Congress" as the source of the authoritative text. But the reference is never made more specific than that; there is no talk in courts of law of "the Liberal majority in 1996," or "the 1996 Chrétien government" being the source. Courts speak this way because of underlying constitutional conventions about the relation of the legislature to the courts in a democratic system of government. But those conventions are not part of the practice of acknowledging the authority of statutes. In the case of written legal opinions, again, if the opinion is a majority opinion, the opinion is considered the opinion of the court; its author is not named. In the case of minority or dissenting opinions, the author may be more often named, but by no means invariably.

Socio-legal studies, particularly of a Critical Legal Studies or legal realist orientation, has made much of this anonymity. The argument is made that such anonymity is a convenient fiction which allows individual judges to ward off responsibility for, and give the semblance of neutrality to, what is purely political decision-making. Moreover, it is argued, it is clear that certain judges' opinions matter more than others; it's the judge, not the judgment, that cuts the ice. I do not think, though, that the notion of authority in play here in the legal context can be so readily reduced to a version of personal authority. Take a case where it is clear that any authority belongs to the individual making the judgment, not the text of the judgment itself. Take art criticism. It's clearly the critic him—or herself—Arthur Danto, Linda Nochlin, F. R. Leavis, Pauline Kael, Deryck Cooke—who is the authority, not the text of their writings. Those texts become authoritative only derivatively. And even so, in art criticism at least, the notion of "authority" in play is much weaker in any case. But the court's opinion in a controlling case does not possess only a shadow authoritativeness derived from the stature of the judges who wrote it and signed on to it. The opinion is given its authoritativeness by the institutionalized normative system of which it is a part.

The authority of legal texts is different in this way even from the authority of ancient manuscripts. We could well imagine that, were the appropriate sort of information available to underwrite the change, it did happen that ancient copyists themselves became authorities, rather than their manuscripts. Not a great deal otherwise would change in how contemporary editors go about establishing what is the most authoritative text for an ancient work. But, if the legal system were to be run on such an individualized system of authoritativeness, it would be a radically different institution, and have to have radically different goals, than as presently understood. It is true that certain judges may acquire an especial reputation for jurisprudential sagacity, and so their word may become authoritative in something like the sense in which we speak of Albert Einstein as an authority on physics, or J. G. A. Pocock an authority on

the eighteenth century. But these are exceptional cases, and only serve to highlight the way in which the notion of authority in the legal context normally functions in a quite different way.

Second, the rules, whether written or conventional, of the institutionalized normative system which is the legal system provide a grounding for the authority of authoritative legal texts which is stronger even than that provided by the conventions of classical scholarship for the notion of manuscript authority. Consider the relation of courts to legislatures in the familiar kind of democratic system of government. While an entrenched constitution may give courts some power to invalidate legislation, fundamentally courts are bound by legislation. They can, and do, interpret the wording of statutes; but they cannot change the wording. Likewise, within a given jurisdiction, lower courts will be bound by precedent decisions of higher courts on the material point of law. Courts standardly distinguish between "authoritative" or "binding" precedent and "persuasive" precedent (see sec. 3.2.2 above). As things now stand the British Columbia Court of Appeal is "bound" by decisions of the Supreme Court of Canada, whereas it is not "bound" by decisions of the U.S. Supreme Court or the House of Lords, or by decisions of the Alberta Court of Appeal, for that matter. It may consider and take what it will from decisions of courts of another jurisdiction, but it cannot be "required" to follow those decisions. It is required to follow decisions of the Supreme Court of Canada.

Those are just plain facts about how the Canadian legal system operates, stated in the language the system itself uses. These facts give us the notion of legal authority, and the bindingness of legal authority. Now, of course, it is possible (and in the end perhaps even necessary) to ask theoretical questions about exactly what "binding" means in the expression "binding authority." I undertook that project in Chapter 3. My point now is that, whatever it means, the idea of legal authority is grounded in the rules of the legal system as institutionalized normative system. Those rules give a formal bite to the notion of authority that is lacking in any other of the instances of authoritative texts we have considered.

9.6. Post-post-modernist Conclusions

Much—most, even—of what I have been saying may be making some people very uneasy. I have been talking about the institutions of law, classical scholarship and art criticism. I have been talking about them as if they and their properties were plain facts in the world, and as if talking about them is a matter of giving their descriptions. Where have I been in the last twenty years, it might be asked? Hasn't it been shown without a doubt that "facts" such as these—facts about social institutions—are socially constructed facts, not facts in the world, and discourse about them just that, discourse and not description?

There is, I confess, a background agenda to this chapter. It would suit me fine to achieve some deconstructing, as it were, of talk about social constructions. Of course, language is a social construction: What else could it be? But this truth does not license sceptical inferences to the effect that any description of the world using language must be epistemologically or otherwise suspect. Different cases are different, even if we need to use language to draw attention to the differences. Talk of "social construction" is worthwhile, when it serves to bring out unnoticed, or under-noticed, features of cases. There is an arguable point to referring to taste in art as socially constructed. The difference between the appeal of a twentieth-century Abstract Expressionist painting and the appeal of a seventeenth-century Baroque painting is not at all like the difference between something sweet and something sour. But we lose the capacity to state that difference in a meaningful way, if we insist that the difference between a sweet taste and a sour taste is "socially constructed."

Likewise with respect to the cases discussed here. There is considerable point to showing how cultural differences affect artistic interpretation, and thus to remarking how the authoritativeness of artistic interpretation is socially constructed. But the potential role of cultural factors is considerably reduced in the case of authoritative manuscript texts of ancient works, because of the mechanical character of the process of manuscript collation and the durability of the results based upon it. In the case of authoritative legal texts, claims of authority are even more grounded in well-understood and well-accepted institutional norms, the existence of which is a matter of fact.

It is possible to argue that, because the norms governing the authoritativeness of legal texts are the norms of a social institution, these norms are "social constructions." Such a claim might serve to mark a difference between the authority of a legal text and the hardness of a rock or the softness of a melting ice cream. But the remark would simultaneously obscure the equally important difference between the authority of a legal text and the authority of a manuscript reading or of an artistic interpretation.

The authority of a legal text is an idiosyncratic form of authority, internal to the legal system of which it is a part. It is in important ways both like and unlike the two forms of literary authority with which I have compared it in this chapter. It is a form of political authority, because a legal system is an important element of the political system of which it is a part. But legal authority is not reducible to political authority either. It is the kind of authority, which exists, in an institutionalized normative system between different parts of the system, with whatever differentiating characteristics flow from the system in question being a legal system. Contextual legal justification is a form of justification, and contextual legal authority a form of authority, both in their own right, and not simply as bastard or derivative versions of deep justification and political authority.

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 4

Scientia Juris

A Treatise of Legal Philosophy and General Jurisprudence

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 4

Scientia Juris

Legal Doctrine as Knowledge of Law and as a Source of Law

by

Aleksander Peczenik
Law Faculty, Lund University, Sweden

A C.I.P. Catalogue record for this book is available from the Library of Congress.

5 Volume Set:
ISBN-10 1-4020-3387-7 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-10 1-4020-3505-5 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3387-2 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3505-0 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York

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Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Printed on acid-free paper

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Printed in the Netherlands.

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A NOTE ON THE AUTHOR

Aleksander Peczenik—born in Kraków (Poland) in 1937—studied law in Kraków and later in Stockholm (Sweden) and received a doctoral degree in law in Kraków and a doctoral degree in philosophy in Lund (Sweden). He has served as professor of jurisprudence in Lund since 1978 and as Samuel Pufendorf Research Professor in Lund since 2003. He is president of the International Association for the Philosophy of Law and for Social Philosophy (IVR). Peczenik's focus of research is the theory of legal argumentation and epistemology, and especially the coherence theory in law and justice. He has published nine books, among which *On Law and Reason* (Kluwer, 1989). One of his roughly 150 scholarly papers is entitled "The Passion for Reason" (in Luc Wintgens, ed., *The Law in Philosophical Perspectives*, Kluwer, 1999), which summarizes his scientific views. In another article, "A Theory of Legal Doctrine" (*Ratio Juris* 14, 2001), there is set out an earlier version of the theory developed more fully in this *Treatise of Legal Philosophy and General Jurisprudence*.

PREFACE

One cannot write a volume of this kind without the help of many people. At the formative stage, my theory of legal doctrine was influenced once and for all by the late Professor Kazimierz Opałek of Jagiellonian University in Kraków. Later on, I had the privilege of closely cooperating with Aulis Aarnio and Robert Alexy. Lars Lindahl helped me to see things in a more profound manner than I otherwise would have been able to do.

Zenon Bańkowski, Christian Dahlman, Svein Eng, Jaap Hage, Kaarlo Tuori, and Jan Woleński commented the manuscript of this volume in a very helpful and constructive manner. My intention was to adjust the text to all the comments. Only in exceptional cases, was that impossible because it would lead to complex and profound philosophical discussion, exceeding the limits of this volume. It is needless to say that I bear the sole responsibility for all the shortcomings of this volume.

Giovanni Sartor and those who took part in the seminar in jurisprudence at the Lund University, especially Uta Bindreiter, Christian Dahlman and David Reidhav, made important comments. At decisive moments, I received inspiration from Wlodek Rabinowicz and Johannes Persson of the Philosophical Institution in Lund, and from Matti Sintonen of Tampere. The Faculty of Law in Lund has created in recent years excellent working conditions. Enrico Pattaro made the whole project of this *Treatise in Philosophy of Law* possible.

I cannot mention here all the people I should thank for their support and inspiration. I know that this volume delivers more questions than answers. Some answers are certainly imperfect. Better ones may come later on when the new generation takes over.

Aleksander Peczenik

Lund University
Law Faculty

If we will disbelieve everything, because we cannot certainly know all things,
we shall do much what as wisely as he who would not use his legs,
but sit still and perish, because he had no wings to fly.

(John Locke)

Chapter 1

LEGAL DOCTRINE AND LEGAL THEORY

1.1. Introduction

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

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

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

This volume is based on the following materials:

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

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

1.1.2. Legal Doctrine and Legal Dogmatics

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

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

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

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

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

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

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

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

1.1.3. Particular and General Doctrine

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

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

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

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

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

1.1.4. Justification, Description, Explanation

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1.5. Influence of Legal Doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1.6. Kinds of Legal Research

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2. General Legal Doctrine

1.2.1. General Legal Doctrine and Normative Legal Theory

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2.2. Defeasible Norms of General Legal Doctrine

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

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

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

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

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

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

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

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

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

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

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

1.3. The Sources of Law

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

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

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

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

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

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

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

1.3.2. Classification of the Sources of Law

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

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

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

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

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

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

tions" refers to general rules issued by the government as well as by subordinate authorities and municipalities.

When performing legal reasoning, one should use precedents as authority reasons, and in some countries, legislative preparatory materials if any are applicable.[10] When doing legal reasoning, one may use the following materials, among others:

- custom (but only where it does not constitute a must-source or a should-source of law);
- writings in legal doctrine;
- foreign law, unless incompatible with any overriding reasons, such as the so-called *ordre public*.

Of course, this enumeration is anything but exhaustive (see Peczenik 1989, 319ff.).

The classification discussed is an idealization. We can work out increasingly complex classifications of the sources of law. Moreover, only vague definitions of "must-sources," "should-sources," and "may-sources" of law are universally acceptable. The precise interpretation of these concepts varies from one legal order to another, from one part of a legal order to another, and from one period to another. Different people will suggest different precise interpretations serving different purposes.

The following comments elucidate the complex meaning of "must," "should," and "may."

- "Must-sources" are formally binding *de jure*; "should-sources" are not.
- The consequences of disregarding "should-sources" are usually milder than the consequences of disregarding "must-sources."
- "Must-sources" are more important than "should-sources," which in turn are more important than "may-sources."

Thus, reasons strong enough to justify disregarding a less important source may be weaker than those required to justify disregarding a more important one. If a collision occurs between a more important source and a less important one, the former has priority, provided no overweighing reasons reverse the order of priority. If we assign priority to a less important legal source over a more important one, we will have the burden of arguing this priority. Overweighing reasons are thus required if we are to follow a precedent contrary to the plain meaning of a statute. A more important *pro tanto* legal source can, however, have a lesser weight than a number of less important ones combined. A number of precedents can thus jointly weigh more than the

[10] One should also use international conventions underlying applicable to national legislation, together with preparatory materials and other interpretational data relative to these conventions.

literal meaning of a statute. A counterargument that "wins" against a stronger source of law must be stronger than a counterargument sufficient to win against a weaker one. In sum, the hierarchy of legal sources is defeasible.

The doctrine of the sources of law faces the problem of globalization, however. There appear new sources of law that are not always precise in character and status. The grounds of their binding force are reason, pedigree, and practice—any combination of them. Let me make some examples:

- UN resolutions;
- human rights;
- commercial custom;
- foreign precedents;
- arbitration;
- recommendations of more or less authoritative organizations;
- other soft law; and
- more or less globalized doctrine.

1.3.3. Legal Doctrine as a Source of Law

Legal doctrine is a source of law that a jurist may take into account as an authority reason. In other words, one may pay attention to theses developed in legal writing not only because of the quality of the reasons proffered therein, but also due to the authoritative position that legal writers occupy. It is a well-known phenomenon that a doctoral dissertation gains in authority the moment its author becomes a professor of law.

Legal doctrine has been a source of law of varying importance in the course of history. But legal doctrine is more than merely a source of law. It is a rational description and refining of the law, and it claims (at least occasionally) to tell us what the law actually is. In other words, legal doctrine has a twofold nature: It is, on the one hand, a relatively subordinated source of law and, on the other, the best presentation of the law itself.

Why is legal doctrine authoritative? The answer is, because of the quality of argumentation it typically produces. Legal doctrine delivers rational arguments; hence the presumption that it should be regarded as authoritative. A more profound answer is that it gains authority because *pro tanto* well informed, coherent, and just.

Thus, legal doctrine converts reason into authority.

1.4. Statutory Interpretation

1.4.1. Types of Argument in Statutory Interpretation

Argumentation in law applies to many things: evidence at trial, the interpretation of contracts, the establishment of a *ratio decidendi* at common law, and so

on. Here, I deal only with the arguments used in statutory interpretation. Statutory interpretation lies at the core of legal method. It has a long history (see Raisch 1995). Friedrich Carl von Savigny (1840, 206ff.) put forward the most influential classification of the elements of statutory interpretation in Germany, and indeed in the whole of continental Europe. There are four such elements: logical, grammatical, historical, and systemic. Statutory interpretation is an organic coming together of all four. The subsequent evolution of legal method brought in one more element: goal interpretation. The most complete and sophisticated treatise on statutory interpretation is Jerzy Wróblewski's (1959), unfortunately accessible only in Polish. Wróblewski describes interpretive directives in three contexts. In the linguistic context we have syntactic and semantic directives; in the systemic context, directives on consistency, completeness, and hierarchy within the legal system; in the social-political context, directives on the goals of law. There are also second-order directives for choosing from among interpretive directives. Normative theories of interpretation are either static or dynamic. Static theories emphasize stability; dynamic ones, the adaptation of law to the needs of life.

The following argument types are used in statutory interpretation:

Linguistic Arguments
1. The argument from ordinary meaning […]
2. The argument from technical meaning […]

Systemic Arguments
3. The argument from contextual-harmonization: The governing idea here is that, if a statutory provision belongs within a larger scheme, whether a single statute or a set of related statutes, it ought to be interpreted in the light of the whole statute in which it appears […]
4. The argument from precedent […]
5. The argument from analogy […]
6. Logical-conceptual argument: The governing idea here is that, if any recognized and doctrinally elaborated general legal concept is used in the formulation of a statutory provision, it ought to be interpreted so as to maintain a consistent use of the concept throughout the system as a whole, or relevant branch or branches of it.
7. The argument from relevant principles of law […]
8. The argument from history […]

Teleological/Evaluative Arguments
9. The argument from purpose
10. The argument from substantive reasons

Transcategorical
11. The argument from intention. (MacCormick and Summers 1991, 512ff.)[11]

The argument from intention is "trans-categorical" in the sense that there are different ways to discover legislative intentions: by using linguistic, systemic, or teleological arguments (ibid., 522ff.).

[11] The list summarizes a comparative project carried through with the participation of scholars from nine countries. Nota bene: Wróblewski took part in the project and noticeably influenced its theoretical framework.

The following comparative remarks deserve attention (ibid., 518): The French system gives special weight to arguments from general principle. In Germany, logical-conceptual arguments are regarded with more favour than elsewhere, especially in comparison with the United States.

1.4.2. Systemic Arguments

Systemic arguments lie at the core of legal doctrine. Thus, when interpreting a statutory provision, we must pay attention to other provisions that contribute to understanding the provision in question. When interpreting a statutory provision, we may pay attention to its title and to its specific placement within the legal system or within a certain statute. This kind of interpretation assumes that coherence within any one part of the law is greater than coherence across different parts of it.

Important systemic arguments seek to solve logical, empirical, or evaluative collisions among legal rules.[12] The following guidelines help jurists work out collisions among legal norms. Whenever we discover a collision between legal rules, we should work it out either by reinterpreting (and thus reconciling, or harmonizing) these norms or by setting up an order of priority among them. When reinterpreting or ranking rules in collision, we should always do so using a method that can be applied equally to similar collisions among other rules. If possible, different sources of law should be so interpreted that they prove compatible. The interpretation of statutes, precedents, legislative preparatory materials, and the like should thus affect one another. When a higher norm is incompatible with a norm of lower standing, the higher norm must be applied.[13] Where an older norm is incompatible with a more recent one, the more recent one must be applied.[14] We may apply a more general norm only in cases not covered by a less general norm incompatible with it.[15] If a more recent general norm is incompatible with an older but less general norm, the more recent and less general norm must be applied.[16] If possible, we must harmonize the results obtained from the use of different methods of statutory interpretation. Whenever the use of different methods of statutory interpretation in a given situation results in an incompatibility, the incompatibility should be worked out by reinterpreting the provision in question.[17]

[12] Collision among principles is another matter (cf. Alexy 1985, 78ff.) because principles are contributive, not decisive reasons.

[13] *Lex superior derogat legi inferiori.* A special question concerns the courts' competence to declare that statutes incompatible with the constitution are invalid.

[14] *Lex posterior derogat legi priori.*

[15] *Lex specialis derogat legi generali.*

[16] *Lex posterior generalis non derogat legi priori speciali.*

[17] Cf. Savigny 1993, 140–1: "Thus, the interpretation consists of 4 elements: logical […], grammatical […], historical […], systematic […]. That is, not several interpretations but

In systemic interpretation, we should avoid *ad hoc* solutions, perhaps reasonable in the case under consideration or in a limited number of cases but foreign to the rest of the system. For example, German jurists opposed the idea of using accident insurance terms to justify introducing a certain speed limit on the highway. This solution would have been foreign to the system.

1.4.3. Restricting and Extending a Norm's Area of Application

A norm's area of application as established in legal reasoning often differs from the area established by most non-juristic readings of the norm based on natural-language analysis. Statutory interpretation may thus extend or restrict a statute's *pro tanto* meaning. Extensive interpretation embraces not only the core but also the "periphery" of a rule's area of application. Restrictive interpretation restricts the *pro tanto* core of a rule's area of application. This kind of extension and restriction is perhaps somewhat strange, but it is linguistically possible. The choice will depend on the weighing and balancing of various substantive reasons and authority reasons, and is of course defeasible.

So-called "reduction" is a radical restriction of this meaning. Reduction eliminates not only the "periphery" of a rule's area of application, but also part of its linguistically uncontroversial core. Such radical restriction contradicts ordinary language. In some cases, one goes beyond reduction and eliminates the entire rule, in what is called *desuetudo derogatoria*.

One may also extend radically a rule's area of application, sometimes beyond its linguistically possible "periphery." The most frequent method of doing so is reasoning by analogy.

1.4.4. Analogy

What is meant by "statutory analogy" is that one applies a statutory rule to a "target" case which, from the viewpoint of ordinary language, cannot be made to fall within either the core or the periphery of the statute's area of application, but which in a relevant way resembles the cases covered by this statute in some essential respects. This definition is based on the result of interpretation—effecting a radical extension of the rule's area of application—as well as on the method applied to obtain the result, namely, proffering a relevant similarity of cases.

Some writers (e.g., Ross 1958, 149) reject the distinction between extensive interpretation and statutory analogy. In judicial practice and in legal writ-

always only one interpretation always composed of these 4 elements." ("Also ist die Interpretation zusammengesetzt aus 4 Elementen: Logisches [...], Grammatisches [...], Historisches [...], Systematisches [...]. Also nicht vielerlei Interpretationen, sondern immer nur Eine Interpretation, immer componiert aus diesen 4 Elementen.")

ing, however, we can find several examples of new norms created by analogy, generally considered more radical than mere extensive interpretation. Moreover, in penal law, for example, courts may reason from analogy to a much lesser extent than is possible by extensive interpretation. A court that should disregard the difference between these two forms of reasoning may unjustifiably begin to use analogy in cases where extensive interpretation is allowed (cf. Peczenik 1971a, 334ff.).

A use of the similarity argument, which does not extend a statute's linguistically possible area of application, is sometimes also regarded as analogy (cf., Kaufmann 1982).

Neither statutory analogy nor *analogia intra legem* is transitive: One case, *C1*, can be analogous to another, *C2*, in its turn analogous to a third, *C3*, and yet *C3* need not be analogous to *C1*. In this sense, analogy is like distance: *C1* may be close to *C2* and *C2* to *C3*, and this without *C3* being close to *C1*. Moreover, the relation of statutory analogy is not reflexive, since the set of cases regulated by a norm is not analogous to itself. The relation of statutory analogy can be symmetrical or not: When *C1* is analogous to *C2*, the latter can—but need not—be analogous to the former.[18]

One may also employ "law-analogy" or "legal induction." With some simplification, we can regard these two terms as synonymous. Law-analogy means that a general norm is postulated on the basis of a resemblance among a number of established (most often statutory) rules, thereby regarded as special cases of that norm.

Let us make an example. The so-called Scandinavian doctrine of wrongfulness (literally, "unlawfulness"; cf. Hellner 1995, 64–5) gave us the following general norm: One should not be held criminally responsible or liable in torts—or at least responsibility should be restricted—if one's action was not wrongful; that is, if the action's positive results were more important than the risks it caused. This general norm is justifiable on the basis of such defences as duty, emergency, authorization, contributory negligence or consent on the part of the victim, or the fact of the victim taking particular risks—all of which restrict or eliminate liability. These defences are merely special cases of the lack of wrongfulness. Assume, for example, that *A* violently threw *B* out of the meeting that *B* disturbed. The court found that *B*'s provocative behaviour justified the conclusion that *A* should not be held criminally responsible (cf. the Swedish case NJA 1915, 511).

Finally, an important form of analogy in the law is institute analogy: A legal institute, such as "instalment payment," can serve as a model for another, as for "financial leasing." Old legal institutes inspire new ones (cf. Peczenik 1995, 341ff.).

[18] Cf. Frändberg (1973, 150–1), though the author discusses analogy among norms, not cases.

When deciding not to reason by analogy, one can follow another legal mode of reasoning, the so-called *argumentum e contrario*. Assume that a statutory provision or other legal norm regulates some cases in a certain way. By virtue of strong *argumentum e contrario*,[19] (similar) cases not covered by either the core or the periphery of this norm's linguistically acceptable area of application should not be treated in the way stipulated by the norm: *Qui dicit de uno negat de altero*.

The following reasoning norms, established by the tradition of *scientia juris*, help us choose between analogy and *argumentum e contrario*: We should not construe by analogy provisions that establish time limits. Nor should we construe such provisions by extension unless particularly strong reasons exist for making an assumption to the contrary. Only very strong reasons can justify using analogy to conclude that an error exists in the text of a statute. We should not construe by extension or by analogy provisions that make exceptions to a general norm unless we have strong reasons for assuming the opposite.[20] We should not construe by extension or by statutory analogy provisions imposing burdens or restrictions on a person unless very strong reasons exist for making an assumption to the contrary.[21]

When making a choice between different analogies, we need to take into account considerations similar to those that come to bear in choosing between analogy and *argumentum e contrario*.

Legal doctrine plays a crucial role in developing such reasoning norms. It also gives them a more precise content in particular legal contexts. The argumentation leading to the development and refinement of such reasoning norms bases itself on a coherent system of propositions and preferences developed in the history of *scientia juris*.

Law-analogy and statutory analogy are both justifiable by the principle "Like cases should be treated alike," and hence by considerations of justice and coherence. This kind of justification is widely open to philosophical argumentation. In consequence, it is both profound and controversial.

The key problem is what similarities between cases are relevant enough to justify juristic reasoning by analogy. The estimate of relevance is holistic. Attention must be paid to the following elements:

- criteria of relevance that follow explicitly or implicitly from statutes and other sources of law;

[19] A distinction is necessary between a weak *argumentum e contrario* and a strong one. By virtue of weak *argumentum e contrario*, the norm in question is not a sufficient reason to conclude that a similar case not covered by either the core or the periphery of the norm's linguistically acceptable area of application should be treated this way.

[20] *Exceptiones non sunt extendendae*: A well-known but contested tenet in juristic literature (cf., Engisch 1968, 147ff.).

[21] *Odia sunt restringenda*.

- normative moral theories regarded as relevant to the legal problem in question; and
- theories of particular legal doctrine regarded as relevant to the legal problem in question.

An interesting general philosophical question is whether all rational use of analogy in the law assumes the formulation of a general rule.

In continental law, the answer is often in the affirmative. The proper explication of an analogical argument that assumes a general rule is said to have the following form: (i) First, a general rule that covers the "target" case is induced (or "abduced," using a more technical term) on the basis of a previously established legal rule; (ii) this general rule is then confirmed or disconfirmed; (iii) if confirmed, finally, the general rule warrants an inference to the target case. Analogical inference must therefore rest on an assumed general rule, for otherwise the step from the premises to the "target" case would not be logically correct.

In common law, on the other hand, the classical answer to the question whether analogy assumes a general rule is in the negative. Gerald Postema has provided a good characterization:

> Unlike deductive argument, this form of reasoning does not involve applying a general rule to a particular case. Rather, it proceeds in accord with Aristotle's characterization of argument by example (paradigm) [...], that is, "from part to part, like to like"—a similibus ad similia, as Bracton put it. Thus, while sometimes a general rule can be articulated linking the two cases, this rule is, on this classical understanding, a product of the identified analogy, not its precondition. And, in the order of intellection, identification of the "likeness" precedes and provides the basis for the articulation of the rule. (Postema 2001)

This understanding of analogy has been a target of deductivist criticism (cf. Brewer 1996, 926–7). The first stage of analogy is, according to Brewer, "abduction in a context of doubt." Having found the relevant cases, the judge discovers a rule—the analogy-warranting rule—that explains the examples. The second step is to test this rule against a set of external criteria called analogy-warranting rationales. Each analogy must be explained by reference to these rationales. Finally, the reasoner applies the confirmed analogy-warranting rule to the case under consideration.

In answer to Brewer, I will again quote Postema:

> Keep in mind, however, that since the premise of the classical account, on our reformulation, is that ultimately analogical inference rests on norms implicit in practice, not on explicit rules, any account of the kind of intellection involved cannot, on pain of inconsistency, take the form of a codified set of rules. We can only, and should only, seek to characterize the process, its structure and its constraints, in order to show why we may reasonably treat it as a form of reasoning. (Postema 2001)

In other words, the idea of logical rationality forces us to formulate a general rule from which the solution of the "target" case follows logically. To justify

analogical inference, we must be able to imagine a general rule from which the solution of the target case follows deductively. This general rule must be in principle acceptable. But, at the same time, the very idea of analogical inference forces us to the insight that this general rule must be contestable. There is an uncodifiable moment in analogical reasoning. Cognitive scientists and artificial intelligence hope to explain it further (cf. Hunter 2002).

Last, but not least, "it is within the context of [...] legal tradition [...] with its interlocking network of principles, rules, etc., that we find the conditions for making valid assertions of analogy and disanalogy" (Bańkowski 1991, 208).

1.4.5. Teleological Construction of Statutes

The teleological construction of a statute is its interpretation in view of its purpose. Sometimes—though not often—a statutory provision states precisely or implies logically a certain goal. But this is not usually the case. The provision in question is more likely to support a certain goal only defeasibly.

A distinction can be made between subjective and objective teleological construction of statutes: The former follows the will of those who take part in lawmaking, in bringing out the *travaux préparatoires*; the latter follows other juristic substantive and authority reasons.

In Sweden, one often finds the goals of the statute in its *travaux préparatoires*. But an influential minority of Swedish lawyers, led by Per Olof Ekelöf (1958, 79ff.), protest against the great role of preparatory materials. Ekelöf's theory is a product of the evolution of legal method in the late 19th and early 20th centuries under the influence of Scandinavian legal realism. On Ekelöf's view, judges and jurists should, in ordinary cases, follow the meaning the statute has in ordinary linguistic usage. In "special" (uncertain, untypical, hard) cases, the interpreter ought not to go into a linguistic analysis of the statute, or feel bound by the *travaux préparatoires*. Instead, she should establish the purpose of the statute by analogy with the effects ("total result," "actual function," or "practical function") the statute has in ordinary cases (cf. Ekelöf 1958, 84ff., 105ff.). It is not clear to what extent Ekelöf's views affected the courts, but it certainly shaped a generation of legal researchers at the faculty of law in Uppsala. This success was only local but intense enough to urge an explanation. One can regard Ekelöf's method as a special case of reasoning by analogy, that is, a statutory analogy based upon relevant similarities of results. This emphasis upon results represents an effort to recommend consequentialist reasons while maintaining loyalty to the authority of the statute.

Another version of teleological interpretation, dominant in EU law, follows general formulations found in a treaty together with common knowledge of the EU's integrationist dynamics.

Sometimes, a statute's goals follow from "the nature of things," that is, they follow from background knowledge of social institutions, values, etc. Each

method of establishing the goal makes it necessary to weigh and balance reasons, as does a choice between competing methods (cf. Peczenik 1995, 375).

The jurisprudence of interests and related movements attempted a reform of legal doctrine. Have they succeeded in changing its deep structure? In my opinion, they have not. They proposed to consider "interests" exclusively, and not also "concepts" and "system," but this they did only in word; indeed, the older conceptual jurisprudence and the newer jurisprudence of interests alike looked at the system of concepts and at interests, both. The shift was mainly in emphasis. Legal doctrine has become more pragmatic and somewhat less systematic. It has also lost its self-trust, conceiving of itself more and more as a servant of politics (Jerusalem 1968; cf. Larenz 1983, 67ff.).

The mixed success of the reform movements is a good example of the tension between juristic tradition and philosophical fashion. The new philosophy led to some changes in legal method, but these changes were smaller than many philosophers had expected.

1.5. Interpreting Precedents

1.5.1. What Is Binding in a Precedent?

Precedent now plays a significant role in legal decision-making and in the development of the law in common law and continental law alike (MacCormick and Summers 1997, 531–2). All students of comparative law know that a big part of common law consists of precedents, whereas continental (or "civil") law is mostly statutory. They also know that, in common-law countries, precedents are legally ("formally") binding on all courts below the highest courts. In other words, it is a legal error not to follow the precedents of higher courts, and such failure will ordinarily be reversed on appeal. The precedents set by the highest courts carry a strong normative force, too, even though there is no possibility of reversal on appeal. The doctrines of binding precedent are particularly strong in the British systems (ibid., 518). In the countries of the European continent, precedent is not formally binding but is regularly followed by the courts in practice. This fact explains why some jurists say that precedents in continental law are binding *de facto* but not *de jure*.[22]

The arguments used to interpret precedents are similar to those used in statutory interpretation. But there are some problems specific to precedent, one of these being the question what is binding in a precedent (cf. ibid.,

[22] Only very special kinds of precedent are binding *de jure* in continental systems. Thus, in Germany, precedents established by the Federal Constitutional Court are formally binding on the courts below. Ordinary precedents established by the Federal Court of Justice are not formally binding, but they have to be followed except where special reasons can be shown to the contrary. Cf. MacCormick and Summers 1997, 461ff.

503ff.). The binding element is the so-called *ratio decidendi.* The theory of *ratio decidendi* has evolved in common-law countries and has influenced continental jurisdictions more or less consistently.

A *ratio decidendi* might be:

1. a rule of law or a ruling in the light of material facts that a prior court explicitly declares or believes itself to be laying down or following; or
2. a ruling in the light of material facts that a prior court (when the decision is analysed) is, as a matter of fact, laying down or following; or
3. a ruling in the light of material facts that a prior court ought to properly (in view of the existing law, facts and precedents) to be laying down or following. (Ibid., 506)

This is easy to state. On reflection, however, common-law history shows confusion in the definitions of *ratio decidendi* (ibid., 510ff.): "The *ratio* is perhaps to be considered an essentially contested concept, because it is not purely descriptive but also evaluative or normative in force" (ibid., 512–3).

In spite of such problems, the general doctrine of precedent is more sophisticated in the common law than in continental systems (cf. ibid., 536ff.). In particular, the common-law tradition developed a methodology called distinguishing the precedent, designed to show why a precedent is not binding in the case under consideration. No such methodology has developed in any of the civil-law countries (ibid., 538). This fact contrasts with statutory interpretation. The doctrine of statutory interpretation is at least as developed in continental-law countries as in common-law countries.

In some countries, like Sweden, the weakness of methodological considerations is offset by precedents having very strong authority. Justice Johan Lind (1996–1997, 362) derived the ultimate consequence: It makes no sense at all for a legal scholar to regard Supreme Court decisions as wrong. They are right by definition, so to say. Such views have been criticized (cf. Nergelius 1997, 437ff.), to be sure. But their existence is in itself worth noticing.

1.5.2. The Binding Force of Precedent

While the question, What is binding in a precedent? is technically juristic, and can be developed in an advanced manner without recourse to a philosophically oriented legal theory, the question of the binding force of precedent requires a deep theoretical investigation.

Without theoretical reflection, one may simply state that some precedents in common law are binding *de jure*, while precedents in continental law are binding *de facto*. But this is not satisfactory. The expression "binding *de facto*" seems to imply that precedents lack normative force even if usually followed. A view of this kind may be theoretically naive, or it may be accompanied by some sophisticated theories. For example, a law theorist may adopt an external point of view with regard to legal practice. A theorist may thus interpret

the expression "*de facto* bindingness" as referring to a statistical regularity, supposing the expression to express the empirically established fact that judges regularly follow certain (types of) precedent. A theorist may also understand the "*de facto* force" of precedents to mean that precedent is (a part of) the judge's motivational basis. This was, for instance, Alf Ross's idea in his theory about the normative ideology of the judge. Thus, Ross's theory was an external description of the judges' internal point of view. On this conception, precedent exerts a "psychological force" in decision-making.

This was the mainstream theoretical solution some fifty years ago. But the solution is highly objectionable. Any non-normative interpretation of "binding *de facto*" is contrary to the lawyers' internal understanding of legal practice in most countries. The word "binding" carries a normative connotation and cannot be reduced to non-normative facts. The theory of *de facto* bindingness is thus self-contradictory and not particularly interesting (cf. MacCormick and Summers 1997, 465ff.).

A better way to express the various kinds of normativity involved in bindingness and normative force is as follows: Precedents that are formally binding, or binding *de jure*, *must* be regarded as authority reasons in legal argumentation. Precedents which are not formally binding, but which have normative force, *should* be used as authority reasons in legal argumentation. This "should" is legal in character, though not in the strict sense of being binding *de jure*. The normative force of all precedents—even those that are not binding *de jure*—is a legal, authoritative force.

All this has interesting consequences for the structure of legal systems in general. One may say that a legal system consists of two layers: norms that *must* be regarded as authority reasons in legal argumentation—as formally binding or binding *de jure*—and norms that merely *should* be regarded as authority reasons in legal argumentation.

The terms "must," "should," and "may" deserve further theoretical analysis, in much the same way as they do in the context of statutory interpretation. As we have seen, this analysis involves a theory of defeasible rules. A theory of this kind exceeds the compass of everyday legal doctrine and requires that we go deep into philosophical analysis.

1.5.3. Justification of Precedent

The question how to justify the binding force of precedents is highly philosophical and yet is a subject of frequent discussion in Anglo-American jurisprudence. Roger Shiner (vol. 3 of this Treatise, 59–60; see also Shiner 1982) states the following.

> There are many standard ways in the literature of seeking to justify *stare decisis*. Richard Wasserstrom, for example, lists certainty, reliance, equality, and efficiency […]. Fairness, in the

sense of the maxim "Treat like cases alike" is regularly mentioned. More specific reasons are also adduced, such as the avoidance of delayed justice, the greater decision-making proficiency of superior courts, the desirability of uniform decision-making in the law [...]. Dworkin [...] appeals to the value of integrity [...]. Anthony Kronman [...] appeals to tradition and respect for the past as values in themselves [...]. Gerald Postema [...] neatly combines elements of both these views while rejecting each, in defending integrity as coherence with the past, but subsuming its value under justice as a characteristic of well-ordered historically extended communities. [...] Antecedently, it would seem unlikely that any single value or set of values would by itself or themselves justify *stare decisis*.

The plurality of values involved in the system of precedents provokes the question whether the system does not suffer inevitably of indeterminacy. Shiner put it this way:

It is an inescapable feature of decision-making by rule that such decision-making is sub-optimal (Schauer 1991, 100ff.). Rules phrased in general terms will be over-inclusive, under-inclusive, or both, with respect to specific instances. We accept that, though, in order to achieve the advantages of decision-making by rules (Schauer 1991, 135–66). [...] But it is a mistake to think that therefore the actual decision under *stare decisis* was unfair. [...] The values that are arguably fostered by a system of *stare decisis* come in at the level of justifying having such a system at all. The system itself, however, insulates decision-making within the system from those values directly influencing the individual case, certainly at every level below that of the supreme tribunal of the system. To the extent that there is "indeterminacy" within the system at the lower court level—mechanisms of distinguishing precedent cases and the like—then there will be seepage of the background values into instances of decision-making in cases. But this seepage constitutes a feature of the rule model of reasoning from precedent, not its repudiation. (Shiner, vol. 3 of this Treatise, 60–1)

1.6. The Doctrine of Fact-Finding

Though general legal doctrine focuses on interpreting statutes and precedents, it has also developed other argumentative contexts. One of these is fact-finding in the law and interpreting legal facts. In some countries, these problems are discussed under the umbrella of legal doctrine; in others, in the context of procedural law. The problems are exceptionally difficult because they require technical juristic sophistication as well as a knowledge of general epistemology. One can mention the following problems.[23]

- How should we set out the difference between a statement of fact and a statement of opinion?
- How can we arrive at shared criteria of what counts as a fact or as a factual statement?

[23] The same group of scholars that published *Interpreting Statutes* and *Interpreting Precedents* (cf. MacCormick and Summers 1991 and 1997) discussed the examples below in 1999.

- Can we work out typologies of facts, such as negative versus positive, institutional versus brute, primary versus secondary, and fact in issue versus evidentiary fact?
- How can we distinguish particular facts from generalizations about facts?
- How can we define the relationship between scientific facts, historical facts, and legal facts?
- Are there domain-specific differences in reasoning about facts, for example, differences between criminal law, administrative law, and commercial law?
- How far do fictions, presumptions, burdens of proof, and standards of proof contribute to or result from domain-specific differences?
- Should we seek truth as an intrinsic value even in law, and should we likewise value the rule of law, *raison d'état*, due process, and human rights.
- How should we treat domain-specific differences in preferred proofs (for example, what requirements of writing ought to be set down)?

I will not characterize here fact-finding juristic arguments in any detail. Suffice it to say that this part of general legal doctrine is less uniform in time and space and across particular domains than are the doctrines of statutory interpretation and of precedents.

Chapter 2

PARTICULAR LEGAL DOCTRINE

2.1. Preliminary Remarks

2.1.1. Juristic Theories

Legal doctrine claims to produce theories, which I shall call "juristic theories." Though one can hardly work out a general definition of theorizing, equally applicable to science in the strict sense and to legal doctrine, the word "theory" in the present context indicates the following:

- theory is stable, in opposition to experience, which is fluid;
- theory is justifiable, in opposition to metaphysics, which are controversial;
- theory is a system of statements that displays consistency, clarity, and fruitfulness (cf. Dreier 1981, 79ff.).[1]

Legal theories can have different levels of abstraction. For example, a theory may simply indicate that some cases resemble other cases. The theory provides, then, a description of particular cases, mapping out possible ways by which to follow the law and possible violations of the law, listing possible interpretations of a statute, developing technical solutions that may facilitate obedience of the law and prevent its violation, and developing relevant distinctions between types of cases.

But a juristic theory may also systematize the law under abstract concepts and principles which have been formulated by international instruments (such as the European Convention on Human Rights) or by national legislatures or courts, or which have been worked out by legal doctrine itself. So, too, juristic theory may use historical and comparative studies, or auxiliary sciences, such as psychology and sociology. Finally, it may use all the basic kinds of philosophical study underlying jurisprudence, that is, moral theory, political theory, language theory, logic, epistemology, the theory of science, and metaphysics. In the following chapters, I will deal with the relationship between juristic theories and philosophical theories.

Dreier (1981, 73ff., 93) has proposed the following classification of juristic theories.

Singular theories deal with relatively concrete norms. There are three kinds of such theories. Interpretive theories constitute the first kind. Thus, the German theory of the essential content (*Wesensgehalt*) of a basic right fo-

[1] Dreier states as well that theory is rather descriptive than related to action. This reflects the ancient distinction between *vita contemplativa* and *vita activa*.

cuses on Section 19 II *Grundgesetz*. Norm-proposing theories constitute the second kind. They deal with unwritten norms regarded as part of the law. One example is *culpa in contrahendo* in German civil law. The third kind consists of midlevel theories, which can be classified as follows.

- Constructive or qualification theories integrate certain social phenomena into the system of basic legal concepts. Among several examples, Dreier mentions the theory by which the legal position of an administrator of property (*Vermögensverwalter*) is made out to be that of an official or of a representative.
- Institute theories deal with complexes of norms regulating some typical social relationships, such as sale-and-purchase, property, marriage, and school.
- Principle theories deal with content and legal character and with the function of abstract (written or unwritten) norms, like the norms setting out the goals of the German state in Section 20 I *Grundgesetz*.
- Other theories deal with basic concepts, that is, with explicit or implicit abstract elements found in many norms. Among several examples, Dreier mentions the theories of subjective rights, of legal persons, of declarations of intention, of administrative acts, and of crime and punishment.
- Finally, some theories deal with large tracts of the law, such as civil law, criminal law, and administrative law. Each branch (or fragment) of the law contains specific principles[2] and concepts. This role of the internal systematic setup of the law makes sense of such questions as, Does it matter in legal practice that the law of torts should fall under private law, not under public law? Does it matter whether commercial law is or is not a part of civil law?[3]

Let me add more examples. The following juristic theories in private law may be mentioned:

- theories of property in private law; for example, the theory of public trust and the theory based on property rights;
- theories on the transfer of property; among these we have the traditional theory by which all aspects of property transfer simultaneously, and the "analytical" theory by which different aspects of property may be transferred in different moments;
- the will theory, the trust theory, and the theory of assumptions in contract law;

[2] See the typology of principles in Peczenik 1995, 446ff.

[3] Legal orders differ in this respect. Thus, these questions matter a lot in Slovakia (see Bröstl 2000, 51ff.) and much less in Sweden.

- the so-called loyalty principle in contract law;[4]
- theories of intent, negligence, and adequate causation in the law of torts; and
- theories of authorization and theories of the bill of exchange (cf. Aarnio 1997, 256ff.).

Among the theories of criminal law we have

- again theories of intent, negligence, and adequate causation;
- theories stating the goals of punishment (treatment, deterrence, retribution, etc.);
- theories of criminal action, instigation, and complicity; and
- the theory of omission as a kind of action.

In constitutional law, some juristic theories draw on political philosophy; such is the case with theories of democracy (see Peczenik 1995, 63ff.) and the rule of law (ibid., 50ff.; Fuller 1964; Hayek 1960). An important theory of German constitutional law deals with weighing principles and with proportionality (see Alexy 2001, 2003, and Section 5.1 below). Another important German theory deals with the essential content of basic rights (see Nergelius 1996, 245ff.). There are also corresponding theories in other legal orders (see ibid., 155ff.). Other theories of constitutional law are closely related to general legal doctrine, as is the case with theories determining the relative importance of different sources of law.

The doctrine of human rights contains a wide spectrum of problems, ranging from basic political philosophy to technical juristic problems such as interpreting laws on the freedom of demonstration.[5]

In administrative law, one can mention the overarching theory contrasting public and private law and the theories on the state's tort liability for damage caused by state employees, and we also have some more-specific theories, such as the theory of compelling danger (*Notstand*) facing a police officer (cf. Maurer 2000, 495).

An important part of the doctrine of procedural law concerns principles, often having ancient or medieval history on their side, such as *nemo iudex in res sua*, *audiatur et altera pars*, *ne bis in idem*, the legality principle (*nullum crimen sine lege*), presumption of innocence, *in dubio pro reo*, and *in dubio mitius*. These principles help legal practice find the proper balance between the main goals of the legal process, as between efficiency and protection of the parties (cf. Nowak 2003, chap. 4).

[4] In Sweden, see Nicander 1995–1996, 49.

[5] There is extensive bibliographical work on the subject; see, for example, the bibliographies published by The Human Rights Center, Institute of International Studies, University of California at Berkeley, at http://globetrotter.berkeley.edu/humanrights/bibliographies/.

There are also some principles in tax law, such as the principle making taxation proportional to the taxpayer's economic capacity, the legality principle (no tax without law), and *in dubio contra fiscum*.

2.1.2. The Distinction between Public and Private Law

Most domain-specific theories of legal doctrine have evolved in private law and criminal law. Theories of public law are more dependent on political philosophy.

Private law deals traditionally with relationships between persons (witness family law and inheritance law); with property, contracts, and torts; with associations, bonds, and instruments of value; etc. Its precise scope varies from one state to another. A general definition of private law is neither interesting nor possible; but one may discuss the distinction between private and public law on the basis of the following criteria (Maurer 2000, 44ff.):

- Private law protects private interests; public law protects public interests.
- Private law regulates horizontal relations between equal parties; public law regulates vertical relations of subordination.
- Private law regulates relations ascribed to the citizenry at large; public law regulates relations ascribed to the state and other authorities.

Though much discussed some years ago, the distinction is no longer very popular. But it might be coming back in a more philosophical form. Thus, Benjamin Zipursky uses the framework derived from Blackstone and Locke and then states what follows: "At the basis of our system of private law is a principle that, under a variety of different circumstances, individuals are *entitled* to act against other private parties in a variety of ways" (Zipursky 2002, 643).

Moreover:

> A fundamental difference between public and private litigation is that public litigation—most obviously, criminal prosecution—involves a state's effort to exercise its power to act against a defendant, whereas in private litigation, it is a private party who attempts to exercise her power against the defendant [...]. The state is acting, but responsively; it is not initiating action. (Ibid., 649–50)

2.1.3. Inner and Outer System in Private Law

The doctrine of private law makes sense only in the structural and systematic context of this domain. Thus, we have to deal with the general part of private law: with persons, transactions, contracts, torts, family law, inheritance law, etc.

One can distinguish between the outer and the inner system of law. The inner system presupposes the outer (cf. Bydlinski 1996, 5). The "outer system" of private law is a readable and accessible ordering of legal materials.

Legal concepts linked to one another within the single parts of private law (contracts, torts, etc.) as well as across different parts—e.g., obligation law and law *in rem*. One cannot understand private law without understanding its systematization.

The inner system of private law is a system of justificatory relations. Some norms, when coupled with external data, justify other norms (ibid., 16). Each part of private law has its own principles, but these are justifiable in relation to general principles. This is possible because extensive normative phenomena are more stable than singular rules (ibid., 22). Normatively specific fragments of the law display specific combinations of principles (ibid., 23). The inner system unifies private law into a coherent whole (ibid., 74).

Concepts in private law are framed to describe the outer system as well as to provide justifications for the inner system. These concepts hang together and presuppose one another. The doctrine of private law pays close attention to the concepts used in statutes and legal practice, but it also creates new concepts by generalizing logically possible cases. Secondarily, it may pay attention to social relationships whose connection with the statute and with legal practice is more indirect.

The inner system of private law as a whole is not a deductively axiomatic system (Bydlinski 1996, 27), even if one can reconstruct some of its parts deductively (ibid., 31ff.). Complete justification in private law must involve all the higher levels of justification (ibid., 44).

The system of justificatory relations includes end-means relations. A good example is the teleological theory of Per Olof Ekelöf, still dominant at the Uppsala Law Faculty. Thus, Bert Lehrberg uses Ekelöf's teleological theory to outline the structure of contract law.

2.1.4. Principles of Private Law

There is a vast literature on principles and policies in private law, among other kinds. And this literature is full of theoretical controversy. So it may be safer here to provide examples of principles in private law, refraining at this stage from theoretical analysis. The point of exemplification is to show that there are many such principles, and that their scope depends on the systematization of the law. Bydlinski sets out the following fundamental principles of all law, including private law:

- protecting basic goods (such as life and dignity);
- maximizing equal freedom;
- ensuring distributive justice;
- providing minimum subsistence;
- protecting the weak;
- providing corrective justice;

- guaranteeing security and peace under the law;
- protecting acquired rights;
- using state organization to guarantee security under the law;
- purposefulness as adequacy of reflective goals;
- purposefulness as utility; and
- purposefulness as economic efficiency.

He lists the following as principles of private law (Bydlinski 1996, 92ff.):

- the principle of relative (bilateral) justification;
- the subsidiarity principle (property shall stay by the lowest effective unit);
- the principle of self-responsibility.

There are also many more-specific principles. I will cite some of them, following Bydlinski. The point here is not to accept his systematization of private law, but merely to show that such systematization is possible. This is an interesting exercise even if there may be many competing ways to systematize private law.

The general part of private law includes the following principles with regard to persons:

- recognizing individual subjective rights as individual legal powers;
- according priority to public protection over individual self-defence;
- prohibiting the abuse of rights;
- ensuring equal legal capacity;
- ensuring equal protection of personal rights;
- ensuring equal capacity of legal action, or a capacity of legal action graded to individual handicap;
- ensuring freedom of association;
- ensuring the freedom to set up associations;
- securing, in principle, the equal position of legal persons (such as corporations) and physical persons (individuals);
- requiring corporate organization as a precondition of the legal capacity of associations;
- protecting minority groups; and
- exercising state control over the right to institute associations.

The general part of private law includes the following principles with regard to transactions:

- ensuring private autonomy in transactions;
- the consensus principle;
- protecting transactions, and especially trust;

- permitting and enabling transactions;
- assuming responsibility for promises and declarations of intention; and
- loss of rights in consequence of long passivity.

The following principles, among others, concern contracts and torts:

- personal liability;
- loyalty;
- limited obligation to conclude contracts;
- causation of damage as a ground of liability;
- compensation for damages;
- the negligence principle;
- prevention of damages;
- joint liability of a victim who is partly at fault; and
- maximum of compensation.

The principles of property law include the following:

- exhaustive enumeration of types of rights *in rem* (*numerus clausus*);
- publicity;
- fixed order of priority among rights *in rem*;
- protection of good-faith acquisition;
- freedom of property; and
- limitations of property in the public interest.

The principles of family law include:

- the permanent character of family relations;
- transparency of family relations;
- enforcement of institutional, non-individual purposes (the goals of a family);
- equal rights of the sexes;
- monogamy; and
- acting in the best interest of the child.

The principles of inheritance law include:

- freedom of testaments; and
- universal succession.

Bydlinski also enumerates principles for special parts of private law: for commercial law, association law, value-papers law, immaterial law, labour law, competition law, and insurance law.

Bydlinski thus lists a great many principles. The list begs several questions.

- Do the principles carry normative consequences, or are they empty formulas, forms of argument, platitudes?
- Is only one such listing of principles thinkable, or are there many possible lists?
- If there are many lists, what system of principles is best and why?
- What criterion should be used for what is best? Morally best or best as what is most fitting for the positive law? In the latter case, what exactly does "fitting" mean?
- Which principles express human rights? Which ones have a less central position? In particular, do all the fifty principles formulated in the European Union Charter of Fundamental Rights express human rights? Can one speak of fifty human rights? Or should we rather speak of fifty principles elucidating the six main values: dignity, freedoms, equality, solidarity, citizen rights, and justice?
- Are such principles universal? Or are they rather bound up with certain periods in history? Are the principles valid for the whole of modern law, for the whole of modern Western law, or for the whole of law in the 21st century? How should one discuss these questions?
- Are these principles valid despite value pluralism in modern society?

2.2. Philosophical and Juristic Theories of Property

2.2.1. Philosophical Theories of Property

Philosophical theories of property use conceptual analysis, ontological distinctions, epistemological reflection, and general normative philosophies in the effort to solve normative problems. Let me make an example: "The ontological differences between material chattels, land, and intellectual property can have an important bearing on questions of justification" (Waldron 1996, 4).

The author takes into account a number of philosophers who produced justificatory theories (ibid., 11ff.): Plato, Aristotle, Grotius, Pufendorf, Hobbes, Locke, Hume, Adam Smith, Rousseau, Hegel, Marx, Bentham, Mill, Nozick, and Rawls.

Of course, debates of this kind involve professional philosophical reflection, mostly in the spirit of individualism and liberalism, but also in the spirit of communitarianism, Hegelianism, and other society-centred views. Thus Alan Brudner, a Hegelian philosopher, states the following: "The law of property (and indeed the common law as a whole) may thus be a system of doctrinal systems" (Brudner 1995, 24). And:

> The principles that are opposed in property law—the negative freedom of the atomistic self and the positive freedom of the socially constituted self—are not Manichean extremes having

no connection with each other. Rather, each contains the other within itself. The common good is *individual* autonomy; and the individual self's objective worth […] presupposes community. (Brudner 1995, 78)

The philosophy of property is valuable because the thinkers who work at it make an earnest attempt to arrange the existing laws under a justificatory first principle. Thus, they introduce a degree of coherence into property law. To be sure, a first principle of this kind can scarcely serve as an axiom from which the actually existing or the best property law follows logically. But it can serve as a basic model for understanding property law. Some parts of property law will follow from this first principle; others will be conceived as justified departures from it. "Justified" means here that they have the support of other principles and rules derived from various philosophies, authorities, and practices.

Even if philosophers fail to find a unique and uncontroversial principle for this role, they might produce a number of possible principles of this kind. But a critic may find that this assessment is curiously distant from the real life of the law. A philosophical first principle for property law may be useful to politicians looking to buttress their political manoeuvrings and agendas with philosophical rhetoric, but it cannot really determine political decisions, because those advocating various political views disagree with one another and use philosophical arguments to support their positions in particular and practical matters. As an example, one can mention the American debate on the standing of television: Is television a public trust or is it private property? The doctrine of public trust, having its roots in Roman law and in English common law, underscored the legal right of the public to use certain lands and waters. This right may be concurrent with private ownership. Some political reformers have enthusiastically applied this doctrine to television.[6] The critics of this doctrine advocated private property. The proper delimitation between the doctrine based on property rights and the public-trust doctrine will depend on a weighing and balancing of considerations. Such balancing provides ample space for political manipulation.

2.2.2. Juristic Theories—Transfer of the Right of Ownership

Upon crossing the Atlantic, one lands in another planet. In particular, Scandinavian jurists take on tasks that are much less dramatic. They describe statutes and cases—the outer system of property law. They may even express some normative standpoints but seldom arrange them under philosophical first principles.

If they ascend to a higher level of abstraction, it is not to seek normative advice but to discover analytical truths. Then, in looking to systematize the

[6] Beginning in 1991, the Government Law Center of Albany Law School sponsored conferences on Public Trust Doctrine. See http://stella.als.edu/glc/ptd-home.html.

complex content of positive law, they may use some of the analytical tools worked out in philosophy.

For example, Aulis Aarnio (1997, 265ff.) has discussed theories of the legal position of heirs and the right of ownership. He did not mention classical philosophers, but discussed instead the structure of property in the particular context, that is, in the transfer of the right of ownership. Legal doctrine has long used the traditional theory (*T1*) by which the right of ownership constitutes in principle an owner's unlimited power over the object. At any one moment, all the aspects of ownership can only belong to one, and only one, physical or juridical person. Even if several persons own the same thing jointly, each of them will enjoy all the aspects of ownership, but only as regards one part of that thing, a part identified either physically or in abstract terms, for example, percentage-wise. A sale will thus result in an instantaneous and total transfer of ownership: Initially the seller is a full owner, and then the buyer is. But this traditional view has met with difficulties in exceptional situations, e.g., when the assignment of chattels is supplemented with a suspensive condition or clause by which the ownership rights will not transfer to the assignee fully until the subsequent occurrence of a given act or event. In this interim period, the assigner no longer has full rights of ownership, and the assignee will not have received full rights, either. For this reason, certain auxiliary theories have been developed in addition to the traditional theory of ownership. Thus, the situation in the interim period has been characterized as a potential right, an expectative right, or a conditional right of ownership.

According to the newer "analytic" theory of ownership—*T2*, formulated by Alf Ross, among others (Ross 1958, 170ff.; Wedberg 1951, 246ff.)[7]—"ownership" is an "intermediate" concept connected with two clusters of norms, the first determining the conditions for becoming an owner, the second setting out the legal consequences of becoming one. If *A* buys or inherits a property, or receives it as a gift, she will then own the property. If she owns the property she may then use or sell it or bring a legal action against anyone who should interfere with such use or sale. Now, contrary to what theory *T1* says, the change of ownership is understood, not as an instantaneous event affecting all ownership rights, but as a series of events in many stages. One can now interpret the transfer of ownership as a process by which one person gradually acquires over time more and more aspects of ownership (cf. Ross 1958; Zitting 1959, 227ff.).[8] Aarnio's comment is that

> the conceptual equipment of *T2* makes it possible to achieve a more detailed analysis of relevant problems than the corresponding equipment of *T1*. This means, more detailed questions, and further, more detailed and richer answers. On the basis of this fact, it seems also to be well-

[7] See also Lindahl's and Odelstad's formalization, Section 5.5 below.

[8] The idea can be traced to a Finnish court ruling issued in the 1880s and to the Finnish jurist Torp. (This I learned from Lars Björne.)

founded to claim that the change from *T1* to *T2* has been an expression of scientific progress. (Aarnio 1997, 272–3)

An interesting application of the theories of ownership concerns the heir's legal position. In the legal orders based on Germanic law, the inheritance transfers to the heirs immediately after the decedent's death. If there are two or more co-heirs, they acquire joint ownership of the property that belonged to the decedent. Two theories of the co-heirs' right of joint ownership have been developed. The theory of indivisible ownership (*T1*) argues that all co-heirs, upon the decedent's death, will jointly own the property in the estate, even if an individual heir does have a right to a portion of the estate as such. On the theory of divisible joint ownership *T2*, each heir will have an imagined, ideal portion (or share) of each individual object in the estate. Correspondingly, the heir's rights will consist of a conglomeration of the imagined portions belonging to her, and there are as many imagined portions as there are objects. The two theories entail similar consequences: The individual heir may not dispose of the objects in the estate.

These two theories would later lose ground to a third theory (*T3*) by which ownership rights are best viewed as composed of component parts, each susceptible to change in a variety of ways in a variety of situations. Aarnio regards it as a paradigm shift: "If *T1* and *T2* are considered articulations of a conceptualist legal dogmatic paradigm, then, in accordance with the above, *T3* is clearly an articulation of an analytical paradigm" (Aarnio 1997, 267).

T1 and *T2* differ from each other only in a very abstract—almost philosophical—way. *T3* differs from both *T1* and *T2* in a philosophical way, too, since it no longer regards ownership as indivisible. But it also differs from them in another respect, namely, it allows for normative solutions that would appear conceptually impossible in the light of *T1* and *T2*. This is all right according to Aarnio, because the idea of ownership as an indivisible whole was too inexact to solve complex legal conflicts in a dynamic society.

2.2.3. Benson's Formalistic Analysis of Property

The idea of ownership as a single unit having aspects linked to one another—though almost abandoned by the analytically minded jurists—is making its way back.[9] Thus Peter Benson has developed a distinct, juristic conception of rights characterized as follows:

A defendant is subject only to a prohibition against injuring what already comes under the plaintiff's right of ownership: in the formulation of the common law, there is no liability for nonfeasance. [...] Secondly, the juridical conception supposes that this protected ownership in-

[9] See also Simmonds 1998, 195ff., on the reemergence of the will and interest theory after Hohfeld.

terest, and hence the plaintiff's right, is of such kind that the only way it can be injured is just through external interaction between the parties. […] Thirdly and finally, the juridical conception of rights [does not deal with] assessing what the general welfare or common good may require. In so restricting its purview, the law purports to articulate terms that are fair and reasonable as between the parties, in the light of their particular interaction. (Benson 2002, 755–6)

Benson distances himself from such ideas as that expressed in the analytical theory of ownership by which the incidents of property are construed as a "bundle" of rights, liberties, powers, immunities, and so forth (ibid., 771).

The three incidents […] of the right of property under first occupancy—namely, the right to possess, the right to use, and the right to alienate—are fully integrated and mutually interconnected, albeit distinct, expression of the very same conception of property. (Ibid.)

Moreover:

The equality of individuals consists in their absolute identity as self-authenticating sources of claims.
This conceptually basic view of individuals as free and equal is the juridical conception of the person ("juridical personality") and is reflected in the right of property. (Ibid., 813)

2.2.4. Philosophy as a Tool of the Doctrine of Property

When jurists discuss property, they often turn to philosophy as a tool. Whereas some American jurists attacking political problems use classical moral philosophy as a tool, some European jurists use logical analysis as a tool. My use of the word "tool" is meant to suggest that the deepest ground for juristic theories does not lie in general philosophy. Thus, for example, one notices the following about Benson's argumentation: A part of the argument consists in a conceptual analysis of juridical property rights in relation to several other juridical concepts, such as possession, use, alienation, compensation, and thing. But there is also a normative side to the argument, which consists in assuming that when property law is organized around these concepts, it carries an inner normativity of its own. This normativity can then be reinforced from the outside by philosophical considerations of freedom, equality, and so on.

Aarnio's argument deserves a similar comment. He presents this development as an attainment of greater theoretical sophistication. The analytical theory is indeed much more precise than the old theories.[10] Moreover, it is clearer in its avoidance of complex metaphysics. According to the older theo-

[10] Aarnio's theory, and the European theories in general, is—on the face of it—"less philosophical" than the American theories in its use of philosophy to frame property law. But this is not entirely accurate. There is behind the European theories, and the Scandinavian theory in particular, a lot of work done by professional logicians, such as Stig Kanger and Lars Lindahl, who refined the analysis originating with Hohfeld.

ries, ownership was an indivisible unity, not unlike a substance. The analytical theory, on the other hand, did not recognize these controversial entities. But there is another part of the argument whose main concern is power rather than clarity. The analytical theory dissociated itself from any thought that the concept of ownership may have normative consequences. The lawgiver, rather than the conceptual speculations undertaken in legal doctrine, should regulate the normative content of law. Thus, the analytical theory encourages creating (in legislation or in legal practice) legal situations where the rights traditionally accorded to the owner exclusively are spread among many subjects. This is a flexible tool that enables the legislature and judiciary to conceive combinations of Hohfeldian legal positions previously not conceived. Analytical sophistication of this kind makes more logical space for legislation and statutory interpretation: It frees the politicians and the judiciary from constraints previously imposed by traditional conceptual jurisprudence, in effect taking some power away from legal scholars and handing it over to politicians and judges. The state may use this tool to take over some aspects of ownership and thus to interfere in private economy.

These questions lead to the following assessment. Though the analytical theory of ownership appears to be more sophisticated than the older theories, this is no reason reduce ownership to its simple Hohfeldian components. The components and the totality are both useful in normative debate. Once this political context of analysis is recognized, one also acquires a tool for further political debate. It will make sense, for instance, to ask whether certain legislative restrictions on the right to dispose of real-estate property are just in one respect only if compensated with generosity in another respect. Should not a homeowner subject to tough restrictions on her right to rebuild or rent a house at least retain an unrestricted power to sell the house? This debate can also prompt a conceptual question: Can an ownership that is restricted in one way also be restricted in another way and yet still preserve its nature as ownership? For example, can a person still be said to own a house who may not rebuild or sell the house at will?

2.3. Juristic Theories in Contracts

2.3.1. What Justice? What Freedom?

The big moral questions in contracts are justice and freedom. Philosophers disagree: Some emphasize freedom, others emphasize justice. There are also intermediate positions (e.g., Richardson 1990, 258).

Moral theory enters contract law through considerations of justice, among others. The traditional view rests upon the concept of commutative justice, holding that adjudication must follow considerations relevant to the parties and must avoid such broader moral and political issues as distributive justice.

Some writers, however, emphasize distributive justice. Thus, Anthony Kronman (1980, 472) suggests, contrary to the ideology of welfare-state liberals and libertarians, that the rules of contract law should be utilized to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive.

Kronman emphasizes groups, not individuals. What is decisive is that "the welfare of most people who are taken advantage of in a particular way be increased by the kind of advantage-taking in question" (ibid., 483).

Unsurprisingly, there are also more complex normative theories. For example:

> Building on his interpretation of Aristotle, Thomas Aquinas, and the Spanish natural law school, Gordley proposes that the virtues of liberality and commutative (or corrective) justice constitute the two main ends of contracting. A party's obligation should depend on which virtue he has exercised. (Benson 1996, 43)

The overall impression is that philosophers are quite helpless when facing the real life of contracts. They employ sophisticated conceptual analysis, yet each of them arrives at her own preferred political position.

The same applies to freedom. The legal concept of freedom of contract emerged in the late 18th and early 20th centuries under the impact of liberal political theory (cf. Gordley 1991). There is a natural link between liberalism and the concept of freedom of contract (cf. Kimel 2001, 473ff.). But there are also controversies about what liberalism requires as well as about what "freedom of contract" should mean. Should one be free to make contracts and have them enforced, despite the fact that there may be moral, economic, social, or political reasons that would indicate restrictions to this freedom?

There is no single correct definition of freedom, but a cluster of overlapping definitions. Only complex definitions capture the central intuitions concerning freedom. For example, according to G. C. MacCallum (1967, 312ff.), freedom has both a positive and a negative aspect. Freedom is a threefold relation, expressed in the scheme:

X is free from *Y* to do *Z*.

Christine Swanton (1992) has developed a coherence theory of freedom based on a wide reflective equilibrium among defeasible considerations of "endoxa," meaning opinions accepted by many or the wise. Ola Svensson (2001) has added to this the idea of complex real freedom, which means two things:

- *Ceteris paribus*, with every new possibility of action, a person is that much freer.
- *Ceteris paribus*, the greater the importance of these possibilities, the freer this person is.

Freedom of contract has economic consequences, too. Thus, formal freedom of contract leads to Pareto optimality: A change in the distribution of resources is optimum and desirable if at least one person considers herself to be better off while no one becomes worse off (see Coleman 1988, 95ff.). A perfect market would lead to Pareto optimality. No market is perfectly competitive, however. Theorists thus discuss the "morality of market failures" (see Collins 1995; Trebilcock 1993). Another economic concept is the Kaldor-Hicks criterion: A change in the distribution of resources is optimum if either Pareto optimality is achieved or those who have gained by the resource reallocation can compensate those who have lost out by it (see Coleman 1988, 98ff.). The Kaldor-Hicks criterion is conceptually independent from freedom of contract. In effect, theorists disagree whether the allocation of resources should follow Pareto optimality, the Kaldor-Hicks criterion, or other moral considerations. The best solution may depend on the degree of market failure and of freedom of contract.

2.3.2. The Binding Force of Contracts

There is a complex controversy on the binding force of contracts. Sophisticated theories differ from one another at a high level of abstraction. Thus, the promise theory derives normative consequences from the principle that contractual obligation is a self-imposed obligation. In the European context, a similar theory is Windscheid's will theory. One philosophical justification of the promise theory is this:

> There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke the convention in order to make a promise and then to break it. (Fried 1981, 17)

Another theory is the reliance theory.

> According to a reliance theory, a contractual obligation is essentially an obligation not to let someone down whom you have induced to rely upon you. It is, in other words, an obligation to ensure the reliability of induced assumptions. (Smith 2000, 115)

What, then, does the binding force of contracts rest on? On invoking a convention, on inducing reliance, or on valid transfer? What is the criterion for choosing a theory?

2.3.3. Moral Philosophy, Economics, Legal Research

Perhaps each theory has something important to say. There is behind contract law a much broader set of values. One must consider the relationship among three different kinds of research: moral philosophy, economics, and legal re-

search. Jurists provide a map of situations in which one needs to rely on evaluations. Moral theorists tell us something about the justification of evaluations. It can happen that one moral theory is intuitively more convincing in one such situation and another in another situation. Economics delivers concepts and distinctions useful to moral theory and other concepts and distinctions useful to legal research. Intuitionist moral theorists can profit from economics because it gives them a map of situations that trigger moral intuitions. Legal research profits from various kinds of moral and economic considerations weighed and balanced depending on the situation.

This plurality of considerations explains why some influential jurists, especially in Scandinavia, present themselves as value pluralists. Thus, Jan Hellner (2001, 93) mentions the following ultimate goals for the law of contracts:

- to make sure that a party who concluded a contract in order to profit from it actually gets that profit;
- to protect the weaker party in a contractual relation;
- to protect the promisor from unexpected consequences of the promise made; and
- to protect the promisee who has placed her trust in another party's promise.

Juristic theories may force the big moral questions into the background. The theories then become less general and less vulnerable to basic philosophical controversies. I will mention two such theories in contracts: the theory of good faith and the theory of assumptions.

2.3.4. Good Faith

American contract scholars in the 1950s and 60s rejected so-called "conceptualist" or "formalist" approaches in favour of supposedly "realist" inquiries. Any effort to reduce the vast complexity of the real world of commercial practice to a general principle was dismissed. Thus, Robert S. Summers (1968) explicitly denied that a general conception of good faith is helpful and proposed instead a series of six categories of bad-faith performance: (a) evasion of the spirit of the deal, (b) lack of diligence and slacking off, (c) wilfully rendering a "substantial performance" only, (d) abuse of a power to specify contract terms, (e) abuse of a power to determine compliance, and (f) interfering with or failing to cooperate in the other party's performance (cf. Barnett 1999).

This attitude toward scholarship began to change in the 1970s and 80s. An example is the theory of good-faith performance developed by Steven Burton (1980). He rejects the list-of-factors approach and holds that legal scholarship must again produce unifying theories. Randy E. Barnett (1999, 1413ff.) would later survey the "core concerns of contract law"—will, reliance, efficiency,

fairness, and bargain—proposing the criterion of manifested intention as a "framework that specifies when one of these concerns should give way to another."

But Summers's categories are much clearer and less controversial than the proposed philosophical super-criterion.

2.3.5. The Theory of Assumptions

Another example is the theory of assumptions in contracts. Originally developed by Bernhard Windscheid (1850; cf. Lehrberg 1989, 34ff.), it presented a tacit assumption of a contract as an undeveloped condition. The plaintiff is not bound by the contract if certain facts take place and

- she had not considered the possibility that these facts could occur and
- had implicitly made it clear that she would not have entered the contract had she known about this possibility.

The contract is void if the defendant knew or ought to have known that the plaintiff would set this condition. The theory is thus based on the hypothetical will of the parties. For this reason, it has been called subjective.

An "objective" version soon appeared that was based on visible assumption and just and equitable risk distribution.[11]

A teleological version of the theory of assumptions—elaborated by Bert Lehrberg (1989)—found success in Sweden. The theory is "a conglomerate of different principles with different levels of precision and unclear relation to each other" (Lehrberg 1989, 277).

The principles provide a classification of various generic cases and of the problems these pose. The solutions are teleological, following Ekelöf's general doctrine by which the consequences of applying the statute in atypical ("hard," or difficult) cases should be the same as in routine cases. According to Lehrberg, one should pay great attention to the consequences of detailed, particular legal provisions. This way, a detailed legislation gains action-guiding importance at the expense of general principles of law.

Lehrberg formulated the following "principles of purpose":

- Trust: The defendant has relied normally upon the validity of the contract; this reliance should be protected.
- Will: Yet the plaintiff is not bound by the contract in opposition to her clearly visible will.
- Protecting good faith: The plaintiff deserves protection if her ignorance of facts is not due to negligence.

[11] Möller and Ussing; cf. Lehrberg 1989, 42ff.

- Fulfilment of the contract: It is easier for the plaintiff to void the contract on the basis of a mistaken assumption if the contract, for any reason, has not been fulfilled.
- Reasonableness: The possible loss of both parties must be considered.
- Profit: The defendant is not in the same need of protection if she stands to lose only the profit to be had from the contract.
- Prevention: The parties must be deterred from making contracts that can be voided.

Much of the theory describes actual or hypothetical generic cases and applies these principles to them. The author presents twelve separate model cases (ibid., 286ff.). He also states that the requirements of good faith vary between different types of assumptions.

The problem is how these principles are to be justified. One may ask, in particular, whether the principles rest on standards of justice. But any such standards are going to be philosophically controversial. The general impression is that the systematization of generic cases and their commonsense solutions is more reliable than any philosophical grounding of these solutions.

2.4. Juristic Theories in Torts

2.4.1. Philosophical Theories of Justification in Tort Law

Why should one be held liable for causing harm or injuring another person? What degree of liability is justified? How extensive should the compensation be? Philosophers disagree. There are various economic theories and various justice-based theories (cf. Perry 1996, 57ff.).

The first economic theory (propounded by Pigou and Calabresi in their earlier writings, cf. Perry 1996, 59ff.) holds that "externalities"—costs that initially fall on *A* because the activity of *B* has caused *A* harm—should be "internalized": The costs weighing on *A* should be transferred to *B*, the causally responsible party.

Another economic theory, introduced by Calabresi in his later writings and developed by Richard Posner, is a deterrence theory. Thus, according to Posner and his followers, the defendant's conduct shall be deemed negligent only if the burden (cost) of precautions was less than the probability of the accident multiplied by the gravity (cost) of the accident ("Learned Hand's formula").[12] In

[12] Judge Learned Hand developed the formula by which one is negligent where the burden (*B*) of avoiding a risk, or package of risks, is less than the probability of that risk occurring (*P*) multiplied by the gravity or severity of the anticipated risk should it materialize (*L*). Expressed algebraically, one is negligent if $B < P \times L$ (United States vs. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947). The formula is now commonly accepted in the law-and-economics movement. Richard Posner is the leading personality of the movement.

other words, the supreme goal of tort law is, and ought to be, total cost minimization (cf. Perry 1996, 61).

The third type of economic theory assumes that the supreme goal of tort law is to spread losses throughout society as thinly and as widely as possible (cf. ibid., 68ff.).

Some economic theories appear to us to be unjust, for example, because they pay too little attention to the economic situation of the person required to pay compensation. Thus, various justice-based theories have evolved. One such type centres around distributive justice. On this theory, the supreme goal of the law of torts is to achieve a just distribution of resources (cf. ibid., 71ff.).

All these theories have been criticized for failing to consider that compensation in torts is a local (person-to-person) problem between parties, and not a global problem of creating an economically efficient or just distribution of resources throughout the community.

2.4.2. Ernest Weinrib's Theory of Corrective Justice in Torts

Ernest J. Weinrib interprets as corrective justice the justice between plaintiff and defendant in the law of torts.

Whereas distributive justice concerns the overall distribution of benefits among a group of people, corrective justice concerns only the relation between two parties, as between the wrongdoer and the plaintiff in the law of torts, without regard to the overall scheme of distribution.

Weinrib develops this idea as follows. First, a system of private law should pursue a coherent end or set of ends. Second, it should follow the Aristotelian perspective of correlative rights and duties based on corrective justice.

> For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. (Aristotle, *Nicomachean Ethics*, v, 1132a)

Third, it should base corrective justice on the Kantian norm of protecting individual autonomy. His conclusion:

> On this view, unreasonable risk is the idea that integrates the defendant's wrongdoing and the plaintiff's injury. The defendant's wrongdoing consists in creating the potentiality of a certain set of harmful consequences; the plaintiff recovers only if the injury is within that set. The consequences for which the defendant is liable are restricted to those within the risks that render the act wrongful in the first place. (Weinrib 1995, 158–9)

The theory has practical consequences. Consider, for example, the famous case Palsgraf vs. Long Island Railroad (162 N.E. 99, N.Y. 1928): A train-station attendant had moved a package while assisting a passenger who was rac-

ing to board a train just then departing. Unbeknownst to the attendant, the package contained fireworks, which exploded just as the package was moved. The plaintiff, a passenger who was standing on the station platform at some distance from the site of the explosion, suffered an injury when struck by a weighing scale. In denying damages, Judge Cardozo insisted that the central tort concept of duty must be defined relationally between a particular defendant's risk-creating conduct and a foreseeable endangerment of the plaintiff. By defining duty in relational terms, Cardozo's opinion faithfully reflects the bipolarity of Weinrib's formalist perspective on rights and duties. By contrast, the idea of tort duties owed to the world at large—an idea articulated in Judge Andrews's dissenting opinion in Palsgraf—deviates from the bipolar perspective and is consequently, on Weinrib's view, erroneous.

Weinrib supports his views with the following considerations of coherence. He insists that the legal positions of the plaintiff and the wrongdoer need to be conceptually connected (Weinrib 1995, 30) and that they must possess a single integrated justification (ibid., 35). Consequently:

> Corrective and distributive justice provide the most abstract representations of unity of justificatory considerations […]. Because corrective and distributive justice are the categorically different and mutually irreducible patterns of justificatory coherence, it follows that a single external relationship cannot coherently partake of both. […] When a corrective justification is mixed with a distributive one, each necessarily undermines the justificatory force of the other, and the relationship cannot manifest either unifying structure. (Ibid., 73)

2.4.3. The Pro Tanto *Locality of Corrective Justice in Torts*

Weinrib's theory has been criticized as artificially isolated from social considerations (cf. Rabin 1996). No doubt, one can ask many questions in this vein: Does Weinrib's theory entail normatively reasonable solutions of cases with strict liability? Does it entail reasonable solutions in cases presenting a so-called *casus mixtus*, as when a thief has bad luck and the stolen property perishes in an accident? Similar questions are possible with regard to all the rich details of the law of torts.

Next problem concerns coherence. Weinrib insists that the legal positions of the plaintiff and the wrongdoer are conceptually connected, that they possess a single integrated justification, and that this justification must rest on one conception of justice, namely, corrective justice. Failing which, these positions are not coherent with one another. But this conception of coherence is too restricted. He thinks that internal coherence in private law must prevail for the sake of individual autonomy, even if this decreases the coherence of private law with the rest of the legal system. It is unclear why this must be so.

It is no wonder that Jules Coleman developed a "mixed" conception that combines the principle of corrective justice, requiring that wrongful losses be annulled, with a "relational principle" that lays this duty of annulment on the

person responsible for the loss. The mixed conception postulates that if the conditions of wrongful loss and responsibility are met, then the wrongdoer must compensate the victim's loss, unless an alternative compensation is in place, such as a social insurance (cf. Coleman 1992, 326). In other words, corrective justice justifies compensating wrongs in general, but does not require laying on the wrongdoer the duty to pay compensation. When deciding whether the burden of payment should fall to the wrongdoer—as against, say, the state or an insurance company—we may justifiably rely rather on distributive justice than on corrective justice.

At a higher level of abstraction, we may introduce openly Hegelian considerations. The following quotation is interesting:

> Neither strict liability nor fault seeks to engulf the law of torts, nor does social insurance seek to displace the law of negligence. Rather, each rules within limits consistent with the preservation of the others' distinctive existence—limits made coherent by the primacy of the whole with respect to its constituent parts. […] This means that while the right to a tort action cannot be extinguished by social insurance, that right must nonetheless yield to the extent necessary to insure a basic level of welfare for all members of the community. (Brudner 1995, 209)

Moreover, private law is not an isolated segment of law. Legal practice—with its use of reasoning by analogy, apportionment of damages, and other legal technicalities to solve the complex problem of causal over- and under-determination—departs in point of fact from Weinrib's ideal. Each deviation has its own justification, which links up with the totality of legal knowledge. Weinrib's coherence is too narrow to grasp this relation. He has a coherent theory of the relation between the parties. This is a good start. But a lawyer needs also a coherent theory of "everything," in which the relation between parties is taken into account together with considerations of interests, deserts, needs, and utilities, both individual and social. A theory of this kind must pay attention, among other things, to restitution, fair risk distribution, and the general deterrence of wrongs (Hellner 1995, 37ff.). It must include a "local" theory of negligence and adequate causation, but it may do so only within a frame to be completed with and corrected by other considerations. This frame must be open to exceptions, defeasible, and *pro tanto*.

A coherent theory so construed must pay attention to both corrective and distributive justice.[13]

2.4.4. Three Intellectual Moves of Legal Doctrine

The overall impression is that philosophers have failed to provide a commonly accepted formula for the justification of liability in torts. How does legal doc-

[13] Cf. Perry 2000, 237ff., on the relationship between the concepts of corrective and distributive justice.

trine handle the disagreement? By making three intellectual moves: relativizing moral theory, localizing problems within parts of the law, and localizing problems in terms of the requirements of liability.

Let me start with relativizing. Jan Hellner (1990, 162ff.; 2001, 92) mentions the following ultimate goals of the law of torts: to compensate the person who suffered an injury or a loss, to assure commutative justice in the sense that whoever pays for additional protection should be considered entitled to this protection, to distribute risks according to economic efficiency, to spread loss among many persons, etc. Such jurists as Hellner usually deny that compensation has a single ultimate goal.

The second move of legal doctrine is to discuss the problems separately for each part of the law. In torts, one must balance such considerations as corrective justice, general deterrence, just distribution of risks, and the victim's needs. Similar factors certainly play an important role in criminal law. A lot can also be said about the retributive, social-utilitarian, and reformative theories of punishment. In contracts, the principle *pacta sunt servanda* has obvious underpinnings in Kantian autonomy, yet social considerations of needs may dominate consumer protection, for example. Labour law must treat desert seriously. But, in some cases, localizing problems in legal doctrine affords only *prima facie* solutions and opens the way to discoveries of a hidden coherence in the legal system. The same problems, principles, and systematizations develop in different parts of the law. For example, tort law and criminal law must both deal with negligence and adequate causation. There is an ongoing process of importing some principles from one part of the law to another.

The third move is to split the discussion on liability into several problems. For example, the jurist distinguishes various requirements of liability, each typically an independently necessary requirement. The sufficient condition of liability is then the joint fulfilment of all these requirements. Which are the requirement of negligence (except in cases of strict liability), the requirement of adequate causation, the requirement of the purpose of legal protection, the requirement of proof, the requirement of strong evidence, and so on (cf. Peczenik 1979a, 283ff.).

2.4.5. Theories of Negligence

Negligence is an important precondition of liability and responsibility in vast areas of the law, not least in torts, contracts, and criminal law. Since time immemorial, jurists have proposed several principles, maxims, and theories in order to draw a demarcation line between what one is and is not liable for. In part, the demarcation is based on negligence, even if there can also be strict liability without negligence and negligence without liability (on this, see the next section). In general, negligence is a mental attitude for which one is blamed. For example, knowing that your action may have brought about

harm and not caring, or not knowing when you should have known. The classical standards of negligence have something to do with normality: One is blamed for carelessness because a normal person, a *bonus paterfamilias*, would take more precautions. The estimate of normality is in turn based either on frequency—what most people do in a certain context is not negligent—or on social expectations. The latter are complex, yet it makes sense to say that one acted negligently even if many other people in that situation have acted similarly. For example, an organizer of a fashionable but extremely risky mountain-climbing tour in the Alps may be found negligent despite the fact that other organizers have done likewise.

Two other theories in competition with the normality standard have appeared just recently: They are Richard Posner's law-and-economics theory and the theory of liability as an element of the welfare-state politics of security. On the law-and-economics theory, the defendant's conduct shall be deemed negligent only if the burden (cost) of precautions was less than the probability of the accident multiplied by the gravity (cost) of the accident ("Learned Hand's formula," which see above). On the other theory, recently presented as an interpretation of some Swedish cases (Dahlman 2000, 58ff.), the defendant is negligent if found to have created an unacceptable uncertainty for the accident victim. The relation between the three theories follows from the metarule (ibid., 106ff., especially 137) by which the main ground for liability is deviation from normality; the law-and-economics criterion is suited for organized activity and the unacceptable uncertainty criterion is suited for organized activity that causes a personal injury.

But this situation opens the question whether we still need the umbrella-term "negligence" to cover all these cases. If we do need this term, what do we need it for? Another problem is how these theories are to be justified. It may be asked, in particular, whether they follow from any standards of justice.

2.4.6. Theories on Adequacy in Torts

Considerations of negligence will not suffice, however. About 1880 a German philosopher, J. von Kries, worked out a theory by which one is not liable when the causation was not "adequate." The theory drew a big following among jurists. Consider the following example: A negligent coachman falls asleep; the horse takes a wrong turn, is struck by lightning, and the lightning kills a passenger. The coachman's negligence is a cause of the passenger's death, but the cause is not adequate. It would, however, be adequate in another case, as when the chain of causation from falling asleep to the passenger's death ends up, not in lightning, but in driving into a ditch. Thus, an unwritten principle of the law of torts was discovered that stipulates that one has to compensate for damage only if the damage is found to be an "adequate" result of the action for which one is held liable. But when is the causal connection "adequate"? Von Kries

came up with two ideas: first, an adequate cause is generally apt to bring about a given kind of a harm and, second, an adequate cause increases significantly the probability of a given kind of a harm.

The relation between negligence and adequacy can be characterized as follows (Peczenik 1979a, 286–90): Negligence depends upon whether a normally careful person—a *bonus paterfamilias*—would not have acted as the wrongdoer did, because she would have foreseen a risk of harm. Adequacy depends upon whether an especially competent person (a cautious expert, a *vir optimus*) would have foreseen a relevant risk of harm of the peculiar type in question. The legal system often requires that both conditions, negligence and adequacy, be satisfied if the wrongdoer is to be held liable.

Different theories of "adequacy" have evolved in legal doctrine (cf. ibid., 153ff.); among them the following: The causal connection between an action and the damage that follows is adequate if, and only if, any action of this kind is apt to bring about (or relevantly increases probability of) a damage of this type. The causal connection between an action and the damage that follows is adequate if, and only if, a very cautious and well-informed person (a cautious expert, a *vir optimus*) can foresee the type of damage in question. The causal connection between an action and the damage that follows is adequate if, and only if, this action is a not-too-remote cause of the damage. The causal connection between an action and the damage that follows is adequate if, and only if, this action is a substantial (important) factor producing the damage.

Each theory claims to be the general theory of adequacy, but each, while reasonable, is contestable. Such theories must be brought into equilibrium with considerations of corrective and distributive justice. Thus, to some extent, moral reasons can be proffered to justify the choice between thinkable criteria of adequacy. And moral reasons can be found for the conclusion that a person shall not compensate for damage even if she had adequately caused it. On the theory of the "purpose of protection" (*Schutzzweck*), the wrongdoer is thus liable only for the damage against which the norm in question is intended to afford protection. *Schutzzweck* is then an extra condition of liability apart from adequacy (see references in Peczenik 1979a, 153ff.; see also Stoll 1968; Andersson 1993). But the new formulations are likewise controversial. Moreover, several authors have tried to replace the theories of adequacy with the purpose of protection or with the law-and-economics theory (see Landes and Posner 1987, chap. 8, and the following footnote, in Posner 1995): "This is not to deny causality: [I]t is to deny that the law requires a concept, definition or doctrine of causation" (Posner 1995, 185, n. 38).

In practice, one must find an equilibrium between abstract considerations and less abstract normative intuitions on the proper solutions to generic cases. A large part of each doctrinal theory describes actual or hypothetical generic cases and applies the chosen principle of liability for adequately caused damage to them. There are many such cases. Special problems come up, for example, in

connection with multiple "competing" causes of the harm (see Peczenik 1979a, 63–100). Using a more up-to-date terminology, one can speak of problems in the cases of over-determination-cum-preemption. Thus, if a certain type of damage *D* is generally consequent upon causes of the types *X* and *Y*, then, given an antecedent *X*-action, a *Y*-action will not necessarily raise in any significant way the probability of a *D*-damage (while the antecedent *X*-action does significantly raise the probability of *D*). Even so, it may still be that the resulting damage *D* is ascribed to *Y* as its (adequate) cause, rather than to *X*, if the intervening *Y*-action preempts the causal connection between *X* and *D*.

We must also distinguish property damage from personal injury, and initial harm from consequential harm. Legal doctrine surveys these cases systematically. The following kinds of cases occur in the context of adequate causation in torts (cf. Peczenik 1979a, 38ff., 206ff.):

- Multiple sufficient causes of a divisible harm.
- Simultaneous, independently sufficient causes of indivisible harm.
- Non-simultaneous, independently sufficient causes of indivisible harm.
- An "overtaken" cause consisting in the plaintiff's illness or vulnerability.
- Is *A* liable when another person's fault hastens the harm?
- Is *A* liable when an accidental event hastens the harm?
- Liability for redundant causal factors.
- Cumulative causes to which fault can be ascribed.
- Cases involving the victim's intervening fault.
- Cumulative causes, one of them consisting in an unusual accidental event.
- Cumulative causes of an injury, one of them consisting in the victim's illness or vulnerability.

And so on (cf. ibid.).

2.5. Some Theories of Criminal Law

2.5.1. Philosophical Justification of Punishment

Criminal law, too, has its philosophical underpinnings. Duff (2002b) lists the following basic questions with regard to the justification of punishment:

> As Hart famously pointed out [...], we must distinguish at least three justificatory issues. First, what is the "general justifying aim" of a system of punishment: What justifies the creation and maintenance of such a system—what good does it achieve, what duty does it fulfil? Second, who may properly be punished: What principles or aims should determine the allocations of punishments to individuals? Third, how should the appropriate amount of punishment be determined: How should sentencers go about deciding how severe a sentence they should impose? We can add a fourth issue, which is insufficiently discussed by philosophers: What concrete modes of punishment are appropriate, in general or for particular crimes? (Duff 2002b)

We can trace in criminal law a tension—similar to that which we have in torts—between justice-based responsibility and social considerations. Theories of punishment depend to a considerable extent on considerations of justice (as is the case with retributive theories) and of utility (as is the case with consequentialist theories stating for punishment such goals as treatment and general and particular deterrence).

A consequentialist must justify punishment (if she is to justify it at all) as a cost-effective means to certain independently identifiable goods. But this punishment can be unjust, and hence wrong. For this reason, retributivism assumes a different position: Penal desert constitutes a necessary and a sufficient reason for punishment (cf. Duff 2002b). Retributivism has normative consequences. Consider, for example, the following quotation: "I believe that these three culpable mental states—purpose, knowledge, and recklessness—all exhibit the single moral failing of insufficient concern for the interests of others" (Alexander 2002, 828ff.). Moreover, "negligence and strict liability, which are not culpable mental states and do not evidence negative desert, cannot themselves provide justifications for punishment" (Alexander 2002, 830).

One can also discuss whether Mill's Harm Principle specifies the only kind of good reason for criminalization (cf. Duff 2002a) or whether there also exists harmless wrongdoing.

The dependence of criminal law on philosophy shows itself in a trend towards abstraction. As in torts, we can observe here the high sophistication and great controversiality of abstract philosophical issues. Let me quote Duff again:

> It is, to put it mildly, unlikely that our normative theory of justified punishment will justify our existing penal institutions and practices: it is far more likely that such a theory will show our existing practices to be radically imperfect—that legal punishment as it is now imposed is far from meaning or achieving what it should mean or achieve if it is to be adequately justified. (Duff 2002b)

It is thus plausible that some scholars should advocate a relational conception based on a plurality of considerations. For example:

> Attributions of responsibility occur not in a juridical vacuum, but in specific interpersonal and circumstantial contexts. Such attributions are fundamentally *relational*: They depend upon the character of moral, legal and social relations among the actor, the victim, and the evaluator. (Kutz 2002, 550)

This insight into the complexity involved in the justification of punishment has Hegelian antecedents. Thus, Brudner (1995), in an explicit endorsement of Hegel's philosophy, states what follows:

> Because each system is a part of a whole, each must be actualized by judges and legislators with a moderation that reflects this constituent status. [...] Hence it is a mistake to make negligence

the basis of liability for crimes against personality or to weaken the strict retributivist understanding of desert for such offences. Subjectivist orthodoxy is appropriate for true crimes. However, it is also a mistake to make subjective fault the standard of blameworthiness for welfare offences or to assess the justice of penalties for such offences from the standpoint of desert. Because the welfare laws are justified instrumentally, the concept of desert strictly understood has […] not intelligible application within this sphere. (Brudner 1995, 255–6)

2.5.2. Some Juristic Questions

Jurists are sometimes sceptical about philosophy, yet they may ask questions similar to those that philosophers ask. A lot can be said here about retributive, social-utilitarian, and reformative theories of punishment. One may also consider Nils Jareborg's (1992, 98ff.) classification of crime ideologies. The primitive ideology and the collectivist ideology base punishment on the wrongdoer's attitude. The primitive theory bases punishment on the wrongdoer's disobedience to the ruler; the collectivist theory, on her disobedience to the authority of the law as linked to morality, community, or natural law. The radical theory does not deal with the wrongdoer's attitude at all, but merely with circumstances that make the action worth punishing, that is, for the most part, with the harm caused by the wrongdoer. Jareborg (ibid., 106ff.) concludes that the radical theory has great practical consequences; for example, it implies that punishment for larceny should be milder than punishment for inflicting mental suffering, and that criminal law should efficiently protect the interests of the victims.

Since the primitive and the collectivist ideologies are based on attitudes, they give rise to problems similar to those arising in connection with retributive theories. The radical theory, on the other hand, echoes consequentialism. The interrelations are complex because the two ideologies are purely legal, not moral (Jareborg 1992, 105). Jareborg's scepticism towards the moral justification of the law is quite controversial but deserves attention, not least because his sceptical approach to moral normativity in the law does not imply a value nihilism. Jareborg (1975), in contrast, has criticized value nihilism.

The most important achievement of the doctrine of criminal law is systematization. Criminal law consists of a general part and a special part. The general part differs from one jurisdiction to another but is typically concerned with the concept of crime, as well as with punishment, legality, the requirements of voluntary action, action and omission, criminal culpability, the individuation of crime, exculpatory circumstances and excuses, completed attempt, and so on. The special part deals with particular crimes.

According to Jareborg (1988, 106ff.), the structure of the penal system consists of three levels: criminalization and threatened punishment, adjudication in connection with punishment, and the execution of punishment. On the level of criminalization, the following questions matter most importantly: What types of action should be criminalized? Who should the legal threat be directed against? Should the threat be differentiated, and if so, how?

Decreasing slightly the degree of abstraction, we may turn to the juristic system of concepts and distinctions. Juristic theories in criminal law, for example, deal with what counts as criminal action. They discuss whether a person who instigates another to commit a crime, or a person who helps commit the crime, is to be regarded as having committed the crime in the first person. One may mention the following theories (Jescheck and Weigend 1996, 645ff.). The so-called unified concept of criminal action, adopted in Austria, for example, classes as wrongdoers all persons who in any form contributed causally to the criminal result. Another conception, adopted in Germany, differentiates between various forms of participation. Direct criminal action (restrictively or extensively defined) is contrasted with indirect criminal action, which includes complicity and instigation.

Sophisticated theories deal with such questions as, Should the accomplice's responsibility depend on whether the primary action was intentional or negligent? Should it depend on whether the primary action is inexcusable? Other theories deal with the indirect criminal action that *A* commits using another person's action as a tool. Interesting questions in this context are, for example, whether the fact of the "tool" acting legally should relieve the indirect wrongdoer of responsibility. This is the case, for instance, when someone deceives a police officer and thus makes her arrest a person on illegal grounds.

2.5.3. Dolus *Crimes and* Culpa *Crimes*

Some crimes require intention (*dolus*); others require carelessness or negligence (*culpa*). There are different kinds of *dolus* (cf. Jescheck and Weigend 1996, 297ff.):

- Intent (*Absicht*): The accused person *A* wants to achieve the criminal result.
- Direct *dolus*: *A* knows for sure that the result will take place.
- *Dolus eventualis*: *A* takes the result into account and accepts that it may take place.

Unsurprisingly, different theories of "dolus eventualis" have evolved; among these:

- *Dolus eventualis 1*: *A* takes into account a certain probability of the result coming to be.
- *Dolus eventualis 2*: *A* takes into account the concrete possibility of the result.
- *Dolus eventualis 3*: *A* would have acted in the same way had she known with certainty that the result would take place.

Each theory of this kind, though reasonable, is contestable. Unsurprisingly again, there are also some critical strands of legal doctrine that call into question the sense of such theories, advocating either

- a reconstruction of *dolus* in terms of probability; or
- a non-theoretical description of judicial practice.

There are also various theories of *culpa* in criminal law. Thus, Jareborg (1988) makes the following distinction:

> Carelessness: *culpa* as fault, act-orientated *culpa*, *culpa* making an action or omission wrong, not allowed, not justified. Negligence: *culpa* as guilt, actor-orientated *culpa*, *culpa* making a person performing an unjustified action or blameworthy omission, not excused. (Ibid., 29)

2.5.4. Causation in Criminal Law

There is also the problem of causation, even though theories of adequate causation play a lesser role in criminal law than in torts (cf. Jescheck and Weigend 1996, 285ff.).

There are radical controversies on the philosophical level. Thus, Larry Alexander proclaims that we should be "rejecting the equation of attempts and success and the problem of proximate causation" (Alexander 2002, 840), but adds the following interesting footnote:

> Moore [...] believes that successes increase negative desert relative to the underlying attempts. Causation, therefore, is a puzzle that he, unlike me, must resolve. (Ibid., n. 52)

Michael Moore's theory (1999, 1ff.) is complex indeed. It deals with the following questions, among others:

- distinguishing causation from mere correlation;
- the cause/condition distinction;
- over-determining causes;
- the scalar nature of legal causation;
- the limited transitivity of the causal relation;
- the sudden breaking of causal chains by (apparently) fresh causal starts; and
- limited liability for omissions.

Moore thus lists ten requirements which the legal concept of causation must fulfil (ibid., 43–5), states that Hume's theory of causation does not meet them (ibid., 50), and concludes what follows:

> It has been recently suggested that we look to singularist, not generalist, theories of causation. A singularist theory rejects Hume's reductionist fourth tenet sketched above. A singularist, that is, refuses to analyze the singular causal statement, "*x* caused *y*," in terms of causal laws. Such a theory will thus be committed to the existence of singular causal relations (and not, as are generalist theories, only committed to the existence of universal or probabilistic uniformities, or of universal or probabilistic relations between universals). (Ibid., 51)

These considerations are metaphysical more so than they are juristic. They are also highly controversial.

On the other hand, when we bring down the level of abstraction, we meet midlevel principles and paradigm cases of greater stability than general philosophical considerations. Consider, for example, the doctrine of objective liability conditions (*Lehre von der objektiven Zurechnung*) in German criminal law. The theory covers a certain number of cases which constitute a crime according to the letter of the law, but whose punishment the majority opinion of law scholars finds unjust. German legal doctrine has made a systematic survey of such cases. Following are some of the ones that have been most discussed (see Jescheck and Weigend 1996, 286ff.; Koriath 1994; Roxin 1989 and 1993):

- A person wants to kill another by infection with a cold, and so shakes hands with that person, thereby infecting her. The "victim" dies (case group: normal risks).
- A person wants to kill another with the help of a thunderstorm and sends the "victim" to a forest. The thunderstorm kills the "victim" (case group: force majeure).
- A person wants to hit another. A third person tries to kill the second by hitting her on the head with a stone. The first person intervenes just in time, and the stone hits the victim's shoulder rather than her head. The victim survives (case group: risk decreased).
- A driver runs a red light and, 200 meters past the light, has an accident in which a person is killed (case group: the purpose of protection).
- A person hits another. The victim refuses medical care and dies (case group: contributory negligence of the victim).
- A person fires at someone with intent to kill. The victim falls into the river, swims to an island and dies there, not from the gunshot but due to lack of food (case group: untypical chain of events).
- A person poisons another with intent to kill. A third person shoots and kills the victim before the poison can take effect (case group: action of a third party).

A special problem is whether omission is a cause of the criminal result. Here, too, we meet competing theories (cf. Jescheck and Weigend 1996, 617ff.).

The doctrine of objective liability is thus much less abstract and much more useful than philosophical theories. To be sure, its origin is partly in philosophy, for it has evolved from Hegel's philosophy of law as modified by the influential professor of law Karl Larenz. But its present use is distinctly different from what Hegel had in mind (cf. Toepel 1992, 137).

In summary: Jurists provide a map of situations in which one needs to rely on evaluations. Moral theorists tell us something about the justification of evaluations. The map is more stable and less controversial than the justifications.

2.6. Law and Economics as the Main Juristic Theory?

There is an important division between humanities-inspired soft juristic theories and mathematics-inspired calculus theories: The former lie at the core of legal doctrine; the latter express the modernistic ideal of precision. Many such theories have been attempted, but only few have succeeded. The most mature theory of this kind is "law and economics."

Richard Posner (cf. Posner 1990)[14] argues that the function of the law is to maximize wealth within the marketplace:

> The "wealth" in "wealth maximization" refers to the sum of all tangible and intangible goods and services, weighted by prices of two sorts: offer prices (what people are willing to pay for goods they do not already own); and asking prices (what people demand to sell what they do own). (Posner 1990, 356)

An entitlement should be conferred on the party who would have purchased it had the transaction costs not made it irrational for her to do so (Spector 1997, 360). The theory claims to be applicable to all parts of the law. It also advises the lawgiver and the courts as to the choice between different kinds of legal regulation. For example, the lawgiver can deter a factory from polluting a river by establishing a punishment, by making the polluter pay damages, by assigning a price for "rights to pollute," etc. The choice is right if it maximizes wealth.

Posner changed his mind twice with regard to moral justification in his theory. From an initial utilitarian defence of wealth-maximizing policies, he turned to a consent-based approach, and then to a pragmatist position (ibid., 359).[15]

The utilitarian justification is obvious but insufficient. Utilitarians think that the main moral principle is to maximize utility; Posner thinks that the main principle for the law is to maximize wealth. Is not wealth utility? Alas, the converse does not hold: There are some utilities different from wealth in Posner's sense. Friendship and family, for instance, make up an important utility for any normal person: It makes her happy and fulfils her preferences. But friendship and other similar kinds of utility elude Posner, since one cannot sell one's friends on the marketplace.

The consent justification of the theory is the following: All individuals will, in choices involving uncertainty, attempt to maximize their expected wealth. Thus, wealth ought to be maximized. However,

> if we grant that it seems plausible that some individuals prior to the enforcement of a judicial principle can identify themselves as losers by the enforcement of the principle, then it is impossible to assume unanimous consent. (Reidhav 1998, 112ff.)

[14] Posner drew inspiration from the Nobel prize winner Ronald H. Coase.

[15] Posner used a utilitarian (consequentialist) strategy to justify the instrumental value of wealth in 1979 (Posner 1979). He turned to a consent-based (Kantian) approach in 1980 (Posner 1980).

Consequently:

> It has been suggested that Posner's theory is contractarian as well as utilitarian but as we have seen in this chapter and in the light of previous chapters it is neither. (Ibid., 115)

Simply put, the losers will not agree to a social contract binding them to Posner's theory. Hence the pragmatic turn of Posner's theory:

> We look around the world and see that in general people who live in societies in which markets are allowed to function more or less freely not only are wealthier than people in other societies but have moral political rights, more liberty and dignity, are more content (as evidenced, for example, by their being less prone to emigrate)—so that wealth maximization may be the most direct route to a variety of moral ends. (Posner 1990, 382)

Posner calls maximization this pragmatic justification of wealth (cf. Posner 1995, 1–25). It is not easy to understand what exactly the term "pragmatic" means in this context. Let me present here Horacio Spector's interpretation:

> Suppose Posner claims that market institutions and human rights are now favored by people in modern societies, and that this is the reason why they are worth of support. In a preference-satisfaction normative theory, market institutions and human rights are justifiable insofar as they can satisfy human preferences [...]. By the same token, market institutions would be justifiable as institutional settings where human preferences are maximally satisfied. [...] I am not sure whether this view can be attributed to Posner. But if it can, his entire position is no different from preference-based utilitarianism. (Spector 1997, 368)

If that is the case, Posner's theory can no longer proclaim itself universally applicable, but only applicable to goods that are traded in the market (Spector 1997, 369). Furthermore, it is a pragmatic matter what is in the market and what is not. The task of sorting out which problems Posner's theory is rightly applicable to will therefore have to be undertaken by drawing upon a complex melange of consequentialist, non-consequentialist, and majoritarian considerations. Thus, the scope of the wealth-maximizing principle must be confined to those areas of the law where basic values, such as autonomy, life, health, and physical integrity, are not directly involved. By contrast, if the good in question is not in the market, it is incommensurable with the theory.

Moreover, Posner's theory faces problems even with regard to those goods that we do find in the market. He understands the maximization of wealth to consist in the satisfaction of those preferences that are backed up by a willingness to pay. But wealth in this sense does not always correspond to utility. For example, a poor man can desire bread more than a rich one, but will not want to pay for it as much as the rich man. On the wealth-maximization principle, the rich man shall get the bread, whereas the utility-maximization principle requires that it should go to the poor and hungry one.

Posner's theory, despite its ambitious claims, is perhaps just one of many juristic theories: It helps us understand and normatively improve some parts

of the law, but not the whole of it. But then, again, it is extremely successful in filling the vacuum created by the legal-realist destruction of the classical “soft” juristic theories (see Chapter 3 below). It leads to unjust effects in many cases, to be sure. But it may serve as the main juristic theory of modern times. One can perhaps argue that the simplest and most politically realistic way of balancing moral considerations is through a wealth-maximization approach, modified when necessary by other considerations. One may accept it defeasibly, that is, unless moral considerations justify a departure from it. Such considerations may express themselves in other juristic theories, which may come closer to commonsense moral intuitions than can the wealth-maximization theory.

Chapter 3

CRITICISM AND DEFENCE OF LEGAL DOCTRINE

3.1. Criticism

3.1.1. Reform Movements and the Alleged Deficiencies of Legal Doctrine

Let me now turn to a critical assessment. Legal doctrine is a product of premodern evolution, for it developed in a line that spans from Greek philosophy and Roman law to medieval *jus commune* and the reaction against natural law effected in the spirit of Hegel and Savigny. Modern philosophy made a linguistic turn and left this tradition behind. The new philosophy—more or less analytic—led to an erosion of legal doctrine. At the same time, radical reformers perceived legal doctrine as an unnecessary ballast. Indeed, criticism affected all legal argumentation, in legal practice and doctrine alike.

Classical legal doctrine achieved its peak with conceptual jurisprudence (cf. Hellner 2001, 138ff., and Peczenik 1974, 144ff.), which

- discussed legal rules in relation to the systematic structure of the law;
- attempted to present legal rules in a unified way;
- put particular legal rules under more abstract concepts; and
- elaborated increasingly abstract principles, deriving normative consequences from them.

Conceptual jurisprudence had its period of greatness in 19th-century Germany. Its foremost representative was Georg Friedrich Puchta.

Later on, conceptual jurisprudence faced criticism because it overestimated the role of deductive inferences in legal reasoning and because some of its concepts lacked practical importance. According to Rudolf von Jhering's jurisprudence of interests, formulated in conscious opposition to conceptual jurisprudence, the content of the legal system reflects the individual and common interests of the people. Statutory interpretation should be teleological, i.e., it should pay regard to legally protected interests—not only material goods, but also honour, love, liberty, education, religion, art, and science. But Jhering saw limitations in the teleological method. He thus refused to use the term "purpose of law" in defining juridical concepts, in systematizing the penal code, and in categorizing rights under private law.

The tension between these two schools survives to the present day, albeit in a modified (and more cautious) form. For example, Hart's choice theory and Raz's interest theory of rights (cf. Kamm 2002, 481ff.) echo the famous dispute in the 19th century between Windscheid's and Jhering's theories.

The criticism against conceptual jurisprudence grew more radical in the writings of François Gény, Eugen Ehrlich (the "free-law school"), and Hermann Kantorowicz. The version of jurisprudence of interests developed by Philipp von Heck was—again—more cautious. Karl Larenz (1983, 117ff.) would later develop the *Wertungsjurisprudenz*, which in substance is a continuation of *Interessenjurisprudenz*.

	Formalist (New Criticism)	Psychological	Structuralist (semiotics)
Academic cross-reference	Organic-form analogies (from biology, painting?)	Psychology (Freudian, Jungian, Lacanian, etc.)	Linguistics, anthropology
Assumptions	Everything you need is in the text; great works resolve tensions into unity; reading is apolitical; ideal readers will all read a given text the same way.	Because literature works on both a conscious and an unconscious level, it is useful to investigate how the unconscious contributes to our understanding of authors, texts, and readers.	The language comprises everything, i.e., a sign system of codes with rules and conventions and patterns of differentiation; the critic should be able to decipher these structures systematically.
Buzzwords	Elements (plot, character, theme, point of view, tone, symbols, setting, etc.), ambiguity, irony, autonomy of the work	Repression, projection, displacement, denial, sublimation, rationalization, castration, id-ego-superego, the unconscious, Oedipus complex, libido, wish fulfilment, archetypes	Codes, signs (signifier/signified), grammar, binary oppositions, synchronic vs. diachronic, systems of differentiation
Tricks/guiding questions	Avoid fallacies: (intentional, affective, mimetic, paraphrase); identify tensions of form and content and find how they get fashioned into organic unity.	Look for rivalries and signs of repressed desire (especially sexual and aggressive drives) in literary forms, characters, authors, and readers.	To decode a text or group of texts, bring out analogies between language structures and the system established within that text or group of texts.

In the United States, Roscoe Pound developed a related theory. The function of the legal order consists in social engineering, that is, in acknowledging certain individual, public, and social interests; determining the limits within which the law should protect these interests; and protecting recognized interests within the limits so determined. In this connection, Pound developed a number of rules for interpreting private law. Property law and most rules of

Post-Structuralist (deconstruction, new historicism)	Marxist	Feminist	Reader response
Structuralism, rhetoric, continental philosophy	Economics, political science, sociology	Any and all other schools, sociology, women's studies	Psychology, subjectivism; [reader : text : performer : musical score]
Meaning is textual and so unravels itself; systematic closure and determinate meaning is impossible	Culture reproduces (but may sometimes also produce) economic relations; class matters (for it affects our understanding of characters, authors, and readers).	Gender matters (for it affects our understanding of characters, authors, and readers); the personal is always political.	The reader plays a vital role in shaping literary experience.
Derridaen: binary oppositions, *differance*, *arche* (origin), free play, margin, privileged term, supplement, presence/absence. Foucauldian: archeology, discourse, power, rupture. New Historicists: thick description	Alienation, ideology, class conflict, base/superstructure, means of production, materialism, bourgeois	Sex (biological) vs. gender (cultural); patriarchal, revision, subversion, resisting reader, patriarchal authority of language, canon, tradition, culture, meaning, "writing the body"	Subjective; implied reader; "interpretative communities"; "fusion of the horizons" of expectation
Isolate hierarchies and show how the supposedly superior term is dependent on the supposedly derivative term; re-destabilize established New Critique or structuralist readings.	Watch for attitudes about labour: Does the text challenge or reinforce dominant ideologies?	Pay attention to what characters say and do in relation to gender; borrow freely from other approaches; get personal.	Examine your own expectations and reactions and contributions to the text (and perhaps compare these expectations with those of other people).

commercial law should be interpreted with the use of precise arguments based on the sources of law, this to protect the rule of law, an important social interest. On the other hand, indemnity rules require free interpretation according to the interpreter's evaluation of colliding interests.

In time, many jurists accepted—though often superficially—the worldview of analytical philosophy, in essence incompatible with legal doctrine. Many jurists adopted as well a critical approach directed against legal doctrine and the law in general. The arts of criticism are many. Legal scholars may provide a political evaluation of particular cases and institutions. Ideological criticism of the law at a higher level of abstraction is more interesting. One can mention here Marxism, critical legal studies, deconstructivism, and feminism. The taxonomy at pages 66–7 provides a general orientation in this complex matter (Steinwand 2003).

In sum, legal doctrine has faced repeated criticism focussed on the following points. Juristic theories have important normative components, despite their frequent claims that they deal with the law only as posited (*lex lata*). Further, legal doctrine allegedly suffers from the following deficiencies: ontological obscurity, indeterminacy, unjustified normative claims, philosophical fragmentation, unclear relation to political pluralism, territorial locality, and unscientific character.

3.1.2. The Alleged Irrationality of All Normative Theories

The normative content of juristic doctrines is a sufficiently strong ground for various value sceptics and rule sceptics to declare such theories non-rational *par excellence*. In other words, these sceptics assume that there is no such thing as normative reason. One may ascribe this position to David Hume. Let me quote his famous fragment:

> Take any action allow'd to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call vice. [...] The vice entirely escapes you, as long as you consider the object. You never can find it, till you turn your reflection into your own breast, and find a sentiment of disapprobation, which arises in you, towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object. (Hume 1985, 520)

According to Hume, there are two main kinds of psychological state. The first consists of beliefs—states that purport to represent the way the world is. The second includes desires—states that represent how the world should be. Desires do not even purport to represent the way the world is (see Smith 1994, 7). This Humean psychology is the psychological equivalent of the logical gap between Is and Ought. Just as the Is and the Ought are assumed to be logically independent, so are belief and motivation. But this belief-desire psychology is highly controversial in moral theory (cf. McNaughton 1988, 20–3, 47–50, 108–13; cf. Hage and Peczenik 2001). Moreover, the

Humean criticism is general, not restricted to the law. Whoever uses Hume to criticize juristic doctrines must be committed to be equally critical of all normative moral theory.

Later on, philosophers like A. J. Ayer would suggest that moral statements simply express the moral sentiments or attitudes of the individual and that philosophy has no way of evaluating which set of moral statements is best.

Hägerström's philosophy was more complex, but he, too, vehemently denied the possibility of rational theorizing in morality, as opposed to theorizing about morality. (See *infra* on ontological problems.)

3.1.3. Indeterminacy and Façade Legitimation

Another problem of juristic doctrines is that they are excessively vague. Here are some examples:

- The theory of statutory interpretation states that the plain meaning of the statute normally, though not always, takes precedence over established judicial practice, but the theory cannot identify precisely the exceptional circumstances under which established judicial practice takes priority over the wording of the statute.
- The normality theory of negligence states that negligence normally involves a deviation from normal practice, but it does not tell us precisely what counts as normal.
- The foreseeability theory of "adequate" causation states that a negligent person is not liable for the consequences of her action if even an expert could not have predicted them. But it fails to tell us which consequences the expert can foresee and which she cannot.

Unsurprisingly, some theorists claim that our interpretation of the law is both unavoidable and necessarily indeterminate. In concentrating on legal rules and other published materials in law, legal doctrine and the written justification of judicial decisions address only what one might call a "façade legitimation" (cf. Ross 1958, 151ff.). In particular, such maxims of interpretation as analogy and *argumentum e contrario*

> are not actual rules, but implements of a technique which—within certain limits—enables the judge to reach the conclusion he finds desirable in the circumstances, and at the same time to uphold the fiction that he is only adhering to the statute and objective principles of interpretation. (Ibid., 154)

Ralf Dreier (1991, 120ff.) calls such criticism irrationalist, discusses methodological and ontological irrationalism in general, and then says the following about irrationalist theories of judicial decisions:

- Judicial decisions are in fact irrational, i.e., dependent on a number of psychological, sociological, and ideological factors.
- The justification of judicial decisions is merely a façade concealing the real motives behind the decision.
- Judicial decisions should depend on irrational factors. Only personal wisdom counts, not argumentation.

The American legal realists and the advocates of critical legal studies claim that the class of available legal materials is insufficient to logically entail a unique legal outcome in most cases, and that judicial decisions in indeterminate cases are influenced by the judge's political and moral convictions—not by legal considerations. The criticism often occurs in the shape of "anti-formalism," making a straw man out of "the formalist" and going through an entire list of more or less exaggerated positions so set up as to be refuted (cf. Himma 2002c).

The idea of indeterminacy also takes more-sophisticated versions. Thus, Joseph Raz claims that legal interpretation has innovative, forward-looking aspects. Innovation defies generalization. Hence, it is futile to attempt to construct a general theory that differentiates good interpretations from the bad (cf. Raz 1996a and 1996b; Dickson 2001; in moral philosophy, see also Williams 1985; Dancy 1993). Moreover, Sunstein (1996, 36) advocates a special role for "incompletely theorized agreements" in judicial decision-making. Judges may agree on the outcomes of individual cases even though they disagree on which general theory accounts best for those outcomes. They also may agree on a general principle, but not on what that principle requires in particular cases, or they may agree on a "midlevel" principle but disagree on the general theory underlying the principle as well as on what particular cases fall under its purview. In German legal theory, Friedrich Müller (1997) has claimed that the meaning of a norm is not a pre-interpretive standard, and that it therefore cannot limit interpretation.

One may find the basis of such scepticism in Wittgenstein's remarks on rule-following (Wittgenstein 1958, §198):

> Whatever I do is, on some interpretation, in accord with the rule,

and we can

> give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. (Ibid., §201)

One particular indeterminacy argument is this: Does not legal doctrine introduce overly complex theories that diminish the usefulness of legal rules? The very point of making rules is simplicity; Luhmann (1993, 54, 62, and elsewhere) speaks of a "reduction of complexity." Is it not a deficiency when legal doctrine makes the legal system more complex (cf. Noll 2000, 58ff.)?

3.1.4. Ontological Obscurity

Whereas the Anglo-American critics focus on indeterminacy, Scandinavian critics focus on ontology.

A big objection to juristic theories is that one cannot state precisely what they deal with. Since the details of legislation and judicial practice can be a product of political compromise, arbitrary evaluation, and at worst corruption, and since these details are nevertheless binding and so affect the basis of juristic theories, jurists who develop a coherent theory must answer that they are not simply describing statutes and decisions, but rather revealing something more profound underlying these statutes and decisions. But what can they reveal if not factual practice or the similarly split attitudes of politicians, judges, and the public? In other words, whereas neat calculi in natural science seem to reveal the very order of the world, neat juristic doctrines cannot reveal any such order, because there is none.

An even more radical doubt is, Do legal rules exist at all? Legal practitioners obviously believe that there is a legal system and that some rules belong to this system. It would be a strange theory, indeed, which holds that all these people are wrong. Yet the question whether legal rules exist is philosophically interesting. A powerful ontological critique has come from so-called Scandinavian legal realism, a theory that places legal doctrine into an ontological vacuum.

The founder of the so-called Uppsala School, Axel Hägerström, built up his theory on the following theses on reality (cf. Hägerström 1929, 111ff.). All knowledge concerns something real. Only one reality exists and it comprises the objects located in time and space. Human beings are thus real because each human being exists in a certain period during which she always occupies a position in space. Mental processes exist because people, who exist in space, experience them as existing in time. Time and space are objective. What cannot be placed in time and space does not exist.

Let me add a terminological caveat. Scandinavian "legal realism" has nothing to do with metaphysical realism, a theory that stipulates the existence of complex entities to which complex concepts refer. Metaphysical realists thus affirm the existence of valid law, that is, of the entity corresponding to the concept "valid law." Their adversaries are the nominalists, who deny the existence of such entities. Legal realists make the opposite point here: They say that no such entity can belong to material reality. Legal realists therefore stand closer to nominalists than to metaphysical realists.

According to Hägerström, value concepts like "good" and "beautiful" are self-contradictory. They apparently say something about objects (e.g., "This picture is beautiful") but in fact do nothing of the kind and merely express feelings (such as one's admiration of the picture). Moreover, value statements lack truth-values, since they "describe" things that fall outside time and space. The value "existing" in an object—e.g., the goodness "existing" in it—does

not exist in any definite sense at all. Thus, on Hägerström's view, the state and the law, among other things, are merely products of our imagination.[1]

Hägerström's ideas gained influence among lawyers when these ideas were taken up by outstanding legal scholars, such as Karl Olivecrona and Alf Ross. Olivecrona held unswervingly with Hägerström's thesis that valid law is merely a product of imagination, but he paid a high price for it: We cannot study valid law in any scientific way; we can only study people's beliefs about what is valid law. In Olivecrona's opinion, legal rules are not imperatives in a literal sense, yet they are independent imperatives in the sense that their addressees regard them that way (as imperatives). Beliefs about what is valid law do not designate any fact. But they do serve social functions—directing human conduct, facilitating the concise writing of statutes, and even conveying vague pieces of information, such as that in the usual course of events the "owner" of an estate exercises a kind control over the estate.

Alf Ross, too, accepted Hägerström's philosophy. Yet he proposed a new definition of valid law. According to Ross, the scientific assertion that a certain rule is valid is, according to its real content, a prediction that the rule will form an integral part of justification in future legal decisions. The philosophical background of this theory consists in the conviction that scientific propositions must have verifiable consequences on the physical conduct and mental experiences of the persons who monopolize the use of physical force in society.

3.1.5. Unjustified Normative Claims

Whereas the "legal realist" criticism focuses on indeterminacy and ontology, the liberal criticism focuses on normativity.

This kind of criticism assumes a dichotomy between genuine normativity and quote-unquote normativity. Legal doctrine is in error when it purports to assert propositions with a claim to normativity. When properly analysed, the propositions of legal doctrine allegedly prove to be, not "genuine legal statements," but "spurious" ones. They do not express any genuine normativity but merely report the content of institutionally established law (cf. Hedenius 1963, 58).

There is behind this criticism a rationalist, contractarian (or Kantian) theory of normativity based on the rational will of individuals. How can there be any legal normativity at all—and in particular any normativity established by doctrine—when all normativity allegedly arises from the rational will of individuals, not from social facts (as is legal practice)?

Moreover, juristic doctrines evolve in the context of specific national legal systems. For example, the German theory of adequate causation in torts is not

[1] Yet Hägerström apparently favoured the autonomous "morality of self-realization" (cf. Bjarup 1997, 106ff.) at the same time as he postulated "the law as substitute for social morality" (ibid., 108).

at all similar to the Anglo-American theory of proximate cause. Nor is it similar to the French theory of *cause étrangère*, though all three theories have similar effects in their respective legal systems. In this sense, juristic doctrines are essentially positivistic. Their content depends not only on principles with a claim to universal validity, but also on the contingencies of particular legal systems. How can any such content be normatively binding?

3.1.6. The Risk of Fragmentation

Another kind of criticism emphasizes internal tension in legal doctrine. Juristic theories show a curious ambiguity vis-à-vis basic theories of practical reason and morality. They are often explicitly or implicitly based on such theories. Philosophical theories are notoriously controversial, however. To deal with this controversialism, legal researchers can split legal doctrine into fragments, some following one philosophical theory, others following another one. Also a way to avoid philosophical fragmentation is by isolating legal doctrine from philosophy. Venture into a daring generalization, one can say that whereas isolation is the main threat in the legal doctrine of continental Europe, philosophical fragmentation is what threatens American doctrine. Disputes between utilitarians, rights theorists, moral particularists, and other moral philosophers thus affect European legal scholars only slightly, if at all. The Americans are more interested in philosophy, but then legal research often follows one or another philosophical fashion and thus faces philosophical fragmentation. The tension between philosophical fragmentation and isolation creates a problem when it comes to providing a deep foundation for the normative force of juristic doctrines.

The philosophical fragmentation of legal doctrine increases in parallel with the increasing complexity of the modern world. For example, Mark van Hoecke and François Ost have written about legal doctrine in crisis, pointing out such factors of crisis as acceleration of the law, specialization, the proliferation of factors in legal doctrine, pluralization of legal systems, and information chaos. Their conclusion is that there is a growing need for a (European) re-systematization of the law (van Hoecke and Ost 1997, 189ff.).

3.1.7. Unscientific Character

Another form of criticism originates from the idea of science. The objection that legal doctrine is unscientific is not new. Julius von Kirchmann's attack of 1848 (Kirchmann 1990) finds its supporters even today: Three words by the lawgiver are enough to convert juristic libraries into garbage.

The objection that legal doctrine is unscientific can even be more sophisticated. Thus, Enrico Pattaro has characterized legal doctrine, as follows:

Law and legal science, only in part divergent, belong to the great realm of ethics, ethics construed in the broad sense as the whole of all discourses (moral, political, legal, etc.) whose prescriptions are aimed at practice, that is, behaviour. To attain their practical ends, law and legal science can make use of logical instruments without becoming scientific discourses by so doing, but rather making such logical instruments contribute to the practical perceptive function of law. (Pattaro 1997, 109–10)

These views are characteristic of many versions of legal realism. For example, an important version—psychological legal realism—has exerted a great influence upon Polish legal theory. Leon Petrażycki (1959b, 1959a, 1960, and 1955; see Peczenik 1975a for a bibliography) created an original theoretical system covering moral and legal philosophy, the theory of science, psychology, and sociology. According to Petrażycki, legal doctrine makes the law uniform and adapts it to its social function to create peace. It uses analogy, induction, conceptual analysis, and deduction in as precise a way as possible. Thus, Petrażycki did not share the American realist views about the indeterminacy of the law and of legal doctrine. Yet he insisted that legal doctrine is not a science, because it is not an adequate theory. In Petrażycki's opinion, scientific theories must be adequate, meaning by this that they must be neither "jumping" theories nor "lame" ones. A "jumping" theory is too wide: What is true of only a part of a class is (erroneously) said of the whole. A "lame" theory is too narrow: What is true of the whole class is said of only a part of it. According to Petrażycki, an adequate theory of law must be a psychological theory of legal emotions. Legal doctrine, because it deals with positive legal norms, and indirectly with the emotions underlying these norms, cannot be adequate, given that emotions similar to these underlie as well the rules of games, of various social conventions, etc. Petrażycki proposed a new classification of psychical phenomena. Not only feeling, knowing, and willing exist, but also impulsions ("emotions"). These are passive/active; thus one feels hunger and at the same time goes looking for food. Moral impulsions consist in "feeling" a duty in combination with an active readiness to act from that duty. Legal impulsions are the only legal phenomena upon which an adequate theory is possible. A correct legal theory must therefore be psychological, and the law is thus made to consist in legal impulsions. These impulsions are imperatively attributive, i.e., they are directed at our own duties in such a way as to lock in with other people's rights, and vice versa. Introspection is the proper method to study our own legal impulsions. The legal impulsions of others are accessible only by way of an analogy with ours. The uniformity of the law is explained in terms of evolution in the manner of natural selection in Darwin's sense. A person whose rights are violated will want to retaliate. The legal psyche is thus aggressive (while the moral psyche is peaceful, for it lacks the element of rights). Therefore, legal rules and legal concepts get brilliantly, though unconsciously, adapted to the need to unify the legal impulsions of different people. Positive law—i.e., official law (the law in a juristic sense), the

law of illegal organizations, the law of children's games, etc.—must be studied within the same adequate theory. With positive law in the sense of "official law," such as legislation and custom, the underlying impulsions are attached to inter-subjectively cognizable "normative facts." Legal rules are mere "impulsive phantasms," projections of shared legal impulsions.

3.1.8. Philosophical Background of the Criticism

The criticism of legal doctrine reflects in part the exaggerated minimalism of the period between the two world wars, and in part the mainstream of late 20th-century intellectual culture. Greater information about different cultures and the advent of pluralistic democracy suggest that

- moral opinions are of necessity relative;
- the interpretation of the law must also be relative if it uses moral valuations;
- the law is nothing more than an instrument of politics; and
- the law needs to be morally neutral in order not to be oppressive.

Indeed, moral relativism, relativism in legal argumentation, and, not least, the separation of law and morals have been quite influential in modern culture. In this context, legal doctrine appears strange. It collides with the mainstream of intellectual culture in the late 20th century, all focussed on the following basic positions:

- foundationalism in epistemology;
- minimalism in ontology;
- deductivism and scepticism in judgment and weighing in the theory of argumentation;
- individualism and dogmatism in moral theory, especially in the sense of reducing normativity to individual, contractarian, or Kantian reflections about first principles; and
- individualism in social theory.

On the other hand, criticism in legal doctrine is often connected with general doubt about the powers of reason, especially practical reason, in the spirit of postmodernism. Only small "narrations" were left intact; among them, formal logical calculi and local legal doctrine.

Consequently, some legal scholars are often victims of hastily accepted fashionable philosophical theories, often too analytical and too critical to be compatible with legal doctrine, and often understood in a superficial manner.[2]

[2] Cf. Moore 2000, 193ff., on the superficial character of "pragmatic instrumentalism."

3.2. Defence of Legal Doctrine

3.2.1. The Copernican Turn: Philosophy Tailored to Legal Doctrine

Now, despite the hostile environment, legal doctrine—and this is a true miracle—fared pretty well: It weathered the criticism and continued to display the central characteristics of conceptual jurisprudence, though often in a diluted form. It had to pay a high price, though: Faculties of law are full of so-called technical jurists who simply continue to deal in legal doctrine on a low level of abstraction—devoid of all reflection.

To some extent they are right. A reflection made by mainstream philosophers about 1950 would irreparably destroy legal doctrine. But philosophical fashion changes and legal doctrine persists.

More to the point, I propose a "Copernican inversion" of the relation of legal theory to moral theory. Instead of adjusting legal theory to one of the notoriously controversial moral theories, we can try to adjust moral theory to legal theory. The same holds for standards of rationality. We can aim at a rational reconstruction of legal doctrine, but this reconstruction is not intended to adjust legal doctrine to strong preexistent standards of rationality. Rather, the reconstruction adjusts the standards of rationality to legal doctrine; that is, it makes a pro-doctrine selection of recognized patterns of rationality, mostly weak ones. The point is to adapt philosophical choices to the practices engaged in at law and under the law. This is all right if philosophy is nothing more than a generalization of knowledge about various segments of the world (cf. Castañeda 1980, passim). Legal practices are an important segment of the world.

Thus, to understand juristic doctrines, a theorist must argue that they are justifiable despite their normativity, ontological obscurity, vagueness, philosophical fragmentation, and territorial locality. In particular, if we wish to make sense of juristic theories, we will have to call into doubt, for example, Hägerström's reductionist ontology along with his radicalism with regard to practical reason. For legal doctrine would make no sense at all if there were no valid law. Nor would it make sense if evaluative statements were not justifiable. At the same time, an advocate of legal doctrine can accept much of Hägerström's criticism, and that of his successors, against rationalist natural law and against rationalist claims to derive precise norms from conceptual reflections. Legal doctrine can make sense even if reason gives us only forms of argument, claims of coherence, and platitudes—not precise norms. Indeed, legal doctrine would face more, rather than less, problems if rationalist natural-law philosophy were true. For in this case a rational reconstruction of legal doctrine would face the difficult—and in my opinion impossible—task of showing how each single evaluative statement of legal doctrine can be traced back to abstract principles of natural law.

This defensive strategy must be contrasted with a trend in analytical philosophy that accepts reductionist ontologies, in the spirit of Hägerström, but ignores the criticism of rationalist natural-law philosophy advanced by Olivecrona and other legal realists. This trend presents a conundrum: How can one talk about rights as if they existed, using pure reason behind the veil of ignorance to logically derive normative consequences, and still embrace ontological reductionism? This is possible only for a mind seized by the dream of precision. Advocates of this trend need a precise and minimalist ontology together with a precise normativity based on a single first principle. They achieve precision but only in segments, and these are inconsistent with one another. They have no way of understanding legal doctrine.

3.2.2. Saying and Doing in Legal Doctrine

In our defence of legal doctrine, we shall pay more attention to what legal scholars do than to what they say they do. When spelled out, the philosophical assumptions may differ from those that scholars actually use in their work. In particular:

- Jurists often pay lip service to the view that moral opinions are necessarily subjective; but in practice they continue to express moral opinions, especially on justice, as if these were objective.
- Jurists often pay lip service to the view that the interpretation of the law must also be subjective if it uses moral valuations; but in practice they continue to express interpretive standpoints as if these were objective.
- Jurists often pay lip service to the view that the law is no more than an instrument of politics; but in practice they continue to contrast the law with politics.
- Jurists often pay lip service to the view that the law, in order not to be oppressive, should be morally neutral; but in practice they continue to treat the central principles of law as if they had objective moral force.
- Jurists often pay lip service to foundationalism in epistemology, and especially to empiricism; yet they fail to reduce juristic theories to empirical data.
- Jurists often pay lip service to minimalism in ontology, and especially to materialism, yet they fail to reduce valid law to material phenomena.
- Jurists are often ontological realists in theory, and so go looking for (and often fail to find) such entities as valid law; yet they are instrumentalists in practice, doing what they always have done, without much philosophical reflection.
- Some jurists often pay lip service to deductivism and scepticism with regard to non-deductive argumentation; yet they fail to present legal reasoning as entirely deductive.

- Jurists often pay lip service to individualism in moral theory, and especially to the reduction of normativity to individual, contractarian, or Kantian reflection on first principles; yet they often keep talking about collective and transpersonal values, difficult to reduce this way.

What is more, self-reflection on the part of legal scholars often results in a philosophical melange. Some philosophical positions are suited for one fragment of juristic work; others are suited for another fragment. Thus, the philosophical assumptions of legal doctrine are often presented as descriptive and even as self-evident.

3.2.3. The Philosophical Background of Anti-Critique

The philosophical background of our anti-critique can be summarized briefly in three statements as follows:

- global reason is possible;
- reason is systematic;
- all philosophy is controversial.

Much of our reasoning is local. But we cannot say without self-refutation that *all* reasoning is local. If this were true, then we could not claim anything at all about "all reasoning" (cf. Suber 1997, 21ff.).

Moreover, there has been no universally accepted metatheory or philosophy of science since the downfall of logical positivism. It is agreed that all of the ingredients of the so-called received view are on shaky ground: The deductive notion of theory structure, the hypothetical-deductive view of theory formation and theory testing, the deductive-nomological model of explanation and its covering-law cousins, all these elements have lost their credibility. They have suffered the fate of many empirical theories: The emergence of anomalies forced them to evasive manoeuvres in which the basic idea lost its initial simplicity—and with it, its appeal (Sintonen 1998).

Nicholas Rescher's (2001) theory of philosophical reasoning leads to similar conclusions. His estimate of modern philosophy is the following. Nineteenth-century philosophizing consisted in the articulation of ambitious systems (Rescher 2001, 257). Many philosophers of the post-WWI era maintained that philosophical systematization of the traditional kind must be abandoned (ibid., 259). After World War II, there was a revival of philosophy, but a rather particularist one, without great systems (ibid., 261ff.). Today, philosophers are again producing complex systems, even if they do so multilaterally and collectively, proceeding by disaggregated and unplanned collaboration (ibid., 268). In other words, philosophy has once again taken an interest in global reason.

At the same time, all philosophical theories are deeply problematic.

> Any given philosophical position, and any particular stage in its development, will, if developed further, encounter inconsistencies. […] As we deploy our distinctions we simply deflect difficulties from one point to another. A sort of entropy principle is at issue: The dissonance or conceptual friction that we remove at one point recurs no less extensively at another. (Rescher 2001, 212)

> It emerges on this perspective that the first principles that are basic to philosophical understanding are "first" (and ultimate questions "ultimate") only in the first instance or in the first analysis and not in the final instance and the final analysis. Their firstness represents but a single "moment" in the larger picture of the dialectic of legitimation. […] The question "Why these principles rather than something else?" is certainly not illegitimate here. (Ibid., 243)

In other words, one can compare a philosopher to Sisyphus (Peczenik 1999, 209). Moreover:

> The conscientious philosopher has no alternative but to proceed systematically. […] The fully adequate development of any philosophical position has to take into view the holistic issue of how its own deliberations fit into the larger scheme of things. (Rescher 2001, 43)

> The better (the more smoothly and coherently) an interpretation fits a text into its wider context, the better it is as an interpretation. (Ibid., 69)

> Recourse to the idea of best *systematization* offers a distinctly more promising alternative to that of best explanation. […] For systematization requires *both* coherence *and* a maximum of achievable comprehensiveness. (Ibid., 138, 139)

3.2.4. Contextually Sufficient Justification and Preference for Weak Theories

Legal doctrine seems to embrace almost all the big philosophical questions at the same time. Yet it does so only indirectly. To elucidate the sense of the word "indirectly" in this context, I have proposed the distinction between two levels of justification: One I call contextually sufficient and the other profound (Peczenik 1983, 1; 1989, 156–7). Contextually sufficient justification stays within the framework of legal reasoning, that is, within established legal tradition, or paradigm, or within the lawyer's horizon. Contextually sufficient legal justification is, so to say, philosophically neutral. Profound ("deep" or "fundamental") justification, by contrast, connects up with things that lie outside the framework of legal reasoning, such as moral reasoning.

But the hope of doing philosophically profound justification and the hope of making justification philosophically neutral are mutually defeating. It appears to be that the optimal strategy of legal doctrine will have to be something along these lines:

- create a list of possible links between legal doctrine and philosophy;
- pick up clusters of philosophies that can make sense of legal doctrine;
- avoid commitment to strong philosophical theories and prefer weak philosophical theories instead.

Obviously, a legal scholar must avoid strong theories that are simplistic and disregard the complexity of the real world. All-encompassing (comprehensive) theories that aim to explain "everything" might be okay, too, were it not that the history of analytical philosophy and jurisprudence teaches us two things.

First, comprehensive theories are weak in the sense that they forgo precision. In particular, legal doctrine will reconcile smoothly with the following weak theories:

- Weak theories on the binding force of law: Jurists may assume that the law is binding and normative without committing themselves to any particular theory of normativity.
- Weak moral theories, such as weak contractarianism, in which the idea of contract as the source of normativity is nothing more than a formal scheme of justification (as in Scanlon 1998)—the exact content of normativity must come from society.
- Weak logical theories, such as nonmonotonic logic and fuzzy logic, for example (Hage 1997b).
- Weak ontological theories (as in Searle 1995).
- Weak epistemological theories, such as the coherentism of BonJour (1985), Lehrer (1997), and Thagard (2000).
- Weak theories in the philosophy of science (as in Cartwright 1999 and Haack 1998).

We will see below that all these theories are comprehensive but must pay a price for it: They are less precise than most analytical philosophers would have demanded some fifty years ago.

Secondly, even these comprehensive theories tend to be controversial. In my opinion, legal theory should fight shy of controversial philosophical problems as much as possible: Legal theory had best go with weak theories, since this is necessary to avoid controversy. A big question is what the term "weak theory" means in this context. Here are two possibilities:

- A weak theory is the common core of a cluster of strong theories, each comprehensive but controversial. For example, BonJour, Lehrer, Thagard, and other coherentists (see below) share the view that knowledge is a coherent whole. The problem is, however, that this common core is difficult to describe and may be trivial.
- A weak theory is an alternative to one such comprehensive theory. A jurist who endorses coherentism would then have to pick out essentials from the theories of BonJour, Lehrer, Thagard, and a few other coherentists, without specifying any common core. For such a jurist, an understanding of coherence amounts to an understanding of the fact that there are alternative conceptions of coherence, and to an understanding of the differences there are between these conceptions.

Chapter 4

LAW AND MORALITY

4.1. Links between Morality and Law

Let us deal now with the problem of the normativity of legal doctrine. As stated above, legal doctrine includes "fused" statements *de lege lata*. The meaning of these statements has a normative component. But is this normativity justifiable? If so, is it a species of moral normativity? Ought the courts to follow the views of legal doctrine, among others? Do the courts act immorally when they ignore such views?

When confronted with such questions, a modern jurist will quite often instinctively say no. But on reflection the questions prove complex. To answer them, we must first discuss the deeper question of the connection between law and morality. Unfortunately, the question is notoriously ambiguous, and in fact makes it necessary to deal with many questions.

Some of them have easy answers.

- The moral minimum as a question of fact: Is the content of law influenced by morality? Do all legal orders actually protect basic moral values? Most jurists would reply to these questions in the affirmative, though many would say that there also exist morally neutral legal rules, such as the rule stipulating left-side or right-side traffic on public roadways.
- The question of the moral criticism of law: All but a handful of jurists would deny that valid law can be made subject to moral criticism.
- The question of justification: Should morality influence the content of law? All but a handful of jurists would deny that it should, though many would say that there are also non-moral reasons the law should pay attention to.

Other questions are more difficult to answer.

- The moral minimum as an analytical question: Is there a "necessary connection" between law and morality? More specifically: Can collision with morality convert valid law into something less than valid law?
- Do we have a legal obligation to interpret the law morally? Most jurists would admit that citizens often expect the law to be interpreted in a just and fair manner. But there is some confusion. Though justice and fairness are moral concepts, some jurists would deny that we have a general legal obligation to interpret the law morally. They may also say that everything depends on the content of the (positive) law of the land.

- The positivistic assumption of legal doctrine: Does legal doctrine necessarily assume a separation of law and morality?
- Does the law create a genuinely normative motivation, one different from moral motivation?
- Profound moral justification of the law: Are there moral reasons to follow the law? Do we have a general moral obligation to follow the law?
- Moral force of legal doctrine: Does legal doctrine create norms that ought to be observed from the moral point of view?

Can collision with morality convert valid law into something less than valid law? This question lies at the core of the dispute between the natural-law school and legal positivism. A classical question is whether there is a necessary connection between law and morality and whether this necessity is conceptual.[1] A more fashionable question is whether this connection follows from the "nature" of the law.

But the question is complex. "Valid law" in the descriptive sense is "law in force." Its existence is a matter of social facts. However, the concept of valid law has a normative aspect as well. To say that a norm is valid is to say that it ought to be observed.

One may emphasize the descriptive question. From this perspective, legal positivism asserts, while natural law denies, that the conditions of legal validity are purely a matter of social facts. The famous dictum of legal positivism—The existence of law is one thing; its merit or demerit is another—is perhaps the most frequently quoted sentence in legal theory (John Austin, quoted by Bjarup 1995–1996, 1179, among others).

This kind of legal positivism ignores the normative meaning of "valid law." It has been quite popular in the Anglo-American world; one may mention here Jeremy Bentham, John Austin, and Herbert Hart. Even today it is quite popular in Scandinavia, too.[2]

These legal positivists tend to dismiss the binding force of the law and state that the law merely possesses a quote-unquote normativity. This species of positivism simply states that the law proclaims itself as binding in fact, but not binding in any deeper sense, whatever this deeper sense may be. This brand of legal positivism comes close to legal realism.

From the normative point of view, valid law is the law which we ought to follow. For the sake of clarity, I will adopt a weak normative theory of legal validity, thereby pushing the problem of the deep justification of legal normativity into a further level of analysis. Thus, Giovanni Sartor[3] states the following:

[1] The very idea of conceptual necessity leads to some problems, noticed by Wittgenstein, Sellars, Quine, Davidson, Rorty, and Brandom, among others.

[2] For example, Frändberg 2000, 657, understands the question "What is valid law" as merely descriptive.

[3] A similar conception has been developed by Wiesław Lang (1962).

> The statement "x is legally valid" is purely normative, it only means "x should be accepted in legal reasoning." Being enacted by the legislator, being included in a sacred book, being accepted by most judges, being accepted by most citizen, being included in the best construction of the political morality of the community, corresponding to the will of God, etc., are different preconditions to which the normative characterisation of being legally valid has been linked in validity debates. It may be more reasonable to give more importance to one or another of those grounds, to exclude some of them, to consider other facts, but this pertains to a substantive theory of the grounds of validity, not to definitional stipulation. (Sartor 2001, 585ff.)

But this is only the first part of a complex research program. Sartor's theory is not intended to facilitate the choice between fundamental philosophical positions on legal normativity. It intentionally cuts off ontology, epistemology, and normativity and leaves a fragmentary clarification to be completed with a deeper reflection.

The different views of the grounds of legal validity can be classed into three categories: natural law, legal positivism, and legal nihilism. Natural law tends to find the super-norm for the law in morality; legal positivism, in the law itself; legal nihilism (often but deceptively called legal realism) regards the whole problem as falling outside the scope of rational reflection (cf. Peczenik 1989, 216ff.). Thus, coherent legal positivism tends to accept the assumption that valid law is binding, in a sense normative, meaning that it ought to be obeyed. At the same time, all the positivists reject any analytic connection between law and morality. They claim that the legal system can be thoroughly immoral and yet valid. From the legal point of view, one ought to comply even with norms that belong to such a systematically immoral system.

4.2. Natural Law

4.2.1. Strong Natural Law

Natural-law theorists claim that the conditions of legal validity are not exhausted by social facts; the moral content of norms, too, bears on their legal validity. The famous dictum of Saint Augustine is *Lex iniusta non est lex* (Unjust law is not law).

Many advocates of natural law have distinguished between "positive" law, created by the authorities, and truly valid or binding law, that which conforms to natural law. Though the term "natural law" is vague, one can assume that it refers to especially important moral norms.

Strong theories of natural law derive a rich set of material consequences from first principles of natural law. Such first principles may be religious, anthropological, or analytical.

Classical natural law often had religious components, but one can advocate it on secularized grounds as well. Classical natural law (in Aristotle, Cicero, Augustine, Aquinas, and others)

> has a clear understanding that one cannot reasonably affirm the equality of human beings, or the universality and binding force of human rights, unless one acknowledges that there is something about persons which distinguishes them radically from subrational creatures, and which [...] is intrinsic to the factual reality of every human being. (Finnis 2002, 4)

Thus, classical natural-law theories were based on anthropological insights.

A natural-law theory is rationalist if the most important parts of it are supported by statements which in one way or another are given by reason. Such statements can be analytic (reporting the sense of some concepts) or otherwise obvious, acceptable to anyone who possesses a coherent world picture, etc. The theory can have empirical support, too, but no important parts of it require the support of religious assumptions.

The modern natural-law tradition of the 17th and 18th centuries takes up "the strategy of assimilating the norms of natural law (morality) with those of logic" (Finnis 2002, 7).

This was chiefly done by assuming that certain norms, if denied, would entail self-contradiction. Thus, Hobbes assumed that it would be self-contradictory not to keep promises (ibid., 6). Grotius and Pufendorf focused on lists of obligations to which we are all duty-bound through laws of nature based on reason, whereas Locke focused on rights which all people naturally have, and which the rest of us are obligated to acknowledge. Almost all such thinkers assumed that human beings have a natural right to the *suum*, that is, to their own or to what is due to them, including a right to life, limb, thought, dignity, reputation, honour, and freedom of action (cf. Olivecrona 1971, 278ff.). The idea of the *suum* justified the binding force of promises, including among these the social contract. The content of law was regarded as justifiable by recourse to such a contract.

Rationalist natural law replaced the omniscience of God with a purportedly logical analysis of the social contract and of other basic concepts. The analysis typically proceeded a priori, that is, independently of data about actual societies. But, paradoxically, claims to derive natural law from logical necessity led to a proliferation of conflicting theories. We have here the notorious controversiality of the hunt for certainty. How many "states of nature" are there in competition with one another?

Kant's moral philosophy, too, is rationalist, though his a priori theories were not analytic. Influenced by Grotius and Pufendorf, Kant agreed that we have moral duties to ourselves and to others, such as developing our skills and keeping our promises to others. But all such duties depended on a single categorical imperative. We as rational beings can judge whether an action is moral by asking if the action is consistent with the categorical imperative. One formulation of the categorical imperative is "Act only on that maxim (intention) whereby at the same time you can will that it shall become a universal law." Another formulation is "Always act to treat humanity, whether in yourself or in others, as an end in itself, never merely as a means."

The problem is, of course, whether such abstractions as the social contract and the categorical imperative entail any particular duties or rights. Hegel provided what has since become a classic point of criticism: Such abstractions are formal and empty. If they are to entail anything, they must be supplemented with historically and socially determined data. Thus, the social contract cannot be thought of simply as derived from natural wants or from the parties' calculative rationality. Rather, it must be treated holistically as a culturally shaped form of social life within which the actual wants of individuals as well as their reasoning powers are made determinate.

One can criticize strong natural-law theories for attempting to derive too much content from formal, "logical" assumptions about social contracts and categorical imperatives. One can also criticize some of them for attempting to derive normative or evaluative conclusions from descriptive propositions about human nature and the like. Natural-law theories face as well some empirical problems. It is not easy to list the invariable elements of human nature, the elements necessary for the law.

Justifiable or not, strong natural law cannot make sense of legal doctrine. Legal doctrine is too complex and diversified to fit into a limited set of first principles. To be sure, one may adjust it to classical, rationalist, or even religious natural law, but then some components of the doctrine become controversial or obscure. For example, Weinrib's effort to base the law of torts on Kant and Aristotle is far from convincing.

It is true that rationalist natural law, because it bases the normativity of law on the social contract, still fascinates some legal theorists. Their trick is to make a distinction between the legality and legitimacy of law. Thus, a theorist can say that the validity of the law is a matter of fact—such as the fact that Parliament has enacted a statute or that the courts are implementing it—and yet proceed at the same time to smuggle in rationalist natural law as a criterion for the legitimacy of legislation and judicial practice. For example, one can study whether legislation and judicial practice is legitimate in view of Locke's or Hobbes's theories.[4] But this use of the heritage of natural law is no longer a theory of law. It is rather a political doctrine designed to criticize existing law.

4.2.2. A Recent Development: Weak Theories of Natural Law

Natural law is not very influential today. But it has survived because it is now typically much weaker than in older times. Such thinkers as Finnis and Moore have given us profound insights into the nature of law, but they would not even dream of developing detailed "codes" of natural law in the spirit of, say, Pufendorf.

[4] For example, Zetterquist 2002 discussed the legitimacy of EC law in the light of Hobbes and Locke.

Thus, Fuller has drawn up a list of minimal requirements for the internal morality of law: Its rules must be general, promulgated, not retroactive, understandable, not contradictory, possible to obey, and relatively constant; there should also be congruence between the rules as announced and as applied. John Finnis works in the tradition of Thomas Aquinas, emphasizing its moderate and commonsense side. Thus,

> the idea that law must pass, as it were, a kind of moral filter in order to count as law strikes most jurists as incompatible with the legal world as we know it. Therefore, contemporary Natural Lawyers have suggested different and more subtle interpretations of the main tenets of Natural Law. For example, John Finnis views Natural Law (in its Thomist version) not as a constraint on the legal validity of positive laws, but mainly as an elucidation of an ideal of law in its fullest, or highest sense, concentrating on the ways in which law necessarily promotes the common good. (Marmor 2002b; cf. Finnis 2002)

Michael Moore expresses a robust belief in the existence and accessibility of moral truth, in a metaphysically realist sense. This is a strong theory, and yet its normative implications are weak and commonsensical, because he also prefers a coherence-theory approach to knowledge (cf. Moore 1992, passim, and Bix 2002, 89ff.).

In Austria, Alfred Verdross (1971, 92ff.) elaborated a moderate theory, returning to the anthropological roots of classical natural law. The theory contains four parts. The first part is based on the thesis that all normal human beings feel certain basic needs and exhibit some primary wants. They all want to live. Though circumstances can force one to suicide, the disposition to self-preservation is natural. All normal people want to avoid being exposed to physical injury, defamation, and economic loss. Though only some people have a disposition to follow a leader, all normal human beings want to have some freedom to fulfil their intentions and not be forced to act. Eternal social morality expresses these needs and wants. Primary natural law consists of norms which belong to social morality and regulate legal problems. Primary natural law is eternal. Secondary natural law indicates how the aims for the legal system that have been derived from primary natural law can best be realized in the given social conditions. Secondary natural law changes continually, since it must take account of changing social facts. Positive law, given in statutes, precedents, etc., and enforced by sanctions, is valid only when in accord with secondary natural law.

Legal doctrine can profit from such theories because they legitimize its normative components without forcing it into the Procrustean bed of rationalist-liberal orthodoxy.

4.2.3. The Claim to Correctness

Another kind of sophisticated theory turns on the idea of practical rationality. The best example is Robert Alexy's idea that the law—i.e., legal norms singly

as well as the legal system as a whole—necessarily makes a claim to correctness. This correctness has a moral character. Alexy does not characterize correct morality in all its details but insists that it would survive in a free process of argumentation. An important thesis is this:

> Legal systems do not lose their legal character if some individual norms or decisions do not raise the claim to correctness. This would only be the case if such a large number of norms or decisions goes without the claim to correctness that one can say that the system as a whole abandons this claim. (Alexy 2000b, 142)

Unless any such catastrophe occurs, a legal system continues to be legal but may be faulty if some of its norms are immoral.

Eugenio Bulygin has pointed out the weakness of Alexy's theory. Bulygin mention Genghis Khan, Philip II of Spain, England's Henry VII, Khomeini, and Pinochet and concludes what follows:

> Probably they understood quite different things by justice or moral correctness. Now, the thesis of the necessary connection between law and morality implies that there is a conceptual link between any legal system, on the one hand, and one and the same morality, not just any moral system, on the other. In the case of Alexy it is the universalistic morality, based on procedural discourse ethics. The alleged fact that all norm-issuing acts performatively imply a claim to justice does not prove that there is a necessary connection between all legal systems and this specific morality. In order to sustain this last thesis Alexy must not only prove that there is one objective morality; he must also prove that this morality is shared by all law-makers. (Bulygin 2000, 134)

Unsurprisingly, Alexy does not heed this advice. Instead, he writes this:

> A necessary connection between law and morality does not presuppose a morality actually shared by all. It is compatible with moral dispute [...]. In order to obtain a necessary relation between law and morality one does not need—as Bulygin assumes—an objective morality actually shared by all law-makers. The idea of a correct morality, the practice of rational argumentation about what morality is correct, and the possibility of constructing, on this basis, practical rationality, suffice. (Alexy 2000b, 143–4)

This dispute is quite characteristic. Bulygin demands explicitness and precision. He is not satisfied with abstract ideals, such as the possibility of practical rationality. His philosophical language has no room for such ideals. This is a respectable position. However, the recent development of legal theory seems to indicate another direction, towards weak and not always explicit theories.

4.3. Exclusive Legal Positivism

4.3.1. Exclusive Legal Positivism—The Normative-Meaning Component

It is no wonder that modern jurists are often attracted to legal positivism. The name "legal positivism" is modern, but the core idea of it is old. The law is what pleases the ruler: *Quod principi placuit, legis habet vigorem* (Dig. 1, 4, 1

pr., Ulpianus). Natural-law theories have been fiercely challenged by the legal-positivist tradition since the early 19th century.

Modern positivism is quite sophisticated.[5] An important distinction is that between inclusive and exclusive positivism. Exclusive positivists deny that a legal system can incorporate moral constraints on legal validity; inclusive legal positivists maintain that the social conventions on whose basis we identify the law may, but need not, make reference to moral content as a condition of legality.

Exclusive legal positivists face problems when they attempt to justify the authority of the law. They need two strong and controversial theories: the theory of exclusionary reasons and the theory of detached legal statements.

The first theory states that legal rules are exclusionary reasons. An exclusionary reason "never justifies abandoning one's autonomy, that is, one's right and duty to act on one's judgment of what ought to be done, all things considered." But it may justify in some cases "not doing what ought to be done on the balance of first-order reasons." An exclusionary reason "is immune from the claim that it should be reexamined with a view to possible revision on every occasion to which it applies" (Raz 1979, 18, 27, and 33).

Stephen Perry (1987) and Frederick Schauer (1991, 88–93) have objected to Raz and claimed that the function of the law is not to exclude first-order reasons, but rather to alter their weight, to create a very strong presumption in favour of certain first-order reasons rather than others. Roger Shiner (1992, 103–15) prefers Raz's view. The key to his argument is a three-part pattern of thinking: Thoughtful people are disposed to have representations of the law; they are disposed to regard the law as a reason for action; they have a desire to follow the law. See also Shiner in Volume 3 of this Treatise.

The merit of exclusive positivism is that it exposes the defeasibility of first-order reasons. Legal rules can defeat these reasons, establishing exceptions to them. But then the exclusive positivists fail to see the other side of the coin. They do not notice that legal rules are themselves defeasible by a process of weighing. We will return to weighing and defeasibility in a while.

The second theory is that the normativity of the law is not genuine. An exclusive legal positivist can dismiss the binding force of the law and state that the law merely possesses a quote-unquote normativity. This kind of positivism simply states that the law proclaims itself to be binding in fact, but that it is not binding in a deeper sense, whatever this deeper sense may be. Such legal positivism comes close to legal realism.

According to Joseph Raz, jurists utter detached legal statements (see Raz 1981, 441ff.). Detached legal statements are categorical statements made from a point of view which is not the jurist's personal point of view, but

[5] See Hart 1961 and 1983; see also George 1996 (a collection of essays) and the works by Himma and Marmor quoted in this volume.

rather that of the (fictitious) legal man. The jurist pretends, as it were, to embrace the view of the legal man. In other words, the law does not create genuine normative motivation. Raz claims that "a detached legal statement [...] does not commit the speaker to the normative view it expresses" (Raz 1979, 153–4).

The view is accompanied with a denial of the general obligation to obey the law (Raz 1979, 233ff.). This denial makes sense if we consider that Raz assumes (and argues against) a very strong theory of obligation to follow the law, rather than the mere *pro tanto* obligation I assume (ibid., 234). Still, Raz admits exceptions for some special persons, like bishops (ibid., 237).

I will not enter at this point into the very sophisticated problem whether the theory of exclusionary reasons is compatible with the theory of detached legal statements. Suffice it to say here that the latter does not tally with the tradition of legal doctrine. No doubt, it is possible to make detached legal statements, about old and foreign legal systems as well as about one's own system. But there are also internal statements by legal researchers that imply a commitment to what the law says. A Swedish jurist who says "Swedish law demands that I pay income taxes" will normally be motivated to pay such taxes.

An advocate of traditional legal doctrine would argue that this motivation reveals a genuine normativity of the law as well as something about the general normativity of doctrinal statements *de lege lata*. The critic would retort, however, that the genuine normativity of social facts, such as the law and legal research, cannot exist. We will return to this problem, too.

The German legal doctrine of the 19th century and the first half of the 20th century differed from this Anglo-Saxon view, because it often affirmed a kind of inherent normativity of the law. One of the most sophisticated positivist doctrines of the genuine normativity of law is Hans Kelsen's pure theory of law. According to Kelsen, legal norms constitute a hierarchy of a peculiar kind. A norm is legally valid if it has been created in accordance with valid norms of higher standing which determine who is authorized to make the norm and how this norm-making is to proceed. The higher norm itself is valid if it has been made in a way prescribed by a still higher valid norm, and so on. But the highest legal norms, set out in the constitution, cannot derive their validity from the validity of still higher legal norms, since no such norms are valid in the legal system. Instead, the highest legal norms must derive their validity from the *Grundnorm*, the basic or apex norm. One formulation of this norm is: The constitution ought to be observed. More precisely:

> Acts of force ought to be performed under the conditions and in the manner which have been stipulated by the historically first constitution of the state and by the norms enacted in agreement with it. (In an abbreviated form: One ought to behave as the constitution prescribes.) (Kelsen 1960, 203–4)

The apex norm is legally invalid because it has not come into existence in any legally prescribed way. It merely gets presupposed conceptually by anyone engaged in legal reasoning on valid law (cf. Bindreiter 2002, especially part 2, chap. 3). And yet it is, according to Kelsen (1960, 202), a "ground" of legal validity.

But can a mere presupposition constitute a ground for legal validity? Kelsen did not solve the problem of the profound justification of law. He did not even attempt to answer the question whether there are moral reasons to follow the law, but merely pointed out that the problem is not a legal one. He did not succeed to explain the legal, non-moral normativity of the law. Indeed,

> nothing remotely like an argument for rejecting natural law theory—for rejecting, that is to say, the morality thesis—has been offered by Kelsen. On the contrary, on this front he offers only a crass and vulgar relativism. (Paulson 2000, 292)

The debate on exclusive legal positivism is far from over. But one thing is certain. Exclusive legal positivists can

> assert that all jurists are unconsciously employing Kelsen's basic norm all the time and in two different ways—on the one hand, in taking for granted that the law is considered valid and binding by the other members of their legal audience, and, on the other, in being committed to this view themselves. (Bindreiter 2002, 127)

However, these positivists have no way of justifying this assumption deeply. They cannot tell us why the jurists ought to be committed thus. In particular, they cannot say why the scholars who produce juristic theories ought to feel bound by their own products. Nor can they tell us why the judges and the public should feel bound by the results of legal doctrine. They may perhaps say that binding law is what pleases the rulers, but certainly not that binding law is what pleases professors of law.

This explains why we must look for a reasonable middle way between legal positivism and natural-law theories. A jurist needs to combine weak legal positivism, and its contextually sufficient legal justification, with a moral basis in profound justification.

4.3.2. Defeasible Grundnorm*, Conditional* Grundnorm*, and Transformation into Law*

Going deeper into this question, one can imagine a distinction between a defeasible *Grundnorm* and a conditional *Grundnorm*.

Exclusive legal positivists stay within the horizon of the everyday jurist. They assume unconditionally that the constitution ought to be followed. Hence, they accept the *Grundnorm* in Kelsen's sense.

Law theorists state that this *Grundnorm* is defeasible. In other words, they realize that there may be exceptions to the *Grundnorm*; they indicate the possibility of transcending the horizon of the everyday jurist. Jurists accept the *Grundnorm*, but they may stop doing so if sufficiently many criteria of law are no longer fulfilled. For instance, they would stop regarding a system as valid law if it were no longer efficient. And some lawyers at least (we might call them anti-positivists) would stop regarding it as valid law if it were extremely immoral or unjust.

Jurists who are not exclusive positivists do in fact transcend the horizon of the everyday jurist. They may reformulate the *Grundnorm* as a conditional norm (cf. Peczenik 1981 and 1982, passim, and 1989, 293ff.). In other words, they work the exceptions into the *Grundnorm*.

An epistemologist may add that the *Grundnorm* exemplifies a leap or "jump" (cf. Peczenik 1989, 116) and a "transformation" in legal thinking. A leap from a set of premises *S* to a conclusion *q* exists if, and only if,

- *q* does not follow deductively from *S*; and
- *S* cannot be expanded or changed to obtain a set of premises *S1* from which the same conclusion follows and which consists solely of certain premises, namely, premises presupposed in the culture under consideration and premises proven to be true.

Leaps occur at many places in the system of legal argumentation (cf. Peczenik 1979b, 47ff.). The most difficult problems concern the leap into the law, that is, from the criteria of law to legal validity.[6] This leap ends up transforming something into law. The legal mind transforms our knowledge of simpler facts into a knowledge of valid law. Metaphorically speaking, it transforms these facts into valid law.

This language of leaps is fruitful because it points out a number of philosophical problems. Some problems are logical. Thus we have

- the problem of informal logic, where the question is asked whether a leap can be a correct or valid mode of reasoning[7]; and

[6] A leap within the law, on the other hand, occurs when we derive conclusions about valid law from a set of premises containing at least one statement mentioning or expressing valid law. A leap of this kind results in a transformation within the law (cf. Aarnio, Alexy, and Peczenik 1981, 149–50, and Peczenik 1983, 33ff.). Here I should make a distinction between legal source-establishing leaps and legal interpretive leaps (cf. Peczenik 1989, 299ff.). An interpretive leap ends up transforming the wording of the sources of law into a knowledge of interpreted law.

[7] For an overview of this problem, see the *Journal Informal Logic: Reasoning in Argumentation and Practice*, published by the department of philosophy of the University of Windsor (Windsor, Ontario, Canada).

- the problem—discussed in artificial intelligence and law—of modelling legal argumentation; to this end, several systems of defeasible logic and nonmonotonic logic have been developed as well as argumentation theories and dialogical models (see below).

Other problems are epistemological; that is the case with

- the problem of defeasible rules and defeasible knowledge; and
- the problem whether we can leap from a description of such facts as that of a parliament enacting certain laws, courts making certain decisions, and legal scholars publishing certain books to the conclusion whereby the norms expressed in these sources of law ought to be observed.

Finally, we have ontological problems:

- What is law? Is it the rules enacted by a parliament? Is it court decisions? Or the opinions of legal scholars justified by way of a leap? Or is it something else?

A law theorist may safely state that we jurists need leaps if we are to speak our language and act the way we do. Philosophers must give us more-accurate theories of the logic, justification, epistemology, and ontology of law. Alas, many philosophical theories are either too reductionist or too metaphorical. The point of the theory of leaps is that it includes a series of questions posed by a jurist and addressed to philosophers.

4.3.3. Positivist and Non-Positivist Criteria of Valid Law

Let us now leave behind the normativity of the law and pass to the descriptive question, What is law? That is, What are the criteria of law?

There is no doubt that, from a psychological standpoint, lawyers can recognize a given country's legal provisions, precedents, etc., spontaneously, that is, without having to reason things out and without recourse to any general definition of law. This information is more bibliographical than theoretical (cf. Wedberg 1951, 254). The information is acquired by entering into a certain socially established practice. Law students often begin their studies by acquainting themselves with this "bibliography." Among other things, they learn a list of the sources of law, such as statutes and precedents, that one must, should, or may pay attention to. Lawyers, too, learn from their practice how to perform legal reasoning.

But many law theorists think that one also needs a more abstract theory, one indicating the criteria of law. Thus, law is a complex of interrelated components (cf. Peczenik 1989, 268). Two kinds of component occupy a central

position in this complex: norms and actions (cf. Peczenik 1984, 97ff.). There are also secondary components, that is, on the one hand, the legal values that justify and explain the norms and, on the other, the mental processes connected with our actions. Legal norms make up a system, and much theoretical literature deals with its structure: That is the case with Hans Kelsen, H. L. A. Hart, and Eugenio Bulygin.

One may also formulate criteria with which to decide when the normative system as a whole is law. I will pay attention here only to criteria for discovering the content of norms and the relationships among norms, leaving aside, for example, the question of their social results. These criteria make up a "big crowd." Here is a sampling:

- The law includes a "dynamic" hierarchy of norms in which higher norms determine the proper method for creating lower norms (cf. Kelsen 1960, 228ff.).
- The law includes, not only norms of conduct, but also constitutive rules enabling us to speak of institutional facts, such as contracts, promises, marriage, and citizenship.
- The law includes norms claiming that the legal order possesses authority to regulate any type of behaviour and constitutes the supreme system of norms in society (cf. Raz 1979, 116ff.).
- The law includes as well some norms claiming that the legal order has the sole right to authorize the physical use of force in its territory (cf. Ross 1958, 34; Olivecrona 1971, 271; Kelsen 1960, 34ff.).
- The law has a high degree of effectiveness (or efficacy: cf. Kelsen 1960, 10ff.). Efficacy means two things. First, we shall find, in any given territory, that its legal norms are observed by far more people in a far greater number of situations than the norms of its non-legal organizations. Second, legal norms are enforced by legally authorized officials, such as judges, prosecutors, police, and executive officers.
- The law is often published and applied openly; it is also frequently interpreted by professional lawyers using established and noticeably advanced methods and doctrines.

These criteria answer the question What is law? leaving moral considerations out of account. If they proved sufficient for identifying the law, legal positivism would pull off a major victory. But the victory is contested by non-positivists, who add another criterion:

- A normative system is the law only if it does not contain or generate too many grossly immoral norms and practices. Moral reasoning decides what is "grossly immoral" and what is "too many."

The extreme immorality of such "law" as some parts of Hitler's or Pol Pot's legislation makes it impossible for a lawyer to use the legal method to reduce

the injustice of a legal practice. Assume now that the "legal" system in question contains very many extremely immoral or extremely unjust provisions. It is plausible to assume that this "legal" system is not law: *Lex iniustissima non est lex.* This thesis may be compared to, but is less radical than, the central tradition of natural law, by which unjust laws are not law (cf. Lucas 1980, 123).

Since the democratic process of legislation is not perfect, unjust laws can be enacted not only in a totalitarian state but also in a democratic society. One may criticize these laws even while approving of the legal system as such. The legal systems of oppressive regimes deserve a more comprehensive criticism, but one must recognize their character of valid law. Only the extreme immorality of a normative system as a whole supports the conclusion that the system is not valid law.

4.3.4. Progressing Sophistication

A possible way to keep the criteria of law free from morality is to move these problems into another "box," namely, into the applicability of legal norms. In this connection, several sophisticated distinctions may prove useful. For example, one may define legal validity by some more or less uncontroversial facts, such as legislative or judiciary practice, together with likewise uncontroversial data concerning language and formal logic; moral deliberation will then decide on the applicability or inapplicability of valid law in specific cases.

Increasing the level sophistication even further, one may attempt a value-free definition of applicability. Thus, Pablo Navarro (2001, 251ff.) has developed the following theory on the applicability of legal norms.

- A distinction is drawn between the internal and external applicability of norms to legal cases.
- Internal applicability refers to the scope of a legal norm; external applicability, to its force.
- The relation between internally applicable norms and their cases is internal (conceptual), but the relation between externally applicable norms and their cases is external (extrinsic).
- Defeasibility affects the external applicability (or force) of legal norms, not their internal applicability (or scope).

Navarro believes that the scope of a norm includes its logical consequences, in accordance with classical logic. For example, the norm "No vehicles may enter the park" prohibits cars, ambulances, and so on from entering the park. But in cases of emergency, the force of this norm is not conclusive, and this could mean that an institutional decision granting admittance to an ambulance may be legally justified. The norm just mentioned applies internally to (or regulates) the case of ambulances, but its force is not conclusive. The

force, not the scope, is defeasible, that is, open to exceptions that may depend on moral valuations. To answer the question of force, one may need moral valuations, but the question of scope is answerable in a non-moral way.

The choice between different conceptualizations of validity, applicability, and defeasibility in the law depends on many factors, and these are difficult to list and even more difficult to evaluate. But whatever conceptualization one may choose, there remains a space for moral valuations in the law. It does not matter very much whether the chosen terminology suggests that these valuations decide what is valid law, or merely what is the applicable law, or perhaps the externally applicable law.

4.3.5. Political Legitimacy instead of Philosophical Justification

Can one ground the profound justification of the law in political philosophy? The presently dominating philosophers of law—such as Dworkin, Habermas, and Raz—shift the discussion from the problem of legal normativity to the problem of the legitimacy of the law. This contrasts with the older continental tradition, in which much of legal theory was concerned with ontological and epistemological questions about the existence of law and of moral values, and so with moral and legal knowledge. Legal theory effected a shift away from comprehensive and transcendental thought towards political and post-metaphysical thought.[8] The concept of legitimacy has political associations. In this spirit, legal doctrine faces criticism because of its alleged lack of political legitimacy. Thus, a well-known criticism of legal doctrine consists in pointing out the controversial political implications of normative statements made by legal researchers (e.g., Wilhelm 1989, 86ff., and Wagner 1985, passim).

But political legitimacy is an unsafe ground for such criticism. "Legitimacy" is an extremely complex phenomenon (cf. Berger and Luckmann 1971, 110ff.), as such not particularly useful as the last step in a complex analysis of legal normativity. One can argue that theories of political legitimacy must hover in the air if they are not accompanied with ontology and epistemology.

Last but not least, the discussion of political legitimacy is not the most promising way of making sense of legal doctrine. A respectable legal scholar aims rather at truth than at political correctness.

4.4. Inclusive Positivism and Propositions *de Lege Lata*

4.4.1. Legal Positivism Inherent in Legal Doctrine?

Despite such difficulties, one may wonder whether legal positivism is not presupposed by all legal doctrine. Aulis Aarnio put this idea in the following way:

[8] Natural-law thinkers like Moore and Finnis are a notable exception to this trend.

> The matrix of legal doctrine […] would seem to consist (at least) of the following elements […] (1) A set of legal philosophical background assumptions and/or commitments, normally implicit, very seldom explicitly expressed. As examples can be mentioned ideas of (a) the origin of law, (b) the validity of legal norms (problem of the rule of recognition), (c) the concept of norm and normativity, (d) the idea of rational discourse. The basic assumption concerning the origin of law seems to accept an idea of the societal sovereign. The bindingness of legal norms does not need any natural-law backing assumption about some kinds of "superior" legal principles behind the positive principles. In this sense, the basic matrix of legal doctrine seems to contain a decisive legal positivist basic standpoint. (Aarnio 1997, 82)

Must the doctrinal jurists subscribe to legal positivism, on pain of self-contradiction? The right *prima facie* answer is yes. Assume first, *arguendo*, that Joseph Raz is right and that jurists merely utter detached legal statements (see Raz 1981, 441ff.), not genuine normative statements. A legal doctrine of this kind is by definition positivist, logically separated from genuine moral statements. Assume now—in accordance with our analysis *supra*—that legal doctrine also includes genuine normative statements. Assume, at the same time, that the normative force of these statements is restricted to a given legal system, limited in time and space, simply because legal doctrine is thus restricted. Assume, finally, that this legal doctrine is endorsed by almost all competent legal scholars, independently of their views in moral theory. These assumptions make it plausible that the normative force of the statements of legal doctrine is separated from universal morality, and so is in this sense positivist.

4.4.2. Inclusive Legal Positivism and Tuori's Critical Legal Positivism

The legal positivism inherent in legal doctrine cannot be exclusive, however: It must be inclusive, that is, it must assume that the social conventions on the basis of which we identify the law may, but need not, make reference to moral content as a condition of legality.[9] Only this kind of legal positivism can make sense of that legal doctrine which purports to stay within the limits of the law and yet includes normative criticism of statutes and precedents on the basis of socially established values, principles, and policies. In other words, an important deficiency of exclusive legal positivism is that it tends to disregard the variety of legal norms (cf. Atienza and Manero 2002). A theory of law, if it is to be useful in legal doctrine, must pay attention to different categories of legal norm, namely:

- regulative norms (norms that command, prohibit, and permit);
- constitutive norms, and especially power-conferring norms; and
- norms, such as principles and policies, that do require deliberation.

[9] A summary of the discussion between exclusive and inclusive positivism may be found in Marmor 2002a, Himma 2002a and 2002b. See also Shapiro 2002.

In this context, one must also discuss Kaarlo Tuori's theory (2002) by which the basis of legal normativity resides in the deep structure of the law, not in morality.

Tuori draws into his theory philosophical reflection, mostly based on Michel Foucault, François Ewald, and Jürgen Habermas. But he also reflects directly on the law as it is, on its creation and application in modern society, as well as on its tradition: Savigny, Puchta, Laband, etc. He tries to integrate these two lines of reasoning. The second line is central. The first is auxiliary and—in the manner of all strong philosophical theories—more vulnerable to criticism, the kind directed at each of the philosophers mentioned and the kind questioning the compatibility of their theories.

Tuori's theory is very useful for our project of making sense of legal doctrine. This is so independently of the future fate of Foucault, Ewald, and Habermas. It may happen that these philosophers will go out of fashion. But even then, Tuori's theory will survive simply because it is a first-rate legal theory. Tuori distinguishes three layers of law:

> "Mature" modern law does not consist merely of regulations that can be read in the book of statutes or court decisions to be found in published collections. It also includes deeper layers, which both create preconditions for and impose limitations on the material at the surface level. I call these sub-surface levels the legal culture and the deep structure of the law.
> […]
> The general doctrines of different fields of law combine conceptual and normative elements of the legal culture. The fields of law receive their identity from their general doctrines: the formation of general doctrines can, in the development of a new aspirant field of law—like, say, labour law or social law—be seen as a sign of independence.
> […]
> If divergent types of law can be discerned in legal history and if these types differ in their respective deep structures, then even the deep structure must be conceived of as historical, as transient. In the deep structure, at the level of the fundamentals of the law, though, the pace of change is at its slowest; the deep structure represents the *longue durée* of the law. (Tuori 2002, 147, 169, and 184)

The deep structure contains elements that are old or global, or both. It is more stable in time and space than the legal culture, and legal culture is more stable than the surface level. Finally, Tuori (2002, 199ff.) develops a classification of the relationships between layers:

- the relation of sedimentation;
- the relation of constitution;
- the relation of specification;
- the relation of limitation;
- the relation of justification; and
- the relation of criticism.

Through the relation of sedimentation, the deep structure—in other respects resembling morality—receives a kind of "positivization" derived from the le-

gal culture and from the surface of the law. How can the law be positive, in the sense of being based on decisions, and yet have a deep structure, a structure obviously independent of the same decisions? The answer is: The deep structure constrains decisions via a tacit knowledge of the deciders. Legal doctrine is the only agent consciously pushing the deep structure to the surface.

I agree with all this in principle. In particular, I fully agree that mature law cannot work without the deeper layers. But then why are the legal culture and the deep structure layers of the law itself? Why not regard them as layers of morality or ethics, perhaps positive morality or ethics?[10] The terminology is convenient because it is consistent with moral pluralism ingrained in our culture since the time of the Enlightenment. Tuori—following Habermas—uses the term "(post-conventional) morality" for universal principles, contrasted with the plurality of ethical convictions competing with each other in the same society. Universal moral principles are too abstract to justify an efficient criticism of legal rules. Particular ethical convictions are too controversial to make such criticism acceptable to all members of society. In contrast with abstract principles of universal morality, the legal culture and the deep structure of the law are historical and connected to a certain society. At the same time, they are the same for the whole of society, thus coming in contrast with particular ethical convictions.

In my opinion, however, the distinction between universal morality and socially centred ethics is an illusion. The reason is that there is no non-social morality. All morality is socially centred. In part, social morality is controversial: There are many competing values. In part, it is firmly established in society—and across societies. But no morality is a priori, universal, and necessary in all possible worlds. This problem will be addressed in the next chapter.

Regardless of this doubt, the most important question is how Tuori's theory would work in legal practice. It would legitimize the perspective of a progressive lawyer, who thinks like a lawyer, thus exhibiting his legal culture which is necessarily historical and in this sense conservative, and yet is capable of absorbing rapid succession of modern or post-modern ideologies.

An interesting aspect of Tuori's theory is its ontological turn. The profound answers to the methodological and epistemological problems of legal doctrine are ontological, for they are expressed in terms of what the law *is.* Thus, the law is complex: Not only does it have a surface structure; it also consists of legal culture and a deep structure. Legal doctrine is a part of this complex law. We will return to ontology later on.

[10] Another question is, What criteria should we use to separate from each other the level of legal culture and that of the deep structure?

4.4.3. Criteria of Validity and Hypothetical Imperatives

Another form of inclusive legal positivism focuses on criteria of validity and hypothetical imperatives. According to Christian Dahlman (2002, 119–22), every legal system governed to some extent by the rule of law applies a number of conditions of legal validity, requiring, for example, that a norm be held invalid if it conflicts with the constitution or with the law of the European Union. When Kelsen observed that a norm is invalid if it conflicts with a higher-order norm, he observed a condition of legal validity being upheld. Other familiar conditions of legal validity are that a norm be invalid if incoherent with the binding decisions of the supreme court, that the interpretation of a statutory rule be invalid if it conflicts with the purpose of the statute, that a rule be invalid if it does not treat like cases alike, etc. In the statement that "it would be wrong for a court not to recognize Jones's right to be compensated by Smith," Professor *X* normally intends to give a learned opinion about the law, i.e., about the consequences of a certain condition of legal validity in the present case. The professor rarely intends to voice a mere personal opinion on the verdict she prefers from a moral point of view. According to Dahlman, legal propositions of this kind are not predictions or prescriptions, but recommendations.

The interesting point here is the following. When Professor *X* states something along these lines, the statement can be construed as a conjunction of two things: First, she utters a descriptive proposition that a certain legal-validity condition has been fulfilled in the present case. Let me add to this that, most often, the professor has a class of cases in mind rather than a particular case. Such propositions remind us of Joseph Raz's theory of detached legal statements. Second, *X* submits to a rule that is valid in accordance with this condition of validity. The act of submission is justifiable in moral terms, but the professor is wise enough not to enter into a discussion about this justification.

Dahlman's story continues like this: Consequently, if someone submits to the meta-norm that the rule which fulfils this condition of validity ought to be obeyed, because she believes that the reasons for obeying the law outweigh the reasons for not doing so, she has not created a moral reason to obey the law, which is independent of the reasons to obey the law in specific cases. She has merely devised a way to avoid the time-consuming enterprise of weighing, in every single case, the reasons for obeying the law against reasons for not doing so.

What, then, are the ultimate and tacit reasons that make our professor submit to the rule? In part, they are economic reasons, such as the prospect of avoiding time-consuming enterprises. But in part they must also be moral reasons, such as the prospect of promoting justice under the rule of law. Can we ignore these moral reasons entirely? I doubt that. If indeed we cannot, then inclusive legal positivism has failed to achieve a definitive separation of law

and morals, merely pushing morality out of the jurist's horizon. And for good reasons, surely—for good (ultimately and partly) *moral* reasons.

4.4.4. The Fused Descriptive and Normative Modality of Propositions de Lege Lata

This reflection makes it possible to understand Svein Eng's theory, previously mentioned, by which propositions *de lege lata* exhibit a "fused descriptive and normative modality" (Eng 1998, chap. 2, sec. F; Eng 2000, passim; Eng 2003, chap. 2, sec. F). They are neither purely descriptive nor purely normative. If a discrepancy is discovered between a lawyer's statement *de lege lata* and the opinion of other lawyers—for example, on the provision of a law-enforcement body—the lawyer making the statement may either modify it in accordance with the opinion held by the other lawyers, or she may uphold the statement despite the opinion held by these other lawyers. In the first case, statements *de lege lata* appear to be descriptive; in the second, normative. But there are no rules at the level of legal language or of legal methodology that may help us determine the usual kinds of *de lege lata* statements by lawyers as either descriptive or normative. The level of objective meaning does not present us with any criteria that may serve as the basis for such determinations. Further, if one asks the lawyer whether she can sort the descriptive from the normative in her statement *de lege lata*, the answer will most often be no: In making her proposition *de lege lata* she did not adopt any view as to what should be adjusted in the event of a subsequent discrepancy. She will often add that she does not think it right or possible to take this view. In other words, the level of subjective meaning presents us with a fusion of the descriptive and the normative. The general descriptive component in lawyers' statements *de lege lata*—it is always considered relevant to ask and to take into account "what opinion other lawyers will probably hold"—corresponds with what Eng terms "the perspective of the generalized lawyer," i.e., a perspective of fundamental consciousness, on the part of the individual lawyer, which builds on and generalizes from the opinions and actions of other lawyers. This perspective represents a condition of the possibility of fusion (Eng 1998, chap. 2, sec. F 2.3; Eng 2000, chap. 2.3; Eng 2003, chap. 2, sec. F 2.3). The concrete context of the general descriptive component and its corresponding perspective of consciousness is the legal-institutional context consisting, on the one hand, of bodies competent to make final and binding decisions as to how to interpret and subsume cases under legal norms and, on the other, of the lawyers' corresponding interest in what these bodies will conclude. The general descriptive component, its perspective of corresponding consciousness, and their concrete context distinguish law from language in general, and from morals and the relationship between parents and children, and explain why we do not find fusion in these last domains (Eng 1998, chap. 2, sec. F 3.2.6; Eng 2000, chap. 3.2; Eng 2003, chap. 2, sec. F 3.2.6).

One can contrast this view with Hedenius's (1963, 58) distinction between genuine and spurious legal statements, the former purely normative, the latter purely descriptive. The distinction held sway as the "sacred cow" of Scandinavian analytical jurisprudence and for fifty years mired all serious research on legal method.

Dahlman criticizes Eng and accuses him of advocating a "confused modality." But he also criticizes Hedenius for having overlooked the fact that legal argumentation includes recommendations. The problem is, however, that Professor *X*, previously introduced, does two things at once: She utters the recommendation—pointing out a criterion of validity in a detached manner—and in addition submits to the rule that fulfils the same criterion. She utters the recommendation in a fused manner, just as Eng says. She could have analysed the statement as a conjunction of a hypothetical imperative—a recommendation in the light of criteria of validity—and a categorical act of submitting to this imperative. Had she performed this analysis, she would have been doing philosophy of law. As a jurist, however, she refrains from the analysis, staying in a "fused" box, the box of propositions *de lege lata*. This box is a reality. Eng demands that we recognize its existence. Dahlman does not deny the existence of it; he only wants jurists to make the philosophical analysis. I doubt very much that jurists are prepared to do this consistently, a time-consuming and perhaps unwise undertaking. I am using the word "time-consuming" here for the second time to underscore the practical character of legal argumentation. Jurists do some conceptual analyses but refuse to do others, not because of any inability on their part but because it is time-consuming or impractical in other respects.

Eng advocates philosophical neutrality on the level of the "generalized lawyer." He claims (Eng 1998, 582–84, 361–5) that there exist areas in current argumentation and language that (a) are relatively well delimited and (b) enjoy a degree of independence from basic ontological and epistemological positions. The independence might be of various kinds and must be demonstrated in particular contexts. For example, Eng claims that legal argumentation *de lege lata* is one such relatively independent segment, characterized by the fact that the lawyers do not have any criterion by which to decide whether their utterances are normative or descriptive. But, let me add with Eng, we also need to bring out the philosophical linkups between these areas and the rest of the worldview. To put it in a provocative manner, we need a separation of law and philosophy, but a contextual separation, not an ultimate one. For practical reasons, it is fine to separate law from philosophy in some contexts but not in others.

The same contextuality exists in the problem of legal positivism. Positivists advocate the separation of law and morals, but this separation, too, is only contextual, not ultimate, fruitful in some contexts but not in others.

4.5. The Justification of Morality

4.5.1. Positivism, Natural Law, and Moral Theory

The relationships between legal positivism and natural-law theories, on the one hand, and moral theories, on the other, are complex.

Natural-law theorists tend to seek objective moral foundations for natural law. But a position is logically possible which regards the law as objectively justified in the light of some social needs, and the like, and which, at the same time, calls objective morality into doubt.

Legal positivism is independent from moral theory. The moral objectivist and the moral relativist can both be legal positivists. Thus, Jeremy Bentham was a moral objectivist, namely, a utilitarian, whereas Hans Kelsen was a moral relativist.

Let me focus now on legal theories that seek to set the law on moral foundations. These theories derive the normativity of the law from the normativity of morality. Legal positivists regard such derivations as problematic. The basis from which normativity is derived—objective morality—is also regarded as problematic.

4.5.2. The Controversialism of Strong Moral Theories

Strong theories of natural law are notoriously controversial. One reason why this is so is that they are based on strong and controversial moral theories. Not only in legal theory, but also in moral philosophy there are three kinds of theories: sceptical (or nihilist), rationalist, and society-centred. Nihilistic moral theories are obviously unable to justify legal doctrine. They cannot normatively justify anything at all, since they reject the very idea of normative justification. On the other hand, one may provide a deep justification of the law on the basis of one of the competing non-nihilist moral theories: utilitarian, Kantian, Aristotelian, Hegelian, etc. Sceptics disagree with objectivists. Rights theorists disagree with utilitarians. Natural-law theorists disagree with various kinds of historicists. Rule utilitarians disagree with action utilitarians. One can give reasons not only in favour of each major moral theory, but also against it. The problem is that this profound justification is controversial. A philosopher is like Sisyphus—always attempting to arrive at non-controversial answers to questions that often admit of no answer at all.

4.5.3. Strong Contractarianism

The core idea of rationalist theories of natural law—the idea of the contract—has regained its influence in moral theory (with Rawls, Nozick, etc.). The idea is much weaker here than in 17th-century theories of natural law. For example, it avoids categorical statements about the invalidity of positive law that

contradict natural law. It also avoids strong metaphysical assumptions about such things as the mode by which values are said to exist objectively.

But contractarianism faces many problems.[11] One can attempt to base morality and natural law on a factual and explicit social contract, but this is sheer science fiction. There simply never has been a time when "everybody" got together and agreed to some set of arrangements. A more promising way is to list facts that are evidence of a tacit (implicit) social contract. Dworkin's "constructive model" implies a social contract in this spirit: The citizens implicitly promise one another that the law will speak with one voice. Dworkin (1977, 162) advocates a "constructive model," not a "natural model." Whereas the natural model deals with moral and legal values and knowledge, the constructive model focuses on responsibility:

> The constructive model [...] demands that we act of principle rather than on faith. Its engine is a theory of responsibility that requires men to integrate their intuitions and subordinate some of these, when necessary, to that responsibility. (Ibid.)

Responsibility thus requires people to integrate their normative intuitions, but why? The question is not easy to answer, because Dworkin presents a model without an ontology and perhaps even without an epistemology. A big weakness of Dworkin's theory is that he refuses to discuss metatheoretical questions (cf. Dworkin 1986, 78ff. and 266ff.). Moreover, it is unclear exactly which behaviours indicate a tacit agreement to go with this or that arrangement.

Ideal hypothetical-consent theories are more popular. They typically operate with a version of or surrogate for a "veil of ignorance" (cf. Rawls 1971, 12) designed to ensure objectivity. But then, why should a person who was never actually in this ideal choice situation, and who never actually agreed to any terms therein, consider herself bound by what she would have agreed to if she had been there? (cf. Dworkin 1977, 150ff.). In brief, how can a hypothetical contract create an actual obligation? One may also wonder whether we can make a rational choice between competing versions of the veil of ignorance. How can a contractarian justify meta-level propositions about how thick the "veil" should be—that is, what knowledge it must exclude—if not by recourse to the contract behind the very same veil of ignorance? Stated otherwise, there is no way to be sure that a rational person behind the veil of ignorance would choose Rawls's maximin criterion or Harsanyi's average utilitarianism (cf. Reidhav 1998 and Harsanyi 1953), or even a form of gambling. Everything depends on genetic dispositions together with the social roots of

[11] Cf. Cudd 2002 and the Scandinavian legal-realist criticism of contractarian natural law (e.g., Olivecrona 1971, 12ff.; Strömberg 1989, 23–43). Even one who doubts the ontological basis of this criticism can agree with the realists that social-contract theories make philosophically controversial assumptions and may lead to whatever result one wish may wish to arrive at.

the person in question. One can so define the veil of ignorance as to support one philosophy or another, to be sure, but such definitions are ad hoc and hover in the air.

Strong contractarianism is controversial—and too strong to make sense of legal doctrine. For example, it is not easy at all to explain and justify all the intricacies of legal doctrine on the basis of Rawls's or Nozick's theories.

4.5.4. Weak Contractarianism

Ideal hypothetical-consent theories do an important philosophical service, however. They elucidate the meaning of the idea of what is morally right and wrong. Thus, Scanlon's contractarianism

> holds that an action is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced general agreement. (Scanlon 1998, 153)

Scanlon bases his theory on the theory of human motivation.[12] All human motivation is based on reasons, and moral reasons are only one kind of reason.

Scanlon's basic idea—leading to contractarianism—is that moral obligation must be justifiable to people (cf. Scanlon 1998, 154),[13] not *in abstracto*. It follows from this idea, according to Scanlon, that the addressee of such a justification should enter as a party to a contract.[14]

Scanlon's theory is philosophically strong because its content is weak. At the end of the day, Scanlon admits that the circumstances of social life may affect the content of moral right and wrong. He thus asks, "How many valid moral principles are there, then? An indefinite number, I would say" (ibid., 201).

Finally, "what people have reason to want depends on the conditions in which they are placed, and among these conditions are facts about what most people around them want, believe, and expect" (ibid., 341).

Consequently, Scanlon (1998, 228) restricts the validity of Rawls's principles to a particular context.

The key concept in Scanlon's theory is reasonableness. "Reasonable" is a primitive concept: It may include any consideration that people have reason

[12] This element distinguishes Scanlon's theory from Hare's, based on the analysis of moral language; cf. Hare 1981.

[13] It may be added here that there is a parallel between Scanlon's justification to others and Aulis Aarnio's idea of justification before an "audience" (Aarnio 1987, 221ff.). See also Perelman 1963; Perelman and Olbrechts-Tyteca 1969, 13ff.

[14] Scanlon compares his theory to Gauthier's, Hare's, Kant's, and Rawls's, and (Scanlon 1998, 393, nn. 2–4) to Habermas's. He admits a close resemblance to Habermas. The difference between the two is, according to Scanlon, that "reaching a conclusion about right and wrong requires making a judgment about what others could or could not reasonably reject. This is a judgment that each of us must make for him- or herself. The agreement of others […] does not settle the matter" (Scanlon 1998, 190).

to regard as morally significant (ibid., 216ff.), and it is, too, "an idea with moral content" (ibid., 194). "In contrast to utilitarianism and other views which make well-being the only fundamental moral notion" (ibid., 216), Scanlon's theory "can account for the significance of different moral notions, within a unified moral framework, without reducing all of them to a single idea" (ibid., 216).

But even weak contractarianism is not immune to criticism, since it

> will have to pivot on what the society would, if rational, consent to contracting for. But in this case we might as well short-cut the social contract and ask what is rational directly. So in this case the "social contract" idea becomes redundant and dispensable. (Rescher 2002, 7)

Moreover, weak contractarianism cannot provide a set of first principles from which one might derive the content of legal doctrine. It cannot answer the question which laws are normatively binding and which laws are not. This question cannot, I believe, be answered on the basis of rationalist quasi-logical speculation, but only on the basis of our knowledge of the social facts.

4.5.5. Society-Centred Moral Normativity

An advocate of a society-centred moral theory would prefer another terminology. She would say that all norms are social and historical. She would be sceptical about universal norms. She would state that the moral theory most suited to the needs of legal doctrine is society-centred and coherentist (Hegelian, Aristotelian, communitarian, or perhaps another kind). The so-called communitarians have contributed to the theory of society-centred morality. Communitarians argue against Kantians and contractarians, and especially against Rawls. Rawls appeared to present his theory of justice, at least initially, as universally true, and communitarians argued against this stance that the standards of justice must be found in forms of life and in the traditions of particular societies.[15] In another philosophical tradition, one may take up the Hegelian idea of the state as an ethical community. We have here a triad, with *Sittlichkeit*—rationalist morality—and the law. Society-centred morality (*Sittlichkeit*) is the common denominator. Individualist moral theories are meaningful only against the backdrop of society. The law inherits its normativity from this society-centred morality.[16]

[15] See Bell 2001; cf. Mulhall and Swift 1992, 155ff. Rawls later sought to eliminate the universalist presuppositions from his theory: See Rawls 1993 and 1999.

[16] To put it otherwise: "That law's foundation is the totality we call dialogic community implies that the principles of formal right and equity are valid only within definite and rational limits. Because formal right and equity are both instantiations of the genuine ground of law, each must be actualized with a moderation that reflects this subordinate status and that preserves the distinctive identity of the other" (Brudner 1995, 150).

Let me now introduce briefly Copp's (1995) views on morality, normativity, and society. He developed two mutually independent theories: the standard-based theory and the society-centred theory.

> Standard-based theory provides a general account of the truth conditions of normative propositions [...]. Standards are norms or rules, expressible by imperatives [...]. According to the theory, normative claims express propositions which entail, nontrivially, that relevant standards have appropriate status. The nature of this status depends on the kind of normative claim in question. In the case of moral claims, the status is itself normative; moral propositions are true only if corresponding moral standards are appropriately justified. (Copp 1995, 3)

The second theory, the society-centred theory, "is intended to explain conditions under which a moral standard would be relevantly justified" (ibid., 4). Namely, "the moral code that would best serve the needs of a society is the code that the society would be most rational to choose, and it is the moral code justified for the society" (ibid., 7).

Much of Copp's book is devoted to explaining such things as society's needs, what best serves society, the choosing of a society, and more. It is open to doubt whether these—often quite daring—explanations need to be accepted to make sense of legal doctrine. But one thing seems to be a *conditio sine qua non*: a kind of social theory of morality that can account for such problems as the we-attitude and the questions of shared knowledge, common knowledge, and shared values. Thus, Copp's theory comes of service to jurists. A jurist who endorses this theory can say: Law can be morally binding and social at the same time because a binding morality must itself be society-centred.

These observations answer the known objection against juristic doctrines that they are local and thus cannot be genuinely normative. They seem to account for the peculiarities of the law of a certain state in a certain period. A critic would emphasize that this kind of territorial locality differs from universality, inherent in both science and morality. But the universality of morality—as opposed to the social, and hence local, character of the law—is itself very much open to question. Moreover, the territorial locality of juristic theories is relative. These theories are often used outside their country of origin. For example, Roman legal doctrine, and German legal doctrine after that, exerted their influence on different European countries. Doctrinal concepts such as "tort," "contract," "property," and "ownership" may have different extensions in different countries even as they have the same core in these countries.

Copp's theory, though society-centred, has the resources to deal with overlaps between different societies: "If a justified moral code is one that best contributes to making society possible then the justified code for a society would not conflict with the justified code for another society that overlaps with it" (ibid., 212).

But there remains the more basic question (ibid., 242–3): "It can be the case that a person would *not* be justified in subscribing [...] to the moral code

that *is* justified relative to her society [...]. Why should one *comply* with the moral code that is justified relative to one's society?"

Copp considers these questions irrelevant because based on the mistaken assumption that action-guidingness or normativity must be explained in terms of rationality (ibid., 244). The questions cannot be easily dismissed, however: They call for a comprehensive study that may leave Copp's theory behind and go into such problems as (Pettit 1993, Editorial Reviews—Book Description)

- What makes human beings intentional and thinking subjects?
- How does their intentionality and thought connect with their social nature and communal experience?
- How do the answers to these questions shape the assumptions which it is legitimate to make in social explanation and political evaluation?

There are, too, in this context, the questions

- What is the source of the normativity of society-centred standards?
- How are the right reasons to be determined in new situations?

Giovanni Sartor, in Volume 5 of this Treatise, has analysed multi-agent practical reasoning and collective intentionality as follows.

First of all an agent has what we may call *self-directed concerns*. [...] One may also have what we may call *other-directed concerns*. These consist in focusing on other agents, and in using practical reasoning to enhance the conditions of them. [...] Finally, an agent may have what we may call *collective-directed concerns*. These consist in focusing on the condition of a group of agents one belongs to (a collective). When one takes a collective-concerned perspective, one views oneself just as a member of the collective one refers to, so that one's identity becomes irrelevant, though one's traits and actions may matter (as they would if they belonged to any other member of the collective), according to the criteria one adopts with regard to the collective. An agent having such concerns will have collective-concerned likings: Consider for example, how one may like the country to which one belongs to have a booming economy, its culture and science are flourishing, its citizens participate in government, they do not suffer poverty, and so on. (Sartor, vol. 5 of this Treatise, sec. 9.1.1)

Society-centred theories face the risk of dissolving in post-modernist rhetoric and deconstructionism. But the risk can be avoided (cf. Pettit 1993, xiii).

4.6. Pluralism and Common Ground in the Law

4.6.1. The One-Right-Answer Ideal and Moral Relativism

Legal doctrine cannot do without the idea that its theories are right or wrong. It would be pointless to give up this idea and yet go on producing such theories.

Ronald Dworkin (1977, 81ff.), focusing on judges rather than on legal scholars, assumes that there must be a single right answer to any legal ques-

tion. This is the case notwithstanding the fact that present-day jurists have abandoned the pursuit of deductive certainty based on irrefutable premises.[17]

An early response to his theory was as follows (cf. Mackie 1977, 9). Dworkin sees only three possibilities:

- The reasons for a conclusion weigh more than its counterarguments;
- The counterarguments weigh more than the reasons in support of that conclusion;
- The reasons and the counterarguments weigh equally.

He overlooks the fourth possibility, that is:

The reasons for a conclusion and its counterarguments are incommensurable.

Indeed judges, and even more so doctrinal researchers, argue for the best solutions, thereby assuming that arguing makes sense. It makes sense only if they explicitly or implicitly accept the ideal of the one best answer to legal interpretive questions.

Mackie's reply to Dworkin brings us to the question of relativism. One may wonder whether there is a single right answer to any moral question. Sophisticated distinctions are possible, too, for example, supposing that there is a single right answer to any question of justice, at the same time denying that there is a single right answer to any moral or ethical question unconnected with justice. These distinctions presuppose controversial philosophical positions. Without subscribing to any of these, one may ask two general questions:

- Are genuinely normative views—and moral views in particular—necessarily relative?
- Do genuinely normative views—and moral views in particular—necessarily conflict with one another?

The first question is the question of relativism, the second the question of pluralism.

Moral relativity—the first question—is answered by several competing philosophical theories. But for all their sophistication, they produce more questions than answers. We have a good example in the dialogue between Harman and Thomson. Harman's position is this:

For the purpose of assigning truth conditions, a judgment of the form, *it would be morally wrong for P to D*, has to be understood as elliptical for a judgment of the form, *in relation to*

[17] Let us agree with the following (Dworkin 1986, 412): "I have not devised an algorithm for the courtroom. No electronic magician could design from my arguments a computer program that would supply a verdict everyone would accept once the facts of the case and the text of all past statutes and judicial decisions were put at the computer's disposal."

> *moral framework M, it would be morally wrong for P to D.* Similarly for other moral judgments. (Harman and Thomson 1996, 4)

Thomson, for his part (ibid., 68), presents the "Thesis of Moral Objectivity: It is possible to find about some moral sentences that they are true." But she argues (ibid., 154) that "Moral Objectivity is compatible with there being issues about which no undisputable conclusion is reached: it is compatible even with there being issues about which no undisputable conclusion is reachable."

There is also the following complication:

> I have been arguing that the truth of a normative reason claim requires a convergence in the desires of fully rational agents. However note that the convergence required is not at the level of desires about how each such agent is to organize her own life in her own world. In their own worlds fully rational agents will find themselves in quite different circumstances from each other, circumstances that are conditioned by their different embodiments, talents, environment and attachment in their respective worlds. Their desires about how to organize their own lives in their own worlds will therefore reflect these differences in their circumstances. The convergence required is rather at the level of their hypothetical desires about what is to be done in the various circumstances in which they might find themselves. (Smith 1994, 173)

Simply put, if I am in Jones's situation, and if we are both rational, my standards will be the same as Jones's.

In a similar spirit, Copp admitted that "the combination of the society-centred theory and the standard-based theory implies a form of moral relativism" (Copp 1995, 7); yet he made the following additions: "There is nothing in […] the society-centred theory to rule out the possibility that there is some moral code that is justified relatively to every society" (ibid., 222–3).

A further complication is that the so-called quasi-realism, developed by Simon Blackburn, apparently couches a profound relativist theory in objectivist language.

The overall impression is that the debate on moral relativity is overly sophisticated and inconclusive. Is a doctrinal jurist committed to taking a position on such matters? Perhaps not. It seems that all the recently proposed views are moderate enough to permit a normative legal doctrine. A jurist may join the camp of objectivists, relativists, or quasi-realists (cf. Dahlman 2002, 105ff.), but she must always opt for a weak and moderate position within the camp she sides with.

4.6.2. Plurality of Cultures

Philosophical uncertainty in such matters justifies bringing down the level of abstraction. The considerably abstract methodological disputes over universalism versus particularism had become less prominent by the 1990s, and the debate now centres on universal human rights (cf. Bell 2001).

Another way of bringing down the level of abstraction is to pass from the philosophy of relativism to less ambitious reflections on pluralism. Pluralism is a close relative of relativism. A pluralist accepts the relativist thesis that there is no single Herculean rationality that universally determines optimal moral opinions and legal interpretation. At the same time, she concedes that moral agreement and agreement in legal interpretation are feasible within a single moral or legal culture. Each culture has its own moral standards and its own standards of rationality. And each—no matter how delimited—will harbour within it a single right answer specific to all its moral and legal questions. But there is no single right answer that holds up across all the cultures.

On the other hand, members of various cultures can communicate with one another. Let me quote Isaiah Berlin:

> I came to the conclusion that there is a plurality of ideals, as there is a plurality of cultures and of temperaments. I am not a relativist; I do not say "I like my coffee with milk and you like it without; I am in favor of kindness and you prefer concentration camps"—each of us with his own values, which cannot be overcome or integrated. This I believe to be false. But I do believe that there is a plurality of values which men can and do seek, and that these values differ. There is not an infinity of them: the number of human values, of values that I can pursue while maintaining my human semblance, my human character, is finite—let us say 74, or perhaps 122, or 26, but finite, whatever it may be. And the difference it makes is that if a man pursues one of these values, I, who do not, am able to understand why he pursues it or what it would be like, in his circumstances, for me to be induced to pursue it. Hence the possibility of human understanding. (Berlin 1998)

Charles Taylor (1999) envisaged a cross-cultural dialogue between the representatives of different traditions. Rather than arguing for the universal validity of their views, however, he suggests that the participants allow for the possibility that their own beliefs may be mistaken. This way, each participant can learn of another's "moral universe." Here I should bring in a theory that Aulis Aarnio developed with me. The following quotation explains it briefly.

> Any value statement belongs to a certain value code shared, to a certain degree, by a number of people. Is the value code itself relative or not? To solve this problem, one must assume that universal value-statements and principles have always a *prima-facie* character. *Prima-facie* value propositions not only claim universality but also can be understood as universally valid in the following sense. First, their validity does not depend on an individual's free preferences. Second, although they are culture-bound, there is something all cultures must have in common. But such *prima-facie* propositions do not logically imply a moral judgement in any particular case. They are merely a starting point of an evaluation procedure, i.e., of weighing and balancing, nothing more. On the other hand, the final (contextual, all things considered) evaluations are necessarily relative to a certain culture and, indeed, to individual preferences. When claiming universality of values, people see the first side of the problem. When endorsing relativism, they see only the second one. (Aarnio and Peczenik 1996, abstract)

4.6.3. The Plurality of Objective Values in General and the Common Core

In general, such thinkers as Isaiah Berlin (1969, 160ff.) claim that there are many values, all of them objective but incommensurable with one another and not reducible to a single ideal. If they come in conflict, then we will have to choose.

> We are doomed to choose, and every choice may entail an irreparable loss. The world we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others [...]. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict—and of tragedy—can never be wholly eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition. (Berlin 1998)

This value pluralism is very much plausible. But pluralism should not be overstressed.

> The morally pluralistic societies with which we are familiar are not deeply and pervasively pluralistic. Their members tend to share moral attitudes towards the central features of the criminal law, for example, and they share moral attitudes toward the central political features of their society, such as its democratic constitution. (Copp 1995, 197)

Moreover:

> There is no guarantee of reaching acceptable results, but the pressures towards objectivity and a right answer, even on the base of conflicting pluralistic values, are very strong wherever values come into practical conflict. [...] We should think of ourselves as responding to the multiplicity of values that historical traditions have presented us with, and should try to take the next step under the pressure of the search for coherence. (Nagel 2001, 110–1)

Moreover, we must deal with overlaps of cultures—in the law, among other things, as well as in commerce, the media, and the World Wide Web. The idea of a society-centred morality is compatible with this possibility.

When speaking of pluralism and overlapping cultures, one may be referring to cultural pluralism within a society or to the cultures characterizing different societies (cf. Rawls 1993 and 1999).

In Rawls's works, this idea of an overlapping consensus gets integrated with the Kantian philosophy of the priority of the right over the good. Rawls discusses the depth and breadth required of the overlap precisely in view of this philosophy (1993, 149ff.). The core idea of an overlapping consensus has a strong intuitive appeal. Its Kantian underpinnings are, however, philosophically controversial. Not all philosophers are Kantians. And, what is more important for us here, not all jurists are. Justifying the normativity of a legal theory in strict dependence on Kantian philosophy makes it unlikely that this theory will keep within an overlapping consensus among jurists.

Yet jurists obviously need a theory of overlapping consensus. Legal doctrine would be pointless absent a community of jurists in principle willing to agree on juristic theories. Aulis Aarnio noticed this in his theory of audiences. What matters for rationality is acceptability (cf. Aarnio 1987, 185ff.) within a relevant group of people, that is, within an "audience" (cf. Aarnio 1987, 221ff.) of colleagues, peers, etc. These persons accept *p* or at least agree that *p* is acceptable according to the standards they accept; *p* is acceptable to a person, *A*, if she finds it legitimate (or permitted) for another person, *B*, to accept and assert *p* even if *A* herself prefers not to accept and assert *p*.

The common core is the main point of this volume. Legal doctrine deals with the common core of values in society. The problem is, however, that while legal doctrine must seek out a common core, it need not commit itself to any specific and strong philosophical theory of common core. Over-sophistication in the debates on moral relativism and pluralism makes it understandable that jurists should often react in the manner of Aulis Aarnio's well-known *bon mote*: Everything is relative, but this relativity is itself relative.

According to Jaap Hage (2004), each theory has its own standards for what is a good theory. There is no way to criticize a complete theory except by means provided by a theory the critic uses; and it is not objectively true that the critic's standards are better than the standards of the theory she criticizes. But the insight that all theories are relative to one's own standards for a good theory does not prevent us from using an objectivistic language. This leads to the following default strategy of relativism. By default, jurists will use an objectivist language for

- the normative bindingness of law;
- moral normativity;
- legal knowledge—genuine though evaluative;
- the genuine existence of law, not identical with subjective convictions about the law;
- the validity of legal reasoning, even if not deductive.

But if a jurist has any reason to doubt an objectivist standpoint, let her attempt a relativization of the language, of culture, of the legal profession, and so on.

4.7. Social Normativity, Morality, and the Law

To sum up, legal doctrine is committed to

- regarding social values as its genuinely normative basis;
- regarding valid law as genuinely binding;
- assuming there is a common core of values in society; and
- assuming that a big part of the law reflects this common core.

At the same time, legal doctrine may retain its neutrality with regard to such questions as

- whether there may also exist a universal normativity, derived from Reason alone, or perhaps originating from God;
- whether there is a common moral core among divergent cultures;
- whether human rights are universal; and
- what is the proper sense and essence of such concepts as "validity," "applicability," and "binding force."

The last item is perhaps crucial. Neither conceptual analysis nor any kind of philosophical insight into the essence of things can yield precise normative conclusions. In fact nothing can—if one understands the word "precise" literally. Approximate conclusions about what one ought to do can be reached, but the best way to justify them is through a coherent weighing and balancing of the moral considerations embedded in the tradition of our society.

Chapter 5

COHERENCE IN LEGAL DOCTRINE

5.1. Weighing and Defeasibility

5.1.1. Space for Defeasibility and Weighing in Legal Justification

Social normativity is an important keyword in our project of making sense of legal doctrine. Other keywords are defeasibility, weighing, and equilibrium. Theories of the defeasibility of legal reasoning have a strange history. In the mid-20th century, H. L. A. Hart wrote what follows:

> Claims upon which law courts adjudicate can usually be challenged or opposed in two ways. First, by a denial of the facts upon which they are based [...] and secondly by something quite different, namely a plea that although all the circumstances on which a claim could succeed are present, yet in the particular case, the claim [...] should not succeed because other circumstances are present, which brings the case under some recognized head of exception, the effect of which is either to defeat the claim [...] altogether, or to "reduce" it. (Hart 1952, 147–8)

The curious thing is that Hart did not return to defeasibility in his later writings. This stance was perhaps incompatible with his legal positivism (see Chapter 4, *infra*). And yet defeasibility is crucial in legal doctrine. Defeasibility affects all legal norms, and hence all

- legal claims;
- legal principles; and
- legal rules.

In particular, it affects, among other things,

- legal-source and reasoning norms and
- precedents.

Defeasibility is importantly connected with outweighability. The relation between the concepts of "outweighable" and "defeasible" is as follows.

A given norm may be both outweighable and defeasible. It is defeasible in the sense that it can be defeated, meaning that we can set it aside in exceptional cases. It outweighable in the sense that the justification of these exceptions requires a weighing and balancing of reasons.

From the logical point of view, a norm may be defeasible but not outweighable. That is, it may be set aside by a process other than weighing, for example, by the arbitrary fiat of a sovereign lawgiver.

In modern legal culture in the West, such fiat is perceived as illegitimate if the lawgiver's authority cannot be justified by any weighing and balancing of

reasons; it is also perceived as objectionable if the lawgiver cannot support the fiat by any weighing and balancing of reasons.

Weighing is relevant in all juristic contexts, such as

- statutory interpretation;
- interpretation of precedents;
- construction of juristic theories; and
- establishing the validity of legal norms, albeit only marginally so.

In all these contexts, weighing is used in

- profound justification of the law, linked to moral theory and to other branches of philosophy; and
- contextually sufficient legal justification.

From another point of view, weighing is used to

- establish an exception to a legal rule, or an extension of it; and
- to balance contributing reasons (including principles) against one another.

Profound normativity in the law—not merely its quote-unquote normativity, that is, the trivial fact of the law proclaiming itself to be binding—must be inherited from society-centred morality (or, in Tuori's terminology, from the deep structure of the law). On the other hand, contextually sufficient justification abstracts from the profound basis of legal normativity. But the abstraction is never complete. When in doubt, the jurist may ask more-and-more fundamental questions, imperceptibly entering the realm of profound justification. This way, contextually sufficient justification changes into profound justification, but not all the time, only when there are reasons for it.

Taking account of legal practice—not merely of what officials and jurists say they do—it is plausible to say that established legal rules, such as statutory provisions, have a defeasible (and thus outweighable) character. More specifically, if a legal provision allows for hard cases, it is defeasible not only from the point of view of morality, but also within the law itself. This is so because

- the provision's application to hard cases may be outweighed by moral considerations; and
- the provision may be applied to the case under consideration in a legally correct way, even if this is contrary to its wording (*contra legem*).

The reasons to be weighed are mostly values and principles. But I think that any rule can be weighed against other reasons (cf. Peczenik 1989, 80ff., and Verheij 1996, 48ff.). Moreover, almost all regal rules can encounter hard cases,

and these are solvable only by a weighing and balancing of reasons. No doubt, the application of some legal provisions involves routine cases only, or almost so. Provisions imposing clear time limits can serve as a good example. But provisions of this kind are very few, and they are not interesting for legal doctrine.

Some concepts used in the theory of legal argumentation, such as "statutory analogy" and "the purpose of the statute," presuppose weighing. For example, only important similarities between cases constitute a sufficient reason for conclusion by analogy. Judgments on importance are justifiable by weighing and balancing various reasons, often principles. Another important problem in statutory interpretation that involves weighing concerns the purpose of the statute. The weighing and balancing of all the circumstances of the case decides what data has priority in deciding what the goal of the statute is.

> In general, various reasons and methods, such as literal interpretation, analogy, systemic interpretation, historical interpretation and goal interpretation support statutory interpretation in hard cases. The choice between the alternatives depends on weighing and balancing of various legal arguments. (Peczenik 1995, 376)

Weighing is important in particular legal doctrine, too.

In property law, the delimitation between the proper realm of the doctrine based on property rights, on the one hand, and the public-trust doctrine, on the other, depends on a weighing and balancing of considerations.

In contracts, one must weigh and balance different theories of freedom of contract and different kinds of justice (commutative and distributive). One must also use weighing to solve problems that are more particular, concerning good faith, implied contract terms, conscionability, and the assumptions built into a contract.

In torts, we again meet a weighing of different kinds of justice. We also meet weighing in more specific, juristic contexts. For example, theories of adequate causation need weighing to elucidate the sense of such terms as "a damage of this type," *vir optimus*, a "too remote cause of the damage," or a "sufficiently important factor in producing the damage." Weighing is also necessary to balance theories of adequacy with competing theories, like the purpose of protection.

In criminal law, one must weigh various kinds of reasons when attempting a philosophical justification of punishment and constructing theories on the purpose of criminal law. In more specific, juristic contexts, one must rely upon weighing when recommending theories of *dolus*, *culpa*, harm, wrongfulness, action, omission, causation, defence, etc. Weighing is indispensable as well when discussing punishment in a concrete, actual, or hypothetical case.

What also needs mentioning here is the German doctrine of weighing in constitutional law (see Alexy 1985, 143ff.).

5.1.2. General Theories of Weighing

In general, there is no algorithm for weighing in legal doctrine (cf. Peczenik 1989, 58–96). Moreover, "ultimately balancing is an act that cannot be captured by criteria, it is an act of the imagination (Bańkowski 2001, 184).

Weighing is defeasible. One weighing is dependent on other weighings. A given factor may make very different contributions to the value of the whole depending on what other factors it combines with (cf. Rabinowicz 1998, 22). In other words, weighing is holistic. This holistic conception of weighing reminds us of ethical particularism. For if weighing in general depends on all accessible reasons together, it follows that weighing in a concrete case depends on all the circumstances connected with the case. Like justice, weighing takes in all considerations. The so-called ethical particularists, such as Jonathan Dancy, seem to suggest that any reason can be undercut, or at least made to weight less, when it appears in new configurations in combination with other factors (cf. Rabinowicz 1998, 22).

One can conceptualize weighing as an aggregation of arguments and a construction of chains of arguments. As soon as one states that one thing weighs more than another, the question comes up, "Why?" At this point one needs another argument and another act of weighing. Briefly stated, x may weigh more than y in isolation, but in a certain situation z can occur and reverse the order, such that x weighs less than $y + z$; $x + q$ may then weigh more than $y + z$. This way, weights can be aggregated. Not all reasons may be cumulated, to be sure. But reasons proffered in legal argumentation cumulate often enough to make cumulation an interesting rule of thumb: *Ceteris paribus*, two reasons pointing in the same direction are stronger jointly than they are singly.

In other words, human beings have a faculty of judgment, and weighing is a product of this faculty. The philosophical question, What faculty of judgment is used in a profound perspective? is not a question for legal theory to address. Perhaps this faculty is the passion for reason, or it may be several kinds of passion for reason. Or maybe something more fundamental, more Kantian, so to speak. A law theorist is well advised to leave all three options open.

One way that has been attempted out of this intellectual labyrinth is to construct a mathematical theory of importance, but a theory of this kind will tend to be complex (cf. Lindahl 1997, 111ff., and Odelstad 2002). Moreover, it will leave philosophical questions without anwers.

Another way is to assume a simple model of weighing where each weighed value or principle is susceptible of three degrees of violation: slight, medium, and serious. When principles collide, a slight violation of one principle is always to be preferred to the medium violation of another, and a medium violation is to be preferred to a serious one (see Alexy 2001 and 2003). In particular, Alexy (2001, 69ff. and 2003) points out what follows. Weighing and balancing can be analyzed in three steps. We must establish (1) the intensity of interference with

the principle, (2) the weight of the principle in the abstract, and (3) the reliability of the empirical assumptions concerning what the measure in question means for the non-realization of the principle. Intensity, weight, and reliability can be measured on the triadic scale slight, medium, serious. Though in some cases the measuring can be questioned, and a "draw" may occur, weighing is most often conclusive. A finer scale, admitting of more than three degrees, is of course logically possible, but it would be impossible to apply in practice.

The formula for weighing and balancing two principles *Pi* and *Pj* in the case under consideration is

$$Wi,j = \frac{Ii \cdot Wi \cdot Ri}{Ij \cdot Wj \cdot Rj}$$

where *I* designates the intensity of interference with the principle in the particular case, *W* the abstract weight of the principle, and *R* the reliability of the empirical assumptions.

In my opinion, Alexy's theory is the best juristic approximation of weighing. It is especially well suited to attacking problems in constitutional law; the triadic scale of *W* corresponds to the fact that some basic rights are privileged, some are normal, and others (such as social rights) are more contestable.[1] The most profound philosophical theory of weighing is the holistic one, but it is difficult to operationalize for the immediate use of lawyers.

5.1.3. Extending the Domain of Reason

Despite its holistic and defeasible character, weighing is a rational activity. Legal doctrine uses weighing but aims at a rational reconstruction of the law. Rationality cannot be reduced to formal logic. Nor should we set up a contrast between rationality and a weaker reasonableness. Thus, according to Gardner and Macklem (2002, 474) "rationality is […] the same as reasonableness. As we have argued, it is simply the capacity and propensity to act (think, feel, etc.) only and always for undefeated reasons."

The concept of a "reason" may be defined in many ways. What is important is that a reason is a fact, or else a belief in a fact. The following definition appeals to the psychological relation of holding one belief on the basis of another:

> A belief *P* is a reason for a person *S* to believe *Q* if and only if it is logically possible for *S* to become justified in believing *Q* by believing it on the basis of *P*. (Pollock 1986, 36)

[1] In this respect, Alexy's theory of weighing is a juristic theory: It belongs to legal doctrine. But when one considers its sophistication, it falls within the reach of legal theory and legal philosophy.

To be sure, some readers may think that logical deduction is the only method of correct reasoning. Yet arguments may be evaluated by several standards. One such standard—deductive logic—is very severe. Arguments that satisfy this standard guarantee the truth of their conclusions on the basis of the truth of their premises. However, since the standard of deductive logic is very severe, many real-life arguments that are useful do not satisfy it. The distinction between good and bad arguments can be brought outside the range of deductively valid argument by developing other standards, standards for defeasible reasoning. The concept of rationality is applicable to vastly different areas. One speaks of logical rationality (deductive and inductive), discursive rationality, supportive rationality, scientific rationality in general, the rationality of actions, goal rationality, norm rationality, system rationality, etc. (cf. Peczenik 1989, 55ff.; Aarnio 1987, 189; Agell 2002, 246).

The narrower the conception of reason, the wider the space for the irrational to creep in (cf. Dreier 1991, 134).

Thinkers who restrict the domain of reason to deductive logic and to empirical observations of brute facts may provide for law theorists useful logical calculi. But they have no chance whatsoever of making sense of legal doctrine. Its subject (valid law) and its reasoning patterns (obviously not only deductive) appear fictitious and irrational to a logical-empirical theorist. Early Scandinavian legal realists, such as Karl Olivecrona and Alf Ross, can serve as an example. Ross's project of legal science as predictions of future judicial practice has proven to be hopeless. It was deemed such from the very beginning by Olivecrona, and it is easy to criticize (see Peczenik 1989, 262ff.; Peczenik 1995, 103ff.).

Thinkers who restrict the domain of reason to deductive logic, empirical observations of brute facts, and goal-means calculi may inspire legal theory by providing additional logical tools. But they still face the same problems when it comes to the object of legal doctrine and its way of reasoning.

Thinkers who restrict the domain of reason to deductive logic, goal-means calculi, Kantian practical reason, and empirical observations of brute facts have a slightly better chance, but they will inevitably distort legal doctrine beyond recognition. Their trick is to split the domain of reason in two hermetically isolated parts: theoretical reason on the one hand and practical reason on the other. Theoretical reason is the realm of deductive logic and brute facts only. Practical reason is a province of deductive logic that takes in Kantian categorical imperatives together with various derivates and social contractarianism more or less linked to Kant. A prominent example is the early Rawls, with countless epigones. The problem is that most of the existing juristic theories have thus far evaded such a reconstruction.

There remains to enlarge the domain of reason by including deductive logic, defeasible logic, goal-means calculi, postulates of practical reason, sociocultural patterns of reasoning, and observations of facts—brute and social alike.

5.1.4. Decisive Reasons, Defeasible Reasons, Rules, Principles

We have seen that defeasible reasoning is common in the context of juristic interpretation and juristic theorizing. Let me add to this that this kind of reasoning is common in many contexts. People often think in terms of what is normally the case and provide plenty of leeway for exceptions. It is thus common for them to utter defeasible statements, justified unless suspended or cancelled by newly presented information.

The artificial-intelligence-and-law community has developed logical tools for modelling defeasible legal arguments that can deal with undercutting arguments, rebuttals, weighing information, reasoning on weighing information, reasoning on rules, lines of argumentation and dialogues, procedural rules, commitment rules, and burden of proof.

In Volume 5 of this Treatise, Giovanni Sartor provides the following definitions.

> [W]e distinguished two kinds of collisions:
>
> 1. *rebutting collision*, where two reasons support incompatible conclusions;
> 2. *undercutting collision*, where one reason leads to the conclusion that another reason is unable to support its own conclusion.
>
> We have also observed that in rebutting collisions the stronger reason prevails, while in undercutting collisions the undercutter prevails, regardless of its comparative strength. (Sartor, vol. 5 of this Treatise, sec. 26.3.1)

> In the normative domain *undercutting* is usually based upon the *inapplicability* of a general rule to certain entities. By saying that a rule is inapplicable to certain entities, we precisely claim that we are not authorised to infer the instances of that rule which concern these entities. (Ibid., sec. 26.3.3)

Let us now make the distinction between decisive and contributing reasons. Decisive reasons determine the conclusions they lead to. If a decisive reason for a conclusion obtains, the conclusion must also obtain.

Some decisive reasons determine their conclusion without any possibility of an exception. Other decisive reasons are, however, defeasible. A decisive reason is defeasible if, and only if,

- the reason is decisive on the basis of the information possessed; and
- new information may become available that was initially not there and converts the reason to a non-decisive one.

In other words, decisive and defeasible reasons determine their consequences in normal circumstances, but do not determine such consequences if the circumstances are not normal. Contributing reasons, on the contrary, never determine consequences by themselves. There can be contributing reasons that plead for and against a particular conclusion. It is the set of *all* reasons (pro and con) contributing to a particular conclusion that determine whether the

conclusion holds (cf. Hage and Peczenik 2000, 306ff.). One can also say that contributive reasons are *pro tanto* reasons.

Rules are decisive reasons, but they often are defeasible. *Principles* are contributing reasons.

Rules apply in an all-or-nothing fashion, in the sense that if a rule is applied to a case, the ruler's conclusion yields the legal consequence for that case. Principles, on the contrary, generate only reasons that plead for actions contributing as much as possible to goal states. Once we know that a certain provision is a principle, or that a certain practice or deliberation expresses a principle, we know that it is a contributing reason, not a decisive one. This definition is closely related to the opinions of both Dworkin and Alexy.

Dworkin's formulation is as follows:

> Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. [...] A principle [...] states a reason that argues in one direction, but does not necessitate a particular decision. (Dworkin 1977, 24, 26)

According to Alexy (2000b, 295; cf. Alexy 1985, 75ff.), "principles are norms commanding that something must be realized to the highest degree that is actually and legally possible. Principles are therefore optimization commands."

There is an extensive analytical literature on rules versus principles. I will provide only one other conceptualization (Atienza and Manero 1998). These authors define principles in the strict sense in terms of a norm's range of application. This principle defines the cases to which it is applicable "in an open manner, while the rules do so in a close manner" (ibid., 9). Thus, the authors reject Alexy's assumption that principles are optimization commands:

> the principles in the strict sense are optimization commands only in the sense that, as their conditions of application are formed in an open manner [...], but once it is determined that in that case the principle prevails, it demands complete fulfilment. (Ibid., 12, 13)

The merit of this conceptualization is that it avoids the problem of contributing reasons and the attendant problem of weighing. In Atienza and Manero's theory, principles are like rules: They must be followed when applicable. But the problem of weighing does not thereby disappear. It only moves from one "box" to another: from an analysis of the content of rules/principles to an analysis of their applicability.

Legal doctrine is not committed to making a final choice from among the analytical conceptualizations of Dworkin, Alexy, and Atienza and Manero, or from among other such conceptualizations. But it is committed to recognizing the importance of defeasibility for legal reasoning, regardless of the conception of defeasibility that is chosen.

In the real world, the use of legal provisions varies. In most cases, legal provisions are applied if their conditions are met and they generate decisive

reasons. In hindsight, these cases may be called routine (or "easy"). Once a case is identified as routine, no values and no choices are necessary to solve it. A decision in this case follows from an established legal rule in combination with the description of the case. Sometimes, however, there are major objections against treating legal provisions as "hard" rules. One will then be prepared to make an exception. In hindsight, such cases are called "hard." There are also hard cases resulting from problems of interpretation.

Some legal realists correctly realized that one cannot draw a clear demarcation line between hard cases and routine cases. Thus, Per Olof Ekelöf made a similar distinction between ordinary and special cases and added what follows. Special cases comprise not only what falls outside of the letter of the law, but also what is clearly covered by this "letter" and yet seldom occurs or is connected with "such special circumstances that a mechanical application of the statute can be regarded as militating against its purpose" (Ekelöf 1958, 84). Ordinary cases, on the other hand, are those cases which are of great importance or are for some other reason so conspicuous that the drafters of the statute could not have avoided taking note of them. Moreover, social change occurring after a statute has been enacted may cause some cases to become ordinary even though the drafters hadn't thought of them. Consequently, when making the distinction between ordinary and special cases, one must rely on an evaluative weighing of various criteria.

Each legal role—for instance, the role of a judge, of an attorney, or of a legal scholar—determines its own delimitation between routine cases, in which the law ought to be followed without deliberation, and hard cases, which require a weighing and balancing of the law against moral considerations. Delimiting routine cases requires a valuation. This valuation is implicit in the legal role assumed and is not justifiable within this role. But it certainly is justifiable within another role, perhaps within the role of a philosopher. A lawyer performs this delimitation intuitively, and that is the way she must and ought to proceed.

5.1.5. Defeasibility, Not Indeterminacy

The idea of defeasibility enables one to criticize sceptics who argue that legal doctrine is a mere façade put up to conceal the real reasons for judicial decision and is hopelessly indeterminate—unable to formulate precise rules for choosing from among conflicting legal arguments.

This criticism could not go unchallenged. A great American legal realist thus concluded with resignation, "A right man cannot be a man and feel himself a trickster or a charlatan" (Llewellyn 1960, 4).[2]

[2] Should probably read "a man cannot be a right man," but the observation is patently true.

One way of challenging the indeterminacy of theories is to argue that legal doctrine formulates general rules for interpreting the law. These rules are defeasible but not fully indeterminate. In particular, argumentation by analogy and *argumentum e* contrario are defeasible but reasonable. The choice between them is justifiable if coherent with the system of already accepted propositions and preferences of both legal and moral character.

These defeasible rules are honestly endorsed by both judges and doctrinal jurists. Even when such rules are a façade concealing other reasons, they may still be correct.

> The alleged façade is in fact worthy of study itself, since at the very least it represents an effort at self-conscious public justification. Thus it enables us to understand what are regarded as satisfactory and publicly acknowledgeable grounds for legal drafting and decision making. (MacCormick and Summers 1991, 17)

Indeed,

> if the reasons given are well-founded and valid it does not matter whether they are judge's "real" reasons. If, again, the reasons are not well-founded or not legally valid it equally does not matter whether they are judge's "real" reasons. In either case, the reasons actually given will be judged on their own merits. (Bergholtz 1987, 441; cf. ibid., 421ff.)

Moreover, disagreement about precise rules of interpretation and about solutions to cases does not imply disagreement about forms of argument. Statutory analogy and *argumentum e contrario*, for example, are not rules but forms of argument (Alexy 1978, 341ff.; Alexy 1989, 279ff.), each supported by a different set of reasoning norms and other principles that a judge has to weigh and balance. They enable the judge to reach the conclusion that is justifiable in the given circumstances and within the limits of the established reasoning norms. In some cases all judges, or all legal researchers, would reach a consensus if they reasoned perfectly; in other cases they would not. But the forms of argument and their argumentative underpinnings restrict the area of disagreement.

In particular, the juristic use of statutory analogy and *argumentum e contrario* "relies upon the principle that the judge should never create norms which are altogether new but should seek his guidance in rules which have already been recognised for other situations" (Schmidt 1957, 195).

Legal doctrine constantly puts out more or less abstract examples of justifiable uses of analogy, such as justifiable examples of *argumentum e contrario*. One can regard these abstract examples as rules of interpretation. These rules are defeasible. Consequently, they are not fully precise. Yet they do say something—they are not fully indeterminate.

Anglo-American philosophers are engaged in sophisticated discussion on the interpretive character of legal theories. Thus, Joseph Raz claims that legal interpretation has innovative, forward-looking aspects. Innovation defies gen-

eralization. Hence it is futile to attempt to construct a general theory that differentiates good interpretations from the bad (cf. Raz 1996a; Dickson 2001). Raz has been influenced by the theory of sceptical philosophers, like Williams (1985) and Dancy (1993).

To avoid scepticism, some scholars question whether legal doctrine can have any interpretive character at all. The question is a special case of the much more general question whether meaning in general is explicable as interpretation. Thus, Marmor (1992) and Stone (1995) reject interpretation as the fundamental determinant of meaning. The key to these views is the following passage from Wittgenstein:

> It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shows is that there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases. (Wittgenstein 1958, § 201)

This passage suggests that rule-following is something other than interpretation. But what is it then? Perhaps a sincere disposition of judges to use rules in certain ways, a disposition acquired through the training they have received and the practice they engage in Postema (1998, 329ff.) thus asks the following question: If the goal of theorizing about the law is to master a practice, can one at the same time state that the goal is to interpret the law?

Still, judges and jurists obviously assume that there are some rules for interpretation. But then they stop reflecting. Typically, they do not ask for rules of the second order, but rely instead on a tacit knowledge acquired through training and practice.

Philosophers inspired by Wittgenstein have not proved that interpretation is irrelevant for legal doctrine. Nor have they shown that interpretation does not diminish the law's margin of indeterminacy: They have not shown that the law is fully indeterminate, but merely that it is not fully determinate.

5.1.6. Logic and Rhetoric in Legal Argumentation

One may need new analytical tools to deal with defeasibility and weighing. Researchers doing artificial intelligence and law have developed tools for modelling legal argumentation (cf. Gordon 1995; Prakken and Sartor 1996; Hage 1997b and Verheij 1996). They have built a theory of defeasible reasoning on top of monotonic logic. The "nonmonotonicity of a logic means that the addition of a new information to a theory can make sentences underivable which used to be derivable on the basis of the smaller theory" (Hage 1997a, 199).

Notice that none of the old information is removed: It stays in the theory. This is important for jurists because congruent with the practice of statutory

interpretation. A jurist may radically reinterpret the statutory provision in question, but the provisions stay within the legal system. Only in extremely hard cases does weighing and balancing lead to the removal of a norm from the legal system (*desuetudo derogatoria*).

In a nonmonotonic logic, an extension of the set of premises can lead to a contraction of the set of conclusions. The essential point is that the premises are defeasible.

Nonmonotonicity, or defeasibility, arises from the fact that arguments can be defeated by stronger counterarguments. The new arguments defeat some of the old ones. In a monotonic logic this would mean that the new set of premises is inconsistent, and hence that one can derive anything from it (*ex falso quodlibet*). But all default argumentation means that *ex falso quodlibet* is no longer regarded as a logical rule. Moreover, nonmonotonic logic makes it possible to extend a theory in such a way that it becomes possible to derive more reasons for a conclusion as well as against it.

Special predicates are used to say that rules are valid, that rules apply, and so on. Rules of derivation establish, for example, that a rule—if applied—gives rise to a reason, that a conclusion holds if the reasons for it outweigh the reasons against it, and so on.

These models can be relatively simple, but they also can embrace formal dialectics that introduce speech acts, burden of proof, etc. (cf. Freeman and Farley 1997). Thus, Arno Lodder (1999) has proposed a model specifying

- the participants;
- the moves of the game;
- the burden of proof;
- the role of commitment;
- the rules of dialogue; and
- levels in the dialogue.

The rules of dialogue determine how to play the game. They define:

- which player's turn it is;
- whether a move is allowed; and
- the consequences of valid moves in terms of commitment.

Rhetoric and logic get combined in this approach to argumentation. Logically compelling arguments are allowed, as are psychological arguments designed to convince.

A general strategy for legal doctrine might be the following. Try first with strict rational models, starting with deduction. If these lead to trivial or counterintuitive results, extend the set of tools to some kind of nonmonotonic logic. If this does not suffice to cross the threshold of trivial-

ity and resistance to intuition, then try dialogue games. If even this is not enough to satisfy a lawyer, switch over to humanistic discourse and metaphysics. Intellectual tools are just tools. They do not eliminate the indeterminacy of legal doctrine. They reduce it, though, because they increase the likelihood of a stable consensus.

Since all these models rely on non-conclusive rules, none can completely eliminate the indeterminacy of legal argumentation. They make it possible to model the law as rules and exceptions. But the model's author, and in some cases its user, must decide what new information generates an exception. This decision is not always determined in the law, meaning established by statute or precedent. The models merely channel the indeterminacy, pointing out the "places" that need to be judged intuitively. Still, the probability of a consensus on such "places" is high enough to secure for such modelling a high rhetorical value. That is, it promotes a stable consensus among legal scholars, lawyers, and the public.

In this context, one may also reflect on the epistemological value of rhetoric, for example, following Stephen Toulmin, along with Chaim Perelman and Louise Olbrechts-Tyteca. But whatever the outcome of such philosophical disputes, it is undeniable that legal doctrine has the space to accommodate both logic and rhetoric.

5.2. Reflective Equilibrium in Legal Doctrine

5.2.1. Wide, Constrained, and Segmented Reflective Equilibrium in Legal Doctrine

No algorithm indicates when an exception enters into a defeasible system of rules. Nor is there an algorithm for juristic weighing. To establish exceptions and perform juristic weighing, one must rely on a web of reasons in a kind of reflective equilibrium.

The idea of reflective equilibrium is well known in political and moral theory. John Rawls characterized reflective equilibrium in the particular context of his theory as follows:

> By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments [...]. I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. (Rawls 1971, 20)

The idea of reflective equilibrium in legal justification requires some modifications. The idea originated in the context of a rather orthodox strand of liberal theory. A liberal moral thinker aims at equilibrium, freely modifying principles and judgments alike. Legal doctrine aims at equilibrium, too, but this equilibrium is not free. It is an equilibrium of a peculiar kind:

- wide;
- constrained;
- segmented; and
- centred around platitudes (truisms or commonplaces).

Simple reflective equilibrium is too narrow for legal doctrine. We need a wider equilibrium. On wide reflective equilibrium in morality:

> A wide reflective equilibrium is a coherent triple of sets of beliefs held by a particular person; namely, (a) a set of particular moral judgments; (b) a set of moral principles; and (c) a set of relevant background theories, which may include both moral and nonmoral theories. […] The agent may work back and forth, revising his initial considered judgments, moral principles, and background theories, to arrive at an equilibrium point that consists of the triple (a), (b), and (c). (Daniels 1985, 121; cf. Swanton 1992, 11ff.)

By working competing moral theories into reflective equilibrium, the jurist takes the first step away from simple reflective equilibrium. Such thinkers as Rawls can modify and adjust principles and judgments, but they have not thought of a free adjustment among moral theories. On the contrary, they hold firmly to a certain kind of liberal moral theory: They are not philosophically neutral but are liberal moral philosophers. Legal doctrine, in contrast, is philosophically neutral, in the sense that it is not committed to a specific moral theory.

Another deviation of legal doctrine from the liberal idea of reflective equilibrium is this. A legal scholar is not entirely free to adjust principles and judgments to each other. A search for reflective equilibrium can be undertaken only when the legal culture makes it possible. That is,

- when it is proper to enter into profound justification;
- when interpreting the law in hard cases; or
- when using value-open concepts.

Thus, wide reflective equilibrium in legal doctrine must be constrained by must—and should—sources of law, that is, mainly by statutes, judicial decisions, and *travaux préparatoires*. The wording of these is immune to revision. Legal doctrine may only revise their interpretation within the limits allowed by legal language and legal culture. The threshold of revision will obviously vary, from relatively low with *travaux préparatoires* to extremely high with the system of enacted legal rules considered as a whole.

Wide and constrained reflective equilibriums in legal doctrine are segmented. Each juristic theory should be coherent with itself, internally, according to its own standards. But different theories have different scopes. Some are relatively narrow, as is the theory of adequate causation in the law of torts. Others cover a whole branch of law, such as private law. At the same time, there exists a total unifying structure for legal doctrine as a whole, and ulti-

mately for the total system of acceptances, reasonings, and preferences relevant for the law. The fragments are like islands and archipelagos rather than like a continent. They are linked by way of "bridges" and "boats" that change direction in line with changes in culture. In other words, legal doctrine aims not only at the internal equilibrium of the legal system, but also at an equilibrium that takes into account our background knowledge of society and philosophy. The law is linked normatively to morality and politics. Indeed:

> The upshot is that the common law is (inherently, though more or less imperfectly in fact) a unity of not only diverse doctrines but also of doctrinal systems. The unity of subunities constitutes the good order and justice of the common law and reveals injustice as the hypertrophic extension of some constituent principle, such as formal liberty, the general happiness, or positive freedom. (Brudner 1995, 261)

5.2.2. Equilibrium around Platitudes—Philosophical Background

Reflective equilibrium in legal doctrine is arranged around platitudes, not around precise ideas. The importance of platitudes for human thinking cannot be overestimated. It is obvious both in science and in morality. Let me start from the evolution of the philosophy of science.

The older philosophy of science was dominated by so-called inductivism. Thus, some philosophers of science have argued that if order rules the universe, induction is the only method of predicting that order; they have also claimed that induction is sufficient to reconstruct all scientific reasonings (Reichenbach 1949, 429ff.) and have brought statistical reasoning into play.

Karl Popper (cf. 1959, 28ff.) criticized inductivism and claimed that the proper method of scientific research consists in creating bold hypotheses. One should try to falsify the hypotheses made. These should be accepted conditionally, that is, so long as they are not falsified (ibid., 40ff.). The growth of knowledge is the result of a process closely resembling what Darwin called natural selection: We have here a natural selection of hypotheses (ibid., 108 and 1972, 261). But Popper's falsificationism faces some difficulties. Pierre Duhem noticed, even before Popper's time, that one may criticize and eliminate the observations that seem to falsify a hypothesis. How should one go about choosing when to contest the theory and when to contest the observation? Popper formulated some methodological rules with which to solve this problem (Popper 1959, 83).[3] The most important of these is the rule that ad

[3] Some philosophers of science have tried to extend the list of methodological rules. Thus, Knut Erik Tranöy (1976, 131ff., and 1980, 191ff.) discusses "norms of inquiry" that not only have a methodological character, but also express distinct traditions, each centred around a different value: self-realization, public welfare, value-neutrality, testability, intersubjective controllability, honesty, sincerity, exactitude, completeness, simplicity, order, coherence, system, academic freedom. To some extent, these norms of inquiry are similar to material inference rules in Toulmin's sense (cf. 1964, 109).

hoc auxiliary hypotheses, introduced to save the theory and not explicative of anything else, are forbidden.

According to Thomas Kuhn (1970, 23ff.), each scientific theory should be judged as part of a broader totality called a paradigm. Each paradigm includes, among other things, (1) examples of concrete scientific achievements (e.g., Einstein's) imitated by scientists in subsequent research; (2) value judgments, norms, and basic beliefs shared by scientists, e.g., criteria for the correctness of physical experiments; and (3) so-called symbolic generalizations about the sense of scientific terms, such as "mass" and "energy."[4] If a scientist cannot solve a problem within a paradigm, this failure does not falsify the entire paradigm or any of the theories essential to it: What is "falsified" is rather the scientist's skill. Paradigms are incommensurable. In the transition from one paradigm to another, words change their meaning or their conditions of application. Each paradigm then satisfies the criteria it dictates for itself and falls short of satisfying some of the criteria dictated by its opponent (ibid., 109–10). In his later works, Kuhn introduced the concept of "disciplinary matrix" (cf. Kuhn 1979, 293ff.), each matrix defining a scientific discipline.

According to Imre Lakatos (1970, 132ff.), a given research program (or group of theories) contains a hard core that includes some central propositions, e.g., the main points of the theory of relativity. This core is protected by auxiliary hypotheses. One thus ought to direct counterexamples against the auxiliary hypotheses, never against the hard core. The research program is fruitful ("progressive") if it continues to produce theories with greater and greater empirical content explaining more and more observations. Failing which, the research program becomes degenerative, often giving way to another program with another hard core. Classical physics thus stagnated in the late 19th century. All questions were apparently solved and no new theories appeared. Some time later it gave way to the new physics based on relativity. In Lakatos's theory, cores thus play a role similar to that of paradigms in Kuhn's system. But Lakatos's theory is philosophically more interesting than Kuhn's. A paradigm shift in Kuhn's theory is nothing more than a changing scientific convention. It simply happens, even for no rational reason. In Lakatos's sense, a change from one research program to another is more like Popper's falsification: It is brought about by the inner dynamics of science.

Despite having enormous success, the philosophy of science from Popper to Lakatos came up against fundamental problems due to its conventionalism and relativism. If all previous theories have been falsified, if the new theories

[4] Popper (1959, 13) was close to this idea: "A structure of scientific doctrines is already in existence; [...] This is why (a scientist) may leave it to others to fit his contribution into the framework of scientific knowledge" (cf. Popper 1972, 51ff.).

are incommensurable with the old ones, how then can one believe in the truth of present-day theories? They, too, are doomed, are they not? Present-day philosophy of science has no clear answer to this question. It only delivers some hints. For example, Nancy Cartwright (1999, 37ff.) claims that we learn the truth about the world not only from physics, but also from the morals of fables, such as the moral, "It is dangerous to choose the wrong time for doing something" or "The weaker always fall prey to the stronger." The point is "that laws of physics are general claims, like morals of fables" (ibid., 47), and that "the laws of physics are true only about what we make" (ibid.).

The truth can be found on the low and midlevel of abstraction, not only in the most abstract and logically prior laws of nature. Eventually, a new abstract theory will replace an old one, and the new theory may use very different concepts. But the morals of fables survive, and they give us insight into the natures of things (Cartwright 1999, 77ff.). The new theory keeps most of the low-level and midlevel content of the old one.

An outsider may regard such views as almost defeatist. But they suggest the following question: If philosophers of natural science tend to play down the scientific claim to precision, shouldn't law theorists, too, learn to accept the profound but not precise "morals of parables"?

To expand on this point, I will change source of inspiration and pass from the philosophy of science to moral philosophy. One cause of moral relativism and pluralism is in the eternal quarrel among the big moral theories. But these moral theories—though incompatible when developed in general, precise, and content-rich fashion—lead to very similar consequences once their level of abstraction, precision, and informational content is brought down. The more abstract, precise, and content-rich a theory is, the more controversial it becomes.

Each of the big moral theories is built up on a platitude. Thus, Kantians emphasize autonomy of the person, utilitarians utility, Aristotelians practices, and—let me add—coherentists coherence. All these platitudes have obvious moral importance, since no one would totally ignore autonomy, utility, moral practices, or coherence. One need not be Kantian, Aristotelian, or coherentist to recognize the importance of the corresponding platitude. All morally sensitive persons seem to accept the platitudes, even if they may disagree when it comes to sophisticated conceptions of morality.

Thus, one may argue that platitudes define morality. In particular, Michael Smith (1994, 39ff.) has stated that there are different kinds of platitude "surrounding our moral concepts." Some indicate that moral judgement is above all practical. There are platitudes that give support to our idea of the objectivity of moral judgement. Others tell us about the supervenience of the moral on the natural. Others still deal with the substance of morality, as by urging a concern and respect for the person. And then there are platitudes that deal with procedure, such as reflective equilibrium. In sum:

> There is in fact a rich set of platitudes about rightness that those who want simply to fix the reference of rightness by some minimal reference-fixing description simply fail to take into account. (Ibid., 32)

Controversies among moral theories first surface when one tries to convert the platitudes into abstract, precise, and content-rich intellectual structures. Let me add that consensus on the precise consequences of platitudes is defeasible. I have previously called this a *prima facie* consensus. It may also be called a *pro tanto* consensus (cf. Peczenik 1998b, 55.2).

There are vague platitudes that define morality in general. Others, slightly less vague, define our morality in Western society; among these we have the platitudes about human rights. The core of human rights is perhaps universal but at the same time allows for historically evolving modifications. A good question is whether the universal core amounts to something more than platitudes.

In law, one can perceive platitudes behind moral theories as "normative patterns" competing with one another. This, I think, is the only way to understand the theory of normative patterns, a theory recently set out by Anna Christensen (2000, 285ff.). She discusses three such patterns, namely, established position, justice, and the "market-functional" pattern. It is easy to see that the established-position pattern echoes theories of entitlement (such as Nozick's) and that the "market-functional" pattern echoes the law-and-economics theory. What is interesting is that Christensen, a professor of law, does not bother very much to go into the intellectual subtleties of these theories, but simply uses the platitudes. Jurists obviously need these platitudes to understand what is going on in the law.

There exists a considerable consensus among people on moral platitudes and perhaps also on some cases. This consensus is clear within Western culture, but one may suspect that it also exists in other mature cultures. Thus, *A* may be more or less widely considered a morally good person if she has a disposition

- not to harm others;
- to help others;
- to tell the truth;
- to keep promises;
- to work efficiently; and
- to show courage (cf. Peczenik 1989, 58).

Such platitudes are in a sense obvious. But they may also be supported by reasons. We can argue for them by giving particular examples of good actions as well as by using big moral theories. For instance, when arguing in favour of the first two criteria (not harming others and helping them), we can adduce examples of saints, but we can also use a utilitarian moral theory. When argu-

ing for the next two (telling the truth and keeping promises), we can adduce examples of particularly honest persons, but we can also use a Kantian moral theory. When arguing for the last two criteria (working efficiently and showing courage), we can adduce examples of great scientists and heroes, but we can also invoke a perfectionist moral theory.[5] One can also envisage cultural progress as the main principle of justification in the law (cf. Peczenik 1983, 116ff.).

In sum, platitudes are more stable than particular judgments and big theories alike. And their stability becomes even greater when one can link them to particular judgments and big theories. A web of platitudes is more stable than the same platitudes considered singly. In other words, a reflective equilibrium among platitudes is more stable than any one platitude alone.

5.2.3. The Philosophy of Platitudes for Legal Doctrine

Inductivism is too rigid for legal doctrine. To be sure, legal doctrine is rife with examples of statutory provisions and other norms of established law generalized by way of the so-called "legal induction." But while "regular" induction leads to theories or hypotheses on preexistent facts, legal induction (and legal reasoning *ex analogia*) often leads from one norm to the creation of a new norm. Juristic theories do not merely reflect enacted statutes and past decisions passively. Rather, there is a mutual influence going on between juristic theories and specific legal rules in a reflective equilibrium centred on legal sources and on some platitudes.

It is also doubtful whether legal doctrine consists of testing falsifiable hypotheses in Popper's spirit, since it is not clear what observational data these hypotheses would explain. Nor is it clear what the term "falsify" means in legal doctrine. Especially so when one considers that legal doctrine contains normative and fused statements. No doubt, honest researchers in legal doctrine are Popper-minded, in the sense that they try to adjust their theories to social realities, not least to statutes and legal practice. But the adjustment is

[5] On perfectionism, see Hurka 1993. Legal doctrine is not committed to Hurka's strong philosophical statements, such as his idea that perfection is connected with human essence (cf. ibid., 23ff.). It suffices to state that humans have a passion for perfection, a component of the human passion for reason. But some of Hurka's statements fall in with the commonsense ideas mirrored in legal doctrine. For example (ibid., 55): "Perhaps perfectionist ideas will serve best in a pluralist morality, where they are weighed against claims about utility or rights." Hurka's main problem is reconciling perfectionism—which on the "maximax" principle apparently privileges the elite—with the egalitarianism of Rawls' maximin criterion (cf. ibid., 75, 83ff.). "The egalitarian tendency of diminishing marginal utility competes against the fact of (somewhat) differing abilities and the support it gives to (some) inequality. To reach a final perfectionist position, we must somehow balance these opposing claims" (ibid., 173). Thus, Hurka hopes to defend "perfectionism with strong but defeasible tendency to favour material equality" (ibid., 189).

often a matter of subtle reinterpretation rather than replacing one theory with another to account for a crucial counterexample.

The most important lesson a law theorist receives from Kuhn's theory of paradigms is the insight that normative and conventional components are by no means specific to legal research. This is important because many critics of legal research have claimed that these components make it unscientific. One can thus find analogies between matrices (and between paradigms) in natural science and legal research. According to Aulis Aarnio (e.g., 1984, 25ff.), the matrix of legal doctrine, in a modified Kuhnian sense, consists of four components as follows:

- a set of philosophical background presuppositions, among which the assumption that legal reasoning is based on valid law;
- presuppositions on the sources of law (one assumes here that some of these presuppositions are either binding or at least that they constitute authority reasons);
- presuppositions on legal method (one assumes here that legal reasoning is and should be governed by methodological norms); and
- a set of values, most importantly in what concerns the certainty of the law (legal certainty) and justice.

Each paradigm of legal doctrine contains a particular interpretation of the matrix.[6] Legal doctrine in different historical periods and societies is underpinned by different sets of assumptions on valid law, legal sources, legal method, legal certainty, etc. But all legal reasoning is based on presuppositions of the kind just mentioned.

"Paradigms" sometimes tend to coexist in legal doctrine, in contrast to the paradigms of natural science, each replacing the previous sequentially in time. Some of the achievements of legal doctrine have been imitated by almost all jurists, but their content is rather limited, by no means comparable to the leading theories of natural science. By way of example, one may cite Savigny's theory of the four methods of statutory interpretation. This theory stands in the background of all writings of this kind in continental Europe, and perhaps even beyond that. But the theory is not followed in all respects. On the contrary, subsequent scholars have paraphrased Savigny freely, sometimes putting in more arguments, directives, and methods than Savigny, and sometimes weighing the methods differently, for example (cf. Wróblewski 1959, 143ff.; McCormick and Summers 1991, 464ff.).

One can also view legal doctrine in the light of a properly adjusted theory of research programs. To achieve this adaptation, I will assume that observa-

[6] On the description of various paradigms in legal research, see Dalberg-Larsen 1977, 513ff.

tional data has its analogue in the following kinds of entities relevant for legal research:

- legal rules—as set forth in statutes and other sources of law—authoritatively recognized in the legal system;
- moral norms (mostly principles) and value statements commonly endorsed within the community;
- sociological and other data about the community; etc.

A scientist tries to interpret observational data as mutually consistent and coherent with the "hard core" of the assumed theory. Analogously, a legal researcher tries to interpret established legal norms and *pro tanto* moral statements as mutually consistent and coherent with the core assumptions of legal doctrine of her time. These core assumptions determine the research program advanced in legal doctrine. A research program is fruitful ("progressive") if it continues to produce coherent theories accounting for increasingly established legal norms and moral statements. It is also progressive if the subsequent theory in the series explains and does away with more anomalies than its predecessor. An anomaly is either a logical inconsistency within a cluster of legal data or another kind of incoherence within this cluster, such as pointless norms not justifiable by general principles. A degenerative legal research program is no longer able to produce such new theories or to eliminate the anomalies.

Last but not least, the idea that the "morals of parables" can be true and epistemically stable is quite useful for our project of making sense of legal doctrine. Legal doctrine consists of midlevel theories, and these appear to be more stable than all-inclusive principles and moral theories. Midlevel theories of legal doctrine are seldom fully accurate. Yet they lie at the core of legal justification. They may be conceived of as "background theories" brought into a wide equilibrium along with inclusive moral theories and particular moral and legal intuitions. They are justifiable downwards by particular intuitions and upwards by inclusive moral theories. At the same time, by virtue of the same reflective equilibrium, midlevel theories take an active role, justifying (in addition to being justified by) particular intuitions and inclusive theories alike. Midlevel theories are such in several respects: Their extension is lesser than that of philosophical theories and their level of abstraction lower, as is their position in the logical hierarchy of theories. Hence they may very well follow from one of the comprehensive and abstract philosophies. They are, however, less controversial than these philosophies.

Each such theory is centred on some platitudes.

Consider the example of negligence. The wrongdoer should be liable for negligent acts; negligence is blameworthy; the wrongdoer is blamed for carelessness because a normally careful person—a bonus *paterfamilias*, for exam-

ple—would take more precautions. The estimate of what is normal is in turn based on frequency, social expectations, and moral intuitions. But on the law-and-economics theory, the defendant's conduct shall be deemed negligent if this judgment generally promotes economic efficiency. On another theory, the defendant will be deemed negligent if found to have created an unacceptable uncertainty for the accident victim (Dahlman 2000, 58ff.). According to a meta-rule recently presented to interpret some Swedish cases, each of these theories prevails in a certain area of the law (ibid., 106ff., especially 137). The problem is that this conception is controversial, as are all such conceptions. The theorists quarrel, and yet there is something stable behind their disagreement. Thus, what is stable in the doctrine of torts is the platitude, "The wrongdoer should be liable for negligent acts." This platitude seems to be an object of overlapping consensus among jurists.

The *bonus paterfamilias* standard of normality is somewhat more precise than this platitude, but it certainly is not very precise. It is stable and has been repeated in the course of two thousand years by the advocates of moral views quite different from one another. It also has been criticized, to be sure: Generation after generation, critically minded jurists have quipped about a *prima ballerina* who should be required to dance like a *bonus paterfamilias*, for example. Yet there is after all something reasonable in this standard, regardless of the moral theory from which one advances the criticism.

The law-and-economics theory is much more precise but much less stable. Its main advocate, Richard Posner, has drawn a following, it is true, but found nothing like an uncontested acceptance. I would venture to guess that the theory will be modified, completed with a number of exceptions and more or less ad hoc supplements. It is destined to be replaced by another theory. This seems to be the destiny of all scientific theories. Indeed, any competing theory whose precision is comparable to the law-and-economics theory would be equally unstable. What, then, is stable? The answer in general is "platitudes." Tuori (2002) would perhaps say that platitudes are part of the deep structure of law.

5.2.4. Reflective Equilibrium and Society-Centred Morality

Finally, there is the problem whether this theory of reflective equilibrium in legal doctrine coheres with the theory of society-centred morality set out in Section 4.5. In his society-centred theory of morality, Copp (1995, 56ff.) disagrees with the theory of wide reflective equilibrium. His main argument is that equilibrium may depend on an individual's "psychological contingencies." One can wonder whether this is a fatal objection. An individual seeking to bring her beliefs, preferences, and modes of reasoning into a wide reflective equilibrium has—within this equilibrium—the means with which to eliminate some of her psychological contingencies. The main purpose of re-

flecting on one's views is just this. My original views are perhaps partly irrational, but reflection may reduce this irrationality. Some of my original views are perhaps in conflict with the moral code in place in my society. Reflection will help me understand that this is the case; my initial interpretation of my society's moral code may then appear irrational to me; reflection will help me adjust my interpretation of this code to my views of rationality. I am both rational and social. All my views are revisable on the basis of social codes as well as on the basis of rationality.

The theory of society-centred morality and the theory of wide reflective equilibrium are both intuitively convincing. They should be reconciled. One way to do this is by understanding the theory of society-centred morality as an ontological theory that says what morality is. At the same time, one can understand the theory of wide reflective equilibrium as an epistemological theory telling us how one can obtain knowledge of society's moral code. Can philosophers work out such reconciliation in detail? Let us hope so.

5.3. The Coherence of Legal Knowledge

5.3.1. Aspects of Coherence in Legal Doctrine

Unfortunately, the term "reflective equilibrium" is going to need some clarification.

> The term "reflective equilibrium" is used to describe a state in which a thinker has achieved a mutually coherent set of ethical principles, particular moral judgments, and background beliefs. But how people do and should reach reflective equilibrium has remained poorly specified. (Thagard 2000, 126)

That is the specification the coherence theory proceeds upon. Legal doctrine produces coherence in the law in several ways. At a high level of abstraction, one may say that argumentation in legal doctrine is a compound of knowledge, morality, and justice. Legal doctrine aims at coherence among all these aspects. At a lower level of abstraction, one may add the following.

- First, legal doctrine uses such traditional means as argumentation *per analogiam*, *e contrario*, and *a fortiori*, and the analysis of the purpose of law. Using these tools typically increases coherence in the law. In modern society there are also some more-particular reasons for having a coherent justification of legal decisions and opinions (cf. Bergholtz 1987, 352ff.). Parties in litigation and citizens in general do not have blind faith in the lawgiver or in decision-makers: They want to know why the decisions are as they are. Moreover, a coherent justification of legal norms and interpretation facilitates social control over lawmaking and law-implementing institutions, and this is an important requirement of democracy.

- Second, legal doctrine uses interrelated concepts, such that the meaning of a concept is often dependent on the meaning of other legal concepts.
- Third, legal doctrine presents the law as a systematic whole; the order of presentation of the parts of the law is predetermined by the relations that hold between such concepts.
- Fourth, legal doctrine presents legal rules under the umbrella of principles and goals that explain and justify legal rules.
- The fifth aspect is unity over time. Legal doctrine presents the law as evolving piecemeal: All parts of the law may change, but not all of them at once.
- Finally, there is the unity of legal validity (this unity reaches considerable sophistication in Kelsen's pure theory of law).

The third aspect is systematization. Savigny stated that legal doctrine is historical and philosophical (Savigny 1993, 30). It is philosophical due to its use of the concept of system (ibid., 32). It integrates exegetical and systematic elements (ibid., 35). As to systematic elements, Savigny stated what follows:

> I place the essence of the systematic method in the recognition and presentation of the inner connection or resemblance, by which the particular legal concepts and legal rules are unified into a big whole. Such resemblances are originally often concealed and their discovery will enrich our insight. (Savigny 1840, xxxvi; my translation)[7]

The fourth aspect of coherence in legal doctrine is that of the overarching principles of law. Thus, on Neil MacCormick's conception of normative coherence in the law, some principles support a number of legal rules, and hence make them coherent (MacCormick 1984, 235ff.; cf. MacCormick 1978, 152ff.). Ronald Dworkin's theory of the "integrity" (or coherence) of law includes an idea similar to MacCormick's idea that principles make rules coherent. Dworkin (1977, 87) thus

> condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right.

The fifth aspect is unity over time. This is one of Dworkin's points. He compares a lawyer to a novelist writing a "chain novel" seriatim. Each novelist, and each lawyer, aims to make her additions coherent not only with general principles but also with all the material she has been given, with the predictions of what her successors will want to or will be able to add, and with her substantive

[7] "Ich setze das Wesen der systematischen Methode in die Erkenntnis und Darstellung des inneren Zusammenhangs oder der Verwandtschaft, wodurch die einzelnen Rechtsbegriffe und Rechtsregeln zu einer großen Einheit verbunden werden. Solche Verwandtschaften nun sind erstlich oft verborgen, und ihre Entdeckung wird dann unsre Einsicht bereichern."

value judgments (Dworkin 1986, 225ff.). In Dworkin's opinion, judges should apply the "constructive model"; that is, they must accept precedents "as specifications for a principle that he must construct, out of a sense of responsibility for consistency with what has gone before" (Dworkin 1977, 161).

Another aspect is the unity of legal validity. Kelsen's view is that lawyers presuppose the *Grundnorm*: Laws inherit validity from the legally valid constitution. Lawyers, then, take for granted, on the basis of the *Grundnorm*, that the constitution is valid—that it ought to be obeyed (cf. Kelsen 1960, 203ff.). This *Grundnorm* brings into unity a variety of norms, thereby making determinate all the norms that belong to this legal order (cf. Kelsen 1960, 197). The *Grundnorm* is open to many interpretations, it is true, but the simple point here is that the postulate of the unity of the law is important to lawyers.

In sum, legal doctrine aims at presenting the law as a web of theories, principles, rules, meta-rules, and exceptions exhibiting different levels of abstraction and connected by means of support relations. Legal doctrine typically aims at obtaining a coherent totality, one that is relatively stable over time.

Let it be noted, too, that Robert Summers (in several works: cf. Summers 1995) has worked out a theory of the formality of the law that seems to have much in common with coherence. Law is formal because it is a functional unit. Form is its purposive systematization. The law is formal in several senses. In particular, it has its own structure, procedure, and methodology. The law as a functional unit requires rules but goes beyond rules. It gives us means, but it also determines some of our goals. The rule of law is one such goal.

5.3.2. Foundationalism, Scepticism, and Coherentism

As stated previously, the main topic of this volume is the question of legal knowledge. Legal doctrine contains normative elements and yet advances a claim to knowledge of the law. Let me now enter into more-abstract problems where coherence and knowledge intersect.

Epistemology has developed three competing views of knowledge: foundationalism, scepticism, and coherentism. Foundationalism holds that all knowledge ultimately rests on evident and basic beliefs (cf. Chisholm 1966, 30ff.). These basic beliefs can be of several types. Empiricists hold that basic beliefs exhibit knowledge initially gained through the senses or by introspection. Rationalists hold that at least some basic beliefs are the result of rational intuition. But foundationalism has been called into question. The alleged foundations are not certain. Each alleged basic belief may be defeated by contrary evidence.

Another alternative is scepticism. A sceptic would thus doubt all knowledge. A nihilist is an extreme sceptic who simply says that there is no knowledge at all. Nihilism is not an attractive project.

Most present-day epistemology is centred on the controversy between foundationalism and coherentism. In contrast to foundationalism, coherentism claims that every belief derives some of its justification from other beliefs. Beliefs are mutually reinforcing. Coherentism is linked to defeasibility. We can call each belief into question, but not all beliefs at once.

Coherentism is inescapable in moral theory, at least at the meta-level. It is possible that the best moral theory is foundationalist in its internal structure, as utilitarianism seems to be. But in choosing a moral theory—for example, utilitarianism as against a Kantian or an Aristotelian position—we must be coherentist. As soon as this choice is questioned, we must list and weigh pros and cons. There is no foundationalist meta-theory for this weighing. A choice of theory can be justified only by recourse to the chooser's total system of beliefs, preferences, and reasonings.

The main problem for coherence theory is how to explain the special status of data—of empirical observations in the first place. Difficulties with data lead to intermediate positions between foundationalism and coherentism, such as Susan Haack's foundherentism (cf. Haack 1993, 19ff. and 203ff).

> Unlike foundationalism, it should not make relations of evidential support exclusively one-directional, but should allow for pervasive mutual support; unlike coherentism, it should allow the relevance of the subject's experience for the justification of his empirical beliefs. (Haack 1998, 85)

Just as a possible filling-in of a blank space in a crossword puzzle can be supported by its consonance with the clues to it as well as by its agreement with other, already filled-in spaces, so a belief can be supported either by its consonance with experiential evidence or by its agreement with other beliefs.

Experiential evidence consists, not of propositions, but of perceptual interactions. It contributes to knowledge, not in virtue of logical relations among propositions, but in virtue of connections between words and world set up in language-learning. In other words, Haack's theory assumes a leap from (non-propositional) experiential evidence to coherent system of propositions.

5.3.3. Conceptions of Coherence

Philosophers usually tell us that coherence is a triad of logical consistency, cohesion, and comprehensiveness (Alexy 1998, 41).

Among the general conceptions of coherence there is Laurence BonJour's, which can be summarized as follows (Bender 1989, 5, referring to BonJour 1985, 9, 10, 92, 102–3, 106, 116, 123–4, 141, 151–4, 170, 191).[8] A system of beliefs is a justification-conferring coherent system iff:

[8] BonJour's theory of coherence is very attractive but somewhat unclear, since he writes of a unified system with unexplained anomalies.

(i) It is logically consistent;
(ii) it exhibits a high degree of probabilistic consistency;
(iii) it exhibits a significant number of relatively strong inferential connections among component beliefs;
(iv) it is relatively unified, i.e., it does not split into relatively unconnected subsystems;
(v) it contains few unexplained anomalies;
(vi) it sets out a relatively stable worldview that remains coherent—satisfying (i) through (v)—in the long run; and
(vii) it satisfies the observation requirement, meaning it must contain laws attributing a high degree of reliability to a reasonable variety of cognitively spontaneous beliefs, including introspective beliefs.

Requirements (i) through (ii) concern consistency, requirements (iii) through (v) cohesiveness, and requirement (vi) diachronic coherence.

Consistency is a logical concept. There also exist convincing logical theories of comprehensiveness (see Hage 2004). But the concept of cohesion is not entirely clarified. It has something to do with the idea that statements belonging to a coherent totality must have the support of other statements within this totality. Some philosophers have attempted a general theory of support or cohesiveness. Others (e.g., Hage 2004) are sceptical about these general ideas and regard cohesiveness as domain-dependent. In other words, they state that each coherent theory has its own standards of cohesiveness.

Though the basic idea of coherence is plausible, philosophers quarrel when attempting a precise theory of coherence. One can thus equate coherence with:

- the consistency of a system, plus the fact that every judgment in the system is entailed by the rest of the system (Bracker 2000, 28, 31; Blanshard 1939, 270–1; Ewing 1934, 229ff.);
- the simplicity of a system, meaning short, conservative leaps and no unexplained cases (Bracker 2000, 49ff.; Quine 1960, 17ff.);
- inferability from maximal consistent subsets within the system (e.g., Rescher 1973, 78ff.);
- the reasonableness of the total system of beliefs, preferences, and reasonings (Lehrer 1990, 115ff.);
- reflective equilibrium among reasons, plus comprehensiveness and simplicity of the system (Bracker 2000, 82ff.; Rawls 1971, 19ff.);
- narrative coherence, on any interpretation of it (e.g., Jackson 1988, 58ff.; Bracker 2000, 128ff.); or
- constraints-satisfaction (Thagard 2000, 15ff.).

Paul Thagard has developed a theory of coherence as constraints-satisfaction. Two statements, *p* and *q*, cohere with each other when one explains the other;

when they jointly explain a third statement; or when they display an analogy in their explanatory power. Coherence relations include explanation, deduction, similarity, and association. He thus takes up at least six different kinds of coherence—explanatory, analogical, deductive, perceptual, conceptual, and deliberative—each requiring different kinds of elements and constraints. If two elements cohere, there is a positive constraint between them. A positive constraint between two elements can be satisfied by either accepting or rejecting both elements. Epistemic coherence is a composite of five kinds of coherence, each with its own kinds of elements and constraints. Thagard's theory of explanatory coherence is informally stated in the following principles:

Principle E1. Symmetry. Explanatory coherence is a symmetric relation, unlike, say, conditional probability. That is, two propositions *p* and *q* cohere with each other equally.
Principle E2. Explanation. (a) A hypothesis coheres with what it explains, which can either be evidence or another hypothesis. (b) Hypotheses that together explain some other proposition cohere with each other. (c) The more hypotheses it takes to explain something, the lower the degree of coherence.
Principle E3. Analogy. Similar hypotheses that explain similar pieces of evidence cohere.
Principle E4. Data Priority. Propositions that describe the results of observations have a degree of acceptability on their own.
Principle E5. Contradiction. Contradictory propositions are incoherent with each other.
Principle E6. Competition. If *p* and *q* both explain a proposition, and if *p* and *q* are not explanatorily connected, then *p* and *q* are incoherent with each other (*p* and *q* are explanatorily connected if one explains the other or if together they explain something.)
Principle E7. Acceptance. The acceptability of a proposition in a system of propositions depends on its coherence with them. (Thagard 2000, 43)

Despite Principle E4, Thagard faces the "isolation objection." Haack's theory is more convincing because it links theories to non-propositional experiential evidence.

The idea of coherence leads to epistemic conservatism. Wlodek Rabinowicz (1998, 17) puts it as follows:

Suppose we discover that our system of beliefs is internally incoherent; or suppose we acquire a new belief that does not cohere with what we have believed before. It is here that the principle of conservatism comes in: A smaller modification is to be preferred to a larger one. Thus, conservatism is a principle of minimal change.

One can wonder why it is so. A simple explanation is that we prefer a smaller modification of the original beliefs to a larger one simply because ex ante these are our beliefs; rejecting them would mean rejecting what we ex ante consider to be true.

This philosophy may appear too conservative but is not. It tells us nothing at all about the extent of the modifications needed to adjust the belief system to new data. This depends solely on how extensive the input of new data is. Moreover, the principle of minimal change may be so adjusted as to allow us to prefer a bigger modification of the belief system to a smaller one if we hope by this means (with the system so modified) to explain more data than we ex-

pect to gather in the future. In this case, a bigger modification of the present belief system is reasonable because it leads to a smaller modification of what is expected to be the future belief system. Scientists often expect that a more coherent theory will thus explain more future data than a less coherent theory. This problem is well known in the philosophy of science, especially in the context of Popper's, Kuhn's, and Lakatos's theories.

From a "consumer's" standpoint, I think there should be some common core for all these theories. Law theorists would like to have such a core theory. But none have so far been forthcoming in any explicit form.

5.3.4. A Complex Web of Big Circles

The biggest problem of coherentist justification is its circularity. If nothing stands as an unshakable foundation of knowledge and everything is open to doubt, I will need reasons to back up my reasons, and so on ad infinitum. A coherentist cannot avoid this infinite regress without accepting circularity.

The problem of the circularity of justification—though formulated at its most general in the theory of coherence—is well known in other contexts as well, for instance, in the theory of science and in hermeneutics.

In the philosophy of science one meets the idea of a "theory circle": A theory is judged in view of data, and data in view of a theory. Perhaps "circle" is not the best word choice for what goes on in this moving back and forth. People do not literally justify *p* with *q* and *q* with *p*. At least they do not do so at the same time, but rather in the course of a justificatory "spiral": $Data_1$ justifies $Theory_1$, which justifies $Data_2$; $Data_2$ in turn justifies $Theory_2$, which justifies $Data_3$; and so on. The description of $Data_2$ thus presupposes theoretical terms with regard to $Theory_1$ but not with regard to $Theory_2$ (cf. Kutschera 1972, vol. 1, 258).

An important problem is that of classifying elements within the theory circle. In natural science, we can always make the conceptual distinction between data and theory. In many humanistic theories, we cannot say clearly which propositions report observational data and which express theories. Stegmüller (1975, 84–5; cf. Aarnio 1979, 154–5) regards this property as an explication of the so-called hermeneutical circle, typically characterized as follows:

> The whole of a cultural product (be it literary or philosophical opus, or the entire work of a thinker or a period) can be only understood if one understands its component parts, while these parts in their turn can be understood only by understanding the whole.

Hermeneutical philosophy has attracted many jurists. Some have even regarded hermeneutics as an alternative to the "positivistic criterion of science" (cf. Berndt and Doublet 1998, 161ff.). I will merely note here, without going into the discussion, the parallel between the idea of reflective equilibrium and that of hermeneutical circle.

In general, a coherent system of acceptances, preferences, and reasonings is like a network of argumentative circles, most of them quite big. A chain of arguments will sooner or later bite its own tail, metaphorically speaking, and hence may be represented as a circle. In a chain of this kind, p_1 supports p_2, p_2 supports p_3, and so on, and p_n supports p_1. "Support" is explicable only as reasonable support: p_2 follows from p_1 only in conjunction with another premise, say r_1. This premise r_1 is reasonable, which implies that it is a member of another such circle.

Circularity is acceptable because the circles are integrated in webs. What is important is the complexity of the web's structure: "Higher complexity of an appropriate kind gives extra safety, makes the circle more robust, less vulnerable to destruction […]. To put it metaphorically: Nets are safer than chains" (Rabinowicz 1998, 18ff.).

5.3.5. Epistemic Coherence, Truth, Knowledge, and Segmented Coherence

One can regard coherence as the main criterion of truth. But this is no reason to speak of truth and coherence as necessarily one and the same thing. A more convincing theory incorporates the idea of coherence into the so-called classical definition of knowledge:

> According to this definition, knowledge consists in true justified belief. More explicitly, the phrase "*X* knows that *A*" […] is equivalent to the conjunction of the three following conditions (a) *X* believes that *A*, (b) *A* is true, and (c) *X*'s belief is (correctly) justified […]. Where can coherence enter into the classical definition of knowledge? The condition (c) is the only suitable place. Thus, we can combine the classical theory of knowledge with a coherence theory of justification. (Wolenski 1998, 25)

We can say that all statements—and hence all normative statements—are justifiable, and that their justification is the same as their membership in a coherent system (cf. Peczenik 1998a and 1998b). More precisely, what is justifiable coheres with the background system of acceptances, reasonings, and preferences (Lehrer 1997, 3).

The background system of beliefs, reasonings, and preferences can be conceived of as an all-embracing theory (cf. Alexy 1998, 42). Coherentism is a kind of holism. Holism has been represented, among others, by Hegel (1999, 19)—"Das Wahre ist das Ganze" (The true is the whole)—and Quine (1953, 42; cf. Quine 1960, 40ff.), "The unit of empirical significance is the whole of science." Davidson's philosophy of language, too, is holistic and assumes that people are mostly right.

But can't a coherent system of acceptances and preferences be false, "isolated from the world"? To understand coherentism, we must keep in mind that neither scepticism in general nor this isolation objection in particular enjoys a privileged status against other beliefs. Coherentism is merely one of sev-

Friedrich Carl von Savigny (1779–1861)

Leon Petrażycki (1867–1931)

Hans Kelsen (1881–1973)

eral competing beliefs. If someone says that my personally justified coherent system of acceptances and preferences is not "objectively" justified, this person will have to outperform the competition provided by my system (cf. Lehrer 1990, 176ff.). Consequently, if I want to argue that I am justified in accepting or preferring *x*, I must appeal to the system of acceptances and preferences I hold to at that time. And if the sceptic wants to convince me that I am wrong, an appeal to the acceptance system I hold with at that time is again all she can make. If what the sceptic accepts is less reasonable than the objection, she loses. The loss means that the acceptance in question is defeated.[9]

But only a Hercules, an Archangel, or another perfect entity could have a coherent theory of everything, and that only if a perfect language were possible. We humans must accept constraints. Segmented reflective equilibrium (which see above) has its counterpart in segmented coherence. It is plausible, within the deep coherentist super-theory, to attempt foundationalist (or quasi-foundationalist) approximative theories. Science in all disciplines is a collection of such theories: These last are fragments, whereas the totality is coherentist rather than foundationalist. A scientific theory claims to be coherent with a certain branch of science. Generally, each fragment of knowledge claims to be coherent with another branch of knowledge. These branches are like islands, they do not form a single continent. The metaphor of bridges echoes "bridging implications." But a better metaphor is ferryboats, not bridges.[10] For a bridge is fixed, it stands where it is. A boat, on the other hand, can find different routes to connect to another island, depending on the (intellectual) weather. Islands are knowledge, boats are philosophy. Philosophy is not fixed. Philosophy has no paradigms. But philosophy links the different parts of knowledge into a coherent whole. It provides the total unifying structure for all of knowledge. It includes many levels: legal, moral, metaethical, epistemological, metaphysical, etc. To have more on this, one can refer to the "multicoherence" theory developed by Paul Thagard (which see above).

In this context, the reader should also consult Giovanni Sartor's analysis in Volume 5 of this Treatise:

> The notion of the status of arguments will be the central element of our argument logic. We shall divide all arguments in certain *discourse* (by a discourse we mean in general any set of arguments) into three classes, according to their status in the discourse, the justified, the defensible, and the overruled ones:
>
> 1. *Justified arguments* have no viable attackers in the discourse.
> 2. *Overruled arguments* are attacked by justified arguments and therefore are deprived of any relevance in the discourse.
> 3. *Defensible arguments* are undecided, since there is an undecided conflict between themselves and their attackers.

[9] Lehrer assumes reasonableness as a primitive concept (Lehrer 1990, 127).

[10] I am grateful to Håkan Gustafsson for this profound insight.

> From our point of view, the status of an argument in a discourse does not depend on the intrinsic qualities of the argument. It rather depends on whether other arguments in the discourse attack the argument [...], and in particular on whether these attackers succeed in defeating that argument. This implies that arguments are defeasible, in a double sense.
>
> First there is *internal defeasibility*, or defeasibility *in a discourse*, that is, relatively to a given set of arguments. An argument $\mathcal{A}$ is defeated in a discourse, when other arguments in the discourse defeat $\mathcal{A}$, relatively to the discourse, and no further arguments in the discourse provide for $\mathcal{A}$'s reinstatement. [...] However, besides internal defeasibility, we also need to consider *external defeasibility*, that is, defeasibility *of a discourse*. What is justified in a discourse D_1 may not be justified in a larger discourse D_2, which is obtained by adding further arguments to D_1: Those further arguments may defeat discourse D_1, in the sense that they undermine some arguments which were justified in D_1. External defeasibility prevents the possibility of ever obtaining safe conclusions. (Sartor, vol. 5 of this Treatise, sec. 27.1.2)

The pursuit of a global coherence of acceptances, preferences, and reasonings is a Sisyphean task—doomed to failure yet inevitable. In this pursuit, a thinker arrives at a conglomerate of interlinked pockets of locally coherent segments. There is nothing in this that is specific to moral or legal thinking. Indeed, that is how humans think in general.

5.3.6. Criteria of Coherence in Legal Doctrine

An interesting research project is to relate Thagard-style constraints to criteria of coherence. Alexy and Peczenik have developed a number of such criteria (cf. Alexy and Peczenik 1990).[11] The more the statements belonging to a given theory approximate a perfect supportive structure, the more the theory will be coherent. Logical consistency—though a necessary condition of perfect coherence at any moment—is not a sufficient condition of coherence. There are additional criteria of coherence. *Ceteris paribus*, a theory's degree of coherence will depend on such factors as

- how many supported statements belong to the theory;
- how complex the webs of supportive reasons are that belong to it;
- how many universal statements belong to it;
- how many general concepts belong to it and how high a degree of generality they exhibit; and
- how many cases and fields of human endeavour the theory covers.

The degree of coherence is determined by a weighing and balancing of these criteria of coherence. But then, How is this weighing and balancing to proceed? The idea of weighing used here is not formal or logic: Weighing is holistic (which see Section 5.1 above). Let me note the following objection:

[11] The presentation here is modified in some respects.

> Such an approach raises many questions, such as how these various criteria of coherence are to be weighed and balanced against each other, and whether it is always the case that the weighing operation will result in a complete ranking of given sets of propositions as either more or less coherent than each other, so that when faced with competing such sets, it is always possible to find the most coherent set of propositions according to the ten criteria. Alexy and Peczenik recognise that weighing and balancing the criteria of coherence will be a complex matter, but appear to assume that it will always be possible to establish which is the most coherent of rival sets of propositions. (Dickson 2001)

Will that always be possible? I do not venture to answer the question. But we human beings must try to establish the most coherent theory. This may be a Sisyphean task, to be sure, but there is no alternative. Human thinking is a quest for coherence.

The criteria of coherence are general, applicable to all coherent theories. This is possible only because these criteria are not precise. They are platitudes of a kind similar to that found in moral theory. Once stated with precision, they dissolve into endless clusters of domain-specific criteria, each cluster applicable to some but not all coherent theories.

As Hage (2004) points out, each coherent theory has its own support standards. A coherent set is in accordance with constraints that are themselves part of the set. The support relations between the elements making up an acceptance set are not defined outside the set, but are part of it. Outside the acceptance set there is only the minimal standard that a good acceptance set satisfy its own standards. Integrated coherentism does specify what mutual support means as a standard of coherence. What counts as mutual support, and also the extent to which such mutual support increases the quality of an acceptance set—these questions the acceptance set will have to work out for itself.

In this perspective, Alexy–Peczenik coherence criteria appear to be a part of the acceptance set of a juristic theory of law rather than a general philosophy of coherence.

5.3.7. Coherence over Time

The law's coherence does not exclude change. It only implies that change must be constrained by certain preexistent and fundamental views, rules, principles, and values.

A legal order, a juristic theory, a moral system, etc., can be justified as coherent in the light of a legitimate tradition. A tradition shows a certain degree of "narrative coherence," which is something like a story. Its present components display many kinds of connections with the past as well as with the expected future.

One can also regard as a tradition the legal culture and the deep structure of the law in Tuori's sense (which see above).

Something of the kind can be found in the theory of science. Kuhn's and

Lakatos's theories of paradigms and research programs elucidate the idea of a stable core that makes the changing science coherent. Paradigms and research programs are scientific traditions.

A tradition can be understood as a transmission of a pattern of thought or action (cf. Rolf 1991, 147). The well-known philosopher of science Michael Polanyi (1962, 54) regards the common law as a classical example of tradition. Any tradition comprises some basic values and patterns of rationality which are taken for granted within the tradition, and which may never (or almost never) be criticized. A tradition is rooted in certain social and political institutions. It determines its own standards of rational argumentation and problem-solving. A living tradition is not static, however—it evolves. Old questions thus find new answers that give rise to new questions. The bearers of a tradition have a latent receptivity to new questions and can develop a new, more profound perspective regarded as closer to the truth.

On *legal* tradition, one can quote the following conclusion by Bańkowski (1991):

> The law is a tradition. Like all traditions law is comprised of beliefs [and] practices [...] which are, or are believed to be, transmitted from the past and which retain authoritative significance in people's current beliefs, practices, etc. (Krygier 1991, 68; cf. Krygier 1986, 237ff.)

Logical consistency is in principle a necessary but insufficient condition of synchronic coherence, but not a necessary condition of *diachronic* coherence. Science, law, culture, etc., change continually. The new may very well be logically inconsistent with the old. The new and the old can still constitute a coherent totality. The cultural heritage can sow the seeds of its own change.

To provide a justification in the light of a tradition is the same as to show that

- we all have already accepted, through our way of life, the core of a certain cultural tradition;
- this tradition carries within it "second-order traditions" able to support their own change as well as the change of other components in the tradition; and
- there has been an optimization in the sense that diachronic coherence has been maximized.

A coherentist justification can thus be based on a tradition, theory, or system of norms in process, that is, subject to continuing change. The following examples elucidate this idea.

Theses about valid law can almost always be supported by a legal norm that has been valid for some time. This kind of support creates an inner coherence for the legal system. This is so even if the previously valid norm has already lost its validity. An old constitution can, for example, decide how the new constitu-

tion, perhaps a radically different one, may be enacted. Secondary legal rules, as analysed by Herbert Hart (cf. Hart 1961, 92ff.), are a good example. While primary rules determine the actions that individuals shall or may perform, secondary rules decide how primary rules come into existence and how they change (see also Luhmann 1993, 109–10). In contrast, Luhmann (ibid.) argues that a "temporal theory of validity" should be adopted instead of the classical, hierarchical theories of validity. He proposes that legal theory "switch from hierarchy to time." Luhmann's proposal may be fruitful in his sociological theory of law, but not in a legal theory that adopts the lawyers' internal point of view. Hierarchical theories of validity should not be rejected, but made complete with a theory of defeasibility and with a temporal theory. The defeasible hierarchical structure of law is an empirically stated institutional fact.

Legal source rules, argumentation rules, and collision rules, too, are an example of coherence-creating norms. A reinterpretation of valid law and creative judicial decision-making are thus based on established rules and methodological principles.

Improvement (*Weiterentwicklung*) of the law by analogy and precedent is based on essential similarities between (actual or hypothetical) cases. The judgment of essentiality must be rooted in the legal tradition of the society concerned. At the same time, however, the improvement may lead to a change in the legal tradition.

5.4. Coherence and Justice in Law

5.4.1. Coherence in Practices and Norms, Not Only in Knowledge

On the face of it, the structure of justice calls to mind the structure of explanation: Both require coherence. This parallelism between cognitive explanation and normative justice is the key idea in Peczenik 1966.

Juristic theories have explanatory force, that is, they promote the coherent understanding of the law. At the same time, they promote justice. This explanatory and justificatory force is possible because these theories reveal various—often overlapping—resemblances among cases. Also, Thagard's idea of multicoherence is applicable to coherence in ethical thinking (Thagard 2000, 161–2). Thus, ethical conclusions are reached by roughly maximizing the satisfaction of the deductive, explanatory, deliberative, and analogical constraints that make it possible to handle the complexity of moral reasoning. Thagard's normative conclusion is that there are "three reasons for considering emotional coherence as being prescriptive as well as descriptive of trust" (ibid., 214). First, the standard models of rationality have little application to real life. Second, emotions cannot—psychologically—be removed from decisions. Third, people do not want to cut "their analytical decision making off from crucial emotional information about what really matters" to them.

But does this surface similarity of justice and coherence bespeak a profound similarity? The basic question here is, If coherence is the key notion of epistemology, how well does it fit in with the normative component of legal interpretation? In other words, Why should practices and norms, too, rather than just knowledge, be coherent? There is a lot that needs to be said to answer this question. Here I will make only the following remarks.

- There is a normative dimension to coherence.
- Coherence has greater affinity with goodness than with evil (Fuller 1986, 91).
- Human practices are open to criticism. We can ask for a justification of practices, asking for reasons that support them. But once we have these reasons, we are faced with the problem of reasons for reasons—we get trapped into the epistemological problem of coherent webs of reasons.
- In particular, a people's respect for the rule of law can be expressed by the postulate that a legal system must exhibit, and be interpreted as exhibiting, a relatively high degree of coherence as a normative system (MacCormick and Summers 1991, 535).
- The law should be just. This is a platitude around which theorists have developed various analytical and normative theories, for example, the theory that the connection between law and justice is a priori.

The role of coherence in considerations of justice is a special case of the problem of coherence in practical reasoning. Let me quote Giovanni Sartor:

> By using reasoning in the ways we have described, rational agents may build what we may call *practical theories*. By a *practical theory* we mean a set of cognitive states that the agent uses to guide its behaviour. Such a theory can include conative states (likings, desires, intentions, and wants), their doxified reformulation, and the epistemic beliefs that are relevant to the adoption of conative states (beliefs concerning, for example, causal connections between one's actions and the realisation of what one likes, conditions for applying a plan's instructions, and so on).
>
> A practical theory is a dynamical construct, which may change when new perceptual inputs are provided to the reasoner. It may also change when new inputs are provided by the agent's conative dispositions. Finally, changes may also be prompted by reasoning (and in particular, as we have seen, by the process of rationalisation).
>
> This leads us to a further issue: How can one choose among different alternative ways of changing the practical theory one is endorsing? For making this choice one needs to consider that each element in one's theory may interfere in various ways with other elements. The function of each element needs to be appreciated from a holistic perspective: It depends on the global cognitive functionality of a theory containing that element as compared to the functionality of a theory not comprising it. (Sartor, vol. 5 of this Treatise, sec. 4.1.4)

5.4.2. Justice as the Weighing of All Considerations

All lawyers would accept the maxim that like cases should be treated alike. But there are many criteria of likeness. Chaim Perelman (1963, 6–7) defined abstract or formal justice as a principle of action by which everyone belonging to the same essential category should be treated alike. There are many essential categories. Thus, one may think it just to distribute goods equally to everyone, or according to each person's merits (or desert), work, needs, rank, or legal entitlement.

Perelman's theory has since been supplemented with more-detailed classifications (cf. Lucas 1980, 164–5). Thus, a distinction can be made between merit and desert. Merit is bound up with a person's qualities; desert, with her action. More specifically, desert is bound up with one's contribution or effort, or to the costs incurred (see Lamont 2002). A comment is necessary here on desert. There is an ancient tradition whereby justice consists in giving people what they deserve. Desert has recently been undermined or completely dismissed by liberal orthodoxy, to be sure, but it still is central to the sense of justice of ordinary people[12] and—I will add—to the tradition of legal doctrine.

Justice weighs all considerations. Thus, Nils Jansen (1998, 161) has worked out the following "formal conception of justice": "Just is the result of right weighing of all principles of justice relevant in a situation."[13]

Justice is a complex web of reasons weighed and balanced. Justice seeks to achieve as coherent a system of valuations on deserts, needs, and relations among parties as is possible in a given context.

Complexity and controversiality are inevitable in justice, yet we keep seeking an absolute and certain justice based on reason. This creates a tension. We call justice into doubt as soon as we seek rational grounds for it, yet we invoke these very grounds as soon as someone stresses the relativity of justice (Lucas 1980, 35ff., criticizing Alf Ross).

There are many considerations of justice, and the system of considerations of justice is complex. In brief: *x* and *y* should be treated equally from point of view *a* but unequally from point of view *b*. What, then, are we to do? We need to find a reason, *c*, with which to establish the priority of *a* over *b*. But *c* may itself be called into question, and hence will need the support of *d*. In the end, we will need a complex web of reasons on deserts and needs, on the relations among the parties involved, etc., weighed and balanced. The identification and weighing of reasons of justice may depend on many factors.

[12] Among the theorists who argue against desert are John Rawls, Ronald Dworkin, Thomas Nagel, Brian Barry, Robert Goodin, and Derek Parfit. Pojman (1999, 283ff.) thinks it absurd to disregard desert.

[13] "Gerecht ist das Ergebnis der richtigen Abwägung aller in einer Situation einschlägigen Gerechtigkeitsprinzipien" (my translation).

5.4.3. Different Justice in Different Contexts?

The relative weight of deserts, needs, and corrective justice is different in different parts of the law. Thus, in torts, one must balance such considerations as corrective justice, general deterrence, fair distribution of risks, and the victim's needs. Similar factors certainly play a big role in criminal law. A lot can be said here about the retributive, social-utilitarian, and reformative theories of punishment. In contracts, the principle *pacta sunt servanda* has obvious underpinnings in Kantian autonomy, but then social considerations of needs—such as consumer protection—may dominate. Labour law must treat desert seriously.

But these differences are differences of mixture or assembly, not differences of category. We can trace the same components of justice in all parts of the law, but each time in a different mixture or grouping.

Some authors, noting the complexity of justice, have tried to construct theories assigning categorically different kinds of justice to different, sharply defined types of goods or societies. A sharp demarcation line of this kind is, I believe, an illusion.

Michael Walzer maintains what follows: "Every social good or set of goods constitutes, as it were, a distributive sphere within which only certain criteria and arrangements are appropriate" (Walzer 1983, 10).

There are different spheres of justice, and the principles of justice are each internal to one such distributive sphere. Walzer thus discusses three modes of human relationship and corresponding justice, namely, solidaristic community (justice according to needs), instrumental association (justice according to desert), and citizenship (justice as equality) (cf. Miller 1976, 339ff.; 1999, 21ff.).

But we must also pay attention to "justice across the spheres" (Gutmann 1995, 102–3). Although various material principles of justice can be justified only within a certain circle of people circumscribed by a social framework (community, culture, subculture), someone belonging to one circle may understand and respect viewpoints advanced from within another circle. We can all be in agreement on certain general values, but not on the their relative weight (Aarnio and Peczenik 1996).

Another author who underscores the complexity of justice is Nicholas Rescher. The complexity is great even if we look at distributive fairness only:

> Strongly normative concepts like fairness, justice, and even rationality resist being captured by single uniformly construed model, because it lies in the nature of things that so extensive a concept has to accommodate itself to a great variety of particular situations so that a "one pattern fits all" is not a workable prospect. (Rescher 2002, 43)

The overall situation is deeply pragmatic. Fairness in division itself becomes a process that reflects the aims and purposes that are at issue in the context within which that division is made.

An interesting tension becomes manifest between justice all things considered, on the one hand, and formal justice, on the other. As stated above, formal justice requires that persons belonging to the same essential category be treated alike. Jurists have always hoped that treating like cases alike would make the law predictable and thus fulfil the ideal of the rule of the law. The hope is realistic as long as the criteria of likeness are imposed by the legislator and by precedent-making courts. No sooner does legal doctrine devise its own criteria of likeness—as it must do to make the law coherent—than it faces the problem of multiple criteria. (Ibid., 120)

5.4.4. Procedural Justice?

We cannot fail to mention procedural justice. Jürgen Habermas seeks to ground ethics (and hence justice) on procedure and on discourse conditions. Universally valid norms may emerge from discourse with the participation and acceptance of all those who stand affected by such norms.[14] Thus, according to Habermas's discourse principle, norms of conduct are valid if, and only if, the people who may stand affected by these norms can accept them as the basis on which to take part in an ideal rational discourse. Rational discourse on public matters can only be achieved within the framework of the law. In this framework, the principle of rational discourse becomes the principle of democracy. On this principle, legal norms may lay a claim to legitimate validity only if all consociates under the law would accept them in a perfect discursive lawmaking procedure (see Habermas 1994, 135ff.).[15] In Habermas's "postmetaphysical thinking" (ibid., 83, 87, 127), the same applies to basic rights. These are no longer grounded in religion or metaphysics, but in the political process as such, and ultimately in rational discourse.[16] Habermas thus believes that a perfectly rational procedure of deliberation must return substantively correct and just results.

John Rawls's theory of justice is also based on a procedure. More to the point, we can reach moral conclusions in general, and principles of justice in particular, without abandoning the standpoint of prudential calculus—and so without positing a moral outlook—merely by having each of us singly pursue our own prudential reasoning under certain procedural bargaining and knowledge constraints.

But Habermas's procedural theory is "a total idealization" (Alexy 1994, 232). As such, it is almost empty. Even if it could tell us that the results of perfect discourse must be correct, we do not—and cannot—know the final content the conclusions of perfect debate would have. In brief, a purely proce-

[14] It will be noted in passing that Robert Alexy (cf. 1978, 1985, 1989, 1994) has worked out a much more careful list of discourse rules and principles.

[15] For criticism of Habermas's principle of democracy, see Alexy 1994, 227–38; cf. Peczenik 1995, 69–71, 523.

[16] It follows that Habermas's catalogue of rights accords a priority to basic political rights (those that guarantee the democratic process), ibid., 155, 320, 529.

dural theory can at best give us an unreachable ideal to approximate, but not a standard against which to judge actual differences of opinion.

In contrast, Rawls claims that his theory yields substantive principles of justice, but his claim is notoriously controversial.

Amy Gutmann and Dennis Thompson have thus developed a theory of deliberative democracy (applicable to justice as well) in which procedural principles are supplemented with substantive ones. The principles are "provisional":

> The principles of deliberative democracy are distinctive in two significant respects: They are morally provisional (subject to change through further moral argument); and they are politically provisional (subject to change through further political argument). (Gutmann and Thompson 2000, 167)

All these principles express, in various forms, the idea of reciprocity:

> Reciprocity suggests the aim of seeking agreement on the basis of principles that can be justifiable to others who share the aim of reaching reasonable agreement. (Ibid., 167)

But

> reciprocity is not a principle from which justice is derived, but rather one that governs the ongoing process by which the conditions and content of justice are determined in specific cases. (Ibid., 167)

According to Gutmann and Thompson, a full theory of deliberative democracy includes substantive as well as procedural principles; it denies that either kind is morally neutral, and it judges both kinds from a second-order perspective (ibid., 163).

5.4.5. Justice, Coherence, Law, and Morality

Justice bears a connection with coherence and is ultimately holistic. The idea of coherence is likewise holistic. But there are differences. Weighing is more important when making considerations of justice than when doing coherent theory-construction in other domains. For example, empirical theories, though they must fit into a coherent system of acceptances, preferences, and reasonings, are often expressed in mathematical language. A theory of this kind is foundationalist in its internal structure. In contrast, justice is always a matter of judgment, never a matter of algorithm. Some theories of justice, such as Rawls's, display sophistication and precision, to be sure. But they are clearly less precise and more controversial than mature empirical theories of science.

An even more important difference is this: While one can have an ideal of global coherence or an ideal of a society's law or morality all things consid-

ered, neither a global justice nor even a simultaneous justice for all the members of that society seems to be conceptually possible. What in a society is legal or moral all things considered may prove unjust for an individual.

In this context, I should like to recall and modify the inclusion theses I have presented elsewhere (Peczenik 1989, 238ff.). The socially established law, set out in such sources as statutes, precedents, and *travaux préparatoires*, has a *pro tanto* character. If a *pro tanto* law explicitly contains, implies, or otherwise supports the conclusion that a person has a certain legal duty or right, then this person is bound by a *pro tanto* moral duty or right having the same content. Even deeply immoral provisions belonging to the socially established law are meaningful *pro tanto* moral reasons which are, of course, easy to override by means other than *pro tanto* moral reasons. This is so because the law is morally binding *pro tanto* unless one denies that the whole system of immoral "law" makes up a legal system. In accordance with the classical tradition of natural law, one may make this denial for moral reasons, and in particular for reasons of justice (*lex iniusta non est lex*), but in my opinion the immorality at issue must then be extreme and must systematically underlie the entire system, including its technical provision of private law.

Moreover, all-things-considered law results from interpreting *pro tanto* law in the light of social standards of justice and morality. If someone has an all-things-considered legal right or duty, then she will also have an all-things-considered moral right or duty of the same content. To be sure, this view may be criticized for bringing about a strange, and even an absurd, inversion of natural law, to the effect that illegal morality is not morality. But the flavour of absurdity disappears if one starts reflecting on the expression "all things considered." If an action is all-things-considered illegal, it cannot be all-things-considered moral. "All-things-considered illegal" means that the action is disallowed in the light of a law that (1) crosses the threshold of extreme injustice (for otherwise it is not law) and (2) has been interpreted morally to the extent required by the tradition of legal interpretation. If the action appears moral in the light of some other foundationalist moral theory, that is a problem for this theory to work out. All-things-considered law, that is, optimally interpreted law, is thus a part of all-things-considered morality.

Like morality and the moral interpretation of law, justice requires us to consider "all things," but this always from the standpoint of an individual or at least from that of a certain group. For example, when a Swedish law of 1980 imposed a 102 percent income tax for certain rare situations, an injustice was certainly done to the persons affected, and yet the law was all-things-considered legal and thus all-thing-considered moral, even if paradoxically so. What is unjust to the person affected by the 102 percent tax may arguably be just (or at least fair) from a radically redistributive perspective. To call the legal provision moral was simply to say that a judge was morally more reasonable to apply it than to refuse to do so, for that would undermine the rule of

law. This makes justice local in a sense and implies that there cannot be a universal system of justice. But then, on the other hand, society-centred morality and law are total within the boundaries of a state.

Justice therefore enters into a tension with society-centred morality and law. There is also a tension between commutative/corrective justice and distributive justice (see Chapter 2 above).

Another tension we have is that between equality and perfection: Whereas egalitarians tend to endorse Rawls's maximin principle, perfectionists are fascinated by the maximax principle.

> According to maximax, each agent's overriding goal should be not a sum or average of lifetime value, but the greatest lifetime value of the single most perfect individual or, if perfections are not fully comparable, of the few most perfect individuals. (Hurka 1993, 75)

In our egalitarian culture, perfectionists hesitate to endorse maximax (Hurka does not; ibid., 75ff.). But "there is a constraint on any attempt to reconcile perfectionism with distributive equality" (ibid., 79).

This tension between equality and perfection connects up with the tension between justice and morality. Equality is more important in the context of justice than in other moral contexts.

5.4.6. The Importance of Justice for Judges, Legal Scholars, and Politicians

It follows from this tension that justice is not the supreme value of society and so must in some cases yield to other values. The question now comes up, What is the optimal position of the judge and of legal doctrine with respect to the tension between justice and morality? Should legal scholars ultimately aim at a just interpretation of the law, or should they aim at a moral interpretation of it? And which should the judge ultimately aim at?

Legal scholars must ultimately aim at interpreting the law in light of the common core of society's morality. Legal doctrine cannot retain its identity if it assumes a priority of (what is necessarily a local) justice over the common core of morality. If reversed, this priority would split legal doctrine in two segments. One segment would be a quasi-sociological description of practice; the other, a cluster of mutually inconsistent conclusions as to what is just from the viewpoint of different individuals or groups.

As to judges, a tempting hypothesis is that they should always administer justice within the limits of the law. But then the method of adjudication and the method of legal research would have to be quite different, the former committed to a local coherence of values and the latter to social morality, and hence to a global coherence of values. This difference between the role of justice in juristic doctrine and the role of justice in the courts explains the following difference.

> While the goal of the kind of doctrinal interpretation undertaken by legal scholars is to establish the unity of an entire legal system, the judicial interpretation undertaken by judges is of a far more local variety, as it is concerned merely with the norms applicable to the case in question, and because a coherent interpretation of those norms may decrease their coherence with other legal norms.[17]

But if this is so, how then can legal doctrine come of service in providing guidance to judges in hard cases? The answer to this question is that legal doctrine can give the judge good advice in normal situations; but when a situation deviates from normality, the judge must set aside broad considerations of coherence—delivered by legal doctrine—and pass to local considerations relevant to the case at hand.

A competing hypothesis is that the judge is legally as well as morally obliged to commit injustice in those cases in which justice conflicts with society's global morality. She may thus have to arrive at a decision that discriminates against someone. In a civilized society, the content of established law and of legal method is such that cases of this kind will be quite unlikely. But if the circumstance does arise, the judge has an overriding duty to make that discriminatory decision—a decision deemed unjust to the person concerned. She also has an overriding duty as a citizen to urge the lawgiver to change the law. These two duties do not collide, because they come to bear on two different roles: the role of judge, on the one hand, and that of citizen, on the other. It is perfectly consistent to make a legal decision as a judge and then recommend that the same law be changed.

The most sensible division of labour between the lawgiver, the judge, and the legal scholar may perhaps be something along the following lines. The lawgiver sets down rules for normal cases, but due to changes in society, and to her human imperfection, she must permit *contra legem* interpretation in hard cases. The legal scholar should try to interpret the products of legislation in the most coherent way possible, paying as much attention as possible to the inner coherence of the law as well as to the coherence between law and morality. From her perspective, enacted law is defeasible in that it must be defeated by legal doctrine if found to be incoherent. The hard cases in which enacted law is thus defeated are not normal from the lawgiver's standpoint, but they are normal enough to make such coherent doctrinal interpretation possible. When a particularly hard case comes up, the judge should deviate—in the service of justice—from the normality imposed by the lawgiver as well as from the normality developed in legal doctrine. To sum up, we have three ideals:

- Legal doctrine must strive for an encompassing coherence, within the law as well as between law and morality.
- Adjudication must seek to do justice to the parties within the limits of the

[17] Dickson 2001, setting out accurately the view I myself defend.

law. Judges should aim at coherence, even if this may be a local coherence restricted to narrow parts of the law.
- Political thinking must strive for a flexible adjustment of decision-making to changing public opinion. Politicians need to acknowledge the plurality of moral opinions in society and the plurality of sources of law. When legislating, they must aim at coherence, even if this may be a local coherence restricted to narrow parts of the law.

Can legal doctrine serve judges and politicians? Yes, it can, by delivering the ideal of coherent law, to be taken into account and balanced against the just demands of the parties and against the demands of public opinion.

True enough, our assumption that the law should be coherent for the sake of knowledge and justice can be challenged. A radical jurist may even require that a juristic theory be legitimate in the sense of finding the acceptance of some (not necessarily everyone) in our pluralist society. Since different people accept different things, the most legitimate juristic theory may well be incoherent (cf. Dahlman 2000, 159ff.). This way of thinking makes political legitimacy, not legal knowledge or justice, the ultimate basis of argument. To pursue this path, one must have a normative theory of legitimacy that is normatively as well as epistemologically testable. But no such theory can pass this test unless it is coherent. Thus coherence, thrown out the front door, comes in from the back.

5.5. Coherence and Concepts in Legal Doctrine

5.5.1. Value-Open Legal Concepts and the Nature of Things

The law itself invites considerations of coherence when it uses value-open concepts (cf. Alexy 1980, 190ff.).[18] Legal scholars have value-open concepts of their own that they invent and use. These concepts are essentially contestable (cf. Gallie 1956, 167ff.) and can be accessed via a wide reflective equilibrium between what "the many or the wise" think (cf. Swanton 1992, 7 and 22ff.). Indicated in these concepts are questions that require weighing. Juristic weighing indicates answers.

The value-open concepts of legal doctrine can be characterized as follows:

- They may have a core, but part of their reference lies at the periphery and can be defined only by family resemblance.
- They link legal rules with their social background.
- They make it possible to identify objects by recourse to weighing.

[18] Shifting emphasis, Larenz (1983, 463ff.) uses the term "function-determined concept." The content of such concepts reflects the principles underpinning the legal rules in question.

When interpreting these concepts, a jurist must aim at a reflective equilibrium among various reasons. But, in this, she is less free than a Rawlsian liberal. She may change the tradition of legal interpretation, but only "piecemeal," never radically.

Value-open concepts indicate "family resemblances" (cf. Wittgenstein 1958, § 67): *x* resembles *y* in several respects, *y* resembles *z* in several respects, and so on, and yet it is logically possible that these objects should share no properties.

There is an interesting parallel between these clusters of resemblance, on the one hand, and what Hegel called "concrete concepts" and Larenz "types," on the other.[19] But there is the following shift of emphasis. Whereas all the members of a family *à la* Wittgenstein may have nothing in common, most objects within a "concrete concept" share most of their properties. For example, the concept "human being" is concrete in the sense that there is no single definiens of a human being. What is decisive for being a human is a cluster of different properties, such as sentience, language, and tool-making, and perhaps moral sensitivity. Every human being possesses many such properties.

There are types and subtypes that come together into clusters of types (*Typenreihen*), thus mapping out resemblances and differences between cases. It is important to understand that these resemblances are not always indicated by statutes or decisions. They are often observed in social relations and taken for granted in legal reasoning.[20] Savigny thus conceived the legal system as a sum of legal institutes that are legal and technical as well as factual. Feedback from old institutes within the system gives rise to new institutes.

With an old word used by Savigny, among others, one can call the system of resemblances "organic." Juristic theories thus explore three kinds of unity in the law: the unity of legal rules, the unity of legal institutes, and the unity of the social relations regulated by law. The metaphor of the organism makes sense in view of the fact that social relations evolve continually. The Organic and practical coherence of legal institutes is holistic because each element not only determines the totality, but is determined by it (cf. Brockmöller 1997, 102ff.).

Savigny thus attributed four traits to the legal "organism":

- its unity, as a natural whole;
- the reciprocal connection of its elements;

[19] Larenz and Canaris (1995, 287), say that if we characterize the type "human" as the whole of human possibilities, then humans can be viewed as corporal, mental, and spiritual entities (all three combined) that fulfil themselves in these three dimensions in many ways and acquire new possibilities. ("Typus 'Mensch' in der Fülle aller seiner Möglichkeiten, dann sieht man ihn zugleich als ein leibliches, seelisches und geistiges Wesen, das sich in diesen drei Dimensionen auf mannigfache Weise verwirklicht und sich neue Möglichkeiten erschließt.")

[20] According to Stahl, the law is thus a juristically formed reality. Cf. Wilhelm 1989, 32ff.

- an immanently evolving structure that is part natural, part moral (*sittlich-geistig*);
- an ability to "live its own life" (whatever this metaphor is taken to mean).

Each juristic theory is linked (explicitly or implicitly) to a background knowledge of society. In some theories, this information about social facts cannot be acquired without a systematic and comprehensive view of society, whereas in others the background often consists of particular nuggets of information. Given this context, we can understand why jurists keep going back to the "nature of things."

The idea of the nature of things is coherent with the teleological world picture of Aristotle and Aquinas, among others. In this perspective, the nature of things is the natural purpose of, inter alia, social relationships and legal norms (cf. Dreier 1965, 11ff. and 14ff.). The teleological nature of things resurfaces with Hegel's philosophy, albeit in a new metaphysical context (cf. ibid., 31ff.). In a different way, the idea is coherent with Kant's theory of a priori, where the nature of things becomes what one must assume a priori about social and legal questions, among others (cf. ibid., 25ff.). The nature of things can also be understood by reference to such social facts as elicit in people evaluative responses expressed in normative and evaluative statements (Radbruch 1950, 99).

When jurists refer to the "nature of the things," what they have in mind is the background knowledge of society, without which the knowledge of law would amount to no more than an empty formalism. This background knowledge is contestable and in part tacit. Any effort to make it explicit will lead to controversy. Juristic statements about the nature of things are always unclear, and yet inevitable.[21] The jurist is free to interpret the nature of things in one way or another. But—again—she is less free in this than a Rawlsian liberal.

5.5.2. Intermediate Concepts

Many legal concepts are intermediate concepts that link a set of conditions with a set of consequences. The point of this theory is to couple normative conclusions with descriptive conditions, thereby reconstructing legal material in a concise way.[22] Alf Ross used the following scheme:

[21] Cf. Dreier 1984, 480ff; earlier, Dreier 1965, 125ff. Dreier had his doubts about the expression "the nature of things."

[22] Cf. Ekelöf 1945 and Ross 1951. Wedberg (1951, 246) refers to a lecture entitled "On the Fundamental Notions of Jurisprudence" that he himself delivered at the Uppsala Law Club in 1944. It makes for an interesting research topic to relate such propositions to fused propositions in Svein Eng's sense.

$$\left.\begin{array}{l} F_1 \rightarrow \\ F_2 \rightarrow \\ F_3 \rightarrow \\ \vdots \\ F_p \rightarrow \end{array}\right\} \quad O \rightarrow \quad \left\{\begin{array}{l} C_1 \\ C_2 \\ C_3 \\ \vdots \\ C_n \end{array}\right.$$

Each F_i expresses a possible legal ground on which x can claim ownership of y. Each C_j expresses one of the consequences of x's ownership of y. O (for ownership) merely stands for the systematic connection by which F_1, F_2, F_3, ..., F_p entail the totality of legal consequences C_1, C_2, C_3, ..., C_n. This is expressed by stating, in one series of rules, the facts that create ownership and, in another series, the legal consequences that ownership entails (Ross 1956–1957, 820; English translation of Ross 1951).

Lars Lindahl and Jan Odelstad (2000) have presented an analysis of intermediate concepts that uses an algebraic framework. An important point of their study is that, in many cases, the imperceptible shifting between descriptive and normative speech

> observed by Hume might result from the use of intermediate terms. For example, it might plausibly be held that "to be in the public interest" is an intermediate term within ethics, in a way analogous to the way in which "owner" is an intermediate term in the law. It is not clear that the sentence "the action *A* is in the public interest" is wholly descriptive neither that it is wholly normative. Rather "to be in the public interest" seems to be descriptive in part and normative in part. (Lindahl and Odelstad 2000, 273)

Though the idea of intermediate concepts was first developed a considerably positivist environment, it is useful in other contexts, too. The conditions need not be factual in a positivist sense. They may very well be described in terms of wide and constrained reflective equilibriums, a procedure that requires some weighing. The consequences need not be legal; they can very well be moral. They are often defeasible, and the defeat may be based on a jurist's good judgment, a spontaneous judgment not derivable from the momentary state of the legal system. Accurately defined conditions and consequences are an ideal, something that 19th-century conceptual jurisprudence sought after, for example. But generations of jurists have perceived this ideal to be overly demanding. Thus, the ranking of principles is not completely pre-programmed (Larenz and Canaris 1995, 304). Moreover, principles are indeterminate and need to be "concretized" by way of less-abstract sub-principles (ibid. 305ff.). Finally, the "inner system" of law is "open and fragmentary" (ibid., 314ff.). The jurist is therefore free to some extent to adjust the conditions and consequences indicated by intermediate legal concepts. But the other side of the coin is—once again—that she is not entirely free.

5.5.3. Concepts and System

Value-open concepts in the law are linked to one another. They make up a web and can be understood fully only within this web. Juristic theories develop these concepts and weigh them against one another within the limits the same concepts indicate.

Juristic theories provide (explicit or implicit) definitions of their basic concepts, principles, and systematization. Each theory consists of several parts, much like a treatise consists of chapters. In each such part, the theory enumerates factual or hypothetical legal cases and recommended solutions.

The concepts of criminal law are interrelated, and it may be discussed in criminal law, for example, what order of presentation will bring out these interrelations most effectively. We might consider the following order: What is crime? What is punishment? What is the justification of punishment? What are the sources of criminal law? How can national criminal law be marked off from international questions? Then we will discuss the concept of a criminal act. And then the concepts of *dolus* and *culpa*. And then the art and conditions of punishment. The order of presentation will depend in part on national laws and in part on "the nature of things."

Another example is the law of contracts (cf. Lehrberg 2003). A presentation of contract law will have to start with three questions: How does a contract come into existence? When is a contract invalid? What is the content of a contract? Then we will introduce the distinction between interpreting a contract and filling it in (or completing it). Then we will analyze the binding force of the contract, list the different conceptions in this regard, and make the distinction between the promise principle (an offer is binding) and the trust model (binding force by effect of a justified trust in the counter party). Then we will analyze the concept of declaration of intention and its main elements. Then we will move on to such problems as contract by various means of communication, subsequent bindingness, liability for breach of contract, liability before the contract is completed (*culpa in contrahendo*), liability in torts, the scope of compensation, power of attorney, abuse of trust, invalidity, the doctrine of assumptions, the grounds of relevance, and general clauses.

The most important word in this brief presentation is *then*. This order of presentation can be rephrased, to be sure. But all possible rephrasings are going to have a lot in common. It would make no sense, for example, to start out with the concepts of abuse and invalidity first and then discuss offer and acceptance.

This way—by setting up a sequence of this sort—the system of law constrains the reflective equilibrium of juristic reasons.

One can link the systemic context of legal concepts with contemporary philosophy of language. Philosophy of language after Wittgenstein has parted into pragmatic theories concerned with the use of language in various con-

texts, on the one hand, and semantic theories concerned with reference, on the other. The first are anti-rationalist; the second, artificial. Robert B. Brandom (1998) has put out a theory that combines normative pragmatics and inferential semantics, thus showing us the middle way between exaggerated scepticism and unrealistic Platonism. Brandom's complex theory is beyond the compass of this volume. But the theory has ideas that a law theorist must surely find sympathetic.

First, it is pragmatic:

It offers an account of knowing (or believing, or saying) *that* such and such is the case in terms of knowing *how* (being able) to *do* something. (Brandom 1998, 4)

Second, it is inferentialist:

Grasping the *concept* [...] is mastering its *inferential* use: Knowing [...] what else one would be committing oneself to do by applying the concept, what would entitle one to do so, and what would preclude such entitlement. (Ibid., 11)

Third, it is holistic:

On an inferentialist account of conceptual content, one cannot have *any* concepts unless one has *many* concepts. (Ibid., 15)

In sum, Brandom is

putting forward a view that is opposed to many (if not most) of the large theoretical, explanatory, and strategic commitments that have shaped and motivated Anglo-American philosophy in the twentieth Century: empiricism, naturalism, representationalism, semantic atomism, formalism about logic, and instrumentalism about the norms of practical rationality. (Ibid., 31)

Further discussion on the way Brandom's theory applies to law is accessible in Klatt 2002.

5.6. Is Coherence Contrary to Facts?

The coherence orientation of legal doctrine has provoked criticism, sometimes based on what is called the polycentricity of law.

Joseph Raz (1994, 289) claims that perfection—and coherence, I would add—should not be "purchased at the cost of losing contact with reality." The law's coherence competes with such other values as subsidiarity, meaning by this decision-making at the lowest efficient level. Moreover, some incoherence in the law may be justifiable if it promotes the efficient working of the market economy and a conflict-free cooperation among people. Raz's negative conclusion is:

Given multiplicity of criteria, it is possible that sometimes coherence has to be sacrificed for some other good and there is no way of deciding which mix of coherence and other values is best [...], because there is no general method of rationality. (Raz 1994, 303–5)

Moreover, Raz claims

> that because the law is meant to be taken as a system based on authority its content is to determined by reference to the intention of legal authorities and their reasons, and, therefore, that, given the vagaries of politics, including [...] judicial involvement in politics, there is no reason to expect the law to be coherent. (Ibid., 300)

In other words, there is no reason, on Raz's view, why the test of coherence should matter in establishing the validity of law. But this test may matter when it comes to interpreting the law. Raz's position has been characterized as follows:

> if we are to apply a coherence account in order to determine how judges ought to decide cases according to law […], then we should assume a coherence-independent test to identify the settled law of a jurisdiction first, and then bring in considerations of coherence at a later stage, and hold that courts ought to adopt that outcome to a case which is favoured by the most coherent set of propositions which, were the settled rules of the system justified, would justify them. (Dickson 2001)

Similar problems come up in the context of the law's "polycentricity," especially as discussed in Scandinavian legal theory. Thus, we have a polycentric theory of the sources of law with Henrik Zahle (1986, 752ff.). Different sources of law carry a different weight in different parts of the law. Moreover, different sources of law reflect different opinions about normative questions. This is to be expected, considering that these different theories originate from different persons at different times (Zahle 1992, 456). In the same spirit, Hans Peter Graver (1992, 132–51) has noticed that the courts' reasoning patterns do not guide other decision-makers, nor is it normatively expected that this should happen (ibid. 139). Rather, there are many competing centres of power, conceptual schemes, patterns of argument, and theories on the sources of law (ibid., 140ff.). In this sense, the legal system breaks down and converts into several independent subsystems (ibid., 151). Håkan Gustafsson (2002, 105ff.) has refined this kind of criticism thus. Polycentricity occurs on the level of legal norms. Legal pluralism occurs on the level of background principles of society analysed from an external, sociological perspective. "Polyvalence" is the plurality of values behind law. Only a local coherence of the law is possible (ibid., 426ff.).

It is not my intention here to ascertain the truth of the empirical findings on factual polycentricity and incoherent fragments of law. I will assume that they are accurate, comparing them with the tradition of legal doctrine. This tradition is also a fact. What we need is a theory able to accommodate some sets of data and conditions as follows:

- law as a product of authority is sometimes incoherent;
- the law should nonetheless be coherent;

- increased coherence is an important objective in the interpretation and application of law;
- coherence plays a role in establishing legal validity;
- legal doctrine aims and should be aimed at attaining legal knowledge, and hence coherence; and, not least,
- legal doctrine aims and should be aimed at attaining justice, and hence coherence again.

Chapter 6

METATHEORY AND ONTOLOGY FOR LEGAL DOCTRINE

6.1. The Question of Cognitivism

6.1.1. The Controversy over the Truth of Normative and Evaluative Statements

A theory of legal doctrine was previously outlined based on a wide reflective equilibrium centred on platitudes. But a critic may ask whether a doctrine of this kind—containing normative components—can lay a claim to truth. For example, can a legal interpretive statement—supported by a weighing of moral arguments—be true even if it can be justified only by a set of premises containing evaluations? Here we will turn to a more abstract problem than that discussed between relativists and objectivists in moral theory. Relativists and objectivists can both be cognitivists. Relativists can claim truth but this is a relative truth, the truth within a framework. Objectivists can claim the truth which is independent of a framework (if any such thing is possible). Obviously, a relativist can also be a non-cognitivist. A non-cognitivist can be an objectivist only in a rather odd sense, which is by assuming that there are objective values, even if no one can ever utter a truth-evaluated sentence about them.

The question whether valuations and norms have truth values is notoriously controversial (see von Wright 2000 and Artosi 2000). Moreover, What is truth? Minimalists (like Horwich) work in Tarski's paradigm: "Snow is white" is true if, and only if, snow is white. Quotation marks make all the difference between talking about words and talking about snow. The truth predicate is a device for unquoting. But then we are still left with metaphysical questions to be asked about snow and whiteness. A minimalist expels metaphysics from the theory of truth but does not thereby destroy metaphysics. She merely sets out a minimalist theory that requires a complement in the form of competing and controversial conceptions about the furniture of the world.

6.1.2. Normative and Descriptive Meaning

Before entering further into this discussion, I need to emphasize a point with regard to the meaning of normative and evaluative statements. There is an important difference between descriptive and evaluative statements: The former have a descriptive meaning only while the latter have a descriptive meaning *and* a normative meaning on top of that.[1]

[1] Cf. Peczenik 1989, 51ff., on the *practical* and *theoretical* meaning of a norm-expressive statements and value statements.

The normative meaning of norm-expressive statements can be grasped by way of their normative qualification. These statements qualify human actions and events as prescribed, permitted, prohibited, and so on. I will not consider here the more complex types of normative qualification. "Prohibited," "prescribed," and "permitted" express a qualification (even if this does not exhaust their meaning). In general, a norm qualifies actions and events as conforming to or violating the norm in question. One can regard normative qualification as an inverted truth, so to speak. This is so because "true" and "false" are also qualifying words. A descriptive proposition *p* will be qualified as true if the facts are in accord with the way *p* describes them; the proposition will be false, then, if it does not correspond to the facts (cf. Peczenik 1967, 133; 1968, 119). Svein Eng subsequently expressed a similar view discussing what happens in case an utterance should fail to correspond with reality. When the speaker modifies the utterance for alignment, this fact will indicate that what she intended to utter was a descriptive statement; when she tries to correct reality, this fact will indicate that what she intended to utter was a normative statement (cf. Eng 1998, 310–50).

At the same time, however, normative and evaluative concepts have a descriptive meaning. This descriptive meaning is expressed by criteria that set forth the meaningful use of the same concepts. Normative and evaluative statements may thus be justified. Justifiability implies that a person confronted with a norm-expressive statement or a value statement can ask, "Why?" and hence request reasons in support of the statement. On our part, pointing out that the action in question is good, or that it ought to be performed, will suffice to show that the same action fulfils at least one of the established criteria of evaluation (cf. Peczenik and Spector 1987, 467ff.).

The basis of this theory is intuitionist. There obviously exist moral intuitions of (morally sensible) individuals. These intuitions—often concerned with particular cases, but also with general principles—are expressed in evaluative as well as normative sentences that tell us about the reasons behind the intuitions. These reasons include other intuitions of the same kind. Finally, we also have the general intuition that moral intuitions ought to be justified. We have a passion for reason or, more precisely, a preference for coherence (Peczenik 1999, 210).

These simple observations come close to David Copp's philosophical theory of realist-expressivism. The core of this theory is this:

> It holds that our moral beliefs and judgments represent moral states of affairs and can be accurate or inaccurate to these states of affairs, which is the central realist thesis, but it also holds that, in making moral assertions, we express certain characteristic conative attitudes or motivational stances, which is central positive view of expressivism. (Copp 2001, 1)

Further:

> The truth conditions of basic moral propositions are given by propositions about what is called by relevantly justified or authoritative moral standards. (Ibid., 27)

These standards are decided by society, and the theory is thus society-centred (ibid., 28). The expressivist side of the theory means that Copp has

> been arguing for the plausibility of the conventional-implicature view for cases in which a speaker asserts basic moral propositions by using moral terms. In such cases [...] the speaker conventionally implicates, other things being equal, that she subscribes to a corresponding standard. In other cases [...] a speaker who expresses a moral belief conversationally implicates that she subscribes to a corresponding standard, other things being equal. (Ibid., 34ff.)

6.1.3. Four Possibilities

The questions just introduced are highly controversial. Let me outline four possible positions.

The first position is non-cognitivist. Jurists are often well disposed towards non-cognitivism. They consequently tend to regard norms as expressive and qualifying statements, not as propositions qualified as true or false. This was my own position in the 1960s and 70s. The theory combines a kind of expressive theory of norms with the following justification of logical rationality in normative contexts. The logic of descriptive propositions deals with the relationships that hold between the truth-values of these propositions. Conversely, one may use normative qualification as a foundation for the logic of norms. Assume, for example, that the meaning of two norm-expressive statements, n_1 and n_2, is such that each action qualified in a given way by n_2 is necessarily qualified in the same way by n_1. It is then plausible to assume that n_1 entails n_2 (cf. Peczenik 1967, 133; 1968, 119; 1969, 46ff.; reprinted in 1970, 31, 11, and 60ff.). Thus, in the realm of norms, the logical connective "if ... then" may generally be defined by way of normative qualification. The same applies to other logical connectives, such as "and" and "not." Thus, a rational non-cognitivist, *A*, follows her *passion for reason* and can have a rational discussion with another rational non-cognitivist, *B*. What *A* does, then, is to show *B* that *B*'s system of beliefs, preferences, and reasonings supports the conclusion that *A* proposes.

The problem is, however, that this very passion for reason requires of us, not only to construct coherent normative theories in morality and in law, but also to state what kind of reality these theories are about.

The second position is a mixed one. In 1989 and 1995 I expressed a theory that is cognitivist relative to *prima facie* (better yet, *pro tanto*) norm-and-value statements and non-cognitivist relative to all-things-considered norm-and-value statements: The former are true if they correspond with the cultural heritage of society; the latter may be more or less reasonable in the light of an individual's acceptance-and-preference system, but are not true in any ontological sense. On this theory, knowledge of *pro tanto* values is possible, whereas a well-argued belief about an all-things-considered value merely expresses something essentially similar to knowledge, but not knowledge in the

literal sense. The rationale here is that we are not thereby committed to the view that there is only one right answer to all moral questions (cf. Peczenik 1989, 309ff.; 1995, 670ff.).

This theory is open to criticism because it is a hybrid theory. It splits up the apparently homogenous category of norm-and-value statements into two radically different categories, one of which is truth-assessable and the other is not. Moreover, non-cognitivism does not give us any profound basis on which to require coherence of all-thing-considered value judgments (cf. Rabinowicz 1998, 17ff. and 23; Peczenik 1998b, 62ff.).

The third position is cognitivist. A cognitivist metatheory may be thought to provide a better account of *pro tanto* norm-and-value statements and all-things-considered norm-and-value statements, both. But a theory of this kind will have to avoid the dogmatism that we are all too familiar with from classical natural law: We must preserve the intuition that it is easier to contest weighing in particular cases than to frontally attack such values as human life. But this cognitivist turn is very difficult for me to take, since my roots are in the legal realism of Petrażycki, Wróblewski, Ross, and Olivecrona.[2]

The fourth position is metatheoretical relativism. The best way out is perhaps to endorse Jaap Hage's idea that there is no fixed demarcation line between the objective and the relative (cf. Peczenik and Hage 2000, 337). Presupposing the concepts and standards of moral-cum-legal practice commits us to viewing our knowledge of these concepts and standards as objective knowledge about the world. Thus, the dependence of judgments on concepts and standards does not rule out the objectivity of these judgments. Only when we start doubting the knowledge we allegedly have of the same concepts and standards do we switch over to a relativist language and add such clauses as "I think that," "in my opinion," and so on. Now, it is particularly odd to doubt basic moral values and easier to doubt judicial decisions. But, as previously stated, the difference is not sharply determined in basic philosophy. The borderline is fluid and contingent. What this means for us in this context is that juristic doctrines may be regarded as affording a kind of juristic knowledge only so long as theorists do not begin to have doubts as to what they "really" do.

6.2. Ontology for Legal Doctrine

6.2.1. The Problem of the Ontology of Law

Lurking behind epistemology and metatheory is ontology. In Volume 1 of this Treatise, Enrico Pattaro presents an analytical and explanatory theory that

[2] Jes Bjarup has an insightful point in this regard: "AP's [...] theory can be regarded as a union of utilitarianism with communitarianism emphasizing that the good legal order is characterized by protecting human preferences. The ground for it is in the non-cognitivist view" (Bjarup 1995–1996, 1186).

shows how complex entities get constructed from simpler components. The following quotations are particularly illuminating.

Despite the Is-Ought dualism, more or less consciously presupposed by the legal doctrine of the civil-law countries, any event in the reality that ought to be is conditioned, according to the same legal doctrine, by events occurring in the reality that is: There is no event in the reality that ought to be which is not the normative consequence of events occurring in the reality that is. I will call the former events "Ought-events," "Ought-effects," "Ought-changes," or "normative consequences," and the latter "Is-events," "Is-causes," or "Is-changes." (Pattaro, vol. 1 of this Treatise, sec. 2.2.1)

As has been anticipated, a norm is, on my view, a motive of behaviour [...]: It is the belief (*opinio vinculi*) that a certain type of action must be performed, in the normative sense of this word, anytime a relevant type of circumstance gets validly instantiated. This must unconditionally be so, that is, regardless of any good or bad consequences that may stem from the performance in question. My concept of norm is *deontologically* oriented. (Ibid., sec. 6.1)

In conclusion, Is-facts, acts, and transactions are events in the reality that is which cause Ought-effects in what is subjectively right in the reality that ought to be: They will bring about, modify, or extinguish rights and obligations among subjects under the law (provided they are valid tokens of a type of Is-event set forth in, and not forbidden by, what is objectively right in the reality that ought to be: Section 2.2.2.1). (Ibid., sec. 3.2.4)

This analysis gives us a good insight into the complexity of the law. It also shows that each time a jurist notices a change in the legal "reality that ought to be," there is a corresponding and underlying change in physical and mental reality. In a similar spirit, Laurent Mommers provides

a framework in which different ontological views can be accommodated. In this framework, there are three basic layers. The first layer consists of non-legal entities that are legally-relevant. The second layer consists of potentially legal entities whose existence status (*qua* legal entity) is not yet established. The third layer consists of legal entities. Transitions between these three layers are possible through varying sets of criteria. A potentially legal entity, such as a judge's decision, becomes a legal entity by checking whether the status layers required do indeed apply. Thus, for instance, an immoral decision is not classified as a legal entity in a natural-law view, whereas it is classified as such in a legal-positivist view. Entities on these three different levels are connected to each other through two different relations. These are the count-as relation [...] and the causation relation. (Mommers 2002, 100)

A metaphysically oriented philosopher of law may, however, ask the embarrassing question, What entities do actually do exist? What entities belong to the "furniture of the world"? Is it not the case that only simple entities, such as beliefs, exist literally, whereas the rest of the above-mentioned entities are reducible to the content of beliefs? Or do laws, rights, transactions, etc., exist in a peculiar manner other than that by which beliefs are said to exist? Generations of philosophers have attempted to dissolve such metaphysical questions. But the questions come back persistently.

No sooner is the metaphysical question set out, than confusion begins to abound limitless. This is because we have to do with two deeply rooted conflicting intuitions.

Intuition (1): The law is a social fact; it is created by power-holders (such as legislators and judges) or by the customs that obtain among people.

Intuition (2): Judges and legal researchers obtain knowledge of the law by way of evaluative operations, that is, by interpreting statutes, precedents, and other sources of law; this interpretation is necessarily connected with justice, such that an unjust interpretation is an incorrect interpretation.

Intuition (1) will result in legal research giving up its claim to knowledge. Or it will result in radical proposals for changing legal research into something like a hardcore, value-free science.

Intuition (2) will result in theories by which the law is an ontologically complex entity. This explains the possibility of legal knowledge obtained by evaluative interpretation, to be sure. But success here comes at a price. It common among ordinary lawyers to gainsay the complex ontology of law, for they are practical minded and loathe metaphysics.

What, then, are we to do?

One possibility is to simply trace out in full the collision course these two intuitions are on and give up on the idea of an ontology of law. This will imply that ontological questions are beyond the jurist's reach. From this perspective, we are led to ask whether our normative beliefs are justified within the jurist's horizon. We will set metaphysical questions aside—not as wrong, but as unpractical—and go on thinking in the manner of a lawyer. This is an option I am strongly inclined towards.

Another possibility is to spell out the complex ontology resulting from Intuition (2) and make it understandable. There are, on reflection, at least eight alternatives in answer to the question what the law is.

The first of these is to explain the law as consisting of legally binding norms, mostly statutory in Europe. This alternative is obviously attractive, not least because it corresponds to the terminology of constitutional law. But even here there are some embarrassing questions that can be asked. There is no doubt that statutes are law, but something else is apparently also a part of the law—judicial practice and unwritten legal principles, for instance.

On to the second alternative, then: The law is a social practice; in a famous slogan, it is what the courts do in fact, and nothing more pretentious than that. This second alternative is attractive to some legal realists precisely because social practices appear to be reality. But this alternative, too, is confusing because it obviously contradicts the basic intuitions of lawyers, who would otherwise say that statutes, not judicial practice, lie at the core of law. No doubt, judicial practice is a kind of law in action (another famous slogan)—but is *all* law judicial practice? What about statutes not yet applied by the courts? What about customary law? What about Dworkinian preexisting principles of law? What about the products of juristic theories?

To modernist philosophers, the first alternative, and even more so the second, looks attractive because it is simple, and philosophers assume that sim-

plicity is the basic merit of ontological theories. Alas, both alternatives are destructive because they run counter to the basic intuition that legal doctrine produces a knowledge of the law rather than arbitrary constructions. The problem may be circumvented by introducing some terminological distinctions. For example, we can split the idea of law in two main components: law in force and binding law. Law in force would fit in with Intuition (1): It would be a social fact, perhaps ultimately reducible to the conventions shared by those in power. Binding law would follow Intuition (2): It would be ontologically complex. Having got into this business of distinction-making, one can also take up Tuori's distinction between the law's surface structure, its deep structure, and its culture. These theories are certainly interesting. But they leave open the metaphysical question, What is the ontologically complex manner of existence of "binding law," "deep structure," "legal entities," and so on?

The third alternative: Everything that legal doctrine produces, using established methods of legal reasoning, is law. But this alternative savours of desperation. Jurists seem to play a strange game with time. They tell us that they are describing the law in force and that this law is a social fact. And yet, all the while, doctrinal jurists reconstruct the law in an effort to make it more coherent and just than it was before. Thus, if doctrine reconstructs the law, it is not describing anything preexistent, but rather making it anew: It is making "law" and deceiving the public by creating the illusion that what is being offered is a description of the law. Description assumes a time sequence: There is first the object described and then the description. But in legal doctrine the order appears to be reversed. Moreover, is this doctrine-made "law" legitimate? And, if so, why?

The fourth alternative: The law is an idealized paraphrasing of legal practice: It is not what the courts do in fact, but what they would have done if they had performed perfectly rational, Herculean thinking (cf. Dworkin 1977).

The fifth alternative echoes the fourth by carrying it over from the courts to the universities. The law is an idealized paraphrasing of legal doctrine: It is not what doctrine produces in fact, but what it would have produced if legal scholars had performed perfectly rational thinking.

The sixth alternative: There are two kinds of law, namely, input-law and output-law. Input-law consists of all legally relevant normative materials and texts, meaning statutes, judicial practice, *travaux préparatoires*, evidence of established custom, evidence of social morality, etc. Output-law is that which legal doctrine produces. In a previous work (Peczenik 1989, 268ff.), I took up this sixth alternative.

The seventh alternative says that legal doctrine is engaged in narration, self-description, self-reference, etc. (cf. Jackson 1988). But this view is controversial.

The eighth alternative: The law is what we in our society ought to obey. Legal reasoning based on statutes, judicial practice, and suchlike is the only

way to discover what this law is. Legal doctrine is the best form of legal reasoning. For it reconstructs the input of statutes, practices, and cultural patterns, all the while describing a "deeper" and preexistent legal ought.

It may be said, to avoid confusion, that all ontology is relative. There are many views of reality, each corresponding to a different background theory that defines the concept "real" (cf. Quine 1969, 53ff.) and indicates what we are to regard as individual objects, and as their parts, kinds, and so on (cf. Goodman 1978, 7ff.). There may be many metaphysical systems, "all such systems being wholly comprehensive and mutually incompatible, but all equally valid descriptions of one's reality" (Castañeda 1980, 19). One can plausibly insist that there is only one world, to be sure—only we see it in different ways because, among other reasons, we have different ways of understanding certain utterances (cf. Searle 1995, 195).

In view of this fact, we must make a choice between two alternatives as follows: We can accept perspectivalism as our meta-philosophy—law as a complex entity exists in the perspective that makes legal doctrine coherent, but not in a profound, metaphysical perspective—or we can opt for the profound ontological perspective.

6.2.2. Law as a Dependent Entity

The property common to the fourth and fifth alternatives is that the truth of statements about such things as valid law and correct interpretation supervenes on the rationality of the corresponding activity, such as adjudication and legal research. Giovanni Sartor suggested to me in conversation a more general formulation as follows: The truth of statements about such things as valid law and correct interpretation supervenes on the rationality of the conative state by which the corresponding practical information is acquired. This view is quite attractive. Let me go a little further into the fifth alternative.

The law exists because people believe in it, but the law is not identical with beliefs. Using a philosophical expression now in vogue, one can say that the law supervenes on human beliefs, preferences, actions, dispositions, and artefacts. Thus, a series of actions by persons acting in their capacity as members of parliament can cause the fact of a text being produced and counting as a legal statute. This way, legal statutes are ontologically dependent on these actions. Dependence is determined by the count-as relation and by the causation relation. We cannot state that these relations obtain without effecting jumps (leaps) in the sense outlined in Section 4.3.2.

Instead of speaking of dependence, leaps, and transformations, we might try a more technical term and speak of supervenience. A preliminary analysis of the law's mode of existence may thus proceed by pointing out that there are non-legal entities (e.g., beliefs, preferences, actions, dispositions, and artefacts) on which the law supervenes. When we engage in legal practices we use

a conceptual scheme in conjunction with which the law—and not just our belief in the law—is enabled to exist. This conceptual scheme determines the criteria for the existence and persistence of the law that we acquire in our social practice. The law exists relative to our conceptual scheme, not by virtue of it. Simply stated, the way we talk about the law in ordinary life, and even more so the way lawyers talk about the law, reveals something about what the law is.

A supervenience theory of the law suffers from the drawback that it seems to introduce a number of entities with an ontological foundation that is less firm than that of purely physical entities (cf. Sosa 1998). Sosa points out nicely the problems with supervenience theories:

> Suppose a world with just three individuals $x1$, $x2$, $x3$. Such a world is held by some "mereologists" to have in it a total of seven things or entities or objects, namely, $x1$, $x2$, $x3$, $x1 + x2$, $x1 + x3$, $x2 + x3$, $x1 + x2 + x3$. Antimereologists by contrast prefer the more austere ontology that recognizes only the three individuals as objects that really exist in that world. (Sosa 1998, 399)

One way to avoid such problems is to make the controversy relative to a choice of language. It will be convenient to use antimereological language on some occasions and mereological language on others. However,

> existence relative to a conceptual scheme is not equivalent to existence in virtue of that conceptual scheme [...]. Each of us acquires and develops a view of things that includes criteria of existence and perdurance for categories of objects. When we consider whether an object of a certain sort exists, the specification of the sort will entail the relevant criteria of existence and perdurance. And when we correctly recognize that an object of that sort does exist, our claim is elliptical for "exists relative to our conceptual scheme." (Sosa 1998, 404)

The law can therefore exist as a supervening entity. But does it do so as a matter of fact? Is there sufficient reason to conclude that the law exists *objectively*? Or is the law a product of the imagination; is it parasitic on human behaviour and mental processes? This question ties in with the debate on reductionism, a complex debate far from finding a solution. In the first half of the 20th century, science was generally of a mind to reduce complex systems to less-complicated components, and ultimately to logical "atoms." Thus, there was a drive to reduce biological laws to chemistry and chemistry to physics. So, too, there was a drive to reduce legal concepts to scientific, ultimately physical concepts. The so-called Vienna Circle (especially with Rudolf Carnap and Otto Neurath) tried to base complex theories in the natural sciences on "protocol sentences" that report observations. Quine (1953, 38ff.) thus critically dubbed "radical reductionism" the belief that each meaningful statement is equivalent to a logical construct upon terms referring to immediate experience. The reductionist program proved to be extremely difficult to fulfil. Thus, Fodor and Putnam initiated an anti-reductionist consensus thirty

years ago by noting the analogy between computational states and mental states (cf. Block 1997). Therefore, the following—cautious—approach is taken in this volume. We will not take any position at all with regard to whether the reductionist program is logically possible. We will only state that any presentation of legal problems in general, and legal doctrine in particular, is going to be extremely complex if carried out in the reductionist way.

6.2.3. A Theory of Legal Conventions and Institutions

Having chosen a "rich" ontology as a practical possibility (without ruling out reductionism as an ideal)—that is, having chosen a language allowing for the existence of legal entities next to the "brute" entities these are dependent on—we can introduce Eerik Lagerspetz's theory of conventional facts and rules.[3] Thus:

R is a regulative rule in *S* if

- the members of *S* generally comply with *R*;
- there is a mutual belief in *S* that *R* is a regulative rule in *S*; and
- this mutual belief is at least in part a reason for this compliance (cf. Lagerspetz 1999, 211).

Rules that exist by way of mutual beliefs are conventional facts. But a single constituent rule within a rule-system need not exist by virtue of mutual beliefs about the rule's existence—witness some of the more esoteric parts of law known only to a small circle of legal specialists. It suffices if a rule belongs to a chain or web of rules that ultimately can be traced to rules existing in the relevant community by way of mutual beliefs (cf. ibid. 209ff). Lagerspetz regards his theory as an improvement on Searle's well-known theory of institutional facts. According to Searle, rules create institutional facts. Lagerspetz asks:

> But what kind of fact, then, is the fact that these rules do exist in relevant communities? Obviously, a fact about the existence of a rule cannot be a brute fact in Searle's sense: it is not a fact on the furniture of the physical world, neither are the statements expressing it subjects of direct perceptual control. If Searle's classification is meant to be an exhaustive one, facts about rules must themselves be institutional facts. Therefore, they are inherently dependent on the existence of further rules: something is a rule only if there is a rule with the effect that it is counted as a rule. We are in an infinite regress. This might be called as the logical regress of rules. (Ibid. 199)

Lagerspetz's

solution to these problems is to develop a notion of non-brute fact which is not inherently rule-dependent. The basic idea behind the solution is the following: There are things which exist and facts which hold only if the relevant individuals believe that they exist or hold and act ac-

[3] Lagerspetz 1999; see also Lagerspetz 1995. Incidentally, a generation earlier, Tore Strömberg regarded beliefs in valid law as a social convention (cf. Strömberg 1981, 39ff.).

cording to these beliefs. What we call as institutions and institutional facts fall under this description. Descriptions of these things and facts are implicitly circular or self-referential, but the circle in question is not a vicious one. In the descriptions, institutional terms reappear only in the scopes of propositional operators describing the attitudes of relevant individuals. Moreover, the existence of the related beliefs is only a necessary condition for the things being there. […] The self-referential nature of conventional facts is not an anomaly, for there are things in the world which are capable for self-reference and for cross-reference. Propositional attitudes—believing, knowing, hoping, fearing, etc.,—have this capability. We can have beliefs about other people's beliefs, while they have at the same time beliefs about our beliefs. This gives rise to the phenomenon called mutual, or shared belief, or common, or mutual knowledge. (Ibid. 199–200)

A more detailed discussion of this topic is found in Peczenik and Hage 2000, on which this and the following sections are based.

6.2.4. The Law as a Product of Convention and Morality

The law is not merely a convention, however. It is a product of convention and morality. Granted that the point of legal doctrine is to present the law as coherent and morally binding, we will have two competing philosophies to choose from. On the first of these, legal doctrine provides us with a knowledge of the coherent and morally binding law that was already in existence before the theories were constructed, even if legislative-cum-judicial practice was neither coherent nor moral. The second philosophy is that legal doctrine changes the law, making it more moral and coherent. Assume for a moment that we accept the claim to knowledge advanced by legal doctrine. We will then have to admit that the law was in a deep sense already coherent and moral before legal doctrine told us so. In other words, a legal scholar can discover a preexisting law by setting out a convincing argument for it. Morally binding law therefore depends on a conjunction of two elements: people's knowledge of legal institutions and moral deliberation. The first element depends in turn on mutual beliefs; the second, on the motivations and dispositions of whoever is doing the interpreting. This coupling of elements approximates morally binding law, provided that the people involved are morally sensitive and rational (cf. Peczenik and Hage 2000, 343ff.).

In sum, someone's personal interpretation of the law converts into morally binding law if

- the interpretation achieves an optimal coherence of the law itself; and
- this construction is coherently linked to an optimally coherent moral theory.

This ideal is of course unreachable. But legal doctrine must try to approximate it in the effort to live up to the ideal of a descriptive-cum-normative *Rechtswissenschaft*.

If accepted, the previously outlined cognitivism and complex ontology of law will make it necessary to add the following about the relation between the law and human motivations (cf. Hage and Peczenik 2001, 141ff., repeated in Peczenik 2001, 92ff.). The law exists—it does so as a fact. But to discover this fact, a jurist must rely on social conventions as well as on personal morality. This morality is dependent on the jurist's motivation. Thus, in seeking to make sense of the claim to knowledge advanced by juristic doctrines, we can attempt to leave Humean philosophy behind and consider the possibility that there are facts whose existence depends inherently on the motivation, or at least on the reasonable motivation, of the knowing subject.

To a modern reader, this is blasphemy. But the present section should be understood as a thought experiment, not as an article of faith. What I present here is a way to achieve a result, that is, making sense of legal doctrine. The price we have to pay for this is a non-Humean theory of knowledge and motivation. Nothing prevents us from looking for a cheaper way to get this result.

Let me assume, therefore, that the law is just such a motivating fact. On this conception, we can easily understand why so many lawyers (at least pre-modern and post-Nazi lawyers) have reasoned as follows: This "law" cannot reasonably motivate me; hence it is not law. Or, more specifically: This "law" is extremely unjust; hence it is not law. This is the point of Radbruch's famous formula (1950, 354; cf. Alexy 1992, 53ff.). When legal doctrine makes enacted law more coherent, it gives us knowledge of the deeper law—of the law as a rationally motivating fact.

All this stuff is highly metaphysical. But the point is that such metaphysics makes sense of descriptive-cum-normative legal doctrine. And legal doctrine is (or at least was) a fact. Personally, I would rather have a simpler metaphysics doing the same service. But I cannot find it. This is perhaps a challenge that philosophers can take up.

Chapter 7

CONCLUSIONS

Legal doctrine faces philosophical criticism. It was pointed out in the foregoing chapters how one can reply to these objections.

- Juristic theories have important normative components and these are allegedly arbitrary. But normative statements are rationally justifiable.
- Legal doctrine allegedly refers to ontologically obscure entities. But legal doctrine can work without complex ontological assumptions. Moreover, a complex ontology admitting of conventional and moral objects is possible.
- Legal doctrine is criticized for its indeterminacy. The answer to this objection is "defeasibility, not indeterminacy."
- Legal doctrine faces the objection that it wrongly presumes a common moral core in a pluralist society. But a core of this kind does actually exist and should not be ignored.
- Legal doctrine faces the objection that it is not universal, but territorially local and hence unscientific. But this locality has been exaggerated. There are considerably global and long-lived components of legal doctrine. Moreover, a precise normative statement cannot be truly universal, because all morality is society-centred.

The most important objection is that the normative claims of legal doctrine are unjustified. But legal doctrine produces a relatively stable normativity. This normativity is based on coherence, which applies to

- legal knowledge;
- justice under the law; and
- legal concepts.

In all three respects, legal doctrine produces midlevel theories with platitudes at the centre. Justification in legal doctrine proceeds through constrained, wide, and segmented reflective equilibriums between legal theories, on the one hand, and particular judgments and moral principles, on the other. The platitudes and the justifications are debated among officials and members of the community. The equilibrium is society-centred, for it results from discussion among many participants. It consists in an overlapping consensus among people seeking coherence.

The platitudes involved are of four kinds at least:

- platitudes in coherence theory itself, which consist of criteria of coherence;

- platitudes in society-centred morality;
- platitudes in general legal doctrine (these are concerned with legal sources and arguments); and
- platitudes in particular legal doctrine.

All these platitudes enter into a single equilibrium. Not one of them is by itself a super criterion. Platitudes are fuzzy, but by bringing them together we can diminish the degree of fuzziness. To "diminish" is not to "eliminate." No theoretical reconstruction of legal doctrine can convert such fuzziness into a calculus of conclusive rules.

Consequently, a legal decision is justified (normatively) if, and only if, it coheres (to a greater extent than any other decision) with the sources of law, which for the most part consist of

- legal statutes;
- past decisions (precedent);
- *travaux préparatoires*; and
- legal doctrine.

Thus, legal doctrine is rationally justifiable. Does this point to a great future for legal doctrine? No one knows for sure. Jurists are good at keeping things stable and reasonable. But the political system pushes for dynamic change and may look upon jurists as an obstacle. The economic system, well-adjusted to the needs of big businesses, demands simple and rapid decisions, not slow juristic debate. "Post-metaphysical" modernism, well-adjusted to the needs of technology, demands clarity at all costs and manifests its revulsion at the traditional talk of truth, justice, and morality. The exponentially growing complexity of the information society exerts pressure on jurists and in many cases makes the juristic dream of a coherent law exactly that, a dream. Last but not least, in this complex and dynamic world, there is a post-religious need for security, if not real at least imaginative. Legal doctrine is too complex and too sophisticated to answer this need. People feel more comfortable with the illusions of strict social science and with politically correct recitations of longer and longer catalogues of the rights we all have.

Are we then looking at the end of legal doctrine? Perhaps so, if we do nothing. But problems are challenges. They can and must be solved.

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 5

Legal Reasoning

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A Treatise of Legal Philosophy and General Jurisprudence

Volume 5

Legal Reasoning

A Cognitive Approach to the Law

by

Giovanni Sartor
CIRSFID and Law Faculty, University of Bologna, Italy

Springer

A C.I.P. Catalogue record for this book is available from the Library of Congress.

5 Volume Set:
ISBN-10 1-4020-3387-7 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-10 1-4020-3505-5 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3387-2 (HB) Springer Dordrecht, Berlin, Heidelberg, New York
ISBN-13 978-1-4020-3505-0 (e-book) Springer Dordrecht, Berlin, Heidelberg, New York

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Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Printed on acid-free paper

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Printed in the Netherlands.

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A NOTE ON THE AUTHOR

Giovanni Sartor is currently professor of Computer and Law at the University of Bologna, after obtaining the PhD at the European University Institute (Florence), working at the Court of Justice of the European Union (Luxembourg), being a researcher at the Italian National Council of Research (ITTIG, Florence), and holding the chair in Jurisprudence at Queen's University of Belfast (where he now is honorary professor). He is co-editor of the *Artificial Intelligence and Law* Journal and has published widely in legal philosophy, computational logic, legislation technique, and computer law. Among his publications are *The Law of Electronic Agents* (Oslo: Unipubskriftserier, 2003), *Judicial Applications of Artificial Intelligence* (Dordrecht: Kluwer, 1998), *Logical Models of Legal Argumentation* (Dordrecht: Kluwer, 1996), and *Artificial Intelligence in Law* (Oslo: Tano, 1993).

PREFACE

First of all, I thank Enrico Pattaro, with whose help and guidance I have been able to develop my research so far, starting from my undergraduate studies, and who has given me the chance of participating in the Treatise project. Also on this occasion, as on many previous ones, his support and his advice have been invaluable to me. I am very grateful to the participants in the Treatise project, and in particular Aleksander Peczenik, Gerald Postema, Nino Rotolo, Hubert Rottleuthner, and Roger Shiner. I have learned a lot discussing with them, and they have provided me with many useful comments on my manuscript and with a lot of helpful suggestions.

I have also had the opportunity of discussing my volume with many other colleagues and friends, all of whom have been very helpful. In particular, Alberto Artosi, Tom Gordon, Jaap Hage, and Henry Prakken have read parts of the manuscript, making a number of cogent remarks. This book would have been much worse without their help in identifying shortcomings and problems, and in suggesting appropriate remedies. I am equally grateful to Claudia Cevenini and Jonathan Gelati for taking the trouble to proofread the whole manuscript, and for helping me to correct many mistakes, both in linguistic expression and in content.

Since the project of the Treatise has started, I have been working first at the Queen's University of Belfast (at the Law School) and then at the University of Bologna (at the Law Faculty). I am thankful to both Universities for offering me a stimulating environment and the opportunity of reconciling research and teaching. I am also thankful to CIRSFID (the Research Centre of History of Law, Philosophy and Sociology of Law and Computer Science of Law, of the University of Bologna) for supporting my research in many ways, and most of all through the friendly help and advice of its director, Carla Faralli.

Last but not least, my thanks and also an apology are due to my family, my wife Lia and my children Giovanna, Chiara, Galileo, Aldo and Benedetta, in order of appearance. They have put up with me during the preparation of this book, and have been supportive, though I was unable to dedicate to them all the attention they deserve, especially in the last months, when time constraints were pressing.

Giovanni Sartor
University of Bologna
CIRSFID and Law Faculty

INTRODUCTION

The study of legal reasoning not only is one of the main areas of legal theory, probably the one which has been more extensively cultivated during the last decades; it is also the battleground of apparently incompatible methods and approaches. Consider, for instance, the eternal opposition of natural law and legal positivism, the 19th century debate between conceptualist and sociological jurisprudence, the 20th century conflict between legal formalism and legal realism, in all their variants.

We shall here try to elaborate a viewpoint from which it may be possible to combine and integrate such diverse models of legal thinking into one comprehensive perspective. This viewpoint is constituted by the assumption that legal reasoning can be viewed as an application of a broader human competence, that is, *practical cognition* or *practical rationality*, namely, the ability of processing information in order to come to appropriate determinations. Epistemologist Susan Haack has rightly said that science "is a thoroughly human enterprise, messy, fallible and fumbling; rather than using a uniquely rational method unavailable to other inquirers, it is continuous with the most ordinary of empirical inquiry, 'nothing more than a refinement of our everyday thinking,' as Einstein put it" (Haack 2003a, 9–10). We take a parallel stand with regard to legal reasoning: It is, and should be, nothing more than a refinement of our everyday practical thinking. This stand will have two implications.

First of all, it will enable us to bring to bear on the analysis of legal reasoning the rich variety of studies which address the phenomenon of practical cognition: not only logic and philosophy, but also psychology, cognitive science, artificial intelligence, game theory and decision theory.

Secondly, it will lead us to view various jurisprudential ideas (for instance, reference to rules, goals, intentions, factors, principles, values, coherence, dialectics) as different aspects of a unique cognitive process—each having a specific function to play, and each being able to contribute, within its proper bounds, to the project of legal rationality—rather than as pointers to incompatible alternative approaches to legal problem-solving.

Our work is divided into two parts. The first is dedicated to embedding legal reasoning within practical cognition, and to fitting the various aspects of legal reasoning in this broad picture. After considering the nature of practical cognition, we shall focus on practical reasoning, and we shall discuss in particular the following aspects: reasoning with rules, goals, preferences, factors, and values; bounded, strategical and dialectical rationality; collective reasoning and

the participation in collective intentionality; the rational endorsement of legally binding normative propositions.

The second part is aimed at providing, with the help of logical analysis, a more precise and accurate account of the fundamental forms of legal reasoning. Among such forms, we shall consider deontic modalities, Hohfeldian concepts, normative conditionals, legal acts and powers, legal sources, argumentation, and theory construction.

Notwithstanding the considerable length of this volume, we shall not be able to review all approaches to legal reasoning, and particularly we shall not be able to consider many of the most recent studies. This depends on the limitations of our knowledge, but also on the fact that our domain of inquiry is so large that a selection is inevitable, and it needs to be made with regard to relevance for the particular perspective we intend to develop.

Part I

Legal Reasoning and Practical Rationality

Chapter 1

PRACTICAL RATIONALITY

In this chapter we shall sketch a general account of practical reasoning, in order to provide the basis for our model of legal reasoning. This reflects the idea that legal reasoning can be viewed as an application of a more general human competence, which we call *practical rationality*. Practical rationality is a fundamental aspect of *rationality*, by which we mean the appropriate way of processing information through reasoning. As we shall see, practical rationality complements *theoretical rationality*, the other fundamental aspect of rationality.

The account of practical and legal reasoning in Part I of this volume is going to be informal. In Part II, some of the notions introduced will be made more precise, and will be characterised with the help of a (moderate) logical formalism.

1.1. Implicit Cognition

Rationality is a capacity that cannot be appreciated in isolation, as a feature of a disembodied pure intelligence: It is a function that is performed by real agents and it is grafted on the top of other cognitive capacities of such agents.

As we shall see, rationality is a significant addition to these other cognitive capacities, since it provides a flexible way of extending, controlling and refining their output, but it would be a useless symbol grinding mechanism if it were separated from them. Therefore, to appreciate the role of rationality, we need first to analyse other forms of information processing, which we group under the heading of *implicit cognition*. These forms of cognition include those ways of information processing that take place within an agent, but are inaccessible to the consciousness of the agent itself,[1] though the agent may have access to their outcome. We shall distinguish two basic types of implicit cognition:

- *fixed reflexes*, which are hard-wired into the agent, and
- *conditioned reflexes*, which are dynamically adapted to the environment.

[1] We use the term *agent* in a very general sense, namely, to refer to any entity capable of autonomous action. This includes not only humans, but also animals and even some artificial entities, like physical robots and virtual ones (the so-called software agents). On the agency of autonomous automata, cf., among the others, Pollock 1989; Pollock 1995; Wooldridge 2000, 1ff.; for a legal discussion, Bing and Sartor 2003. On rule-governed interaction of software agents, see Artikis et al. 2002.

We shall then consider those more complex cognitive functions that are provided by specialised cognitive organs.

1.1.1. Fixed Reflexes

Fixed reflexes connect certain environmental inputs (impacting on the agent's sensors) to certain behavioural responses. These reflexes never change during the agent's life. An agent having only fixed reflexes is incapable of learning, since its behavioural responses are completely determined by the input-output function that is implemented into its physical make-up: Every time the agent receives a certain type of input, it will reply with the same kind of action.

For such agents, learning may take place only with regard to the species, thanks to *evolution*. If the reproduction mechanism of a species is capable of producing variations, then those variations will preferentially survive and reproduce, which have reflexes that are best fit to the environment. Therefore, the species will "learn" (become more adapted to its environment), as the generations pass one unto another, even if the behaviour of each individual is unchangeably defined by its input-output functions. As Popper (1976, sec. 37, 179ff.) observes:

> Life as we know it consists of physical "bodies" (more precisely, structures) which are problem solving. This the various species have "learned" by natural selection, that is, to say by the method of reproduction plus variation, which itself has been learned by the same method.

Agents having fixed reflexes can be biological ones, such as viruses, bacteria, plants, animals, but also artificial ones, such as certain robots and computer programs. In the latter case, the reproduction mechanism is usually the process of fabrication, rather than self-replication, while variation and selection will be operated by experiments and choices of designers, rather than by natural selection (though the development of new artificial agents through self-replication is increasingly popular, as in genetic approaches to computing). In humans, fixed reflexes provide for all basic bodily functions, from processing food, to preserving blood pressure and bodily temperature, to the first phases of processing sensory inputs.

It is important to remark that, even if evolution (or the project of the agent's creator) has given an agent reflexes which are adapted to the agent's environment (i.e., reflexes which provide for survival of the agent and persistence of its species), an agent having fixed reflexes is not reacting directly to its chances of survival and reproduction. There is no teleology at work, as far as the individual is concerned. The individual agent is only blindly reacting to certain features of its environment, as its sensors perceive them.

Teleology, in a sense, works at the level of the species, through selective evolution: The species may change so as to meet the requirements of the environ-

ment (thanks to the higher reproductive success of agents having better-adapted reflexes). Consider for example, how viruses tend to evolve into forms that are not attackable by the available drugs. More generally, Darwinian evolution will tend to endow species with biological solutions that are appropriate to their survival problems: In this sense we may say that evolution engages in a kind of design work, if this is generally understood as "the work of discovering good solutions for problems that arise" (Dennett 1996, 133).

1.1.2. Conditioned Reflexes

A more complex type of implicit cognition is provided by *conditioned reflexes*, that is, by the mechanism of *operant conditioning*, the key idea of behaviourist psychology (Skinner 1953). Agents endowed with conditioned reflexes have the capacity or *learning*, by acquiring and modifying their reflexes. Let us consider briefly what architecture may underlie such capacity.

First, there are certain states of the agent that act as *positive reinforcers* for its reflexes. This means that when an action, triggered by a certain input, produces a reinforcing state, the agent will increase its tendency to replicate this action in the future, in response to the same type of input: The activation of the positive reinforcer will start or strengthen the activating reflex. Similarly, there are other internal states that act as *negative reinforcers*. This means that when an action, triggered by a certain input, activates a negative reinforcer, the agent will tend to refrain from responding to that input with that action: The activation of the negative reinforcer will weaken or even cancel the activating reflex.

Conditioned reflexes are not rigidly fixed: They can change, according to the impact of practising each reflex on positive or negative reinforcers. Reinforcers, on the contrary, are usually embedded in the agent's architecture, and they are linked to physiological states that usually favour the survival of the agent (though they may be reinforced according to the impact of their satisfaction on further, higher level, reinforcers).

Secondly, to be capable of acquiring new conditioned reflexes (of learning them) an agent also needs a mechanism for generating some variations in its behavioural responses to external stimuli. The variations that activate a positive reinforcement will then tend to be transformed into new reflexes.

Such a learning mechanism can even lead to the modification of the reflexes, that is, to their *generalisation* (extension to further inputs) or to their *specialisation* (restriction to a reduced set of inputs). On the one hand, when a behavioural response, originally linked to a certain class of inputs, results in positive reinforcement after being practised with regard to a new input, that response can be linked also to the new input (generalisation). On the other hand, when a behavioural response, originally linked to a certain class of inputs, results in negative reinforcement after being practised with regard to a particular instance of that class, the corresponding reflex can be specialised (the class of

inputs which activate the reflex is restricted), so that the response is no longer triggered by that particular input (specification). For example, animals may expand the range of the foods they tend to approach, after enjoying new foods, or may restrict it after bad gastronomic experiences.

Finally, conditioned reflexes provide an unconscious form of analogy, being susceptible of being activated also by inputs that that are only similar to those which were experienced by the agents in the past.

We cannot consider here the type of mechanisms that provide an agent with conditioned reflexes. In fact it seems that conditioned reflexes can be implemented in similar ways into different types of structures, from biological ones, as in neuronal connections in brains, to electronic ones, as in electronic neural networks.[2] In any case, an agent endowed with conditioned reflexes is characterised by the disposition to react to certain situations with the activation of a reinforcer, and by the capacity of strengthening the reflexes that are followed by (the production of such situations and therefore by) the activation of a positive reinforcer.

Consider, for example, a robot that moves in an environment where plugholes with different shapes are available, each type of plughole being susceptible of providing the robot with a different amount of electricity. Let the resulting increase (decrease) in the electrical charge of the robot be the positive (negative) reinforcer for the act of plugging into different kinds of plugholes. We can expect that such a robot, after exploring the available holes, will tend to (will have "learned to") plug into those holes-shapes that provide it with more electricity, and to avoid those holes-shapes that provide less or no energy.

We have spoken loosely of positive and negative reinforcers, meaning those internal states that determine a positive or a negative reinforcement. We may want to give a bio-psychological interpretation of this notion, assimilating positive reinforcers with pleasure and negative reinforcers with pain. However, this way of speaking may be sensible only with regard to humans and more sophisticated animals, while being inappropriate for computer devices and probably also for simpler types of animals.

It is also necessary to avoid viewing an individual agent endowed with conditioned reflexes as necessarily aiming to achieve its own survival and reproduction. A reinforcer is activated by certain situations (more exactly, by the sensorial input available in such situations) and not directly by the prospects of survival and reproduction characterising those situations.

It is true that selective evolution tends to ensure a correspondence between the situations activating a positive (negative) reinforcer and the situations con-

[2] On neural networks the classical reference is Rumelhart and McClelland 1986; on the use of neural networks to model legal cognition, see Philipps 1989, Philipps and Sartor 1999a and the contributions in Philipps and Sartor 1999b. On neural network and legal reasoning, see also: Zeleznikow and Stranieri 1995; Hunter 1999; Bourcier and Clergue 1999; Merkl et al. 1999.

tributing to (detracting from) the survival and reproduction of the agent. However, this happens only in the long term: In rare or new circumstances, it may happen that the agent's reinforcers (its drives) make it subject to damage or death.

Consider again the conative robot of the example above. What if new plugholes are introduced with a voltage exceeding the capacity of the robot? The robot (driven by its craving for holes providing more electricity) will insist in plugging into the high voltage holes, until it burns its circuitry. Similarly, let us assume that the favourite food of an animal becomes polluted, so that continuing to eat it will cause the animal's death, without producing any pain in the animal (or at least without producing any pain immediately after consuming the food). Then, eating the food, although not activating any negative reinforcer (or even being accompanied by pleasure) will cause the animal's death. Something similar may happen also to humans. Consider, for example, how our tendency to feed ourselves as much as we can (reinforced by the pleasure of eating) has been a powerful help to survival in times of scarcity, but may nowadays put at risk our health.

The mechanism of conditioned reflexes is a very important way of learning also for humans. It allows humans to get very complex forms of implicit knowledge, which may drive them to the right responses (on the basis of past pleasurable experiences, and of satisfaction associated with success or reward) even when they are not aware of the reasons why such responses were right. This is the kind of knowledge to which Hayek (1977, 41) refers, when he observes that:

> what we call knowledge is primarily a system of rules of action assisted and modified by rules indicating equivalences or differences of various combinations of stimuli.

In connection with our tendency to *imitation*, conditional reflexes provide an important mechanism for *social learning*. Individuals tend to imitate the behaviour of other people, especially when those people are successful or approved in their community, and tend to replicate their own behaviour when it is successful or approved.

1.2. Explicit Cognition

In some sense, a *reactive agent*—which has inherited a set of fixed reflexes and has developed or fine-tuned a set of conditioned reflexes—possesses some *implicit knowledge*: The agent's functioning is adapted to its environment, since its reflexes provide appropriate solutions to the survival and reproduction problems that the agent is likely to meet. In fact the mechanism of inborn and conditioned reflexes is a very powerful one, and many experiments have shown that reactive agents can perform impressively well in various tasks, from recognising

forms and shapes (as in scanning devices), to playing football (as in robot tournaments), to making business decisions (like investments in the stock market).

However this mechanism only provides us with a partial account of the operation of cognition. When considering reflexes, we only focus on *implicit knowledge*, namely, on knowledge that is inherent to the way an agent is built (fixed reflexes), or to the way it developed, interacting with its environment (conditioned reflexes). With regard to implicit knowledge, there is no internal state of the agent, which is specifically intended to represent this knowledge in such a way that the agent may use it as a basis for its further internal processes or external behaviour. This distinguishes implicit knowledge from *explicit knowledge*, namely, knowledge which is represented inside the agent, in such a way that it can be accessed by the agent itself. The use of explicit knowledge (through appropriate cognitive organs) characterises what may be called a *cognitive agent* in a proper sense.

In considering a developed cognitive agent, we need to move beyond the mechanism of reflexes, and thus, beyond *behaviourism*, the approach to psychology which focuses on the connection between external inputs and observable behaviour, disregarding the internal cognitive processes of the agent. We need rather to focus on the specific processes that characterise cognition: According to the approach of *cognitive psychology* we need to analyse the ways in which information is internally processed. This leads us to distinguish different cognitive functions, which are performed by different cognitive organs, both in epistemic and in practical cognition.

1.2.1. Cognitive Functions and Cognitive Organs

We cannot here consider the many theories of various cognitive functions. Just to give an idea of the approach of cognitive psychology, let us recall Marr's (1982) theory of *perception*. According to this theory, the functioning of perception can be explained by distinguishing four modules, which work in sequence, providing the following outputs:

- a representation of the image in the retina (of the intensity of light at each point of the retina);
- a primal sketch, which identifies potentially relevant areas of the image, and their geometrical connections;
- a $2\frac{1}{2}$-D sketch, which makes explicit the orientation and depth of visible surfaces, relative to the observer;
- a 3-D representation, where shapes and their spatial organisation belong to specific objects, independently of the observer's position.

Marr's approach shows how, according to cognitive psychology, one cannot approach the mind as a black box, the behaviour of which is fully determined by

environmental inputs, as in operant conditioning.[3] On the contrary, one can understand a complex cognitive function only by distinguishing the cognitive modules that realise this function, and by specifying the ways in which these modules operate and interact.

Similarly, Chomsky famously argued that our *language* faculty, like other human cognitive faculties, does not reflect the circumstances of our environment: It is rather a complex *mental organ*, which develops, like physical organs do, according to its own (genetically determined, that is, innate) structure:[4]

> The capacity to deal with the number system or with abstract properties of space—capacities that lie at the core of what we might call the human "science forming faculty"—are no doubt unlearned in their essentials, deriving from our biological endowment. [...] These systems have many of the relevant properties of physical organs. We might think of them as mental organs. Thus the human language faculty might well be regarded on the analogy of the heart or the visual system. It develops in the individual under the triggering effect of experience, but the mature systems that grows in the mind [...] does not mirror the contingencies of experience, but vastly transcends that experience. (Chomsky 1987, 420)

According to this author, only some linguistic parameters are provided by the environment (in particular, by the examples given by other speakers), and these parameters provide for the differences between different natural languages, all of which are applications of the same basic mechanism.

From this perspective, the production and the comprehension of linguistic expressions are no adaptations to external stimuli, and in particular are not learned through conditioning. They result from the speaker's possession of a *grammar*, that is, from the fact that the speaker's language organ has been parameterised in such a way as to be able to cope with (produce and decode) the sort of linguistic tokens that the speaker finds in the environment.

The grammar that the speaker has adopted defines the speaker's *linguistic competence*, and can be expressed through a set of rules. One is usually not aware of the grammar one follows, but one applies it unconsciously, when one engages in linguistic performance, namely, when speaking or listening.

The idea that the mind is to be viewed as a set of connected mental organs, whose working is genetically determined, is expressed in general terms by Pinker (1999, 21):

> The mind is what the brain does; specifically the brain processes information, and thinking is a kind of computation. The mind is organised into modules or mental organs, each with a specialised

[3] For a synthetic account of the psychology of perception, and some references, see, for example: Gross 1996, 201ff.; Gregory 1987; van Leeuwen 1998.

[4] Among the many publications in which Chomsky provided and refined his model of our language organ, identifying the common structures of the grammars which enable us to generate correct linguistic expressions (generative grammars), let us just mention Chomsky 1957, which started a revolution in modern linguistic. On the idea that language is genetically determined faculty, see also Pinker 1994.

design that makes it an expert in one arena of interaction with the world. The modules' basic logic is specified by our genetic program.

1.2.2. Reason As a Mental Organ

Here we shall not discuss any longer the cognitive models of various mental faculties, nor shall we address the controversies concerning the extent in which they are innate (determined by human DNA) rather than resulting from environmental inputs (for an interesting introduction to this issue, see Ridley 1999). We shall just focus on *reason* or *reasoning*, which we tend to view as a *mental organ*, like Marr's perception modules or Chomsky's language faculty.

Let us just observe that for Chomsky linguistic competence is an individual possession, rather than a social entity. Here is how he criticises the view that language is a social fact:

> This "externalized language" that Jones and Smith share must be an abstract object of some sort, a property of the community, perhaps [. . .]. Suppose that Smith and Jones have more or less the same shape; we do not conclude that there is a shape that they partially share, and the interactions between Smith and Jones give us no more grounds to suppose that there is a language that they share. (Chomsky 1993, 39–40)

We largely share Chomsky's focus on individual linguistic competence (I-language) and the rejection of social hypostases. In the following, we shall tend to present *rationality* in a similar way, namely, as a "mental organ" that belongs to the individual mind, to the individual psychology. According to this psychological approach the inputs of rationality—its reasons—will be constituted by certain mental or *cognitive* states of the individual reasoner.

Our focus on individual minds (our methodological individualism), as we shall see in the following, does not exclude the communal aspects of human cognition: We accept that, both for language and for reason, individuals use (or, better, "parameterise") their natural organs in such a way as to reproduce those schemata that are practised in their societies (as observed by Millikan 2002), and that they may use such organs to engage in collective cognitive enterprises, and submit to the rules and constraints which are appropriate to such enterprises.

However, we believe that our distinctively cognitive approach, rather than renouncing to capture the social aspects of legal reasoning, provides—compared to purely behavioural accounts—a deeper understanding of such aspects and has higher explanatory power.[5]

[5] This way we hope to be able to overcome criticisms like those that Patterson 2003 raises against cognitive approaches to the law (in particular, Patterson addresses the psychological models of categorisation in Winter 2001, and Amsterdam and Bruner 2000).

In fact, we can understand and forecast people's action in every-day life only by moving beyond observable behaviour and attributing to people cognitive states: We need to try to "understand people's behaviour by coming up with explanatory hypotheses about their beliefs, goals, etc." (Haack 2003a, 166).

Moreover, we can attribute such cognitive states—when no direct evidence is available—only by assuming that people engage in reasoning, i.e., that they often move from possessed cognitive states into new ones according to rationality. We need to adopt this perspective (to view people as carriers of cognitive states, which they often process rationally) in order to understand many social phenomena, and in particular the law.[6]

Our particular perspective—approaching reason as a mental organ, coupled which viewing reasons as mental states—allows us to set aside the distinction between *guiding reasons* and *explanatory reasons*, the first being intended as the facts that justify performing certain actions, the second as the facts that explain why certain actions were performed (on this distinction, see Raz 1975, and Hage 1997, 35).

Since we are interested in the working of reason as a mental faculty or organ, the mental states that lead rationality to draw certain conclusions, according to its correct way of working are necessarily *both* (1) guiding and (2) explanatory:

1. they should lead us (our reason-organ) to such conclusion, since this is what reason does when it is properly working, and at the same time
2. they do lead us to such conclusions, when we properly apply our rationality.

Clearly, the use of rationality as an explanatory hypothesis requires that humans have, as a matter of fact, the faculty of rationality and use it, at least in some occasions.[7]

1.2.3. Epistemic Reasoning

In examining a cognitive agent we need to distinguish two types of cognition: *epistemic cognition* and *practical cognition*.

[6] For a defence of the specific explanatory function of mental states, though inclining towards a dispositional account of them, see Haack 1993, 170ff. The idea of *Verstehen* (understanding), intended as the attribution of mental states to social actors, plays a central role in German historicism (see, for instance, Dilthey 1991) and in Max Weber's sociology (see Weber 1947, 87ff.). On understanding, see also von Wright 1971.

[7] Though there are various social mechanisms (like imitation, or selective evolution) that make humans behave as if they were rational, even when they are not using their rationality. We cannot here discuss this issue, which is related to the well-known and much discussed problems of the explanatory value of economic theories, which typically embed rationality assumptions. This is an issue that has also been discussed with regard to using economic models in the law (Posner 1983, 2ff.), or in politics (Pettit 1993, chap. 5).

Epistemic cognition consists in the agent's capacity of forming internal (mental) states that have the function of representing aspects of the agent's world. We call such states *epistemic states*. We distinguish two types of epistemic states, percepts and beliefs.

Percepts are mental states that are caused by the various mechanisms of perception, which are activated when some input is provided to the agent's sensors (on the distinct cognitive function of percepts and beliefs, see Pollock and Cruz 1999, 84ff.). Perception may concern the external environment (heteroception: sight, hearing, touch, smell, and taste) but also the state of the agent's body (proprioception: the perception of the position and movements of one's limbs).

A *belief* consists in the endorsement of a proposition. To believe a proposition means:

> to adopt it as a basis for further attitudes, choices and behaviour, i.e., to consider the information expressed by it as correct and proceed accordingly in thoughts, and actions. (Lehrer 1990, 36)

In other words, to believe a proposition means to adopt it as a premise of one's reasoning and acting, that is, as something one is ready to think and act upon. We shall put a very low threshold in the "quantity" of endorsement required for belief (on a gradual approach to belief, cf. Haack 1993, 90). So we shall say that one believes a proposition, not only when one is absolutely certain about that proposition, but also when one is aware that one's evidence for that proposition may be overridden by evidence to the contrary (when the belief is defeasible, see Section 2.2 on page 55). We also speak of a belief in a proposition when one only adopts the propositions as a *hypothesis*, i.e., as a premise for one's further epistemic inquiries, but not (yet) for one's action.

An agent endowed with the faculty of epistemic cognition processes external inputs and obtain epistemic states. Then the agent reasons, producing new mental states on the basis of the epistemic states the agent already has. *Epistemic reasoning* is indeed the process through with one builds new epistemic states moving from the epistemic states one already possesses.

Consider, for example, my mental process when I see my youngest child with a broken knee. First my brain will process the visual input provided to my eyes in such a way to provide a perception of the body of the child. My having this mental state (this perception) will start my reasoning. On the basis of this perception I will form the belief that indeed the child has a bodily lesion having certain features. On the basis of the latter belief (and the knowledge I already possess) I will form further beliefs, concerning possible consequences of the injury, the appropriate medication, the time required for the injured child to recover, the type of event that caused the injury, and so on.

Obviously, the same kind of mental process may also take place in a legal framework. Consider for example, how a judge—having to decide a case where compensation is requested for an injury resulting from a traffic accident—will

approach the cognitive task of establishing the features of the injury, its causes, its likely effects. Though the cognitive process of the judge will be also governed by various procedural constraints, within those constraints the judge's cognition will be governed by (and criticisable according to) epistemic rationality.

The reasoning process we have just exemplified, namely, the process of epistemic reasoning, does not proceed randomly: It tends to follows certain schemata, it implements certain procedures. Those schemata and procedures, as we shall see, constitute what we may call *epistemic rationality*.[8]

Assume for example, that I believe that ⌈if the injured knee is dirty, then it may develop an infection⌉[9] and that I also believe that indeed ⌈the injured knee is dirty⌉. This would lead me to believe that the injured knee of the child may develop an infection. Such inference would happen according to a pattern, or *reasoning schema*, which we call *detachment*,[10] and which has the following structure:

Reasoning schema: *Detachment*

(1) believing that A; AND
(2) believing that ⌈if A then B⌉
———— IS A REASON FOR
(3) believing that B

As we shall see in Chapter 2, by a *reasoning schema* we mean in general a transition schema between mental states: A certain combination of certain mental states of the agent, which we call the *precondition* or the *reason* for the application of the schema, leads the agent to having certain other mental states, which we call the *postcondition* or the *conclusion* of the schema.

When the reason is composed of distinct mental states, we say that each one of those mental states is a *subreason* of the schema, and when the conclusion is composed of distinct of mental states we say that each one of those mental states is a *subconclusion* of the schema.

When one reasons, one tends to produce instances of one's reasoning schemata. For example, the schema *detachment* above may be instantiated as follows.

[8] We prefer to use the term *epistemic rationality* when specifically referring to the use of reasoning for getting to factual (epistemic) conclusions, rather than the term *theoretical rationality*, since we shall extend the notion of a theory also to the practical domain (see Section 4.1.4 on page 125).

[9] We use symbols "⌈" and "⌉" to enclose propositions, in particular when we need to specify the scope of an operator which applies to propositions (such as "believing that" or "knowing that"). We shall omit these symbols when the concerned proposition can be immediately and unambiguously detected.

[10] Another name for this reasoning schema is the medieval locution *modus ponens*, or more exactly *modus ponendo ponens*, meaning "the proposing (affirming) method."

Reasoning instance: *Detachment*

(1) believing that the injured knee is dirty; AND
(2) believing that ⌈if the injured knee is dirty, then it (the injured knee) may develop an infection⌉
——— IS A REASON FOR
(3) believing that it (the injured knee) may develop an infection

1.2.4. Practical Reasoning

The practical side an agent endowed with epistemic cognition can still correspond to the model of built-in or conditioned reflexes: These reflexes will be activated by the agent's epistemic states, rather than directly by sensorial input. For example, my believing that food is coming (rather than directly my smelling the food) may start salivation; my believing that something dangerous is happening may determine a state of alert (muscular tension, accelerated cardiac palpitation, and so on).

However, the benefits of epistemic cognition will be mostly significant to agents who can also engage in *practical cognition*. Like theoretical cognition, practical cognition consists in the capacity of forming internal (mental) states. The difference is that these states are not intended to represent the agent's environment: Their function is rather that of guiding the deliberative process of the agent, of playing a role in the process that leads the agent to determine its behaviour.

We call all such mental states (like desires, goals, intentions, and wants) *conative states*. An agent endowed with the faculty of practical cognition possesses conative states, and has the ability of forming new conative states on the basis of its current epistemic and conative states. Practical reasoning is indeed the process through with an agent builds new conative states on the basis of the epistemic and conative states it possesses.

For example, assume that I like ice creams. If I also believe that it is possible for me to get ice creams, then practical reasoning will lead me to have a desire to have one. This desire—together with my beliefs about where ice cream shops are located (there is one near the corner, and another a little further away), their quality (the shop further away is a little better than the nearby one), the money I have in my pocket, etc.—will lead me to make plans on how to satisfy this desire and to inquire on the relative merit of such plans (should I go to the nearby shop, or to the further away, but better one?).

Then, practical reasoning will lead me to adopt one of those plans, in consideration of its advantages (how much I will like my ice cream) and its costs (going there, spending some money, etc.), and also of how it interferes with plans for achieving alternative goals (for example, I may have a plan to keep on working without interruptions to respect a deadline).

Once I have adopted a plan and I have formed further beliefs concerning the circumstances of its implementation, practical cognition will lead me to intend to implement the various steps of my plan. This will lead me to want to implement each one of these steps (getting dressed, getting out of my house, going to the ice cream shop, and so on) when the right time comes. Finally, I will behave correspondingly.

We believe that the processes we have just described—through they lead to practical determinations rather than to epistemic ones—pertain to *reasoning* and *rationality*. Like theoretical reasoning, also *practical reasoning* is a sequence of transitions between mental states. Like theoretical reasoning, also practical reasoning does not take place randomly: It takes place according to certain patterns or standards. These standards constitute the correct way of reasoning with conative states, that is, they constitute *practical rationality*.

1.2.5. The Foundations of Rationality

Our description of (epistemic and practical) rationality as the correct way of reasoning leads us to the philosophical issue of the foundation of rationality (for a discussion, cf. Pollock and Cruz 1999). Why should we consider certain reasoning schemata, and not certain others, as being correct ways of reasoning? For instance, why should we accept *detachment* and reject *wishful thinking* (moving from desiring that a state of affair holds to the belief that this state of affair indeed holds)? We may consider here two possible foundations.

The first is an *internalistic foundation*. We, being rational agents, know how to reason and can tell when we reason correctly and when we do it wrongly. In other words, even when we cannot make our own reasoning schemata explicit, we can monitor our own reasoning, and establish whether it is proceeding correctly or wrongly (though the monitoring process is fallible too). Thus, there is a judge for reasoning, which is reasoning itself (or the rational agent): Our rationality consists in reasoning according to schemata that our reasoning certifies as being correct. This Kantian foundation (reason is the ultimate judge and therefore it is the only one who can engage the critical task of establishing reason's standards of correctness[11] unfortunately looks circular, and violates the basic legal principle that one should not judge one's own case (*nemo judex in causa sua*).

Thus, we may want to explore an *externalistic foundation*. From this perspective, reasoning schemata are rational when they enable us (better than other possible reasoning schemata, given out biological constitution and the nature

[11] "It is a call to reason to undertake anew the most difficult of all its tasks, namely, that of self-knowledge, and to institute a tribunal which will assure to reason its lawful claims, and dismiss all groundless pretensions, not by despotic decrees, but in accordance with its own eternal and unalterable laws" (Kant 1999, Axi–xii).

of our environment) to know our environment, and to act appropriately. Accordingly, practical reasoning can be viewed as a specific technique that enables (certain type of) agents to intervene in the world, and adapt it to their considered likings. This statement indirectly concerns theoretical reasoning too, which by providing appropriate epistemic inputs to practical rationality improves the performance of the latter.

If the agent's considered likings concern states of affair that enhance the agent's chances of survival and reproduction, then rationality also contributes to enhance those chances. Therefore, externalist analyses of reasoning can provide an explanation of the existence of rationality, of why reasoning agents exists in the world: Rationality increases fitness, and thus rationality leads to the preservation and replication of rational agents (and thus of rationality itself), according to the mechanism of selective evolution.[12] Another explanation would, obviously, consist in rational agency resulting from the action of a creator who intended to create embodiments of rationality.[13]

For our purposes we do not need to make a choice between internalist and externalist approaches. We may leave to professional epistemologists the discussion of their comparative merit (on the opportunity not to make unnecessary theoretical commitments in legal theory, see Peczenik, Volume 4 of this Treatise, sec. 3.2). We just need to remark that both foundations of reasoning may be equally applied to epistemic and practical reasoning.

1.3. The Nature of Practical Cognition

We have just said that practical cognition consists in adopting new conative states on the basis of one's current conative and epistemic states. Let us now consider what these conative states may be and when it is rational to adopt or withdraw them.

[12] The opposite thesis—that is, the idea that reason has negative survival value—was advanced by Kant in order to detach reason from any empirical aim, and put aside Hume's view that reason is only instrumental to the satisfaction of passions (Hume 1978, 413ff). Kant argues that reason cannot have the function of providing self-preservation, welfare, or happiness, since these aims can be much better maintained by instinct alone, without reason "meddling incompetently with the purposes of nature" (Kant 1972, 61). More generally, he affirms that "the more a cultivated reason concerns itself with the aim of enjoying life and happiness, the further does man get away from true contentment" (ibid.). We agree indeed with Kant that reason alone is much inferior to instinct alone, as a guide to survival. However we disagree with his view that reason has a negative survival value, since a combination of reason and instinct (a combination that characterises human practical cognition, as we shall see in Section 1.5.3 on page 44), where each faculty plays its proper role, is likely to outperform instinct alone.

[13] Both evolution and creation are rejected by Nagel (1986, 78ff.), who, however, admits that he has no alternative explanatory hypothesis. For a discussion of the relation between faith and science, and in particular, between creationism and evolutionism, see Haack 2003a.

1.3.1. Basic Conative States

We may distinguish four basic conative states.

The first conative attitude consists in having *likings* or *preferences* (we use those expressions as synonymous). The agent likes or dislikes certain situations (present of future) or certain features of them. By a liking (or a disliking), we mean a generic *pro* (or *con*) attitude (Pollock 1995, 12ff.). These notions should be distinguished from pleasure and pain: They are more abstract positive or negative stances. Usually, there is a connection between likings and pleasures, and between dislikings and pains, but it is possible that an agent dislikes pleasurable situations or likes painful ones. For example, I would certainly dislike the situation when my brain is taken out of my head and wired into a pleasure machine, even if the machine will provide me with the most exquisite and varied experiences (see Nozick 1974, 42–45).[14] Other people may even have an ascetic attitude, and dislike pleasurable sensations; or they may have a masochistic attitude, and like situations where they are feeling pain.

The second conative attitude consists in having *desires* or *goals*. A desire is more specific and focused than a liking. Consider for example, the difference between liking ice creams, and desiring to have one. It seems to us that desire involves the selection of a specific goal, and has the psychological (cognitive) function of prompting the agent to make plans to achieve that goal. Therefore, by a goal, we mean the content of a desire: We shall equivalently say that one has goal G or that one desires G.

The third conative attitude consists in having *intentions*. By an intention we mean in general the state of mind of an agent who has determined that a certain action is to be executed, possibly under certain conditions. As we shall see in the following, by an *instruction* we mean a specification of an action to be performed, under given conditions. Therefore we may also say that an intention is the adoption or the endorsement of an instruction.

We use the word *intention* to refer both to *self-directed intentions*, namely, one's determination concerning one's own behaviour, and to refer to *other-directed intentions*, namely, one's determinations concerning other people's behaviour. However, we shall now exemplify the notion of an intention by considering self-directed intentions (other directed intentions will be discussed in Section 1.4.4 on page 35).

When one has the self-directed intention to perform a certain action (or combination of actions), one has made up one's mind with regard to whether one will perform that action, under the appropriate conditions, and is ready to execute the action, as soon as these conditions are satisfied.

Adopting intentions is the way in which we shall store the plans we have adopted, and keep ready for executing them: Instructions contained in chosen plans provide the content to our intentions.

[14] For a different view, according to which one may accept to trade reality for dreams and artificial memories, see Dick 2002.

Thus, an agent having formed an intention is *committed* to implement the corresponding instruction, since this is required by the way in which practical rationality works: One may rationally withdraw one's intention, but it would be irrational for one not to implement one's intention, while having it. For example, when I select the plan of going to the ice cream shop round the corner (rather than to a better shop, further away), I adopt the intentions to go there and buy an ice cream. I may withdraw this intention (since there is something more important I must do), but it would be irrational for me both to keep the intention and not to implement it (at least when there is no conflict with stronger intentions).

The fourth conative attitude, of which we shall provide a very concise account, consists in having *wants*. A want is an impulse towards performing an action, which the agent feels when the action needs to be performed. For instance, when I look at my watch and I see that the time has come for getting my ice cream (according to my intention), I feel the impulse (want) to get up and go out.

1.3.2. Adoption and Withdrawal of Conative States

Let us now examine how reasoning schemata lead us to adopt new conative states when having certain other conative and epistemic states.

The first typical reasoning step concerns moving from likings to desires. This step presupposes that one believes that the object of one's liking is achievable. We may express the reasoning schema for desire formation as follows:

Reasoning schema: *Desire adoption*
(1) liking A; AND
(2) believing that A can be achieved
——— IS A REASON FOR
(3) desiring A

Having a desire leads one to start making plans on how to satisfy the desire. A *plan*, is a combination of instructions for achieving a certain goal (the content of the desire). In the simplest case, a plan prescribes making a single action. For instance, in order to have some fresh air, I can make the plan of opening the window, and implement it. In more complex cases, a plan includes various combinations of actions to be performed under various conditions. For example, my plan to get an ice cream consists of the following sequence of instructions, to be executed in the sequential combination, that is, one after the other:

1. I shall go to the shop round the corner,
2. if it is open, I shall buy an ice cream there,

3. if it is closed, I shall look for another ice-cream shop.

One should withdraw a mental state, adopted according to a reasoning schema, whenever one withdraws the states of mind that provided the reason for applying that schema (in some cases the situation is more complex, since a mental state can have been derived according to more than one reasoning schema, as we shall see later). Correspondingly, when one withdraws the belief that a liking can be fulfilled (there are no ice creams accessible to me, since all shops are closed today) one should abandon the corresponding desire. This is rational since having a desire activates planning, and it is a waste of time to make plans for something that cannot be achieved.

A second typical transition concerns moving from having a goal and believing that a certain plan provides a sufficiently good way to achieve the goal (better than any other option the agent is aware of, after making an adequate inquiry), into adopting this plan. The adoption of the plan consists in adopting the intention to achieve the goal of the plan, and also in adopting the intention to execute each of the instructions in the plan (in the appropriate sequence). This would happen accordingly to the following schema, which we call *intention-adoption* or also *teleological inference*:

Reasoning schema: *Teleological inference*
(1) desiring A; AND
(2) believing that plan B is a sufficiently good way of achieving A
——— IS A REASON FOR
(3) intending to achieve A; AND
(4) intending to perform all instructions in B in the appropriate combination

By a *sufficiently good* way of achieving a result we mean a way that—though not necessarily being optimal, nor necessarily being believed to be optimal—is better than inactivity, and better that any other plan we have been able to conceive so far. On the other hand, believing that a better incompatible plan is available (there is a better cheaper new ice-cream shop quite near) is a reason for abandoning the previously adopted plan (to go to the shop round the corner). This is also rational since sticking to the old plan would imply failure to achieve a superior result.

Note that this feature of practical rationality combines the idea of *bounded rationality* (see Chapter 5) with the idea of *critical cognition*: On the basis of the awareness of the limitations of one's own cognitive processes, one can revise their outcomes.

According to the first idea (bounded rationality), one should act also on the basis of a suboptimal plan, and even when one knows that the plan is subopti-

mal: A suboptimal solution may be adequate with regard to one's needs. However, according to the second idea (critical cognition), if one comes across a better solution, then one should abandon the inferior one.

Assume for example, that I have some money I want to put in a bank. Assume that the offer of bank b_1 provides for the best conditions, among the offers I have collected so far. Assume also than a financial expert, whom I consider to be both competent and sincere, tells me that he knows of a bank offering better conditions, but he is not going to tell me the name of this bank. Clearly, under such conditions, rationality commands me to chose bank b_1, though I know that my choice is suboptimal. However, if I succeed, before making the contract, in coming to know which bank is providing better rates, I should not make the contract with b_1, but I should rather go for the more profitable deal.

Similarly, assume that I am a prosecutor, and I am convinced that the man in front of me has murdered a child, but the evidence I have only allows me to require his conviction for a minor offence. Clearly, under such conditions, I should try to get him condemned for the minor offence. However, if I come, before the end of the trial, to access further evidence, which supports his conviction for murder, I should indict him for this.

A third typical transition concerns moving from the intention of executing an instruction in a plan, to the actual (present time) *want* of doing what this instruction establishes, when time for execution comes. For instance, if I have the intention of having an ice cream at 5 o' clock, when this moment comes, practical rationality requires me to want to go to get the ice cream.

Reasoning schema: *Want adoption*

(1) having the intention that ⌈now, I shall do A⌉

——— IS A REASON FOR

(2) wanting to do A

When we get to the level of wants, rationality must abandon the scene. There is no time for reasoning now, and one should just let one's wants be transformed into actions. A want may conflict with other wants, emerging from different plans (the agent has not noticed the conflict at planning time) or emerging from the agent's instinctive reflexes (fixed or conditioned ones).

Consider for example the situation when there is the conflict between my impulse to put the plug into the plughole, which derives from my plan to operate the computer, and the impulse to bring back my hand, which derives from the instinctive reaction to an electric shock. Pollock (1995) assumes that such conflicts are to be solved by a non-rational mechanism, which gives priority to the stronger impulse. However, according to Pollock's account, rationality—though not being able to change the working of this mechanism—may influence its output by providing appropriate inputs: Rationality provides each impulse to action with a strength which is proportional to the value of the instruction and

the plan implemented by the impulse. This would ensure that the most valuable plans tend to be implemented first.

By combining in a sequence the reasoning schemata we have considered we obtain a downward-going chain:

- from likings into desires,
- from desires into intentions,
- from intentions into wants.

The chain terminates with the agent's attempt to execute actions. If all reasoning steps have functioned properly, one will act in such a way as to be successful, at least in most cases (failure is always possible, in a complex and unpredictable world, even when one has used one's cognitive functions as well as one can). This means that one will

- realise one's wants, and so
- implement one's intentions, and so
- fulfil one's desires, and so
- make the world more likable to oneself.

From our perspective, practical rationality appears to be a technique for enabling a reasoner to reach the target of higher-level conative states, by achieving the target of lower level conative states: By realising one's wants, one implements one's intentions; by implementing one's intentions one achieves one's goals; by achieving one's goals one satisfies one's desires, and by satisfying one's desires one adapts the world to one's likings. This explains why the function of each conative state consists in producing, under appropriate conditions, corresponding lower level conative states.

1.3.3. Abstract Plans and Subplanning

We have considered above how the adoption of a goal leads to devising a plan. However, when one is planning, one rarely has the time and the information required for specifying in full details all actions to be performed. To a certain extent, this may be remedied by including *conditional instructions* in one's plan. For instance, to get an ice cream I can make a plan establishing that ⌈if the shop round the corner is open, I shall go there⌉, and ⌈if it is closed, I shall go to the shop in the town square⌉.

However, there are many contingencies that one cannot anticipate, not even conditionally, at the time when one starts planning. Moreover, at that time one may have more important things to do, rather than keep refining one's plan.

Therefore, one would usually devise at first only an *abstract plan*, providing for *abstract actions*. This provides the precondition for later *subplanning*: One will translate each abstract action into a combination of more specific actions, only when one has the time, the information, and the opportunity to do it.

The development of a plan, therefore, proceeds top-down, by progressive refinements. One fills the details progressively, by reducing each abstract action indicated in the high level plan into a combination of more concrete actions required for the performance of the abstract action. The process continues until the plan only consists in a combination of elementary instructions directly available to the agent (by that time, usually the execution of the plan will have started).

To exemplify the process of subplanning, let us consider a goal that is more complex that the ice cream goal we considered above. Assume that I have the goal of attending a conference that takes place in the city of Barcelona. At first, I can make a very schematic plan, including the following actions: I shall fly to Barcelona, I shall then attend the conference, I shall fly back when it is finished. However, performing each of those abstract actions requires further planning from my side, since I do not know yet how to perform each of actions, and there may be different ways of doing them, having different costs and advantages. For example, flying to Barcelona requires me to devise a subplan consisting in buying a ticket, getting a taxi to the airport, and jumping on the right plane. In turn, to buy a ticket I must devise and implement a sub-subplan which includes getting to a travel agency, browsing through the Barcelona flights available on the 27th of next month, choosing the most convenient one, writing a cheque, and so on.

This progressive top-down specification of plans, through the mechanism of subplanning, is ensured by the formation of *instrumental desires* and goals (Pollock 1995, 29). Let us consider this important aspect of practical rationality.

Selecting a plan produces, as we have seen, the intention of performing, in the appropriate order, all actions of the plan. But the agent may be unable to immediately execute the abstract action: In order to perform a non-elementary action (like flying to Barcelona) one must have a plan on how to do it, according to the context in which the action is to take place. Thus, the intention to perform an abstract action does not produce a want, but rather an instrumental desire to execute the action. This means that the agent will adopt the goal that the action is executed. To satisfy this goal the agent needs to start planning again, this time with the goal of making the abstract action.

Thus, we may say that instrumental desires (and goals) have the functional role of activating subplanning. In fact, the idea that intending to do something leads to having a corresponding goal is generally accepted in the logics of intention: These logics usually include axioms or inference rules according to which the intention to execute action A entails having the goal that A is executed (see, among others, Wooldridge 2000, 100ff.). However, it seems that such a transition, though being generally acceptable, is to take place only with regard to non-elementary action, namely, the actions one cannot execute directly, through an available routine. This is reflected in the following schema:

Reasoning schema: *Instrumental desire*

(1) having the intention to execute non elementary action A

——— IS A REASON FOR

(2) desiring to execute A

The way in which instrumental desires are processed corresponds to the general way of processing desires. The instrumental desire to execute A will prompt the agent to search for plans for achieving A, and to adopt one such plan, according to *teleological inference*.

Consider again my plan to fly to Barcelona, attend the conference and fly back. Once I have adopted this plan, I will have the intention to fly to Barcelona. This would lead me to desire to fly to Barcelona, to adopt this as my goal, and so start subplanning again. Assume now that I build a subplan including: buying a ticket, getting a taxi to the airport, and jumping on the right plane. I will then form a desire to buy a ticket to Barcelona, adopt this as my goal, and start subplanning, and so on.

Subplanning ends when one's plan only contains actions which one already knows how to execute (like the action of walking along a certain street) or which one knows one will be able to specify at the time of their performance (like the action of buying a ticket at the travel agency).

1.3.4. The Structure of Plans

As we have seen, planning consists in devising plans or programs (combinations of instructions) the execution of which would achieve certain goals of the planner. In the simplest case, a plan would involve just a sequence of instructions, to be executed sequentially (Pollock 1995, 177), like the following plan for getting a flight to Barcelona.

1. I shall phone the travel agency,
2. I shall make a reservation,
3. I shall go to the airport,
4. I shall jump on the plane.

Plans frequently have a more detailed and articulated structure than a straightforward sequence. They may involve conditional forks (if the telephone is engaged, I shall walk to the travel agency), loops (I shall repeat phoning the travel agency, until there is an answer), and other control structures, similar to those we can find in computer programs.

1.3.5. The Evaluation of Plans

We cannot go here into a discussion of how planning is performed (for a detailed analysis, see in particular: Bratman 1987, and Pollock 1995, 175ff.).This

would require us to consider possible heuristic strategies for generating plans, which would be a formidable task. Thus, we shall not even approach the issue of plan-generation: We assume that a rational agent has a cognitive module for performing end-means reasoning and devise appropriate plans (as is true for humans), but we shall not try to examine how this module functions. We shall rather focus on the simpler (but still very difficult) task of evaluating a constructed plan, to decide whether to adopt it. This decision may require a comparison with alternative plans.

The most popular model for evaluating and comparing decisional alternatives is provided by *decision theory* (see, for all, Jeffrey 1983). Decision theorists usually assume that the value of an outcome consists in a numeric measure, which is called the *expected utility* of that outcome.

Rationality (as it is understood in decision theory) recommends choosing the plan that provides the highest utility, and we may certainly agree on that. Unfortunately the difficult issue is that of computing utilities.

Let us consider first the simplest case, to wit, the case of a plan that is completely *deterministic*: The plan has just one possible outcome, of which the planner is absolutely certain. Then, the merit of the plan is to be determined by the expected utility of its outcome.

As an example, consider the following circumstances: A judge is charged with the task of deciding whether a convicted criminal may leave prison in advance, and he is absolutely certain that the convict has now changed and will not commit any serious crime. Therefore the judge believes that the only relevant outcome of his decision will be a very positive one: The convicted person will enjoy her freedom again, she will probably get a job and contribute to supporting her family in need. The alternative decision (letting the convict in jail) will achieve, with equal certainty, a negative outcome: The convict is likely to get into drug-abuse and to be introduced into serious forms of criminality, her chances of getting a job will diminish and her family is likely to collapse.

When one is so lucky to find so simple a decisional context, the decision is easy, even when one has not been able of assigning numerical utilities: One knows for certain that one decisional alternative is better than all the others.

The situation is more complex when the plan is non-deterministic, that is, when the plan may have different outcomes having different utilities. Consider, for example, the situation of another judge: She has to decide whether to free in advance a paedophile convict. Assume that the judge believes that there are good chances that the paedophile will now be able to control his impulses, but she is also aware that there are some chances that he will repeat his criminal behaviour. According to decision theory, she needs to evaluate each action she may take by considering the utility of each possible outcome of that action, multiplying this value by the chance of that outcome, and summing up all results she

obtains for the different possible outcomes.[15] For example, suppose that the judge makes the following utility assignments: utility 1 to the situation where the paedophile leads a peaceful live, and utility -6 to the situation where he repeats his crimes. If there were only 10% chances that the convict repeats his crimes, then a decision to let him free would have a positive value, namely, the expected utility 0.3, according to the following calculation:

$$(1 * 0.90) + (-6 * 0.10) = 0.30$$

Even if, for the sake of simplicity, we discount the problem that a plan may have multiple possible outcomes, depending on unknown circumstances, we still have to face a very hard problem when applying decision theory in practical cases: It is very difficult, in many practical domains, to assign a numerical utility to the outcomes of possible plans, so that one can establish their comparative merit.

In fact, to "rationally" compare alternative plans (choices, decisions), it seems that one needs first to analyse the expected outcomes of each one of those plans, by identifying the desired (valuable) features that characterise each outcome and establishing to what degree each feature will be satisfied (promoted) by that outcome. Then one needs to assess the total value of each plan, by considering the plan's combined impact on all those features. Finally, on the basis of such evaluation, one needs to compare the different alternative plans that one has been able to devise.

For example, when considering the plan of going to a restaurant r, I may consider to what degrees I expect that a dinner at r would exemplify the desired features of the quality of the food, the quality of the wines, the quality of the service, the price, and so on. Then I would need to compute the whole expected value of the experience of going to restaurant r, as being characterised by the fact that the desired features are satisfied to such degrees. Having done that, I would be able to compare plans to go to different restaurants, each of which provides a different combination of levels of quality for food, wines, service and price.

Similarly, a judge, when considering different alternative ways of deciding a case, may examine how each possible choice will impact on legally relevant values. For example, a decision that permits putting video cameras in public spaces, and keeping recordings for a year would impact both on the values of privacy and security. To evaluate this decision, and compare it with possible decisional alternatives (prohibiting cameras altogether, or allowing them only

[15] In general, when a plan α may lead to n mutually-exclusive outcomes $\omega_1, \ldots, \omega_n$—each outcome ω_i having probabilities P_i and utility $u(\omega_i)$—then α's expected utility $EU(\alpha)$ is given by the following formula:

$$EU(\alpha) = \sum_{1}^{n} u(\omega_i) * P_i$$

if recordings are deleted after a very short time), one needs to assess how the decision impacts on each value and to provide, on the basis of such assessment, a comprehensive evaluation.

According to the procedure that is usually suggested by decision theory, making the evaluations we have just described requires a mathematical characterisation of both:

- the information on the basis of which a plan is to be evaluated, and
- the procedure that computes, on the basis of that information, the merit of whole plan.

In the simplest case, this is done by:

1. assigning a (positive or negative) weight to every relevant feature of the outcome,
2. quantifying the degree to which every feature will be satisfied by the expected outcome of a certain choice,
3. multiplying the degree of satisfaction of each relevant feature by its weight, and
4. summing up the results that are obtained in step (3).

Note that weights are negative for those features which impact negatively on the outcome: the higher the quantity of this feature, the worse the outcome (all the rest being equal). So, for example, assume that I assign weight $\mathbf{4}$ to food, $\mathbf{2}$ to wines, $\mathbf{1}$ to service and $-\mathbf{3}$ to price, and that I expect that restaurant r will score 3 for food, 2 for wines, 1 for service, 2 for price (0 indicates average, so that 2 describes a fairly high price). Then expected value of the choice of going to r will be:

$$(3 * \mathbf{4}) + (2 * \mathbf{2}) + (1 * \mathbf{1}) + (2 * (-\mathbf{3})) = 11$$

Similarly, assume that a judge gives weights $\mathbf{3}$ to security and $\mathbf{2}$ to privacy, and expects that a situation where recording are taken and are kept for a year will satisfy security to level 3 and privacy to level -2. Then the expected value of such a choice would be:

$$(3 * \mathbf{3}) + ((-2) * \mathbf{2}) = 5$$

Such a numerical procedure appears intuitively correct, and even upon reflection it appear to be free from apparent flaws. The issue we need to address is then why humans rarely perform such numerical calculations, especially when taking important decisions: Few people use arithmetic when selecting their partner, their house or even their new car. We may conjecture that the reason for this apparent "irrationality" is that our natural (implicit) cognitive capacities include

more powerful unconscious mechanisms for plan evaluation. It is not clear at all how such mechanisms may work, but they are certainly there.[16]

This fact does not imply that explicit plan evaluation (and even the assignment of weights and numbers) is useless, since our unconscious processes, though far better than any approach decision-theorists have yet been able to provide, are far from infallible. We would rather say that explicit evaluation of plans (according to the indications of decision theory) should be used to check the intuitive results that are provided by our implicit cognition. It would be improper, in most cases, to use it on its own, as an independent procedure for decision making.

1.3.6. Epistemic Desires: Knowledge and Interest

As we have seen, the reasoning steps that are commanded by practical rationality are conditioned to the agent's having or not having certain beliefs (besides having or not having certain conative states). And one will have appropriate beliefs only when one has made appropriate inquiries.

Therefore, when one has a conative state one should start making inquiries to see if one can obtain beliefs that enable one to move into subsequent conative states. When I like something, I should check whether my liking can be realised, in order to transform my liking into a goal (desire). When I have a goal, I should try to find a sufficiently good plan to achieve it, in order to obtain the intention to realise the goal and to implement its instructions. When I have the intention to perform a conditional instruction in a plan, I should check whether the precondition of the instruction holds, so that I can form the unconditioned intention to make the conditioned action (which will prompt a corresponding want).

Inquiry is an activity and, like any other activity, it will not take place unless it is prompted by appropriate conative states. This is particularly clear when an inquiry requires external behaviour: For instance, to form a reliable belief concerning the telephone number of a travel agency, I need to leaf through the phone book. However, also mental activities require a conative stimulus. This is provided by the *desire to know*: Whenever one's progression in practical reasoning depends upon possessing a belief on a certain issue, one will form the desire to know the solution of that issue.

In particular, when one has a desire and one does not know how to satisfy it, rationality requires that one adopts a new desire, namely, the desire to find a plan that satisfies one's original desire. This epistemic desire prompts the operation of epistemic cognitions (unless there is something more urgent to do). As soon as epistemic cognition finds such plans, and gives an indication on their merits,

[16] There is a vast philosophical tradition, from Aristotle to Pascal, which has remarked the intuitive nature of practical reasoning; for a discussion, see Pattaro 1988.

practical cognition will select the most convenient plan. As soon as one adopts a plan, one forms the intention of performing the actions in the plan. If one does not know how to perform an action, one will form the desire to realise that action, which will produce the epistemic desire to know how to realise the action. This would activate again epistemic cognition. The following reasoning schema captures the link between desire and desire to know.

Reasoning schema: *Instrumental desire to know*
(1) desiring A; AND
(2) not knowing how to realise A
——— IS A REASON FOR
(3) desiring to know how to realise A

According to schema *instrumental desire to know*, my desire to go to the Barcelona conference would produce my epistemic desire to know how to go there. The latter desire would lead me to search for appropriate plans, and possibly to find one that includes flying to Barcelona, attending the conference, and coming back. My intention to implement this plan would produce my desire of performing its single abstract steps. This again prompts the epistemic desire of knowing, for example, how to fly to Barcelona. Satisfying this desire—that is, constructing a sufficiently good plan which specifies how to achieve the goal of flying to Barcelona (I shall buy a plane ticket, take the plane, and so forth)—might engender further epistemic desires, for example, the desire to know how to buy a ticket. Finding a plan for that (I shall go to the nearest travel agency, ask for the ticket, . . .), might prompt further epistemic desires, for example, the desire of knowing where the nearest travel agency is located.

Similarly, a public administrator, who has the goal of reducing pollution, will have the desire to know how such a goal may be achieved. This would lead him to identify a set of remedies, the combination of which is likely to reduce pollution, such as limiting traffic and recycling waste. The goal of limiting traffic will again start the desire to know how to do it, which would lead the administrator to identify possible strategies for restricting the circulation of vehicles.

Reasoning may be sufficient for satisfying epistemic desires. For example, I may already know where travel agencies are located, so that to find the nearest one I just need to reason (to compute and compare their distances from my house).

When on the contrary reasoning is insufficient, physical action is required. For instance, establishing which travel agency is the nearest one, may require the following actions: finding the telephone directory, leafing through it, writing down the names of the travel agencies and their addresses, getting a map, locating the addresses, checking distances with a ruler. Similarly, the public administrator who is interested in reducing pollution needs to have samples of air and water taken and examined, to make contracts with experts, and so forth.

According to the model we have just presented, epistemic rationality does not consist in randomly extending one's beliefs with further beliefs, but is rather driven by conative states: desires (included epistemic desires), intentions, wants. This means that epistemic cognition is in principle instrumental, that is, subordinated to practical cognition, and therefore to the conative states that guide practical cognition and are produced by it.

However, this does not imply that all epistemic interests are only instrumental to specific "material" goals of the agent. We seem to have an inborn conative disposition for knowing (curiosity), regardless of the uses of this knowledge, and a corresponding liking for the discovery and possession of knowledge.[17]

1.3.7. Strategies, Standing Plans, and Instructions

The description of practical cognition provided so far has the defect of depicting an ideal that is difficult to realise in a complex environment, given the resource limitations that constrain any real cogniser.

The problem is that the model so far presented relies too much on *teleological inference*, and in particular puts an excessive emphasis on planning. Unfortunately, planning is a very difficult task: For getting sufficiently good results it requires processing a lot of information, in complex ways. If every action required new planning, then one would be condemned to inactivity (or to random action) in most cases, since one would not be able to find sufficiently good plans in time.

Thus, any rational agent endowed with bounded resources needs additional, quicker and simpler ways of processing information. Some ways may be provided by one's in-built and conditioned reflexes and more generally by the working of one's unconscious cognitive organs, but also reasoning may contribute.

A very helpful approach consists in permanently storing a set of ready-made plans on how to satisfy those desires that the agent will most frequently have. Those abstract plans may be called *strategies*, or *know-how*. Usually, strategies concern instrumental desires, which can be activated by different higher level desires, and which are sufficiently simple that a standard plan can be appropriate in most situations where the instrumental desire might arise.

The language of *technical* or *hypothetical imperatives* (⌈if I want A, I must do B⌉, or ⌈if you want A, do B⌉) has probably the function of expressing standing plans or strategies (A expresses the possible goal, and B the plan for achieving it). Technical imperatives, together with the corresponding desire, provide the input for the following reasoning schema.

[17] According to the opening words of Aristotle's *Metaphysics*, 980a, "all men by nature desire to know."

Reasoning schema: *Technical imperative*

(1) desiring A; AND
(2) adopting the technical imperative ⌈if I desire A, I must do B⌉

——— IS A REASON FOR

(3) intending to do B

For example, the first time I wanted to go to my new office, I had to make plans on how to get there. After studying maps and time-tables, I came to adopt a plan that included the following: taking bus number 8, getting off at the third stop, getting on bus number 12, and jumping off at the fourth stop. After my first successful trip to my office, I have no need of studying maps and timetables again. Every morning, as soon as I adopt the goal of going to my office, I retrieve the standing plan that tells me ⌈If I desire to go to work, I must take bus number 8, get off at the first stop, and so on⌉. The retrieval of the standing plan is activated by the fact that I adopt the corresponding goal (I desire to go to work).

Processing is even simpler when the agent has a permanent goal, which can be achieved by performing actions of the same type whenever a certain condition holds. Note that in such a case only the repetition of a certain action (under the appropriate circumstances) will achieve the goal (a one time behaviour will not do), and this repetition is the content of the plan.

For example, let us assume that, to keep my shape, I adopt the plan of running every morning at least for half an hour. In other terms, I adopt a plan which includes an iterative instruction: ⌈I shall repeat the following: When morning comes, I shall run for half one hour⌉. Every morning, I would run, to execute this instruction, according to my persistent intention to implement my original plan, without the need of devising a new plan.

Assume that one morning I have the desire to sleep longer, and consequently consider the plan ⌈today I shall stay in bed⌉. This plan will conflict with my original plan to run every morning, and endanger its objective (my fitness). Thus, when I wonder whether to get up or not, I put into question my whole original plan and its goal (getting fit), not just the immediate results of today's running. I can obviously devise an alternative (and possibly better) plan which does not contemplate my running today, and still enables me to get fit, but until I have done that, if my desire for fitness counts more than my desire for sleeping, the rational thing to is to stick to the original plan.

Something similar happens when one knows that one is going to have a desire of a certain type whenever a certain situation occurs. In such cases, one can use the same plan for satisfying any of such desires. So, for example, assume that when I am at work I usually desire to have my laptop computer, in order to satisfy various goals of mine (writing papers and letters, sending e-mails, accessing the www, etc.). Then, I can adopt the *standing instruction* of bringing the computer with me whenever I go to the university. Every morning then I simply

retrieve and execute this instruction, without considering what my goals are and how best I could satisfy them. However, should I fail to execute the standing instruction today, I would just impair my achievement of today's goals and no encompassing plan.

Standing instructions are very similar to conditioned reflexes, and it may be difficult to discriminate between the two. For example, when I start leafing through a book as soon as I get it in my hands, am I implementing the standing instruction ⌈I shall leaf through a book whenever I get hold of it⌉ or am I reacting according to a conditioned reflex (I enjoyed leafing through books so much in previous times, that I developed the tendency to do it)?

A further connection between standing plans and conditioned reflexes results from the fact that plans which have been successfully executed many times tend to transform into conditioned reflexes, or routines, which can be applied without recourse to reasoning. On the other hand, conditioned reflexes, when the agent can find a rationale for them (as hopefully it should frequently be the case), may be transformed into standing plans.

1.4. The Function of Intentions

Intentions play a fundamental role in practical reasoning, by linking teleology and action: They provide the link between teleological reasoning (the formation and evaluation of plans) and the implementation of wants through actions, enabling us both to distinguish and to connect these two dimensions. The cognitive function of intention is not exhausted by establishing this connection: Often we need to process our intentions through reasoning, and acquire new intentions on the basis of the intentions we already have.

Thus, reasoning with intentions represents an important aspect of practical reasoning, as we shall see in the next sections, an aspect that is often overlooked by accounts that are only centred upon teleological reasoning.

1.4.1. Intentions and Instructions

Our notion of an intention comes close to the notion of *commitment*, as used by computer scientists (like Cohen and Levesque 1990) and cognitive psychologists (like Castelfranchi 1995) when analysing rational action. As we said above, by forming intentions an agent gets *committed* to performing certain actions. This is the way in which one stores the deliberative outcomes one has achieved, so that one can move into further deliberative tasks, even before executing such outcomes. If one were unable to commit oneself to the (provisional) outcome of one's deliberation, one would be incapable of focussing one's mind upon new practical issues, while keeping ready to use the results of one's previous deliberations, at the appropriate occasion. Therefore practical rationality, intended as

the correct way of going about in dealing with practical issues, requires the ability to form intentions, in agents facing multiple problems with limited resources.

Commitment is a practical attitude, consisting in the tendency to appropriately use intentions in reasoning and in acting. One's commitment to an intention consists in one's persistence in the intention (it would be irrational to abandon the intention without a reason, before it is implemented) and in one's pull to deliberate and act according to the intention (it would be irrational not to reason and act according to the intentions one is having).[18]

We use the term *instruction* to denote the content of an intention. By an *instruction*, we mean a cognitive structure, which is characterised by the function of specifying the content of an intention: The instruction indicates what needs to be done, by whom and in what circumstances, to fulfil the corresponding intention.

We might also say that instructions are *imperatives*, to emphasises that they are meant to direct action, but it must be clear that here as an "imperative" we do not mean a speech act (the act of commanding), but rather the content of a mental state (the intention).

1.4.2. Reasoning with Intentions

As we have seen above, when one adopts a plan, one forms both the *intention* to achieve the goal of the plan and the intention to execute every instruction in the plan. The instructions in the plan concern a combination of more specific actions, the performance of which enables the agent to execute the abstract action of realising the plan's goal (I shall first walk to the nearer ice cream shop, if it closed I shall go to the shop round the corner, and so forth).

However, the adoption of the plan does not terminate the planner's practical reasoning: What cognitive activities are required for executing the instructions in a plan depends on the content of these instructions.

The simplest kind of instruction concerns the immediate execution of an action by an individual: The instruction says that individual x shall perform action A. For example, consider the instruction requiring that John buys an ice cream, which we express as: ⌈John shall buy an ice cream⌉.

Thus, when John has the intention of buying an ice cream we say that John has the intention that ⌈John shall buy an ice cream⌉.

Some instructions include a temporal reference. For instance, they can require that an action is accomplished at a certain time: ⌈I shall buy an ice cream at 5pm⌉. Executing such instructions requires doing the action when the time comes (neither sooner, nor later).

Other temporalised instructions specify that an action is to be performed before or after a certain time (I shall go to work before 9am) or before or after a

[18] For a discussion of commitment, cf. Wooldridge 2000, 23ff.

certain event has taken place (I shall go home before my wife arrives), or while a certain condition obtains (I shall work while the children are away).

Many instructions have a conditional structure: They specify the conditions under which the indicated action needs to be accomplished. Consider, for example, the following instructions (concerning the reasoner's own behaviour): ⌈if my wife has gone to work, I shall pick up the children⌉, ⌈if there are no policemen around, I shall drive through the lane reserved for public transportation⌉.

Besides simple instruction we may have, as in programming languages, complex instructions, such as those requiring that a certain action is repeated until a certain condition is satisfied: ⌈I shall repeat the action of circling around, until I have found a parking place⌉.

We may also have *general instructions*, namely, instruction requiring that an action is performed whenever a certain type of event is instantiated: ⌈whenever I finish eating, I shall brush my teeth⌉.

Intentions may be transformed into wants, so that their treatment is passed to a non-rational module of the agent, or they may be processed through reasoning, leading one to forming new intentions on the basis of the intentions one currently has.

We shall not provide here a structural account (nor a formalisation) of different ways of reasoning with intentions. We shall just mention some reasoning steps one may perform for moving from the intention to perform a complex instruction (plus the appropriate beliefs) to the intention to perform a combination of simpler instructions.

First of all, the intention of executing a conditional instruction, plus the belief that the corresponding condition obtains, leads one to intend to perform an unconditional instruction, according to the schema *intention detachment*.

Reasoning schema: *Intention detachment*

(1) intending to execute instruction ⌈if *Precondition* then I shall accomplish *Action*⌉; AND
(2) believing that *Precondition* is satisfied
——— IS A REASON FOR
(3) intending that I shall accomplish *Action*

For example, my intention to execute the instruction ⌈if my wife has gone to work, I shall pick up the children⌉, plus my belief that ⌈my wife has gone to work⌉ leads me to adopt the intention that ⌈I shall pick up the children⌉.

Similarly, one's intention to perform a general instruction, leads one to perform any specific instruction that instantiates the general instruction, as indicated by the schema *intention specification*.

Reasoning schema: *Intention specification*

(1) intending to execute the instruction ⌈whenever *Precondition* is satisfied then I shall accomplish *Action*⌉

——— IS A REASON FOR

(2) intending to execute the instruction ⌈if in occasion o, *Precondition* is satisfied, then I shall accomplish *Action* in occasion o⌉

For example, my intention to implement the general instruction ⌈whenever I finish eating, I shall have a nap⌉, will lead me to the specific conditional instruction ⌈today, when I finish eating lunch, I shall have a nap⌉.

1.4.3. Behavioural and Cognitive Instructions

We need to distinguish two types of instructions: *behavioural instructions* and *cognitive instructions*.

Definition 1.4.1 *Behavioural instruction. A* behavioural instruction *requires that an agent holds a certain external behaviour.*

Definition 1.4.2 *Cognitive instruction. A* cognitive instruction *requires that an agent forms a certain mental state.*

We may say that the first type of instruction expresses a *behavioural policy*, while the second type express a *mental policy*. Thus, in the second type of instruction, the required action consists in the adoption, or in the acceptance, of a mental state. As a common-sense example of a cognitive instruction, consider the following policy, adopted by a nurse in a kindergarten who has decided not to give uncooked foods to the children, to prevent the spreading of an infection: ⌈If food has not been heated above 150° C, then I shall adopt the belief that it is uncooked (I shall consider it to be uncooked)⌉.

As a legal example, consider the following instruction, adopted by a judge for the purpose of deciding a case: ⌈If Mark has committed a crime in the last 5 years, then I shall consider him to be a recidivist⌉.

The interesting peculiarity of cognitive instructions is that they can be executed by reasoning alone. Rationality, therefore, does not stop at their adoption, but also includes their execution. Thus, if one comes to have the intention that one shall adopt mental state M, rationality requires one to adopt M (unless one abandons that intention). In other words, in the execution of cognitive instructions two steps are involved:

1. one forms the intention that one shall adopt the required mental state,
2. this leads one to adopt that mental state.

This idea is expressed by the following reasoning schema:

Reasoning schema: *Executing cognitive intention*

(1) having the intention that⌈I shall adopt mental state A⌉

——— IS A REASON FOR

(2) adopting mental state A

For instance, assume that the I have the following mental states:

a. the intention that ⌈If Mark has committed a crime in the last 5 years, I shall believe that he is a recidivist⌉,

b. the belief that ⌈Mark is a recidivist⌉.

From this mental states, according to schema *intention detachment*, I will first form the intention that ⌈I shall believe that Mark is a recidivist⌉. Then, by implementing this cognitive intention (according so schema *executing cognitive intention*) I will adopt the belief that ⌈Mark is a recidivist⌉.

1.4.4. Other-Directed Intentions and Commands

Besides distinguishing between behavioural and cognitive instructions, we need to consider the following kinds of intentions:

- intentions concerning one's own behaviour, which we call *self-directed intentions*, and
- intentions concerning other people's behaviour, which we call *other-directed intentions*.

When agent j has the intention that agent k performs a certain action (an other-directed intention), not only j desires or has the goal that k does that action, but j *directly intends* that k shall do it.

To clarify the notion of an other-directed intention, we need therefore to distinguish the case when one has an intention concerning the behaviour of another, from the case where one only has the expectation or the goal that another behaves in a certain way (see Grosz and Kraus 1996).

One first clue is that when one has the other-directed intention that some people behave in a certain way, one relies upon the behaviour of those people, one puts one's trust on their action. In fact, the formation of other-directed intentions is related to the phenomenon of *multi-agent planning*. This concerns the fact that often for one it is not possible or opportune to achieve one's goal through one's action alone: One needs to build plans which also include the action of other agents (consider a manager that is deploying her collaborators to achieve her goals).

In such cases one needs to engage in multi-agent planning, and rely for the achievement of one's aims on the behaviour of the other agents participating in

this plan.[19] From our perspective, however, simple reliance on the behaviour of others is not sufficient for having an intention concerning their behaviour. The key element for the existence of an other-directed intention is that one views one's own intention (as perceived by one's partner) as a reason that should lead one's partner towards executing the intended instruction.

For example, for my wife to intend that I wash the dishes there is no need of an agreement between us, she just needs to assume that my awareness of her intentions should contribute to my washing the dishes. This is the so-called *reflexivity of intentions*, which is common to self-directed intentions and other-directed intentions: When one has the intention that an instruction is implemented, one also has the intention that the implementation of the instruction is determined by the very fact that one has that intention.

Our choice of using the word *intention* also to refer to attitudes towards the behaviour of other people, though corresponding to linguistic usage, is different from the terminological and conceptual choices of some authors. For example, Castañeda (1975) uses the word *practition* to refer to what we call an instruction, and distinguishes two possible practitions, *intentions* (practitions concerning one's own actions) and *mandates* (practitions concerning actions of other people).

Our use of a broader notion of an intention is justified by the idea that "intentions" concerning the behaviour of other people are mental states having a cognitive function which is similar to that of intentions concerning one's own behaviour, at least as far as reasoning is concerned.

Also with regard to intentions concerning the action of other people, we should not mistake the state of having an intention for the speech act that presupposes (and possibly originates) the possession of an intention by the speaker. Issuing a request, a command, or making an agreement are no mental states: They are actions (speech acts), though actions which include or presuppose the formation of mental states.

Consider, for example, the situation of a coach who is telling his players what are to do in the next match. When giving player Peter the command: ⌈if an adversary hits you, you shall hit back⌉, the coach will form the intention that ⌈if an adversary hits Peter, Peter shall hit back⌉. This intention will usually persist in the mind of the speaker after the performance of the speech act, and will be used in subsequent reasoning. For instance, the intention of the coach, when added to the belief that ⌈an adversary hits Peter⌉ will lead him to have the intention that ⌈Peter shall hit back⌉. Such an inference will take place according to the inference schema that we called *intention detachment*.

[19] According to Castelfranchi and Falcone (1998) one's intention that another performs a certain action is psychologically grounded on the fact that one relies upon the other's action, and views this action as a component of one's plan.

Thus, we need to distinguish carefully the mental state of the commander from the action of commanding (or agreeing): The latter includes a behavioural performance, though such a performance is accompanied by mental states. We follow here the mentalistic model of meaning and speech acts proposed by Grice (1989), and consequently view the semantics of speech acts as being grounded on mental attitudes.[20] Here is how Grice (1997, 65) defines the concept of meaning:

that U meant something by uttering x is true iff, for some audience A, U uttered x intending:
1. A to produce a particular response r;
2. A to think (recognise) that U intends (1);
3. A to fulfil (1) on the basis of his fulfilment of (2).

Accordingly, we view the speech act of prescribing or commanding, as consisting in a *declaration of intention* (a *declaration of will*). More precisely, a command consists in an utterance by the commander, expressing the following complex intentions:

1. that the commandee shall execute a certain instruction,
2. that the commandee recognises that the commander has intention (1),
3. that the commandee fulfils commander's intention (1) on the basis of the fulfilment of commander's intention (2), that is, on the basis of the recognition that the commander has intention (1).

Usually the commander's intention comes to existence at the time when the command is expressed. More precisely, when executing the act of commanding, usually the commander also performs the following mental transition: She moves from (*a*) having the intention of making so that the commandee does something (by ordering him to do it), into (*b*) having the intention that he does it.

For instance, before telling my child to wash his hands, I have the desire that he washes his hands, but I do not have yet the intention that he does it. I adopt this intention when performing the act of commanding him to wash his hands, since this act expresses the combination of the following intentions:

1. that he washes his hands;
2. that he recognises that I intend that he washes his hands;
3. that he does (1) on the basis of the fact that he recognises that I intend (want) him to do that.

[20] We cannot provide here a general discussion of speech acts, though we shall address the intentional production of normative effects in Chapter 23. The classical references, beside Grice 1989, are Austin 1962 and Searle 1969. Italian legal theory has recently dedicated a particular attention to the legal application of the theory of speech acts, see among others: Di Lucia 1997; Azzoni 1998; Conte 2002.

The idea that commands are related to intentions (or volitions), concerning somebody else's behaviour, is very common also in legal theory. For instance, Bentham (1970, chap. 1, sec. 1) views a law as:

> an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed [...] by [...] persons, who [...] are or are supposed to be subject to his power; such volition trusting for its accomplishment to the expectation of certain events [...] the prospect of which it is intended should act as a motive upon those whose conduct is in question.

Similarly, Kelsen (1960, 4–5) speaks of *acts of will* (*Willensakte*) to refer to those contexts where "a person through an act expresses the will that another person behaves in a certain way."

Here, we shall not say more about commands, since we are not interested in the speech act of commanding, but rather in the psychological attitude of the person who has (seriously) issued a command, an attitude that consists in the intention that the addressee of the command behaves in a certain way (plus the related higher-level intentions we described above). This attitude—though starting at the time when the act of commanding is performed—continues after that act is completed. Therefore we do not need to worry about a logic of commands, but we must rather focus on the logic of intentions. This has also the advantage of allowing us to treat in the same way, that is, as intentions, both the volition which concerns one's own behaviour and the volition that concerns other people's behaviour.

In Chapter 23 we shall view the action of commanding in a different (though equivalent way), that is, as the action through which the commander proclaims to create an obligation of the commandee, exactly with the intention of creating such an obligation.

1.4.5. General and Collective Intentions

An agent may have *general intentions*, concerning the implementation of certain instructions by all members of a group. Consider for example, a captain's intention that all members of his squad march in the same direction, namely, his intention that ⌈Every soldier shall turn to the left⌉. After issuing the command "All of you, turn to the left!," the commander shall indeed have the intention that every one of his soldiers shall turn to the left, from which he will infer his intention than a specific soldier, say Mark, shall turn to the left. The captain's reasoning corresponds to the following schema:

Reasoning schema: *Intention individualisation*

(1) intending that ⌈any x, who is P, shall execute action A⌉

——— IS A REASON FOR

(2) intending that j, who is P, shall execute action A

where j is any particular individual, and P is any predicate which specifies the kinds of agents one is referring to. This would be instantiated into inferences like the following:

Reasoning instance: *Intention individualisation*

(1) having the intention that ⌈any x, who is under my command, shall turn to the left⌉

——— IS A REASON FOR

(2) having the intention that ⌈$Mark$, who is under my command, shall turn to the left⌉

Agents may also adopt *collective intentions*, namely, intentions which they ascribe to a group to which they belong (see Section 9.2 on page 247). Such intentions may concern the group as a whole, or individual members of it. In the first case the collective intention concerns a joint action, to be performed through a combination of actions of all members of the group. In the second case, the collective intention only concerns the behaviour of one or some members of the group. Note that, for one to have a collective intention, it is not necessary that one assumes that one's own individual state of mind has a decisive impact on the behaviour of the addressee of the instruction: It is sufficient that one assumes that the collective intention of the group may determine that behaviour.

1.4.6. May-Instructions and Intentions

We have so far considered the shall-intention, concerning the instruction that one shall do something under certain circumstances. However, we also need to examine the *may-intention*, concerning the instruction that one may act in a certain way, under certain conditions.

When one forms the intention that one may do certain actions (tomorrow I may go to the sea, I may also stay at home, but definitely I shall not go to the mountains), one accepts the possibility that one (if one wishes to do so) behaves accordingly. The practical function of adopting a may-instruction seems to consist in storing a pre-selection of candidate shall-intentions. Firstly one screens some actions or plans that are likely to be sufficiently good choices (though not necessarily the best ones), and memorises them as the content of may-intentions. Then, when the time comes for making a choice, one retrieves the may-instructions one has adopted, and one has some possible choices at one's disposal.

When one has the may-intention to execute a certain action, one is not committed to choose that action, but one puts this action in a particular evidence, in comparison to other possible actions.

May-intentions are particularly important with regard to the actions of other people. One's intention that another may do something concerns one's accep-

tance that the latter behaves this way. Consider for example, what it means for me to intend that my daughter may go out tonight, or for a captain to intend that his soldiers may take half a day off, or for a coach to intend that her players may finish the training session in advance if they wish so.

An agent j's intention that agent k may do action A is not viewed by k an autonomous reason for doing A (my daughter's awareness that I intend that she may go out is not a reason for her to go out, unless she wishes to do so). Rather, j's may-intention enables k to decide whether do A without considering that j can have a contrary intention (the intention that k shall not do it). This is because having a may-intention that action A is done is incompatible with having the shall-intention that A is omitted. One may also say that an agent having a may-intention that action A is done is committed not to have the intention that action A is omitted, has excluded to adopt the instruction that A is omitted.

It is important to remark that having a may-intention that A is done cannot be assimilated to not having the shall-intention that A is omitted. For instance, it is not the same to say that I have the may-intention that my daughter goes out, and to say that I do not have the intention that she shall not to go out (I do not that the intention that she shall stay at home).

My not having the intention that my daughter shall not go out is a purely negative condition, which also exists when I have not yet considered the matter. It just means that my mind does not contain the intention that my daughter shall not go out. Therefore, my subsequent adoption of the latter intention does not require a retraction of any of my previous (conative) states of mind. This transition (from not having the intention to having it) only consists in acquiring an additional state of mind.

For instance, assume that I start my cogitations without having any idea about what my daughter shall or may do tonight: I am having neither the intention that she shall not go out, nor the intention that she may go out. However, after having considered the matter, I come to the conclusion that is it is better that she does not go out, and form the corresponding intention, which I communicate to her. Clearly this transition only consists in adding this new determination to the states of mind I had before, without changing any of my previous states of mind.

On the contrary, my having the intention that my daughter may go out is a positive state of mind. It means that I have made up my mind with regard to her going out (at least in the sense that I decided not to interfere with her choice to go out).

Assume that I start my cogitations having the intention that she may go out. However, reconsidering the matter (I come to know that she has a school test tomorrow), I form the intention that she shall not go out. This is no simple addition to my previous cognitive states: Adopting this new attitude requires, to preserve consistency, that I abandon my previous may-intention.

1.5. Reasoning and Cognition

Our special attention for reasoning, though fully justified (being reasoning the subject of this book), should not lead us to overemphasise the importance of reasoning among mechanisms of cognition. In fact reasoning is only one of such mechanisms, though a very important one. We could not survive without our implicit cognition, while many cognitive animals prosper without engaging in reasoning.

It has been convincingly argued that many failures of Artificial Intelligence can be traced to *intellectualism*, namely, to the idea that cognition can be reduced to reasoning. For example, Brooks (1985; 1991) argues that motoric, perceptive and reactive skills are the difficult parts of intelligence, while reasoning is trivial, once these skills are available. He observes that it took evolution billions of years to produce beings that could move and perceive, while reasoning could be quickly achieved, on the top of these abilities, in less that one million years. According to his view, a purely ratiocinating entity cannot achieve intelligence, if intelligence consists in the ability to successfully engage in autonomous problem-solving, in a real environment. This ability, on the contrary requires a strict connection between perception and action: An intelligent agent is situated in the environment, the agent is stimulated by the environment and is active in it, engaging in its exploration and its modification (see Brooks 2002, 3ff.).

1.5.1. Failures of Reasoning

There is empirical evidence that reasoning and calculation alone are often insufficient to make good judgments (cf. Thagard 2000).

For example Damasio (2000) describes people with injuries that have disconnected the parts of their brains that perform verbal reasoning and numerical calculation from emotional centres such as the amygdala. One would expect that these people, having no emotion, should be perfect decision-makers: They should embody the Aristotelian ideal of an "intelligence without passion" (*Politics*, 1297a). On the contrary, it appears that they tend to make poor decisions, especially when others are involved. Damasio conjectures that this deficiency arises because the brain damage prevents the patients from making emotional evaluations that involve somatic markers (bodily states that indicate the positive or negative emotional value of different possibilities). Consequently, such patients do not know what they care about.

As Thagard (2000) observes there is also research showing that there are domains where people's intuitive judgments may be more effective than their more systematic, deliberative judgements. For example Wilson and Schooler (1991) studied college students' preferences for brands of strawberry jams and for college courses, and found that students who were asked to analyse the reasons for their preferences ended up with choices that corresponded less with expert

opinion than did the choices of less analytical students. Wilson and Schooler conjectured that this happens because analysing reasons can focus people's attention on relatively unimportant criteria. More generally, Liebermann (2000) argues that intuitions are often based on unconscious learning processes that can be interfered with by attempts at explicit learning: Not only intuition can do better than reasoning, but reasoning can impair intuitive cognition.

Our view is that an appropriate and critical use of reasoning is able to succeed in building upon the outcomes of intuition, by checking and refining them, as we shall see when discussing rationalisation (see Section 4.1 on page 121). On the contrary, when reasoning is the only or dominant form of cognition, results are likely to be extremely poor.

1.5.2. Reasoning's Dependency on Implicit Cognition

It is easy to see that epistemic reasoning is fully dependent upon implicit cognition.

First of all, we need *perception*, which processes sensorial data and provides the necessary input for epistemic reasoning. Consider for example the mechanism of vision: Given a certain external input (the rays of light hitting the sensors in our retina), there is a mechanism in our brain (which we largely share with other animals, such as reptiles, birds and mammals) which reacts to those inputs, processes them, and provides us with percepts. Our introspection gives us no idea of what is going on inside our brain, from the moment when the input stimuli are received to the moment when the corresponding cognitive states are formed (the moment when we have certain percepts). However, this mechanism works fairly well, as far as we can judge, providing us with a view of our environment that is adequate for most of our needs.

Moreover, our brain has inbuilt mechanisms for a vast array of cognitive tasks: recognising faces, measuring and comparing areas, identifying solid shapes, synthesising linguistic expressions, forecasting trajectories, finding analogies in objects and events, finding symmetries, making and evaluating plans of actions, and so on. We come intuitively to having beliefs on all these matters without engaging in any reasoning, without performing any transition (accessible to consciousness) from one belief to another. We just need to listen to our intuition, that is, to collect the results which are provided by a non-rational module of our mind.

This is good for us since we have no time for reasoning in all these matters, and in most cases, we have no idea of how to do that. Consider, for example, the task of developing an explicit inference which (*a*) starts with the belief that millions of cells in the retina of your eye are being stimulated in certain ways by waves of light having different lengths, and (*b*) concludes with the belief that an object is in front of you, having certain dimensions, shape, colours, and position. We have no idea of how to do that, and even if we knew how to do it,

we would never find the time for it. Only our implicit cognition can provide us with adequate perceptual knowledge.

This raises the question of why we should trust our implicit cognition, though we have no way of controlling its processes. One answer is that implicit cognition results from the fine tuning of cognitive mechanisms in the millions of years since life started in our planet, through the mechanism of selective evolution (for a discussion of the links between evolution and cognition, see Dennett 1996).

As implicit theoretical cognition provides us with percepts and beliefs, implicit practical cognition provides us with a vast array of conative states. Consider for example how nature provides us with desires related to food, sex, and environmental conditions (for instance, avoiding too much hot or cold) or even with a desire for knowledge (curiosity). Consider also how one has certain attitudes concerning one's children and relatives, how one feels attraction or repulsion towards certain foods, animals, or people, how one has instinctive reactions under certain circumstances (from the basic impulse to withdraw one's hand when it touches a hot object, to the tendency to run away in a situation of danger).

We cannot here consider the way in which humans come to have "instinctive" conative states. As Damasio (2000) observes, to do that one would have to examine the chain of reciprocal interactions connecting basic life regulation (simple, standardised schemata of bodily response), emotions (more complex schemata of bodily response), feelings (perceptions of pleasure, pain and emotions), and reason. This would be a very difficult inquiry, which goes much beyond the object of this volume and the competence of its author.

Let us just say that our knowledge of inbuilt cognitive modules of natural agents (humans and animals) is still very scanty. Only in the recent years has neurology started to identify the areas of the brains that are involved in cognitive tasks and some of the chemical-physical processes that are required by these tasks. Until further progress is made, we can approach the non-rational cognitive models operating in humans and animals only conjecturally: From observing the results provided by these modules we can try to figure out their functioning.

Recently, some insights have been obtained by Artificial Intelligence, which has attempted to model cognitive processes and is achieving a few substantial results.

In opposition to the "neatness" of the reasoning-based approaches to cognition, methods for processing implicit cognition have sometimes been called "dirty" or "scruffy." Pollock (1995) proposes to call them instead "quick and inflexible" (Q&I). By this he means that those methods are efficient: They provide us with quick cognitive answers, which usually present the required grade of accuracy (consider, again, vision, or face recognition). However, they are also inflexible in the sense that the agent cannot deliberately change them, adapting

them to new circumstances. Therefore, implicit cognitive faculties represent a good solution for the types of problems they were "made for" (to which they represent evolutionary responses). However they may provide inadequate answers in new or unusual circumstances.

1.5.3. Reasoning's Contribution to Cognition

The limitations of implicit cognition do not imply that reasoning is always superior to it, so that one should abandon implicit forms of knowledge as soon as reasoning becomes available. Exactly the contrary is true: In most cases implicit cognition is much better than reasoning, and reasoning can be grafted only on an agent already possessing implicit cognition.

The latter is in fact (at least for natural agents) both the evolutionary antecedent, and the functional prerequisite for the possession of reason. First of all, the efficiency of intuitive cognition is necessary in a dynamic environment. Secondly, the fine-tuning of the agent's behaviour and the incremental acquisition of behavioural schemata on the basis of experience, which is provided by the mechanism of conditioned reflexes is still required in reasoning agents. Finally, we do not know how we would achieve through reasoning or through computations the results that we obtain by using our unconscious mental organs in tasks like perception, analogy, or language understanding.

Correspondingly, a rational agent cannot be an agent all of whose behaviour is determined by reasoning, but rather an agent that adds a reasoning capability on the top of the faculties for implicit cognition. Relying on reason alone would produce death or madness, and thus a complete failure both in practice and theory, rather than the triumph of rationality. Reasoning (reason), rather than substituting all other cognitive faculties, should monitor and control their working, and process their outcomes.

Consider, for example the situation when I have drawn two closed areas on a sheet of paper, and want to establish which one is bigger. My intuition (my specialised cognitive module for measuring areas) tells me that area A is bigger than area B. Let us assume that I have no time to use mathematical calculus to compute the two areas, or that I do not know how to do it (my knowledge of geometry is very elementary), or that the importance of the result does not justify that effort. Then the belief produced by my intuition will be all I have to rely on, and reasoning would only intervene to draw further inferences from this belief, or even to confirm it, on the basis of my knowledge of the reliability of my intuitive module for comparing areas.

Let us assume that on the contrary I have time to apply mathematical integration to compute the two areas, and that I find out that B is bigger then A. Then, if I am fully rational, I would apply reasoning to adjudicate the conflict, but I should not automatically decide in favour of the result provided by reasoning. It may be that I am aware that my knowledge of the integration calculus

is quite limited, so that it is quite likely that my calculations were mistaken. In such a situation, my correct reasoning (my rationality) should lead me to believe the results provided by intuition, rather than those provided by my mathematical reasoning. There is no contradiction in this: A rational agent should not be a fanatical rationalist (following only reasoning, or giving always priority to it), but rather a critical rationalist (on this notion, see Popper 1976, sec. 24; Hayek 1973), capable of taking into account, in its reasoning processes, also the limits of reasoning itself and the advantages of other mechanisms for cognition.

A similar situation may occur in practical reasoning. Also here, when there is a conflict between what is suggested by reasoning and what is proposed by intuition, reason itself may command following the latter. Thus, for example, when reasoning leads me to actions for which I feel a sincere repulsion, possibly the most rational conclusion is believing that my reasoning may have gone wrong. Consider the predicament that Dostoyevsky depicted so well in "Crime and Punishment" (Dostoyevsky 1997) and generally the situation where one's favourite moral theory leads one to conclude that one should kill innocent people (for example, since this would increase average happiness, or produce more equality). The idea of implicit cognition (and of instinctual reaction as resulting from implicit cognition) allows one to reconcile a rationalistic perspective with giving some credit to irrationality. Thus, a person committed to rational cognition may even agree with Nietzsche (1966, 191) on the following idea: "One has to see to it that they [the instincts] as well as reason receive their due—one must follow the instincts but persuade reason to follow them with good reasons."

Chapter 2

BASIC FORMS OF REASONING

After distinguishing the broad domains of epistemic and practical reasoning, we can now look more closely into their basic structures.

In the following sections we shall first focus of the ways of reasoning which may be collected under the idea of *ratiocination*, the thinking process that follows established patterns, which both guide and justify its progression.

In the last section we shall introduce the idea of *heuresis*, the creative formation of new ideas or hypotheses.

2.1. Ratiocination

Ratiocination consists in moving from possessed cognitive states into new cognitive states, according to established patterns. These patterns are usually accessible to introspection, though their application does not require a deliberate choice. When such patterns directly apply to existing cognitive states, and provide the information one is interested in, ratiocination is the appropriate problem-solving method.

2.1.1. Mental States, Noemata, Sentences, and Speech Acts

Before moving into the analysis of ratiocination, we need to put some order in our psychological and linguistic terminology.

First of all, we need two psychological notions:

- *mental state*, namely, the psychological situation in which a cognitive agent may be at a certain time (having a liking, a desire, a belief, an intention, a want);
- *noema* (plural *noemata*), namely, the contents or objects of such mental states.[1]

To specifically refer to the noemata corresponding to the mental states we mentioned in Chapter 1, we shall use the following terms:

- *proposition*, for the content of a belief;

[1] We borrow the term *noema* from Castañeda (1975, 7), who uses it to mean "what is *thought* or *conceived*, *planned* or *purposed*, to refer both to propositions and to the similar counterpart units of content of practical reasoning."

- *goal*, for the content of a desire;
- *instruction*, for the content of an intention or a want.

For example, my believing that ⌈today is Wednesday⌉ is a mental state (a belief), like my intending that ⌈I shall keep working until 1 pm⌉ (an intention). The contents I have in mind while having these mental states are two noemata, and precisely ⌈today is Wednesday⌉ is a proposition, while ⌈I shall keep working until 1 pm⌉ is an instruction.

Besides the psychological notions we just introduced (mental states and noemata), we also need two linguistic notions:

- *sentence*, namely, the sequence of words that expresses a noema;
- *speech act*, namely, the communicative action that is performed through uttering sentences.

For example, the sequences of words "today is Wednesday" and "I shall keep working until 1 pm" are sentences. On the other hand, my action of asserting that today is Wednesday (when replying to my wife's question "What date is it today?") is a speech act. More exactly, the speech act is constituted by the fact that I uttered the words "today is Wednesday, October 23th" with the intention of making so that my wife understood this message.

The same holds for my action of saying at the phone the words "I shall work until 1 pm!" with the intention of committing myself to do that, and of conveying to my hearer this intention of mine (I did this when I was requested to complete this morning my paper for a conference).

We have characterised noemata as psychological entities. However, they can be detached from their psychological carriers (the particular individuals who are currently having states of mind concerning the noemata) and they can be seen as contents of possible mental states. This leads us to viewing noemata as linguistic components, namely, as *meanings*, that are associated to sentences or utterances, where such associations are determined by the cognitive operations of speakers, hearers, or third parties, or by what cognitive operations they should perform according to the semantic rules of their language. We do not need to go into the difficult discussion of the connection between meanings and mental states of individuals. For our purpose it suffices that we focus on noemata as psychological entities, to wit, as the contents of real or possible state of minds, contents that can be associated to linguistic entities.

We speak of *cognitive states* to mean all mental states that occur in theoretical or practical cognition: beliefs, desires, intentions, and so on. These states are frequently referred to also as *intentional states*, using the word *intentional* in its philosophical meaning, which concerns the relationship (also called *aboutness*) between mental states and the things they refer to (on intentionality, cf. Dennett and Haugeland 1987). To avoid confusion between this technical sense of "intentional" and the commonsense (and legal) meaning of "intentional" as being

deliberate, or on purpose, we shall use the term *cognitive state* rather than the term *intentional state*. We shall however, occasionally use the term *intentionality* in the sense just indicated, namely, to refer to the adoption of (or to the ability to adopt) a cognitive state (see Section 9 on page 241).

We hope that the reader will forgive us for not even trying to provide a deeper analysis of the notions we have just introduced, addressing the vast literature on the matter. Unfortunately this would require us to move into philosophy of language—one of the most complex and controversial domains of philosophical inquiry—-, which we cannot do in the few lines we can dedicate here to this matter.[2]

2.1.2. Reasoning Schemata and Instances

As we have seen in Section 1.2.3 on page 11, a ratiocinating agent proceeds through discrete reasoning steps. Each step is characterised by its preconditions (some mental states already possessed by the reasoner) and its post-conditions (some new mental states, to be acquired through performing the reasoning step). The transition from pre-conditions into post-conditions takes place according to certain patterns, which we have called *reasoning schemata* (see Pollock 1995, whose theory of reasoning provides the basic inspiration for our model). In general, such schemata have the following form:

Reasoning schema: *Name*
A_1; ...; AND A_n
———— IS A REASON FOR
B_1; ...; AND B_m

where *Name* is the name of the schema, $A_1, \ldots, A_n$ are the pre-conditions of the schema, and $B_1, \ldots, B_n$ are its post-conditions. We say that the set of all the pre-conditions in a schema constitutes its *reason*, and the set of all its post-conditions forms its *conclusion*. We also speak respectively of a *subreason* or of a *subconclusion* to refer to a single pre-condition or to a single postcondition, that is, to refer to a single mental state contained in the reason or in the conclusion.

We maintain a certain ambiguity, by using the same expressions (reason and conclusion) to refer on the one hand to the mental states a reasoner has before and after applying a schema, and on the other hand to the contents of such mental states, that is, to the corresponding *noemata* (see Section 2.1.1 on page 47). When we want to refer specifically to noemata rather than to the corresponding mental states, we shall explicitly indicate it.

Reasoning schemata are *formal*, in the sense that they apply to all mental states having a certain structure or *logical form*, though natural language can

[2] For a collection of contributions on the philosophy of language, see, for example, Ludlow 1997.

express such states (or noemata) in different ways.[3] Any specific instance of a reasoning schema—that is, any combination of mental states matching the reasoning schema—constitutes a *reasoning instance*. For example, consider the following reasoning schema, which we call *syllogism*:[4]

Reasoning schema: *Syllogism*
(1) believing that all P's are Q's; AND
(2) believing that a is P
——— IS A REASON FOR
(3) believing that a is Q

Note that the reason of this schema includes two components or *subreasons*:

- the belief in a general proposition, which is usually called the *major premise* of the syllogism, and
- the belief in a particular (individual or concrete) proposition, which is usually called the *minor premise* premise of the syllogism.

The major and the minor premise are connected by the fact that a predicate (P) occurs in both of them.

The reasoning schema *syllogism* is instantiated by following reasoning instance, which embodies its pattern:

Reasoning instance: *Syllogism*
(1) believing that all Mondays are days on which there is a flight to Barcelona; AND
(2) believing that today is Monday
——— IS A REASON FOR
(3) believing that today is a day on which there is a flight to Barcelona

When opportune, we abbreviate reasoning instances as follows:

$$\frac{Reason}{Conclusion}$$

[3] One may even wonder whether there is a universal *language of thought* (Fodor 1983) in which each cognitive content may be uniquely expressed.

[4] We use the expression *syllogism*, since this pattern of reasoning corresponds, in the legal domain, to what is usually called *judicial syllogism* (Wróblewski 1974). However, we need to remind the reader that the Aristotelian theory of syllogism was not concerned with propositions referring to specific individuals, like proposition (2) and (3) in our schema. The syllogistic figure which comes closest to our *syllogism* would be the Barbara mood, according to which the couple of (universal) premises (1) ⌈all P's are Q's⌉ and (2) ⌈all Q's are R's⌉ leads to the (universal) conclusion that (3) ⌈all P's are R's⌉. A more precise account of syllogisms and of normative syllogisms in particular will be provided in Chapter 15 and in Chapter 20.

Therefore, we may represent the above instance of the *syllogism* schema as follows.

(1) believing that all Mondays are days on which there is a flight to Barcelona;
(2) believing that today is Monday

---

(3) believing that today is a day on which there is a flight to Barcelona

When *syllogism* is applied in practical reasoning, it provides what we call *practical syllogism*. This is the kind of reasoning which seems to corresponds to the model of the *Aristotelian practical syllogism* (*Nicomachean Ehics*, 1477a), namely, the reasoning which terminates with the performance of an action (in the example of *Nicomachean Ehics*, 1477a, tasting this cake), on the basis of a general rule (the rule that one should taste sweet foods).

We can translate the Aristotelian practical syllogism into an inference step whose reason is constituted by a general intentions (in the example, a content-general intention, namely, the intention that ⌈if a food is sweet I shall taste it⌉) and by the belief that the antecedent of the intention is satisfied in a particular case (the belief that ⌈this cake is sweet⌈), and whose conclusion is constituted by a specific intention (the intention that ⌈I shall taste this cake⌉).

(1) intending that if something is sweet I shall taste it;
(2) believing that this cake is sweet

---

(3) intending that I shall taste this cake

Note that in our example, practical reasoning does not lead directly to action, as in the Aristotelian practical syllogism: It only leads to a further cognitive state, an intention (the intention that I shall taste this cake). This cognitive state requires a further inference to be transformed into a want (the want to eat it the cake), which finally leads to action through a non-ratiocinative process, unless external factors prevent the action from taking place or from being completed.

Substituting intentions with normative beliefs—according to the process of doxification, which we shall extensively describe in Chapter 3—we obtain the *normative syllogism*, that is, a syllogism whose preconditions are a general normative conditional and a specific instance of the conditional's antecedent, and whose postcondition is a specific instance of the conditional's consequent.

(1) believing that if something is sweet I ought to taste it;
(2) believing that this cake is sweet

---

(3) believing that I ought to taste this cake

Here are two legal examples of normative syllogisms. The first corresponds to the so-called *judicial syllogism*:

Reasoning instance: *Syllogism*
(1) believing that all thieves ought to be punished; AND
(2) believing that John is a thief
——— IS A REASON FOR
(3) believing that John ought to be punished

The second concerns the type of reasoning which is involved in referring to authoritative sources of law (as we shall in chapter 25), which we call *meta-syllogism*.

Reasoning instance: *Meta-syllogism*
(1) believing that all rules issued by the head of the law school are binding; AND
(2) believing that rule ⌈it is forbidden to smoke in the premises of the law school⌉ was issued by the head of the law school
——— IS A REASON FOR
(3) believing that the rule ⌈it is forbidden to smoke in the premises of the law school⌉ is binding

While in ordinary syllogisms we use a rule for deriving normative qualifications of people or objects, in meta-syllogism we use a meta-rule (a rule about rules) for inferring properties of rules (more generally, of normative propositions) or relations between rules. It is not strictly necessary to introduce a specific reasoning schema for meta-syllogisms, since meta-syllogisms are no different from other syllogisms, as far as their inferential properties are concerned. However, we shall do it anyway, since we need to refer frequently to this kind of inferences:

Reasoning schema: *Meta-syllogism*
(1) believing that all rules being P's are Q's; AND
(2) believing that rule r is P
——— IS A REASON FOR
(3) believing that rule r is Q

Though reasoning-schemata primarily concern mental states, for simplicity we shall often represent a schema by indicating just the corresponding noemata (in particular, when only beliefs are concerned, we shall often indicate the believed propositions). For example, we can express the schema *syllogism* as follows:

Reasoning schema: *Syllogism*
(1) all P's are Q's; AND
(2) a is a P
——— IS A REASON FOR
(3) a is a Q

and, in abbreviated form

(1) all P's are Q's;
(2) a is a P
———
(3) a is a Q

2.1.3. *The Adoption of a Reasoning Schema*

Let us specify what it means for a reasoner to *adopt a reasoning schema*. When saying that a reasoner j adopts a reasoning schema, we mean that j has a particular inclination: Whenever j instantiates all preconditions of the schema, then j will also tend to instantiate the schema's post-conditions. For instance, when saying that j adopts schema *detachment*, we mean that j has the following inclination: Whenever j believes both A and ⌈if A then B⌉, j will also tend to believe B. We need however to clarify what we mean by j having such an inclination.

Let us observe that one cannot perform all inferences that are required by every reasoning schemata one adopts: This would lead one to acquire an infinite number of useless mental states, and therefore to fill one's head with useless contents. The simplest inference rules of propositional logic[5] are sufficient to lead an overzealous reasoner into such a hopeless condition. Consider, for example, the following schema:

Reasoning schema: *Disjunction introduction*
(1) A
——— IS A CONCLUSIVE REASON FOR
(2) A OR B

[5] Propositional logic is the most basic section of logic, which is based just upon the meaning of propositional connectives, like AND and OR, as we shall see in Section 15.1 on page 405.

The inferences that are enabled by schema *disjunction introduction* look obvious: Any proposition entails its disjunction. For instance, a reasoner believing that ⌈today is Tuesday⌉ can safely come to believe that ⌈today is Tuesday OR today is Thursday⌉. This process unfortunately may continue: As from proposition A one infers proposition ⌈A OR B⌉, from the latter proposition one can infer ⌈A OR B OR C⌉, and so on infinitely.

This issue is linked to the so-called problem of *logical omniscience*: One cannot derive (and endorse) all implications of one's beliefs. This *cannot*, however, can be read in two different senses.

In a first sense, it points to a serious limitation of our cognitive powers: We cannot (are unable to) infer many important truths that follow from what we already know (discovering these truths is the difficult task of mathematicians and logicians).

In a second sense, which is the one we are now considering, the assertion that we cannot be logically omniscient rather refers to the futility of a misguided cognitive effort: We cannot (we should not, since it would be silly or unreasonable) derive all useless or trivial implications of our current beliefs.

The way out of the latter problem consists in limiting oneself to performing only those inferences that may be relevant for one's epistemic interests, according to the priorities determined by these interests (and according to the available time and energy). Therefore we cannot view reason-schemata neither as absolute necessities, forcing one to draw whatever irrelevant conclusions they indicate, nor as pure possibilities, which one can randomly implement or disregard. Reasoning schemata rather express a *necessity* that is *conditioned* to the utility or relevance of their use. Thus, one believing both P and ⌈if P then Q⌉ should acquire belief in Q only if one has some interest in establishing whether Q holds (and one has nothing more important to do). Otherwise a rational reasoner should refrain from making the inference.[6]

Note also that the same reasoning schemata, such as *syllogism*, are so ubiquitous that sometimes they are expressed elliptically. For instance, when saying that:

⌈a is a P⌉ IS A REASON FOR ⌈a is a Q⌉,

we often mean that:

⌈a is a P AND all P's are Q's⌉ IS A REASON FOR ⌈a is a Q⌉.

Such ellipses are usually harmless, and even useful in some circumstances. In particular, they are useful when one wants to hint that there is a way of completing one's reasoning, but one does not want yet to commit oneself to a specific way of doing this (or one does not know yet how to do it). However, for clar-

[6] On the connection between reasoning and interest, see Pollock (1995), who proposes an architecture for interest-driven reasoning.

ity's sake we prefer to express all reasoning schemata by specifying all of their subreasons.

2.2. Conclusive and Defeasible Reasoning

We shall distinguish two types of reasoning schemata: conclusive and defeasible ones. The basic difference between the two kinds of reasoning schemata can be summarised as follows.

A *conclusive* reasoning schema indicates a transition that can operate regardless of any further information the agent possesses, as long as the reasoner instantiates the pre-conditions in the schema: Whenever one endorses the reason of the schema, one may safely endorse its conclusion.

Definition 2.2.1 *Conclusive reasoning schema. A reasoning schema R is* conclusive *if one can always adopt R's conclusions while endorsing R's premises (and one should never reject R's conclusions while endorsing R's premises).*

When a reason A supports a conclusion B according to conclusive reasoning, we also say that R *entails* C and write:

$$A \vdash B$$

When both A entails B and B entails A, we say that A *is equivalent to* B and we write:

$$A \equiv B$$

The distinctive feature of a *defeasible* reasoning schema is that it may be defeated by further information to the contrary: The schema indicates a transition that only operates when one has no prevailing beliefs (or, more generally, mental states) against applying the schema or against adopting its conclusions. When one endorses the premises of a defeasible schema but has such prevailing beliefs, one should:

- refrain from adopting the conclusion of the schema, and even
- withdraw the adoption of that conclusion.

Definition 2.2.2 *Defeasible reasoning schema. A reasoning schema is* defeasible *if one should, under certain conditions, refrain from adopting its conclusions though endorsing its premises.*

In the following sections we shall consider some important aspects of conclusive and defeasible reasoning, analysing their commonalities and differences.

2.2.1. Validity and Truth-Preservation

The strong connection between reason and conclusion that characterises conclusive reasoning schemata can be linked to the idea of *truth-preservation*. Conclusive inference schemata (in the epistemic domain) are truth preserving: Whenever (in any possible situation where) the premises of a conclusive schema are true, then also the conclusions of the schema are true. Said otherwise, it is impossible that the premises of a conclusive schema are true and its conclusions are false.

Definition 2.2.3 *Truth preservation. A reasoning instance R is* truth preserving *if necessarily, whenever R's premises are true, then also R's conclusions are true. Similarly, a reasoning schema R is* truth-preserving *if all R's instances are truth preserving.*

Truth-preservation is a very useful and important property, but it does not characterise all rational reasoning patterns. Therefore, it does not delimit the scope of logical reasoning, if by *logic* we mean rational reasoning, or rational ratiocination.

It is true that many authors tend to limit logic to truth-preserving reasoning: They view logic as having the specific function of providing truth-preserving ways of reasoning. Moreover, many logicians refer to truth-preservation by using the word *valid*. For instance, it is said "an argument is VALID if it is logically impossible for all the premises to be true, yet the conclusion false" (Sainsbury 2001), or, just to take another citation, that "an argument is called *valid* when its premises entail it conclusion, in other words, if the premises can't be true without the conclusion also being true" (Hodges 1983, 1). Correspondingly, it is also said that logic is the study of valid reasoning.

Obviously, there is nothing wrong in using the word *valid* in this specific sense (for which there is a long and very respectable tradition), nor in defining the word *logic* so that it only concerns truth-preserving reasoning. However, these definitions lead people (especially when they are not familiar with formal reasoning and with the technical meaning of logical notions) to the idea that any form of reasoning that is not truth-preserving is "invalid," in the generic sense of being wrong, arbitrary, or unreasonable.

To avoid this connotation sneaking into our discourse (and to avoid confusion with the sense in which the word *valid* is used in the law, for example when discussing legal sources), we shall refrain from using *valid* in the sense of "truth preserving" (and *invalid* in the sense of "non truth-preserving").

This allows us to avoid qualifying all defeasible inferences as being "invalid": Though they are not truth-preserving (it may happen that their preconditions hold, but their conclusions fail to be true), defeasible reasoning schemata are indeed "valid" or "sound" forms of reasoning, in the sense of being appropriate ways of approaching certain cognitive tasks.

Reasoning schema: *Conclusive syllogism*

(1) all Y's are Z's; AND
(2) x is Y
——— IS A CONCLUSIVE REASON FOR
(3) x is Z

Reasoning schema: *Defeasible syllogism*

(1) all Y's are normally Z's; AND
(2) x is Y
——— IS A DEFEASIBLE REASON FOR
(3) x is Z

Table 2.1: *Conclusive and defeasible syllogism: reasoning schemata*

2.2.2. Monotonic and Nonmononic Reasoning

Conclusive reasoning schemata provide for *monotonic reasoning*: The conclusions that can be derived by a reasoner that only uses conclusive reasoning always grow, as long as the reasoner is provided with further input information.

More exactly, if a conclusion A can be conclusively derived from a set of premises S_1, then A can also be derived from whatever set S_2 resulting from the addition of further premises to S_1 (from whatever set S_2 such that $S_1 \subset S_2$).

On the contrary, when one draws defeasible inferences from a set of premises S_1, it may happen that, by adding further premises to S_1, one obtains a set S_2 which does not entail some conclusions one could derive from S_1 alone. Defeasible reasoning schemata license *non-monotonic* reasoning: Their conclusions may need to be abandoned when new information is available.[7]

In Table 2.1 you can see the reasoning schemata for defeasible and conclusive syllogism, which are applied in the reasoning instances of Table 2.2 on the next page. According to the first reasoning instance, when one believes that ⌈all bachelors are unmarried⌉ and that ⌈John is a bachelor⌉, one can conclusively conclude that ⌈John is unmarried⌉. According to the second instance, when one believes that ⌈Pet dogs are normally unaggressive⌉ and that ⌈Fido is a pet dog⌉ one can defeasibly conclude that ⌈Fido is unaggressive⌉.

The difference between conclusive and defeasible reasoning emerges most clearly when one acquires beliefs that contradict the conclusions of one's previous inferences.

Let as assume, for example, that Mary—who knows that ⌈bachelors are

[7] On non-monotonic reasoning, see Ginzberg 1987, which collects the contributions which have originated research in this domain. For an introduction, see also Brewka 1991.

Reasoning instance: *Conclusive syllogism*

(1) all bachelors are unmarried; AND
(2) John is a bachelor
——— IS A CONCLUSIVE REASON FOR
(3) John is unmarried

Reasoning instance: *Defeasible syllogism*

(1) pet dogs are normally unaggressive; AND
(2) Fido is a pet dog
——— IS A DEFEASIBLE REASON FOR
(3) Fido is unaggressive

Table 2.2: *Conclusive and defeasible syllogism: reasoning instances*

unmarried⌉ and ⌈husbands are married⌉—after meeting John at a dinner party comes to believe, according to John's statements, that ⌈John is a bachelor⌉. This leads Mary to believe, according to schema *conclusive syllogism*, that ⌈John is unmarried⌉. However, the day after a friend tells Mary that ⌈John is Lisa's husband⌉. This should lead her to conclude, still according to *conclusive syllogism*, that ⌈John is married⌉, which contradicts her belief that ⌈John is unmarried⌉.

At this stage, Mary has no choice but to abandon the premises of one of these inferences. If she sticks to the idea that John is a bachelor, she needs to withdraw the belief that John is Lisa's husband, while if she accepts the idea that John is Lisa's husband, she needs to withdraw the belief that John is a bachelor.

In defeasible reasoning, a different approach is required. Let us assume, for instance, that one endorses all of the following propositions: ⌈Fido is a pet dog⌉, ⌈pet dogs are normally unaggressive⌉, ⌈Fido is a Doberman⌉, ⌈Dobermans are normally aggressive⌉. According to schema *defeasible syllogism*, this set of premises licences both of the defeasible inferences in Table 2.3 on the facing page.

Let us assume that the second inference in Table 2.3 on the next page is stronger (more reliable) then the first one. In such a situation, we are not required to withdraw any of the premises of the weaker inference (withdraw the belief that pet dogs are normally unaggressive, or that Fido is a pet dog). We can maintain the premises of both inferences, that is, we can keep on believing both of the following reasons (sets of premises): {Fido is a Doberman; Dobermans are normally aggressive}, {Fido is a pet dog; Pet dogs are normally not aggressive}. However, we shall refrain from deriving the conclusion that ⌈Fido is aggressive⌉.

(1) Fido is a pet dog;
(2) pet dogs are normally unaggressive

---

(3) Fido is unaggressive

(1) Fido is a Doberman;
(2) Dobermans are normally aggressive

---

(3) Fido is aggressive

Table 2.3: *Two defeasible inferences*

2.2.3. *The Rationale of Defeasibility*

Defeasible reasoning schemata, as we have observed in Section 2.2 on page 55, are not truth-preserving. They license what Peczenik (1989, 114ff.) calls *jumps* or *leaps*: When believing the premises of a defeasible schema, we are lead to endorse the conclusions of the schema, though these conclusions are not truth-preservingly implied by our premises (and they may indeed turn out to be false, even when the premises hold true). However, failure to satisfy truth preservation does not entail logical faultiness. On the contrary, epistemology has come to identify various kinds of sound defeasible inference (Pollock 1995, 52ff.). Here we list a few of them:

1. *Perceptual inference*. Having certain perceptual contents is a defeasible reason to believe in the existence of corresponding external objects. More generally, having a percept with content φ is a defeasible reason to believe φ. For instance, having an image of a red book at the centre of my visual field is a defeasible reason to believe that there is a red book in front of me.
2. *Memory inference*. Recalling φ is a defeasible reason to believe φ. For instance, my memory that yesterday I had a faculty meeting is a defeasible reason for me to believe that indeed there was such meeting.
3. *Enumerative induction*. Observing a sample of F's all of which are G's is a defeasible reason to believe that all F's are G's. For instance, believing that all crows I have ever seen are black is a defeasible reason to believe that all crows are black.
4. *Statistical syllogism*. Believing that ⌈most F's are G's AND a is an F⌉ is a defeasible reason to believe that a is a G. For instance my beliefs that ⌈most printed books have even-numbered pages on their left side⌉ and

that ⌈the volume on the top of my table is a printed book⌉ are defeasible reason for me to believe that this volume has even-numbered pages on its left side.

5. *Temporal persistence.* Believing that φ is the case at time t_1 is a defeasible reason to believe that φ is still the case at a later time t_2. For instance, my belief that my computer was on the top of my table yesterday evening (when I last saw it) is a defeasible reason for me to believe that my computer is still there (on temporal persistence, see Section 21.4.4 on page 569).

In general, there is nothing strange or pathological in defeasible reasoning. On the contrary, defeasibility is the natural way in which an agent can cope with a complex and changing environment.

We do not even need to view defeasibility only in cognitive agents: An agent only endowed with fixed or conditioned reflexes may exhibit what may be viewed as a form, or at least as an evolutionary antecedent, of defeasible reasoning. Consider a reactive agent having two reflexes r_1 and r_2 such that:

- according to r_1, stimulus s_1 (tasting good) triggers action a_1 (eat it!);
- according to r_2, stimulus s_2 (feeling hot) triggers action a_2 (get rid!);
- r_2 is stronger then r_1.

Assuming that the strength or each reflex is proportional to its importance for an agent's survival or reproduction, the most useful thing to do (with regard to survival and reproduction) when incompatible reflexes are triggered would be to implement the stronger of the two reflexes. Accordingly, when confronted with stimuli s_1 and s_2 (a tasty, but burning bite of food), a well-adapted reactive agent, rather than staying inactive or choosing randomly, will execute r_2 and do a_2 (get rid of the food). Therefore we may conclude that, in a certain sense, reflex r_2 defeats r_1: Given only stimulus s_1, the agent would react with a_1, but given the combination of s_1 and s_2, the agent will react with a_2.

Though one may correctly speak of defeasible reflexes, defeasibility acquires its fullest meaning for cognitive agents: For such agents defeasibility consists in having certain cognitive states and withdrawing them when further cognitive results become available. In particular, we shall focus on *defeasible ratiocination*: The agent acquires through reasoning certain provisional cognitive states, and later may retract them, as a result of further reasoning.

To refer to the provisional conclusions of defeasible reasoning, usually the qualification *prima facie* is used. However, qualifying all defeasible conclusions as being *prima facie* suggests that all results of defeasible reasoning are obtained on the basis of the only information that is immediately available to the reasoner. This suggestion is misleading, since a defeasible conclusion may also be adopted after an accurate inquiry.

Possibly a better terminological choice (suggested by Peczenik, Volume 4 of this Treatise, sec. 5.1.3) consists in qualifying the outcomes of defeasible

reasoning as *pro-tanto* conclusions, namely, conclusions which, through being justified on the basis of the information so far considered, may be withdrawn on the basis of further information.

Note that a defeasible belief is not necessarily so strong as to justify acting accordingly. One may be aware that further inquiry may provide reasons against maintaining that belief. In such a case, one may resist acting on the basis of a *pro-tanto* conclusion. It will depend on the circumstances of the case, and mainly on the depth of the inquiry so far performed and on the need of providing a quick answer, whether rationality requires jumping from *pro-tanto* acceptance into action, or rather deferring action until the issue has been better examined. The important idea of *rational deferment* goes back to Buridan (1968), who was unjustly ridiculed with the famous story of the Buridan's ass (see Section 7.1.1 on page 195).

Consider for example the case of a person who asks his tax lawyer whether he should pay taxes on money he earned abroad. Assume that the lawyer finds a rule stating that also money earned abroad should be taxed. However, the lawyer is aware that a number of exemptions exist, concerning different countries and different types of revenue (though she is not aware of the content and the preconditions of such exceptions). Therefore she should tell the client that she only *pro-tanto* (namely, on the basis of the information she has so far considered) believes that the money he earned abroad is not taxed. She needs to look further into tax law for providing a sufficiently reliable answer.

2.2.4. The Logical Function of Defeasible Reasoning Schemata

According to the analysis we developed in the previous section, defeasible inference schemata seem to have a twofold function.

The first function is that of providing the reasoner with provisional thoughts, on the basis of which one may reason and if necessary act, until one has new information to the contrary. In this spirit, Pollock (1995; 1998) relates defeasible reasoning to a general feature of human cognition. He argues that normally one starts with perceptual inputs and goes on inferring beliefs from one's current cognitive states (one's percepts plus the beliefs which one has previously inferred). Such a belief-formation process must satisfy apparently incompatible desiderata:

- One must be able to form beliefs on the basis of a partial perceptual input (one cannot wait until one has a complete representation of one's environment).
- One must be able to take into account an unlimited set of perceptual inputs.

Defeasibility is the way to reconcile such requirements:

> The only obvious way to achieve these desiderata simultaneously is to enable the agent to adopt beliefs on the basis of small sets of perceptual inputs but then retract them in the face of additional perceptual inputs if those additional inputs conflict in various ways with the original basis for the beliefs. This is a description of *defeasible reasoning*. Beliefs are adopted on the basis of arguments that appeal to small sets of previously held information, but the beliefs can later be retracted in the face of new information. (Pollock 1995, 40)

The second function for defeasible reasoning is that of activating a structured process of inquiry, based upon drawing *pro-tanto* conclusions, looking for their defeaters, for defeaters of defeaters, and so on, until stable results can be obtained. This process has two main advantages: (1) it focuses the inquiry on relevant knowledge, and (2) it continues to deliver provisional results while inquiry goes on.

2.2.5. Collision and Defeat

In order to have a first look into the working of defeasible reasoning, let us consider an example that is frequently referred to by epistemologists.

Assume that I believe that swans are normally white, and that I am told that there is a swan in the park. This enables the following defeasible inference (an instance of the schema *statistical syllogism*):

(1) most swans are white;
(2) the bird in the park is a swan

---

(3) the bird in the park is white

However, when I look out of the window, I see that the bird in the park, although being unmistakably a swan, looks kind of pinkish. This prompts the following perceptual inference:

(1) I am having a pink image of the bird in the park

---

(2) the bird in the park is pink

Thus, I am pushed towards conflicting conclusions, supported by competing defeasible inferences (according to the first inference, the bird is white, according to the second one it is pink). Assume that, being a moderate empiricist, I consider the perceptual inference to be stronger than the statistical one. Therefore, I should abandon my *pro-tanto* belief that the swan is white and accept (though provisionally) that it is pink. In such a case, we say that the inference concluding that the swan is white is defeated by the perceptual inference according to which it is pink.

Inference $\mathcal{A}$	Inference $\mathcal{B}$
(1) Most swans are white	(1) I perceive the image of a pink bird in the park
(2) The bird in the park is a swan	
(3) The bird in the park is white	(2) The bird in the park is pink

Table 2.4: *Rebutting collision: Inference $\mathcal{A}$ collides with inference $\mathcal{B}$*

Cognitive processes like the one we have just considered can be explained by introducing two notions, collision and defeat.

Definition 2.2.4 *Collision. Let mental state M be a reason for adopting mental state Q and mental state M^* be a reason for adopting mental state Q^*. We say that that there is a* collision *between M and M^*, when the combined mental state which consists in endorsing both of M and M^* does not support adopting both of Q and Q^*.*

When one finds oneself in a collision, one is prevented from performing both colliding inferences. One may be prevented from performing just one of them, or one may be prevented from performing both. Those inferences which are prevented by the collision, are said to be *defeated*, while the reason that prevents deriving a conclusion is said to be a *defeater* (see Pollock and Cruz 1999, 195ff.):

Definition 2.2.5 *Defeat. Let mental state M be a reason for adopting state Q. Mental state M^** defeats *(is a* defeater *for) M, iff the combined state consisting in endorsing both of M and M^* does not support adopting Q.*

In the example above, mental state m (believing that most swans are white and that the bird in the park is a swan) collides with mental state m^* (the percept that that the bird in the park is pink). State m alone was a reason for adopting a mental state q (believing that the bird in the park is white), according to *statistical syllogism*. However, the combined state consisting in having both m and the additional mental state m^* is no reason for adopting q: Because of the defeater m^*, the inference from m to q is blocked or defeated. The conflict between the two inferences $\mathcal{A}$ and $\mathcal{B}$ originated by the two colliding mental states m and m^* is reproduced in Table 2.4.[8]

[8] Here and in the following, we shall refer to sequences of propositions—and in particular to inferences and arguments—by using symbols $\mathcal{A}$, $\mathcal{B}$, ...

2.2.6. Collisions and Incompatibility

The type of collision we exemplified at the end of previous paragraph (conflict of inferences leading to incompatible conclusion) will be called *rebutting collision*. As a first approximation, we may define rebutting collision as follows:

Definition 2.2.6 *Rebutting collision. There is a* rebutting collision *between reasons M and M* when*

1. *M is a reason to adopt mental state Q,*
2. *M^* is a reason to adopt mental state Q^*, and*
3. *Q is incompatible with Q^*.*

This definition needs to be integrated with a specification of what it means for two mental states to be incompatible:

- When beliefs are at issue, incompatibility consists in the fact that Q and Q^* concern propositions that cannot jointly be true (either the swan is pink or it is white).
- When shall-intentions are at issue, incompatibility consists in the fact that Q and Q^* concern instructions that cannot be jointly implemented (either I shall make a donation or I shall spend my money).[9]

However, only in some cases can incompatibility be assessed by looking only at the directly concerned mental states: These are the cases when these mental states contain noemata that are incompatible in all logically possible situations. For instance, it cannot be that case that Tom both stole a car and did not steal it; or that Mary both is obliged to repair some damage and is not obliged to do so.

In many other cases, to assess the incompatibility of two mental states one needs to consider further information, concerning meaning connections, causal links, or further facts. For example, to assess that being pink and being white are incompatible states of one same object (our swan) one must know that an object cannot have two colours at the same time. Similarly, to know that there is a conflict between the fact that others detain and process one's personal data and one's free self-determination (as affirmed by privacy supporters), much psychological and sociological background-knowledge is to be assumed. Finally, to know that low inflation and full occupation are incompatible (in a certain economic context) one must have a lot of economical information.

Therefore, very often the incompatibility of two conclusions cannot be immediately detected by the reasoner, but is rather the result of finding relevant

[9] By "implementing an instruction," we mean performing the indicated action under corresponding circumstances. The problem of compatibility becomes more complex when may-intentions are also considered. We shall address this issue in Chapter 17, when dealing with permissions.

	Inference $\mathcal{A}$		Inference $\mathcal{B}$
(1)	I perceive a pink bird in the park	(1)	There is red light outside
		(2)	Perceiving a pink object under red light does not warrant that it is pink
(2)	The bird in the park is pink	(3)	My perceiving a pink bird does not warrant that it is pink

Table 2.5: *Undercutting collision: Inference $\mathcal{A}$ collides with inference $\mathcal{B}$*

information and of bringing it to bear through reasoning processes (for an illuminating discussion, see Perelman and Olbrechts-Tyteca 1988, sec. 46).

2.2.7. Undercutting Collisions

Besides rebutting collisions, there is another way in which reasons can collide. This happens when the reasoner has a reason to believe that, in the present circumstances, a reasoning schema does not apply, since under those circumstances the reason of the schema provides no reliable support to its conclusions.

Let us consider a variation of the ornithological example we introduced in Section 2.2.5 on page 62. Assume that I am seeing (or rather having the vision of) a pink bird, and that I come to believe, according to a perceptual inference, that the bird is indeed pink. I notice, however, that there is beautiful sunset now, throwing red light over all things. I know that red light makes white objects look pink. Therefore, I conclude that it would be unreasonable for me to believe that the swan is pink on the basis of the only fact that it looks pink to me (under the present conditions the pink-looking swan might as well be white).

Note that this reasoning does not tell me that the swan is white, since pink objects would still look pink under red light: It only undermines the previous inference, without providing a different conclusion (Table 2.5).

This type of collision (collision between a reason M, and a reason M^*, indicating that M is unreliable) shall be called *undercutting collision*. More exactly, according to Pollock and Cruz (1999, 196), we define undercutting collisions as follows.

Definition 2.2.7 *Undercutting collision. There is an* undercutting collision *between reasons M and M^* when*

1. *M is a reason for adopting mental state Q,*

2. *M^* is a reason for believing that M does not support Q.*

Under these conditions we also say that M^* undercuts *M.*

For instance, my awareness that there is red light is a reason for believing that the fact that the bird looks pink does not support concluding that it is pink. Such awareness *collides with*, and more exactly *undercuts*, my considering the pink appearance of the bird as a reason for concluding that it is pink.

2.2.8. Preference-Based Reasoning

When one endorses two colliding reasons, one cannot derive the conclusions of both of them: At least one of these reasons is defeated.

We may thus distinguish the following two cases:

1. If one reason, assume R_1, prevails over the other, R_2, we may reject R_2 and endorse R_1 (so that only R_2 is defeated).
2. If, on the contrary, none of the two reasons prevails, both reasons are defeated.

Thus, it appears that a reason R_1 *defeats* a reason R_2, whenever R_1 collides R_2, and R_2 does not prevail over R_1. When, additionally, R_1 prevails over R_2 (item 1 above) then R_1 *strictly defeats* R_2 (defeats R_2, but is not defeated by it).[10]

In considering what reason prevails, there is a difference between rebutting and undercutting collisions:

- In rebutting collisions there is a perfect symmetry between the two reasons: One reasons prevails over the other exactly when it is stronger, that is, when it outweighs the other.
- In undercutting collisions, the undercutter is favoured: It always prevails.

Thus, in case of rebutting collision the stronger reason outweighs and strictly defeats its competitor. Consider for example, a recent case that had to be addressed by the Italian privacy authority. It concerned the case of a woman who requested for health reasons to access data concerning the DNA of her father (the data was stored in the database of a hospital), who did not give his consent. Therefore, the authority needed to balance the privacy-based inference (the father's data could not be provided since sensitive data cannot be communicated without the consent of the data subject) and the inference based upon the right to health (one has a right to obtain what is needed for one's health, such as, for

[10] Note that the propositions that (*a*) $\lceil R_2$ does prevail over $R_1\rceil$ and that (*b*) $\lceil R_1$ prevails over $R_2\rceil$ are not equivalent: The first also holds when the outcome of the conflict of the two reasons is a draw (is undetermined), while the second requires that the conflict is positively decided in favour of R_1 (we assume that the prevailing-over relation is antisymmetric).

that woman, access to the father's DNA). In such a case the health-based inference was considered to be preferable to the privacy-based inference, so that the latter was viewed as being strictly defeated, and the former inference dictated the outcome of the case.

In case of undercutting collisions, the undercutter prevails: It strictly defeats the attacked reason. This seems indeed the most reasonable way of approaching undercutting. If I just have a reason R_1 to believe that the bird in the park is pink, and a reason R_2 to conclude that R_1 is unreliable, I should not conclude that the bird is pink (on the basis of the unreliable reasons R_1). Similarly, assume that I find in a law text two rules: a rule r_1, and a rule r_2 saying that r_1 is inapplicable under certain circumstances. If these circumstances are satisfied in the present case I should conclude that r_1 is indeed inapplicable, and refrain from deriving its conclusion.

Though our approach to undercutting seems generally acceptable, we need to apply it with some caution in order to avoid absurd conclusions. Assume for instance that r_2 is a Constitutional rule, while r_1 is a statutory rule saying that r_2 is inapplicable. It seems that, according to the mechanism of undercutting, r_1 should prevail, so that r_2 would be inapplicable (though that Constitutional provisions prevail over statutory rules). However, this absurd conclusion can be avoided if we specifically assume the principle that legislative provisions curtailing a constitutional rule—by declaring it to be inapplicable—are to be rejected. The rejection of such provisions (the view that they are not binding, i.e., that they are invalid) can be justified on teleological grounds (since admitting their bindingness would impair the limiting function of the Constitution with regard to legislation).[11]

In conclusion, when facing a collision, we should reason as follows:

- in rebutting collisions, we should compare the strength of the conflicting reasons, and assume that any reason that is not stronger than its competitor is defeated (only stronger reasons prevail);
- in undercutting collisions, we should assume that the undercutter always prevails.

Let us consider a further example on undercutting. Assume that I have heard two different accounts of the same event, from two friends, John and Mary:

- John tells me A,

[11] We shall not consider here how to assess the comparative strength of competing reasons (the outweighing relation), an issue that will be extensively discussed in Chapter 7. By now we just need to observe that our treatment of undercutting corresponds to Prakken and Sartor 1997. The logical treatment of undercutters is a very difficult and controversial matter. Even John Pollock, who introduced the notion of undercutting in the logical debate, changed his mind in this regard. While he had at first assumed that undercutters always prevail (as we also assume), he later affirmed that an undercutter only succeeds if it is at least as strong as the undercut reason (Pollock 1995, 103–4).

- Mary tells me NON A (A is not the case), and
- I consider both of them to be sufficiently reliable, under normal circumstances (so that I would have believed each one of them, if the other had kept silent).

It seems that I should view the statements of Mary and John as defeating one another, and refrain from forming any belief on the matter (neither A nor NON A), unless I can assume that one of the two conclusions more reliable then the other. In the latter case, I should provisionally (defeasibly or *pro-tanto*) believe the content of the more reliable statement, and reject the other.

Similarly, assume that I come to know both of the following facts:

- Tom intentionally caused harm to Mary's property, driving into her fence, and
- he acted in a state of necessity, to avoid hitting a child who was crossing the street.

Under such conditions, I should conclude that Tom has no duty to compensate Mary's damage, since the conclusion that he is not liable (having acted for the necessity of saving another's life) prevails over the conclusion that he is liable (having intentionally damaged another's property).

This way of reasoning assumes, however, that one has a way of determining what conclusion (if any) is more strongly supported. In some cases, one may do that by adopting mathematical methods. For example, one may use probability calculus, and assume that the strength of each conclusions corresponds to its probability, which can be computed by combining the probabilities of its preconditions. Other numerical calculations of the comparative strength of beliefs have also been proposed, which diverge under some respects from standard probability (see, for example, Pollock 1995).

We cannot here discuss the merit of numerical methods for assessing credibility, which would require us to address the technicalities of probability and statistics. Let us just observe, in general, that there are certain specific legal issues (in particular in the domain of evidence) where numerical calculi can provide appropriate answers. However, these calculi do not provide a generally applicable solution for dealing with incompatible conclusions in moral and legal reasoning. In the law, it is rather the case that one needs to engage in priority reasoning, that is, one needs to bring to bear further information, and to decide accordingly which inference is to prevail (this idea will be extensively examined in Chapter 7). Though this information rarely is numerical, it enables in most cases a sufficiently precise assessment.

2.2.9. Reinstatement

We need to introduce a further idea that explains the characteristic procedure of defeasible reasoning: the notion of *reinstatement*. When a defeater is strictly

Inference $\mathcal{B}$ is preferable to inference $\mathcal{A}$

Inference $\mathcal{A}$		*Inference $\mathcal{B}$*	
(1)	Mary loved John	(1)	Mary's clothes were stained with John's blood
(2)	people normally do not kill their loved ones	(2)	if one's clothes are stained with the victim's blood, then normally one has killed the victim
(3)	Mary has not killed John	(3)	Mary has killed John

Table 2.6: *Defeat by rebutting*

defeated by a further inference, then the inference originally attacked by the defeat may recover its capacity to establish its conclusion.

Let us develop further the pink-swan example. As before, assume that the bird of which I am having a pink vision is a swan, so that I would conclude for its whiteness, unless this conclusion was defeated by my perception of its pinkness. Assume also that I realise that the sun is setting, and that its light makes all white things look pink. My awareness of this undercuts the conclusion that the bird is pink (see Table 2.6). As a consequence of the perceptual inference being undercut, the inference for whiteness is reinstated: I again *pro-tanto* believe that the bird is white (being a swan).

Let us consider another example, concerning the difference between rebutting and undercutting. Let as assume that a detective is investigating the violent death of John, of which Mary, John's inconsolable girlfriend, is accused. The detective believes that Mary loved John, but has evidence that her clothes were stained with John's blood. The information he has allows him to build two inferences, which rebut one another: the inference according to which Mary did not kill John, since she loved him (inference $\mathcal{A}$), and the inference that she killed him, since her clothes were stained with John's blood (inference $\mathcal{B}$).

Assume that the detective also believes that inference $\mathcal{B}$ is preferable to inference $\mathcal{A}$ (he gives more credit to chemistry then to psychology). This allows the detective to endorse the conclusion of inference $\mathcal{B}$: At this stage of the inquiry he forms the belief that Mary killed John (inference $\mathcal{B}$ defeats inference $\mathcal{A}$, but inference $\mathcal{A}$ does not defeat $\mathcal{B}$).

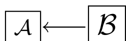
However, assume that the detective discovers that Lisa (John's previous girlfriend) tried to frame Mary, by staining Mary's dress with John's blood. Again, this alone would not be a reason to believe that Mary did not kill John, but rather a reason for considering that the inference $\mathcal{B}$ (from Mary's having blood-stained clothes to her being the murderer) is unreliable, and therefore to view this inference as being undercut.

Inference $\mathcal{B}$ is preferable to inference $\mathcal{A}$

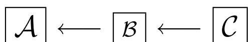
Inference $\mathcal{A}$	*Inference $\mathcal{B}$*	*Inference $\mathcal{C}$*
(1) Mary loved John	(1) Mary's clothes were stained with John's blood	(1) Lisa stained John's clothes with blood
(2) people normally do not kill their loved ones	(2) if one's clothes are stained with the victim's blood, then normally one has killed the victim	
(3) Mary has not killed John	(3) Mary has killed John	(2) Mary's clothes being stained with John's blood does not warrant that Mary killed John

Table 2.7: *Reinstatement through undercutting*

The latter inference, let us call it $\mathcal{C}$, by undermining inference $\mathcal{B}$ results in reinstating inference $\mathcal{A}$. Thus, we pass from the following situation (we use a smaller character for defeated inferences):



where inference $\mathcal{A}$ is strictly defeated by inference $\mathcal{B}$, into the situation:



where inference $\mathcal{B}$ is strictly defeated by inference $\mathcal{C}$, and consequently $\mathcal{A}$ is reinstated. Thus given all of $\mathcal{A}$, $\mathcal{B}$, and $\mathcal{C}$, the detective would conclude, according to $\mathcal{A}$, that Mary did not kill John (since she loved him).

A further type of undercutting collision is provided by inferences presupposing that one does not have a certain mental state: These inferences collide exactly with one's adoption of that mental state. Such inferences are made when one assumes that, if a certain proposition A were true, one would have come to believe A, or at least one would possess the information that enables one to infer A.[12] Therefore, when failing to form the belief that A, one may conclude that A does not hold and reason accordingly. However, when one positively finds

[12] This seems to be the rationale of the so-called autoepistemic logic (Moore 1987), and of the use of negation by failure in logic programs (Clark 1987).

Inference $\mathcal{A}$	Inference $\mathcal{B}$
(1) If I do not believe that one is guilty, then I presume that one is innocent	(1) I have evidence proving that Mary is guilty
(2) I do not believe that Mary is guilty	
(3) Mary is innocent	(2) Mary is guilty

Table 2.8: *Undercutting presupposition*

that A holds, one should abandon inferences based upon the assumption that A does not hold.

For example, why do I believe that my children are in the garden? The answer is the following: I believe that they have come back from school, and I believe that they are not in the house (and that the garden is the only other place where they may be). But why do I believe that they are not in the house? The reason is the following:

- I do not have the belief that the children are in the house, and
- I expect that if they were in the house I would have this belief (since I would have heard them entering the door, which would have lead me to believe that they were in the house).

Since my conclusion that the children are in the garden is based upon my non-believing that the children are in the house, as soon as I can positively conclude that the children are in (for example, because I hear them screaming), I will withdraw the inference.

A similar mechanism may also be used in legal contexts, and may even be mandated by legal rules. For example, when a judge does not believe that a person is guilty, he should base his verdict upon the thesis that the person is innocent (*in dubio pro reo*), as shown in Table 2.8.

It may be argued that this kind of situation takes place more generally in the law, whenever a rule makes a certain legal effect dependent upon the fact that certain facts are not shown to hold (see Sartor 1995). This is indeed the typical way of reasoning with legal *presumptions*. Consider for example the rule in the Italian civil code, which says that one is presumed to have received a message when the message arrived at one's address, unless one proves that one had no possibility of accessing the message. The judge, according to this rule, will be able to conclude that one has received a message on the basis of the sole fact that the message arrived at one's address, under the assumption that the addressee could read the message. However, if there is evidence showing

that the addressee was under the impossibility of accessing the message, this conclusion will be defeated.

2.2.10. Undercutting in Practical Reasoning

Undercutting also applies to practical reasoning. The need to act on the basis of defeasible conclusions is particularly apparent when one—pressed by many goals and commitments—needs to quickly find plans for achieving each of these goals, and adopt those plans without further ado (even when one is aware that there may be better plans which one could find, having additional time at one's disposal). However, as we observed above, if a better plan becomes available before action takes place, one should abandon one's previous intention, and adopt the new plan.

Consider, for example, the inference leading me to adopt the intention of leaving on Monday for Barcelona, since this plan is sufficiently good: It is better than staying at home (the inactivity option), and is better than any plan I have so far considered. This inference gets defeated when I build a plan for leaving on the Sunday before, which allows me to get a cheaper ticket and to make a short visit to the main monuments of the city.

In general, as we have seen above, in teleological reasoning one moves from (1) having a goal G and (2) believing that plan (instruction) P_1 is a satisfactory way of achieving G, into (3) intending to realize P_1. However, this inference can be undercut when the reasoner comes to believe that a different plan, let us call it P_2, is better than P_1, as a way of achieving G. The defeat schema seems therefore to be the following:

Defeating schema: *Teleological defeat*

(1) believing that plan P_2 is a better way of achieving goal G than plan P_1

———— IS AN UNDERCUTTING DEFEATER AGAINST

(2) using *teleological inference*, for adopting P_1 as a way of achieving G

Assume for example that a judge has so far decided cases on product liability by requiring that customers prove the producers' fault. Assume that the judge adopted this policy since she believed that this was a satisfactory way to induce producers to take care in order to avoid releasing faulty products. Assume, however, that the same judge comes now across some law-and-economics literature that shows that strict liability provides a stronger incentive to preventing damage to the customer. The judge should then be induced to abandon the fault liability approach in favour of strict liability (we discount consideration concerning the need that the judge co-ordinates her action with the action of her colleagues, of legislators and of the citizens, on which see Chapter 9).

Inference $\mathcal{A}$	*Inference $\mathcal{B}$*
(1) I have the goal of getting the new book of my friend Henry Prakken	(1) Plan p_2 (getting a free author's copy) is a more convenient way of getting Henry's book
(1) Plan p_1 (buying it on line) is sufficiently good way of achieving this goal	
(1) I intend to implement plan p_1	(1) the convenience of plan p_1 does not support its adoption

Table 2.9: *Teleological defeat*

Here is the corresponding defeat instance:

Defeating instance: *Teleological defeat*
(1) believing that strict liability is a better way of preventing damage to the customers than fault liability
——— IS AN UNDERCUTTING DEFEATER AGAINST
(2) using *teleology*, for adopting fault liability as a way of preventing damage to the customers

Another example of this type of defeat is represented in Table 2.9.

2.2.11. Defeasible Reasoning and Probability

We may wonder whether defeasible reasoning is the only, or the best, way to deal with incomplete information. In particular, we need to consider the main alternative to it, that is, *probability calculus*, and in particular the versions of probability calculus that are based upon the idea of *subjective probability*. In fact, probability calculus has more solid scientific credentials than any defeasible logic, and a rich history of successful applications in many domains of science and practice.

Following the probability approach, the reasoner—rather than facing incompatible beliefs (like the belief that John was driving the car, when the car run over Tom, and the belief Mary was driving the car, in the same occasion), and then having to make a choice—would come to the consistent conclusion that incompatible hypothesis have different probabilities (for instance, on would reach the conclusion that there is a 40% chance that John run over Tom, and a 60% chance that Mary did it). Probabilistic inference, as it is well known, determines the probability of an event on the basis of the probability of other events, ac-

cording to the mechanism of probability calculus: If there is a 80% chance that Tom will have walking problems because of having been run over, there is a 32% chance (40% ∗ 80%) that Tom will have such problems having been run over by John, and 48% chance (60% ∗ 80%) that he will have such problems having been run over by Mary.

Here we cannot introduce probability calculus, nor discuss the many difficult issues which are related to it (especially when ideas of probability and causation are combined). Let us just point at a few issues concerning the normative application of probability calculus, which make it inadequate as a general solution for normative reasoning.

The first issue concerns practicability: Often we do not have enough information for assigning numerical probabilities in a sensible way. For instance, how do I know that there is a 40% probability that John was driving and 60% probability the Mary was driving? In such a case, it seems that either we arbitrarily attribute probabilities, or, with equal arbitrariness, we assume that all alternative ways in which things may have gone have the same probability.

The second issue is a conceptual one: Though it makes sense to ascribe probabilities to epistemic propositions, it makes little sense to assign it to practical information. What does it mean that a certain desire (goal) or intention (instruction) has a certain probability?

The third issue relates to psychology: Humans tend to face situations of uncertainty by choosing to endorse hypothetically one of the available epistemic or practical alternatives (while keeping open the chance that the other options may turn out to be preferable), and applying their reasoning to this hypothesis (while possibly, at the same time, exploring would be the case, if things turned out to be different). We do not usually assign probabilities, and then compute what further probabilities follow from such an assignment.

This cognitive behaviour corresponds to the reasoning skills of which we are naturally endowed. Humans, once they have definite beliefs or hypotheses, are able to develop inference chains, store them in their minds (keeping them unconscious until needed), and then retract any of such chains when one of its steps is defeated. On the contrary, humans are bad at assigning numerical probabilities, and even worse in deriving further probabilities and in revising a probability assignment in the light of further information.

Our incapacity of working with numerical probabilities certainly is one of the many failures of human cognition (like our incapability of quickly executing big arithmetical calculations). In fact, computer systems exist which, using complex nets of probabilities (these are called *belief networks* or *probability networks*), perform very well in certain domains by manipulating numerical probabilities much quicker and more accurately than a normal person (see, for a short introduction, Russell and Norvig 1995, chap. 14, and for a collection of important contributions, Shafer and Pearl 1990).

However, our bias toward adopting a binary, rather than a probabilistic ap-

proach (endorsing one alternative, rather than assigning probabilities to all of them), in face of uncertainty has some advantages: It focuses cognition on the implication of most likely situation, it makes it easier to make long reasoning chains, it facilitates building scenarios (or stories) which then may be evaluated according to their coherence, it enables linking epistemic cognition with binary decision-making (it may be established that one has to adopt decision B if A is the case, and NON B if A is not the case). There is indeed psychological evidence that humans develop theories even under situations of extreme uncertainty, when no reasonable probability assignment can be made.

In a social context a binary approach makes it easier to replicate the reasoning and thinking of other people: One can forecast more easily a binary choice by another than the ascription of probabilities, and such a binary choice can become the focus of social expectations, an aspect is particularly emphasised by Luhmann (1974, chap. 6, sec. 1).

The limited applicability of probability calculus in the practical domains does not exclude that there are various practical and legal issues where statistics and probability provide decisive clues, as when scientific evidence is at issue (on scientific evidence, see Haack 2003b, and Haack 2003a, 233ff.).

2.3. Some Notes on Defeasibility in Law and Morality

The notion of defeasibility, before becoming the focus of much AI research (for a collection of seminal contributions, see Ginzberg 1987) was deployed by some epistemologists (in particular, see Pollock 1974, and Chisholm 1977). Even before that, however, the idea of defeasibility was frequently applied and sometimes studied in the domain of practical (moral and legal) reasoning.

2.3.1. The Idea of Defeasibility in the Practical Domain

The word *defeasible* is a traditional legal term, indicating the possibility that a legal instrument is voided in special circumstances. In fact, it is a typical feature of law and morality that they can only offer standards appropriate for normal situations. When exceptional circumstances occur, these standards may need to be put aside (on defeasibility in the law, cf. among others: Gordon 1988; Sartor 1995; MacCormick 1995; Alchourrón et al. 1985). This is well expressed in a famous Aristotelian citation, where defeasibility is considered not a fault, but a natural feature of legal rules:

> All law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case, for the raw material of human behaviour is essentially of this kind. So, when the law states a general rule, and a case arises under this that is

exceptional, then it is right, where the legislator, owing to the generality of his language, has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances. (Aristotle, *Nicomachean Ehics*, 1137b)

Similarly, Aquinas makes the following precise observation:

[I]t is right and true for all to act according to reason: And from this principle it follows as a proper conclusion, that goods entrusted to another should be restored to their owner. Now this is true for the majority of cases: But it may happen in a particular case that it would be injurious, and therefore unreasonable, to restore goods held in trust; for instance, if they are claimed for the purpose of fighting against one's country. And this principle will be found to fail the more, according as we descend further into detail, e.g., if one were to say that goods held in trust should be restored with such and such a guarantee, or in such and such a way; because the greater the number of conditions added, the greater the number of ways in which the principle may fail, so that it be not right to restore or not to restore. (Aquinas, *Summa Theologiae*, I-II, q. 94, a. 4)

The very notion of defeasibility is at the centre of the work of David Ross, an outstanding Aristotelian scholar and moral philosopher, who developed a famous theory of *prima-facie* moral obligations (Ross 1930; 1939). Ross, who adopted a pluralist form of moral intuitionism, relates defeasibility to the possibility that moral principles are overridden by other moral principles in concrete cases:

Moral intuitions are not principles by the immediate application of which our duty in particular circumstances can be deduced. They state [...] *prima facie* obligations. [...] [We] are not obliged to do that which is only *prima facie* obligatory. We are only bound to do that act whose *prima facie* obligatoriness in those respects in which it is *prima facie* obligatory most outweighs its *prima facie* disobligatoriness in those aspects in which it is prima facie disobligatory. (Ross 1939, 84–5)

The notion of defeasibility, quite usual in legal practice and in doctrinal work, was brought to the attention of legal theorists by Hart (1951, 152), whose observations anticipate the current debate on the topic:

When the student has learnt that in English law there are positive conditions required for the existence of a valid contract, [. . .] he has still to learn what can defeat a claim that there is a valid contract, even though all these conditions are satisfied. The student has still to learn what can follow on the word "unless," which should accompany the statement of these conditions. This characteristic of legal concepts is one for which no word exists in ordinary English. [. . .] [T]he law has a word which with some hesitation I borrow and extend: This is the word "defeasible," used of a legal interest in property which is subject to termination of "defeat" in a number of different contingencies but remains intact if no such contingencies mature.

In legal defeasibility two aspects must be distinguished:

1. the inventive, heuristic reasoning required for understanding the inadequacy of a general rule in a particular context and for stating a corresponding exception or rebuttal;

2. the structure of the reasoning that takes into account exceptions, rebuttals, and presumptions in order to reach conclusions justified by all available knowledge.

The second aspect does not fall outside logic, although it does not consist in deduction, since it can be reproduced in formal models of defeasible reasoning, along the line we indicated above, and as we shall specify in Chapters 26 and 27. Legal defeasibility implies that for justifying a legal conclusion it is normally, but not always, sufficient to select from the available pool of premises a subset supporting that conclusion. In fact, the inference of that conclusion may be defeated, if an exception or an "unless" clause is satisfied, or if a relevant presumption is found to be contradicted.

2.3.2. Defeasibility in Legal Language

The legislator often explicitly foresees the defeasibility of legal rules, by using different linguistic structures. For example, to establish that tort liability is excluded by self-defence or state of necessity, the legislator may use any of the following formulations:

- *Unless clause*. One is liable if one voluntarily causes damage, unless one acts in self-defence or in a state of necessity.
- *Explicit exception*. One is liable if one voluntarily causes damage. One is not liable for damages if one acts in self-defence or in a state of necessity.
- *Presumption*. One is liable if one voluntarily causes damage and one does not act out of self-defence or state of necessity. The absence of self-defence and of a state of necessity is presumed.

According to all these formulations, for concluding that one must make good a certain damage it is normally sufficient to ascertain that one voluntarily caused that damage, but this inference is defeated if the person turns out to have acted either in a state of necessity or in self-defence.

By distinguishing circumstances that have to be positively established to derive a certain conclusion from circumstances susceptible to blocking this derivation, the law divides the *burden of proof* between the parties. The plaintiff, who is interested in establishing a certain legal conclusion, has the burden of establishing the supporting circumstances. The defendant, once the plaintiff has succeeded, has the burden of establishing the impeding circumstances. Though defeasibility may not fully explain the dialectics of legal procedures, it provides their logical background.[13]

[13] The link between defeasibility and procedures will be addressed in Section 27.4.1 on page 727.

2.3.3. The Defeasibility of Legal Concepts and Principles

Defeasibility is also an essential feature of *conceptual constructions* in the law. Legal concepts have to be applied to such a diverse domain of instances that they can at best offer a tentative and generic characterisation of the objects to which they apply, which has to be supplemented with exceptions. General legal concepts presuppose defeasibility: The requirement of absolute rigour in defining and applying concepts—the demand that all features which are included in, or entailed by, a concept apply to each one of its instances—would paradoxically run against the very possibility of being "logical" in the sense of using general concepts.

In fact, even the definitions of the legal concepts that can be found in statutes and codes reflect the stepwise defeasible process of establishing legal qualifications. First a general discipline is established for a certain legal genus (for example, contract), then special exceptions are introduced for species of this genus (like the sale contract), and finally further exceptions may be introduced for specific subspecies (like the sale of real estates). Consequently, when using conceptual hierarchies we must apply to a certain object the rules concerning the category in which it is included only in so far as no exceptions emerge concerning a subcategory in which that object is also included.

Defeasibility can be consciously established by the legislator, but it may also result from the evolution of legal knowledge: After a general rule has been established, exceptions are often provided for those cases where the rule appears to be inadequate. This is typically the evolution of judge-made law, where general *rationes decidendi* are often limited by means of *distinctions*, namely, by means of exceptions introduced for specific contexts.

General attitudes of legal reasoning can also be explained and justified as *defeasible presumptions*. For example, interpretation standards and even judicial precedents (*rationes decidendi*) bind judges only defeasibly, in the sense that they should be followed only in so far as they are not overridden by (strong) reasons to the contrary (Alexy 1989, 274, 279). Even the obligation to apply legislation is considered to be defeasible by many authors, who believe that statutory texts are not legally binding when completely unacceptable from a moral standpoint (Peczenik 1989; Alexy 1992).

Similarly, the due consideration for widespread social attitudes, legal traditions, socially accepted common-sense rules (so much stressed by theorists of argumentation) can be distinguished from blind conservatism only when those factors are given the statute of defeasible presumption. This was, by the way, also the spirit of the principle of inertia advocated by Perelman and Olbrechts-Tyteca (1969, 142), according to which any opinion adopted in the past should only be abandoned when having sufficient reasons to do that. More generally, defeasible endorsement is the appropriate cognitive attitude with regard to what Aristotle calls *endoxa*, meaning, any "opinion held by everyone or by the major-

ity or by the wise—either all of the wise or the majority or the most famous of them—and which is not paradoxical" (Aristotle, *Topics*, 104a8-13).

2.3.4. Defeasibility and Legal Procedures

Finally, also the procedural aspect of defeasibility needs to be considered. This aspect concerns the fact that, as we have observed above, defeasible reasoning activates a structured process of inquiry—based upon drawing *prima facie* conclusions, looking for their (*prima facie*) defeaters, looking for defeaters of defeaters, and so on—until stable results can be obtained. Such a process reflects the natural way in which legal reasoning proceeds. This is particularly the case in the application of the law to particular situations, when one has to bring to bear on particular situations the different, and possibly conflicting legal rules that apply to them, and adjudicate the conflicts between these rules.

Günther (1993; 1989) has affirmed that the application of the law is characterised by a *sense of appropriateness*, intended as the ability of impartially taking into consideration all different features of the considered situation, according to all valid rules which may apply to it. We believe that defeasible reasoning can indeed be viewed as a formalisation of Günther's sense of appropriateness. The model of defeasible reasoning is indeed based on the distinction between on the one hand the adoption of general defeasible rules, each of which only takes into account a few aspects of possible situations, and on the other hand the application of this rules to concrete situations, where one needs to take into account all aspects that are relevant according to all applicable rules.

In fact in the law, as in "any subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons" (Mill 1991a, 41), the point by which "truths have reached the point of being uncontested" (ibid., 51) is far from being attained. Therefore, in legal reasoning the use of *positive logic*, which relates a thesis to its supporting grounds, must be supplemented with critical discussion of the opinion to the contrary, that is, by that *negative logic* which "points out weaknesses in theory or errors in practice, without establishing positive truths" (ibid, 109). It seems to us that theories of defeasible reasoning have the merit of unravelling exactly the basic structure of Mill's negative logic.

Defeasibility of legal reasoning also reflects the dialectics of judicial proceedings where each party provides arguments supporting its position, which conflict with the arguments of the other party. This debate may also be transferred into the judicial opinion that resumes the results of the dispute and determines its output. To convincingly justify a judicial decision in a case involving serious issues, it is not sufficient to produce a single argument, but it is necessary to establish that the winning argument prevails over arguments to the contrary, especially those that have been presented by the losing party.

Also doctrinal work cannot avoid being contaminated by the dialectics of le-

gal proceedings, since its main function consists in providing general arguments and points of view to be used in judicial debates. In this perspective, doctrinal reasoning may be viewed as consisting in an exercise of *unilateral dialectics*, intended as a disputational model of inquiry in which “one develops a thesis against its rivals, with the aim of refining its formulation, uncovering its basis of rational support, and assessing its relative weight” (Rescher 1977, 47).

2.3.5. Overcoming Legal Defeasibility?

Some authors have suggested that the law ought to be recast in a set of consistent axioms, which would lead to compatible outcomes, according to deductive inference, in any possible factual situation. This reformulation of the law would eliminate normative conflicts, and therefore would allow us to avoid legal defeasibility (at least of the rebutting type).

We need to observe, however, that it is very doubtful that such reformulation of the law is really possible (feasible). Moreover, even if it were possible, it is doubtful that it would be useful.

Against the possibility of a consistent axiomatisation of the law, we note that incompatibility between normative propositions can often only be established on the basis of further information, as observed in Section 2.2.6 on page 64. Not all this information can be obtained in advance, at the time when the law is being axiomatised.

Against its utility, we remark that it is doubtful that such axiomatisation would really make the law easier to understand and apply. Legal prescriptions would need to become more complex, since every rule would have to incorporate all its exceptions.

In addition, such a representation of the law would not be able to model the dynamic adjustment that takes place—without modifying the wording of existing rules—whenever new information concerning the conflicting rules and the criteria for adjudicating their conflicts is taken into consideration. Finally, by rejecting defeasible reasoning, one would lose its capacity of providing provisional outcomes while the inquiry goes on.

Our observations concerning the need of representing the law in ways which facilitate defeasible reasoning do not imply that the current way of expressing legal regulations in statutes and regulatory instruments cannot be improved. Large improvements in legislation techniques on the contrary are required to cope with the many tasks that need to be carried out by modern legal systems. However such improvements should not aim at producing a consistent set of legal rules, just for the sake of logical consistency. They should rather aim at producing legal texts that can be more easily understood and applied (Gordon 1988).

This objective requires a skilful use of the very knowledge structures (such as conceptual hierarchies, speciality, or the combination of rules and exceptions)

that enable defeasible reasoning. In this regard, we need to observe that such structures are largely used also outside the law, in situations when one has to express precisely ways of dealing with complex and changing situations, as in difficult applications of computing.

For example, conceptual hierarchies (enabling defeasible inheritance) have become a standard programming technique in object-oriented programming (the mainstream programming methodology nowadays), while defeasible reasoning (in the form of negation by failure, see Section 27.4.1 on page 727) represents the core of logic programming.

2.4. Heuresis and Coherence Evaluation

Using the term *heuresis* we refer in general to all cognitive processes through which a reasoner generates new hypotheses or conjectures and evaluates their merit, without applying precise reasoning schemata.

2.4.1. The Construction of Conjectures

Heuresis is concerned in the first place with the construction of *conjectures*, namely, sets of general propositions that explain the specific beliefs that one has obtained via perceptions, and more generally through experience. We say that in general a set of propositions S explains a proposition Q, when:

1. Q may be derived from S by using ratiocination,
2. S does not contain Q, and
3. Q's derivation requires using general statements or laws.[14]

Some authors have emphasised the ratiocinative process that leads from individual propositions to general laws (inductive logic). We agree that inductive logic can be a very useful tool in many inquiries (aspects of inductive logic may be seen at work in various algorithms for machine learning, though these also include heuristic elements). However, it does not exhaust the process of making conjectures: Hypotheses are usually formed on the basis of a very limited set of individual instances, and they contains predicates that would not have been used to describe these individual instances, unless the agent already had the hypotheses in mind (the classical critique of inductivist approaches to theory formation is provided by Popper 1959).

Let us consider a famous example of a theoretical conjecture, analysed by Hempel (1966, 3ff.). A large number of women who delivered their babies at the First Maternity division of Vienna General Hospital died of an illness know as puerperal fever. The death rate for this illness was much higher in the First division than in other hospitals, and in particular higher than in other

[14] For a more refined characterisation, cf. Hempel 1966.

divisions of the same hospital. The solution to this puzzle was provided by a Dr. Semmelweis, who developed and tested various hypotheses (the deaths were due to overcrowding, to rough examinations by students, to the visits of a priest, to the position in which the women were delivering, and so on). Finally, after having discarded various explanations, Semmelweis came up with the right one: Doctors and students frequently examined women in labour just after having performed autopsies, and their hands carried infectious material from the dead bodies to the delivering women. He tested the hypothesis by having doctors clean their hands with antiseptic liquid before examining the women, and saw that the death rate fell dramatically.

Clearly Semmelweis's conjecture cannot be viewed as the application of ratiocination to the evidence possessed by him. To use the words of Hempel (1966, 15):

> There are, then, no generally applicable "rules of induction," by which hypotheses or theories can be mechanically derived or inferred from empirical data. The transition from data to theory requires creative imagination. Scientific hypotheses are not *derived* from observed facts, but *invented* in order to account for them. They constitute guesses at the connection that might obtain between the phenomena under study, at uniformities and schemata that may underlie their occurrence.

However, ratiocination is not useless in heuresis: Rather than in the process of finding the best hypotheses it may be applied to the process of testing the hypotheses (as emphasised by Carnap 1950), and by considering their implications for past events and new experiments.

Also in the legal domain, the construction of hypotheses plays an important role, and also in the legal domain it cannot be reduced to ratiocination. As a simple example of legal heuresis, consider the invention of the well-known Learned Hand formula for allocating liability for damage: Liability falls upon the party who could most cheaply prevent the damage. This is a conjecture that was not included in the previously available beliefs, but which allows us to explain (and justify) many decisions and regulations in the tort domain, and to anticipate or justify the outcomes of future disputes.

A similar role may be recognised to other broader (and much less plausible) hypotheses advanced by legal theorists. Consider for example the theory that judges tend (and should tend) to maximise economic efficiency (Posner 1983, 11ff.), or the theory that on the contrary, they exclusively aim (and should aim) at securing rights (Dworkin 1977c, 81ff.), regardless of efficiency (Dworkin 1985c).

2.4.2. Functions of Heuresis

Besides being required for the construction of new hypotheses, heuresis also comes into play when competing theories have been conjectured, and thus are

to be comparatively evaluated. Here ratiocination provides the input: It tells us what are the logical relations among the statements included in these theories, and what are their links to the evidence which is accessible to the reasoner. However, as we shall see in Chapters 28 and 29, it is up to non-ratiocinative processes to establish what theory has to be rejected for its inferior coherence (though some standards, applicable via ratiocination, may constrain and direct this judgement).

Moreover, heuresis must come to the help of ratiocination by providing it with objectives: Before engaging in ratiocination, one needs to establish what proposition, among the infinite ones he may derive from the available knowledge, may be relevant for the problems one has to solve.

Finally, heuresis must come to help when there are too many possibilities of applying the available reasoning schemata to one's premises. In fact, one may be unable to proceed only via ratiocination since one does not know what reasoning schema to apply to what premises in order to solve the issues one is addressing. One approach could consist in applying all applicable reasoning schemata to the available premises, and then again all applicable reasoning schemata to the conclusions which have been obtained, and so on. This approach, however, would often lead to the so-called *combinatorial explosion*: The number of reasoning steps to be performed would soon exceed the capacity of the reasoner. Therefore one needs to make heuristic guesses concerning what directions one should take, in order to restrain the space for one's search through ratiocination.

2.4.3. Heuresis and Ratiocination: An Overview

The distinction between heuresis and ratiocination is not a clear-cut one. Also heuresis may correspond to certain schemata: This is the case for some classical schemata of analogical reasoning, such as the *a fortiori* reasoning, which we shall discuss in Chapter 8.1. And also the use of ratiocination—at least by a human being, who cannot serially process symbols as quickly as a computer can—requires some guessing skills.

We may try to clarify the differences between ratiocination and heuresis by saying that the first is *deterministic*, and the second is *non-deterministic*. Ratiocination is deterministic since, when a reasoning schema allows us to directly derive from our mental states a conclusion we are interested in, we just need to apply the appropriate reasoning schema to find the answer. If more than one such schemata provide interesting conclusions, then we may follow any fixed order (for example the alphabetical order of our reason schemata) for inferring these conclusions.

On the other hand, heuresis is not deterministic. We are not able to specify a fixed procedure that ensures a successful heuresis. Firstly, we do not have the full knowledge of all heuristic methods and techniques our mind uses. Secondly, we do not know how to apply all of them according to a fixed procedure.

Thirdly, even if we had this knowledge, the resulting procedure would be so complex that no agent (at least no human agent) would be able to understand and follow it.

The fact is that our brain is not primarily a tool for ratiocination: It is primarily a selective rather than a ratiocinating organ (cf. Edelman and Tononi 2000). The (changing and adaptable) ways in which our brains processes its inputs are provided by the enormous complexity of the neural connections in the brain, the interactions and reciprocal adaptation of different networks of connections, the interaction between signals interchanged in those networks and the chemical messages produced by the body. Ratiocination is a later acquisition, built on top of this machinery. It certainly represents a huge evolutionary advance and gives our species an indisputable primacy over other animals, but can be usefully employed only in connection with those more ancient, complex and deeper functionalities. Those functionalities, besides providing for perception and conditioned learning, also support the process of heuresis.

A second difference between ratiocination and heuresis concerns their connection to justification. The fact that a conclusion was obtained via ratiocination provides the reasoner with a reason for believing that conclusion: One's awareness that one obtained a certain outcome through ratiocination provides one with a justification for endorsing this outcome. For instance, my belief that Jones killed Martin, and that killers ought to be punished leads me to the belief that Jones ought to be punished. If I were asked why I have this belief, I would reply by indicating the reasoning step I have just performed.

This is not the case for heuresis. The process of heuresis produces beliefs, but indicates no explicit ground why these beliefs should be maintained. This is because one is generally not aware of the process of heuresis (one does not know from what previous beliefs a new idea comes from). Moreover, even if one knew the input beliefs of one's heuristic processes, one would not know on the basis of what kind of connections one has come up with a specific idea. The grounds for believing a proposition obtained through heuresis are to be found elsewhere, and in particular, as we shall see, in the ratiocinative connections with other beliefs one currently has, and more generally in the function played by the new idea in one's belief set. Thus, in the case of heuresis there is dissociation between the process through which one obtains certain beliefs, and the grounds on the basis of which one should maintain these beliefs.

The latter observation seems to lead us to the traditional distinction between *context of discovery* and *context of justification* (see: Reichenbach 1938, 6–7; Popper 1959, chap. 1, sec. 2). However, we believe that also ratiocination is a genuine, though limited, source of knowledge, and therefore, a technique for discovery. It is true, however, that it leads us to fairly obvious discoveries, and that, as we said, it provides a justification for them (for a criticism of drawing too sharp a distinction between discovery and justification, see Haack 2003b, 116ff.).

Heuresis undoubtedly plays a fundamental role in legal reasoning, and there is much of it that stays outside the boundaries of legal logic, even if such boundaries are as inclusive as possible. With regard to heuresis, logic can be of little help, since "there is no such thing as a logical method of having new ideas, or a logical reconstruction of this process" (Popper 1959, 32). More generally, explicit methodological prescriptions play a limited role in the search for legal solutions (though many lawyers find them useful) given the way in which heuresis works, even if we do not accept the contention of Haft (1986, 27), that the current "mythical mystical descriptions of legal method can be explained by the fact that a legal method does not exist." We believe that methodological indications can be useful, though their prescription cannot substitute learning by example, as Friedrich von Savigny, the great 19th century German jurist, affirmed, saying that: "One can only learn true legal method, by reading inside the law of the classical Romans and learning from them their approach" (quoted by Haft 1986). More generally methodology can assist and stimulate, but cannot substitute trained intuition.

Finally, legal heuresis can coexist with ratiocination, not only complementing it, but also interacting with it. As we shall see in Chapter 28 it is possible to control, check and validate the outcomes of heuresis, resorting to analytical inference and coherence evaluations. Moreover, heuresis provides a stimulating challenge for the student of legal thinking, who can extract some aspects of legal heuresis, submit them to a precise analysis, and possibly also transfer them into computer systems.

Chapter 3

THE DOXIFICATION OF PRACTICAL REASONING

In the previous chapters, we have viewed practical reasoning as being a procedure for acquiring (or abandoning) conative states: While theoretical reasoning consists in moving from one's current beliefs and perceptual states into new beliefs, practical reasoning consists in moving from one's beliefs and conative states into new conative states. We have also seen that practical reasoning can be as rational as theoretical reasoning can be.

We shall now consider an important option that is available to an agent possessing both types of cognition. One can perform practical reasoning by using some of the resources one has for theoretical reasoning. This happens by reformulating conative states as if they were epistemic states, and in transferring into epistemic reasoning the reasoning schemata available for practical reasoning. We call this process the *doxification* of practical reasoning.[1]

3.1. Doxification

Consider, for example, the inference that leads us to adopt the intention of executing a plan, according to schema *teleological inference*. As we have seen above, when one (*a*) has a goal, and (*b*) believes that the plan is a satisfactory way of achieving the goal (the plan satisfies one's likings sufficiently well, and better than any alternative plan one has found through an adequate inquiry), then (*c*) one may adopt the intention to execute the plan. On the other hand, one abandons such an intention as soon as one believes that a better plan is available.

The same result can also be obtained in an indirect way. One may ask oneself the apparently theoretical question "What plan is such that I should adopt it?," a question that may be viewed as an abbreviation for "What plan is such that I should have the intention of executing it?" In replying to this question, as we shall see, one will be led to recast one's conative states in the form of normative beliefs.

[1] We take the basic idea of doxification from Pollock (1995, 277ff.), who speaks in this sense of *doxastification*: "Rather than requiring separate computational modules for defeasible epistemic reasoning and defeasible practical reasoning, human cognition makes do with a single module dedicated to epistemic reasoning and then integrates practical reasoning into that module using a technical trick. The trick involves 'doxastifying' normative judgement." We have reduced *doxastification* to *doxification* just to provide a shorter term to express this idea.

3.1.1. Adoption-Worthiness and Bindingness

We need to introduce some terminology, to avoid the awkwardness of the expressions like "this plan is such that I should have the intention of executing it."

Note that English, as other modern languages, has no synthetically unambiguous way of expressing the idea of *necessity* or *optimality* (as distinct from the idea of possibility). The suffix *able* (or *ible*), is sometimes used to convey also this idea: We speak of applicable rules, desirable objectives, pleasurable sensations, preferable choices and so on. However, this suffix is likely to engender ambiguities, having the idea of possibility as its primary meaning. For instance, one may wonder whether an applicable rule is a prescription that one may or may not apply, or rather a prescription that one is required to apply. Similarly, one may wonder whether a desirable goal is an objective that one may or may not desire to attain, or whether one is required to aim at its achievement. To cite a famous example, when John Stuart Mill said that happiness is desirable (Mill 1991b, 168), was he meaning that there is the possibility that people desire it, or that they are bound to do that?[2]

To avoid such ambiguities, we say that a mental state (or its content) is *adoption-worthy*, to express *cognitive optimality*. In other words, by saying that a mental state is adoption-worthy, we mean that this mental state is worthy of, deserves or requires being adopted, i.e., that we should adopt it. Said otherwise, adopting this mental state is necessary to fulfil our cognitive duty, that is, to proceed correctly in our cognitive effort, according to the requirements of rationality.[3] For the sake of conciseness, we shall also use the word *binding*, to convey this idea (we shall comment on the use of the term *binding* in Section 3.1.5 on page 93).

Definition 3.1.1 *Adoption-worthiness (bindingness). A mental state (or a noema) is* adoption-worthy*, or more simply,* binding*, when it (or its content) deserves to be adopted.*

Therefore, when one says that a mental state—a belief, a liking, a desire, or an intention—is adoption-worthy (binding), one means one should have that belief, liking, desire, or intention. The same ideas are expressed by saying that the corresponding noema—proposition, preference, goal, or instruction—is adoption-worthy (binding).

[2] Note that the ideas of necessity (or obligation) and possibility (permissibility) would be expressed differently, for example, in Latin, where one would be able to distinguish *amabilis* (that may be liked) from *amandus* (that should be liked).

[3] We cannot develop here the idea of a cognitive duty, and analyse its commonalities with and differences from other kinds of duties, like prudential, ethical or legal ones. Let us just observe that this idea can be linked to the attempts to build a deontologic notion of justification, like those advanced, among others, by Chisholm 1977, BonJour 1985, and Pollock and Cruz 1999.

3.1.2. The Notion of Doxification

We shall not try to define a semantics for the notion of *adoption-worthiness* by appealing to other, more primitive notions: This idea needs rather to be clarified by making explicit the conceptual role it plays in reasoning. We shall do that by analysing the reasoning processes that we call *doxification* and *de-doxification*, by which we mean respectively, the transformation of a conative state into a belief and vice versa.

Let us consider, for example, how doxified planning may mimic the direct adoption of a plan:

- Direct plan-adoption. According to schema *plan adoption* (see Section 1.3.2 on page 18), when one has a goal (one desires something) and one believes that a plan is a sufficiently good way of achieving that goal, one will form the intention to execute the plan.
- Doxified plan-adoption. When one believes that a certain goal is adoption-worthy and one believes that a plan is a sufficiently good way of achieving that goal, one will form the belief that the plan is adoption-worthy.

The same happens for the retraction of plans:

- Direct plan-retraction. According to schema *teleological defeat* one will abandon one's intention to execute a plan as soon as one believes that a different plan provides a better way of achieving the goal of the earlier plan.
- Doxified plan-retraction. One will abandon one's belief that a plan is adoption-worthy as soon as one believes that a different plan provides a better way of achieving the goal of the earlier plan.

In general, doxification appears to be a reasoning technique that allows one to store one's conative states in the form of beliefs and manipulate them accordingly, in order to achieve rational determinations: Rather than memorising the intention to implement a plan, one memorises one's belief that the plan is adoption-worthy (binding); rather than memorising the desire for something, one memorises the belief that something is desirable (it is a valid object for desire). However, the condition under which it is rational to have such beliefs remain the same conditions under which it is rational to have the corresponding conative states (no progress is done in this regard).

Let us use again our ice cream example. Assume that, moved by my desire for ice cream, rather than working on my book I spend my time in devising plans for getting ice creams, and I come to believe that the plan ⌈At 5 pm I shall go to the ice cream shop round the corner, and then I shall buy an ice cream⌉ is a sufficiently good one. Since I am a doxifying agent, this would lead me to the belief that ⌈this plan is adoption-worthy⌉ (rather than directly to the adoption

of this plan). Then I would move from having this belief to the adoption of the plan, so that I will form the intention ⌈At 5 pm I shall go to the ice cream shop round the corner, and I shall buy an ice cream⌉.

Retraction of a plan would take a similar route. Assume that I form the belief that another plan is better (there is a new shop, not too far away, where I can get better ice creams). This would lead me to retract the belief on the adoption-worthiness of the plan of going to the nearest ice cream shop and buy there an ice cream. Correspondingly I will retract my adoption of this plan.

Note that doxified practical reasoning leads to the same outcomes I would have obtained by direct practical reasoning, with regard to both the formation and the retraction of intentions. Only the reasoning process is different: Direct practical reasoning immediately infers the intention to adopt the plan, doxified practical reasoning takes the detour of forming the belief that the plan is adoption-worthy.

The kind of reasoning we have just seen in relation to whole plans also applies to single instructions. So, rather than forming the intention to execute an instruction—for instance, the intention to execute the instruction ⌈when I finish eating lunch, I shall take a nap⌉—I will form the belief that the intention to execute this instruction is adoption-worthy.

As we have just seen, *doxified practical reasoning* mimics direct practical reasoning on the basis of the following ideas:

1. The conditions for (rationally) believing that a mental state is adoption-worthy are the same as the conditions for (rationally) adopting it.
2. The conditions for believing that a mental state is not adoption-worthy are the same as the conditions for abandoning it.
3. When one believes that a mental state is adoption-worthy one is justified in endorsing that conative state.

The third idea leads to the reasoning schema we call *de-doxification*:

Reasoning schema: *De-doxification*

(1) believing that mental state (or noema) M is adoption-worthy

——— IS A REASON FOR

(2) endorsing M

3.1.3. The Rationale for Doxification

Doxification makes techniques for treating and expressing beliefs available to practical reasoning. Moreover, it allows one to distinguish clearly the conative states one currently has (one's current having a certain liking, desire, intention, etc.), from the states that may emerge from a fresh cognitive process.

In other words, it allows one to distinguish:

- the (epistemic) question ⌈What desires (intentions, wants, etc.) am I currently having?⌉, and
- the (practical) question ⌈What desires (intention, wants, etc.) should I have (are adoption-worthy to me)?⌉.

These two questions play a different role in one's cognition.

The first stimulates a report on one's current conative states, on the basis of the introspective examination of one's own current state of mind. The second, on the contrary, activates a fresh reasoning process that may lead one to form new conative states, or to revise one's current conative states. This process may fail to provide belief, but an attempt seems required to answer seriously to the second query.

The first question is similar to asking oneself for a report on one's own current epistemic condition ("Do I believe that the ice cream shop near the corner is open?"), which may be answered on the basis of an introspective analysis. The second question is similar to asking oneself how things are in the world ("Is it the case that the ice cream shop near the corner is open"), which stimulates a process of inquiry, intended to form a fresh belief on the matter.

The distinction between asking what conative states one has and asking what conative states one should have enables us to differentiate our approach from emotivistic conceptions of normative reasoning and normative language. We are not saying that true normative propositions are dependent upon the contingent conative states of the reasoner: We are not saying that the proposition ⌈something is good (for me)⌉ is true whenever I like it, or similarly that the proposition ⌈something is obligatory (for me)⌉ is true whenever I feel committed to do it. We are rather saying the following:

- one should (rationally) believe that something is good exactly when one should (rationally) like it, and similarly
- one should (rationally) believe that something is obligatory, exactly when one should (rationally) intend to do it.

Rational (or true, if you prefer) normative beliefs only accompany rational conative states, namely, the outcomes of correct practical cognition.

The process of doxification, by putting a further step between reasoning and action, provides us with a finer approach to practical decision-making, which is particularly required when we need to balance our different interests, roles and capacities. Consider, for example, how, before deciding what to do this morning, I may consider what I should do out of my concern for my health (do some physical exercise), for my family (take my children to the park), for my job (sit down and prepare my lectures), and so on.

Note that one has different concerns—as we shall see, one may be concerned for oneself, for one's fellows, or for the various communities in which one participates—and reason in different roles (as an individual, as a member

of a social group, as having a special role in that group, and so forth). Before effectively forming a definitive want to act in a certain way, one needs to consider what conative states would correspond to each of the concerns one is having and the roles in which one is acting. This is done by forming a belief that a certain conative state is binding (adoption-worthy) with regard to a certain concern one has, or to a particular role one is playing, or to a particular perspective one is adopting. This belief may not be sufficient to determine one's behaviour, since one may need to consider one's other concerns and roles.

3.1.4. The Doxification of Conative States

Doxification may operate with regard to different conative states.

Let us first consider *likings*: A doxifying reasoner, rather than simply having preferences, would form beliefs concerning what he or she should like, that is, about what preferences are adoption-worthy, or said otherwise, about what is *good* or what represents a *value*. For example, I may wonder whether I should like having ice creams (whether is it good that I have ice-creams), or whether I should be indifferent to them, as I should be with regard to every sensual pleasure, according to stoical philosophy.

For a legal example, consider how a judge may ask herself what are the values proper to her legal system, and may conclude, for instance, that individual liberty, work, health, communication, culture, happiness, participation are such values. These are the things that are valuable from the legal point of view, the goods that should orient legal reasoning. Consequently, the judge, at least when acting in her official position, will adopt these likings and reason accordingly.

The process of doxification equally concerns *desires*. A doxifying reasoner, rather than simply forming and withdrawing desires (according to his or her likings and other mental states), forms and withdraw beliefs concerning what he or she should desire, that is, beliefs concerning the adoptions-worthiness of certain goals (under certain conditions). For instance, I may wonder whether I should desire having ice creams, or whether I should refrain from having this goal, given that by now all such shops have closed down.

As a legal application of this reasoning schema, consider how the above judge, who believes that her community has certain legal values, may form the belief that one of these values, being realisable in the case at hand, deserves being adopted as a goal to be implemented. For instance, believing that human health is one of the legal values at issue in that case, she may conclude for the adoption-worthiness of the goal of realising this value.

Finally, also *intentions* can be doxified. One, rather than adopting or abandoning the intention of executing certain instructions (plans), will form or abandon beliefs concerning whether one should adopt those instructions, that is, concerning whether those instructions deserve being adopted. This is a belief that one should form—as we said in Section 1.3.2 on page 18 when introducing

schema *teleological inference*—as soon as one believes that a plan is sufficiently good, while not having in mind a better plan.

As a legal application of this reasoning schema, consider how our judge, who has adopted in her legal reasoning the goal of contributing to the realisation of the value of health, may consider that for this purpose the best solution is to adopt (in the name of her community) the instruction ⌈one shall fully compensate the damages one causes to the physical and mental health of others⌉. As a matter of fact, the endorsement of such a rule by Italian judges in the '70s marked a significant evolution in Italian tort law (previously, only damage causing a reduction of one person's future earnings would be legally relevant with regard to tort liability).

Obviously, when considering whether this rule should be adopted as legally binding, the judge needs to consider not only how implementing this rule would contribute to the goal of protecting health, but also how it will impact on other legal values (the efficient functioning of the judicial process, individual freedom in social relations, and so on). Moreover, she needs to consider, as we shall see in Chapter 12, the chance she has of contributing, through her decision, to the general (or a sufficiently generalised) adoption of this rule by the judiciary and the citizens, and how this choice fits with her role in the legal process.

The notion of doxification allows us to introduce two concepts we shall frequently use in the following pages, *normative belief* and *normative proposition*.

Definition 3.1.2 *Normative beliefs and normative propositions. A* normative belief *is a belief that doxifies a conative state. A* normative proposition *is the content of a normative belief.*

As we shall see in the following, our notion of a normative belief includes believing that something is a value to be appreciated, a goal to be pursued, a factor promoting an outcome, or a binding rule, and also believing that, under appropriate circumstances, certain actions are obligatory or permitted, certain persons have certain rights or other entitlements, various legal or moral qualifications hold. The diverse contents of all such beliefs constitute what we call *normative propositions*.[4]

3.1.5. The Idea of Cognitive Bindingness

Reasoning agents have various ways of expressing the concepts we have so far introduced, with various nuances. We have suggested that, rather than saying that a certain practical content (value, goal, instruction) is adoption-worthy, we may

[4] Note that our idea of a normative proposition is different from the notion of a normative proposition that is provided by Alchourrón and Bulygin 1971, sec. 7.2, 121ff. These authors use the term *normative proposition* to refer to those epistemic assertions one may express about a normative system (a set of normative statements), like the assertion that such a system contains of entails certain statements (see also Alchourrón 1969).

also say that this content is *binding* (such that one is bound or constrained, according to rationality, to adopt it). According to our terminological stipulation, belief in the adoption-worthiness of an instruction and belief in the bindingness of this instruction are the same mental state. This mental state represents the doxification of the intention of implementing the instruction, and it is to be adopted and retracted exactly in the case when one would (rationally) adopt and withdraw this intention.

However, in the practical domain one tends to speak of bindingness only when there may be a conflict between one's determination to adopt a certain content and other psychological tendencies one has or may have. This is the case when the adoption-worthiness of a certain content results from a perspective that is different or broader than one's self-interest (such as when one is reasoning out of the concern for one's fellows, for a community, or for a certain institution).

For instance, it may seem strange for me to say that my intention of going to restaurant r is binding to me, since r provides me with the best value-for-money ratio. It would seem less strange to say that the instruction ⌈I shall go to the gym⌉ is binding to me: I need to exercise to get fit, but my laziness would lead me not to go to the gym. It would seem even more appropriate to say that the goal of keeping my travel expenses within the limits of the travel budget that has been allocated to me is binding to me, in my role of a civil servant: I need to adopt this goal out of the concerns that are linked to my role, though I would like to spend much more. Accordingly, though we assume a perfect logical equivalence between adoption-worthiness and bindingness, we shall speak of bindingness only when self-interest is not at issue.

Doxification also concerns the inference schemata for intentions (see Section 1.4 on page 31): When one believes that conditional or general instructions are binding, one is lead to believe (under appropriate conditions) that the corresponding unconditional, or specific instructions are binding.

For instance, when a judge believes in the bindingness of the instruction ⌈one shall compensate any damages one causes to the physical and psychical health of other people⌉, he will conclude for the bindingness of the instruction ⌈Jones shall compensate any damage he caused to the physical and psychical health of Brown⌉. This conclusion, and the belief that ⌈Jones caused damage worth € 1,000 to the health of Brown⌉, will lead the judge to believe in the bindingness of the instruction ⌈Jones shall pay Brown € 1,000⌉.

In conclusion, the idea of cognitive bindingness leads us to connect psychological and normative notions:

- believing that something is a *value* amounts to believing that this is a *binding preference* (that it should be liked);
- believing that something is a valid *goal* amounts to believing that this is a *binding goal* (that it should be pursued);
- believing that an *instruction* is valid amounts to believing that it is a *bind-*

ing instruction (an instruction that one should have the intention of executing).

Though the terms *value* and *valid* can also be understood in different senses, this appears to be an important way in which they are frequently used, as we shall see in Chapters 12 and 13.

Note that our notion of *cognitive bindingness* needs to be carefully distinguished from the notion of *obligatoriness*. The most common and proper use of the predicate *obligatory* consists in applying it to action-descriptions: This predicate expresses that an action ought to be done by an agent (see Section 17 on page 453).[5] On the contrary, we apply the predicate *binding* to a noema (a cognitive content), to express that rationality requires that this content is adopted by the agent. So we may apply this predicate to any kind of noema, both to propositions describing states of affairs, and to practical contents (preferences, goals, instructions).

We shall later comment on the specific cognitive function that is played by the idea of bindingness. By now let us just observe that from our perspective, saying that ⌈proposition A is binding⌉ does not coincide with saying that ⌈it is obligatory that A⌉, as the following example will show.

Consider, the following bindingness-proposition: ⌈the proposition that ⌈Mary copies her exam papers⌉ is binding⌉. This bindingness-proposition expresses the idea that we are bound to accept (believe) that ⌈Mary copies her exam papers⌉. We can reasonably endorse this idea whenever our evidence sufficiently supports the conclusion that Mary does indeed copy her papers.

Consider, on the other hand the absurd deontic proposition: ⌈it is obligatory that ⌈Mary copies her exam papers⌉⌉. This deontic proposition expresses a very different idea: Mary is under the obligation to copy her exam papers.

A connection between bindingness-propositions and deontic propositions exists when the content of a bindingness proposition is provided exactly by a deontic proposition: According to schema *de-doxification* the belief that ⌈it is binding that ⌈A is obligatory⌉⌉ leads to the belief that ⌈A is obligatory⌉. However, this schema holds for the belief in the bindingness of any proposition and not just for the belief in bindingness propositions expressing the obligatoriness of an action (for any proposition A, believing that ⌈A is binding⌉ leads to believing that A). Exactly in the same way, from ⌈it is binding that A is permitted⌉ one may conclude ⌈A is permitted⌉.

A specific logical connection between bindingness-propositions and deontic propositions only exists between one's belief in the bindingness of the instruc-

[5] There are cases in which the predicate *obligatory* is applied to propositions describing states of affairs (other than the accomplishment of an action), but it seems that these are just elliptic formulations, where the agent is left implicit, and the action is specified by indicating the state of affairs resulting from its accomplishment. Consider, for example, the proposition ⌈In this street it is obligatory that the cars' speed is lower than 50 kilometres per hour⌉.

tion that ⌈j shall accomplish A⌉, and one's belief that ⌈it is obligatory that j accomplishes A⌉. As we shall see in Section 3.2.1 on page 100, this connection depends of the fact that the second belief represents the doxification of the first one: The proposition ⌈it obligatory that ⌈j accomplishes A⌉⌉ can be seen as another way of saying that ⌈the intention that ⌈j shall accomplish A⌉ is binding⌉.

Similarly, as we shall see in Section 3.2.2 on page 101, the proposition ⌈it permitted that ⌈j accomplishes A⌉⌉ can be seen as another way of saying that ⌈the intention that ⌈j may accomplish A⌉ is binding⌉.

3.1.6. The Doxification of Cognitive Instructions

In the previous section we have seen how doxification may work for behavioural instructions, concerning the performance of external actions (see definition 1.4.1). However, we can doxify also *cognitive instructions*, concerned with mental activity (see definition 1.4.2).

Let us first consider how a legal reasoner moves from believing in the bindingness of a cognitive instruction into applying that instruction. Assume that a judge believes the following bindingness-proposition:

> It is binding that ⌈everyone shall accept that ⌈the amount of compensation due to a person for causing permanent impediment to walking is the result obtained by multiplying € 1,000 for the years of the expected life of the damaged person⌉⌉.

This belief will lead the judge, according to schema *de-doxification*, to endorse the following conclusion:

> Everyone shall accept that ⌈the amount of compensation due to a person for causing permanent impediment to walking is the result obtained by multiplying € 1,000 for the years of the expected life of the damaged person⌉.

The latter belief, according to schema *specification*, will lead to:

> I shall accept that ⌈the amount of the compensation due to a person for causing permanent impediment to walking is the result obtained by multiplying € 1,000 for the years of the expected life of the damaged person⌉.

Endorsing this cognitive instruction will finally lead the judge to execute it (according to schema *executing cognitive intention*, see Section 1.4.3 on page 34), and to acquire the following belief:

> The amount of compensation due to a person for causing permanent impediment to walking is the result obtained by multiplying € 1,000 for the years of the expected life of the damaged person.

The latter belief—combined with the belief that Brown's accident caused him a permanent impediment to walking, and that his expected life span is 30 years (and that $30 * 1{,}000 = 30{,}000$)—will lead the judge to syllogistically conclude that:

> The amount of compensation due to Brown is € 30,000.

We shall now consider specifically the link between cognitive and behavioural instructions, as it appears to a doxifying reasoner.

For instance, assume that Mary, a cook in a kindergarten, has to face an epidemic that is related to food infection. She asks herself: What instructions (determinations) shall I adopt, out of my concern for the health of the children, to prevent the spread of the epidemic? Assume that she concludes that she should adopt the behavioural instruction that she shall never give the children any uncooked food. This practical belief is supported by her belief that cooking the food will kill the germs causing the infection.

Her belief in the adoption-worthiness (bindingness) of this policy leads her to adopt that policy, that is, to form the intention that she shall never give uncooked food to the children. Mary is happy with the choice of this plan of action, which allows her to pursue her mission of feeding the children, while being sure that she is not harming them.

To be able to apply her policy, however, Mary has to solve an apparently theoretical question: "When is a food uncooked?" To answer this question she may refer to linguistic knowledge and consult a dictionary to find out the meaning of "uncooked." More ambitiously, she may investigate non-empirical realities and look for uncookedness in a dimension inhabited by conceptual realities: When does a food count as being uncooked? When is it endowed with the non-empiric property of uncookedness? When does it partake to the idea of uncookedness?

However, being a practically minded woman, Mary does not care about such inquires, but only about the health of her children: Since she views cooking as a way of killing germs through heat, and since she believes that all germs will be killed at 150 degrees Celsius, she concludes that the following cognitive instruction is adoption-worthy to her: ⌈I shall accept that food is uncooked, whenever it has not been heated above 150° Celsius⌉.

Let us now see how Mary will apply this instruction. Faced with a food that has not been heated up to that temperature, she will conclude that she shall accept that it is uncooked. This belief, according to reasoning schema *executing cognitive intention* will lead her to believe that the food is uncooked, as you can see in Table 3.1 on the following page. Note that the cook's reasoning in Table 3.1 on the next page can be shortcut, if she translates the proposition

> I shall accept that food is uncooked, whenever it has not been heated above 150° Celsius

into the following form:

(1) I shall accept that food is uncooked whenever it has not been heated above 150° Celsius;
(2) this dish has not been heated above 150° Celsius

---

(3) I shall accept that this dish is uncooked

---

(4) this dish is uncooked

Table 3.1: *Inference with cognitive intentions*

(1) food is uncooked whenever it has not been heated above 150° Celsius;
(2) this dish has not been heated above 150° Celsius

---

(3) this dish is uncooked

Table 3.2: *Doxification of the inference with cognitive intentions*

> food is uncooked whenever it has not been heated above 150° Celsius

and stores the latter proposition in her mind. This allows her to reduce the inference in Table 3.1 above to the inference in Table 3.2, which looks like an epistemic inference.

Observe that the epistemic-like inference of Table 3.2 leads the cook exactly to the same result (her belief that the food is uncooked) she could achieve by using the corresponding cognitive instruction (first inferring the intention to believe that the food is uncooked, and then forming that belief).

One may want to make a step forward and say that the fact that Mary has adopted (or should adopt) the belief ⌈if a food has not been heated above 150° Celsius, it is uncooked⌉ constitutes a new reality (a rule, or a rule-based connection), according to which the fact that a food has not been heated above 150° constitutes its uncookedness.

We shall consider in Section 3.2 on the next page how, and in what sense, a normative reality may be constituted by one's beliefs. By now, let us just observe that the propositional doxification of cognitive instructions may be viewed as a psychological foundation of the phenomenon of the so-called *constitutive rules*, which have kept busy so many philosophers of law and of morality.

Such rules are usually said to be essentially different from *regulative rules*, or better *deontic rules*, namely, those rules which express the obligation or the per-

mission of performing an action. While deontic rules directly govern behaviour, constitutive rules are affirmed to create (to constitute) new states of affairs(see Searle 1995, 9ff.), such as the following facts:

- the fact that a food is uncooked , as distinguished from, but supervening upon, the fact that it has not been heated above 150° Celsius),
- the fact that one has a certain nationality, as distinguished from, but supervening upon, the fact that one was born in a certain place or from certain parents, or
- the fact that one committed a crime or made a contract, as distinguished from, but supervening upon, the fact that one has killed somebody or has made an agreement.

From our perspective, constitutive rules, or better *non-deontic rules*—in the sense of rules establishing non-deontic qualifications—are indeed derivative upon cognitive instructions. They basically are reasoning shortcuts: Their application leads, through a simpler computation mimicking epistemic reasoning, to the same conclusion one would obtain by applying cognitive instructions. This is the case both when one is reasoning individually and when one is reasoning as a member of a group (this issue will be examined in Chapter 9).

Such a cognitive simplification unfortunately produces philosophical complications. We believe that such complications can be at least partly overcome, when one focuses on the function of constitutive rules in reasoning, rather than on their "ontological status," and considers their functional equivalence to *cognitive instructions*.

3.2. The Projection of Practical Beliefs

As we have seen above, for rationally forming the belief that a conative state is adoption-worthy, one does not need to assume that there is an external state of affairs corresponding to the content (the noema) of that conative state. One simply needs to correctly derive this belief on the basis of the (doxastic counterpart of the) reasoning ways that, in direct practical reasoning, would enable one to rationally form that conative state. For instance, the cook of the example above when concluding that the instruction ⌈I shall never give uncooked food to my children⌉ is binding (adoption-worthy) to her does not need to assume that there is an external reality which corresponds to this instruction, and makes it true.

However, when one believes that one should adopt certain conative attitudes, one tends to assume that states of affairs exist corresponding to these attitudes, to wit, that there are *normative states of affairs*. This takes doxification one step further, as we shall see in the following section.

3.2.1. Doxified Shall-Intentions

When I believe that the instruction ⌈I shall make action *A*⌉ is *binding* (adoption-worthy), I tend to project this instruction into the world, assuming that action *A* has a property, namely, the property of being *obligatory*. Similarly, we project *conditional instructions* we believe to be binding into *causal-like connections* holding between factual preconditions and normative effects.

For instance, assume that I believe that I should adopt the instruction ⌈I shall help my brother, when he is in need⌉. According to this assumption, I shall form the belief that there exists a link between my brother's being in need and my obligation to help. In other words, I shall view this instruction being paralleled by a causal-like connection between my brother's state of need and my obligation to help him, a connection that can be described by apparently epistemic propositions such as the following:

> if my brother is in need, then I ought to help him

or even:

> the fact that my brother is in need determines (causes) my obligation to help him

A similar type of projection also holds for legal beliefs. So, my belief that I should adopt (in legal reasoning) the instruction:

> one shall compensate people whom one has damaged

will be paralleled by my belief in the existence of a *legal connection*, namely, a causal-like connection existing as a legal ought-to-be, as Kelsen (1960, sec. 4.b) would say (see also Kelsen 1992, sec. 11).[6] According to such a connection, producing damage causes an obligation to repair:

> if one damages another, then one ought to compensate the damage

or even

> one's damaging another determines one's obligation to repair the damage.

Thus, to doxifying reasoners the fabric of the world appears to be enriched with a new dimension: the practical state of affairs corresponding to their practical beliefs. In particular, these states of affairs include the obligations and the permissions corresponding to shall- and may-instructions that the "doxifiers" believe to be binding (out of any of their particular concerns or roles).

[6] For a discussion of the Kelsenian idea of ought-to-be, see Pattaro, Volume 1 of this Treatise, sec. 1.1 and chap. 14; for our criticism of it, see Section 21.3 on page 563.

Normative beliefs are critically discussed in Pattaro (2003, 136ff.) in connection with the idea of *duty sentences in the form of judgements* originally proposed by Axel Hägerström, the founder of Scandinavian legal realism (see Hägerström 1953, 127–32), that is, the idea that such beliefs are practical attitudes in disguise.

We agree with the realist tradition in considering that normative beliefs are functional to practice, and are conducive to conative states. However, our cognitive perspective leads us to emphasise the rational aspects (the opportunities for practical cognition) that are offered by doxification: Having such beliefs—though it may seem ontologically suspect—is useful, and indeed rational, for a practical reasoner. Reasoning with practical beliefs is an appropriate way to deal with many practical issues, and thus it is a sound way of reasoning, if one remains within the cognitive purposes that doxification is intended to satisfy.

Consider for example, the instruction adopted by Mary, the kindergarten cook: ⌈whenever a food has not been heated above 150° Celsius, I shall believe that it is uncooked⌉. Her belief that she should adopt this instruction leads her to assume a non-deontic connection: ⌈the fact that a food has not been heated above 150° Celsius determines its uncookedness⌉. She will indeed believe that ⌈not having been heated causes a food to be uncooked⌉.

Similarly, a judge's conclusion that her community should adopt, for the purpose of legal reasoning, the instruction ⌈anybody who damages one's health shall pay compensation⌉—this being the best available way to promote the value of health—leads the judge not only to intend that this instruction is executed, but also to project a corresponding connection into the world, that is, to believe that, according to the law, ⌈damaging one's health determines the obligation to pay compensation⌉ (on normative determination, see Section 20.2 on page 523).

3.2.2. Doxifying May-Intentions

The idea of a projection also extends to may-intentions. A may-intention is doxified into the belief that an action is allowed or *permitted*.

For example, my intention that I may have a drink tonight gets doxified into the belief that I am permitted to have a drink. Similarly, my intention that my daughter may go out tonight is projected into the fact that she is permitted to do that.

As a legal example, consider how a judge, when forming the intention (from the perspective of his community) that women may take off their bras at the sea, may conclude adopting the belief that topless is permitted on public beaches (this happened in Italy at the end of the 1970s).

There is another way to express the doxification of the may-intention that action A is performed: Rather than saying that A is permitted, we may say that A's omission is not obligatory, i.e., that A is not forbidden. As we shall in

see in Chapter 17, saying that A is not forbidden amounts to saying that A is permitted.

In fact, a may-intention to do an action A can be seen as a negative intention to omit A: When one intends that A may be performed, one excludes that one shall intend that A is omitted (the idea of permission as exclusion is developed by Hernandez Marín 1998, chap. 16). Excluding the intention that A is omitted is no purely negative state of mind, it does not merely consist in not having the intention that A is omitted. Nor is this state of mind obtained through introspection: It is not the case that ⌈I can conclude excluding the intention that A is omitted, whenever introspection tells me that my current mental states do not comprise the intention that A is omitted⌉. To reach this conclusion a specific inquiry is called for.

This seems to correspond to what we generally do when we have to establish whether a negative state of affairs holds. To establish that the negative proposition ⌈NON A⌉ holds it is not sufficient that one fails to find A among one's beliefs, or even that one fails to derive A from one's beliefs. It is rather necessary that one finds an incompatibility between one's beliefs and A, so that one can exclude that A is true. For example, for me to establish that my son Aldo is not in his room, it is not sufficient that I fail to retrieve in my mind the belief that Aldo is in his room, nor that I fail to conclude that Aldo is in his room from my current beliefs (I may have no information about where he is, so that neither I can conclude that he is in, nor I can conclude that he is out). Only when I get some information that is incompatible with his being in his room (I hear a noise in the kitchen, and I know that he is the only person in the house besides me), I can conclude that Aldo is not in his room.

Similarly, my exclusion of the possibility that I adopt a certain intention gets doxified into the belief that it is not the case that the state of affairs doxifying the excluded intention holds. Correspondingly, my exclusion of the intention that I shall do A gets doxified into my belief that it is not obligatory that I do A, i.e., into my belief that I am permitted to omit A. Correspondingly, my exclusion of the intention that I shall omit A gets doxified into my belief:

- that it is not obligatory that I omit A, or equivalently,
- that I am not forbidden to do A, or equivalently,
- that I am permitted to do A.

This leads to the equivalence between the negation of a prohibition and a permission, an equivalence that we shall discuss in Section 18 on page 479.

3.3. Normative Beliefs and Normative States of Affairs

In Chapter 3 we approached doxified practical reasoning at a purely epistemic or cognitive level, that is, we considered what function normative beliefs play

in cognition. Seen at this level, doxified practical reasoning gives us no specific problem: It is a cognitive tool that facilitates us in reaching the same conclusions we would achieve through direct practical reasoning.

From a purely functional perspective, there is no problem is projecting our conative states into the external world, assuming the existence of normative properties and states of affairs, and adopting corresponding beliefs: Doxification is a useful trick, which provides us with a further chance to use our epistemic skills in the practical domain, and so enhances our ability in practical reasoning. This is the position that is taken by Pollock (1995, 275):

> [A doxified practical] judgement is epistemic in name only. It requires no "objective fact" to anchor it or give it truth conditions. It is merely a computational device whose sole purpose is to allow us to use defeasible epistemic reasoning to accomplish defeasible practical reasoning.

A reflective practical reasoner, however, may transfer this issue at the ontological level, asking "What are the state of affairs that correspond to practical beliefs?" or "What states of affairs make practical beliefs true?" We cannot here provide a thorough discussion of such a fundamental philosophical question, but we shall not refrain from addressing it within the limits in which it is relevant for our purposes.[7]

3.3.1. Normative States of Affairs and Current Cognitive States

It is a fact that when one forms normative beliefs by doxifying one's conative states, one also tends to couple such beliefs with states of affairs, which are projected into the external words. This also concerns those normative beliefs that have been obtained through reasoning. For instance, assume that the kindergarten cook, besides believing that that she ought not to serve uncooked food to her children, also believes that a particular dish is uncooked. These premises lead her to conclude that she ought not to serve that dish, i.e., that she is under the obligation not to serve that dish, this obligation having been determined by the dish's uncookedness.

The fate of the projections of (doxified) conative states is obviously linked to the fate of the conative states to which they correspond. If the cook abandons her belief on the bindingness of the instruction ⌈I shall not serve uncooked food⌉ (because she has come o know that the infection was not caused by food, but by the contact with infected children), she would stop projecting that instruction onto the external world, i.e., she would stop believing that a food's uncookedness determines the obligation not to eat it.

[7] This issue has been extensively discussed in the literature. For a series of sceptical considerations on the matter, cf. Mackie 1977, and with specific regard to the law see Patterson 1999 and Pintore 2000. For vindication of the existence or moral and legal entities, properties and relations, see Moore 2003. For a discussion of legal ontology see also Pavlakos 2003.

It is not easy to establish an appropriate semantics from normative beliefs, and a corresponding ontology for normative states of affairs.

An answer—unfortunately, an untenable one, as we shall see—is that normative propositions are made true by the fact that the agent has the corresponding conative state. From this perspective, Mary's intention not to serve uncooked food verifies the proposition that she ought not to eat uncooked food as well as its implications (like the proposition that she ought not to serve the children a particular dish of vegetables). The proposition that she ought not to serve uncooked food remains true as long as she continues having the intention not to serve such food. As soon as she stops having this intention, the propositions become false (and she no longer has the obligation).

Similarly, this perspective leads us to say that the proposition that some things (for instance, freedom, welfare, peace, etc.) are values holds true as long as one continues to like those things (to have a preference for them). For instance, as long as Mary cares for the health of the children, it holds true that children's health is a value. Were she to become cynical, indifferent, or completely egoist, the proposition that the health of the children is a value would become false (at least as far as Mary is concerned).

In general, the approach we have just described expresses the view that practical states of affair supervene upon the fact that one adopts the corresponding conative state: My liking something makes it likable (valuable or good), my desiring something makes it desirable, my intention to implement an instruction makes it binding.

Unfortunately, this view cannot be maintained. Consider again the case of Mary, the kindergarten cook, who has the intention to avoid serving uncooked food to the children (and believes that she should have this intention), on the basis of her belief that such food would be dangerous for their health. Assume that she comes later to know that there is no danger in eating uncooked food (the germs causing the infection were transmitted through contact with infected children, and not through the food). At the cognitive level, the situation is quite clear. Her belief that there is no danger related to uncooked food leads her to withdrawing all of the following:

1. the intention to avoid serving uncooked food,
2. her belief that this intention is binding, and
3. her belief that she ought not to serve such food.

However, what happened to the state of affairs corresponding to the proposition ⌈Mary ought to avoid serving uncooked food⌉? Was it really true that she had the obligation to avoid serving uncooked food while she was having that intention (the intention to avoid serving uncooked food), though, as a matter of fact, there was no risk of any infection?

It seems to us that she had no obligation to avoid serving uncooked food (since there was no risk of an infection, and on the contrary it would have been good for the children to have some fruit and vegetables) even when she had that intention. Then it is clear that the state of affairs that she ought to avoid serving uncooked food did not supervene on her having that intention.

Consider also the position of a parent of a child, who works as a doctor and has come to know that the children's disease has nothing to do with uncooked food. Should the parent too conclude that Mary ought not to serve uncooked food, just because he knows that Mary has that that intention? It seems that we must give a negative answer to this question. This implies that Mary's obligation neither supervened upon her intention not to serve the food nor upon her belief that she was under the corresponding obligation.

The same considerations also apply to legal reasoning. Assume that a judge knows that most of her colleagues and fellow citizens adopt the instruction ⌈no compensation shall be given for damage to health (beyond the economic loss which was suffered by the victims)⌉. Is this sufficient for her to conclude that ⌈if one damages one's health one has no right to compensation⌉, since this normative connection supervenes on the intention of her fellows and colleagues? Is the judge justified in drawing this conclusion even when she knows that allowing compensation for health damages would much better serve the values of the legal system, that most of her colleagues would share her argument for adopting a rule to that effect and follow her example, that her adoption of such rule would be consistent with her role, that any rational cognisers who intended to implement shared legal values in the current social conditions would agree with her?

If we must give a negative answer to this question, then it is clear that a legal obligation does not directly supervene upon people's belief that there is such an obligation (though people's current opinions have an important role to play, as we shall see in Chapter 12).

Consider also the following hypothetical case. Assume that I believe the following: (1) damage to health ought to be compensated, and (2) Mark damaged John's health in a traffic accident. Yesterday these beliefs led me to conclude that Mark ought to compensate John. Assume however that this morning I come to know that Mark did not damage John's health (John's medical problem pre-existed to the accident). Under such epistemic conditions, today I can conclude that it is not the case that Mark ought to compensate John.

This conclusion does not concern only the present, but also the past. Once I know the facts of the case, I become convinced that even yesterday there was no obligation for Mark to compensate John, though I wrongly believed that he had this obligation. This shows that Mark's obligation did not supervene on my belief that he had that obligation.

3.3.2. Normative States of Affairs and Optimal Cognitive States

It seems that the conclusions of Section 3.3.1 on page 103 (normative properties do not supervene on people's belief that such properties exist) lead us to a dilemma: Either we assume that there are in the world normative properties and states of affairs, which exist independently of people's mental states, or we have to admit that there are no such properties and states of affairs, so that reasoning about them is plain nonsense.

In the latter case, we may admit that, though normative beliefs have great social importance, they remain irrational or even absurd. We would end up adopting the thesis of the Scandinavian realists: Normative beliefs are both necessary to the social fabric and senseless.[8]

This view puts at potential risk the mental health of lawyers (at least those who cannot avoid pursuing rationality and coherence): They need to face the cognitive dissonance between having normative beliefs and acting upon them (as required in order to contribute to the social function of the law), and viewing such beliefs as irrational or absurd.

We believe that there is a way out, so that the existence of a normative state of affairs can be distinguished from people's current beliefs, without assuming that normative states of affairs have an existence similar to that of physical states of affairs. This is the idea that what constitutes a practical state of affairs is the *cognitive optimality* of the adoption of the corresponding conative state—or, which is the same, the cognitive optimality of the belief that this conative state is adoption-worthy.

Before moving on, we need to specify the idea of cognitive optimality. In particular, we need here to distinguish different ways in which a mental state may be cognitively optimal, or which is the same, *justifiable* (we use synonymously the expression "cognitively optimal" and "justifiable"). All of these ways must be counterfactual: They do not concern the mental state that the one has as a matter of fact, but they rather concern the mental states that one would have if one had perfectly applied various cognitive tools at one's disposal, where by perfectly applying a cognitive tool, we mean using it correctly, whenever it is relevant.

This leads us to defining different notions of justifiability. The first, *inferential justifiability*, is limited to ratiocination, as applied the current mental states of the reasoner.

Definition 3.3.1 *Inferential justifiability. A mental state M is* inferentially justifiable *to agent j, if j would maintain M after applying perfect ratiocination to j's current mental states.*

[8] See, in particular, Hägerström 1953 and Olivecrona 1971. For a related discussion, see also Pattaro 2000. As is well known, Scandinavian realists linked legal conceptions with magical beliefs or other irrational attitudes (see Faralli 1987).

Assume, for example, that I have come to the conclusion that I need to pay € 1,000 to fly to Barcelona. However, when reasoning about the cost of my ticket I failed to consider that a € 10 fee has to be paid to the travel agency for booking an international flight. I knew that there was this condition, but I failed take it into account. If I had perfectly applied my ratiocinative powers to all my beliefs (included the condition concerning the fee), I would have concluded that I have to pay a € 1,010 rather than € 1,000. Thus, my belief that I have to pay only € 1,000 is not inferentially justifiable.

The second notion of justifiability, *rational justifiability*, is still confined to the current mental states of the reasoner, but concerns any kind of reasoning process.

Definition 3.3.2 *Rational justifiability. A mental state M is* rationally justifiable *relative to agent j, if j would maintain M after applying perfect reasoning to j's current mental states (with the exclusion of any external cognitive input, but including not only ratiocination, but also heuresis and coherence evaluation).*

Assume, for example, that when forming the belief that I had to pay € 1,010 to go to Barcelona, I failed to consider my knowledge that in various previous cases when I travelled on Monday, I paid a 10% lower price than when I travelled on other days of the week. This should have led me (through heuresis) to form the hypothesis that there may be a Monday discount also for travelling to Barcelona. Adopting this hypothesis should have prevented me from adopting the belief that when travelling to Barcelona on Monday the ordinary € 1,010 price is to be paid, and should have led me to the belief that I may possibly need to pay only € 910. Thus the belief that I have to pay € 1,010 price, though being inferentially justifiable, is not rationally justifiable.

The third notion of justifiability, *cognitive justifiability*, besides reasoning, also includes actions that may lead one to get new external inputs (typing at a computer keyboard, looking at objects, walking to places, asking people, etc.).

Definition 3.3.3 *Cognitive justifiability. A mental state M is* cognitively justifiable *to agent j, when j would maintain M after a perfect inquiry starting from j's current mental states.*

Assume for example, that a new 20% discount on tickets to Barcelona has just been decided by the airplane company, and typed into the computer system that manages the issue of flight tickets. I have now the rationally justifiable belief that the price is € 910, but this belief is not cognitively justifiable, since there is a true fact (which would be accessible through a perfect inquiry) that would lead me to withdraw that belief. Knowledge of the new discount would indeed lead me to conclude that the price of the ticket is € 730, which is the result I obtain by applying to the pre-discount price (900), the 20% discount and adding the fee for the travel agency (since $900 * 0.80) + 10 = 730$). Note that reasoning (and even conversation) would not suffice for me to reach that conclusion. I

also need to query the computer system (and before that, I need to switch it on, activate the Internet connection, and so forth).

Therefore, a mental state is *cognitively justifiable* for a certain reasoner, if that reasoner would have that mental state, and remain in it, after having been provided with all relevant perceptual input, and having processed that input (plus the current mental states of the reasoner) according to all resources of perfect, or *optimal rationality* (there included ratiocination, heuresis, and coherence evaluation).

Since optimal rationality may be assumed to be the same for all reasoners, we can make this idea independent of the identity of the reasoner.[9] This leads us to rephrase Definition 3.3.3 on the page before as follows.

Definition 3.3.4 *Cognitive justifiability. A mental state M is* cognitively justifiable *when any rational agent would maintain M after an optimal inquiry.*

We can also introduce into this notion the idea of truth for theoretical knowledge. We can say that a conative state (liking, desire, intention, want) is cognitively justifiable, if a reasoner would have that mental state, and would remain in it, after having been provided with all relevant true theoretical propositions, and having processed that input according to all resources of optimal rationality (there included conclusive reasoning, defeasible reasoning, heuresis, and coherence evaluation).

When a conative state is cognitively justifiable, we may say that the content of that cognitive state is *adoption-worthy* or *cognitively binding*.

For instance, according to the ideal of optimal cognition (cognitive justifiability), we may say that it was not the case that Mary (the kindergarten cook) ought to avoid serving uncooked food: There was a true belief (the belief that the uncooked food was safe) that would have led her to abandon her endorsement of this obligation. Said otherwise, the instruction ⌈I shall not serve uncooked food⌉ was not cognitively binding to her (though she believed it was).

Similarly, I may say that it was not the case that Mark ought to compensate John, since there is a true belief (the belief that he did not damage John) that, according to reason, would have lead me to abandon the belief that Mark ought to compensate John.

Finally, imagine that a judge believes that Internet providers are to be considered liable for any damage caused by contents stored and published on their servers, whenever they had some control over such contents—this seems to be the *ratio decidendi* of case *Stratton Oakmont vs Prodigy Services Co.* (Supreme Court of New York Country, 1995). Assume that the judge has not considered that this rule restricts the providers' choice (if they want to avoid liability) to the

[9] Though one may argue that even optimal cognition cannot discount different starting points: When reasoners j and k have different starting points (different current mental states) even perfect cognition would sometimes lead them to different outcomes (we shall address the issue of relativising cognitive states in Section 4.2.5 on page 133).

following alternatives, both having prejudicial implications: Either providers omit every control (so that any illegal material can go on line) or they refuse to publish any contentious information (so engendering freedom of expression).

If the judge had considered these implications of his ruling, he would not have adopted it and reasoned accordingly. Under such conditions—though the judge believed that the provider was liable, and condemned it to pay damages—we may say that the provider was not liable for defamation. This does not exclude that now, according to the decision of the judge, the provider is obliged to pay damages. However, this happens because of the wrong decision of the judge in the individual case, and not because of the law pre-existing that decision.

3.3.3. Cognitive Optimality and Collective Inquiry

Our notion of a proposition being cognitively justifiable may be connected to the idea of truth as the ultimate outcome of inquiry, according to the famous definition of Charles S. Peirce:

> "Truth" is that concordance of an abstract statement with the ideal limit towards which endless investigation would tend to bring scientific belief. (Peirce 1966, vol. 5, par. 565)

With reference to Peirce, however, we must discuss the idea that such an outcome needs to be agreed by the community of the researchers:

> The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth, and the object represented in this opinion is the realty. (Peirce 1966, vol. 5, par. 408)

We need in this regard to distinguish *unbounded* or *optimal cognisers*, having unbounded cognitive resources, and *bounded* or *suboptimal cognisers*, having limited cognitive resources.

If we are referring to *unbounded cognisers*, having unlimited cognitive capacities (in the perceptual, ratiocinative and heuristic domains) and unbounded time at their disposal, it is not clear why many such cognisers (being able to communicate) would perform better than only one of them. In fact, an unbounded cogniser could perform in parallel all cognitive processes that may be separately performed by a set of cognisers, and access the outcomes of all such processes. No advantage (except in efficiency, which is no problem for an optimal cogniser) could be obtained by distributing cognition over a set of communicating agents. So, if we take the idea of an optimal cogniser as the standard for cognitive justifiability, one such cogniser seems to be enough.

Things look very different if we refer to *bounded cognisers* as humans are. With regard to bounded cognisers, we may certainly assert that usually a set of communicating inquirers functions better than an isolated enquirer, and a larger

set of enquirers, when interactions are properly managed, often is more effective than a smaller set.

However, a community, no matter how large, of bounded cognisers cannot provide us with a definition of cognitive optimality (justifiability). In particular, the limitations of each cogniser also impacts on his or her ability to process messages coming from other cognisers: When a community of interacting cognisers grows above a certain limit, its cognitive performance starts to deteriorate (since most of energies will be spent in communication), unless interactions are restricted.

Moreover, it may be better that the single cognisers (or separate groups of them) work to a certain extent in parallel, independently one of the others, each one focusing on his or her own ideas: Too much interaction at an early stage can lead the cognisers to converge into what appears to be most promising at the initial stage, disregarding the individual exploration of ideas that, though initially less appealing, given a sufficient time and effort could turn out to be the right ones. In other words, an excess in interaction can favour exploitation of other people's ideas over the exploration of new ideas (as observed by Axelrod and Cohen 2000, chaps. 2 and 3), and thus degrade the heuristic performance of the whole conversational community.[10]

In conclusion, increasing the number of interacting bounded cognisers and the intensity of their communication does not necessarily lead to cognitive optimality. To define this notion we need to refer to the performance of optimal cognisers, endowed with a perfect cognitive capacity, but then, as we observed, one such cognisers is enough. Moreover, assume that we really idealise the cognitive and communicative competence of each individual belonging to a community of optimal cognisers, assuming that each such member in the following conditions:

1. he or she has immediate access to all cognitive results that are obtained by any other cognisers,
2. he or she takes such results into account as if they were provided by his or her own cognition,
3. he or she processes such results immediately through his or her reasoning (the outcomes of which, according to item (1) are accessible to all other cognisers).

It is easy to see that such a community would function as a single mind, processing information in parallel (which is what our brain does, though far from perfectly) and having access to the outcomes of all its parallel processes: Distributed

[10] As an extreme example of successful closure to interaction during inquiry, consider the case of Andrew Wiles, the English mathematician who succeeded in proving Fermat's last theorem (the conjecture that for whenever $n > 2$, for no x, y and z, $x^n + y^n = z^n$). Wyle achieved this extraordinary result, solving a problem on which mathematicians have been struggling 300 year, by working almost in complete isolation for seven years (only his wife knew he had this research objective). On Wyle's story, see Singh 1997.

information-processing, once all resource bounds are removed, is brought back to monological information-processing.

3.3.4. Cognitive Optimality and Dialogues

These considerations take us away from the idea that cognition and truth can be defined as the outcome resulting from unrestrained dialogues, as Habermas (1971) famously claimed (see also Habermas 1999, 34ff., 1981), an approach that was transferred into the law by Alexy (1989). Here is Habermas's original formulation:

> I may predicate something of an object, if and only if every individual who could enter into conversation with me would predicate the same thing of the named object. In order to distinguish true from false statements, I refer to the judgement of others—indeed the judgement of all others with whom I might ever engage in conversation (here I include, counterfactually, all speech-partners whom I might encounter if my life history were co-extensive with humankind). The condition for the truth of statement is the potential agreement of *everyone* else. (Habermas 1971, 124; translation by R. Adler and N. MacCormick in Alexy 1989, 102)

With regard to Habermas's theory, we agree with the following critical comment of Tugendhat (1980, 6):[11]

> Every foundation [. . .] is not essentially communicative, since it can also be accomplished by one single reasoner for him or herself, that is, in this sense, monologically.

It is true that Habermas insists that what matters in not whatever factually reached consensus, but only a *rational* consensus, which is produced following the principles of rationality. However, in this case, as Rescher (1993, 13–14) observes: "[W]e might then as well have started from a concern for rationality as such and left consensus out of it", since "it will only be a rationally engendered consensus that is significant; and what is significant about it is not its consensuality but its rationality."

From our perspective, only optimal cognition—for which there seems to be no difference between dialogue and monologue—can take the burden of constituting normative truth.

Different dialectical procedures can be devised (and have been devised) by social evolution or by conscious design, as ways to enhance the cognitive performance of bounded individual cognisers through interactions with others. Such procedures, however, rather than the fixed transcendental-pragmatic paradigm

[11] See the discussion in Alexy 1991, 399ff. The possibility of founding normative conclusions monologically, though within a contractarian approach, is affirmed by Scanlon 1998, as observed by Peczenik, Volume 4 of this Treatise, sec. 4.5, to which we refer for some critical considerations, concerning more generally contractarian foundations to normativity. A monological foundation of normativity is also developed, for instance, by Gewirth 1978.

of rationality (Habermas 1981), are more modestly to be viewed as methods aimed at enabling bounded cognisers to achieve certain cognitive and other goals, by co-operating with their fellows. Thus procedures for cognitive interaction need to be justified instrumentally, according to teleological reasoning, as we shall argue in Chapter 11.

Note that our approach is based on a mentalistic, rather than on a linguistic approach. In fact Habermas (1999, 10ff.) rightly locates the basis of his approach in the "linguistic turn," which at the end of the XIX century tried to distinguish sharply logic and epistemology from psychology, viewing public language as the only medium of cognition, repository of knowledge and siege of thought.[12]

Here we shall move away from this paradigm, and locate our work within the "psychological" or "mentalistic turn" which seems to characterise the last decades of the XX century, thanks to the advances in linguistic psychology, philosophy of mind, and cognitive science.[13] Correspondingly, we view cognition as a (mental and practical) activity of the cognising individual (interacting in various ways, linguistic and non linguistic, with others), and see language and in particular its public use, as being subsidiary upon, and derivative from, a psychological foundation.[14]

In particular, with regard to the connection between dialogues and research, we believe that researching together is usually an opportune choice, given the limits of the cognitive capacities of each single researcher. Obviously, the research group must have the right size (according to the nature of the research which is being performed), and there must be the appropriate frequency of exchanges of information (not too few exchanges, since we need the contribution of others, and not too many, since this will not allow us the time for processing autonomously the information that is provided to us).

[12] For a criticism of the very idea of a public language, see Chomsky 1993. For an extreme criticism of reducing cognition to language, see Churchland (2000, 508), who observes that language use "is mastered by a brain that evolution has shaped for a great many function, language use being only the very latest and perhaps the least of them." Thus Churchland views language use as a "superficial" and "extremely peripheral" activity, which cannot provide standards of intellectual virtue: It only uses a very elementary portion of the available neural machinery and cannot match the complexity required for organising and processing perceptual knowledge. The idea that heuresis cannot be limited to linguistic performance is well expressed by following often cited words of Einstein 1981, 398: "The words of the language as they are written or spoken, do not seem to play any role in my mechanism of thought. The physical entities which seem to serve as elements in thought are certain signs and more or less clear images which can be 'voluntarily' reproduced and combined. [. . .] [T]his combinatorial play seems to be the essential feature in productive thought —before there is any connection with logical construction in words or other kinds of signs which can be communicated to others."

[13] For a collection of important contributions to cognitive science, see Cummins and Dellarosa-Cummins 2000.

[14] On viewing rationality as a psychological feature, and epistemology as kind of psychological inquiry, cf. Pollock and Cruz 1999, 170ff.. For a psychological approach to normativity, see Conte and Castelfranchi 1995.

However, we also maintain that for gaining cognition, perception and experiment (and therefore action, and not only of the communicative type) is required. This idea was powerfully expressed by Galilei (1960, sec. 44), who opposes the outcome of experiments to the general opinion:

> Adducing such witnesses serves no purposes [. . .], since we have never denied that many people have written and believed such things. We did indeed say that the thing is false, but as to authority yours alone is as cogent as that of a hundred men in making the effect true or false. You take your stand upon the authority of many poets, and against the experiments which we produce. I reply by saying that if those poets were to be present at our experiment, they would change their opinion, and without any revulsion whatever they might say that they had written hyperbolically or might confess themselves to have erred.

We view dialogues as ways of collectively processing information: They offer to individual cognisers the chance of overcoming (to some extent) their cognitive limitations, by pooling their premises and outcomes, and, especially, their heuristic findings: Though conversation does not constitute rationality—nor does it exhaust the ways in which rational enquiry can be carried out—dialogues are a fundamental addition to bounded individual rationality.

In the practical domain, a special limitation of individual cognition is the fact that—though we may reason adopting a communal or impartial point of view (see Chapter 9)—we are usually incapable of properly assessing the needs of others, or the communal needs, giving them an appropriate weight (though we may assume that an optimal cogniser also has this capacity).

We shall see in Chapter 11 how dialectical interaction can facilitate bounded cognisers in approximating optimal rationality. This will lead us to reaffirm the value of public deliberation, especially in the political domain, and the hope that ways of interaction can be found where cognition and participation can go hand in hand.

Finally the idea of cognitive justifiability as being constitutive of normative "truths" and states of affairs, could also be linked to the model of judge Hercules, the perfect legal cogniser, according to Dworkin (1977a, 105ff.). However, we shall try to be less personal, by translating Dworkin's personal ideal of epistemological virtue into a set of cognitive moves and skills.

The idea of cognitive justifiability can also be connected to the version of Peircean approach recently proposed by Coleman and Leiter (1995), which makes legal truths dependant upon ideal cognition, through we emphasise the way in which ideal practical cognition is constitutive of practical truths: Ideal practical cognition can reach practical truths because it constitutes the very states of affairs that (doxified) practical propositions describe. If one accepts this dependency of normative states of affairs upon practical cognition, one may consider our approach to be consistent also with realistic approaches to law and morality (see for instance Moore 2002).

3.3.5. The Supervenience of Normative States of Affairs

The dependency of normative states of affair on optimal practical cognition (rather than on possessed mental states) explains why we view normative states of affairs as having an independent reality and tend to assimilate them to physical situations. This dependency corresponds to the traditional rationalistic approach to morality and natural law, that is, to the idea that reason (cognition) constitutes normative state of affairs. To repeat the famous words of Grotius (1925, sec. 1.10.1):

> The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity.

Our contribution will consist in an attempt to provide cognitive foundations not only for conclusions pertaining to natural law, but also, as we shall show in the following pages, for conclusions concerning positive law. For this idea too, one may find illustrious predecessors, like Aquinas, who famously said that human reason

> from the precepts of the natural law [. . .] needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws. (Aquinas, *Summa Theologiae*, I-II, q. 91 a. 3, c)

Note that the idea that practical cognition constitutes normative states of affairs does not depend on what solution one gives to the problem of the origin of practical cognition. This idea is consistent both with the view that practical cognition is an "imprint on us of the Divine light [. . .] nothing else than the rational creature's participation of the eternal law" (Aquinas, *Summa Theologiae*, I-II, q. 91 a. 2, c),[15] and with the view that it rather is an outcome of selective evolution, a produce of the "blind watchmaker" (Dawkins 1986) to which neo-Darwinians attribute the ability of designing intelligence and consciousness.[16] The assumption that practical cognition can constitute normative state of affairs only depends (*a*) on the possibility of applying reason also in the practical domain, and (*b*) on the possibility of providing a sufficiently precise account of reasons's functioning in this domain.

The idea that it is possible to give a cognitive foundation to legal conclusions seems to be contradicted by the contingency of positive law, and especially by the contingency of legislative statements. These statements are undoubtedly created by the decisions of the legislator, in the sense that the legisla-

[15] For recent discussions on the theological foundations of practical and legal cognition, see for instance Cotta 1995, 8ff and D'Agostino 1997.

[16] For an introduction to neo-Darwinian thinking, see, among the others, Dawkins 1989 and Dennett 1996. On Darwinian approaches to law and society, see also Rottleuthner, Volume 2 of this Treatise, sec. 3.2.1.2.

tor's choice, expressed through the appropriate procedures, makes them legally binding. However, we need to consider that when trying to figure out what intentions one should have according to reason—and particularly what shall- or may-instructions are cognitively binding, i.e., what is obligatory or permitted—one needs to consider all relevant information. This information also includes the fact that certain actions have been performed, by the reasoner or by others, that certain events have taken place, and in particular they include the fact that other people have issued certain directives, and have certain mental attitudes.

When I, as a rational cogniser, inquire what mental attitudes I should have, I may cancel (revise or abandon) some of my current mental states: This is what I should do as soon as I become convinced that they are wrong. However, I cannot cancel the actions that I (possibly together with other people) have accomplished on the basis of wrong mental states, and obviously I cannot cancel what other people have done and what they now believe. The actions which have been taken (even if wrongly) and the attitudes and opinions of others (even if mistaken) contribute to forming the factual context within which I must now make up my mind: They are part of the input which is available to my practical cognition, and on the basis of which I must come to a rational determination. Cancelling wrong acts or mistaken attitudes by an act of will does not pertain to rationality, but to wishful thinking.

For instance, assume that yesterday my wife and I adopted the intention to go to the sea today, on the basis of our shared belief that the weather would be sunny. This morning we discover that we were wrong: The sky is cloudy. However we are now ready to leave, we have made the bookings, have loaded our car with stuff and children, etc. If we had known that it would be cloudy, we would not have decided to go to the sea. If yesterday we had had optimal cognition (there included a perfect weather forecast), we would not have had the intention to go to the sea, but we would have planned to go elsewhere. However, as a matter of fact, this very decision led us to further actions and initiatives, which created a new state of affair, in which the best thing to do (according to practical cognition) is now definitely to go to the sea. So, what we intend (and should intend) to do today, is something that we wrongly intended to do yesterday.

Similarly, assume that my community (its legislators) has wrongly decided to abolish a certain tax (for example the inheritance tax, as happened in Italy a few years ago). I believe that we should have kept this tax: The money was needed and there is much social and economic evidence that inheritance tax corresponds to the interest of our community.

However, people who have inherited after the abolition of the tax have the expectation not to pay such tax and they have arranged their business correspondingly, and tax offices are no longer organised for taxation. Moreover, reintroducing the tax is a collective decision that is to be taken by the appropriate legislative organs. Also from the point of view of one who sincerely wants to

contribute to the welfare of one's community, it would be irrational to try to pay the tax after it has been abolished (though it was rational to pay it before it was cancelled): One would only cause trouble to the tax offices and would appear silly to one's fellows. It would even be more irrational to try to coerce other people into paying this tax without a legislative backing (assume that the reasoner is a judge or a prosecutor working in the tax domain), which would cause disruption and endanger the proper functioning of legal institutions.

In conclusion, when assessing what cognitive states one would optimally have, one should be ready to revise one's own current cognitive states, and consider what outcomes one would obtain through a fresh optimal cognitive effort (including access to all relevant inputs). However, one cannot revise away:

1. all actions that one and one's fellows have accomplished (even when they were irrationally motivated);
2. those mental states that other agents currently have (even when those agents wrongly came to having those mental states).

Points (1) and (2) indicate part of the context in which one's rationality is to be deployed.

For example, assume that I am the judge in a case, and have to establish whether causing health damage produces the obligation to restore it. Clearly, I cannot assume that this obligation just supervenes on my current belief that it exists, nor on my belief that I should adopt the corresponding instruction, since I know that my beliefs may be wrong. The obligation only supervenes on the fact that optimal cognition, under perfect knowledge of all relevant circumstances (there included the existing beliefs of the judiciary and citizens, but also legislation and precedents, existing causal connections, and so on) would lead us to adopting that rule.

Among the factors I need to consider, according to reason, there may also be the wrong opinions which my fellows have concerning what rules they should adopt in such a case (this issue will be considered at length in Chapter 9).

From our point of view, there is no contradiction in assuming that a wrong belief may determine a decision that makes this belief true (with regard to future occasions): The very fact that an agent adopts a certain decision creates a new situation, where it may become rational (for the agent itself and for others) to adopt the mental state that the agent wrongly adopted at the time of the decision. Consider, for example, the case of a judge who, by deciding a case wrongly (according to a rule she should not have adopted in deciding that case) creates a binding precedent. Now reason commands that, in subsequent cases (unless conditions occur for overruling or distinguishing the precedent) the judge should adopt the same ruling that she wrongly adopted in the past, though she is now aware that she made a mistake.

3.3.6. The Relativisation of Practical Cognition

We need to consider a possible criticism of our idea that normative states of affairs supervene on optimal practical cognition. Though ratiocination seems to proceed according to schemata that are shared by all cognisers (see Section 4.2.4 on page 131), cognition may fail to lead everyone to the same outcomes. The problem is that different individuals may have different inputs to their reasoning, through their different "intuitions" (the outcomes of non-ratiocinative modules), their different experiences and previous beliefs. Shall we admit that there can be different (and possibly incompatible) optimal answers to the same practical question? In this case, our idea that the existence of a practical state of affairs is constituted by the cognitive optimality of the corresponding belief, will force us to admit that incompatible practical states of affairs may exist (that a rule can be both binding and not binding, that an action can be both forbidden and permitted, and so on), thus violating the Aristotelian principle of non-contradiction, stating that "the same attribute cannot at the same time belong and not belong to the same subject and in the same respect" (Aristotle, *Metaphysics*, 1005b12).

Our solution to this difficult issue will have two strands.

Firstly, we shall provide a *sceptical* model of defeasible reasoning: Mutually incompatible conclusions, supported by equally good reasons, cannot be endorsed by a rational reasoner.[17]

Secondly, we shall assume that when different reasoners have different cognitive inputs, shared answers can be obtained by relativising practical reasoning to the different non-rational inputs: Rather that concluding that one should adopt unconditionally a certain mental state, we can conclude that one should adopt a certain mental state relative to a particular position or point of view one is taking. We can consequently affirm that also the existence of the corresponding practical states of affairs is relative to those assumptions.

This is the attitude we normally adopt even when we are reasoning on our own, but we are uncertain on what starting points to take. For example, before deciding whether to give priority to family or work, I may wonder what I should do under each one of those perspectives. Assume I conclude that, out of my concern for my children, I ought to take them to the park. However, it is also true that today I have important work to do, so that, out of my concern for my work commitments I should stay at home. After having explored what I should to under each one of these two regards, I can make a decision.

Similarly, a judge may consider that:

- to promote a reduction in litigation, he should adopt the instruction

[17] We use the word *sceptical* in the sense in which it is employed in describing reasoning systems. Sceptical systems. which refrain from deriving incompatible conclusions supported by equally good reasons, are opposed to *credulous* systems, which derive such conclusions (see Horty et al. 1990).

⌈health damages should not be compensated⌉, while
- according to the value of health, he should adopt the instruction ⌈health damages should be compensated⌉.

Correspondingly the judge may say that giving priority to the value of reducing litigation, it is the case that health damages should to be compensated, while, giving priority to the value of health this is not the case. This seems to be true, not only before the judge chooses whether giving priority to reducing litigation or to promoting health, but even after he has made that choice.

Finally, one may adopt normative judgements relativised to a particular point of view, that is, to a whole set of values, beliefs, instructions (those proper to one particular religion, moral or legal system, etc.), to the exclusion of other points of view. This means that one will separately apply one's cognition to the inputs provided by each point of view, getting to beliefs that are relativised to that point of view. By projecting these relativised beliefs and mental states unto the reality one sees the world as being populated by different types of relativised obligations (legal, moral, religious, professional, and so on) corresponding to those different points of view. When one projects relativised normative connections, one reasons out of the particular concern one is adopting: A normative state of affairs exists (out of a particular concern) when optimal cognition, as constrained by that concern (to the exclusion of other concerns), would lead the agent to adopt the corresponding conative state. The same happens when one is considering various normative systems (moral, religious, legal ones), each one projecting possibly incompatible normative relations over the same physical reality.

3.3.7. Practical Cognition and the Existence of Normative States of Affairs

Let us conclude our attempt to provide a cognitive foundation for the semantics of normative beliefs, by observing that the issue of whether practical rationality (practical cognition) is possible does not depend upon the assumption of the independent existence of normative states of affairs. Practical rationality (like theoretical rationality) is an information processing competence that, as a matter of fact, humans happen to possess. The opposite is true: Normative states of affairs exist as a reflex of practical cognition.

The issue of the ontology of normative states of affairs has little importance to a reasoner who wants to discover what conative states he or she should adopt. The task of establishing what normative states exist coincides with the task of establishing what conative states one should rationally adopt, according to one's own reasoning and one's further cognitive faculties (as applied to the available cognitive inputs, and to the results of previous theoretical and practical inquiries). Since normative states of affairs are not perceptible entities, one cannot take the opposite route and start by observing what normative states exist in

the world and then infer what conative states one should adopt (since normative states are not accessible to perception).

However, the difficulty of providing an ontology for normative beliefs does not question the legitimacy of adopting such beliefs. For the legitimacy of having practical beliefs, it is not necessary to assume that a reality exists that corresponds to these beliefs. It is sufficient that one can establish a mapping between doxified practical reasoning and direct practical reasoning: Whenever the first way of reasoning leads an agent to adopt or reject the belief in the projection of a conative state, the second way of reasoning should enable the same agent to adopt or reject that state. Therefore, doxified practical reasoning—though depending upon direct practical reasoning, and being, in a sense, a shadow of the latter—does not necessarily belong to the domain of magic and illusion. Not only has it an important social function, but it also has a significant cognitive function, and is a significant and useful complement to direct practical rationality (on the utility of practical reasoning in an assertive form, even from the of view of an emotivistic theory of ethics, see Blackburn 1998).

Even those who do not find very palatable the idea of that our world is inhabited by extra-empirical entities such as rights, duties, norms and values, may indulge in doxified practical reasoning, without falling into superstition, ideology or self-deceit.

Finally, we believe that the assumption that these extra-empirical entities exist, though not being necessary for engaging in doxified practical cognition, is admissible. When one employs one's epistemic resources in practical reasoning, one is free to assume that the world is populated by the entities and the properties corresponding to justified practical determinations, those entities being constituted exactly by the fact that they match the conclusions of practical knowledge. Using the terminology of Searle and Vandervecken (1985), we may say that, from this perspective, ideal practical knowledge has a *word-to-world* direction of fit: It constitutes (it makes existent) the referents of its justified conclusions.[18]

[18] Our definition of cognitive justifiability appeals to epistemic idealisation, rather than to factual consensus. Thus it leads to the view that the law is *modestly objective*, in the sense of Leiter (2002, sec. 5), i.e., to the assumption that the existence of legal facts depends upon ideal legal cognition (see also Coleman and Leiter 1995).

Chapter 4

RATIONALISATION, REFLEXIVITY, UNIVERSALITY

Doxified practical reasoning, as we have seen in Chapter 3, is a reproduction of practical reasoning through epistemic reasoning: It leads to justified conclusions exactly when such conclusions would also be obtainable through direct practical cognition. However, it has some interesting advantages, which allow for significant enhancements in practical rationality. In particular, it facilitates practical reasoning to move in an upward direction, according to the idea of rationalisation, and to focus on itself, according to the idea of reflexivity.

In this chapter we shall first focus on *rationalisation* and then we will shall examine *reflexivity*. This will lead us to some considerations concerning the power and the limitations of practical reasoning, and in particular its ability to implement universal standards of rationality. Finally we shall provide an extensive example that combines various reasoning patterns we have introduced.

4.1. Rationalisation

While usual practical thinking moves downward, from likings to desires, to goals, to intentions, to wants, *rationalisation* consists in taking the opposite direction, going from lower level conative states to higher level ones.

In rationalisation, one moves from the conclusions of a reasoning schemata to possible premises that may license these conclusions. Since different sets of premises may licence the same conclusions, schemata for ratiocination, when used backwards, only provide clues for heuresis: They open a space of possible justifications or explanations, so that heuristic search is required to find and select, within that space, what hypotheses one should endorse.

4.1.1. Upwards Practical Reasoning

When one feels a want to do something, rather than immediately letting one's want be transformed into action, one may asks oneself: "Should I really do this?" This question starts an inquiry aimed at finding whether one really has the intention to do that action. Failure to form such an intention, would lead one to question one's want.

Similarly, when having the intention of executing a certain instruction, one may ask oneself: "Is this instruction really binding?" This would lead to searching for a sufficiently good plan (or a higher level intention) including that in-

struction. Failure to find such a plan would lead one to question the adoption of the instruction (one's belief that it is binding). It is possible that failure only concerns reasoning (there is a possible plan which may include this instruction, but one has failed to construct it), but it may rather be that one's intention is irrational (rationality would recommend not to execute that instruction, since it is useless or obnoxious).

In the same way, one may question one's current desires, wondering: "Should I really have such desire?" This query would start an inquiry intended to find whether one would really like the situation where one' desire is satisfied.

Finally also one's likings may be questioned in the same way ("Should I like this thing?"), according to one's other likings and meta-likings.

To clarify the idea of rationalisation, consider for example the situation of a researcher who feels the want to make a disparaging comment on a recent work by a colleague of his, generally considered to be a much more brilliant academic. He may then stop and wonder: "Should I really make this derogatory comment?"

Assume that the researcher obtains, through introspection, the awareness that he really has the intention of making such comment (he was not just misinterpreting his own intentions). Then he asks himself: "Why should I intend to disparage my colleague?" Assume that the researcher has to admit that the work of his colleague, as a matter of fact, is quite good. So, the only possible goal, which may be served by the derogatory comment, is to belittle his colleague, to take away from her a bit of her academic glamour.

Then the researcher may wonder why he should desire to realise this goal: "Why should I have the goal to belittle my colleague?" First he checks whether this may be an instrumental desire. This would lead him to wonder whether the satisfaction of this desire (belittling his colleague) may be seen as a way of realising a higher-level plan, serving a higher-level goal. Assume that he finds no such plans.

Having failed to attribute an acceptable instrumental function to his desire, the researcher considers whether belittling his colleague should be a top-level desire. To do that, he must move from desires to likings. The researcher asks himself: "Do I really like the situation where my colleague is belittled?"

Assume that the answer is positive: Our researcher would really like this to happen. Then the researcher may wonder: "But why should I like the situation where somebody's position is impaired, though no advantage comes to me or to others?" Envy is the only ground he can find, and he must admit that he has this feeling toward his colleague. However, the researcher has no particular liking for the fact that he is envious. He feels rather a dislike for the idea of being motivated by envy, and he believes that his dislike for envy is appropriate.

Thus, rationalisation has failed: In the light of the considered likings of the researcher, and of the reasoning steps we described, our researcher could not complete a full piece of rational reasoning leading him to the action he wants to take.

On the contrary, his dislike for the idea of being motivated by envy, as his practical reasoning moves down, leads him to believe that he should have the desire of not being motivated by envy. This leads him to adopt the plan not to act out of invidious grounds, and in particular, to the intention not to disparage his colleague's work for reasons of envy. In this particular case, his awareness that envy is his only motivation for disparaging her work, leads him to intend not to behave in this way

In this example, rationalisation has changed the psychological state of the agent: Now he is aware that his rationality could not support his intuitive want to hurt his more successful colleague, and he has indeed to face a clash between this intuitive want to disparage his colleague, and the new intention of not doing it, which has resulted from his failed rationalisation.

4.1.2. Rationalisation and Critical Thinking

The process of rationalisation is therefore a process through which one submits one's own intuitions to the tribunal of reason, by linking intuitive determinations to explicit knowledge. This ability is a very important skill: It allows one to test, develop and refine one's ways of thinking and behaving, and particularly to adapt them to new situations. Consider that the basic human inborn reflexes were already established in the Stone Age, in hunting and gathering communities, after which little change seems to have happened with regard to the biological constitution of our species. Nowadays, technologic and economic changes provide a new social context, continuously changing, in which some traditional or even inborn behavioural schemata may be inadequate. An overhauling of such dispositions, using the flexibility of reasoning, may indeed be required.

A critical reasoner, however, should not expect too much from reason's verdicts, and should be very careful before translating them into actions. In fact, reasoning can also be wrong, and, in some cases, it can be terribly wrong. This is specially linked to the fact that rationalisation does not consist only in the mechanical use of given reasoning schemata. It requires discovery, or heuresis.

For instance, to conclude that certain instinctive or traditional forms of behaviour do not contribute to the achievement of any value, I need to find out that there is no sufficiently good plan that may prescribe such forms of behaviour. However, my failure to find any such plan is more likely to depend on the limitation of my intellectual resources, rather than on the fact that those forms of behaviour are really worthless. Similarly, my reason's endorsement of certain plans of action, when it is incompatible with what intuition suggests to me, may decisively depend on my insufficient knowledge of the obnoxious effects of implementing such plans.

A rational agent, as we said above, is not one who always and only follows the outcome of one's reasoning, but rather one who uses reasoning to test, refine and

verify the working of the various cognitive instruments one has at one's disposal (including reasoning itself, though not in any privileged position).

From this perspective, we may also see why the higher-level conative states of the agent are corroborated by their capacity to rationalise lower level conative states. Assume that my impulses result from reliable non-rational modules for practical cognition, and that I can rationalise my impulses according to my higher-level conative states (likings, desires and plans). This successful rationalisation not only indicates that my impulses are likely to be correct; it equally indicates that my higher level conative states are likely to be correct.

We hope that this discussion may show how the attainment of coherence between lower and higher level cognitive states, as well as between epistemic and practical cognition, though not offering any certainty concerning the correctness of one's determinations (and *a fortiori*, not constituting such correctness) has a relevance that is not only psychological, but also epistemological. The achievement of a *reflective equilibrium* (see Rawls 1999c, 18–9, 42–5) may indeed be a good indicator that one is on the right track.

4.1.3. Rationalisation in Legal Reasoning

The process of rationalisation is very important in legal reasoning. Usually a judge does not start with top-level legal values: He or she rather starts by considering specific decisional alternatives for the case at hand. From these decisional alternatives (Has this child the right to compensation for the health damage he suffered as the consequence of a car accident or should such right be denied?), the legal reasoner moves up to the possible rules which may support the alternative conclusions, from the rules to the values supporting them, and so on. This process would have to continue until one reaches a result one considers to be sufficiently reliable.

Various legal theorists have provided models of legal reasoning where justification plays an important role. For instance, this aspect is addressed by MacCormick (1978), who adopts the view that legal decisions must be deductively justified from premises including general norms, but rejects the thesis that the legal system already includes all such norms. He accepts that the interpretation of valid sources may offer alternative incompatible rules, or may be unable to provide any relevant rule, and claims that under these circumstances formal justice (equal treatment of equal cases) requires the judge to make a choice among the alternative rules or for a new one. Such a choice must be justified on the basis of its consequential acceptability and its legal coherence.

In our framework we would say that the aspects of judicial reasoning that are presented in MacCormick (1978) pertain in particular to the rationalisation of legal decision-making. We will show in the following, how teleological reasoning and coherence evaluation are indeed the basic ways in which rationalisation can be performed (beyond the point where rules and meta-rules take us).

We disagree, however, with MacCormick in considering that a deductive justification is always required in the legal domain. On the contrary, we believe that a defeasible justification, according to the patterns of defeasible reasoning suffices (and it is indeed viewed as perfectly sound by legal decision makers). Moreover, when there are alternative justifications leading to the same outcome, there is no need for choosing among them. For instance, if the plaintiff will be liable both by adopting fault liability and strict liability, and the judge can think of no other possible theory of liability with may apply to the case, there is no need for the judge to commit to any of the two theories (the idea that judges should not overcommit is discussed by Sunstein 1996a).

In conclusion, we agree with the idea that usually, as Judge Holmes puts it: "It is the merit of the common law that it decides the case first, and determines the principle afterwards" (Holmes 1995, 212). However, determining a principle and, more generally, a theory that rationalises a decision is not a useless embellishment, nor an act of deceit (or self-defeat). It can be (and hopefully it is usually) a serious attempt to make sense of one's decision, an attempt whose failure may lead to withdrawing or revising that very decision, or to departing from it in subsequent cases.[1]

Note also that a successful rationalisation of the adoption of a legal rule does not necessarily presuppose that one views the rule as a way to achieve or honour the values which the legislators had in mind when issuing that rule: It is sufficient (and indeed necessary) that the rule achieves or honours the legal values one presently recognises, as pertaining to the legal system of one's community. It may well happen that a rule "adapts itself to the new reasons which have been found for it, and enters on a new career" (Holmes 1881, 5).

4.1.4. Practical Theories and Their Coherence

By using reasoning in the ways we have described, rational agents may build what we may call *practical theories*. By a *practical theory* we mean a set of cognitive states that the agent uses to guide its behaviour. Such a theory can include conative states (likings, desires, intentions, and wants), their doxified reformulation, and the epistemic beliefs that are relevant to the adoption of conative states (beliefs concerning, for example, causal connections between one's actions and the realisation of what one likes, conditions for applying a plan's instructions, and so on).

A practical theory is a dynamical construct, which may change when new perceptual inputs are provided to the reasoner. It may also change when new inputs are provided by the agent's conative dispositions. Finally, changes may also be prompted by reasoning (and in particular, as we have seen, by the process of rationalisation).

[1] The opposite view, as it is well known, was held by realists, see for example Llewellyn 1931.

This leads us to a further issue: How can one choose among different alternative ways of changing the practical theory one is endorsing? For making this choice one needs to consider that each element in one's theory may interfere in various ways with other elements. The function of each element needs to be appreciated from a holistic perspective: It depends on the global cognitive functionality of a theory containing that element as compared to the functionality of a theory not comprising it.

Various features of the competing ways to change one's theory can govern this choice. In particular we can mention the following:

- A theory must be an efficient reasoning tool: It must be usable with a limited effort, it must be controllable, and easily updateable.
- There should be a certain degree of support among the components of a theory. Lower elements should be inferable from higher elements, and the latter should be rationalisable according to the former.
- The theory should have the capacity to assimilate (to explain) the inputs provided by non-rational cognition (such as perception or the agent's conative dispositions). Those cognitive modules have a degree of reliability of their own (which does not depend on reasoning), and provide independent supports to a theory able of explaining their outcomes.

To sum up all these requirements, we may use the idea of *coherence*, an idea that plays a central role in legal reasoning. When one engages in legal reasoning, one needs to be aware that one's choices contribute to the production of a legal theory that is going to be used also by other people and in other circumstances. It should contain integrated epistemic and practical beliefs, and it should match feelings and intuitions concerning justice. The requirement that one's theory matches one's feelings and intuitions does not necessarily require that only the theory is modified to meet to the pre-existing attitudes of the reasoner: One may well be induced to modify one's attitudes on the basis of one's endorsement of the tenets of a practical theory. Matching may thus result from a process of reciprocal adaptation, leading to a state of mind which we may call *reflective equilibrium*.

Legal theorists have often appealed to the idea that a lawyer's work needs to be inspired by coherence, though rarely making this idea sufficiently precise. One step in this direction is provided by Alexy and Peczenik (1990) who affirm that the coherence of a theory is to be judged according to a number of standards, besides logical consistency: the number of its supported statements, the length of its supportive chains, the number of its general statements, the number of cases and fields of life it covers, and so on (see also Peczenik 1996, 160).[2]

[2] A further development of the idea of coherence, including a formal analysis, is provided by Hage (2000b). The characterisation of the notion of legal coherence also depends on how the legal

In Chapter 28 we shall come back to the idea of coherence, and consider some significant aspects of it.[3]

4.2. Reflexive Reasoning and Universality

Let us conclude our basic analysis of rationality by casting a superficial glance at some deep philosophical issues.

4.2.1. Planar and Reflexive Reasoning

We may distinguish two types of reasoners: *planar* reasoners and *reflexive* reasoners.

Planar reasoners lack the ability to observe themselves: They move from one mental state to another mental state, without being aware that this is happening.

Reflexive reasoners, on the contrary, are capable of observing themselves, of having mental states about their mental states. First of all reflexivity consists in one's capacity of being aware of one's own mental states, according to the reasoning schema *introspection*.

> **Reasoning schema**: *Introspection (self-awareness)*
> (1) having mental state M
> ——— IS A CONCLUSIVE REASON FOR
> (2) believing to have mental state M

Note that inferences from mental states to beliefs about them need to take place only when introspective beliefs are useful to the reasoner, since otherwise one's head will soon be cluttered with useless meta-beliefs (and meta-meta-beliefs, and so on).[4]

system is characterised (on the notion of a legal system, see Losano 2002), for instance on whether one also includes in it social values and attitudes and on whether one also considers the social effects of the practice of legal rules. We believe, however, that our cognitive perspective, which requires us to include in our coherence evaluation all contents that are relevant for approaching legal issues, can provide an adequate framework.

[3] For a broader discussion of coherence, which links legal science and epistemology, we need to refer the reader to Peczenik, Volume 4 of this Treatise, chap. 5. For two recent accounts of the notion of coherence, see Thagard 2001 and Haack, forthcoming.

[4] This distinguishes our reasoning schema *introspection* from the ideas of *positive* and *negative introspection*, as they are usually introduced in epistemic logic, that is, from the idea that agents are aware of what they believe (when one believes A, then one also believes to believe A) and of what they do not believe (when an agent does not believe A then the agent also believes not to believe A). Similarly, introspective practical reasoners are assumed to be aware of what they intend (when one intends to do A, then one also believes that one intends to do A) or desire. On introspection see Konolige 1986, chap. 5, and with regard to intentions, Rao and Georgeff 1991.

Reflexive agents, besides having beliefs about their mental states, may come to have conative states about their mental states (one may like, desire, intend, want to have certain mental states).

Finally, reflexive agents may also have the capacity of observing the properties of their mental processes (one may try to establish how quick, reliable, fatiguing one's cognitive activities are). In particular, reflexive agents can monitor their reasoning processes, and correct those processes when they depart from rationality.

Pollock and Cruz (1999) observe that rationality, in this regard, is similar to linguistic competence, as described by Chomsky (1965, 3ff.). Possessing a competence means to experience a form of normativity. An agent endowed with a competence possesses and applies a know-how, a kind of procedural knowledge: One tends to follow certain schemata—which Pollock and Cruz (1999) call *epistemic norms*—and, though one is not aware of the very schemata one follows, one can recognise when one has failed to apply them.

Consider linguistic competence: When one is proficient in a language, one (usually) applies the patterns characterising that language, though occasionally failing to do so. In addition, one can recognise that one is making a mistake, even when one has no explicit knowledge of the grammar of one's language. Remember that according to Chomsky the way language works is fully defined by our inborn linguistic competence, and learning a particular language only consists in providing our language organ with the parameters proper to that particular language (see Section 1.2.1 on page 8).

Correspondingly, we may assume that our basic epistemic know-how (our basic reasoning schemata) forms part of the natural endowment of human beings (of our natural reason), and in this sense it is universal and inborn. However, this know-how just is our starting point: One may come to adopt further ways of processing information, as a consequence of training or of culture, or of choices which one has made according to one's aims and needs. One then views also those acquired ways of reasoning as appropriate, and one learns to apply them also in one's reasoning (they become part of one's know-how, or reasoning competence).

4.2.2. Reasoning and Meta-Reasoning

So far, we have considered *planar reasoning*, that is, the unreflective functioning of rationality, its spontaneous way of approaching the issues that it needs to address, according to the know-how of the reasoner (see Section 4.2.1 on the preceding page).

However, as we can monitor and govern our locutions (though linguistic performance is usually spontaneous), so we can also monitor and govern our own reasoning. This is rationally done through *reasoning about reasoning*, that is, through *meta-reasoning*. Meta-reasoning has a theoretical side (becoming

aware of how we are reasoning), but also has a practical side (deciding how we shall reason).

We have seen some examples of meta-reasoning in Section 3.1.6 on page 96 when we considered cognitive instructions, namely, instructions requiring an agent to adopt certain mental states under certain conditions.

However, practical meta-reasoning can take a more general shape, as when one decides to adopt certain reasoning schemata rather than certain others, or to focus on certain sub-reasons while disregarding certain others. From this perspective the cognitive instructions can be viewed as a subtype of a more general class of instructions that prescribe a certain cognitive (mental) behaviour.

Meta-reasoning raises various difficult issues. The first deals with the interaction between the natural ways of reasoning—which represent our original endowment, and that we apply "automatically," without any special deliberation about them—and the ways of reasoning that one consciously decides to adopt. The adoption of new ways of reasoning must be the result of a choice that one performs on the basis of one's original reasoning: In this sense, new reasoning ways are dependent upon one's natural reasoning. However, there can also be a conflict, since this choice may lead one to outcomes that are different from the outcomes that one would have achieved by using one's original ways of processing information.

A bridge between meta-reasoning and planar reasoning may be provided, in the practical domain, by a general undercutter, which we call *meta-undercut*. It concerns how a meta-level practical conclusion, and specifically one's intention to reject an inference, leads to undercutting the latter inference:

Defeating schema: *Meta-undercut*
(1) intending to reject reasoning instance R
——— IS A UNDERCUTTING DEFEATER AGAINST
(2) reasoning instance R

Thus, when I have made up my mind (formed the intention) that I should not accept the outcomes of reasoning instance R, I shall view R as being undercut. Note that by the intention to reject a reasoning instance, we mean neither the intention not to perform it, nor the belief that it is unreliable: We rather mean the practical attitude of refusing to view the conclusion of that reasoning instance as being supported by its reason. Note also that this intention can be doxified, so that one's intention to reject reasoning instance R can be accompanied by one's belief that this reasoning instance should be rejected.

Assume, for example, that I am convinced that I should not rely on wishful thinking, and that I have formed indeed the intention not to accept any instance of such way of thinking. Assume also that I come to believe, while still half asleep in my bed, that the train will be half an hour late this morning. However, I am aware that I could only obtain such belief through wishful thinking: I moved from desiring that the train be late (so that I do not have to get up now), to

believing that the train is indeed late. This should lead me to intend to reject this inference, an intention that will undercut it, and thus prevent me from endorsing its conclusion.

Here is the corresponding reasoning instance:

Reasoning instance: *Syllogism*

(1) intending to reject instances of wishful thinking; AND
(2) believing that reasoning instance ⌈I desire that the train is late, therefore I believe that it is late⌉ is an instance of wishful thinking

——— IS A REASON FOR

(3) intending to reject reasoning instance ⌈I desire that the train is late, therefore I believe that it is so⌉

The conclusion of this piece of reasoning is a premise of the following instance of schema *meta-undercut*, which undercuts the instance of wishful thinking.

Defeating instance: *Meta-undercut*

(1) intending to reject reasoning instance ⌈I desire that the train is late, therefore I believe that it is so ⌉

——— IS AN UNDERCUTTING DEFEATER AGAINST

(2) reasoning instance ⌈I desire that the train is late, therefore to believe that it is so⌉

A doxified version of the schema *meta-undercut* can be obtained by substituting the intention to reject with the belief that one ought to reject:

Defeating schema: *Doxastic meta-undercut*

(1) believing that reasoning instance r ought to be rejected

——— IS A UNDERCUTTING DEFEATER AGAINST

(2) reasoning instance r

Wishful thinking can also have legal applications, both with regard to issues of fact and issues of law. Consider for instance how a judge may be induced to believe that an accused person did not commit the crime of which she is accused, by the fact the judge would like that she had not committed the crime so that he could acquit her without violating the law (assume that the judge has a personal sympathy for the accused, or has political reasons for preferring that she is not declared guilty).

Similarly, a judge may be induced to believe that a certain legal interpretation is legally correct, simply by the fact that he would prefer that this was the case (since this would correspond to his personal goals or political convictions).

4.2.3. Descriptive and Ideal Rationality

According to a *descriptive view of rationality*, one's rationality includes whatever reasoning schemata one applies in one's own reasoning processes. Correspondingly, from the perspective of a particular agent, a conclusion is rational if it has been reached adopting the reasoning standards of this agent, whatever they are.

A purely descriptive view of rationality is clearly inadequate, and would lead to absurd implications. Assume that one is reasoning according to wishful thinking: Whenever one desires something to be true, one comes to believe that it is true. According to a purely descriptive view of rationality, we would have to conclude that for such an agent it is rational to conclude that something is true whenever he or she would like it to be true.

A purely descriptive approach to rationality is untenable also because the reasoning schemata one is adopting are under the reflexive scrutiny of rationality: One (a rational agent) needs to abandon any of one's reasoning schemata, as soon as one ceases to view this schema as being an appropriate guide to one's reasoning (according to rationality itself). Thus, rationality is a self-correcting faculty, though it is fallibly so. For instance, as soon as one verifies that many conclusions one has derived through wishful thinking happen to be false, one's rationality will suggest abandoning this way of reasoning. Thus, it seems that rationality may be its own judge: Its verdicts are going to be applied by rationality itself, by revising the processes it certifies as being incorrect.

This leads us to a second view of rationality, a *normative* or *ideal* view: Rationality consists in applying methods that are appropriate (conducive to cognition), according to rationality itself. This may be called the *idea of reason*, or *ideal rationality*. Approaching ideal rationality is the task of reflexive reasoning, which monitors the reasoning of the agent, and adapts it to the requirements of rationality.

The notion of ideal rationality leads to an idea of *objectivity*: Standards of rationality are followed because of their correctness, certified by the agent's rationality, not because the reasoner adopting these standards has certain individual idiosyncrasies. As a matter of fact, the reasoning schemata that constitute an agent's rationality do not condition the acquisition of a new mental state to the identity of the agent, but only to the agent's cognitive states: They equally apply to any other agents having the same cognitive states. So ideal rationality includes a pull toward *universality*, which depends both on the universality of the basic ingredient of rationality, namely, natural reason, and on rationality's capacity of critically revising itself according to standards it views as being correct.

4.2.4. Particularised and Universal Rationality

This pull toward universality contrasts with the fact that on the basis of different experiences, and of the different cognitive states that result from having had

such experiences (or on the basis of different psychological constitutions) different agents may have come to adopt different reasoning patterns, and these patterns may lead them to different reflexive judgements concerning the very reasoning patterns they are using.

Assume, for instance, that I adopt reasoning patterns $\{s_1, s_2\}$, while you adopt $\{s_3, s_4\}$. Assume also that patterns $\{s_1, s_2\}$ support one another, and the same for patterns $\{s_3, s_4\}$. Under these conditions, reflexivity does not lead us to converge: It pushes me towards sticking to $\{s_1, s_2\}$ and it pushes you towards sticking to $\{s_3, s_4\}$: What is rational to different people (including the very reasoning patterns they use) is relative to the reasoning patterns they start with.

This situation is logically possible, but fortunately not likely to happen. At least with regard to the differences that may emerge between humans, natural (innate) reason seems powerful enough to adjudicate such conflicts, by establishing what ways of reasoning are right and what ways are wrong, or by accepting that different ways of reasoning are appropriate to the different circumstances in which the different reasoning agents are using their cognitive competence.

Our sharing the fundamental schemata of rational thinking does not imply that everyone is equally good at cognising. Cognitive performance varies dramatically in different individuals. However, as Pollock and Cruz (1999, 156) observe, there is empirical evidence that, insofar as people make cognitive mistakes, they can generally be brought to recognise these mistakes. This suggests that their underlying procedural knowledge (the basic constitution of their rationality) is the same.

We may certainly wonder to what extent an alien intelligence (as may be found on other planets) or an artificial intelligence (which has gone through an autonomous evolutionary process, as in genetic computing) may correspond to human rationality but, with regard to the latter, we may agree with the following statement by Rescher (1990, 3):

> Rationality has two distinguishable, although inseparable aspects: the one personal, private, and particular; the other impersonal, public and universal. The private (particularised) aspect turns of what it is advisable *for the agent*, duly considering his or her personal situation and circumstances—the agent's idiosyncratic information, experience, opportunities, capabilities, talents, objectives, aspirations, needs and wants. [...] The universal aspect of rationality turns in its being advisable by standards that are person indifferent and objectively cogent for *anyone in those circumstances* to proceed in a "rationally appropriate" way in the matters at issue. The standards of rationality are unrestricted an general, in the sense that what is rational for one person will also be rational for anyone else who is in the same condition.

Thus, we may conclude by affirming our faith in the *objectivity* of rationality.

This does not imply that rational reasoners will always come to the same conclusions, nor even that they will always adopt the same reasoning schemata.

What conclusions one rationally achieves (also concerning what reasoning schemata one should use) depends on what cognitive inputs one receives (first of all through perception, but also through other forms of implicit cognition) and on the particular role or perspective one is adopting. Individual rationality is a limited and fallible cognitive faculty, operating along with other cognitive faculties.

However, one's individual rationality, being bootstrapped by our shared natural reasoning competence, and reflexively monitoring itself and the working of other cognitive faculties, may still lead one towards universality and objectivity.

4.2.5. Limits of Rationality

The objectivity of rationality is a problematic idea since rationality appears to be characterised by an intrinsic duplicity. On the one hand, rationality processes the inputs it happens to find in the reasoner's mind, according to the schemata that happen to be endorsed by that reasoner at the time when reasoning takes place. On the other hand rationality itself may be applied to validating these inputs and reasoning schemata. However, such validation has to be performed on the basis of whatever criteria are adopted by the reasoner at the validation time.

Thus, it is no wonder that different authors appreciate in different ways the chances of success of the pull towards universality and objectivity we just considered. Simon (1983, 5) provides a very clear and strict statement as to the limits of reason:

> Reasoning processes take symbolic inputs and deliver symbolic outputs. The initial inputs are axioms, themselves not derived by logic but simply induced from empirical observations, or even more simply posited. Moreover, the processes that produce the transformation of inputs to outputs (rules of inference) are also introduced by *fiat* and are not the products of reason. Axioms and inference rules together constitute the fulcrum on which the lever of reasoning rests, but the particular structure of that fulcrum cannot be justified by the methods of reasoning. This ineradicable element of arbitrariness—this Original Sin that corrupts the reasoning process and therefore also its products—has two important consequences. [...] First it puts forever beyond reach an unassailable principle of induction [...]. Second, the principle of "no conclusion without premises."

This second principle is so described by the same author:

> Reason [...] goes to work only after it has been supplied with a suitable set of inputs, or premises. If reason is to be applied to discovering and choosing courses of action, then those inputs include, at the least, a set of *should*'s, or values to be achieved, and a set of *is*'s, or facts about the world in which the action is to be taken. Any attempt to justify these *should*'s and *is*'s by logic will simply lead to a regress to new *should*'s and *is*'s that are similarly postulated. (Simon 1983, 5)

Simon's observations are so compelling that one may wonder how faith in reason may survive such severe limitations. Our idea is that the limitation of reason's with regard to *is*'s can possibly be overcome by expanding the appeal to reason

into an appeal to cognition, including, beside reasoning, also perception and more generally what we have called implicit cognition: The combination of implicit cognition and reasoning (there included coherence evaluation and heuresis) may be assumed to lead optimal cognisers to convergent outcomes. This is likely to happen when cognisers share the same perceptive functions (or at least when they are able to figure out why their perceptive apparatuses respond to the same stimuli with different outcomes), and they are able to communicate and appreciate the results of their heuresis.

With regard to *should*'s the situation is more difficult, and scepticism has a long tradition, which finds its most authoritative statement in David Hume's assertion that "reason is and ought only to be the slave of passions, and can never pretend to any other office than to serve and obey them" (Hume 1978, 415, vol. 2, sec. 3.3).

Recently the issue has been tackled by Nozick (1993, 139ff.), who identifies 16 rationality conditions concerning preferences and goals. These conditions do not only include the usual rationality constraints on preferences, such as transitivity (If I like x more than y and I like y more than z, then I should like x more than z). They also include the conative attitudes that promote and facilitate the use of rationality: preference for satisfying rationality, desire for the means to achieve it, preference for being able to exercise rationality, and so forth.

Nozick assumes that also these conative attitudes are intrinsic to rationality: Rationality itself requires and motivates the realisation of the pre-conditions for its fullest exercise, that is, it includes what Peczenik (1997) calls the "passion for reason."

Another interesting perspective consists in updating the old project of moral intuitionism (Ross 1930; 1939) and in assuming that the results which are provided by our inborn non-inferential cognitive competence—at least when they can stand the challenge of rationalisation—may be viewed as properly justified elements of practical knowledge. This seems to be the thesis that is developed by Audi (1999, 282), who views intuition as a non-inferential cognitive capacity, which can provide us with appropriate cognitive responses. Similar to this idea is the hypothesis that humans have an inborn moral competence, similar to their linguistic competence, an idea developed by Mahlmann (Volume 2 of this Treatise, sec. 3.2.1.3).

We believe that intuition—to which we may also refer, in the normative domain, by using the more solemn word *conscience*—has indeed a fundamental role to play also in legal cognition.[5]

Some German authors—in particular Philip Heck, one of the leading repre-

[5] See for instance, with reference to constitutional issues, Bobbitt 1991, 183–6. The notion of *legal conscience* (*Rechtsbewußtsein* or *Rechtsgewissen*) was used by some German jurists, like Jung and M. Rümelin, in the first decades of the 19th century (for some references, see Lombardi Vallauri 1967, 342–3).

sentatives of the so-called jurisprudence of interests (*Interessenjurisprudenz*)—have referred to legal intuition by using the term *Rechtsgefühl* (which we may translate as *legal feeling* or also as *sense of rightness*)[6] , but have understood this notion in a way which is fully compatible with legal rationality, and even provides an integration of it. While viewing *Rechtsgefühl* as an independent important aspect or organ of legal cognition, Heck connects it to reasoning and subjects it to the control of rationalisation:

> [The] *Rechtsgefühl* can provide the very decision of the case, but also major premises and value judgements that then lead to the decision of the case by way of the normative reflection. [...] This intuitive acquisition of legal results (*intuitive Rechtsgewinnung*) is based upon the unaware combination of all pieces of knowledge and all experiences, not only with regard to the content of the laws, but also with regard to the extension, the direction and the meaning of the concerned life-interests. [...] The certainty of the appropriateness [of the *Rechtsgefühl*] depends upon the presence of these pre-conditions. Also the intuitive legal feeling can make mistakes and under the influence of reflection be recognised as misleading, so that it disappears completely. (Heck 1968b, sec. 16.3; my translation)

Here we shall not consider to what extent the approaches we have just mentioned can take us beyond the idea that rational agents use reasoning to adapt the world to their likings, whatever such likings are, as Pollock (1995) seems to assume.[7] By now we may content ourselves with the conclusion that the idea of optimal cognition enables us to assert that certain conative states are *cognitively optimal*, and therefore to assert (if we wish to do so) that corresponding normative states of affairs exist.

As we observed above, the cognitive optimality of those conative states—and therefore the existence of corresponding normative states of affairs—may be relative to certain basic mental attitudes of the cognising agent, including preferences between fundamental values (Peczenik 1989, 47ff.). Such a relativisation may concern social roles, audiences (Aarnio 1987, 221ff.), ideologies, individual idiosyncrasies. However, at least within one of such relativised perspectives, it seems possible to reach, through practical cognition, outcomes one may consider to deserve acceptance, and therefore (if one wishes to project one's practical conclusions into a normative reality) to be constitutive of normative states of affairs (on relativising normative judgements, see in particular Wróblewski 1992).

[6] Since the German word *Recht* means both "law" and "correct" (see Pattaro, Volume 1 of this Treatise, sec. 1.3).

[7] For an attempt to capture the impartiality of morality from this perspective, see Pollock 1986.

4.3. An Example in Practical Reasoning

It is now time that we try to provide the reader with an example in normative reasoning, which may illustrate the reasoning schemata we have so far described. We shall approach a very classical paradigm, the story of Antigone, a mythological tale that in the mid fifth century B.C. became the subject matter of the homonymous tragedy by Sophocles, an undisputed masterpiece of world literature (on Antigone and the law, see Rottleuthner, Volume 2 of this Treatise, sec. 3.1.).

The prologue to the tragedy is provided by the fight for the kingdom of Thebes between two twin sons of the unlucky king Oedipus, Polynices and Eteocles. Polynices, who had been expelled from Thebes by Eteocles returns with an army to conquer the city. In front of the walls of Thebes the two brothers kill each other in a duel.

After the duel, the attackers are defeated and Creon, the maternal uncle of the brothers, becomes the new king. Creon forbids upon the death penalty that Polynices be buried (and so, according to the religious beliefs of the Greeks, prevents him from finding repose in the after life).

Antigone, a sister of the two dead brothers, violates Creon's command by burying Polynices's body, and is therefore put to death.

4.3.1. Creon's Reasoning

Let us first consider Creon's reasoning, which he expresses with the following words (Sophocles, *Antigone*, 131):

As God above is my witness, who sees all,
when I see any danger threatening my people,
whatever it may be, I shall declare it.
No man who is his country's enemy,
Shall call himself my friend. Of this I am sure –
Our country is our life; only when she
Rides safely, have we any friends at all.
Such is my policy for our common weal.
In pursuance of this, I have made a proclamation

[. . .] Polynices,
Who came back from exile intending to burn and destroy
His fatherland and the gods of his fatherland,
To drink the blood of his kin, to make them slaves –
He is to have no grave, no burial,
No mourning from anyone: It is forbidden.
He is to be left unburied, left to be eaten
by dogs and vultures, a horror for all to see.

We can recast (quite roughly) Creon's reasoning as a sequence of inference steps according to the reasoning schemata we described above.

(1) believing that the safety of Thebes is a valuable goal;
(2) believing that punishing (treating as my enemies) the enemies of Thebes is a sufficiently good way of contributing to that goal

---

(3) believing that I ought to punish the enemies of Thebes

Table 4.1: *Creon's inference: Creon ought to punish the enemies of Thebes*

(1) believing that Polynices tried to destroy Thebes;
(2) believing that if one tries to destroy Thebes, then one is an enemy of Thebes

---

(3) believing that Polynices is an enemy of Thebes

Table 4.2: *Creon's inference: Polynices is an enemy of Thebes*

The first one is a doxified instance of schema *teleological inference*, whose value-premise is provided by the belief that the safety of Thebes is a valuable goal,[8] and whose conclusion is the obligation to punish the enemies of Thebes (see Table 4.1).[9]

The second inference by Creon consists in applying schema *syllogism*: given that Polynices tried to destroy Thebes, he concludes Polynices is an enemy of Thebes (see Table 4.2).

The conclusion of the latter inference provides Creon with the minor premises of a *normative syllogism*, and enables his to conclude that he ought to punish Polynices (see Table 4.3 on the next page).

To fulfil the obligation to punish Polynices, Creon adopts this as a goal (as an instrumental value) and then finds a way to achieve this goal, that is, to ensure that Polynices remains unburied (see Table 4.4 on the following page). This can be viewed as an instance of schema *teleological inference*, and in particular an instance of subplanning (expressed in a doxified form).

Fulfilling this obligation (implementing this intention) requires a further step into sub-planning (teleological reasoning). Creon adopts the instrumental goal

[8] By a *valuable goal*, we mean a goal that should be adopted (that is adoption-worthy), namely, an intrinsic or instrumental value.

[9] Note that we are adopting the doxified perspective. We could as well perform our inferences in their direct form, reasoning on the basis of conative states (rather than on corresponding beliefs). In such a case the inference in Table 4.1 would be recast as follows: (1) having the goal to ensure the safety of Thebes and (2) believing that punishing the enemies of Thebes is a sufficiently good way of realising this goal, is a reason for (3) intending to punish the enemies of Thebes.

(1) believing that I ought to punish the enemies of Thebes;
(2) believing that Polynices is an enemy of Thebes

---

(3) believing that I ought to punish Polynices

Table 4.3: *Creon's inference: Creon ought to punish Polynices*

(1) believing that ⌈punishing Polynices⌉ is a valuable goal;
(2) believing that ⌈ensuring that Polynices remains unburied is a sufficiently good way for punishing him⌉

---

(3) believing that ⌈I ought to ensure that Polynices remain unburied⌉

Table 4.4: *Creon's inference: Creon ought to ensure that Polynices remains unburied*

(1) believing ⌈ensuring that Polynices remains unburied⌉ is a valuable goal;
(2) believing that ⌈my ordering that nobody ought to bury Polynices is a sufficiently good way to ensure that he remains unburied⌉

---

(3) believing that ⌈I ought to order that nobody ought to bury Polynices⌉

Table 4.5: *Creon's inference: Creon ought to order that nobody ought to bury Polynices*

of ensuring that Polynices remain unburied, and to device a way (a plan) for achieving this goal. This leads Creon to conclude that he should order that nobody shall bury Polynices (see Table 4.5).

From the conclusion of the inference in Table 4.5, according to schema *dedoxification*, Creon infers his intention of issuing that order (see Table 4.6 on the next page).

This concludes a first phase of Creon's reasoning (we assume that issuing this order does not require further subplanning). Note that he may have performed these reasoning steps backwards, in order to rationalise a pre-existing intuitive intention to issue such order, or he may have come through reasoning to this result.

(1) believing that ⌈I ought to order that nobody ought to bury Polynices⌉

---

(2) intending that ⌈I shall order that nobody ought to bury Polynices⌉

Table 4.6: *Creon's inference: Creon shall order that nobody ought to bury Polynices*

(1) believing that ⌈Creon has issued the order that nobody ought to bury Polynices⌉;
(2) believing that ⌈if Creon issues an order then its content is binding⌉

---

(3) believing that ⌈the proposition ⌈nobody ought to bury Polynices⌉ is binding⌉

Table 4.7: *Creon's inference: the order not to bury Polynices is binding*

(1) believing that the proposition ⌈nobody ought to bury Polynices⌉ is binding

---

(2) believing that ⌈nobody ought to bury Polynices⌉

Table 4.8: *Creon's inference: nobody ought to bury Polynices*

At this stage Creon acts according to his intention: He issues the order.

The fact the he has issued the order changes the cognitive context in which Creon and his fellows are acting. Now Creon (as his soldiers and his fellow Thebans in general) can infer, according to *syllogism*, that what Creon has ordered is binding (see Table 4.7). This allows his to conclude, according to *dedoxification*, that nobody ought to bury Polynices (see Table 4.7). The type of reasoning we have just described also applies to Creon's decision to punish with "stoning before all the folk" those who disobey his order, as we learn from Antigone's words. The starting point consists in applying schema *teleological inference*: given the importance of implementing his order, Creon concludes that he ought to ensure that the violators are punished with stoning (see Table 4.9 on the following page).

A further teleological inference leads Creon to the intention to establish the sanction (stoning the violators) by ordering it (see Table 4.10 on the next page).

(1) believing that ⌈ensuring that my order not to bury Polynices is implemented⌉ is a valuable goal;
(2) believing that ⌈punishing with stoning those who disobey my order is a satisfactory way for ensuring the implementation of my order⌉

---

(3) believing that ⌈I ought to ensure that those who disobey my order not to bury Polynices are punished with stoning⌉

Table 4.9: *Creon's inference: Creon ought to ensure that violators are punished with stoning*

(1) believing that ⌈ensuring that those who disobey my order not to bury Polynices are punished with stoning⌉ is a valuable goal;
(2) believing that ⌈ordering such punishment is a sufficiently good way to ensure that it is carried out⌉

---

(3) believing that ⌈I ought to order that those who disobey my order not to bury Polynices are punished with stoning⌉

Table 4.10: *Creon's inference: Creon ought to order the punishment*

Once Creon has issued the order concerning the sanction, his soldiers (and Creon himself) can apply schemata *normative syllogism* and then *de-doxification*, to conclude that those who bury Polynices ought to be stoned (see Table 4.11 on the facing page).

Creon later provides, when talking to his son Haemon, a rationalisation of his goal that his order not to bury Polynices is implemented. This goal follows from a higher goal he has. This is the goal of ensuring obedience (Sophocles, *Antigone*, 144):

He whom the State appoints must be obeyed
To the smallest matters, be it right or wrong
And he that rules his household without a doubt
Will make the wisest king or, for that matter,
The staunchest subject. [...]
There is no more deadly peril then disobedience;
States are devoured by it, homes laid in ruins,
Armies defeated, victory turned to rout.
While simple obedience saves the life of hundreds
Of honest folk. Therefore I hold to the law
And will never betray it —least of all for a woman.

(1) Creon has stated that ⌈those who bury Polynices ought to be stoned⌉;
(2) if Creon issues a statement then its content is binding

---

(3) the proposition that ⌈those who bury Polynices ought to be stoned⌉ is binding

---

(4) those who bury Polynices ought to be stoned

Table 4.11: *Creon's inference: those who bury Polynices ought to be stoned*

(1) believing that ⌈saving the city of Thebes from ruin⌉ is a valuable goal;
(2) believing that ⌈ensuring obedience to the orders of ruler of Thebes is a satisfactory way to contribute to saving that city⌉

---

(3) believing that ⌈I ought to ensure obedience to the orders of the ruler of Thebes⌉

Table 4.12: *Creon's inference: Creon ought to ensure obedience to the orders of the ruler of Thebes*

With a further abuse of Sophocles's poetry, we may recast Creon's reasoning as a combination of schemata *teleological inference* and *syllogism*. First *teleological inference* leads Creon to conclude that he ought to ensure that the orders of the rulers of Thebes are obeyed (see Table 4.12).

Then, according to *syllogism*, the premises that he is indeed a ruler of Thebes and that he has ordered that nobody ought to bury Polynices lead Creon to conclude that he ought to ensure the implementation of this specific order (see Table 4.13 on the following page).

4.3.2. Antigone's Reasoning

Let us now move to Antigone's reasoning. Let us reconstruct it from the following reply she gives to Creon (Sophocles, *Antigone*, 138):

That order did not come from God. Justice,
That dwells with the gods below knows no such law.
I did not think your edict strong enough
To overrule the unwritten unalterable laws

(1) believing that I am the ruler of Thebes;
(2) believing that I have ordered that ⌈nobody ought to bury Polynices⌉;
(3) believing I ought to ensure obedience to the orders of the ruler of Thebes

---

(4) believing that I ought to ensure obedience to the order that ⌈nobody ought to bury Polynices⌉

Table 4.13: *Creon's inference: Creon ought to ensure obedience to the order not to bury Polynices*

(1) believing that ⌈propositions stated by the gods are binding⌉;
(2) believing that ⌈the gods have stated that ⌈every one ought to bury one's own relatives⌉⌉

---

(3) believing that ⌈the proposition that ⌈every one ought to bury one's own relatives⌉ is binding⌉

---

(4) believing that ⌈every one ought to bury one's own relatives⌉

Table 4.14: *Antigone's inference: we ought to bury our relatives*

Of God and heaven, you being only a man.
They are not of yesterday or to-day but everlasting,
Though where they came from, none of us can tell.

With further violence to Sophocles, we shall rephrase Antigone's reasoning through a sequence of syllogisms. The first of them is followed by a dedoxification step, as you can see in Table 4.14. After concluding for that one ought to bury one's relatives, Antigone adopts, through one further syllogism, her fatal determination: she ought indeed to bury her brother Polynices (see Table 4.15 on the facing page).

However, Antigone also believes that she Creon's orders are binding, which would lead here to the opposed conclusion (see Table 4.16 on the next page).

4.3.3. Comparison of the Two Reasonings

Thus Antigone has to face a (tragic indeed) contradiction: One inference concludes that she ought to bury Polynices, the other, that she ought not to do that.

(1) every one ought to bury one's own relatives;
(2) Polynices is my relative

---

(3) I ought to bury Polynices

Table 4.15: *Antigone's inference: Antigone ought to bury Polynices*

(1) Creon has issued the order that ⌈nobody ought to bury Polynices⌉;
(2) if Creon issues an order then its content is binding

---

(3) the proposition ⌈nobody ought to bury Polynices⌉ is binding

---

(4) nobody ought to bury Polynices

---

(5) I ought not to bury Polynices

Table 4.16: *Antigone's inference: Antigone ought not to bury Polynices*

What is Antigone to do?

To get out of her predicament, she needs to compare the reasons leading her to conflicting conclusions.[10]

First, through schema *meta-syllogism* she infers that the rule that obliges people to bury their relatives is stronger then the prohibition to do so. This result leads her to conclude that she has an outweighing reason supporting her obligation to bury her brother (see Table 4.17 on the following page). According to this preference, as we shall see more precisely in Chapter 26, Antigone endorses the argument leading her to conclude that she ought to bury Polynices, which leads her to behave correspondingly.

On the other hand, Creon does not take seriously this conflict until it is too late. When he decides to follow the advice of Teiresias, the soothsayer, and free Antigone, she will already be dead. This will cause further losses, since Creon's son and wife will kill themselves.

We shall not consider further the tragic problems of Creon and Thebes, but we hope that this example may show how our approach covers significant aspects of practical and normative reasoning.

[10] We shall extensively consider preference-based reasoning in Chapter 7. Here we shall only provide an exemplification, without analysing it.

(1) rules stated by the Gods are stronger then those stated by a state-rulers;
(2) the rule ⌈people ought to bury their relatives⌉ was stated by the Gods, while the rule ⌈people ought not to bury their relatives⌉ was stated by a state-ruler

---

(3) the rule ⌈people ought to bury their relatives⌉ is stronger than the rule ⌈citizens ought not to bury their relatives⌉

---

(4) reason: ⌈Antigone is Polynices's relative; people ought to bury their relatives⌉ for ⌈Antigone ought to bury Polynices⌉
outweighs
reason: ⌈nobody ought to bury Polynices⌉ for ⌈Antigone ought not to bury Polynices⌉

Table 4.17: *Antigone's inference: the reason for burying Polynices outweighs the reason for not doing that*

Chapter 5

BOUNDED RATIONALITY: COGNITIVE DELEGATION

Our idea that normative states of affairs supervene upon optimal (though possibly relativised) practical cognition needs to stand a further challenge. This is provided by the idea of *bounded rationality*, namely, the idea that human rationality is a limited faculty, for which optimal cognition is often out of reach.

Therefore, rather than considering what one would think and do if one could get perfect cognition, we should focus on how one can use well-enough one's own bounded cognitive resources.

The idea of bounded rationality has found many important applications in a number of different domains, from economics, to politics, to computing. Here, in Chapters 5 and 6, we shall focus on its application to aspects of cognition that are especially important for the law.

In this chapter, after introducing the notion of bounded rationality, we shall explore the limitations of rational teleological reasoning, and we shall discuss whether and to what extent these limitations can be overcome by delegating teleological reasoning to others, and in particular, by relying on the judgement of authorities.

5.1. The Notion of Bounded Rationality

For characterising the idea of bounded rationality, we will refer to the fundamental contribution by Herbert Simon, who deserved the Nobel Prize in economics for his elaboration of this idea (Simon 1979), but also used it to provide ground-breaking contributions to political science and artificial intelligence.[1]

Simon developed a model of human reason as a limited and fallible competence, and consequently investigated how individuals and institutions can use such competence appropriately, providing it with attainable tasks, favourable contexts and practicable methods.

[1] For an informal introduction to the many ideas developed by Simon, we refer the reader to his autobiography (Simon 1996).

5.1.1. The Limitations of Human Rationality

Simon's starting point is that human rationality has restricted powers, when compared to the magnitude of the problems which humans have to face:

> The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behaviour in the real world or even for a practicable approximation to such objective rationality. (Simon 1957, 198)

The limitations of the human mind (in memory, attention, perception, reasoning, etc.) have two connected implications: the impossibility of examining all options and the impossibility of considering all information.

The first implication concerns practical reasoning. Optimal practical rationality (by which Simon means *maximisation*, namely, the choice of the plan that maximises the satisfaction of the objectives of the decision maker) is usually out of reach. Rather than aiming at optimality, that is, at making the best choice among all possible alternative plans, one (rational realistic decision-maker) should aim at *satisficing*, as Simon says, that is, at finding "a course of action that is satisfactory" or "good enough" (Simon 1965, xxv), and stop one's inquiries when one has got to that point.

> We cannot within practicable computational limits generate all the admissible alternatives and compare their respective merits. Nor can we recognize the best alternative, even if we are fortunate enough to generate it early, until we have seen all of them. We satisfice by looking for alternatives in such a way that we can generally find an acceptable one after only moderate search. (Simon 1981, 139)

The second implication concerns theoretical reasoning (when functional to practical choices). Also in theoretical reasoning, bounded rationality should not aim at complete cognition. One should "recognize that the world as he perceives it is a drastically simplified model of the buzzing, blooming, confusion that constitutes the real world." One should therefore aim at building a "simplified picture of the situation that takes into account just a few of the factors that he regards as most relevant and crucial" (ibid.).

A further implication of bounded rationality is the role that *institutions* play in providing us a context where a useful deployment of rationality is possible. Institutional arrangements, by limiting uncertainty (reducing complexity), enable us to use our limited cognitive faculties:

> Our institutional environment, like our natural environment, surrounds us with a reliable and perceivable schema of events. [...] The stabilities and predictabilities of our environment, social and natural, allow us to cope with it within the limits set by our knowledge and our computational capacities. (Simon 1983, 78–9)

Consider, for example, how we would approach a world where we would not have the expectation that shops will be open, that traffic will be regulated, that debts will be paid, and so on.[2]

On the other hand, institutions need to be arranged in such a way as to promote the effective use of bounded rationality. Among the institutional arrangements that enable the use of limited rationality, Simon mentions the following:

- organisations, where individuals can specialise in specific tasks and take routine decisions competently,
- markets, which synthesise through prices all information concerning production costs,
- adversarial settings, such as legal proceedings, where each party, by only focusing on its own interest and point of view, and only providing the information which advances its interest and expresses its views, contributes to producing a pool of information which tends to reflect all interests and views.

5.1.2. Substantive and Procedural Rationality

The idea of making the best use of the limited capacities of the human mind contributes to explaining many feature of legal decision-making: its adversarial nature, its restricted time-frame, the need to appeal to legal authorities, the procedural restrictions on usable information (for example, judges may be bounded to take into consideration only evidence that has been provided by the parties, in legally appropriate ways).

We shall here focus on how the idea of bounded rationality—the fact that humans are fallible and should be content with suboptimal choices—may impact on our view that normative states of affairs are constituted by optimal practical cognition.

This requires us to address a further distinction between forms of rationality, which also has much importance in the legal domain. This is the distinction between *substantive rationality* and *procedural rationality*. This distinction was originally introduced by Simon (1976), and is expressed as follows by Rubinstein (1998, 21), citing the words of Simon:

> On the one hand substantive rationality refers to behaviour that "is appropriate to the achievement of given goals within the limits imposed by given conditions and constraints"; on the other hand "behaviour is procedurally rational when it is the outcome of appropriate deliberation."

We may also express this distinction by saying more generally that the substantive rationality of a cognitive state consists in the fact that it would result from

[2] The role of institutions in "reducing complexity" has been stressed in legal sociology, in particular, by Luhmann 1985.

optimal cognition, while its procedural rationality consists in the fact that it would result from a cognitive effort that is appropriate to the conditions of the cogniser.

Clearly the two ideas of rationality can lead us to different results: It may be that substantive rationality would require choice a, but that application of reason to information I have (including the information I could obtain through a reasonable cognitive effort) leads me instead to choice b. For instance, if I had all information concerning the stock market, I should buy stock a but, on the basis of the information I have, it is rational for me to buy stock b (I do not know, nor have any way of knowing, that there is an attempt to buy over company a, so that the price of its stock is going to rise).

Similarly, in a legal case the following situation may obtain: If the judge knew what really happened he would condemn the defendant, but given that the judge does not have sufficient information (the defendant succeeded in destroying all evidence), he must acquit the defendant.

Moreover, it may be rational that one does not even try to get further information, even when one knows that this would enable one to improve the substantive rationality of one's beliefs and decisions, since the cost of the inquiry is higher then the advantage one may obtain through a better decision. For example, assume all of the following:

- I want to fly to Barcelona;
- I believe that there exists a cheaper ticket for Barcelona than the ones I could find so far (I was told by a person whom I trust, but whom I am unable to contact today);
- I currently do not know how to get the cheaper ticket;
- I could find it out through an appropriate inquiry (just phone all travel agencies) which requires a lot of time and effort.

Under such conditions is may be rational for me not to make the costly inquiry, but rather buy the cheapest ticket among those I have already found, though I am aware that this choice is suboptimal.

Similarly, when deciding a minor legal case, it may be rational for a prosecutor or an administrator to stop inquiring when further search is only going to make little difference, which would not compensate the costs of the inquiry.

The distinction between procedural and substantive rationality is also relevant to the law. Consider for example how one may want to differentiate the procedural correctness of a judicial or administrative decision (including both the respect of procedural rules and the soundness of reasoning) and its substantive correctness: Procedural correctness does not ensure substantive correctness, whenever the decision-maker is unable to obtain sufficient information on some decisive aspect of the case. For instance, assume that though pollutants from j's factory caused k's cancer (and j was aware of this risk, on the basis of some secret research), scientific knowledge publicly available at the time of the

process does not allow to substantiate any connection between pollution and cancer: The procedurally correct decision consists in denying compensation to k, though this is substantially wrong.

Let us consider whether normative states of affairs are constituted by substantive or by procedural rationality. For instance, for the obligation to do A to exist, is it required that *optimal* (substantive) cognition would lead one to have the intention that A is done or is it sufficient that *bounded* (though procedurally correct) cognition leads one to intend that A is done? It seems that only unbounded substantive rationality can do the job. This is particularly clear when we consider the cognition of an observer, rather than the cognition of the author of the action. It does not make sense to assume that the normative qualification of an action depends on the knowledge state of a bounded observer, or on the particular procedure that the latter used.

For instance, assume that the correct exercise of her bounded cognitive resources enables Mary to conclude that the decorator who was working in her house badly damaged a painting (this is the conclusion she can obtain by processing all clues she could access, through a reasonable cognitive effort). This leads her to conclude then the decorator is under the duty of paying damages to her.

However, this is not the outcome that a perfect cogniser would have achieved: By looking into the past, or more modestly, by processing DNA traces left on the brush, such a cogniser would have concluded that the decorator did not damage the painting (this was done by a malicious neighbour of Mary, with whom she had a dispute, and which profited of the open door to take revenge).

It seems that we need to affirm, under such conditions, that the decorator has no obligation to pay damages to Mary, though she justifiedly believes that he does, and though also any judge (unless having super-human cognitive capacities) would come to the same conclusion. The decorator may become obliged after the wrong decision of the judge, but has no obligation before that decision is taken.

The idea that only cognitive optimality constitutes normative states of affairs is consistent with the fact that the law often gives normative relevance to suboptimal cognitive states. For instance, negligence may determine liability, irrationality of an administrative decision may lead to its annulment, one's ignorance of the effects of one's action may reduce or prevent one's criminal liability. However, this only means that to establish the appropriate normative qualification of an action, optimal cognition may needs to consider some suboptimal mental states of the agent: Also these mental states are among the circumstances to be taken into account, in order to establish what is normatively the case.

It is true that sometimes one's progress in knowledge impacts on one's knowledge state, and therefore produces a relevant change in the very situation to be evaluated. For example, assume that a civil servant, after an adequate inquiry, has made up his mind for a certain course of action, which appears satisfactory

according to the available information. Adopting that course of action under that knowledge state would be procedurally rational, and would not be legally challengeable. However, assume that the civil servant subsequently comes upon further information, which shows that there is a clearly better solution than the one he had envisaged. After obtaining the new information the civil servant is in a new knowledge state, in which it would be irrational (and legally challengeable) to accomplish what he rationally intended to do in his previous knowledge state. Also such considerations, however, do not impact on our idea that only optimal cognition constitutes normative states of affairs, once such cognition is allowed to refer to the agent's cognitive states: In our example there has been a change in the knowledge state of the civil servant (which is one of the circumstances to be considered), that explains why optimal cognition would judge differently his choice before and after having the obtained additional information.

The idea that optimal practical cognition constitutes normativity is also consistent with the fact that one needs to take into account past mistaken decisions. In fact, though substantive rationality requires me to ideally take into account every relevant circumstance, it cannot require me to undo past mistakes. For instance, assume that I have bought an expensive flight to Barcelona, wrongly believing that no cheaper flight was be available. After I have completed the purchase (getting a non refundable ticket), it becomes rational for me to take that flight (though this choice was irrational before buying that ticket). Similarly, optimal cognition may require a judge to act according to an enacted law or a precedent, even when the law should never have been enacted and the precedent should never have been decided that way.

Finally, Simon's idea of *satisficing* (rather than optimising) is included to some extent in our model of teleological reasoning. A rationally chosen plan (according to schema *teleology*) is not required to be optimal: It rather must be satisficing (good enough) and must appear as the best one only among the plans that the agent has so far considered.

5.2. Bounded Rationality and Teleology

The description of practical reasoning we provided in Section 1.3 on page 16 emphasises the role of teleology: The formation of intentions relies upon adopting plans in order to achieve goals. This emphasis duly reflects the importance of means-end analysis in practical reasoning, as providing the pivotal link between epistemic and practical reasoning: (1) practical reasoning provides epistemic reasoning with goals, (2) epistemic reasoning finds and evaluates plans, according to one's likings and beliefs, and (3) practical reasoning endorses the most satisfactory plans.

However, we should also give due consideration to the practicability of teleological reasoning: Teleological reasoning requires an enormous amount of

knowledge, which often is not available. This is required not only for approaching the tremendous problem of planning (constructing plans), but also for comparing and evaluating the constructed plans. The latter task is undoubtedly more tractable, but nevertheless seems to exceed human powers in many contexts.

Any boundedly-rational agent needs to find some ways to limit his or her commitment to teleological reasoning. Moreover, the outcomes of teleological reasoning of other agents are very unpredictable, since they strongly depend on the particular circumstances of the individual reasoner (on the information and experience which is available to him or her). When predictability and coordination are a primary requirement, teleological reasoning may need to be constrained.

In the following pages we shall first try to identify the limitations of teleological reasoning, and then we shall see how we can overcome these limitations, or at least live with them.

5.2.1. Failure to Achieve Teleological Optimality

As we observed above, plans of actions do not exist in nature, as perceivable objects: One must *construct* them. Constructing a plan requires that one anticipates the effects of possible actions, and combines them in such a way as to achieve one's goal. Since different plans can be obtained, one may need make a choice. Therefore, identifying the best plan involves two aspects:

1. constructing a set of candidate plans that includes the best one, and then
2. making the right choice among the constructed plans (choosing the best among them).

In both regards, optimisation is often out of reach for a bounded decision maker.

Firstly, we cannot consider all possible strategies for achieving certain objectives, and therefore we may fail to construct the best strategy, and consequently miss it. For example, when planning for a dinner in a foreign city, I may miss the restaurant that is better suited to my tastes, since I am not aware of its existence.

Similarly, consider how a legislature may fail to discover what solution would be most advantageous for achieving the highest economic growth (for example, cutting taxes too much may cause a recession and a huge deficit, rather than favouring economic development, as expected), or how judges or legal scholars may fail to discover optimal solutions to the problems they are considering (for example, making Internet providers liable for publishing illegal contents whenever they exercise some control over their sites, may lead them to omit any control, rather than to be more careful).

Secondly, even when we have constructed the best plan (together with other candidate plans), we may not be able to realise that it is the best one, and choose

an inferior option. Failure to rank the available options according to their merit may depend in particular on the following:

- we have very little knowledge of the factual consequences of many of our choices;
- we have very confused ideas about what values should inspire our evaluations, and about their relative importance, in various possible situations.

Simon (1965, 63) depicts as follows the latter limitation of human rationality:

> The fact that goals may be dependent for their force on other more distant ends leads to the arrangement of these goals in a hierarchy—each level to be considered as an end relative to the levels below it and as a means relative to the levels above it. Through the hierarchical structure of ends, behavior attains integration and consistency, for each member of a set of behavior alternatives is then weighed in terms of a comprehensive scale of values—the "ultimate" ends. In actual behavior, a high degree of conscious integration is seldom attained. Instead of a single branching hierarchy, the structure of conscious motives is usually a tangled web, or more precisely, a disconnected collection of elements only weakly and incompletely tied together; and the integration of these elements becomes progressively weaker as the higher levels of the hierarchy—the more final ends—are reached.

This problem concerns individual psychology, but also the functioning of organisations. It frequently happens that

> the connection between organisation activities and ultimate object is obscure, and these ultimate objectives are incompletely formulated, or there are internal conflicts and contradictions among the ultimate objectives, or the means selected to achieve them. (Simon 1965, 64)

Obviously, such problems are particularly serious in political and legal decision-making, which should ideally take into consideration all values that are relevant to a community, according to the preferences of all its members.

This makes it very difficult to assess the rationality of decisions impacting on different values, according to a combined assessment of resulting gains or losses with regard to the relevant values. Consider for example, how it is difficult to assess the rationality of decisions in issues of Internet law, where one has to balance such diverse values as privacy, freedom of information, individual liberty, democracy, economic growth, technological and scientific development.

Various views have been taken in this regard. Some authors seem to believe that we can understand and justify decision-making by moving beyond teleological rationality, and focusing rather on *systemic rationality*: We should look at how certain forms and styles of decision-making contribute to the functioning of the social systems in which they take place, regardless of how they match the goals pursued by the decision-makers (this is the view famously advanced by Luhmann 1973). Others, such as Habermas (1999, 259) have rejected the

idea that rational decision-making involves assessing and comparing impacts on relevant values, affirming that:

> weighing takes place either arbitrarily or unreflectingly, according to customary standards and hierarchies.

To overcome such dismissive views, while addressing seriously the issue of the limitations of teleological reasoning, we need to go back to the analysis of teleology which we developed in Section 1.3.6 on page 27, and consider the problem of the evaluation of outcomes and plans.

5.2.2. The Evaluation of Outcomes

In evaluating a plan one needs to identify its outcome (the results it will produce), distinguish the relevant desirable or undesirable features that are involved by that outcome, consider to what degree these features are advanced or impaired by the plan, and finally establish what value is to be accordingly attributed to the plan.

For instance, when considering the plan of going to a restaurant r (see Section 1.3.6 on page 27), one may consider to what degrees one expects a dinner at r would exemplify the following features: quality of the food, quality of the wines, quality of the service and amount of the price. Then one would move from the level of realisation of each feature into the evaluation of their combination.

The most delicate step is the last one, namely, moving from single features to their joint evaluation. Analytical reasoning (ratiocination) is in general not very capable of capturing and assessing interconnected sets of features: This is a task that seems to be performed by a kind of holistic understanding, similar to pattern recognition in perception (as affirmed by Thagard 2000). However, under certain conditions analysis may help.

The analytical evaluation of multi-featured decisional outcomes is facilitated when all of the following conditions hold:

- there is a numerical measure for the realisation of each relevant feature,
- the value (the likeability) of each feature grows linearly (always in the same proportion or weight) according to the measure of the realisation of this feature,
- all desired features are independent.

Under these conditions, to obtain the evaluation of an outcome, we just needs to multiply the measure of the realisation of each feature in that outcome for the weight of the feature, and sum up the results we obtain.[3] This provides an easy

[3] The evaluation EV of outcome ω—where ω realises features $f_1, \ldots, f_n$, to the degrees

	food	*wine*	*service*	*price*	*totalvalue*
r_1	$4 * \mathbf{3}$	$2 * \mathbf{2}$	$2 * \mathbf{1}$	$(6) * -\mathbf{2}$	6
r_2	$3 * \mathbf{3}$	$2 * \mathbf{2}$	$1 * \mathbf{1}$	$(2) * -\mathbf{2}$	10

Table 5.1: *The expected value of two restaurant-experiences*

way for computing the value of plans of action and consequently for comparing them.

For instance, assume that I assign weights **3** to food, **2** to wines, **1** to service and $-\mathbf{2}$ to price. Moreover, I expect that in restaurant r_1, food will score 5, wines 2, service 1, and price 6 (€ 60), while in restaurant r_2 food will score 3, wines 2, service 1, and price 2 (€ 20). This allows me to assign points 6 to restaurant r_1 and points 10 to r_2, as Table 5.1 shows. Thus, if the input data are correct, and if all assumptions above hold, rationality commands me to go to the cheaper restaurant r_2, even though it offers an inferior food and service quality than r_1.

This example shows how this way of evaluating choices gives questionable results, when no precise and objective way is available for quantifying degrees of satisfaction and weights, or when different features interfere. One may rightly challenge my choice for restaurant r_2 (or anyway my procedure for reaching that choice) by pointing to the arbitrariness of assigning degrees of satisfaction and weights (how do I know that the level of food quality of r_1 is 4, rather than 5 or 3, how do I know that food quality has weight **3**, rather than **4** or **2**?), to their contingency (for example, the importance of the quality of service depends on how much time I have and on how irritable I am, on that particular day), to their interdependence (having bad service would likely spoil my enjoyment of the food).

However, it may still be possible to compare the degrees of satisfaction of a certain desired feature in different situations. Combining this assumption with the idea of monotonic growth of desires as the degree of the desired feature grows, one gets some clues on how to develop one's preferences.

$d_1(\omega), \ldots, d_n(\omega)$, and each feature f_i has weight $\mathbf{w}_i$—is given by the simple formula:

$$EV(\omega) = \sum_{i=1}^{n}(d_i(\omega) * \mathbf{w}_i) \quad (5.1)$$

5.2.3. Pareto Efficiency

If outcome δ, in comparison to outcome γ, presents at least one feature at a more desirable degree and no feature at a less desirable degree, then it seems that a rational agent should prefer δ to γ (and thus, that it would be irrational to prefer γ to δ).

Let us try to state this idea more precisely. Let us write $x \succ y$ to mean that x is preferable to y.[4] Thus, when x and y are degrees of a positive feature (like the quality of the food), namely a feature of which it is desirable to have a higher degree, then $x \succ y$ whenever $x > y$ (x is greater then y). On the contrary, when x and y are degrees of negative feature (like the price of the food), namely a feature of which it is desirable to have a lower degree, then $x \succ y$ whenever $x < y$ (x is smaller then y). Accordingly, we can say that a rational agent should prefer outcome δ to outcome γ under the following conditions:

(a) δ and γ share the same desirable features $f_1, \ldots, f_n$, and
(b) δ presents these features at degrees $d_1, \ldots, d_n$ and γ at degrees $g_1, \ldots, g_n$.
(c) there is an i such that $d_i \succ g_i$, while for no j, $g_j \succ d_j$.

For instance, if a restaurant r_1 provides better food than a restaurant r_2, and equal or better wines and service, then a rational agent should prefer r_1 to r_2 ($r_1 \succ r_2$).

This is the idea of what we may call *Pareto efficiency*,[5] which, can be viewed as a modest but general feature of rational choice: When a choice is required between alternative decisions δ and γ, and the two decisions impact on the same values (desirable features), but δ advances some of these values to a higher degree than γ does, the impact on all other values being equal, then δ is to be preferred.

Consider for example, the choice between these two ways of treating videos taken through cameras located in a street having a high crime rate:

- cancelling data after a week, or
- keeping data for one year.

Let us assume that cancelling data after a week allows a greater achievement of the value of privacy, while there is no difference with regard to the attainment

[4] More generally, in the following we shall write $a \succ b$ to mean that entity a is preferable to entity b, that is, whenever we want to express the comparative merit of certain objects, like values, rules, and so on.

[5] The idea of Pareto efficiency is used by game theorists to denote a situation where no one's position can be improved unless somebody else's position is worsened. More exactly, a Pareto-efficient outcome has the following property: There is no other outcome that makes every player at least as well-off and at least one player strictly better-off. Here, following Alexy 2003, 135, we extend this notion to impacts on different values, rather than on different individuals.

of the value of security (one week being sufficient to check video recordings, in relation to all serious claims). Under such conditions, the decision to keep the videos for a year would be irrational, according to the idea of Pareto efficiency (assuming the only relevant values are privacy and security).

Thus, we can say that a decision is irrational when the decision-maker knows (or should know, through an appropriate cognitive effort) that an alternative choice provides a higher satisfaction of some values, without diminishing the level of satisfaction of any other value.

Though it may seem quite trivial, the idea of Pareto-efficiency is a useful minimum standard for evaluating decisions. For instance it seems to subsume some of the standard of *reasonableness* which are used in constitutional and administrative review. For instance, a decision which impairs certain values without contributing to increasing the realisation of any other values is certainly inefficient, and in this sense it is more then just unreasonable, it is irrational. Similarly, a choice (*a*) would be irrational on grounds of its Pareto-inefficiency when it achieves certain values by impairing certain other values, but there is an alternative choice (*b*) that would realise the same values to the same extent without impairing any other values (or impairing them to a lesser degree): Choice (*a*) is unreasonable since it determines a value-prejudice which is unnecessary to achieve its beneficial outcomes.

5.2.4. Weighing Alternatives

The idea of Pareto efficiency, however, does not help us in making choices in those situations where there are alternatives δ and γ, such that δ advances more than γ certain values, and γ advances more that δ certain other values. Consider for example, the problem of making a choice between two restaurants r_1 and r_2, such that r_1 provides better food, r_2 provides better service, and all other relevant features are satisfied to the same degrees. Similarly, consider the problem of choosing whether to cancel video recordings after one day or after seven days, assuming that cancellation after one day gives a higher level of privacy while cancellation after seven days provides a higher level of security.

One may say that such issues can be solved through a comparative analysis that takes into account (a) the degree at which the values are satisfied by the different choices, and (b) the importance of the values. Choice α is better than choice δ if the comparative gains concerning the values that are better promoted by α, outweighs the comparative loss concerning the values that are better promoted by δ. For instance, rationality requires me to go to restaurant r_1 rather than to restaurant r_2 if the comparative advantage in food quality outweighs the disadvantage in service quality. Similarly, one may say that rationality requires cancelling videos after seven days rather than after one day, if the gain in security outweighs the loss in privacy.

The difficulty, however, consists in finding a sufficiently precise character-

isation of how one should rationally "weigh" such alternatives. One may say that the weighing judgement depends both on the quantities that are gained or lost, and on the importance of what is gained and lost, but this gives very little help to the decision-maker, for whom the problem is exactly that of establishing quantities and relative importance.

Moreover, the importance of a gain or a loss with regard to a certain value, does not only depends on the "quantity" that is gained or lost (whatever one means by quantity) and on the importance of the value at issue. It also depends on the level of satisfaction with regard to which we measure gain or loss.

For instance, in relation to the value of wealth (or of nutrition), a small quantity of money (of food) can have great importance to a poor (starving) person, and very little importance to someone who is rich (well fed). In other words, the importance of a certain feature does not grow linearly in relation to the quantity of its realisation (that usually marginal utilities tend to decrease is a fact well-known to economists). Thus, a fixed proportion (a weight) cannot always capture the connection between the quantity of a feature and its value: A more complex functional correlation might need to be specified.

The difficulties we have just considered should lead us to be careful and critical (maybe even sceptical) with regard to pretended "objective" or "scientific" evaluations of decisional alternatives. However, they should not lead us to conclude that the rational comparison of alternative is impossible, that the tools of decision theory are useless, that every choice puts us in front of the incommensurable or the "absurd," as existentialists used to say, and calls for (or at least presupposes) an arbitrary commitment (cf. Sartre 1993).

In fact, we need to approach the problem of weighing and balancing on the basis of our awareness, not only of our failures, but also of our cognitive powers, and in particular, of the power of our implicit cognition. As a matter of fact, we know how to take decisions which impact on different values and objectives, and we can approach this task in a way that, though far from perfect, is sufficiently good for most of our purposes.

Humans seem to possess an adequate cognitive faculty (organ) for evaluating and comparing, under conditions of uncertainty, alternative plans of actions, though we cannot tell precisely how this faculty works, nor can we fully replicate its functioning through explicit reasoning. It is no chance that even decision theorists, when they have to make choices involving multiple aspects in complex domains (choosing a partner, a profession, buying a house or even a car), rely more on their intuitive judgement then on the conceptual tools provided by their discipline.

Thus, the fact that our comparative evaluations usually result from an unconscious process does not imply that they are random or absurd. On the contrary, our implicit cognition usually also takes into account data that are explicitly provided and processes these data unconsciously, along with information which remains implicit, and that we do not have the ability and the time to express

and consciously evaluate. For instance, my choice to buy a certain car may be influenced by the information I find in car journals, or in suggestions by friends, along with various other things I know, though I can only partially articulate this data.

Moreover, one can (and should, in important cases) articulate, at least in part, this implicit knowledge at the stage where one critically analyses one's choices, trying to rationalise them, as being based upon good grounds. For instance, before writing a check to the car dealer, I may try to consider if my intuitive preference is really based upon good grounds, by explicitly listing the pros and cons of a certain particular choice, as compared to the available alternatives. I should stop only at the stage where I have found a reflective equilibrium, that is, when intuitive assessment and explicit reasoning lead me to the same result.

The situation is no different with regard to legal decision-making. Consider for instance a judge who has to decide, in the absence of a precise rule, whether a certain way of processing data taken through street-cameras is admissible, or whether an employer is allowed to have access to the e-mails an employee has sent and received using the account provided by the company. One can take a stand on such issues only with reference on the one hand to the legal values at stake (security, privacy, economic efficiency, and so forth) and on the other hand to the technological and social knowledge concerning the ways in which different arrangements are going to impact on these values. All of this knowledge is brought to bear, usually unconsciously, on one's evaluation of whether a certain choice unduly impairs the value of privacy, with regard to other possible arrangements. This intuitive judgement needs, however, to be rationalised by articulating grounds for it, a rationalisation that should lead the decision maker to find a satisfactory reflective equilibrium.

We may thus say that in the domain of value-based comparison explicit reasoning, rather than substituting intuition (implicit cognition) should process and rationalise its outcomes. This implies the possibility of revision, since failure to provide a satisfactory rationalisation is an important symptom that the intuitive decision was wrong, as we observed in Section 4.1 on page 121.

Therefore, we can draw two conclusions. The first is that cognition and rationality can (and should) also govern comparative evaluations. The second is that the quantitative methods proposed by decision theory, in most contexts, should be used to control intuitive choices, analyse their compatibility with similar choices, and fit them into a theoretical background, rather than to provide a self-sufficient alternative to human intuition (to implicit cognition).

5.2.5. Simplifying Evaluations

For some purposes, and under certain conditions, some simplifications may help, providing us with useful and workable ways of analysing relevant aspects of important decisions, and of checking their consistence.

For example, Alexy (2002) proposes a simple method of characterising numerically the impact of legal decisions on relevant values.

He observes that the German Constitutional Court frequently justifies its judgments on the legitimacy of certain laws by examining the impacts of such laws on legal values, and by characterising such impacts as *light*, *medium*, or *serious*. For example, the duty to place health information (regarding the dangers of smoking) on tobacco products was considered to be legitimate since such duty implied a *light* interference on freedom of occupation (economic freedom), which was outweighed by the need to protect customer's health, *heavily* endangered by smoking.

Correspondingly, Alexy recommends the following:

- we should qualify legal values according to their low, medium or high importance, and link this qualification to numerical weights (for instance, **1** for values having low importance, **2** for medium importance, and **4** for high importance);
- we should also qualify gains and losses in the achievement of legal values (gains being positive and losses being negative) as light, moderate, or serious, and link such qualifications to simple numerical quantities (for instance, 1 for light, 2 for medium and 4 for serious),

The value-impact of a decisional alternative on a single value is then to be computed by multiplying the significance of the impact on that value by the importance the same value. For example, if freedom of occupation is a value having a medium importance, a decision implying a light violation of it would get score $(-1) * \mathbf{2}$, that is, -2.

The total value-impact of the decision is calculated by summing up its impacts on all values. For instance, a decisional alternative implying both a light violation of the medium value of freedom of occupation and a medium enhancement of the very important value of health would get the following positive score:

$$(-1) * \mathbf{2} + 2 * \mathbf{4} = 6.$$

We shall not discuss here the merits of Alexy's proposal, nor the circumstances in which it may be applied. We believe that it may be very useful in some contexts—when decisions can be conceptualised and compared according to the proposed grid—but not in others (for example, in choosing restaurants the light-medium-serious grid sometimes is sensible, but sometimes is not). This method, however, exemplifies why and how reasoning can be used to check intuitive evaluations.

Such controls, though being superficial when compared to the complexity of the decisional problems (and to the way in which implicit cognition can take into account such complexity) can be very useful. More generally, mathematical computations are particularly important when economic impacts need to be

examined, so that one can use the tools of economic analysis (as is done by the economic analysis of law; cf. Posner 1983). However, when such tools are used outside their proper domains, they may lead to questionable, if not misleading, results.

A rougher simplification than that proposed by Alexy is provided by assuming that that there is a so-called *lexicographic order* over values. This is the view that values (or sets of them) can be listed in order of importance, and that no gain, however big, in a lower level values can outweigh a loss, however small, in a higher level value. For example, it is frequently said that personality rights always prevail over economic rights.

Clearly, such an extreme view cannot be taken literally, or rather can only be maintained by sensible persons at the price of hypocrisy and self-deceit (masquerading economic rights as personality rights whenever one feels that they ought to prevail, and vice versa). For instance, it seems undeniable that the modest loss in privacy that is involved in the fact that a seller keeps a record of the sale, for a limited time, is outweighed by the chance of monitoring the performance of the contract. On the other hand, the idea that personality rights normally (defeasibly) prevail over economic rights, and that this defeasible presumption can only be defeated when there is a clear and specific reason to the contrary, seems quite sensible.

A lawyer may use further techniques to simplify teleological evaluation. First one may limit oneself to considering "the types of decision which should have to be given in hypothetical cases which might occur and which would come within the terms of the ruling," and one may evaluate those consequences by asking about "the acceptability of such consequences" (MacCormick 1978). This means that rather than examining the social and economic consequences that follow from certain legal decisions (or from the adoption of certain legal rules), one may simply consider what legal decisions would be taken in certain classes of cases if certain rules were adopted (for a discussion of this idea, cf. also Luhmann 1974, chap. 4, sec. 5).

A different way of simplifying teleological reasoning is provided by reasoning *per-absurdum*. This consists in focusing on just one negative implication of a certain choice, and on the values that are impaired by such an implication. This very crude way of cutting away the complexity of teleological reasoning is appropriate when a single consequence of a decision is so detrimental that very unlikely it will be outweighed by the advantageous effects of the same decision. Often, for getting a vivid impression of the negative impact of a certain choice, it is not even necessary to specify what values are going to be impaired. Here is how Lord MacMillan refuted the thesis that producers own no duty of care to customers:

Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned. Could he be

heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had fallen into it, his only liability was for the breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? (House of Lords [1932] A.C. at 620)

Some usual criteria of reasonableness, used in constitutional or administrative review, can also provide useful clues for detecting irrationality. For instance, the choice of allocating a certain advantage or burden to certain individuals, while not allocating it to other persons that are in an equal situation (with regard to all relevant features), besides violating the principle of equality, is also an index of irrationality. In fact, with regard to such a choice, usually there must be a better alternative, which may consist either in putting the same advantage or burden also upon these other persons (in case that this advantage or burden has a positive value-impact), or in eliminating it completely for everybody (in case that it has a negative value-impact).[6]

Similarly, the fact that a certain choice completely disregards certain values is an index of its likely irrationality: Since the importance of the compression of a value increases more than proportionally when the value is satisfied to a little extent, it is very unlikely that the complete non-realisation of a certain value can be outweighed by an increase in the satisfaction of other values. For instance, an increase in security, though justifying a reduction of freedom, cannot justify the complete elimination of freedom, and the less freedom we have, the higher the increase in security must be to justify additional restrictions.

5.3. Cognitive Delegation and Authority

An important way of overcoming one's cognitive limitation is to rely on others, that is, to delegate to others certain cognitive tasks. This is what we call *cognitive delegation*. In this section, after considering the notion of *delegation*, we shall distinguish different types of it, and then analyse its connection with the idea of *authority*.

[6] The decision of whether to extend or to eliminate an advantage (or a burden) is a difficult one, but one which must be addressed by a rational decision maker. Refusing to address it may lead to very negative consequences. For instance the Italian Constitutional judges for a long time have avoided to face this problem by adopting the policy of extending every benefit (for instance, with regard to salary or pension) to every person being in the same situation as those already enjoying the benefit (even when the benefit appeared to be an unjustifiable privilege), in the name of the principle of equality. This policy had a very bad impact on public finances, so that recently the judges had to reconsider it: They now do not exclude that a privilege may have to be eliminated rather then extended (and usually prefer to stimulate a legislative adjustment, rather than act directly). For a discussion of reasonableness in the decisions of the Italian Constitutional Court, see Morrone 2001.

5.3.1. The Concept of Delegation

We shall understand the notion of delegation not in the legal sense (concerning the delegation of power, and especially of normative power, an aspect we shall explore in Chapter 24), but in the broader sense in which this idea is used in social and cognitive sciences. For instance, Castelfranchi and Falcone (1997) view delegation as consisting in one's expectation that another will contribute to realising one's own plans:

> In delegation the delegating agent (x) needs or likes an action of the delegated agent (y) and includes it in her own plan: x relies on y, x plans to achieve g through y. So, she is constructing a multi-agent plan and y has a share in this plan: y's delegated task is either a state-goal or an action goal.

In this very broad sense, delegation covers any case in which one views other people as contributors to one's aims. It covers such diverse contexts as the relation between employers and employees (the first delegating various productive and administrative tasks), the relation between students and teachers (the first delegating the task of providing them with certain information and training), the relation between citizens and public officers (the first delegating the performance of public tasks). According to Castelfranchi and Falcone (forthcoming) the psychological attitude of the delegator may be called *trust*, and consists of two components, *core trust* and *reliance*. Core trust includes the following:

1. The truster has a certain goal, that is, he is interested in the production of a certain result.
2. The truster believes that the trustee is able to bring about that goal (competence belief).
3. The truster believes that the trustee is willing to bring about the goal (disposition belief).

Reliance includes the following:

4. The truster believes that he needs to rely on the trustee for the achievement of the goal, since it would be impossible or inconvenient for him to achieve the goal directly (dependence belief).

5. The truster believes that the goal will really be achieved, thanks to the action of the trustee.

We cannot here consider to any larger extent the theory of trust,[7] though it has various significant implications for the law (for some preliminary notes, see

[7] For some significant contributions to the theory of trust, see Gambetta 1990. For a general introduction to the social and political aspects of trust, see Fukuyama 1995.

Memmo, Sartor, and Quadri 2003). Let us just borrow the general ideas of delegation and trust and apply them to the domain of practical cognition. In particular, we speak of *cognitive delegation* to refer in general to situations where, rather than performing directly a cognitive task, one prefers to rely upon the cognitive performance of someone or something else.

For instance, consider how I may delegate to my lawyer the task of establishing how I shall behave in a dispute, to my doctor the determination of how I shall take care of my health, or to my electronic calculator the task of performing mathematical operations.

In the following we shall try to identify the rationale of cognitive delegation, and to consider whether this notion may be useful for approaching legal reasoning.

5.3.2. Types of Cognitive Delegation

When one decides to delegate a cognitive task to another, one forms the intention that one shall not form the appropriate mental state on the delegated issue through one's own cognition, but one will rather adopt the results that will be provided by the delegatee. Note that cognitive delegation may depend upon at least three quite different reasons (which may, though not necessarily, concur):

- *effort-based delegation*, which is determined by the belief that it is too costly to use one's own energies in performing the delegated task;
- *qualification-based delegation*, which is determined by the belief that the delegatee is better qualified than oneself in performing the delegated task;
- *coordination-based delegation*, which is determined by the belief that one should use the outcome provided by the delegatee (rather than the outcome provided by one's own cognition), since in this way one will coordinate one's action with the action of other people.

For instance, if I have decided to delegate to my secretary the booking of a hotel, this is because I have more urgent things to do. I could perform that task myself, possibly better than her (since I know my preferences better), but this would imply spending my time doing this, and not being able to use it for other purposes.

On the other hand, I have decided to delegate to the doctor the task of establishing what medication I should take, since I think that she is better than me in doing that. I rely on her judgement more than I rely on mine.

Finally, I have delegated to my wife the task of establishing how to furnish our house, since we need to take one decision on the matter, and she would not listen to my objections (and I want to avoid having discussions or fights).

It is easy to see that the delegator takes a different attitude in the three cases.

In effort-based delegation, the delegator forms the intention not to employ his cognitive activity for the delegated task, but to rely on the delegatee. However, this is not, for the delegator, a reason against thinking and acting on the basis of the outcome of his cognition. Assume that I have forgotten that I had told the secretary to look for a hotel, and that I succeed in finding a good one. The fact that the secretary has found another hotel is no reason why I should refrain from choosing the one I found myself, if I believe that I am better than her in choosing hotels for me (though I believe that I should not spend my time looking for hotels). So, in efficiency-based delegation, one has the expectation that somebody or something else will provide one with sufficiently good cognitive answers, and one has the intention not to use one's own cognition for that purpose. However, one trusts the outcomes of one's own inquiries on the matter (one does not have the intention of not using those outcomes, when they are available).

In qualification-based delegation, the delegator forms the intention to adopt the cognitive outcomes provided by the delegatee, and prefers these outcomes to those provided by his own cognition. However, he does not necessarily have the intention not to apply his own cognitive powers to the delegated task. For example, I do not behave irrationally if, after the doctor has given me her diagnosis and therapy, I read the medical encyclopaedia trying to understand by myself what is happening to me, and what remedies are available in my circumstances. However, the result of my cognition will have a limited use to me, since I will stick to what the doctor says, and I will not form any intention on the basis of the outcomes of my own inquiries. When such outcomes conflict with the doctor's, I will view them not only as being rebutted by the doctor's indications to the contrary, but also as being undercut: The very fact that there is such conflict would lead me to think that my cognitive effort must have gone wrong, to view it as being unreliable.

Finally, in coordination-based delegation the delegator intends to adopt cognitive outcomes provided by the delegatee, since he is sharing this attitude with the members of a certain community, and this may lead them to the possibility of collective behaviour and coordination. This does not imply any judgement on the merit of his cognitive efforts as compared to the results provided by the delegatee. Therefore, though I may consider the conclusions I would on my own (concerning how to furnish the house) as being defeated by the incompatible indications I get from my wife (for the sake of coordination), I would not see my reasoning as being undercut by such conflict: The grounds that would lead me to endorse a certain conclusion (had the coordinator not intervened) still favour that conclusion.[8]

[8] Our idea of coordination-based delegation may possibly be viewed as a case of what Soper (2002) calls *deference*.

5.3.3. Authority and Normative Power

The idea of a cognitive instruction offers us a way of representing cognitive delegation. This takes place when one endorses the *meta-instruction* that one shall adopt instructions that are issued by a certain person or according to a certain procedure. When this is the case, we may say that one delegates to that person or to that procedure the formation of one's intentions (or the determination of one's obligation), and this may be explained by the fact that one trusts that person or procedure for providing appropriate practical (normative) determinations.

This seems to be the case when one recognises a competence (a normative authority) to a certain person or institution. For example, on the basis of grounds pertaining to qualification (my wife is better endowed then I am in aesthetic taste) or coordination (I do not want to have fights concerning how to arrange our house) or to both, I may adopt meta-instruction mi_1:

> mi_1: Whatever instructions my wife issues concerning the arrangement of our house, I shall adopt it[9]

Assume also that I had doxified meta-instruction mi_1 into meta-proposition mp_1:

> mp_1: Whatever normative proposition my wife states concerning the arrangement of our house, it is binding upon me

The intention to implement meta-instruction mi_1 will make so that whenever my wife issues an instruction, I will have the intention to implement it. Similarly, my belief in meta-proposition mp_1, will lead me to believe that any normative proposition she states is binding to me and, therefore, to endorse any normative proposition she states (or, more exactly, proclaims; see Chapter 23).

Accordingly, when my wife tells me "You shall move the sofa to the opposite side of the room," I shall form the intention to do that. Similarly, when she tells me "You are obliged to move the sofa to the opposite side of the room," I shall believe that I am under this obligation.

The same attitudes seem to exist when one endorses a rule attributing a legal competence. For example, when one is ready to endorse whatever instruction is issued by the Parliament, we may say that one is adopting the meta-instruction:

> mi_2: Whatever instruction is issued by the Parliament, I shall adopt it

[9] By "adopting an instruction," we mean forming the intention to execute it.

Assume that the concerned person has doxified meta-rule mi_2 into the meta-proposition mp_2:

> mp_2: Whatever normative proposition is stated by the Parliament, it is binding upon me

When one believes meta-proposition mp_2 and one knows that the Parliament has stated a certain normative proposition, one is led to endorse that proposition. For example, if one, besides endorsing mp_2, believes that Parliament has stated proposition,

> p_1: It is forbidden to smoke in working places

one will be led to endorse the proposition p_1.

Finally, if one also believes that one's office is a working place, one shall infer the specific proposition p_2:

> p_2: I am forbidden to smoke in my office

5.3.4. Rules and Teleology

Cognitive delegation can lead to outcomes that conflict with the outcomes one obtains through other ways of reasoning, and in particular by teleologically deriving a specific determination from one's own goals and values. Assume, for example, that on the basis of the values characterising my legal system, such as liberty and self-determination, I would be led to adopt the rule that one is allowed to smoke in working places when no non-smoker is around, as it is the case now. Thus I would conclude that I am allowed to smoke now in my office.

What is the connection between this inference and the inference we examined in the previous section, which led me to conclude, that I am forbidden to smoke in my office, by appealing to the competence meta-rule mp_2, and to the rule p_1 I consequently adopted?

It seems that this issue does not only concern the application of meta-rules, but it more generally concerns the relation between *normative syllogism* and *teleological inference*. An adequate discussion of this matter would require us to consider some fundamental questions of the theory of practical reasoning, such as the controversial issue of the connection between act-utilitarianism and rule-utilitarianism, which we cannot address here (see, among others, Hare 1981, secs. 2.4 and 2.5). However, we shall not refrain from briefly considering some aspects that are relevant for the logic of normative reasoning.

In fact, we can reduce the burden of means-end reasoning by adopting the following strategy: We endorse rules according to teleological reasoning, and

then we adopt specific determinations following from these rules according to syllogistic reasoning. This strategy allows us to distinguish the level of *ordinary practical thinking*, where one straightforwardly applies the rules one has adopted, and the level of *critical thinking*, where one chooses teleologically what rules to follow.

This strategy can be extended to meta-level reasoning: We endorse meta-rules according to teleological reasoning, and then we adopt rules according to syllogistic reasoning, based upon these meta-rules. Consider, for instance the meta-rule according to which rules issued by the Parliament are binding for the citizens, a meta-rule that leads citizens to conclude syllogistically that a particular rule, having been issued by the Parliament, is binding for them. Consider also the meta-rule according to which rules issued by the guru of a certain religious sect are binding for the members of the sect, a meta-rule that leads members of the sect to conclude syllogistically that a particular rule, having been issued by the guru of the sect, is binding for them. This kind of cognitive delegation—we delegate to meta-rules, and thus to the rule-production mechanism to which they refer, the task of determining what rules we should follows—leads us to turn into a matter of ordinary practical thinking also the choice of what rules we should adopt: These are the rules that somebody else has produced, according to the meta-rules we critically endorse.

The rule-based picture of practical reasoning depicts an attitude that is undoubtedly sensible in some contexts, though it may lead to a rigid and insensible behaviour, and particularly to underestimate the cognitive significance of one's feelings and experiences.

However, from the perspective here developed, this is just one possible strategy for coping with the complexities of practical thinking, and other strategies are also available. Among these strategies, the following are worth mentioning: considering the teleological merits of specific choices, making analogies out of such choices, experiencing one's involvement in caring relationships, rationalising the attitudes and feelings emerging from one' s involvement in individual cases, and so forth.[10] Only the combination of rule-based reasoning with these different strategies can provide a comprehensive approach to practical thinking.

5.3.5. The Notion of an Exclusionary Reason

Raz (1975; 1978) has developed an analysis of normative reasoning based upon the idea that norms (rules) are exclusionary reasons: They are reasons for not considering certain other reasons. We shall now examine and evaluate this

[10] The idea that there are acceptable alternatives or at least complements to a rule-based approach to practical reasoning has been particularly explored by some feminist researchers, and most famously by Gilligan (1982). For a recent statement of the importance of the ethics of care, see also Held 2003.

highly influential jurisprudential theory, connecting it to our idea of cognitive delegation.

In Raz's analysis the basic notion is that of a *reason*, which he views as a fact, namely, a fact which is a ground for an action by a certain person. Our perspective is different in that we consider reasons to be mental states, rather than facts. This however is not a major difference, since we admit that one may assume that there are "normative" states of affairs, corresponding to those conative states which would result from perfect practical cognition (see Section 3.3.2 on page 106).

Therefore, rather than focusing on the distinction between reasons as facts and as mental states, we shall focus on what is generally viewed as the most significant contribution of Raz to practical reasoning, namely, his idea of an *exclusionary reason*. First we shall try to express this idea in our framework. Then we shall consider whether the idea of an exclusionary reason provides us with an understanding of the notion of a rule and of the power to issue rules.

In Raz (1975, 35ff.), the idea of an exclusionary reason is introduced by discussing the case of Ann, who refuses to make an investment choice, since she does not rely on her judgement, being too tired. Raz describes the situation by saying that Ann's tiredness is not a first-level reason for not making the investment, to be balanced against reasons for making the investment. It rather is a higher-level reason, and in particular a reason for not acting on the balance of the first-level reasons for and against making the investment choice, that is, an exclusionary reason that precludes Ann from taking all such reasons into account.

We describe Ann's situation in a different way: she has the cognitive intention not to rely on (to reject) any reasoning which might lead her to form the intention of making the investment. Such a cognitive intention is rational if it is adopted (or rationalised) according to some of the reasoning schemata we described above.

Let us assume, for instance, that Ann reaches this conclusion by using *teleology*, as you can see in the top left part of Table 5.2 on the next page.

Let us also assume that Ann possesses cognitive states that would lead her to form the intention of making the investment her friend suggests (she desires to earn money, and she believes that making the investment would be a satisfactory way of making money): she has a reason for intending to make the investment.

However, this reason is excluded by her cognitive intention to reject the inference leading to the investment decision, in the sense that this cognitive intention prevents her from endorsing the conclusion of that inference, namely, the intention to make the investment.

Let us consider why she should not form that intention. Through a syllogism, she first acquires the intention to reject the inference leading her to make the suggested investment (since this is a reasoning leading her to an investment decision), as you can see in the bottom part of Table 5.2 on the facing page.

(1) having the goal of preventing losses (2) believing that a satisfactory way of preventing losses consists in ⌈rejecting any reasoning for or against investment-decisions, when I am too tired⌉	
(3) intending that ⌈I shall reject any reasoning for or against investment-decisions, when I am too tired⌉	(4) Believing that ⌈now I am too tired⌉
(5) intending that ⌈I shall now reject my reasoning for or against this investment decision⌉	

Table 5.2: *Exclusionary inference*

The latter intention undercuts that inference, according to the reasoning schema *meta-undercut* (see Section 4.2.2 on page 128), thus preventing the endorsement of the intention to make the investment.

Defeating instance: *Meta-undercut*

(1) intending to reject reasoning instance ⌈I shall make the investment suggested by my friend since this is a satisfactory way of reaching my goal of making money⌉

IS AN UNDERCUTTING DEFEATER AGAINST

(2) reasoning instance: ⌈I shall make the investment suggested by my friend since this is a satisfactory way of reaching my goal of making money⌉

In another example, Raz considers the case of a father who has promised his wife that, in choosing a school for their child, he would only consider the child's interests (for a similar legal example, consider a young attorney who is told by her boss that, in choosing a strategy, she should only consider the interests of their client).

In our framework, we can model this case by assuming that the father has the intention to reject all teleological reasoning concluding with the intention of sending his child to a school, where such decision is finalised to, or evaluated according to, any value which does not pertain to his child's well-being. This intention would also lead the father to view all corresponding inferences as being undercut, according to the reasoning schema *meta-undercut*.

5.3.6. Exclusionary Reasons and Normative Delegation

After introducing the idea of an exclusionary reason and expressing it in our framework, we need to consider whether this idea is helpful in understanding the phenomenon of legal authority, viewed as a kind of cognitive delegation. The idea of exclusionary reasons is in fact applied by Raz (1979) to characterise the notions of authority or normative power, which he views as the ability to "change protected reasons":

> [A]n act is the exercise of a normative power if there is sufficient reason for regarding it either as a protected reason or as a cancelling protected reasons and if the reason for so regarding it is that it desirable to enable people to change protected reasons by such acts, if they wish to do so. (Raz 1979, 18)

By a protected reason Raz means "a fact that both is a reason for an action and an (exclusionary) reason for disregarding reasons against it."

By applying Raz's notions to our example of no-smoking legislation, it appears that from the viewpoint of one who recognises the normative power of the Parliament, the fact that the Parliament issued the prohibition to smoke, on the one hand should provide a reason for not smoking, and on the other hand should exclude that liberty and self-determination are reasons for not smoking.

We have some doubts that this is the most plausible analysis of the most common attitude towards normative powers. In fact one's endorsement of a competence rule usually involves coordination-based delegation, rather than qualification-based delegation: One's readiness to endorse the decisions of the legislator, even when it expresses a political view one strongly opposes, does not result from one's belief that the legislator is more likely to be right than oneself, but rather from one's recognition that coordination requires that one accepts legislation even when the legislator is wrong (we shall address the issue of the limits of such acceptance in Section 13.2.1 on page 368). Therefore such an attitude does not exclude (undercut) but rather rebuts what grounds one may have for a different determination.

For instance, the fact that I endorse the conclusion that I ought not to smoke, even if nobody is around who could be damaged by my smoke, does not stop me from believing that freedom and self-determination are important legal values, so that their consideration would lead me to conclude that I am permitted to smoke under such circumstances. This is consistent with the fact that the conclusion I would derive from this reason, according to teleological reasoning, is rebutted (and defeated) by the inference I can draw, according to syllogism, from the Parliamentary rule prohibiting smoke.

Therefore, the rule against smoking does not seem to be an exclusionary reason, but rather an independent (sub)-reason, which operates without appealing directly to teleological reasoning (it is to be applied through the schema *normative syllogism* and not through the schema *teleology*), and which may indeed

clash against the conclusions which are derivable according to teleological reasoning.

This type of analysis applies in general to the recognition that certain persons or institutions are legal authorities: The fact that I view the instructions of such persons or institutions as binding on me (in the sense that I am committed to endorse them) does not stop me from recognising that an attempt to directly implement the goals of the legal system would lead me to different determinations.

5.3.7. Authorities as Exclusionary or Independent Reasons

It seem that by viewing authoritative statements as exclusionary reasons, Raz aims at preserving the independence of normative syllogisms from direct teleological reasoning, However, one needs to do that only when one views practical reasoning as a single one-step transition from an all-comprehensive set of reasons into the determination to perform an action, where such a set contains whatever elements may contribute to supporting or attacking that determination, according to whatever kind of inference. When one takes this view, one needs to exclude explicitly from the comprehensive reason-set whatever reasons may wrongly interfere with other reasons in the set: In particular when one reaches a conclusion by applying rules, one must exclude, when applying the rule, any considerations pertaining to the value-impact of that conclusion.

Our perspective, on the contrary, is based on the analytical distinction of different reasoning schemata, each concerning specific types of reasons (we shall discuss this aspect in Section 8.2.4 on page 236). Thus, for recognising the independence of normative syllogism from teleological considerations we do not need to view the syllogism's premises (and in particular, the rule) as excluding anything.

From our perspective, on the contrary, one's adoption of a rule would even be compatible with the fact that one views the rule's conclusion as being defeated by teleological reasoning, when the rule leads to teleologically unacceptable results (i.e., there are cases where I give priority to the outcome of my teleological reasoning over rule-based syllogism). At most we may say that in such situations ideal rationality requires a theory-construction effort: Future conflicts between rule-based and teleological reasoning should be prevented by framing and endorsing a general exception to the defeated rule.

Therefore, it does not seem that one may view rules, and in particular power-conferring rules, as exclusionary reasons, at least in cases when purely coordination-based delegation is involved.

Things would look differently if one's attitude towards a ruler consisted in what we have called *qualification-based delegation*. In this case not only one would endorse the ruler's indication for the sake of coordination, but one would do this since one believes that the ruler is a better practical cogniser then oneself. The dissonance with the prescription of such an enlightened ruler would lead

one to view one's reasoning as being unreliable and therefore as being undercut. Consider for example, my attitude toward certain sanitary precautions which have been stated by the Ministry of Health, and which are in conflict with what I may have done otherwise. Not only will I follow those precautions since I am committed to adopt whatever prescription is stated by the Ministry, but I would view the conflict with the Ministry's prescriptions as a decisive proof that my independent sanitary views are flawed (and possibly extend my doubt to the premises that have led me to such conclusions).

Thus, it seems to us that in most cases, the citizens' attitude towards legal authorities can be viewed as a case of coordination-based delegation, rather than as a case of qualification-based delegation. Correspondingly, one should view's one's commitment to legal meta-rules and rules (when combined with appropriate factual knowledge) as a reason for adopting what follows from them via syllogism. This does not exclude that one has reasons for adopting different determinations according to legally relevant values (and teleological reasoning), though such determinations are rebutted by the conclusions of rule-based syllogisms (which usually prevail, for the sake of coordination).

5.3.8. Commands and Reasons

Wallenstein, the protagonist of the homonymous trilogy by Friedrich Schiller, represents paradigmatically the tragic conflict between the orders of an authority and one's substantive reasons.[11]

Wallenstein was the general of the imperial forces during the Thirty Years War, opposing Protestants (also supported by Catholic France, for political reasons) and Catholics, led by the Austrian emperor Ferdinand the Second. After twelve years of fighting, Wallenstein became aware that war was only producing atrocities and the reciprocal destruction of the opposed parties. Therefore, he tried to make peace with the Protestants and, in particular, with the Swedes, who had the strongest army in the Protestant side. This initiative went against the will of his fanatical emperor, who allegedly said to prefer a desert to a land full of heretics. Unfortunately, Wallenstein was discovered, betrayed and killed by emissaries of the emperor. This led to eighteen additional years of war, which caused the complete devastation of central Europe.

Let us consider Wallenstein's attitude toward his emperor, according to Schiller's interpretation. His hierarchical subordination to the emperor does not exclude what cares and values he has. On the contrary, when deciding to disobey he affirms (Schiller 1800, scene 16) that:

[11] Schiller's trilogy on Wallenstein includes the plays: *Wallenstein's Camp* (1798), The *Piccolomini* (1799), and *Wallenstein's Death* (1799). For the whole trilogy, see Schiller 1980. In the following citations we use the translation of *Wallenstein's Death* by S. Coleridge (Schiller 1800), who only translated the last two plays of the trilogy. A similar literary example of disobedience for the common good (though not on such noble grounds as Wallenstein's) is provided by von Kleist 2002 .

My cares are only for the whole: I have
A heart—it bleeds within me for the miseries
And piteous groanings of my fellow-Germans.

Thus, his submission to the emperor's authority does not prevent him from engaging in teleological reasoning. He is rather in a situation where (scene 2):

[...] Like enemies, the roads
Start from each other. Duties strive with duties

It does not seem that the emperor's order to continue the war is seen by Wallenstein as an exclusionary reason, which makes irrelevant his teleological reason for trying to make peace with the enemy (his goal to stop war, and the belief that acting autonomously to making peace is the only way to achieve this goal). On the contrary, Wallenstein views the emperor's order to continue war as an independent subreason, that according to *syllogism* leads himself to a conclusion that is incompatible with the conclusion he can reach by using *teleological inference*, as you can see in Table 5.3 on the following page. Thus, Wallenstein has to compare the strengths of these two inferences (of the corresponding reasons): Up to a certain time he values argument $\mathcal{A}$ as being preferable, but when the costs of war become unbearable, he considers that argument $\mathcal{B}$ is to be preferred.

It seems to us that Wallenstein's attitude well exemplifies the way in which a rational agent should approach political authority. The statements of political authorities do not exclude what (valuable) reasons one may have for behaving differently, but rather lead to inferences that have a certain strength, according to the values which support the recognition of authority (and in particular, the need for political coordination). Authority-based inferences may thus usually prevail over incompatible inferences (and in particular over the teleological considerations based upon the needs and values of one's community), but they do not exclude what reasons provide the basis for these teleological inferences, which may prevail under appropriate circumstances.

5.3.9. The Independence of Normative Syllogism from Teleological Reasoning

Our analysis does not entail that the conflict between commitment to an authority (one's intention to obey the authority) and teleological reasoning can be reduced to teleological reasoning alone, by incorporating into one's cost-benefit analysis also the costs of disobedience.

On the contrary, we need to consider the conflict between a general intention (the intention to behave in a certain way in all situations of a certain kind), and the teleological inference that leads one to conclude that under the present circumstances one should behave in a different way. As we observed in Section 1.3.7 on page 29, one's general commitments (general intentions or beliefs

	Inference $\mathcal{A}$		Inference $\mathcal{B}$
(1)	the emperor has ordered that I shall continue war until all heretics are eliminated;	(1)	stopping atrocities and destruction is a valuable goal;
(2)	I shall endorse any order of the emperor	(2)	making peace with the Swedes is a satisfactory way of reaching that goal
(3)	I shall continue war until all heretics are eliminated	(3)	I shall make peace with the Swedes

Table 5.3: *Wallenstein's dilemma*

in general rules) serve goals that are larger than those that are involved in a single choice.

Consider for instance the conflict between my commitment to jog half an hour every day and my teleological inference that today I had better stay at work, since this would enable me to achieve results that are more important that the outcome of my jogging today. The problem is that the second inference—based upon the comparative evaluation of the single actions of running or not running today (according to their impact on my goals and values)—is not the only relevant consideration. In fact my commitment to jog every day responds to considerations (my health and fitness would be favoured by a consistent jogging practice) that are broader that those involved in my choice between running and working today (had I not taken that commitment), and this commitment is challenged by my decision not to run today. Similarly, consider the conflict between my commitment not to smoke and the teleological conclusion that I may now smoke, a conclusion I obtained according by balancing positive and negative effects of a single act of smoking.

It seems that exactly in the same way the importance of one's general commitment to accept the instructions of an authority (under certain circumstances) is to be weighed against one's teleological evaluations leading to disobedience. In our framework such conflicts can be viewed as instances of rebutting collisions between reasons leading to incompatible conclusions.

Similarly, the adoption of a legal rule, like for instance the rule that makes hotel owners liable for certain injuries and losses of their guests, may lead us to conclusions that may be different from the results we would reach if we just balanced the consequences of alternative decisions on a specific individual case, regardless of the benefits arising from the shared adoption and consistent implementation of this rule in all cases falling under its scope. It is exactly the benefit arising from a consistent application of the rule that we are to balance against our assessment of the specific impact of our decisions on the interests at

stake in the individual case (on this issue, see for instance Fletcher 1996, 189ff.). The benefit of a rule-based practice may be very low (or even negative), like when we are dealing with a domain where decision-makers can obtain enough information on the specific cases, these present complex combinations of interdependent features, and there is little need to coordinate decisions and generate consistent expectations (as for instance in certain non-economic areas in family law). Or, on the contrary, the benefit may be high, like when decision-makers have little information concerning the individual cases, and need to generate consistent expectation.

It may be argued that the analysis in term of exclusionary reasons, though not fitting defeasible rules, provides an account of the working of indefeasible rules. As long as one who keeps one's commitment to such rules, one needs to reject any inference leading to incompatible outcomes: When one has superior reasons for not complying with the rule's conclusion (for example, one has superior reasons for smoking), one needs to withdraw one's commitment to the rule. Thus, one's commitment to indefeasible rules—as long as it is maintained—excludes (the relevance of) incompatible premises.

Our reply to this argument is the following. We agree with this analysis as to the determination of the results that can be obtained by a reasoner who is committed to indefeasible rules. However, we believe that these results are not obtained because an indefeasible rule aims at excluding incompatible reasons, but simply because it conflicts with them, and re-establishing consistency requires (when dealing with conclusive reasons) retracting the weaker reasons.

As a matter of fact, epistemic generalisations seem to behave no differently from normative generalisations in this regard. When one endorses a defeasible epistemic generalisation (for example, Mary usually tells the truth), evidence to the contrary (she was lying to me yesterday) may lead one to reject an instance of the generalisation (she was telling the truth yesterday), while maintaining belief in the generalisation. On the contrary, when one endorses an indefeasible generalisation (for example, Mary never has told a lie), one needs to reject evidence to the contrary (the evidence that she yesterday told a lie), as long as one keeps one's endorsement: One may accept this evidence only by abandoning one's endorsement of the indefeasible generalisation.

Thus, our conclusions seem to diverge from the ideas expressed by Shiner (Volume 3 of this Treatise, sec. 3.6.2), who relies upon the notion of an exclusionary reason in his theory of legal sources, and who defends this idea against the critiques of Schauer (1991) and Perry (1989).[12]

However, we believe that this divergence depends on the particular framework we have developed for practical reasoning, which takes into account "automatically" what we view as the main aim of the doctrine of exclusionary rea-

[12] Exclusionary reasons also play a fundamental role in the account of legal reasoning provided by Hage (1997).

sons: avoiding that spurious considerations enter into sound reasoning patterns (this issue will be discussed in Section 8.2 on page 233). As a matter of fact, our model of practical reasoning implicitly embeds a kind of "exclusion." This concerns the fact that any instance of a reasoning schema does not admit, within the its preconditions, sub-reasons that are incompatible with or irrelevant to, the functioning of the schema, namely, sub-reasons that so do not contribute to forming the reason of the schema. In this sense, any instance of the syllogistic inference excludes from itself goals and values, as Raz's view correctly implies (since the schema *syllogism* only allows for a general conditional plus an instance of the conditional's antecedent).

However, from our perspective this exclusion only concerns appealing to goals and values within the syllogistic inference. It does not expel such goal and values from the deliberation of the agent, where they still provide grounds for different inferences, possibly defeating the rule-based syllogism.

In conclusion, we believe that Raz's notions of an exclusionary reason does not provide a general notion of authority and an understanding of the psychological functioning of authoritative statements or rules. Nevertheless, it can be profitably used for analysing more specific contexts, such as when one is prohibited from taking a certain reason in account in making a certain kind of decision. Consider, for example, how an employer is prohibited, in many legal systems, from taking decisions on appointments or promotions according to the race or the sex of the applicant (on exclusionary rights, see Section 19.5.3 on page 516). Moreover, as we have observed, the idea of an exclusionary reason can capture the essence of what we called qualification-based delegation (see Section 5.3 on page 161).

Finally, note that we have only considered conflicts between legal rules and teleological reasoning as applied to legal values. A different issue concerns adopting legal decisions on the basis of one's private interests and goals. Those interests and goals (or rules, like ⌈I shall always favour my friends⌉) should not enter into legal decision-making, since they are not appropriate to the particular point of view that is proper to the legal process. But this is not linked to the existence of particular legal rules, operating as exclusionary reasons against such interests and values, but to the nature of legal decision-making as being oriented to the "common good," rather than to the individual interests of a particular decision-maker (see Section 9.1 on page 241).

Chapter 6

BOUNDED RATIONALITY: FACTORS

In Section 5.3 on page 161 we considered how we can sometimes unburden ourselves from the fatigue of reasoning—and particularly of teleological reasoning—by delegating it to others. However, this is not always possible, nor always advisable, since others may not be available or may not be sufficiently honest or competent, and relying too much on them would compromise our individual autonomy. Fortunately, when teleological reasoning is not practicable or opportune, a viable shortcut may still be available to a bounded cogniser, as we shall see in the next sections: This consists in relying on what we shall call *propensities*, the cognitive attitudes which can be doxified in the form of *factor/outcome-links*.

6.1. Propensities

Having a *propensity* consists in experiencing certain circumstances as factors prompting our physical or mental behaviour in a certain direction, that is, as favouring certain outcomes.

Consider for instance how one may have at the same time two propensities: to go out when it is sunny, and stay inside when the whether is dull. Similarly consider how one may have a propensity to help people in need, but also a propensity to stay away from distressful situations.

We may describe such attitudes by saying that when one has a propensity, one experiences certain types of situations as *factors* favouring certain *outcomes* (staying at home, going out, helping a person, avoiding him or her, and so on), but one does not commit oneself to implement these outcomes whenever the factors are present.

The conative attitude which is constituted by a propensity can be doxified in the belief in a *factor/outcome-link*, to wit, in one's belief that the factor *favours* or promotes the outcome—that the factor indicates that the outcome may be profitable or appropriate—though not necessarily committing one to endorsing the outcome.

6.1.1. Propensities and Intentions

It appears that there is a fundamental difference between a conditional intention and a propensity. When one endorses a conditional intention (the intention to

adopt a conditional instruction) one has made up one's mind about what to do in case the condition holds. This is particularly clear in the case of intentions concerning a specific action, like the following: ⌈If this afternoon the whether is fine, I shall go out⌉. A rational agent having that intention should perform the action (unless the agent withdraws the intention).

In case of general intentions, which allow for defeasible reasoning, one may keep the general intention, though not implementing it in certain individual cases. However, this requires either having a stronger intention to perform an incompatible action (so that reasoning based upon the general intention is rebutted) or rejecting the corresponding reasoning (so that it is undercut). Consider for example how I may keep my general intention ⌈I shall do some jogging every morning⌉, though I may allow an exception for one day when I am ill, or when I have to join an important meeting. Unless there are prevailing reasons to the contrary, rationality prevents us from having a general intention and not implementing it.

On the contrary, when having a propensity to act in a certain way in a given situation, one has not yet made up one's mind about how one shall behave in that situation, i.e., one is not committed (even only towards oneself) to act in the suggested way when the situation obtains. The rational way of processing a propensity does not consist in immediately intending (or wanting) to act accordingly. One is rather supposed to view one's propensity as an input to a further decisional phase that will eventually lead to forming an intention.

Continuing the example above, assume that when I wake up in the morning, I see that the weather is nice and I retrieve my propensity of going out when this is the case. Under these circumstances, I should not feel an immediate urge to jump out my door, nor should I immediately get ready to go out. I rather need to consider all my active propensities—or if you prefer all factors which favour or disfavour that outcome (it is a nice day, but not all children are well and I have some work to do)—to weigh or balance all these factors and reach a corresponding determination to go out or to stay at home.

6.1.2. Factors and Teleology

Propensities, as they need to be distinguished from intentions, need also to be distinguished from goals and values. A factor promoting a certain outcome is no goal to be achieved in the future: It is rather a feature of the pre-existing context that favours a certain future choice. For example, the fact that my children are sick is a factor favouring my decision to stay at home, but it is not something I want to achieve through my decision.

Though propensities and goals are to be distinguished, there is a connection between these two cognitive structures. Propensities, like intentions, may arise out of teleological reasoning: A propensity may originate from the fact that one has a certain goal and believes that acting in a certain way under certain condi-

tions is a way of promoting that goal. This corresponds to the application of the reasoning schema *propensity formation*.

Reasoning schema: *Propensity formation*

(1) having goal G; AND
(2) believing that doing action A, under pre-condition C, promotes G

——— IS A REASON FOR

(3) having the propensity to do action A under pre-condition C (viewing pre-condition C as a *factor* favouring action A)

The goal is not promoted by the mere existence of the factor (the pre-condition): What matters is the performance of the action when the factor obtains. Assume for example that I have the goals of getting suntanned and of keeping fit (while keeping in good health), and that I believe that this is likely to happen if ⌈when the weather is good I go the sea⌉ (where I can lie in the sun and swim). This may lead me to the following instance of propensity formation.

Reasoning instance: *Propensity formation*

(1) having goals of⌈getting suntanned and keeping fit⌉; AND
(2) believing that ⌈going to the sea, when the weather is good contributes to producing the result of ⌈getting suntanned and keeping fit⌉⌉

——— IS A REASON FOR

(3) having the propensity ⌈to do action going to the sea, when the weather is good⌉ (regarding condition ⌈the weather is good⌉ as a factor favouring action ⌈going to the sea⌉)

Note that my goals (tan and fitness) will not be achieved by the simple fact that the factor (good weather) holds, but by performing the action (going to the sea) when the factor holds (when there the weather is good).

Similarly, my having the goal that the children are in good health, plus my belief that keeping the children at home when they are sick contributes to their good health, allows me to infer that the children being sick is a factor that favours keeping them at home.

When the pre-condition (the factor) of a propensity is satisfied, one does not obtain an intention, but rather an unconditional propensity. This unconditional propensity can be formed according to the schema *propensity detachment*.

Reasoning instance: *Propensity detachment*

(1) having the propensity ⌈to go to the sea, when the weather is good⌉; AND
(2) believing that ⌈the weather is good⌉
——— IS A REASON FOR
(3) having the propensity ⌈to go to the sea⌉

The unconditional propensity to go to the sea is not yet an intention. To form an intention on the basis of one's propensities one needs to collect and balance them, in order to evaluate whether those favouring a certain action outweigh those against such action.

6.1.3. Logical Function of Propensities

There are strong similarities, but also significant differences between intentions and propensities. Compare, for example, the reasoning schemata *propensity formation* and *teleology*. Both of them take into account goals: Having certain goals (or values) is a pre-condition leading to the formation of both intentions and propensities. However, the teleological formation of an intention is much more demanding, as a cognitive task, than the teleological formation of a propensity.

For adopting the intention to execute a certain instruction, one needs to take into consideration—when assessing whether the instruction provides for a satisfactory way of achieving one's goal—all relevant values on which the execution of the instruction may impact.

On the contrary, for adopting a propensity, it may be sufficient to consider just the goal one is focusing on. In such a case, the consideration of other values is delayed to a subsequent phase, that is, to the time when one needs to engage in action: Only at that time does one weigh and balance this propensity along with all other relevant propensities one may have.

Thus, propensities provide a way of simplifying teleological reasoning: One does not analyse anew, whenever one has to undertake a specific action, the impact of that action on all values one is pursuing (as it happens when one teleologically decides what to do in a single case), nor does one anticipate how a certain type of action is going to impact on all values in all possible circumstances one may anticipate (as it happens when one teleologically adopts a general intention). When reasoning with propensities, one rather factorises the process: First one forms the view that when certain conditions are satisfied, it may be good to act in certain ways (since this may positively impact on some interests or values) and then, when these conditions (along with others) are satisfied, one weighs conditions for acting in these ways against conditions for acting differently.

This appears to be quite a rough way of deciding, since it cannot take well into account the way in which different values and different factors interact, nor can it ensure that all relevant values are taken into consideration (only the values

which already have led to forming propensities will contribute to the decision). However, this reasoning strategy seems to be adequate to a bounded agent living in a world like ours, an agent who is usually justified in taking the attitude which Simon (1965, xxv–vi) describes as follows:

> [He] is content with this gross simplification because he believes that the real world is almost empty —that most of the facts of the real world have no great relevance to any particular situation he is facing, and that most significant chains of causes and consequences are short and simple. Hence he is content to leave out of account those aspects of reality—and that means most aspects—that are substantially irrelevant at a given time.

Note that developing a propensity does not necessarily presuppose that one has a conscious picture of the goals that support the propensity. The propensity-formation process is largely unconscious: The goals supporting propensities can usually be precisely identified only through a process of rationalisation.

Consider my propensity for taking a walk when the weather is good, or, if you prefer, my belief that good weather favours taking a walk. I have no clear idea of the goals that such propensity serves: To identify them I need to engage in rationalisation (maybe the goal is keeping fit, or just enjoying the view, or . . .).

Finally, we need to consider that propensities seem to operate like force-vectors, which add their effect when going the same direction: Factors favouring the same action can be viewed as a combined factor providing a more solid support to that action (the analogy between reasons and forces is defended by Hage 1997). This is a feature that has also been described by Wisdom (1944, 187) using the following furniture-based metaphor (see also Twining and Miers 1991, 268):

> In such cases we notice that the process of argument is not a chain of demonstrative reasoning. It is a presenting and re-presenting of those features of the case which severally cooperate in favour of the conclusion, in favour of saying what the reasoner wishes said, in favour of calling the situation by the name which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain.

For example, if the children being sick is a factor for staying at home, and so is the fact that I have some work to do, the combination of the two is a stronger factor for staying at home. This, as we shall see in Section 8.1 on page 221 may be seen as the foundation of some typical forms of analogy (the so-called *a fortiori* reasoning), that are particularly important in case-based legal reasoning.

6.2. Factors

As conditional intentions are doxified into rules, so propensities are doxified into what we call *factor/outcome-links*, or simply *factor-links*, that is, in the con-

nection between a certain factor and a certain legal outcome (a deontic or other qualification) which the factor favours.

As we shall see in the following sections factors may have different logical structures and they licence peculiar kinds of inferences.

6.2.1. Binary Factors and Dimensions

Some factors are *binary*. A *binary factor* either is fully present in a case (and the factor's outcome is favoured) or is fully absent: It does not make sense (or it is anyway irrelevant) to view the binary factor as being present to a higher or lower degree. For instance either today is a school holiday (this being a factor which favours taking the children to the sea) or it is not so. Similarly, either one is a woman (a man), this being a factor with favours one's appointment in an area where women (men) are underrepresented, or one is not.

Some other factors appear to be *scalable*: The more intensely they are present, the more they favour a certain action. For example, my children being sick is a factor for staying at home, but as the degree of sickness increases, so increases the strength with which this factor favours staying at home. Similarly, the malice of the author of a crime is a factor that increasingly favours his or her punishment: The more malice one has exhibited in committing a crime, the more the punishment should increase.

We shall call a scalable factors a *dimensional factor*, or simpler, a *dimension*, using the terminology proposed by K. Ashley and E. Rissland (Ashley 1990; Rissland and Ashley 1987), who introduced the use of dimensions in the analysis of legal knowledge.[1]

Some dimensions appear to have a *double direction*: Up to a certain degree they favour a certain outcome, above that degree they favour the opposite outcome. Consider for example the clearness of the sky. Having very little clearness (the sky is fully clouded) favours staying at home, but, as the sky becomes clearer, there is a point where the dimension changes direction and favours going out rather than staying at home.

Similarly, the goodness of the motives for which a crime has been committed provides a ground for diminishing punishment (and to diminish it more, the better being the motives), while the badness of such motives provides a ground for augmenting it (and for increasing it more, the worse being the motives): We may see the quality of the motives of a crime as being a continuous dimension (ranging from the noblest and worthiest motives, to the most abject and vile ones), having a tendency to influence the amount of the penalty towards a progressive increase.

As we shall see in Section 8.1.4 on page 225, transforming a continuous di-

[1] See also, for a recent discussion of the idea of a dimensions, Bench-Capon and Rissland 2001. On dimensions as scalable factors, see Bench-Capon and Sartor 2003.

mension into a binary factor (either motives are good or are bad, and there is a corresponding fixed increase or decrease of the sanction), is an additional strategy of bounded rationality for simplifying one's decisions, for making them easier and more foreseeable, though at the price of a reduced capacity of apportioning one's conclusions to the specific features of individual cases.

6.2.2. Factors and Principles

Factor-based reasoning plays a central role in moral and legal reasoning, though it is rarely specifically discussed under this heading[2] being rather approached in connection with the idea of a *principle*. For instance, the two paradigmatic examples of principles that are to be found in Dworkin 1977b, a contribution that originated a vast debate on the notion of a principle, seem to be properly classifiable as factor/outcome-links. The first principle is taken from case *Riggs vs Palmer*, a decision of a New York court (in 1889) that denied the inheritance to a person named in the will of his grandfather, who had killed the grandfather in order to inherit from him. The ground of this decision is idea that:

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.

The second principle is taken from case *Henningsen vs Bloomfield Motors Inc.*, a decision from a New Jersey's Court (in 1960). In this case the judges recognised the liability of the manufacturer of a faulty car for the damages suffered by the buyer, though the contract between the manufacturer and the buyer included a limitation of liability. Their conclusion is supported by the idea that:

> The courts generally refuse to lend themselves to the enforcement of a bargain in which one party has unjustly taken advantage of the economic necessities of the other.

Both principles can easily be rephrased into factor/outcome-links: The first says that the fact than one has obtained a profit (advantage or property) through fraud (wrong or iniquity) favours the conclusion of not allowing one to keep that profit; the second says that the fact that one party in a contract has unjustly taken advantage of the economic necessities of the other party favours the conclusion that the contract should not enforced.

This interpretation is confirmed by Dworkin's description of the way in which principles work:

> [A principle] states a reason that argues in one direction, but does not necessitate a particular decision. If a man is or is about to receive something, as a direct result of something illegal he

[2] Reasoning with factors, is specifically addressed by Sunstein (1996a).

> did to get it, then that is a reason which the law will take into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction—the policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle may not prevail, but this does not mean that it is not a principle of our legal system, because in the next case, when these competing considerations are absent or less weighty, the principle may be decisive. (Dworkin 1977b, 26)

Also other examples of principles indicated by Dworkin could be rephrased as factor links: An act being formally regular favours the conclusion that the act is enforceable, a punishment not having been explicitly established by the legislator favours the conclusion that the courts should not order that punishment, and so on.

To express the connection between a factor and the outcome it favours, one may use the word *reason*, saying that the factor is a reason for its outcome. However, we should pay attention that in this connection the word "reason" may refer to different objects and play different functions: In particular, when by speaking of a reason, sometimes we mean a *complete reason*, autonomously supporting a conclusion, sometimes we only mean a *subreason*, which only works as a component of a larger reason. For instance, we may say all of the following:

- The factor ⌈having obtained a profit though fraud⌉ is a subreason for the outcome it favours, that is, for ⌈not being allowed to keep the profit⌉: When one both believes that an instance of the factor is present (one person has obtained a profit through fraud) and endorses the factor link, one will be pushed towards the corresponding outcome (that person is not allowed to keep the profit).
- The factor link ⌈having obtained a profit though fraud favours not being allowed to keep the profit⌉ also is a subreason, for being pushed towards that same outcome.
- Any goal or value which is going to be promoted through the recognition of this factor/outcome-link (for example, the goal of reducing frauds, or of enhancing mutual trust) is a subreason for recognising the factor link, together with the belief that recognising the link will contribute to achieving this goal. Therefore the promoted goal lends an indirect support to any conclusion that can be obtained thanks to that link.

Our analytical apparatus allows us to distinguish all of these elements and to give each of them the appropriate place in reasoning.

It is particularly important to distinguish the notion of a factor/outcome-link from the notions of a value, as both values and factors are frequently merged under the heading of principles.[3]

[3] An assimilation of principles to values (or goals) is proposed by Alexy 1985, 75–7, who views principles as *commands to optimize*, which prescribe to reach a certain outcome as much as

On the contrary, we believe that the cognitive role of values is different from that of factors. Values (together with goals) find their proper role within teleological reasoning (which may support the adoption of both intentions and propensities), while factor-based reasoning has a different cognitive function, namely, providing an alternative to teleological reasoning.

Similarly, we need to distinguish factors and defeasible rules, which (or at least some of which) also are frequently called "principles."[4] While a factor (combined with the factor/outcome-link) only is a contributory reason for the favoured result, the antecedent of a defeasible rule (combined with the rule itself) is a defeasibly sufficient reason for the rule's effect. In other words, when believing that a certain factor exists in the current situation, I am not committed to assume that, in the absence of reasons to the contrary, the favoured result obtains. On the contrary, when believing that the antecedent of a defeasible rule is satisfied, I am committed to assume that in the absence of reasons to the contrary, the rule's consequent obtains.

We will not provide a precise characterisation of the notion of a *principle*. It seems to us that it is better to use term *principle* in a generic way, namely, as expression or the importance of a certain legal noema (a piece of normative information), and of the fact that this noema is the premise from which further significant noemata (like legal rules, instrumental legal values, specific factors) can be inferred. In fact, it seems to us that qualifying a legal noema as a principle usually entails no commitment to a specific logical function or form, or to a specific origin.[5]

With regard to the logical form and function of legal noemata we believe that the four classes we have so far identified—indefeasible rules, defeasible rules, values, and factors—may be viewed as providing an adequate classification. One can find instances of "principles" (important premises of legal reasoning) within all such classes. We can correctly speak of a principle with regard

possible. From our perspective, this can only be accepted as a synthetic characterisation of what needs to be analytically specified: A value is to be maximised in the sense that, everything else being equal, it is better to achieve more of it rather than less; defeasible rules are to be maximised in the sense that they have to applied whenever there are no prevailing reasons to the contrary; factors-links have to be maximised in the sense that factors determine the outcomes they favour, whenever they have a sufficient strength (combined with other factors) and are not overridden by contrary factors.

[4] Principles are characterised in a rule-like way in Nozick 1991. The assimilation of principles to defeasible rules is assumed by Atienza and Ruiz Manero (1998), who view principles as rules having open conditions of applications. If openness consists in the fact that a "principle" is not to be applied when there are prevailing reasons against doing that, then principles are indeed defeasible rules.

[5] This seems to correspond to the way in which the term "principle" is currently used by jurists (Alpa 1993, see, among the others) and has been used along legal history (see Pattaro 1988). In a similar sense, also the term *general clause* (in German, *Generalklause*; in Italian, *clausola generale*) is often used (see for instance Rodotà 1987). The notion of a principle is downplayed by Raz 1972, while the opposition of rules and principles is affirmed by Sieckmann 1990.

to all of the following: a legal value, like ⌈human dignity is a fundamental legal value, to be protected and advanced⌉; an indefeasible rule, like ⌈nobody shall ever be tortured⌉; a defeasible rule, like ⌈workers have a right to strike⌉; a factor/outcome-link, like ⌈the fact that an interpretation corresponds to the textual meaning of a statute favours its endorsement⌉.

As we can use the term *principle* to denote legal contents having different logical structures, we can use it to refer to contents having different origins. In particular, we can correctly speak of a principle non only with regard to ideas pertaining to legal tradition or political morality, but also with regard to contents that are expressed in positive sources of the law: in a constitution (like the principle that workers have a right to strike, included in the Italian Constitution), in ordinary legislation (like the principle of vicarious liability of employers, stated in the Italian Civil code), in case law (like the principle that health damages are to be compensated, introduced by Italian judges some years ago).

6.2.3. Factors, Dimensions and Standards

The notion of a factor, and in particular of a *dimension*, can be connected to a further kind of legal information, *legal standards*, that is, those legal models of behaviour which, according to Pound (1954), have the following characteristics:

> (1) They all involve a certain moral judgment upon conduct. It is to be "fair," or "conscientious," or "reasonable," or "prudent," or "diligent." (2) They do not call for exact legal knowledge exactly applied, but for common sense about common things or trained intuition about things outside of everyone's experience. (3) They are not formulated absolutely and given an exact content, either by legislation or by judicial decision, but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand.

From our perspective, a standard (fairness, good faith, reasonableness, care) appears to be a *dimension*, and in particular a property which increasingly favours a positive evaluation of the activities to which it applies (the more one is fair, conscientious, reasonable, prudent, the more praiseworthy one's behaviour is).

However, the application of the standard involves also other kinds of legal information. The standard is combined with a one or more *rules*, legally requiring that a certain level of the standard is maintained in certain domains (for instance different rules of law may require different levels of care in different activities and with regard to different professions). These rules can be cast as an obligational rules: ⌈Producers have a duty of care to their customers⌉, ⌈Contractual parties must be fair toward one another⌉, and so forth.

Determining the required dimensional levels may require teleological considerations: Given the goals of facilitating the formation of contracts, promoting mutual trust, and preventing litigation, but also of ensuring the liberty of contractors and limiting the cost of contracting, what minimum level or fairness

and consciousness should be legally required from the parties? The required level of the standard can also be determined with reference to an exemplar or prototype: the normal person, the good father of a family (*bonus pater familias*), the good medical doctor, lawyer, accountant, and so on (on prototypes, see Section 6.2.7 on page 191).

Establishing whether this level has been achieved requires extralegal knowledge, proper to the domain of activity that is being considered. For instance, to establish whether a doctor has behaved with the required level of medical care, one needs to consider what medical information was accessible to him or her, whether this information was used correctly understood and applied in his or her work, whether a sufficient degree of attention was maintained, and so on.

6.2.4. Factors in Legislation

In his famous characterisation of principles, Dworkin (1977b) identifies further characters of them (besides the fact that they operate as factors): Principles are dependent on morality (rather than on expediency), they have the function of protecting individual rights (rather than advancing social goals), they are included in legal culture (rather than having been expressly stated by a legislator). Not all such characters apply to all factors.

In particular, the relevance of certain factors may depend upon legislative choice: The legislator may state explicitly what factors are, or are not, to be considered when taking a particular decision.

For example, the Italian criminal code specifies what factors may lead to an aggravation of a crime (like the fact that it was committed with cruelty), and what factors may lead to its attenuation (like the circumstance that the author of the crime acted in a state of wrath, caused by the behaviour of the victim), and requires the judge to balance those factors to establish whether the aggravation or the attenuation prevail, and consequently increase or decrease punishment.

Though there are some rules that constrain the evaluation of aggravating circumstances, this evaluation seems to correspond to the model of factor-based thinking we have just described. In fact this is the way in which the Norwegian legal theorist Torstein Eckhoff describes the evaluations involved in sentencing (see Twining and Miers 1991, 269), though he refers to the criteria governing such evaluations by using the term *guiding standards*.

> To know the relevant reasons is not the same as having reached a solution. The weighing of reasons still remains. This weighing is, of course, very easy when all relevant reasons pull in the same direction. But still it is a different process from that of subsuming a set of facts under a rule. And a weighing of reasons which pull in different directions can give rise to considerable doubt and scruples. [. . .] Take for instance, principles of sentencing, which I conceive of as typical examples of guiding standards. They supply answers to the question of what must be taken into account when deciding whether an offender should be sentenced and what the sentence should be. They tell us, for instance, that the gravity of the offence and the age and record of the offender must

be considered. But they do not determine whether a particular offender should be discharged or imprisoned, or what the length of his prison sentence should be. These questions are left to the judge who has to base his decision on a weighing of the relevant factors. (Eckhoff 1976, 217)

As another example of legislative factors, consider for example the US Copyright Act, which mandates, at section 107, that:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- the effect of the use upon the potential market for or value of the work.

The factors in section 107 are bi-directional dimensions:

- the more the use is no-profit the more fair use is favoured, the less it is so the more copyright protection is favoured;
- the more the content is factual the more fair use is favoured, the less the content is factual (the more the content is fictional) the more copyright is favoured;
- the smaller the used portion the more fair use is favoured, the bigger the portion the more copyright is favoured;
- the smaller the impact upon the market value of the work, the more fair use is favoured, the larger the impact the more copyright is favoured.

This example clarifies the difference between factors on the one hand and values on the other hand. Factors are not results one should aim at achieving as much as possible in the future (through a specific action or through the general practice of a rule). They are rather features of the existing (or pre-existing) situation favouring a certain normative conclusion: While values are forward-looking, factors are backward-looking.

The relationship between factors and values is not identity but *teleology*: The reason why a factor is recognised as promoting a certain outcome consists in the fact that through recognising this factor/outcome connection (by giving the factor a certain weight when taking a decision) one promotes certain values.

For example, by giving relevance to the factual nature of a work as favouring its fair use, one promotes the values of knowledge and information, while by giving relevance to its fictional nature as a factor for copyright protection one promotes creativity.

However, when one reasons with factors, one does not need to refer to the connection between factors and the underlying values, and one does not even

need to be aware of such connections. This simplifies the reasoning of the agent, who can find "satisficing" solutions (as Simon would say, see Section 5.1.1 on page 146) without engaging in the complexities of teleological reasoning. One needs to move up to values only when factor-based reasoning leads to absurd or meaningless outcomes, or when one has to adjudicate a conflict of competing factors. Under such circumstances, one needs to engage in rationalisation, trying to secure the doubtful or contested factor/outcome-links by anchoring them to values.

A failure to provide this anchorage signals that a factor/outcome-link may have to be abandoned, since it does not play any acceptable function. For example, up to a certain time, in Italian criminal law, the fact of acting out of sense of honour was considered to be a factor favouring a considerable reduction in criminal punishment (especially in cases of homicide between partners or relatives, in particular when extramarital relations were at issue). However, at a certain time this factor started to have less and less importance, as people started to look in a different way at family relationships.

6.2.5. Factors in Case-Based Reasoning

Factor-based thinking is an essential aspect of case law. For a clear reference to factors and factor-based reasoning, we will refer to the case *Playboy Enterprises Inc. vs George Frena* (1993). In this case the judges had to decide whether the publication of some Playboy photos on a subscription-based bulletin board, maintained by George Frena, implied a infringement under 15 U.S.C. Section 1114.

One of the central points to be established concerned the likelihood that confusion was caused by the fact that Frena used the word "Playboy," a registered mark, in presenting those photos. Here is how the judges describe how this evaluation needs to be performed:

> The following factors are highly relevant in deciding whether there is a likelihood of confusion: "(1) the type of mark at issue; (2) similarity of marks; (3) similarity of product or services; (4) identity of purchasers and similarity of retail outlets; [. . .] (6) the defendant's intent; and (7) actual confusion." Ice Cold Auto Air, 828 F.Supp. at 935 (citing Freedom Sav. and Loan Ass'n, 757 F.2d at 1182-83). The Court, however, is not required to specifically mention each of these factors in making its decision. See Univ. of Georgia Athletic Ass'n v. Laite, 756 F.2d 1535, 1542 (11th Cir.1985) (analyzing the factors in the context of a claim of unfair competition). Rather than simply determining whether a majority of these factors indicate a likelihood of confusion, a court must "evaluate the weight to be accorded the individual factors and then make its ultimate decision." [. . .] An analysis of fewer than all seven factors may support a finding of likelihood of confusion. See Univ. of Georgia Athletic Ass'n, 756 F.2d at 1543. In the Eleventh Circuit, the type of mark and evidence of actual confusion are the most important factors.

Thus, according to the judges, the conclusion that there is a likelihood of confusion (a conclusion that may lead, in its turn, to establish that there was a trade-

mark infringement) depends upon a number of scalable factors. These factors are to be weighed together, in their variable combinations, to see whether they are sufficient to support that conclusion in a particular case.

6.2.6. The Role of Factors in Practical Inference

Practical inference based on conditional intentions is quite different from practical inference based upon propensities. In the first case, one just needs to check whether the intention's pre-condition is satisfied, and then perform the action, unless exceptions emerge. The agent having a propensity, on the contrary, needs to do the following:

- first collect factors favouring or disfavouring a certain outcome, both pros and cons;
- then compare the combined strength of the two sets of factors, and
- finally, according to this evaluation, form an intention (or refrain from forming it).

We may distinguish two ways in which such an intention is formed.

The first way consists in reasoning directly with factors, without forming general intentions or endorsing rules. The presence of a certain combination of factors directly leads the agent to form the specific intention to perform a particular action.

The second way consists in moving from the recognition that a certain combination of factors supports a certain conclusion to the adoption of a general commitment: One shall endorse the conclusion whenever that combination of factors is present. This means that this set of factors becomes the antecedent of a conditional instruction, to which one gets committed. As usual, such instruction can be doxified into a conditional normative proposition.

For example, after my child falls seriously ill, having being taken to the sea while she was sick, I may commit myself to the intention of never taking my child to the sea when she is sick. This means that I commit myself to viewing the fact that my child is sick no longer only as a (contributory) factor favouring staying at home but rather as the antecedent of an abstract instruction I am committed to. I can still assume that prevailing counterreasons may impede the application of the instruction, but unless I am satisfied that such counterreasons exist, I intend to implement the instruction.

As a legal example, assume that in a certain legal system, the educational nature of a certain use of a copyrighted work favours the conclusion that it is a fair use. A lawyer could argue that the value of education is so overwhelming that this factor/outcome-link should originate a conditional rule: The law should be viewed as including a rule to the effect that any educational use is fair.

The opposite passage can also take place, to wit, one may transform a conditional instruction into a factor/outcome-link: Rather than rigidly committing

oneself to that instruction, one may choose to view the instruction's antecedent as a factor which needs to be balanced in the concrete case with factors to the contrary.

For example, one may argue that under the conditions of the Internet society, where circulation of information has become ubiquitous and costless (so that one cannot limit the unwanted uses of one's work, once it has been made accessible), a rule to the effect any educational use is fair would involve an inadmissible compression of the rights of the authors: Rather than as a rule, the connection between educational and fair use it to be viewed as a factor/outcome-link, the relevance of which has to be evaluated case by case, according to the ways and circumstances of the educational use.

We will not provide reasoning schemata for the transformation of factors into rules (and vice versa), since such ways of reasoning do not appear to pertain to ratiocination, but rather to heuresis and theory construction, namely, to the processes through which one attempts to improve one's practical theory, either by making it more rigid, or more flexible. We will consider these processes in some detail in Chapters 28 and 29.

6.2.7. Factors, Dimensions, and Prototypes

Factors and dimensions are connected to another very important notion—which is applicable in different fields, like linguistic, artificial intelligence, and legal theory—the notion of a *prototype*.

It has been frequently observed that many legal concepts are not characterised through a set of necessary and jointly sufficient conditions, but rather through a prototype, or through a set of prototypes, connected by *family resemblances*.[6] Prototypical meanings are not limited to legal language: It seems that the concept we are most familiar with (the notions of a table, a plate, a chair, a fruit, a game) are not understood through precise definitions, but rather through prototypes or exemplars. These concepts elicit a set of typical cases to which we compare the objects of our experience: We conclude that a concept applies to an object when the similarities between the concept's prototypes and the object outweigh their differences (and no alternative concepts gives a better match).

In general, to check whether a certain entity is an instance of a prototypical notion one has to consider: (*a*) to what degree and in what combination the features characterising the prototype are present in that entity, and (*b*) whether the entity has additional features, which are absent in the prototype, and which would hinder the present prototypical features from playing their normal function.

[6] On family resemblances, see Wittgenstein 1974, secs. 67ff., who introduced this idea, Rosch and Mervis 1975, who developed it within cognitive psychology, and Hart 1983c, 174–275, who applied it to the law.

In artificial intelligence and law, the idea of prototypical reasoning has been advanced in particular by McCarty (1982), in particular with regard to company law. In his model, indeterminate legal concepts are represented by three elements: (*a*) an optional invariant, indicating necessary, but not sufficient, conditions for the concept (for example, in the domain of corporate positions, holding a share of a certain object); (*b*) a set of paradigms or prototypes (for examples the prototypes of stockholding, bondholding, etc., each of those being characterized by a bundle of rights and obligations); (*c*) a set of transformations (or deformations), allowing one prototype to be mapped (transformed) into other prototypes (for example, to map stockholding into bondholding), or concrete cases to be related to a prototype.

Also German legal theorists have dedicated much effort to the idea of a legal prototype, assuming that a *Typus* is "characterised by features that do not need always to be present together, or that can be present to different extents in the concrete instances" (Larenz 1992, 131; my translation). As examples of prototypically characterised notions, Larenz (1992) indicates the notion of the "essential component of an object" (*wesentliche Bestandteil einer Sache*), which depends on the measure in which the component contributes to the normal functions of the object, or the notion of the guardian of an animal (*Tierhalter*), a qualification which is dependent on the extent to which one has control over the animal in one's own interest. He also argues that for establishing whether a certain entity is an instance of a *Typus* one has to refer to values, that is, one has to consider whether—with regard to the relevant values—it would be appropriate that the entity produces the legal effects that are connected to the *Typus* (on *Typen*, see also Kaufmann 1965, and Hassemer 1968).

We cannot hope to provide here a precise analytical understanding of the notion of a prototype (which would be a substantive achievement for legally theory) and of its connections with related ideas such the sociological notion of a pure or *ideal type* (see Weber 1947, chap. 1, sec. 1.a.10). We shall just consider whether our notions of a factor and a dimension can provide an insight into prototypical thinking.

Let us assume that the variable and exchangeable features that characterise legal prototypes are viewed as factors and dimensions. Correspondingly, we characterise a prototypical qualification as being favoured by certain factors or along certain dimensions, and we view prototypes as consisting in the optimal combinations of such factors and dimensions.

For example, assume that the law grants particular warranties to employees (protection against unjustified dismissals, against mobbing and discrimination, health insurance, and so on), warranties which are not available, or not to the same extent, to independent workers. Assume also that the qualification of a worker as an employee would be favoured to the extent that the worker is dedicating a larger proportion of his working time to one work-giver, is following the directions of the work-giver, is working within the premises of the work-giver or using the work-giver's tools.

With regard to such dimensions, not only can we build the notion of a prototypical employee (a person who is working full time for a single employer, under detailed directions, within the employer's premises and using the employers' tools), but we get a multi-dimensional space were we can locate different real or hypothetical cases. For instance, assume that we locate within this dimensional space case c_1 where a judge concluded for the existence of an employment relationship between a_1 and b_1, where a_1 is a woman who was working in her house, but was dedicating 80% of her working time to the work-giver b_1, and following b_1's detailed instruction, and mostly using b_1's tools.

Once that we have characterised the dimensional space, and have located within this space the known positive or negative examples at our disposal, we can reason analogically, in order to establish whether a certain hypothetical or real case can be characterised as an instance of the prototypical concept. This would be done by considering what factors and dimensions apply to the new case, and comparing the new case to the known instances of the prototypical notion (according to *a fortiori* reasoning or other ways of analogising).

For instance, consider case c_2 where a_2 is a man dedicating 90% of his time to work-giver b_2, and a_2 is following b_2's directions and using b_2's tools to the same extent in which a_1 was following b_1's directions, used b_1's tools, and so on. Under these circumstances, *a fortiori* reasoning allows us to conclude that indeed also the relation between a_2 and b_2 is an employment relationship. Consequently, we can conclude that also b_2, like b_1, has rights to health insurance, to a certain degree of stability in his job, and so on (on *a fortiori* reasoning, see Section 8.1 on page 221, in particular Section 8.1.2 on page 222 and Section 8.1.6 on page 233).

When *a fortiori* reasoning cannot be used (or when one wants to challenge past classifications), one needs to resort to values. The assignment to a prototype involves reference to values since values explain why factors and dimensions promote the classification under a certain prototype: Such classification determines certain legal effects, and connecting these legal effect to the relevant factors and dimensions (by means of the intermediate prototypical concept) contributes to some values.

For instance, when we cannot or do not want to rely on analogies from past exemplars of relationships between workers and work-givers, which have already been qualified as instantiating or not instantiating the employment relationship, we need to engage in teleological reasoning: We need to examine to what extent the existence of an employment relation under certain conditions (when certain factors are present) would contribute to realise the values that underlie a stable employment relationship (mutual trust, security, freedom from arbitrary power, the chance to develop long term life projects, and so on), and weigh these values against the values that may be satisfied by a more flexible arrangements (economic freedom, efficiency, increased access to work, and so forth).

This evaluation may lead us to restructure the dimensional space, adding certain exemplars or even changing the qualifications of previously classified exemplars (for example, seeing instances of employment relationships where we previously saw independent work, or vice versa).

By appealing to the idea of a dimension (or to the interchange of equivalent factors), we may explain McCarty's idea of a transformational matching between a prototype and its candidate instances. By increasing or decreasing the level to which a dimension is satisfied, or by cancelling, adding, and exchanging factors, we can move from an hypothetical exemplar or real case to other exemplars or cases within the same dimensional space.

Finally, the possibility of passing from factors and dimensions to rules, and vice versa, through theory-construction processes (as we shall see in Chapter 28), explains the dialectical movement of legal thinking between the prototypical characterisation of legal notions and the attempt to capture these notions through precise definitions.

Chapter 7

PREFERENCE-BASED REASONING: RULES

In Chapters 7 and 8 we shall examine an aspect of legal cognition that integrates the main forms of reasoning we have so far considered: rule-based defeasible reasoning, teleological reasoning, and factor-based reasoning. This is *preference-based reasoning*, by which we mean addressing conflicts of reasons by taking into account the relative importance of such reasons, on the basis of the weight of the elements they include: rules, values, and factors. We have already considered how to take into account the relative importance of values in Section 5.2 on page 150. Therefore, we shall now focus on rules, and address factors in the next chapter.

7.1. Rules and Preferences

When a rule[1] leads us to a conclusion that is incompatible with what can be inferred through another rule, we must make a choice, and accordingly endorse only one of the two inferences (unless we reject both of them). The rational way to approach such conflicts, which legal reasoning shares which common-sense reasoning, consists in moving into *preference-based reasoning*.

7.1.1. Undecided Conflicts

As an example of a conflict between two incompatible rules, consider the case of Tom, who endorses both the rule that one is forbidden to drive at a speed higher that 80 km per hour on suburban roads, and the rule that he is obliged to be at work at 8 o' clock every morning. Unfortunately, it is now 7.30, and he knows that there are still 50 km to go, so that he has no chance to be at work in time while respecting the speed limit. Under these circumstances (see Table 7.1 on the next page), he needs to decide which one of the two inferences $\mathcal{A}$ and $\mathcal{B}$ to perform, and consequently, which conclusion to endorse.

According to the two inferences, Tom could derive the following conclusions: ⌈I am obliged to get to my office by 8 o' clock⌉ and ⌈I am forbidden to go at a speed higher than 80 km per hour⌉. These conclusions are not contradictory (they are mutually consistent), when seen in isolation from the back-

[1] By a *rule* we mean any general instruction or normative proposition. Remember that we speak of an *instruction* to refer to the content of an intention, and we view *normative propositions* as being the doxification of instructions.

Inference $\mathcal{A}$		Inference $\mathcal{B}$	
(1)	I am now driving on a suburban road;	(1)	today it is a working day;
(2)	when one is driving on a suburban road, one is forbidden to go at a speed higher that 80 km per hour	(2)	every working day, I am obliged to get to my office by 8 o' clock
(3)	I am forbidden to go at a speed higher than 80 km	(3)	I am obliged to get to my office by 8 o' clock

Table 7.1: *Conflicting inferences*

ground knowledge. However, these propositions are incompatible in Tom's case, since Tom gets a contradiction when he combines them with further information (which he has no reason for questioning), such as the information that now it is 7.30, and that his office is 50 km away.

The situation we have just considered is particularly perplexing since it seems that Tom has no way out. He will be faulty in any way, either for violating the speed limit, or for being late at work. Until he has decided which fault is lighter than the other, he is left in a state of perplexity: Both propositions ⌈I ought to slow down⌉ and ⌈I have to speed up⌉ seem equally appealing to him, or at least he has no reason for preferring the one to the other. Choosing arbitrarily one of the two seems to be irrational.

A more serious kind of undecided practical clash is provided by Sartre's story concerning a young man who has to decide whether to join the partisan war or to stay by his old mother (this case is discussed in Sartre 1988). Not to speak of Hamlet's famous dilemma: "To be or not to be: that is the question/ Whether 'this nobler in the mind to suffer/ The slings and arrows of outrageous fortune,/ Or to take arms against a sea of troubles, And by opposing end them?" (Shakespeare 1981, sec. 3.1, 64–8)

For a similar situation in the epistemic domain, consider Laura's state of mind when she finds her house flooded, and (*a*) Laura's daughter Mary tells her that she (Mary) did not leave the tap on (it must have been her brother Anthony), while (*b*) Laura's son Anthony tells her that he did not do it (it must have been his sister Mary). Assume also the following: (*c*) Laura is certain that one of her children did it (she knows that only her daughter and her son were in the house), and she is usually ready to believe her children. Under such conditions, she is incapable of forming an opinion on the matter, and making an arbitrary choice seems to be irrational.

In the framework for defeasible reasoning we sketched in Chapter 2.2, we are in front of a case of *reciprocal* defeat (reciprocal rebutting): The reasoner is incapable of forming a definite opinion on the matter at hand since two in-

compatible conclusions elide each other. The reason for adopting one such conclusion would provide a sufficient stimulus for endorsing that conclusion, unless the reason for adopting the incompatible conclusion was present. However, given that both reasons are jointly present in the reasoner's mind, neither of them is decisive (yet).

Here one may suggest, with Pollock (1995, 64), that there is a fundamental difference between practical and epistemic reasoning:

- epistemic rationality requires that one refrains from adopting any one of two equally strong incompatible conclusions;
- practical rationality, instead, may require that one selects randomly one of the two conclusions.

The practical necessity of making a choice would be required for avoiding the fate of the famous *Buridan's ass*, which starved to death standing between two haystacks that were indistinguishable in accessibility and delectability. However, as we shall see in the following, the need to choose at random (whatever one may say on the rationality or the morality of lotteries, see Elster 1989) may be avoided if one comes to believe that one inference prevails over the other.

7.1.2. Priority Beliefs

The importance of conflicts of reasons in legal thinking has been recognised and emphasised especially by the realist movement and, more recently, by the critical legal studies. Both approaches view such conflicts as a confirmation of their scepticism towards legal reasoning (as opposed to power and interest): Conflicts of legal reasons can only be decided by the "sovereign prerogative of choice" of the judge (Holmes 1897). On the contrary, we believe that practical cognition, can also approach conflicts of reasons, and identify preferable choices (with the possible exception of "Buridan's ass cases"), or at least rationalise intuitive evaluations.

To find a rational way out of perplexity, the reasoner must come to believe that the reason supporting a conclusion is stronger or preferable to the reason supporting the other. If one comes to have such belief, then one should view only the weaker inference (the inference based upon the weaker reason) as being defeated (rebutted), and should adopt the conclusion of the stronger inference.[2]

[2] An additional approach to cope with uncertainty consists in probabilistic inference, which in the law can be profitably used to evaluate factual evidence, when appropriate input data are available. We cannot address here the many legal and epistemological issues linked to the assessment of evidence, on which see, among the others, Anderson and Twining 1991, with regard to the common law, and Taruffo 1992, with regard to civil law jurisdictions. On the doctrine of fact-finding, see Peczenik, Volume 4 of this Treatise, sec. 1.6. For an introduction to the philosophy of probabilistic inference, see Cohen 1989. For an attempt to apply defeasible reasoning in examining evidence, see Prakken 2001b.

In Section 2.2.6 on page 64 we observed that when there is a collision between reasons R_1 and R_2, at least one of the two colliding reasons is defeated and possibly both of them. We have also observed that when R_1 prevails over R_2, we should endorse the conclusion of R_1, and refrain from accepting the conclusion of R_2: In this case R_2 is defeated by R_1 but R_1 is not defeated by R_2.

This leads us to specify the notion of defeat through the following definition.

Definition 7.1.1 *Defeat. Reason* R_2 defeats *reason* R_1 *when*

1. R_1 *collides with* R_2*, and*
2. *it is not believed that* R_1 *prevails over* R_2

According to this definition, one's belief that a reason R_1 prevails over its competitor R_2 prevents the defeat of R_1. Consequently, one may endorse the conclusion of R_1 (one may perform the corresponding inference) even while continuing to endorse the R_2 (but one will not endorse R_2's conclusion). In this case, we also say that the prevailing reason *strictly defeats* the weaker one.

Definition 7.1.2 *Strict Defeat. If* R_1 *defeats* R_2*, but* R_2 *does not defeat* R_1*, then* R_1 strictly defeats R_2*.*

With regard to establishing what reasons prevail, we have to distinguish rebutting collisions and undercutting collisions:

- in rebutting collisions, the stronger reason prevails;
- in undercutting collisions, the undercutter prevails.

With regard to rebutting collisions, the decisive issue now becomes that of establishing when one reason is stronger then its competitor. We shall assume that the decisive element—in establishing the comparative strength of two competing syllogisms–is indeed the comparative strength or *priority* of their rules. Thus the decisive issue would be that of establishing when a rule is preferable to another rule.

For this purpose, we shall restrict ourselves to a specific type of inference, that is, *normative syllogism*, and in particular to what we have called *rule-syllogism*. As we have seen in Section 2.1.2 on page 49, this is the inference that makes it possible to infer properties of rules or relationships between rules according to a meta-rule. In particular, in our case we shall infer that a rule r_1 is stronger then another rule r_2, given a reason including (beliefs in):

- the fact that the concerned rules r_1 and r_2 are in a certain relation;
- the meta-rule saying that whenever a couple of rules (like r_1 and r_2) are in these relation then the one of them is stronger then the other.

7.2. Kinds of Rule Preferences

In the following sections we shall see how different priority criteria allows us to infer priorities between the concerned rules, and thus adjudicate their conflicts.

7.2.1. Source-Based Priority

The comparative importance of competing rules frequently depends on the fact that they have been issued by different agents, endowed with a different levels of normative power (see Chapter 25). Under such conditions, the reasoner should adopt the normative conclusion following from the normative proposition that was stated by the agent endowed with greater normative power. This applies more generally whenever a certain comparative level of strength (a certain priority) is associated with a certain source of law (see Section 25.2 on page 653), according to the traditional saying that *lex superior derogat legi inferiori* (a superior law derogates an inferior one).

This way of reasoning is not limited to legal contexts. As a common-sense example, consider the plight of Mark, a nice little boy who is ready to obey to both his mother and his older sister. The problem for him is what to do when he gets conflicting indications. What if mother told him that he is forbidden to watch television after 9 pm, and his older sister, who is in charge of him today but does not want to be bothered, tells him that today he is allowed to watch television as much as he likes? It seems that under such conditions Mark should give priority to the prescription of his mother, and conclude that he is still forbidden from watching television.

A similar situation is that of a law-abiding civil servant, who in post-war Italy had to decide whether to go on strike: The Italian Constitution gives every worker the right to strike, but statutory rules issued under the Fascist regime (included in the criminal code) prohibited striking, and one such rule especially referred to civil servants, punishing their strikes with a severe penalty. Under such conditions, it seems that the civil servant would be right in giving priority to the Constitution, and consequently in concluding he was permitted to strike.

Assume that our civil servant was considering the two inferences in Table 7.2 on the next page. To establish which inference to endorse, the civil servant needs to establish which inference is based upon a stronger reason. This requires that he establishes the comparative strength (preferability) of the premises in those reasons, and in particular of the constitutional rule ⌈Workers have the right to strike⌉ and the statutory rule ⌈Civil servants are forbidden to strike⌉. This comparison also requires reasoning, and in particular a syllogistic step, as shown in Table 7.3 on the following page. Having come to the conclusion that the constitutional rule prevails, the civil servant will adopt the belief that the inference based upon the constitutional rule (inference $\mathcal{A}$) is stronger

Inference $\mathcal{A}$	Inference $\mathcal{B}$
(1) I am a worker;	(1) I am a civil servant;
(2) workers have the right to strike	(2) civil servants are forbidden to strike
(3) I have the right to strike	(3) I am forbidden to strike

Table 7.2: *Conflict of syllogisms: right or prohibition to strike*

(1) ⌈workers have the right to strike⌉ is a constitutional rule;
(2) ⌈civil servants are forbidden to strike⌉ is a statutory rule;
(3) constitutional rules are preferable to statutory rules

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(4) rule ⌈Workers have the right to strike⌉ is preferable to rule ⌈civil servants are forbidden to strike⌉

Table 7.3: *Preference inference*

than the inference based upon the statutory rule (inference $\mathcal{B}$). Accordingly, he will view the latter inference as being defeated, but not the former, and he will endorse the conclusion of the former inference (he has the right to strike).

In certain legal systems (such as the Italian one), a Constitutional Court has the power of striking out statutory rules violating the Constitution. However, before the statute is voided legal reasoners need to relate constitutional and statutory prescriptions, performing the kind of reasoning we have just presented.

7.2.2. Time-Based Priority

In other cases, the clue for adjudicating the clash of competing inferences is given by temporal priority, according to the traditional saying that *lex posterior derogat legi priori* (a subsequent law derogates the previous one).

Also this kind of prioritisation is not limited to the law. For a common sense example, assume that Lisa asks her parents whether she is allowed to go out tonight with her friends. Her parents at first give a negative answer to her request: She is forbidden to go out, since she must complete her homework. However, at 8 o' clock, seeing that she accepts their verdict, but that she feels very unhappy and distressed about having to stay at home while all her friends are going out (she is crying in her room), her parents change their mind, and tell her that she is permitted to go out, if she really wants to do so. Under such

Inference $\mathcal{A}$	Inference $\mathcal{B}$
(1) Tom is a legitimate owner of his copy of "The Concept of Law," by H.L.A. Hart;	(1) "The Concept of Law," by H.L.A. Hart, is a copyrighted work;
(2) legitimate owners of a copyrighted work are permitted to duplicate it for personal use	(2) anyone is forbidden to photocopy more than 1/3 of a copyrighted work
(3) Tom is permitted to duplicate his copy of "The Concept of Law," by H.L.A. Hart	(3) Tom is forbidden to photocopy more than 1/3 of "The Concept of Law," by H.L.A. Hart

Table 7.4: *Conflict of syllogisms in intellectual property law*

conditions it seems that Lisa may safely conclude that she may disregard the previously expressed normative proposition, and conclude that she may go out.

A similar conflict results from the fact that a legislator issues a new normative statement that is incompatible with a previously issued one. Consider, for instance, how various countries have issued laws restricting fair use of copyrighted work (for example, by limiting the number of pages one is allowed to photocopy, or by requiring that a fee is paid). Clearly, a judge deciding a copyright case after one such law has been enacted will consider that the rules of the new law prevail over the previous, more liberal, legislation. Accordingly the judge will conclude, for instance, that Tom is now forbidden from photocopying a whole book for personal use, though this was allowed by pre-existing laws.

For instance, assume that Tom would like to make a copy of all pages of "The Concept of Law," the well-known jurisprudential contribution of H.L.A. Hart. Being a law student, before performing this operation, Tom considers the legal aspects involved: Is copying this book permitted or forbidden? (see Table 7.4). The answer to this question is provided by the principle of temporality, or of *priority by posteriority*, as is shown in Table 7.5 on the following page.

The idea that subsequent laws take precedence over previous ones is quite a reasonable assumption: This is necessary to adapt the law to new social needs and political ideas, it is required to implement the intention of the norm issuers, it is a shared uncontroversial thesis of our legal culture. Note, however, that also the opposite idea, namely, the idea that older laws prevail over newer ones may be appealing under some situations. This idea—though difficult to be realised in practice—may be appropriate to cultures that view history as progressive deterioration, also with regard to practical cognition.

Inference $\mathcal{C}$

(1) the rule ⌈anyone is forbidden to photocopy more than 1/3 of a copyrighted work⌉ was issued subsequently to the rule ⌈legitimate owners of a copyrighted work are permitted to duplicate it for personal use⌉;
(2) subsequently issued rules are preferable to anterior ones

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(3) the rule ⌈anyone is forbidden to photocopy more than 1/3 of a copyrighted work⌉ is preferable to the rule ⌈legitimate owners of a copyrighted work are permitted to duplicate it for personal use⌉

Table 7.5: *Preference inference*

Inference $\mathcal{A}$		Inference $\mathcal{B}$	
(1)	Tweety is a bird;	(1)	Tweety is a penguin;
(2)	birds fly	(2)	penguins do not fly;
(3)	Tweety flies	(3)	Tweety does not fly

Table 7.6: *Specificity in epistemic syllogisms*

7.2.3. Specificity-Based Priority

A further clue for adjudicating normative conflicts is given by the idea that more specific rules prevail over more general ones, according to the traditional saying that *lex specialis derogat legi generali* (a special law prevails over a general one).

This way of reasoning is very frequently adopted in common-sense reasoning both in practical and in epistemic domains. In Table 7.6 you can see an epistemic example that is often mentioned in the literature on defeasible reasoning, to show that it makes sense to prefer more specific inferences. Given that Tweety is both a bird and a penguin, we would be led to conclude both that he flies and that he does not: The latter conclusion prevails since it is based upon a more specific property (penguins are a specific type of birds).

As a more significant example of a common-sense situation involving a conflict of rules, consider the case of a pregnant woman, Mary, who is reading the instructions for taking certain pills (assume that she trusts these instructions, and is ready to endorse all of them). She first reads that an adult person may take up to three pills a day and then, at the bottom of the instructions, she reads that pregnant women should not take more than two pills a day. The former instruction entails that Mary (who is undoubtedly an adult) may take three pills a day, but the latter, more specific, instruction entails that she should not take more than two.

Inference $\mathcal{A}$	Inference $\mathcal{B}$
(1) I am an adult;	(1) I am pregnant;
(2) if one is an adult, then one may take up to three pills a day	(2) if one is pregnant, then one ought not to take more than two pills a day
(3) I may take up to three pills a day	(3) I ought not to take more than two pills a day

Table 7.7: *Specificity in practical syllogisms*

It appears that in such a case, the rational way to process this information is to conclude that she should not take more than two pills. Thus, she should prefer and endorse the second of the inferences represented in Table 7.7 (inference $\mathcal{B}$).

The reason why she should prefer the second inference is that it is based upon more specific information, since pregnant women are a strict subset of adults (at least if we assume that all pregnant women are adults). This seems to correspond to a rational reasoning-pattern: If we know that something normally holds for a certain set of entities, but that something incompatible holds for a subset of such entities (which includes the case we are interested in), we had better focus on the features of the subset.[3] In general, if we can reach a certain conclusion, on the basis of having certain pieces of information about an entity (the fact that it is a human being), and we can reach a different conclusion on the basis of having more information about that entity (the fact that it is a pregnant human being of feminine sex), then the conclusion we obtain on the basis of our having more information is to be preferred (this can be linked to the idea of subproperty defeat, see Pollock 1995, 69).

In case of rules that have been voluntarily issued (see Chapter 23), and thus may be assumed to result from an intelligent effort, the idea of specificity defeat emerges from the likely intention of the rule issuer (at least when we may assume that the issuer is proceeding sensibly): We need to conclude that more specific rules are intended to prevail over more general ones, unless we assume that the rule-issuer wanted to generate an undecided conflict or to produce a useless rule (as the more specific rule would be, if all inferences including it were always strictly defeated by inferences based on more general rules).

Moreover, the very fact that people (and in particular lawyers) reason according to specificity-defeat is a ground while one should adopt this principle,

[3] This only holds when subsets are identified in certain natural ways. How to characterise such subsets is a very difficult issue of the logic of probabilistic and defeasible reasoning, which we cannot address here (for some references, see Pollock 1995, 69ff.).

(1) the rule ⌈if one is pregnant, then one ought not to take more than two pills a day⌉ is more special than rule ⌈if one is an adult, then one may take up to three pills a day⌉;
(2) if a rule is more special than another rule, then it is preferable to the latter

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(3) the rule ⌈if one is pregnant, then one ought not to take more than two pills a day⌉ is preferable to rule ⌈if one is an adult, then one may take up to three pills a day⌉

Table 7.8: *Preference inference based upon specificity*

in order to converge with our fellows in a shared way of addressing normative conflicts (see Chapter 12.4.1). And this common attitude is well-known to rule issuers too, who are likely to act on this assumption. Thus this attitude should also be adopted in order to respect the probable intention of the legislators and the way in which this intention is likely to be generally understood.

We cannot here discuss any further the logical grounds of specificity defeat. For our purposes, it is sufficient to consider how specificity works, according to our notion of rebutting. For this purpose it is sufficient to assume that specificity determines preferability, that is, to adopt the meta-rule ⌈If one rule is more special than another rule, then the first rule preferable to the latter⌉. This enables a reasoner to perform inferences like the one in Table 7.8. When one has come to believe that the most specific rule is preferable to the more general one, one will also believe that the reason including the more specific rule is stronger than the reason including the more general rule, and will therefore view the first reason as strictly rebutting the second.

There are many legal contexts where we proceed according to the idea of specificity. For instance, when we learn that all contracts are binding for their parties, but that contracts concerning real estates are void unless they have written form, we understand that the second rule (and the inferences where it is used) is to prevail, thanks to its specificity.

Similarly when we read in a criminal code that a certain penalty is established for theft, and that a higher penalty is established for robbery we assume that the second provision is to prevail over the first one (since robbery is a specific kind of theft). Therefore in case one commits a theft which can be qualified as a robbery, we shall only apply the robbery rule.

In fact specificity plays a fundamental role in the structuring of legal knowledge. Thanks to the idea of defeat by more specific information, it is possible to structure legal knowledge into inheritance-hierarchies (Touretzky 1987; Horty 1999). By this we mean that is possible to have a hierarchy of legal concepts,

or *types* (as Pattaro, Volume 1 of this Treatise, calls them), going from more abstract concepts, such as the concept of a contract, to even more specific ones such as the concept of a sale, to more specific ones such concept of sale of goods, sale of goods to consumers, and so on.

Legal effects can then be attached to concepts at different levels in the conceptual hierarchy. More abstract concepts also cover the entities falling under more specific concepts (a sale contract is still a contract). However, defeat by specificity ensures that qualifications linked to more general concepts are only derived when they are compatible with qualifications linked to more specific concepts. Therefore, rules established for contracts in general will apply to consumer sales only if they are not overridden by incompatible rules concerning sales, or consumer contracts.

7.2.4. Checking Specificity

Notwithstanding the ubiquity of the idea of specificity, it is very difficult to exactly characterise what it means for a rule to be more specific than another rule.

This issue has been extensively discussed in artificial intelligence, where many approaches use specificity as the main or only criterion for solving conflicts between defeasible rules (see, among others, Poole 1985; Delgrande 1988; Simari and Loui 1992; Geffner and Pearl 1992). Examining the various techniques for embedding a specificity check into defeasible reasoning would require a level of technical detail that goes beyond the scope of this book. For our purposes it is sufficient to remark that usually the test for specificity consists in checking whether the precondition of one rule entails the precondition of the other rule. This means that for rule ⌈if A_1 then B_1⌉ to be more specific than rule ⌈if A_2 then B_2⌉ it must be that both of the following conditions obtain:

- in every case where A_1 is satisfied also A_2 is, and
- there is some case where A_2 is satisfied and A_1 is not.

For example, the rule that unwritten contracts concerning real estate are void (in Italian law) is more specific than the rule saying that any contract is binding for its parties. In fact every unwritten contract concerning real estate is a contract (being an unwritten contract concerning real estate entails being a contract) while the opposite is not the case (being a contract does not entail being an unwritten contract concerning real estate). Similarly, the rule saying that minors (people under age) cannot make contracts on their own is more specific than the rule that any person can make contracts (since being a minor entails being a person, while being a person does not entail being a minor).

There are a number of technical problems which are linked to performing a specificity check (see Prakken 1997, 141ff.), but what we need to stress here is that when lawyers speak of specificity they are referring to a broader (and

vaguer) concept, which is not limited to what emerges from a syntactically defined specificity-check. In particular, it seems that in some cases one needs to selectively identify—within the preconditions of the competing rules—what elements to focus on, for establishing specificity.

Consider, for example art. 7 and 8 or the European Data Protection directive:

Art. 7
[P]ersonal data may be processed [. . .] if:

a. the data subject has unambiguously given his consent; or
b. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
c. processing is necessary for compliance with a legal obligation to which the controller is subject; or
d. processing is necessary in order to protect the vital interests of the data subject; or
e. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in the interest of a third party to whom the data are disclosed; or
f. processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

Art. 8
1. [It is prohibited the] processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

When sensitive data (the types of data listed in Art. 8) are processed under the conditions listed in Art. 7, a conflict seems to arise: According to Art. 7 the data may be processed, while according to Art. 8 the data should not be processed.[4] It may seem that the solution is provided by specificity: specificity should favour Art. 8 over Art. 7 since the concept of sensitive personal data is certainly more specific that the concept of personal data in general (sensitive personal data are always personal data, while personal data may not be sensitive). Unfortunately this is not the case. Art. 7 makes the permission to process personal data dependent upon specific conditions (such as the fact that the data subject has consented) that do not necessarily hold for all sensitive data as specified in Art. 8: Sensitive personal data do not always fall under one of the conditions listed in Art. 8, and thus Art. 8 is not syntactically more specific than Art. 7.

[4] Further provisions of the data-protection directive, which we cannot consider here, specify particular conditions under which even sensitive data can be legally processed.

7.2.5. *Priority of Exceptions*

We need to distinguish specificity from the relation that exists between rules and exceptions. The latter consist in the fact that certain rules, let us call them the *principal rules*, establish certain conclusions, while other rules, called *exception-rules* or simply *exceptions*, contradict the conclusions established by the principal rules, in order to prevent these conclusions being established under certain conditions.[5] Exceptions are intended to prevail over principal rules, and thus, to strictly defeat them. However, exceptions often are not more specific than the corresponding principal rules.

Consider, for example, the criminal rules establishing that one is to be punished with various penalties when one commits various types of crimes (murder, manslaughter, theft, slander). There are various exceptions to these rules, such as those stating that one is not punishable if one acted in self-defence, or in state of necessity, or when one was incapable. Clearly such exceptions are not more special than any one of the criminal rules they are intended to counter.

Compare, for instance, the rule that ⌈one is not punishable if one acts in self-defence⌉, and the rule that ⌈one is to be punished with 30 years of imprisonment if one commits murder (intentional killing)⌉. The self-defence rule is not more specific than the murder rule. For this to be the case, it would be required that all cases of self-defence were also cases of intentional killing. Fortunately this is not always the case: Though it may happen that one kills others in self-defence, fortunately one can often defend oneself in other ways (only injuring the attacker, or damaging his or her property, etc.).

However it is clear that the self-defence provision is intended to prevail over the murder provision, and to defeat the conclusion that can be derived from the latter. Consider for instance the two inferences of Table 7.9 on the following page. It seems clear that inference $\mathcal{A}$ should defeat inference $\mathcal{B}$. The justification for this outcome is provided by the preference inference of Table 7.10 on the next page.

This preference inference exemplifies how, on the basis of the belief that a rule r_1 is an exception to a rule r_2, one is led to believe that r_1 is preferable to r_2. Accordingly, in our example, inference $\mathcal{A}$ strictly defeats inference $\mathcal{B}$ and emerges undefeated.

Unfortunately, we are unable to provide a precise and univocal check for identifying exceptions. However, some textual (syntactic) clues may be helpful:

- rules with negative conclusions often can be viewed as exceptions to rules with the corresponding positive conclusion;
- rules that follow, in the textual order, other rules having a complementary conclusion, often can be viewed as exceptions to the latter;

[5] On rules and exceptions, see, among others: Gordon 1988; Kowalski and Sadri 1990; Sartor 1993b; Winkels et al. 1999. The notions of a principal rule and of an exception-rule are not be understood in absolute qualifications. They are relational notions: Also an exception can have exceptions, in which case the exception is a principal rule with regard to its own exceptions.

Inference $\mathcal{A}$	Inference $\mathcal{B}$
(1) Tom intentionally killed Karl;	(1) Tom acted in self defence while killing Karl;
(2) if one intentionally kills another, then one is to be punished with 30 years of detention	(2) if one acts in self defence, then one is not punishable;
(3) Tom is to be punished with 30 years of detention	(3) Tom is not punishable

Table 7.9: *Principal rule and exception-rule*

(1) the rule ⌈if one acts in self defence, then one is not punishable⌉ is an exception to rule ⌈if one commits murder, then one is to be punished with 30 years of detention⌉;
(2) if one rule is an exception to another, then it is preferable to the latter

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(3) the rule ⌈if one acts in self defence then one is not punishable⌉ is preferable to the rule ⌈if one commits murder, then one is to be punished with 30 years of detention⌉

Table 7.10: *Preference inference for exception*

- rules having a more restricted scope (though not being more specific in a strict sense) often can be viewed as exceptions to incompatible rules having a broader scope.

However, these textual clues are far from decisive: Establishing whether a rule is an exception to another rule is a problem of interpretation, which needs to be addressed according to the usual interpretation methods (on which, see Peczenik, Volume 4 of this Treatise, secs. 1.4 and 1.5).

7.2.6. Value-Based Priorities

Conflicts between incompatible syllogisms can also be adjudicated by considering what values are served by the competing rules. This leads us to an instrumental evaluation of rules: Rules are viewed as instruments to achieve certain objectives, to implement certain valuable goals in a satisfactory way (taking into account all relevant values). Accordingly, preference goes to the rules having the

better impact on the values at issue: This is what we call *value-based priority*, or *priority by axiology*. To use again a citation by Judge Holmes:

> behind the logical form lies a judgement as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgement, it is true, and yet the very root and nerve of the whole proceedings. (Holmes 1897, 466)

From our perspective, however, this judgement too may be cast on a logical form. This is the form of *teleological inference*, which we have considered at various places in the preceding pages, starting in Section 1.3.2 on page 18. The difference with regard to the examples we have introduced above is that we are now comparing rules—general normative propositions (or instructions)—rather than specific determinations.

This means that in comparing rules we need to adopt to a certain extent a Kantian attitude: The evaluation of a rule should depend upon the benefit of its universal application (or at least upon the benefit of its application by the number of people which may reasonable be expected to adopt its), rather than upon the benefit deriving from its application by a particular person in a specific case. We need to consider whether one would wish that the rule one is adopting "should become an universal law" (Kant 1972, 84). This Kantian attitude can be limited by providing exceptions, to exclude the application of the rule under the circumstances where we know that it would be inappropriate to apply the rule.

We speak of the *value-impact* of a rule to refer to the positive or negative influence—on all relevant values—of its universal (or generalised) application. We can thus assume the following substantive priority criterion: If a rule has a value impact which is better than the value impact of another rule, then it prevails over the latter.

This leaves us with the task of deciding which rule has a better value-impact. As we have said above, this is a very difficult judgement, which can be made precise only under restricted circumstances, such as when one can apply the idea of Pareto optimality, and when values do not interfere with each other. Obviously, different values may be differently ranked when considered from different perspectives (for instance, according to different legal system, or to different ethical or religious traditions), and this assessment may lead to different comparative evaluations.

Consider for example, the situation of a judge who has to decide a case concerning the publication of a web page presenting and defending racist ideas.

This is a situation to which two conflicting rules may apply:

1. the rule that every one has the right to freely express one's opinions,[6] and

[6] As in the First amendment of the US Constitution, or in Art. 21 of the Italian Constitution.

2. the rule prohibiting the spread of racist theories.[7]

As is well known, this is a conflict that is adjudicated differently within different jurisdictions: US law tends to give primacy to freedom of speech, whereas the law of various European countries gives priority to the prohibition of racist and hate speech. Such a conflict emerged recently in a case concerning the sale of Nazi memorabilia through Yahoo (an Internet portal offering e-business services), which was prohibited in 2000 by a French judge (the Superior Court of Paris), and was allowed in 2001 by a US judge. Here is how district judge James Fogel (San Jose division), in deciding the case *Yahoo vs Ligue contre le racisme et l'antisemitisme*, describes the differences between the French approach and the US approach.

> The French order prohibits the sale or display of items based on their association with a particular political organisation and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order [. . .]. The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence [. . .].

A further complication concerning value-based priority is that one should not consider just consider which values are promoted by a certain rule, but also the degree to which these values are promoted.

Moreover, the comparison should only concern the impact of the concerned rules upon values at issue, rather the values in themselves. For instance, when comparing the rule that ⌈everyone is allowed to express one's opinion⌉ with the rule that ⌈everyone is forbidden from expressing racist views⌉, we should not compare abstractly the value of freedom of speech and the value of non-discrimination (and racial harmony). We need rather to consider whether the impairment of freedom of speech which is determined by the prohibition to express racist views is more important than the impairment of non-discrimination and racial harmony which is determined by allowing the expression of racist views.

The comparison may be further complicated by exclusionary rules, which prohibit from taking certain aspects or values into consideration when performing this comparative evaluation.

Finally we need to consider that value-based comparative evaluations become more complex (and tend to shift into unrestricted teleological reasoning) when we are not confined to two rules in conflict, but we need to examine whether alternative rules would provide a better value-impact than the two rules we are comparing. For example, when establishing whether a certain rule legiti-

[7] According to the UN International Convention on the Elimination of All Forms of Racial Discrimination, which establishes that States "Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination."

mately limits a constitutional provision, not only we need to consider whether by endorsing the legislative rule (and assuming that it prevails in certain cases over the constitutional provision) we obtain an impact on to the satisfaction of constitutional values which is better than the result we would obtain by not having that rule. We may also need to consider whether a different rule would provide an even better result.

For instance, it may be argued that the principle of freedom of speech can be combined with a rule that prohibits racist theories being formulated in certain ways (in emotional terms, with incitements to hatred or aggressive behaviour, and so on). Such a selective prohibition would have the effect that such theories, being presented in an understandable form, can become the object of public political and scientific debate, where they can be defeated. The supporters of this solution would say that it entails a much smaller impairment of freedom of speech than the outright prohibition of any racist speech, while not damaging too much (and possibly even enhancing) the values of non-discrimination and racial harmony.

Following this line of thought, we cannot endorse neither the idea that freedom of speech unconditionally prevails over the prohibition to express racist views, nor the idea that the prohibition to express racist views unconditionally prevails over freedom of speech: We can rather say that only the prohibition to express racist theories in certain ways—in emotional terms, with incitements to hatred or aggressive behaviour, and so on—prevails over the principle of free speech.

7.2.7. Factor-Based Priorities

A conflict between rules can also be adjudicated by viewing the conditions of the two competing rules as expressing sets of competing factors. Preference goes then to the rule expressing a stronger set of factors. Which factors are stronger can then be decided by referring to the values that ground the recognition of a certain factor.

For instance, consider the following two rules:

1. it is forbidden to propagate private information;
2. it is allowed to propagate every piece of information having a public significance.

A piece of information about the private life of a person having a public role both concerns the privacy of an individual and has public relevance (assume, for example, that a photo of an actress or a politician is published in a newspaper), so that its propagation puts the mentioned rules into conflict.

To adjudicate the conflict the reasoner may move to factor-based reasoning, and view the antecedents of the two rules as two competing sets of factors, each pleading for the conclusion of the corresponding rule. Then the reasoner

may consider which set of factors more strongly supports its conclusion, and assume that the rule expressing a stronger set of factors is to be preferred. We shall not analyse any further this aspect, since we shall address it in the following: We shall extensively examine preferences between factors in Section 8.1 on page 221, and we shall address the link between rules and factors in Chapter 28.

7.3. Reasoning with Rule-Priorities

After considering various kinds of rule-priorities we shall consider what ways of reasoning are required for determining and using rule-priorities. In particular we shall analyse how can one deal with multiple priorities, general priorities and meta-priorities.

7.3.1. Multiple Priorities and Their Ordering

Priorities between rules establish an order over the concerned rules. On the basis of this order, weaker rules are to be applied only when there is no conflict with stronger rules. Let us consider an example from science-fiction, the famous *three laws of robotics*, which represent an essential component of the vision of Isaac Asimov:

1. A robot may not injure a human being, or, through inaction allow a human being to come to harm;
2. A robot must obey the orders given it by human beings except when such orders would conflict with the First Law;
3. A robot must protect its own existence as long as such protection does not conflict with the First or Second Law. (Asimov 1968, 8)

Asimov has expressed the priority relations between the laws of robotics implicitly, by including in the conditions for deriving the conclusion of each law the requirement that the law's conclusion does not clash against certain other laws (the ones preceding it in the list, which are implicitly assumed to be more important). This makes it unnecessary to reason about priorities, since the outcome of such reasoning—the conclusion that a rule is more important that another, and thus prevails in case of conflict—is already encoded within each rule. However, in a later work by the same author, a fourth rule is considered, the Zeroth (0th) Law, which is assumed to override all other rules:

0. A robot must not injure humanity, or, through inaction, allow humanity to come to harm.[8] (Asimov 1996, 496)

[8] The Zeroth Law allows (and requires) a robot to harm particular human individuals, when this is necessary to prevent damage to humanity.

By using the representational technique used by Asimov, the introduction of this further rule would require the modification of all the existing three: The First Law would need to include the proviso "except when there is a conflict with the Zeroth Law"; the Second Law, the proviso "except when there is a conflict with the Zeroth or the First Law"; the Third Law, the proviso "except when there is a conflict with the Zeroth or the First or the Second Law."

The necessity of making this reformulation was not the reason why Asimov's robots found it so difficult to use the Zeroth Law. This was rather due to a much more serious fact: Robots had great difficulty deciding when something was harmful to humanity since "A human being is a concrete object. Injury to a person can be estimated and judged. Humanity is an abstraction" (ibid.).

The way out was the attempt to unify humanity (and the ecology required to sustain it) in a unique super-organism, and this required endowing individuals with new cognitive capacities (making them capable of participating in each other's thoughts and feelings) and new motivational attitudes (so that they may value the super-organism to which they belong more than their own individuality). This is not the place for discussing Asimov's utopia (or nightmare). We need rather to focus on a much simpler issue, namely, the fact that, relying on preference-based reasoning, one may re-express Asimov's laws of robotics as follows:

0. A robot may not injure humanity, or, through inaction, allow humanity to come to harm;
1. A robot may not injure a human being, or, through inaction allow a human being to come to harm;
2. A robot must obey the orders given it by human beings;
3. A robot must protect its own existence;
4. Rules from (0) to (3) are preferentially ordered according to their numbers: Rule (0) is preferable to rule (1), which is preferable to rule (2), which is preferable to rule (3).

Note that the explicit order of rules, as we shall see in Section 26.4.2 on page 689, is to be extended according to transitivity: Since rule (0) is preferable to rule (1), and rule (1) is preferable to rule (2), then rule (0) is also preferable to rule (2). Given these assumptions, preference-based reasoning would naturally lead to the type of reasoning that Asimov would wish his robots to do.

For instance when being commanded to destroy itself by a human, a complying robot will come to believe that it ought to do this, form the corresponding intention, and start disassembling itself (this case is considered in another famous novel by Asimov, "The Bicentennial Man," see Asimov 1996, 186ff.), since the Second Law of obedience (and the conclusions following from it, like, in this case, the obligation to disassemble itself) takes precedence over the Third Law of self-preservation, according to order indicated in clause (4).

Moving now from science fiction to the real world, we can observe that besides cases where the order is implicit, there are also cases in which the law expressly states that certain rules are to be preferred to certain others. This is to induce preference-based reasoning, so that the legal reasoner can determine accordingly what rules are to be preferentially applied (according to rebutting defeat) when a conflict emerges. For instance, in Italy, in town planning regulations we can find a priority rule stating that rules intended to protect artistic buildings prevail over rules concerning town planning. Similarly, in the Netherlands, sec. 1637c of the Civil Code gives priority to statutory rules concerning labour contracts over statutory rules concerning any other type of contract (these examples are discussed in Prakken and Sartor 1996).

7.3.2. General Priority-Rules

Complex normative systems, besides preferences between particular rules, also contain *general priority-rules*, namely, meta-rules stating that between any rules having a certain type of relation a preference exists.

Priority rules have a general character, and may be used to adjudicate conflicts between all rules falling within their scope. They have different sources: Some have been expressly stated by legislators (like the Italian preference for rules on artistic heritage over rules on town planning), some express very traditional legal principles (like the preference for later or more specific rules over earlier or more general ones), some emerge from case law, as preferential *rationes decidendi*.

With regard to judicial creation, consider that general priority-rules adopted by judges to decide one case are frequently applied to new cases, although those cases do not directly concern the solution of the same substantial issue. Consider for example the *Simmenthal* case (1978), a famous decision of the European Court of Justice where EC law was said to prevail over national laws of the Member States, in order to solve a specific conflict between a particular European rule and a particular national rule. The *Simmenthal* ruling was later used in a number of cases in order to support the preference of other European rules against other national rules.

One of the most cited of such cases concerns Italian pasta. According to the Italian law, only products exclusively made with durum wheat could be merchandised under the name "pasta." However, products made with soft wheat were legally sold under the description "pasta" in other European countries. The European Court of Justice declared (in 1986, in a preliminary ruling on *Zoni*, an Italian criminal case) that such prohibition violated the European community law, being incompatible with the principle of the free movement of goods within the European community. This principle requires that goods that are legitimately sold in one Member State can also be sold in any other member State (there are some exceptions, which we cannot consider here). From

this decision (and the priority stated in the *Simmenthal* ruling) it follows that "pasta" products not made of durum wheat, merchandised in other European countries, may also be sold in Italy (nothwithstanding the Italian prohibition).

7.3.3. Meta-Priorities

As we have observed above, in legal reasoning there are various competing priority criteria. These criteria may lead to diverging results: According to criterion (priority rule) p_1, rule r_1 is preferable to rule r_2, but according to criterion p_2, r_2 is preferable to r_1. For example, it is very frequent that there is a conflict between the so-called *hierarchy principle*, according to which, as we have said above, rules issued by a higher source prevail upon rules emerging from a lower source, and the *posteriority principle*, according to which a later rule is preferable to an older one.

Fortunately, the idea of preference-based reasoning includes a way for dealing with such conflicts. In fact that priority rules behave exactly like any other legal rule, with regard to preferential reasoning: Also priority rules make their consequent dependent on the satisfaction of certain conditions, and also conflicts between priority rules can be solved according to priority reasoning, by considering which priority rule is preferable. For instance, it usually makes sense—both in common-sense reasoning and in the law—to assume that the hierarchical criterion prevails over the temporality criterion.

Consider the situation of little Tony, who was given by his mother the following instruction:

i_1: you must not go out while I am away

Assume that Tony, besides accepting the authority of his mother, is also ready to obey his older sister, who is in charge of him, though he believes that she is less important than his mother. Moreover, Tony believes that new instructions, both by his mother and his sister, override previous ones. Finally, assume that his sister, who would like to be left alone with her boyfriend, gives him the following instruction:

i_2: Tony, please, go out and get some milk

Tony believes that the comparative evaluation provided by the hierarchical principle:

mother's instruction i_1 is stronger than sister's instruction i_2

overrides (strictly defeats) the evaluation following from the chronological principle:

the later instruction i_2 is stronger than the prior instruction i_1

Tony therefore believes that ⌈i_1 is preferable to i_2⌉. Accordingly, the conclusion ⌈I am now forbidden to go out⌉, which he gets from i_1 (and his belief that his mother is now away), overrides the conclusion ⌈I now have to go out⌉, which he gets from i_2. This is how he comes to believe he is still forbidden to go out (regardless of the request of his sister).

Tony's reasoning is quite similar to the reasoning of a law-abiding citizen facing a conflict between a lower-level legal rule and higher-level one, for instance, between a statute and the Constitution, or between a regulation and a statute. Such reasoning is frequently left implicit, since one tends to focus on the antecedent issue of understanding the conflicting rules, and of assessing whether there is a conflict between them. However, once a conflict has been identified, preference-based reasoning can intervene to adjudicate it.

Consider for example, the situation of Lisa, who is involved in a charity concerned with the prevention of AIDS, and has participated in setting up an Internet site containing explicit information and images on the ways of transmitting AIDS.

Assume that such information was on Lisa's site when the Communications Decency Act of 1996 (CDA) was issued, which prohibited sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual [...] activities or organs." She was aware that some images on her site were "patently offensive as measured by contemporary community standards" and that minors surfing the Internet were likely to access the site. However, she believed that (*a*) the need to respect other people's (and their children's) sensitivity was overridden by the need to protect people, and particularly minors, from AIDS infection (according to the values of life and health), but also that (*b*) spreading information on AIDS is covered by the first Amendment to the US Constitution, which gives her the freedom (the permission) to express her opinions. Under such conditions, it seems that the right attitude for Lisa was to continue to keep the information on her site, since the Constitutional permission was to be preferred to the statutory prohibition. Lisa's attitude was then confirmed by the decision of the US Supreme Court, in case *Reno vs American civil liberties union* (1966), which declared that the CDA indeed violated the first Amendment.

Note, however, that Lisa's preferential reasoning would have been correct (before the judicial decision), even if the Supreme Court had decided differently: Lisa may have been wrong in interpreting the Constitution, but not in assuming that it prevails over statutory rules.

Consider, for instance, the situation of Martin, who has published on his web-site results of his studies on how to decrypt DVDs, and believes that this too is a way of expressing his opinions, and falls under the protection of the first Amendment, though being prohibited by legislation. According to this belief, Martin is justified in keeping (at his risk) the information on DVD decryption on his web site.

Assume that the Supreme Court decides that such information does not fall under the first Amendment protection (or that the need to protect intellectual property though technical measures overrides free speech concerning ways of violating such measures). Martin might change his view, and adopt the belief that he ought not to publish decryption instructions. He might do that either because he believes that the supreme judges are better than him in making Constitutional evaluations (according to the idea of qualification-based delegation, which we discussed in Section 5.3.2 on page 163), or because he believes that citizens should sacrifice their view of the Constitution to the view of the Supreme Court, even when the Court is wrong, to contribute to a shared constitutional view (according to the idea of coordination-based delegation). Note that in any case Martin's deference to the Court does not entail that he was wrong in putting the Constitution above the legislation.

7.3.4. Reasoning with Priorities and Belief Revision

In the previous section, we assumed that we can continue to endorse rules leading to incompatible conclusions, while using preferential information to establish what conclusions to accept. For instance, we may continue to accept the general rule that copyrighted work ought not to be duplicated, though being convinced that there are cases where duplication is allowed by fair use prescriptions.

However, a different cognitive attitude may also be adopted. This is the attitude that consists in refusing to endorse conflicting rules: Whenever a conflict emerges, we modify the set of rules we are endorsing in order to obtain consistency. Thus, rather than viewing a weaker rule as being defeated in a specific context by a stronger incompatible rule, we would definitely reject it (expel it from our mind, or refuse to accept it), on the basis of its inconsistency with the stronger rule, and possibly we would try to modify our beliefs in a way such as to keep as much information as possible, while avoiding inconsistencies.

For example, we might solve the conflict between the prohibition to duplicate copyrighted works and the permission of making a fair use of them, by rejecting one of the two, and concluding that it is always forbidden or always permitted to duplicate copyrighted work. More sensibly we might try to rephrase the rule that ⌈copyrighted works ought not to be duplicated⌉, by merging it with the fair use exceptions (and all other possible exceptions), so as to obtain and memorise a rule saying that ⌈copyrighted works ought not to be duplicated unless the following conditions obtain ...⌉.

This latter view is at the basis of the approach that is called *belief revision*. We cannot here discuss the technicalities of belief revision, a complex logical and mathematical theory (for a technical introduction, see Gärdenfors 1987). Let us just observe that belief revision was originally developed specifically to deal with the dynamics of normative systems—with the decisive contribution

of the legal theorist and logician Carlos Alchourrón (Alchourrón and Makinson 1981)—and later became a major approach to deal with change in data-bases and knowledge-bases (Alchourrón et al. 1985). *Belief revision* has also been applied in various ways to the study of legal reasoning (see Alchourrón 1991; Sartor 1992, and for a critical discussion, Prakken 1997).

For our purposes, it may be sufficient to say that a legal reasoner adopting a belief-revision approach does not accept inconsistencies in the law, and rejects the inferior pieces of information that produce such inconsistencies. This would amount to assume that any piece of inferior information, when clashing with more important information is considered to be *derogated*, rather than *defeated*.

It appears that this approach is frequently adopted when there is a conflict between a higher-level norm and a lower-level one (as in conflicts between statutes and legislation).

On the contrary, belief revision is not appropriate to the conflicts between more general rules and more specific ones: In such situations the more general rules continue to govern the cases that are not covered by the more specific rules.

It is very hard to find a general way of choosing between belief revision and defeasible reasoning. It may, however, be useful to go back to the analysis of the incompatibility between rules of Ross (1965, 128ff.), who distinguished cases when the scope of one rule completely covers the scope of another rule (total-partial incompatibility) from the situation when there is only a partial intersection between the scopes of two rules (partial incompatibility). Accordingly, we can distinguish the following situations:

- *Partial priority collision.* The scope of the preferred rule is strictly included in the scope of the weaker rule (the weaker rule is more general): Whenever the antecedent of the preferred rule is satisfied, also the antecedent of the weaker rule is satisfied, but the converse does not hold. In such a context it seems that the weaker rules should survive. The reasoner should continue to endorse it, and should continue to apply it when this is allowed by priority defeat (when there is no conflict with the stronger and more special rule).[9]
- *Total priority collision.* The scope of the preferred rule completely covers the scope of the weaker one (whenever the antecedent of the weaker rule is satisfied, also the antecedent of the preferred rule is satisfied), so that priority defeat would never allow for the application of the weaker rule. In such a context it seems that one should view the weaker rule as being derogated or invalid.

When there is a partial intersection between the scopes of the two rules (there

[9] As an example of the first type of conflict, consider the relation between a rule forbidding unauthorised duplication of computer software and a rule saying that users are allowed to make a back-up copy without authorisation (according to the European directive on software protection).

are possible cases when only the antecedent of the first rule is satisfied, and possible cases where only the antecedent of the second rule is satisfied) it is impossible to state a precise policy. We may just say that that the smaller the intersection, the higher the tendency to continue to endorse the weaker rule.

In any case, such quantitative consideration also needs to be connected to a substantive evaluation: If the stronger rule is inspired by an appreciation of the relevant values that is incompatible with the evaluation which supports the weaker rule, then this pleads for rejecting the latter, according to the idea of (teleological) coherence.

Chapter 8

PREFERENCE-BASED REASONING: FACTORS

After applying preference-based reasoning to rules (in Chapter 7), we shall bring it to bear on *factors*. This will allow us to address some important patterns of normative reasoning, and in particular, to analyse *a fortiori* reasoning. Finally, we shall consider how preferential reasoning approaches combinations of reasons, rejecting the idea that reasons having the same conclusions accrue, that is, add their preferential strengths.

8.1. Reasoning with Factors

Factors pointing to opposite directions need to be compared and evaluated, in order to establish what outcome is indicated by their combination.

One possible approach consists in relying on teleological rationalisation, that is, in ascending to the values that are promoted or impaired by recognising certain factors or certain combinations of them. Then we can assume that the comparison of the factors reflects the relative importance of the corresponding values.

However, one should not rely too much on teleological reasoning, which should be used for rationalising and fixing the outcome of intuitive evaluations, rather than as an autonomous source of practical determinations (see Chapter 28). It is more promising to appeal to precedents, and transfer to new cases the evaluations that were made in the past, as we shall see in next sections. First we shall introduce an example and examine some plausible reasoning moves, and then we shall try to provide a theory that synthesises these moves. Finally, we shall extend our model with reference *dimensions* (scalable factors).

8.1.1. An Example in Factor-Based Reasoning

The following example addresses the issue of whether one's stay in another country changes one's fiscal domicile with respect to income tax (the example is adapted from Prakken and Sartor 1998).

We indicate the direction of the factors with arrows. In general, we write $F{\uparrow}^{\varphi}$, to indicate that factor F favours outcome φ, while we write $F{\downarrow}^{\varphi}$, to indicate that factor F disfavours outcome φ. However, since in our example we are only concerned with one outcome (the change in fiscal domicile) we shall leave

Pro-change factors	*Con-change factors*	*Decision*
long stay↑	domestic company↓	Change
	kept house↓	

Table 8.1: *The representation of case* $Prec_a$

Pro-change factors	*Con-change factors*	*Decision*
long stay↑	domestic company↓	?
minor assets↑	kept house↓	

Table 8.2: *Case* New_{a1}

the outcome implicit: We write $F\uparrow$ to indicate that F is a *pro-change* factor, and $F\downarrow$ to indicate that F is a *con-change* factor.

Assume that the following pro- and con-change factors can be identified in legislation, doctrine, or precedents:

- pro-*change* is that the taxpayer's house was given up [gave up house↑], while con-*change* is that the house was kept [kept house↓];
- pro-*change* is that the taxpayer's company is based in the foreign country [foreign company↑], while con-*change* is that the company is based in the old country [domestic company↓];
- pro-*change* is that the duration of the stay abroad is long [long stay↑], while con-*change* is that the duration is short [short stay↓];
- pro-*change* is that one has minor assets [minor assets↑] in one's country, while con-*change* is the fact that one has large assets there [major assets↓].

We do not presume that each factor receives a definite value in each case: For example, the duration may be neither long nor short, so that it does not push the decision in any direction.

Assume that a binding precedent $Prec_a$, which was decided for *change*, is characterised by the following factors: the taxpayer had a long duration contract for working abroad, was working for a domestic company, and kept his domestic house (see Table 8.1).

8.1.2. *Factor-Based* A-Fortiori *Reasoning*

Consider now the new case, let us call it New_{a1}, which is described in Table 8.2. The new case concerns a worker having a long-term contract for a domestic company, who kept his house and had small assets in his home country. We

Pro-change factors	*Con-change factors*	*Decision*
long stay↑	kept house↓	?

Table 8.3: *Case* New_{a2}

need to establish what we should conclude with regard to the new case New_{a1}, if we want to be consistent with decision in $Prec_a$ (in Table 8.1 on the facing page).

Observe that the $Prec_a$ expresses two messages:

- The first message is that its pro-factor [long stay↑] is sufficient for having a pro-*change* decision (unless defeated by contrary factors). This follows from the fact that a *change* decision was taken in $Prec_a$, where only this pro-*change* factor was present.
- The second message is that factor [long stay↑] outweighs the combination of con-factors [domestic company↓] and [kept house↓]. This follows from the fact that $Prec_a$ has decision *change*, though both these con-factors were present.

Let us see what is the relevance of these messages for New_{a1}. This case shares with $Prec$ one pro-*change* factors, i.e., [long stay↑], and also includes $Prec$'s con-factors [domestic company↓] and [kept house↓]. The only difference which emerges from the factor-based description of the two cases is that New_{a1} has one additional pro-*change* factor, namely, [minor assets↑].

It seems that a reasoner should conclude that also in New_{a1} the fiscal domicile has changed. In fact, if in $Prec$ [domestic company↓] and [kept house↓] were outweighed by [long stay↑] alone, *a fortiori* they should be outweighed when [long stay↑] is joined by an additional pro-*change* factor, [minor assets↑].

Let us consider now another new case, let us call it New_{a2}, which is described in Table 8.3. Assume that neither of [domestic company↓] or [foreign company↑] applies to New_{a2}, since the taxpayer is a free-lance worker. Thus, New_{a2} is characterised by only two factors, [long stay↑] and [kept house↓].

By comparing New_{a2} and $Prec_a$, we can see that New_{a2} contains the same pro-factors as $Prec_a$, i.e., [long stay↑] and only one of $Prec_a$'s con-*change* factors, i.e, [kept house↓].

Therefore, we may conclude that the message of $Prec_a$ also applies to New_2 and dictates the same outcome, i.e., *change*. In fact, if the pro-*change* factor [long stay↑] outweighed in $Prec_a$ the combination of the two con-factors [domestic company↓] and [kept house↓], *a fortiori* it should outweigh in New_{a2} just one of those con-factors.

8.1.3. Factor-Based Inference

Let us try to identify reasoning schemata that may licence the inferences we have just presented.

We can conclude that the facts of New_{a1} lead to the same conclusions as $Prec_a$, on the basis of the following idea: When the factors favouring a conclusion φ prevail over the factors against φ, then adding additional factors favouring φ (the winning conclusion) should not change the outcome of the comparison (but rather strengthen such outcome). This is the inference pattern we call *additive a fortiori*, and that we may describe as follows (we write $F{\uparrow}^{\varphi}$ to denote a set of factors all of which favour a certain conclusion φ, and $F{\downarrow}^{\varphi}$ to denote a set of factors all of which disfavour conclusion φ):

Reasoning schema: *Additive a fortiori*
(1) $F{\uparrow}^{\varphi}$ outweighs $G{\downarrow}^{\varphi}$; AND
(2) $F^*{\uparrow}^{\varphi}$ is at least as inclusive as $F{\uparrow}^{\varphi}$ ($F{\uparrow}^{\varphi} \subseteq F^*{\uparrow}^{\varphi}$)
——— IS A DEFEASIBLE REASON FOR
(3) $F^*{\uparrow}^{\varphi}$ outweighs $G{\downarrow}^{\varphi}$

Note that by a set of factors F being at least as inclusive than a set of factors F^*, we mean that F^* is a subset of F, namely that all factors in F^* are also be contained in F ($B \subseteq A$).[1]

On the basis of this inference, the reasoner believing that the only pro-factor of $Prec_a$ could outweigh the two con-factors of that case, will conclude that also the couple of pro-factors of New_{a1} (including the pro-factor of $Prec_a$) should *a fortiori* outweigh the same couple of con-factors.

This will lead one to conclude that the inference one can make by referring to these pro-factors (according to reasoning schema *factor-based inference*, cf. Section 6.2.2 on page 183) strictly defeats any inference one can make appealing to the con-factors.

There also is a different situation in which a precedent's outcome *a fortiori* dictates the decision of a new case: The new case rather than having more factors favouring the precedent's outcome, has fewer factors against that outcome: We can conclude that the facts of New_{a2} also lead to the same outcome as $Prec_a$ according to the idea that when a set of factors favouring conclusion φ outweighs a set of factors against φ, then the outcome should not be changed (but rather strengthened) by eliminating factors against the winning conclusion.

[1] We shall use the usual set operators in their usual meaning: $a \in B$ means that a is an element of of B (a is contained in B); $A \subseteq B$ means that A is a subset of B (all elements of A are also elements of B); $A \subset B$ means that A is a strict subset of B (all elements of A are elements of B, but some elements of B are not contained in A), $A \cup B$ is the union of A and B (the set of all elements belonging to A or to B); $A \cap B$ is the intersection of A and B (the set of all elements belonging to both A and B).

This is the inference pattern we call *subtractive a fortiori*, which we describe through the following reasoning schema:

Reasoning schema: *Subtractive a fortiori*

(1) $F{\uparrow}^{\varphi}$ outweighs $G{\downarrow}^{\varphi}$; AND
(2) $G^{*}{\downarrow}^{\varphi}$ is no more inclusive than $G{\downarrow}^{\varphi}$ ($G^{*}{\downarrow}^{\varphi} \subseteq G{\downarrow}^{\varphi}$)
——— IS A DEFEASIBLE REASON FOR
(3) $F{\uparrow}^{\varphi}$ outweighs $G^{*}{\downarrow}^{\varphi}$

Note that by a set of factors A being no more inclusive that a set of factors B, we mean that A is a subset of B, i.e., that all elements (all factors) in A are also be contained in B.

The two inference patterns can be merged into reasoning schema *bidirectional a fortiori* which covers the two cases:

Reasoning schema: *Bidirectional a fortiori*

(1) $F{\uparrow}^{\varphi}$ outweighs $G{\downarrow}^{\varphi}$;
(2) $F^{*}{\uparrow}^{\varphi}$ is at least as inclusive as $F{\uparrow}^{\varphi}$; AND
(3) $G^{*}{\downarrow}^{\varphi}$ is no more inclusive than $G{\downarrow}^{\varphi}$
——— IS A DEFEASIBLE REASON FOR
(4) $F^{*}{\uparrow}^{\varphi}$ outweighs $G^{*}{\downarrow}^{\varphi}$

The *a fortiori* conclusion is defeasible, since there may be interference between the factors: It is possible that certain factors individually favour a certain outcome, but do not favour this outcome in their combination. As a common sense example where this happens, consider the following combination of factors. The fact that the weather is hot may favour the conclusion that one should not go jogging. Similarly, the fact that it is raining also favours the conclusion that one should not go jogging. However the combination or hot weather and rain can meet one's tastes and indeed be a reason for one to decide to go jogging (for a discussion of this example, see Prakken and Sartor 1996).

8.1.4. From Binary Factors to Dimensions

By playing with factors different patterns of analogical reasoning can be obtained. For example, we can assume that normally by substituting a pro-φ factor f in a set of factors $F{\uparrow}^{\varphi}$ with another pro-φ factor f^{*} having a strength which is not inferior to the strength of f, one should obtain a set of factors $F^{*}{\uparrow}^{\varphi}$ which has a strength which is not inferior to the strength of $F{\uparrow}^{\varphi}$.

Assume that a new case New_3 is exactly equal to a previous case $Prec$, except that New_3 exemplifies f^{*} rather than f. If $Prec$ was decided for φ, then *a fortiori* New_3 should also have decision φ.

We cannot here explore the multifarious patterns of analogical reasoning that can be obtained by using factors. We shall rather focus on the relationship between *binary factors* and *dimensions* (scalable factors).

Categorising a situation as exemplifying or not certain binary factors is a superficial way of understanding how a the features of that situation favour a certain outcome. In many cases, a binary categorisation results from transforming a deeper dimensional structure into a binary alternative, as we have observed in Section 6.2.1 on page 182 (see Bench-Capon and Sartor 2003; Bench-Capon and Rissland 2001).

Consider for example binary factor [long stay↑]. When looking at a case through this category we are only able to say whether the employment contract abroad has a long duration or not—all long durations being considered in the same way. On the contrary, a more refined analysis of the situation would lead us to identify a *continuous dimension*, the duration of the stay abroad, denoted as [duration of stay]:

- the longer the stay, the more a *change* decision is favoured,
- the shorter the stay, the more a *no-change* decision is favoured.

The dimension [duration of stay] favours a *change* or a *no-change* decision with a strength that varies continuously, along with the duration of the stay. There is a turning point or threshold—level 0, on the y axis, which corresponds to a duration of two years—where the dimension switches direction. Figure 8.1 shows how, as the stay abroad gets longer, it increasingly favours the change in fiscal domicile. Note that the Figure 8.1 on the facing page represents a linear relationship: It shows a fixed proportion between the quantity of the dimension's property (the duration of the stay) and the strength of the dimension's propensity (its ability to favour *change*). This is not generally the case—we would have to draw a curved line, rather than a straight one, to provide a more accurate representation of this connection—but for our purposes a linear relationship is an adequate approximation.

Besides continuous dimensions, there may be discrete dimensions, concerning a property that may only assume discrete values. For example, higher marks in exams may increasingly favour giving a grant to a student, or the number of children in a family may increasingly favour giving the family an allowance.

Moving to a binary representation, we obtain a coarser and simplified view of the matter, where a gradual increase is transformed into a yes/no question: All stays below a certain threshold (one year and a half) are equalised as instances of the [short stay] factor, while all stays above a certain duration (two years and a half) are equalised as instances of the [long stay] factor (see Figure 8.2 on the next page). The durations in between one year and a half and two years and a half are equalised as being indifferent to the change issue: they promote neither *change* nor *no-change*.

The transformation of dimensions into factors pertains to the strategies of

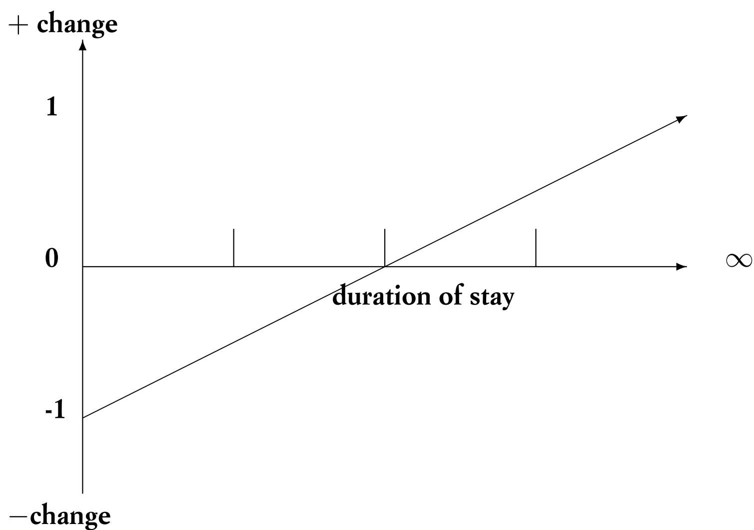

Figure 8.1: *The* [duration of stay] *dimension*

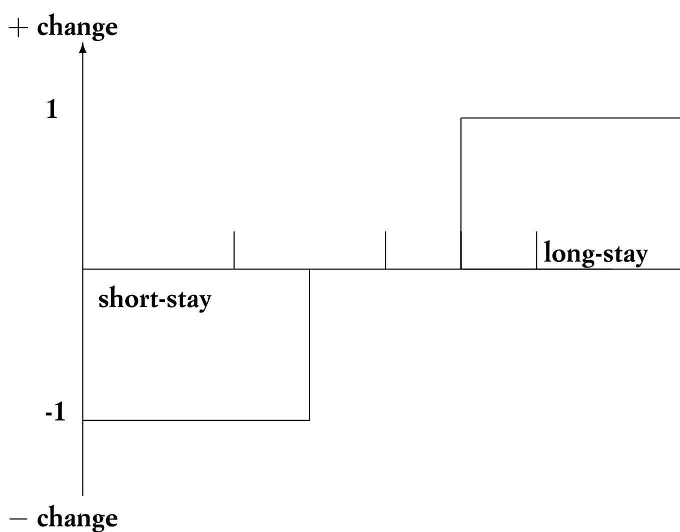

Figure 8.2: *The* [long stay] *factor*

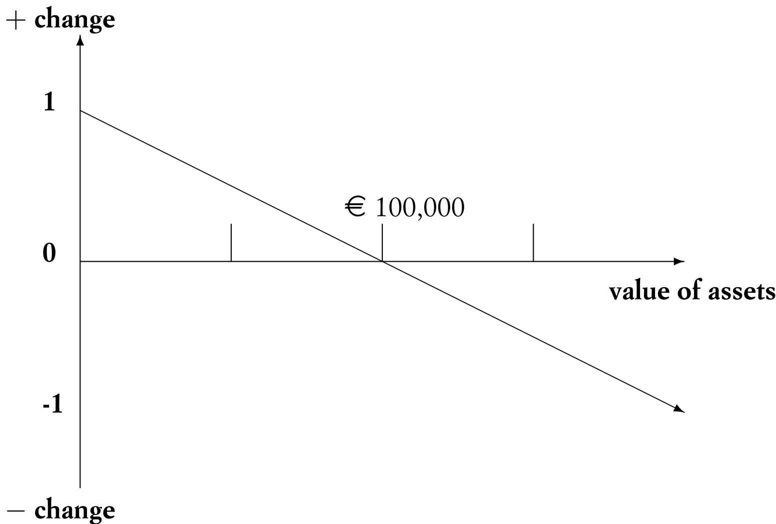

Figure 8.3: *The* [Domestic Assets] *dimension*

bounded rationality: It is a way of simplifying the analysis of complex situations in order to make them tractable. In particular, looking at a set of cases as instantiating or not instantiating certain factors allows one to perceive at a glance their relevant commonalities and differences. The need that lawyers look at social reality in a tractable way, refraining from impracticable distinctions is a real one, which has inspired many legal theorists, from François Gény (see Gény 1924) to Oliver Wendell Holmes. However, the conclusion one may reach by only looking at binary factors may be strengthened or questioned by going back to the finer grid of the underlying dimensions.[2]

For better analysing this issue let as add the new dimension [Domestic Assets], which is represented in Figure 8.3: As the value of the assets (indicated on the x-axis) one has in one's own country increases, the support for a change in the fiscal domicile decreases. The turning point is located at € 100,000.

Let us analyse the example cases of Table 8.4 on the next page. Consider $Prec_b$, which was decided for *change*, and where the taxpayer had a 4-year work contract and assets of 140,000. It seems that we may extract two messages from this decision:

1. level 4 along [duration of stay] is sufficient to produce *change*, and

[2] On the relation between factors and dimensions, see Ashley and Rissland 1988; Bench-Capon and Rissland 2001; for a discussion of the way of passing from the ones to the others, see Bench-Capon and Sartor 2003.

Cases	*Duration of stay abroad*	*Amount of domestic assets*	*Decision*
$Prec_b$	4 years	€ 140,000	*change*
New_{b1}	5 years	€ 140,000	*change a.f.*
New_{b2}	4 years	€ 120,000	*change a.f.*
New_{b3}	4 years	€ 150,000	*distinguish*
New_{b4}	3 years	€ 120,000	*distinguish*

Table 8.4: *Dimensional comparison*

2. this level is sufficient to outweigh the pressure against *change* provided by having € 140,000 of [domestic assets].

Let us now consider the other cases in Table 8.4:

- Case New_{b1} has an easy answer with regard to $Prec_b$: since the duration of the stay abroad is longer (and gives a stronger pull toward change) while the assets remain the same, *a fortiori* New_{a1} should be decided for *change* (in the table we abbreviated *a fortiori* with *a.f.*).
- Case New_{b2} is covered by *a fortiori*, with reference to $Prec_b$: the same pull for change as in $Prec_b$ is contrasted by a smaller pull for no-change, due to the smaller level of the domestic assets (120,000 rather than 140,000).
- Case New_{b3} can be distinguished form $Prec_b$: In it a higher amount of domestic assets (150,000 rather than 140,000) provides a stronger pull for $no-change$. On the basis of $Prec_b$ we cannot tell whether a 4 years duration of the stay abroad still prevails and dictates the outcome. Thus the analogy with $Prec_b$ can be challenged.
- Case New_{b4} can also distinguished from $Prec_b$: it provides a smaller pull for change, due to the inferior duration of the stay abroad (3 years rather than 4), and also a smaller pull for *no-change*, due to the inferior amount of domestic assets (120,000 rather than 140,000). The precedent does not tell us which of these tendencies is going to prevail.

Assume now that the dimension [domestic assets] is factorised as shown in Figure 8.4 on the next page, that is, into factors [negligible domestic assets↑], spanning from 0 to € 75,000, and [substantial domestic assets↓], covering the span above € 125,000.

Let us now look at the cases in Table 8.4 according to the grid provided by the corresponding factors: [long stay], [short stay], [negligible domestic assets], [substantial domestic assets]. We get the representation of Figure 8.5 on page 231. Note that the chances of distinguishing have been lost: The fact that a dimension (for instance, [duration of stay]) is satisfied to different levels in two

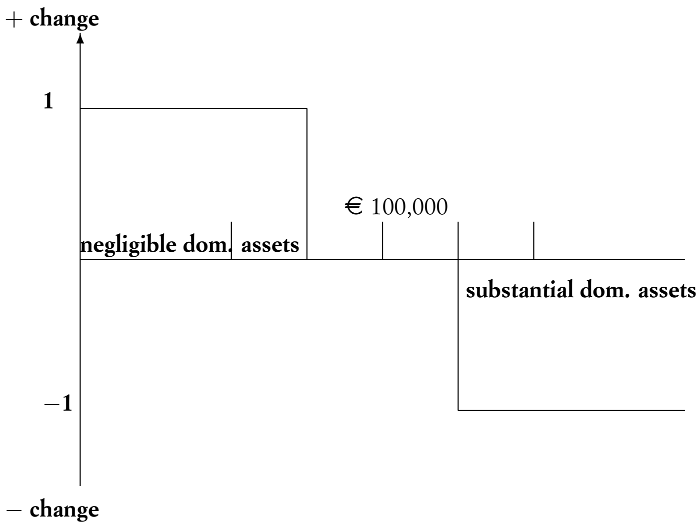

Figure 8.4: *The factors* [negligible domestic assets] *and* [substantial domestic assets]

different cases (for instance, the fact that the duration is 4 years in one case and 3 years in the other), does not matter, as long as the same factor ([long duration]) applies to both. Consequently, some cases of *a fortiori* reasoning we provided according to the dimensional representation have now become cases of identity of factors (as for case New_{b2}), while some possibilities of distinguishing (as for cases New_{b3} and New_{b4}) are now lost.

Only when the difference in the level of a dimension determines the application of a different factor, does this difference becomes relevant to a factor-based perspective. Case New_{b4} is particularly interesting in this regard. According to the factorial representation the inferior duration of the stay, which founded the distinction from $Prec_b$ (and justified not deriving the conclusion $change$, because of the inferior pull for $change$) has become irrelevant. On the other hand, the inferior amount of domestic assets, which provides a stronger pull for change is relevant, since is leads to the non-application of the con-change factor [substantial domestic assets] (which was not satisfied in $Prec_a$). In conclusion, since New_{b4} satisfies the same pro-change factor [long stay] which was in the $Prec_b$, but fails to satisfy the con-change factor [negligible domestic assets], it should *a fortiori* have decision $change$.

This example shows how moving from dimension to factors pertains to ampliative reasoning: It consists in a cognitive *jump* (see Peczenik, Volume 4 of this Treatise, sec. 4.3.2), based upon the unstated assumption that differences

Cases	*Duration of stay abroad*	*Amount of domestic assets*	*Decision*
$Prec_b$	long	substantial	*change*
New_{b1}	long	substantial	*change*
New_{b2}	long		*change a.f.*
New_{b3}	long	substantial	*change*
New_{b4}	long		*change a.f.*

Table 8.5: *Factorial comparison*

between dimensional levels are irrelevant, when covered by the same factor. The ability of making such a jump (and reason accordingly, with the advantages of binary reasoning), but also the ability to challenge the jump, on the basis of a dimensional analysis, is a very important aspect of legal rationality. As we shall see in Section 29.3 on page 765, the challenge may include the proposal of a different way of factorising the same dimension.

8.1.5. Dimension-Based Inference

Let us try to specify an inference schema similar to the one we have devised for factors, but that applies to dimensions and allows for the refinements that are required for capturing the argument moves we have just exemplified.

As we have observed, each dimension is characterised by the fact that it tends to promote certain outcomes to a certain extent, when it is satisfied up to a certain level. Thus, to describe a situation in terms of certain dimensions we need not only to specify what dimensions apply, but also to what level.

For example, in case of the dimension [duration of stay] we need to indicate how long the stay will be, and in the case of [domestic assets] we need to express the importance of such assets. Various scales may be applied, either discrete or continuous.

Let us introduce some notions that may facilitate our analysis of dimensions.

Definition 8.1.1 *Rightward dimensional outcome. We say that outcome O is the* rightward outcome *with regard to dimensions d, and write* $\overrightarrow{O_d}$ *if O is increasingly favoured as d's level increases.*

The denomination *rightward outcome* corresponds to the assumption that the quantity of a dimension is represented along the x axis, from left to right, as in Figure 8.1 on page 227 and Figure 8.3 on page 228. For instance, we may say that *change* is the rightward outcome of dimension [duration of stay] since, as the duration of the stay abroad increases, the outcome *change* is more strongly favoured.

Definition 8.1.2 *Leftward dimensional outcome. We say that outcome O is the* leftward outcome *with regard to dimensions d, and write* $\overleftarrow{O_d}$ *if O is increasingly favoured as d's level decreases.*

For instance, we may say that *no-change* is the leftward outcome of dimension [duration of stay], since, as the duration of the stay abroad decreases, the outcome *no-change* is more strongly favoured. Many dimensions can also be characterised by a pair of complementary outcomes, such that $\overrightarrow{O_d}$, the rightward outcome of d, is increasingly favoured by increasing degrees of d, and $\overleftarrow{O_d}$, the leftward outcome, is increasingly favoured by decreasing degrees of d. For example, with regard to dimension [duration of stay], *change* is the rightward outcome and *no-change* is the leftward outcome. On the contrary, with regard to dimension [domestic assets], *no-change* is the rightward outcome and *change* is the leftward outcome.

Assigning directions to outcomes (with regard to dimensions) allows us to specify when one outcome is more strongly supported according to a dimension.

Definition 8.1.3 *Dimensional support (along a dimension). For any couple of dimensional levels* l_1 *and* l_2 *of dimension d,* l_1 more strongly supports *outcome O than* l_2 *if :*

- $l_1 > l_2$*, in case that* $\overrightarrow{O_d}$*, and*
- $l_1 < l_2$*, in case that* $\overleftarrow{O_d}$*.*

The notion of a dimensional support allows us to define the comparative strength of sets of dimensions, at least in the uncontroversial case where one set is better with regard to one dimensions, and not worse with regard to any other (and there is no interference between dimensions).

Definition 8.1.4 *Dimensional strength (of sets of dimensions). Given a set of dimensions* $\Delta = d_1 \dots d_n$*, and two sets* D^1 *and* D^2 *of dimensional levels on* Δ*,* D^1 *is* dimensionally stronger *than* D^2*, with regard to outcome O if*

- *there is at least one dimension* d_i*, such that* d_i*'s level in* D^1 *more strongly supports O, then* d_i*'s level in* D^2 *does;*
- *for every other dimension* d_j*,* d_j*'s level in* D^1 *does not support O more strongly than* d_j*'s level in* D^2 *does.*

According to this definition, given a set of dimensional levels favouring outcome *change*, if we substitute a stay abroad of 2 years with a stay of 3 years, all the rest remaining equal, we obtain a stronger pull towards a *change* decision. The same result would be achieved by changing the taxpayer's domestic assets from € 100,000 to € 50,000.

Cases	*Duration of stay*	*Domestic assets*	*Decision*
$Prec_b$	4 years	€ 140,000	*change*
New_{b1}	5 years	€ 140,000	*change a.f.*
New_{b2}	4 years	€ 12,000	*change a.f.*

Table 8.6: *Dimensional* a fortiori

8.1.6. *Dimensional* A-Fortiori *Reasoning*

According to the ideas we introduced in the previous section, a dimension-based approach allows for subtler ways of reasoning *a fortiori*. We can indeed provide the following characterisation *dimensional a fortiori*, namely the outweighing relations between sets of dimensional levels, where D, D^*, H and H^* denote sets of dimensional levels over the same dimensions.

Reasoning schema: *Dimensional a fortiori (outweighing)*
(1) $D\uparrow^{\varphi}$ outweighs $H\downarrow^{\varphi}$;
(2) $D^*\uparrow^{\varphi}$ is at least as dimensionally strong as $D\uparrow^{\varphi}$;
(3) $H^*\downarrow^{\varphi}$ is not dimensionally stronger than $H\downarrow^{\varphi}$
——— IS A DEFEASIBLE REASON FOR
(4) $D^*\uparrow^{\varphi}$ outweighs $H^*\downarrow^{\varphi}$

In Table 8.6 you can see the dimensional evaluation of three of the cases we considered in Table 8.4 on page 229, and of which we proposed a factor-based evaluation in Table 8.5 on page 231. Precedent $Prec_b$ had decision *change*, with regard to a taxpayer who was to be abroad for 4 years and had domestic assets for € 140,000. The message of $Prec_b$ is that staying abroad 4 years supports *change* to such an extent as to outweigh the extent in which having domestic assets for € 140,000 supports *no-change*. Thus case New_{b1}, where one stays abroad for 5 years (providing a stronger pull toward *change*), and has domestic assets as in $Prec_b$ (€ 140,000) should *a fortiori* have decision *change*. The same conclusion should hold in case New_{b2}, where the taxpayer stays abroad for 4 years like in $Prec_b$, but holds assets for € 120,000 (which provides a lesser pull toward *no-change* than in $Prec_b$).

8.2. The Accrual of Reasons

We need now to address a very difficult issue in practical reasoning: Do reasons accrue, when do they support the same outcome? In this regard two different approaches, supported by different metaphors, exist, as we shall see in the following paragraphs

8.2.1. The Accrual Thesis

The first view is that reasons accrue: They work in sets, and large (more inclusive) sets of reasons are stronger than smaller (less inclusive) sets.[3] More reasons leading to a certain conclusion give a stronger support to that conclusion.

This is particularly relevant when we need to compare reasons favouring a certain conclusion and reasons against that conclusion. In such a case, according to the accrual idea, we need to collect all reasons for and against and compare the strengths of the two opposed teams.

This view is supported, at the metaphorical level, by the idea that reasons are *forces* or *weights*: Having more reasons going to the same direction leads to an increased effect, similar to that which one would obtain by having more forces pushing or pulling in the same direction, or by having more weights on the same scale: The strength of a set of reasons having the same direction needs to be computed by adding their individual strengths. In simplified quantitative terms: If R_1 and R_2 are reasons for conclusion q, and R_1 has strength 3 while R_2 has strength 4, then the combination of R_1 and R_2 leads to q with strength $3 + 4 = 7$.[4]

8.2.2. The Negation of the Accrual Thesis

The second view, on the contrary, is that reasons do not accrue. Each reason works separately, according its own schema. We may happen to endorse more than one reason leading towards the same conclusion. However, either it is possible to merge these reasons into a unique combined reason (which matches one of the available inference patterns), or the separate reasons have to operate each on their own, without being able to join forces. In simplified quantitative terms: If R_1 and R_2 are reasons for conclusion q, and R_1 has strength 3 while R_2 has strength 4, then the combination of R_1 and R_2 leads to q with strength 4 (the strength of the strongest of the two combined reasons).

This view may also be supported by other analogies, like the one expressed by a brilliant saying of Galileo Galilei:

> If discoursing about a difficult problem was like carrying weights, where many horses carry more sacks of wheat than only one horse, I would agree that many discourses would do more than one,

[3] By a larger set we mean here a more inclusive one: A set S_1 is larger than set S_2 when $S_2 \subset S_1$.

[4] The idea of reasons operate like forces has been analytically developed by Hage (1997), who, according to this analogy (ibid., 24ff., 78ff.), has developed a logic (reason-based logic) which is based upon the idea of collecting and weighing relevant sets of reasons (ibid., 130 ff.). While we agree that Hage's method is appropriate when dealing with factors (Hages's model anticipates indeed various aspects of the treatment of factors we discussed in Section 8.1 on page 221), we believe that a different approach is required when dealing with rules, or with heterogeneous reasons, as we shall argue in the next pages.

but discoursing is like running, and not like carrying, and one only Barbary horse can run quicker than one hundred Frisian ones. (Galilei 1960, par. 45)

The latter view is adopted, for example, by Pollock (1995, 101f.), who, though admitting the intuitive appeal of accrual, concludes that reasons do not accrue:

Cases that seem initially to illustrate such accrual of justification appear upon reflection to be better construed as cases of having a single reason that subsumes the two separate reasons. [...] If we have two undefeated arguments for a conclusion, the degree of justification is simply the maximum of the strengths of the two arguments.

8.2.3. A Terminological Clarification

It is not easy to see clearly how one can find a reasonable and uncontroversial solution to the accrual dilemma. Are reasons like weights or like horses? Can many light reasons outweigh a heavy one by joining their weights, or will many slow reasons be left behind a quick one?

The issue becomes clearer if we distinguish the different senses in which one may speak of a *reason*.

The first way of using the notion of a reason is for denoting any mental state (or, if you prefer, the corresponding noema or fact) that may, in combination with other similar states (noemata or facts) support a certain conclusion. This corresponds to what we have specifically called a *subreason*. For instance, the proposition ⌈Tom intentionally damages another⌉ is a subreason for concluding that Tom is liable, and the rule ⌈If one intentionally damages another, then one is liable⌉ is another subreason for drawing this conclusion. It cannot be doubted that subreasons need to merge in order to lead to conclusions: Only by merging them appropriately with other subreasons do they form a complete reason. However such merging needs to take place in such a way that the resulting combination of subreasons satisfies one reasoning schema (like *syllogism*). One cannot take whatever subreasons, each partially satisfying a different schema, and add them in order to get a stronger reason.

The second way of using the word *reason* consists in referring to a *complete reason*, namely, to a combination of mental states (or, is you prefer, noemata or facts) that is sufficient to lead to a certain conclusion, representing the input to a reasoning schema. According to this second notion of a reason, neither of ⌈Tom intentionally damages another⌉ and ⌈if one intentionally damages another, then one is liable⌉ is a reason for concluding that ⌈Tom is liable⌉. These are just *subreasons* and only their combination provides a reason, according to schema *syllogism*.

Here we follow the second terminological choice: A subreason that does not provide the whole precondition of a reasoning schema is no reason for us. Thus,

the issue we have to discuss is whether two reasons (full reasons) have a strength that is superior to the strength of each one of them.

8.2.4. Merging and Adding Reasons

In some cases, as Pollock (1995) observes, we have the impression that concurrent reasons add their strengths, but on a closer look, we see that this happens because these reasons are merged into a reason which still matches one of our reasoning schema. But then we can forget about the separate full reasons and only consider the new full reason that results from merging their components.

Assume that according to *teleological inference* I form the intention to perform action A, believing that A is a satisfactory way to achieve goal G_1, and I also form the intention to perform the same action A, believing that A is a satisfactory way to achieve goal G_2. It may seem that in such a case the two inferences join their strengths, producing a stronger push toward doing A.

For instance, assume that I have the goal of getting good food, which leads me to form the intention of going to restaurant r_1 since this is a satisfactory way for me to get good food, and I have the goal of getting good wine, which also leads me to form the intention of going to r_1 since this is a satisfactory way for me to get good wine. Similarly, assume a judge is aware that forbidding spamming (sending unwanted advertisements) on the Internet has two effects: on the one hand it protects Internet users from an unwanted trespass to their private sphere, and on the other hand it contributes to promoting the use of the Internet and thus to developing the Internet economy.

It may seem that in both cases we should perform two inferences, one per each goal at issue, and that such inferences will join their strengths, producing a stronger intention of performing the action both of them indicate (the action of going to restaurant r_1 in the first case, and the action of prohibiting spamming in the second).

However, we may doubt that this picture is accurate. For instance, in the restaurant case, it seems that I should rather view myself as having the combined goal of ⌈getting good food and getting good wine⌉. I should there select the action most appropriate to achieve this combined goal just though one teleological inference. The advantage of this way of thinking is that it leads one to focus on the connections between the two goals: For instance, if I only have the money for doing one of the two things (for eating or for having a bottle of good wine), it would be irrational to join the strength of the two intentions of going to restaurant r_1 (I would rather go to the cheaper restaurant r_2 where food and wine are not as good, but where with my money I can have both). Thus, it seems that rather than adding the forces of the two inferences $\mathcal{A}$ and $\mathcal{B}$ of Table 8.7 on the next page (or, if you prefer, adding the weights of the two goals), one had better merge the two inferences into inference $\mathcal{C}$ (or, if you prefer, merge the two reasons into one combined reason).

	Inference $\mathcal{A}$		Inference $\mathcal{B}$		Inference $\mathcal{C}$
(1)	I have the goal of having good food;	(1)	I have the goal of having good wine;	(1)	I have the goal of having good food and having good wine;
(2)	going to restaurant r_1 is a satisfactory way of having good food	(2)	going to restaurant r_1 is a satisfactory way of having good wine	(2)	going to restaurant r_2 is a satisfactory way of having good food and good wine
(3)	I intend to go to restaurant r_1	(3)	I intend to go to restaurant r_1	(3)	I intend to go to restaurant r_2

Table 8.7: *Adding teleological inferences or merging them*

	Inference $\mathcal{A}$		Inference $\mathcal{B}$		Inference $\mathcal{C}$
(1)	w_1 said that Mary shot John;	(1)	w_2 said that Mary shot John;	(1)	w_1 and w_2 said that Mary shot John;
(2)	if w_1 says something then it is likely to be true	(2)	if w_2 says something then it is likely to be true	(2)	if w_1 and w_2 say something then it is likely to be true
(3)	Mary shot John	(3)	Mary shot John	(3)	Mary shot John

Table 8.8: *Adding factual inferences or merging them*

The same considerations seem to apply also to the formation of factual beliefs (see Table 8.8). Assume that two witnesses w_1 and w_2 declare that they have seen Mary shooting John. Assume that a third witness, w_3 says, instead, that Mary was with him at the time when the shooting took place. Assume that there is no ground to doubt their testimonies (except for the fact that they are incompatible). Also in this case it seems that, rather than making two separate inferences and adding their strengths, I had better merge those inferences into one, and take this into consideration. Merging the two inferences will lead me to take into account the possible interference of the facts upon which they are based. For example, I may know that the two witnesses had an interaction, so that one may have influenced the other. The likeness that what both of them say is true is not necessarily obtained by separately establishing what is the likeness that each one is true, and summing up the results.

The idea that, rather than adding the weights of reasons, we should merge

Inference $\mathcal{A}$	Inference $\mathcal{B}$	Inference $\mathcal{C}$
(1) educational use favours fair use;	(1) non-commercial use favours fair use;	(1) educational use and non-commercial use favour fair use;
(2) distributing reading material to students is educational use	(2) distributing reading material to students is non-commercial use	(2) distributing reading material to students is non-commercial and educational use
(3) Fair use is favoured	(3) Fair use is favoured	(3) Fair use is favoured

Table 8.9: *Merging factors*

converging reasons into one combined reason also applies to factors. Rather than making separate inferences for each factor favouring the same outcome, and then adding the strengths of those inferences, one had better build just one inference that considers all factors supporting the same conclusion (see Table 8.9).

The primacy of the idea of merging reasons over the idea of adding their strengths is confirmed by the fact that when reasons cannot be merged, then it does not make sense to add their strengths: Whenever, by combining two separate reasons, we obtain no reason—since the result does not match any reasoning pattern—it seems unreasonable to add the strengths of the two inferences.

For example, it does not make much sense to add the strengths of a *normative syllogism*, and of *teleological inference*.

First of all this may lead to *double counting*: The goals one aims at achieving in adopting the behaviour that is required by a rule may be the grounds supporting the adoption of the rule.

For instance, assume that George is considering whether he is allowed or not to smoke in his office: (*a*) There is a rule which prohibits smoking in public buildings, in order to promote the value of *health*, but (*b*) he believes that other values, namely *freedom* and *autonomy* (as self-determination), require that one is allowed to smoke in one's own working space.

Under these conditions, one might consider that there are two grounds which support the conclusion that George is prohibited from smoking: the no-smoking rule and the value of *health*. Thus, one should put on one pan of the balancing scale the no-smoking rule plus *health* and on the other pan *liberty* and *autonomy*. Assume, for simplicity's sake that each element on the scale has weight 1. It seems that there is a perfect equilibrium: two units of weight for *smoking-allowed* and two units for *smoking-forbidden*.

However, the result is questionable since the value *health* influences in two

different ways the outcome *smoking-forbidden*: on the one hand as a subreason directly supporting *smoking-forbidden*, and on the other hand as a subreason for adopting the no-smoking rule (which in its turn is a subreason for concluding *smoking-forbidden*). Thus, while values *liberty* and *self-determination* have each one been counted for their weight, which is 1, *health* has been counted for the double of its weight: besides the weight 1 of health itself we have added the weight 1 of the non-smoking rule, though this rule was only adopted as a way of advancing the value of health.

More generally, we doubt that the additive approach contributes to clarify George's thoughts. Similarly, we doubt that he would get any clarification by the idea that the no-smoking rule is an exclusionary reason with regard to the values for or against a permission to smoke, so that if he endorses this rule, he should not take values into consideration.

A better solution would be for George to approach the situation by making two distinguished independent inferences:

1. the first inference is a *normative syllogism*, concluding that he ought not to smoke, according to the no-smoking rule;
2. the second inference is a *teleological inference*, concluding that he can smoke in his office, according to the values he sees as proper to his legal system.

Then, he will have to consider which one of these two inferences is stronger, and behave accordingly.

As a further step to be eventually taken on the basis of this assessment, he might (if he sees this as opportune) update his normative beliefs to prevent future conflicts between *syllogism* and *teleological inference*. For example he may recognise a general exception to the non-smoking rules, for the case where nobody else is in a smoker's office. This second step, however, is a rationalisation that has to be performed only when this appears to be opportune (and likely to be endorsed also by George's fellows, see Section 10 on page 267).

Also when we two normative syllogism lead to the same conclusions, it does not seem that such syllogisms may be added to get a stronger pull towards their outcome. In particular it does not seem that the merged strengths of two weaker syllogisms can override a syllogism that prevails singularly over each one of the weaker syllogisms. For instance it does not seem that by adding the weight of various statutory rules that are inconsistent with a constitutional rule, one may obtain a set of inferences that prevail over the inference one may derive from the constitutional rule.

The same happens for exceptions. Assume, for instance, that Tom attempts to rape Laura while she is visiting him, and in order to defend herself, she hits him with a precious vase, both destroying the vase and hurting him, and finally she profits from his resulting state of unconsciousness to lock the door, run away and call the police. It would be strange to argue that the self-defence

exception (saying that one is not liable when one is trying to defend oneself), though prevailing over each one of the single prohibitions Laura has violated (the prohibition to damage property, to harm people, to imprison them) does not prevail over their combination, so that Laura is to be considered to be criminally liable for such actions. Common sense tells us that the fact that Laura was attempting to defend herself against a serious aggression overrides all such prohibitions, regardless of the fact that they come together. It may certainly be said that some actions she performed to defend oneself were excessive, or no longer required since the offender no longer was a real danger: This depends, however, on the comparative balance of all values at stake, and on the existing factual situation (thus, it depends on teleological reasoning), it does not depend on the number of rules one has violated.

In conclusion, we reject the idea that separate reasons add their strengths or weights. Either they can be merged into one combined reason, or each one of them has to fend for itself on its own. Thus, we do not usually need to worry for excluding certain (sub)-reasons when balancing two conflicting reasons.

Thus, our approach provides a simple way for dealing with the problems of double counting: Explicit exclusion is unnecessary since the structure of reasoning schemata takes care that only appropriate materials form the opposing reasons. All materials that do not fit into a reason (according to the structure required by its reasoning schema) will not have any impact on the strength of that reason.

Chapter 9

MULTI-AGENT PRACTICAL REASONING

We shall now consider how a practical reasoner can rationally approach situations where other similar reasoners are involved. After examining what different concerns and points of view an agent may adopt, we shall analyse the ways in which the actions of different agents may interfere, focusing in particular in the dilemmas that characterise strategic interactions.

9.1. The Concerns of an Agent

We must distinguish different *ultimate concerns* an agent may have, and corresponding different focuses of the agent's practical reasoning. When one engages in practical reasoning, one is interested in the fate of certain entities, which are the objects of one's concern. The ultimate object of one's concern may consist in oneself, in certain other agents, in a collective (a group) of agents, or it may even include other types of entities (nature, the environment, cultural heritage, and so on). Here we distinguish the case where one is concerned with oneself, with others, or with collectives.

9.1.1. Three Types of Concerns

First of all an agent has what we may call *self-directed concerns*. When adopting this perspective, one distinguishes oneself from one's social and natural environment, and uses practical reasoning as a way of enhancing and preserving one's own condition. One has then self-directed likings: One likes having certain properties, or being in certain relations which other things. Consider for example how I may like the situation where I am having a good dinner, or more generally the situation where I am handsome, healthy, rich, admired, capable, and so on. Correspondingly, one adopts self-directed desires (desires to achieve the object of one's self-directed likings), chooses self-directed plans of actions to achieve those desires, and feels self-directed wants.

One may also have what we may call *other-directed concerns*. These consist in focusing on other agents, and in using practical reasoning to enhance the conditions of them. The other agents one is concerned about may be individually identified, or they may be characterised by certain properties of them (being my children, my relatives, my human fellows, sentient animals, and so forth). One has then other-directed likings: One likes the fact that certain other agents have

certain properties or are in certain conditions. Consider for example, how one may like the situation where one's children are happy, one's parents are healthy, where no human being is starving, where no sentient being is suffering, and so on. The agent having other-directed likings may form corresponding desires (for instance, the desire that people living in an underdeveloped country are not starving), adopt plans of actions to this purpose (the plan of making a donation), and feel the want to implement them (the want to make the donation).

Finally, an agent may have what we may call *collective-directed concerns*. These consist in focusing on the condition of a group of agents one belongs to (a collective).[1] When one takes a collective-concerned perspective, one views oneself just as a member of the collective one refers to, so that one's identity becomes irrelevant, though one's traits and actions may matter (as they would if they belonged to any other member of the collective), according to the criteria one adopts with regard to the collective. An agent having such concerns will have collective-concerned likings: Consider for example, how one may like that one's country has a booming economy, that its culture and science are flourishing, that its citizens participate in government, that they do not suffer poverty, and so on. The agent will consequently adopt collective-directed desires, select collective-directed plans, and feel collective directed wants.

9.1.2. The Construction of Collective-Directed Concerns

The idea of a collective-directed concern is neutral with regard to the content of this concern. In fact, it can be construed in various ways by different agents.

One possibility is that my collective-concerned preferences result from the self-concerned preferences of the individuals currently belonging to my collective: For instance, my highest preference may refer to the situation maximising the sum of the degrees of satisfaction of the self-directed preferences of all members of my collective (as in some variants of preference-utilitarianism). Another possibility is that I like my society to be organised as is suggested by Rawls (1999c), but not out of self-directed concerns under circumstances of ignorance (as in Rawls's original position), but from a collective-directed concern: I like that my collective be such that every member of it enjoys basic liberties and that its poorest people are as well-off as possible.

Still another possibility is that I like the common good as characterised by

[1] We use the term *collective* in a very generic sense, namely, to refer to any group of people having any kind of cooperation and common interest. To refer to collectives, we shall also the expression *community*, especially when we are referring to political collectives. We are not using the term *community* in the more specific sense of a collective characterised by strong personal and emotional ties, as in the famous opposition of community (*Gemeinschaft*) and society (*Gesellschaft*) due to the German sociologist Ferdinand Tönnies (see Tönnies 2001). Nor as we directly referring to specific communitarian theories of society and politics, though our model of legal reasoning will emphasise collective attitudes and commitments.

Finnis (1980, 154), that is, "securing a whole ensemble of material and other conditions that tend to favour the realisation, by each individual in the community, of his or her personal development." Finally, another option would consist in maximising equal basic capabilities, following the ideas of Sen (1997).[2]

On the other hand, one's collective-concerned preferences may also be focused on global features of one's collective, which are reducible neither to the self-directed nor to the other-directed preferences of its members (for instance, the preservation of the natural and cultural heritage of one's nation, its military power, its economic productivity, its excellence in arts and science). One's collective-concerned preference may also concern the fact that one's fellows conform to what one believes to be patterns of good life.[3] On the other hand, one may believe that a political community should be indifferent (or neutral) with regard whatever patterns of life individuals choose, out of respect for the autonomy of one's fellows, as in some liberal approaches.[4]

We cannot here enter into the controversial domain of normative political philosophy. Let us just say that it seems very difficult to reduce collective-concerned preferences (and values) to a unity, as Nozick (1989, 292) observes:

> There are multiple competing values that can be fostered, encouraged, and realised in the political real: liberty, equality for previous unequal groups, communal solidarity, individuality, self-reliance, compassion, cultural flowering, national power, aiding extremely disadvantaged groups, righting past wrongs, charting bold new goals (space exploration, conquering disease), mitigating economic inequalities, the fullest education for all, eliminating discrimination and racism, protecting the powerless, privacy and autonomy for its citizens, aid for the foreign countries. Not all of these worthy goals can be pursued with full energy and means, and perhaps these goals are theoretically irreconcilable also, in that not all good things can be adjusted together into a harmonious package.

Notwithstanding the difficulty indicated by Nozick, it seems that rationality requires that in framing one's concept of the collective interest one tries to fit into it and balance the (legitimate) interest of the individuals and the groups which are included into the collective, as well as those interests that can only be attributed to the collective as a whole.

[2] An interesting issue is whether my collective-concerned likings may also be a function of collective-concerned likings of members of my collective. Assume that in my collective there is large number of people who would like that everybody in their collective be vegetarian. Would this collective-concerned liking of other people provide me (even if I have no liking for vegetarianism) with a reason to like, from a collective-concerned perspective, that everybody is vegetarian? This issue, which we shall not consider further, is discussed by Dworkin (1977c, 234ff., 275ff.) and Hart (1983b, 208ff.), who take different views on the matter.

[3] Obviously, ideas on good life may be very different: Should we listen to classical music or to heavy metal, should we search for knowledge or live in ignorance, should we let our brain conditions be determined by the natural chemicals produced by the brain or should we use drugs to achieve the brain condition we prefer, should we cultivate cooperation or competition?

[4] Cf. Dworkin 1985b; see however, Raz 1986, and Finnis 1980, 221ff. For a recent discussion of the different views on the matter, see Verza 2000.

Besides the need to consider different collective-concerned values, the circumstances of human life expose the practical reasoner to a further source of conflicts: One may belong to different collectives (a family, an ethnic or religious community, a company, a university, a city, a region, a nation, humanity, and so on), so that one will needs to develop different collective-concerned perspectives, which can conflict one against another.

9.1.3. Reasoning and Collective-Directed Concerns

One may doxify the conative states one has, out of one's different concerns. Thus, one may ask oneself the following questions:

- What should I like for myself (what are my self-directed values)?
- What should I like for my fellows (what are my other-directed values)?
- What should I like for my collective (what are my collective-concerned values)?

These are different questions, to which a rational agent should provide independent answers. Similarly, one should distinguish what desires, plans and wants one should have (are acceptance-worth) out of one's concern for oneself, for others, and for one's collective.

The process of practical reasoning for an agent having other-directed or collective-directed concerns still corresponds to the model we have described in the previous chapters: One adopts desires to achieve what one likes (for one's community), find plans to satisfy those desires, adopts intentions of realising the instructions in those plans, wants to perform the actions indicated by those instructions. In this reasoning process, however, only conative states functional to certain concerns are reasons for adopting lower level conative states that are functional to the same concerns.

Thus, only my collective-concerned likings (values) are reasons for adopting collective-concerned desires, only my collective-concerned desires are reasons for adopting collective-concerned intentions, only my collective-concerned intentions are reasons for having collective-concerned wants. When one views one's self-directed conative states to be reasons for adopting collective-concerned conative states, one reasons irrationally (as far as its collective-concerned deliberation is concerned).

Assume that I am working for a public agency, and that I am offered a bribe to make a contract (in the name of my agency) with company x, though company y is providing more favourable terms. The fact that I would get a bribe from company x is no reason for intending to make the contract with company x, out of my collective-directed concerns. It is rather a reason for intending to make a contract with company x, out of my self-directed concerns. Accordingly, the patterns for practical reasoning that we have introduced in Chapter 1 need

to be indexed to the concerns the reasoning agent is having, as shown in the following:

Reasoning schema: *Collective-concerned desire-adoption*

(1) having a collective-concerned liking for G;
(2) believing that G can be achieved
——— IS A REASON FOR
(3) having a collective-concerned desire for G

Reasoning schema: *Collective-concerned teleology*

(1) having a collective-concerned goal G;
(2) believing that plan P is a satisfactory way of achieving G
——— IS A REASON FOR
(3) having a collective-concerned intention of implementing P

Reasoning schema: *Collective-concerned want-adoption*

(1) having the collective-concerned intention to do action A, under condition C;
(2) believing that condition C obtains
——— IS A REASON FOR
(3) having the collective-concerned intention to do A

Assume for example that I have a liking, out of concerns for my local community, for the preservation of its water reservoirs, and that I indeed desire that a sufficient quantity of water is preserved. This would lead me to have the high level collective-concerned plan to minimise the water I use (as a way of contributing to the satisfaction of that desire), that is, to adopt the instruction ⌈I shall minimise my usage of water⌉. Through the mechanism of subplanning, this would lead me to make the plan not to water my garden, as long as there is little water available (to adopt the instruction ⌈I shall not water the garden, while there is water scarcity⌉), and indeed to feel now that I do not intend to water the garden (though according to my self-directed concerns, I would like to have it watered).

According to the reasoning patterns listed above, rationality excludes that self-directed concerns motivate truly collective-concerned conclusions. Rationality does not exclude, however, various patterns of deviation from the communal concerns: (1) giving priority to self-directed concerns over collective-directed ones (I decide to make the contract with company x and take the bribe, even if I believe that this damages my community); (2) finding a compromise with one's self-directed concerns (I decide to take a lower bribe from company y, which offers better terms, rather than a higher bribe from company x); (3)

cheating one's fellows, depicting a conclusion which is based upon self-directed concerns, as if it was based upon collective-directed concerns (I prepare a detailed justification, based upon false information, intended to make you believe that the bribing company provides our community with the most convenient service).

Moreover, in some cases there is no conflict between one's different concerns. For instance an entrepreneur, while aiming at his profit, within certain legal and moral constraints, may justifiably believe that he is benefiting his community.

The simple fact of the independence of other-directed and collective-concerned reasoning from self-directed concerns seems to imply some features that various authors have associated with moral and legal reasoning.

First of all, acting out of a collective-directed concern implies that the reasons supporting one's collective-concerned deliberation are not indexed to the identity of the deliberating agent, within the collective: My awareness of having a certain identity within the collective (for instance, of being myself, rather than my wife, within my family) is no reason (no justification) to me why I should reach a certain collective-concerned conclusion.

Secondly, acting out of a collective-directed concern implies the idea of the exchange of roles (on this idea, see: Hare 1962, 89ff; Alexy 1989, 70ff., 202ff.): My having a certain position within my collective is no reason for adopting a collective-concerned choice of a plan of action, and therefore my choice should not change if my position is changed. If my particular identity provided me with a reason for drawing a certain conclusion or if I would withdraw such conclusion in case my position were different, then I would be cheating (I would be reasoning out of my self-directed concerns and only pretend to reason out of my collective-directed concerns).

Assume, for example, that I am a Member of Parliament, and that I participate in a committee concerned with determining the allowance for members of Parliament. Assume that I develop the following piece of reasoning:

Reasoning instance: *Faked collective-concerned teleological inference*

(1) desiring a higher allowance;
(2) believing that voting for an increase of the allowance for members of Parliament is a satisfactory way to contribute to increasing my allowance

——— IS A REASON FOR

(3) my intending to vote for an increase of the allowance for members of Parliament, out of my concern for my community

This piece of reasoning is not only strange, but also irrational: From a goal functional to my private concerns, it concludes with a collective-concerned inten-

tion. From this case of flawed reasoning we need to distinguish other reasoning processes, leading to the same outcome without violating rationality:

- I may develop a genuine collective-concerned argument leading me to the same conclusions I can get though my self-concerned reasoning. Assume that I sincerely believe that giving a higher allowance to members of Parliament would induce better people to get this job, or will induce present members of Parliament to better do their work.
- I may fake, out of my self-directed perspective, to engage in collective-concerned reasoning, and pretend to derive from collective-concerned premises I do not endorse a conclusion I endorse out of different premises (pertaining to my self-directed concerns). Assume that I do not believe that a higher allowance would contribute to having better Members of Parliament, but I state this premise in order to justify an increase I desire out of personal reasons.

The idea that agents are motivated by different concerns implies that one may have certain conative states only out of some of one's concerns, to the exclusion of other concerns. When seen from the perspective of the excluded concerns, those cognitive states appear to the agent as something that "should" determine his or her actions, though they may fail to do so (if the excluded concerns prevail in the end).

Assume, for example, that I adopt, out of my concerns for my fellows in a third world country, the intention of making a large donation. When reasoning out of my concern for myself this intention appears to me as a constraint (a should) that restrains my own determination. The same applies, however, when I reach a certain conative state according to my concern for myself (I formed the intention of spending the holidays working for the sake of my career), which conflicts with my concerns for my family: My intention to work appears to me as a "should" which constraints the determinations I may adopt out of my concerns for my family.

9.2. Acting in a Social Context

In the previous paragraph we have seen how one may have concerns for others, but the presence of others has a further implication: the need to take into account in one's determination the behaviour of others, and therefore also their practical reasoning.

This is particularly clear if we consider *planning* (teleological reasoning). Planning, as we have seen, involves finding a course of action that enables one to reach a goal. However, whether this course of action will realise the goal, and what are its impacts on other likings one has, usually depends on how others will behave: Will they thwart one's action, or will they provide preconditions for one's action to succeed?

For example, the achievement of my goal of flying to Barcelona depends on the actions of thousands of people, many of whom I do not know (employees in the travel agency, airport clerks, pilots, hotel personnel, and so on). To make a travel plan I must form expectations concerning the behaviour of all those people, and adapt my plan to these expectations (for instance, my plan for going to Barcelona needs to be different if I expect that tomorrow there will be an air strike).

9.2.1. External Motivation and Threats

In general, when acting in a social context, one needs to consider that many results one is interested in (out of one's self-, other- or collective-directed concerns) can only be obtained through the *cooperation* of others. However, one directly commands only one's own behaviour.

Let us first consider what possibilities are available when one only focuses on one's own individual action, viewing others only as parts of the context in which such action is to take place.

Under such conditions, one's practical reasoning will usually proceed in two steps. First one will consider what *action profiles* (sets of actions by oneself and by others, see Definition 9.2.1 on page 252) would produce (if they were implemented) the outcomes one desires. Secondly, one will consider how one can produce these action profiles through one's own action. This can be reduced to the mechanism of instrumental desire we considered in Section 1.3.3 on page 21. Thus, we may distinguish two reasoning patterns.

The first results in desiring that a certain action profile is implemented, being a way of satisfying a goal of the reasoner.

Reasoning schema: *Desiring action-profile*

(1) having goal G;
(2) believing that action profile A is a satisfactory way of achieving G

——— IS A REASON FOR

(3) desiring that action profile A is realised

Assume that I am the administrator of a discussion group on the Internet, and I believe that the action profile where nobody sends commercial information to this discussion group would be a good one, in order to promote participation in the discussion group, out of my concern for the discussion group and its participants. This leads me to desire that this profile be realised.

Reasoning instance: *Desiring an action profile*

(1) having the goal that participation is increased;
(2) believing that realising action profile ⌈nobody posts commercial information⌉ is a satisfactory way to increase participation

——— IS A REASON FOR

(3) desiring that action profile ⌈nobody posts commercial information⌉ is realised

This desire would prompt me to search for plans to implement this action profile. Assume that I am in a condition of excluding people from the group (of making so that the computer system hosting the discussion refuses access to people I include in a certain list). Then my plan for achieving the result I am instrumentally interested in (making so that nobody sends commercial information) would consist in threatening exclusion against those who send commercial information. This corresponds to the schema *teleological inference*:

Reasoning instance: *Teleological inference*

(1) desiring that action profile ⌈nobody posts commercial information⌉ is realised;
(2) believing that ⌈threatening with exclusion those who post commercial information⌉ is a satisfactory way of implementing that action profile

——— IS A REASON FOR

(3) intending to threaten with exclusion those who post commercial information

In such a case, the reason why I believe that through the *threat* I will achieve the action profile is my assumption that my threat (and the expectation that I will implement it) will provide others with the belief that if they send unsolicited commercial information they will be excluded from the group. This belief should lead them to adopt the intention of not sending such information, as a way to avoid being excluded.

Note that the reasoning patterns just described (that is, the psychology of threats) may be associated with those models of the law that focus on the threat of sanctions. Here are the constituents of the law, according to Austin (1995, 17):

> 1. A wish [...] by a rational being, that another [...] do or forebear. 2. An evil to proceed from the former, and be incurred by the latter, in case [of disobedience]. [...] 3. An expression or intimation of the wish in words or other signs.

On the side of the threatened person, the psychology of threats can be reduced to a combination of epistemic and practical reasoning. Epistemic reasoning con-

cerns the expectation that the threat will be carried out, if the precondition is provided.

Reasoning instance: *Threat acceptance*

(1) believing that you have threatened that ⌈if I send commercial information I will be excluded⌉;
(2) believing that you will implement your threat

——— IS A REASON FOR

(3) believing that ⌈if I send commercial information I will be excluded⌉

Practical reasoning concerns forming the intention not to realise the precondition of the threat.

Reasoning instance: *Teleological inference (avoiding the undesired)*

(1) desiring not to be excluded;
(2) believing that ⌈if I send commercial information I will be excluded⌉

——— IS A REASON FOR

(3) intending not to send commercial information

One can succeed in obtaining the action profiles one desires, by providing incentives rather than threats. Consider for example how I (if I had sufficient money at my disposal) could achieve an action profile which I think is good for my collective (for instance, the profile where children coming from deprived families pursue their studies) by providing financial rewards for the actions which contribute to implementing this action profile (paying teachers and social workers, providing some support to students and parents, etc.).

As another example of using external motivation to implement an action profile, this time undoubtedly out of self-directed concerns, consider the case of a large software company, desiring to gain a monopoly over Internet browsers.

The action profile the company desires to implement, as a way of extending and securing its market dominance, is that we all use the browser it provides, rather than the products of competitors.

The plan though which the company tries to achieve this profile will consist in a combination of actions intended to provide us with incentives to use the monopolist's product and with disincentives to use other products: giving away that browser, providing it as a free add-on included in other company's products, signing exclusive agreements with hardware and software companies, providing the browser with powerful and unique features, making it difficult or impossible to remove it once installed, making it impractical to use other browsers in com-

bination with other products of the company (in segments where the company already dominates the market).

These examples show that sometimes an action profile can be realised by externally motivating the agents involved. Under such conditions, the agents performing the actions in the profile do not need to have the goal of realising the whole profile. They only need to have the intention of performing the individual actions that contribute to the realisation of the profile.

A further way of achieving an action profile through the behaviour of agents who do not intend to realise the whole profile (each one just focusing on his or her own actions) consists in motivating these agents through commands.

This is different from the case of a threat. When issuing a threat, one expects that the other people's awareness of one's intentions will *indirectly* provide them with reasons to behave in certain ways. Correspondingly, (*a*) my awareness that one intends to punish a certain behaviour will lead me (*b*) to forecasting that the one will punish me, which would provide me with a reason for (*c*) my intention not to perform that behaviour. On the contrary, a commander *directly* intends that others behave in a certain way. More precisely, when I follow a command (*a*) my awareness that the commander intends that I shall behave in a certain way directly provides me with a reason for (*b*) my intention to do so (see Section 1.4.4 on page 35).

9.2.2. Double Contingency

In many situations external motivation is impossible or inopportune. When one cannot (or does not desire to) directly influence the deliberation of others by providing them with incentives or disincentives, one finds oneself in a peculiar situation: One can determine only one's own behaviour, but one is aiming at results which also depend upon the behaviour of others.

Moreover, one knows that the behaviour of the others depends upon their deliberation, and that the deliberation of the others may depend upon they others believe one will do. But what the others believe one will do depends on what they believe that one believes that others will do, which, in its turn, depends on what they believe that one believes they believe that one will do.

Consequently, one is caught in a trap of an endless spiral of mutual expectations: What I will do (Shall I pay the price?) depends on what I believe that you will do (Will you deliver the merchandise?), but this, in its turn, depends on what you believe that I will do (Shall I pay the price?).

This is the aspect of human interaction which was famously called by Parsons *double contingency* (cf. also Luhmann 1990):

> The crucial reference points for analysing interaction are two: (1) that each actor is both acting agent and object of orientation both to himself and to the others; and (2) that, as acting agent, he orients to himself and to others, in all of primary modes or aspects. The actor is knower and object

of cognition, utilizer of instrumental means and himself a means, emotionally attached to others and an object of attachment, evaluator and object of evaluation, interpreter of symbols and himself a symbol. (Parsons 1968, 436)

The problem of double contingency takes us into the domain of strategic reasoning. This is the reasoning of rational decision-makers who, in determining their behaviour, take into account their knowledge or expectations of the behaviour of other rational decision-makers (Osborne and Rubinstein 1994, 1). The study of strategic reasoning is the domain of *game theory*, a well-developed and very technical discipline, which we cannot approach here.[5] Let us just introduce a few simple notions, which we shall use in the following.

A *strategic framework* is characterised by a set of agents S, where each agent j in S is capable of performing certain actions (when we speak of actions in general, we also include negative actions, or omissions). A combination of actions of those agents is called an *action profile*.

Definition 9.2.1 *Action profile. An action profile for a set of agents S is a combination of actions, one per each agent in S.*

For example, if S includes all 100 people taking part in my Internet discussion group, the combination of actions where 5 members of my discussion group send commercial information, and the other 95 do not, is an action profile. Another action profile for my discussion group would be the combination of actions where everybody (all 100 people) omits sending commercial information.

Another basic notion we need is that of *common belief*. In this regard, we follow the usual idea of distinguishing the simple fact that different agents share the same belief (they all believe the same proposition), from the fact that they have a common belief, which also implies that they are aware of sharing the same belief (and of sharing the awareness of this):[6]

Definition 9.2.2 *Common belief. A proposition P is* common belief *of a set of agents S exactly when all members of S believe that P, they believe that all of them believe that P, they believe that all of them believe that all of them believe that P, and so on.*

9.3. Strategic Dilemmas

In the following paragraphs we shall see how in strategic interactions some problems or dilemmas emerge, which individual rationality seems unable to tackle.

[5] See, for a technical introduction to game theory, Osborne and Rubinstein 1994, for a discussion of its relevance to normativity, Ullman-Margalit 1977, for applications to the law, Baird, Gerner, and Picker 1994.

[6] See, for example: Wooldridge 2000, 113; Balzer and Tuomela 1997. The idea of a common belief is analysed with regard to the law and other institutions by Lagerspetz (1995), who expresses this concept by using the expression "mutual belief."

In particular, we shall consider three kinds of such dilemmas: prisoner's dilemmas, coordination dilemmas and assurance dilemmas. We shall argue that in order to solve such dilemmas we need collective intentionality, and in particular, the shared endorsement of normative beliefs.

9.3.1. Prisoner's dilemmas

The prisoner's dilemma concerns the plight of two people who are imprisoned, having been found with illegal weapons near a bank. The prosecutor, who believes they were trying to rob the bank, tells them that he will ensure that the following takes place:

- if only one prisoners confesses the attempted robbery while his mate does not, then the confessing prisoner will walk free, while his mate will get the whole punishment for attempted robbery (10 years);
- if both prisoners confess, both will get a lower punishment (4 years).

Both prisoners know that the prosecutor cannot prove the attempted robbery without the confessions of one of them: If both omit the confession, each will only get the mild punishment established for carrying illegal weapons (1 year).

After listening to the prosecutor, each prisoner has to decide separately whether to confess that they were trying to rob the bank or to omit the confession. They know that whatever they do, their decision is having no influence on the decision of their partner, who is in a separate cell (at decision time there is no communication between the two prisoners).

In this example, the set S of agents contains two individuals, which we call "I" and "you," abbreviated into I and Y:

$$S = [I, Y]$$

The set of possible actions available to me (I) are confessing or omitting the confession, which we denote as c^I (I confess) and o^I (I omit to confess). Therefore I's actions are $A_I = \{c^I, o^I\}$. Also you (Y) can confess or omit the confession. The set of Y's actions is therefore $A_Y = \{c^Y, o^Y\}$.

The set of our possible action profiles is given by all possible combinations of our actions: I confess and you confess $[c^I, c^Y]$, I confess and you omit $[c^I, o^Y]$, I omit and you confess $[o^I, c^Y]$, I omit and you omit $[o^I, o^Y]$. In other words the set A of all profiles is:

$$A = \{[c^I, c^Y], [c^I, o^Y], [o^I, c^Y], [o^I, o^Y]\}$$

This decisional context is captured by Table 9.1 on the following page, where rows represent my choices and columns represent your choices. Each entry in the table corresponds to a profile (a combination of actions of the prisoners), and it contains the penalties that prisoners get for that profile, first my years

$I \backslash Y$	c^Y	o^Y
c^I	$4, 4$	$0, 10$
o^I	$10, 0$	$1, 1$

Table 9.1: *The prisoner's dilemma*

of imprisonment and then yours. For example, the top left entry, which is at the crossing of row c^I and column c^Y, and therefore corresponds to the profile $[c^I, c^Y]$ (both of us confess), contains the data $[4, 4]$ (I get 4 years and you get the same). Each one of those profiles is going to satisfy to different extents the likings of the two agents.

Let us assume that each prisoner has purely self-concerned likings: Both I and Y like to stay in jail as little as possible and are indifferent to the fate of their colleague. This implies that for me the profiles are ordered as follows:[7]

$$[c^I, o^Y] \succ [o^I, o^Y] \succ [c^I, c^Y] \succ [o^I, c^Y]$$

I prefer the profile where I confess and you do not (and I get 0 years of detention) to the profile where both of us omit to confess (and I get 1 year). Moreover I prefer the latter profile to the profile where both of us confess (and I get 4 years). Finally I prefer the latter profile to the profile where I omit to confess and you confess (and I get 10 years).

Obviously, according to your self-directed likings, the order is different:

$$[o^I, c^Y] \succ [o^I, o^Y] \succ [c^I, c^Y] \succ [c^I, o^Y]$$

Your most preferred profile is the one where I omit to confess and you confess (since in that case you get 0 years of prison), which is my least preferred one (since I get 10 years of prison). These preferences are expressed by Table 9.2 on the facing page, were each slot indicates the comparative position that each party assigns to the action profile represented by that slot: I_n and Y_m indicate respectively that I puts the concerned profile at position n in the order of his preferences, while Y puts the concerned profile at position m in the order of her preferences.

Observe that, though I am evaluating our action-profiles only according to my self-directed preferences, the realisation of these profiles will not depend on my action alone, it will also depend on your action. The fact that I confess (c^I)

[7] We write $x \succ w$ to mean that profile x is preferable to profile w (see footnote 4 on page 155).

$I\backslash Y$	c^Y	o^Y
c^I	I_3, Y_3	I_4, Y_1
o^I	I_1, Y_4	I_2, Y_2

Table 9.2: *The prisoner's dilemma: preferences*

does not determine univocally what outcome I will obtain: According to what you will do, I may get a 4 year sentence (in case that you confess too) or a 0 years sentence (in case you do not confess). In general, one will achieve one's preferred profile, only if the others contribute to realising that profile.

The example shows that, when there is a mismatch between the preferences of the concerned agents, if each one behaves as required by his or her own most preferred profile, nobody will realise his or her most preferred profile. In fact, my preferred profile includes my action c^I, but also your action o^Y, your preferred profile includes your action c^Y, but also my action o^I. If each one of us unilaterally chooses the action included in the profile he or she prefers, we shall produce profile $[c^I, c^Y]$, that is, our third choice.

To approach this situation, we need to use two important notions from game theory. The first is the idea of a *dominant choice*.

Definition 9.3.1 *Dominant choice. An action A is a dominant choice for agent j, if A enables j to achieve the best outcome according to j's likings, whatever the other agents do.*

According to the table above, the dominant choice, both for me and you, is to confess. Consider for example my situation: If you confess (c^Y), my best action is to confess (c^I), since doing so I get 4 years of detention rather than 10; if you omit to confess (o^Y), my best action is still to confess, since by doing so I get 0 years rather than 1. Your reasoning is exactly the same: Your dominant choice is c^Y.

The idea of a dominant choice allows the agent to escape from the problem of double-contingency: If a choice of mine gives me, for every one of your choices, a result which is preferable to the result I would obtain making any other choice, then this is the action I should perform. I can go for it regardless of what you will do (therefore I do not need to try to model your reasoning, and to anticipate your beliefs on what I will do). The second important notion is that of a *Nash-equilibrium* (Nash 1950).

Definition 9.3.2 *Nash-equilibrium. An action profile is a* Nash-equilibrium*, if no agent can do better by changing his or her choice alone, assuming that the actions of all other agents remain unchanged.*

For example, the situation when everybody confesses is the only Nash equilibrium for our prisoners. With regard to this profile, no one can improve one's lot, by changing one's position unilaterally. If one changes one's mind, omitting to confess (while the other keeps confessing) one will get 10 years rather than 4. The situation where we both omit to confess—though providing us with a better payoff (1 year of prison each, rather than 4)—is not a Nash-equilibrium: If you maintain your choice of not confessing, I may improve my position by confessing, and the same holds for you.

The prisoner's dilemma is characterised by having just one Nash-equilibrium, which obtains when both agents implement their dominant choice (confessing). Consequently, it seems that the decision for both parties should be straightforward: Both of them should implement their dominant choice. However (and this is why prisoners are assumed to face a dilemma), both parties would be better off if, rather than both confessing, they both omitted to confess (if they did so, they would get 1 year each, rather than 4). This action profile, however, is inaccessible to them, when each is separately moved by his or her self-directed concerns, as characterised by the above likings, and has no possibility of influencing the decision of the partner through his or her decision. Confessing is the only rational choice, even when one believes that the other party will not confess (remember that we have excluded any communication between the two prisoners).

9.3.2. Prisoner-Dilemma Structured Situations

The prisoner's-dilemma situation exemplifies a more general type of context, which we may call *prisoner's-dilemma structured situation* (Ullman-Margalit 1977, chap. 2, sec. 3). This is the context where everybody prefers the profile where everybody acts in a certain way A (for instance, omitting the confession) to the profile where everybody acts in way B (confessing). However, one still prefers (to both the all-A's profile and the all-B's profile) the profile where one is the only agent doing B (confessing), and all others are doing A (omitting the confession). Finally, one dislikes the situation in which another agent is doing A and all others (including oneself) are doing B.[8]

Consider for example, my problem of deciding whether to go to work by bicycle or by car. Assume that according to my self-concerned likings, the possible action profiles are ordered as follows:

1^I I am going by car and everybody else is cycling (I get very quickly and comfortably to work, since I find no traffic).

[8] This ideas can be further extended and generalised, for example to situations where more than one person is defaulting (see Ullman-Margalit 1977, chap. 2, sec. 3.2).

2^I Everybody, me included, is going by bicycle (I get to work quickly enough, though with some effort).

3^I Everybody, me included, is going by car (I get stuck in the traffic and breathe polluted air).

4^I I am going by bicycle and everybody else is going by car (I get stuck in the traffic, breathe more polluted air, and run the risk of being run over by cars).

In such a situation, the rational thing to do for me, when I take a separate decision, according to my self-directed concerns, is taking the car. Taking the car dominates going by bicycle since:

- taking the car is my best choice when all others take the bicycle (I will get profile 1^I, rather than 2^I), and moreover
- taking the car is my best choice also when all others take the car (I will get profile 3^I rather than 4^I).

The problem is that, if everyone else reasons the way I do, we shall end up all driving our cars, stuck in the traffic, and this would be a profile we all consider inferior to the profile where we all are cycling.

As another example of prisoner's-dilemma structured situation, consider also the following interpretation of Hobbes's state of nature.[9] My problem is to decide whether I should respect other people's life and property. Assume that possible profiles are ordered as follows, according to my likings:

1^I I am the only one that does not respect other people's life and property (I am able to take from them what I want, under favourable circumstances).

2^I Everybody respects other people's life and property (I will get a more moderate but secure lifestyle).

3^I Nobody respects other people's life and property (I will live in misery and insecurity).

4^I I am the only one who respects other people's life and property (I will be even more miserable and insecure).

In such a situation, the rational thing for me to do, namely, what I should do, as a rational reasoner (assuming that I am only motivated by my self-directed concerns), is not to respect other people's life and property; this is my dominant choice, since it will give me the best result whatever the others do. But if everybody reasons this way, we shall end up in profile 3^I, which we all consider inferior to profile 2^I.

[9] For a game-theoretical discussion the state of nature according to Hobbes 1968, chap. 13, cf. Gauthier 1969 and Ullman-Margalit 1977, chap. 2, sec. 11.

As everybody knows, in Hobbes' story, the framework is changed by the empowerment of the sovereign, who changes the payoffs of the game: By threatening (and implementing) sanctions for the violation of other people's life and property, he makes so that the profiles where I attack others are less attractive to me than the profiles where, *ceteribus paribus*, I do not attack (since now there is a serious chance of being punished, whenever I am the attacker). In this way the sovereign takes me (and everybody else) out of the prisoner's dilemma.

9.3.3. The Tragedy of the Commons

The literature provides many other examples of prisoner's-dilemma structured situations. One particularly interesting class of cases pertains to the so-called *tragedy of the commons*: Self-interested individuals are not motivated to contribute to the supply of public goods (like, security, environmental protection, infrastructures).

The supply of these goods is likely to be suboptimal on account of the following preferences: One prefers the situation where a public good is supplied (though everybody pays a share of its costs) to the situation where the public good is not supplied (and nobody pays anything), but one mostly prefers the situation where one does not pay one's share and the good is still supplied (though at a slightly lesser level) using the resources provided by one's fellows.

Therefore one's dominant choice is not to pay one's share: If all others are paying, the public good will be supplied anyway and one will enjoy it without paying; if the others are not paying, one's paying one's share will be useless. However, if everybody reasons in this way, nobody will pay, so that the public good will not be supplied, a situation that, according to everybody's evaluation, is worse than the situation where the good is supplied and all are paying their share.

9.3.4. Strategic Dilemmas and Collective Concerns

In all examples we have so far considered, agents involved in a prisoner's-dilemma type situation were motivated by their self-directed concerns. However, prisoner's-dilemmas can also emerge when the parties are only motivated by other- or collective-directed concerns. As an example where agents are motivated by other-directed concerns, consider the following.

Assume that I am the head of my department, and I have to decide whether to promote to professorship one of my collaborators, who unfortunately has a very weak research record, but whom I like very much on personal grounds. Also other heads of department are facing the same issue with regard to their collaborators. Assume that I like to have my collaborator promoted out of my concern for him, but I also like professors in general in my university to have strong research records. More exactly, I would grade possible profiles as follows:

1^I I promote my collaborator, but no other lecturer having a weak research record is promoted to professorship (this would preserve a high standard for professors, which would not be much impaired by having just one exception, and I will have my collaborator promoted).

2^I No weak lecturer is promoted to professorship.

3^I All weak lecturers (one per department) are promoted to professorship.

4^I All weak lecturers are promoted, except my collaborator.

It is easy to see that my dominant choice is promoting my collaborator. This gives me a better result both when others do not promote their collaborators (I get 1^I rather than 2^I) and when they do (I get 3^I rather than 4^I). However if everybody reasons in the same way, we shall end up in situation 3^I (having all weak lecturers promoted to professorship, which I (as all other heads of department) like less then 2^I.

Finally, let us consider a prisoner's-dilemma type situation where everybody is only motivated by collective-directed concerns. Assume that you and I are leading competing political parties: I am leading the labour party, and you are leading the conservative party. I believe that it would be better for our community if my party gets bribes (br^I), while your party does not get any ($nobr^Y$), that is, I communally prefer $[br^I, nobr^Y]$.

I have this preference out of purely unselfish collective-directed concerns: I sincerely believe that these bribes would allow my party to win the elections, and implement what I view as a communally advantageous policy (improving health care and education, developing public services, providing support to the poor, and so forth). This policy would, I believe, produce communal benefits that largely outweigh the damage deriving from the need to reward the bribing company with public favours (for instance, by providing it with certain advantageous public contacts).

You think the same for your party, that is, you communally prefer $[nobr^I, br^Y]$, since you believe that this would allow you to win the election and so implement what you view as a communally advantageous policy (lowering taxes, promoting the economy, reducing welfare dependency).

However, both of us believe that the common interest would be better served when none of our parties were bribed, rather than when both of them were. For both of us the following preference holds

$$[nobr^I, nobr^Y] \succ [br^I, br^Y]$$

In fact, if both parties get equal bribes (as is likely to happen), then bribes will have no electoral impact, but the winner (who would have won anyway) will have to reward its briber. Thus in any case (whoever wins), and to both of us, the situations where we both receive bribes is worse then the situation where nobody receives them.

I/Y	br^Y	$nobr^Y$
br^I	I_3, Y_3	I_1, Y_4
$nobr^I$	I_4, Y_1	I_2, Y_2

Table 9.3: *The bribes dilemma*

The combination $[nobr^I, nobr^Y]$, however, is inaccessible to us, since for each of us the dominant choice, according to (what we view as) the interest of our community, is receiving bribes, so that we shall inevitably fall to the inferior state $[br^I, br^Y]$ (see Table 9.3, where numbers indicate the order of the profiles, according to the preferences of the parties).

9.3.5. Coordination Dilemmas

Let us now move away from the prisoner's dilemma and consider a different type of interaction problem. This is what we shall call a *coordination dilemma*, by which we refer to the situations which characterise the so-called *coordination games* (for a characterisation of those games, see Lewis 1969, and Ullman-Margalit 1977, chap. 3).

Coordination games are characterised by the presence of *multiple Nash-equilibria*. This means that such games include multiple action-profiles having the following property: No one in those profiles can improve one's own position (produce a profile that looks better to oneself) by a unilateral change. Therefore, one will choose an action of oneself that belongs to a particular equilibrium-profile, if only one may forecast that the others are choosing the actions of theirs that are included in the same profile. Moreover, one will not change one's choice so long as it forecasts that the others are maintaining theirs.[10]

Consider the classical pattern of the café vs pub choice. Both of us (I and You) want to meet, and we have no possibility of communication. We have the common knowledge that there are just two places where we may possibly meet: One is a pub and the other is a café. Assume that we do not care which place we shall go to: We only care about meeting each other.

This situation is represented in the matrix of Table 9.4 on the facing page, where one's evaluation for an action profile is express by 1 (positive evaluation)

[10] A finer account is provided by Ullman-Margalit (1977, chap. 3, sec. 1), who distinguishes profiles where each one can only make things worse through unilateral change, from profiles were each one cannot make things better through unilateral change.

I/Y	c^Y	p^Y
c^I	$1,1$	$0,0$
p^I	$0,0$	$1,1$

Table 9.4: *A coordination dilemma: pub vs café*

and 0 (negative evaluation), p is for pub and c is for café.

The matrix of Table 9.4 corresponds to the following ordering:

$$[c^I, c^Y] = [p^I, p^Y] \succ [p^I, c^Y] = [c^I, p^Y]$$

which holds for both of us (there is a perfect match in the way we order possible profiles).

However, to achieve either of the profiles we like best ($[c^I, c^Y]$ or $[p^I, p^Y]$), we need to co-ordinate our choices, and this requires that each of us can anticipate what the other will do. It is not sufficient for realising one of our preferred profiles (we both go to the café, or we both go to the pub) that I perform one action of mine included in one of these profiles. If you do not perform the same action we shall end in neither of these profiles: We shall rather realise one of the profiles we both dislike (those where we do not meet).

This is a genuine example of double contingency: One party cannot decide what to do until it can forecast what the other party will do (I will go where I believe that you will go, and I do not know where you will go, since I only know that you will go where you believe that I will go).

9.3.6. Salience

The key idea for getting out of the coordination paradox is *salience*. If I know that one action profile is salient to both of us (for whatever reason this may happen), then I should choose the action of mine included in that profile, assuming the you will do the same salience-based reasoning.[11]

For instance, Lewis (1969) links salience to *precedent*, namely, to the existence of the repeated practice of a certain action profile. This makes this action profile salient to each one: One will perform one's own action belonging to that profile, in order to achieve that profile. This profile will therefore perpetuate itself, since every one will continue to perform the action that belongs to that

[11] The idea of salience is described in Schelling 1960, elaborated in Lewis 1969, and criticised by Gilbert 1996.

profile, on the basis of the salience of the profile, and consequently every one will contribute to keep the profile salient. Besides being linked to precedent, salience may arise (initially) from other factors such as, for example, the casual fact that a certain convergence has emerged, the deliberation of a body charged with setting standards, the particular convenience of a certain practice for most agents, and so on.

The mechanism we have just described makes *communication protocols* spread and become established. Consider for example, how the Internet took shape though the spontaneous adoption (by all of its numerous and diverse users) of the same salient protocols, such as TCP-IP (for exchanging messages divided in packets) or HTTP (specially used for accessing resources on the WWW).

In the Internet, salience is provided by precedent use of the protocols, and also by their adoption by well-known technical committees, such as IETF (Internet Engineering Task Force). By choosing to follow a certain protocol I contribute to preserving it. For instance, by choosing to use a certain format for publishing a file over the Internet, on the basis of the expectation that everybody is or will be using that format, I contribute to maintaining the situation where everybody is using that format, and therefore, to provide the precondition for people continuing to choose it.

Once the protocol has become salient, self-interest provides a sufficient incentive for everyone to follow it. This does not exclude that one may also consider that it would be good for one's fellows or for one's collective that a certain protocol is established (rather than certain other protocols). However, this is not necessarily the motivation of all or most of the participants in that convention: A protocol may also be established by a powerful commercial player, just in its own interest (this happens frequently for protocols in computing, which result from commercial battles and agreements). As we shall see, even when it is clear that the protocol is suboptimal for most participants (a different protocol would better suit them), one is forced (by one's own interest) to follow the salient (and dominant) pattern of behaviour. The protocol has become what Lewis (1969) calls a *convention*. As further examples of conventions, consider using a certain language form, dressing in a certain way when going to a certain type of event, driving on the right (or on the left), and so on.

In general, for a coordination dilemma to exist, and for salience to provide its solution, it is not necessary for all coordination profiles to be equally appreciated by all parties. In particular, it is not necessary that all parties view the salient profile as the best one. As a variant of the example above, consider the case where I prefer to stay with you in the café and you prefer to stay with me in the pub. This would lead to following pattern (increasing numbers express a higher liking) in Table 9.3.6.

The pattern of table 9.3.6 corresponds for *me* to the following order of preference:

$$[c^I, c^Y] \succ [p^I, p^Y] \succ [p^I, c^Y] = [c^I, p^Y]$$

I/Y	c^Y	p^Y
c^I	$2,1$	$0,0$
c^I	$0,0$	$1,2$

Table 9.5: *A coordination dilemma with diverging preferences*

and for *you* to the following:

$$[p^I, p^Y] \succ [c^I, c^Y] \succ [p^I, c^Y] = [c^I, p^Y]$$

This still is a coordination game, since the profiles we (I and You) most dislike are those where we act differently. Therefore, the main objective of each one of us should still be making the same choice, rather than going alone to the place where we would prefer to stay together. If each one of us chooses of one's own the action of oneself which would contribute to the profile one likes most, we shall get none of those profiles: We shall end up making different choices (I will go to the café and you will go to the pub).

This example shows that in the context of a coordination game we should abandon the Kantian maxim: "Act as if the maxim of your action were to become through your will a universal law of nature" (Kant 1972, 84), since we want different maxims to become a law of nature. I want the maxim ⌈Each one of us ought to go to the café⌉ and you want the maxim ⌈Each one of us ought to go to the pub⌉. If each one of us acted according to his or her preferred maxim, we simply would not meet and would thus produce the worst possible action profile, that is $[p^I, c^Y]$. Therefore, in the context of coordination problems, the following observation by Mackie (1977, 148), seems to hold true:

> The prescription "Think of a set of rules and principles the general adoption of which would best promote what you value and see worthwhile, and then follow them yourself, regardless of what your think others will do" may well be a recipe for disaster.

Note that, as we have observed for prisoner's-dilemma structured situations, coordination dilemmas may emerge when the parties are only motivated by their collective-directed concerns. Consider for example the case where an Englishman prefers the profile where everybody drives in England on the left, to preserve a distinctive national tradition, and an Englishwoman prefers that everybody in England drives on the right, to facilitate English people in buying cars and travelling abroad. This situation would have the character of a coordination

game, though each party only is motivated by his or her collective-concerned preferences.

However, in many cases parties having different self-directed concerns share the same collective-concerned views. Then a way out of the dilemma may be represented by focusing on the equilibrium profile they both prefer, when motivated by their collective-directed concerns. Even if the parties, according to their self-directed concerns, have different preferences regarding different coordination equilibria, their shared collective-concerned preference for one equilibrium can make this equilibrium salient, and therefore an appropriate choice, also when they are mainly motivated by their self-directed concerns.

Assume that you have a slight preference for pubs, but you know that I have a very strong preference for cafés, due to my health conditions (smoke makes me sick). Assume that it is our common knowledge that the collective of the two of us (where our communal likings are obtained by summing up our private likings) would be better in the café then in the pub. Then this should make the café salient to us, and you should go there (in the expectation to meet me), even if you do not care much about my health.

9.3.7. Assurance Dilemmas

A way out of the dilemmas determined by the clash of self-directed concerns may be found when all of the following conditions are true:

1. the agents share their preference for one action profile over all the others, out of their collective-directed concerns,
2. their collective-directed concerns prevail over their self-directed concerns,
3. items (1) and (2) are common knowledge.

Consider again the prisoner's dilemma, and assume that we (You and I) share the view that it would be communally better for us not to confess: Both of us prefer, when looking at the situation from the perspective of our communal concern, the action profiles where the total time of detention is lower (see Table 9.6 on the next page). This is expressed by the pattern of preferences in Table 9.6 on the facing page, to which the following ordering corresponds:

$$[o^I, o^Y] \succ [c^I, c^Y] \succ [o^I, c^Y] = [c^I, o^Y]$$

Assume also that the following is common knowledge between us: We share these collective-concerned preferences, and we intend to give priority to our collective-directed concerns. Then a solution to the prisoner's dilemma would be available to us: We should both omit confession. In fact, with regard to our collective-concerned preferences, the game has now become a coordination dilemma, where two Nash-equilibria are available: We both omit to confess, or

$I\backslash Y$	c^Y	o^Y
c^I	I_2, Y_2	I_3, Y_3
o^I	I_3, Y_3	I_1, Y_1

Table 9.6: *Assurance dilemma*

we both confess. However, not confessing is salient to both of us, being the situation we both prefer (and we are aware of this): Therefore we can safely choose to omit confession.

However, the only fact that all partners share the collective-concerned preference for an action profile (this being our common knowledge), is not sufficient to solve the dilemma when one has no certainty that his partner will give priority to her collective-directed concerns over her self-directed concerns.

Assume that we (the two prisoners) share the collective-concerned preference for the situation where we both omit the confession. Additionally, I intend to give priority to my collective-directed concerns over my self-directed ones. However, I know that you have the following self-directed ordering, and that you will act upon your self-directed concerns (since these will override your concerns for our collective, and for your colleague):

$$[c^I, o^Y] \succ [o^I, o^Y] \succ [c^I, c^Y] \succ [o^I, c^Y]$$

Under these conditions, I know that you are going to confess (since this is your dominant choice, when you take the self-directed perspective), and therefore the rational thing for me to do (out of my concerns for our collective), is to confess too. If I do not confess, we shall get into profile $[o^I, c^Y]$, where we shall get 10 years of detention (all for me), while if I confess, we shall realise profile $[c^I, c^Y]$ where we shall get 8 years (4 each).

In fact, my attitude transforms the prisoner's dilemma to me into an *assurance game*: I would do the co-operative action (omitting the confession) only if I am sufficiently sure that you are doing the same (on viewing the prisoners' dilemma as an assurance game, see Sen 1974).

Therefore, also when facing an assurance game, the Kantian attitude—doing what we would like everybody would do—may be irrational, even when one is aiming at the collective good and one's view of the collective good coincides the view of one's fellows. If I omit to confess I fail to achieve the profile that would produce the collective good, since you will confess, following your self-concerned preferences. The resulting profile (I confess and you do not) would be worse, according to my very collective-concerned likings, than the profile

where we both confess. Therefore, in the described condition, though I am acting out of our collective-directed concerns, rationality commands me to contribute to the profile where we both confess, which is the same sub-optimal choice would do when looking only at my individual interest.

As another example of an assurance-dilemma, consider the following elaboration on the bicycle example. Assume that that the profile I like most (in the bicycle example), out of my collective-directed concerns, is the profile where all go by bicycle, and I know that we all like most this profile, from our collective-concerned perspective. However, assume that I believe that most other people are guided by their self-directed concerns, characterised by the preferences indicated above. Then it makes no sense for me to decide to go by bicycle. By doing so, I will not realise the situation I would mostly like for my community (the situation where everybody goes by bicycle), but I would contribute to bringing about the nasty situation when a few cyclists (me included) are polluted and run over by their self-concerned fellows, all driving their cars.

Chapter 10

COLLECTIVE INTENTIONALITY

In Chapter 9 we have seen how agents may fail to participate in action profiles that would be advantageous to themselves and their collectives, due to their inability to cooperate with their fellows. In this chapter we shall see how this inability may be overcome by engaging in what we shall call *plural intentionality*.

This will require us to consider how individual reasoners, while maintaining their personal (and possibly diverging) opinions about what best suits themselves and their collective, may succeed in participating in a collective perspective. In particular, we shall consider how reasoners can develop a specific legal intentionality and endorse legal rules.

10.1. Coordination and Collective Intentionality

Under the heading of prisoner's dilemmas, coordination dilemmas, and assurance dilemmas, we have seen in Chapter 9 various situations where individual rationality is unable to find satisfactory solutions.

Such a solution is out of reach even for agents being selflessly motivated by their concerns for their fellows and their collective: When such agents have different collective-concerned likings, preferences, beliefs, or when they are not sure of the "pureness" of the motivations of their fellows, cooperation may still be out of reach.

The fact that some agents are acting out of their collective-directed concerns, can put even more stress on the interaction between the agents, providing new, and more serious, occasions for conflicts between them (as many tragic religious or political conflicts show).

In fact, on the one hand it seems easier to achieve consistency between collective-directed concerns, since having the same collective-directed objective means having compatible likings: If both of us like the same thing for our collective (for instance, we both want our company to be located in a certain new building), then we have a common aim, which will be satisfied by producing the same state of affairs (getting the new building for the company). Though we may disagree on the ways in which this result is to be achieved (we may evaluate differently different plans producing this result), we have a common starting point for our practical reasoning.

On the contrary, having the same self-directed likings (we both would like, for our individual offices, the same room in the new building) when limited

resources are available, means to have incompatible desires: My satisfaction would be maximised by giving all resources to me, while your satisfaction would be maximised by giving everything to you (if I get the room you do not get it, and vice versa).

On the other hand, however, it is more difficult to make one's collective-directed concerns consistent with the (self- or collective-directed) concerns of one's fellows, since the action-profiles which serve the interest of a collective concern a larger set of actions, by a larger set of subjects. When I consider the interests of my collective, the behaviour of all others becomes relevant (being susceptible of impacting on our collective interest), even if they are remote from me.

For example, I may not know who you are and have no private relation to you, but still have a collective-directed concern that you do not dump your industrial waste in the nearby river, or that you pay your share of the costs for the provision of public goods to our community.

On the contrary, when I am focused on my self-interest, most actions of the others would be irrelevant to me (I am not drinking or smelling your waste, since I live very far away from that river), or very unlikely to obtain for me (I would like you to give all your money to me, but I know that you would never do that), and therefore negligible to me. I would have no (serious) desires with regard to those actions, so that no conflict would arise with regard to them: My self-directed desires do not include that you do not dump your waste and that you give your money to me, and so they do not conflict with your preference for dumping the rubbish and keeping the money.

In the following we shall investigate how rational agents, concerned with their fellows and collectives, may approach in a rational way the dilemmas we have considered above. In particular, we shall investigate whether the idea of participating in a collective intentionality (rather than individually aiming at achieving what one views as the common good, according to one's collective-directed concerns) can provide a way out of strategic dilemmas.

10.1.1. Collective Cognitive States

One first clue comes from the distinction between individual and collective agency, and between individual and collective cognitive states.

Let us start by remarking that actions and cognitive states can be ascribed to collectives as well as they can be ascribed to individuals. In fact, in order to maintain themselves, also collectives need to act appropriately in their environment. The persistency of a collective can be explained by the ability of that collective of adapting itself to its environment, and to adapt the environment to itself.

A collective, obviously, will act through the behaviour of its members, a behaviour that (when it is intentional) will be ascribed by the agents themselves

to their collective: One will act as a member of one's collective, that is, one will view one's action as the participation in the functioning of one's collective. Consider, for example, how a football player may see his scoring a goal as an action that his team is performing, and how his colleagues will see this action as something they are performing too (as a team).

The capacity of a collective to react appropriately to its environment can be explained by the working of evolutionary mechanisms, which tend to preserve collectives having the best adapted behavioural reactions: Selective evolution, combined with the mechanisms of fixed and conditioned reflexes (see Section 1.1 on page 3), may explain why certain collectives may prevail and be imitated, while others may collapse and die out. This may apply, for example, to animal communities (consider for example social insects): The patterns of collective behaviour of these communities are well adapted to their environment, and having been "learned" through selective evolution.

The same explanation can also be applied to social systems: Consider, for example, how firms having ways of functioning that provide them with higher profits may not only survive and grow, but also tend to be imitated (so that their ways of functioning tend to be replicated), and how similar considerations apply to football teams winning more matches. This is the view of social evolution that has been defended, in particular by Friedrich Hayek:

> "Learning from experience" among men no less that among animals, is a process not primarily of reasoning but of the observance, spreading, transmission and development of practices which have prevailed because they were successful—often not because they conferred any recognizable benefit on the acting individual but because they increased the chance of survival of the group to which he belonged. The result of this development will in the first instance not be articulated knowledge but a knowledge which, although it can be described in terms of rules, the individual cannot state in words but is merely able to honour in practice. The mind does not so much make rules as consist of rules of action, a complex of rules, that is, which it has not made, but which have come to govern the actions of the individuals because actions in accordance with them have proved more successful than those of competing individuals or groups. (Hayek 1973, 18)

From this perspective, the fact that the members of a collective feel the conative disposition to act in ways that are traditional in their collective, out of their concern for their collective, can be viewed as the way in which behavioural patterns characterising a certain collective are stored and replicated. This would allow collectives to be characterised by certain peculiar behavioural practices, and would enable collectives having the most successful behavioural practices to persist and be imitated, and in this way would lead social evolution to select and preserve the most successful practices. This is the perspective from which Hayek (1976) looks at social evolution, a perspective which provides a social parallel to the idea of kin-selection developed by socio-biology (Wilson 1975; Wilson 1999, 186–7).[1]

[1] These cursory comments are not intended to provide an account of legal evolution, on which

Another interesting idea going in this direction is that *docility*—the tendency to adopt and reproduce whatever behaviour is practised and approved by society[2] —by ensuring the persistence of collectives, would also contribute to the survival of individuals belonging to these collective.

According to Simon (1983), docility can increase individual fitness directly (by facilitating learning and access to rewards), and also indirectly, by promoting the success of the group to which docile individuals belong.

10.1.2. Collective Rationality and Collective Cognitive States

However, in a changing environment, docility needs to be supplemented with ways to invent and experiment new behavioural patterns. In this regard, we may observe that collectives can also function according to the model of *rationality*. This means that a collective would have likings or preferences for certain states of affairs, would adopt, on the basis of these likings, the desire to achieve certain goals, would build and evaluate (according to its likings) plans to attain such goal, would adopt the intention of adopting those plans, would want to implement the instructions in those plans when the appropriate conditions are satisfied. Obviously, the states of mind would need to be possessed by the individual members of the collective, when they view themselves as reasoning and acting as members of their collective, to wit, according to their collective intentionality (on collective intentionality, see, for example, Searle 1995).

This idea requires us to specify when the intentionality of single members of a collective can be viewed as the intentionality of the collective itself. We need to distinguish one's attempt to participate in a cognitive state of one's collective, from the fact that one succeeds in doing so. We cannot here discuss the difficult problems involved in the notion of an attempt. However, we hope that the following example may suffice to exemplify the difference between participating in collective intentionality and failing to do so. Imagine a lunatic, declaring war on a foreign country, in the name of his own country. In such a case, the concerned individual certainly attempts to act for his own country, but it is equally certain that he fails to do so: Neither his action, nor the intention to perform it, can be ascribed to his country.

There have been various proposals to define the idea of collective intentionality on the basis of the idea of common knowledge (see, for example, Dunin-Keplicz and Verbrugge 1996). According to such proposals a cognitive state S is a cognitive state of a collective C if:

1. every member of C has cognitive state S, and
2. it is common knowledge in C that (1) holds.

see, among others: Luhmann 1996, chap. 6; Barberis 1996.

[2] See Simon 1983, 63–4: "Docility may be defined as the propensity to behave in socially approved ways and to refrain from behaving in ways that are disapproved."

This account however is not satisfactory for our purposes: A cognitive state is frequently attributed to a collective though not all members of the collective share it (it would be very difficult to find one single cognitive state that is shared by all members of a large collective, such as a national State), and it may also be argued that under certain circumstances the fact that all members of a collective have a cognitive state and are aware of this fact is not sufficient to make this cognitive state attributable to their collective (Gilbert 1996, 194ff.).

To understand the difference between having a cognitive state as an individual and having a cognitive state as a member of a collective, we need to specify what it means to accept a cognitive state. An adequate notion of acceptance is provided by the following definition:

> [T]o accept that p is to have or adopt a policy of deeming, positing, or postulating that p—i.e., of including that proposition or rule among one's premises for deciding what to do or think in a particular context, whether or not one feels it to be true that p. (Cohen 1992, 4)

Thus, it seems that we may say that a cognitive state may be attributed to a group, when the members of the group have adopted the shared policy of accepting this cognitive state when acting or reasoning for the group, and this is their common knowledge. This problem has been investigated in particular by Tuomela who, in a number of contributions (see in particular Tuomela 2000), has provided a deep and precise analysis of collective agency and collective intentionality. In particular, he defines collective intentionality (we-intentionality) as follows:

> A member A_i of a collective g we-intends to do X if and only if:
>
> i. A_i intends to do his part of X (as his part of X);
> ii. A_i has a belief to the effect that the joint action opportunities for an cognitive performance of X will obtain (or at least probably will obtain), especially that a right number of the full-fledged and adequately informed members of g, as required for the performance of X, will (or at least probably will) do their parts of X, which will under normal conditions result in a cognitive joint performance of X by the participants;
> iii. A_i believes that there is (or will be) a mutual belief among the participating members of g (or at least among those participants who do their parts of X intentionally as their parts of X) to the effect that the joint action opportunities for a cognitive performance of X will obtain (or at least probably will obtain);
> iv. (i) in part because of (ii) and (iii). (Tuomela, forthcoming)

Following Tuomela's suggestion, we extend the notion of a collective cognitive state beyond the notion of a common belief (as introduced in Definition 9.2.2 on page 252):

1. We admit collective cognitive states concerning actions performed only by some members of the group.

2. We include in collective cognitive states not only beliefs, but also other kinds of mental states (including intentions and desires).
3. We include attitudes which are not accepted by each single member of the group.
4. We assume that acceptance by the group does not need to exist in the moment when the collective cognitive-state is adopted by a single member of the group.

Let us consider the third condition, to wit, the fact that the acceptance of a cognitive state by all members of a group is not necessary for the cognitive state to be attributed to the group. In this regard, we can substitute the requirement of everybody's acceptance with a functional and gradual approach. The group has a cognitive state to the extent that the acceptance of this cognitive state by members of the group plays the appropriate *functional role* in the reasoning of the group, that is, in the decisional process that will determine the action of the group (on a functional view of cognitive states, cf. Dretske 1986). We believe that indeed the existence of collective cognitive states contributes to explaining why we can look at collectives from the *intentional stance*, that is, why we can interpret and forecast the behaviour of collectives by assuming that they have cognitive states.[3]

Consider the example of a football team. The adoption of a certain objective by the president of the team (concentrating efforts in winning a certain competition) is to be viewed as a goal of the team (even if it is not communicated to the players, but only to the coach), since it will lead the coach of the team to devise a multi-agent plan to achieve that goal. The adoption of this plan by the coach is again to be viewed as an intention of the team, since it will lead each individual player to adopt this plan, and to adopt the plan of performing the task that the plan assigns to him. Finally, each player's desire to perform his task and his plans to make it in a certain way—in the name of his team—still can be ascribed to the team (though his colleagues may not be aware of all the details of such plan), since implementation of those plans will lead the team to act appropriately.

Thus, a cognitive state can be attributed to a group, though many members of the group do not share it, and possibly are not even aware of it. Most members of the group must rather share the general acceptance of the collective reasoning process to which those cognitive state belongs (a process in which different agents play different roles), and offer their availability to play their part in this process.

Let us move to the last weakening, that is, the fact that the acceptance by other members is not required at the time when an agent participates in the formation of the cognitive state by the group: The acceptance of the others may follow later. Consider again the case of a football team. A multi-agent

[3] On the intentional stance, see Dennett 1989. For a discussion of possibility of attributing intentionality to artefacts and collective bodies, see Sartor 2003 and Sartor, forthcoming.

plan of action (for example, the strategy of renouncing further attacks in order to defend a goal that has just been scored) may be adopted by one player in the name of his team, in the belief that the other players will join this strategy. What will decide whether this strategy is a strategy of the team, and not a just a strategy individually (and wrongly) adopted in the name of the team by a single player, will be the subsequent attitude of the other members of the team. The interpretation that one gives to one's action—viewing it as a part of common plan of action—will be correct if a sufficient number of the others join in this plan, so that the individual action becomes part of a joint action; it will be wrong if the others do not join. This leads us to define as follows what it means to attribute to a collective a cognitive state of a certain kind (perception, belief, liking, goal, intention, and so on), that is, to view a certain cognitive state as a communal attitude of that collective:

Definition 10.1.1 *Cognitive state of a collective (collective mental state). A cognitive state S of kind T is a* collective cognitive state *of a collective C, with regard to a certain decisional process of C when*

1. *certain members $c_1, \ldots, c_n$ of collective C attempt at participating in cognitive state S,*
2. *thanks to 1, cognitive state S effectively plays a type T role in the decisional process of collective C.*

The issue concerning whether cognitive state S plays the functional role proper to a cognitive state of type T in the decision process of collective C is an empirical question, to be decided according to the way of functioning of C (though the functioning of the collective may, in its turn, be governed by shared rules, as we shall see).[4] This may require that S is adopted by a sufficiently large number of members of C, vesting appropriate roles (consider the issue of when a certain judicial practice may be viewed as generating a binding rule), that S is expressed in appropriate ways (consider for example voting procedures as a way of expressing the attitude of the people or of a parliament), and so on.

Going back to our football example, we may say that one player's collective intention to adopt a defensive strategy contributes to the adoption of a defensive strategy by his team, when a sufficient number of players are adopting (or will adopt) the intention to defend and this is (or will be) common knowledge of these players. Our notion of a collective cognitive state allows us to distinguish clearly two different attitudes and ways of reasoning:

- *collective-concerned reasoning*, namely, reasoning on the basis of one's collective-directed concerns;
- *collective reasoning*, namely, participating in the reasoning of one's collective.

[4] On the link between collective agency and collective intentionality, see Pettit 1993, and more recently Pettit 2002. On personifying a political community, see also Dworkin 1986, 167ff.

As we shall see in the following there is no necessary conflict between these two attitudes. In particular, while aiming at pursuing one's view of the common good, one may be complying with the determinations of one's collective, or doing what is not only permitted but also encouraged according to these determination (consider one's voluntary engagement in a non-governmental organisation acting for some collective purpose). However, as we shall see, conflicts are possible: Acting according to what I view as the good of my collective may conflict with the determinations of the same collective.

10.1.3. Rational Adoption of a Collective Cognitive State

We need to introduce a further distinction. This concerns the difference between the existence of a collective cognitive state and the existence of an individual attempt to participate in such a cognitive state: Though the community's cognitive state supervenes upon the participation of individuals, individual attempts can be unsuccessful.

To identify the attitude of an individual that tries to participate in a collective cognitive state, we use the expression *plural* attitude, and we speak correspondingly of a *plural* cognitive state, to refer to the state of mind an individual agent who views his or her endorsement of such state as his or her participation in a collective state (an opinion which may be wrong).

We need now to consider when one may rationally adopt a plural attitude. Rational plural endorsement of a cognitive state seems to require two conditions:

1. the belief that the collective is likely to have this cognitive state;
2. the belief that this cognitive state would be better, for the community, than any alternative cognitive state the community is likely to have.

Condition (1) refers to the fact that one needs to believe that by adopting a cognitive state in the name of one's community, one will really contribute to form that collective cognitive state. When a cognitive state can be attributed to my community only if others participate in it, and I know that they will not participate, it makes no sense for me to try to participate in my community's intentionality (though I can act individually according to my collective-directed concerns). On the other hand, if I value consent and participation, the more people will join in (and the less people will refuse to join in), the better it is. Moreover, if I value rational deliberation, the more people will join in on the basis of a rational reasoning process, the better it is.

Consider again the example of the football team. When I form the intention of participating in my team's attack strategy, then I must hope that a sufficient number of my colleagues are joining in that cognitive state, so that this state may play the appropriate role in the team's decisional process (it may become the intention of my team, and determine its way of playing). As a matter of fact, I also hope that all of my colleagues will join in, so that we may really

play together. These hopes are to be intended as *factual forecasts*. It makes no sense that I intend to participate in a certain strategy of my team, when I know that others will not join me in that strategy (so that my team will not adopt the strategy in which I intend to participate).

Condition (2) refers to the fact that one must believe that one's plural endorsement will contribute to the satisfaction of one's collective-directed concerns (it will contribute to the common good, as one sees it), or anyway to what one views as the appropriate stand for one's community. Note that condition (2) does not require that one believes that the cognitive state at issue is the best possible choice for one's community (the cognitive state that it would be best for the community to have). It rather requires that one believes that this is the best cognitive state in which one could participate, in the name of one's community (and in any case that participating this way is better that acting alone, though for the common good). In other words one cannot consider all logically possible cognitive states: One's choice—when one intends to participate in collective reasoning—is restricted to those cognitive states that are practically possible, namely, those which satisfy conditions (1) and (2) above.

For instance, in the football example, to join an attack I must believe that my joining the attack will contribute to the good of my team, more than any alternative strategy in which I may participate, and in any case more than my playing a different strategy alone. I need not believe that the attack is the best strategy that my team could possibly play.

In evaluating one's participation in collective intentionality, one must also consider that the significance of a collective cognitive state depends on that cognitive state playing an appropriate role in the deliberation of the collective. Thus, when I participate in a desire of my collective, this should correspond to likings (values) of my collective; when I participate in the adoption of a plan in the name of my collective, this should be a way of satisfying a desire we collectively adopt, to be evaluated according to collective values; when I feel the want to do something in the name of my collective, this should be required by a collectively adopted plan.

For instance, my participation in the intention (of my football team) to play an attack strategy should be linked to my team's desire to win the match, which will lead us to get a good position in the national cup. Similarly, my participation in the team's adoption of an attack plan should be linked to our common aim to achieve this objective, according to the indication of our coach.

Let us try to analyse further, in relation to this football example, the connection between the two conditions we have just indicated, and in particular, to establish how condition (1) restricts the scope for condition (2).

Assume that I believe that the only collective cognitive state in which I may join, according to condition (1) will be the attack strategy. In fact, I know that my colleagues are determined to pursue an attack strategy, according to the indications of our coach, and this will be my team's strategy, whatever I do. How-

ever, I also believe that my colleagues (and our team) are wrong: A defence strategy would be a much better choice for my team. To win the match we should defend our current advantage, rather than continue to attack. What should I do, under these conditions?

Since I have no possibility of influencing the behaviour of my colleagues through my choice, I need to consider which one of the following profiles is better:

a. To join my colleagues in the attack strategy, so that we all co-ordinate our efforts in attacking, according to a collective intention.

b. To adopt the defence strategy alone, and act individually (though on the basis of my concerns for my team), detaching my individual intention from the collective intention of my team (and so disrupting, to a certain extent, the implementation of that intention, and more generally, the decisional process of our team).

Assume that I believe that option (*a*) is better than option (*b*). Then what I should do is to join, as a member of the team, the collective intention of playing attack. This is not in contradiction with my belief that it would be better if we all shared the collective intention of playing defensively, since I have no way of making my community adopt that intention.

Assume that, on the contrary, I believe that option (*b*) is better than option (*a*). Then what I should do is to abandon the attempt of engaging in collective intentionality, and adopt an individual defensive strategy. I would then act for (what I view as) the good of my team, but not as a participant in the intention of my team.[5]

The first decisional context is represented by Table 10.1 on the next page, where we have adopted the following notation; I means "I," O means "the other players," a means "attack," d means "defence," and subscript numbers indicate the position of a profile according to the preferences of the indicated player, (for instance I_1 indicates the most preferred choice of player I). The matrix shows how for all the other players the dominant choice is to attack, since in this case they will obtain either their top option (we all attack together) or their second best (I defend alone while all others attack). Therefore I know that the others will be attacking. Given this assumption, my choice is restricted to the alternative between the profile were I join the attack and the profile where I defend alone while all the others are attacking. Therefore I will choose to join the attack.

Table 10.2 shows a different assessment of the situation. The dominant choice for the others is still to attack, as above. However, I now prefer (in

[5] Obviously, the conclusion that option (*b*) is better than option (*a*) requires a complex evaluation, which takes into account not only the immediate effects of my behaviour, but also its impact on the cohesion of the team, on the mutual trust that we have, on the functioning of our deliberative process, and so on

$I\backslash O$	a^O	d^O
a^I	I_3, O_1	I_2, O_4
d^I	I_4, O_2	I_1, O_3

Table 10.1: *Rational choice to collaborate*

$I\backslash O$	a^O	d^O
a^I	I_4, O_1	I_2, O_4
d^I	I_3, O_2	$I_1, 0_3$

Table 10.2: *Rational choice not to collaborate*

the interest of my team) the profile where I defend alone while all the others are attacking, to the situation where we are all attacking together. Therefore, I should defend alone, abandoning the collective intention to attack, though still acting for (what I believe to be) the interest of my team.

10.1.4. Collective and Plural Optimality

As the football example we have just discussed shows, the question "What cognitive state (liking, desire, intention, want) should we adopt?" can be given two distinct meanings.

The first meaning expresses what we may call *collective optimality*: "What cognitive state would it be better that we all adopted?" In the example we have just discussed, my answer to this question would be "We should all adopt the collective intention of defending."

The second meaning is *distributive*, or *plural optimality*: "To what cognitive state of my community should I participate, along with each one of my fellows?" To this question my answer (according to the matrix in Table 10.1) will be: "I should join the collective intention of attacking."

The first meaning expresses the idea of the *collective optimality* of a collective cognitive state.

Definition 10.1.2 *Collective optimality of a cognitive state. A cognitive state of*

a cllective C is collectively optimal *for members of C, when optimal cognition by collective C would lead C to adopt that collective cognitive state.*

Note that I may consistently believe that a collective cognitive state is optimal, and that such cognitive state will not come to existence, whatever I do: My fellows (especially those who are able to contribute to the intention of the community) are not going to join me into that cognitive state, in the time frame in which this would be useful. Therefore, my belief in the collective optimality of a possible collective cognitive state is not sufficient for justifying my attempt to participate in that cognitive state (I should not attempt at participating, if I know that the attempt is going to fail). This leads us to the idea of the *plural optimality* of a cognitive state. The idea of plural optimality is different from the notion of collective optimality, as characterised in Definition 10.1.2 on the page before, since it takes into account the chance that one's fellows may be wrong, and that one is unable convince them in time.

Definition 10.1.3 *Plural optimality of a cognitive state. A cognitive state M is* plurally optimal *for an individual j, with regard to a community C, when optimal cognition would lead j to plurally endorse M, as being a cognitive state of C.*

By relaxing the idea of plural optimality—according to the idea of bounded rationality—we may obtain what we may call *participability*.

Definition 10.1.4 *Plural adoptability of a cognitive state (participability). A collective cognitive state M is* plurally adoptable *or* participable *to an individual j, if*

- *participating in M is better for j that acting independently for the common good, and*
- *j cannot think of any superior incompatible collective cognitive state in which j could effectively participate.*

This is the idea that is relevant, when one is considering whether one should endorse a plural cognitive state. The evaluation of participability can be viewed as resulting from the product of two factors:

1. the importance (the value-impact) of adopting a certain cognitive state, that is, the advantage that its adoption would have for one's community, and
2. the chance that the community will adopt this cognitive state, that is, the probability that, by attempting to participate in a collective cognitive attitude, one succeeds in participating in it.

By using the expression *product*, we do not exactly refer to mathematical calculation ($importance * chance$), but rather to the need of combining these two aspects. Accordingly, I may choose to attempt to participate in a certain collective intention (the defence strategy, for the football team) even if there is only a

slight chance that my fellows will follow me, if I am sure that the adoption of this intention would be very beneficial to my team (while my failure to converge with them would have a negligible cost). On the other hand, I may prefer attempting to join an intention that has a greater chance of being adopted by my community (the attack strategy), though I believe that its collective adoption would be less beneficial that the adoption of a different strategy (the defence strategy).

Similarly, consider how a judge may choose to adopt a rule he believes would lead to a much better social practice, if it were adopted by everybody (for example, a rule allowing for compensation of moral damages also in the tort domain), though there is only a slight chance that his colleagues and citizens will join him. Consider how, on the other hand, the judge may choose to stick to a rule he believes to be less beneficial to his community (e.g., allowing compensation only for damages to health), since he is knows that everybody endorses this rule, and he expects that a different decision by him would not be followed by his colleagues, and would therefore only cause uncertainty and useless litigation.[6]

10.1.5. The Gamble of Participation

Thus, the choice of adopting a certain collective cognitive state, at least for those agents who may influence, through their behaviour, the attitude of their fellows, appears to be the result of a gamble, where one has to consider the two aspects we mentioned in Section 10.1.4 on page 277: importance (or rather value-impact) and chance.[7]

The second aspect (chance) characterises participation in collective attitudes. When one intends to contribute to a collective cognitive state, one must take into account beliefs and propensities of all other agents with whom the one intends to concur into forming that collective cognitive state. All these agents form the *audience* that one must bear in mind when one is giving a plural reference to one's behaviour.

Note that by an *audience* here we are not only referring to the people that may hear or read a verbal message addressed to them, nor to the people that a speaker intends to convince through arguments (as in Perelman and Olbrechts-Tyteca 1969). For our purposes a broader notion of an audience is required, which also includes people one addresses in tacit communication, and even people to whom one refers when one tries to anticipate the reasoning and the behaviour of others, in order to converge with them into shared attitudes and behaviour. From such a perspective, one's audience is the set of agents with

[6] Our ideal of rational participation can be linked to the view that the task of the lawyer (and of legal science) consists in the formulation of the best possible law, that is, in identifying the best legal choice among the choices that are factually possible. For this characterisation of the purpose of legal science, see Lombardi Vallauri 1989, 7.

[7] For simplicity's sake, we omit to consider a third aspect of this evaluation, i.e., the degree of certainty with which one can express judgements concerning importance and chance.

which may concur in forming the collective cognitive states in which one wants to participate. Therefore, one's audience consists in a set of minds rather than a set of hearers and speakers. With reference to such an audience (even when silently following the train of one's own thoughts) one develops legal and moral arguments "in which he expects all his audience to concur with him" (Hume 1978, 272).

One may need to consider different audiences, these being related to the different collective cognitive states in which one wants to participate. For example, the audiences a judge needs to consider include:

- the parties in the proceedings, whom she would like to join her reasoning concerning the case at hand (though in this regard, her attitude is sufficient to bring about the community's attitude);
- her colleagues with whom she would like to contribute into forming shared rules governing judicial decision-making;
- her fellow citizens with whom she would like to concur into forming the law of her country.

She would fail to participate in a collective attitude if the parties considered her decision to be arbitrary, if her colleagues adopted different rules and considered her decision to be wrong, if her fellows disregarded the *ratio* of her decision as being absurdly incompatible with their beliefs and practices. In relation to each of such audiences, however, the judge is not reporting her view of her audience, nor trying to convince them: She is participating, in her official role, in the process through which a collective attitude is formed, and the very input she is providing may contribute to changing the outcome of this process.

More generally, whenever one evaluates one's chance of success in participating in a collective attitude, one needs to consider how one's action (and in particular the very fact of publicly attempting to participate in a certain attitude, and of publicly expressing the reasons supporting one's choice) can modify the chance that such an attitude is adopted by one's community.

Moreover, besides considering the specific behavioural outcome that the collective attitude is likely to produce, one also needs to consider how that attitude will fit into the decisional process of one's collective.

Thus, when I try to lead my fellow players to participate in a defence strategy, I need to consider that adopting this strategy would imply disregarding the instructions of our coach, which may have further negative impact on the functioning of our team (if everybody starts disregarding the coach's indication whenever one believes they are inappropriate, we would end in chaos).

Similarly, before adopting a decision that openly contradicts a statutory prescription (or goes against the clear intention of the legislator), a judge should consider that even if her choice is successful (her colleagues follow her, and her fellow citizens approve her choice) such decision might have negative impacts on future coordination between legislation and judicial decision-making.

Respect for the (rationality of the) decisional process of one's community may command judicial restraint.

10.2. Participation as a Coordination Game

The decision to participate in a collective cognitive state can be viewed as the solution to a *coordination game*. There are various collective cognitive states that I (according to my concern for my collective) prefer to the situation where we have no collective cognitive state. For instance, in the football example, having any of the collective strategies of defending or attacking is better than having no collective strategy at all.

Also for my fellows (some) such cognitive collective cognitive states are better than the situation when we have no collective cognitive state at all. Therefore, to us all, any of such collective cognitive states is a coordination equilibrium: Each one of us prefers to join in a collective cognitive state rather than acting alone (or attempting to bring about a different collective cognitive state, and failing to produce it).

10.2.1. Salience as a Guide to Success

To succeed in joining my fellows in a collective cognitive state, I need to anticipate what they will do, and this requires me to understand what equilibrium would be salient to all of them, when the time for their decision comes. Salience may be based upon different factors:

- Explicit agreement. We have explicitly agreed to adopt together a certain cognitive state (assume that, before entering the playing ground one of us asked all others: "Do you agree to attack?" and everybody replied "Yes").
- Currently-shared endorsement. Most of us are currently collectively endorsing a certain cognitive state (my football team has the intention of playing an attack strategy), which is functioning as our collective cognitive state and this is our common knowledge. If I join this cognitive state, I insert my attitude into an existing framework, which has already led us to further collective cognitive states and behaviours (we are now attacking). The currently adopted cognitive state tends to be more salient to us than any alternative cognitive state, and has a high chance of persisting.
- Currently-shared optimality-belief. A certain cognitive state appears, to us all, as the best choice out of our collective-directed concerns (with regard to this behaviour, our collective-concerned preferences overlap). Then, firstly each one of us will have this pattern in mind (and know that the others share this thought), and secondly each one will be likely to join in (and know that the others will join in as well). Assume that each

player in our team believes that the optimal strategy for us all would be defence, and this is common knowledge. This makes defence salient to us all, so that one may safely adopt this intention as our collective intention, expecting that the others will join.

- Currently-shared meta-rules. We share the collective intention that we shall adopt certain collective cognitive states under certain conditions, and this is our common knowledge (for instance, we know that we all accept that we shall adopt the strategy of attacking whenever we are playing at home and we are not winning the match). Then I can expect that under such conditions we all will adopt the corresponding attitude.
- Currently-shared values and principles. The adoption of a cognitive state follows from collective cognitive states that most of us (or the most competent, or most knowledgeable, of us) are already adopting. Shared values, principles, standards—i.e., what Aristotle (*Topics*, 104a8–11) calls *endoxa*—besides being endowed with a certain cognitive plausibility (because of the merit of the processes of collective learning from which they result)[8] are endowed with a salience of their own.
- Equilibrium-forecast. I can forecast that most of my fellows will join in the collective cognitive state, for some of the reasons above. This allows me to forecast that also the others (though not sharing these reasons) will join in, understanding that no alternative collective cognitive state has a chance of becoming a shared equilibrium.

According to the list of clues we have just seen, in many cases agents can converge on the same collective attitude and solve to a certain extent the problem of double contingency (Section 9.2.2 on page 251). However, having the same collective attitude is not a fully adequate solution to double contingency since it is still possible that agents follow self-directed concerns, disregarding the collective intention. This conflict is taken care by the mechanism of sanctions, on which we shall comment later.

10.2.2. Rational Participation and Consent

From our perspective, rational adoption of a plural cognitive state is constrained by the need to find a real convergence with one's fellows. This distinguishes our approach from the view that the optimality or the rationality of a cognitive state is a sufficient (and necessary) condition for its collective adoption.

In particular, we need to distinguish our approach from the well-known theory—advanced by Habermas (1971) and developed with regard to the law

[8] The cognitive merit of processes of collective learning of a certain community depends on the contingent character of these processes, which may vary according to the context in which they take place. For instance, they can be based on open critical discussion (joint with distributed processes of experimentation and imitation), or on orchestrated propaganda.

by Alexy (1989)—that a proposition is true (justified) when adopted in an ideal discursive situation (see Section 3.3.4 on page 111).

First of all, for us cognitive optimality does not depend just on dialogue: Perception, experiment, reasoning, implicit cognition are an essential part of it.

Secondly, and most importantly, plural endorsement (participability) is linked to *plural cognitive optimality*, rather than to collective cognitive optimality. When one tries to figure out what one should think or do, as a member of one's community, one should not refrain from overcoming, as we said in Section 3.3.5 on page 114 the limits of one's own current cognition, and modify one's cognitive states. However, one has no power of modifying the cognitive states of one's fellows (except that by providing certain cognitive inputs to their reasoning), and one cannot act on the basis of the assumption that they will accept whatever one believes to be cognitively optimal.

The problem here lies in the inevitable and inextricable intertwining of the particularity and the universality of reason (as we said in Section 4.2.4 on page 131): The only way I have to check whether a thesis is cognitively optimal (and in this sense universally valid) is to apply my cognition to my own perceptions and cognitive states. Therefore, I will believe that a thesis is cognitively optimal whenever I still believe in that thesis after an adequate (but necessarily limited) cognitive effort. The reasoning through which I can try to establish whether a thesis should be believed—whether it is cognitively optimal, namely, whether it would be adopted by everybody in an ideal cognitive situation—is no different from the reasoning through which I come to believe this thesis, and is equally fallible. Therefore, my assumption that I am right—and that I should indeed maintain the beliefs and conative attitudes I happen to have, to wit, that these beliefs correspond to optimal cognition—is insufficient to ensure that you will agree with me, so that we may join in a collective intention (on disagreement, see Rescher 1993, and on disagreement in legal reasoning, see Waldron 1999b).

To clarify this issue, let us consider a further example. Assume that you and I are writing a paper together, which neither of us can write alone (since, for example, the paper requires a combination of law and logic, and I am a lawyer, while you are a logician). I think that it will be optimal for us to develop approach A, which I believe to be the right solution to our problem: I should write the introductory part A_1 and you should provide the formal analysis in part A_2. However, you think that B is the right approach: I should introduce it in part B_1 and you should formalise it in part B_2. Both of us sincerely believe that one of the two approaches is right, but unfortunately our beliefs do not match. In such a context, my belief that approach A is right (so that you too would adopt it in a cognitively ideal situation) and B is wrong, does not license the plural plan $\langle A_1, A_2 \rangle$, since I know that you are not going to choose this plan.

In the face of your opposition, I can still try to implement what I believe is better for us both, but to do that I need to move from a collective to an

individual view. Knowing that you will not collectively choose the right action (A_2), I can succeed in having it done by motivating you externally—for instance, by paying you, coercing you or cheating you. The abandonment of the plural perspective does not necessarily imply egoism: I can push you into doing A_2 since I believe this is good for both of us, or even for you (you need a good paper, as A would be, to improve your career chances). I can act altruistically, but still not collectively.

10.2.3. Rational Participation in a Future Collective State of Mind

Though our notion of participability does include a reference to the chance of successful participation, one's rational attempt to participate in a collective cognitive state does not presuppose that one's fellows already share that cognitive state: I may expect that my fellows will later converge in the collective cognitive state to which I am attempting to participate. Participation does not necessarily presuppose either an agreement with others (I may expect you to agree later), or a previous communication with others (my action implementing my plural choice can be the very way in which I communicate my choice). What is necessary is that one can forecast—with a degree of certainty that is sufficient, considering the importance of collective adoption—that a sufficient number of one's fellows are going to converge on that cognitive state when that cognitive state is to play its role in the decisional process of the community.

One way to establish whether my fellows are going to share a certain cognitive state is through vicarious reasoning. I may anticipate that you will join me in adopting a certain attitude if I can mimic the reasoning process that you would instantiate when wondering about what collective attitudes you should participate in, as a member of our community. I need to hypothetically adopt your current epistemic and conative states, and in particular the ones you are adopting in the name of our community, and see how, through a reasoning process, you would move from having those states into adopting a certain other collective-concerned attitudes. I may also anticipate that you will have new cognitive inputs in due time (for instance, since I will provide them), so that you will be able to use these inputs in your reasoning. I may anticipate that your reasoning will lead you to change your views and to abandon some of your beliefs. I may even intend to produce this result by providing you with new cognitive inputs. However my vicarious reasoning needs to start from the views you are currently endorsing (rather than from my current views) and from the views you are attributing to our community.

Another way in which people may come to share a collective cognitive state is through dialogue or collective *deliberation*. This consists in engaging in communicative interactions where different people express their views on a collective issue, articulate their collective-concerned attitudes, present the reasoning steps that should lead their collective to adopting certain deliberations (so that these

collective-concerned attitudes become collective ones), take into account the view of others and engage in a learning process that may lead them to revise their initial opinions. In this process, by sharing reasons through language people try to come to a common point of view. What cognitive states the discussing partners are committed to adopt, as argumentation goes on, depends on different aspects: on the initial beliefs and attitudes of each of the partners, on the contents of their interchange, on the rules that govern the particular argumentation process they are engaged in (the *argumentation protocol*, see Section 11.1.1 on page 304). In any case, if the dialogue partners reach shared conclusions, these conclusions are obvious candidates for collective intentionality.

A difficult issue concerns the extension of the participation in the dialogue. On the one hand, a larger participation provides additional cognitive inputs to each participant, and gives additional importance to shared premises and outcomes (as preconditions of a larger future cooperation). On the other hand, a larger participation entails a higher "computational" burden over each agent, in order to process all information provided in the dialogue. Thus, dialogues enhance the chance of reaching collective cognitive states and the cognitive quality of those cognitive states, so long as enough time and energy is available. However, engagement in a dialectical process is not the only way to come to a collectively adopted intention, and in any case, it is not constitutive of the correctness of such an intention (as we have argued Section 3.3.2 on page 106).

10.2.4. The Intrinsic Value of Participation

Though effective participation in collective intentionality may require that one sometimes does not aim at implementing what one views as optimal for one's community, such participation has a distinct value, which makes it particularly appealing, whenever it is possible. Consider that when I am acting individually, I am taking a *parametric view* with regard to the actions of other agents. My own action is the only thing I am deliberating about. Expected attitudes of others, like expected natural events, only provide the context for my choice, determining my chances of generating (though my action) certain results. This also happens when I am taking a strategic perspective, and I am forming my own expectations by anticipating the reasoning of other agents. To use (or, possibly, to abuse) a well-known Kantian idea, when I am taking a parametric choice, I am viewing others as *means*, rather than as *ends*: Even when I am acting on my own for what I view as a value for my community (what I believe I should desire from the collective-concerned perspective), I am not recognising my fellows as deliberators within my own deliberation.[9]

[9] One of the formulas expressing Kant's categorical imperative is indeed the requirement that every one "should treat himself and all others, never merely as a means, but always at the same time as an end in himself" Kant (1972, 95).

This is not the case when I am reasoning plurally, namely, when I am trying to participate in the collective reasoning of my community. In this case I recognise the autonomy of my fellows and attempt to converge with them into what may be viewed as our common point of view.[10]

10.2.5. The Process of Collective Reasoning

Also collective reasoning can be developed both downward and upward. According to the downward direction, one starts with likings (values) one attributes to one's community, from this one moves into desires (goals) one has in the name of the community, from this into having collective intentions and wants.

Reasoning schema: *Plural desire-adoption*
(1) participating in value V;
(2) believing that V is achievable
——— IS A REASON FOR
(3) participating in desiring V

Reasoning schema: *Plural plan-adoption*
(1) participating in desire G;
(2) participating in the belief that plan P is a satisfactory way of achieving G
——— IS A REASON FOR
(3) participating in the intention of implementing plan P

Reasoning schema: *Plural intention-detachment*
(1) participating in the intention to do A, under condition B;
(2) participating in the belief that condition B obtains
——— IS A REASON FOR
(3) participating in the intention to do A

Those reasoning schemata correspond to the schemata we have previously introduced for individual reasoning. We have just added the fact that, when engaging

[10] This may be linked to the notion of reciprocity, on which see for instance Rawls (1999a, 136), who says that those proposing certain terms of fair cooperation must "think at least reasonable for other to accept them," though we emphasise the factual chance that other may converge with us, or at least the chance that they may find acceptable the view we are endorsing, rather than the reasonableness of their acceptance. On reasoning in the first person plural, see Postema 1995 and 1998. On the plural perspective, see also Gilbert 1996 and Tuomela 2000. For an excellent collection of contributions on public reason, see D'Agostino and Gaus 1998.

in collective reasoning, one is viewing oneself as participating in the decisional process of one's community. Note that, as we said before, at the time when one is reasoning, one does not know for certain whether the community will adopt the cognitive state in which one wants to participate. Rather than "participating in cognitive state S," we should rather say "plurally endorsing cognitive state S."

Also with regard to collective cognitive states, rational agents may apply a doxifying approach: Rather than directly trying to participate in a collective cognitive state, one may ask oneself whether one should participate in it. Thus, the agent should consider the following questions:

1. "What should I like, in order to participate, along with my fellows, to form the likings of my community?" or more shortly "What preferences should I endorse, on behalf of my community?"
2. "What should I desire, in order to participate, along with my fellows to forming the desires of our community?" or more shortly "What is desirable to us?" or "What values and goals should I pursue, on behalf of my community?"
3. "What instructions should each one of us adopt, in order to participate, along with his or her fellows, to forming the intentions of our community?" or more shortly "What instructions (rules) are binding, on behalf of my community?"
4. "What wants should I adopt, in order to contribute, along with my fellows, to the determinations of my community" or more shortly "What ought I to do, as a member of my community?"

As we observed in Chapter 3, thanks to doxification, practical reasoning can also be developed upwards. In this case, one would start with lower level conative states (a want, an obligation or an intention) one is adopting as a member of a community, and start wondering: "Why should we want (intend, be obliged) to do this action?"

Assume, for instance, that I wonder whether I should pay a certain tax. The first answer consists in finding a rule I believe to be collectively binding, for example a rule of tax law according to which one has to pay taxes in a certain percentage of one's income. I will then ask myself: "Why should I (plurally) adopt this rule in the name of my community?" An answer to this further question may consist in finding a higher-level rule which requires adopting the tax rule (for example, a rule empowering the Parliament to issue binding laws). Finally, the question, "But why should I (plurally) adopt this higher rule?" may be answered by finding that its practice serves certain collective values I am endorsing (legal certainty, democracy, and so on).

Additionally, I may find some goals that are directly served by the practice of the tax rule (for instance, providing resources for public goods, or helping the less well-off among my fellows), goals that contribute to realising collective

values. Besides reasons for paying the tax, I can have reasons against paying it. For instance, I may believe that the money will also be used for other objectives, like aggressive warfare, whose achievement will impair the realisation of the values my community should pursue.

10.2.6. Collective Practical Theories

As individual rationality, also collective rationality can be seen as contributing to the production of a practical theory. Such a theory will include the various cognitive states that a community adopts: conative states (likings, desires, intentions, and wants), their doxified reformulation, and the epistemic beliefs the acceptance of which is relevant to the adoption (or the retraction) of these conative states (beliefs concerning, for example, causal connections between actions and the realisation of collective values, beliefs concerning the conditions for applying a plan's instructions, etc.).

The construction of such a theory is a task that is collectively performed by the individual members of the community, who are reasoning on behalf of their community, and who are trying to converge on such a theory. Thus, one needs to view one's participation in collective reasoning as one's contribution to solve a specific collective problem, but also as one's contribution to the practical theory of one's community. One may also consider how to change that theory, but this must happen in ways which, being accepted by a sufficient number of relevant members of the community, can produce a new functioning practical theory for the community.

Beside this, when one intends to put forward a change in the current collective practical theory, one must consider what effects this change is going to produce on the theory as a whole. Thus, we may repeat for collective practical theories the coherence requirements we stated in Section 4.1.4 on page 125.

First of all, a collective practical theory must be an efficient reasoning tool: It must be usable by (a sufficient number of) members of the community (in the appropriate positions) with a limited effort, it must be controllable by them, and easily updateable.

Secondly, there should be a certain degree of support between beliefs in the theory. This means that rational reasoning patterns must allow reasoning to go from one belief to the other in the theory. This is good, since it means that each lower element in the theory can be inferred from higher elements, and the latter can be rationalised according to lower elements.

A third consideration pertains to the capacity of a practical theory to assimilate (to explain) the inputs provided by non-rational cognition. We have discussed this issue in Section 1.5 on page 41, where we observed that reason is no autarchic cognitive faculty, which may proceed on its own: It must rather use the inputs provided other cognitive faculties (perception, pattern matching, conditioned reflexes, heuresis, and so on), giving them all the credit they deserve. We

have also observed that each of these faculties has a degree of reliability of its own (which does not depend on reasoning), and provides independent support to a theory able of explaining its outcome.

With regard to the collective practical theories, a similar argument can be mounted in favour of those collective conative dispositions that are part of the tradition of the community. Also with regard to such traditions, one may assume that they should be collectively adopted (until a better option becomes collectively accessible). This is because, according to evolutionary selection, their persistence shows that they are not incompatible with the survival and success of the community, and that it is likely, though not necessary, that they contribute to this result. Moreover, though one may be unable to reproduce the reasoning that other agents did in the past, the adoption and the persistence of certain collective attitude may be explained through the hypothesis that people achieved those attitudes via correct cognition. The combination of these hypotheses should lead the agent to adopt what Perelman and Olbrechts-Tyteca (1969) famously called the "law of inertia": It is not necessary to justify the adoption of existing practices, but on the contrary, change requires a (collectively acceptable) justification (Alexy 1989, 216ff.).

In the light of these considerations, we may see that a (critically) rational approach to collective decision-making does not require adopting that "prejudice against prejudice itself, which denies tradition its power" (Gadamer 1989, 270), which characterised the age of Enlightenment, according to its critics. On the contrary, both individual and collective rationality are fully compatible with the belief that "Logic is a poor guide compared with custom" (Churchill 1951).[11]

The fact that one has not yet found a plausible rationalisation for a certain traditional attitude is no sufficient ground for the rational rejection of that attitude. For this purpose, specific grounds are required. Such grounds for rejection can indeed by found in many cases without much effort, as for example when ethnic or racial prejudices are at issue. However, when this is not the case, shared conative attitudes—especially when tested by time—deserve due respect.

10.2.7. Collective Adoption of Multi-Agent Plans

Some further considerations are required concerning the collective adoption of multi-agent plans of actions (actions profiles), which we considered at the beginning of this paper.

[11] The importance of traditions in practical reasoning is stressed by MacIntyre 1988, who emphasises the differences between different traditions (like the Aristotelian understanding of virtues, the Augustinian version of Christianity, the Scottish Enlightenment). While we agree with this author in assuming that traditions provides a fundamental input to practical reasoning, we deny that traditions provide alternative accounts of practical rationality: They rather provide different inputs (values, priority, rules, techniques) to the universal faculty of practical cognition.

With regard to multi-agent plans, we need first to observe that adopting a collective attitude provides a way out of the dilemmas we considered above.

The collective attitude provides a way out of prisoner's-dilemma situations, even when emerging out of conflicting views of the interest of a community. Consider for example, the bribes case we considered above. The situation when the socialist party gets bribes, and the conservative party does not, is no eligible collective choice, since this is a choice that you (being conservative) will never share with me. This choice is not participable from your perspective, since, according to your view of the public interest, it is worse than the result that you would obtain by acting alone (we both get bribed).

Similarly, the collective attitude provides a way out of coordination dilemmas, at least when a plan is salient to everybody since it better satisfies collectively participable values.

We have seen in Chapter 1 how agents may adopt general and abstract instructions (standing plans), and how such instructions, from the doxified perspective of Chapter 3, correspond to general normative propositions. We have used the term *rule* to refer both to general instructions and to general propositions. For example, consider rules requiring that everybody drives on the right when on the public road, that everybody stops when approaching a red light, that everybody performs any contracts he or she has made. Here we need to focus on the situation where a rule is collectively adopted, that is, the situation where one does (or tries to) participate with one's fellows in the collective endorsement of a rule-instruction (or in the collective belief in a rule-proposition).

Remember that, as we said above, an individual should participate in adopting a rule when it would be cognitively optimal for that individual to do that, to wit, when the rule is participable by that individual. We have seen in chapter 1 how one may infer from the intention to implement a general instruction, the intention to implement the specific instructions that follow from it (according to the reasoning schemata *intention specification*). Therefore, my intention to implement a rule leads me to intend to implement any single specification-individualisation of the rule, from which (when having appropriate beliefs) I can infer further intentions and wants. For example, my acceptance of the rule that we all drive on the right implies my intention that I drive on the right, and my want to stay to the right, when I am driving my car. It also implies my intention that you drive on the right, and my want that you stay to the right side of the road, when you are driving.

Finally, let us remark that not every pattern of action I wish to have in my society can (or should) be translated into a normative requirement, established for our common interest: Many beneficial patterns of action can also or only emerge through the interaction of self-interested behaviour. However, there is a link between normative patterns and non-normative regularities: Often the latter (such as the efficient resource allocation provided by the market) will only emerge if certain rules (on property and contracts, against monopolies, preventing nega-

tive externalities, and so on) are generally followed. Similarly, my preference for a society where people efficiently allocate resources through market exchanges (given appropriate constraints) will lead to my plural choice for the rules that ensure the proper functioning of a market economy.

10.2.8. Collective Adoption of Acceptance Policies

Collective adoption may also concern cognitive instructions (see Section 1.4 on page 31), and in particular, general and abstract cognitive-instructions, which we may call *acceptance policies*, namely, instructions according to which agents should accept certain propositions, under certain circumstances (for certain purposes and within certain reasoning forms).

Acceptance policies concern, first of all, preconditions of conditioned instructions. Remember that the acceptance of a proposition has an inferential function. It concerns "including that proposition or rule among one's premises for deciding what to do or think in a particular context" (Cohen 1992). By adopting the collective policy of accepting that the preconditions of certain rules are satisfied, under certain conditions, a community can fine-tune its shared application of those rules, according to different circumstances. Assume, for example, that besides accepting the rule

every one, WHEN C, ought to do B

we also adopt the cognitive instruction:

every one, WHEN D OR E, shall endorse C

Applying the latter instruction implies concluding for C under conditions D or E. This finally leads us to conclude for B, according to the first rule, under the same conditions.

As we have seen in Section 3.1.6 on page 96, cognitive instruction are doxified into *non-deontic rules*, namely, rules whose consequent is constituted by a non-deontic qualification. Thus, the cognitive instruction above can be doxified into the non-deontic instruction:

IF D OR E, THEN C

For example, the collective adoption of the rule according to which ⌈one should compensate the damages one causes negligently⌉, may be supplemented by a non-deontic rule according to which ⌈if one does not respect the standard of one's profession, one is negligent⌉ and by further rules specifying what standards concern different professions (for example, by physicians, lawyers, accountants, and so on).

Secondly, collective acceptance may refer to meta-rules. This means that we may collectively adopt the policy of accepting certain types of rules, given

certain conditions. This allows us to lift collective choices at the meta-level: We collectively choose the acceptance policy that we should adopt any rule that is issued in a certain form, within certain bounds, by a certain body. Such a collective choice for the policy of adopting all rules stated by a certain agent j, takes the form of a competence rule, i.e., a collective intention having the content:

we shall accept each rule R such that j has issued R

which can be doxified into the meta-rule (see Section 23.3.4 on page 604):

each rule R such that j has issued R is legally binding

For example, we may share the meta-rule according to which any prescription issued by our Parliament is legally binding, and consequently adopt specific legislative rules.

Thirdly, collective acceptance may concern principles to be used to prioritise rules, so as to be capable of addressing those situations where conflicting rules provide conflicting individual prescriptions. For example, we may collectively accept the priority rule according to which rules issued by a higher normative authority prevail over rules issued by lower authorities, or rules according to which rules issued later prevail over prior ones.

We shall not comment now on higher-level acceptance, but postpone its discussion and exemplification to Chapter 25.

10.2.9. Collective Normative Beliefs

Our discussion of acceptance leads us to a notion of a *normative belief*.

Definition 10.2.1 *Normative belief. A* normative belief *of a unit of agency X is a normative proposition which is adopted (believed) by X.*[12]

For instance, if Fariba's mother believes that ⌈Girls ought to wear the veil⌉, we may say that proposition ⌈Girls ought to wear the veil⌉ is a normative belief of Fariba's mother.

Though one may also speak of individual normative beliefs, for instance, when describing the attitude of Fariba's mother, we are interested in the case when the unit of agency we are concerned with is a collective. Thus, assuming that in Fariba's Legal Community-FLC endorses the belief ⌈Girls ought to wear the veil⌉ (so that this belief plays the appropriate role in legal reasoning and decision-making) we may describe this state of affairs by saying that ⌈Girls ought to wear the veil⌉ is a normative belief of FLC.

When understood in this way, the concept of a normative belief differs from all of the following notions:

[12] Note that when we speak of a normative belief we refer to the believed noemata, rather than to the mental attitude of believing it.

- *normative sentence* and *normative clause*, which refer to the sequence of words expressing a normative noema, rather than to the noema itself;
- *normative speech act*, which refers to an action rather than to a mental state;
- *intention of the issuer of a normative speech act*, which refers a more complex mental state, including in particular the intention of generating a new normative qualification or connection (or the bindingness of a normative proposition);
- *normative proposition*, which identifies a certain kind of noema, regardless of the fact that anybody endorses it;
- *binding normative proposition*, which refers to the idea of bindingness as adoption-worthiness, rather than to the fact of endorsement.

Let us consider this last point. Our notion of a normative belief is purely factual: the proposition $\lceil N$ is a normative belief of $X \rceil$ is satisfied exactly if N plays the cognitive function that is proper to a normative proposition in the functioning of X.

This is also the case when the unit of agency to which we attribute a normative belief is a *collective*, or a *social system*. When saying that normative proposition N is a normative belief of community C, I refer to the social fact that C possesses the cognitive state of adopting N (to the fact that N is the common belief of a sufficient number of people, which are in the appropriate position for implementing N). On the contrary, when I say that N is binding for me, as a member of C, I mean that I should participate in the adoption of N (N is adoption-worthy to me). This is no factual judgement, since it includes a reference to ideal practical cognition (on which adoption-worthiness depends).

Thus, on the one hand, the fact that proposition N currently is a normative belief of my community does not entail that N is binding to me (that I should participate in N, that I should adopt N as a way of participating in the normative reasoning of my community). One, as we have seen, may consistently believe that (*a*) N presently is a normative belief of one's community and that (*b*) N is not binding. Both conditions obtain when one believes that N is so damaging that it is better not to participate in its adoption and implementation.

On the other hand, one may attempt at participating in the collective adoption of a normative proposition N that is not yet a normative belief of one's community, when one thinks that it is likely that N will become, possibly a consequence of one's (reasoned) endorsement, a normative belief of one's community.

This happens first of all when the community does not appear to have any definite cognitive state on a certain matter, either because an issue has not yet been considered (for instance, when a certain legal issue is a "case of first impression," which has not yet been the object of a decision), or because a conflict between different views has not yet been settled.

Secondly, this may happen when there appears to be a communal opinion on a certain matter, but one believes that one's reasoned adoption of a different and better solution is likely to be followed by one's fellows (in the appropriate positions), so as to become the new opinion of the community.[13]

10.3. Sanctions and Assurance

We have so far assumed that agents, when participating in collective intentionality, act according to their collective choices, as inspired by their collective-concerned preferences, their collective conative and epistemic states, their expectations concerning the collective choices their fellows will make. However, one also has private interests, and those may be in conflict with collective interests. Under these circumstance, one may decide to follow one's self-directed perspective, acting against the very determinations one endorses out of one's collective-directed perspective. This leads to the problems we shall discuss in the following paragraphs.

10.3.1. The Possibility of Non-Compliance

I may have the collective-concerned liking for the situation where everybody contributes to public expenses, and I may participate in the collective endorsement of the rule requiring us to pay our dues according to certain criteria. However, the situation where I do not pay any taxes when all others are paying theirs still is at the top of my self-directed preferences.

When this action profile is accessible to me (I am sure my tax-evasion will never be detected), then I have to choose whether to follow my plural choice of the rule or to follow the choice dictated by my self-directed concerns. Moreover I know that I am not the only one who may find oneself in a conflict between self-directed and collective-directed concerns. Also others may be in the same predicament.

The possibility that agents may follow their self-directed concerns, when these conflict with their collective-directed concerns, and also with rules they collectively endorse, is relevant not only when one feels the temptation to give

[13] Our factual notion of a normative belief comes close to the notion of a *norm* as defined by Pattaro, Volume 1 of this Treatise, chap. 6, though he does not address the issue of collective beliefs (and of the beliefs of collective entities). We shall use the full locution "normative belief" to mark the difference between this notion of *norm* and other uses of the term *norm* (and of its translation in various languages). For instance, Italian lawyers frequently use the term *norma* to refer both to normative sentences and to a normative propositions (see Guastini 1990, 15ff.). The use of *norm* for referring to the attitudes expressed through normative speech acts has been advanced in Alchourrón and Bulygin 1981; 1984b, while the notion of a norm as a normative proposition has been defended, for instance, by Weinberger 1984. Finally the use of *norm* for referring only to binding normative propositions can be found in Kelsen 1967, sec. 4b .

precedence to one's self-directed concerns, but also when one is selflessly pursuing the collective interest.

Assume that I am consistently collective-directed (my communal preferences always override my private preferences), and that I am acting in a context where everybody agrees that general compliance with a certain rule would be communally better than the general disregard for it. However, assume also that:

1. some people are likely to disobey the rule when it is against their self-directed concerns, and
2. many others are likely to disobey it when they see others doing so.

In such a situation I may consider the option of not following the rule myself, since the public benefits that would be obtained if everybody were following the rule would not be preserved when only a few are practicing it: In such a case the rule followers would then be exploited and look silly, and this may even discredit rule-following behaviour in general.

Assume for example, that we share a rule according to which we take turns in paying our drinks at the bar (more or less, each one of us pays once a month for everybody). This is a reasonable collective choice for us: We avoid getting annoyed with paying every time we drink and we have a way of expressing our friendship.

Assume, however, that a few of us carefully avoid paying for any drinks. Seeing this behaviour, some others get annoyed and start not paying for drinks either. The few who keep paying for everybody, at the stage when the majority has stopped paying for others, will probably see that it makes no sense for them to continue. Paying for people who are not reciprocating makes payers annoyed (or possibly gives them an inappropriate sense of self-righteousness), makes those who have stopped paying because of other people's free-riding feel uneasy, makes some malevolent people happy at seeing other people's embarrassment.

10.3.2. The Role of Sanctions

The example at the end of previous section shows that, in a context where a rule (which would be collectively beneficial if followed by everybody) is not generally followed, it may be better, even in the collective interest, that "nice" people too stop following it. To use the words of Hume (1975, 177, par. 148):

> Should be a virtuous man's fate to fall into the society of ruffians, remote from the protection of laws and government [...], his particular regard for justice being no longer of use to his safety or that of others, he must consult the dictates of self-preservations alone, without concern for those who no longer merit his care and attention.

Using the game-theoretical model we discussed above, this situation may be seen as an assurance game: It is rational for me to attempt to participate in a collective cognitive state and behave accordingly only when there is sufficient chance that my fellows will reason and behave according to our collective intention.

Therefore, the possibility that self-directed concerns take the lead over collective-directed concerns seems to make the shared adoption of rules impossible (at least in many realistic contexts). The obvious solution to this predicament consists in linking a sanction to the violations of the rule. As a result of the sanction (assuming that it is to be effectively implemented in most circumstances where a violation takes place), any behaviour disregarding the rule would not only be collectively harmful, but also be privately harmful to the violator. This should exclude free riding in the private interest, and increase the appeal of rule-following behaviour to those who are motivated by collective interest (since the general practice of the rule would now be in place and display all its benefits).

Ensuring the matching of self-directed plans and of collective plans seems to be the physiological function of sanctions. However, once the sanctioning apparatus is in place and works efficiently, it can motivate people also without any links to plural action and collective preferences. Assume that sanction S is regularly applied to the violators of the rule ⌈whenever A, then one ought to do B⌉. This social regularity can be experienced by the concerned agents no differently from a physical law: ⌈Whenever condition A is satisfied, if one does not accomplish B, then one is likely to undergo S⌉. From this general "social law," I can infer its instance concerning myself, that is, ⌈whenever condition A is satisfied, if I do not accomplish B, then I am likely to undergo S⌉. If I know that A is indeed satisfied, I may detach the following simpler conditional: ⌈if I do not accomplish B, then I am likely to undergo S⌉

Consequently, we may distinguish different roles for sanctions.

The first situation has been considered above: I would follow the rule if I only had the assurance that you too were acting accordingly. Then the sanctioning connection has the function of providing this assurance, by making so that also your self-directed concerns push you toward following the rule.[14]

The second situation exists when I participate in the collective adoption of the rule ⌈every one shall do B under condition C⌉, but the following conditions hold: (1) out of my self-directed concerns I prefer not doing B to doing it, and (2) I am inclined to act according to my self-directed concerns. The forecast that I may be sanctioned then leads me to do—for the sake of my self-directed

[14] Our account of sanction has been limited to considering the impact of punishment on potential "knavish" violators, motivated by self-interest. There are also other ways of promoting compliance—like preventive screening, appropriate training, ensuring reciprocal cooperation and control, providing regard-based rewards—and an optimal sanctioning systems needs to take into account that spontaneous compliance may be endangered by disruptive punishment (for various interesting considerations on sanctioning, see Pettit 1997 chap. 7, sec. 2).

concerns—what I have plurally chosen as a member of my community: It ensures that the action of mine which follows from my participation in collective intentionality, is also privately advantageous to me. In fact, under condition C, the sanction transforms the choices available to me. If there was no sanction, I would have the choice between the following options:

1. omitting B, and
2. performing B.

Between these options, I would go for (1). However, given that the sanction is likely to follow violation, my choice is limited to the following options:

1. omitting B and undergoing sanction S (NON B AND S), and
2. performing B and avoiding S (B AND NON S).

Between these two option I prefer (2), and thus I shall perform B.

The third situation is the most perplexing one: I believe that the action profile that would be realised through the implementation of the rule (the situation in which each one of us does B under condition C) seriously impairs the common good, and therefore I believe that this profile is not participable to me. The fact that an effective sanctioning connection is in place, however, makes B preferable to me from my private point of view: I prefer, in my private interest the situation where I do B and I am not punished (B^I AND NON B^I), to the situation where I omit B and I get the sanction (NON B^I AND S^I), though I have the opposed preference, when looking at my collective preferences. Consequently, I will behave as to avoid the sanction (i.e., I will perform action B) only in my private interest, though I see my behaviour as damaging our communal good, and not as part of a possible plural choice. Consider, for example, the case of the prisoners in a concentration camp, forced to behave against their fellows, according to the rules of a mechanism designed to produce everybody's moral and physical annihilation.

In large collectives, obviously, the three situations just presented may coexist: Some agents plurally adopt a rule ⌈Each one shall do B under condition C⌉ and follow it regardless of coercion (once that they have a reasonable expectation that others will follow it too), others adopt the rule through a plural choice, but follow it only when they are afraid of being sanctioned, others do not plurally choose the rule, but will behave as it requires for fear of the sanction.

Note that also sanctions can be the object of a collective choice: Not only we collectively adopt a certain rule, but we may also collectively choose that this rule is to be enforced against those who are not going to follow it. More generally, we may collectively establish what rules are to provide reasoning policies to be used in establishing coercible conclusions, and what sanction may follow from the violations of these rules. This represents an important aspect of the passage from general practical reasoning to legal reasoning, which we shall analyse in Chapter 12.

10.4. Plural Legal Intentionality

Let us summarise the account of collective reasoning we have provided in the previous pages.

We have distinguished different types of concerns that an agent, belonging to a certain group or community may have. In particular, we have distinguished one's self-directed concerns (one's concerns for oneself, as a single individual), and one's communal concerns (one's concerns for one's group or community).

We have observed that agents, according to the psychological mechanism of practical rationality, have correspondingly self- and collective-concerned likings, which lead them to adopt self- and collective-concerned desires, which conduce them to choose plans to satisfy those desires and to intend to implement them, and finally to want to execute the actions prescribed by those plans.

We then remarked that one must take into account the fact that the effects of one's action (and more generally of one's adoption of a certain cognitive state) will depend also on the actions of other agents. Thus, one's choice of a plan of action, in an n-person society, tends to be one's solution to an n person coordination game where any other person is also making similar plans. Moreover, those pathological situations that tend to emerge in the interaction of individual autonomous agents (such as prisoner's dilemmas, coordination dilemmas, and assurance dilemmas) also emerge when agents are focusing on their communal interest (but disagree in assessing the latter).

This problem may be solved if one takes a different perspective: Rather than taking an individual perspective, according to which one has a parametric approach to other people's actions, even when one is acting out of collective-directed concerns, one needs to take the plural view. According to this view, one's reasoning is aimed at participating in the formation of the collective intentionality of one's community. One is asking oneself "How can I participate in a shared intentionality, in which my fellows will also want to join (under the expectation that the others are going to do the same)?"

We have also considered in particular those plural cognitive states concerning the adoption of rules, prescribing that all members of one's community behave in a certain way under certain conditions. Each agent forms the intention of adopting such rule and to act accordingly, doing its share, under the assumption that all (or at least most) others do the same.

We have also analysed the role of sanctions, which have an ambiguous relation to normativity. They can support it, by making one's private interest coincide with one's plural choices, but they can also clash against one's choices, by forcing one to act as (one believes) one should not act (in the interest of their community).

Thus, our discussion has identified in the *plural perspective*—that is, in the attempt to participate in collective intentionality—the basis of normativity, and has shown that this perspective has some advantages. In particular, it provides a

solution to the dilemmas that emerge when people tend to act to the disadvantage of their community, though all of them intend to pursue their communal concerns (having different views of these concerns). We have seen that the rational adoption of such a perspective assumes that one believes that the cognitive attitude one is adopting is sufficiently participable, where judgement on participability depends on the likeness of the communal adoption of that cognitive state, combined with the importance that its communal adoption would have.

On the basis of this judgment one participates in conative states one ascribes to one's community (endorsing certain values, intending to execute certain plans of action, wanting to implement the action required by those plans). These conative states (and their doxifications) are experienced by the agent as particular types of feelings: the sense of duty, and in particular, the sense of loyalty to the values, goals and rules of one's community (these are the civic feelings which have been recently revaluated by the current of political philosophy that is called *republicanism*; see Pettit 1997). These feelings may conflict with the conative states that are functional to the agent's self-directed concerns. However, these feelings need not be considered as an expression of irrationality. On the contrary, they may be viewed as resulting from one's rational attempt to participate in collective practical reasoning, that is, into collective rationality.

In the following we hope to convince the reader that some important aspects of legal reasoning can be explained and rationalised as pertaining to the legal reasoner's attempt to participate in the collective intentionality of the legal community, adopting the perspective we have here introduced (on the social dimension of law and morality, see Peczenik, Volume 4 of this Treatise, sec. 4.5.5).

10.4.1. Collective Reasoning and Authoritarianism

Let us conclude this chapter by trying to rebut two possible criticisms to our collectivistic approach to legal reasoning. The first concerns the fact that collectivistic views have often been adopted by illiberal and authoritarian ideologies and regimes. For instance, Art. 1 of the fascist "Carta del lavoro" (Charter of Work) of 1927, says that:

> The Italian Nation is an organism having purposes, life, and means of action that are superior in power and duration to those of its individual members, separated or united in groups. It is a moral, political and economic unit, which realises itself completely in the Fascist State.

We believe that the recognition of agency of collective bodies, like in particular political communities, and the corresponding recognition of the collective dimension of legal reasoning, does not involve at all the acceptance of authoritarian views. There is certainly the need to distinguish clearly between individual freedom of action and participation in collective agency, between what Constant (1988) calls liberty of the moderns (individual self-determination) and

liberty of the ancient (participation in collective choices). However the fact that there is no necessary coincidence between the two aspects of liberty (see also Berlin 1969) does not entail that there is a necessary conflict between them. This is a point that has recently been made within different approaches to political thinking such as liberal communitarianism (Selznick 1992), republicanism (Pettit 1993), and discourse theory (Habermas 1999).

For our purposes, we do not need to address deep issues in contemporary political theory. It is sufficient for us to observe that, on the one hand, the recognition of collective agency entails the possibility that practical rationality is effectively adopted also by collective bodies, a possibility that, in its turn, can only be implemented through unrestricted critical control, which only democratic liberties can ensure. Moreover, as we have observed, the choice to participate in collective action needs to be based upon the belief that collective action is better, with regard to the common good, than one's individual action. When on the contrary, a collective action has detrimental effects, civil disobedience can be the best way in which one can serve one's own community.

10.4.2. Collective Values

The second criticism we need to face regards the idea that a collective-concerned approach needs to focus only on the collective, to view the collective, as opposed to its single members, as the only reference for values, an idea that is brutally expressed by the famous Nazi slogan: "You are nothing, your nation is everything." This idea does not follow from our approach.

We need to distinguish in this regard, having collective-directed concerns, and reasoning from a collective perspective.

When reasoning from the collective perspective one needs obviously to focus on the interest of the collective itself, but the following needs to be considered:

1. The interests of the collective include also the interest of the individual members of the collective or of subgroups included in it. As we have observed in Section 9.1.2 on page 242, one's collective-concerned preferences can and indeed should (also) refer to the well-being (the satisfaction, or flourishing, or capabilities) of the individual members of the collective.
2. The collective may pursue also interests of others. Like an individual, also a collective may have other-direct concerns, and therefore take initiatives to improve the situation of other collectives (for instance, poorer nations) or individuals (deprived people not participating in the collective).[15]

Thus, a collective does not need to be concerned only with its own preservation and power. On the contrary, when approaching an issue from a plural perspec-

[15] On the duties of assistance between peoples, see Rawls 1999b, sec. 16.

tive, one may and should indeed be rather concerned also with the well-being of one's fellows, and more generally with whatever values one believes one's collective should pursue.

We cannot here go to any extent into the philosophy of values. Let us just take from Radbruch (1950b, 146ff. 1959, 27ff.) the distinction between three types of values, *individualistic values* (inherent to single human personalities), *collectivistic values* (inherent to collective bodies), and *transpersonal values* (inherent to the cultural objects, like the outcomes of art and science). To the latter we would also add *naturalistic values*, concerning preserving the environment, ecosystems, and animal life.

All of these values may (and need to) constitute appropriate concerns for a political community and correspondingly may constitute appropriate references for legal decision-making. We cannot even tackle here the issue of what priorities, connections, dependencies exist between these kinds of values: We must leave such issues on the one hand to normative political theory and normative legal philosophy, and on the other hand to doctrinal contributions on specific legal issues. However, any legal reasoner needs to address such issues one time or the other, when taking seriously the goal of understanding (and contributing to develop) the law of his or her community.

Chapter 11

COLLECTIVE COGNITION AND DIALOGUES

In Chapter 3, we concluded that the cognitive bindingness of a normative proposition—and, consequently, the proposition's practical truth and the existence of a corresponding normative state of affairs—depends on the fact that belief in this proposition would result from an ideal inquiry, performed by an unbounded cogniser. Consequently, we have denied that (dialectical) interaction procedures can be constitutive of cognitive optimality: For characterising optimality we need to appeal to ideal cognition, which cannot be viewed as consisting in the maximisation of interactions between bounded cognisers. However, this does not exclude the importance of dialectical interactions, as a way of (partially) overcoming the limitations of individual cognition.

11.1. Dialogues and Cognition

For bounded cognisers, like human beings, cooperating with their fellows, in appropriate ways, is often the only chance they have to approximate ideal cognition. This leads to the following two theses.

The first thesis concerns the necessity of distributing information-processing over different individuals and of enabling them to interact, in order to transfer to others, or to receive from them, cognitive results. This is required on various grounds:

- Different individuals perceive different aspects of the world. In particular, in the practical domain, we need to consider that each one of us has a privileged access to his or her internal attitudes (needs, desires, commitments, and so on).
- Each individual needs to specialise in different areas of knowledge. This is vital nowadays since in modern societies knowledge has grown so much that no individual mind can handle it all.[1]
- Different individuals may provide different heuristic insights, according to the particularities of each one's makeup and experience. This diversity increases the chances that appropriate solutions are discovered.
- Individual cognitive competence results from a process of learning, which is also based on the inputs one receives from one's fellows and on interaction with them.

[1] Though the saying that human life is too short for learning one skill, often cited as *ars longa, vita brevis* goes back to Hippocrates.

The second thesis concerns the ways in which bounded cognisers should interact: To achieve appropriate cognitive results, the structure of their interaction needs to be adequate to the nature of the cognitive task at issue and of the context in which the task is to be carried out.

These premises lead us to reject the view that the rationality (intended as the conduciveness to practical knowledge) of multi-agent cognitive processes can be measured according to the distance between on the one hand the existing patterns of information exchanges and on the other hand an ideal pattern for communicative interaction (as assumed, most famously, by the discourse theory of Habermas 1981). On the contrary, there are multiple forms of cognitive interaction, none of which is abstractly preferable to others: Each one of these forms needs to be evaluated through an instrumental (teleological) assessment, concerning its capacity to provide practical cognition, but also its compatibility with other significant values (like individual dignity and freedom), an evaluation which is dependent upon the concrete circumstances where such interaction is taking place.

Consider for instance how different procedures can be more or less appropriate for different kinds of legal determinations, according to the content of the determination and the context in which it is to take place:

- everybody's equal participation in a decision, as in a referendum;
- debate and voting by an elective body, like in Parliamentary legislation;
- depoliticised decision by an impartial bodies of experts, as in the proceedings of technical commissions;
- a combination of impartial expert-judgement and partisan adversary-debate, as in judicial proceedings;
- open dialogue, where everybody is assumed to bring his or her view, though without commitment to a decision, as in political debate through the media, or amongst citizens, and more specifically in doctrinal debate in the law.

To approach the issue of describing and evaluating cognitive interactions concerning legal issues, we need to introduce a theoretical framework that allows us to analyse and compare different kinds of dialectical exchanges. This will be provided by the theory of *dialectical systems*, which we will briefly present in the next sections.

11.1.1. Dialogues and Dialectical Systems

To understand how legal interactions are structured and to evaluate their merit, we refer to the idea of a *dialectical system*, an idea originally introduced by Hamblin (1970). In general, by a dialectical system, we mean an "organised conversation where two parties (in the simplest case) speak in turn, by asking questions

and giving replies (perhaps including other types of locutions) in an orderly way, taking into account, at any particular turn, what occurred previously in the dialogue" (Walton and Krabbe 1995, 5).

Dialectics, as Hamblin conceives it, has little or nothing to do with the Fichtean, Hegelian or Marxian triadic process of thesis, antithesis and synthesis: It rather identifies in general the study of dialogues, and more specifically of dialectical systems. As Walton and Krabbe (1995, 5) observe, Hamblin's dialectics comprises two branches:

- *Descriptive dialectics*, which studies the rules and conventions currently adopted in actual discussions (parliamentary debates, lawsuits, meetings, and so forth);
- *Formal dialectics*, which sets up "simple systems of precise but not necessarily realistic rules" and studies dialogues conforming to such rules (Hamblin 1970, 256).

We find this way of distinguishing dialectical systems to be confusing, since it merges two different oppositions:

- The first is the opposition between *formal* and *informal protocols*, which concerns the language and the precision through which a dialectical system is specified. It opposes specification through natural language and specification through logical and mathematical formalisms.
- The second is the distinction between *description* and *design*, which concerns the purpose of the specification of a dialectical system. It opposes the aim of describing existing dialectical systems (the systems which are currently practiced by the parties of certain dialogues) and the aim of designing new (or partially new) dialectical systems (as ways to improve interaction in certain contexts).

These oppositions are continuous dimensions, and define a two-dimensional space in which we can try to locate particular dialogue protocols, according to the extent to which they are more or less formal, and to which they reproduce practised protocols or innovate them.

All dialectical systems, regardless of their being formal or informal, and their aiming at description or design, are normative in the sense of including rules specifying how dialogues are to be carried out (if they are to respect the requirements of the dialectical system). However, designed dialogues are also normative in a different sense, concerning the choice of rules rather than their implementation: They suggest what rules ought to be adopted for certain purposes and in certain contexts.

Another notion that needs to be introduced when approaching dialectical systems is the idea of a *dialectical protocol*, by which it is usually meant the rules governing the interaction of the parties in the corresponding dialogues. Here

we will use this notion in a broader sense. We view the protocol of a dialectical system as a *practical theory*—in the sense we introduced in Section 4.1.4 on page 125, that is, as the whole set of assumptions that may provide appropriate guidance to the implementation of the dialectical system in actual dialogues. Thus, a protocol for a dialectical system does not include only rules, but also specifications of values and goals to be achieved, and information concerning opportunities and risks related to the implementation of the dialectical system.

We cannot here provide an account of current research on dialectical systems, elements of which can be found in strands of various disciplines: philosophical studies on argumentation, computer-science research on distributed architectures, artificial intelligence research on the interaction of intelligent agents, models of e-commerce, studies in (electronic) democracy. Let us just observe that at the origins of this theory we can find two main research lines.

The first line of research concerns *formal protocols*, and tries to capture the structure of dialectical system through rigorously defined rules. This was started by Lorenz and Lorenzen's attempt to provide a dialectical reconstruction of deductive logic as a play constrained by formal rules (see Lorenzen 1960; Lorenzen and Lorenz 1978), as well as by the idea of Hamblin (1970; 1971) that formal dialectics could have a broader scope than modelling deduction, an idea that was further developed by Rescher (1977) and MacKenzie (1981; 1990).

The second line of research concerns *informal protocols*, and provides natural language descriptions or specifications of the structure and the requirements of dialogues. Here the most influential contribution is undoubtedly provided by Perelman's rich account of argumentation (see, in particular Perelman and Olbrechts-Tyteca 1969), followed by a number of contributors, among whom we may mention Walton (1990) and van Eemeren and Grootendorst (1992).

As far as research in legal dialectics is concerned, the main inspiration to the study of dialectics has been provided by Alexy (1989), who has devised rules for rational legal argumentation. Recently, various contributions approaching legal dialectics from a formal perspective have been developed within the research on artificial intelligence and law, as we shall see in Section 11.2.4 on page 326.

According to the two lines of research we have just mentioned, dialectical systems can be formally specified, or they can remain informal. Formal dialectical systems can frequently be characterised as *games*, in a strict sense, i.e., according to game theory: The parties have certain *possible moves* (locution types) at their disposal, and under certain conditions the dialogue will *terminate* with certain outputs. Since the parties may assign different values to these outputs, somebody will then *win* or possibly *lose*.

The game-theoretical approach emphasises the *strategic* dimension of dialectical interaction: Each party intends to win as much as possible, but this depends on the other party's moves. Therefore each party, besides respecting the rules of the game, must develop a strategy, and must do this by anticipating the counterparty's strategy. This does not mean that the parties need always to act one

against the other. Some dialogues can indeed be qualified as *non-cooperative games*, where for each winner there is a loser, but others represent *cooperative games*, where parties win or lose together, according to their ability to coordinate their actions and work towards common aims.

One of the most interesting features of the theory of dialectical systems is that it allows for the characterisation of infinite varieties of dialectical systems. At the descriptive level, this enables us to define dialectical systems that can approximate the concrete structure of different social interactions, taking into account the peculiarities of these interactions. At the design level, it allows us to specify what types of interactions would be more appropriate for achieving different purposes, in different contexts. Thus, a design characterisation of an interaction needs not be an idealisation, to wit, it needs not describe what might happen in circumstances that are not to be found in the real world. On the contrary, a dialectical system can be adapted to the concretely available possibilities and to the limitations (in knowledge, competence, time, and so on) that characterise its likely parties, and thus it may provide rules that the parties are capable of respecting.

The features of the theory of dialectical systems we have presented so far make it a useful tool for the study of legal procedures. Legal processes are indeed dialectical interactions, in which different parties play different roles. These interactions are governed by rules establishing what kind of locutions are allowed to each party, in what circumstances, and to what effects. There is much at stake, and there will usually be winners and losers, so that the parties will often develop a strategic interaction, each one anticipating the other's moves. There are various goals to be achieved, which will, and must, be reflected in the complexities of the rules of the game. The players are real persons acting under stringent resource constraints.

11.1.2. How to Characterise Dialectical Systems

A key aspect on the characterisation of a dialogue consists in a set of rules. However, rules are not enough: They make sense only by adopting a purposive, or functional perspective.

By the *function of a dialectical system*, we mean those outcomes of the practice of a dialogue which explain and justify its being practised. This function does not need to be the aim of all participants in the dialogue. Often, the function of a dialogue will rather be achieved through the institutional machinery provided by the dialogue, even if the parties only aim at different particular purposes, corresponding to their individual interests.

For instance, in the typical legal proceedings in civil matters, the parties aim at opposite outcomes: Each one wants to win the case, getting an advantageous outcome at the expense of the other. However, in pursuing their conflicting objectives the parties contribute to a different institutional purpose, that is, achiev-

ing a fair and informed justice while putting an end to their litigation. This difference—between the aims of the parties of a dialogue on the one hand and the function of the dialogue on the other—does not necessarily imply hypocrisy or self-deception: Lawyers defending, legally and loyally, their clients, aim at winning their cases, but at the same time they may correctly believe that they are contributing to justice.

Viewing dialogues from a functional perspective enables us to understand the function of each rule, that is, its contribution to the dialogue's general purposes. This allows us to move from the pure description of the dialogue's rules to an *immanent critique*, and ultimately enables us to move to from description to design: We wonder whether the current rules of the dialogue enable it to perform its function in the best way, and what different rules would improve the functioning of the dialogue.

Beside the function of a dialectical system and the goals of its participants, we also need to identify the side-effects it may have, distinguishing the positive and the negative ones, both when the dialogue achieves its end and when it fails.

To characterise dialogues, we start from the classification schema in Table 11.1 on the next page where we distinguish eight kinds of dialogue: persuasion, negotiation, deliberation, information-seeking, epistemic inquiry, practical inquiry, eristic, reconciliation.[2]

We shall not provide here a detailed comment of our schema, nor claim its exhaustiveness and adequacy. We will rather use it as a tentative pattern for identifying certain features of legal interactions, and thus to emphasise certain similarities and differences between them:

- making a contract or achieving a settled solution to a dispute can be classified as kinds of negotiation;
- parliamentary discussion falls under the heading of persuasion and negotiation, or sometimes of eristic (sometimes there also is an element of inquiry);
- doctrinal exchanges are instances of epistemic or of practical inquiry (sometimes also of persuasion);
- judicial proceedings contain elements of persuasion, information seeking, negotiation and possibly of inquiry and reconciliation.

11.1.3. The Structure of Dialectical Systems

Let us now move from a teleological perspective to a structural analysis, and consider the different types of rules that define the structure of dialogues.

[2] This is a revised version of the model proposed by Walton and Krabbe (1995, 66), which we have modified in two regards: We have added two new types of dialogues, practical inquiry and reconciliation, and also a description of the dangers ensuing from failure.

Type	Subtypes	Initial situation	Main goal	Participant's aims	Beneficial side effects	Implications of main goal	Dangers related to failure	Psychological disposition required
Persuasion	Dispute; discussion of proposals	One party's position not shared	Get to a shared position	Persuade the other(s)	Develop and reveal positions	Opponent commits to the persuader's thesis	Resent lack of understanding	Accept merit of arguments by others
Negotiation	Bargain; make a package deal	Need of cooperation; conflicting interests	Make a deal, possibly stable and fair	Make a deal convenient for oneself	Cooperate; recognise others' interests	All commit to the agreed deal	Resent greed; implement threats	Disposition to keep promises
Deliberation	Board meeting; political decision-making	Need to adopt a (rational) group-position	Good and effective decisions; participation	Favour a decision one views as better	Cooperation	Shared commitment to the decided result	Distrust, uncoordinated action, conflict	Disposition to work for the common good
Information-seeking	Interrogation, expert consultation	Interviewer needs to know; interviewee putatively knows	Spread knowledge; reveal positions	Gain or pass personal knowledge	Agreement; cooperation; prestige	Interviewee commits to statement		Sincerity
Epistemic Inquiry	Scientific investigation; examination	General ignorance	Progress in epistemic knowledge	Find proofs or destroy them	Agreement; cooperation; prestige	Technological ability		Curiosity; passion for reason
Practical inquiry	Moral, political or doctrinal discussion	Uncertainty of what should be done	Progress in practical knowledge	Find arguments or destroy them	Agreement, cooperation, prestige	Ability to act correctly		Curiosity; passion for reason
Eristic	Quarrel; eristic discussion	Conflict; distrust	Reach provisional accommodation	Strike and defeat the other	Vent emotions; reveal positions	Reciprocal recognition	Physical violence; refusal to interact	Combativeness; resilience
Reconciliation	Peace making; restorative justice	Past conflicts; distrust	Build trust; prepare cooperation	Repentance; forgiveness	Shared understanding of the past	Shared commitment to acceptance and cooperation	More struggle and distrust	Recognition; trust; sincerity

Table 11.1: *Types of dialogues*

A dialogue may be viewed as a succession of moves, each of which consists in performing a speech act. Performing one move has certain effects on the dialogue, and in particular on the *commitments* of the parties, that is, on the positions a party is bound to sustain (until the party can validly withdraw them, paying the penalties that are possibly linked to withdrawal). We may say that one party's commitments are those statements the party is bound to recognise (for instance, if I affirm something, I am bound to stick to it), unless the conditions for retraction are satisfied.

Our analysis will be based on the model of Walton and Krabbe (1995), which distinguish the following types of dialogue rules:

- *locution rules*, establishing what moves are available to the parties;
- *structural rules*, indicating when the available moves can be performed;
- *commitment rules*, specifying what effects moves have on commitments of the parties;
- *termination rules*, stating when the dialogue terminates and with what results.

11.1.4. The Persuasion Dialogue: The Structure

To illustrate the notions we have introduced in the previous paragraph, let us analyse the structure of the most studied type of dialectical system, the *persuasion dialogue*, of which we will provide an elementary account. First we characterise the parties:

- there are two parties, let us call them *Proponent* and *Opponent*;
- the Proponent is going to try to persuade the Opponent and the Opponent will resist persuasion.

Let us now consider locution rules and commitment rules (here we combine the two for simplicity) for the persuasion dialogue: We identify what speech acts are available to the parties and specify what effects these acts have on the commitments of the parties. The set of available moves can accordingly be described as follows:

1. Claiming a proposition φ. This commits the speaker to φ. For instance, the Proponent says: "I claim that you have to compensate me for the tear in my jacket."
2. Challenging a claimed proposition φ. This obliges the hearer to give grounds for φ. For instance, the Opponent says: "I challenge your statement that I have to compensate you for the tear in your jacket." This obliges the Proponent to give grounds that support the conclusion that the Opponent has to compensate the damage.

3. Conceding a proposition φ that was claimed by the other party. This commits the speaker to φ. For instance, the Opponent says: "I concede that the tear in your jacket was caused by my fence."
4. Claiming proposition φ to support a previously claimed proposition ψ. This commits the speaker to φ. For instance, assume that the Proponent says: "You have to compensate me, since the fence which caused my damage is your property, and owners are under the obligation to compensate others for damage caused by their properties."
5. Claiming proposition φ as a sub-reason for an asserted proposition ψ. Commits the speaker both to ψ, and to the assumption that ψ can be expanded into a complete reason for φ. For instance, the Proponent rather than stating the complete reason indicated in (4), can only provide a part of it, by saying: "You have to compensate me, since the fence which caused my damage is your property."
6. Challenging subreason φ (in reply to move 5). Obliges the hearer to expand φ with further subreasons. For instance the Opponent says: "I challenge your statement that the fence being my property entails that I have to compensate you for the tear in your jacket."

Let us consider the structural rules, which indicate when the moves we have just described can legitimately be performed:

- The dialogue starts with an initial claim of the Proponent, after which the parties take moves in turn.
- The Opponent may attack (challenge) one of the Proponent's previous statements, or accept it (concede).
- The Proponent may defend (by giving grounds) the attacked statement.
- Those Proponent's statements which the Opponent has not explicitly attacked count as being conceded, until they are explicitly attacked.

Finally, here are the termination rules:

- The dialogue terminates in favour of the Proponent when, after a move by the Opponent, the statements implicitly or explicitly conceded by the Opponent form a valid argument supporting the Proponent's claim.
- The dialogue terminates in favour of the Opponent, when, after a Proponent's move, the statements conceded by the Opponent or yet unchallenged do not form such a valid argument.

The latter rules, in other terms, say that the Proponent wins if the Opponent has explicitly or implicitly conceded all statements of an argument supporting the Proponent's initial claim. On the contrary, the Opponent wins if she has challenged all arguments so far proposed by the Proponent and the latter does not put forward any further arguments supporting his claim.

For instance, the following dialogue is won by the Proponent, since the Proponent concedes (explicitly or implicitly) premises which are sufficient to support the Proponent's request for compensation (the Proponent performs P-labelled statements, and the Opponent, the O-labelled ones):

P_1: I claim that you have to compensate me for the tear in my jacket.
O_1: I challenge your claim.
P_2: You have to compensate me for the tear in my jacket, since the fence that caused this damage is your property.
O_2: I concede that the fence which caused this damage (the tear in your jacket) is my property, but I challenge that this entails that I have to compensate you.
P_3: I claim that owners are under the obligation to compensate others for damages caused by their properties.
O_3: I concede that owners are under the obligation to compensate others for damages caused by their properties.

11.1.5. The Persuasion Dialogue: The Position of the Parties

In a persuasion dialogue the Proponent tries to push the Opponent into a situation where the Opponent will be forced either to fall in contradiction (or in an unsustainable positions) or to concede elements sufficient to establish the claim of the Proponent. Thus, in principle the Opponent enjoys an advantaged position: She may avoid losing just by challenging whatever statement the Proponent puts forward and never committing to anything. In this way, the Opponent will be sure that she will never fall in contradiction (and the Proponent in the end will have to abandon the game).

The position of the Proponent is much more difficult: He must make assertions (and therefore he can fall in contradiction), and must support them by giving grounds.

In a realistic setting the challenge-all trap may be avoided by appealing shared opinions.

First of all, an opinion may be shared by the parties of the dialogue, that is, the Proponent may appeal to ideas that are already adopted by the Opponent— who is committed to these ideas either on personal grounds, or because she has publicly endorsed them.

Secondly, the Proponent may appeal to opinions that are shared in the social setting where the dialogue takes place. These opinions are usually referred to by using the Aristotelian term *endoxa*, which denotes propositions that are normally accepted in the social context in which the dialogue is embedded (for a legal discussion on *endoxa*, see Cavalla 2003). As we have observed in Section 2.3.2 on page 77 *endoxa* may be viewed as defeasible presumptions, to be accepted until refuted. The same holds for the so called *rhetorical places* (*topoi*),

namely, the theses that can be introduced in any discourse (common places) or in particular disciplines (specific places) being generally accepted and acceptable, though being susceptible of limitations, conflicts and exceptions.[3]

Moreover, as we shall see in the following, when a third party participates in a persuasion dialogue (as a judge or a jury) the decisive step consists in appealing to the opinions of the third party. More generally (consider for example a political debate) the proponent's position is strengthened when there is an audience, who can sanction the opponent's refusal to concede what is accepted (and appears to require acceptance) by everybody else.

11.1.6. *Other Kinds of Dialogue: Information Seeking, Negotiation, and Reconciliation*

The pattern of interaction which is required for the purpose of information seeking is different from that of a persuasion dialogue. In an *information-seeking dialogue*, speech acts are not claims, challenges and concessions, but rather *questions* and *answers*. We may also admit the challenge of a query, consisting in questioning its admissibility or its relevance. As a result of such a challenge, the information-seeking dialogue will embed a persuasion dialogue, where the interviewer tries persuade the interviewee (or the observers) of the relevance of her question.

In information-seeking dialogues the interviewer plays safe: She does not need to commit to any assertion. On the contrary, the interviewee gets committed to his statements, and incurs the risk of contradicting himself. However, in a cooperative situation, information-seeking dialogues are win-win games: The interviewer succeeds by accessing the information, the interviewee by transmitting it. On the contrary, in a non-cooperative situation, when one party is interested in coming to know certain facts, where the other does not want to provide information, the interviewer will win if she extracts the information she wants. In a different sense, the interviewer also wins if the interviewee falls into contradiction, and is discredited. As an example of a (usually) cooperative interview, consider a lawyer examining a witnesses he has indicated; as an example of a (usually) non-cooperative interview consider a lawyer examining the witnesses

[3] Among the most famous legal *topoi* we can mention the following: *ne ultra petita* (condemnation cannot go beyond what is requested by the parties), *et audietur altera pars* (also the other party must be heard, which entails that everyone has the right to defend oneself), *in dubio pro reo* (when the commission of the crime is uncertain, the decision must be in favour of the accused), *nemo plus juris in alium transferre potest quam ipse habet* (one can transfer to another only the rights that one has), *casum sentit dominus* (the owner sustains damages resulting from hazard). We will not discuss separately legal *topoi* since, from a logical perspective, they seem to be reducible to the logical structures we have already discussed: defeasible rules, factor-links and values. We will also not address the historical and philological issue of distinguishing between *endoxa*, *topoi*, and *regulae juris*, an issue we must leave to the competence of legal historians (see in particular Stein 1966).

indicated by the other party. Also prosecutorial fact-finding tends generally to assume the pattern of an information-seeking dialogue, though there are significant variations in different legal systems (see Jackson 2004).

Still different rules are required for a *negotiation dialogue*. In such dialogues there is a *negotiation space*, namely, a set of negotiated outcomes that both parties prefer to a non-negotiated solution. However, the parties gain differently from different negotiated outcomes. For example, assume that a prosecutor would prefer trial to an agreed penalty lower than 5 years, and the accused would prefer trial to an agreed penalty higher than 10 years. Within this negotiation space (from 5 to 10 years) the two parties have to find an agreement. Here the moves are the parties' offers. Each party is committed to his or her offers, in the sense that if the offer is accepted by the other party, it will become a binding agreement. Moreover, the subsequent offer of one party must be at least as convenient as the previous offer of that party. The dialogue finishes when an offer is accepted, and thus a deal is made.

In a successful negotiation dialogue both parties win, and the amount of their victory is the difference between the agreed result and the minimum result they were ready to accept (which is determined by the expected value of a non-negotiated solution). In our example, if the agreement is for the accused to plead guilty with a six-year sentence, the prosecutor wins one year ($6 - 5 = 1$) and the accused wins four years ($10 - 6 = 4$). Note that the gains of the two parties may be very different (in a sense, we may also say the party getting the lion's share is the one who really wins). The game also finishes when both parties refuse to make further offers: In this case both parties lose, missing the advantages of cooperation. The loss may even be worse than simple non-cooperation: If in the course of a negotiation threats were issued, now they may need to be implemented, to the detriment of both parties (otherwise the issuer of the threat would lose his or her credibility, and the possibility of using threats in the future).[4]

Still different rules are required for *practical inquiry*, where the parties engage in a common disinterested search for practical knowledge. In these dialogues—a precise account of which has been provided by Alexy's (1991) theory of practical reasoning (see also the formalisation provided in Gordon 1995)—each one can put forward relevant statements, can defend them through arguments, is obliged to justify his or her statements if required to do so, and can challenge the statements and the arguments of any others. In practical inquiry, defining what counts as winning or losing depends on the purposes of each participant, to wit, on whether they want to achieve an agreement, or rather to increase their individual knowledge or practical wisdom through the interaction with other

[4] We hope that the reader will excuse us for this very simplified account of the complex issue of negotiation, on which there is a huge amount of literature (for a classical reference, see Raiffa 1985).

people, or rather to contribute to the enterprise of increasing collective practical knowledge:

- In the first case, everybody wins if a shared conclusion is achieved, to wit, if there is an argument which has been capable of surviving all challenges and attacks. Everybody loses if no such argument can be found.
- In the second case, one wins if one becomes aware of relevant and insightful arguments supporting or attacking a thesis one is interested in. One loses if no increase in one's individual knowledge and wisdom is obtained through the dialogue.
- In the third case, one wins if one contributes to the development of practical knowledge, viewed as a collective enterprise.

Finally, different rules hold for *reconciliation dialogues*. Here the starting situation is where one party is accused of committing certain offences, the performance of which impairs future cooperation, and which reveal a hostile disposition incompatible with cooperation.

Though very often both parties in a reconciliation dialogue may be in the offender's position one towards the other (as is usually the case after a civil war), it is useful, for analytical purposes, to view reconciliation between reciprocal offenders as consisting in two reconciliation processes going in opposite directions, and thus to keep the idea that reconciliation connects an offender and a victim. The accused party has the possibility either of rejecting the accusation, or instead of admitting his past wrongs while rejecting the disposition that led him to commit such wrongs. The rejection of the accusation would possibly determine a shift into a different type of dialogue, possibly an information-seeking or a persuasion dialogue. The admission would determine a situation where the other party, either gives her forgiveness or challenges the change in disposition of the accused. Again this last reply may start a new type of dialogue—possibly an information-seeking or a persuasion dialogue—intended to establish whether such a change has taken place. It is hard to say who wins or loses a reconciliation dialogue, since this largely depends on the psychological attitudes of the parties. We can say that both win if the reconciliation takes place: Both parties are now committed to cooperate, and the wrongdoer has changed for good. Both lose if reconciliation fails, which can lead to an escalation of the conflict.

11.1.7. Combination of Dialogues, Dialogue Shifts, and Inversion of the Burden of Proof

According to Walton and Krabbe (1995), various other aspects become relevant in describing a dialogue, besides those we considered in the previous sections: the type of conflict (more generally, the type of problem) from which a dialogue originates, the nature of the subject discussed, the degree of rigidity of the rules, the preciseness of the procedural description of the dialogue, the commixture

with other types of dialogues. These aspects too need to be discussed with specific reference to different dialectical systems. For instance, an excessive precision of rules and procedures can play a negative role in a reconciliation dialogue, where an excess in formality can may prevent people from sincerely expressing their feelings, while precision can be useful in persuasion dialogues, where it can make interaction quicker and more effective.

The diversity of dialectical systems, and their different ability of coping with different aims and contexts, explains why a *combination of dialogue-types* may be required for handling complex interactions, where more than one purpose is at hand, and parties may take very different attitudes. This is typically the case in legal proceedings.

The basic pattern for reconstructing such proceedings, both in the civil process and in the (accusatorial) criminal process is given by the *persuasion dialogue*. There are indeed many advantages linked to this type of dialogue. It strongly protects the interests of the opponent, and in particular allows him control over his *privacy*, namely, over the decision of what information to disclose at what stage (by conceding the corresponding statement of the proponent). It does not make major psychological demands on the parties: They are fighting one against the other, and there is no need for their having a joint purpose. It may be tightly regulated, since each party reacts to the moves of the other party. Though a persuasion dialogue has these interesting features, it is clear that no legal process could work as pure persuasion.

First, the opponent could always avoid being persuaded (so that he would never lose) simply by challenging every statement of the proponent, even those that are most evident. This can be compensated by introducing in the debate an impartial observer, such as a jury (or a judge), with the task of establishing what statements cannot be undermined by a simple challenge, but must be assumed unless proof to the contrary is provided (when *res ipsa loquitur*). The evaluation of the observer may be anticipated by the proponent, who tries to provide reasons which her auditorium will presumptively accept. The judgement on the presumptive acceptability can also be made directly by the law, by establishing inversions of the burden of proof.

An inversion of the burden of proof, in a persuasion dialogue, starts a new, embedded persuasion dialogue, where the parties switch their places: In relation to a certain proposition, now the original opponent (the defendant) becomes the proponent while the original proponent (the plaintiff) becomes the opponent. For instance, in the example above once the plaintiff has established that the fence has caused the damage, the defendant can still avoid liability by showing that the decisive precondition for the production of the damage was the plaintiff's careless behaviour. In regard to this condition, the burden of proof is upon the defendant: He becomes the proponent of this proposition, and he must push the plaintiff to concede it, or provide evidence that convinces the judge.

For instance, the defendant can prove that the plaintiff tore his jacket while he trying to jump over the fence, rather than entering through the gate.

Another way to avoid the challenge-all trap is to embed inside the persuasion dialogue an information-seeking phase, as when a witness is interrogated, an expert provides his opinion, or when one of the parties takes an oath. Again, such a step will (usually) provide an inversion on the burden of proof, which requires the defendant to take the initiative: What results from the embedded dialogue will be presumed, unless the defendant persuades the other party (or at least the observer) of the contrary.

Finally, there may be the possibility of embedding negotiation into persuasion, though this would rather consist into moving to a completely different dialogue, as when parties negotiate an agreement to end litigation.

Embedding is an aspect of the more general phenomenon of a *dialogue-shift*, which occurs when a dialogue shades into another dialogue type, possibly without the parties being fully aware of this change. For instance, persuasion can become inquiry if the proponent, rather than defending her thesis, confesses her perplexity on the matter, and asks for cooperation in order to solve her predicament. Similarly persuasion can become information seeking, if the persuader starts questioning her opponent. Inquiry can become persuasion when one researcher is so convinced of (or so committed to) her thesis that she just focuses on resisting the challenges against it.

In some contexts, such shifts may have a negative impact, since they imply abandonment or distortion of the original purpose of the dialogue. For instance epistemic inquiry (for example by a committee of experts) can shift to a negotiation when the parties bargain the result of their inquiry (since they can find an outcome which would be more convenient to all of them, then what they believe to true), failing to achieve the epistemic purpose of inquiry (getting to the truth). Similarly, a persuasion dialogue can degenerate into a quarrel, and so miss the purpose of settling a disagreement. It is even worse when reconciliation dialogue shifts into a quarrel: In this case the parties will attack each other, emphasise their differences, and attribute to each other (and exhibit) features and attitudes that make a future cooperation even more difficult.[5]

11.2. Dialogues and Procedures

Dialectical exchanges constitute the essential component of legal procedures. We need, however, to refrain from always imposing a single dialectical model, inspired by an abstract idea of dialectical rationality.

As we shall argue in the next chapter, different procedures serve different

[5] On the works of the South African Truth and Reconciliation Committee, see among the others Christodoulidis 2000, who stresses the tension between legal proceedings and reconciliation, and the dangers of a dialogue-shift toward an adversarial paradigm.

	Reach cognition	Avoid mistakes	Promote cooperation	Avoid violent clashes	Promote recognition	Preserve dignity	Promote accommodation	Be self-supporting	Provide Efficiency	Psychological ease
Persuasion	L	H	L	H	L	H	L	H	M	H
Negotiation	L	L	H	H	M	M	H	H	H	H
Deliberation	M	M	H	M	M	M	M	M	M	H
Information-seeking	H	L	M	M	L	L	M	L	H	M
Epistemic Inquiry	H	H	H	H	M	H	M	H	L	L
Practical inquiry	M	M	H	H	M	H	M	H	L	L
Eristic	L	L	L	M	M	L	L	H	M	H
Reconciliation	M	M	H	H	H	H	M	M	M	L

H=High; M=Medium; L=Low

Table 11.2: *Performance of different dialectical systems*

aims, in different contexts, and need therefore to be viewed as implementing different types of dialogue.

11.2.1. *What Dialogues for What Procedures*

Different types of dialogues might contribute to different extents to the different ends which may be pursued through legal processes, as shown in Table 11.2, which lists the performance of different types of dialogue under different regards (the grades indicated just exemplify a very tentative and intuitive assessment).

As it appears from the table, different types of dialogues have different advantages and disadvantages and are thus more or less appropriated for different goals: This implies that for achieving the various goals of a legal procedure we will need a combination of dialogues.

For instance, a criminal process inspired only by *persuasion* would correspond to an extreme versions of the accusatorial system: The accuser is the proponent, the defendant is the opponent, and the jury (or the judge) is an impartial observer. Such a process would have the advantage of maximising the avoidance of wrong condemnations, since the burden of proof would lie on the accuser, but on the other hand it would also minimise the possibility of establishing the liability of the defendant. However, much would depend on what evidentiary strength is required in order that the burden of proof is switched unto the other party, to wit, on what conditions have to be satisfied for a statement to be considered so evident that it needs to be disproved, rather than proved.

A persuasion-based process would not promote cooperation, since the two parties would have conflicting strategies, but on the other hand it would avoid violent clashes, since whatever one party may say, it will be attributed to the "logic of the game," rather than to personal attitudes towards the other party (in other words, this would reduce shifts towards quarrel).

In fact, the antagonistic position of the parties favours their reciprocal recognition as adversaries in a fair contest. This is different from being partners in a cooperative project, but also from one party having an arbitrary power over the other. A legal interaction modelled according to the persuasion dialogue would tend to be characterised as a win-all or lose-all game. Thus an accommodation that is satisfactory for both parties will not usually be achieved.

On the other hand, the persuasion model is self-sustaining, since it builds upon the interested behaviour of the parties. It is also moderately efficient, and it requires minimal psychological attitudes on the parties: They would define their strategies so to maximise the achievement of their opposite interests, without the need of taking an impartial or cooperative perspective.

Let us now move to model of the *information-seeking* dialogue. This seems to characterise the model of the *inquisitorial process*. Here the accuser (the judge or prosecutor) is basically an interviewer, who has the task of putting questions to the accused, who plays the role of the interviewee. The accused is thus forced to take a stand, affirming of denying what he is questioned about. In such a dialogue, the dignity and the privacy of the interviewee are at risk, unless appropriate safeguards are taken. There is even the risk that the questions become threats so that the dialogue shifts into mental or bodily abuse, namely, into *torture*.

Also in an accusatorial process the information-seeking mode is adopted when a person is called to contribute his information (as a witness). The skill of the interviewer consists in facilitating the interviewee in bringing out his entire story, by asking the right questions in the right order. However, if the interviewee is not cooperative, the interviewer may try to force him into contradiction: The interviewee is committed to his answers, in the sense that he is not allowed to provide a contradictory version of the facts. If this happens, the interviewee will have to pay the penalty possibly established for falsehood, and withdraw one of the contradictory statements. Moreover the interviewer will probably assume that the interviewee lied in order to protect his interest (or the interest of the party he is trying to support). Thus the interviewee's falsehood may support the conclusion that the version of the facts that less corresponds to his interests (or to the interest of that party) holds true.

A legal process organised as a pure *negotiation* dialogue would usually take place as an alternative way of resolving a dispute (as when mediation takes place). This also happens in criminal cases when the accused negotiates with the prosecutor the conditions for *pleading guilty*.

There are also some instances of legal proceedings being developed as *recon-*

ciliation dialogues. Here *truth and reconciliation committees* need to be considered, which found their highest example in the South African experience (see Tutu 1999).

In such proceedings, the declaration of one's repentance from one's faults and the forgiveness of the other parties are at the foreground. The focus is on psychological attitudes, since the grounds for future cooperation are at issue.

What would make the process fall apart is the impression that an exploitative view is taken by the parties to be reconciled, and especially by the wrongdoer: He does not really want to start future cooperation on new bases, detaching himself from his past actions, but simply tries opportunistically to avoid punishment for his wrongful behaviour. Here the "defendant," when put before his wrongs, should provide evidence of his change of attitude, his rejection of his past, and his commitment for future cooperation, a commitment that should be trusted by the victim, in first place, and by his other fellows too.

The prosecutor (better, the victim) either is satisfied or asks for further admissions and commitments. However, her request should not be viewed as a way of humiliating the wrongdoer (for stigmatising his person, rather than his action), or even of rewarding him for his past wrongs, but rather as a way to ensure that the wrongful damages are restored and to extract evidence that a real change has taken place within the wrongdoer.

Similar kinds of dialectical interactions partially characterise also models of the criminal process inspired by the idea of *restorative justice* (Braithwaite and Pettit 1990).

11.2.2. Dialogue and Collective Choices

Our discussion of dialogue types in legal debates is by no means intended to provide an exhaustive review. We just meant to clarify how legal reasoning has a collective dimension, in regard to which diverse dialectical patterns are required, according to the goals to be achieved and the context in which they are to be pursued.

Our approach requires therefore detaching the idea of practical cognition fromm the structure of a particular type of interaction. What type of interaction may be more appropriate to practical cognition (and in particular to collective practical cognition, namely, cognition from the perspective of a collective), depends on the type of problems to be faced, on the available resources and skills, and on the existing psychological attitudes.

In many cases, as we have seen above, social cognition only indirectly results from the individual participation in a dialogue. This happens when the aims of the participants do not coincide with the function proper to the dialogue, as is usually the case in judicial proceedings.[6]

[6] This detaches one's individual contribution to social cognition from one's intentions. One's

However, as we have seen in Chapter 9, people also directly and intentionally engage (and should engage) in making collective choices, trying to identify appropriate practical determination from the point of view of their collective, and to converge in such choices with their fellows. For this purpose, a vital requirement is that people may intentionally engage in dialectical interactions with their fellows in order to achieve social cognition and perform social choices. This can take in particular two forms.

The first consists in one's participation in *collective practical cognition*. This is the discursive situation where a collective of reasoners share the purpose of reaching practical cognition, concerning a collective choice—the choice of what values, rules, actions their collective should adopt—through sharing their ideas (on communication and cognition as a collective enterprise, see Tuomela 2002).

The reasoners engaged in collective practical cognition would publicly express their beliefs concerning what best advances the collective's aims and also state their critical observations on views by others. Expressed opinions would become part of a common pool of hypotheses to be tested by the participants in the dialogue, and consequently, accepted or rejected by each one of them. Here the focus is on collective inquiry, on each one's availability to contribute his or her own ideas concerning the common good, and on how to realise it, and on each one's availability to take into account impartially the views of others. Practical inquiry is a very appealing kind of interaction with regard to collective choices, there included legal choices: Not only does practical inquiry allow for shared advances in practical knowledge, but it also emphasises the participants' active citizenship, their dignity (each being considered as a valid contributor and evaluator of ideas concerning the common good) and their sense of community (each being involved in the collective enterprise of practical cognition).

Some philosophers, and notably Arendt (1958) have viewed political action (which is sometimes identified with action tout court, in its fullest sense) as the only domain in which this attractive features can emerge, as opposed to theoretical inquiry or to technological activities. We rather believe that the characterising features of collective practical cognition derive from its being a form of collective cognition, an aspect that it shares with theoretical science and technological research (for instance, in physics or in software engineering), as long as they are developed according to the principles of an open research community. The common purpose of finding the solution to a cognitive problem (be it epistemic or practical, scientific or technologic, theoretical or applied) and the availability to provide and consider (according to its merit and its relevance)

contribution to the function of the dialogue in a way becomes similar to the unintentional contribution to social cognition one may provide in non-linguistic ways: for instance, by showing to one's fellows one's "experiments" of living (see Mill 1991a, 71ff.) that others will imitate or avoid according to the success of these experiments, or by contributing through one's economical activity to building social indicators, like prices (on the cognitive function of prices, the classical reference is Hayek 1977).

any input which may be significant to this purpose are common to any collective cognitive enterprise, both in the epistemic and in the practical domain.

The second situation consists in what we may call *negotiation on the common interest*, where people having different views on what choices most contribute to the public good try to converge with one other into a shared solution, and accept a negotiated outcome that to each (or to most) of them appears to be inferior to the solution he or she would have preferred. For instance, to find an agreement on a law on reproductive technologies, a bargain may be reached which allows for artificial insemination, but only when the request comes from a stable couple (given that some would ban all forms or artificial insemination and other would always admit it), and which allows for modifying genes, but only to prevent hereditary diseases (when some would reject all intervention on the human genome and others would also admit ameliorative interventions). Similarly, in a decision concerning affirmative action, the agreement may consist in admitting it, but only under restricted conditions (no fixed quotas, no single criteria, and so on).

Negotiation on the common interest is different from usual negotiation, where each party aims at maximising his or her gains: Here all parties aim at the common good, though having different views of it. This way of bargaining may take place, for instance, between the political parties forming a coalition government, or between the judges in a panel.

A mostly important kind of such negotiation takes often place when a new constitution is adopted. For instance, when the Italian constitution was adopted after the second world war, different political parties, having very different ideologies (Marxist, Christian-Democrat, Socialist, Liberal-conservative), converged in a constitutional arrangement that represented a compromise between the different values expressed by these ideologies. Each of these parties would have preferred, according to its own ideology (according to its peculiar view of the public good), a different arrangement from the one that was agreed and adopted, but they were able to converge on a satisfactory second best, which was acceptable to all of them.

Such compromises often take place at the international level, where Declarations and Treaties on human rights—and first of all the 1948 Universal Declaration of Human Rights—provide the most significant, and most beneficial, example.

Also negotiation in the common interest presents appealing features: It assumes that participants in the interaction recognise their partners as sincerely expressing their views on the common good, take the views of others seriously, and identify what compromise might be appropriate for convergence.

11.2.3. Deliberation, Democracy and Cognition

With regard to both types of interaction we considered the previous section—collective practical cognition and negotiation on the common interest—the ideal of *deliberative democracy* includes two different requirements: democracy and deliberation.

The aspect of *democracy*, on the one hand, requires the broadest participation of citizens, and their equal chance of influencing the output of the decisional process, both in the inquiry and in the negotiation phase.

The element of *deliberation*, on the other hand, requires that the decisional process tracks practical rationality, that is, expresses the idea that political deliberation should approach the procedure of ideal practical cognition, and deliver correct outcomes.

We cannot here discuss the issue of democracy, and of deliberative democracy in particular (see, among the many contributions dedicated to deliberative democracy, Bohman and Rehg 1997). Let us just observe that there is neither a necessary opposition nor a necessary conciliation between these two requirements.

Participation does not necessarily lead to good deliberation, even when everybody is allowed to provide inputs, under conditions of equality. Consider, for example, the limited cognitive results that are often obtained by non-moderated discussion fora over the Internet. In such fora everybody is allowed to provide his or her contribution, under conditions of perfect equality, and without any violence or undue interference (one may even maintain anonymity if one wishes to do so). However, the results are often poor: Sometimes the discussion degenerates into reciprocal abuse and usually many contributions are not worth reading. Moreover, such fora can be easily hijacked by vocal minorities (or by paid lobbyists), so that their outcome is very different from what the (considered) opinion of the polity should be. In fact, Internet debates are usually more fruitful and interesting when they address specific issues (computing problems, technical matter, hobbies, and so on) rather than when they concern general social and political themes.

The short history of Internet discussions seems therefore to confirm the obvious truth that not all have the resources (in time, competence, motivation) to participate in public debate, or rather that nobody has the resources for participating effectively in all public debates. Such limitations can easily be exploited for having open practical inquiry to shift, possibly without the awareness of its participants, into manipulation and deceit.

Moreover, dialogues very rarely lead everybody to shared outcomes. For providing a deliberation, dialogues would need to be coupled with voting procedures, which may lead to a situation where the majority ignores cognitive inputs provided by the minority, so that "will takes the place of reason" (*stat pro ratione voluntas*).

This should not be understood as a criticism of participatory democracy, nor as a criticism of the use of computer technologies for enhancing political participation.

On the one hand political participation, according to appropriate procedures, not only is an important intrinsic value, it also is a fundamental aspect of practical cognition in the political domain: It enables people's views (on their needs and of the ways of satisfying them) to become influential inputs to political decision-making while making governments responsible for the way in which they take this inputs into account, and it enables people to revise and refine their views (to enter a learning process) by having access to political debate and contributing to it.[7]

On the other hand, information technologies are a powerful tool for distributing information, for communicating, and for interacting. Thus, they can give a huge contribution both to participation and to deliberative quality.

However, the advantages of political participation, supported by information techology, do not follow automatically from giving to all an equal opportunity of voicing their opinions and of voting on them. On the contrary, appropriate procedures, constraints, and facilitations must be in place for improving the quality of the process of collective cognition, through collective practical inquiry.[8] .

Even when deliberation is entrusted to elected representatives, there is no necessary link between discussion (coupled with voting) and practical cognition: Electoral mechanisms may undermine the deliberative quality of decision-making, by having representatives focus on sectional interests, or on the passions of their constituencies rather than on the rational identification of the common good. On the contrary, ensuring the deliberative quality of collective decision requires, in various contexts, its *depoliticisation* (see Pettit 2003). This is particularly significant for judicial decisions (and more generally in the application of the law to individual cases).

We view legal reasoning, and in particular judicial reasoning as an active participation in collective reasoning—both in ordinary application of the law and in constitutional review—and thus as a kind of political activity, in a broad sense. However, we believe that judicial decision making (and more generally the application of the law to specific cases) needs to be depoliticised, in the sense of

[7] See for instance Sen (1999), who attributes to democracy the following virtues: "first, the *intrinsic* importance of political participation and freedom in human life; second, the *instrumental* importance of political incentives in keeping governments responsible and accountable; and third, the *constructive* role of democracy in the formation of values and in the understanding of needs, rights, and duties." On law, democracy, and participation, see also, among the many contributions which address this issue, Nino 1996 (who emphasises the cognitive performance of democracy) and Urbinas 1996.

[8] On the risks of illiberal democracies, with the discussion of examples from recent history, see for all, Zakaria 2003. On e-democracy, see for an interesting application Gordon and Karacapilidis 1997, for a discussion with examples Morison and Newman 2001, for more general considerations Sunstein 2001.

being detached from the direct influx of the political bodies through which direct or representative democracy is exercised.[9] This is needed for a number of reasons: Judicial decision-making needs to refer to legally binding standards, it requires legal expertise, it is exposed to strong partisan lobbying (since judicial decisions have a strong impact on the specific interests of the parties while having little incidence on those who are not directly involved), it may involve protecting minorities against the will of the majority. In other legal choices, on the contrary, political decisions (within constitutional constraints) are undoubtedly most appropriate: Universal referenda are suitable for certain basic political choices concerning a whole community, while the vote of representative bodies is needed for ordinary legislation.

Our rejection of politicised application of the law does not exclude that judicial decision-making should be open to discussion and criticism. In this regard, besides general public discussion (which usually can only concern a few most significant issues) and political debate (which is influenced by the competing interests and biases of the opposed political parties), open doctrinal discussion plays a decisive role. Legal doctrine may give (and does fortunately give, in many cases) a fundamental contribution to making so that legal issues are approached in an informed and rational way, according to the idea of practical inquiry (we agree with Peczenik, Volume 4 of this Treatise, sec. 3.2 on emphasising the role of legal doctrine in legal cognition and decision-making).

In conclusion, how universal participation in collective decision-making, directly or through elected representatives—as is required both by everybody's dignity and by everybody's potential for providing useful inputs (as emphasised by Waldron 1999a)—may be reconciled with the idea of practical cognition depends both on the matter to be decided, and on the implementation of appropriate institutional arrangements. We cannot here consider how this reconciliation might happen (we must leave the discussion to political theory and to the doctrine of constitutional law). We need to content ourselves with the statement that only with regard to determinate substantive issues and institutional frameworks, is it possible to establish precisely what legal decisions can be entrusted to the whole citizenship, to elective bodies, to committees of experts, or to professional judges.

[9] In ancient democracy, the same Assembly had frequently both legislative and judicial functions, as illustrated in literature by Aeschylus's *Orestiad* and by Plato's *Apology of Socrates*. A remnant of this kind of arrangement can be found in the judicial function of the English House of Lords—though, as a matter of fact, Law Lords have evolved into a separate judicial body.

11.2.4. Adversarial Models of Legal Argumentation

In recent research there has been an increasing focus on the procedural aspects of legal argumentation, and in particular, on adversarial disputation, as it typically takes place in judicial cases (for some logical analysis of disputations, see for instance: Gordon 1995; Lodder 1999; Prakken 2001b.

Our work has a broader focus than adversarial disputation: We view legal reasoning as the process through which one attempts at identifying binding (and enforceable) normative conclusions, participating in the viewpoint of one's community. This gives legal reasoning a relevance that goes beyond adversarial disputation, a relevance that goes beyond judicial proceedings: Legal reasoning also takes place in cooperative frameworks, as in doctrinal discussion, and more generally whenever people impartially consider what legal solutions are more appropriate (adoption worthy).

This warning does not exclude the need to find appropriate procedural regulations for adversarial disputations, and to implement them carefully. This aspect is linked both to the bounds of human rationality and to our tendency to focus on our own particular interests and opinions, and to privilege them when they conflict with the interests and the opinions of others. Such regulations are required to avoid the disputation shifting into a quarrel, and never reaching an end.

In analysing adversarial legal procedures, the following features of them need to be taken into account.

Firstly, the outcome of a legal dispute often depends not only on the propositions and arguments exchanged, but also on the dialectical behaviour of the parties involved (such as when a claim was disputed, conceded, or not responded to) and on how the burden of proof is allocated. In legal disputes it is not only important what arguments have been exchanged, but also what premises of these arguments have been disputed, conceded (or withdrawn), and how the burden of proof has been allocated.

Even if we only look at arguments and the statements from which they are composed, procedural law has a lot to say. For instance, there are issues of fairness to be considered: As soon as one party has fulfilled his burden of proof, the dispute is not over but the other party must be given a fair opportunity to provide counterevidence.

Moreover, we need to establish when a dispute has to be terminated. This requires answering the following question: Under what conditions a certain body of information is sufficient to decide the dispute, and under what conditions it is better to search for more information? This issue is partly regulated by procedural law, though procedures usually leave some freedom to the judge, at which point rational criteria for termination are called for.

In particular, the problem of termination concerns the distinction between *inferential justifiability* and *cognitive justifiability* we traced in Section 3.3.2 on page 106, that is, the distinction between what would result from correct infer-

ence from a given set of beliefs (of premises), and would result from a larger inquiry (including the search for new cognitive inputs).

For the outcome of a legal process to be fully acceptable it is not sufficient that this outcome is *inferentially justifiable* with regard to premises that satisfy the existing procedural rules, namely, premises that have been provided in the process, have passed the procedural filters and have been accepted according to the decision-making empowerments which characterise the process. The acceptability of the outcome of a legal process also presupposes a certain degree of *cognitive justifiability* as well: The procedure must have offered the possibility that the adequate cognitive inputs (in the first place, adequate pieces of evidence) were provided, and also must have ensured, or at least promoted, the realisation of this possibility.

In this regard, the ideal of cognitive justifiability must be balanced with the fact that human cognition is bounded. A minimal requirement is that anyone that is directly involved in the dispute is offered a fair opportunity of bringing in his or her beliefs and views and of providing the relevant evidential data.

Summarising, when one wants to reconstruct certain pieces of adversarial reasoning, in the frameworks of legal proceedings, one must also take into account how the legal procedure gives permissions and powers of disputing, conceding or ignoring claims, and how it regulates the admissibility of evidence and counterevidence. Moreover, this process evolves in time: The arguments that pass the procedural filter at a certain stage in a dispute may favour the plaintiff, but the dispute may proceed and a new set of arguments passing the procedural filter at a later stage may favour instead the defendant. Finally, the issue of termination is governed by considerations of fairness, relevance (asking the right questions) and resource limitations, especially time and money.

11.2.5. Formal Analyses of Legal Disputation

The formal analysis of the procedural aspects of legal argumentation is a the object of a promising line of research, which originated in the 1990s, when researchers in artificial intelligence and law applied the theory of dialectical systems to legal disputes, developing formal models of dialectical proceedings.[10] These models establish when certain speech acts may or must be made, which effects they have on the (current) outcome of a dispute, and (sometimes) when a dispute terminates.

Formal models of legal disputes often express a design-stance: They aim at providing protocols for how legal disputes can be conducted and resolved in a fair, rational and effective way.

[10] Among the many contributions recently published, see: Gordon 1995; Hage, Leenes, and Lodder 1994; Lodder 1999; Loui 1998; Bench-Capon, Geldard, and Leng 2000; Prakken 2001b. For two recent overviews see: Hage 2000a; Prakken and Sartor 2002)

- *Plaintiff*: I claim that defendant owes me 500 euro.
- *Defendant*: I dispute plaintiff's claim.
- *Judge*: Plaintiff, prove your claim.
- *Plaintiff*: Defendant owes me 500 euro since we concluded a valid sales contract, I delivered but defendant did not pay.
- *Defendant*: I concede that plaintiff delivered and I did not pay, but I dispute that we have a valid contract.
- *Judge*: Plaintiff, prove your claim that you have a valid contract.
- *Plaintiff*: This document is an *affidavit*, signed by us.
- *Defendant*: I dispute that this document is an *affidavit*.
- *Judge* Defendant, since the document looks like an *affidavit*, prove that it is not.
- *Defendant*: This lab report shows that the notary's signature was forged.
- *Plaintiff*: That evidence is inadmissible, since I received it too late.
- *Judge*: I agree: The evidence is inadmissible.

Table 11.3: *Example of a disputation*

Some of these protocols have also been implemented in computer systems intended to support the interaction of the parties in the corresponding dialogues. Thus, the formal analysis of legal disputation is also related to the area of inquiry sometimes called *computational dialectics*, which is concerned with computer-based support to dialectical interactions.[11]

An example of a disputation regulated by a formal model of disputation is shown in Table 11.3. The example dispute is about contract formation. It contains a claim, concessions and disputations, decisions about the burden of proof, an argument and a counterargument, and a decision that a piece of evidence was illegal.

By engaging in the dialectical exchange of Table 11.3, the plaintiff has constructed the argument in Table 11.4 on the next page while the defendant has constructed the argument in Table 11.5 on the facing page (for simplicity's sake we leave some premises implicit, in particular the general rules). The plaintiff's argument passes the procedural filter, since premise (8) was not replied to by the defendant, premises (3) and (5) were conceded by defendant, while with respect to the remaining premise (7), the burden of proving the opposite was assigned to defendant. The defendant's argument, on the other hand, does not pass the procedural filter, since one of its premises (11) was declared inadmissible evidence.

[11] For examples of computer system aimed at supporting legal debates, see: Gordon 1995; Gordon and Karacapilidis 1997; Lodder 1999; Verheij 2003.

$$\dfrac{\dfrac{(3)\ \textit{I delivered} \qquad \dfrac{\dfrac{(7)\ \textit{affidavit} \quad (8)\ \textit{signed}}{(6)\ \textit{offer}\ \text{AND}\ \textit{acceptance}}}{(4)\ \textit{valid contract}} \qquad (5)\ \textit{you didn't pay}}{(2)\ \textit{breach of contract}}}{(1)\ \textit{you owe me 500}}$$

Table 11.4: *Plaintiff's argument*

$$\dfrac{\dfrac{(11)\ \textit{lab report}}{(10)\ \textit{notary's signature forged}}}{(9)\ \textit{no affidavit}}$$

Table 11.5: *Defendant's argument*

Space limitations prevent us from illustrating formal models of disputation in detail. Our main point here is to highlight that disputational dialogues can be formalised in ways that capture specific dialectical protocols.

In recent years, models of the procedure of legal argumentation have made great progress. However, more work remains to be done, especially on formalising these accounts. Important, and still largely unexamined, research issues concern, for instance:

- what strategies should be adopted in playing a certain role a dialogue, e.g. what are the right questions to ask (see Prakken, Reed, and Walton 2003);
- what are good criteria for termination of disputes;
- how process-based models of legal disputation, which focus on single speech acts, can be combined with coherence-based models of legal reasoning, which are concerned with the holistic evaluation of competing theories (see Chapter 28).

Chapter 12

COGNITIVE AND LEGAL BINDINGNESS

In this chapter we shall apply our model of practical reasoning to the analysis of legal thinking and decision-making. In particular, we shall attempt to map the notion of *legal validity*, in the sense of *legal bindingness*,[1] into the idea of *acceptance-worthiness*, or cognitive bindingness that we have introduced in Section 3.1.1 on page 88. This will be a significant test for the soundness of the approach we have developed, given the ubiquity of the idea of validity and the central role it plays, not only in legal theory, but also in legal practice.

12.1. The Paradox of Legal Validity

The notion of *legal validity* is both a fundamental criterion for identifying mainstream approaches to legal philosophy and a major jurisprudential battleground. For example, natural law theory, positivism, and realism are usually characterised by their different concepts of validity. The first assumes that a rule is valid if it corresponds to the will of God or to the dictates of reason; the second, if it has been issued by the State or, more generally, if it possesses a legally defined pedigree; the third, if it is practised by citizens and officials.

The dialectic between these views on validity has been a major constituent of the history of legal thought. In particular, the contest between natural law and legal positivism has continued from ancient Greece (where it underlies such literary and philosophical masterpieces as Sophocles's *Antigone* and Plato's *Republic*) to the 20th century and still is a central issue of legal philosophy.[2] Similarly, the conflict between positivism and realism has been the focus of legal theory in the last century (see Pattaro 1998). Recently, the conflicts between different approaches to legal theory have left room for more compromising views, but validity still remains in the foreground, since these views (also) present themselves as answers to the question of what constitutes "law" or "valid law" (see, among others: Dworkin 1986; MacCormick and Weinberger 1986; Peczenik 1989; Alexy 1992).

[1] We prefer to use the term *bindingness*, rather than of validity, when considering a status of normative propositions, to avoid confusions with the notion of validity as applicable to actions and procedures, on which see Section 23.4.2 on page 608, and in a more general sense, Pattaro, Volume 1 of this Treatise, chap. 2.

[2] On the connection between natural law and legal positivism see Shiner 1990. For a recent review of the theories of natural law, see Finnis 2002, and Bix 2002.

Even a superficial examination of the validity debate reveals, however, a seeming paradox, or, better, a puzzle. On the one hand, this debate has represented the focus of much jurisprudential effort and is considered to have produced some of the greatest achievements of legal thought. On the other hand, it is not easy to understand what the contest is about, and it is even doubtful whether it addresses any genuine problem. Does the validity controversy only concern the *definition* of the meaning of the term *valid*, namely, the description of the current usage of this term, or the stipulation of a new meaning for it? If this is the case, why not simply admit that this term is polysemous: It has many meanings, so that it can legitimately be used in different senses in different contexts and theoretical frameworks?

In this spirit, it would be very easy to distinguish different notions of validity, which are appropriate for specific purposes. For example, following the suggestion of Wróblewski (1992), we could distinguish *axiological validity* (conformity to evaluative standards), *systemic validity* (conformity to "pedigree" requirements, concerning the procedures for law making), and *operative validity* (conformity to the behaviour, attitudes, and beliefs of certain social actors, typically the judges).

More articulate concepts could be devised, by combining these notions. For example, we could define the notion of *systemic-operative validity* as being systemic validity according to operatively valid pedigree criteria (criteria which are in fact socially accepted). This notion would cover, in particular, Hart's model, in which valid laws are identified by practised rules of recognition (Hart 1961). By adding a further component we can define the concept of *axiological-systemic-operative* validity, according to which a normative content is legally valid if, besides being systemically-operatively valid, it does not (grossly) violate certain axiological standards. This concept would include, in particular, Radbruch's famous formula: Positive law, stated and supported by political power, loses its validity when its injustice becomes *intolerable*, that is, when its injustice outweighs the benefit of legal security (Radbruch 1950a; for a sympathetic approach, see also Fuller 1958, and recently Alexy 1992).

Once we have built a taxonomy distinguishing all notions of legal validity we may want to express, there should be no reason for opposing one notion to the others. Before debating validity, one should clearly state what notion of validity one is using, and what terms one is employing to express this notion. After that, the other participants in the debate would still be allowed to contest the truth, the correctness, or the reasonableness of any statement affirming or denying the validity of a normative proposition. However, it would make little sense to question the use of a term instead of another one, for expressing a certain notion of validity, or to argue that a different meaning should be given to a certain term. Everyone, after declaring what one means by *valid*, should be allowed to go along with his or her preferred terminology.

From this perspective, validity controversies seem susceptible of being ex-

plained away as trivial linguistic misunderstandings. Let us consider, for example, the contrast between Radbruch (1950a) and Hart (1983d) on the evaluation of extremely unjust laws (*leges iniustissimae*), such as those implementing racial persecution in Nazi Germany. Hart, when affirming that even such extremely unjust prescriptions were legally valid, was using the term *legally valid* to mean systemically valid (or, more exactly, operatively-systemically valid). Radbruch, when denying their validity was referring to axiological validity (or, more exactly, to axiological-systemic-operative validity). Had this been made clear, both authors should have easily agreed on a platitude: Those Nazi regulations were both systemically valid and axiologically invalid. The difference between the views of Hart and Radbruch—rather than being based on genuine epistemic or practical disagreement—seems to result from that vice known as essentialism: They mistook the different meanings they were assigning to the term *legally valid* for incompatible assertions concerning the same "essence" (Popper 1966, 31f.).

Such a mistake-theory would offer a simple explanation of the validity puzzle. The jurisprudential debate on validity is puzzling because it is nonsensical: It consists in opposing alternative definitions of the same terms, in misinterpreting definitional stances for substantive ones.

However, this view *prima-facie* seems quite implausible. Can we believe that the most brilliant legal theorists have engaged their best energies in endless discussions about legal validity, though nothing was really at stake? Could such debates only concern the frivolous attempt to impose one use of the term *valid* over another (equally legitimate) application of that same term?

In the following pages we shall try to provide a hopefully more sensible explanation of the validity puzzle, in the framework of the theory of practical reasoning we have developed.

We shall first identify the cognitive function that the notion of validity plays in legal reasoning. This will lead us to assimilate the notion of validity, or at least the most important and controversial use of this notion, to our idea of adoption-worthiness, or bindingness. Then we shall consider how conventional or institutional considerations (assessment of shared attitudes, beliefs, and practices) can affect bindingness (validity) judgements, although such considerations are purely epistemic and such judgements are purely practical. Finally, we shall examine how the cognitive function of bindingness judgments determines the meaning of the term *legally binding*—and of the term *legally valid*, when intended in this sense—and what implications can consequently be derived for the use of these terms in law and in legal theory.

12.2. A Legal Example

Let us first introduce a simple example of legal reasoning and analyse the reasoning patterns occurring in it. This will allow us to verify whether the conceptual

(1) believing John assaulted and battered Mark;
(2) adopting instruction ⌈if one assaults and batters another then one shall be punished⌉

---

(3) adopting instruction ⌈John shall be punished⌉

Table 12.1: *Normative syllogism*

framework we have developed is appropriate to illustrate the conceptual role (function) that the idea of validity (interpreted as bindingness) plays in legal language and thinking.

12.2.1. Prima-Facie *Reasoning*

A judge—let us call her Deborah like the famous woman judge from the Bible (Judges 4: 5)—is facing a difficult case. It concerns John, a police officer, who is accused of having assaulted a citizen, Mark, during an investigation. Mark has complained about the assault, but John denies the charge.

Now that the arguments of counsel in the case have been heard, Deborah is trying to make up her mind. She rehearses the arguments of the parties, by reproducing these arguments in her mind. The first argument that Deborah instantiates is the basic *normative syllogism* to which Mark is appealing: The adoption of the instruction[3] that ⌈John shall be punished⌉ follows from the fact that John assaulted and battered Mark, combined with the general instruction that requires punishing those who assault and batter another (see Table 12.1).

From a doxifying perspective—where one first substitutes adoption with belief in adoptability, and then with belief in a normative propositions (see Section 3.2.1 on page 100)—Deborah's reasoning can be recast as concerning the obligation to punish John, as following from the rule that those who assault and batter another ought to be punished (see Table 12.2 on the next page). Finally, by indicating noemata (propositions) rather than beliefs, we get to the objective formulation of Table 12.3 on the facing page. In this reasoning, the adoption of the normative conclusion ⌈John ought to be punished⌉ is supported by a composite reason, including:

1. the minor premise, which is the specific fact-subreason ⌈John assaulted and battered Mark⌉, and
2. the major premise, which is the general rule-subreason ⌈if one assaults and batters another, then one ought to be punished⌉.

[3] By "adopting the instruction" we mean, as we know, "having the intention of implementing the instruction."

(1) believing that John assaulted and battered Mark;
(2) believing that ⌈if one assaults and batters another then one ought to be punished⌉

---

(3) believing that John ought to be punished

Table 12.2: *Doxified normative syllogism*

(1) John assaulted and battered Mark;
(2) if one assaults and batters another then one ought to be punished

---

(3) John ought to be punished

Table 12.3: *Doxified normative syllogism: objective formulation*

12.2.2. The Adoption (Endorsement) of a Legal Rule

Deborah, *prima facie*, considers this syllogism quite convincing, and feels indeed inclined to adopt its conclusion. However, being a critical cogniser, her reasoning must now move up according to the process we have called *rationalisation* (cf. Section 4.1 on page 121). She needs to consider whether she should adopt the subreasons that led her to conclude that Mark ought to be punished: "Did John really assault and batter Mark, and does assaulting and battering one person imply that the assaulter is to be punished?" In other words, she wonders whether these premises are adoption-worthy to her, in her position as a judge, for the case at hand.

We shall not consider here the issue of the adoption of the fact-subreason, the *minor premise*, of her syllogism (we shall examine this aspect in Section 20.4.5 on page 537), but we shall focus on the rule-subreason, the *major premise*. This is the rule: ⌈if one assaults and batters another, then one ought to be punished⌉. Deborah has to decide whether she should adopt this rule, i.e., whether this rule is *binding* to her (cf. Definition 3.1.1 on page 88).

Her first reasoning-step would consist in a *meta-syllogism*:[4] The rule is binding since it is a *ratio decidendi* of the highest court and such *rationes decidendi* are binding, as you can see in Table 12.4 on the next page.

[4] Remember that a *meta-syllogism* is the inference where one concludes that a particular proposition has a certain qualification, on the basis of (1) a meta-proposition saying that propositions satisfying certain conditions have that qualification and (2) the fact that the particular proposition satisfies these conditions. (see Section 2.1.2 on page 49). In the present case, the qualification at issue is legal bindingness.

(1) *rationes decidendi* of the highest court are binding;
(2) the rule ⌈if one assaults and batters another, then one ought to be punished⌉ is a *ratio decidendi* of the highest court

---

(3) the rule ⌈if one assaults and batters another, then one ought to be punished⌉ is binding

Table 12.4: *Meta-syllogism*

(1) the rule ⌈if one assaults and batters another, then one ought to be punished⌉ is binding

---

(2) if one assaults and batters another, then one ought to be punished

Table 12.5: *De-doxification*

Finally, according to the pattern of reasoning which we have called *de-doxification* (see Section 3.1.2 on page 89), the belief that a certain content is binding (that the corresponding certain cognitive state is adoption-worthy) leads to believe that content. Accordingly, Deborah's belief that the rule ⌈if one assaults and batters another, then one ought to be punished⌉ is binding to her, leads her to adopt that rule, according to the inference in Table 12.5 (which is an instance of schema *de-doxification*, as applied to beliefs, a schema which we shall also call *Binding*-elimination; see Section 23.3.4 on page 604).

Exactly the same type of reasoning, *meta-syllogism* + *de-doxification*, could be used by Deborah when considering whether she should adopt other rules, as subreasons why John ought to be punished or not. For instance, Deborah recalls the rule ⌈police officers cannot be punished unless there is an authorisation from the Minister of Justice⌉, which, since such authorisation was not granted, would lead to John's acquittal. Adoption of this rule could be supported by considering that it was adopted by the Parliament, and that rules adopted by the Parliament are binding, as you can see in Table 12.6 on the next page.

12.2.3. Substantive Adoption Policies

The two pieces of reasoning we have just considered in the previous section deal with cases where the adoption of a rule follows from the adoption of a meta-rule requiring to adopt rules having a certain source (having a certain history). To such *source-based* adoption policies, we can oppose *substantive* adoption policies, where adoption is based upon the fact that the rule has a certain content,

(1) rules issued by Parliament are binding;
(2) the rule ⌈police officers cannot be punished unless there is an authorisation from the Minister of justice⌉ was issued by Parliament

---

(3) the rule ⌈police officers cannot be punished unless there is an authorisation from the Minister of justice⌉ is binding

Table 12.6: *Meta-syllogism + De-doxification*

and in particular *teleological* adoption policies, where adoption is based upon the fact that the application of the rule promotes certain values.

Let us now consider how Deborah will decide whether a rule is adoptable to her on the basis of substantive grounds.

Assume that Mark was hit by John, but he did not suffer any physical damage. Deborah would like her community to adopt the rule ⌈even someone who hits another person without causing physical damage is battering this person⌉, abbreviated into ⌈even harmless hitting is battering⌉, though there is an old precedent against this rule. Deborah believes that general adoption of this rule (its adoption by all judges and citizens) would contribute to her concerns for her society by preventing harm and ensuring freedom from fear. In fact, if all her fellows adopted that rule, they would conclude for punishment also when no physical damage has been produced.

However, the fact that general adoption (and practice) of this rule would produce the social results which Deborah desires (and which correspond, she believes, to the values of her community) is not sufficient for her adoption to count as her community's adoption, and to produce the results that general adoption would produce. She knows that her individual decision is going to contribute little to the indicated objectives. Only general practice of the judiciary (and its broad acceptance by the population) can achieve these results. If she moves alone, her decision is likely to be quashed, and it will only cause otherwise avoidable costs to the parties and uncertainty for everybody.

However, things look different if Deborah can expect that the other judges will share her arguments for change and follow her example. In this case her attempt to overrule the existing judicial practice is likely to lead to a new practice, corresponding to a new, different (and better) opinion of the community in the matter.

This inference too leads to the adoption of a legal rule, though according to teleological reasoning on the basis of a substantive reason (a reason concerning the advantages of the application of a rule, rather than the way in which the rule was produced): The rule⌈even harmless hitting is battering⌉ is binding since its

(1) my community's adoption of the rule ⌈even harmless hitting is battering⌉ would contribute to our concerns for our society and to important legal values;
(2) my adoption of this rule has a sufficient chance of contributing to its general acceptance, in the name of my community

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(3) the rule⌈even harmless hitting is battering⌉ is binding (adoption-worthy) to me

Table 12.7: *Adoption of a rule on teleological grounds*

collective adoption contributes to advancing legal values, and has a sufficient chance of being collectively adopted (see Table 12.7). The first subreason above corresponds to the idea that, in order to attempt to participate in adopting a collective cognitive state, one must believe that having that cognitive state would be good for one's community, while the second subreason expresses the idea that the cognitive state one is adopting in the name of one's community needs to have a sufficient chance of becoming a cognitive state of one's community.

The reader will easily see that this piece of reasoning by Deborah instantiates the idea of plural reasoning (participability), which we introduced in Definition 10.1.4 on page 278 and discussed at length in Chapter 10. Reasoners involved in legal reasoning are typically engaged in plural reasoning, that is, they are trying to participate in the adoption of cognitive states of their community.

However, one may also develop arguments that lead one to refuse participating in such an attitude. Consider, for instance, the following query: "Should I adopt rule ⌈Police officers cannot be punished unless there is an authorisation from the Minister of Justice⌉?"

To answer this question Deborah may consider an inference that constitutes a negative application of schema *meta-syllogism*: This rule should not be adopted, since it violates human rights and we should not adopt rules violating human rights (see Table 12.8 on the facing page).

12.3. Validity, Bindingness, Adoptability

From the example above, it clearly appears that we propose to translate the word *valid*, as used in many legal contexts, into our notion of *adoption-worthiness* or *bindingness*, as defined in Section 3.1.1 on page 88. Thus, meta-rules stating that certain legal rules are valid under certain conditions can be rephrased as stating that these rules are binding under the same conditions.

According to the perspective we developed in Section 3.1 on page 87, such meta-rules result from the doxification of cognitive instructions, and particularly

(1) rules violating human rights should not to be adopted;
(2) the rule ⌈police officers cannot be punished unless there is an authorisation from the Minister of Justice⌉ violates human rights of the victims of police crimes

---

(3) the rule ⌈police officers cannot be punished unless there is an authorisation from the Minister of Justice⌉ should not to be adopted

Table 12.8: *Negative meta-syllogism: inferring that a rule should not be adopted*

of meta-instructions having the following content: They require that the reasoner forms the intention to endorse certain instructions (the instructions which are qualified as being binding) when appropriate conditions are met. This characterisation holds both for meta-rules recommending adoption for substantive reasons (on the basis of the content of the rule to be adopted), and for meta-rules concerning adoption for source-based reasons (on the basis of the history of that rule).

In the following paragraph we shall investigate how one may come to rationally adopt legal meta-rules, and this will be linked to the notion of plural reasoning (participability into a collective cognitive state), which was discussed in Section 10.1.4 on page 277. This will allow us to investigate rationality conditions for legal reasoning, and find a justification for some attitudes which reasonable lawyers tend to adopt.

12.3.1. The Social Impact of Legal Reasoning

Legal decision-making is aimed at providing solutions to single cases, solutions that can be coercively enforced upon their addressees, if necessary. So, when Deborah, as a judge, achieves a certain conclusion, she is also accepting that this conclusion will be supported by sanctions.

However, legal decision-making has a broader social impact. In settling individual cases, judicial decisions contribute to form a set of *common expectations*. What if one had no expectation that one's life and property would be respected, that one's contracts would be complied with, that road traffic would follow certain patterns, and so on? Some legal realists have ridiculed such certainties: They have observed that legal expectations may be disappointed, and that legal rules may leave room for interpretation, discretion, and negotiation. However, according to Deborah, the fact that these expectations are defeasible and relatively undetermined does not make them less essential to social life. On the contrary, she believes that the advantage that everybody derives from the

preservation of a stable framework of social expectations normally overrides the interests involved in the specific case:

> However single acts of justice may be contrary, either to public or private interest, it is certain, that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society and to the well being of every individual. (Hume 1978, 497)[5]

This means that her decision counts as her participation in her community's intentionality under two aspects. On the one hand, what she decides in this case is going to function as the premise of further actions and decisions on account of her community (for example, when enforcement is required). On the other hand, she is participating in the adoption of general rules of behaviour by her community. Under the first regard, it is up to her to express what will count as the determination of her community (until her decision is quashed by a higher judge). Under the second regard, her adoption of a certain rule is not going to count as the view of her community, but only as her contribution to the collective process of judicial law-making.

12.3.2. Legal Reasoning as a Contribution to the Legal Process

When acting as judge, Deborah is not reasoning in her private capacity. She is participating in the decisional process of her community, a decisional process which led in the past to various results: the constitution, the statutes issued by the Parliament, the rulings of the Constitutional Court, the decisions of other judges, the beliefs and the behaviour of the citizens. These results were preceded by certain cognitive states (the intention of those who produced the corresponding acts) and are now viewed in certain ways by people dealing with them (a certain law text is being interpreted in a certain way by the courts and by the citizens), and will be viewed in certain ways in the future.

That Deborah is participating in the reasoning process of her community does not mean that she should take into consideration just the official or authoritative statements. On the contrary, she is also to identify the implicit dimension of legal practice (cf. Fuller 1968; Postema 1994), by which we mean its cognitive background, those cognitive states and processes which lie behind verbal and non-verbal behaviour which is practised in legal contexts. To do that, Deborah needs to move away from behaviourism and adopt what Dennett (1989) calls the *intentional stance*, i.e., to view behaviour as the expression of cognitive states. As Dennett observes, when adopting this perspective:

[5] This idea can also be related—when we view the formation of convergent expectations as a function of the law, rather than as a goal to be pursued by legal agents—to Luhmann's (1985, 82) definition of the law as the "structure of a social system which depends upon the congruent generalisation of normative behavioural expectations" (see Rottleuthner, Volume 2 of this Treatise, sec. 4.2).

First you decide to treat the object whose behaviour is to be predicted as a rational agent; then you figure out what beliefs that agent ought to have, given its place in the world and its purpose. Then you figure out what desires it ought to have, on the same considerations, and finally you predict that this rational agent will act to further its goals in the light of its beliefs. (Dennett 1989, 17)

When we adopt this perspective with regard to the legal behaviour of our community, we need to figure out an intentional interpretation of this behaviour. To do that we must consider what the concerned individuals meant to do, and in particular to what collective cognitive state they intended to participate, how they viewed their own behaviour of producers of new normative texts, judges and arbiters in disputes, followers of rules. But we cannot understand the attitude of the concerned individuals unless we also try to figure out what attitudes these individuals attributed to others, and what attitudes they thought that others would attribute to them. Here is how (Fuller 1969, 194) describes how parties try to make sense of their interaction:

Suppose [...] that *A* and *B* are two persons in conscious and lively interactions with one another. *A* and *B* may, for example, have entered upon some common undertaking. They have not yet settled on the terms of their collaboration, but as the venture gets under way they begin to negotiate, by words explicitly and by actions tacitly, a kind of constitution regulating their relations with one another. Each is orienting his words, signs and actions by what he thinks the other seeks and in part also by what he thinks the other thinks *he* seeks.

According to Fuller the mutual adjustment of expectations is also what allows us to identify the law governing the relationship between the parties:

the quality and terms of the parties' emergent relationship—its "laws" if you will—constitute an important social reality, but it is a reality brought into being and kept alive by purposive effort and by the way each of the parties interprets the purposes of the other. (Fuller 1969, 195)

To Fuller's vivid picture, we add the indication that in normative contexts, as we showed in Chapter 9, coordination may be obtained by the parties converging on values, desires and intentions they adopt from the plural perspective, that is, as a way of participating to the decisional process of their community: Identifying (and integrating) their plural choices is the appropriate way of making sense of the normative constraints of their interactions.

This does not imply that one should always and only aim at pursuing public or collective purposes. Collective indications may, in some domains, only concern normative constraints for individual action (Fuller 1969, 207). Within such normative framework one, like one's fellows, may then autonomously focus on one's individual interests, select one's individual goals and the means of their implementation. There is no contradiction between being a bourgeois and a citizen, if this only means that both of the following conditions are satisfied:

- one endorses, from the collective perspective, and taking into account other people's view, a set of shared (or at least participable) rules, and at the same time
- one pursues one's particular interests, according to one's judgement, within the constraints that are established by such rules.

12.3.3. Participation in Legal Beliefs

When Deborah is involved in legal decision-making, she is not just wondering what cognitive state her community has on the point at issue. She is a member of that community, having an active role to play in determining her community's view, by participating in that view, and in this way, influencing it.

To understand what she is doing, she needs to focus on the point or purpose of her reasoning. Certain grounds may provide sufficient support for adopting a cognitive state for certain purposes, together with certain agents, while failing to support its adoption for other purposes, together with other agents.

For example, Deborah thinks that the rule "nobody ought to eat meat" should be adopted in everyone's prudential (or even moral) reasoning. She is led to adopt that rule (together with her fellow vegetarians) by considerations concerning the healthiness of a vegetarian diet, the need to live in harmony with nature, and the fundamental equality of all beings capable of suffering. However she does not adopt this rule in her judicial reasoning, as a premise to be legally enforced.

Similarly, Deborah may be bound to adopt, in her judicial reasoning, the statement of a jury that a financial advisor did not misappropriate his clients' money, and acquit him consequently. However, she may keep her private belief that the advisor is a crook, and act consequently in her private life (choose a different advisor for herself, and advise her friends to do the same).

A link between the point of a piece of reasoning and the bindingness of a rule also holds for cognitive instructions. Thus, a rule establishing the effects of the so-called legal proofs, or excluding certain types of evidence, while deserving to be adopted by judges, may not deserve to be adopted in a historical investigation, by the community of historians. Similarly, the level of "corroboration" required for using a rule of experience in ascertaining criminal liability may well be superior to that which is required for adopting that rule as a sociological hypothesis, or as a principle governing our private lives.

These considerations seem to confirm our initial idea that, by concluding that a rule is legally valid for certain agents, one is just claiming that this rule is binding in the sense of adoption-worthy, and more specifically that the rule is participable by the concerned agents. Since usually the reasoner is one of the agents the participation of which is at issue, such reasoning takes place from the *internal point of view* (Hart 1961), or better from the *first person plural* (Postema

1995), or, as we said in Chapter 9, from the *plural perspective*. In judicial reasoning there are different *we*'s with whom the judge is trying to participate: the first *we* concerns the collective of the dispute, including, besides the judge, also the parties of the dispute; the second *we* concerns the collective of the judiciary, which forms judge-made law; the third *we* concerns the whole of the legal community (and especially those who are going to be involved in similar cases).

With regard to each one of these communities Deborah is situated in a specific position:

- Her decision is going to be decisive with regard to the first community (whatever she will say will officially count as the view of the law on that case).
- She is in the same position of her fellow judges with regard to the second community (she has the same power of influence that other judges have).
- She has a specific position with regard to the third community, though not a decisive one (citizens may continue to disregard a judge's rulings with which they do not agree and this may lead to new legal developments, for example through legislation).

With regard to every such community she is to determine what cognitive attitudes better suits the common good (if adopted by all, or most, members of it), and her chance of producing a collective cognitive state through her own action.

In particular, since we are considering the cognitive attitude consisting in the adoption of normative propositions, she has to consider whether the *ratio* or her decision is or is likely to become a normative belief of her community (in the sense indicated in Section 10.2.9 on page 292). Remember that by a *normative belief of a community*, we mean a normative proposition which is the common belief (see Definition 9.2.2 on page 252) of a sufficient number of people, in the appropriate positions: This proposition plays the role of a collectively endorsed normative proposition, by influencing the practical reasoning and action of the community and of its members.

12.3.4. Reasoning about Legal Bindingness

As we have seen above, reasoning about the legal bindingness (validity) of a normative proposition tends to take two shapes.

First of all we can reason about *teleological bindingness*. This happens when one concludes that one should endorse a rule, given that the general adoption of that rule would contribute to certain values, and that one's adoption of that rule contributes to its being generally adopted. This can be viewed as an instance of teleological reasoning (see Section 1.3.2 on page 18): One's endorsement of certain value (a goal) and one's belief that a plan of action (the endorsement and practise of the rule) is going to promote that value, lead one to intend to implement the plan.

This is exemplified by Deborah's reasoning concerning the adoption of the non-deontic rule ⌈Even harmless hitting is battering⌉. Remember that she formed the intentions of adopting this rule, since she participated in endorsing the value of freedom from harassment, and believed that the general adoption of that rule would contribute to achieving such value. Moreover, she believed that her attempt to participate in the collective adoption of the same rule would have sufficient chances of being successful.

Reasoning schema: *Teleological bindingness*

(1) V is a collective value;
(2) the collective adoption of normative proposition N is a good way to advance V; AND
(3) my adoption of N has a sufficient chance of contributing to N's collective adoption
——— IS A REASON FOR
(4) N is binding

Besides adopting a rule according to schema *teleological bindingness*, we can also adopt a rule on the basis of its *source-based bindingness*. The second type of reasoning leads to the intention to adopt a rule (to the belief that a rule is binding), on the basis of one's adoption of a content-general cognitive instruction requiring the adoption of all rules which are expressed by, or embedded in certain source-facts. This happened when Deborah adopted the rule ⌈if one assaults and batters another, then one ought be punished⌉ on the basis of the fact that such rule was the *ratio decidendi* of a decision of the highest court. Here is the corresponding reasoning pattern:

Reasoning schema: *Source-based bindingness*

(1) all normative propositions which are expressed by source S are binding; AND
(2) normative proposition N is expressed by source S
——— IS A REASON FOR
(3) N is binding

12.4. Bindingness and Rationality

From our characterisation of the notion of bindingness it appears that bindingness judgements primarily are practical judgements: They express the deliberation (the attempt) to participate in the collective adoption of a rule. Such judgements may be doxified and mimic the shape of epistemic judgement (as every practical judgement can). However, they remain practical judgements, and they can be assigned truth values only by referring to ideal practical cognition: It is

true that a rule is binding to a reasoner exactly when ideal practical cognition would lead that reasoner to endorse the rule from the plural perspective, that is, in the attempt to participate in the collective adoption of that rule.

This idea is at odds with those doctrines which view legal rules and their bindingness (validity) as purely social, or conventional facts, as we shall see below. However, this idea does not exclude that social circumstances can affect bindingness judgements. Both decision-makers and citizens need to take into account also (though not only) existing practices and conventions, in establishing what is legally binding . To show how this may happen, we shall expand the example above, so that Deborah can articulate her perspective.

12.4.1. Convergence as a Ground for Bindingness

Let us consider teleological judgements on bindingness. In such judgments social facts play a decisive, though not exclusive, role.

First of all, one has to establish whether the general practice of a rule would really contribute to realising the values of one's community. This judgement involves an epistemic component, since one needs to rely on causal knowledge for establishing the rule's impact of the relevant values.

Secondly, one needs to consider whether one's attempt to participate in a new rule would really contribute to its general acceptance and practice. The latter judgement is a factual judgement, based upon what normative views are held—or are likely to be held in the future—as a matter of fact, by one's fellows.

Let us now consider the second type of bindingness judgements, which lead to the adoption of a rule according to a meta-rule. In their doxified form, these judgements lead one to infer that a rule is binding since it is qualified as such by the appropriate meta-rule.

For instance, in the inference of Table 12.9 on the next page (an instance of schema *source-based bindingness*) factual feature of rule ⌈if one assaults and batters another, then one is to be punished⌉—the fact that this rule is a *ratio decidendi* of the highest court—supports the conclusion that it is binding. However, the argument's premises also include the meta-rule ⌈*rationes decidendi* of the highest court are binding)⌉, which gives practical relevance to this factual feature.

One may not be satisfied with retrieving such a meta-rule in one's mind, and may attempt to rationalise its adoption, searching for answers to the query "Why should I adopt that meta-rule? (Why is this meta-rule binding?)"

To provide an answer, the reasoner can use a teleological inference (according to the schema *teleological bindingness*): The bindingness of the meta-rule ⌈*rationes decidendi* of the highest court are binding⌉ follows from the positive value-impact of its communal adoption, combined with the chance that it will be collectively adopted, as you can see in Table 12.10 on the following page.

With regard to this piece of reasoning the main question we need to answer

(1) the rule ⌈if one assaults and batters another, then one is to be punished⌉ is a *ratio decidendi* of the highest court;
(2) *rationes decidendi* of the highest court are binding

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(3) the rule ⌈if one assaults and batters another, then one is to be punished⌉ is binding

Table 12.9: *Source-based bindingness*

(1) my community's adoption of the meta-rule ⌈*rationes decidendi* of the highest court are binding⌉ would be a good way to advance our collective values;
(2) my adoption of meta-rule ⌈*rationes decidendi* of the highest court are binding⌉ has a sufficient chance of contributing to its collective adoption

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(3) the meta-rule ⌈*rationes decidendi* of the highest court are binding⌉ is adoption-worthy (binding)

Table 12.10: *Teleological bindingness: inferring the bindingness of a meta-rule*

is why one should believe that adopting such meta-rule would contribute to important values of one's community. Deborah remembers from her university course in legal theory a citation by Lon L. Fuller, which may put her on the right track, as we shall see in the next section:

> As we seek order, we can meaningfully remind ourselves that order itself will do us no good unless it is good for something. As we seek to make our own order good, we can remind ourselves that justice itself is impossible without order, and that we must not lose order itself in the attempt to make it good. (Fuller 1958, 657)

12.4.2. Why Share Legal Rules and Meta-Rules

The merit of sharing the adoption of a meta-rule like the one we have just considered is that the meta-rule's collective adoption provides for rule-sharing: It enables judges (and citizens) to form common normative beliefs, that is, to endorse the same rules and be aware that this is the case.

This fact, however, sets the stage for a broader question. We have seen that Deborah's teleological argument for rule-adoption moves from the considera-

tion that sharing certain rules may be a good way of realising certain values. But why should rule-sharing be a good way of realising collective values?

Deborah knows that she is involved in legal decision-making: Her reasoning is going to produce normative conclusions which should be obeyed by the parties of the case, and which can be coercively enforced upon them, if necessary. She also knows that her decision is going to affect the lives of the parties: If she punishes John, John's career in the police will be destroyed; if she acquits John, Mark will feel embittered and disappointed.

However, she also knows that judicial decision-making has a broader social impact. In settling individual cases, judicial decisions contribute to form a set of shared expectations, which allow for coordination (see Section 12.3.1 on page 339).

Deborah also knows that there may be different meta-rules susceptible of producing convergence, if generally practised by their addressees. She can even see that the general practice of some rules would promote certain interests and values better than the general practice of other rules. However, only general practice is going to produce these results. As we have seen in Chapter 9, the practice of a rule by only one individual, while all others are disregarding it, will not produce what the general practice of that rule would have brought about, but it is likely to cause only disruption.

What if one believed, with good reasons, that English drivers would be better off if all of them drove on the right, and therefore one started to drive in this way in England, while no one else adopted this practice? One would not achieve the results one expected (lower car prices, easier travelling abroad, fewer accidents, and so on), but one would instead endanger one's life and that of other people. As we have seen above, game theorists describe this situation as a *coordination game*: Each individual prefers coordination, but there are different possible ways of achieving it (for instance, all driving on the right, or instead all driving on the left). Although the general practice of any of these ways will provide coordination, it will do no good if different individuals practised different ways (one going on the right and the other on the left).

Coordination will only be obtained if each one behaves in the same way (or in coherent ways), choosing what the others also choose (or what is coherent with the others' choices). The concern for coordination is particularly pressing for Deborah since she is a judge, and judges can succeed in providing coordination to society only if they coordinate their own activities, converging into the same rules.

The need that lawyers take into account the beliefs of other lawyers has been addressed by Peczenik, Volume 4 of this Treatise, sec. 4.4.4, who comments on Eng's (2000) view that legal judgements had a double nature, descriptive and normative. According to Eng, this duplicity is shown by the fact that one may react in different ways when one sees that one's legal opinion is not shared by most other lawyers (and in particular by judges): Sometimes one changes one's

mind (which proves that one's legal opinion was prevalently factual), sometimes one persists in one's deviant opinion (which prove that one's legal opinion was prevalently normative).

We agree with Eng on the fact that lawyers can take these two attitudes, when disagreeing with the mainstream legal opinion. From our perspective, however, the fact that a judge (or a doctrinal writer) chooses to align his or her legal opinion with the opinion of others does not imply that legal judgement has a descriptive nature. This attitude rather depends on the normative commitment to achieve legal values through the practice of shared norms: Sometimes one renounces to push forward a normative belief one would like to see generally endorsed, for the sake of coordination (since there is little chance the others will join). This attitude is consistent with the fact that, in other occasions, one may on the contrary push forward such a normative belief, in the expectation that the others will follow.

12.4.3. Participation in Currently Shared Rules

In the previous paragraph we have seen the importance of adopting shared meta-rules. However, we need to address the second sub-reason why Deborah should conclude for participating in sharing a rule: She believes that her adoption of that rule is going to be successful, in the sense that a sufficient number of people will effectively converge in adopting that rule, so that the rule will maintain (or obtain) the status of being a normative belief of her community. In the following we shall identify certain situations where this belief is justified.

The first situation to be considered is the following: The rule Deborah is considering to adopt is currently shared by her colleagues (and by the other citizens). In other words, the rule already is a normative belief of her community, in the sense of Section 10.2.9 on page 292.

In such a case she should be sufficiently confident that she will succeed in participating in a shared normative belief. She would fail to do so only in the improbable case that her community suddenly changed its view. Thus, we can represent her reasoning in the following pattern:

Reasoning schema: *Persistent convergence*

(1) normative proposition N currently is a normative belief of my community; AND
(2) it is very unlikely N will suddenly be abandoned
——— IS A REASON FOR
(3) my adoption of N has a sufficient chance of contributing to N's persistent adoption by my community

The reasoning schema *persistent convergence* allows Deborah to conclude, for example, that her adoption of the rule ⌈if one assaults and batters another, then

one is to be punished⌉ has a sufficient chance of contributing to the collective adoption of this very rule. This schema, plus the belief that the general adoption of this rule would contribute to legal values, would lead her to believing that this rule should be adopted (that it is binding).

Schema *teleological bindingness* leads one to conclude that a normative proposition is binding, given that (1) its collective endorsement promotes certain value, and that (2) one's endorsement is likely to contribute to collective endorsement). By merging it which schema *persistent convergence*, we obtain the following schema, which we may call *present teleological convergence*.

Reasoning schema: *Present teleological convergence*

(1) having normative belief N is a sufficiently good way to advance collective values;
(2) N currently is a normative belief of my community; AND
(3) it is very unlikely that N will suddenly be abandoned

——— IS A REASON FOR

(4) N is binding

This schema can be viewed as an instance of the idea of cooperative virtue (Den Hartog 1998): When coordination is already at work, and one approves its results, one should join in, rather than free ride on others' effort.[6]

Thus, according to this schema, the reasons for preserving a convention do not coincide with its causes, with the reasons why it started. That a rule has come to be generally shared can be explained by various causes, like the following ones: our instinct to imitate other people's behaviour and transform normality into normativity; the performance of social evolution in selecting and spreading the best adapted rules of behaviour; our capacity of finding solutions to collective problems and of mirroring other people's reasoning, so as to converge on the same answers to the same problems; the intervention of political or economical power. Whatever these causes are, the fact that the rule has become a convention (producing a desirable form of coordination), provides, from the moment when this is the case, a new reason why it should be accepted.

Deborah can apply schema *present teleological convergence* at different levels.

Firstly, she may apply it directly to the substantive rules at issue. Let us assume the following: (*a*) Deborah has some evidence that her fellow judges are sharing the rule ⌈if one assaults and batters another, then one is to be punished⌉, and (*b*) she has some evidence that citizens too tend to consider this rule as being appropriate. These two elements are sufficient for her to conclude that this rule is a normative belief of her community. Moreover, she believes that general practice of this rule contributes to some values of her community. Then she can

[6] On the connection between law and coordination see: Finnis 1980, 238ff.; Finnis 1989; Viola and Zaccaria 2003, 27ff.

(1) convergence into meta-rule ⌈*rationes decidendi* of the highest court are adoptable⌉ is a sufficiently good way of promoting collective values;
(2) this meta-rule is currently a normative belief of my community;
(3) it is very unlikely that this normative belief will suddenly be abandoned

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(4) the meta-rule ⌈*rationes decidendi* of the highest court are binding⌉ is binding

Table 12.11: *Present teleological convergence: inferring the bindingness of a meta-rule*

conclude that she should participate in adopting this rule, i.e., that this rule is binding, since (1) it is a normative belief of her community, (2) the practice of which provides a desirable form of convergence (just substitute the rule for the variable N in the argument pattern above).

Note that schema *present teleological convergence* is reinforced when one mirrors other people's reasoning. Deborah can hope that her colleagues are not going to change their mind (so preserving the first subreasons of the inference above), since they should reason in the same way as she does: Each judge should choose to follow the others, assuming that everybody else will do the same. This is the characteristic circularity of conventions:

- The fact that people share a certain belief provides to each one of them a reason why he or she should accept this belief.
- The fact that people are aware that each one of them has this reason, in its turn, reinforces the conclusion that they share the belief.

Secondly, Deborah may apply schema *present teleological convergence* to shared meta-rules prescribing the acceptance of rules having certain properties. Shared meta-rules contribute to the common good by facilitating coordination: Convergence on meta-rules provides convergence on substantive rules, and so indirectly induces coordinated behaviour. Correspondingly, Deborah can produce the instance of *present teleological convergence* in Table 12.11: She can conclude for the bindingness of the meta-rule ⌈*rationes decidendi* of the highest court are binding⌉, given that this meta-rule—which is collectively endorse (and unlikely to be abandoned)—has a positive value-impact.

Deborah's consequent acceptance of the meta-rule, allows her to build a new meta-syllogism, leading her to accept the substantive rule (see Table 12.12 on the facing page): She conclude for the bindingness of the particular rule ⌈if one assaults and batters another, then one is to be punished⌉, given that this rule is a *ratio decidendi* of the highest court. Now Deborah has two parallel inferences

(1) *rationes decidendi* of the highest court are binding;
(2) the rule ⌈if one assaults and batters another, then one is to be punished⌉ is a *ratio decidendi* of the highest court

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(3) the rule ⌈if one assaults and batters another, then one is to be punished⌉ is binding

Table 12.12: *Source-based bindingness: inferring the bindingness of a particular substantive rule*

why she should adopt the substantive rule ⌈if one assaults and batters another, then one is to be punished⌉. The first inference moves from the fact that this rule is a normative belief of Deborah's community, and provides for coordination, the second, from the fact that it is a *ratio decidendi*.

The two inferences are distinct, but connected: The second helps the reasoner in establishing the precondition of the first. We have said above that to understand whether a normative proposition is a normative belief of one's community one has to consider whether this normative proposition is the common belief of a sufficient number of people, in the appropriate positions and circumstances. Among these people, the judiciary exercises a particular role. Except in exceptional circumstances (when the legitimacy of the judiciary is gravely contested) the common belief of the judges is sufficient for a normative propositions to be viewed as being endorsed (believed) by the community: The normative proposition is going to determine the decision of individual cases, a decision which is going to be collectively enforced if necessary. Thus to apply schema *teleological convergence* Deborah has to verify whether the normative proposition she is considering currently is a normative belief of her community, which means that she has to check whether this proposition is a common belief of the judges.

This verification, however, is no trivial pursuit. Deborah has little evidence that all judges in her jurisdiction share the rule ⌈if one assaults and batters another, then one is to be punished⌉ and she cannot make any accurate empirical inquiry (it would be inappropriate to mail questionnaires to her colleagues or make telephone polls). However, she can achieve this conclusion by mirroring the reasoning of her colleagues. She knows that all of them accept the metarule ⌈*rationes decidendi* of the highest court are binding⌉, and that all of them are aware that the substantive rule ⌈who assaults and batters another, is to be punished⌉ was stated in a precedent of the highest court. But then, all judges must have come to the conclusion that this rule is binding. Each of them must have consequently accepted this rule and must know that everybody else is accepting it: The rule is a common belief of all judges.

12.4.4. Participation in Future Rules

The prospect of convergence does not necessarily require the upholding of existing collective normative beliefs. Deborah can also consider the possibility of producing future convergence by starting the practice of a new rule. Her attempt will make sense only when she has reasons to believe that her behaviour will trigger a process of learning and imitation, ending up in the general adoption of the same rule (in its becoming a collective normative belief, in the sense of Section 10.2.9 on page 292).

This presupposes that the general practice of the new rule will provide substantial collective benefits, clearly outweighing the costs of change, according to arguments on which most people will agree. These arguments must appeal to reasons that are shared by most people in the relevant circles: Each one of these people, besides being ready to accept the new rule, must be convinced that most other people will accept it. This awareness will make all those who are in favour of the new rule move together towards the new equilibrium. Since these people are the majority, the reluctant few who would prefer to stick to the old ways should follow soon, since this is the only option they have to achieve convergence.

For instance, we may assume that Mark was hit by John, but that he did not suffer any physical damage, and that the current judicial convention says that such instances of hitting do not amount to battering. However, Deborah strongly supports the contrary rule ⌈Even any someone who hits another person without causing physical damage is battering this person⌉, abbreviated into ⌈Even harmless hitting is battering⌉. She backs this rule with the consideration that its implementation will promote important social and legal values: preventing harm, ensuring freedom from fear, and so on.

If this view were destined to remain only hers, she should probably backtrack, by considering that her attempt to participate in the collective adoption of this rule is going to fail, as we observed in Section 12.2.3 on page 336. However, things look different if she can expect that her colleagues will share her arguments for change and follow her example.

Her reasoning in this regard is going to be similar to the reasoning we described in the previous paragraph. The only difference concerns the way in which she gets to the belief that most of her colleagues are going to participate in the rule she is adopting.

There are two types of reasons that may be appealing to her fellows:

- The first type of reasons concerns why they should (learn to) appreciate the collective adoption of rule she is proposing (its collective adoption will contribute to certain collective values they endorse).
- The second type of reasons concerns why each one of them should believe that one's adoption of the rule will lead to its general adoption.

Assume that she believes that when both these preconditions hold, there is a

(1) my fellows are going to share my idea that the general adoption of rule r would contribute to collective values
(2) each one of them is going to believe that his or her adopting r is going to contribute to r's general adoption
(3) for any rule x, if conditions (1) and (2) hold, then my adoption of x has a sufficient chance of contributing to x's general adoption

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(4) my adoption of r has a sufficient chance of contributing to r's general adoption

Table 12.13: *Syllogism: inferring that one's adoption of a new rule contributes to its general adoption*

sufficient chance that her attempt will be successful. Then Deborah's conclusion that her fellows are going to join her in adopting the new rule ⌈Even harmless hitting is battering⌉, can be based upon a syllogism: This conclusion can be grounded upon the idea that whenever both preconditions hold with regard to a certain new rule, then one's adoption of this rule is likely to lead to its general adoption (see Table 12.13, where we denote the new rule as r). The conclusion of this syllogism, combined with Deborah's belief that the collective adoption rule r would be a good thing (since it would satisfactorily realise certain values) leads her to conclude that she should accept rule r. Thus, according to Deborah, the rule ⌈Even harmless hitting is battering⌉ is binding, though it is not yet accepted nor practised by her fellows, not even by her colleagues.

12.4.5. Coordination and Prioritisation

The fact that the law satisfies collective values through the endorsement and the practice of collective normative beliefs, while providing Deborah with reasons why she should adopt conventional rules (and overrule them only when she has a good chance of starting a new convention), also explains why she should accept that certain rules are stronger than others, so that they can defeat their competitors.

In fact everybody's adoption of the same rules is not yet sufficient to produce *legal coordination*, intended as a situation in which collective decisions (and in particular judicial ones) are in line with the expectations of citizens and of other decision-makers. To achieve coordination through the practice of certain rules, it is necessary that each single person be able to anticipate what everybody else will do (and what they expect others to do) in the relevant circumstances, to wit, in the conditions contemplated by those rules. This requirement is not satisfied when all share the same rules, but they disagree on adjudicating the conflict between each rule and its competitors.

(1) coordination is a collective value;
(2) my community's adoption of the priority ⌈legislation prevails over case law⌉ is a good way to advance coordination;
(3) my adoption of the priority ⌈legislation prevails over case law⌉ has a sufficient chance of contributing to its general adoption

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(4) the priority ⌈legislation prevails over case law⌉ is binding

Table 12.14: *Teleological bindingness: inferring a preference-proposition*

Let us assume that two judges accept both rules r_1 (whoever assaults and batters another is to be punished) and r_2 (police officers cannot be punished, unless this is authorised by the Minister of Justice), but disagree on which one is stronger. This disagreement will imply that the two judges would decide differently the case of John (he, as we know, is a police officer and has assaulted Mark, but his punishment has not been authorised):

- The first judge ranks r_2 over r_1. Therefore she would acquit John.
- The second judge ranks r_1 over r_2. Therefore he would punish John.

When there are such disagreements in the judiciary, citizens will not be able to anticipate judicial decisions in concrete cases. One's ability of making such forecasts would require indeed that one—besides knowing what rules judges are currently sharing—also knew how every particular judge will adjudicate the conflicts between these rules. This seems to be a diabolical task!

Fortunately, the task is simplified by the fact that people (and judges in particular) also share some meta-rules, which tell them what to do in cases of conflict. Those prioritising meta-rules also contribute to coordination. Therefore they can be supported (if they are in fact shared by most judges, or are likely to be) through coordination-based arguments.

This is certainly the case for the meta-rule that, in Deborah's jurisdiction, adjudicates conflicts between *rationes decidendi* and legislative rules, in favour of the latter. This meta-rule is in fact generally accepted, and therefore Deborah can conclude that it should be accepted (that it is binding), since it contributes to important legal values (first of all the need of certainty, but indirectly also all those other values which can be promoted though legal coordination).

This inference, as you can see in Table 12.14, is just another instance of the *teleological bindingness* schema we considered above. Note that this priority argument may be decisive in Deborah's reasoning. It provides her with a premise for establishing that rule r_2 (police officers cannot be punished, unless this is authorised by the Minister of Justice) prevails over rule r_1, so that she can conclude John is to be acquitted (on rule priorities, see Section 7.1 on page 195).

The application of the coordination pattern can provide even more abstract coordination arguments. For example, one can conclude that:

> we should accept the meta-rule ⌈rules which provide for coordination prevail over other rules⌉

given that this meta-rule is already practised by the judiciary, and given that this practice provides a valuable form of coordination (by increasing existing rule-based coordination).

The extraction of normative conclusions from ongoing practices—while contributing to objectives of convergence and coordination—leads to conformism. Fortunately, the search for convergence does not exhaust legal reasoning.

As the schema *present teleological convergence* shows, there is also the need for convergence to lead to the "common good." Thus, Deborah may well consider to reject a rule (like the rule exempting police officers from punishment, unless there is a political authorisation) by claiming the following: (*a*) rules grossly violating human rights are not binding, and (*b*) this human rights-based proviso defeats the other rules, there included those that are currently practiced.

Moreover, as we have seen in Section 12.4.4 on page 352 conformism is not the only avenue towards coordination: Under appropriate conditions, new rules may also aspire to become the focus of a shared practice, and be endorsed from the plural perspective, in order to participate in a new collective normative belief.

Chapter 13

THE FOUNDATION OF LEGAL BINDINGNESS

Let us summarise the results we have obtained in Chapter 12. First, we have stated the idea that the word *valid*, when applied to an instruction or to a normative propositions, often means *binding*: It expresses the idea of adoption-worthiness or bindingness, by which we mean the cognitive necessity to endorse that normative proposition. Such necessity is relative to the context and the purpose of the reasoning process in which the normative proposition is to be used. When collective adoption is at issue, the idea of adoption-worthiness is specified into the idea of *participability* in a shared norm or value.

Correspondingly, in the discussion above, we substituted the expression "rule r is valid," with the expression "rule r is binding." Hopefully, the reader may by now be convinced that this substitution works well, providing an intuitive account to the role played by the predicate *valid* in legal discourse, when it qualifies a normative proposition.

Secondly, we have seen this notion of bindingness at work in a judicial example, and in particular, in those inferences aimed at establishing what rules count as legally binding. These inferences have exemplified how the normative notion of bindingness allows for the construction of rich conceptions of the law, in which also social facts (legal sources) can be given appropriate recognition, as reasons supporting bindingness conclusions.

According to our notion of bindingness as (cognitive) participability in the collective adoption of a normative proposition, what is binding may vary according to the context and the purpose of the bindingness judgement, but also according the specific position of the author of the judgement. In fact, such circumstances impact on two (sub-) reasons supporting the conclusion that a new rule is binding:

1. the extent to which the general adoption of a new rule would contribute to realising (or impairing) legal values, and
2. the chance that one's adoption of the rule would lead to its collective endorsement.

Considerations concerning the reason (1) explain why the beneficial impact of a new rule may support the adoption of this rule in civil matters (when declaring a private right, or ordering a compensation), but not in criminal matters (where punishment is at issue, and certainty has the highest importance). Considerations pertaining to the reason (2) explain why some judges may be justified in

adopting a new *ratio decidendi*, departing from precedent, while other judges should instead follow precedents. For example, in the British legal system, the precedents of the Court of Appeal are binding for the other judges, except that for the House of Lords.

These dimensions of legal bindingness can be specified by adding further contextual specifications to the word *binding*. Therefore, we may well say that a rule is binding in criminal law but not in private law, or even that it is binding for judge j and not for judge k.

Our notion of bindingness makes it applicable also to factual rules (for instance, rules of experience), and in particular to the interplay of scientific, common sense, and legal criteria in the evaluation of evidence. Since the purpose of the bindingness discourse is to establish whether a certain rule (or more generally, proposition) should be adopted in a certain reasoning process, all relevant standards can dialectically interact in establishing such a conclusion.

Finally, from our perspective, it is no surprise that what might be binding in a historical or scientific argument might be unacceptable in a judicial argument, and vice versa. Similarly it may be well justified to apply stricter proof-standards in criminal cases than in civil ones: For example, certain empirical generalisations (for which there is only probabilistic evidence) can be binding in private law, while not being acceptable in criminal matters.

In the following sections we shall go back to the general idea of bindingness, in order to establish its jurisprudential implications. Firstly, we will consider the nature of bindingness judgements, exploring how they relate to the position of their author, and what function they play in legal cognition. Secondly, we will consider what implications we can derive from this function and sketch the connections between legal bindingness, optimal law, and moral bindingness.

13.1. Definitional and Substantive Issues

When we speak about legal bindingness (validity), we tend to mix two different kinds of issue: (*a*) the definitional issue of providing an appropriate notion of bindingness, and (*b*) the substantive issue of establishing under what conditions something is binding (valid). In the following sections we shall distinguish these two issues and analyse their connections.

13.1.1. Definitions of Legal Bindingness

According to the above analysis, ⌈rule r is legally binding⌉ means ⌈r deserves to be adopted for the purpose of legal reasoning⌉, where legal reasoning may be characterised as the type of reasoning which is meant to derive conclusions that should be complied with, and can be publicly enforced upon the concerned parties.

Gustav Radbruch (1878–1949)

Chaïm Perelman (1912–1984)

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This "definition" of the notion of legal bindingness does not include any indication of the grounds upon which a rule may be characterised as being legally binding. In fact, people discussing whether a rule is legally binding may disagree on those grounds.[1] Some may think that only those rules are legally binding (adoptable in legal reasoning) that are issued by a national legislator, or that are "contained" in certain precedents. Others may include also the rules issued by certain international bodies. Others may endorse conventions (customs) existing in the judiciary or in certain professional circles. Others may insist on principles that can be derived from certain religious traditions or political ideologies. Others may exclude the bindingness of those rules which violate human rights, or that are grossly unjust under other criteria. Others may take the anarchical stand that no rule whatsoever is legally binding, excluding that any rule whatsoever can qualify for the purpose of acceptance in legal reasoning, namely, for the purpose of possible public coercion.

To understand how people having different ideas on legal bindingness can entertain a meaningful discussion, we must identify the regions of their dissent and of their agreement. All debaters strongly dissent on "why" something is legally binding, that is, on what features or preconditions enable a rule to be binding, and consequently they disagree on "what" is legally binding. However, they all agree on the meaning of "legal bindingness," to wit, on the conceptual function of legal-bindingness judgements (as judgements intended to support the use of a normative proposition in legal reasoning).

This agreement explains why it matters so much to establish that something is binding, and therefore why there is such fierce dissent on what rules are binding, according to what reasons. This agreement also explains the limits of a definition of legal bindingness—and of legal validity when intended in this way. This definition only provides as an account of the meaning of the term *legally binding*, but it is not sufficient to identify the denotation of this term (to circumscribe all legally binding propositions): It only captures the common use of the term "binding," namely, its function in legal debates, as viewed from the "internal" perspective of the participants in those debates.

13.1.2. Grounds for Bindingness

We must carefully distinguish such a *definition of bindingness* from a *theory of the grounds for bindingness*, by which we mean an account of what properties a rule must enjoy in order to be legally biding. A theory of the grounds for

[1] On the possibility that different people may adopt different rules of recognition (or fundamental rules, *Grundnormen*, in the Kelsenian terminology), see Jori 1985, 235ff.. This thesis is criticised by Catania 1992, on the ground that of that the selection of a rule of recognition is to be constrained and motivated only by the need of recognising the legal nature of effective rules, supported by organised force. For our objections to the latter view, see Sections 13.1.3 on page 362 and 13.2.2 on page 371.

legal bindingness, when applied to appropriate inputs (facts and evaluations) will provide a determination of what rules are legally binding.

Since the concept of bindingness is evaluative ("x is binding" means "x deserves to be adopted"), also any theory of the grounds for bindingness also is evaluative (it is a practical rather than an epistemic theory). The fact that a rule has certain "factual" features is not sufficient to support a bindingness conclusion (unless the argument is an enthymeme): We also need a practical or normative subreason, namely, a meta-rule saying that rules having these features are binding. A theory of the grounds for legal bindingness is indeed mainly constituted by a combination of meta-rules about bindingness:

- positive ones, establishing that a rule is binding if it has certain features, and
- negative ones, establishing that a rule is not binding if it has certain other features.

For example, in the debate of Chapter 12 our judge has affirmed the bindingness of the rules that are issued by the legislator, that are laid down by the highest court, that are the focus of desirable co-operation, and so forth. She has also denied the bindingness of those rules that are not shared by the judiciary, which violate human rights, and so on.

The thesis that facts alone are insufficient to ground a bindingness conclusion may seem to push us towards a Kelsenian approach: The validity (bindingness) of a rule depends on meta-rules, the validity of which needs to be established through further meta-rules, until one reaches a single fundamental normative proposition, the *Grundnorm*, the validity of which is postulated without any further arguments (on Kelsen's *Grundnorm* see also Rottleuthner, Volume 2 of this Treatise, sec. 4.1). One important point of contact between our approach and Kelsen's is indeed the idea that validity (bindingness) expresses a normative notion, an "ought" (as stressed by Nino 1978). However from our perspective, this "ought" is the *cognitive duty* (see Section 3.1.1 on page 88) to accept a rule in legal reasoning, rather than the fact that the rule states an obligation (as we shall see in Section 21.3 on page 563), or that it is the meaning of anybody's real or presupposed act of will (Kelsen 1967, sec. 4.b).

Moreover, the idea of bindingness here developed does not imply that all meta-rules establishing what rules are legally binding also need to be themselves legally binding. In order to use a certain meta-rule as a criterion for bindingness, I do not need to believe that this meta-rule itself is legally binding.[2]

In our approach we may indeed say that the fundamental rules are meta-rules

[2] More precisely, let as assume that I am adopting a set MR of meta-rules, according to which I identify a set BR of legally binding rules. All meta-rules in MR must attribute legal bindingness: Each of them must state that certain rules (which satisfy certain conditions) are legally binding. Nevertheless, those meta-rules do not need to be themselves all legally binding (as Bulygin 1990 assumes): They do not need to be included in BR. Some meta-rules in MR may indeed be legally

that are not qualified as legally binding by any other legal meta-rules. There is no need for arbitrarily "stipulating" or "assuming" or "presupposing" the legal bindingness of these ultimate meta-rules: We should rather adopt them on the basis of various meta-legal (political, ethical, religious, humanitarian, etc.) considerations (combined with the need to plurally converge with our fellows). The ultimate meta-rules provide the core of any theory of the grounds of legal bindingness, by providing the link between legal discourse and other types of practical discourse. There may be just one ultimate meta-rule, or more than one, according to the particular theory of the grounds of bindingness one is adopting.

Correspondingly, our idea of bindingness does not imply the idea that a legal system should be a pyramid ending in a single meta-rule (a single fundamental norm, or rule of recognition), stipulated to be legally binding.

Note that ultimate meta-rules may also be the result of a process of rationalisation (through abduction), where one tries to identify appropriate foundations for a set of rules one is already endorsing, those foundations being abductively validated exactly by the fact that they determine the bindingness of the very rules one already believes to be binding on substantive grounds (since they are part on ongoing practice which one generally approves, as a whole).

More generally, the definition of legal bindingness as "adoption-worthiness in legal reasoning" is neutral with regard to different theories of the grounds of bindingness (of the conditions making so that a rule is adoption-worthy): This definition constrains neither the content of the meta-rules in these theories, nor the sources they are derived from.

It is important to remark that the neutrality of the definition of legal bindingness does not imply that adopting one or another theory of the grounds of legal bindingness is an irrelevant or arbitrary choice. This adoption has weighty practical implications, especially for legal decision-makers: By determining what rules one views as legally adoptable, it affects the conclusions of one's legal reasoning, and hence the decisions one will impose on the parties of legal disputes and possibly enforce upon them against their will. Therefore, proposing such theories and developing arguments for or against them is an important and challenging task for the legal theorist.

binding, since there are meta-rules in MR that say so. Assume, for instance that I accept a meta-rule r_1 saying that all rules issued by the authority j are legally binding, and that a meta-rule issued by j, let us call it r_2, says that rules issued by the authority k are legally valid: Rule r_2 will be included both in MR, since it is a bindingness meta-rule I endorse, and in BR, since it is legally binding, according to rule r_1. However, some other meta-rules in MR may not be characterised as legally binding by any meta-rule in MR (therefore they would not be included in BR).

13.1.3. Terminological Disputes and Substantive Disagreement: The Stance of the Enactment Positivist

To convert the terribly serious problem of determining what rules are binding in legal reasoning into a terminological dispute concerning the meaning of the word *valid* leads to a disastrous misunderstanding. Let us consider, for example, the conflict between *natural law* and *enactment-positivism*, where by *enactment-positivism* we mean those theories according to which all binding legal rules are the content of authoritative enactment-acts.[3]

Why should a rule be adopted in legal reasoning, for its intrinsic justice or for its legislative pedigree? Are enacted rules still binding (do they still deserve adoption in legal reasoning) when they are grossly unjust?

This debate makes sense if we assume that both the enactment-positivist and the naturalist are aware that they are putting forward competing theories of the grounds of legal bindingness, namely, competing normative criteria for establishing what rules are appropriate in legal reasoning, what rules should be publicly obeyed and enforced. It becomes absurd if they are putting forward competing definitions of the same terms (the term *legally binding* or *valid*).

Let us first assume that the enactment-positivist is taking the correct (normative) stance (this point is clearly made by Scarpelli 1965). By simplifying the enactment-positivist's position we may say that he is cognisant that he is putting forward two strict (indefeasible) meta-rules, an affirmative and a negative one:

- The affirmative one states: ⌈If a rule is enacted by the legislator, then it is binding⌉.
- The negative one says: ⌈If a rule is not enacted by the legislator, then it is not binding⌉.

The naturalist is also putting forward two bindingness meta-rules.

- The affirmative one says: ⌈if a rule is required by justice (nature), then it is legally binding⌉.
- The negative one says: ⌈if a rule is unjust, then it is not binding⌉.

When a rule is issued by the legislator and is unjust (according to the naturalist's view of justice), or when although required by justice it was not laid down by the legislator, the enactment-positivist and the naturalist will disagree. The application of their respective meta-rules will achieve conflicting conclusions: The same rule will be legally binding (adoption-worthy in legal reasoning) for the first, and unacceptable for the second.

[3] We specifically speak of *enactment-positivism* rather than of *positivism* tout court, since the word *positivism* is often used, especially in the Anglo-American legal theory, in a broader sense, namely, to cover all theories according to which the existence and content of law only depends on social facts. Intended in this broad sense positivism also covers what we shall call practice-positivism. As classical instances of enactment-positivists, we can mention Jeremy Bentham and John Austin.

Both parties to this debate should therefore try to provide arguments why their meta-rules should be preferred to those of the other party, or why the other party's meta-rules should be rejected.

We may agree with one of the parties in this debate, or with none of them, but we cannot deny that their dialogue makes sense. It deals with the practical problem of determining what rules are be to used in legal reasoning, a choice on which the freedom or the well being of individuals and communities depends.

On the contrary, whole discussion becomes senseless and misleading, when it is understood as concerning the choice of the best definition for the term *legally valid*.[4]

Let us assume, now, that the enactment-positivist adopts a definitional stance. He is not interested in whether a rule should be used or not in legal reasoning (on whether it is binding, in the sense here indicated). He is just working out, for his own cognitive and analytical purposes, a new definition of the term *valid law*, which he thinks has certain conceptual merits. This is why he stipulates that *legally valid* now means "issued by the legislator." So far, so good, but the meaning that the locution "*r* is legally valid" had before the enactment-positivist's stipulation—namely, "*r* should be accepted in legal reasoning"—is not a dispensable one. To bootstrap our reflexive reasoning in the normative domain we need to be able to ask ourselves whether we should accept certain rules or not. This is the cognitive function that is played by the validity discourse.

Thus, we have to understand the enactment-positivist's stipulation as the request that we reserve the formula *legally valid* for the new use he recommends. Consequently, we need to use different terms for expressing the idea that something should be accepted (is adoption-worthy) in legal reasoning. Unfortunately, common language cannot be changed by anybody's fiat. After the enactment-positivist's stipulation, the expression *legally valid* would have preserved its original conceptual function, and will be oscillating ambiguously between the old and the new meaning. Even those who accept the enactment-positivist's "definition," when affirming that a normative proposition is valid, will tend to imply not only that this normative proposition was issued by the legislator, but also that it is binding, to wit, that it should be accepted in legal reasoning.

Moreover, by rephrasing the meta-rule ⌈Whatever is issued by the legislator is valid⌉ into a new definition of validity, the enactment-positivist has succeeded in making this meta-rule unquestionable. Any denial of the validity (in the sense of bindingness) of a rule issued by the political power—the assertion such a rule should not be adopted in legal reasoning, since it is not applied by the courts, it violates human rights, it is intolerably unjust, and so on—would not count as a challenge to the enactment-positivist's stand. Those denials could be dismissed

[4] Definitional approaches to validity are attacked by Dworkin 1986, 31ff.; cf. also Williams 1990, 175. For a critique of Dworkin's view, see Coleman 2002.

as futile and inappropriate attempts to contest his stipulation of the meaning of the expression *valid law*. This definitional stance stifles the validity debate by masquerading substantive arguments into definitional stipulations.

13.1.4. Terminological Disputes and Substantive Disagreement: The Stance of the Practice Positivist

Let us now move to the approach to the legal validity which we can call *practice-positivism*, namely, the view that those rules are valid, which are practised by the courts, the public administration, or by the citizens at large. Also practice-positivism, like enactment-positivism, views legal validity as depending on social facts (and thus it can be considered as a kind of positivism), but it refers to different social facts: It focuses on social practices rather than on authoritative enactments.[5]

Let us first interpret the claim of practice-positivism as a normative theory of the grounds of legal bindingness, by assuming that "rule *r* is legally valid" means "rule *r* is cognitively binding in legal reasoning." The practice-positivist's theory would then consist of two strict (indefeasible) meta-rules concerning legal bindingness:

- a positive one, according to which ⌈if a rule is practised by the courts, then it is binding⌉, and
- a negative one, according to which ⌈if a rule is not practised by the courts, then it is not binding⌉.

Obviously, not everybody will be satisfied with these meta-rules. Some may deny any duty to accept and perpetuate the current practice whatever it is. Others may qualify this duty in the framework of more articulated theories of the conventional grounds of legal validity. Others may put forward competing bindingness rules: ⌈those rules which violate human rights are not binding, even if they are practised by most courts⌉; ⌈those rules which express the will of a democratically elected legislator are binding, even if they are not practised by most courts⌉, and so forth. However, even those who disagree with the practice-positivist's normative stance cannot deny that this stance makes sense as a substantive position in the legal debate.

On the other hand, the practice-positivist may argue that this is not what she is doing. She is not interested in establishing what rules should be accepted in legal reasoning. She is redefining the term *legally valid* so that it becomes useful for her empirical enquiries. Besides wondering why she should bend the term *legally valid* to this new use, rather than choosing a different term, we

[5] To refer to practice-positivism the word *realism* if often used, especially in Continental legal philosophy (as when one speaks of Scandinavian realism), but we prefer to use a less ambiguous and controversial term.

must observe that the practice-positivist's stipulation is also likely to have little success. Even after the practice-positivist's attempt, the expression *legally valid* will have preserved its original conceptual function (expressing the notion of cognitive bindingness, as we have characterised it), and will be oscillating ambiguously between this function and the one assigned by the practice-positivist's stipulation. According to the practice-positivist's "definition," when one labels a rule as valid, one not only means that this rule is practised by the courts, but one also implies that, being valid, this rule should be accepted in legal reasoning, i.e., that the rule is binding in the sense here indicated. By disguising the meta-rule ⌈whatever is practised by the court is valid (should be accepted in legal reasoning⌉, into a new definition of validity (*valid* means "practised by the courts"), the practice-positivist too has succeeded in making this meta-rule unquestionable. The price would be a misleading ambiguity: The practice-positivist herself would be oscillating between the old and the new meanings of validity, as when she says that to be *valid* means to be "accepted as valid."

13.1.5. Terminological Disputes and Substantive Disagreement: The Stance of the Inclusive Positivist

The same critiques we addressed against enactment-positivism and practice-positivism can be directed, we believe, also against the so-called *inclusive positivism* (see: Waluchow 1994; Villa 2000; Himma 2002), also called soft positivism (Hart 1994, 250) or incorporationism (Coleman 1996, 287–88). Inclusive positivists affirm that, in order to identify the valid law of a certain community, one only needs to apply the criteria (the rule of recognition) that are used, as a matter of fact, for this purpose within that community. These criteria may, though need not to, include a reference to morality.

When read in a prescriptive way, this seems to amount to a strict (indefeasible) request of conformism: "Adopt in your legal reasoning exactly those normative propositions which you can qualify as binding according to the bindingness criteria which most (or most influent) people in your community are currently adopting!" This prescription puts these standard out of discussion, and excludes that one may try to contest, or even refine the very standards for legal bindingness that are currently in use. As Moore (2002, 652) affirms "the legal conventionalist, like his relativist cousin in ethics, makes the majority infallible".

The prescriptive version of inclusive positivism seems questionable. For instance, assume that a German jurist, during the Nazi era, had the courage of trying to convince his fellows to reject or to restrict the generally accepted principle that the any wish of Adolf Hitler was legally binding at the highest level (the legal application of the so-called *Führer's Principle*). Such a generous—and rational, though not from a purely self-concerned perspective—attempt would indeed be outlawed by the prescription of inclusive positivism.

On the other hand, the inclusive positivist may claim that he is not interested

in the issue of legal bindingness, as we are intending it. He is just proposing a new definition of the term *valid*: For him *valid* does not mean "legally binding," but rather "qualifiable as legally binding according to the bindingness criteria adopted by most (influent) people in the legal community." This definitional stipulation, however, provides no substitute for the notion of bindingness as we have been describing it, though it may be interesting for certain purposes (for example, in sociological inquiries, or when one is interested in analysing the content and the implications of the most widespread opinions about the law).

13.1.6. The Normativity of Legal Bindingness (Validity)

We can overcome the conceptual puzzles we have described in the previous section by considering that the sentence "rule *r* is legally valid" usually and primarily expresses the proposition that ⌈rule *r* is legally binding⌉. The conceptual function of this proposition is thus limited to the ascription of the elementary normative qualification we denoted as *cognitive bindingness* or *adoption-worthiness*: The sentence above just says that rule *r* is cognitively binding in legal reasoning, namely, that *r* deserves to be adopted for the purpose of legal reasoning.

In the history of legal thinking, different grounds have been put forward to support this normative characterisation: being enacted by the legislator, being included in a sacred book, being accepted by most judges, being accepted by most citizens, being qualifiable as binding according shared rule of recognition, being endorsed by most scholars, being included in the best construction of the political morality of the community, corresponding to the will of God, and so forth. It may be more reasonable to give more importance to one or another of those grounds, to exclude some of them, to consider other facts, but this pertains to a substantive theory of the grounds of legal bindingness, not to the definitional stipulation of the meaning of the term *legally binding*.

Viewing the specification of grounds for legal bindingness (validity) as a definitional stipulation leads us to confuse two different questions. Remember that Moore (1968, 37) urged us to distinguish the question "What is meant by *good*?" from the question "To what things and in what degree does the predicate *good* attach?" Similarly, we need to distinguish the question "What is meant by *legally valid*?" and the question "To what propositions (rules) and in what degree, does the predicate *legally valid* attach?"

Every stipulation of the meaning of *binding law* (and of *valid law*, in this sense) appears to be an answer to the second question, which is presented as a reply to the first one. Therefore it could be attacked by a version of the famous open-question argument proposed by Moore (1968) against naturalistic definitions of the good. Let us consider any possible definitions of *legally binding* (valid), like the following: "What is stated by the legislator," "What is practised by the highest court," "What was ordered by God," "What we expect that other

people will expect." With regard to any of such definition, one may always ask a non trivial question: "But is that (the statements of the legislator, the current practice of the courts, the order of God, the shared expectation, and so forth) legally binding?", by which one means: "But should we accept that in legal reasoning?" The possibility of asking such a question proves that these pseudo-definitions are disguised meta-rules, which can be dialectically questioned and challenged as such.

This implies the failure, not only of the naturalist and positivist definitions, but also of those definitional attempts that build upon institutional or conventional models of the law. As we have seen in the example of Chapter 12, as far as bindingness is concerned, a convention is no different from any brute physical, psychological or historical fact. A convention can provide (in the appropriate circumstances and in the framework of an appropriate theory of the grounds of legal bindingness) a factual ground for a bindingness conclusion, but cannot offer any self-standing notion of bindingness (and of validity so understood).

Thus, as we have rejected inclusive positivism, *a fortiori* we need to reject the so-called *exclusive legal positivism*, namely, the thesis that "legal validity is exhausted by reference to the conventionally identified sources of law" Marmor (2002, 105), or even that "legal norms are products of authoritative resolutions; every legal norm consists of an authoritative directive" (ibid., 117).[6] Obviously we do not deny, as it should emerge from the examples we have discussed in this chapter and in the previous one, that social facts contribute to determine what the law is (remember that here, by the law we refer to the normative propositions which are binding in legal reasoning). Usually we have indeed very good reasons for assuming that normative propositions issued by certain authorities, according to certain procedures are (just on the basis of this fact, though within certain constraints) binding in legal reasoning. Similarly, we have very good reasons for assuming that rules endorsed and practised by the community or by the judiciary are (just on the basis of this fact, though within certain constraints) binding in legal reasoning.

However, this does not mean that the problem of identifying the law coincides with the empirical problem of listing what kinds of facts are generally viewed (by judges and citizens) as generating the legal bindingness of the rules they embed (see Section 25.2.4 on page 657). On the contrary, the opposite holds true: The attempt to solve the genuinely normative problem of identifying what rules are binding in legal reasoning (what rules we should endorse in legal problem-solving) leads us to refer also to certain social facts. Thus, we can assume that these social facts generate the legal bindingness of the corresponding propositions, only according to certain normative grounds. Rather than reducing legal inquiry to the detection of shared practices, we need to ground on

[6] The latter statement seems very strict: It reduces exclusive positivism to what we called *enactment-positivism*, excluding, for instance, the bindingness of customary law.

practical cognition our decision to participate in the existing practices, and in particular our determination of whether and to what extent we can view the outcomes of these practices as providing legally binding propositions.

13.2. Political Conflicts and Legal Bindingness

In the previous chapter, not only did we propose a notion of bindingness as adoption-worthiness, but we also articulated elements of a theory of bindingness, specifying some reasons for adopting or rejecting the propositions that a certain rule is binding.

One may wonder to what extent our theory is neutral, rather than expressing specific grounds for bindingness. We believe that our account is neutral to the extent that the two aspects we have focused on—attempting at promoting the common good, and doing this through the practice of shared normative beliefs—may be considered to be necessary features of the law. These aspects are compatible with the most different ways of viewing the public good and the most different ways of balancing these two requirements.

13.2.1. Legal Bindingness and Optimal Law

Legally binding rules should not be confused with *optimal* (ideal) law. Bindingness and optimality are both normative notions, but are different ones: I can consistently affirm that a rule is adoption-worthy in legal reasoning (the rule is legally binding), and that I would prefer that we were in condition to adopt a better rule (the rule is sub-optimal). In particular, I may believe that we should accept a legislative statement or a judicial ruling, and in the meantime I may also believe that the legislators or the judges were wrong, that they should have taken a different decision.

The possibility of distinguishing what is legally binding from what is legally optimal can indeed be affirmed within different theories of the grounds of bindingness. This option is available, for instance, within a normative version of legal positivism. In fact, the meta-rule ⌈if a rule is enacted by the legislator, then it is binding⌉ does not imply that the legislator only enacts optimal rules. An enactment-positivist judge may consistently believe that he should accept (and implement) a rule (since it was issued by the legislator), and still consider the rule sub-optimal (it would have been better if the legislator had decided differently).

Similarly, a judge endorsing a normative version of practice-positivism may consistently believe that a rule is binding (it deserves being adopted by her in her decision) since it is practised by most of her colleagues, and still consider that this rule is sub-optimal (it would have been better if her colleagues had been following a different practice).

Even from a perspective that is sensitive to the instances of natural law, it is possible to distinguish bindingness from optimality. For instance, we can rephrase the approach of (Radbruch 1950a) as the combination of the following meta-rules:

1. rules stated and supported by the political power are binding, unless they are unbearably unjust,
2. a rule is unbearably unjust when the evil caused by its practice outweighs the contribution that its implementation provides to legal security.

According to this approach, moderately unjust rules issued by an effective legislator are both sub-optimal and binding: They should be adopted in legal reasoning (for the sake of legal security) even though the legislator could and should have decided better (that is, he should have enacted a just rule rather than a moderately unjust one). Only unbearably unjust legislative rules are both sub-optimal and non-binding.

Results similar to those provided by the Radbruch's formula can also be obtained in the terms of the theory of the grounds of legal bindingness here advanced. Let us analyse at some level of detail the piece of reasoning, the mental monologue, in which a legal reasoner (a judge) may articulate his or her reasons for distinguishing bindingness from optimality, that is, for recognising the adoptability of a sub-optimal rule:

"I need to decide whether to participate in a shared rule according to the plural perspective: I am trying to converge with my fellows into a collective attitude. Thus, when expressing bindingness judgements—that is, when considering what rules *we* (I, together with my fellows) should adopt—I am considering what rules each single members of my community (or a sufficient number of them) may adopt, given our shared expectations concerning each other's attitudes.

The subject of such a decision is no ideal *we*, all of whose members, being in the same optimal epistemic-communicative situation, and sharing an identical information-processing procedure (universal ideal rationality), would infallibly converge upon the optimal rules, those supported by the strongest reasons (Habermas 1999). I, like any other citizen (and any other judge), may have my view of what is optimal, defend it in political discourse, and possibly try to implement it through my participation in political institutions, but this view does not need to coincide with my view of what is legally binding.

This is because I know that we, the real members of my community, are separate individuals, each looking at our shared problems and at our common interests from our particular perspectives, as determined by our particular experiences. So we, although being all (to a certain extent and in different ways) rational and sincere, may well end up having very different ideas of what is best for us all, and even an open dialectical interaction, in the existing circumstances, is unlikely to overcome our differences (cf. Rescher 1993; Waldron 1999b).

Thus, even if I sincerely claim that I am right in my identification of what would be the best framework for our interaction, my claim is not sufficient for producing coordination, since other members of my community (and of its judiciary) are raising the same sincere claim in favour of different frameworks. Given such judgmental diversity, my attempt to implement (and enforce upon others) my view of the common best will not achieve it, but will produce conflict, and possibly violence and hatred, so destroying the very basis of our cooperation. A plural view oriented to coordination, on the contrary, assumes our diverse determinations of what is best, and correspondingly tries to establish what we should all recognise as the common focus for a possible participation.

Therefore, what I believe each one of us should accept, as a legally binding rule, may be different from what I believe we should jointly deliberate, agreeing upon the best rule. This plural perspective, by making me adhere, in my legal reasoning, to sub-optimal rules (rules that I think we should not jointly deliberate, if we had access to fully rational collective reasoning), makes participation possible also when we have not yet come, and even when we will never come, to an agreement on what is optimal for us all."

Let us now see how this kind of argument can be applied to a concrete legal issue. Assume, for example, that in a country the legislative rate for high income tax payers is 40%. Two judges, let us call them Libertarian and Egalitarian, would have preferred a different legislative choice: Judge Libertarian would have preferred a lower tax rate (20%), while judge Egalitarian would have cherished a higher one (60%). However, both of them will stick to the legislative rate in their legal inferences: Neither Libertarian would acquit a person who has paid a tax corresponding only to 20% of his revenue, nor would Egalitarian order a person who has already paid a tax corresponding to 40% of her revenue to pay a further 20%.

But why do both of them apply a rule they believe to be sub-optimal (although for different reasons and with regard to different alternatives)? The answer again comes from reflecting upon coordination. Judge Egalitarian's support for the rule establishing a higher income tax is justified by his expectation that it will provide certain public benefits he highly values: more public resources, and therefore better education, health care, and social services, especially for disadvantaged people. Those benefits, however, are not going to be provided by Egalitarian's individual enforcement of the higher-rate rule: Only the general practice of this rule, based upon its shared acceptance, is going to achieve those public objectives. If Egalitarian goes alone in what he considers to be the right direction, against the expectations of everybody else, he would only cause disruption.

Moreover, judges like Libertarian—who have a different view of what is optimal—could view Egalitarian's licence as an authorisation to go themselves

in the direction they prefer (to lower tax rates), which might lead to a drop in total fiscal revenues. In conclusion, since Egalitarian himself can see that his example is not likely to be generally followed, he should adopt a rule he believes to be sub-optimal, but which at least allows for coordination. This conclusion is reinforced though the idea that by disregarding the legislative rule he would jeopardise the convention that legislative rules are and should be respected, a convention which provides a fundamental mechanism for spreading cooperation (and implementing democracy).

Similarly, Libertarian also expects from a lower tax rate certain important public benefits: a vibrant economy, job creation, new opportunities for individual initiative, and an increased sense of each one's responsibility. However, she can see that these public benefits cannot be provided by her action alone. They will accrue only when the lower tax rate is generally applied (and it is generally expected to be so). Libertarian as well, in the impossibility of establishing a better equilibrium through her own action, should stick to the existing one, and apply the 40% rate.

Therefore, both judges can conclude that they should adopt (i.e., consider valid or binding) the legislative rule: This is the only rule they (and their fellows) can share, although for neither of them this rule is optimal.

This conclusion is also confirmed by considerations pertaining a judge's awareness of his or her judicial role, and of the function that the judiciary plays in collective decision making: Disregarding the statements of the legislator (even when one believes that they are "moderately" wrong) would imply jeopardising the correct functioning of the legal process, according to the democratic principle. Though the legislator has no monopoly over the law, the legislator has a vast competence, or prerogative, concerning the formation of new law, a prerogative which must be respected in legal reasoning, and in particular in judicial reasoning, according to the idea of judicial restraint (see Kriele 1976, 60ff.). Similar considerations also apply to judicial review with regard to discretional decisions of administrative bodies.

Note that from our perspective, legally binding normative propositions are not limited to the (probably quite small) set of rules on whose optimality there is an *overlapping consensus*, namely, the rules which all the concerned individuals believe to be optimal: Convergence is rather the result of a process in which each participant needs to focus on a rule which is salient to all participants (typically, since it is generally practiced or it is characterised as binding by a shared meta-rule), even though such a rule may look sub-optimal to some (or even all) of them.

13.2.2. Unacceptability on Substantive Grounds

In the piece of reasoning just presented, Libertarian's and Egalitarian's concern for rule-sharing has allowed them to distinguish bindingness from optimality, in

the sense of admitting the legal bindingness of sub-optimal rules. This, however, does not imply that, from the perspective of our judges, the intrinsic goodness or badness of a rule is irrelevant to its legal bindingness:

1. the assessment of the optimality of a rule, under certain conditions, may justify the assertion of its bindingness even when the rule is not yet generally endorsed and practised, while
2. the assessment of the sub-optimality of a rule, under certain conditions, may justify the denial of its bindingness, even when the rule is currently endorsed and practised.

The first kind of judgement (endorsing an optimal rule which is not yet practised) may take place when one—besides believing that a rule is optimal—is also aware that one's optimality-belief is shared by most of one's fellows, in the relevant circles. As we have seen above, coordination can be obtained not only by following existing practices, but also by starting new practices, under the assumption that others will follow. The common belief on the optimality of a certain rule provides a background in which this assumption may be justified: If one knows that everybody shares one's belief that the general practice of the new rule r_2 would be better than the practice of the old rule r_1, then one may reasonably expect that, once one starts practicing r_2, everybody will follow converging in the new rule.

Moreover (though much more precariously), one may conclude for the bindingness of a rule one believes to be optimal, even when there is no agreement yet on the rule's optimality, but one expects that such an agreement will come about when everybody has heard one's arguments. Among the factors that condition one's chances of success there are also one's institutional role (for instance, one's position as a judge) and the expectations that are aimed at that role (in particular, the fact that one is considered to be entitled to decide legal conflicts, through certain ways of reasoning) .

Our last considerations assume that one's fellows are endorsing a sub-optimal rule only because this is the current convention. One's reasoning would need to be more complex if one's fellows were endorsing that rule (also) since it was characterised as binding by a specific meta-rule (the meta-rule according to which legislative rules are binding). To convince them, one would then also have to propose an exception to this meta-rule, appearing acceptable to all, which excludes the bindingness of the sub-optimal rule.

The second kind of judgement (the negation of the bindingness of a practised rule) takes place when coordination based upon a shared enforceable rule is likely to produce a public evil, which is so big as to outweigh the costs of rejecting that rule. Let us see how a (rational) legal reasoner may approach this difficult issue. Assume that the legal reasoner praises plural participation in shared normative beliefs as the only way of achieving the main public benefits which may be assured through the practice of the law (through the public state-

ment and enforcement of normative conclusions): protection of rights, liberty, security, collection of resources for various social functions, and so on.

Such norm-participation is an instrumental good (it is valuable since it provides these further benefits), but a necessary one (there is no other way of providing these benefits): Unless judges and citizens share a set of common rules, these objectives are not going to be achieved. The need to achieve certain fundamental collective goods through the law gives a moral significance to the conditions under which the law can achieve coordination, conditions which represent "the morality that makes the law possible" or the "internal morality of the law" (as Fuller 1969, 33ff. calls it; see Rottleuthner, Volume 2 of this Treatise, sec. 4.3). Therefore, usually, one should consider as binding any rule that is viewed as binding and consequently practised by a sufficient number of one's fellows, in the appropriate roles (even when this rule is sub-optimal).

However, not every form of coordination based upon common rules achieves the benefits that make the law a valuable enterprise: The fact that coordination is in place is a necessary, but not a sufficient condition for the attainment of those benefits. Norm-participation may indeed be geared towards different and even incompatible purposes (repression of civil liberties, exploitation, slavery, genocide, etc.), purposes which should be publicly contrasted, rather than pursued. If the currently practised rules delivered such results, on should conclude that these rules—though providing the pattern for the ongoing norm-participation—should not be accepted in legal reasoning: These rules though being effective, and possibly also being believed to be binding by most citizens and judges, are not legally binding (cf. Peczenik 1989).

Such a conclusion presupposes a complex balancing exercise. Let us consider the opposed arguments a legal reasoner—and in particular, a judge—needs consider as weights placed on the two pans of a measuring scale. On the one pan, besides the immediate advantage of not applying the evil rule in the specific case, one would also put the probability that others may follow one's example, so that the general practice of that rule could, in the long run, be interrupted or at least questioned. On the other pan, besides the immediate disadvantage of frustrating the expectations of one's colleagues and citizens in the individual case, one would also put the disadvantage of increasing future uncertainty. Moreover, one would need to add the risk of jeopardising the norm-spreading mechanism that made the evil rule into a communal normative belief (the mechanism of legislation) and of discrediting the values underpinning this mechanism (the value of democracy).

In general, what sub-optimal rules—among those generally practised and enforced—one should consider as legally binding depends on what purposes one believes should be collectively pursued (or contrasted) and on how these purposes relate to one's concern for normative participation, in the legal and social context in which one is operating. These premises would determine how much one approves (or disapproves) the currently practised rules, and how

much one fears (or wishes) the "destabilisation" of the existing legal practices. In general, with regard to a legal system that is acceptable as a whole, reason requires that norm-participation is usually viewed as an overriding concern: From this perspective, a reasonable legal decision-maker in order to provide those goods that only coordination can ensure, should adopt the rules that are, or at least are likely to become, shared patterns of a common practice. However, one needs to agree with Radbruch in considering that history has provided many cases where sufficient reasons do indeed exist for rejecting generally practiced rules (for denying their bindingness), even when no alternative rules are likely to provide coordination.

13.2.3. Constitutions and Constitutionalism

In many legal systems the rejection of legislation is facilitated by the common view that certain normative standards—a constitution—prevail over ordinary legislation and thus limit the action of the legislator: In case of a conflict with such standards (there included, in particular, certain individual rights) legislation is not to be applied (according to the mechanism of preferential reasoning we considered in Chapter 7) and possibly can be voided through constitutional review.

When constitutional principles—prevailing over legislation—include basic human rights and respect for fundamental legal values, one may reject a bad legislative rule by referring to the fact that it violates the constitution, rather than directly appealing to its evilness. Appeal to a constitution makes the legal rejection of a piece of legislation much more practicable: One may expect that others will more easily converge with one's belief that a certain piece of legislation should not be viewed as legally binding since they share the endorsement of the constitutionals standards and the idea that they limit the legislative power. Thus, it is true that, in a way, constitutionalism is the successor of natural law, as a legal constraint on political power.[7]

We cannot here consider the many theories of constitutionalism (on constitutions and constitutionalism, see Shiner, Volume 3 of this Treatise, sec. 6), broadly intended as the doctrine of the legal limitations of political power.[8]

[7] The significance of constitutions for legal reasoning has been frequently emphasised in recent times. On constitutionalism, see for instance Alexander 1998, and with regard to the Italian doctrine, Ferrajoli 1990, 348–61, 369–76, Zagrebelsky 1992, and Bongiovanni 2003.

[8] One may locate within constitutionalism, intended in a broad sense, quite opposed ideas, like for instance: Kelsen's idea of a positive constitution, prevailing over ordinary laws (Kelsen 1967, sec. 35.a); Dworkin's idea of fundamental moral-political rights, trumping laws aimed at collective goals (Dworkin 1984); Hayek's idea that the whole law governing interpersonal relationship (as opposed to the organisation of the state's administration) should not be decided upon by legislators (not even when elected through a democratic process), but should rather reflect the autonomous order resulting of spontaneous socio-economic evolution, which judges should understand, clarify and facilitate (Hayek 1973).

We shall thus content ourselves with some common-sense considerations. As reason, according to the natural law theorists, requires humans to abandon the state of nature and endorse a legal order, so reason, we believe, favours a constitutional arrangement: Rationality requires that one participates into the currently adopted constitutional arrangement, when the substantive contents of the currently endorsed constitution appear to be acceptable enough; it also requires that one tries to push forward for such an arrangement if it is not yet in place.

In fact, a realistic analysis of electoral and political processes, and of the decisional practice by elective Parliaments and Governments shows that things can go very wrong: Laws may be issued just to satisfy the hates and fears of the constituency, they may infringe basic liberties, majorities through the government may oppress minorities, lobbies and private interest may dictate the contents of legislation. Thus, constitutional constraints (coupled with their judicial implementation) may contribute to make so that legislation tracks (up to a certain extent) practical cognition: They may prevent major mistakes, limit the tragic risks of an unlimited political power, ensure that everybody can trust that minimal warranties are being preserved.

On the other hand, a realistic appreciation of the decisional practice of judicial decision-making (also in constitutional review) shows that also here things can go very wrong: Judges may protect corporative or individual interests, may impose on society their prejudices (without the feedback provided by electoral mechanisms), may fail to assess the social and economical impacts of their choices, may prevent innovative legal solution from being tested though their implementation and submitted to public debate.

In conclusion, respect for political democracy (for the dignity of legislation, see Waldron 1999a) and awareness of the limited capacity of judges as policy makers (and practical cognisers) require that a large legislative prerogative is left to elected bodies, though within judicially enforced constitutional constraints.

Finally, the collective endorsement of a constitution, and the existence of a constitutional jurisdiction does not exclude that one may criticise and oppose certain contents of the currently endorsed constitution and certain constitutional judgements. Even the rejection of constitutional rules and judgements may indeed be the right thing to do, when contents or judgements are so terribly wrong that they are not adoption-worthy in legal reasoning (they are not legally binding, or, if you prefer, they are legally invalid).

Thus, we need to reject the view that adoption-worthiness with regard to a certain community can be equated with substantive correspondence with the constitution of that community.[9]

This equation is possible only if by the *constitution* of a certain community we just mean the set of all constraints that legislation enacted in that community

[9] For the statement of a strict link between legal validity and respect of substantive constitutional provisions, see for example Ferrajoli 1990, 351–6.

needs to respect in order to be adoption-worthy. On the basis of this understanding of the notion of a *constitution*, we might indeed say that any correct justification of one's choice not to apply a certain legislative rules is a constitutional justification. However, this unfortunately only is a tautology: If constitutions are defined as including all and only the constraints over legislation which are adoption-worthy in legal reasoning, obviously any constitutional content will be adoption worthy in legal reasoning. This definition gives no indication to the legal decision-maker, who needs exactly to establish when there is a correct justification for the choice not to apply a legislative rule.

If, on the contrary, by a *constitution* we refer to a constitutional text, or to the constitutional beliefs currently adopted in a community, this equation does not always hold: One may consistently claim that a piece of legislation respects the constitution of a community, but is not adoption-worthy in that community. There is no logical necessity that a constitution, intended in this sociological or conventionalist way, sufficiently respects human rights: It is perfectly conceivable that a constitutional text admits or even requires racial or sexual discrimination, criminalises dissent on certain political or religious issues, gives unlimited power to a dictator, and so on.

Thus, we need to reject the view that constitutions are binding just because of their general acceptance, just because "they are there": We can think of many cases where a shared constitutional principle is not adoption-worthy. Consider, for instance, the above mentioned *Führer*'s principle, which was indeed a constitutional principle of Nazi Germany, being publicly endorsed and generally assumed to prevail over any other legal source.[10]

The distinction between the bindingness of a constitution and the fact that it is endorsed and applied, does not exclude that, as a matter of fact, there may be a large overlap between binding constraints on legislation and the endorsed and applied constitution.

Firstly, one's rejection of a piece of enacted legislation is rational (with the exception of most tragic cases) only when one forecasts that one's community may (now or in the near future) share this rejection. This results can usually be achieved only when one can appeal to constraints expressed in a constitutional text or endorsed on a customary basis. In fact, we need to distinguish between

[10] This conclusion can be avoided (at least in the worst cases), when the words *constitution* and *constitutionalism* are used to refer only to those arrangement which respect the basic principles which are typical of liberal western society, being intended to limit the power of the State in order to protect individual liberties (see, for instance: McIllwain 1947; Matteucci 1963; Sartori 1993, sec. 9.5). This notion of a constitution is historically and politically very important. For instance, according to Art. 16 of the 1789 Declaration of the rights of man and the citizen "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no constitution." However, we prefer not to use here this history- and value-laden notion of a constitution, since this would add a level of complexity to our analysis (the need to establish when the basic legal arrangement of a community qualifies as a constitution in this restricted sense), without any significant advantage for our purposes.

optimality and bindingness also with regard to constitutional constraints. On the one hand, an optimal constitutional standard (a constitutional constraint that a certain community should ideally adopt) may not be legally binding for an individual legal reasoner, since there is no chance that this standard will be collectively adopted (see Section 13.2.1 on page 368). On the other hand, even sub-optimal (but already practised) constitutional standards can be binding for the individual reasoner, since they may represent the best choice, among the practicable ones.

Secondly, the tragic history of the last century (and advances in legal and ethical thinking) has led to include, within the currently adopted constitutions, many principles that undoubtedly are adoption-worthy at the constitutional level.

Finally—at least when an unrestrained legal debate can take place—legal cognition focuses on shared constitutions its collective efforts to elaborate theories and principles, producing results which are tested and reviewed through widespread discussions and experiences. This is a further ground for assuming that shared constitutional theories and principles usually provide a good guidance to the legal reasoner, or a least a good starting point for his or her thought.

13.2.4. Law, Power, Sovereignty

The considerations we have been developing so far lead us to reject a strict rule to the effect that all normative propositions produced by the political power (at the statutory level, but also at the constitutional level) are necessarily legally binding. This amounts to rejecting the normative version of enactment-positivism (see Section 13.2.1 on page 368), namely, the proposal to adopt a strict (indefeasible) bindingness meta-rule to the effect that:

> the most obnoxious legislative law, as long as it is produced in a formally correct way, must be recognised as binding. (Bergbohm 1892, 144)[11]

Rejecting this view entail also rejecting the view that the State enjoys an unlimited *legal sovereignty*, that is, the unlimited legal power to make whatever content legally binding: A legal reasoner is thus justified in assuming that certain minimal warranties (like those contained in the UN conventions) limit the State's authority, so that the State has no power of producing binding laws when violating such warranties. Further limitations to the legal sovereignty of a State may depend on the need to cooperate with other legal communities, and to

[11] Quoted in Kaufmann 1984, 76–7, who provides an introduction to the German debate on legal positivism (ibid., 70ff.). The classical reference for a critique of legal positivism is Radbruch 1950a, whose approach has been recently developed by Alexy (1992).

participate in the activity of international organisations, like the UN, or the European Union: Also with regard to such organisation, the legal reasoner may be justified in assuming that incompatible State-rules are not legally binding.

Note that the theses we have just stated are consistent with a milder form of normative legal positivism, which we believe is indeed generally justified (at least when citizen are provided with legal security and a working framework for co-operation, and when a democratic control is in place). This is the adoption of a defeasible meta-rule (a principle) to the effect that the outcomes of political decision-making, according to pre-established procedures, are normally legally binding. We must also admit, however, that this rule is defeated by prevailing exceptions to the contrary (as when constitutional constraints are violated, and in the cases of extreme injustice referred to by Radbruch).

A further corollary of our view of legal bindingness is the rejection of the idea that all binding laws are necessarily produced or authorised by the State. In fact it may well be the case that other sources provide normative contents that are adoption-worthy in legal reasoning: These sources may deserve acceptance in legal reasoning, even if State legislation does not include them, neither explicitly or implicitly, in its list of the recognised sources of law. Among such sources we may mention commercial practice (also at the international level), endorsed customary rules, judicial precedent (also from foreign countries), decisions of international bodies, and so on. The decisive criterion for adopting the rules produced by such sources, the ground of their legal bindingness, is the very fact that these rules work (or are likely to work), through collective practice and enforcement, as the shared basis of valuable forms of coordination.

Such considerations—and reference to values like certainty, cooperation, respect for self-organisation and for shared expectations—may lead, for instance, Italian judges to conclude that the following contents are immediately legally binding, though with various limitations and exceptions: regulations and judgements issued by the institutions of the European Union, *rationes decidendi* of judicial precedents (at least as long as they are not shown to be wrong, see for instance: Galgano 1985; Gorla 1990), rules adopted in international contractual practice and arbitration, rules adopted by Internet bodies, acquiesced upon deliberations of certain international bodies, and so on (we will consider the sources of law in Section 25.2 on page 653).

13.2.5. Legal Bindingness and Moral Bindingness

As legal bindingness can be distinguished from legal optimality (ideality), both notions can be distinguished from moral bindingness. We cannot undertake here a serious attempt at defining the notion of morality, but we may advance the hypothesis that when one says that a rule is morally binding, one means that it should be accepted in moral reasoning, that is, for the purpose of establishing how the members of a community are to behave towards one another, and

consequently, what they are entitled to expect from others, regardless of the possibility of coercion. Obviously, there is no inconsistency in affirming that a rule is both morally binding (we should accept it for the purpose of establishing how we are to behave to one another) and legally unacceptable (we should not view it a justification for coercion).

Even if a rule is morally binding, its coercive enforcement may be inappropriate—too expensive, too obtrusive, and so on. Moreover, the rule's enforcement without a previous enactment may violate the existing constitutional arrangements, and the existing expectations of the citizens. Therefore, there are certain rules that are morally binding, but are not, and should not become, legally binding.

According to our perspective, the distinction between law and morality does not need to be grounded on the subjectivity and indeterminacy of morality.

A deeper ground for distinguishing law and morality can be found in the idea that an essential aspect of moral life and moral choice is autonomy, intended as the freedom of choosing between different goods, but also between good and evil. Thus, this idea of autonomy does not assume moral relativism, and may go beyond the domain where one has may be said to choose between a set of acceptable options, and where one's personal likings and attitudes contribute to establishing what is better for one (as for instance, when one chooses a job, a partner or more generally a style of life).

For the sake of moral autonomy, intended in this broad sense, doing the right thing must be legally facultative (in the sense we will specify in Section 17.3.4 on page 462), rather than legally obligatory, at least to some extent. This requirement may even extend to areas where one may cause damage to others, i.e., in the areas where, according to the traditional liberal doctrine of Mill (1991a), the intervention of the law is legitimate.

Assume that whenever an action impacting on others were morally binding, it were also legally binding: One would be legally bound (under the treat of a sanction) to be generous, helpful towards one's fellows in need, to respect everybody's feelings, and so on. Under such conditions, one would not be able to experience morality, to freely exercise moral self-determination. For the sake of moral life itself, it seems that the law must leave some space for immorality, egoism and greed, so that one can have the chance of autonomously adopting and implementing moral choices. As Radbruch (1950b, 139–40) observes, "the law does serves morality through the obligations it imposes, but rather through the rights it grants [. . .] to individuals, so that they can better satisfy their moral obligation." To offer us the "possibility of morality," the law must also offer us the "possibility of immorality" (ibid., 141).[12]

[12] In the same sense as Radbruch, see for instance von Savigny 1981, sec. 52: "The law serves morality, not by implementing its commands, but by ensuring the free development of the force which is internal to each individual will" (my translation). The idea that "not everything which

13.2.6. Bindingness Propositions

The predicate *legally binding* is primarily used in those meta-propositions having the form ⌈Rule *r* is legally binding⌉, meaning ⌈I (we) should participate into adopting rule *r* in legal reasoning⌉. Such *bindingness-establishing* propositions must be distinguished from the higher-level (meta-meta) propositions embedding them, which we can call *bindingness-embedding propositions*.

Bindingness-embedding propositions may be factual ones, such as those asserting that certain people believe a bindingness proposition: ⌈Most people believe that [rule *r* is binding]⌉. Further levels of embedding are also possible: ⌈All people in our community are aware that [most people in the community believe that [rule *r* is binding]]⌉.

Bindingness-embedding propositions can also express cognitive idealisations. They may affirm that people would come to believe certain bindingness propositions, under certain epistemic circumstances: ⌈People would come to believe that [rule *r* is binding], if they were reasoning correctly, in the awareness of the relevant facts, etc.⌉. The formulation of cognitive idealisations requires vicarious reasoning: One must consider what results other people would achieve given the beliefs that these people are currently having (and assuming that they are able of rationally processing such beliefs).

Bindingness-embedding propositions provide no alternative notions of bindingness: They contain bindingness propositions, and therefore assume the very notion of bindingness expressed by the latter. This is true even when—as in coordination-based arguments—bindingness-embedding propositions (in particular, propositions asserting that most people share or will share the belief that a rule is binding) provide pre-conditions for affirming a bindingness proposition. Thus we may assimilate bindingness-embedding propositions to those statements of the law which are expressed from the *hermeneutical* point of view of MacCormick (1981, 33–40), and possibly also with those statements that are expressed from the *detached* point of view of Raz (1980, 153ff.) (see Rottleuthner, Volume 2 of this Treatise, sec. 2.4.2).

Our notion of bindingness implies that one can make proper bindingness judgements (judgements expressing bindingness propositions) only when one is reasoning from inside a legal system (when one views oneself as a member of the "we" that should accept the rule at issue). There is no detached way of asserting a proper bindingness proposition. Thus, we must conclude that legal reasoning is not reasoning from a detached perspective, it is rather reasoning from a particular perspective, to wit, as a participant in the legal community.

is permitted is honourable" (*Non omne quod licet honestum est*) can be found in *The Digest of Justinian*, 50.17.144. Radbruch's view is rejected by Raz (1986, 381), who affirms that "only very rarely will the non-availability of morally repugnant options reduce a person's choice sufficiently to affect his autonomy." Consequently Raz concludes that "the availability of such options is not a requirement of respect for autonomy."

This is not contradicted by the possibility of affirming that a rule is binding in a foreign or an ancient legal system, since such statements are to be understood as elliptical ways of expressing bindingness-embedding propositions.

For example, the assertion that ⌈rule r was binding in ancient Roman law⌉, where r stands for "masters are permitted to kill their slaves," does not mean ⌈we should have accept rule r for our legal reasoning in ancient Roman law, that is, under the hypothesis that we were members of the Roman legal community⌉. It rather means: ⌈Romans believed rule r to be binding⌉. I may have this belief, and at the same time also believe, that, if I were a Roman jurist (keeping all my current knowledge) I would not view such a rule as legally binding.

One's bindingness-embedding beliefs may approach one's bindingness beliefs through cognitive idealisation. For instance, when cognitive idealisation is pushed far enough (including the Romans' capacity to review their legal and moral theses, and to interpret appropriately their sources), the critical student of Roman law could even conclude that rule r was not binding in ancient Roman law (Romans should not have endorsed it, and they would not had endorsed it if they had fully exercised practical cognition), although, as a matter of fact, most Roman lawyers believed that r was binding.

To substantiate this statement, the critical Romanist scholar needs to present a (hypothetical) cognitive process that starts with the actual (false or incorrect) beliefs of ancient Roman lawyers (and with their sources of the law), but leads them, through reasoning and experiential data, to revise such beliefs.

13.2.7. Legal Reasoning and Detachment

To clarify the distinction between reasoning from a detached perspective and reasoning from a particular perspective, consider the position of an administrator of a firm. The administrator, when acting in his professional competence, has to take decision in the interests of his firm: He will adopt the goals that characterise his firm (goals like providing profits to its shareholders, but also maintaining and increasing its market share, preserving the jobs of the employees, and so on), and devise ways of achieving such goals. His contribution will not be purely passive, he will creatively contribute to the achievement of such goals, but he will also contribute to refine and characterise these goals, according to his understanding of the mission of a commercial firm, and of his understanding of the views of owners and managers.

When doing all of this, the administrator is not engaging in vicarious reasoning, he is not asking himself: "What determinations would mister X adopt if he were the administrator of my company?," or "What determination would I adopt if I were an administrator of my company?," or even "What determination would my company adopt, under the present circumstances?" He is rather reasoning directly, in his professional role, that is, adopting the perspective which corresponds to his identification with, or his participation in, his company. He is

asking himself: "What determination should *I* adopt as the administrator of my company?", which is equivalent to "How should I participate in the decisional process of my company?"

The same kind of reasoning also applies to a civil servant, having some responsibility in managing a State agency. When the civil servant is vested of her professional role, she is taking the perspective of her agency, and doing her best to achieve the public aims of her agency, within the constrains that are proper to her role.

There is nothing mysterious in this phenomenon, which is indeed present in every community and organisation, both in the public and in the private domain, and is ubiquitous in political discourse. Simon (1965, 205) speaks in this regard of *identification*:

> we will say that a person identifies himself with a group when, in making decision, he evaluates the several alternatives of choice in terms of their consequences for the specified group.

This also happens when one is engaging in legal reasoning. Like the administrator of a company (and any of the company's employees) directly gives *his* contribution to the decision-making process of his company, rather than figuring out what another would do in his place, similarly a legal decision-maker (and any citizen) actively participates in the reasoning of *her* legal community, rather than figuring out, from a detached perspective, what somebody else would have believed and thought at her place.

One may, and should, in the appropriate circumstances, also engage in vicarious reasoning, trying to anticipate what rules other people will or would endorse and implement. Not only is this the perspective proper to Holmes's bad man (who looks at the law "only for the material consequences which such knowledge enables him to predict": Holmes 1897, 8), but this is also, as we observed above, an essential step in the process of converging into shared normative beliefs. However, this attitude does not exhaust the stand of the honest legal reasoner, but rather only has, for him or her, a preliminary function: The ultimate issue that one has to address, as a legal reasoner, is what rules oneself has to endorse (view as legally binding) and implement through one's own decisions and actions.

The thesis that legal reasoning consists in detached reasoning may be understood in two quite different ways. One way of understanding detachment stresses the idea that the legal reasoner needs to detach from his or her personal motives, in order to participate in the reasoning process of his or her community, endorsing (but also contributing to shaping) its normative system and its values. The other way of understanding detachment consists in viewing detached reasoning as modelling, simulating or replicating the law's reasoning, without endorsing it, without participating in it.

We accept the first view, and reject the second: Legal reasoning (at least

from the perspective of a judge, or of a loyal citizen) presupposes identifying with (or participating in) the legal community and directly reasoning from this perspective. It seems to us that this also concerns the activity of the doctrinal lawyer: When proposing a certain legal solution, one is considering how one's community should approach a certain kind of legal issues (especially, though not exclusively, at the level of judicial decision-making).

This view only partially matches the reasoning of advocates (barristers or attorneys), who have the task of leading the judge to endorse the legal solution that is more convenient for their clients. Advocates are indeed allowed to "cheat" in the sense of presenting their theses as being the most legally appropriate, even when they do not believe that this is the case.

Consider how this attitude, which is perfectly acceptable in advocates—corresponding to their professional duty toward their clients (within the limits of professional correctness), and to the adversarial mechanism of litigation (see Section 11.1.2 on page 307)—would not be viewed as appropriate with regard to doctrinal writers. We would indeed criticise the insincerity of a writer defending in a scientific article a thesis he or she does not endorse, but which is more convenient to an important client. Such a criticism would not be appropriate towards a thesis expressed by the same person, when acting as an advocate in the course of judicial proceedings.[13]

However, the advocate can achieve its objective (winning the case) only by modelling the reasoning of the judge and by anticipating the judge's reaction to the advocate's suggestions, assuming that the judge is reasoning as we have indicated.[14]

13.2.8. Legal Reasoning and Shared Legal Opinions

Our view of legal reasoning takes us away not only from strict or exclusive legal positivism, but also from *inclusive positivism*. The latter still assumes that all the law can be found in certain social sources, and is *inclusive* only in the sense of including within those source also socially established values, principles and so on. We believe that this view does not provide an adequate description of legal reasoning since fails to recognise that lawyers—rather than only aiming providing an account of current legal beliefs and of their implications—may actively and knowledgeably contribute to forming such beliefs.

When engaging in legal reasoning, one needs to identify with his or her community (rather that take an egocentric-personal stand), to insert one's reasoning in the deliberative process of one's community (and thus take as one's starting point the sources, values and attitudes that may be attributed to that commu-

[13] For a sceptical view of the advocate's task, see Morison and Leith 1992.

[14] We discount illegal conducts, such as bribing the judge, or anyway appealing to the personal interest of the latter.

nity), to take into account the current opinions of one's fellows, in order to converge non-manipulatively (plurally) in a common position. However, this does not confine the legal reasoner to the rehearsal of these sources, values, attitudes, and opinions. We can say—using the words of the Roman jurist Pomponius (*The Digest of Justinian*, 1, 2, 2)—that the lawyer (*juris peritus*), also has the task of contributing to make so that "the law [...] is improved day by day" (*jus* [...] *cottidie in melius produci*; my translation).[15]

Firstly, a (good) lawyer can play a creative role in the legal process. A lawyer (even a doctrinal writer) should be a problem-solver, not limiting his or her activity to describing practical determinations (norms, values, goal, decisions) adopted by others in the past, but extending that activity to the refinement of previous determinations and also to the adoption of new determinations—as long as one can assume that there is a sufficient chance that one's view is going to be collectively adopted (we referred to this aspect by speaking of the *gamble of participation* in Section 10.1.5 on page 279).

In proposing refinements and developments of the current legal practice one often refers to political morality (as observed by Dworkin 1986, 96): One needs to consider what determination should be adopted by one's community, though this reference is constrained by the need to converge with one' fellows and to insert this determination in the framework of the community's reasoning and decision-making.[16]

Secondly, the very need to focus on the values that one's community should pursue may lead one—though still identifying with one's community, and even because of this identification—to deny the legal bindingness (adoption-worthiness) of some determinations one's community is currently endorsing (see Section 13.2.2 on page 371), and of the rules which implement such determinations. For instance, with regard to shared rules that are intended to bring about the genocide of a minority, the elimination of political opponents, engagement in aggressive warfare, or some clear and severe form of injustice (like racial discrimination) rejection and disobedience seem the appropriate choices, in the interest of the concerned political community and even of its law.[17]

The idea that lawyers, there included doctrinal lawyers, need to identify with the legal system—rather than reproduce the reasoning of those who identify

[15] Pomponius also says that unless this task is fulfilled, the law cannot persist (*constare non potest*). See Lombardi Vallauri 1967, 5ff. The fact that lawyers have this task does not entail that they always (or even mostly) fulfil it, as many critics have often observed. For two old, by still very effective, pamphlets against lawyers and legal doctrine, see for instance: Muratori 1958 (on which cf.Pattaro 1974); von Kirchmann 1966.

[16] We discussed this issue in Section 10.1.4 on page 277 with regard to the connection between collective and plural ideality.

[17] As Martin Luther King famously said in his letter from Birmingham Jail (1963) "an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law."

with the legal system—can also be given a psychological explanation. A lawyer, as any problem solver, needs to engage in heuresis for finding imaginative solutions to the legal problems he or she has to face. This requires one's mind to be focused on those problems, in order to devise creative solutions. To perform well in such a heuristic search one needs to directly adopt those problems as one's own problem, rather than to aim at mimicking somebody else's reasoning in facing these problems.

Probably, one would not contribute much to science, if one did not believe in science as a form of cognition and was not engaged in making scientific discoveries, but rather aimed at anticipating what kind of inquiries and discoveries committed scientists would do. Similarly, one would probably be a bad artist if one aimed at reproducing or anticipating the style of some other artists rather than to provide one's own contribution. In the same way, one would probably be a bad legal scholar and decision maker, if one aimed at reproducing or anticipating what other lawyers would think and do, rather than at solving the legal problems one has adopted as one's own problems (or rather as the problems of one's own community).

Possibly we may say that the legal positivist (both of the exclusive and of the inclusive type) tends to assimilate the task of the lawyer, and in particular of the doctrinal lawyer, to the task of the sociologist or historian of science. Sociologists and historians of science should indeed study what scientific theories are accepted in a certain society at a certain time and work out some implications and presuppositions of such theories, there included—if one is an inclusive sociologist of science—shared scientific values, background metaphysical assumption, and so on.

However, it goes beyond the mission of the sociologist of science to try to solve substantive scientific issues, a task which they must leave to real scientists. Thus, if we adopt the positivist perspective, and we view lawyers as sociologists of law, we need to find somebody else who will provide the object of the lawyer-sociologist's studies, not only by solving specific legal issues , but also by developing practical theories that may support legal decision-making.

13.2.9. Overcoming the Paradox of Legal Validity

In the beginning of Chapter 12 we identified a puzzle: How can the validity debate be so important for lawyers and jurisprudes if it only concerns the choice of a definition for *legally valid*? Our explanation is that the puzzle of legal validity arises when a substantive issue (what rules are binding in legal reasoning?) is taken for a definitional one (what is the meaning of *legally valid*?). This is because the term *validity* is usually employed to express the normative notion of *bindingness* that we have here analysed.

We have argued that when one qualifies a rule as legally binding, one just wants to assert that the rule should be adopted in legal reasoning, namely, in the

reasoning that is intended to establish enforceable normative conclusions. The assertion that a rule is legally binding is the conclusion of arguments which support the use of that rule in legal reasoning, while the negation of its bindingness is the conclusion of arguments that reject such use. One needs to be capable of expressing such arguments if one wants to engage in reflexive legal reasoning, that is, to question or support the rules one is using in drawing legal conclusions.

From our assimilation of the idea of validity (in the sense here described, for a different notion, see Pattaro, Volume 1 of this Treatise, chap. 2) to the idea of bindingness, it follows that legal theory has no need to engage in definitions or re-definitions of the notion of legal validity (intended in this way). It has, instead, a large role to play in providing what we have called "theories of the grounds of legal bindingness."

Besides developing normative theories concerning the grounds of legal bindingness, legal theorists (and legal sociologists) should also investigate what views of the law are in fact adopted in legal communities or in sections of those communities. However, these empirical analyses cannot provide any sensible definition of bindingness, not even a lexical one. They only provide a description of how (upon what grounds) the members of the relevant communities usually derive bindingness propositions.

Unfortunately, as we have seen above, legal theorists have frequently merged these legitimate normative or empirical inquiries with the attempt of re-defining the term *legally binding* (or legally valid). This not only has created theoretical confusion, but has also stifled the dialectical exchange between different traditions of legal theory, such as naturalism, positivism, and realism.

Each of those traditions often not directly advocates certain arguments for attributing or excluding bindingness, which can be attacked by counterarguments and need to be correspondingly supported by appropriate reasons and meta-reasons. It rather presents itself as the sponsor of a certain definitional stipulation, which as such does not need any support, and which it would be just silly to question on substantive grounds. To solve the validity puzzle we need to bring the validity discourse, even within legal theory, back to its proper domain, that is, to the normative dialectics of arguments intended to establish what rules should determine legally binding—and thus publicly enforceable—normative conclusions.

Part II

Legal Logic

Chapter 14

LAW AND LOGIC

14.1. Introduction: Logic and Legal Reasoning

The relation between law and logic has been governed, as many of the most intense relationships are, by both a strong attraction and persistent strife. Let us consider first the reciprocal attraction between the two disciplines, then the reasons for their strife, and finally a way to find a possible accommodation.

14.1.1. The Attraction between Law and Logic

On the one hand, law—with its rich and diverse palette of reasoning forms and with its large social relevance—has appealed to logicians as an ideal field for application and experimentation. Law offers a large-scale effective decisional practice, in real-life contexts, frequently accompanied by reasoned justifications. Moreover, legal reasoning represents a middle way between formal inference and commonsense thinking: Even though legal discourse is not formal, it tends to appear in uniform and relatively structured ways, so that its patterns can be made accessible to logical analysis.

On the other hand, logic—with its capability of providing instruments for rational thinking—has appeared to many lawyers as a necessary tool for improving legal reasoning and communication. Since the young Leibniz proposed the transposition of the axiomatic approach to law (Leibniz 1974), by expressing the legal system in a few propositions, from which all legal conclusions could be "geometrically" derived, many lawyers were fascinated by the analogy between the logical deduction of a conclusion from a set of axioms, and the judicial derivation (justification) of a decision from legally binding sources. Reducing judicial reasoning to logical deduction would ensure certainty and testability, it would constrain the arbitrariness of human decision-making.

14.1.2. The Conflict between Law and Logic

However, the relation between law and logic has not always been that of a peaceful cooperation. Both partners have felt, at certain times, deep reciprocal distrust, accompanied sometimes by indifference or open attack. It is no surprise that a lawyer may resent being described as "logical" or "formalist," by which the lawyer may understand "pedantic" and "non-creative," and in the same way a logician may resent being attributed lawyerlike captiousness and verbosity.

More specifically, legal experience may appear to the logician (and more generally to the scientifically trained mind) as dominated by rhetorical appeals, magical conceptions, and unreasoned reliance on authorities: So much is legal practice a mixture of persuasion, superstition, and brute strength, that no canon of rationality can either be derived from, or be applied to it. On the other hand, a lawyer may find logic trivial and barren: Its complex and technical mechanisms just make explicit what is already known, without offering any substantial help to the creative task of constructing legal solutions adequate to new problems (to "the art of the good and the equitable", *The Digest of Justinian*, 1.1.1).[1]

The assumption of a basic, irreconcilable conflict between formal logic and legal reasoning motivated, from the end of the fifties, a number of attempts at grounding an alternative account of legal reasoning in the tradition of rhetoric and argumentation.[2] Legal reasoning often defined itself according to the argumentative technique which Perelman and Olbrechts-Tyteca (1969, 411ff.) call *dissociation*, that is, by pointing to a set of oppositions, which distinguished it from formal logic and were often used as polemical tools, loaded with evaluative connotations:

- Abstraction vs concreteness 1. Logic is abstract, since it only considers those features that are translated into its formal language. Legal reasoning is concrete, since it is capable, by preserving the richness of natural language, to capture the full-blooded content of legal problems.
- Abstraction vs concreteness 2. Logic is abstract, since it extracts the formalised data from the underlying network of beliefs and attitudes that determines the contextual meaning of each piece of information. Legal reasoning is concrete, since it takes into account the social and linguistic background of the audience.
- Closeness vs openness 1. Logic is closed, since it assumes a fixed system of knowledge. Legal reasoning is open, since it moves from assumptions freely chosen from a pool of general ideas, maxims or principles.
- Closeness vs openness 2. Logic is closed, since it blindly derives all consequences of a consistent set of premises. Legal reasoning is open, since it allows for alternative principles to be dialectically harmonised.

[1] The Latin original: "ars boni et aequi."

[2] The main reference is provided by the many contributions by Chaïm Perelman (and in particular Perelman and Olbrechts-Tyteca 1969, and Perelman 1979), but also Viehweg (1965) had a large impact on the legal discussion. The rhetorical tradition was also developed in Italy, for instance by Giuliani 1961 and 1966. More recently, in the German speaking area, legal rhetoric has been a very active area of research, see for example: Ballweg and Seibert 1982; Haft 1990. In the English speaking area, legal rhetoric can be connected to quite different kinds of jurisprudential research. On the one hand there are various approaches to the law based on literary studies, which we shall not be able to examine in this volume (see for instance: Jackson 1985; Fish 1989; Goodrich 1990; for a critical discussion of the application of literary methods to the law, see Posner 1988; for a recent discussion of law and literature from continental Europe, see Ost et al. 2001). On the other hand there are analyses of different kinds of informal arguments and fallacies (see, for instance: Walton 1997 and 2002) and studies of dialectical interactions (see Chapter 11).

- Closeness vs openness 3. Logic is closed, since (in order to be able to solve all legal problems) it assumes that the legal system is complete. Legal reasoning is open since it assumes the incompleteness of any set of sources and it relies on ampliative inferences for filling the gaps.
- Constraint vs persuasion. Logic is constraining, since it is not possible, for any rational being, to refuse assent to a logically valid inference. Legal reasoning is persuasive, since it leads its addressees towards a certain conclusion without forcing upon them the acceptance of that conclusion.
- Formality vs materiality. Logic is formal, since it evaluates inferences only on the basis of their syntactic structure. Legal reasoning is material, since the acceptability of a legal argument depends not only on the form, but also on the substantive value of that argument (that is, on the intrinsic goodness of its premises and conclusions or on their correspondence with social beliefs and attitudes).
- Impersonality vs personality. Logic is impersonal, since its inferences purport to be convincing for every rational being. Legal reasoning is personal, since it has to convince each particular audience, by appealing to the premises and the inferences that would be acceptable to it.
- Monologue vs dialogue. Logic is monological, since its inferences always move from a unique consistent pool of premises. Legal reasoning is dialogical, since it consists in confronting different points of view.
- Objectivity vs evaluation. Logic is objective, since it excludes choices: Either there is a contradiction, so that the whole axiomatic base collapses, or there is consistency, so that no choice is required. Argumentation is subjective (evaluative), since it admits conflicting theses and supports the evaluative choices required to adjudicate between them.
- Positive vs negative reasoning. Logic is a positive form of reasoning, since it supports a conclusion by showing that it is derivable from certain premises. Legal reasoning emphasises negative reasoning, which supports an argument by undermining its competitors.
- Rigidity vs flexibility 1. Logic is rigid, since it does not distinguish between the status of its premises: All axioms are assumed to be true facts, and their conflict determines an insoluble contradiction. Argumentation is flexible, since it admits different types of premises, and in particular it distinguishes facts from presumptions. The latter must be accepted only in so far as there is no evidence to the contrary.
- Rigidity vs flexibility 2. Logic is rigid, since once the premises of a logical inference are accepted as true, all and only their logical implications must also be accepted as true. Legal reasoning is flexible, since it distinguishes multiple ways in which conclusions can be supported by premises, and therefore it allows for different probability degrees of its conclusions.

- Rigidity vs flexibility 3. Logic is rigid, since it finds inferences to be either fully correct or fully incorrect. Legal reasoning is flexible, since arguments may have different degrees of strength.
- Statics vs dynamics. Logic is static, since it is concerned with the eternal relationships between truths. Legal reasoning is dynamic, since it develops in time according to procedural constraints.

The list of oppositions between formal logic and legal reasoning can possibly be further extended and clarified, but our (very open and indeed topical) presentation is maybe sufficient to give a feeling of the dispute that took place in legal theory, especially in the 1960's and 1970's. In this dispute, each party often assumed extreme positions and directed its criticism against the adversary, without much effort to understand the opponent's good points and its own limits.

In the 1970's, the dispute calmed down due to weariness, without reaching a satisfying synthesis. In fact, the "formal" approach—even if extended beyond Aristotelian syllogism (and first-order predicate logic) thanks to the equipment of modal and deontic logics—was incapable of giving a reasonably wide account of legal reasoning. Though legal logic produced valuable analyses of certain contexts, only limited fragments of law texts seemed amenable to a logical formalisation. Moreover the logical application of the law usually required a radical change—with regard to the usual legal practice—both in the formulation of legal knowledge and in the methods of legal inference.

On the other hand, the informal approach—even if extended beyond general rhetorical moves, into specific aspects of legal reasoning—was more successful in pointing to problems than in finding convenient solutions. Its refusal of any formal tools impeded the development of a precise definition of the forms of legal reasoning.

Fortunately, the hostile opposition between logic and argumentation has been largely overcome in the last thirty years, which have seen a fruitful interaction between formal logic and legal reasoning. This started in legal theory, where many scholars have approached legal reasoning adopting an analytical perspective. Some have applied in innovative ways classical and deontic logic to the analysis of legal reasoning,[3] and others have embedded deductive reasoning within broader accounts of legal argumentation.[4] Analytical legal theory has indeed offered a common language for logic and jurisprudence.[5]

[3] See, among the others: Alchourrón and Bulygin 1971; Horovitz 1972; Rödig 1980; Tammelo 1978; Neumann 1984; Golding 2001; Soeteman 1988; Weinberger 1989.

[4] See, among the many volumes which have addressed legal argumentation from an analytical perspective: Taruffo 1975; MacCormick 1978; Tarello 1980; Koch and Rüßman 1982; Neumann 1986; Gianformaggio 1986; Peczenik 1989; Atienza 1991; Wróblewski 1992; Pavčnik 1993; Aarnio 1987; Alexy 1989; Feteris 1999.

[5] There have also been a few attempts to provide an analytical account of the structure of legal norms for the purpose of legislation, rather then for the application of the law. See, for instance: Rödig 1976; Lachmeyer 1977. For a recent account of the relationship between legislation and legal theory, see Wintgens 2002.

More recently, especially in artificial intelligence and law (AI and law), some new logical accounts of legal reasoning have been provided. These accounts preserve the preciseness of deductive logic, but try to further extend the formal analysis of legal reasoning.[6]

These recent results seem to indicate that the conflict between logic and informal accounts of legal reasoning could after all end in a harmonious cooperation.

We hope that the framework we are proposing in this book may contribute to such reconciliation. In the previous pages we have extended our analysis of ratiocination beyond the domain of traditional deductive reasoning, to cover teleological, defeasible, and factor-based reasoning. For each one of these reasoning forms we have identified some basic reasoning patterns. Though there are many important aspects of legal problem-solving that fall outside our analysis—and more generally outside the domain of ratiocination, as we remarked when considering heuresis—the identification of these patterns opens the way to the attempt to provide a formal characterisation of significant aspects of legal reasoning: If these patterns indicate rational ways of reasoning, then their formal characterisation may be called a *logic*, intending by logic the study of the correct forms of reasoning.

We hope to be able to show in the following pages how this kind of extended logical inquiry—an inquiry that goes beyond the boundaries of deductive reasoning—may contribute to the study of legal reasoning. First of all, however, we need to reconstruct briefly the debate on the applicability of logic to the law, to place our attempt in the appropriate context.

14.2. Deduction and Formal Logic in Legal Reasoning

In legal discourse, the words *logical* and *formal* are frequently used in a very loose sense. However, their meaning is somehow related to the ideal of an axiomatic organisation of legal knowledge (Alchourrón 1996, 332), which parallels the implementation of the axiomatic paradigm in mathematics and empirical sciences. As we shall see, both critiques and defences of the use of logic in the law usually refer to a restricted view of logic, that is, to logic viewed as deduction. We shall argue that, instead, a reconciliation between (formal) logic and legal reasoning can only the achieved when the domain of logic (or formal thinking) is extended beyond the domain of deduction.

[6] See, among the published volumes: Gardner 1987; Gordon 1995; Hage 1997; Prakken 1997; Lodder 1999; Branting 2000. Many contributions on logic in the law can be found in the proceedings of the International conference on Artificial intelligence and law (ICAIL), which is held every two years.

14.2.1. The Deductive Model of Legal Reasoning

As it is usually understood, a *logical* approach to the law implies a *deductive* model of legal reasoning. This means that legal reasoning (or at least the justification of legal decisions) should have the following form:

1. the content of a legal decision should be a conclusive consequence of a set of pre-existing factual and normative premises (according to the standards of deductive reasoning), and
2. the normative premises included in this set should be general.

As Alchourrón (1996, 334) observes, this approach to legal reasoning parallels certain theories of empirical sciences, and in particular Carl G. Hempel's model of scientific explanation (Hempel 1966; 1970):

1. the facts to be explained (the *explanandum*) should be the logical consequences of a set of premises (the *explanans*), and
2. the *explanans* should contain general laws, along with specific prior facts.

Besides being supported by this connection with science, the axiomatic model of the law and the deductive model of the application of the law are backed by specific legal values:

- Formal quality. If each case is decided by a deduction from the same set of general rules, cases of the same type will receive the same solution.
- Legal certainty. Citizens, by accessing the law texts and performing deductive inferences, are able to know how the law regulates their behaviour and to foresee the legal effects of their actions.
- Efficiency. When facts can be easily ascertained (and corresponding rules are available), the deductive application of the law is simple and straightforward.
- Testability. It is always possible to check if the deductive procedure has been correctly implemented, and to establish correspondingly whether the ensuing decision is correct.

Different versions of the axiomatic-deductive model of law are possible, according to the origin of the general normative premises. In a legislation-based approach (the approach we called enactment-positivism), all axioms are assumed to be established by the legislator. This view tends to emphasise the principle of the division of powers, by limiting correspondingly the function of the judge to the rigorous application of pre-existing statutory rules. This division of labour may be considered to correspond to a democratic ideal, when the legislature is democratically elected and may be assumed to express the "general will."

In a milder version of positivism, the set of normative axioms may be extended to take into account other sources of the law, such as customs and authoritative *rationes decidendi*.

A further development can be found in the so-called conceptualist approaches to legal science, which assume that legislation (and judge-made law) can be supplemented with conceptual constructions operated by the jurists.

What unifies these approaches—beyond their accent on different legal sources—is the ideal of legal decision-making as a reasoning process rigidly constrained by previously established criteria. This is made clear by Perelman and Olbrechts-Tyteca (1969, 197), in their description of the *logical strategy* of problem solving:

> The first [approach], which may be called logical, is that in which the primary concern is to resolve beforehand all the difficulties and problems which can arise in the most varied situations, which one tries to imagine by applying the rules, laws and norms one is accepting. This is usually the approach of the scientist, who tries to formulate laws which appear to him to govern the area of his study and which, he hopes, will account for all the phenomena which can occur in it. It is also the usual approach of someone who is developing a legal or ethical doctrine and who proposes to resolve, if not all the cases where it applies, at least the greatest possible number of those with which one might be concerned in practice. The person who in the course of his life imitates the theorists we have just referred to is regarded as a logical man, in the sense in which the French are logical and the English are practical. The logical approach assumes that one can clarify sufficiently the ideas one uses, make sufficiently clear the rules one invokes, so that practical problems can be resolved without difficulty by the simple process of deduction. This implies moreover that the unforeseen has been eliminated, that the future has been mastered, that all problems have become technically soluble.

14.2.2. Deduction and Anticipation

From a psychological perspective—moving from our idea that legal rules can be assimilated to (general) instructions, the latter being the content of intentions—Perelman and Olbrechts-Tyteca's (1969) description of the *logical strategy* seems to correspond to what we may call the *anticipatory approach* to problem-solving. According to such an approach, one adopts in advance abstract and general rules and then inflexibly derives one's specific intentions through syllogisms. For instance, assume that I have adopted the following rules:

1. ⌈during all summer, whenever there is a sunny day, I shall go to the sea⌉, and
2. ⌈whenever I receive an e-mail message from my students, I shall immediately reply to it⌉.

Having adopted the first rule will enable me to form the intention of going to the sea today, since it is a sunny summer day (and I am committed to going to the sea on every sunny summer day). Similarly, having adopted the second rule will enable me to form today the intention of answering the mail I have just received today from Mary, one of my students, since she is indeed a student of mine (and I have committed myself to answer students' mails).

When the idea of *logic* is used in this sense, logic is not opposed to rationality, nor to ratiocination, but to a different attitude, which Perelman and Olbrechts-Tyteca (1969, 198) call the *practical approach*:

> Opposed to this approach is that of the *practical man*, who resolves problems only as they arise, who rethinks his concepts and rules in terms of real situations and of the decisions required for action. Contrary to the approach of the theorist, this is the approach of practical men, who do not want to commit themselves more than is necessary, who want to keep as long as possible all the freedom of action that circumstances will permit, who wish to be able to adjust to the unexpected and to future experience. This is the normal attitude of a judge who, knowing that each of his decisions constitutes a precedent, seeks to limit their scope as much as he can, to pronounce his verdicts without giving any more reasons than are necessary as a basis for his decision, without extending his interpretative formulas to situations whose complexity may escape him.

This "practical approach" may be more exactly (and less ambiguously) described as a *responsive approach*, that is, as the approach of a reasoner that prefers to respond to each specific issue at the time when a solution is required, rather than pre-establishing general solutions (common to certain kinds of future issues). The responsive approach may reflect two quite different strategies:

- The *reactive approach*. This consists in eliciting one's intuitive reaction, which, though unconscious, may result from the working of very complex information-processing ways, taking into account the combinations of natural instincts, conditioned learning, and explicit knowledge.
- The *teleological approach*. This consists, as we know from Section 1.3.2 on page 18, in identifying a satisfactory course of action to realise one's goals in the current circumstances.

There is no necessary conflict between logic and rationality on the one hand, and responsiveness of the other hand. Logic and rationality can also be used by a *responsive reasoner*:

- Rationality itself requires that one does not commit oneself to general instructions, when one does not have the information that is required for framing reliable rules of behaviour.
- Rationality itself should recognise the cognitive significance of intuitive reactions (see Section 1.5.3 on page 44).
- Logic is not limited to rule-based syllogisms, but it also includes teleological reasoning[7] and preferential reasoning. Also the process of weighing the factors in a particular case, at the time of its decision, can be subject to logical analysis, to a certain extent (see Section 8.1 on page 221 and Chapter 28).

[7] Teleological rationality and teleological inference correspond indeed to what Weber (1947, sec. 1.1, page 115, and n. 38) calls "rational orientation to a system of discrete individual ends" (*Zweckrationalität*), and to the end-means analysis which is the typical domain of decision theory.

However, for an agent who has adopted an anticipatory style of decision-making, logical reasoning in the specific sense of deductive or conclusive reasoning has a special importance. For such an agent, logical syllogism would be a sufficient guide for a large number of specific decisions, which would reached by applying endorsed general rules to the specific facts of the case. Other forms of reasoning (adoption of goals, teleological reasoning, factor-based reasoning) would be generally confined to the adoption of such general rule.

Much could be said about the comparative advantages and disadvantages of the logical (anticipatory) attitude and of the practical (responsive) attitude.[8]

Let us just remark that the anticipatory style of decision, when adopted in a collective enterprise may also express a division of labour: Some agents (individuals, bodies, and institutions) are charged with defining general rules of actions, and others with applying these rules to specific cases at hand. In this arrangement, choices on what goals to pursue and on how to pursue them are moved higher up in the organisational structure, being entrusted to the rule-definers, while practical reasoning at the lower level is limited to syllogism. This division of labour may improve the use of cognitive resources within the organisation: It ensures that issues common to many decisions, by different decision-makers, are treated just once (when the general rules are adopted) with better competence and higher cognitive investment.

Also in regard to organisations, however, there is no necessary connection between rationality and anticipation. In many circumstances, it is rational for an organisation—in the sense of functional to its operations—to defer teleological choices to the particular agents which deal with specific cases. This happens, in particular, when the following conditions hold: (*a*) many different possible circumstances exist in which different actions are opportune; (*b*) a decision-maker well-acquainted with those circumstances is usually able of making a sufficiently good choice (see Section 5.1.1 on page 146), and (*c*) generating precise general expectations is not the overriding concern. As an example, consider the issue of deciding arrangements on child custody in divorce cases.

14.2.3. The Tension between Legal Logic and Legal Practice

Since the "logical" (but better "anticipatory") ideal is susceptible of being fulfilled to different degrees, the attribute "logical" is normally used in legal contexts as a (muddled and) scalar notion. Possibly we are not very far from the truth if we say that a way of dealing with legal problems is called "logical" by lawyers, in so far as:

- the relevant legal conclusions are inferred from a set of pre-defined premises;

[8] For various considerations on the merits of rule following in legal decision-making, see Jori 1980, 7ff., and Schauer 1991. For a thorough and balanced discussion of the comparative merits of rules and analogies, see Sunstein 1996b, in particular, 244ff.

- inference is deductive (non-ampliative) with regard to those premises;
- the premises can be easily and univocally ascertained;
- the premises have a high degree of generality;
- the premises are consistent.

Correspondingly, lawyers tend to describe as "logical" or "formalistic" not only the activity consisting in inferring (deductively) the solutions to the case at hand from pre-existing premises, but also the activity consisting in pre-defining a set of premises in order to pre-determine future decisional activity. Therefore, legislators are "logical" (in the sense of "anticipatory") in so far as they try to establish a coherent detailed regulation of a wide legal domain, judges are "logical" in so far as they justify their decisions through consistent and wide-scoped *rationes decidendi*, and legal academics are logical in so far as they tend to provide a set of systematic general notions.

In fact, the tension between logic (theory) and practice (experience) which frequently emerges in various legal cultures mostly concerns the degree of generality of legal conceptions (Twining and Miers 1991, 259), and this is linked to how much different kinds of lawyers rely on anticipatory thinking. "Logicians" (usually academics) tend to consider general problems and to treat them with abstract conceptual constructions, intended to be consistently used in different legal domains. "Practitioners" (lawyers and judges) tend to focus on individual cases, to use more specific notions and to emphasise the defeasibility of conceptual constructions. Therefore, the alleged "inconsistency" of legal practice does not necessarily imply speaking nonsense. It may just consist in the tendency to differentiate the meaning of the same expression in different contexts and in admitting that general qualifications may be overridden by specific features of the particular cases at hand.

In any case, it should be clear that this supposed conflict, or inconsistency between "logic" and practice does not directly concern logic intended as the formal analysis of thought, or even ratiocination viewed as a thought procedure: It rather concerns the opposition between anticipatory and reactive approaches to legal decision making. The connection with logic in the strict sense (deduction) only consists in the fact an anticipatory attitude facilitates the use of some basic patterns of deductive reasoning (deductive syllogism).

14.2.4. The Anti-Deductive Critiques

We can possibly distinguish two basic critiques of the deductive model of legal reasoning, which are usually mixed in the anti-formalistic contentions that "the life of the law has not been logic, it has been experience" (Holmes 1881, 1).

The first critique raises, at least *prima facie*, a factual question. It asserts that in the legal domain the preconditions of deductive problem-solving do not

hold: Legal knowledge does not satisfy the conditions required for the solutions to legal problems to be derived from pre-determined rules. When facing a legal problem often we do not have enough rules (our rule-set is incomplete), or we have too many rules (our rule-set is inconsistent), or we have to address indeterminacy (we are uncertain about the content of the relevant rules in our rule-set).

Under this perspective, the deductive model of legal decision making is no real legal methodology (which should suggest what to do in cases of incompleteness, inconsistency, ambiguity, indeterminacy), it is rather a deceptive ideology, which offers a cloak of objectivity and legitimacy for hidden legal policies: The stereotypically "logical" lawyer claims that his or her decision is "deduced" from the legal system, and possibly also refers to certain rules extracted from certain pieces of text, but he or she does not say why those texts were interpreted in such a way as to obtain those rules, why other texts were not taken into consideration, what factors were (or were not) considered, what goals were (were not) promoted, and so on. To cite again Judge Holmes:

> behind the logical form lies a judgement as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgement, it is true, and yet the very root and nerve of the whole proceedings. (Holmes 1897, 466)

The second critique instead raises a value question. It affirms that the logical approach is inadequate in the legal domain, even when its preconditions hold, to wit, when pre-established standards, sufficient for deriving a legal conclusion for the case at hand, are available. This critique considers that in any real problem-situation the consequences resulting from the (blind or mechanical) application of pre-established rules may turn out to be "iniquitous, inopportune, voidable, unreasonable, that is, unacceptable for one reason or another" (Perelman 1990, 650). According to this view, dealing with concrete cases by means of general pre-established standards only supports some legal values and in particular the ideals of certainty and formal equality, at the disadvantage of other values, which should also inform the application of the law, such as justice and equity.

Both critiques inspired the revival of the old tradition of rhetoric or argumentation: Many authors were indeed united by the attempt to build a non-deductive account of legal reasoning, by rediscovering and developing that tradition.

For example, we can recall the well-known contention of Viehweg (1965), that legal reasoning is topical (rather than logical): It approaches specific problem situations by referring to an open, unordered, inconsistent, undetermined list of *topoi* (points of view, usually expressed in maxims), which address the relevant features of the different situations, rather than by referring to a complete and consistent system of universal axioms (we have shortly addressed legal

topoi in Section 11.1.3 on page 308).[9] The choice among alternative *topoi* is not abstractly determined, but it depends on the features of the individual cases. This contention emphasises that the law does not always provide a determinate solution to a legal problem, but often only presents alternative *prima facie* answers, from which a choice is required. Such an indication may be unsatisfying for those who strive for absolute certainty, but nevertheless it offers some help to the concerned decision maker, by individuating some relevant aspects of the case, and indicating some candidate options for a reasoned choice.

Secondly, we can mention Perelman's contention that legal reasoning is dialectical rather than analytical. It concerns choices and decisions in the domain of uncertainty (probability), that is:

> the means of persuading and convincing through discourse, of criticising the theses of the adversary and of defending and justifying one's own theses, with the help of more or less strong arguments. (Perelman 1979, 2)

According to this contention, most legal inferences are not binding deductions, but rather defeasible arguments whose conflicts must be dialectically adjudicated. Moreover, not all premises of those arguments are made explicit, since explicit assumptions gain their meaning only in the context of the presuppositions and of the presumptions which characterise a certain social context (Perelman 1990, 644).

Thirdly, we can mention the contention of Toulmin (1958), that legal reasoning deals with substantial (ampliative), rather than with analytical (deductive) inference: It introduces new information, not included in the input data. Such reasoning cannot be modelled as a deduction, since it combines different types of elements, each playing a specific logical role:

- the claim, i.e., the statement which is put forward (for example, "Harry is a British subject");
- the data, i.e., the information which supports the claim (Harry was born in Bermuda);
- the warrant, i.e., the rule which allows one to derive the claim from the data (a man born in Bermuda will generally be a British subject);
- the backing, i.e., the information which supports the warrant (The following statutes and legal provisions . . .).

According to Toulmin, the specific logical role of each one of these elements would not be captured by modelling legal reasoning according to deductive

[9] For a discussion of legal *topoi*, see Struck 1971, whose list of *topoi* is also discussed in Perelman 1979, 86ff. Various legal *topoi* can be traced back to the *regulae juris* of Roman law (*The Digest of Justinian*, L), though some *regulae juris* are unacceptable to modern sensibility, and some famous legal maxims have a more recent origin (on *regulae juris*, see Stein 1966).

logic, namely, as the deduction of a conclusion from a set of undifferentiated axioms.

Toulmin also stresses the dialectical procedures in which arguments are constructed. When approaching a legal issue, we do not need to state from the start all relevant premises, but information is to be provided only if needed: A piece of data must be provided only if a claim is challenged; a warrant, only if the challenge concerns the inference of the claim from the data; a backing, only if the challenge moves to the warrant; a rebuttal, only when an argument has to be contested.

14.2.5. Defences of the Axiomatic-Deductive Model

The supporters of the application of the axiomatic-deductive model have responded to the above-mentioned critiques in various ways.

A first response claims that this model is not intended as a description of real legal praxis, but only as an ideal that can be satisfied to different degrees by historical legal systems (Alchourrón 1996, 339).

A second response separates the use of the axiomatic-deductive model from the hypothesis that legal decisions can be determined by pre-existing general rules. What is important, according to this view (see Rödig 1980), is that each individual decision is deduced from a set of premises presented by the judge as a justification for that decision, whatever be the source of this axiomatic base. This would allow legal decisions to be evaluated with reference to their premises, even if the premises are not extracted from pre-existing sources.

A third response consists in delimiting the role of logic on the basis of two distinctions: The distinction between the *context of discovery* and the *context of justification*, on the one hand, and the distinction between the *internal justification* and the *external justification* on the other hand:

- According to the first distinction, legal reasoning involves two separate phases: (*a*) the thought process through which the legal decision-maker conjectures a legal solution (discovery), and (*b*) the subsequently provided explanation of that conclusion (justification).
- According to the second distinction, the justification of legal decisions involves two levels: (*a*) the derivation of the decision from general legal rules (the internal justification), and (*b*) the derivation of these premises from further assumptions (the external justification).

When the legal system is conceived as composed of all legally valid (binding) normative propositions, this second distinction can be supplemented by assigning different methods of reasoning to internal and external justification: Internal (legal) justification is reduced to deduction while external justification is the empire of informal or argumentative justification. Therefore, the role of logic is first

limited to the context of justification, and then is further restricted to the internal justification: Deduction from a consistent set of legal premises is the only task for formal logic in regard to legal reasoning.

It is quite dubious whether any of the three responses just presented succeeds in matching the anti-deductive critiques.

Firstly, it is true that a deductive reconstruction of legal reasoning represents a normative model, rather than a mere description of legal practice. Nevertheless, deduction does not cover essential features of actual legal reasoning (as the theorists of informal logic pointed out), like the ability of dialectically addressing the opposition of conflicting conclusions, alternative interpretations, and competing principles. To eliminate this dimension (in favour of deduction from a set of consistent premises) would require a radical departure from current legal usage, while a normative model can be effective only if it is not too far from the existing practice. Moreover, it is debatable whether this departure would be axiologically acceptable, considering that the legal system is committed to balancing the values of predictability and justice of legal decision-making (Peczenik 1989, 31ff.).

Secondly, the neutral version of deductivism seems to have a limited value: reducing one thesis (the judicial decision) to another set of theses (the axioms from which it is deduced). It makes sense to justify a legal decision as following from a certain normative premises only when these premises are legally binding, because they were expressed through authoritative statements (of legislators or judges), or because they are customarily endorsed and practised, or because their content deserves legal recognition (as for fundamental legal principles, like those concerning human rights), or because they can be supported by other legal contents, according to the processes of rational cognition, like teleological reasoning or rationalisation (we considered the issue of legal bindingness in Chapters 12 and 13 and we shall address the notion of a legal source in Chapter 25). Unfortunately, since legal authorities, customs and principles can be conflicting, debatable, defeasible, it may be doubted that straightforward deduction is the right way of dealing with them.

Thirdly, limiting logic to internal deductive justification has the effect of pushing all most significant aspects of legal reasoning outside the competence of logic, in the undetermined domain of second order justification. So, it is no surprise that even the most radical adversaries of formal legal reasoning could agree with this approach, which allows to separate formal logic (having a negligible role) from the theory of informal legal argumentation. In such a perspective, the theory of legal argumentation—rather then formal logic—becomes the only significant methodology of legal reasoning. Thus it becomes the only referent of the expression *legal logic*, used in a wide sense as denoting the (real) technique for legal reasoning:

There is nothing wrong, ultimately, in presenting judicial reasoning in the form of a syllogism, but

this form gives no guarantee of the value of the conclusion. If this is socially unacceptable, it means that the premises have been accepted lightly. Now, let us not forget that the whole of judicial debate and the whole of legal logic only concern the choice of the premises which would be better justified and which would raise the fewest objections. It is the role of formal logic to make the conclusion cohere with the premises, but it is that of legal logic to show the acceptability of the premises. This results from the confrontation of pieces of evidence, of arguments and values which are opposed in the litigation; the judge must arbitrate in order to take a decision and to justify his/her judgement. (Perelman 1979, 176; my translation)

14.2.6. Legal Logic Beyond Deduction

In the following we shall try to sketch a possible reply to Perelman. Our main contention will be that, even if deduction cannot provide a satisfactory structural analysis of legal reasoning, other formal tools can be applied to the various aspects of legal cognition we described in Part I. We will do that by introducing such tools, exemplifying their application, and hopefully convincing the reader of their potential usefulness.

Thus, the next chapters will provide a formal analysis of the structures of legal knowledge and of the forms of legal reasoning we informally introduced in Part I of this volume.

Our discussion will be inspired by the idea that logical forms are embedded into common-sense ways of reasoning. Logical analysis, rather than an alternative to natural reasoning, is a technique for studying and refining it. As Russell (1914, 44) puts it:

> Some kind of knowledge of logical forms, though with most people it is not explicit, is involved in all understanding of discourse. It is the business of philosophical logic to extract this knowledge from its concrete integuments, and to render it explicit and pure.

According to Russell's idea, we shall adopt the following strategy.

First we shall provide a discursive introduction to the legal concepts we are studying and we shall exemplify the various ways in which they are usually expressed.

Secondly, we shall try to provide an informal canonical definition of them (using the linguistic formulas we deem to be more appropriate).

Thirdly, we shall provide an elementary formal reconstruction. In doing that, we shall use *formal logic*, to which we refer by using the expression "logic" *tout court*.

We will not supply a complete logical characterisation, in order to preserve simplicity and readability. In fact, we only aim at specifying the logical properties that legal notions need to possess, in order to play their role in legal reasoning. This characterisation may be compatible with different full formalisations and different formal semantics.

Our formal results will generally be consistent with the ideas we informally introduced in Part I. However, when our logical formalism allows us to provide a better characterisation of concepts we have already introduced, we shall not refrain from redefining these concepts.

In the following, unless otherwise specified, we shall always refer do the doxified version of legal reasoning. In fact an advantage of doxification, as we said above, is to allow one to use the methods that are available for epistemic reasoning also within practical reasoning. This opportunity has indeed been frequently exploited by legal logicians, who have applied in the legal domain methods originally developed for epistemic reasoning.

Chapter 15

CLASSICAL LOGIC AND THE LAW

Under the heading "classical logic and the law," we shall consider the application to the law of the fundamental core of logic, namely *first-order classical logic*. This is the most well-known and widely-used logical formalism. It has represented for more than a century the gravity centre of logic.[1] Though various alternatives and innumerable extensions to classical logic have been proposed, none has yet succeeded in questioning its domination. Thus, it is no surprise that many attempts to apply formal methods to the law have been centred upon using first-order classical logic.

In the following we shall consider some such attempts: First we shall examine propositional logic, then we shall move to predicate logic, and finally we shall focus on the representation of time.[2]

15.1. Propositional Logic

Propositional logic constitutes the undisputed foundation of logic, also in the legal domain. Any further levels of logic, though providing for higher levels of expressivity (and complexity), are still based upon the basic constructs provided by propositional logic.

Therefore, we cannot refrain from a simple introduction to propositional logic, which will provide us with the basic ideas for any deeper logical analysis, and with the building blocks for any higher logical construction.

[1] First-order classical logic was established by mathematicians such as George Boole, Gottlob Frege, and Bertrand Russell, between the end of the 19th century and the beginning of the 20th, though the first textbook which included the whole of first order logic and distinguished it from other logical formalisms was probably Hilbert and Ackermann 1927. The power and the limitations of this formalism were properly circumscribed in the first half of the 20th century, by the work of other great mathematicians, such as Alfred Tarski and Kurt Gödel.

[2] We cannot here examine in any detail classical logic. For an introduction, we refer the reader to any of the many good handbooks that are available on this subject. Two traditional references are Copi 1961, for a very basic account, and Mendelson 1990, for a more in-depth analysis. For a deeper and more problematic presentation of first-order classical logic, cf. Gabbay and Günthner 1983 and, in particular, Hodges 1983. On alternatives to classical logic, like intuitionistic logic, see Gabbay and Günthner 1986. For a recent basic introduction to logic, cf., for instance, Sainsbury 2001.

15.1.1. Propositional Formalisation

When we analyse knowledge by using propositional logic, we need to stop at the level of *atomic propositions* (propositions that cannot be decomposed in a combination of smaller propositions). In fact, in propositional logic, each atomic proposition needs to be represented by a separate propositional constant, namely, a syntactic object that cannot be further analysed, whose content does not matter to representation and inference through propositional logic.

To exemplify the limitations of propositional logic, let us assume that legislation concerning Italian nationality includes the following rule, which expresses the idea of the so-called *jus soli*:[3]

1. if [one is born in Italy][4] then [one is an Italian citizen]

Let us then represent as follows some specific propositions in this domain:

2. [John is born in Italy]
3. [John is an Italian citizen]

In propositional logic there is no connection between propositions (1), (2), and (3). In particular, it is not possible to infer proposition (3) from propositions (1) and (2): From the point of view of propositional logic, those are different propositions, and there are no structural connections between them.

This becomes clearer if we represent every proposition with a label (using the same label when the proposition is exactly the same):

a: [one was born in Italy]
b: [one is an Italian citizen]
c: [John was born in Italy]
d: [John is an Italian citizen]

By expressing propositions with labels we get the following representation:

1. if a then b
2. c
3. d

This shows how in propositional logic we cannot express the obvious connection between propositions (1), (2), and (3), that is, we cannot formally express normative syllogisms like the following:

[3] The *law of the soil*, namely, the legal principle that one's nationality is determined by that one's place of birth.

[4] We use the square brackets "[" and "]", as delimiters for textual clauses (while we keep using "⌈" and "⌉" to denote the proposition expressed by the included text).

Reasoning instance: *Syllogism*

(1) if one was born in Italy then one is an Italian citizen;
(2) John was born in Italy
———— IS A REASON FOR
(3) John is an Italian citizen

To formally express such inferences, we have to move to the level of predicate logic. This, however, is not the only difficulty we find in modelling legal reasoning through classical logic, as we shall see in the following paragraphs.

15.1.2. Propositional Connectives

Knowledge represented in propositional logic consists of two elements:

1. atomic propositions, each atomic proposition being represented by a different atomic symbol, that is, by a different propositional constant, and
2. propositional connectives.

Propositional connectives specify relationships between propositions, with the help of parentheses that delimit the scope of the connectives. In this way we express the *propositional structure* of knowledge, to wit, the formal structure that supports the inferences of propositional logic.

For representing such structure in a rigorous way, but using a language that can be understood also by a reader untrained in logics, we shall borrow some ideas advanced by Allen (1957; 1979; 1982), in the framework of his *normalisation* technique.

Normalisation is a method for representing legal information in such a way as to eliminate syntactic ambiguities. Its main aspect consists in substituting logical connectives to ambiguous connectors of natural language (like "and," "or," "if ... then," "unless," and so on):

- Logical connectives are expressed by using the wording of the corresponding expressions in natural language. Their logical meaning is signalled though an appropriate typographical style, such as capsizing. For instance, the logical conjunction, which corresponds to "and" in natural language, can be expressed as "AND."
- The scope of logical connectives is precisely delimited by using parentheses or indentation.

Let us introduce the most frequently used logical connectives. As usual, we characterises logical connectives through their *truth conditions*, that is, by specifying when a proposition containing such connectives is true.

Negation

NON represents negation: Proposition ⌈NON A⌉ is true iff[5] proposition A is false. For example:

NON [Tony stole John's bicycle]

is a proposition which is true iff proposition [Tony stole John's bicycle] is false, i.e., if Tony did not steal John's bicycle.

Note that in natural language negation goes inside the sentence to which it applies, which is not the case in usual logical language. This corresponds to a general feature of logical syntax: It is *compositional*, in the sense that it allows to build larger units by combining smaller units, without modifying the latter (the context where a certain syntactic structure appears does not modify its form).

This contributes to making logical syntax much simpler than the syntax of natural language, more precise and easier to control. On the other hand, this leads to awkward and redundant expressions. More generally, logical formalism tends to be more rigid than natural language, but it often enables us to achieve more clarity and sometimes it facilitates the expression of ideas that it would be very difficult to articulate in natural language.

Conjunction

The symbol AND represents conjunction: Proposition ⌈A AND B⌉ is true iff both A and B are true. For instance:

[Tony stole John's bicycle] AND [Tony sold John's bicycle to Laura]

is true if both [Tony stole John's bicycle] and [Tony sold John's bicycle to Laura] are true, i.e., if Tony both stole and sold John's bicycle.

Disjunction

The symbol OR represents disjunction: Proposition ⌈A OR B⌉ is true iff either A or B, or both of them, are true. For instance:

[Tony stole John's bicycle] OR [Tony sold John's bicycle]

is true in any of the following three cases: (1) Tony stole John's bicycle though he did not sell it; (2) Tony sold John's bicycle, though he did not steal it; (3) Tony both stole and sold the bicycle.

[5] We write *iff* to abbreviate *if and only if*.

Material Conditional

The symbol IF ... THEN^m represents material conditional, also called material implication (we use, here and in the following, superscripts to distinguish different types of conditionals). Proposition ⌈IF A THEN^m B ⌉ is true iff (1) A is false or (2) B is true. This also includes the case where both A is false and B is true, so that we can also say that, IF A THEN^m B is false only when A is true and B is false. For instance:

> IF [Tony stole Mary's bicycle]
> THEN^m [Tony must return Mary her bicycle]

is a proposition which is true if any of the following two conditions is satisfied: (*a*) Tony did not steal Mary's bicycle or (*b*) Tony must return it. This explanation of the meaning of the material conditional clarifies how material conditional is equivalent to a disjunction:

> IF A THEN^m B = (NON A) OR B

Thus, in principle we could avoid using material conditionals altogether, and substitute them with disjunctions.

15.1.3. Normalisation

The use of propositional logic for representing legal texts has been advocated by Allen (1957; 1979). This author has argued that the syntax of propositional logic would enable legal drafters to avoid unintended syntactical ambiguities, and so prevent litigation. As an example of avoidable litigation Allen (1982, 386ff) discusses the case *Brekken vs Reader's Digest Special Products Inc.* (US 7th-Circuit, 1965). It concerned the interpretation of the following contractual clause:[6]

> [a: this agreement shall be effective from the date of execution] and [b: this agreement shall remain in effect for a period of twelve months] and [c: this agreement will be automatically renewed for twelve-month terms] unless [d: this agreement is sooner terminated]

Brekken, who had been dismissed within the first year of employment, argued that early termination only concerned renewal after the first year, while Reader's Digest argued that it also concerned continuation of work during the first year. In other words (reading "unless" as IF NON), Brekken interpreted the clause as:

[6] Following Allen's example, we use *labels* as names for atomic clauses.

1. [a: this agreement shall be effective from the date of execution] AND
2. [b: this agreement shall remain in effect for a period of twelve months] AND
3. A. IF NON [d: this agreement is sooner terminated]
   B. THEN [c: this agreement will be automatically renewed for twelve-month terms]

Table 15.1: *Brekken's reading of the contract clause*

1. [a: this agreement shall be effective from the date of execution] AND
2. A. IF NON [d: this agreement is sooner terminated]
   B. THEN
      i. [b: this agreement shall remain in effect for a period of twelve months AND]
      ii. [c: this agreement will be automatically renewed for twelve-month terms]

Table 15.2: *Readers Digest's reading of the contract clause*

a AND b AND (IF NON d THEN c)

Using the full text of the propositions in the clause, this becomes the normalised statement in Table 15.1.

Reader's Digest understood the contractual clause in a different way:

a AND (IF NON d THEN (b AND c))

Using the full text of the propositions in the clause, this becomes the rule in Table 15.1.

The judges chose the second interpretation, so that Reader's Digest won the case.

Allen's contention is that, if the contract had been written using normalisation, and so unambiguously specifying its propositional structure, the litigation could have been prevented, whatever content the parties decided to give to their contract.

As another example of avoidable ambiguity, we consider Art. 615 *ter* of the Italian criminal code, concerning unauthorised access to a computer system. The text of this provision reads as follows:

Whoever enters a computer or telecommunication system which is protected by security measures or remains in such a system against the will of the person who is entitled to exclude him, shall be punished with detention up to three years.

1.	IF	A.	i.	[a: the individual abusively enters the computer or telecommunication system (named cts)] AND
			ii.	[b: the cts is protected by security measures] OR
		B.	i.	[c: the individual remains in the cts] AND
			ii.	[d: there is the contrary will of the person who is entitled to exclude the individual]
2.	THEN	[e: the individual is punished with detention up to three years]		

Table 15.3: *First interpretation of art. 615*

There have been many discussions as to whether the two elements forming the antecedent condition of this rule—the protection by security measures and the contrary will of the person in charge of the system—are both required for the commission of the crime, or are alternatively required, or whether the first element is required when entering and the second when remaining in the system.

This issue includes two aspects. One aspect concerns identifying what is meant by "such a system": Does this only refer in general to a computer or telecommunication system, or more specifically to a computer or telecommunication system protected with security measures? The other aspect concerns establishing the scope of "against the will of the person who is entitled to exclude him": Does this apply only to the last clause (remaining in the system) or does it refer the whole disjunction (entering or remaining)?

Let us try to disambiguate Art. 615, by using Allen's methodology. First we need to extract from the text the atomic propositions. Assume that we obtain the following result:

> If [a: the individual enters the computer or telecommunication system (named cts)] and [b: the cts is protected by security measures], or [c: the individual remains in the cts] and [d: there is the contrary will of the person who is entitled to exclude the individual], then [e: the individual shall be punished with detention up to three years]

We can represent as follows the different interpretations of Art. 615 we identified above (which you can see in Tables 15.3, 15.4, and 15.5):

1. IF $\{(a \text{ AND } b) \text{ OR } (c \text{ AND } d)\}$ THEN e
2. IF $\{(a \text{ OR } c) \text{ AND } (b \text{ AND } d)\}$ THEN e
3. IF $\{(a \text{ OR } c) \text{ AND } (b \text{ OR } d)\}$ THEN e

There can be arguments in favour of each one of these three interpretations of art. 615. As a matter of fact, it seems that Italian judges are inclined to adopt interpretation 3 (though there have been different decisions) or rather

1.	IF	A.	i.	[a: the individual abusively enters the computer or telecommunication system (named cts)] OR
			ii.	[c: the individual remains in the cts] AND
		B.	i.	[b: the cts is protected by security measures] AND
			ii.	[d: there is the contrary will of the person who is entitled to exclude the individual]
2.	THEN	[e: the individual is punished with detention up to three years]		

Table 15.4: *Second interpretation of art. 615*

1.	IF	A.	i.	[a: the individual abusively enters the computer or telecommunication system (named cts)] OR
			ii.	[c: the individual remains in the cts] AND
		B.	i.	[b: the cts is protected by security measures] OR
			ii.	[d: there is the contrary will of the person who is entitled to exclude the individual]
2.	THEN	[e: the individual is punished with detention up to three years]		

Table 15.5: *Third interpretation of art. 615*

they tend to view the contrary will of the owner of the system as the decisive element (while security measures are only a clue for presuming such will). So their reading seems to correspond to the following combination of rules:

a. IF $\{(a$ OR $c)$ AND $d\}$ THEN e
b. IF b THEN it is presumed that d

Using normalisation rules (*a*) and (*b*) are expressed in the text in Table 15.6 on the next page.

There have been some attempts to use normalisation in legislation and in contracts (see, for instance, Gray 1985), but in general Allen's proposal has not been practically successful. Lawyers' ignorance of logic can provide a partial explanation, but, as our examples suggest, there are further reasons.

Firstly, propositional logic forces the representation of legal knowledge into too straight a jacket, leading to formulations that are awkward and difficult to grasp. Secondly, only a very small fragment of legal knowledge is captured by the logical structures of propositional logic.

These difficulties do not exclude that logical connectives can be used in legal drafting. For this purpose, Allen proposes some typographic conventions (like indenting and labelling) for embedding logical forms in legal texts, while preserving their readability. In the following we shall use some of his suggestions.

First rule

1. IF A. i. [a: the individual abusively enters the computer or telecommunication system (named cts)] OR
   ii. [c: the individual remains in the cts] AND
   B. [d: there is the contrary will of the person who is entitled to exclude the individual]
2. THEN [e: the individual is punished with detention up to three years]

Second rule

1. IF [b: the cts is protected by security measures]
2. THEN [d: it is presumed that there is the contrary will of the person who is entitled to exclude the individual]

Table 15.6: *Fourth interpretation of art. 615*

15.1.4. Inference Rules for Propositional Logic

We shall not provide here an in-depth analysis of the inferential machinery of propositional logic. Let us just introduce the basic rules for reasoning with propositional connectives. Both the preconditions and the postconditions of these rules concern beliefs, and therefore, we shall refrain from explicitly expressing mental attitudes, i.e., we shall present our schemata as concerning propositions. Let us see inference rules for AND, NON, OR and IF ... THEN^m.

The first inference rule, concerning the introduction of connection AND is quite obvious: When we believe two propositions, we may also believe their conjunction.[7]

Reasoning schema: AND *introduction*

(1) A;
(2) B
——— IS A CONCLUSIVE REASON FOR
(3) A AND B

[7] When representing reasoning schemata whose reason including multiple subreasons, we have so far used an AND connective between the last two of these subreasons, to indicate that all subreasons are to be viewed as conjunctive components of the reason of the schema, rather than as independent grounds for deriving the schema's conclusion. From now on, to avoid confusion between the AND used within subreasons (to specify conjunction in propositional logic) and the AND used between subreasons, we shall avoid indicating the latter. However, our understanding of the relation between the subreasons of a schema remains unchanged.

Here is an instance of this reasoning pattern:

Reasoning instance: AND *introduction*

(1) [Tony stole John's bicycle];
(2) [Tony sold John's bicycle to Mary]
——— IS A CONCLUSIVE REASON FOR
(3) [Tony stole John's bicycle] AND [Tony sold John's bicycle to Mary]

Also the rule for the elimination of the conjunction is quite uncontroversial. From the belief that one conjunction is true one should be able to move into the belief that each conjunct is true.

Reasoning schema: AND *elimination (1)*

(1) A AND B
——— IS A CONCLUSIVE REASON FOR
(2) A

Similarly

Reasoning schema: AND *elimination (2)*

(1) A AND B
——— IS A CONCLUSIVE REASON FOR
(2) B

Here is an instance of this reasoning pattern:

Reasoning instance: AND *elimination*

(1) [Tony stole John's bicycle] AND [Tony sold John's bicycle to Mary]
——— IS A CONCLUSIVE REASON FOR
(2) [Tony stole John's bicycle]

Let us now consider the introduction of disjunction: When we believe a proposition we may also believe its disjunction with any arbitrary proposition.

Reasoning schema: OR *introduction*

(1) A
——— IS A CONCLUSIVE REASON FOR
(2) A OR B

Here is an instance of this reasoning pattern:

Reasoning instance: OR *introduction*

(1) [Tony stole John's bicycle]
——— IS A CONCLUSIVE REASON FOR
(2) [Tony stole John's bicycle] OR [The sun was shining]

The disjunction rule can leave the reader quite perplexed. It is obviously correct, since a stronger belief implies a weaker one, but it seems quite silly to reason this way: There is a loss of information since the premise is more meaningful than the conclusion. However, this kind of reasoning is quite common in the legal domain. In fact, legal rules frequently have a disjunctive antecedent: They make a certain legal effect depend upon a disjunction of conditions. In such a case one's knowledge that a condition is true allows one to infer that the disjunctive rule-antecedent including that condition is satisfied, which leads one to conclude that the rule's effect takes place.

Let us now consider an inference rule concerning negation. This is the familiar rule for eliminating *double negation*.

Reasoning schema: *Double-negation elimination*

(1) NON NON A
——— IS A CONCLUSIVELY REASON FOR
(2) A

This rule needs little explanation: Denying the negation of a proposition amounts to affirming that proposition. Believing that it is not the case that Mary did not steal my bicycle amounts to believing that she stole it.

Reasoning instance: *Double-negation elimination*

(1) NON NON [Mary stole John's bicycle]
——— IS A CONCLUSIVE REASON FOR
(2) [Mary stole John's bicycle]

The inference rule for eliminating disjunction is called OR *elimination* or *unit resolution*: If we know that the disjunction of two propositions is true and we also know that the first proposition is false, we can conclude that the second proposition is true.

Reasoning schema: OR *elimination (1)*

(1) A OR B;
(2) NON A
——— IS A CONCLUSIVE REASON FOR
(3) B

Similarly, if we believe that the second proposition in a disjunction is false, we can endorse the first proposition.

Reasoning schema: OR *elimination (2)*
(1) A OR B;
(2) NON B
——— IS A CONCLUSIVE REASON FOR
(3) A

Here is an instance of OR *elimination*.

Reasoning instance: OR *elimination*
(1) [Tony stole John's bicycle] OR [Mary stole John's bicycle];
(2) NON [Tony stole John's bicycle]
——— IS A CONCLUSIVE REASON FOR
(3) [Mary stole John's bicycle]

The latter rule—remembering that NON NON A is equivalent to A, and that (NON A) OR B can also be expressed as IF A THEN^m B—leads to the schema for the elimination of the conditional, also called *detachment*:

Reasoning schema: *Detachment* (IF ... THEN^m *elimination)*
(1) IF A THEN^m B;
(2) A
——— IS A CONCLUSIVE REASON FOR
(3) B

Here is an instance of this reasoning pattern:

Reasoning instance: *Detachment*
(1) IF [Tony steals John's bicycle] THEN^m [Tony commits a crime];
(2) [Tony steals John's bicycle]
——— IS A CONCLUSIVE REASON FOR
(3) [Tony commits a crime]

The second variant of the OR elimination rule is called *modus tollens* when taking the following form:

Reasoning schema: *Modus tollens*

(1) (NON A) OR B;
(2) NON B
——— IS A CONCLUSIVE REASON FOR
(3) NON A

which, can also be expressed as:

Reasoning schema: *Modus tollens*

(1) IF A THEN^m B;
(2) NON B
——— IS A CONCLUSIVE REASON FOR
(3) NON A

Consider for example the following instance:

Reasoning instance: *Modus tollens*

(1) IF [Tony stole John's bicycle] THEN^m [Tony was in Bologna];
(2) NON [Tony was in Bologna]
——— IS A CONCLUSIVE REASON FOR
(3) NON [Tony stole John's bicycle]

We also have a rule for the introduction of new conditionals, which we can call *transitivity of the conditional*, or *general resolution* (this name is used when conditionals are represented in their disjunctive form).

Reasoning schema: IF ... THEN^m *introduction*

(1) IF A THEN^m B;
(2) IF B THEN^m C
——— IS A CONCLUSIVE REASON FOR
(3) IF A THEN^m C

Here is an instance of this reasoning pattern:

Reasoning instance: IF ... THEN^m *introduction*

(1) IF [Tony steals John's bicycle] THEN^m [Tony commits a crime];
(2) IF [Tony commits a crime] THEN^m [Tony is liable to punishment]
——— IS A CONCLUSIVE REASON FOR
(3) IF [Tony steals John's bicycle] THEN^m [Tony is liable to punishment]

15.2. The Application of Propositional Logic to the Law

Even the simple formalism of propositional logic originates some very difficult problems for legal theory.

First of all, some inferences we can perform according to inference schemata of classical propositional logic appear absurd in the legal domain. This concerns in particular the treatment of conditionals and contradictions (as we shall see in Section 15.2.1 and Section 15.2.2 on the next page).

More generally, it has often been affirmed that it does not make sense to apply the truth-preserving inferences of classical propositional logic to normative propositions, which cannot be true or false (this objection will be considered in Section 15.2.3 on page 420).

15.2.1. Material Conditional and Hypothetical Propositions

One of the most difficult issues in philosophical logic concerns the nature of conditional connections. In particular, we need to consider whether the material conditional, as provided by propositional logic, covers all, or most, senses in which we use the words "if ... then ... " in common and legal language. When we say "if A then B" in a legal context, do we always mean "A is not the case or B is the case"?

Many logicians have answered negatively to this question: While the logical connectives AND, OR, and NON provide good approximations of the meaning of the corresponding expressions (and, or, not) in natural language, material conditional "IF ... THEN^m ..." fails to capture the intuitive meaning of "if ... then ..."

One first source of apparent absurdities is the fact that ⌈IF A THEN^m B⌉ is equivalent to ⌈(NON A) OR B⌉, and thus, for a conditional to be true is sufficient that its antecedent condition is false. For example, the fact that Mary has brown eyes—so that the proposition ⌈Mary has blue eyes⌉ is false—makes it true that:

IF [Mary has blue eyes]
THEN^m [I am obliged to give Mary € 1,000,000,000]

Similarly, the fact that John has not stolen Tony's car, makes it is true that:

IF [John has stolen Tony's car]
THEN^m [John is entitled to keep it]

The source of these problems is the fact that a material conditional cannot express a hypothetical proposition: It cannot express that under the hypothesis A, B would be the case. When endorsing such a hypothetical proposition, one does not take a stand on whether A is the case or not, but one takes a stand on what would be the case if A were to be the case.

Thus, the truth of a hypothetical proposition should be independent from the truth or the falsity of its antecedent. For instance, the fact that Tony has not stolen John's car is no reason for Tony to believe the hypothetical proposition that ⌈if he had stolen the car, then he would be allowed to keep it⌉. Unfortunately, this is exactly what happens by using propositional logic (if one understands the IF ... THEN^m connective of classical logic as a synonym of the "if ... then" of natural language). For example, the proposition:

NON [Tony has stolen John's car]

entails, in classical propositional logic, that:

IF [Tony has stolen John's car]
THEN^m [Tony is allowed to keep John's car]

This shows that the "if ... then ... " connections we can find in natural language (and that we use in normative propositions) do not coincide with the material conditional "IF ... THEN^m ..." To find an appropriate notion of a normative conditional, we shall have to look for additional logical tools, as we shall do in Chapter 20.

Some authors have tried to avoid the problems of material conditionals by using, rather than classical logic, other logical systems, which provide for different types of conditionals. For example, Allen and Saxon (1991) use the *relevance logic* of Anderson and Belnap (1975), a logical system which requires, for a conditional to hold, that the antecedent is relevant to establishing the consequent. Others have been using the idea of a *strict conditional* as provided by modal logic: Strict conditionals express the idea of a necessary connection between their antecedent and their consequent (see, for all, Alchourrón 1991). Neither relevant conditionals nor strict conditionals hold only on the basis of the falsity of their antecedent.

We shall not consider here such attempts, since this will require us to discuss logical technicalities going beyond the scope of this book: Having rejected material conditional, we shall try to establish the minimal requirements that normative conditionals need to satisfy, requirements that are consistent with different logical formalisms (see Chapter 20).

15.2.2. Ex Falso Sequitur Quodlibet *in Legal Reasoning*

In classical propositional logic, we can infer whatever conclusion from a contradiction (from a falsity anything follows, in Latin *Ex Falso Sequitur Quodlibet*). This can be done by combining schema OR *introduction* and schema OR *elimination*.

According to the first schema, any contradiction C (as any other proposition) allows one to infer⌈C OR A⌉, where A is any arbitrary propositions.

According to the second schema, from ⌈C OR A⌉ and NON C (we can assume the latter proposition, since we know that the contradiction is false), we can conclude that A. For instance, assuming that ⌈Mark both is a man and is not a man⌉, we can conclude the following disjunction:

[Mark both is a man and is not a man] OR
[Mark is one thousand years old]

From this, knowing that NON [Mark both is a man and is not a man], we can conclude that:

[Mark is one thousand years old]

As this example shows, in propositional logic contradictions do not remain isolated: They sprawl arbitrary conclusions. On the contrary, in the law we must find ways of keeping contradictions local, and of solving them without getting to further absurdities.

15.2.3. Logical Inference and Truth-Preservation

We conclude our discussion of propositional logic by mentioning an important feature of all inference rules we have just presented. They are *truth-preserving*, to wit, it is impossible that their premises are true and their consequences are false (see Definition 2.2.3 on page 56). This property follows easily from the truth-functional definition of logical connectives we provided above (in Section 15.1.2 on page 407).

This corresponds to the traditional view that logic is limited to truth-preserving reasoning. We have already considered, in Section 2.2.1 on page 56, one significant implication of this view, namely, the idea that only conclusive reasoning can be a proper object of logic. We need now to consider a further implication, the idea that it is useless or even absurd to apply logic to objects that are not susceptible of being true or false.

This has led many legal theorists into an unpleasant quandary, the so-called Jörgensen dilemma (from the name of the Danish legal theorist who discussed it; see Jörgensen 1938). The dilemma consists in the supposed necessity of making the following choice: Either one rejects using logic in the law (and, more generally, in practical reasoning) or one has to admit that legal contents (practical noemata) can be true or false. Said otherwise, it makes sense to apply logic to the law only under the assumption that normative contents can be assigned truth-values.

The dilemma was particularly perplexing for those thinkers that supported the use of logic in the practical domain, but wanted to maintain a clear distinction between epistemic and practical reasoning. Many of these authors agreed on the need to find some ways out of the dilemma, though they expressed different views concerning the matter of normative reasoning: For some norma-

tive reasoning concerned mental attitudes such as desires and wants, for others prescription viewed as the content of speech acts of commanding, for others propositions expressing rules, values rights and obligations.

As an attempt to find a solution to the Jörgensen dilemma which is neutral with regard to the nature of normative premises, we can mention Alchourrón and Martino's (1990) claim that the central notion of logic is the idea of *inference*, rather than the idea of truth. Therefore, according to these authors, we can apply logic—seen as a set of correct inference methods—to normative contents even if such contents cannot have truth-values.

Others, like Tammelo (1978) have affirmed that for applying logic it is sufficient that we assign any binary values—which can be 1 and 0 rather than *true* or *false*—to thought contents, and that we ensure that logical reasoning preserves positive values (leads to positively valued conclusions whenever the premises have positive value), though we can interpret such values in different ways (for instance, as referring to acceptability or legal validity rather than to truth).

We do not need here to discuss this issue any further, since from our perspective the Jörgensen dilemma does not represent a real problem.

First of all, we do not view logic (and rational reasoning) as being limited to truth-preserving reasoning. As a matter of fact, non truth-preserving reasoning plays an important role also in epistemic reasoning, as we have seen when considering defeasible reasoning (see Sections 2.2 on page 55 and 2.2.2 on page 57).

Secondly, we view doxified practical reasoning (once it is properly understood, according to its cognitive function) as a fully acceptable way of approaching practical issues, so that we admit that truth values can be assigned to doxified practical contents, and in particular to practical propositions.

Thirdly, and independently from our second observation, we believe that the most important structures of legal reasoning—such as the connection between the antecedent and the consequent of a rule—cannot be expressed by using truth-preserving classical logic (as we said above, material implication is not the appropriate way of expressing such connections). On the contrary, the most common legal inferences are defeasible, and can only be modelled through ways of reasoning that are not truth-preserving, as we shall see in the following.

15.3. Predicate Logic and the Law

Let us now address *predicate logic*, the logical formalism that is so important, so ubiquitous, so powerful (compared to its relative simplicity) that it constitutes the paradigm of logic, provides the common language of formal sciences, and offers the basis for any further development in logical analysis.

15.3.1. Predicates and Terms

Predicate logic is built on the top of propositional logic, to which it adds the possibility of analysing the formal structure of atomic propositions. Atomic propositions can be looked into only when we take the microscope of predicate logic (to use the well-known metaphor of Frege 1970).

In particular, using predicate logic, we can distinguish the following elements of a sentence: (*a*) *predicates*, which express actions, properties and relationships, and (*b*) *terms*, which indicate the objects to which predicates refer. For instance, in the propositional formula:

Tony steals *Mary's bicycle*

predicate logic allows us to distinguish the predicate:

[1] steals [2]

a predicate having two arguments, indicated by the numbered place-holders, and terms *Tony* and *Mary'sbicycle*. By substituting the terms for the place-holders in the predicate, we obtain a propositional formula (we take the idea of using numbers as place-holders for terms from Quine 1974).

The decision on what is a predicate and what is a term is to be taken according to considerations of opportunity: It depends on what propositional contents one wants to reason about. If the stolen object were fixed (since we were only interesting in establishing someone's liability with regard to the theft of Mary's bicycle), then we could have used the following predicate

[1] steals Mary's bicycle

The use of long predicates is particularly common in building the knowledge base for *logic-based expert systems*, namely, computer systems which can automatically perform logical inferences. In building the knowledge base of such system, one needs to include in a predicate only those parts of the natural language expressions one considers not to be relevant for the automated application one is considering. For example in the seminal application of logic programming to the British Nationality Act of Sergot et al. (1986), which inspired much subsequent work in logic-based legal information systems, predicates were used like the following:

[1] acquires British citizenship on date [2] by sect. [3]

This was appropriate for that application, since the only elements to reason about were: (1) the identity of the person applying for citizenship, (2) the date in which citizenship was to be acquired and (3) the section to be applied. Thus, it was appropriate to include the word "British" within the predicate. On the contrary, it would be necessary to have a separate term for indicating British citizenship if one wanted to reason about the possibility of acquiring the citizenship of different States. We would then have the following predicate:

[1] acquires [2] citizenship on date [3] by sect. [4]

where the placeholder [2] can be substituted with different terms indicating the different nationalities ($British$, $French$, $Italian$ ...).

We need to distinguish two basic kinds of terms in propositional logic: *constants* and *variables*. Constants refer to specific individuals, while variables refer to any object within the domain of discourse. We distinguish terms (both constants and variables) by using *italics*. We denote variables with letters x, y, w, z, and if we need further variables we add subscripts. For instance,

x steals y

is a formula expressing that an undetermined individual, referred to as x, stole an undetermined object, referred to as y.

As the example shows, a formula like this does not express a proposition (an entity which can be truth or false), since we cannot establish whether the formula is true or false until we have established who the individuals involved are. For instance, the formula can be true if x is Tom and y is $Mary$, it is certainly false if x is $Giovanni\ Sartor$ and y is $Prof.\ Peczenik's\ bicycle$ (you can believe me, I never stole Prof. Peczenik's bicycle).

To transform a formula containing variables into a propositional formula we need to substitute individual names for the variables, as in the following example:

Tom steals $Mary's\ bicycle$

15.3.2. Quantifiers

There is a second way to obtain a propositional formula out of an expression containing variables. This consists in using two typical constructs of predicate logic, the universal quantifier FORANY and the existential quantifier FORSOME.

Let us consider first the universal quantifier . For example the very general proposition expressing that any object is a being can be expressed as follows:

FORANY (x) [x is a being]

Obviously, very little can be said in general of all possible objects. More interesting assertions can be obtained by using universal quantification over conditionals. In this case we are able of specifying that all objects which satisfy a certain condition have certain properties:

FORANY (x) (IF [x is human being]
THEN^m [x has human rights])

meaning that everyone who is a human being has human rights.[8]

The existential quantifier FORSOME is used to express the idea that there exists at least one individual that satisfies a certain predicate (or that some individuals satisfy the predicate, where also one counts as some). For example:

FORSOME (x) [x is a parent of Tom]

expresses the idea that there is at least one entity, which is a parent of Tom (Tom has at least one parent). The following proposition:

FORANY (y)
IF [y is a person]
THEN^m FORSOME (x) [x is y's mother]

shows how one can combine the two quantifiers. It is to be read as: ⌈For any entity, if that entity is a person then some other entity is the mother of that person⌉, or more simply, ⌈every person has a mother⌉.

15.3.3. Inference Rules for Predicate Logic

As we did for propositional logic, let us introduce reasoning schemata for predicate logic. We shall only present two schemata, which are most relevant for legal reasoning, and will be used in the following.[9] The first such schema concerns the elimination of the universal quantifier, which we may also call *specification*.

Reasoning schema: FORANY *elimination (specification)*
(1) FORANY (x) $A[x]$
——— IS A CONCLUSIVE REASON FOR
(2) $A[x/a]$

where $A[x]$ is a formula containing variable x, and $A[x/a]$ is the expression which is obtained by substituting every occurrences of term x with term a.[10] Here is an example;

[8] In the following formulas, we drop parentheses when using indentation, assuming that the quantifier's covers all expressions which are indented below the quantifier.

[9] These two schemata do not provide the full power of predicate logic. For an introduction to the whole of predicate logic, we need to refer the reader to any introductory book on logic, like the ones we mentioned in footnote 2 on page 405.

[10] To achieve the right result, we need to substitute only the free occurrences of variable x, namely, those occurrences which do not fall within the scope of other quantifiers. Moreover, we need to assume that the domain of quantification is not empty, namely, that that there is at least one object we can speak about.

(1) FORANY (x)
IF [x is a human being] THEN^m [x has human rights])

---

(2) IF [*Tony* is a human being] THEN^m [*Tony* has human rights]

As this example shows, this inference schema allows one to pass from universal propositions to individual propositions. If a universal proposition holds, then certainly all of its specifications hold as well.

The second schema concerns the introduction of the existential quantifier FORSOME:

Reasoning schema: FORSOME *introduction*
(1) $A[a]$
——— IS A CONCLUSIVE REASON FOR
(2) FORSOME (x) $A[a/x]$

Schema FORSOME introduction says that if a proposition holds for one specific individual, then we may infer than there exists some individual for which it holds.

(1) [*Tony* steals *John's bicycle*]

---

(2) FORSOME (x) [x steals *John's bicycle*]

15.3.4. Normative Syllogism

Predicate logic includes propositional logic, so that inferences of propositional and predicate logic can be joined together. In this way we obtain, in particular, the schema *syllogism*, which we need to consider with a particular attention, since it plays a fundamental role in legal reasoning.

Before analysing syllogism, let us introduce in general the idea of a *combined reasoning schema*. Let us assume the following:

- according to schema (1), A is a reason for B, and
- according to schema (2), $\lceil B$ and $C\rceil$ is a reasons for D.

Whenever these two conditions are satisfied, we can combine schemata (1) and (2) into a new reasoning schema (3), according to which A and C is a reason for D.

The rationale for such a step is obvious. As we can move from A to B, and we can move from [B and C] to D, we can also jump directly from [A and C] to D. The practical justification is also obvious: When one performs such

inferences frequently, it can be convenient to economise one's mental resources and perform them just in a single step.

In particular, as we have just seen, reasoning schemata *specification* and *modus ponens* operate as follows:

1. the first enables us to move from a universal conditional, to a specific conditional;
2. the second enables us to move from a conditional and its antecedent, to the conditional's consequent.

By merging the two inferences we obtain schema *syllogism*: Given a universal conditional and a specific instance of its antecedent, we achieve a corresponding instance of the conditional's consequent.

Let us consider more precisely how this happens. Remember that $A[x/a]$ is the result we obtain substituting within formula A every occurrence of x with a. Clearly, performing such substitution in both the antecedent and the consequent of a conditional is the same as performing it on the whole conditional:

$$A[x/a] \text{ THEN}^m \ B[x/a]$$

is the same as:

$$(A \text{ THEN}^m \ B)[x/a]$$

Thus, when we have beliefs:

1. FORANY x (IF A THEN^m B)
2. $A[x/a]$

we can do the following. First, according to a *specification* we make the following inference:

(1) FORANY x (IF A THEN^m B)

---

(2) IF $A[x/a]$ THEN^m $B[x/a]$

Then, according to *modus ponens* we proceed with the following:

(1) IF $A[x/a]$ THEN^m $B[x/a]$;
(2) $A[x/a]$

---

(3) $B[x/a]$

By combining the two inferences we get the following combined reasoning schema:

First inference (*specification*)

(1) FORANY (x)
IF $[x$ is a human being] THEN^m $[x$ has human rights]

---

(2) IF [*Tony* is a human being] THEN^m [*Tony* has human rights]

Second inference (*detachment*)

(1) IF [*Tony* is a human being] THEN^m [*Tony* has human rights];
(2) *Tony* is a human being

---

(3) *Tony* has human rights

Combined inference (*conclusive syllogism*)

(1) FORANY (x)
IF $[x$ is a human being] THEN^m $[x$ has human rights];
(2) *Tony* is a human being

---

(3) *Tony* has human rights

Table 15.7: *Separate inferences and their combination in a syllogism*

Reasoning schema: *Conclusive syllogism*
(1) FORANY x IF A THEN^m B;
(2) $A[x/a]$
——— IS A CONCLUSIVE REASON FOR
(3) $B[x/a]$)

According to schema *conclusive syllogism*—which we informally introduced in Chapter 2—rather than performing the first two inferences in Table 15.7 (*specification* and *detachment*), we can just perform the third inference in the same Table (*conclusive syllogism*), an inference which combines the first two. As this example shows, according to *conclusive syllogism*, from (1) a specific condition A (referring to individual j) and (2) a general conditional (having variable x at places where the individual name "j" is), one can infer (3) the specific conclusion B, also referring to the individual j.

Note that when syllogisms are represented in predicate logic, they take a

form which looks different from the most common way of expressing them in natural language, where we tend to use instead the typical syllogistic patterns of Aristotelian logic (we adopted the Aristotelian form in Section 2.1.2 on page 49). However, the translation from Aristotelian to modern logic is immediate. Given an Aristotelian syllogism:

Reasoning schema: *Aristotelian syllogism*

(1) all P's are Q's;
(2) a is P
——— IS A REASON FOR
(3) a is Q

we simply transform the major premise in a universal conditional, where the universal terms (combined with the copulative verb) are predicates applied to the quantified variable. In this way we obtain a species of our syllogistic schema:

Reasoning schema: *Aristotelian syllogism in modern form*

(1) FORANY (x) IF $[x$ is $P]$ THEN^m $[x$ is $Q]$;
(2) $[a$ is $P]$
——— IS A REASON FOR
(3) $[a$ is $Q]$

This idea of a syllogism can be generalised so that rather than substituting only one variable we substitute a sequence of variables, specifying a universal propositions with multiple variables in one step. Here is an example:[11]

(1) FORANY (x, y)
IF $[x$ causes an unjust damage to $y]$
THEN^m $[x$ is due to compensate $y]$;
Tony causes an unjust damage to *John*

———

(2) *Tony* is due to compensate *John*

Conclusive syllogism is the kind of reasoning that is usually assumed to correspond to the so-called judicial syllogism.[12] Here is another example of such syllogisms, adapted from Klug (1966, 55).

[11] We write FORANY $(x_1, \ldots, x_n)$ as an abbreviation for FORANY (x_1),..., FORANY (x_n).

[12] In the following we shall argue that this is not exactly the case—since judicial syllogism rather corresponds to what we shall call defeasible syllogism—but we can temporarily assume that conclusive syllogism can do the job.

(1) FORANY (x)
IF [x is a receiver of stolen goods]
THEN^m [x is to be punished with detention up to a maximum of 10 years];
(2) *Tony* is a receiver of stolen goods

---

(3) *Tony* is to be punished with detention up to a maximum of 10 years

One further way of merging inferences is obtained by joining schema AND *introduction* and schema *conclusive syllogism*, the first schema being applied as many times as needed. This allows to derive in one step the consequent of a general conditional having a conjunctive antecedent (when all elements of the antecedent are satisfied):

Reasoning schema: *Conjunctive syllogism*
(1) FORANY x IF A_1 AND ... AND A_n THEN^m B;
(2) $A_1[x/a]$;
...;
(n) $A_n[x/a]$
——— IS A CONCLUSIVE REASON FOR
(n+1) $B[x/a]$

Here is an example of conjunctive syllogism.

(1) FORANY (x)
IF [x is born in Italy] AND [x's parents are Italian]
THEN^m [x is Italian];
(2) *Mario* is born in Italy;
(3) *Mario*'s parents are Italian

---

(4) *Mario* is Italian

This single inference corresponds to the following sequence of applications of our elementary reasoning schemata, as you can see in Table 15.8 on the next page. Another useful combination of inference schemata is given by schema *disjunctive syllogism*, which is obtained by combining schemata OR *elimination* and *syllogism*.

1. FORANY (x)
   IF $[x$ is born in Italy$]$ AND $[x$'s parents are Italian$]$
   THEN^m $[x$ is Italian$]$ ⟨initial belief⟩
2. *John* is born in Italy ⟨initial belief⟩
3. *John*'s parents are Italian ⟨initial belief⟩
4. [*John* is born in Italy] AND [*John*'s parents are Italian]
   ⟨from (1) and (2), by AND introduction⟩
5. IF [*John* is born in Italy] AND [*John*'s parents are Italian]
   THEN^m [*John* is Italian] ⟨from (1), by specification⟩
6. *John* is Italian ⟨from (4) ad (5), by detachment⟩

Table 15.8: *Conjunctive syllogism: analytical description*

Reasoning schema: *Disjuntive syllogism*

(1) FORANY (x) IF A_1 OR ... OR A_n THEN^m B;
(2) $A_i[x/a]$
——— IS A CONCLUSIVE REASON FOR
(3) $B[x/a]$

where i is one of $1 \ldots n$. This allows to infer the consequent of a rule having a disjunctive antecedent by establishing just one of the disjuncts. Here is an example taken from Roman law:

every obligation is dissolved by the payment of the thing due, or of something else given in its place with the consent of the debtor. (*Institutes of Justinian*, III, 29) [13]

which provides the major premise for the disjunctive syllogism in Table 15.9 on the facing page.

15.4. Time in Predicate Logic

Classical logic does not provide specific facilities for expressing time. In fact, modern logic was born as a tool for mathematical reasoning, where we do not usually need to worry about time and change (remember that for Plato mathematical objects inhabit the eternal and unchanging world of ideas).

[13] The Latin original: "Tollitur autem omnis obligatio solutione eius quod debetur, vel si quis, consentiente creditore, aliud pro alio solverit." The English version of this citation from the *Institutes of Justinian* is taken from the translation by Sandars (1941), which we shall adopt in all our citations from the *Institutes*.

(1) FORANY (x, y, z)
IF [the due thing, x, was delivered to creditor y] OR
[some other thing, z, was delivered to creditor y in place of the due thing x, with y's consent]
THEN^m [the obligation to give x to y is dissolved];
(2) some other thing, *5 cows*, was delivered to creditor *Marcus*, in place of the due thing, *10 sheep*, with *Marcus*'s consent

---

(3) the obligation to give *10 sheep* to *Marcus* is dissolved

Table 15.9: *Disjunctive syllogism*

On the contrary, natural language and common sense reasoning embed various, very deep and articulate, ways for dealing with time and change, which have not yet been captured even in most advanced studies in logic and language (see Gabbay and Günthner 1989). Consider, for instance, how natural language enables us to express temporal relationships by using verbal forms, temporal adverbs, and prepositions.

The huge superiority of natural reasoning and natural language over any formal attempt at dealing with time should not come as a surprise. Humans are adapted to their environment and have the (inborn and cultural) skills that are needed in their environment, which is undoubtedly a temporal and spatial environment.

As no logic of perception can hope to fully capture the ways in which we process perceptual inputs, so no logic of time can hope to fully capture our ways of processing temporal information. This does not mean that logic is useless in dealing with time. On the contrary, as in other domains, it can provide useful ways of integrating and controlling the use of our natural abilities, and the products of our cultural evolution.

To emphasise the need to represent temporal references, in some of our previous examples we have used the simple form of the verb (for instance, steals) also in cases when natural language would have had the past or the continuous form. In fact, classical logic provides no way for connecting the verbal form "stole," used to refer a specific instance of stealing which happened in the past, to the verbal form "steals," used in the general rule stating that if one steals something then one is to be punished. Similarly, classical logic offers no way of capturing the distinction between continuous and simple verb forms.

However, as we shall see in the following sections, predicate logic is not completely helpless in dealing with time. Its structures, and in particular, the

universal quantifier, offer us a way of expressing temporal references, though we shall argue that predicate logic does not model adequately temporal reasoning.

15.4.1. Propositions and Fluents

As we observed above, from the perspective of classical logic, a proposition is something that holds true or false. Unfortunately, formulas like the ones we have been using above to represent events and states of affairs (Tom steals $Mary's$ $bicycle$, $John$ is an Italian citizen) cannot properly express propositions, since they do not include any temporal and spatial specifications.

A formula with no space and time reference is indeterminate: We need to know to what occasion the speaker is referring to, in order to establish whether this proposition is true or false.

Assume all of the following:

a. Tom stole Mary's bicycle at 10 o' clock, on 10.10.2003,
b. this was the first time he did it, and
c. he never did it again.

According to propositions from (*a*) to (*c*), it is true that ⌈Tom steals $Mary's$ $bicycle$ at 10 o' clock, on 10.10.2003⌉, but it is false that he did steal her bicycle at any other time.

Let us consider a larger example, to clarify the power and the limits of classical logic in temporal reasoning. Assume that there is a rule saying that:

1. FORANY (x, y)
   IF [x is y's boss] AND
   [x mobs y]
   THEN [x is due to compensate y's moral damage]

To apply this rule to the relationship between Mary and Tom, first we need to establish whether she is his boss.

Assume all of the following:

a. Mary was Tom's boss since 1995,
b. Tom moved into another unit on 1997,
c. Tom was again assigned to Mary's unity on 1999.

The formula

2. $Mary$ is Tom's boss

expresses a relationship between Mary and Tom, but it does not specify the time in which this relationship holds.

This shortcoming would not be significant, if being one's boss was a necessary and eternal relationship (like for number 2 being smaller than number 3).

However, this is not the case: Mary has been Tom's boss at certain times, while not being his boss at other times. In particular, it is true that Mary was Tom's boss in 1996, while it is false that she was his boss in 1998.

Therefore, it is impossible to state whether the timeless formula (2) above is true or false, unless one specifies, explicitly or implicitly, to what time this formula refers.

Against this conclusion, it may be objected that timeless formulas always refer to the present time, so that determining temporal reference involves no real problem (when I say "it is hot," I am really saying "now it is hot"). However, this is not always the case, and most importantly, this is not the case with regard to formulas embedded into general conditionals. For instance, in expression "x is y's boss" contained in the rule (1) above, variable x clearly does not only refer to people that are now the boss of the mobbed person y (in the moment when one is applying the rule). If this was the case, Mary could avoid punishment on the basis of the fact that she is no longer Tom's boss.

15.4.2. From Fluents to Propositions

Following John McCarthy (1987), one of the founders of Artificial Intelligence, we say that expressions such as

$Mary$ is Tom's boss

do not express propositions, but *fluents*. A *fluent* is a noema that cannot be said to be true or false *tout court*, but only when it is associated with a time reference. This association transforms the fluent into a proposition. For instance, according to what we said in the previous section, proposition:

$Mary$ is Tom's boss, in 1996

is true, while proposition:

$Mary$ is $Tom's\ boss$, in 1998

is false.

Besides fluents that are *temporally contingent*—in the sense that they may hold at certain times and not at other times—there are also *spatially-contingent* fluents: At the same time, they hold in certain places and not in other places. When a fluent is both temporally and spatially contingent, to transform it into a proposition we need to add both a temporal and a spatial specification.

Consider for example the proposition ⌈the radioactivity level is above the admissible limit⌉. We cannot say whether this proposition is true or false, until we add both a time (on 1.1.2002) and a place (in Chernobil).

To keep things simple, in the following we omit to consider the specification of place, and focus on the representation of time: We assume that the fluents we

are concerned with only are temporally contingent, so that indicating a time is sufficient to transform them into propositions.

The most immediate way of expressing time is to extend every predicate, incorporating in it a temporal reference. For instance, rather that having a predicate:

[1] is [2]'s boss

which leads to propositions like:

Mary is *Tom*'s boss

we have predicates like:

[1] is [2]'s boss, at time [3]

which leads to propositions like the following:

Mary is *Tom*'s boss, at time 1996

Similarly , we would have a predicate ⌈[1] steals [2], at time [3]⌉, which can be instantiated into propositions like ⌈*Tom* steals *Mary's bicycle*, at time 10 o' clock on 1.6.2003 ⌉ (for this idea see Quine 1960; 1974).[14]

This approach, however, requires that we modify each predicate, adding an additional term to it. We prefer to adopt a different solution, which allows us to keep every predicate in its original form, and moreover to distinguish events from states of affairs, a solution which we borrow from the event calculus of Kowalski and Sergot (1986), though we do not provide here an account of the underlying logic-programming framework (for a legal application of the event calculus, see Hernandez Marín and Sartor 1999).

To express that a certain property or relation holds at a certain time, we use the expression:

[1] *holds at time* [2]

where [1] is a property and [2] is a temporal reference.[15] For example, to say Mary is Tom's boss, on date 10.5.1996, we write:

[*Mary* is *Tom*'s boss] *holds at time* 10.5.1996

Similarly, to express that a certain event happens at a certain time we use the expression:

[14] For simplicity's sake we keep our notions informal, without specifying the granularity of our representation of time (what are the time instants we are referring to, by way of temporal variables), and how we deal with durations (e.g., one year) rather that with time instants.

[15] We use the locution *holds at time* to introduce any time reference: a time instant (1:56 pm, on 04.05.2003), an hour (1 pm, on 04.05.2003), a day (04.05.2003), a year (2003).

$\boxed{1}$ *happens at time* $\boxed{2}$

where $\boxed{1}$ is an event and $\boxed{2}$ is a time reference. For example, to express that Mary mobbed Tom at time 10.5.1996 we write:

[$Mary$ mobbed Tom] *happens at time* 10.5.1996

15.4.3. *Representing Temporally-General Rules*

The representational technique we introduced in the previous section enables us to express temporally-general rules—intended as rules referring to events or situations happening at any time—by using the universal quantifier. For instance, the mobbing rule could be expressed as:

FORANY (x, y, t)
  IF [x is y's boss] *holds at time* t AND
    [x mobs y] *happens at time* t
  THEN^m [x is due to compensate y's moral damages] *holds at time* t
(for any persons x and y, and any time t, if x is y's boss at time t . . .)

We can then apply inference schema *conclusive syllogism* to infer temporally specific propositions, as in the following inference.

(1) FORANY (x, y, t)
  IF [x is y's boss] *holds at time* t AND
    [x mobs y] *happens at time* t
  THEN^m [x is due to compensate y's moral damages]
    holds at time t;
(2) [$Mary$ is Tom's boss] *holds at time* 10.5.1996;
(3) [$Mary$ mobs Tom] *happens at time* 10.5.1996

---

(4) [$Mary$ is due to compensate Tom] *holds at time* 10.5.1996

We can reason in the same way with regard to the theft of John's bicycle:

(1) FORANY (x, y, t)
    IF [x steals y] *happens at time* t
    THEN [x is liable to punishment] *holds at time* t;
(2) [$Tony$ steals $John'sbicycle$] *happens at time* 1.6.2003

[$Tony$ is liable to punishment] *holds at time* 1.6.2003

The representation of time we have just provided is simple and powerful, but has a serious limitation: It leads one to infer that a conclusion only holds at the indicated time (the time when the causing event happened), but not at a later time.

For instance, we may establish, on the basis of the rule above, that Mary is due to compensate Tom on 10.5.1996, but we are unable to say that she is still due to compensate him on the following day.

Similarly we can infer that Tom is liable at time 1.6.2003, but we are unable to conclude that he still is liable subsequently.

Thus, it seems that a wrongdoer must always be acquitted since a judge would never be able to establish that the wrongdoer is still liable at the time of the judgement (acquittal seems required also when one is tried on the spot, since also in this case the judgement will come after the wrongful act is committed). Common-sense reasoning, on the contrary includes the idea of *persistence*, both in the natural word and in the legal world: When a property starts to hold it continues so, unless something relevant happens. For instance, if one started being liable when one performed an unlawful act, then, unless liability was terminated by a subsequent event, one would still be liable for that act at the time when one is tried. This kind of reasoning, unfortunately, is not available in the static framework of classical logic. We shall introduce it in Section 21.4 on page 566, when analysing normative conditionals, in the framework of defeasible reasoning.

15.5. Conclusions on Predicate Logic in the Law

Predicate logic provides the foundations of logics, and provides the basic ideas for any further development of logical analysis. Also in the legal domain, predicate logic has been frequently used for representing legal contents, often with interesting results.[16] However, the use of predicate logic in the law raises some difficult problems.

Firstly, as we have just seen above, conditional rules cannot be viewed as material conditionals: If we assimilated normative conditional to material conditionals, the normative words would be populated with rules establishing the wildest consequents for any false antecedents.

Secondly, the inference rules of propositional logic (which, as we know, are included in predicate logic) allow for the principle that any arbitrary proposition follows from a contradiction (*ex falso sequitur quodlibet*).

Thirdly, classical predicate logic does not allow for defeasible reasoning. It only provides us with conclusive results. On the contrary, as we shall see, in the

[16] For significant examples of the formalisation of legal contents in predicate logic—sometimes integrated with the basic deontic modalities—see, among others: Klug 1966; Ferrajoli 1970; Yoshino 1978; Tammelo 1978; MacCormick 1978; Alexy 1980; Rödig 1980; Koch and Rüßman 1982; Golding 2001.

law one needs to take into account the possibility of defeat: Legal inference may be defeated by stronger reasons requiring a different solution, or making a rule inapplicable.

Fourthly, classical predicate-logic does not take into account the specific constituents of practical knowledge: actions, duties, rights and permissions.

Fifthly, classical predicate-logic does not provide satisfactory ways for dealing with time, and in particular for subsuming concrete events into temporally-general rules, and for obtaining persistent legal consequences.

To synthesise the limitations of classical predicate-logic when applied in the legal domain, we may say that classical predicate-logic is a tool which enables us to derive truth-preserving implications out of a consistent body of epistemic knowledge, which is assumed to describe a definite state of the world. When one wants to move beyond truth-preserving reasoning—to consider the possibility of contradictions, to allow for hypothetical reasoning, to use normative concepts—one needs to consider further logical tools. This is what we are going to do in the next chapters.

However, this does not mean that we must renounce the power of classical first-order predicate logic, which still provides the foundation of all logical thinking, but rather that we should attempt at integrating classical logic with tools that are appropriate to the different areas of reasoning we are considering.[17]

[17] We shall not examine here the attempts to substitute classical logic with alternatives to it. Though some of such attempts are very interesting, considering them would require bringing in a very complex logical machinery, without solving the problems we have just indicated. Among such alternatives, we may mention the following: (*a*) *intuitionistic logic*, whose application in the legal domain was proposed by Philipps (1964) and was investigated, with applications to computing, by McCarty (1989); (*b*) *relevance logic*, which is used for representing legal concepts in Allen and Saxon (1991); (*c*) *multi-valued logic*, which provide the semantics for the theory of deontic modalities proposed in Kalinowski 1953. For a technical presentation of all main alternatives to classical predicate logic, see Gabbay and Günthner 1986. For a philosophical introduction to classical logic and its alternatives, see Haack 1978.

Chapter 16

ACTIONS

Now that we possess the basic toolkit for logical analysis, namely, first-order classical logic, we can move forward, and approach the logical notions that are specific to practical reasoning. The notion of an *action* will provide our starting point, since legal reasoning (as practical reasoning in general) is concerned with governing action.

16.1. The Characterisation of Actions

Usually, two components are identified in an action: the *behaviour* of the agent, and *consequences* of that behaviour.[1] Correspondingly, there are two ways in which we can characterise actions:[2]

- A *behavioural* characterisation, which consists in describing the type of behaviour that an agent j is holding, abstracting from the consequences of such behaviour.
- A *productive* characterisation, which consists in describing the results which j's behaviour produces, abstracting from the behaviour which produced those results.

For example, ⌈Tony is smoking⌉ is a behavioural characterisation, while ⌈Tony causes damage to his health⌉ is a productive characterisation.

This distinction is a familiar one in the theory of action. For instance, von Wright (1983b, 107) views this distinction as concerning the relation between two aspects of action, *process* and *achievement*, which may be present in every action, to different extents. In order to provide for both the behavioural and the productive characterisation, we distinguish two types of actions:

- *Behavioural actions*, which are described by indicating the type of behaviour in which they consist. They are realised iff the concerned agent realises an instance of the indicated type of behaviour;

[1] We use the term *action* in a very general sense, and shall not explore the more specific ways in which this terms is used by some authors, who relate to the Aristotelian distinction (see *Nicomachean Ehics*, 1140b) between *poiesis* (productive activity, aiming at an external outcome, like the production of an object or the bringing about of a state of affairs) and *praxis* (the action which is done for its own sake, which is itself an end). See for instance Arendt 1958, where the scope of action is limited to to the political sphere, with the exclusion of labour and work.

[2] Both ways are covered by what Pattaro (Volume 1 of this Treatise, sec. 6.2) calls a "type of action."

- *Productive actions*, which are described by indicating the type of result they produce. They are realised iff the concerned agent produces an instance of that type of result.

The same series of events, where one behaves in a certain way and one's behaviour causes certain consequences, realises both types of actions. Consider, for example, the case of Mary, who studies for an exam, and gets an A mark. The sequence:

$$\langle \text{Mary studying; Mary getting an } A \text{ mark} \rangle$$

realises both the behavioural action of studying and the result action of getting the A mark. Observe that Mary would have equally performed the action of studying even if she had obtained a different result (failing the exam), and that Mary would have equally performed the action of getting the A mark, even if she had obtained that result without studying (for example, by copying her assignment, or bribing her teacher).

We prefer to preserve in our formalisation this fundamental distinction, since it is frequently used in approaching various domains of the law. For instance, in criminal law we usually distinguish between crimes consisting in behaving in a certain way (for example, the unauthorised access to another's residence, or computer system) and crimes including the causation of an event (for example, homicide). Similarly, in tort law, we may need to distinguish the behaviour of an agent from the effects of that behaviour, a distinction that is particularly relevant when causality is at issue. For instance, we may distinguish a doctor's action of prescribing a certain drug to a patient, from the damaging effect of this action, namely, the patient's death which followed the wrong prescription.

16.2. Logical Analysis of Action

We shall use some elementary logical tools to analyse the structure of action. Firstly, we introduce two operators for representing univocally behavioural and productive actions. Secondly, we characterise their logical behaviour.

16.2.1. Two Action-Operators

For behavioural actions, we use the *Does* operator, followed by the indication of agent (subscript), and by the description of the action (between square brackets).

Thus, the canonical way of saying that Tom is now smoking

$$Does_{Tom}[\text{smoke}]$$

to be read as "*Tom* does smoke" or "*Tom* is smoking" (our representation does not distinguish between simple and continuous verbal forms).

For result actions, we use with the operator $Brings$, to be read as "brings it about that" or "sees to it that." This operator is followed by the indication of the agent (subscript) and by the description of the state of affairs resulting from the action (between square brackets).[3] Thus, the canonical way for expressing that Alex (who owns a powerful, but stinky, car) pollutes the air is the following one:

$Brings_{Alex}$[the air is polluted]
($Alex$ brings it about that the air is polluted)

We cannot here consider more deeply the notions of a productive action, and in particular state precisely what we mean by an agent producing a certain result.

There are even some paradoxes linked to this notion. Consider, for example, the famous example concerning a person who died of thirst in the desert, after that (*a*) one killer put poison in the victim's bottle to poison him, and (*b*) another killer independently made a hole in the bottle to let the victim die of thirst. In such a case, we may wonder who brought it about that the victim died: the first killer, who was prevented from poisoning the victim, or the second, who saved the victim from being poisoned, and so postponed the victim's death.

In analysing the idea of a productive action, we could view causality as our only primitive notion, and define the notion of a productive action accordingly. Thus, when we say that an agent j brings about a state of affairs, we would just mean that j causes this state of affairs to hold. This would lead us to conclude that in general an agent j performs the action $Brings_j A$ exactly when j's behaviour (bodily movement) causes A. This raises a number of philosophical issues. First of all, we may wonder whether any type of causation by an agent's bodily movement (for example, a movement done while sleeping, or in the course of an epileptic attack) can properly be said to realise an action.[4] Secondarily, one may want to discuss the relation between causation and the more general idea of *generation* (Goldman 1970) or *determination* (see Section 20.2 on page 523).

Following the indication of Peczenik (Volume 4 of this Treatise, sec. 3.2.4), that "legal theory should fight shy of controversial philosophical problems as much as possible," we shall not address these deep philosophical issues. We shall limit ourselves to saying that we adopt a very broad view of a productive action, which tends to include any form of causation by an agent, and a very broad notion of causation, which approximates the idea of generation or determination.

[3] We do not distinguish between the two agentive expressions "bringing about that" and "seeing to it that," since we do not address the connection between action and intention (which is suggested by the latter one).

[4] For a reference to the philosophical discussion on the relationship between agency and causation see Herrestad 1995. For logical models of action that focus on the productive aspect, see in particular: Belnap and Perloff 1989; Pörn 1977, 6ff.; Pörn 1989, 554ff.

Our choice does not exclude that for specific particular purposes, one may need more specific notions of production and causality. For instance, in certain contexts, we may require a connection between the agent's intentionality and the state of affair resulting from the agent's behaviour (excluding unintended effects, or at least the effect of involuntary behaviour), or we may require that the agent's behaviour is generally or normally susceptible of determining that result (excluding effects resulting from exceptional concurring factors).

16.2.2. The Logic of Action

Logicians have provided various characterisations of the logic of action, and many further attempts have been accomplished by computer scientists.[5]

The logic of action is indeed a very complex and unsettled area of philosophical logic, where conflicting proposals, based upon conflicting intuitions, clash against each other. Fortunately, we do not need to provide here a full logical characterisation of our action predicates. We shall just specify three inference schemata.

The first couple of schemata state that, for both behavioural and productive actions, doing separate actions entails doing their combination.

For behavioural actions, we have the following reasoning schema:

Reasoning schema: *JBA-junction of behavioural action*

(1) $Does_j A$ AND $Does_j B$

——— IS A CONCLUSIVE REASON FOR

(2) $Does_j(A \text{ AND } B)$

For instance, if Joan does the action of twisting and does the action of shouting, she performs the conjunctive action of twisting and shouting.

(1) $Does_{Joan}$[twist] AND $Does_{Joan}$[shout]

---

(2) $Does_{Joan}$([twist] AND [shout])

Similarly, for productive actions:

[5] The approach here developed is based, in particular, on the formalisation of productive action that was originally provided by Kanger (1971; 1972) and was further developed, and combined with other normative and social concepts, by Pörn (1977). Among the logical analyses of action, see also: von Wright 1963, 1983b; Belnap and Perloff 1989. The logic of action has also been studied in computer science, where in particular dynamic logic—the logic used for analysing the behaviour of computer programs—has been used (for an application of dynamic logic to normative reasoning, see Meyer 1988).

Reasoning schema: *JPA-junction of productive action*

(1) $Brings_j A$ AND $Brings_j B$

——— IS A CONCLUSIVE REASON FOR

(2) $Brings_j$ $(A$ AND $B)$

For instance, assume that, when colliding against John's car with her scooter, Mary makes so that John's car is dented and that her scooter is broken, we may say that she performs the conjunctive action of making it so that both John's car is dented and her scooter is broken.

(1) $Brings_{Mary}$[John's car is dented] AND
$Brings_{Mary}$[Mary's scooter is broken]

---

(2) $Brings_{Mary}$([John's car is dented] AND
[Mary's scooter is broken])

Note that our idea of a conjunctive action requires no connection between the involved behaviours or states of affairs. Thus we may say that Napoleon did the conjunctive behavioural action of invading Spain and escaping from the island of Elba, and that he did the conjunctive productive action bringing it about that Russia was invaded and that he himself was proclaimed Emperor.

This unrestricted way of joining actions can be counterintuitive in some cases, since often we tend to assume that some connections (causal, temporal, functional, and so forth) exist between conjunctive actions. However, this seems to be what Grice (1989, 22) calls an *implicature*, to wit, an assumption which usually accompanies a speech act (or a belief) rather than a feature of the logic of action. Thus, we shall assume that the schemata above can always be legitimately used.

One may wonder whether the opposite entailment also holds, that is, whether doing a conjunctive action involves doing the corresponding elementary actions:

1. Given that j did action $\lceil A$ AND $B\rceil$, can we infer that j did action A and that j did action B? In formulas, is it the case that proposition $Does_j(A$ AND $B)$ entails each of $Does_j A$ and $Does_j B$?
2. Given that j brought about state of affair $\lceil A$ AND $B\rceil$, can we infer that j brought about A and that j brought about B? In formulas, is it the case that proposition $Brings_j(A$ AND $B)$ entails each of $Brings_j A$ and $Brings_j B$?

It seems to us that we need to answer these questions negatively with regard to both productive and behavioural actions.

Let us first consider conjunctive productive actions. It is easy to observe that producing a conjunctive result does not entail producing each element of

the conjunction: One achieves a conjunctive result also when one directly produces only one element the a conjunctive state of affairs, while the other element obtains independently. For instance, the fact that John, the Good Samaritan, brings it about that Mary, while she is injured (since she has been hit by a runaway car), receives appropriate medication may be represented in logic as follows:

> $Brings_{John}$([Mary is injured] AND [Mary receives medication])
> (John (by giving medication to Mary who is injured) realises the state of affairs that ⌈Mary is injured and she receives medication⌉)

This fact, certainly does not entail that he made her injured:

> $Brings_{John}$([Mary is injured])
> (John brings it about that Mary is injured)

Similarly, the fact that one performs a conjunctive behavioural action having a conjunctive description does not entail that one performs each element of the conjunction: Some elements of the conjunctive description may indicate the context where the behaviour of the agent takes place (rather than the components of that behaviour). For instance, my walking while it is raining does not entail that I perform the action of raining.

The problems we have just mentioned could be addressed by conveniently restricting the legitimate content of our action operators, but we prefer to refrain from adopting a general inference schema for splitting conjunctive actions. This possibility will only be allowed for specific types of conjunctive actions, when all conjuncts may be viewed as behaviours of the agent, or as direct results of the agent's activity, as for the actions described in Section 23.4.4 on page 610.

The third reasoning schema we accept for actions says that performing a productive action conclusively entails the existence of the corresponding result. We may express this idea by saying that a productive action is *necessarily successful*: It does not count as being performed unless its result is realised. If the result is not realised, the productive action has failed to take place. At most we may say that it has been attempted.

> **Reasoning schema**: *SPA-Success of productive actions*
> (1) $Brings_j A$
> ——— IS A CONCLUSIVE REASON FOR
> (2) A

For instance, if Mary performs the action of bringing it about that John's car is dented, when she has performed that action, it must be true that John's car is dented.

(1) $Brings_{Mary}$[John's car is dented]

---

(2) [John's car is dented]

As we have just seen, we may build complex actions by combining more atomic actions through logical connectives. Let us call *atomic action-descriptions*, those *action-descriptions* that do not contain any logical connective. For example:

$Does_j$[drives j's car]
(j drives his car)

is an atomic action-description, as also:

$Brings_j$[the air is polluted]
(j brings it about that the air is polluted)

On the contrary:

$Brings_j$([the air is polluted] AND [k has a cough attack])
(j brings it about that the air is polluted and that k has a cough attack)

is not an atomic action description.

16.2.3. Actions-Descriptions as Propositions and as Terms

Actions and their descriptions play a dual role.

On the one hand, an action may be viewed as the happening of an event, namely, the performance of the action (which may be seen as a temporary dynamic state of affairs). This happening may be described through a proposition, an *action-proposition*, which may be expressed through an *action-sentence*.[6] When we view actions as happenings, we tend to represent them through finite verbal forms. For instance, the sentence "Mary is sleeping during John's talk" expresses the proposition that describes the fact that Mary is sleeping (during John's talk).

On the other hand, an action may be viewed as an object we speak about, and to which we refer through an appropriate name, an *action-designator*. When we adopt this view, we tend to represent actions through verbs in the infinite form. For instance, in the sentence "Mary's sleeping during John's talk was very unfortunate," the locution "Mary's sleeping during John's talk" is the name (the definite description) of the action it designates: It is the action-designator of the action consisting in Mary's sleep (during John's talk).

In our analysis, we express both action-sentences and action-designators trough the following forms:

[6] The distinction between using a certain expression for describing certain states of affairs and for naming them is extensively discussed in Hage 1997.

- $Does_j A$, for behavioural actions, and
- $Brings_j A$, for productive actions.

However, when we need to specify that we are using an action name, we shall occasionally use the following action-designators:

- $ToDo_j A$, for referring to behavioural actions, and
- $ToBring_j A$, for referring to productive actions.[7]

For instance, to express our view about Mary's behaviour during John's talk, we may use the following formulation:

$ToDo_{Mary}$[sleep during John's talk] was unfortunate
(the action of Mary to sleep during John's talk was unfortunate)

The relationship between the two views on action is captured by the following equivalence:

$Does_j A = (ToDo_j A)$ *happens*
($\lceil j$ does action $A\rceil$ is equivalent to $\lceil j$'s action to do A happens$\rceil$)

For instance, Mary sleeps exactly if her sleeping happens.

$Does_{Mary}$[sleep] $=$ ($ToDo_{Mary}$[sleep]) *happens*
($\lceil Mary$ does sleep$\rceil$ is equivalent to $\lceil$the action of Mary to sleep happens$\rceil$)

In the following we shall use the predicate:

$\boxed{1}$ *happens*

which indicates the taking place of a named event, also to express the performance of an action. For instance, to say that the performance of a certain action takes place at a certain time t we can write:

$(ToDo_j A)$ *happens at time* t

However, in most circumstances no confusion arises, so that we can safely use the form $Does_j A$ also as an action-designator, and express the happening of an action as:

$(Does_j A)$ *happens at time* t

For instance, to say that Mary slept during John's speech, at 3 pm on 10.03.2003, we can write:

($Does_{Mary}$ [sleep during John's speech])
happens at time 3 pm, 10.03.2003

[7] We shall also use the expression $ToDo$ ($ToBring$) to express the action to do (to produce) A without explicitly indicating its agent. This will be useful when we want to approximate the use of infinitive action clauses in natural language.

16.2.4. Connections Between Behavioural and Productive Actions

Though we have based our presentation on the distinction between behavioural and productive action, we need to observe that it is impossible to draw a sharp distinction between these two types of action: The difference does not concern so much the actions in themselves, as the aspects of them on which our analysis is focused.

For example, the action consisting in Ms. White making a dent on Mr. Black's car can be viewed both as the behavioural action:

$Does_{White}$[make a dent in Black's car]
(White makes dent in Black's car)

and as the productive action:

$Brings_{White}$[a dent exists in Black's car]
(White brings it about that a dent exists in Black's car)

It would indeed be possible to adopt just one of the two representations as our basic formalism for actions. On the one hand we could view productive actions as a particular kind of behavioural actions, according to the following definition:

$Brings_j A \equiv Does_j$ [bring about that A]
($\lceil j$ brings it about that $A\rceil$ is equivalent by definition to $\lceil j$ does the action (holds the behaviour) of bringing about that $A\rceil$)

On the other hand, we could view behavioural action as a particular kind of productive actions, where the author of the action produces his or her own activity:

$Does_j A \equiv Brings_j$[j does A]
($\lceil j$ does $A\rceil$ is equivalent by definition to $\lceil j$ brings it about that j does $A\rceil$)

We shall not discuss here these reductions, and what axioms may justify them. We prefer do adopt the two distinct operators for actions, without assuming that one is reducible to the other. In the following, however, we shall avoid duplicating all or our logical definitions of normative notions (having one definition for behavioural action and one for productive actions): When using the operator for behavioural actions we shall implicitly refer to also to productive actions.

16.3. Omission

We need to consider one of the most difficult notions, both in social theory and in law, namely, the notion of an *omission*, by which we mean the non-performance of an action.

16.3.1. The Notion of an Omission

Let us start with a truism: Omitting an action simply means not doing it, and this holds for both behavioural and productive actions. From this perspective, saying that agent j has omitted an action simply means affirming that j has not accomplished that action. In particular, if φ is an action description, we write:

$$\text{NON } \varphi$$

for affirming that action φ has not taken place.

We need to carefully distinguish an *omissive action*, like:

$$\text{NON } (Brings_j[k \text{ is injured}])$$

(j does not bring it about that k is injured)

from the a *negative action*, like:

$$Brings_j(\text{NON } [k \text{ is injured}])$$

(j brings it about that k is injured)

The difference between omission and negative action can be stated as follows:

- for the omissive action NON ($Brings_j[k$ is injured]) to take place it is sufficient that j did not cause k's injury;
- for the negative action $Brings_j$(NON [k is injured]) to take place it is rather required that j prevents that k is injured (which presupposes that without j's intervention k would have been injured).

We consider this distinction to be sufficiently intuitive, though its analysis would require various philosophical considerations and distinctions.[8] Let us just remark that it is difficult to distinguish negative actions from omissions with regard to purely behavioural actions: This would require distinguishing cases when the agent behaves in such a way as to avoid performing a certain action, and cases where he simply does not perform that action. This distinction is clearer for productive actions, when we need to consider the following cases:

1. event A *does take place*, *consequently* of j's behaviour (without j's behaviour A would not have happened),
2. event A *does take place*, *independently* of j' behaviour (without j's behaviour A still would have happened),
3. event A *does not take place*, *consequently* of j's behaviour (without j's behaviour A would have happened)

[8] Like, for example, the distinction between actions which produce a new state of affairs and actions that impede an existing state of affairs from ceasing. See, for instance, von Wright 1983b, and, for a recent formalisation, Sergot and Richards 2001.

4. event A *does not take place*, *independently* of the behaviour of j (without j's behaviour A still would not have happened)

In case (1), we can say that j produces A (and thus he fails to omit to produce A). In cases(2), (3), and (4), we can say that j has omitted to produce A: In all these three cases the omissive action has been performed. Only in the case (4) can we affirm j has prevented A: Only in the case (4), besides omitting to produce A, j has performed the negative action of producing NON A.

Finally, it must be observed that sometimes the term *omission* seems to have a stronger meaning: It denotes non-performance only in those cases when the author of the action had the opportunity (and possibly also the ability) of performing it (cf. von Wright 1983b, 109f.). For example, it is quite odd to say that today I have omitted to fly at the speed of light, or that I have omitted to play in the national football team.

However, we shall not define omission in this way, though we agree that in certain contexts a more restricted notion of omission would make sense and would capture more precisely the linguistic usage. Simplicity requires that we maintain our weak idea of omission: Omission for us simply means non-performance, and the fact that j omits action φ does not imply that φ is possible.

16.3.2. Logical Analysis of Omission

For providing a logical characterisation for omission, we just need to recall that double negation gets cancelled: NON NON (φ) is equivalent to φ. Therefore, by denying that there was an omission, we affirm that there was the complementary positive action. Thus, that one omitted to omit to do something, just means that one did it.

This leads us to the following definition, where the omission of an action is characterised as the realisation of its complement.

Definition 16.3.1 *Omission. The omission of action φ—written Omitted φ, where φ is a positive or negative action description— is the complement of φ:*

$$\mathit{Omitted}\ \varphi \equiv_{def} \overline{\varphi}$$

In general, remember that for any proposition ψ, its *complement* $\overline{\psi}$ is obtained:

- by prefixing a negation, when the proposition is positive ($\overline{\phi}$ = NON ϕ), and
- by eliminating the negation, when the proposition is negative ($\overline{\text{NON}\ \phi} = \phi$).

Thus, on the one hand:

$$Omitted\ Does_j A = \text{NON}\ Does_j A$$
(⌈it is omitted that j does A⌉ is equivalent to ⌈j does not do A⌉)

and on the other hand:

$$Omitted\ \text{NON}\ Does_j A = Does_j A$$
(⌈it is omitted that j does not do A⌉ is equivalent to ⌈j does A⌉)

16.3.3. Some Abbreviations for Representing Actions

To indicate generically that a certain action is performed by an agent—without specifying whether it is a positive action or an omission, and whether it is a behavioural or a productive action—we shall use the *generalised action operator* $Does{*}_j A$, which indicates any one of the following: (1) $Does_j A$, (2) NON $Does_j A$, (3) $Brings_j A$, (4) NON $Brings_j A$.

Similarly, we write $ToDo{*}_j A$ to indicate any of the following (1) $ToDo_j A$, (2) NON $ToDo_j A$, (3) $ToBring_j A$, (4) NON $ToBring_j A$.

Finally, we write $Done{*}\ A$ to indicate any of the following: (1) A is done, (2) A is produced, (3) A is not done, (4) A is not produced. When reading a formula containing such expressions, we may choose any of these interpretations for its action operators, though this interpretation must be consistent: All occurrences of $Does{*}_x A$ and $ToDo{*}\ A$ within the formula are to be read in the same sense. For instance, the formula:

$$Does{*}_j A\ \text{AND}\ [ToDo{*}_j A\ \text{was wrong}]$$

subsumes any of the following:

1. $Does_j A$ AND [$ToDo_j A$ was wrong];
2. $Brings_j A$ AND [$ToBring_j A$ was wrong];
3. NON $Does_j A$ AND [NON $ToDo_j A$ was wrong];
4. NON $Brings_j A$ AND [NON $ToBring_j A$ was wrong]

but it does not subsume mixed expressions like:

$$Does_j A\ \text{AND}\ [ToBring_j A\ \text{was wrong}]$$

Accordingly, when referring to the generalised action operator, we shall speak of "doing" in a generic sense, which also includes producing and omitting.

We also introduce the following abbreviations:

$$Omits_j\, ToDo{*}\ A \equiv_{def}\ Omitted\ Does{*}_j A_i$$
("j omits doing A" means that "it is omitted that j does A")

For instance, the omission of action:

$Does_j$ [smoke]
(j smokes)

which consists in the fact that:

NON $Does_j$ [smoke]
(it is not the case that j smokes)

can also be expressed as:

$Omits_j$ $ToDo$ [smoke]
(⌈j omits to do the action of smoking⌉, that is, more simply ⌈j omits to smoke⌉)

Correspondingly, the omission of the non-performance:

NON $Does_j$ [smoke]

which consists in the fact that the action is performed, i.e., that:

$Does_j$ [smoke]

can also be expressed as:

$Omits_j$ NON $ToDo$ [smoke]
(j omits not to smoke)

Corresponding abbreviations ($Omits_j$ $ToBring$ A, $Omits_j$ NON $ToBring$ A) can be used also for the omission of productive actions.

Chapter 17

DEONTIC NOTIONS

In this chapter we shall focus on the basic building blocks of normative knowledge: obligations, prohibitions and permissions. Being obligatory, being forbidden and being permitted are indeed the three fundamental *deontic statuses* of an action, upon which we shall build more articulate normative concepts.

In analysing deontic statuses, we shall consider some results obtained in *deontic logic*, the branch of philosophical logic that is specifically concerned with obligations, prohibitions and permissions (the term *deontic* derives from the Greek verb *deomai* which means being due or obligatory).

Though some philosophers and legal theorists, such as Wilhelm F. Leibniz, Jeremy Bentham, and Wesley N. Hohfeld, anticipated many aspects of deontic logic (and one may even go back to Ancient philosophy, in particular to Aristotle)[1] the birth of modern deontic logic can be traced back to the beginning of the 1950s.[2] In the following years deontic logic achieved a very high level of technical complexity, being generally approached in the rich framework provided by *modal logic*, the logic originally intended to deal with necessity and possibility.[3]

Here we shall not discuss the connection of deontic logic with other areas of

[1] On Aristotelian deontic reasoning, see for instance, Kalinowski (1972, 35ff.), who considers various normative syllogisms in *Nicomachean Ehics* and in *De motione animalium*. According to Knuttila 1971, on the contrary, the theory of deontic thinking originated only in the middle ages.

[2] When three important works were independently published: von Wright 1951, Becker 1952, and Kalinowski 1972. However, the first formal analysis of the deontic notions was provided by Mally 1926. His systems, unfortunately, fails to distinguish alethic and deontic notions: It entails that whatever is the case is obligatory and vice versa (in Mally's system A is equivalent to ⌈it is obligatory that A⌉).

[3] For a discussion of deontic logic within the framework of modal logic, see Chellas 1980, 190ff., which also provides an excellent presentation of propositional modal logic. For an introduction to modal logic, see also Hughes and Cresswell 1984. For an introduction to deontic logic, see: Hilpinen 1971; al Hibri 1978; Åqvist 1984 and 1987; Meyer and Wieringa 1993b and 1993a; Jones and Carmo 2000. On deontic logic in legal reasoning, see Alexy 1985, 182ff. For a discussion of the limits of deontic logic, see Mazzarese 1989. For a recent discussion of some important aspects of it, cf. Artosi 2000. For an attempt to capture aspects of deontic logic using logic programming (with constraints), see Alberti et al. 2004. Excellent contributions to deontic logic are contained in Hilpinen 1971 and 1981. More recent contributions can be found in the proceedings of the DEON workshop (International Workshop on Deontic Logic in Computer Science), which is held every two years (for the proceedings of the last DEON workshop, see Lomuscio and Nute 2004). DEON also addresses the application of deontic logic through computer systems and its use in computer science (for instance, to specify the desired behaviour of computer systems).

logic—in particular, with the many axiomatic or semantic characterisations of modal logic[4] —though this connection represents nowadays the starting point of most formal analyses of deontic logic: To keep our presentation simple we shall only consider the deontic properties that are most useful in modelling legal reasoning, and we shall refrain from addressing the logical background which may provide a foundation for these properties.

17.1. Obligation

To say that an action is *obligatory* is to say that the action is due, has to be held, must be performed, is mandatory or compulsory. It is very difficult to clarify the intuitive meaning of the notion of obligatoriness through definitions and conceptual analyses, since this notion is not reducible to other, simpler or more familiar, ideas.

In Chapter 3 we tried to provide such a clarification by taking a different approach, that is, by examining the cognitive function of the idea of an *obligation*. In particular, we viewed this idea as emerging from the doxification of intentions. Consequently we assumed that the proposition expressing the obligation to perform a certain action has the following truth conditions: Such a proposition is true whenever optimal practical cognition (possibly restricted to certain specific concerns) would lead one to have the intention of accomplishing that action. Here we shall rely on this functional analysis of obligations, in characterising their logical behaviour.

17.1.1. The Representation of Obligations

We shall represent obligations by formulas having the following structure:

Obl A
(it is obligatory that A)

where A is any (positive or negative) action description, and ***Obl*** is the deontic operator for obligation, to be read as “it is obligatory that.” Obligations can concern both behavioural actions, as in the following formula stating that j has the obligation to lecture:

Obl $Does_j$[lecture]
(it is obligatory that j lectures)

and productive actions, as in the following formula stating that j has the obligation to cancel k’s personal data:

[4] Among the many modal axiomatisations and semantics for deontic logic, see: Chellas 1980, Jones and Pörn 1985; McCarty 1986; Alchourrón 1991.

Obl $Brings_j$[k's personal data are cancelled]
(it is obligatory that j bring it about that k's personal data are cancelled)

With regard to the logical behaviour of obligations, we assume the following reasoning schema *JO-junction of obligations*, according to which having separate obligations to do certain action leads to have the obligation to do the conjunction of these actions.

Reasoning schema: *JO-junction of obligation*
(1) ***Obl*** A AND ***Obl*** B
——— IS A REASON FOR
(2) ***Obl*** (A AND B)

For instance, given that John, a university professor, has towards his employer both the obligation to teach and the obligation to do research, we can conclude the he has the obligation both to teach and to do research.

(1) ***Obl*** [John teaches] AND ***Obl*** [John does research]

---

(2) ***Obl*** ([John teaches] AND [John does research])

17.1.2. Positive and Negative Obligations

Elementary obligations can be distinguished between:

- *elementary positive obligations*, which concern positive elementary actions;
- *elementary negative obligations*, which concern negative elementary actions.

For example, the following formula expresses an elementary positive obligation, the obligation that j pays his debt:

Obl $Brings_j$[j's debt is paid]
(it is obligatory that j brings it about that his debt is paid)

The following formula expresses an elementary negative obligation, j's obligation not to smoke, which amounts to j's obligation to omit smoking (on this way of expressing omission, see Section 16.3.3 on page 450):

Obl (NON $Does_j$[smoke]) $\equiv$ ***Obl*** ($Omits_j$ $ToDo$ [smoke])
(⌈it is obligatory that j does not smoke⌉ is equivalent to ⌈it is obligatory that j omits to smoke⌉)

17.2. Prohibition

The idea of an obligation is paralleled by the idea of a prohibition. Being forbidden or prohibited is the status of an action that should not be performed. In common language (and in legal language as well) prohibitive propositions are expressed in various ways. For example one may express the same idea by saying: "It is forbidden that John smokes," "John must not smoke," "There is a prohibition that John smokes," and so on.

17.2.1. The Representation of Prohibitions

We represent prohibitions by using the symbol ***Forb***, to be read as "it is forbidden that." Here are two examples. The first formula, concerning a behavioural action, states that j is forbidden to smoke:

> ***Forb*** $Does_j$[smoke]
> (it is forbidden that j smokes)

The second, concerning a productive action, states that j is forbidden to damage other people's health:

> ***Forb*** $Brings_j$[other people's health is damaged]
> (it is forbidden that j brings it about that other people's health is damaged)

We do not need to say much about prohibitions, since a prohibition can be viewed as an obligation to omit (as it will appear in the next Section), so that our analysis of obligations can be transferred to prohibitions.

This does not exclude that the idea of prohibition plays a pivotal role in normative thinking, especially in the legal domain. There is a long philosophical history for the idea that the law basically consists of prohibitions.

Just remember the idea of Thomasius (1963) that the law's task is that of specifying the prohibition "what you do not want to be done to you, you shall not do to others" (*quod tibi non vis fieri, alteri ne feceris*) or Kant's idea that the law's business is that of limiting each one's liberty in order to ensure its coexistence with the liberty of everyone else according to universal rules (Kant 1996, B.4).

We cannot discuss here the comparative social and legal importance of obligations and prohibitions, since we need to focus on the logical representation of prohibitions rather than on their philosophical relevance or their social function. Let us just remark that within deontic logic, the idea of the primacy of prohibitions can possibly be found in those approaches that found deontic logic upon the idea of a sanction. In particular, Anderson (1958a; 1958b) reduced deontic logic to alethic modal logic (the logic which deals with possibility and necessity), by assuming that "A is forbidden" just means ⌈if A takes place, then necessarily a sanction will ensue⌉. From this perspective, prohibition appears

to be the primitive normative notion, on the basis of which the other normative ideas—and in particular those of an obligation and a permission—are to be defined.[5]

Here we shall take a different perspective, since in our model the notion of obligation is not dependent on the idea of a sanction (it is rather connected to the idea of an intention), nor is legal reasoning primarily intended to avoid sanction (it is rather connected to participation in collective intentionality), though we admit that sanctions play a fundamental role in the law (see Section 10.3 on page 294).

17.2.2. Connections between Obligation and Prohibition

Most approaches to deontic logic agree in assuming that, for any action A, the prohibition of A amounts to the obligation not to do action A: This is the axiom we denote as FON:

$$FON\text{:}\quad \textbf{\textit{Forb}}\ A \equiv \textbf{\textit{Obl}}\ (\text{NON}\ A)$$

(FON (Forbiddenness is Obligatoriness): ⌈it is forbidden that A⌉ is equivalent to ⌈it is obligatory that NON A⌉)

For example, j's being forbidden to discriminate her employees on the basis of their age, amounts to her being obliged not to do that:

$$\textbf{\textit{Forb}}\ Does_j[\text{discriminate } j\text{'s employees on the basis of their age}] \equiv \textbf{\textit{Obl}}\ (\text{NON}\ Does_j[\text{discriminate } j\text{'s employees on the basis of their age}])$$

which we read as ⌈it is forbidden that j discriminates j's employees on the basis of their age⌉ is equivalent to ⌈it is obligatory that j does not discriminate j's employees on the basis of their age⌉.

On the basis of the equivalence of NON A and *Omitted* A we introduced in Section 16.3 on page 447, we can use interchangeably NON A and *Omitted* A. Thus, we can also say that:

$$\textbf{\textit{Forb}}\ A \equiv \textbf{\textit{Obl}}\ (Omitted\ A)$$

(⌈it is forbidden that A⌉ is equivalent to ⌈it is obligatory that A is omitted⌉)

Moreover, an omission being forbidden amounts to the corresponding positive action being obligatory (though qualifying an omission as being forbidden in order to express an obligation seems a useless complication).

$$\textbf{\textit{Forb}}\ Omitted\ A \equiv \textbf{\textit{Forb}}\ \text{NON}\ A \equiv \textbf{\textit{Obl}}\ A$$

(⌈it is forbidden that A is omitted⌉ is equivalent to ⌈it is forbidden that NON A⌉, which is equivalent to ⌈it is obligatory that A⌉)

[5] The Andersonian approach has been recently adopted in some attempts to provide formal definitions of deontic notions. See for instance Meyer 1988, and Boella and Lesmo 2002.

Here is an example of this equivalence:

$$\textit{\textbf{Forb}}\ \ Omitted\ \ Does_k[\textsf{pay taxes on } k\textsf{'s fees}] \equiv$$
$$\textit{\textbf{Forb}}\ (\textsc{non}\ \ Does_k[\textsf{pay taxes on } k\textsf{'s fees}]) \equiv$$
$$\textit{\textbf{Obl}}\ \ Does_k[\textsf{pay taxes on } k\textsf{'s fees}]$$

(⌈it is forbidden that k omits to pay taxes on her fees⌉ is equivalent to ⌈it is forbidden that that k does not pay taxes on her fees⌉, which is equivalent to ⌈it is obligatory that k pays taxes on k's fees⌉)

Since the omission of action φ consists in accomplishing action NON φ, and the omission of the omissive action NON φ consisting in accomplishing action φ, we may say that in general an action being forbidden amounts to its omission being obligatory. This subsumes the two cases we have just considered, and may be taken as a definition of the notion of "forbidden," so that ***Forb*** does not need to be counted among our primitive deontic notions. This leads us to redefine the notion of forbiddenness as follows:

Definition 17.2.1 *Forbiddenness. That action A is* forbidden *means that that A's omission is obligatory:*

$$\textit{\textbf{Forb}}\ \ A \equiv \textit{\textbf{Obl}}\ \ (Omitted\ \ A)$$

(⌈it is forbidden that A⌉ is equivalent to ⌈it is obligatory that A is omitted⌉)

17.3. Permission

The third basic deontic status, besides obligation and prohibition, is *permission*. According to the idea we advanced in Section 3.2.2 on page 101, we view permissions as resulting from the doxification of a *may-intention*, by which we mean one's intention that something may be done. This intention consists in one's acceptance that something is performed, or also one's exclusion of one's intention that something shall not be done.

17.3.1. The Representation of Permissions

Permissive propositions are expressed in many different ways in natural language. We say, for example, that "Tom is permitted to speak", that "he has the faculty of speaking," that "he can speak," that "it is licit that he speaks," that "he is allowed to speak," that "he is has the power of speaking," that "he is empowered to speak," and so on.

To express permissions in a uniform way, regardless of the various formulations being used in natural language, we use the operator ***Perm***. For example, to indicate that Tony is permitted to speak we write:

$$\textit{\textbf{Perm}}\ \ Does_{Tony}[\textsf{speak}]$$

(it is permitted that *Tony* speaks)

Similarly, for affirming that Tony is permitted to build a house in his land, we write:

Perm $Brings_{Tony}$[a house is built on $Tony$'s land]
(it is permitted that $Tony$ brings it about that that a house is built on his land)

17.3.2. Positive and Negative Permission

Permissions can be positive or negative according to whether they concern actions or omissions. For example, assume that Tony is given the following information concerning a dinner party he has been invited to: (1) he is permitted to wear trainers, and (2) he is permitted not to wear a tie. The first normative proposition would be expressed as:

Perm $Does_{Tony}$[wear trainers]
(it is permitted that $Tony$ wears trainers)

and the second as:

Perm (NON $Does_{Tony}$[wear a tie])
(it is permitted that $Tony$ does not wear a tie)

or equivalently, according to our definition of an omission, as:

Perm ($Omits_{Tony}$ $ToDo$ [wear a tie])
(it is permitted that $Tony$ omits to wear a tie)

17.3.3. Connections between Obligations, Prohibitions, and Permissions

Let us now consider the logical connections between the deontic notions we have so far introduced. First of all, we need to observe that when one believes that an action is obligatory then one can conclude that the same action also is permitted.

This is expressed by the following conclusive reasoning pattern:

Reasoning schema: *OP-Permissibility of obligatory action*
(1) ***Obl*** A
——— IS A CONCLUSIVE REASON FOR
(2) ***Perm*** A

For example, if one (like Antigone herself; see Section 4.3 on page 136) believes that Antigone has the obligation to bury her brother Polynices, one may conclude that she is permitted to do that.

(1) ***Obl*** $Does_{Antigone}$[bury Polynices]

---

(2) ***Perm*** $Does_{Antigone}$[bury Polynices]

This does not exclude that from a different point of view (for example. Creon's point of view) Antigone may be forbidden to bury Polynices. One may also view Antigone's case as involving a conflict of obligations, as we shall see when considering defeasible reasoning. However, even this view does not exclude that obligation implies permission: The conflict between two obligations will rather lead also to a conflict between permissions and obligations (for instance, between Antigone's being permitted to bury the body and her being forbidden to do it).

It is true that it may seem quite strange to affirm that one has the permission to behave in a certain way, when one is obliged to behave so. Thus, we would not say that Antigone believes that she is permitted to bury Polynices, when she believes that she is obliged to do.

Similarly, to consider a more mundane example, it is strange to say that I am permitted to wear a tie at the party when I am obliged to do that.

However, the oddness of saying that something is permitted when something is obligatory is consistent with, and even explained by, the fact that being obligatory entails being permitted (so that "obligatory" is more informative than "permitted"). This oddness reflects indeed the well-known conversational maxim that one should make one's assertions as informative as required, which Grice (1989) called the "maxim of quantity." In particular, in contexts like the ones we are considering, the utterance of a sentence usually "conversationally implicates" (as Grice would say) that the speaker does not believe related propositions which are higher in the scale of informativeness.

Thus, my statement that ⌈I am permitted to wear a tie⌉ usually *implicates* that I do not believe that ⌈I am obliged to wear a tie⌉: If I believed that ⌈I am obliged to wear a tie⌉ (a more informative proposition), I should state my obligation to do that, rather than just saying that I am permitted. However, this only is an implicature (a conversational presupposition), it is no logical implication.

Since A's obligatoriness entails A's permittedness, ***Obl*** A is incompatible the fact that A is not permitted:

Obl A **incompatible** NON ***Perm*** A
(⌈it is obligatory that A⌉ is incompatible with ⌈it is not permitted that A⌉)

The connection between the obligatoriness of A and the permittedness of A is replicated in the connection between the forbiddenness of A and the permittedness of A's omission: An action being forbidden entails the permission to omit it.

(1) ***Forb*** A

---

(2) ***Perm*** (NON A)

In particular, when a positive action is prohibited, we may conclude that its negation (its omission) is permitted. For example, if I believe that it is forbidden that Tom smokes, then this leads me to believe that he is permitted not to smoke.

(1) ***Forb*** $Does_{Tom}$[smoke]

---

(2) ***Perm*** (NON $Does_{Tom}$[smoke])

Similarly, when an omission is prohibited then the corresponding positive action is permitted. For instance, that George is forbidden to omit wearing a tie, entails that he is permitted to wear it.

(1) ***Forb*** NON ($Does_{George}$[wear a tie])

---

(2) ***Perm*** $Does_{George}$[wear a tie]

As we have just observed, an action A being forbidden entails that the omission of A is permitted. Thus, there is a contradiction between an action being forbidden and the omission of that action not being permitted.

Forb A **incompatible** NON ***Perm*** (NON A)
(⌈it is forbidden that A⌉ is incompatible with ⌈it is not permitted that A is omitted⌉)

For instance, there is a contradiction, and therefore an incompatibility, between j being prohibited to smoke and his not being permitted to omit smoking (or between his being prohibited to omit wearing a tie, and his not being permitted to wear the tie).

1. ***Forb*** $Does_j$[smoke] **incompatible**
   NON ***Perm*** (NON $Does_j$[smoke])
2. ***Forb*** (NON $Does_j$[wear a tie]) **incompatible**
   NON ***Perm*** ($Does_j$[wear a tie])

All the logical relations between deontic notions we have just described are synthesised in Table 17.1 on the next page. The schema shows that there is an opposition between being obliged and being prohibited: If an action A is obligatory, then its performance is permitted, which contradicts that A is forbidden.

Similarly, if an action A is forbidden, then its omission is permitted, which contradicts that A is obligatory.

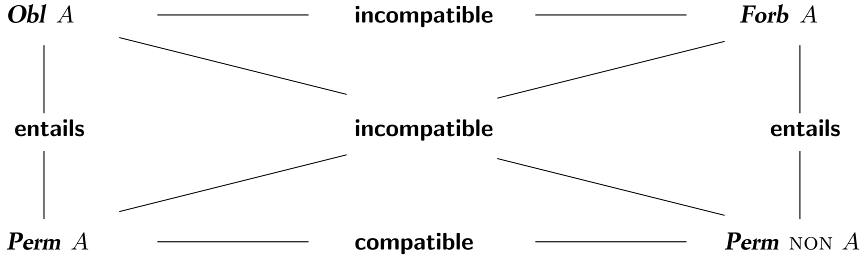


Table 17.1: *The first deontic square*

It is instead compatible that both an action A is permitted and its omission NON A also is permitted. In such a case, A would be neither obligatory nor permitted, but *facultative*, as we shall see in the next section.

17.3.4. A Fourth Deontic Status: Facultativeness

The deontic qualifications "obligatory" and "forbidden" are complete, in the sense that they determine the deontic status of both the action they are concerned with, and the complement of that action. In fact, on the basis of the equivalence:

Obl $\varphi \equiv$ ***Forb*** NON φ

we get the following two equivalences, the first concerning the case where φ is a positive action A, the second concerning the case where φ is the omissive action NON A (remember that double negations get cancelled):

1. ***Obl*** $A \equiv$ ***Forb*** NON A
2. ***Obl*** NON $A \equiv$ ***Forb*** A

According to equivalence (1), saying that j's action of wearing a tie is obligatory amounts to saying that j's omission to wear a tie is forbidden:

Obl $Does_j$[wear a tie] $\equiv$ ***Forb*** (NON $Does_j$[wear a tie])

Similarly, according to equivalence (2) saying that j's action of carrying a gun is forbidden amounts to saying that j's omission to carry a gun is obligatory.

Forb $Does_j$[carry a gun] $\equiv$ ***Obl*** (NON $Does_j$[carry a gun])

On the contrary, when we only know that an action is permitted, we do not know the status of its complement. In particular, when a positive action is permitted,

country	wearing the veil (V)	not wearing the veil (NON V)
France	***Forb*** V	***Obl*** NON V, ***Perm*** NON V
Iran	***Obl*** V, ***Perm*** V	***Forb*** NON V
UK	***Perm*** V	***Perm*** NON V

Table 17.2: *Complete deontic qualifications*

then its omission can be either permitted as well, or forbidden (this will be the case when the action besides being permitted, also is obligatory).

Consider for example, the action of a girl wearing a veil when going to school, which we denote as V. Action V is permitted in the UK, it is obligatory in Iran, it is forbidden in France. Consider now the omission of the veil, namely, action NON V. Action NON V is permitted as well in in the UK, but it is forbidden in Iran, and is obligatory in France. From Table 17.2 it appears that to express the normative qualification of the action of wearing a veil by a girl going to school in Iran or in France, it is sufficient to say that in Iran wearing the veil is obligatory while in France it is forbidden. In fact, the deontic propositions ⌈***Obl*** V in Iran⌉ and ⌈***Forb*** V in France⌉ entail all other deontic propositions that are indicated on the table with regard to Iran and France:

1. wearing the veil is permitted in Iran (since ***Obl*** V entails ***Perm*** V);
2. not wearing the veil is obligatory, and thus permitted, in France (since ***Forb*** V, is equivalent to ***Obl*** NON A, and ***Obl*** NON A entails ***Perm*** NON A) and it is forbidden in Iran (since ***Obl*** V is equivalent to ***Forb*** NON V).

On the contrary, saying that V is permitted in the UK is not sufficient to fully specify V's normative status in these countries: The permission to wear a veil (***Perm*** V) is consistent both with the permission not to wear it (***Perm*** NON V) and with the prohibition not to wear it (with ***Forb*** NON V), that is. with the obligation to wear it (with ***Obl*** V).

Thus, to provide a complete deontic specification, we need to specify whether not wearing the veil is forbidden, or whether this is forbidden. In the UK, wearing a veil is permitted (like in Iran, and contrary to what is the case in France), but also not wearing the veil is permitted too (like in France, and contrary to what is the case in Iran).

In conclusion, besides an action being obligatory (and its omission being forbidden), and besides an action being forbidden (and its omission being obligatory), there is a third way for the deontic status of an action to be fully specified: This consists in both the action and its negation being permitted.

In common language, when one says "permitted" one usually refers to this third option (according to the above mentioned Grician principle of quantity). We prefer to use the specific term *facultative*—abbreviated as ***Facult*** —to express this notion.[6]

Definition 17.3.1 *Facultative. An action A is* facultative *when both A and A's omission are permitted:*

> ***Facult*** $A \equiv$ (***Perm*** A) AND (***Perm*** NON A)
> *(⌈it is facultative that A⌉ is equivalent to ⌈it is permitted that A* AND *it is permitted that* NON *A⌉)*

For example, saying that ⌈in the UK, for a girl going to school, it is facultative to wear the veil⌉ amounts to saying that ⌈she is is permitted both to wear it and not to wear it⌉.

17.3.5. Commands and Deontic Statuses

We need to carefully distinguish the *deontic statuses* and the *speech acts* which may produce them, though common language is not very helpful in this regard. In particular, while the word *obligation* is quite univocal (it refers to the fact of being obligatory, rather than to the act of issuing a command), the expressions *prohibition* and *permission* are ambiguous, referring to both the state of being prohibited or permitted, and to the acts of prohibiting or permitting.

We have used the expressions *obligation*, *prohibition* and *permission* always to refer to the fact that something is obligatory, forbidden or permitted. Being forbidden or obligatory are *normative statuses*: They should not be confused with the speech acts that may produce such statuses. Thus, from our perspective, the act consisting in John's stating "You are allowed to smoke a cigarette, if you want" (in reply to Mary's request "May I smoke a cigarette?") is not a permission, but a permissive act. Similarly Lisa's statement "Not in my house!" (in reply to Tom's request: "May I smoke a cigar?") is not a prohibition, but a prohibitive act.

We admit that often one concludes (and believes) that an action is obligatory, forbidden, or permitted on the basis of the fact that somebody has performed a prescriptive, prohibitive, or permissive act. However, this is not necessarily the case: Such conclusions can be drawn on the basis of different grounds, such as the goals and the values one attributes to the institution or the community one is serving, or the normative customs one shares, and believes one ought to share with one's fellows (see Chapter 9).

[6] For a discussion of this notion, and for references to the literature, see Alexy (1985, 203ff.), who refers to it by using the expression *unprotected freedom* (*unbewehrte Freiheit*).

In general, even when the ground for believing that an action is obligatory or forbidden is a previous act of prescribing that action, we need to clearly distinguish two propositions:

1. the proposition asserting that an act of prescribing or forbidding a certain action took place;
2. the proposition asserting that this action is obligatory or forbidden.

As we shall see in Chapter 25, proposition (1) may be a component (a subreason) of a reason leading to endorsing proposition (2). However, to obtain a complete reason for adopting proposition (2), proposition (1) must be accompanied by further premises. In particular, when adopting a stated normative proposition as a legal authority we must assumed a meta-rule to the effect that whatever is stated in certain ways is legally binding.

It is true that according to certain theorists, whom we have called *enactement positivitists* (see Section 13.1.3 on page 362), the status of legal obligatoriness can only be produced through authoritative statements (an in particular through commands). However, this is not the view that is developed here.

Moreover, even enactment-positivitists need to distinguish conceptually (*a*) obligatoriness as a deontic status and (*b*) the fact that something has been commanded. If they were unable to trace this conceptual distinction, their substantive legal position (every obligation is produced though a command) would be reduced to a trivial tautology.

Finally, we need to observe that our definition of *forbidden* as meaning "what is obligatory to omit" does not necessarily imply that being obligatory is more basic or more fundamental that being forbidden: It just means that the two notions are interdependent. As far as logic is concerned, we might equally start with the notion of *forbidden*, and define "obligatory" as meaning "what is forbidden to omit."

However, since our psychological perspective leads us to view obligations as the doxification of intentions, we need to consider prohibitions as being the doxification of negative intentions (intentions that not to do), and therefore as being reducible to negative obligation (obligation not to do).

17.4. An Axiomatisation for Deontic Reasoning

In this section we shall synthesise the content of the ideas we have been discussing so far. First we shall provide a precise account of the connection between obligations, prohibitions and permissions. Then we shall review all axioms and inference schemata we have introduced in this chapter.

17.4.1. Relationships between Obligations and Permissions

In analysing the logical connections between obligation and permission, we need to start with the fact that, as we know, believing that an action is permitted amounts to believing that it is not forbidden.

PNF: ***Perm*** $A \equiv$ NON ***Forb*** A
(PNF (Permission is Non-Obligation): ⌈it is permitted that A⌉ is equivalent to ⌈it is not forbidden that A⌉)

This means that not being permitted amounts to being forbidden (just negate both formulas, and cancel double negations):

NON ***Perm*** $A \equiv$ ***Forb*** A
(⌈it is not permitted that A⌉ is equivalent to ⌈it is forbidden that A⌉)

For instance, believing that smoking is not permitted (that it is excluded that smoking is permitted) amounts to believing that it is forbidden to smoke. From this follows that an action being permitted contradicts that action being prohibited:

Perm A **incompatible** ***Forb*** A
(⌈it is permitted that A⌉ is incompatible with ⌈it is forbidden that A⌉)

Similarly, believing that an action is obligatory amounts to excluding that its omission is permitted:

Obl $A \equiv$ NON (***Perm*** NON A)
(⌈it is obligatory that A⌉ is equivalent to ⌈it is not permitted that not A⌉)

For example, believing that it is obligatory to wear a tie amounts to believing that it is not permitted to omit wearing a tie. Correspondingly, the obligatoriness of an action (entailing the permission to perform it) contradicts the permittedness of its omission:

Obl A **incompatible** ***Perm*** NON A
(⌈it is obligatory that A⌉ is incompatible with ⌈it is permitted that NON A⌉)

The formulas we have just being considering are summarised in the second square of deontic notions, in Table 17.3 on the facing page.

17.4.2. Reasoning Schemata for Action Logic and Deontic Logic

The set of reasoning schemata and equivalences in Table 17.4 on the next page synthesises our analysis of the logical properties of action operators and deontic qualifications (remember that $\vdash$ means "entails").

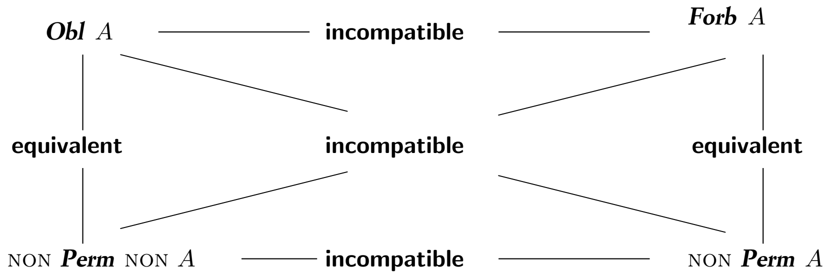


Table 17.3: *The second deontic square*

Action logic
- SPA: $Brings_j A \vdash A$
- JBA: $(Brings_j A$ AND $Brings_j B) \vdash Brings_j(A$ AND $B)$
- JPA: $(Does_j A$ AND $Does_j\ B) \vdash Does_j(A$ AND $B)$

Deontic logic
- FON: ***Forb*** $A \equiv$ ***Obl*** (NON A)
- OP: ***Obl*** $A \vdash$ ***Perm*** A
- PNF: ***Forb*** $A \equiv$ NON (***Perm*** A)
- JO: (***Obl*** A AND ***Obl*** B) $\vdash$ ***Obl*** (A AND B)

Table 17.4: *Inference schemata and equivalences for action logic and deontic logic*

We believe that this set provides an adequate formalisation of the basic properties of normative concepts, and identifies the core of deontic logic. This core is included indeed in most systems of deontic logic, which also include, however, some further, more questionable, logical principles, as we shall see in Section 17.7 on page 473.

17.5. Negative Corollaries on Permission

In the conceptual framework we have provided, saying that an action A is permitted just means the A's omission is forbidden. This simple characterisation allows us to state some negative corollaries concerning the meaning and the function of permissions, that is, to specify what is *not entailed* by the notion of permission. In this way—that is, by clarifying what permission is not—we shall try to disentangle the concept of permission from other ideas that are frequently associated with it.

17.5.1. Permission Does Not Entail Facultativeness

First of all, being permitted does entail being facultative. In fact, according to the definition we have introduced in Section 17.3.4 on page 462, ***Facult*** A is equivalent to the following conjunction:

Perm A AND ***Perm*** NON A

Thus, for action A to be facultative it is not sufficient that A is permitted: It is also necessary that A's omission also is permitted.

For example, for wearing a tie to be facultative, it is not sufficient that it is permitted to wear a tie, it must also be permitted not to wear it: If I am obliged to wear a tie at the party, then wearing it is permitted, but it is not facultative (since I am not permitted to abstain from wearing it).

Thus, we may express the connection between permittedness and facultativeness, by stating that, on the one hand, an action being permitted does not entail that it is facultative:

Perm A $\nvdash$ ***Facult*** A
(⌈A is permitted⌉ does not entail ⌈A is facultative⌉)

while, on the other hand, an action being facultative entails that it is permitted:

Facult A $\vdash$ ***Perm*** A
(⌈A is facultative⌉ entails ⌈A is permitted⌉)

17.5.2. Permission Does not Entail Prohibition to Prevent

That I am permitted to do an action does not entail that other people are forbidden to prevent me from doing that action. For example, I am permitted to park on the side of my street, though I am frequently prevented to do that by the fact that other cars have already taken all the available space.

Frequently, however, when one prevents another from performing permitted actions, one violates certain obligations that one has, though these obligations are not directly connected with the permission. Assume for example that I am permitted to park on the side of my street, and that I indeed leave my car there. Then the action of somebody who removed my car from the parking place would be illegal. However this would not follow from the violation of my permission to park, but rather from the violation of my ownership right over my car (which entails that others are obliged to not to interfere with my car without my authorisation).

Similarly, the fact that George is permitted to smoke does not imply that others are forbidden to prevent him from smoking. They may succeed in preventing his smoking in ways that do not involve the violation of any obligation: They may buy the last cigarette box available in the tobacco shop and destroy

it, they may refuse to lend George their lighter, they may threaten that they will leave the room if he smokes, and so on.

On the other hand, the others are forbidden to do various actions that would interfere with George's ability to smoke, such as stealing his cigarettes, threatening to hurt him if he smokes, throwing a bucket of water at him. However, the forbiddenness of such actions does not follow from the fact that George is permitted to smoke: It rather follows from the fact that he is the owner of the cigarettes, that all are forbidden to cause or threaten physical damage to others, and so forth.

Consider, for instance, Mary's action of taking the only packet of cigarettes that is on table, an action that has the effect of preventing George from doing something he is permitted to do, namely, smoking. Whether this action is legal or illegal does not depend on its impact on George's ability to perform what he is permitted to do, but on whether the cigarettes belong to Mary or to George.

In conclusion, we need to clearly distinguish the permission that j does A from the prohibition that another (or all others) prevents j from doing A: It is possible (and very common indeed) that one is permitted to do actions that others are also permitted to prevent.

However, there are general prohibitions upon others that—by limiting in general their action—proscribe certain ways of interfering upon the holder of the permission, and thus indirectly provide a certain legal protection to the holder's possibility of doing what he or she is permitted to do. As Hart (1982, 171) puts it:

> at least the cruder form of interference, such as those involving physical assault or trespass, will be criminal or civil offences or both, and the duties or obligations not to engage in such modes of interference constitute a protective perimeter behind which liberties exist and may be exercised.

Thus, for instance, George's possibility of exercising his permission to smoke is protected by the prohibition of assaulting him and by his property right over his cigarettes, though, as we observed, Mary is allowed to use other means to prevent him from smoking.

There are also cases where one's permission is coupled to another's prohibition to prevent exactly the permitted action, or at least by the prohibition to prevent it on purpose. These are the case to which Alexy (1985, 208ff.) refers by speaking of *freedoms* which are *directly protected* by corresponding prohibitions to interfere. Among such freedoms, there are the negative liberties one has towards the State in liberal countries (for instance, freedom of speech, of professing a religion, and so on).

17.5.3. Permission Does Not Presuppose Prohibition

It has been often affirmed that every permission is an exception to a prohibition, and therefore presupposes a prohibition. We reject this thesis, which we call the *exception-theory of permission*, as we shall see in the following, where we consider different versions of it.

The first version of the exception-theory of permission concerns the formation of normative belief. It consists in the thesis one can rationally come to believe that action A is permitted only in those cases where, unless one had this belief (and the information for obtaining it) one would believe that A is forbidden.

According to this view, the formation of permissive beliefs has the specific psychological function of countering prohibitive beliefs one already has (or would have, on the basis of one's current state of mind): Permissive beliefs only exist when they rebut prohibitive conclusion. From this perspective, it makes sense for me come to have the belief that I am permitted to walk in the park, only under the condition that, unless I had performed the inquiry which led me to this conclusion, I would have believed that I was forbidden to walk in the park.

This idea does not seem plausible. In many cases one adopts permissive beliefs as a result of an inquiry which starts with one's need to determine the normative status of an action. For engaging in this inquiry one does not need to have information leading to the conclusion that the considered action would be forbidden (unless prevailing reasons to the contrary existed).

It is true that, like any other beliefs, the belief that something is permitted may be in conflict with other beliefs. In particular, it may be in conflict with the belief that something is forbidden. However, this conflict is not necessary, since one may believe an action A is permitted also when one has no reasons for believing that A is forbidden. Moreover, also when one has such reasons, the permission does not necessarily prevail over the prohibition. In fact, to establish which belief prevails, one needs to establish which belief is preferable, and this can be done, as we have seen in Chapter 7, according to various criteria.

Thus, we need to reject the first version of the exception-theory of permission: It is not the case that every permissive belief presupposes a preexisting prohibitive belief, having a wider scope.

The second version of the exception-theory of permission does not concern permissive beliefs, but rather permissive speech acts—that is, acts through which one proclaims that something is permitted (see Section 23.4.1 on page 607) in order to achieve such result. This version of the exception-theory states that all permissive acts have the same function: They bring it about that something becomes permitted, which would otherwise be prohibited. Thus, a permission is useless unless it overrides a pre-existing prohibition.

We agree that permissive acts are frequently intended to provide permis-

sive information that will defeat inferences leading to a prohibitive conclusion. However, we reject the view that this function provides the necessary motivation of all permissive acts: There are permissive acts that do not have this motivation.

For instance, when I tell my son "You may watch television tonight!" I may have the objective of making a precise transition take place: I intend that the deontic status of his watching television passes from prohibited into permitted. However, this is not necessarily the case. Very frequently, when one performs a permissive act, one has the intention to remove uncertainties concerning the deontic status of this action, by providing a new reasons for endorsing a permissive proposition which may already follow from other reasons. For example, I may issue the permission to watch television though I believe that, in the current circumstances, my son is already allowed to watch television. Assume, for instance that he is too tired for reading and has no homework to do, so that watching television is the best thing for him to do, if this is what he likes: Even before issuing the permission, I (and also my son) can exclude that he is forbidden to watch television, given the values and principles that underlie our family.

The third version of the exception theory of permission also concerns permissive acts, and views the essential function of these acts in countering prohibitions. However, it affirms that permissive acts, besides changing the normative status of currently forbidden actions, have a further, forward-looking, function: They prevent the operation of future forbidding acts. Consider, for instance, Constitutional provisions granting the so-called civil liberties: I am permitted to move around, to express my opinions, to communicate with other people, and so on. These provisions lead to the bindingness of permissive propositions that are able to defeat future legislative prohibitions.

This preventive function is indeed an important motivation to the performance of permissive speech acts (Bulygin 1986). However, we need to reject also this third version of the exception-theory of permissions: We deny that it provides the universal rationale of all permissive acts. When telling my child that he is allowed to watch television, I may have the intention of making it so that future prohibitions to watch television—issued by authorities that are lower than me in the family hierarchy, like my older daughter—are ineffective, but I may simply want to deny that my child is now prohibited to watch television.

17.6. General Deontic Propositions

So far we have considered *individual deontic propositions*, namely, deontic propositions concerning the action of determined individuals. However, many normative propositions, both in law and in morality, express *personally-general* deontic propositions, namely, propositions concerning all individuals.

Within general deontic propositions, we shall first consider the *categorical* ones, namely, the propositions that unconditionally qualify a certain action as obligatory, prohibited, or permitted for everybody (everybody is prohibited

from smoking, everybody is obliged to pay the ticket, everybody is permitted to walk in the park, etc.).

It may be doubted that these propositions really are unconditioned. Usually in fact there are contextual conditions that remain implicit, as the fact that only human agents are considered. Moreover it would be easy to recast any unconditioned proposition in a conditional form, by transforming the characterisation of the action to be performed into a precondition of performing a generic action: The categorical proposition ⌈it is permitted to walk in the park⌉, can be transformed into the synonymous conditional proposition ⌈if one performs in the park an action which consists in walking, than that action is permitted⌉.

However, we do not need to be worried by this apparent semantic equivalence between categorical and conditional propositions: This equivalence only concerns alternative ways of representing the same normative contents, and has no substantive impact on the analysis of legal reasoning. For it to be worthwhile to consider general deontic propositions that are specifically categorical, it is sufficient that it is possible (and useful) to express certain normative contents in a categorical form.

17.6.1. The Representation of Categorical Deontic Propositions

In natural language general deontic propositions are expressed in various ways. For example, to state categorically the forbiddenness of smoking, we may use any of the following locutions: "It is forbidden to smoke," "Nobody shall smoke," "No smoking allowed," "No smoking!," "Please, do no smoke!"

For expressing in a uniform way general deontic propositions having a categorical content we shall use some resources of predicate logic: variables x, y, w, and the universal quantifier FORANY. This enables us to formulate different kinds of such propositions in the following forms.

A general (categorical) obligative propositions has the form:

FORANY (x) ***Obl*** $Does{*}_x A$
(for any x, it is obligatory that x does A)

For example:

FORANY (x) ***Obl*** $Does_x$[pay taxes]

means that ⌈any x must pay taxes⌉, or more simply that ⌈everybody must pay their taxes⌉.

A general (categorical) prohibitive propositions has the form:

FORANY (x) ***Forb*** $Does{*}_x A$
(for any x, it is forbidden that x does A)

For example:

FORANY (x) ***Forb*** $Does_x$[smoke]

means, that ⌈any x is forbidden to smoke⌉, or more simply that ⌈everybody is forbidden to smoke⌉.

A general (categorical) permissive proposition has the form:

FORANY (x) ***Perm*** $Does*_x A$

For example:

FORANY (x) ***Perm*** $Does_x$[express x's opinion]
(for any x, it is permitted that x does A)

means that any x is permitted to express x's opinion, or more simply that everybody is permitted to express his or her opinion.

17.6.2. Personally-General and Specific Deontic Propositions

The most common reasoning one may do with personally-general categorical propositions is to infer personally-specific categorical propositions. This can be done according to the schema FORANY *elimination* or *specification*, which we borrow from predicate logic (this inference consists in dropping the universal quantifier and in substituting the quantified variable with and individual name).

Here are three examples of such inferences. The first inference concludes that John is obliged to pay taxes, given the premise that everybody is obliged to pay taxes. The subsequent ones are to be read similarly.

(1) FORANY (x) ***Obl*** $Does_x$[pay x's taxes]

---

(2) ***Obl*** $Does_{John}$[pay *John*'s taxes]

(1) FORANY (x) ***Forb*** $Does_x$[smokes]

---

(2) ***Forb*** $Does_{Mary}$[smokes]

(1) FORANY (x) ***Perm*** $Does_x$[express x's opinions]

---

(2) ***Perm*** $Does_{Claire}$[express *Claire*'s opinion]

17.7. Standard Deontic Logic and Deontic Paradoxes

In this section we shall move beyond our formalisation of deontic logic, and connect it to other analyses of deontic reasoning, and in particular, to the so-called *standard deontic logic*. First we shall consider some controversial schemata

for deontic reasoning, and then we shall address the deontic paradoxes that are originated by these schemata.

The comparison of different deontic systems will require us to use some logical notation. The reader who prefers to shun logical formalism can safely jump to the next chapter.

17.7.1. Standard Deontic Logic

The schemata of our formalisation (see Table 17.4 on page 467) do not exhaust the inferences that are usually enabled by most common action-logics and deontic logics.

For example, to obtain the so-called *old system* of deontic logic (originally proposed by von Wright 1951) we need to add one further reasoning schema. This schema, which we call *DO-distribution of obligations*, allows us to infer the obligation to do separate actions, given the obligation to do their conjunction.

$$DO\text{:}\ \ \textbf{\textit{Obl}}\ (A \text{ AND } B)\ \vdash (\textbf{\textit{Obl}}\ A \text{ AND } \textbf{\textit{Obl}}\ B)$$

The so-called *standard deontic logic* (see Hansson 1971; Hilpinen 1971, 13ff.) extends von Wright's system with a further logical principle, the axiom schema *OT-obligatoriness of tautologies*:

$$OT\text{:}\ \ \textbf{\textit{Obl}}\ (A \text{ OR NON } A)$$

Schema OT says that for any propositions A, it is obligatory that A holds or that it does not hold.

Note that while von Wright's system (like in our formalisation) deontic operators apply to actions, in standard deontic logic they apply to any kind of proposition: The deontic operator ***Obl*** in standard deontic logic expresses the idea that a state of affairs ought-to-be (in German, *Sein-sollen*), rather than the idea that someone ought-to-do an action (*Tun-sollen*).

Axiom OT more generally entails (if one admits the substitution of equivalent propositions), the obligatoriness of any *tautological* combination of actions, namely, any combination that logically cannot fail to exist, that holds in every logically possible situation (for instance, it is a logical necessity that either A is performed or it is not performed).[7]

Finally, we obtain the usual axiomatisation of standard deontic logic, by substituting DO with the following schema *DD-deontic detachment*:

$$DD\text{:}\ \ \textbf{\textit{Obl}}\ (\text{IF } A \text{ THEN}^m\ B)\ \vdash \text{IF } \textbf{\textit{Obl}}\ A \text{ THEN}^m\ \textbf{\textit{Obl}}\ B$$

[7] Various logicians and legal theorists have rejected OT, on account that it unduly connects alethic and deontic modality (by deriving obligation from logical necessity). For instance, von Wright (1951, 10) refuses this axiom, in the name of what he calls the *principle of deontic contingency*: "A tautologous act is not necessarily obligatory, and a contradictory act is not necessarily forbidden."

17.7.2. Paradoxes of Standard Deontic Logic

Standard deontic logic has a number of implications that many authors find weird or unacceptable. Some of these implications are indeed counted among the *deontic paradoxes*.

Some of these paradoxes are linked to the fact that in standard deontic logic, the following holds: whenever (1) IF A THEN^m B is a theorem,[8] which we abbreviate as $\lceil \vdash$ IF A THEN^m $B\rceil$, and (2) we know that A is obligatory, then (3) we can conclude that also B is obligatory. This means that the obligation to realise a state of affair A entails the obligation to realise any state of affairs B that is more generic (less specific) than A,[9] as the following reasoning schema OG indicates:

Reasoning schema: OG*-obligation generic-making*

(1) $\vdash$ IF A THEN B;
(2) ***Obl*** A
——— IS A REASON FOR
(3) ***Obl*** B

OG, which results from a combination of reasoning schemata for standard deontic logic, tells us the following: Whenever A is more specific than B,[10] the assumption that A is obligatory justifies the conclusion that also B is obligatory.

A first instance of this inference is the famous Ross's paradox (Ross 1941) of the derived obligation. Assume the following obligation, which concerns posting a letter, abbreviated as $Post$.

$R1$: ***Obl*** $Post$
(it is obligatory to post the letter)

For any proposition A, it is a logical theorem (and a logical truth) of propositional logic that IF THEN^m (A OR B) (this follows from OR *introduction*). Thus for instance:

$R2$: $\vdash$ IF $Post$ THEN^m $Post$ OR $Burn$
(it is a logical theorem that ⌈if ⌈the letter is posted⌉ THEN^m ⌈the letter is posted or burned⌉⌉)

Thus, according to schema OG, from ($R1$) and ($R2$) we draw the following conclusion:

[8] A theorem is a proposition we can conclusively establish just on the basis of the logical form of A and B, without the need to appeal to any premise.

[9] We assume that a proposition B is more generic than (more exacly, at least as generic as) a proposition A, if it is logically necessary (it is a theorem) that if A obtains, than also B obtains, i.e., if IF A THEN B is a theorem.

[10] When it can be conclusively established that whenever A is true also B is true.

$R3$: ***Obl*** ($Post$ OR $Burn$)
(it is obligatory that the letter is posted or burned)

Thus, the premise that it is obligatory to post a letter entails the conclusion that it is obligatory to post it or to burn it.

An even more absurd instance of schema OG is exemplified by so-called paradox of the *Good Samaritan*: Having the obligation to help an injured person implies that it is obligatory to injure this person. For instance, let us assume that it is obligatory that Tom acts as the Good Samaritan toward Mary, to wit, that he helps Mary who is injured (we abbreviate ⌈Tom helps Mary⌉ with *Help* and ⌈Mary is injured⌉ with *Injured*):

$S1$: ***Obl*** ($Helps$ AND $Injured$)
(it is obligatory that John helps Mary who is injured)

According to schema AND *elimination* we obtain the following obvious logical theorem (and logical truth):

$S2$: $\vdash$ IF $Help$ AND $Injured$ THEN^m $Injured$
(it is a logical theorem that ⌈if ⌈Tom helps Mary who is injured⌉, then ⌈Mary is injured⌉⌉)

Propositions ($S1$) and ($S2$) lead us to conclude, according to OG, that:

$S3$: ***Obl*** $Injured$
(it is obligatory that Mary is injured)

Thus, if we believe that it is obligatory that Tom acts as a Good Samaritan (that he helps Mary who is injured), we must conclude, according to standard deontic logic, that it is also obligatory that Mary is injured.

Another disquieting instance of the OG schema concerns the notion of knowledge, and is called *paradox of the knower*, or paradox of *epistemic obligation* (Åquist 1967). Assume that a person, let us call him John, has the task of watching customers in a supermarket. John must pay attention, so that he is aware of any illegal activities going on: If somebody steals, it is obligatory that John knows that this persons is stealing (and inform the direction). Assume that Mary is stealing. According to schema *syllogism* we can establish the following conclusion, which provides the premise of our paradoxical inference:

$E1$: ***Obl*** $Knows_{John}$[Mary is stealing]
(it is obligatory that John knows that Mary is stealing)

For any proposition A, it is a logical theorem that, if we know A, A is true (in the logic of knowledge, for a belief to be knowledge, it must concern a true proposition):

$E2$: $\vdash$ IF $Knows_{John}$[Mary is stealing] THEN^m [Mary is stealing]
(it is a logical theorem that ⌈IF ⌈John knows that Mary is stealing⌉ THEN^m ⌈Mary is stealing⌉⌉)

According to OG, we can draw from ($E1$) and ($E2$) an absurd conclusion:

$E3$: ***Obl*** [Mary is stealing]
(it is obligatory that Mary is stealing)

Thus, the premises that John ought to know that Mary is stealing surprisingly entails, in standard deontic logic, that Mary ought to steal.

Finally, let us address the most famous puzzle of standard deontic logic, the so-called Chisholm's paradox (Chisholm 1963). Assume all of the following propositions (the example is taken from Castañeda 1981):

$C1$: ***Obl*** $AttendCeremony$
(it is obligatory that Jones attends the June commencement ceremony)

$C2$: ***Obl*** (IF $AttendCeremony$ THEN^m $WearRegalia$)
(it is obligatory that ⌈if Jones attends the June commencement ceremony, then he wears academic regalia⌉)

$C3$: IF NON $AttendCeremony$ THEN^m NON ***Obl*** ($WearRegalia$)
(if Jones does not attend the June commencement ceremony, then it is not obligatory that he wears academic regalia)

$C4$: NON $AttendCeremony$
(Jones does not attend the June commencement ceremony)

From premise ($C2$) according to schema DD, we can infer:

$C5$: IF ***Obl*** $AttendCeremony$ THEN^m ***Obl*** $WearRegalia$
(If it is obligatory that Jones attends the June commencement ceremony, then it is obligatory that he wears the regalia)

Given ($C1$) and ($C5$), we can establish, according to *detachment*, the following result:

$C6$: ***Obl*** ($WearRegalia$)
(it is obligatory that Jones wears the regalia)

On the other hand, from premises ($C3$) and ($C4$) according to schema *detachment*, we can infer conclusion $C7$, which contradicts $C6$:

$C7$: NON ***Obl*** ($WearRegalia$)
(it is not obligatory that Jones wears the regalia)

The paradoxality of Chisholm Paradox consists indeed in the fact that apparently sensible and consistent premises (the set $C1$–$C4$), lead us to contradictory conclusions.

The Chisholm Paradox is also called the paradox of *contrary-to-duty* imperatives, since it originates from the combination of two obligations: The first requires an action A to be performed; the second requires an incompatible action B to be accomplished, in the event that A is not performed (in the case that the obligation to do A is violated). It has been argued that this paradox shows how standard deontic logic fails to provide a genuine notion of *derived obligation*: Deontic logic tells us what would be the case if all obligation were fulfilled, but fails to tell us would we ought to do in the real word, where obligations can be violated.

17.7.3. How to Avoid Deontic Paradoxes

We cannot here discuss any further the deontic paradoxes, since this would require a detailed technical discussion, going beyond the scope of the present volume, in order to analyse and compare different intuitions, formalisation, and logical systems.[11] Let us just observe that the deontic paradoxes do not arise in our account of deontic reasoning, which is more restrictive than standard deontic logic in two regards:

- we reject all of the axioms and inference schemata which originate the paradoxes, like DO (distributivity of obligation), OT (obligatoriness of the tautology), DD (deontic detachment) and OG (obligation generic-making);
- we apply deontic operators only to action-descriptions.

Our logical parsimony enables us not only to avoid paradoxes, but also to omit addressing many controversial issues of deontic logic. This does not exclude that for certain domains or applications a stronger deontic logic may be needed, whose adequate formalisation requires paradoxes and controversies to be carefully addressed. This, however, we can leave to specialised research on deontic logic.

[11] For a list of the main paradoxes of deontic logic, see Meyer and Wieringa 1993b, sec. 1.3. For a discussion of some of them see Castañeda 1981. There are also interesting paradoxes of normative reasoning which are not related to deontic logic, like in particular Ross's paradox of the self-amending legislation (Ross 1969), which concerns the possibility of amending the rule which confers the power to make constitutional amendments (we shall address this paradox in Section 27.3.4 on page 713).

Chapter 18

NEGATION, PERMISSION, AND COMPLETENESS

In this chapter we shall address an important and still very controversial issue of deontic logic: the *negation of deontic propositions*. In particular, we need to understand the connection between the negation of the forbiddenness of action A (which we express as NON ***Forb*** A) and the permission of A (which we express as ***Perm*** A).

The discussion of this issue will lead us into a more general problem: the meaning and logical function of *negative legal propositions*. Finally, this will lead us into an even broader subject, the subject of the *completeness of the law* (or, seen from the complementary perspective, the problems of *gaps in the law*). Though we will be unable to consider adequately the huge philosophical and doctrinal debate on this subject, we will state our view on whether, and in what sense, the law (and legal cognition) may be said to be complete.

18.1. Permission, Ignorance, Non-Derivability

We shall distinguish two different aspects usually merged in discussing the notion of permission. The first concerns the distinction between being permitted and not being prohibited. The second concerns the distinction between having the information that a certain deontic status does not hold, and not having the information that it does hold.

18.1.1. Being Permitted and Not Being Prohibited

We need first to consider whether proposition:

> NON ***Forb*** B
> (it is not forbidden that B)

can be considered to be equivalent to proposition:

> ***Perm*** B
> (it is permitted that B)

This issue can be cast in epistemic terms: Is believing that B is not forbidden the same as believing that B is permitted?

Our answer to this question is positive. In general, as we have seen in Section 3.2.2 on page 101, the belief in the negation of the obligational proposition ***Obl*** A, namely, the belief that:

NON ***Obl*** A
(it is not obligatory that A)

corresponds to the doxification of a negative intention, i.e., to the state of mind of *excluding* the intention to do A. In particular, the negation of the prohibition to do A, that is:

NON ***Forb*** A
(it is not forbidden that A)

or equivalently:

NON (***Obl*** NON A)
(it is not obligatory that NON A)

doxifies the state of mind of an agent which excludes to adopt the instruction that action A shall be omitted. This is exactly the state of mind corresponding to having the intention that action A may be done, which (see Section 3.2.2 on page 101) can be doxified as:

Perm A
(it is permitted that A)

Therefore, we may conclude that the belief that A is not forbidden coincides with the belief that A is permitted. This conclusion corresponds to the following statement of von Wright (1983a, 187), though he speaks of norms, rather than of normative beliefs:

> [T]he negation norm of an obligating norm permits the omission of the thing to which the obligating norm obliges—and the negation norm of a permissive norm makes obligatory the omission of the thing which the permissive norm permits.

Before addressing non-forbiddenness we need to insist on the distinction between forbiddenness as a deontic status and prohibitive acts (acts of forbidding). On the one hand, A may be forbidden on the basis of grounds that have nothing to do with acts of prohibiting (in other words, it may be the case that A is forbidden though nobody has prohibited it). For instance, we may conclude that A is forbidden according to teleological reasoning, that is, since A's omission is required for achieving some important legal values. On the other hand, A may not be forbidden, though somebody has performed an act aimed at prohibiting A: The prohibitive act may not succeed in bringing about that A is now forbidden, since it has been issued invalidly, or since it has been repealed, or since it conflicts with a more important or more special permission.

Thus, when saying that A is not forbidden, we do not mean that nobody has prohibited A, but rather that A does not possess the status or property of

forbiddenness (illicitness). This equivalence between being permitted and not being forbidden leads us to the following definition of permission (in the sense of permittedness).

Definition 18.1.1 *Permission. Action A is* permitted *iff it is not the case that A is forbidden:*

$$\textbf{\textit{Perm}}\ Does_j A \equiv \text{NON}\ (\textbf{\textit{Forb}}\ Does_j A)$$

(⌈it is permitted that j does A⌉ is equivalent by definition to ⌈it is not forbidden that j does A⌉)

Remembering the connection between forbiddenness and obligatoriness, we may equally provide the following alternative definition:

Definition 18.1.2 *Permission. Action A is* permitted *iff it is not the case that A's omission is obligatory:*

$$\textbf{\textit{Perm}}\ Does_j A \equiv \text{NON}\ (\textbf{\textit{Obl}}\ \text{NON}\ Does_j A)$$

(⌈it is permitted that j does A⌉ is equivalent by definition to ⌈it is not obligatory that j does not do A⌉)

Having defined *permitted* as "not forbidden" or "not obligatory to omit" does not necessarily imply that forbiddenness or obligatoriness are more basic normative statuses than permittedness. As far as logic is concerned, we might as well have started with permittedness, and defined the other deontic statuses in the term of it (this was done, for instance, by von Wright 1951).

However, from our psychological perspective—since obligation doxifies intention, and permission doxifies the rejection of an intention—we may view obligatoriness as being prior to permission, and we are thus justified in adopting a corresponding definitional strategy.

18.1.2. Permission as Ignorance

Having established that permission amounts to non-forbiddenness, we need now to consider whether having the information that A is permitted may be equated to not having the information that A is forbidden.

This issue is confusing since it is not so clear what we mean by (not) having the information that something holds.

In a first, and quite plausible sense, having information about something means having a belief (or having knowledge, when the information is true). From this perspective, we need to assess whether believing that action A is permitted—or, which is the same, that A is not forbidden—amounts to not believing that A is forbidden.

It seems to us that such view cannot be maintained, since there is a substantial difference between the following mental states:

- having the belief that A is permitted, or which is the same, having the belief that A is not forbidden;
- not having the belief that A is forbidden.

In the first case, one is convinced that action A has the property of being permitted—or, which is the same, one is convinced that A does not have the property of being forbidden. In the second case, one simply does not have the belief that A is forbidden, and may not have either the belief that A is not forbidden. To express this idea more clearly, let us write:

$\mathit{Believes}_j A$
(j believes that A)

to mean that j believes proposition A.

Let us first observe that in general (and obviously) believing in a negation is different from not believing in the negated proposition

1. $\mathit{Believes}_j(\text{NON } A) \not\equiv \text{NON } \mathit{Believes}_j(A)$
($\lceil j$ believes that NON $A\rceil$ is not equivalent to $\lceil j$ does not believe that $A\rceil$)

For instance, having the belief that Mary has not arrived, is different from not having the belief that she has arrived. The second state of mind, but not the first, also exists when I do not know whether she has arrived or not. According to (1), we may state that having the belief that A is not forbidden is different from not having the belief that A is forbidden:

2. $\mathit{Believes}_j(\text{NON } \textbf{\textit{Forb}} \ A) \not\equiv \text{NON } \mathit{Believes}_j(\textbf{\textit{Forb}} \ A)$
($\lceil j$ believes that A is not forbidden$\rceil$ is not equivalent to $\lceil j$ does not believe that A is forbidden$\rceil$)

Considering that, as we know, being permitted amounts to not being forbidden:

3. $\textbf{\textit{Perm}} \ A \equiv \text{NON } \textbf{\textit{Forb}} \ A$

we get that believing that A is permitted amounts to believing that A is not forbidden:[1]

4. $\mathit{Believes}_j(\textbf{\textit{Perm}} \ A) \equiv \mathit{Believes}_j(\text{NON } \textbf{\textit{Forb}} \ A)$
($\lceil j$ believes that A is permitted$\rceil$ is equivalent to $\lceil j$ believes that A is not forbidden$\rceil$)

Finally, given that believing that action A is not forbidden is different from not believing that A is forbidden, according to (2), we are lead to conclude that believing that A is permitted is also different form not believing that A is forbidden:

[1] To fully validate this inference we should address the difficult issue of the intensionality of the notion of belief, and discuss under what conditions belief in a proposition entails belief in logically equivalent propositions. For our purpose, however, it is sufficient to rely on commonsense, and assume that such entailment holds at least when the reasoner is aware of the equivalence.

5. $\mathsf{Believes}_j(\textbf{Perm}\ A) \not\equiv$ NON $\mathsf{Believes}_j(\textbf{Forb}\ A)$

(⌈j believes that A is permitted ⌉ is different from ⌈j does not believe that A is forbidden⌉)

18.1.3. The Case of Socrates, the Judge Who Knows That He Does not Know

Let us develop an example to clarify the distinction between believing that something is permitted and not believing that it is forbidden. Consider that only in the last 20 years have most countries introduced laws extending copyright protection to software. In the United States this was done with the Computer Copyright Act in 1980, while in Italy it was done only in 1992, according to the 1991 European directive on software protection.

Before these acts were enacted, there was a considerable debate, where some authors (and some judges) affirmed that copyright protection extended to software, so that unauthorised duplication of computer programs was forbidden, while others affirmed that this was not the case.

Assume that a judge approached the issue of the unauthorised duplication of computer programs in the late 1960s.

We call him *Socrates*, since we want to construct him as an exemplar of epistemic self-awareness. As opposed to Dworkin's Hercules—which is an exemplar of superhuman legal skills—Socrates is (like all humans) a bounded cogniser: He has limited cognitive capacities, in perception, ratiocination, heuresis, analogy, and experimentation. Socrates however—differently from many humans—has a clear awareness of his cognitive limitation: He knows that his cognition only provides fallible outcomes, on the basis of limited input information and constrained processing capabilities. Rephrasing, in an attenuated form, the famous motto which is attributed to the ancient Socrates (according to Diogenes Laertius, *Life of the Philosophers*, 2, 32), our judge knows that there is much he does not know. Judge Socrates, however, does not view this motto as a profession of scepticism, but rather as a statement of the condition which justifies his cognitive efforts, and his tendency to criticise, refine and review his past cognitive achievements.

Assume that, when starting to consider the matter, Socrates has no idea concerning the deontic status of unauthorised duplication of computer programs (probably he, like most people in the 1960s, does not even know what a computer program is).

In other words, when starting his inquiry, neither Socrates believes that it is forbidden to duplicate software, nor does he believe that it is not forbidden (that it is permitted). Correspondingly, we may describe his state of mind as follows:

NON $\mathsf{Believes}_{Socrates}(\textbf{Forb}$ [software is duplicated]$)$ AND
NON $\mathsf{Believes}_{Socrates}($NON $\textbf{Forb}$ [software is duplicated]$)$

At this stage, it would be unreasonable for Socrates to infer that it is not forbidden (that it is permitted) to duplicate software from the simple fact that he does not have the belief that duplication is forbidden. Whether duplication is forbidden or not is what he needs to establish through a legal inquiry: He cannot infer non-forbiddenness from his own present state of uncertainty (ignorance). Thus the proposition that Socrates does not have the belief that duplication if forbidden (which is true) is different from the proposition that Socrates believes that duplication is not forbidden (which is false).

$$\text{NON } \mathit{Believes}_{Socrates}(\textbf{\textit{Forb}} \text{ [software is duplicated]}) \neq$$
$$\mathit{Believes}_{Socrates}(\text{NON } \textbf{\textit{Forb}} \text{ [software is duplicated]})$$

Finally, from the equivalence between not being forbidden and being permitted, we conclude that, with regard to Socrates, not having the belief that unauthorised duplication is prohibited is different from having the belief that it is permitted.

$$\text{NON } \mathit{Believes}_{Socrates}(\textbf{\textit{Forb}} \text{ [software is duplicated]}) \neq$$
$$\mathit{Believes}_{Socrates}(\textbf{\textit{Perm}} \text{ [software is duplicated]})$$

In conclusion, we need to reject the view that ⌈believing that an action A is permitted⌉ can be assimilated to ⌈not believing (or not knowing) that A is forbidden⌉: Permission cannot be equated with uncertainty or ignorance about a prohibition.

18.1.4. Permission as Non-Derivability

Now that we have rejected the view that believing that action A is permitted amounts to not having the belief that A is forbidden, we need to consider whether we can recast the link between permission and lack of information on prohibition in a different way: This is the idea that A is permitted, in situation circumstances Cs, if A's prohibition (its forbiddenness) in Cs is not derivable from the law with regard to Cs.

Let us first specify our use of the term *situation* and of the related term *circumstance*.

Definition 18.1.3 *Situation. By a* situation*, with regard to a proposition φ, we mean all states of affairs that are that are relevant to the establishment of whether φ holds. By a* circumstance *of a situation, we mean a proposition describing any of such states of affairs. By* situation circumstances*, we mean the set of all circumstances of a situation.*[2]

[2] A *situation* is often identified as possible state of the world: The full description of a situation S requires specifying whether any possible (atomic) proposition P holds or does not hold in S. From this perspective, we may thus view the description of a situation as a complete set of

A situation may be present (its circumstances obtain now), past (its circumstances obtained at certain time-points in the past), or only hypothetic (it includes circumstances which would hold under certain conditions).

To understand the connection between permission and non-derivability of prohibition, we need to consider how we should in general understand expressions of the form ⌈it is not derivable from the law that ⌈φ in situation circumstances Cs⌉⌉, where φ is any normative proposition.

First of all, we need to observe that the statement of φ's non-derivability from the law is very imprecise, unless we specify what set of premises we include in "the law" and what patterns of reasoning we use to derive conclusion from such premises: A proposition φ may be derivable from certain sets of premises and not from certain other ones, according to certain inference schemata, and not according to other schemata.

Let us first clarify that we say that a proposition φ is obtainable from a certain set of legal contents (noemata), with regard to a situations, when φ is derivable from the premises set we obtain by combining the legal propositions and the (circumstances of the) situation. Now, the question we need to ask, with reference to legal contents Ls, situation circumstances Cs and reasoning schemataRs is the following: "What conclusion can one derive from Ls with regard to Cs, by using Rs?"

This question can more exactly be expressed as "What propositions are derivable from $Ls \cup Cs$, according to Rs?"[3] or also as "What propositions does set Ls entail according to Rs, with regard to circumstances Cs?"

Let us address this question by considering a specific example. Assume all of the following, with regard to Socrates, the judge in the software case we considered in the previous section:

- he can find in the copyright statute the set Ls_1 of legal contents in Table 18.1 on the next page;
- he is aware of all relevant circumstances Cs_1 in Table 18.2 on the following page;

circumstances Cs, where each circumstance c in Cs is an atomic proposition or negation of such a proposition. This idea was originally developed in Carnap 1950 and 1956. It was applied to the law by Alchourrón and Bulygin (1971, 21ff), who use the term *case* to refer to what we call a *situation*. It also corresponds to the idea of a *world* in possible-words semantics for modal logic, according to the approach introduced in Kripke 1963. For our purposes we need to relax this notion of a situation, since the relevant circumstances may include states of affairs holding at different time points (for instance, ⌈Jane married Mark⌉, one year after ⌈Jane had an affair with Andrew⌉, two years after ⌈Jane was no longer married to Mark⌉), and non truth-functional connections between states of affairs (for instance, ⌈Jane having this affair caused the breakdown of her marriage⌉).

[3] We use the expression $Ls \cup Cs$ for referring to the *set-theoretical union* of sets Ls and Cs, which is the set of all elements contained either Ls or in Cs. In our example, this is the set of all propositions listed in Tables 18.1 and 18.2.

a_1: FORANY (x)
IF $[x$ is a literary work$]$ AND NON $[x$ is in the public domain$]$
THEN ***Forb*** $[x$ is duplicated$]$
a_2: FORANY (x)
IF $[x$ is a work of fiction$]$ OR $[x$ is a scientific contribution$]$
THEN $[x$ is a literary work$]$
a_3: FORANY (x)
IF $[x$ is in the public domain$]$
THEN ***Perm*** $[x$ is duplicated$]$

Table 18.1: *Legal contents Ls_1*

b_1: *Tom's code* is a computer program
b_2: *Great Gatsby* is a work of fiction
b_3: *War and Peace* is a work of fiction
b_4: NON [*Great Gatsby* is in the public domain]
b_5: NON [*Tom's code* is in the public domain]
b_6: *War and Peace* is in the public domain

Table 18.2: *Situation circumstances Cs_1*

- he proceeds according to a set of reasoning schemata Rs_1, including all inferences for classical logic (all schemata we introduced in Chapter 15).

In our example, we may say that the legal propositions in set Ls_1 entail the prohibition to duplicate *Great Gatsby*, with regard to situation circumstances Cs_1. Given the premises in $Ls_1 \cup Cs_1$, according to Rs_1, Socrates can indeed infer the following proposition:

Forb [*Great Gatsby* is duplicated]

He can achieve this result according to the inference in Table 18.3 on the next page.

Similarly, Socrates can infer a permission with regard to *War and Peace*:

Perm [*War and Peace* is duplicated]

With regard to Tom's program, he has no way (according to Rs_1) to infer from $Ls_1 \cup Cs_1$ neither:

Forb [*Tom's code* is duplicated]

nor:

1. b_2: *Great Gatsby* is a work of fiction
2. a_3: FORANY (x)
   IF [x is a work of fiction] OR [x is a scientific contribution]
   THEN [x is a literary work]
3. *Great Gatsby* is a literary work ⟨from 1 and 2, by *syllogism*⟩
4. b_5: NON [*Great Gatsby* is in the public domain]
5. a_3: FORANY (x)
   IF [x is a literary work] AND NON [x is in the public domain]
   THEN ***Forb*** [x is duplicated]
6. ***Forb*** [*Great Gatsby* is duplicated] ⟨from 3, 4 and 5, by *syllogism*⟩

Table 18.3: *Inference from* $Ls_1 \cup Cs_1$*, according to* Rs_1

NON (***Forb*** [*Tom's code* is duplicated])

To express in general the idea that a set of premises Ps entails a proposition φ, according to reasoning schemata Rs, we write:

$$Ps \ \vdash_{Rs} \varphi$$

With reference to the example above, Socrates should affirm that premise set $Ls_1 \cup Cs_1$ *entails* the prohibition to duplicate *Great Gatsby*, according to reasoning schemata Rs_1. Socrates's statement to that effect can be formally expressed as follows:

$$Ls_1 \cup Cs_1 \ \vdash_{Rs_1} \textbf{\textit{Forb}} \ [\textit{Great Gatsby} \text{ is duplicated}]$$

Similarly, to express in general the idea that a premises set Ps does not entail a proposition φ, according to reasoning schemata Rs, we write:

$$Ps \ \nvdash_{Rs} \varphi$$

With reference to the example above, Socrates would affirm that premises set $Ls_1 \cup Cs_1$ *does not entail*, according to Rs_1, the prohibition to duplicate Tom's code:

$$(a) \ Ls_1 \cup Cs_1 \ \nvdash_{Rs_1} \textbf{\textit{Forb}} \ [\textit{Tom's code} \text{ is duplicated}]$$

Equally, such premises set *does not entail* that it is not forbidden (that it is permitted) to duplicate the code with regard to situation circumstances Cs_1:

$$(b) \ Ls_1 \cup Cs_1 \ \nvdash_{Rs_1} \text{NON } \textbf{\textit{Forb}} \ [\textit{Tom's code} \text{ is duplicated}]$$

Propositions (a) and (b) are perfectly consistent. Socrates, after looking into premises set $Ls_1 \cup Cs_1$, is aware that he cannot conclude either that it is forbidden or that it is not forbidden (that it is permitted) to duplicate software.

In fact, premises set $Ls_1 \cup Cs_1$ does not tell him anything about the deontic status of the duplication of computer software. To establish this status Socrates needs to consider further legal and factual information, and to deploy other ways of reasoning.

This further effort may lead him to conclude that the duplication is permitted or that it is forbidden, depending on what information he finds and on how he processes it (as we said at the end of the sixties and in the early seventies judges reached different conclusions with regard to the duplication of software).

18.2. Completeness of the Law

According to the conclusion we achieved in the previous section, we must reject the idea that the non-derivability (from a limited set of normative premises) of the prohibition of action A, amounts to A's permission.

We may however wonder whether this idea can be accepted in the limit case, that is, when the whole law is considered. Can we say that A is permitted in a situation S when A's forbiddenness is not derivable from the whole law, with regard to situation S, according to any rational inference methods? And more generally, can we say that for any legal proposition φ and any situation S, φ holds in S, whenever a ideal legal cogniser would fail to derive NON φ with regard to S?

By answering these questions we will be able to take a stand regarding the controversial issue of the completeness of the law and of legal cognition.

18.2.1. The Completeness of Legal Cognition: A Noble Dream?

The failure to derive the negation of a legal proposition NON φ may be considered as a proof of φ only if we lift any *a priori* limitations concerning both what information can be taken into account and what rational reasoning methods are to be applied. Any limitation in these regards can lead Socrates—when assimilating non-derivability of ***Forb*** A to ***Perm*** A—to wrong conclusions.

For instance, Socrates cannot assume that the law does not contain the prohibition to duplicate of software, on the basis of the only fact that legislation does not entail this prohibition. He is aware that there is also the possibility that the prohibition is derivable from further legal sources, like precedents. Thus, it would be wrong for him to jump to the conclusion that duplicating software is not forbidden (and thus permitted), on the basis of the only fact that legislation does not forbid it.

Similarly, Socrates cannot conclude that the law does not contain the prohibition to duplicate software, on the basis of the only fact that conclusive (deductive) inferences do not provide this result: It is possible that the prohibition can be obtained through defeasible inferences or analogies. In fact, before statutes on software protection were issued, many lawyers (and judges), in various coun-

tries, affirmed that, on the basis of an analogy with literary works, it was possible to conclude that it was forbidden to duplicate software.

Socrates—being aware of his own cognitive limitations—does not in general assimilate his inability to derive a certain proposition to the derivation of the negation of that proposition. He does that only under restricted circumstances, that is, when all of following conditions are satisfied:

1. The domain he is considering is characterised by *bivalence*: For any proposition concerning this domain either this proposition or its negation is the case, i.e., there are no undetermined propositions.
2. The information (and the cognitive tools) he already has at his disposal is complete: It enables him to obtain exactly every positive proposition which holds in that domain.

Only when both such conditions hold, can he view his inability to establish that ⌈***Forb*** φ⌉ as a decisive reason for concluding that ⌈NON ***Forb*** φ⌉, which amounts to ⌈***Perm*** φ⌉. Let us consider whether both conditions hold with regard to the law.

Possibly we may accept condition (1) in the normative domain: It is necessarily the case that, for any legal proposition φ and any possible situation S, either φ or NON φ holds in S (for a recent discussion, see Golding 2003). This means—according to the connection we established between practical truth and optimal practical cognition (see Section 3.3 on page 102)—that for any proposition φ and any possible situation S, perfect legal cognition would lead us either to endorse φ or to endorse NON φ. This seems to be what is claimed by Dworkin (1977a; 1985a), when saying that there is one right solution even for hard cases, and that this is the solution that judge Hercules, the perfect legal cogniser, would find.

We may indeed give the assumption of bivalence an epistemic form, by saying that ideal legal cognition as a whole is complete, or has no *gaps*: A complete (an ideal) rational inquiry, which takes into account all relevant normative and factual information, would lead an ideal cogniser to reach a determinate outcome with regard to every issue having the form "Is it the case that φ in S?," where φ is any legal proposition and S is any situation. Such a reasoner would, for any legal proposition φ and any situation S, either endorse ⌈φ in S⌉ (exactly in case that φ is the case in S) or endorse ⌈NON φ in S⌉ (exactly in case that φ is not the case). Thus an unbounded reasoner could view his or her inability to establish φ as a proof that φ is not the case.[4]

Note that when the notion of legal cognition is broadly understood (putting no constraints on the inputs to legal cognition and on the rational ways of processing them), the "noble dream" (as Hart 1983a would say) of the completeness

[4] This statement needs to be qualified with regard to Gödel's incompleteness theorem, according to which there are true but non-provable propositions.

of legal cognition becomes a very modest idea, having little practical importance: This is the idea that there are no (or few) *Buridan's ass issues* in legal reasoning. According to this idea, namely, there are no (or few) issues such that alternative incompatible solutions to these issues would be equally delectable (equally adoption-worthy) to an ideal legal cogniser.

The noble dream would indeed be an impossible fantasy (or at most a very remote, and questionable, political ideal, see Section 14.2.1 on page 394) if we were setting to ourselves the following restrictions:

- our cognitive inputs were limited to the currently shared rules of our community (or to the rules which have been expressly stated by a legislator), and
- our ways of reasoning were limited to deductive inference (or also to the patterns for rule-based defeasible inference).

The "dream" becomes instead a possibly controversial, but quite reasonable (and even trivial) assumption, if one abandons both limitations, that is, if one assumes that completeness concerns ideal legal cognition, having perfect unbounded cognitive resources, with regard to both the available inputs and the ways of processing them.[5]

Under this condition, indeed, the dream of completeness has limited practical implications for a reasoner like Socrates, who is (and is aware to be) a bounded cogniser. Even if Socrates believed that necessarily either φ of NON φ is the case (and that Hercules necessarily either would conclude for φ of for NON φ), he would not view his failure to establish φ as a proof of NON φ. This fact is independent from the principle of bivalence: Socrates knows that it is possible that φ is the case, also when he is unable to establish this conclusion.[6]

For instance, assume that Socrates accepts the principle of bivalence, also its epistemic version: He believes that duplicating software either is legally forbidden or is legally permitted, and he accepts that Hercules would know which one of the two is the case. However when starting his inquiry, he is aware that he is no Hercules: He does not know whether the duplication is forbidden or permitted, and he has no warranty that when he forms a belief on this matter, this belief will be correct.

[5] This claim still is possibly controversial, since it may be argued that there are many Buridan's-ass issues in legal reasoning, or even that most (serious) legal issues are Buridan's-ass issues, with regard to legal cognition. However, this would entail a conclusion which many lawyers would not find very plausible: A large area of legal decision-making—at least so long as it pretends to be rational—is a lottery in disguise.

[6] We cannot here tackle the problem of gaps in the law in general terms, which would require us to address technical aspects of meta-logics (concerning the notion of derivability and decidability), to examine specific areas of substantive law, and to discuss the huge literature on this subject. On gaps in the law, see, for instance: Zitelmann 1903; Bobbio 1960; Conte 1962; Conte 1966; Kelsen 1967, sec. 35.g 245ff.; Alchourrón and Bulygin 1971, secs. 5 and 6.

Under such conditions, Socrates should try to find reasons in favour or against the prohibition to duplicate software, using all materials and all ways of reasoning at his disposal, rather than drawing inferences from his current ignorance of the matter.

18.2.2. Completeness of Sections of the Law

The idea that the optimal legal cognition has no gaps, besides being consistent with one's awareness of one's ignorance, also is consistent with the view that limited sets of legal information may have gaps. Thus, this idea is consistent with the view that a certain particular set Ls^* of legal information (a set of legislative rules, a set of cases, of customs, and so on) when combined with certain reasoning procedures Rs^* is incomplete, namely, with the idea that Ls^* fails to provide a solution to some legal issue in some situation. More exactly, this idea is consistent with the view that there exists at least one legal proposition φ and one situation Cs^*, such that $Ls^* \cup Cs^*$ does not entail, according to Rs^*, neither φ nor NON φ:

$$(Ls^* \cup Cs^* \;\nvdash_{Rs^*} \varphi) \text{ AND } (Cs^* \cup Ls^* \;\nvdash_{Rs^*} \text{NON } \varphi)$$

In particular, the completeness of ideal legal cognition is consistent with the incompleteness of the set of all current legal beliefs of certain community c, namely, the set of all legal propositions that are currently endorsed by c.

The latter form of incompleteness consists more precisely in the fact that the set LBs_c of the *legal beliefs* of that community (with are kind of normative beliefs in the sense of Section 10.2.9 on page 292) is not complete, with regard to reasoning schemata for conclusive reasoning (CRs) and for defeasible reasoning (DRs). This means that there exist a legal proposition φ and situation Cs^* such that:

$$(LBs_c \cup Cs^* \;\nvdash_{\{CRs,DRs\}} \varphi) \text{ AND } (LBs_c \cup Cs^* \;\nvdash_{\{CRs,DRs\}} \text{NON } \varphi)$$

This is indeed a situation that often happens when a new issue emerges: Consider for instance human cloning, genetic engineering, and so on

However, the incompleteness of the normative beliefs currently endorsed by the legal community entails neither the incompleteness of legal cognition, nor the incompleteness of the law (intended as the set of normative noemata that are adoption worthy in legal reasoning). A legal reasoner even when his or her community has not yet adopted a rule establishing whether φ or NON φ is legally the case, may be able to opt for one of the two alternative solutions, and view his or her choice as legally binding (as being part of the law). For instance, we can achieve this result according to teleological reasoning or to analogies.

Obtaining specific conclusions may require adopting new general propositions, propositions that are not yet endorsed by one's community, but which one hopes and believes will become normative beliefs of one's community. The

ground for viewing such general propositions as legally binding may consist in their inferential connections with contents which are known to be legally binding (and in particular in teleological connections with legal values). Moreover, such propositions can be viewed as legally binding on the basis of the preferability of a legal theory containing them to a legal theory excluding them, a preferability to be measured according the criteria which we included in the idea of legal coherence (see Section 4.1.4 on page 125), subject to the requirement of plural adoptability (see Section 10.1.3 on page 274).

From our perspective, we can say that a particular legal conclusion follows from the law even when we reach this conclusion on the basis of normative propositions we have devised according to heuresis and we have endorsed (as being legally binding) on the basis of coherence evaluations (in particular, according to the reasoning model we shall expound in Chapters 28 and 29).

This is because for us *the law* includes all practical noemata which are legally binding (adoption-worthy in legal reasoning), and a general proposition can be legally binding exactly because of its coherentist preferability: We (as bounded cognisers) may be wrong in believing that a certain noema is legally binding, but we are necessarily right (according to our approach) in assuming that all legally binding propositions belong to the law.

18.2.3. Closure Meta-Rules

A legal system can contain meta-rules establishing that certain legal conclusions hold unless certain other legal conclusions can be obtained in certain ways from certain kinds of premises. For instance, many legal systems contain the principle *nulla poena sine lege* (no criminal punishment without a law), which we interpret (according to the civil law tradition) as the requirement that all crimes have to be specified through legislation. This means that we need to assume that an action is no crime, unless the legislative provisions entail that it is a crime.

In our framework, if $LegRs$ is the set of the legislative rules (as constructed according to legal interpretation), Cs is a set of situation circumstances, CRs is the set of conclusive (deductive) reasoning schemata, and DRs is the set of the defeasible reasoning schemata, we can recast such a meta-rule for the criminal law as follows:

FORANY (A, Cs)
IF $(LegRs \cup Cs) \nvdash_{CRs,DRs} [A \text{ is a crime in } Cs]$
THEN NON $[A \text{ is a crime in } Cs]$

(for any action A and situation circumstances Cs, if the set of legislative rules $LegRs$, combined with Cs, does not lead, according to conclusive and defeasible reasoning, to the conclusion that action A in circumstances Cs is a crime, then A is no crime in Cs[7])

Rules linking the negation of a proposition φ to the non-derivability of φ can be called *closure rules*, since they ensure that a conclusion is always obtainable:

[7] In this and in the following formulas, by "φ in Cs," where φ is a proposition and Cs is a

When we adopt a closure rule, then in every possible case either φ is derivable, or NON φ is derivable (for specific reasons or anyway according to the closure rule).

18.2.4. Strong Permission and Weak Permission

The link between non-derivability and substantive legal conclusions has often been addressed with regard to the connection between prohibition and permission.

In particular, it has been much discussed whether the non-derivability that an action A is forbidden necessarily leads to the conclusion that A is permitted. If this were the case, then all legal systems would be complete or *closed*:[8] Given a legal system LS, we would always be able to conclude for any action A and situation Cs, either that A is forbidden in Cs or that A is permitted in Cs.[9] In fact, according to the assumption that non-derivability of forbiddenness entails permittedness, one of the following two conditions must necessarily hold, with regard to LS:

1. either we can derive that ***Forb*** A;
2. or we can conclude that ***Perm*** A (on the basis of the fact that we cannot derive that ***Forb*** A).

To avoid the assimilation of permission to non-derivability of prohibition, while retaining some connection between non-forbiddenness and permittedness some authors have distinguished between two distinct notions of permission:

- A's *weak permission*, that is, the non derivability of A's forbiddenness and
- A's *strong permission*, that is, the derivability of A's permittedness.[10]

In particular, some authors have wondered whether every legal system LS necessarily includes a *closure rule* r_{clos}, stating that whenever a behaviour is not weakly permitted according to the rest of the legal system $(LS - r_{clos})$,[11] then this behaviour is strongly permitted (for a thorough discussion of this issue, see Alchourrón and Bulygin 1971, chap. 7, sec. 2).

set of situation circumstances, we express that φ holds in Cs. This means that when Cs is the case (when every circumstance in Cs obtains) φ also is the case, which we can express conditionally as: IF Cs THEN^m φ.

[8] The term *closed* is used in this sense by von Wright 1968: "A normative system is closed when every action is deontically determined in this system [...]. A system which is not closed is called open." See also Alchourrón and Bulygin 1971, chap. 7, sec. 1.

[9] For a discussion of this complex issue see Alchourrón and Bulygin 1971, chap. 6, sec. 2.

[10] On the controversial issue of the distinction between strong and weak permission, see: von Wright 1963; von Wright 1968; Alchourrón and Bulygin 1971; von Wright 1983a; Opalek and Wolenski 1973, Alchourrón and Bulygin 1984a; Bulygin 1986; Opalek and Wolenski 1991; von Wright 1991. For a recent review, see Mazzarese 2000.

[11] $LS - r_{clos}$ denotes the result we obtain subtracting (cancelling) r_{clos} from LS.

r_{clos}: FORANY (A, Cs)
IF $((LS - r_{clos}) \cup Cs) \nvdash$ ***Forb*** A
THEN ***Perm*** A in Cs

(for any action A and situation circumstances Cs, if the normative system $LS - r_{clos}$ (the legal system LS minus r_{clos}), combined with Cs, does not entail, according to conclusive and defeasible reasoning, that action A is forbidden in situation circumstances Cs, then A is permitted in Cs)

18.2.5. Closure Rules and Bounded Legal Cognition

The real relevance of a closure rule, like r_{clos}, cannot be stated in general terms: It depends on what contents one includes in one's concept of the law, and what ways of reasoning one includes in one's concept of entailment.

Let us consider first a *most-liberal closure-rule*, that it, a closure rule which assumes the broadest understanding of both law and entailment:

- the law includes all practical contents (rules, values, factors-links) that are adoption-worthy in legal reasoning, whatever their source;
- entailment includes all rational ways of processing the law; and
- there are no limit in the time and effort to be used for identifying and processing the law.

Under these assumptions, a closure rule is likely to be useless, or almost so.

A most-liberal closure-rule is perfectly useless if "there is always a right answer," that is, if (*a*) legal knowledge is bivalent and (*b*) optimal legal cognition is assumed to be able to find the right answer.[12] If this is the case, a right answer exists for any question of the type "is it the case that A is permitted or is the case that A is forbidden?," and it consists either in stating that A is permitted or in stating that A is forbidden.

Thus the closure rule would be irrelevant to an optimal cogniser: Whenever an optimal cogniser does not reach the conclusion that A is forbidden, the cogniser must be able to reach the conclusion that A is permitted, regardless of the closure rule.

The closure rule would on the other hand be misleading to a bounded cogniser: The fact that such a cogniser is unable to establish A does not exclude that A is the case, and thus such inability is no proof of NON A.

A most-liberal closure rule is almost, but not completely, useless if we assume that there are legal issues that are fully indeterminate, that is, if we assume there are legal issues with regard to which even an optimal cogniser would be in the position of the Buridan's ass: There are no superior legal grounds for preferring

[12] As we shall see in Chapter 28, this requirement can be understood in a very weak sense: An outcome is the right one, when the theory supporting it is preferable to theories supporting incompatible outcomes.

the conclusion A is permissible to the conclusion that A is forbidden, and vice versa.

However, also under the assumption that there are Buridan's-ass cases in legal reasoning, the most-liberal closure-rule would still be misleading for a bounded cogniser: A bounded cogniser would never be sure whether his or her inability to establish A depends on the fact that optimal cognition too would fail to establish A (the cogniser is facing a Buridan's-ass case), or depends on his or her cognitive limitations.

A closure rule becomes really meaningful only when it includes some restrictions either on the premises to be considered, or on the way of processing them, or on the available time. Under this condition, the closure rule becomes useful also to a bounded cogniser. However, a restricted closure-rule is a substantive legal rule, to be accepted or rejected on specific grounds, a rule whose effect consists in precluding certain legal contents, or certain ways of reasoning, from entering into legal decision-making.

For example, we can recast the closure-rule concerning criminal law as follows (by assimilating being a crime and being criminally prohibited):

> FORANY (A, Cs)
> IF $(CriminalRules \cup Cs) \nvdash_{r_{clos},DR}$ ***Forb*** A
> THEN ***Perm*** A in Cs, according to criminal law
>
> (if the set of the statutory criminal rules, $CriminalRules$, combined with the circumstances Cs of the case, does not lead, according to conclusive and defeasible reasoning, to conclude that A is forbidden, then A is permitted according to criminal law)

We need to specify that the permissive conclusion only holds with regard to criminal law, since it may still happen that the same behaviour is prohibited according to private law. For instance, various Italian judges concluded, before a law on software protection was issued, that duplicating software was no crime (was not criminally forbidden, and thus was criminally permitted), since no statute prohibited it (and crimes require a statutory provision). However, the same judges held that duplication was a tortious action, forbidden according to private law, on the basis of an analogy with the prohibition to duplicate literary work.

The practical significance of the closure rule *nullum crimen sine lege* consists therefore in disabling analogical reasoning and also teleological reasoning (unless used in the interpretation of legislation). In fact, these ways of reasoning are usually appropriate only when a solution cannot be derived though rule-based reasoning, according the available legislative, judicial or customary rules. The closure rule above, by allowing a conclusion to be derived through rule-based reasoning in any case (either via a specific rule, or via the closure rule), prevents teleological or analogical reasoning from being used.[13]

[13] On the possible conflict between a permissive closure rule (a rule asserting that any ac-

The existence of explicit closure-rules like the *nullum crime sine lege* one—which make a legal conclusion dependent on the fact that a different result does not follow from a limited set of legal information or of ways of processing it—does not contradict the assumption of the completeness of optimal legal cognition (the thesis that there is always a right answer for any legal issue).

Under this assumption, an optimal legal cogniser would have achieved a determined result even without the closure rule. However, such a closure rule—differently from the most-liberal closure-rule we considered above—is not irrelevant to an optimal cogniser: It is an additional substantive premise, which may lead an optimal cogniser to a result which is different from the result the cogniser would have achieved without the meta-rule.

18.2.6. Ignorance and Autoepistemic Inferences

We have asserted—in general and with specific regard to the connection between prohibition and permission—that a bounded cogniser cannot view his or her inability to establish a legal conclusion as a proof of the negation of that conclusion. This does not exclude that in certain contexts one can draw consequences from one's own ignorance.[14]

Such inferences can be drawn only when one can make the so-called *closed-world assumption*, namely, the assumption that one's information allows one to infer all positive propositions that hold in the chosen domain, an assumption that is sometimes useful in computer databases and inference systems (see Reiter 1978, and Clark 1987). This assumption, however, needs to be justified with reference to specific circumstances, it cannot be taken for granted.

There are certain contexts and situations (in particular, in legal proceedings) where the law allows or requires one to draw certain negative conclusions from the fact that other facts (or legal conclusions) could not be established in certain ways. In particular, this is connected to the application of the rules on the burden of proof: One party's failure to prove a certain fact may licence inferences based on the assumption that this fact does not hold.

For instance, if the prosecutor fails to prove that a crime has taken place, the judge should indeed assume that the crime has not take place, and absolve the accused person. Similarly, in a civil lawsuit, if the plaintiff fails to show that the defendant has violated the plaintiff's rights, the judge should assume that no violation has taken place, and decide accordingly.

This, however, only concerns specific legal conclusions and specific decisional contexts. It cannot be viewed as providing the general way in which the law deals with negations of legal propositions (and, in particular, with the negation of prohibitions, that is, with permissions).

tion which is not explicitly prohibited is permitted) and the outcomes of analogical reasoning, see Bobbio 1960, 152–7.

[14] This is the reasoning pattern which characterises *autoepistemic logic* (see Moore 1987, and Levesque 1990).

18.2.7. Some Conclusions on Negation, Permission, and Completeness

Our discussion of the issues of negation, permission, and completeness has led us to the following conclusions.

We retain the equivalence between permitted and non-forbidden, that is, between ***Perm*** A and NON ***Forb*** A.

However, the negation NON in the locution NON ***Forb*** A, is not to be understood as non-derivability: We cannot assimilate legal negation to non-derivability from any fixed set of legal premises. This is because in principle legal cognition can adopt whatever premises appear to be adoption-worthy in legal reasoning, and can process these premises according to any rational ways of processing information.

According to our broad notion of legal cognition, though limited sets of legal premises have gaps, it is doubtful whether legal cognition as a whole has gaps: The existence of gaps would require that there is a legal propositions φ, such that there is no legally relevant reason for preferring a legal theory (in the sense specified in Section 4.1.4 on page 125; see also Chapter 28) entailing φ to a legal theory entailing NON φ. Similarly (and equivalently) it is doubtful whether the law as a whole has gaps, where by "the law as a whole" we mean the set of normative contents (noemata) that are adoption-worthy in legal reasoning.

In any case—whatever solution we give to the theoretical issue of the completeness of legal cognition— logic alone does not allows us to assimilate A's permission to the failure to establish A's prohibition from any specific set of premises (for example, from statutory rules). We can do that only when there are appropriate closure rules, which, however, are substantive (contingent) rules: They are to be appropriately justified, with regard to a specific legal system, to be legally binding.

Chapter 19

OBLIGATIONAL CONCEPTS

The basic deontic qualification—obligatory, forbidden, permitted and facultative—need to be integrated with further components to capture the fundamental normative notions of legal language, such as, in particular, the notion of a right.

In this chapter we shall make a first step in this direction, providing an account of those legal concepts, the *obligational concepts*, that are based upon the notion of an obligation. These include, in particular, the first four *Hohfeldian concepts*: duty, right, noright, and privilege.[1]

19.1. Teleology of Normative Propositions

Before addressing the obligational concepts, we need to introduce a more general idea. This is the idea that normative propositions are intended to satisfy certain *purposes*, namely, certain final or instrumental values.[2]

19.1.1. The Teleological Stance toward Normative Propositions

We often need to adopt a teleological stance with regard to normative propositions: We need to view the endorsement and practice of normative propositions as being aimed at serving certain communal purposes (goals and values). In particular, this is required to articulate the content of a such propositions, and to adjudicate their conflicts.

First of all, we need to adopt this attitude with regard to general rules. This does not concern only the rules that we have directly derived from values according to teleological reasoning, but it also the content of authoritative statements:

[1] As we shall see in Section 19.4 on page 510. We shall examine the remaining Hohfeldian concepts, the power-based or *potestative* concepts, in Chapter 22.

[2] Under the notion of a purpose, we include not only ultimate values, but also instrumental values, that is, the *goals* that have an instrumental role with regard to the achievement of further values. Consider, for instance, goals like reducing the speed of cars, promoting the use of a certain technology, reducing the consumption of tobacco, and so forth. We could also use the expression *interest*, in the comprehensive sense in which it is used by the so called jurisprudence of interests (*Interessenjurisprudenz*), through it may be argued that the purposes of a rule do not include all interests at stake in the rule's adoption and practice: The purposes of a rule only include the interests advanced by the rule, to the exclusion of the interests impaired by its adoption (Heck 1968a, sec. 4, 155).

Whenever we engage in rationalising our normative system (see Section 4.1 on page 121), we need to ascribe communal purposes also to legislative and judicial rules, in order to explain and justify their adoption and persistence (as components of the practical theory our community is using in legal decision-making).

Secondly, purposes can be attributed also to the specific propositions that are derived from general rules through syllogisms, since such propositions inherit their purposes from the corresponding general rules.

The purpose of a rule should not be mistaken for the aim (possibly a self-interested one, or also an illegal one) that is pursued by the individual members of the legislative body when voting for that rule. This issue has been famously addressed by von Jhering (1924, III, 35), who distinguished the purpose of a duty (the interest it is intended to serve, according to the point of view of the legal system, or of the legal community), from its various side-effects (reflex-effects, *Reflexwirkungen*).

Jhering considers, for instance, the case (quite frequently occurring also nowadays) that a law prohibiting the import of certain goods is enacted by persons having in mind the objective of favouring a particular domestic producer (who has lobbied for achieving this result). He argues that this fact does not imply that this law confers a right to that manufacturer, since his advantage is only to be viewed as a side effect.

The identification of what valuable goals a certain rule is intended to serve is rather the result of an exercise in rationalisation, through which one attempts at finding what effects of the practice of a rule can be viewed as reasons for its communal adoption and persistent endorsement.

In some cases, it may be difficult to identify what communal aims are served by a certain normative proposition: The proposition may only be useless or damaging. Consider, for instance, a case where it clearly appears that the ruling political party has issued a new regulation, in order to make it more difficult for its leaders to be convicted of certain offences (for instance, by prohibiting the use of certain kinds of documents, which would prove such offences, by limiting the time in which prosecution can take place, and so on). In such a case the search for a communal goal or aim is likely to fail to provide any acceptable result. One may then frankly admit that this is the case: There are no substantive grounds for the communal endorsement of such regulations. The only reason for adopting the regulation is the fact that it has been stated by the legislative power.

In other cases, it may be very difficult to disentangle the various effects that a certain normative proposition can produce, and to identify what effects may be viewed as the purposes of that proposition. Consider, for instance, the permission of having abortions. It may be seen as having, among others, the following effects:

1. preventing deaths or health damage caused by illegal abortions;

2. reducing abortions (under the assumption that, once abortion is legalised, it can be prevented through contraception);
3. attributing women the freedom of choosing not to become mothers, even after being pregnant;
4. enabling people to have control over their reproduction;
5. population control (reducing the total number of births);
6. selective population control (assuming that legalised abortion induces a reduction of births in the poorest portions of population, not having easy access to illegal abortion and to contraception);
7. savings in social security, due to a reduction of costs involved in taking care of unwanted children;
8. reduction of criminality, under the assumption that unwanted children have a stronger tendency to develop criminal behaviour.[3]

This is not the place for considering whether the legalisation of abortion really has all the effects we have listed. It is sufficient for us to observe that, even if this were true, not all such effects could be seen as valuable goals for a community which has legalised abortion, but respects everyone's dignity and has no pressing overpopulation problems. While the first four effects (or at least some of them) may possibly be viewed as teleological grounds supporting a permission to abort, that is, as purposes of a permissive regulation, the subsequent ones should rather be viewed as side-effects.

Obviously the possibility of finding some valuable goals that are served by a certain normative proposition does not imply finding a convincing teleological rationalisation for that proposition: It may happen that adopting that proposition leads to negative effects that outweigh its positive effects.

For instance, an opponent of the legalisation of abortion, though accepting that legalisation has certain positive impacts, may believe that its negative impacts (and, first of all, its impact on the life of legally aborted foetuses) outweigh its positive impacts.

19.1.2. A Notation for Normative Teleology

Let us propose the following way to indicate that a certain normative proposition serves certain goals or purposes. We write:

$$Prop{\Uparrow}^{G}$$

to indicate that the adoption of $Prop$ advances the goal (or the set of goals) G. For instance, assume that we believe that (all instances of) the rule that gives the general permission to abort has the goal of protecting public health (by preventing health risks from illegal abortion). We can express this idea as follows:

[3] This is the controversial thesis advanced by Donohue and Levitt 2001.

$\text{FORANY}\ (x)\ (\textbf{\textit{Perm}}\ [x\ \text{aborts}])\Uparrow^{Public\ Health}$

(for any x, it is permitted that x aborts in order to advance public health)

Often the purpose of (the adoption of) a normative proposition is to protect the interest of certain persons, though this interest may take different contents (within certain ranges). This is the case, in particular, for normative propositions attributing rights.

In such cases, we write:

$Prop\Uparrow^{G_j}$

($Prop$, in order to to advance j's goal G)

where G_j is the particular interest of j which is meant to be furthered by the adoption of the normative proposition $Prop$. For instance, if one believes that the permission to abort, rather than being aimed at promoting public health in general, is aimed at promoting the health of the particular individuals that are going to have abortions, then one needs to rewrite the proposition above as:

$\text{FORANY}\ (x)\ ((\textbf{\textit{Perm}}\ [x\ \text{aborts}])\Uparrow^{Health_x})$

(for any x, it is permitted that x aborts, in order to advance x's health)

The specification of what interest is advanced by (the adoption of) a normative proposition allows us to distinguish:

- the normative propositions that are aimed at advancing some collective goals or values (like public health), and
- the normative propositions which are aimed at advancing goals or values of individual persons (like the health of those individuals).

For instance, from the proposition above, one may infer that Mary's permission to abort has the purpose of protecting her individual health (rather than public health):

$(\textbf{\textit{Perm}}\ [Mary\ \text{aborts}])\Uparrow^{Health_{Mary}}$

(Mary is permitted to abort, in order to advance her health)

Finally, when a proposition is aimed at advancing the interests of an individual, but it is not necessary to specify what interests, we say that the proposition has the purpose of advancing that individual, and we write:

$Prop\Uparrow^{j}$

($Prop$, in order to advance j's interests)

where j is the individual at issue. For instance, Tom's obligation to pay Mary a professional fee of € 1,000 is aimed at protecting her unspecified interests, so that we may say:

$(\textbf{\textit{Obl}}\ Does_{Tom}[\text{pay}\ Mary\ €\ 1{,}000])\ \Uparrow^{Mary}$

(it is obligatory that Tom pays Mary € 1,000, in order to advance Mary's interests)

19.2. Directed Obligations

Our analysis of the connections between normative propositions and purposes allows us to provide a precise characterisation of the direction of an obligation, which will enable us to introduce a set of obligational legal concepts, as we shall see in the following sections.

19.2.1. Other-Directed Obligations

Our starting point for the analysis of obligational concepts will be the notions of a *other-directed obligation*. By this we mean an obligation of an agent having the function of satisfying the interest of another (for a discussion of this notion, see Herrestad 1995, and Krogh and Herrestad 1996).

This is what typically happens in private law: One's obligation is intended to satisfy the interest of a specified individual, which is called the *beneficiary* of the obligation.

In other words, we are concerned with those cases when one's obligation can be explained or justified by the fact that this obligation contributes to promoting the interests of another person. This is not to be viewed as a side-effect of that obligation: It rather is an essential element of it, its *intentional justification*.

We need to consider whether all obligations are other-directed, or whether there are obligations to which this qualification does not apply. It seems that there are indeed non-other-directed obligations, like those that are only justified on paternalistic grounds, those that are intended to satisfy the interests of non-organised groups, and possibly those that are intended to satisfy non-human interests (animals, ecosystems, and so on).

Let us first consider *paternalistic obligations*, namely, the obligations that are intended to safeguard the interests of the obliged person, rather than the interest of others. There have been various legal and political theories arguing that such obligations should not be legally enforceable, but should rather pertain to individual morality (or rather to the specification of individual life-styles).

We can mention, for instance, Thomasius's (1963, 1.4.40–2) idea that the principle of the *right* or *lawful* (in Latin *justum*, from *jus* "law") consists in the prescription not to harm others (*quod tibi non vis fieri, alteri ne fecieris*, "what you do not want to be done unto you, do not do unto others"). This principle is to be distinguished from the principle of the *honourable* (in Latin *honestum*, from *honor*, "honour"), concerning one's behaviour toward oneself (*quod vis, ut alii sibi faciant, tute tibi facies*, "what you do want that other do unto themselves, do it unto yourself").[4] More recently and more famously, the idea that the

[4] Thomasius also introduces a third principle, the principle of the *decorous* or *becoming* (in Latin *decorum*, from *decus*, "moral dignity" or "virtue"), concerning the active promotion of the interests of others (*quod vis ut alii tibi faciant tu ipse facies*, "what you do want that other do unto you, do it unto them").

proper domain of the law only includes obligations unto others was promoted by John Stuart Mill, who expressed it in the following famous statement:

> the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. (Mill 1991a, 14)

We do not need here to discuss these theories, nor the opposed views that the law may legitimately impose also obligations which are not aimed at protecting the interests of others (the classical debate on these and related matters is provided by Hart 1963, and Devlin 1965).

For us it is sufficient to observe that various legal systems contain non-other-directed obligations. Consider for instance the prohibition to use narcotics, the obligation to wear belts in cars, the prohibition of suicide or consented euthanasia.

We apply the idea of other-directed obligations also to cover duties aimed at preserving some communal or collective good—such as prohibitions to pollute the environment, to damage the cultural heritage, or to endanger national security. However this can be done only when the protected collective interest can be attributed to a unit of agency. In such cases this entity may be viewed as the particular individual agent whose interest is intended to be protected, even when this individual agent is a collective entity (for example, when the community concerned is organised into an association, an administrative body, and so on).

19.2.2. The Representation of Other-Directed Obligations

Following the approach we adopted in Section 19.1 on page 499, we represent obligations aimed to advance another's interest, in the following form:

$(\boldsymbol{Obl}\ Does{*}_j A){\Uparrow}^k$
(it is obligatory, that j does A, in order to advance the interest of k)

where obviously, k and j need to be different.[5]

This leads us to define accordingly the notion of an *other-directed obligation*.

Definition 19.2.1 *Other-directed obligation. It is* obligatory, toward *k, that j does A* ($\mathbf{Obl}^k Does{*}_j A$) *iff it is obligatory, that j does A, in order to advance the interest of k* (($\mathbf{Obl}\ Does{*}_j A){\Uparrow}^k$)*:*

[5] This formula does not concern only to positive actions, having the form $Does_j A$. It also applies to negative actions (omissions), having the form NON $Does_j A$. Moreover, it also concerns productive actions, having the form $Brings_j A$ or NON $Brings_j A$. This is indicated by the use of the generic action operator $Does{*}_j A$, which covers both positive and negative actions, both of the behavioural type and of the productive type (see Section 16.3.3 on page 450).

$$\textbf{\textit{Obl}}^{k} Does*_j A \equiv (\textbf{\textit{Obl}}\ Does*_j A)\Uparrow^{k}$$

The notion enables us to express normative propositions like the following, for positive action:

$\textbf{\textit{Obl}}^{Mary} Does_{Tom}$[pay € 1,000 to $Mary$]
(it is obligatory, toward Mary, that Tom pays € 1,000 to $Mary$)

or like the following, for negative actions:

$\textbf{\textit{Obl}}^{Tom}$ NON $Does_{Mary}$[communicate to others Tom's trade secrets]
(it is obligatory, toward Tom, that $Mary$ does not communicate to others Tom's trade secrets)

Usually the beneficiary of the duty is also the addressee of the action to be performed. However, this is not always the case.

For instance, assume that Mary, in order to provide € 10,000 to her father John who is in need, makes a contract with Mark, according to which Mark will deliver that amount directly to John. According to this contract, Mark is obliged, in the interest of Mary, to pay the € 10,000 to John: Mary if the beneficiary of the obligation, which John is the addressee of her action. This would be simply represented as:

$\textbf{\textit{Obl}}^{Mary} Does_{Mark}$[pay € 10,000 to $John$]
(it is obligatory, toward $Mary$, that $Mark$ pays € 10.000 to $John$)

Besides direct obligation, we may also have directed forbiddenness. Consider for example, how Mary may be forbidden to raise a building taller than 10 meters on her land, in the interest of her neighbour Tom (assume that the contract through which she bought the land from Tom included a term to this effect). We express this normative position as follows:

$\textbf{\textit{Forb}}^{Tom} Does_{Mary}$[raise a building taller than 10 meters]
(it is forbidden, toward Tom, that $Mary$ raises a building taller than 10 meters)

19.2.3. Other-Directed Permissions

In Chapter 17 we have seen that the notion of permission corresponds to the negation of forbiddenness (prohibition), and thus corresponds to the negation of an obligation concerning the complementary action:

$$\textbf{\textit{Perm}}\ Does*_j A \equiv \text{NON}\ \textbf{\textit{Forb}}\ Does*_j A \equiv \text{NON}\ \textbf{\textit{Obl}}\ \text{NON}\ Does*_j A$$

(⌈it is permitted that j does A⌉ is equivalent to ⌈it is not forbidden that j does A⌉ which is equivalent to ⌈it is not obligatory that j omits to do A⌉)

Correspondingly, by denying other-directed prohibitions, we get other-directed permissions. This leads to the following equivalences:

$\textbf{\textit{Perm}}^k Does{*}_j A \equiv$ NON $\textbf{\textit{Forb}}^k(Does{*}_j A) \equiv$
NON $\textbf{\textit{Obl}}^k$NON $Does{*}_j A$

(⌈it is permitted toward k that j does action A⌉ is equivalent to ⌈it is not forbidden toward k that j does A⌉ which is equivalent to ⌈it is not obligatory, toward k, that j omits to do A⌉)

For example, assume that Mary and Tom make a new agreement, according to which she is permitted to raise a building up to 15 meters high. We may then say that:

$\textbf{\textit{Perm}}^{Tom} Does_{Mary}$[raise a building up to 15 meters high]
(it is permitted, toward Tom, that $Mary$ raises a building up to 15 meters high)

There is no contradiction between having a permission toward one person and not having the same permission toward another.

Assume for instance that Mary has another neighbour, let us call her Lisa, and that Mary has also undertaken toward Lisa the obligation to remain below 10 meters, but that Lisa does not want to give Mary the permission to raise her building higher than that.

Under such conditions, we may consistently say the following:

$\textbf{\textit{Perm}}^{Tom} Does_{Mary}$[raise a building up to 15 meters high] AND
NON ($\textbf{\textit{Perm}}^{Lisa} Does_{Mary}$[raise a building up to 15 meters high])
($Mary$ is permitted, toward Tom, to raise a building up to 15 meters, though being not permitted (being forbidden) to do that toward $Lisa$)

Thus, permission toward a person is compatible with prohibition toward another.

19.2.4. Reasoning with Directed Obligations

We do not need to introduce specific reasoning schemata for other-directed obligations and other-directed permissions, since these normative positions just inherit the reasoning schemata we introduced for obligations and permissions in general. For example, the reasoning schema:

(1) $\textbf{\textit{Obl}}\ A$

---

(2) $\textbf{\textit{Perm}}\ A$

according to which the obligatoriness of action A entails A's permittedness, is paralleled by the schema:

(1) $\textbf{\textit{Obl}}^j A$

---

(2) $\textbf{\textit{Perm}}^j A$

according to which the obligatoriness of action A toward j entails A's permittedness toward j.

19.3. Obligational Rights

The notion of an other-directed obligation leads us to the idea of an *obligational right*. Whenever a person j has an obligation that is directed toward another person k (the obligation is intended to promote the interest or the benefit of k) we say that k has a *right* toward j. We call this right an *obligational right*, to mean that it consists in the fact that the obligation has the purpose of satisfying the interest of the right holder.[6]

19.3.1. Representation of Obligational Rights

Obligational rights may be defined as follows:

Definition 19.3.1 *Obligational right. k has the* obligational right *that j does A iff it is obligatory, toward k, that j does A:*

$$\textbf{\textit{OblRight}}_k Does{*}_j A \equiv \textbf{\textit{Obl}}^k Does{*}_j A$$

For example, to say that:

$$\textbf{\textit{OblRight}}_{Tom} Does_{Mary}[\textsf{pay} \text{ € } 1{,}000 \textsf{ to } John]$$

(Tom has the obligational right that $Mary$ pays € 1,000 to $John$)

means that:

$$\textbf{\textit{Obl}}^{Tom}(Does_{Mary}[\textsf{pay € 1,000 to John}]$$

(it is obligatory, toward Tom, that $Mary$ pays € 1,000 to $John$)

Similarly, to say that

$$\textbf{\textit{OblRight}}_{Tom} (\text{NON } Does_{Mary}[\textsf{raise a building taller than 10 meters}])$$

(Tom has the obligational right that $Mary$ does not raise a building taller than 10 meters)

means that

[6] Our account of legal rights (in this chapter and then in Chapter 22), will only consider the logical structure of various kinds of rights. We will not even address the issues concerning the social and institutional function, or the moral foundations of rights. On this issues, see, among this others: Luhmann 1965; Nozick 1974; Nino 1991; Rawls 1993, lecture viii; Waldron 1993; Habermas 1999, 118ff; Palombella 2002; Kamm 2002.

$$\textit{\textbf{Obl}}^{\,Tom}\ (\text{NON } Does_{Mary}[\text{raise a building taller then 10 meters}])$$

(it is obligatory, toward *Tom*, that *Mary* does not raise a building taller than 10 meters)

which we can also express by saying "Mary is obliged toward Tom not to raise a building taller than 10 meters."

19.3.2. The Benefit Theory of Rights

Our notion on an obligational right expresses a very common and intuitive idea of a right (subjective right), which can be traced back to Bentham (1970) and von Jhering (1924): To say that a person is the holder of a right means that another person has a duty which is intended to benefit the first person.[7]

In this connection, by a duty being intended to satisfy a certain interest we mean that satisfying this interest is the *aim* or *purpose* that is intended to be satisfied by the existence of the duty, to wit, that it provides an appropriate *intentional justification* (*explanation* or *rationalisation*) of the collective intention to have this duty, as we observed in Chapter 9.

Other authors have contested the idea of a right as a protected interest (or rather as consisting in the protection of the rightholder's interest through somebody else's duty), arguing that the idea of a right needs rather to be based upon the idea of a *power*. For instance (Kelsen 1967, sec. 29.c, 133) affirms that:

> [T]he right of the creditor [. . .] protected by the legal obligation of the debtor [. . .] is nothing but this legal obligation of the debtor.

According to the same author:

> [T]he essence of the right that is more than a mere reflex of a legal obligation consists in the fact that a legal norm confers upon an individual the legal power to bring about by a law suit the execution of a sanction as a reaction against the non-fulfilment of the obligation. (Kelsen 1967, sec. 29.d, 136)

Similarly Hart (1982, 174ff.) argues that the idea that a right is the position of the beneficiary of somebody else's duty is useless: This legal situation can be better described by only using the notion of a duty. He thus proposes to understand a right relative to an obligation as:

> a special case of a legal power in which the right holder is at liberty to waive or extinguish or to enforce or leave unenforced another's obligation. (Hart 1982, 188)

We agree with Kelsen and Hart in considering that the notion of a power is normally a fundamental component of the notion of a right, as it is usually employed

[7] For a survey of theories of rights, see: Waldron 1984; Herrestad 1995; Kamm 2002.

in legal contexts, though this is not the case when one speaks of children's or animals' rights, as Hart (1982, 189) admits (we shall extensively discuss the notion of a power in Chapter 22).

However, we believe that both Kelsen and Hart fail to recognise adequately that the idea of an obligational right does not parallel the simple idea of a duty, but rather it parallels the idea of a *other-directed duty*: Saying that k has the obligational right that j performs a certain action A is not equivalent to saying that j has the obligation to perform A.

The idea of an obligational right includes indeed an additional content, which is expressed exactly by saying that not only j has an obligation:

$$\textbf{\textit{Obl}}\ Does*_j A$$
(j has the obligation to do A)

but rather he has an obligation toward a specific person (k):

$$\textbf{\textit{Obl}}^k Does*_k A,$$
(j has, toward k, the obligation to do A)

The latter obligational proposition (but not the first one) is equivalent to the following statement:

$$\textbf{\textit{OblRight}}_k Does*_j A$$
(k has the obligational right that j does A)

According to our idea of the purpose of a normative proposition (see Section 19.1 on page 499), being the beneficiary of a duty (the holder of the obligational right) has to be distinguished from being advantaged by the fulfilment of the duty. If j is obliged in the interest of k to give a sum of money to l, then only k is the holder of the obligational right. It is true that l is going to profit from the execution of the obligation, but this is only, as Jhering would say, a reflex of the implementation of k's right (of the execution of the corresponding obligation).

From our perspective, which recognises and emphasises the importance of intentional notions, also when applied to collective entities and institutions (see Chapter 9), the use of teleological concepts (as that of a duty being intended to benefit a certain person) does not violate any scientific commitment to neutrality. There is no particular mistake or "impurity" (as Kelsen 1967 might say) in describing the law by making use of teleological concepts, that is, in viewing the law as a "purposeful enterprise," as remarked by authors such as von Jhering (1913) and Fuller (1969).

The two basic components of the notion of a right—obligational protection of an interest and powers—need to be separately studied, in order to understand their connections and the ways in which they can be combined (on the need to preserve the two ideas, cf. MacCormick 1977).

In particular, there is usually a teleological connection between the two components of the notion of a right: The right-holder's powers over a duty have the purpose of ensuring the satisfaction of right-holder's interest which the duty is meant to serve.

On the basis of this connection, we may frequently move from one idea to the other. On the one hand, the fact that a duty is intended to serve another's interest may lead us to infer (abduct) that this person has powers in relation to the exercise, the enforcement, and the persistence of such a duty (those powers also being functional to the satisfaction of the interest of this person). On the other hand, the fact that one has particular powers in relation to a certain duty may lead us to infer (abduct) that this duty is intended to satisfy one's interest, to wit, that one holds the related obligational right.

According to the teleological connections we just mentioned, both components of a right tend to coexist on the head of the same agent: The holder of the protected interest usually possesses the powers which are meant to ensure the protection of that interest (and in this case we may speak of a subjective right in the fullest sense to denote the combination of an obligational right and a potestative right). However, in other cases the two components may be split, being allocated to different agents. This happens, for instance, when a child's interest is protected by attributing certain powers to the child's parents, or to certain public-agencies.

19.4. A Formalisation the Hohfeldian Obligational Set

The notion of other-directed obligation allows us to express the first quartet of the fundamental legal concepts introduced by Hohfeld (1913; 1917), which we shall call the *Hohfeldian obligational concepts*.[8]

19.4.1. The Hohfeldian Obligational Set: Original Formulation

Hohfeld did not provide a logical definition of the legal concepts he introduced, but discussed them through example. For instance he says that:

> if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place [...] whereas X [...] has the privilege of entering on the land; or, in equivalent words, X does not have a duty to stay off. (Hohfeld 1964, 38–9)

[8] These contributions have been collected, with minor changes, in Hohfeld 1964, to which we shall refer in the following.

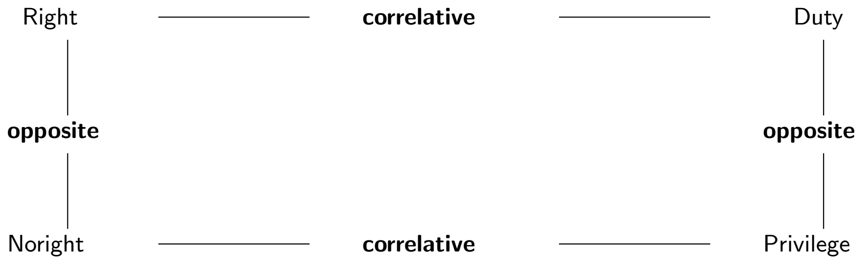


Table 19.1: *The first Hohfeldian square*

Hohfeld expressed the relationships between fundamental legal concepts in the square of jural opposites and correlatives of Table 19.1.[9] In the following paragraph we shall define the Hohfeldian concepts through the notions we have just introduced.

19.4.2. The Hohfeldian Obligational Set: Logical Reformulation

The Hohfeldian notion of a *right* corresponds to our obligational right, while the Hohfeldian notion of a *duty* corresponds to our notion of an other-directed duty. Therefore the Hohfeldian correlation between right and duty becomes our equivalence between obligational right and other-directed duty.

The Hohfeldian notion of a *privilege* can be expressed through our notion of other-directed permission: To say that j has a privilege toward k with regard to A means that j is permitted, toward k, to omit A. Therefore the notion of a Hohfeldian privilege is captured by the following definition:

Definition 19.4.1 *Privilege. j has a* privilege *toward k, with regard to action A iff it is permitted toward k that j omits to do A:*

$$\textbf{\textit{Privilege}}^k(Does*_j A) \equiv \textbf{\textit{Perm}}^k(\text{NON } Does*_j A)$$

(⌈j has, toward k, a privilege with regard to doing A⌉—literally, ⌈there is a privilege toward k, that j does A⌉—is equivalent by definition to ⌈it is permitted, toward k, that j omits to do A⌉)

According to this definition, a privilege with regard to a positive action $Does_j B$ amounts to the other-directed permission to omit doing B, while a privilege

[9] For an introduction to the Hohfeldian concepts and a discussion of the literature, see, among the others: Ross 1968, 118ff., and Alexy 1985, 185ff. On their formalisation, see: Lindahl 1977, 25ff.; Makinson 1986; Allen and Saxon 1991; Sergot 2001.

with regard to a negative action NON $Does_j B$ amounts to the other-directed permission to omit doing non B, that is, to the permission to do B.

On the basis of Definition 19.4.1 on the preceding page, affirming that j has, toward k, a privilege with regard to A, amounts to denying that j is obliged toward k to do A, i.e., it amounts to saying that k has no obligational right that j does A.

$$\textbf{\textit{Privilege}}^k(Does_j A) \equiv \text{NON } \textbf{\textit{Obl}}^k(Does*_j A) \equiv$$
$$\text{NON } \textbf{\textit{OblRight}}_k(Does*_j A)$$

(⌈j has a *privilege* to do A, toward k⌉ (literally, ⌈there is a privilege toward k that j does A⌉) is equivalent to ⌈it is not obligatory toward k that j does A⌉, which is equivalent to ⌈k has no obligational right that j does A⌉)

The notion of a privilege makes sense, and is logically coherent with the Hohfeldian framework, but has the defect of not being very intuitive, and indeed has frequently been misunderstood, a privilege with regard to A being sometimes correctly read as the permission to do NON A, and sometimes as a permission to do A. Therefore, our advice is to substitute the notion of a privilege to do A with the clearer notion of other-directed permission to omit A.

Following Hohfeld, we may use the less controversial expression *noright* to express that one does not have the obligational right that another does a certain action, that is, to denote the situation when the latter is permitted toward the first to omit that action:

Definition 19.4.2 *Noright. k has a* noright *that j does A iff j is permitted, toward k, to omits A:*

$$\textbf{\textit{NoRight}}^k(Does*_j A) \equiv \textbf{\textit{Perm}}^k(\text{NON } Does*_j A)$$

(⌈k has a noright *that j does A⌉ is equivalent by definition to ⌈it is permitted, toward k, that j does not do A⌉)*

Note that, according to Definitions 19.4.1 on the page before and 19.4.2 the proposition that ⌈j has a *privilege* to do A, toward k⌉ is equivalent to the proposition that ⌈k has a *noright* that j does A⌉: Both propositions are equivalent to ⌈it is permitted, toward k, that j does not do A⌉. Thus, according to our definitions, we obtain the formalisation of the Hohfeldian square that is represented in Table 19.2 on the next page.

Assume for instance that Mary, a writer, has made a contract with Tom, a publisher, and has committed herself to write a novel for him. Under such conditions, we can say Tom has the obligational right that Mary writes the novel, which amounts to saying that Mary is obliged, toward Tom, to write the novel. Tom's right is incompatible with Mary having a privilege, toward Tom, concerning writing the novel. Such a privilege would consist in the Mary having permission toward Tom not to write the novel, a normative situation which could also be described as Tom's noright that Mary writes the novel.

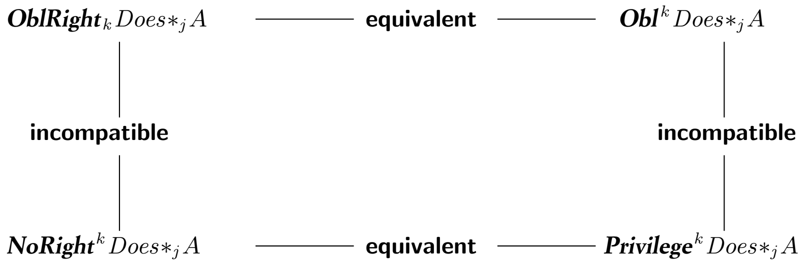


Table 19.2: *Formalisation of the Hohfeldian obligational set*

Similarly, with regard to omissions, assume that Mary has the obligational right that Tom does not change the content of her novel. This amounts to saying that Tom is obliged, in the interest of Mary, not to change the content of her novel. This obligation is incompatible with Tom having the privilege, toward Mary, to change the content of her novel. Such a privilege would consist in Tom having the permission toward Mary to change the content of her novel, a normative situation that could also be described as Mary's noright that Tom does not change the content of her novel.

19.5. Further Kinds of Rights

By using the notions of other-directed obligation and other-directed permission, we shall specify further aspects of the idea of a right, which complement or specify the basic notion of an obligational right.

19.5.1. Permissive Rights

The idea of a directed permission offers us the basis for providing a notion of a *permissive right*, which is a directed permission aimed at satisfying the interest of the permitted person.

Definition 19.5.1 *Permissive right. A person j has, toward a person k, the* permissive right *of doing A* (**PermRight**^{k} $Does*_j A$) *iff it is permitted toward k, in the interest of j, that j does A:*

$$\textbf{\textit{PermRight}}^k\, Does*_j A \equiv (\textbf{\textit{Perm}}^k\, Does*_j A)\Uparrow^j$$

(($\ulcorner$there is a permissive right toward k, that j does A$\urcorner$ is equivalent by definition to $\ulcorner$it is permitted toward k, in the interest of j, that j does A$\urcorner$)

Note that the holder of a permissive right, in the sense of its beneficiary, is the author of the permitted action, rather than the person toward which this permission exists: In a permissive right $\boldsymbol{PermRight}^k\, Does{*}_j A$, j is the beneficiary of the right, while k, the addressee of the permission, bears the burden of it (in the sense that k's interest is not protected by means of a prohibition that j does A). For instance, to express that Mary has the permissive right toward Tom to raise a building up to 15 meters, we write:

$$\boldsymbol{PermRight}^{Tom}\, Does{*}_{Mary}[\text{raise a building up to 15 meters}]$$

Similarly, to express that Ali, a Muslim worker, has the permissive right to abstain from work on Fridays, against his employer Mary, we write:

$$\boldsymbol{PermRight}^{Mary}(\text{NON } Does_{Ali}[\text{work on Friday}])$$

Note that distinction being one's permission to do A and another's prohibition to prevent A (see Section 17.5.2 on page 468) also applies to permissive rights: $\boldsymbol{PermRight}^k\, Does{*}_j A$ does not entail that k is prohibited from preventing A.

$$\boldsymbol{PermRight}^k\, Does{*}_j A \;\nvdash\; \boldsymbol{Forb}\;\, Brings_k(\text{NON } Does{*}_j A)$$

($\lceil j$ has the permissive right toward k to do $A\rceil$ does not entail that $\lceil k$ is forbidden to bring it about that j does not do A$\rceil$, i.e., it does not entail that $\lceil k$ is forbidden to prevent j from doing $A\rceil$)

When this is the case—when we have both a permissive right and the prohibition to prevent its exercise—we can speak of a *protected permissive right*.

Permissive rights are the classical liberal rights: Having such a permissive right to do an action only means that one is not forbidden to abstain from it. A permissive right does not entail that its holder has the ability of doing the permitted action. For example, having the permissive right to have the education one chooses, means that one is not forbidden from educating oneself as one chooses. Still one may not have the means for doing that (being unable to bear the costs of the education, or not having the intellectual potential for the type of education one would like to have). Similarly, one may be permitted to have the medical care one prefers, but be unable to bear the ensuing medical costs.

In socially-oriented political communities one's permissive rights (or some of them) tend to be coupled with obligational rights upon others, to provide some of the means which enable one to practice what one is permitted to do (providing, for instance, everybody with access to education, health care, and so on).

19.5.2. Absolute and Relative Rights

Until now we have only considered obligations (and obligational rights) toward a determined person. However, the notions we have so far provided allow us to specify also rights toward everybody (absolute rights).

Definition 19.5.2 *Absolute obligational right. k has the* absolute obligational right *that A is done iff k has, toward any x, the obligational right that x does A:*

$\boldsymbol{AbsoluteOblRight}_k Done{*}\ A \equiv$
$\text{FORANY}\ (x)\ \textbf{OblRight}_k Does{*}_x A$

That k has the obligational right that x does A means that x is under the obligation to do A for the benefit of k. By substituting the obligational right with the corresponding directed obligation in the last above we obtain:

$\boldsymbol{AbsoluteOblRight}_k Done{*}\ A \equiv$
$\text{FORANY}\ (x)\ \boldsymbol{Obl}^k Does{*}_x A$

(⌈k has the absolute obligational right that A is done⌉ is equivalent to ⌈for any x, x is obliged, toward k, to do A⌉)

For example, Mary, who is the author of a novel, has an absolute obligational right that nobody copies her novel. This means that, toward every person x, she has the obligational right that x does not copy her novel, which means that any person x has the obligation, toward Mary, not to copy her novel.

Given that Mary has that absolute obligational right, according to FORANY *elimination*, we can (defeasibly) infer that she has the obligational right that Tom does not copy her novel, which means that Tom is obliged, toward Mary, not to copy her novel:

(1) $\boldsymbol{AbsoluteOblRight}_{Mary}\text{NON}\ Done$ [copy $Mary$'s novel]

---

(2) $\text{FORANY}\ (x)\ \boldsymbol{OblRight}_{Mary}\text{NON}\ Does_x$[copy $Mary$'s novel]

---

(3) $\boldsymbol{OblRight}_{Mary}\text{NON}\ Does_{Tom}$[copy $Mary$'s novel]

---

(4) $\boldsymbol{Obl}^{Mary}\text{NON}\ Does_{Tom}$[copy $Mary$'s novel]

The same holds for other absolute rights Mary has, such as her right to life (that nobody takes her life), to privacy (that nobody interferes with her privacy), to personal integrity (that nobody harms her), and her property rights.

Besides absolute obligational rights there may be absolute permissive rights, which we define similarly:

Definition 19.5.3 *Absolute permissive right. k has the* absolute permissive right *of doing A iff k has toward any x the permissive right of doing A:*

$\boldsymbol{AbsolutePermRight}_k ToDo{*}\ A \equiv$
$\text{FORANY}\ (x)\ \textbf{PermRight}^x Does_k A$

For instance, we may assume that Mary, who is living in a liberal country, has absolute permissive rights to express her opinion, to have the private life she chooses to have, to use her property as she likes, to belong to a union, to use contraception, and so on.

19.5.3. Exclusionary Rights

The idea of an obligational rights takes a peculiar shape when it concerns the prohibition of performing certain inferences, or of using a certain kind of premises for certain purposes, in the interest of a particular person.

This is especially the case of anti-discrimination rules. These rules establish no unconditioned prohibition to perform certain actions (like dismissing an employee or refusing to appoint somebody), but rather prohibit to decide for a certain course of action—that is, to intend to perform that action—on the basis of a certain reason (a certain mental content): They prohibit the process which concerns (*a*) forming the intention to act in a certain way of the basis of that reason and (*b*) implementing the intention.

For instance, in many legal systems employers are prohibited to adopt any decision having a negative impact on their employees on the basis of race or sex, and this prohibition, though also serving some collective purposes, is primarily aimed at promoting the employee's interest.

FORANY (x, y)
IF [x is y's employer]
THEN^n
(***Forb*** [x intends to impairs y's work situation on the basis of y's race or sex])$\Uparrow^y$

This is a cognitive obligation, namely, the obligation not to adopt a certain mental state as a premise (a reason) of a certain kinds of reasoning. Therefore, reason itself can take care not only of its endorsement, but also of its implementation. Thus, the rational employer endorsing the above rule is prevented from forming the corresponding intention: The rule operates as an undercutter for the inference leading to forming the prohibited intention.

Obviously, we may re-express this rule as concerning an obligational right.

FORANY (x, y)
IF [x is y's employer]
THEN^n
OblRight$_y$ [x DOES NOT intend to impairs y's work situation on the basis of y's race or sex]

There may be similar exclusionary rights with regard to religious beliefs: One has a right that one's position is not impaired on the basis of the fact that one does or does not share a certain religious faith.

It may be wondered whether there is a more content-general exclusionary right concerning religious matters, namely, the right that no political decision is taken on religious grounds (on premises which partake to the dogmas of a certain religious persuasion).

FORANY (x)
OblRight$_x$ [political decisions impacting on x are NOT adopted on the basis of religious grounds]

We shall not consider whether this rule is binding in certain legal systems, since we do not want to enter the difficult debate on neutrality, tolerance, and public reason in religious matter. For our purposes, it suffices to have shown that this rule has the logical form we have just analysed.

19.6. Rights and Norms

Our characterisation of the notion of a right is based upon the view that certain normative situations are intended to serve the interest of particular individuals.[10]

This feature of rights allows us to understand why authoritarian legal systems, besides curtailing specific rights have also attacked the idea of a right, arguing that all normative positions are aimed at protecting collective interests.

However, we must distinguish the correct idea that there is a conflict between the idea of a right and the most radical forms of collectivism from the idea that there is a conflict between rights on the one hand and the view that the law consists of "norms", these being intended as obligations or normative propositions or authoritatively-stated propositions. We shall argue in the following sections that the idea that there is such a conflict is largely based upon conceptual confusion.

19.6.1. Rights in Authoritarian Legal Systems

There is a tension between the authoritarian assumption that an individual has no worth in him/herself (that the individual person is nothing, and the nation is all, as the Nazis used to say), and the idea that individual interests provide the intentional justification purpose of a normative position. It is true that the case for a certain degree of (instrumental) recognition of individual rights can be made even within radically collectivistic ideologies (once we assume, for instance, that market economy or freedom of research are the best ways to promote certain collective goods, such as economical efficiency and technological power).

[10] This is the case for both obligational and permissive rights, and also for potestative rights. As we shall see in Sections 22.1.4 on page 581 and 22.1.5 on page 583, potestative rights correspond to purpose-oriented conditional connection between an action and a normative effect.

However, expressing and honouring the principles of these ideologies—and in particular the idea that the single person is worthless compared with a certain social entities, like the nation, the race, the working class and so on—usually requires individual rights to be downplayed or suppressed, much beyond what is necessary to advance collectivistic goals.

19.6.2. The Supposed Conflict between Rights and "Norms"

The tension between rights and authoritarian political ideologies does not enable us to assume a general or conceptual opposition between rights on the one hand and norms on the other (see for instance by La Torre 1988, who considers rights in Nazi legal doctrine). Let us consider different meaning in which the ambiguous term "norm" can be understood: an obligation (a normative proposition expressing an obligation), a binding normative proposition, the content of an (effective) authoritative statement.

Let us first consider the opposition between rights and obligations. There can indeed be an conflict between certain rights and certain obligations. This may hold in particular, for permissive rights: the permission to accomplish action A is certainly incompatible with A's prohibition. However, this possible conflict does not exclude that in a certain sense one may speak of a logical primacy of the notion of an obligation, since, as we know, a permission is the exclusion of a prohibition, that is, of an obligation to omit. Moreover, there cannot be any opposition between the idea of an obligational right and the idea of an obligation, since an obligational right exactly consists in the obligation of others in the interest of the right holder. There also is no opposition between the notion of a right as a power and the notion of an obligation. On the contrary, the exercise of powers frequently determines the creation of new obligations, like the obligations stated in a contract, or the obligation of the judge to decide the issues submitted by a plaintiff.

Let us now consider the oppositions of rights and normative propositions: The idea that rights are a fundamental component of the law has been opposed to the idea that the law is made of normative propositions, and thus to normativistic models of legal systems. It seems to us that this opposition seems to be based upon the deeply entrenched conceptual confusion of three distinct ideas: a binding normative proposition, a normative act, and an obligation. This confusion is indeed quite common in legal thinking and probably is connected with Kelsen's (1992; 1967) use of the term *norm* do denote all of the following: a binding normative propositions, the meanings of positive acts of will, and an ought, the latter concept merging the ideas of obligation and of normative conditionality (as we shall see in Chapter 20). This confusion is also increased by merging the idea of a *cognitively-binding* proposition (a proposition which deserves to be endorsed, which is adoption-worthy) with the idea of an *obligational* proposition (a proposition which says that somebody has the obligation

to behave in a certain way). Once that appropriate conceptual distinctions are introduced the supposed conflicts between rights and norms can be overcome.

First of all, there is no necessary conflict between *rights* and norms, intended as *normative propositions*: Normative propositions can have a wide range of contents: obligations, possibly for the benefit of specific persons, but also permissions, powers, and various other legal qualifications. In particular, also the proposition that ⌈somebody, under certain conditions, has a right⌉ is a normative proposition. Obviously there can be conflict between different normative propositions, and a normative proposition expressing a right can conflict against other normative propositions, expressing permissions, obligations, or other rights.

Secondly, there is no necessary conflict between *rights* and norms, intended as *binding normative propositions*, if by bindingness we mean cognitive bindingness (rather than obligation), that is, adoption-worthiness. Our assertion that certain persons have a certain right, expresses indeed what we view as a binding normative proposition (a proposition which we view as adoption-worthy in legal reasoning), namely, the proposition that these persons have that right. There are indeed many binding normative propositions whose content is a right. Some of these propositions express universal human rights, and are thus binding with regard to any modern legal system (in any context in which legal reasoning is used), others are only binding with regard to specific legal systems (with regard to specific territorial and institutional frameworks). Some of these propositions express permissive rights, like the propositions that every one is permitted to express one's own opinion, that everyone is permitted to associate with one's fellows, and so on. Other binding normative propositions express obligational rights, like the proposition that every one has the obligational right not to be tortured (that it is forbidden, in there interest of the concerned human being, that he or she is not tortured).

Similarly, it makes little sense to oppose in general terms *rights* and norms intended as *authoritative propositions*, that is, normative propositions stated by a normative authority (a legislator).

It is true that there are rights (but also obligations) that exist independently of authoritative enactment-acts (even when among such acts we include also the production of constitutional texts). These rights having a non-enacted foundation include not only human rights, but also any other rights resulting from normative propositions that are binding on non-enacted grounds (for instance, on the basis of precedent or custom).

It is also true that normative propositions stated by a normative authority can impinge upon individual rights by prohibiting what was permitted in the interest of the right holders (for instance, forbidding free speech or free movement). However, authoritative statement can impinge upon rights also by permitting and empowering what was forbidden in the interest of right holders (for instance, by empowering employers to sack their employers, by permitting fac-

tories to pollute the environment, by permitting local communities not take care of their schools).

Finally, normative propositions stated by a normative authority frequently favour rather than impair rights: They introduce or extend rights, both of the permissive and the obligations type, or provide the precondition for their enjoyment. This concerns permissive rights like the permission to use certain public spaces, to have contraception, to take maternity leave, but also obligational rights like the workers' right to be paid an insurance by their employer or the citizens' right that their personal data are not processed without their consent.

It is misleading therefore to oppose in general terms rights and legislation. The potential conflict between non-enacted rights and legislative provisions rather concerns the distinctions between natural and positive law, between constitution and legislation, between "social" and institutionalised sources of the law.

Chapter 20

NORMATIVE CONDITIONALS AND LEGAL INFERENCE

In Section 15.2.1 on page 418 we have seen that material conditionals, as provided by classical propositional logic, are inappropriate, under various regards, to express conditional normative propositions. Here, we shall provide an alternative formalisation, which hopefully will help us in understanding the logical structure of normative conditionals and their function in legal reasoning.

Our inquiry will start with the analysis of the cognitive function of normative conditionals. This will enable us to establish which inferences are applicable to them, and which inferences are not applicable.

20.1. The Cognitive Function of Normative Conditionals

Before providing a formal analysis of normative conditionals, we need to investigate their cognitive function.

This requires us firstly to consider their connection with conditional instructions (see Section 1.4 on page 31), and secondly to distinguish different types of normative conditionals.

20.1.1. Conditional Instructions and Propositions

Conditional normative propositions can be viewed as expressing the doxification of *conditioned instructions*, namely, instructions requiring that, under certain conditions, certain actions shall or may be taken, or certain mental states shall or shall not be adopted.

For example, the conditioned instruction:

(a_1) When I wake up, I shall phone Mary

becomes the normative proposition:

(a_2) When I wake up, then I ought to phone Mary

Correspondingly, my intention to execute instruction (1) is coupled by my belief that proposition (2) is true.

For instance, an intention-based formulation is used in the first of the twelve tables, the most ancient text of Roman law, to express the general instruction:

(b_1) If one summons another into court, the latter shall go[1]

which may be doxified into the normative proposition:

(b_2) If one summons another into court, then the latter is ought to go

This general rule can be expressed, using our formalism, as follows:

(b_3) FORANY (x, y)
IF [x summons y into court]
THEN ***Obl*** $Does_y$[go]

(for any persons x and y, if x summons y into court then it is obligatory that y goes)

As a more modern example, consider a term in the contract between Tom and Mary, saying that if she is late in delivering the merchandise, she is to pay a penalty of € 1,000. In such cases, the parties have the intention that the following conditioned instruction is executed:

(c_1) If Mary is late, then she shall pay a penalty of € 1,000

which may be doxified as:

(c_2) If Mary is late, then she ought to pay a penalty of € 1,000

and which we also express as:

(c_3) IF [$Mary$ is late]
THEN ***Obl*** $Does_{Mary}$[pay a penalty of € 1,000]

20.1.2. Kinds of Normative Conditionals

As the previous examples show, conditioned normative propositions express that under certain conditions a certain normative conclusion holds. Such propositions may be formulated in various ways, especially when they have a general content. Here are some examples:

- "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty" (Article 11 of the Universal Declaration of Human Rights), which can be conditionally expressed as "if one is charged with a penal offence, then one has the right to be presumed innocent until proved guilty."
- "Everyone who works has the right to just and favourable remuneration" (Article 23, number 3, of the Universal Declaration of Human Rights), which can be conditionally expressed as "if one works, then one has the right to just and favourable remuneration."

[1] The Latin original: "Si in ius vocat, ito."

- "Who receives an undue payment, has the duty to return it to the true creditor" (from the Italian civil code), which can be conditionally expressed as "if one receives an undue payment, then one has the duty to return it to the true creditor."
- "Corporeal things are those which are by nature tangible, as land, a slave, a garment, gold, silver, and other things innumerable" (*Institutes of Justinian*, 2.1), which can be conditionally expressed as "if a thing is a piece of land, a slave, a garment, gold, silver, or another innumerable matter, then it is corporeal."[2]

In the following, we shall provide a canonical representation for conditioned normative propositions, which enables us to represent in uniform ways the different contents that are stated so diversely in ordinary legal language.

20.2. Specific and General Normative Conditionals

We usually conceive normative conditionals as general propositions, having the following content: If a certain kind of situation exists, or a certain kind of person has performed a certain kind of action, then a certain kind of normative effects shall follow.

However, we sometimes also reason according to specific normative conditionals (conditionals referring to specific subjects and objects). Since we shall develop the logical analysis of general conditionals by considering the specific conditionals that can be inferred from them, we need first to consider specific conditionals. Then we shall discuss general conditionals.

20.2.1. Specific Normative Conditionals

Specific normative conditionals are frequently expressed by contractual terms. Consider for example the following:

> *if* Tom does not pay the whole price by 10.01.2004,
> *then* he must pay a penalty of € 1,000.

In such a proposition we may distinguish an antecedent (a pre-condition):

> Tom does not pay the whole price by 10.01.2004.

and a consequent (a post-condition):

> Tom must pay a penalty of € 1,000.

Our canonical representation of a specific conditional proposition is the following:

[2] The Latin original: "Corporales eae sunt, quae sui natura tangi possunt, veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles."

IF *Antecedent*
THEN *Consequent* IS NORMATIVELY DETERMINED

where by saying that the consequent IS NORMATIVELY DETERMINED by the antecedent we indicate that the antecedent causes or at least enables the verification of the consequent. Normative conditionality is more than the simple cooccurrence of antecedent and consequent: The antecedent *determines* the dependent realisation of the consequent.[3]

20.2.2. Normative Conditionals and Causality

Rather than saying that the antecedent determines the consequent, we could say that the antecedent *causes* the consequent, but we prefer to use a more neutral language, to avoid equivocations with natural causation, though we basically view legal conditionality as a form of causality. In fact, a causal view of legal rules not only has a long tradition, but is also reflected in common language, like when we speak of "legal effects" or "legal consequences"[4] .

Besides the idea of causality, various metaphors have been used to express the dependence between legal conditions and legal effects. For instance, the biological metaphor of legal effects being generated, or being born, has a long history. For example, Roman lawyers used to say that obligations "are born from contract"(*ex contractu nasci*, *Institutes of Justinian*, 3.27).

Another very ancient way of expressing the idea of legal conditionality is the cosmic metaphor of rising, which we can find, for instance, in the legal saying that "the law (any legal entitlement) rises from the facts" (*ex facto oritur jus*).

A further metaphor (though now no longer perceived as such) consists in the originally spatial idea of *constituting* (from Latin *constituere*, having the basic meaning of putting, placing, establishing, erecting). It is said that all (or some) legal rules are constitutive: Their antecedents are constitutive facts, which indeed constitute their effects (see Section 21.1.2 on page 551).

This is not the place either for going through the many metaphors that express the notion of normative conditionality, or for examining their relative merit. In fact, though the discussion of these metaphors may be interesting, it would not be useful for our purpose of providing a sufficiently precise logical characterisation: All these different formulations are just different ways of

[3] Out notion of *determination* can be related to the notion of *generation*, as described by Goldman 1970. By speaking of determination, generation, or causality we do not intend to commit ourselves to specific logical axiomatisations of these notions. For instance, we do not commit ourselves in general to the constraint of the rejection of identity (the idea that *A* cannot determine *A* itself), as Shoham 1990 does, with regard to causality. We rather view normative determination as a general kind of counterfactual dependency.

[4] For a discussion a causal views of normative conditionals, with particular reference to the Italian and German doctrines, cf. Falzea 1985, who goes back to Zitelmann 1879, 204, and Carcaterra 1990, who draws from Reinach 1913. On legal conditionality, see also Vida 2001.

pointing to the relation of dependence between antecedent and consequent in normative conditional.

All of these ways of referring to legal conditionality—there included the idea of legal causality—should be only be viewed as useful metaphors, that direct to some similarities between legal conditionality and other forms of conditionality, and stimulate inquiries intended to explore commonalities and differences.

For example, some have observed the following difference between legal conditionality and natural causality: Contrary to what happens with regard to natural causality, where an event cannot be viewed as a cause of something that already independently exists, a legal effect which has already been determined can still be determined by a new precondition of it. For instance, one's ownership of a thing may be determined by a valid purchase contract and, at a later time, by usucapion (by possessing the thing for 20 years): When ownership is at issue, if usucapion can be established it is useless to inquiry on the validity of the contract. We cannot here address this issue of doubly produced legal effect. Let us just remark that accepting the view that legal effects can be doubly (or multiply) determined, by independent preconditions, is consistent with continuing to speak of *legal causality*, in the sense in which we use the term *causality*.[5]

Another interesting difference between physical causality and normative conditionality pertains to *retroactivity*. Physical effects cannot precede their causes, while legal effects can retroact to a time that precedes the happening of the event determining the effects. For instance, when a contract is ratified (or voided), usually this retroacts to the time when the contract was stipulated. Thus it is assumed that the contract was effective (or ineffective) from the time of its stipulation.

To emphasise the dependence between antecedent and consequent in normative conditional, we could express conditional norms though a language that directly expresses the idea of determination. For instance rather than writing:

IF A THEN B

we may write:

A DETERMINES B

However, we prefer to stick to the traditional "if ... then" language, and express the conditionality between Tom's omission to pay, and his obligation to pay a penalty simply as:

IF [Tom does not pay the whole price by 10.01.2004]
THEN [Tom must pay a penalty of € 1,000]
IS NORMATIVELY DETERMINED

In general, when writing:

[5] For a discussion of this issue, with reference to the literature, and more generally for a critical discussion of causal views of legal conditionals, see Engisch 1968b, chap. 2.

IF A THEN^n B

we shall be meaning

IF A THEN B IS NORMATIVELY DETERMINED

that is, we shall be referring to normative determination. We shall use the superscripts n and m to distinguish the normative conditional IF ... THEN^n and the material conditional IF ... THEN^m.

20.2.3. *General Normative Conditionals*

Let us now examine general normative conditionals. Consider for example the following rule:

Those below 18 years are forbidden to buy alcoholic drinks

which we conditionally represent as:

FORANY (x)
IF [x is below 18 years]
THEN^n ***Forb*** $Does_x$[buy alcoholic drinks]
(for any x, if x is below 18 years, then it is forbidden that x buys alcoholic drinks)

As this example shows, normative *generality* is captured by universal quantification. When quantification concerns refers to persons (and in particular to holders of normative positions, or authors of actions), we speak of *personal generality*. When quantification concerns different elements of a normative proposition, we can speak of *content-generality*.[6] Let us take another example, this time from classical natural law.

By a wrong here we mean every fault, whether of commission or of omission, which is in conflict with what men ought to do, either from their common interest or by reason of a special quality. From such a fault, if damage has been caused, by the law of nature an obligation arises, namely, that the damage should be made good. (Grotius 1925, sec. 17.1.1)

We may synthesise the Grotian principle—which was adopted, with some adaptations, in continental civil codes[7] —into the rule that whoever culpably causes an unjust damage to another is obliged to compensate the damaged person. This rule is both personally-general (with regard to the author x and victim y) and content-general (with regard to damage d).

[6] This aspect is frequently referred to by using the term “abstractness.” To avoid distinguishing between generality and abstractness, we prefer to speak of generality in both cases.

[7] See Art. 1382 of the French code: “Every act whatever of man which causes damage to another obliges him by whose fault the damage occurred to repair it.” Also Art. 2043 of the Italian civil code uses similar words.

FORANY (x, d, y, t)
IF $Does_x$[cause damage d to y] AND
[x's behaviour is culpable]
THEN^n ***Obl*** $Does_x$[compensate y for d]

(for any persons x and y and damage d, if x causes damage d to y and x's behaviour is culpable, then x is obliged to compensate y for d)

20.2.4. Operative Facts, Precondition-Types and Tokens

Any element that contributes to determine a normative effect according to a normative conditional—that is, any element which contributes to instantiate the antecedent of the conditional—can be called an *operative fact*, according to the suggestion of Hohfeld (1964, 32):

Operative, causal, or constitutive facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both these functions simultaneously.

For instance, we may say, with reference to the liability rule above, that both causing an unjust damage and being culpable are operative facts. For referring to the abstract characterisation of all operative facts that can be found in the antecedent (the precondition) of a general or abstract normative conditional, the German word *Tatbestand* is often used (see, for instance, Larenz 1992, 159), which we translate as *precondition-type*.[8] Thus, a *Tatbestand* is a set—or better a logical combination—of operative facts that is sufficient for producing a legal effect.

Definition 20.2.1 *Precondition type. A* precondition-type *is the antecedent of an abstract or general normative conditional. More exactly, given a conditional:*

FORANY $(x_1 \ldots x_n)$ IF $A(x_1 \ldots x_n)$ THEN^n $B(x_1 \ldots x_n)$

where $A(x_1 \ldots x_n)$ *and* $B(x_1 \ldots x_n)$ *are formulas containing some variables* $x_1 \ldots x_n$*, the corresponding precondition-type is :*

$A(x_1 \ldots x_n)$

Thus, with regard to the rule above, the precondition-type would be represented by:

[8] Note that the word *type* is here used in the sense of a generic characterisation. We are not using it to mean a *prototype*, which comes close to the meaning in which the word *Typus* is used in German legal theory (see Section 6.2.7 on page 191).

(T1) $Does_x$[cause damage d to y] AND
[x's behaviour is culpable]

To emphasise the idea that variables just are place holders, we substitute them with numbered boxes, as we did in Section 15.3 on page 421. We thus may represent the above precondition-type as:

(T1) $Does_{\boxed{1}}$[cause damage $\boxed{2}$ to $\boxed{3}$] AND
[$\boxed{1}$'s behaviour is culpable]

Since a precondition-type is a general representation (in our example, both personally general and content-general) we can have many different concrete instances or tokens of it (on types and their tokens, see Pattaro, Volume 1 of this Treatise, sec. 2.1). Thus we need to distinguish the *precondition-type* as an abstract characterisation from the specific description of one of its instances, to which we can refer by using the expression *precondition-token* (corresponding to the German the word *Tatsache*) .

Definition 20.2.2 *Precondition-token. A* precondition-token *is the concrete instance of a precondition-type.*

For example:

(T2) $Does_{Tom}$[cause damage *dent in the car* to *Mary* on 13.06.2003] AND
[*Tom*'s behaviour is culpable on 13.06.2003]

is an instance of the precondition-type above, and thus a precondition-token.

The passage from a precondition-type to one of the corresponding precondition-tokens requires supplementing the precondition-type with elements of a particular case. In this way, we obtain a description that matches just one particular situation (on the notion of a situation, see Definition 18.1.3 on page 484), as we shall see in the following pages, when we shall address the notion of subsumption.

Usually this is done by substituting the variables (the pronouns) in the rule antecedent (precondition-type) with the name of particular entities (persons or things). This is sufficient when the precondition-type is concerned with events that can happen just once, with regard to particular entities (typically, birth or death).

In case of events that may take place more that one time with regard to the same entities, we need further specifications. For example, we may need to distinguish the fact that Tom parked on the left side of his street on 13.06.2003 from the fact that he parked there on 14.06.2003. For making this distinction,

we need to provide a specification of the spatial-temporal situation where the precondition-token has taken place (usually the indication of a time would be sufficient, unless we are concerned with events which can happen at different places at the same time).

For instance, Tom may park in more than one occasion on the left side of his street, where parking is forbidden. When fining him, the police officer needs to identify the particular instance of the antecedent-type ⌈x parks in a forbidden place p⌉ that has taken place. For this purpose, it is not sufficient to refer to the fact that Tom has parked on the forbidden left side of his street; it is also necessary to mention the time when this has taken place.

Note that from the point of view here developed, not every sentence in a law text having a conditional form provides, in its antecedent, the complete characterisation of a precondition-type. Our notion of a precondition-type is a semantic, rather than a syntactic, notion. It refers to the antecedent of a normative conditional, that is, to the set of facts that are normally (defeasibly) susceptible of producing a certain legal result.

These are many ways in which, when using natural language, we can specify the content of a normative conditional.

We can do that through just one sentence, which specifies both the antecedent and the consequent of the conditional. Or we may state separately the various conditions that need to take place jointly to produce the legal effect.

For instance, rather than saying ⌈if one causes to another an unjust damage, with negligence or intention, one is obliged to compensate it⌉, we may say all of the following:

- if one causes to another a damage, one is obliged to compensate it;
- the damage must be unjust (for determining the obligation to compensate it);
- it must be caused with negligence or intention (for determining the obligation to compensate it).

The "must" which occurs in the above clauses (2) and (3) should not be taken for an expression of obligatoriness: It rather expresses the necessity (the need) that a certain circumstance takes place for the legal effect to be determined—according to a certain determining connection, that is, according to a certain precondition type—as we shall see in the following section.

20.2.5. Must and Relative Necessity

In many cases, when a legal text uses the words *must*, *ought*, *may*, or *can* it does not express obligations or permissions in the precise sense we discussed in Chapter 17. Consider for example, when the law says that a petition or contract must or must not be done in a certain ways, or that it can or cannot contain certain terms.

In these cases, the law establishes what we may call a *relative necessity*: It establishes that certain requirements need (or need not) be satisfied for a certain legal result to be obtained in a certain way, i.e., for the realisation of a certain precondition-type. Often the specification of this result is left to further normative propositions.

For instance, assume that in a law text, after the rule that whoever appropriates property of others is going to be punished as a thief, there is the statement that the appropriator *must* have the intention of getting permanent possession of the stolen object. Clearly, there is no legal obligation to have such intention. The *must* signals a necessity, relative to the precondition-type "theft," that is, relative to the precondition which determines subjection to punishment for theft. It indicates that the elements explicitly contained in the antecedent of the theft rule are not really sufficient to produce the effect indicated in that rule: A further element, which is, the intention to appropriate is also required to provide the full antecedent (to instantiate the precondition of the rule).

We may use the term *anancastic*—from the Greek word *ananke*, necessity—to characterise the (anancastic) propositions expressing this kind of necessity. We may also say that these propositions express an anancastic connection between a certain antecedent element and a legal precondition, that is, the necessity of that element for completing the precondition. In particular, we speak of *anancastic rules* for referring to general or abstract propositions of this type. Note that from our approach, that sharply distinguishes propositions and speech acts, we need to distinguish the anancastic proposition in itself and the speech act that states or proclaims it (see Section 23.2 on page 593), determining its bindingness.[9]

As we may have normative propositions expressing anancastic connections, we may also have propositions denying (excluding) such connections. For instance, assume that a law text states the following proposition: ⌈a thief *does not have to* intend (or *may not* intend) to appropriate the stolen object directly, the thief *can* also have the intention to provide possession to another⌉. In this context, the locution *does not have to* (or *may not*) does not express lack of obligation, but the lack of the above indicated necessity, and *can* does not express permission, but rather signals an alternative possibility: Also the intention to provide possession to another is a sufficient way to satisfy the intention requirement for theft. As a result of the enactment of this law-text (of the bindingness of the propositions it expresses), the intention to appropriate for oneself is no longer a necessary element of the precondition of theft: It may be substituted with the intention to provide possession to another (it is now only necessary is

[9] On anancastic rules, see Conte 1985, 360ff., and Azzoni 1992; 1997. This terminology was anticipated by von Wright (1963, 10), who defines an "anakastic statement" as a "statement to the effect that something is (or is not) a necessary condition of something." The *anancastic* use of the word *must* is also is discussed in legislation technique, though under other descriptions (see, for instance, Haggard 1996, 239).

that there is either the intention to appropriate for oneself or the intention to appropriate for another).

The word *must* is most frequently used in an anancastic sense when:

- the condition to be realised is dependent upon the action of a person, and
- the satisfaction of the condition contributes to determining an entitlement of this person, or in any case a result that the person normally would like to produce.[10]

Consider, for example, the case when a statute or a contract says that a certain act must be done in writing, or that a certain notice must be given before a certain date.

When the two conditions above are satisfied, must-statements—besides stating the relative necessity of a certain condition, and indeed on the basis of this necessity—may be viewed as implying a *technical* or *hypothetical imperative*: Given that the realisation of the condition is necessary for determining an advantageous result (according to a certain rule), we may say that ⌈If one wants to achieve the conditioned legal result, one must realise the condition⌉.

When the action to be performed has a cost for its agent, we may also say that the must-proposition puts a *burden* or an *onus* upon the person that would benefit for the realisation of the conditioned legal result: Given that the realisation of the condition represent a necessary cost (burden or onus) to be sustained for determining the result in a certain way, we may say that: ⌈If one wants to achieve the conditioned legal result in that way (that is, as resulting from a certain precondition-type), one must bear the cost (burden or onus) of realising the additional condition⌉.

However, the basic and constant meaning of the anancastic *must* consists in what we called *relative necessity*, which can possibly be characterised by saying that the combination of the following propositions (1) and (2):

(1) if A then B
(2) C *must* be realised for B to be determined according to (1)

may be assumed to be equivalent to following proposition (3):

(3) IF A AND C THEN^n B

Similarly the combination of the following propositions (1) and (2):

(1) if A and C then B
(2) rather than C, D *can* be realised for B to be determined according to (1)

may be assumed to be equivalent to:

[10] Note that these conditions, though being usually satisfied are not necessary for the occurrence of this kind of *must*. For instance the second condition is not satisfied in the theft example we have just presented.

(3) IF A AND $(C$ OR $D)$ THEN^n B

Though these equivalences seem to capture correctly the semantic function of anancastic propositions, we need to observe that the word "must" is often also used in related but weaker senses.

Often, rather than indicating that an elements partakes to the operative facts of a certain normative conditional, the word "must" signals that the concerned element represents the absence (non verification) of circumstances which either would impede (*impeditive* facts) the conditioning facts from producing their effect or would eliminate the effect (extinctive facts). For instance, with regard to the existence of an obligation to compensate a damage, the wilful or negligent causation of an unjust damage is to be viewed as the operative fact (the fact determining the legal effect, according to the corresponding normative conditional), while the state of necessity and the incapability of the author represent impeditive facts. This is what we may elliptically express, though a bit improperly, when saying that the author a tort must be capable and must not be in a state of necessity.

The distinction between operative facts, on the one hand, and absence of impeditive or extinctive facts, on the other hand, is relevant in particular with regard to the discipline of the burden of proof: Usually once the determining facts have been established, the judge is to derive their legal effect, unless any impeditive or extinctive facts are also established. Thus, legal reasoning with impeditive facts corresponds to the model of defeasible reasoning, as we shall see in Chapters 26 and 27.

Finally, when saying that certain circumstances "must" occur with regard to a certain result, we sometimes mean that they consist in the absence of facts that would make that result unsafe (voidable). For instance, when saying that a contract must not be due to duress or deceit, we may imply (though a bit improperly) that duress or deceit would determine the voidability of the contract.

20.3. The Negation of Normative Conditionals

As in Chapter 17 we considered the negation of actions and deontic statuses (and the corresponding link between obligation and permission), and in Chapter 19 we considered the negation of Hohfeldian positions, now we shall deal with the negation of normative conditionals.

We shall approach the latter issue on the basis of our idea that normative conditionality can be viewed as a type of causation, or *determination*. Therefore, the negation of the normative conditional:

IF A THEN^n B

which we express as:

NON (IF A THEN^n B)

is to be read as the negation that A determines B, that is, as the proposition expressing that A is unable to determine B:

NON (IF A THEN^n B) $\equiv$ A DOES NOT DETERMINE B

For instance, the following negated conditional:

NON
IF [Tom does not pay the whole price by 10.01.2004]
THEN^n [Tom must pay a penalty of € 1,000]

is to be read as meaning that:

[Tom does not pay the whole price by 10.01.2004]
DOES NOT DETERMINE
[Tom must pay a penalty of € 1.000]

We cannot here pursue in any detail the issue of the negation of normative conditionals, and in particular, we cannot adequately address the negation of general normative conditionals. Let us just observe that we need to distinguish two ways of applying negation to such normative conditionals:

- When negation comes before the universal quantifier, it expresses that some instances of the antecedent do not determine the consequent.
- When negation comes after the universal quantifier, it expresses that no instances of the antecedent determine the consequent.

Compare, for instance, the following two formulas:

(*a.*) NON
FORANY (o)
IF you commit adultery on occasion o
THEN^n you are responsible for divorce

and

(*b.*) FORANY (o)
NON
IF you commits adultery on occasion o
THEN^n you are responsible for divorce

Formula (*a*) says that not on all occasions, if you commit adultery are you responsible: There are some occasions when committing adultery does not determine responsibility for divorce.

Formula (*b*) is the stronger assertion that in every occasion, it is not the case that if you commit adultery you are responsible: Committing adultery never determines responsibility for divorce.

(1) Tom does not deliver the merchandise by 10.01.2002;
(2) IF [Tom does not deliver the merchandise by 10.01.2002] THEN^n [it is obligatory that Tom pays € 1,000 to Mary]

---

(3) it is obligatory that Tom pays € 1,000 to Mary

Table 20.1: *Instance of* normative detachment

20.4. Inferences for Normative Conditionals

For identifying the basic logical inferences concerning normative conditionals, we need to start with our commonsense intuitions. For this purpose, we shall rely on examples, but also on the idea that normative propositions are reducible to (the doxification of) conditional instructions, and thus to conditional intentions. Thus, we shall assume that the same inferences are applicable to both conditional intentions and conditional normative propositions.

This approach will enable us to specify what inferences, among those that are licensed by material conditionals, also apply to normative conditionals, and what inferences, on the contrary, are inappropriate to the normative domain.

20.4.1. Detachment

First of all, normative conditionals (like conditioned instructions) should allow for detachment, similarly to material conditionals. Contrary to *syllogism* in classical logic, normative detachment is defeasible.

Reasoning schema: *Normative detachment*
(1) A;
(2) IF A THEN^n B
——— IS A DEFEASIBLE REASON FOR
(3) B

According to *normative detachment*, for instance, we can perform the inference in Table 20.1.

20.4.2. Specification and Universal Conditionals

Normative premises, as we observed above with regard to categorical normative propositions, allow for *specification* (FORANY *elimination*). This also holds when general conditional propositions are at issue. Note that the schema *normative specification* (contrary to classical detachment) is defeasible.

(1) FORANY (x, d, y)
IF [x unlawfully causes damage worth d to y]
THEN^n ***Obl*** $Does_x$[pay d to y]

---

(2) IF [Tom unlawfully causes damage worth € 2,000 to $Mary$]
THEN^n ***Obl*** $Does_{Tom}$ [pay € 2,000 to $Mary$]

Table 20.2: *Instance of* normative specification

Reasoning schema: *Normative specification*
(1) FORANY (x) $A(x)$
——— IS A DEFEASIBLE REASON FOR
(2) $A(x/a)$

For example, from the general and abstract rule that ⌈if one illegally causes a damage, then one has to pay the value of the damage to the damaged person⌉, it may be inferred that ⌈if Tom causes a damage of € 2,000 to Mary, then he will have to pay that sum to her⌉, as you can see in Table 20.2.

20.4.3. Normative Syllogism

We have seen that in classical predicate logic, by combining *specification* and *detachment*, we get *syllogism*. This combination can also be applied in normative inferences, so that, by combining *normative specification* and *normative detachment*, we obtain a compound defeasible inference schema, which we call *normative syllogism*.

Reasoning schema: *Normative syllogism*
(1) FORANY (x) IF $A(x)$ THEN^n $B(x)$;
(2) $A(x/a)$
——— IS A DEFEASIBLE REASON FOR
(3) $B(x/a)$

where x is the list of all (free) variables appearing in A and in B, a is a list of terms referring to individual persons or objects, $A(x/a)$ and $B(x/a)$ are the results we obtain by uniformly substituting, within A and B, all variables in x with constants in a. According to this reasoning schema, we can perform the inference in Table 20.3 on the following page.

(1) FORANY (x, d, y)
IF [x unlawfully causes a damage worth d to y]
THEN^n ***Obl*** $Does_x$ [pay d to y];
(2) Tom unlawfully causes a damage worth € 2,000 to $Mary$

---

(3) ***Obl*** $Does_{Tom}$ [pay € 2,000 to $Mary$]

Table 20.3: *Instance of* normative syllogism

20.4.4. Chaining Syllogisms

Normative syllogisms can be performed one after the other. Thus they form a chain, where the conclusions of earlier syllogisms provide preconditions for further syllogisms.

This is what is usually meant by a logical reconstruction of legal reasoning by most writers who have tried to use predicate logics in formalising the law.[11]

Let us consider, for instance the famous scene that opens Malraux's *La condition humaine* (Malraux 1946, 9ff.). The scene takes place in Shanghai, on 21st March 1927. Tchen, a communist revolutionary is waiting in the dark beside the bed where a man is sleeping, under a mosquito net. The man is a trader in weapons who is going to deliver guns to the government. This delivery would possibly compromise the success of a plan for insurgency. Malraux admirably describes the thoughts and feelings of Tchen before the strike, until he suddenly plunges his dagger in the body of his victim, who passes inadvertently from sleep to death.

By applying to Tchen's case the analysis provided by Alexy (1989), we obtain the inference in Table 20.4 on the next page (we discount possible legal issues concerning the applicable laws with regard to the time and place of the event):

This example shows why *judicial syllogism* (a sequence of chained syllogisms) is said to provide only a superficial view of legal reasoning. The syllogistic model of legal reasoning is based upon the reasoner's endorsement of specific factual conditions and general normative conditionals, like those we labelled as premises in Table 20.4 on the facing page, but it does not include inferences leading to the adoption of the rules one is using. To provide a sufficiently broad picture of legal reasoning we need to model also these higher-level inferences.

In Chapter 25, we shall consider inferences that lead to the endorsement of rules that are expressed by, or embedded in, a source of law. In the following

[11] Examples of this way of modelling legal reasoning can be found, for example, in the following contributions: Ferrajoli 1970; MacCormick 1978; Hernandez Marín 1989; Golding 2001; Alexy 1989.

1. *Tchen* kills a sleeping person in the absence of any special defensive precaution taken by the victim ⟨premise⟩
2. FORANY (x)
   IF [x kills a sleeping person in the absence of any special defensive precaution taken by the victim]
   THEN^n [x knowingly takes advantage of the victim's unsuspected and defenceless condition, to kill him or her] ⟨premise⟩
3. *Tchen* knowingly takes advantage of the victim's unsuspected and defenceless condition, to kill him or her ⟨from 1 and 2, by *syllogism*⟩
4. FORANY (x)
   IF [x knowingly takes advantage of the victim's unsuspected and defenceless condition, to kill him or her]
   THEN^n [x treacherously kills a human being] ⟨premise⟩
5. *Tchen* treacherously kills a human being ⟨from (3) and (4), by *syllogism*⟩
6. FORANY (x)
   IF [x treacherously kills a human being]
   THEN^n [x commits murder] ⟨premise⟩
7. *Tchen* commits murder ⟨from (5) and (6), by *syllogism*⟩
8. FORANY (x)
   IF [x commits murder]
   THEN^n [x is to be punished with life imprisonment] ⟨premise⟩
9. *Tchen* is to be punished by life imprisonment ⟨from (7) and (8), by *syllogism*⟩

Table 20.4: *Chain of syllogisms*

section, we shall focus on rules (see statements 2, 4, and 6 in Table 20.4) which are used in subsumption, that is, for bridging the distance between the facts of a case and the rule-antecedent (the precondition-type).

20.4.5. Syllogism and Subsumption

Syllogistic representations of legal reasoning are often accused of failing to represent adequately the *subsumption* process, namely, the way in which a reasoner matches the perception of certain events (or a lower level linguistic representation of such events) with the antecedent of a rule.

In fact, when one makes a syllogistic inference one must have already solved the subsumption problem, since *syllogism* assumes that the current situation is categorised using the terms that occur in the rule-antecedent: Exactly the same predicate must occur both in the antecedent of the universal rule (the *major premise*) and in the description of the situation to which the rule is to be applied (the *minor premise*).

However, when one starts considering a new case, usually one has not yet categorised its aspects so that they perfectly match a rule one has in mind.

Consider again Tchen's case, which we introduced in the previous section. Let us assume that we approach this case by reading Malraux's pages, and having in mind the following rule:

(1) FORANY (x)
IF $[x$ commits murder$]$
THEN^n $[x$ is to be punished with life imprisonment$]$

The simple fact of remembering this rule does not provide us with a full reason to conclude, according to *syllogism*, that Tchen is to be punished with life imprisonment. This is because rule (1)—the major premise—can be syllogistically applied only if one also believes the corresponding minor premise:

(2) *Tchen* commits murder on 21 March 1927

Only by combining the rule (1) with the specific factual-proposition (2) we obtains the reason of schema *syllogism*, and we can therefore derive the rule's conclusion.

Unfortunately, in Malraux's pages we cannot find the explicit statement of premise (2): these pages do not contain at all the word "murder." We can find only the train of Tchen's thoughts and feelings before the killing, and the description of his stroke and of the ensuing death of this victim. Thus, we still have to establish whether this sequence of events represent an instance of murder.

In general, establishing the minor premise of the syllogism is the result of the reasoning process of *subsumption*. In the legal domain, subsumption consists in establishing whether a certain *concrete situation* matches the *antecedent* of a general normative conditional (a *precondition-type*, see Section 20.2.4 on page 527) and thus determines the corresponding legal effect: Subsumption requires establishing the relevant facts, finding a corresponding (general) conditional, and comparing the facts and the antecedent of the conditional.

The successful result of this comparison is finally expressed in a proposition (the minor premise) that instantiates the antecedent of the conditional (the precondition-type) with reference to the individuals and the spatial-temporal context of the established factual situation. In our case, this would consist in proposition (2) above, saying that Tchen, on 21 March 1927, committed murder.

The information concerning the factual situation (the precondition-token) can be provided by perception. Consider, for instance, a police officer that sees a car that is parked near a crossing: Immediately, without verbalising (even in his thoughts) the situation, the officer forms the belief that he should fine that car.

In other cases, we find the factual information in linguistic form, as a result of a categorisation produced by ourselves or by others. This happens, for instance to a reader of *La condition humaine* who reconstructs Tchen's action on the basis of Malraux' s words. Similarly, when a judge reads a report of the police or listens to testimony, he or she reconstructs the events on the basis of a verbal account.

Nowadays (though this could not happen in the 1920's), the linguistic description of relevant facts can also be provided by some technological device, which stores the results of previous categorisations (like a police database containing information on precious convictions, or on the results of current investigations). In some cases, the information may also be automatically perceived and categorised (as it happens when automatic devices detect certain violations of traffic rules).

Some information concerning a specific case can also be inferred by a reasoner, from other information that is already at his or her disposal. Consider for instance, how a judge may form a belief concerning a crime on the basis of evidential inferences (for instance, the author's identity can be inferred from the shape of fingerprints or from DNA traces).

Whatever the way in which a reasoner obtains information on the facts of a case, he or she must find out what normative conditionals may apply to these facts. This search is influenced by the factual descriptions which are available to the reasoner, by their level of abstraction, and their connection with the precondition-types in the relevant normative conditionals.[12]

For instance, assume that one is provided with the following description of Tchen's action: "Tchen willingly caused the death of a sleeping arms-merchant by stabbing him in the stomach." Given this description, one can perform further steps toward abstraction, leading to further descriptions of the same event: "Tchen killed a sleeping man by stabbing him in the stomach," "Tchen killed a sleeping man by stabbing him," "Tchen killed somebody," and so forth.

We cannot here even address the working of perception and in particular the way in which humans, when given certain perceptual inputs, produce a conceptual categorisation and a corresponding linguistic representations (see Section 1.2.1 on page 8). Let us just remark that this is largely an unconscious process, the results of which we need to accept as appropriate inputs to out reasoning (unless we have specific reasons to doubt the working of our natural faculties, or there is a disagreement with other observers of the same facts).

What shall focus on the connection between different linguistic representations that aim at capturing the (relevant features of the) same event, and in particular between:

[12] Nowadays retrieval of legal materials is increasingly dependant upon computer technology. For a discussion of the theoretical issues involved in legal information-retrieval, see Bing 1984; for a recent review of the main trends, see Bing 2003.

- the categorisation which one forms after perceiving the event (or after being told a narrative concerning that event), and
- the categorisation that one may find by interpreting a law text.

Usually, one would start with a low level categorisation of the relevant facts, and try to find a normative conditional that matches this categorisation. For instance, assume that a reasoner is given the factual description ⌈Tchen stabbed a sleeping man causing his death, on 21st March 1927⌉. The reasoner may then do the following:

1. find (retrieve or construct) the rule ⌈if one commits murder, then one ought to be punished with life imprisonment⌉, and
2. subsume the facts that have been so described under the antecedent of the rule.

Completing the subsumption under the rule means coming to endorse the view that the particular facts referred to by the factual description are an instance of the antecedent of the rule. Thus, the positive outcome of the process of subsumption can be characterised by specifying the normative antecedent with regard to the entities and the spatial-temporal circumstances that characterise the particular facts under examination. For instance, with regard to Tchen's case, the subsumption's outcome can be expressed as follows:

$Tchen$ commits murder on 21st March 1927

20.4.6. Subsumption Rules

The conclusion that the antecedent of a certain rule is satisfied may be obtained, or at least justified, through what we call *subsumption rules*. By a subsumption rule, we mean a rule saying that all facts satisfying a certain description satisfy a certain other description, which provides the antecedent (the precondition-type) for a normative conditional.

Subsumption rules are a particular kind of *non-deontic rules*: They may be viewed as expressing *non-deontic emergence* or a *counts-as* connection (for these notions, see Section 21.1.1 on page 549). For instance, when examining Tchen's case, one may adopt the following subsumption rule:

FORANY (x)
IF x stabs another causing his or her death
THEN^m x commits murder

Note that the adoption of a subsumption rule only is a fallible hypothesis. For example, one may criticise the rule above, on account that it makes causing death by stabbing a sufficient precondition of murder. One may indeed argue

that causing another's death (even through stabbing) is not sufficient to produce a murder: The killing must also be intentional.

When examining a possibly relevant rule, one may discover that the rule's antecedent specifies some features that one has not yet considered. Then one needs to look again at the facts, to check if they really possess these additional features.

For instance, assume that when examining the murder-rule, we discover that only an intentional killing can qualify as a murder. Then we need to inquire whether Tchen had the intention of causing the death of his victim: Only if this is the case, shall we be able to apply the murder rule. Thus, we need to go back to the facts, and examine whether they satisfy this additional feature (whether Tchen had a murderous intention). In Tchen's case, by reading Malraux's account, we can without any doubt be satisfied that had indeed the intention of killing his victim. Thus we may reframe our subsumption rule as saying that:

FORANY (x)
IF x stabs another *intentionally* causing his or her death
THEN^m x commits murder

This rule allows the reasoner to infer—since ⌈*Tchen* stabs another *intentionally* causing his death on 21st March 1927⌉—that ⌈*Tchen* commits murder on 21st March 1927⌉.

The examination of the case at hand may lead the reasoner to reshape the normative conditionals he or she is endorsing (as legally binding) or hypothetically considering (for instance, as expressing a plausible interpretations of certain law texts, see Section 12.4.4 on page 352).

In particular, the reasoner may broaden or restrict the antecedent of a normative conditional according to teleological considerations, namely, according to whether a broader of more restricted shaping of the antecedent of the normative conditional will contribute to reach certain values in the case at hand and in similar cases (as we shall see in Section 25.1 on page 637). For instance, we may claim that the notion of murder needs to be extended also to cases where one (though not having the intention of killing) intentionally causes a serious bodily injury which leads to death.

On the other hand the analysis of the features of the case at hand may lead us to establish that the rule we are considering does not apply to that case (and to similar ones). For instance, a revolutionary tribunal may assume that it is absurd or unreasonable to view Tchen as a murderer, since his action was commanded by supreme necessities of revolution. More generally this tribunal may assume that political killings executed for the revolution's sake, against the enemies of the revolution, do not count as murders, but are rather to be viewed as capital sentences.

This is the process with regard to which the German doctrine speaks of "moving to and from of the glance" (*hin und her-wenden des Blickes*), between

factual and normative categorisations: We need to look at the facts, in order to investigate whether there is any rule which may be applied to them, but we also need to look at the rules to establish whether and under what conditions the facts are legally relevant, and to what effects (see, for all, Kriele 1976, 197ff, and Kaufmann 1965, 31).

In most complex cases, rather than using a single subsumption-rule to link the description of the facts and the rule's antecedent, we may provide a set of such rules, operating at different level of abstraction. Accordingly, we can construct a chain of syllogisms, where each step uses a subsumption rule to establish the minor premises for the subsequent step, as you can see in Table 20.4 on page 537. In this way, a sequence of smaller inference steps justifies the transition from the intuitive low-level perception of the facts to their categorisation as an instance of a rule-antecedent, that is, as a precondition-token (for a computational analysis of this process, see Branting 1994).

20.4.7. Subsumption and Learning

When set in a syllogistic form, subsumption may appear to be reducible to logical deduction: To perform a subsumption one just needs to retrieve the required subsumption rules and arrange them in a syllogistic chain.

However, this view fails to consider that very frequently we have to face the following difficulties: (*a*) we do not have access in advance to all subsumption-rules we need in order to pass from the intuitive *prima-facie* perception of the facts into an instance of a rule-antecedent, and (*b*) even if we can find an applicable rule among those which others have applied in the past, this rule may appear to be wrong or inappropriate (taking into account the present needs, attitudes, and values). Thus, we very often need to refine or create the applicable rules at the time when we are considering a new case, having in mind the legal outcome which we view as being appropriate to that case (we shall consider some aspects of rule-creation in Chapter 28). As a matter of fact, usually a legal reasoner would first produce an intuitive categorisation of the case (by using the resource of non-ratiocinative implicit cognition), and then would try to rationalise his or her intuition according to existing rules or to new ones.

Subsumption rules are typically stated in judicial decision, or are constructed by interpreters when trying to make sense of such decisions (they are an essential component of case law, both in common-law and in civil-law jurisdictions). They are made precise in the process of *distinguishing*,, namely, when one needs to explain why the particular features of the present case require it to be decided differently from similar precedents.

By establishing that the antecedent of a certain general normative conditional is satisfied by certain facts (or by certain kinds of facts, according to subsumption rules) the lawyer often contributes to partially specifying (to making concrete or positive) the content of that conditional.

Simplifying (and trivialising) a very complex legal and philosophical discussion that we cannot address here, we may just say that determinations adopted with regard to particular cases contribute to the inferential meaning of the applied rule: They expand the results one can obtain by applying that rule through inferences.

In fact, by combining a general rule with the proposition that certain kinds of facts match (instantiate) the antecedent of the rule, we supplement the rule with further information. This information allows us to infer the conclusion of the rule whenever instances of these kinds of facts take place, a result that possibly would not be achieved (or not so easily) on the basis of the rule alone. This information, obviously, is more relevant when it results from a binding precedent, or from a decision that has lead to the formation of significant social expectations.

Thus, we may say that the process of the application of a legal theory (intended as set of general legal premises) tends to be, in many cases, also a process of *theory construction*: The very theory being used is refined and extended, in particular, by reshaping pre-existing subsumption rules or by producing new ones. This learning process achieves a collective dimension when decisions of individual cases are supported by appropriate opinions, which are the object of judicial and doctrinal discussion.[13]

The fact that the application of the law also is a collective learning-process raises interesting questions concerning the application of the law with the help of computer systems, and in particular of computer systems which are able to directly apply, when given appropriate factual inputs, the relevant rules.[14] These systems, which recently are starting to achieve substantial results in a number of domains,[15] tend often to include detailed subsumption rules, so that the contribution of the person providing using such systems for deciding cases is facilitated, but also limited.

There are important questions to be answered with regard to subsumptions performed through such systems. Will such systems hinder the decentralised learning process which takes place in the application of the law, leading to a mechanical application by an indifferent computer operator? Or will they facilitate (collective) learning processes, by enabling an easier understanding of complex

[13] This aspect has been addressed in particular by the German legal doctrine, which describes it as the concretisation or *positivisation* (*positivisierung*) of the law through the decision of individual cases (see: Engisch 1968a; Esser 1974; Zaccaria 1990, 175ff..)

[14] For a very early discussion of the connection between law and computerisation, which captures the essential aspects of the problem, see Luhmann 1966.

[15] For the presentation of successful commercial systems which provide (or assist in) the rule-based determination of legal effects, see: Dayal and Johnson 1999, and van Engers and Boekenoogen 2003. For a review of knowledge-based systems for legal practice, see Kennedy et al. 2002. For a discussion of the role of these systems in the functioning of the law, see: Susskind 1996; Gordon 2003. On the logical foundation of such systems, see Kowalski and Sergot 1990. As examples of early prototypes, see among the others: Sergot et al. 1986; Biagioli et al. 1987.

combinations of legal rules, and a continuous critical scrutiny of their content and their implications?

We believe that the answer depends firstly on the technology used in developing such systems. A computer system may facilitate collective learning when it enables an easy understanding of the legal information that it embodies, and it allows us to experiment with the modification and extension of this information.

Secondly, the answer depends on the organisational context in which such systems are going to be applied. A computer system may allow and even facilitate decentralised collective learning when its users have a certain degree of autonomy, there is cooperation and trust between them, and appropriate channels of communication and feedback are in place (on the automatic application of the law, see Sartor 1993a).

20.5. Inapplicable Inferences

In Section 20.4 on page 534, we considered some important inferences of predicate logic that are also admissible with regard to normative conditionals. However, we cannot fully assimilate normative conditionals to material conditionals of classical logic, since other inferences of classical predicate logic are very questionable, when transferred to the normative domain.

20.5.1. Inferring a Conditional from a Falsity

The first questionable inference consists in passing from any proposition NON A to the material conditional IF A THEN^m B:

(1) NON A

---

(2) IF A THEN^m B

The logical validity of this inference (according to classical logic) depends on the fact that, according to the OR *introduction* schema, NON A entails NON A OR B, which is exactly equivalent to IF A THEN^m B. Transferring this schema to normative conditionals, we would obtain quite a weird way of reasoning.

Assume that now it is daytime (it is not nighttime). From this it follows that if it is nighttime, then it is permitted to torture children.

(1) NON [it is nighttime]

---

(2) IF [it is nighttime] THEN^m ***Perm*** [to torture children]

Obviously, a defender of material conditional can replicate that this inference is perfectly right, once we understand exactly its premises. When we say that ⌈if it

is nighttime then it is permitted to torture children⌉, and we read the "if ... then ... " as a material conditional, we are just saying that ⌈either it is not nighttime or it is allowed to torture children⌉. Undoubtedly, this disjunctive proposition is currently true, since it is now daytime (it is not nighttime), regardless of what may (or may not) be done to the children. In fact, for a disjunctive proposition to be true, it is sufficient that one of its component propositions is true. When this is the case, it is irrelevant that the other component proposition is true or false: The conditional is true either way. Through a material conditional we are simply describing the word as it is now, we are not saying anything about what would be the case in a different situation (that is, if the first component proposition were false).

However, such defences of material conditional can be rebutted by replying that the *prima facie* apparent absurdity of this inference proves that when one says "if ... then ... " in a normative context, one is not expressing a material conditional. One is rather expressing a kind of counterfactual conditional: One is considering what would be the case (what would be determined) if the antecedent were true (regardless, and possibly without knowing, whether it will really become true).

Therefore to establish whether it is the case that ⌈if it is nighttime, then it is permitted to torture children⌉, one should not look at what is the case now (and be satisfied by ascertaining that now it is not nighttime, i.e., that now it is daytime). One needs rather to consider the hypothesis that it were nighttime. Only in the case that under such circumstances (under the hypothesis that it were nighttime) it would be allowed to torture children, one might say that ⌈if it nighttime then it is permitted to torture children⌉. Since this is not the case (even if it were nighttime it would still be forbidden to torture children), then the conditional does not hold (on hypothetical reasoning, see, for all, Rescher 1964).

Note that the same absurdity would emerge if we were reasoning with conditional intentions rather than with normative conditional:[16] : The belief that a certain proposition is false, should nor lead one to adopt the intention to perform any absurd action in case such proposition was true. Adopting such an intention would indeed be irrational.

Assume, for instance, that I am driving home and that I desire to get there as soon as possible, but without damaging my car or myself. Since I am about one kilometre from my house, and I believe that there is enough petrol in my car to reach my destination, I decide to go on without stopping for fuel. Under such conditions—that is, given my belief that ⌈the car will not stop for lack of petrol⌉ (and certain other beliefs which I have)—I may rationally form the intention that ⌈if, contrary to my expectations, the car stops for lack of petrol, then I shall go

[16] It seems that this parallel confirms our idea that normative conditionals doxify conditional intentions

to the nearby garage asking for help⌉. However, my belief that the car will not stop for lack of petrol, does not license whatever absurd conditional intention, like, for instance, the intention that ⌈if the car stops for lack of petrol, I shall drive it into the nearby river⌉.

20.5.2. Normative Conditionals and Contraposition

A second questionable inference concerns the use of the *modus tollens* schema:[17]

(1) IF A THEN B;
(2) NON B

---

(3) NON A

Modus tollens inferences are sound when applied to epistemic propositions, and especially when reasoning with natural causation. Consider the following piece of epistemic reasoning:

(1) IF [it has rained recently] THEN [the ground is wet];
(2) the ground is not wet

---

(3) it has not rained recently

This piece of reasoning clearly makes sense. I may execute it when I have some autonomous evidence (in particular, perceptual evidence), which leads me to believe that the ground is not wet (subreason 2 in the above inference). This belief contradicts the consequent of the conditional (subreason 1 in the above inference), and leads me to conclude that the antecedent of the conditional is false (that it has not rained). In fact if the antecedent were true, then the ground would be wet, which I know it is not the case.

Unfortunately, *modus tollens* inferences become very weird in the normative domain. Consider for instance the piece of normative reasoning in Table 20.5 on the next page: The conclusion that Tom has delivered the merchandise in time is derived from the fact that he is not obliged to pay the penalty for late delivery. This piece of reasoning is a sound application of the schema *modus tollens*, but nevertheless it appears very strange, if not absurd.

[17] The full name for this inference schema was, in medieval logic, *modus tollendo tollens*, meaning "the removing (denying) method." This reasoning schema is linked to *contraposition*, which is the possibility of deriving from a conditional IF A THEN B, a conditional IF NON B THEN NON A. In fact, *modus tollens* is just contraposition combined with *detachment* (*modus ponens*). Thus often the terms *modus tollens* and *contrapositive inference* are used interchangeably.

(1) IF [Tom has not delivered the merchandise in time]
THEN^n [Tom is obliged to pay a penalty of € 1,000];
(2) Tom is not obliged to pay a penalty of € 1,000

---

(3) Tom has delivered the merchandise in time

Table 20.5: *Normative* modus tollens

The reason for such weirdness seems to be the following. Normative properties are not perceivable through our senses. There cannot be any perceptible evidence that directly leads us to believe that normative properties hold or do not hold. We can come to conclude that a normative property does not hold (for a certain individual or a certain object) only when we believe that none of the reasons that may determine that property is to be endorsed, or that all such reasons are defeated.

Therefore, my believing that Tom is not obliged to pay € 1,000, presupposes that one the following alternative conditions holds:

- I already believe, before making the inference, that Tom has delivered the merchandise in time. This belief makes the inference in Table 20.5 useless, since I already believe the conclusion of that inference.
- I believe that there are prevailing reasons for concluding that Tom is not obliged to pay the penalty, even when he did not deliver the merchandise (for instance, Mary, who was supposed to pay the price in advance has not yet paid, so that Tom would be justified in withholding the delivery). This belief makes the inference in Table 20.5 wrong (since it leads me to believe that Tom delivered the merchandise even when he did not).

The idea that *modus tollens* inferences do not make much sense in the legal domain can be confirmed by considering the corresponding direct (non doxified) practical reasoning.

Assume that my wife has the following intention: ⌈if my husband is late, I shall go on my own⌉. Assume that she is aware that she has not yet gone on her own (she is nervously waiting at the place where we were supposed to meet). Is this a reason for her to conclude that her husband is not late? Would the following reasoning be sensible?

(1) I have the intention that if my husband is late then I shall go on my own;
(2) I am aware that I have not yet gone on my own

---

(3) I believe that my husband is not late

Though many people would be very happy to have their partners reasoning this way, this can hardly be seen as a paradigm of rationality.

According to our idea that doxified practical reasoning needs to track direct practical reasoning, the weirdness of applying *modus tollens* to conditioned intentions explains the weirdness of applying it to conditioned normative propositions.

There has been a significant debate, especially within research on artificial intelligence and law, as to whether legal rules allow for *modus tollens*. Some formalisms—as the logic adopted in Gordon's *Pleadings Game* (Gordon 1995)—admit this type of inference. However, Prakken (1993; 1997) has convincingly argued that contraposition makes arguments possible that would never be considered in actual legal practice.

An explanation that is similar to ours—though based upon ontological, rather than upon epistemological consideration—is provided by Hage's idea that any legal rule has to be applied, in order to produce its consequent, and lawyers never apply rules contrapositively (Hage 1996; 1997).

In artificial intelligence, *modus tollens* is also rejected when defeasible rules are modelled as *inference licences* or *inference policies* (Loui 1998), and sometimes also with regard to certain kinds of causal reasoning (Geffner and Pearl 1992).

Finally, *modus tollens* is also invalid in *extended logic programming*, where one represents conditionals as uni-directional rules, rejecting contraposition (Kowalski 1979).

Chapter 21

VARIETIES OF NORMATIVE CONDITIONALS

In this chapter we shall analyse different kinds of normative conditionals, which will enable us to address some issues concerning legal language and the structures of legal knowledge.

We shall focus in particular on the cognitive role of intermediate, non-deontic, normative qualifications (like being a citizen, being an owner, having certain powers), a role which is essentially dependant on normative conditionality: These qualifications depend upon certain conditional antecedents, and allow, through further normative conditionals, further, deontic or non deontic, conclusions. We shall also critically discuss some views on legal conditionality, and in particular Hans Kelsen's theory of it.

Finally, we shall extend our analysis to the temporal aspects of legal conditionality and to the negation of normative conditionals.

21.1. Types of Normative Conditionals

In Chapter 20 we have focused on the commonalities among normative conditionals, indicating their shared function and logical structure, and specifying what inferences are appropriate or inappropriate with regard to any normative conditional. In the following, we shall consider differences: There are different types of normative conditionals, and some of them require a specific logical treatment.

21.1.1. Different Kinds of Normative Determination

Though normative conditionals are always concerned with an antecedent condition determining certain normative results, this may take different forms. Let us analyse the conditional propositions listed in Table 21.1 on the following page:

1. The first proposition expresses what we may call *deontic initiation*. An event determines the initiation of a deontic state of affairs (the obligation to pay the penalty), and this state of affairs continues also after the event that has started it.
2. The second proposition expresses what we may call *negative deontic initiation* or *deontic termination*. An event determines the termination of a deontic position, that is, it makes so that this position does not hold any

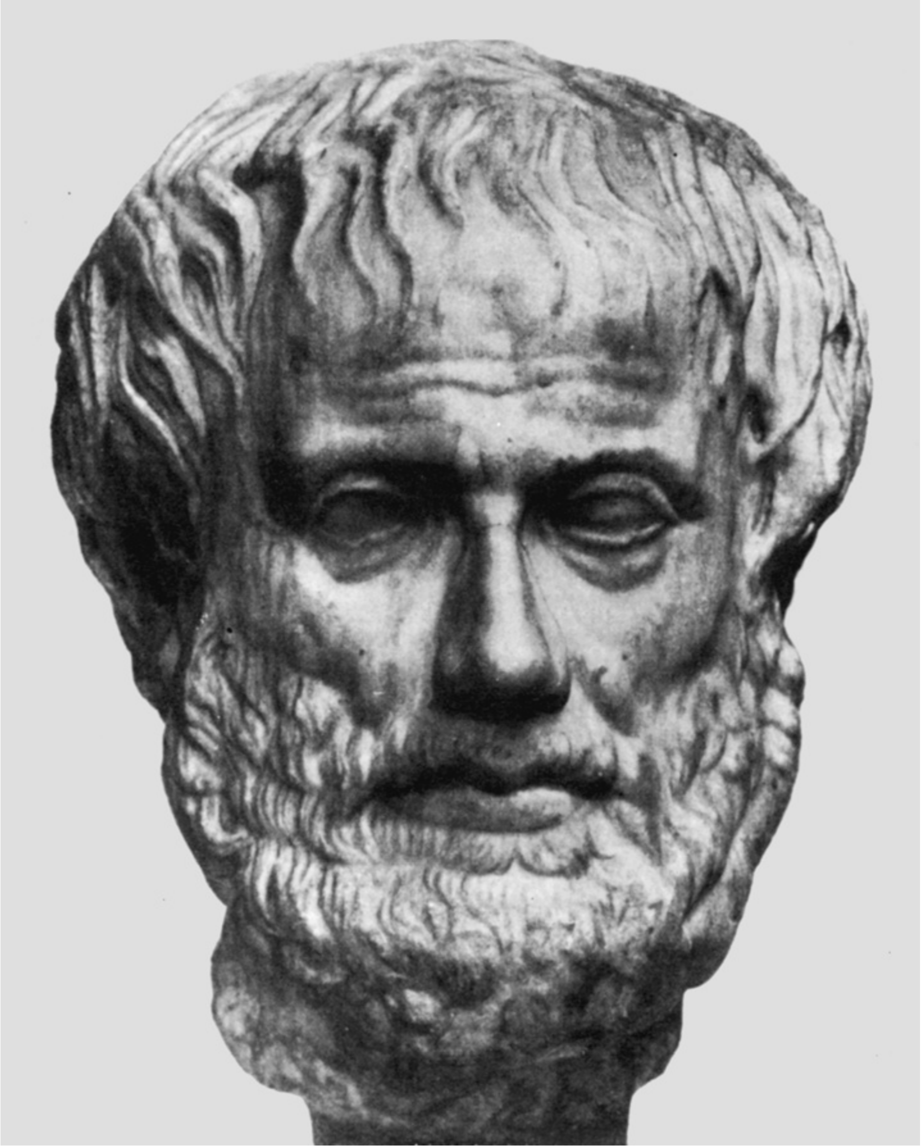
(1) IF [Tom does not deliver the merchandise in time]
THEN^n Tom becomes obliged to pay a penalty of € 1,000]
(2) IF [Mary renounces to the payment of the penalty]
THEN^n [Tom ceases to be obliged to pay it]
(3) IF [Tom is inside a mosque]
THEN^n [Tom is forbidden to wear shoes]
(4) IF [Tom is born in Italy]
THEN^n [Tom becomes an Italian citizen]
(5) IF [Tom acquires another citizenship]
THEN^n [Tom ceases to be an Italian citizen]
(6) IF [an object is permanently attached to the soil]
THEN^n [the object is an immovable good]
(7) IF [Tom drives while being drunk]
THEN^n [Tom commits a criminal offence]

Table 21.1: *Examples of normative conditionals*

longer (the obligation to pay the penalty), and this continues after the terminating event.

3. The third proposition expresses what may be called *deontic emergence*. The holding of the antecedent state of affairs (Tom is inside the mosque), determines the co-occurrence of a normative position (he is under the obligation not to wear shoes). As soon as the antecedent state of affairs ceases, also the consequent state of affairs ceases.
4. The fourth proposition expresses what we may call *non-deontic initiation*. An event (being born in Italy) determines the initiation of a non-deontic state of affairs (Tom's citizenship). As in the first case (deontic initiation), this state is assumed to persist after the event that has started it.
5. The fifth proposition expresses what we may call *non-deontic negative initiation* or *non-deontic termination*. An event (getting a different nationality) makes so that non-deontic state of affairs does not hold (that Tom is no longer a citizen). As is the previous case, this is assumed to persist after the terminating event.
6. The sixth proposition expresses what we may call *non-deontic emergence*. The persistence of the antecedent state of affairs (being attached to the soil) as long as it holds, determines the persistence a non-deontic qualification (being an immovable object).
7. The seventh proposition is similar to the sixth one, but consists in the emergence of an event over another event, let us call it *event-emergence*. The emerging event happens when the conditioning event takes place.

We can understand the function and the working of each of these types of conditionals by considering what instructions they doxify.



Aristotle (384–322 B.C.)

Georg Henrik von Wright (1916–2003)

Normative initiation doxifies the intention to perform backward-looking behavioural instructions. These instructions require certain behaviour to take place in case a certain event has previously taken place. As examples of such instructions, consider the following: ⌈If the car remains without gas, I shall walk to the gas station⌉ or ⌈If tomorrow you get a bad mark, then you shall stay at home to study⌉.

Deontic emergence doxifies the while-type of behavioural instructions, namely, instructions requiring certain behaviour to take place as long as (while) a certain condition obtains. Here are two examples of these instructions: (*a*) ⌈While I have some energy left, I shall keep running⌉, (*b*) ⌈While it is sunny, you shall wear your hat⌉.

Non-deontic initiation doxifies the intention that if a certain event has taken place at a certain time, then one shall accept that a state of affairs has started to exist (and this state of affairs will continue even after the originating event took place, unless the state of affairs is terminated). As instances of (the noemata expressed by) such intentions, consider the following instructions: (*a*) ⌈If you are late again, then I shall believe that you are completely unreliable⌉, (*b*) ⌈if you have registered for this school, then I shall assume that, from January 1, you are a member of the class⌉. As we saw above, one may also view such instructions as concerning the intention to unconditionally endorse a conditioned proposition: I shall accept that ⌈if you have registered for this school, then, from January 1, you are a member of the class⌉. The initiating time for the conditioned state of affairs usually coincides with the time when the conditioning event is completed, but in some cases, as the last example shows, it can be different.

Non-deontic emergence doxifies one's intention to accept that if a certain state of affairs (event) is taking place, then another state of affairs (event) is also taking place. The cognitive function of these instructions is to enable moving from the belief in the existence of the first state of affairs (event) into the belief in the existence of the second state of affairs (event), the two being viewed as happening at the same time. Here are two examples, the first concerning the non-deontic emergence of a situation and the second concerning the non-deontic emergence of an event: (*a*) ⌈We shall assume that while you keep smoking, you are an intruder⌉; (*b*) ⌈We shall assume that if the ball falls over the line, then it falls inside the tennis court⌉.

21.1.2. Counts-as Connections and Constitutive Rules

Some authors have affirmed that there exists a further specific and fundamental type of normative connection, which they have expressed through the idea of *counts-as*. This idea was made popular by Searle (1969), who has recently reaffirmed it (Searle 1995, 28), asserting that counts-as rules have the following form:

"X counts as Y" or "X counts as Y in context C"

He calls such rules *constitutive* and gives them a pivotal role in the construction of social and legal reality.[1]

Similarly, Jones and Sergot (1996) view counts-as connections as providing the bridge between brute and institutional facts.

We prefer not to provide a specific representation for counts-as connections, but rather to view them as an instance of the type of normative determination which we called *emergence*. This notion is broader than the notion of counting-as in the sense that it covers also the emergence of deontic qualifications, for which talking of counting-as would not make such sense: For instance, it would be quite weird to say that ⌈staying in this room counts-as being forbidden to smoke⌉. Moreover we maintain that normative effects emerge not only from brute facts, but also from other normative qualifications (for a formalisation that takes into account this double function of normative connections, see: Gelati et al. 2002a; Gelati et al. 2002b).

With regard to characterising counts-as connections as constitutive rules, we need to observe that, in a certain sense, the meaning of any legal qualification is determined or constituted by certain rules: These are the rules establishing under what conditions the qualification emerges or initiates, and what further effects follow it.

Correspondingly, a constitutive nature, intended in a broad sense, must be recognised to all rules establishing legal effects. This very general sense of *constitutive* seems indeed to be the commonly used in traditional legal language, where the term *constitutive facts* tends to cover any operative fact (see Section 20.2.4 on page 527). Accordingly, any normative conditional appears to be constitutive with regard its effect, and the notion of *constituting* tends to coincide with our notion of *determining*.[2]

Thus, all of the following rules seem to be equally constitutive of European citizenship:

- ⌈one's Italian citizenship determines one's European citizenship⌉ (non-deontic emergence);
- ⌈birth in a European country determines European citizenship⌉ (non-deontic initiation);

[1] For a detailed distinction of different types of constitutiveness, see Conte 1995. Pattaro (Volume 1 of this Treatise, sec. 2.1) understands constitutiveness in a different, more general way, that is, as consisting in the relation between a concept (a "type") and its instances (in the sense that adopting a concept or a type as a component of one's conceptual framework, leads one to viewing certain entities and situation as instances of the concept). From Pattaro's viewpoint, one may also say that all kinds of rules we have mentioned are constitutive: Such rules, by determining the meaning of such concepts or types, contribute to "constituting" their instances, either by identifying such instances or by linking to them certain normative properties.

[2] See Hohfeld (1964, 32) where the terms *operative*, *casual* and *constitutive* are used synonymously. For this broad idea of constitutiveness, see recently Carcaterra 1979.

- ⌈one's European citizenship determines one's rights to move across the European Union, and not to be discriminated relative to other European citizens⌉ (deontic initiation).

In fact, as we will argue in next paragraph, the appropriate semantics for *intermediate legal concepts* is an inferential semantics, where the meaning of such concepts is given by the network of inferences leading to them or departing from them. This assumption will lead us to state that all kinds of rules we have been introducing—regardless of whether we can express them using the counts-as language—are constitutive of the concepts appearing in their consequents or in their antecedents.

21.2. Intermediate Legal Concepts

The idea that legal rules are constitutive has been advanced in particular with regard to non-deontic or *intermediate* legal concepts, like those of citizenship, ownership, real property, contract, sale of goods, namely, those legal concepts that do not immediately express an obligation or a permission, and thus differ from the basic deontic modalities of Chapter 17 and from the obligational notions of Chapter 19. We need therefore to have a look into the logical and cognitive role played by such concepts.

21.2.1. Alf Ross's Theory of Legal Concepts

The classical starting point for the analysis of intermediate legal concepts is provided by the story presented in Ross 1957. Ross imagines a population, the Noît-cif tribe, which endorses two kinds of rules:

1. rules stating under what conditions something is (or starts to be) a tû-tû, and
2. rules stating further normative qualifications or positions are determined by having or acquiring the tû-tû quality.

These two types of rules as exemplified by the following rules:

(1) If some person has eaten of the chief's food, he is tû-tû;
(2) If a person is tû-tû, then he shall be subjected to a ceremony of purification. (Ross 1957)

According to Ross, to understand how the word tû-tû is used by the Noît-cifonians we just have to know all rules of the two kinds just mentioned, that is, all rule which establish:

1. when something is qualified as a tû-tû, or

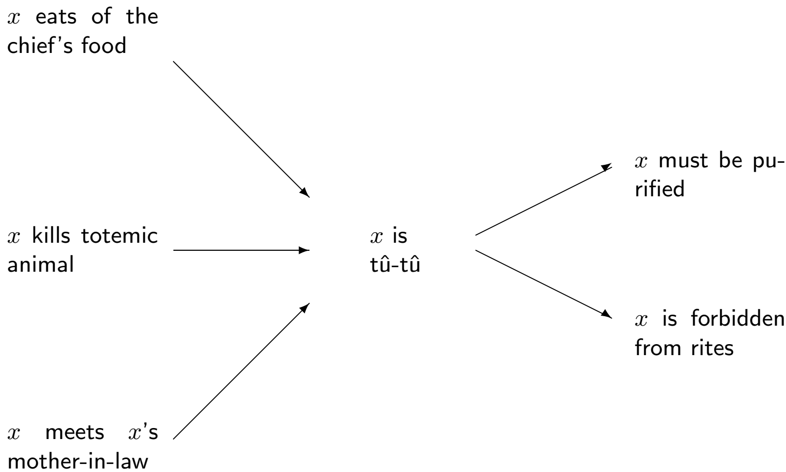


Table 21.2: *Tû-tû, an intermediate normative concept*

2. what further normative qualifications or positions are determined by having or acquiring the tû-tû quality.

Note that the Noît-cifonian population may endorse many rules concerning both the determination of the tû-tû quality (for instance, rules stating that that killing a totemic animal determines the tû-tû-ness of the killer, or that meeting one's mother-in-law determines one's tû-tû-ness), and what effects tû-tû-ness determines (for instance one's tû-tû-ness may determine one's prohibition of participating in certain ritual activities, and one's obligation to undergo a purification ceremony). Thus we get the normative information which is represented in Table 21.2, where each arrow-connection represents a general rule.

For instance the arrow between ⌈x eats of the chief's food⌉ and ⌈x is tû-tû⌉ stands for the rule:

FORANY (x) IF x eats of the chief's food THEN^n x is tû-tû

The members of the tribe, who endorse rules concerning the initiation of tû-tû and rules establishing tû-tû's effects, need two inference steps for obtaining deontic conclusions, as you can see in Table 21.3 on the next page: The first step is concerned with establishing that a persons is tû-tû, and the second step is concerned with establishing a deontic implication of tû-tû-ness.

Ross affirms that the tû-tû concept is superfluous, in the sense that the same deontic conclusions which are licensed by tû-tû-based inferences can also be ob-

1.	Tom meets Tom's mother-in-law	⟨premise⟩
2.	FORANY (x) IF x meets x's mother-in-law THEN^n x is tû-tû	⟨premise⟩
3.	Tom is tû-tû	⟨from 1 and 2, by *syllogism*⟩
4.	FORANY (x) IF is tû-tû THEN^n x must be purified	⟨premise⟩
5.	Tom must be purified	⟨from 3 and 4, by *syllogism*⟩

Table 21.3: *Two-step inference, using tû-tû*

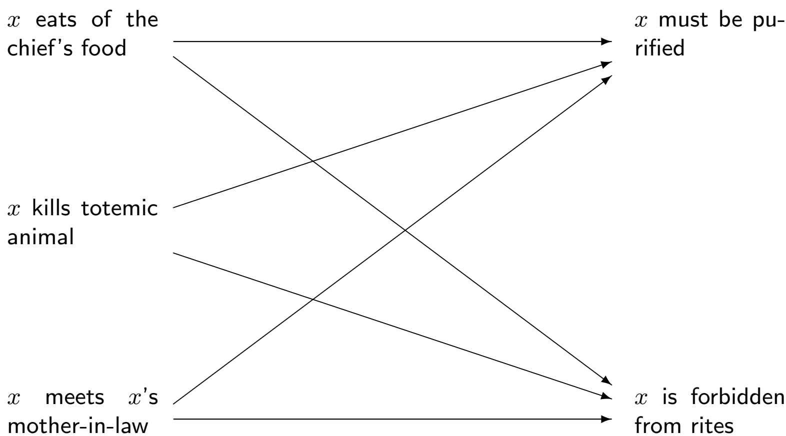


Table 21.4: *The elimination of tû-tû*

tained through rules directly connecting facts and deontic qualifications. If the members of the tribe would forget about tû-tû and learn the rules in Table 21.4, they would have lost no real normative information: They would be still able to derive the same deontic conclusions they could derive before (when they still used the tû-tû notion), in the same situations.

Ross argues that non-deontic legal qualifications, such as the notion of ownership are logically no-different from tû-tû-ness: Their function is limited to being relay-nodes between factual preconditions and normative effects, as you can see in Table 21.6 on the next page.

Like tû-tû-ness, also ownership can be eliminated without deontic loss: Just substitute the set of rules in Table 21.6 on the following page, with the set in Table 21.7 on page 557.

1.	Tom meets Tom's mother-in-law	⟨premise⟩
2.	FORANY (x) IF x meets x's mother-in-law THEN^n x must be purified	⟨premise⟩
3.	Tom must be purified	⟨from 1 and 2, by *syllogism*⟩

Table 21.5: *One-step inference, without using tû-tû*

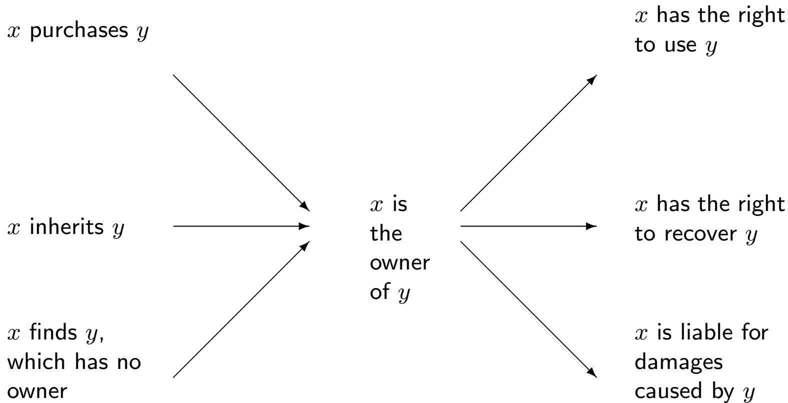


Table 21.6: *Ownership: an intermediate legal concept*

The result we obtain by eliminating the notion of ownership is a more complex knowledge representation: In Table 21.7 on the facing page we have nine connections, that is, nine rules rather than the six rule of Table 21.6.

On the other hand, as we have seen with regard to the tû-tû concept, after eliminating ownership we can derive deontic conclusions in one step, rather than in two steps. For instance, rather than performing the inference in Table 21.8 on the facing page, we can perform the shorter inference in Table 21.9 on page 558.

Thus, Ross correctly remarks that ownership can be eliminated—through a conceptual revision of all the original ownership-based rules—in such a way that the possibility is preserved of inferring the same deontic conclusions in the same factual situations.

From this fact, which he so clearly describes, however, Ross moves to questionable conclusions. In particular, he makes the following claim:

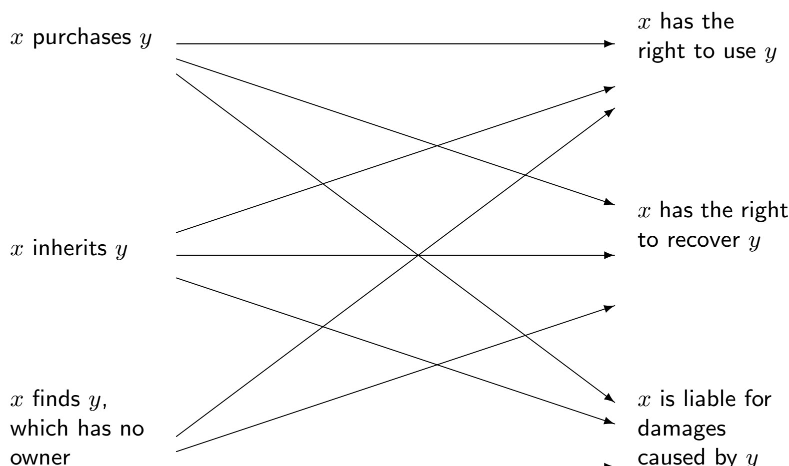


Table 21.7: *The elimination of ownership*

1.	*Tom* has purchased *this CD*	⟨premise⟩
2.	FORANY (x, y) IF x purchased y THEN^n x is the owner of y	⟨premise⟩
3.	*Tom* is the owner of *this CD*	⟨from 1 and 2, by *syllogism*⟩
4.	FORANY (x, y) IF x is the owner of y THEN^n x has the right to use y	⟨premise⟩
5.	*Tom* has the right to use *this CD*	⟨from 3 and 4, by *syllogism*⟩

Table 21.8: *Two-step inference, using ownership*

[T]he "ownership" inserted between the conditioning facts and the conditioned consequences is in reality a meaningless word without any semantic reference whatever, serving solely as a means of presentation. (Ross 1957)

Therefore, Ross's view of the function of intermediate legal concepts—they enable us to simplify the representation of normative contents—leads Ross to a conclusion concerning the semantics of these concepts: They are just meaningless dummies. In the following, while accepting that legal concepts have (also) the inferential function that Ross attributes to them, we shall reject Ross's conclusion on legal semantics.

1. Tom has purchased $this\ CD$ ⟨premise⟩
2. FORANY (x, y) IF x purchased y THEN^n x has the right to use y ⟨premise⟩
3. Tom has the right to use $this\ CD$ ⟨from 3 and 4, by *syllogism* ⟩

Table 21.9: *One-step inference, without using ownership*

21.2.2. The Inferential Meaning of Intermediate Legal Concepts

The fact that a term can be eliminated from a body of rules, without loss of deontic conclusions, does not prove that this term is meaningless. On the contrary, the very fact that we need to reformulate our rules, to achieve this result, proves that such term had a meaning: The reformulation is required exactly to express the meaning of that term in a different way.

Moreover, the fact that a term had no meaning before being inserted in a body of information does not prove that the term has no meaning after having been included within such body or information, and being connected through rule-based links to other pieces of such information.

With regard to terms expressing legal qualifications, we should rather say that such terms have an *inferential meaning*. The *meaning* of legal qualification Q—intended as Q's *conceptual function*—is given by two sets of rules:

a. the rules stating what conditions determine qualification Q (Q-determining rules), and
a. the rules linking further properties to the possession of qualification Q (Q-conditioned rules).

Therefore, knowing the meaning of qualification Q requires knowing from what conditions Q is determined (according to Q-determining rules), and what follows from the possession of Q (according to Q-conditioned rules). It is exactly this meaning that enables us to refer to legal qualifications in deriving certain deontic conclusions from certain facts, and that allows Ross to eliminate such qualifications the way he does.

Our analysis of how Q-determining and Q-conditioned rules contribute to specify the meaning of qualification Q—that is, our analysis of the conceptual function of being a Q—leads us to some corollaries concerning the "constitutiveness" of such rules.

First of all, though trivially, we can say that such Q-determining and Q-conditioned rules *constitute* Q's inferential meaning, since they determine what inferences lead to Q and what inference depart from it. For instance, we can say that:

a. ownership-determining rules contribute to constitute the notion of ownership, by establishing that ownership is acquired under certain conditions, while

b. ownership-conditioned rules contribute to constitute the notion of ownership, by establishing the rights and duties of owners.

Secondly, such rules determine when Q applies to particular individual entities and what further properties Q-qualified entities have. Therefore, those rules may be said to *constitute* the fact that certain individuals are Q's, as well as the normative consequences of this fact. For instance, we may say that the following:

a. ownership-determining rules contribute to constitute the ownership of current owners of certain things, by having enabled the generation of their ownership of those things (as resulting from the conditions which determine ownership, according to such rules), while

b. ownership-conditioned rules contribute to constitute the ownership of current owners, by enabling the generation of the normative entitlements owners have with regard to their possessions (as resulting, according to such rules, from ownership of these possessions).

Our analysis of the connection between inferential meaning and rules also applies to non-legal terms. Consider for example offside in football: There are certain rules of football which establish that certain situations determine a state of offside (offside-determining rules), and there are other rules of football which establish that being in a state of offside determines certain normative consequences (offside-conditioned rules). Thus, the meaning of the notion of offside seems to be reducible to its inferential role, according to both sets of rules. Consequently, we may say that such rules constitute the notion of offside, and also that they constitute the "offsideness" of those particular situations which, on any football pitch, happen to instantiate the notion of an offside.

21.2.3. Cognitive Function of Non-Deontic Legal Concepts

According to the thesis we presented in the last section, we may conclude that non-deontic legal qualifications have a meaning, and in particular an inferential meaning. This meaning is determined by the rules concerned with determining (*a*) when these qualifications apply and (*b*) the consequences of having this qualifications. This is the meaning one gets acquainted with when one learns such rules.

We need now to establish whether such an inferential meaning exhausts the significance of non-deontic legal concepts. We will start considering the above-mentioned view of Alf Ross: Legal concepts only have the function of enabling a simpler representation of the legal material.

As Lindahl (2003, 186, 193ff.) observes, ideas similar to those of Ross were advanced, in the same years, by Wedberg (1951). According to Wedberg, the use of "meaningless expressions" has—not only in the law, but also in natural science—the function of reducing the number of rules that are needed for

licensing certain conclusions. When we have m sentences $A_1 \dots A_m$, and n sentences $B_1 \dots B_n$ and we want to be able to infer from each A_i all of the $B_1 \dots B_n$, we has two choices.

The first consists in having, for each A_i, n rules connecting A_i to each of the $B_1 \dots B_n$. This implies having $m * n$ rules altogether (this is the situation we have represented in Tables 21.4 on page 555 and 21.7 on page 557).

The second choice consists in introducing "a meaningless symbol Z" and in having the following rules: (*a*) for each A_i, just one rule connecting A_i to Z, and (*b*) for each B_j, just one rule connecting Z to B_j. This implies having only $m + n$ rules altogether, a number of rules much smaller that $m * n$ (when m and n get big enough), as you can see in Tables 21.2 on page 554 and 21.6 on page 556.

We agree with Ross and Wedberg in attributing to intermediate concepts the function of enabling a more compact representation of knowledge. However, we also believe that intermediate legal concepts have a broader range of functions to play with regard to practical cognition.

Here is the list of some cognitive roles of concepts according to Thagard (1992, 22), who uses the concept *whale* as an example:

1. *Categorization*. Our concept *whale* enables us to recognize things as whales.
2. *Learning*. Our concept *whale* must be capable of being learned, perhaps from examples, or perhaps by combining other existing concepts.
3. *Memory*. Our concept *whale* should help us remember things about whales, either in general or from particular episodes that concern whales.
4. *Deductive inference*. Our concept *whale* should enable us to make deductive and inductive inferences about whales, for example, enabling us to infer that since Gracy is a whale she has fins.
5. *Explanation*. Our knowledge about whales should enable us to generate explanations, for example saying that Gracy swims *because* she is a whale.
6. *Problem solving*. Our knowledge about whales should enable us to solve problems, for example how to get an errant whale out of the harbour.
7. *Generalization*. Our concept *whale* should enable us to learn new facts about whales from additional examples, for example to form new general conclusions such as that whales have blubber under their skin.
8. *Analogical inference*. Our concept *whale* should help us to reason using similarities: If you know that dolphins are quite intelligent and are aquatic mammals like whales, then whales are perhaps intelligent too. The metaphor should also be supportable by the concept, as when we say that someone had a whale of an idea.

It seems to us that all such roles are played also by legal concepts, such as owning something, being a citizen, or being drunk (this being determined by having a certain level of alcohol in the blood, and determining such conclusions as being prohibited to drive). This is exemplified in the following list, where the conceptual roles identified by Thagard are applied to legal concepts:

1. *Categorisation*. Things are categorised according to who owns them (for instance, by tax officers), and people are categorised according to their

citizenship (by immigration officers) or are qualified as being drunk or sober (by police officers).

2. *Learning*. We learn the concepts of ownership, citizenship, or drunkenness when we are children, and if we become lawyers we refine and expand our understanding in the law school, where we merge our intuitive understanding with the knowledge of how such properties are legally determined, what they determine, and for what purposes.
3. *Memory*. We use these legal concepts for storing and synthesising information, which may have been extracted from specific rules, though we cannot tell which ones.
4. *Deductive inference*. We use the information that is linked to legal concepts for drawing inferences, for example, about rights and duties of owners, citizens, and drunk people.
5. *Explanation*. We make explanations according to our conceptual model of the law. For instance, we may explain judicial decisions concerning certain persons with the fact that they were owners, citizens, or drunk drivers.
6. *Problem solving*. Our knowledge of what it means (for the law) to own something, to be citizen, or to be drunk provides us with clues on how to approach situations where ownership, citizenship, or drunkenness are at issue.
7. *Generalisation*. Our notions of ownership, citizenship, or drunkenness, enable us to consider at a glance all different situations falling under such concepts, perceiving their commonalities and differences.
8. *Analogical inference*. Our notions of ownership, citizenship, or drunkenness, enable us to make analogies. For instance, they enable us to wonder whether intellectual property or privacy rights over one's data are so similar to ownership that some of the ownership-related normative positions can be extended to them or not, or whether drug addition may be assimilated to drunkenness.

The meaning of a legal concept—such as ownership, tort or contract, or even drunkenness—is not fully reducible to its inferential function, established by a fixed set of rules, though this inferential function, as constituted by these rules, is an essential aspect of such a meaning.

In fact, the study of a legal concept—or better the study of the legal regime which is identified by a certain concept, what the Germans call a *Rechtsinstitut* (legal institute, see von Savigny 1981, sec. 5)—consists in bringing together not only the rules directly related to the concept (the rules which determine the qualification according to the concept, or that establish the consequences of this qualification), but also further normative, empirical and evaluative knowledge concerning the application of these rules. We build theories of *Rechtsinstitute* and these theories need to be as good (as a cognitive and decisional tool) as

possible, given the input material at one's disposal. This material may include conflicting rules, factors, and values: This does not exclude that when organising such material one should aim at coherence, that is, at shaping it in such a way to make it usable in legal problem-solving.

Some critical approaches to legal studies (on which see, for instance, Kennedy 1976; Unger 1986; Kennedy 1997) often jump too quickly from the recognition that the law expresses conflicting values, policies, rules to denying that it makes sense to accommodate all of this information within a comprehensive picture. We should indeed criticise attempts at building coherence by cancelling realities or experiences (this would indicate a psychotic personality, rather than a cognitive attitude), and one may rightly choose to focus one's efforts into bringing to the fore aspects of the law that others fail to recognise. However, the fact that legal materials are conflicting and that one views one's mission as that of studying and emphasising such conflicts, should not prevent one from recognising the merit of attempts to try to organise as well (as coherently) as possible this material, using it to construct an adequate practical theory.[3]

It seems to us that lawyers approaching the study of particular legal concepts and institutes (*Rechtsinstitute*) should engage in *local theory-construction* (see Chapter 28): They should try to build legal theories of the particular domains of their inquiry, theories which—though having their starting point in rules which appear to be binding in a certain domain, and cases where they have been applied—end up with broader claims, concerning the contents of such rules, the values to which they are related, the ways in which such values may be achieved within legal practice.

Thus, in studying legal concepts, besides collecting sets of rules having the same qualification as a consequence or as an antecedent, one needs to consider how such rules are to be understood, whether they are liable to exception, or even whether one needs to expand the available rule-set with new rules, as required by analogies with existing material, by values to be pursued, by the existing socio-economic conditions. Rather than only listing such rules, one needs to articulate the information according to which it may be possible to identify, understand, use, integrate them.[4]

The task of designing appropriate conceptual structures for legal thinking is

[3] This idea comes close to the view of legal doctrine that is advanced by Dworkin (1986), though he prefers to speak of integrity rather than of coherence, and focuses on moral-political requirements rather than on cognitive-epistemological standards, as we do (this is also the approach which is adopted in Peczenik, Volume 4 of this Treatise, chap. 5). Dworkin's approach has stimulated a vast debate (see for instance Cohen 1984), where Dworkin's views of legal reasoning have met both criticism and support, in different legal traditions (as Italian examples of these different attitudes, see: Pintore 1990, 143ff, and Bongiovanni 1999).

[4] A presentation and critical examination of legal doctrines, which well exemplifies how one can build local theories of the law, centred on a particular legal concept or institute, can be found in Peczenik, Volume 4 of this Treatise, chap. 2.

a fundamental task for legal doctrine, a task through which one contributes to the growth of legal knowledge and to the refinement of the techniques for legal problem-solving.

In performing this task, a doctrinal lawyer needs to take into account the multiple and often conflicting needs of the legal practice. Moreover he or she is constrained by the existing conceptual framework (as provided by legislative language, and by prevailing judicial and doctrinal conceptions). One cannot get too far from that framework, to avoid being ignored by the legal community: Also in redefining legal concepts, or in proposing new ones, the legal reasoner is contributing to the legal theory of his or her community and has to face what we have called "the gamble of participation."

However, some bold attempts to provide new conceptual frameworks for established domains of the law have been successfully (though controversially) advanced, with the intention of complementing, subsuming, or even substituting some traditional conceptual structures. Consider for example how students in law and economics have proposed to broaden the concept of property rights, so as to cover all cases when an entitlement cannot be taken away without the owner's consent. Thus, on this understanding, property rights also include certain contractual rights against specific persons, namely, and in particular a creditor's right to specific performance. Correspondingly, they have extended the notion of liability, to include any case in which an entitlement can be taken away by paying a compensation.[5]

Thus, we may conclude our analysis of legal concepts by saying that though such concepts are constituted also by rules, there is a sense in which theories of legal concepts contribute to law-making, by framing the very rules in which such concepts occur.[6] The often-ridiculed pretension of conceptualist lawyers that they can turn concepts into binding rules has probably more truth than it is usually assumed to have.[7]

21.3. Kelsen's View of Legal Conditionality

Our causal-like approach to normative conditionals comes close to the view of normative conditionals advanced by Hans Kelsen. In the following sections we will critically review Kelsen's model, relate it to our approach, and identify commonalities and differences.

[5] For this distinction, see Calabresi and Malamed 1972. For some critical considerations on the conceptual strategy of law and economics, see Fletcher 1996, 155ff.

[6] Lindahl (2003; 2004) has recently affirmed that legal concepts, or at least some of them, should not be constructed arbitrarily, but having in mind their cognitive function in legal reasoning, and particularly the need to use them in coherent justifications.

[7] For an extreme statement of this pretension, see von Jhering 1857, though Jhering himself satirised his earlier views in his later writings (see von Jhering 1964).

21.3.1. Causality and Imputation

Kelsen affirms that the normative domain is characterised by a special type of causal-like connection, which he calls *imputation* (*Zurechnung*).

> Just as laws of nature link a certain material fact as cause with another as effect, so positive laws [in their basic form] link legal condition with legal consequence (the consequence of the so-called unlawful act). If the mode of linking material facts is causality in the one case, it is imputation in the other, and imputation is recognised in the Pure Theory of Law as the particular lawfulness, the autonomy, of the law. (Kelsen 1992, sec. 11.b, 23)

As is well known, Kelsen (1992, sec. 11.b, 24-25) describes imputation as consisting in an *ought-to-be* link, implementing what he calls the *ought* (*Sollen*) category:

> Laws of nature say "if *A*, then *B* must be." Positive laws say: "if *A*, then *B* ought to be." The "ought" designates a relative a priori category for comprehending empirical legal data. In this respect, the "ought" is indispensable, lest the specific way in which the positive law connects material facts with one another not be comprehended or expressed at all.

Therefore, in Kelsen's view, while causal connections have to be described as:

IF *A*, THEN *B* MUST BE

imputation connections have the form:

IF *A* THEN *B* OUGHT TO BE

where THEN ... MUST BE and THEN ... OUGHT TO BE express respectively physical causation and normative causation. This view, combined with Kelsen's idea that each norm establishes a sanction, leads Kelsen to believe that each norm has the form:

IF *Action* THEN *Sanction* OUGHT TO BE

21.3.2. Problems with the Kelsenian Conditionality

Kelsen views his representation of normative conditionality as eliciting the typical structure of legal rules, and even as expressing the necessary form, the *basic category* of legal knowledge (as he says, inspired by neokantian philosophy).

Unfortunately, we cannot share this view: The Kelsenian model, at least when literally understood, fails to capture the structure of legal rules, and risks being very confusing. This is because the words "ought to be" are normally used to express the notion of obligatoriness, rather than the connection between the antecedent and the consequent of conditional rules. Consequently, at least in conditional normative propositions expressing obligations, Kelsen's representation of normative conditionality leads to confusing two aspects:

- The common nature of all normative conditionals, namely, the fact that they are concerned with determining normative effects (we expressed this fact by adding the n superscript to the THEN connective).
- The specific normative qualification of obligatoriness, which is only established by those normative conditionals which determine (establish) obligations (we express this qualification through the ***Obl*** operator).

We believe that these two aspects need to be carefully distinguished to obtain a proper understanding of legal conditionality. Consider for example the following rule:

> IF [one is below 18 years]
> THEN^n ***Obl*** [one does not buy alcoholic drinks]
> (if one is below 18 year, then one is obliged not to buy alcoholic drinks)

A Kelsenian representation of this rule would require the following rewriting:

> IF [one is below 18 years]
> THEN [one does not buy alcoholic drinks] OUGHT TO BE

It is clear that in the Kelsenian representation OUGHT TO BE not only signals normative determination (rather than physical causality), but also expresses the deontic qualification "it is obligatory," that is, it includes the deontic operator ***Obl***. In other words, the Kelsenian representation of conditionals establishing obligations, merges our connective for normative conditionals IF ... THEN^n ... and our obligational qualification ***Obl***, into the connective IF ... THEN ... OUGHT TO BE.

This way of expressing normative rules fails to be applicable whenever a rule's consequent expresses a qualification that is different from obligatoriness, like, for instance, permission.

Consider for example the following rule:

> IF [one is above 18 years]
> THEN^n ***Perm*** [one buys alcoholic drinks]
> (if one is above 18 year, then one is permitted to buy alcoholic drinks)

The Kelsenian strategy of leaving the deontic qualification implicit into the normative conditional IF ... THEN ... OUGHT TO BE here cannot work, since it forces us to lose the information that this is a permissive rule. One would in fact obtain:

> IF [one is above 18 years]
> THEN [one buys alcoholic drinks] OUGHT TO BE

which would be probably be read as stating the obligation of buying drinks (rather than the permission of doing that) when one is above 18. Nor can we

collapse IF ... THEN ... OUGHT TO BE and ***Perm*** into IF ... THEN ... ***Perm***, obtaining rule:

> IF [one is above 18 years]
> THEN [one buys alcoholic drinks] ***Perm***

since in this way one would lose the information that we have a normative connection (which is signalled by the locution OUGHT TO BE), rather than an instance of natural causality.

Moreover, following the latter suggestion, one would lose the possibility of expressing in a uniform way the idea of a normative connection between a determining condition and the determined result, regardless of the particular content of such result. This confusion clearly emerges in the later thought of Hans Kelsen, who says that:

> The man to whom the command, permission, authorisation is directed *ought to*. The word "ought" is used here in a broader then the usual sense. According to customary usage, "ought" corresponds only to a command, while "may" corresponds to a permission, and "can" to an authorisation. But in the present work the word "ought" is used to express the normative meaning of an act directed toward the behaviour of others, this "ought" includes "may" and "can." (Kelsen 1967, sec. 4.b, 5)

To get out of this difficulties and ambiguities, we need to clearly distinguish the two aspect which are merged by Kelsen:

- the way in which we signal normative determination, that is, the connection existing between the antecedent and consequent of a normative conditional, and
- the way in which we express the particular normative qualification which is expressed by the consequent of the conditional.

For this purpose, we shall use the pattern IF ... THEN^n to express normative conditionality, where the superscript n signals normativity, and we shall use different operators (like ***Obl*** and ***Perm***) to specifically express different conditioned normative qualifications.

21.4. Normative Conditionals and Time

Normative determination is an historical phenomenon, which takes place along the axis of time: Normative preconditions hold or happen in certain temporally characterised occasions, and consequently their effects too hold or happen within temporal bounds. In providing an analysis of normative conditionality, we cannot refrain from introducing some temporal notions, though avoiding as much as possible the complexities of temporal logics.

21.4.1. *Temporal Predicates*

For expressing temporal propositions we shall use the temporal predicates we introduced in Section 15.4.2 on page 433:

$\boxed{1}$ *holds at time* $\boxed{2}$

and

$\boxed{1}$ *happens at time* $\boxed{2}$

where $\boxed{1}$ is a fluent and $\boxed{2}$ is a time reference. In addition we will use the temporal predicate:

$\boxed{1}$ *initiates at time* $\boxed{2}$

to express that fluent $\boxed{1}$ starts to hold at time $\boxed{2}$, and continues so, until its persistence is terminated. We also use the abbreviation *terminates*, to express that a fluent initiates not to hold (terminates):

$\boxed{1}$ *terminates at time* $\boxed{2}$ $\equiv$ (NON $\boxed{1}$) *initiates at time* $\boxed{2}$

For instance, proposition:

[Tom is obliged to pay the penalty of € 100]
initiates at time 12.06.2003

means that Tom's obligation to pay that penalty initiates at 12.06.2003 and persists after that, until a terminating event takes place. Similarly, the proposition:

[Tom is obliged to pay the penalty of € 100]
terminates at time 12.07.2003

means that Tom's obligation to pay that penalty terminates at 12.07.2003 (for example, since he has paid the penalty, or since he has succeeded in having it revoked) and its non-existence persists after that.

21.4.2. *Temporally Specific Normative Initiation*

Let us use the temporal predicates we introduced Section 21.4.1 for formalising *most-specific conditionals*, namely, conditionals which not only concern determined persons and objects but which also refer to specific time instant. For example, assume that there is a contract clause according to which if Tom fails to deliver his merchandise at 10 o' clock on 12.06.2003, then at that time he will start being obliged to pay the penalty of € 100. We can express this through the following formula:

IF NON([Tom delivers the merchandise]
happens at time 12.06.2003)
THEN^n
[Tom is obliged to pay the penalty of € 100]
initiates at time 12.06.2003

This representation is sufficient for our purposes, though the temporal connections between an antecedent and a consequent may include further aspects, which we cannot consider here, for the sake of simplicity. For instance, in certain cases, the consequent state of affairs does not start at the moment when the antecedent event happens, but sooner or later than that (for an attempt to approach this issue, see Hernandez Marín and Sartor 1999).

21.4.3. Temporal Generality and Normative Initiation

Let us now consider how we can represent normative initiation with regard to *temporally-general rules*, namely, rules that concern events happening at any time (though possibly within a certain interval). This concerns first of all *personally-general rules*, which are usually general also regard to time. However, even rules that specifically concern determined persons and objects, often are general with regard to their time frame. Consider, for example, a contractual clause saying that if a fault is discovered (at any time) then it will have to be communicated to the seller within a week (from that time).

In principle, we may treat temporal generality by applying the universal quantifier also to a temporal variable, as in the following example:

FORANY (x, y, w, t)
IF $[x$ causes an illegal damage worth w to $y]$ *happens at time* t
THEN^n (***Obl*** $[x$ pays compensation w to $y]$) *initiates at time* t

(for any persons x and y, and amount w, if person x causes an illegal damage worth w to person y at a time t, then the obligation that x pays compensation w to y initiates at that time)

The reasoning schema *specification* allows us to infer instances of this rule concerning not only determined persons and damages, but also determined time points. For instance, given the rule above, we may infer the following conditional, concerning what happens if Tom, by hitting Mary's car at 9:25 on 01.05.2003, causes her damage worth € 1,000.

IF
[*Tom* causes illegal damage worth € 1,000 to *Mary*]
happens at time 9:25 on 01.05.2003
THEN^n
(***Obl*** [*Tom* pays compensation € 1,000 to *Mary*])
initiates at time 9:25 on 01.05.2003

If we know that indeed Tom has caused such damage:

[Tom causes illegal damage worth € 1,000 to $Mary$]
happens at time 9:25 on 01.05.2003

then we may apply schema *detachment* to obtain:

(***Obl*** [Tom pays € 1,000 to $Mary$])
initiates at time 9:25 on 01.05.2003

The two inferences (*specification* and *detachment*), can be merged, as we have seen in Section 15.3.4 on page 425, into schema *normative syllogism*, leading to the following application of that schema:

(1) [Tom causes illegal damage worth € 1,000 to $Mary$]
happens at time 9:25 on 01.05.2003
(2) FORANY (x, y, w, t)
IF [x causes an illegal damage worth w to y]
happens at time t
THEN^n (***Obl*** [x pays w to y]) *initiates at time* t

---

(3) ***Obl*** [Tom pays € 1,000 to $Mary$]
initiates at time 9:25 on 01.05.2003

Thus we conclude that Tom's obligation has initiated at time 9:25, on 01.05.2003.

21.4.4. Temporal Persistence

The inference we have just considered in the end of the section Section 21.4.3 on the preceding page, allows us to conclude that Tom's obligation has initiated at time 9:25, on 01.05.2003. However, it does not tell us that the obligation also holds in subsequent times, for instance, on 01.06.2003.

For this purpose, one further inference step needs to be performed: From the fact that a state of affairs has been normatively initiated at a certain time t_1, we need to infer that this normative situation also holds at any subsequent time t_3, until the persistence of that situation is interrupted by a new event, at a time t_2. This is the so-called the law of *temporal inertia* or *temporal persistence*, which seems to apply to both physical and normative situations.

Obviously, according to the law of inertia, we can only make defeasible inferences: Given that a normative state of affairs has started, the conclusion that it still holds at a subsequent time is defeated, if it appears that this state of affairs has already been terminated. For instance, the knowledge that Tom has compensated the damage (so terminating his obligation) would lead us to refrain from concluding that he is still obliged to compensate it.

The two following inference schemata capture the functioning of the law of inertia. The schema *temporal persistence* tells us that when a normative situation is initiated, then it continues to hold in the future, until some new event makes a change:

Reasoning schema: *Temporal persistence*
(1) A *initiates at time* t_1;
(2) t_3 is subsequent to t_1
——— IS A DEFEASIBLE REASON FOR
(3) A *holds at time* t_3

There is an undercutting defeater for this schema, which is provided by the defeating schema *interruption*:

Defeating schema: *Temporal interruption*
(1) A *terminates at time* t_2;
(2) t_2 is between t_1 and t_3
——— IS AN UNDERCUTTING DEFEATER AGAINST
(3) (a) A *initiates at time* t_1;
(b) t_3 is subsequent to t_1
——— IS A REASON FOR
(c) A *holds at time* t_3

The defeater says that when a state of affairs A is terminated (remember that the termination of A consists in initiation of NON A), then the previous initiation of A is no a reason for believing that A holds after the termination time.[8]

Here is an example of how these reasoning schemata work. According to schema *temporal persistence*, from the fact that Tom's obligation started on the 01.05.2003, we can infer that he still was obliged on 01.07.2003:

(1) [Tom is obliged to pay € 1,000 to $Mary$] *initiates at time* 01.05.2003;
(2) 01.07.2003 is subsequent to 01.05.2003
———
(3) [Tom is obliged to pay € 1,000 to $Mary$] *holds at time* 01.07.2003

However, the fact that Tom's obligation started on 01.05.2003 is no reason to conclude that he is still obliged at a time (for instance, 01.07.2003) which is

[8] These ideas are captured by various formalisms for expressing temporality within artificial intelligence. In particular, our treatment of temporality is inspired by the *situation calculus* (McCarthy 1987), and the *event calculus* (Kowalski and Sergot 1986).

posterior to the time when Tom's obligation was terminated (assume that he paid his debt on 01.06.2003).

Defeating instance: *Temporal interruption*

(1) [*Tom* is obliged to pay € 1,000 to *Mary*]
terminates at time 01.06.2003;
(2) 01.06.2003 is between 01.05.2003 and 01.07.2003
——— IS AN UNDERCUTTING DEFEATER AGAINST
(3) (*a*) [*Tom* is obliged to pay € 1,000 to *Mary*]
initiates at time 01.05.2003;
(*b*) 01.07.2003 is subsequent to 01.05.2003
IS A REASON FOR
(*c*) [*Tom* is obliged to pay € 1,000 to *Mary*]
holds at time 01.07.2003

21.4.5. Temporalised Normative Syllogism

In the following, when representing temporally-general conditionals (conditionals concerning any time) whose consequent initiates exactly at the time when the antecedent event happens, we adopt a simplified syntax: We leave time references implicit, assuming the temporal predicates apply to a temporal variable and that a universal temporal quantifier applies to all instances of that variable. In other words, instead of writing:

FORANY (t)
IF *Event* *happens at time* t
THEN^n *State* *initiates at time* t

we use the simplified formula:

IF *Event* *happens*
THEN^n *State* *initiates*

Accordingly, we can express to temporalised normative syllogisms in the following way:

Reasoning schema: *Temporalised normative syllogism*

(1) *Event* *happens at time* t_0;
(2) IF *Event* *happens*
THEN^n *State* *initiates*
——— IS A REASON FOR
(3) *State* *initiates at time* t_0

Here is an instance of a corresponding inference:

(1) [Tom causes $Mary$ illegal damage worth € 1,000]
happens at time 01.10.2003; AND
(2) FORANY (x, y, w)
IF [x causes y illegal damage worth w] *happens*
THEN^n [x is due to pay w to y] *initiates*

---

(3) [Tom is due to pay € 1,000 to $Mary$]
initiates at time 01.10.2003

Finally, note that the *happens* predicate in not necessary when we are dealing with action, since the performance of an action can be viewed indeed as the happening of an event. Thus we can also express the last rule in the following form:[9]

FORANY (x, y, w)
IF $Does_x$[cause y illegal damage worth w]
THEN^n [x is due to pay w to y] *initiates*

21.4.6. Time and Normative Emergence

After considering normative initiation, let us analyse the temporal aspects of *normative emergence*. We can express *state-emergence*—namely, the normative emergence of states of affairs—through formulas having the form:

FORANY (t)
IF $State_1$ *holds at time* t
THEN^n $State_2$ *holds at time* t

for states of affairs. Similarly, we can express the *event-emergence*, namely, the normative emergence of events (there included actions) as follows:

FORANY (t)
IF $Event_1$ *happens at time* t
THEN^n $Event_2$ *happens at time* t

Let us consider two examples of normative emergence. The first one, exemplifying state emergence, corresponds to Art. 812 of the Italian civil code:

[9] In the rule we use the behavioural form of action which we could also represent as a productive one, namely, as $Brings_x[y$ suffers illegal damage worth $w]$

(a) FORANY (x, t)
IF [x is a piece of land, water source, a tree, a building, or is anyway permanently attached to the land] *holds at time* t
THEN^n [x is an immovable good] *holds at time* t

The second example, dealing with event-emergence, corresponds to Art. 1136 of the Italian civil code:

(b) FORANY (x, t)
IF [x makes an offer to the public, containing all terms of the contract it concerns] *happens at time* t
THEN^n [x makes a contractual offer] *happens at time* t

Normative syllogism also applies to normative emergence, both to state-emergence and to event-emergence. Here is an example of *state-emergence*:

(1) [$John's\ living\ place$ is a building] *holds at time* 13.4.2002
(2) FORANY (x, t)
IF [x is a building] *holds at time* t
THEN^n [x is an immovable good] *holds at time* t

---

(3) [$John's\ living\ place$ is an immovable good] *holds at time* 13.4.2002

Here is an example for *event-emergence*:

(1) [Tom makes an offer to the public, containing all terms of the contract it concerns] *happens at time* 13.3.2003;
(2) FORANY (x, t)
IF [x makes an offer to the public, containing all terms of the contract it concerns] *happens at time* t
THEN^n [x makes a contractual offer] *happens at time* t

---

(3) [Tom makes a contractual offer] *happens at time* 13.3.2003

We use a convenient abbreviation for normative emergence, whenever the time in which the emergent state holds coincides with the time of the conditioning state, or the time in which the emergent event happens coincides with the time of the conditioning event.

In particular, for state-emergence, rather than:

FORANY (t)
IF $State_1$ *holds at time* t
THEN^n $State_2$ *holds at time* t

we also write:

IF $State_1$ *holds*
THEN^n $State_2$ *holds*

For instance the rule above stating that buildings are immovable goods, can be rewritten as:

FORANY (x)
IF [x is a building] *holds*
THEN^n [x is an immovable good] *holds*

For event-emergence, rather than:

FORANY (t)
IF $Event_1$ *happens at time* t
THEN^n $Event_2$ *happens at time* t

we write

IF $Event_1$ *happens*
THEN^n $Event_2$ *happens*

For instance, the rule above concerning offers can be rewritten as:

FORANY (x)
IF [x makes an offer to the public, containing all terms of the contract it concerns] *happens*
THEN^n [x makes a contractual offer] *happens*

21.4.7. Temporalised Counts-As

Our analysis of state and event emergence provide us the ingredients for introducing appropriate abbreviations for those who want to follow Searle (1995, 28), in using the counts-as terminology. For state-emergence we can introduce the following definition.

Definition 21.4.1 *Counting-as state. State A* counts-as state *B, if A's holding determines B's holding (B's holding emerges upon A's holding):*

State A COUNTS-AS *State* $B \equiv$
IF A *holds* THEN^n B *holds*
(⌈state A counts as state B⌉ is equivalent to ⌈A's holding determines that B holds⌉)

Definition 21.4.2 *Counting-as event. Event A* counts-as event *B, if A's happening determines B's happening (B's happening emerges upon A's happening):*

Event A COUNTS-AS *Event* $B \equiv$ IF A *happens* THEN^n B *happens*
(⌈event A counts as event B⌉ is equivalent by definition to ⌈A's happening determines that B happens⌉)

For example, assume that Tom owns an e-business company and has advertised on line the offer of a set of CDs, indicating all terms of the offer, among which a very cheap price, which he now thinks was too low. Since Tom's offer determines a contractual offer—or if you prefer, since his offer "counts as" a contractual offer—he is bound toward those who have accepted the offer, as we shall see in the following chapter.

This piece of reasoning can be expressed equivalently in two different forms. The first form uses the determination terminology (as applied to events):

(1) FORANY (x)
IF [x makes an offer to the public, containing all terms of the contract it concerns] *happens*
THEN^n [x makes a contractual offer] *happens*;
(2) [Tom makes an offer to the public, containing all terms of the contract it concerns] *happens at time* 13.3.2003

---

(3) [Tom makes a contractual offer] *happens at time* 13.3.2003

The second form uses the counts-as terminology (as applied to events):

(1) FORANY (x)
Event [x makes an offer to the public, containing all terms of the contract it concerns]
COUNTS-AS
Event [x makes a contractual offer];
(2) [Tom makes an offer to the public, containing all terms of the contract it concerns] *happens at time* 13.3.2003

---

(3) [Tom makes a contractual offer] *happens at time* 13.3.2003

Our preference goes for the first form, using the determination-based terminology, which we find more direct and less misleading, but readers should feel free to adopt the counts-as language, if they find it more intuitive.

Chapter 22

POTESTATIVE CONCEPTS

Our extensive analysis of normative conditionals (see Chapters 20 and 21) enables us to introduce a new family of normative concepts, which we call *potestative* concepts (from the Latin word *potestas*, “power”) since they are based on the notion of a *normative power*.

We need first to examine carefully this notion, and distinguish different meanings in which we may speak of a *normative* or *legal* power. In fact the concept of a normative power plays a fundamental role in normative reasoning, but has often been misunderstood and confounded with other normative concepts, such as those of a permission and an obligational right, or with factual powers, such as the ability to use physical force or persuasion.[1]

Here we shall only consider *normative power*, namely, the power that directly concerns the production of normative results. Thus, we shall refer to normative power when speaking of *power tout court*. When, on the other hand, we need to refer to the ability of producing certain physical (or psychological) states of affairs, we shall indicate it explicitly.

On the basic of our analysis of the notion of normative power we shall distinguish different potestative concepts, and in particular, we shall articulate four additional Hohfeldian concepts, which complement the obligational concepts we introduced in Section 19.4 on page 510.

22.1. Powers and Potestative Rights

Normative conditionality is the basic ingredient for constructing the idea of a normative power, an ingredient that is shared by all notions of power we shall consider. On the basis of this idea we shall also construe the idea of a potestative right, namely, the right consisting in the possession of a normative power.

22.1.1. Generic Power

The simplest and most general kind of such power—which we call *generic power*—is the direct reflex of normative conditionality. Whenever a normative

[1] The notions we shall present in this chapter and in the following are in part the development of ideas that were presented in: Gelati, Rotolo, and Sartor 2002, and Gelati et al. 2002a. On the notion of power, see also: Makinson 1986; Allen and Saxon 1991. For a formalisation based upon modal semantics, see: Jones and Sergot 1996, and Artosi 2002, who refer to Elgesem 1997.

conditional IF A THEN^n B holds, then one has the generic normative power of making so that the consequent B takes place, by bringing about the antecedent A.

Consider the Grotian rule (see Section 20.2.3 on page 526), according to which whoever culpably causes damage, is obliged to compensate it (Grotius 1925, sec. 17.1.1). On the basis of such a rule, we can say that Helen has the generic power of making so that Tom acquires the obligation to compensate Mary. Helen could "exercise" this generic power by inducing Tom to damage Mary. For instance, she could remind Tom how much Mary has been nasty to him, by suggesting that he takes revenge by cutting the tyres of Mary's car, and so she could convince him to perform a tortious action.

The same situation also happens with regard to non-deontic conditionality. Assume that there is a rule saying that whoever is born in the territory of country c, acquires c's citizenship. On the basis of this rule, we may say that Mary, who is pregnant, has the power to make her child become c's citizen, by travelling to country c and waiting there for the birth of her child.

The idea of a generic power can be defined as follows:

Definition 22.1.1 *Generic power. We say that there is the* generic power *to achieve B via A, and write* **GenericPower**(B VIA A)*, whenever B is normatively determined by A:*

$$\textbf{\textit{GenericPower}}(B \text{ VIA } A) \equiv \text{IF } A \text{ THEN}^n\ B$$

(⌈there is the generic power of achieving B via A⌉ is equivalent to ⌈if A is the case then B is normatively determined⌉)

In this definition A can be the happening of an event, or the initiation or the holding of a situation, since the idea of normative determination, as we have seen in Section 20.1.2 on page 522, covers all types of conditionality (initiation and termination, in the deontic and non-deontic forms, according to state emergence and event emergence).

Note that our notion of a generic power to produce normative effect B by bringing about A abstracts from the fact that those who are interested in achieving B have the factual ability of bringing about A. By adding this requirement, we could obtain a more restricted notion of power, which joins in sequence factual ability and normative conditionality (having the power to achieve B via A would mean having the physical ability of realising A, which normatively determines B).

However a precise characterisation of such a mixed (physical-normative) notion of power would require us to introduce a whole range of new notions (like factual possibility and necessity, and various related notions, such as ability and competence). Moreover we would need to engage in complex considerations pertaining to the connection between factual (or natural, as it is often called) and normative ability. Since this is not required for the development of our

analysis, we prefer to remain only at the normative level, and refrain from considering factual powers.

22.1.2. Action-Power

A more interesting and more specific notion of power exists when the antecedent of a normative connection is formed by the *action* of an agent. This is what we call a *action-power*.

Definition 22.1.2 *Action-power. We say that j has the* action-power *of achieving B by doing A, and write* **ActionPower**$_j$(B VIA A) *whenever B is normatively determined by j's doing A:*

$$\textbf{\textit{ActionPower}}_j(B \quad \text{VIA} \quad A) \equiv \text{IF } Does{*}_jA \text{ THEN}^n \ B$$

For instance, in Roman law, the following rule holds:

Wild beasts, birds, fish, that is, all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the law of nations the property of their captor; for natural reason gives to the first occupant that which had no previous owner. (*Institutes of Justinian*, 2.1) [2]

A simplified version of this rule (if one captures an animal that does not belong to anybody, then one becomes the owner of that animal) can be formalised as follows:

FORANY (x, y)
WHEN [animal y does not belong to anybody]
THEN^n IF $Does_x$ [capture y]
THEN^n ([x is the owner of y] *initiates*)

We can rephrase the last rule by according to the above definition of an action-power: When an animal does not belong to anybody, then one has the action-power of initiating one's own ownership of the animal, by capturing it:

[2] The Latin original: "Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra mari caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est id naturali ratione occupanti conceditur."

[2] For readability's sake we take the liberty of substituting in some formulas, like the following one, the bare infinitive (like "capture") with the gerund ("capturing"), assuming that the expressed propositional component remains the same. Said otherwise, for us [capture y] and [capturing y] are synonymous ways of expressing the same meaning.

FORANY (x, y)
WHEN [animal y does not belong to anybody]
THEN^n ***ActionPower***$_x$[x is the owner of y] *initiates*
VIA
[capturing y]

(for any person x and animal y, if y does not belong to anybody, then x has the action-power of initiating x's ownership of the animal, by capturing y)

Note that the general idea of an action-power does not only concern the situation where the author of the action intends to achieve the normative result which is determined by that action. For instance, this idea is also applicable to the Grotian rule that whoever culpably causes a damage to another is obliged to compensate the damaged person:

FORANY (x, w, y)
IF $Does_x$[cause damage w to y by fault]
THEN^n (***Obl*** [x compensates y for w] *initiates*)

Our definition of an action-power allows us to say (though this seems quite weird) that one has the action-power of initiating one's own obligation to make a damage good, by causing that damage through one's fault.

FORANY (x, w, y)
ActionPower$_x$
Obl [x compensate damage w to y] *initiates*
VIA
[causing damage w to y by fault]

(for any persons x and y, and damage w, x has the action-power to bring it about the initiation of x's obligation to compensate damage w to y, by causing damage w to y by fault)

So far we have only considered cases where the action-power consists in the ability to initiate new normative situations. An action-power can also consist in one's ability to make certain events happen, by making them emerge upon one's behaviour.

For instance, assume that a contract clause says that if party j does not deliver the merchandise in time, then party k can terminate the contract by communicating the intention to do so (k's communication determines the emergent event of the cancellation of the contract).

WHEN NON $Does_j$[deliver the merchandise in time]
THEN^n IF $Does_k$[declare that the contract is cancelled]
THEN^n ([the contract is cancelled] *happens*)

On the basis of this normative connection, we may say that if j does not deliver in time, k has the action-power of terminating the contract, by declaring to do so.

$$\text{IF NON } Does_j\text{[deliver the merchandise in time]}$$
$$\text{THEN}^n\ \textbf{\textit{ActionPower}}_k$$
$$\text{[the contract is cancelled] } \textit{happens}$$
$$\text{VIA}$$
$$\text{[declaring that the contract is cancelled]}$$

(If j does not deliver the merchandise in time, then k has the action-power to produce the event that contract is cancelled by declaring that the contract is cancelled)

This is an instance of the notion of *proclamative power*, the power to create a legal result through a corresponding declaration or proclamation, which we shall extensively describe in Chapters 23 and 24.

22.1.3. Abstract Action-Power

In some cases, we want to make a reference to the fact that an agent has the action-power to achieve a certain result, though omitting to specify what action would cause that result. By saying that agent j has the power to achieve a certain result, we mean that there exists some action, by agent j, which, if it was performed, would produce the indicated result.

We call this normative situation an *abstract action-power*, and we define it as follows.

Definition 22.1.3 *Abstract action-power. We say that j has the* abstract action-power *to achieve B, and write* **AbstractPower**$_j B$*, when there exists an action A whose performance by j normatively determines B. More precisely:*

$$\textbf{\textit{AbstractPower}}_j B \equiv \text{FORSOME}\,(A)\ (\text{IF } Does_j A \text{ THEN}^n\ B)$$

According to this definition, we can affirm that both the debtor and the creditor have the abstract action-power to extinguish the debtor's obligation toward the creditor (or, which is equal, the creditor's right toward the debtor): The debtor has the power of doing that by fulfilling his obligation, and the creditor by renouncing to her credit.

22.1.4. Enabling Power

The idea of an action-power, as described above, is still too general to be useful in legal contexts. We tend to use the notion of a power only to cover those cases where the law, by linking a certain result to one's action, aims at enabling one to achieve that results. Consequently, we do not speak of a "power" to refer to cases where the law links a disadvantageous outcome (a sanction) to a certain action to deter or punish its performance.

To appropriately circumscribe the notion of power—so that it matches our intuitions—we need to refer to a teleological view of the corresponding normative connection. It is true that some authors, and most famously Kelsen (1992;

1967) hoped to expel teleological considerations from legal theory, to achieve some kind of "purity." However, we view such attempts as being misguided: Even the most basic normative notions cannot be specified without appealing to teleological ideas.

Thus, we shall not refrain from adopting a teleological perspective—that is, from viewing the law from the *intentional stance*—also when dealing with powers. Let us state our basic idea: A normative connection between one's action and a normative result can be said to create one's legal power to achieve that result only when such connection has the purpose of enabling one to achieve that result, by performing the indicated action (if one so decides).

Such an "enablement" can, in its turn, be aimed at facilitating the pursuit of different interests, pertaining to different subjects:

- the interests of the power holder (as it is usually the case in private law, for instance with regard to the powers of the creditor over the debtor);
- the interests of other people (as for powers that are conferred to parents with regard to their children and to tutors with regard to their tutees); or
- the interests of a community (as for public powers).

All such cases are covered by our notion of *enabling power*. On the contrary, we cannot say that one has the enabling power of creating one's obligation to compensate a person by causing an unlawful damage to this person, or that one, by murdering another, has the enabling power of creating the judge's obligation to condemn one to 30 years of detention. This statements are false, since neither is civil liability aimed at offering people the opportunity to acquire an obligation to restore damages, nor is the murder rule aimed at offering people the chance of getting a long-term sentence.

Definition 22.1.4 *Enabling power. We say that j has the* enabling-power *to achieve B by doing A, and write* $\textbf{EnablingPower}_j(B \text{ VIA } A)$*, to mean that j's performance of A normatively determines B, in order to enable j to achieve B:*[3]

$$\textbf{\textit{EnablingPower}}_j(B \quad \text{VIA} \quad A) \equiv (\text{IF } Does_j A \text{ THEN}^n \ B)\Uparrow^{Enable:Brings_j B}$$

The idea of an enabling power can be given an abstract formulation, that is, it can be used without referring to the action through which the power is to be exercised.

Definition 22.1.5 *Abstract enabling-power. We say that j has the* abstract enabling-power *to achieve B, and write* $\textbf{AbstractEnablingPower}_j B$*, when there exists an action A whose performance by j normatively determines B, in order to enable j to achieve B. More precisely:*

[3] We use the upward arrow to express the purpose of the preceding normative proposition.

$$\textbf{\textit{AbstractEnablingPower}}_j B \equiv$$
$$\text{FORSOME}\,(A)\ (\text{IF } Does_j A \text{ THEN}^n\ B)\Uparrow^{Enable:Brings_j B}$$

When we say that j has the power to achieve a certain result without mentioning the action through which it is exercised, we refer to our notion of abstract enabling-power. This is what we mean when we say, for example, that the debtor has the power of extinguishing his debt.

22.1.5. Potestative Right

The most significant instance of the idea of enabling power is what we call a *potestative right*. This is an enabling power that is intended to further the interest of the power holder:

Definition 22.1.6 *Potestative right. We say that agent j has the* potestative right *of achieving B by doing A, and write* **PotestativeRight**$_j$*(B* VIA *A), to express that j has the enabling power of achieving B by doing A, in order to further j's own interests:*[4]

$$\textbf{\textit{PotestativeRight}}_j(B\ \text{VIA}\ A) \equiv (\textbf{\textit{EnablingPower}}_j B\ \text{VIA}\ A)\Uparrow^j$$

In such a case, therefore, the normative connection IF $Does_j A$ THEN^n B is intended to enable j to achieve B (***EnablingPower***$_j B$ VIA A), but this enablement, in its turn, has the function of enabling j to pursue his or her own interests. Similarly, we can have abstract potestative rights, where we omit the reference to the action through which the power is to be exercised.

$$\textbf{\textit{PotestativeRight}}_j B \equiv (\textbf{\textit{AbstractEnablingPower}}_j B)\Uparrow^j$$

The notion of ***PotestativeRight*** expresses the idea of a right as a power: It identifies a way of protecting the interest of the right-holder (the power to determine certain legal results) which complements the idea of an obligational right, which we discussed in Section 19.3 on page 507.

As examples of potestative rights, consider the following ones: the creditor's power to free the debtor or to bring the debtor to court; an owner's power to sell his or her property; a student's power of choosing, within certain constraints, what subjects to take exams on.

22.1.6. Powers and Permissions

It is very important to distinguish clearly the notion of a power from the notion of a permission. This is most clearly expressed in the following passage of Alois Brinz, a German jurist of the 19th century:

[4] As before, the upward arrow to expresses the purpose of the preceding normative entitlement, but we abbreviate as j the proposition $\lceil j$ better pursues j's own interests$\rceil$. Note that by interest we mean whatever (legitimate) goals j may choose to pursue, not only j's egoistic goals.

> Legal permission and legal ability (*licere*, *posse*), though linguistically indistinct, are different from each other. Permission, or licence, is something that occurs in both kinds of acts, ordinary acts and acts-in-the law;[5] legal ability, or legal power, on the other hand, occurs only in acts-in-the-law, i.e., in the widest sense of the word, only in such acts which are imposed or adopted by the law for achieving its invisible legal effects. Where the legal power exists for an act-in-the-law, there usually is also a license for it, yet, sometimes the former exists where the latter is missing. Physical ability is different both from permission and from ability in our sense, though neither the latter nor the former can be made use of without permission (*vi, clam facere, delict*); acts-in-the-law without legal power are null and void. (Brinz 1873, 211, as translated in Lindahl 1977, 211)

Also according to our analysis there is no necessary conceptual connection between permission and power.

In our framework, an action is permitted exactly if that action is not forbidden, that is, exactly if it is not obligatory to abstain from that action (see Section 17.3 on page 458). Thus, one's permission to do A does not require that a normative conditional holds according to which, by performing another action B, one achieves the result of performing A.

For instance, I am certainly permitted to sell one of my kidneys, in the sense that it is not the case that I am forbidden to do that. However, I have no power of doing that, in the sense that I am unable to achieve, by making a contractual declaration, the normative result which characterises a valid sale contract (in this case, acquiring the duty to deliver the kidney and the right to be paid the agreed amount).

On the other hand, I may be forbidden from doing something though having the power of doing it. For instance when buying a house one may undertake the obligation not to sell the house to a third party, before a certain term. Under such a circumstance, according to Italian law, one is forbidden to sell the house (and the violation of the prohibition is punished, as being a breach of contract), but one still has the power of doing that. This means that the sale will be effective (the house will be transferred to the new buyer, who will acquire it), but illicit (so that a compensation has to be paid).

The conceptual distinction we have just drawn does not exclude that there is a connection between permission and power. This connection results from the intentional interpretation of the acts through which a power is granted. Using the Grician notion of implicature (see Section 16.2.2 on page 442) we may say that the act that grants a person the power to achieve a certain result usually implicates giving the permission to exercise that power. In fact, usually it makes little sense to confer a power and to prohibit its exercise. Thus we usually assume that a power and the permission to exercise it go together (unless we are told that this is not the case). In fact, in legal language the word "can" is frequently used to express both a permission and a power.

[5] The term *act-in-the-law* is a translation of the German word *Rechtsgeschäft*, which we shall render as *legal transaction* (see Chapter 23).

This does not exclude that there may be special cases when power and permission are detached:

- one might be permitted to attempt at achieving a certain result, but have no the power of achieving it (so that the result would not be produced); or
- one might be forbidden from achieving a certain result, but have power of achieving it (so that one would achieve the result while violating the prohibition to realise it).

22.2. A Formalisation of the Hohfeldian Potestative Set

The conceptual framework we have just introduced enables us to introduce and formalise a second set of Hohfeldian concepts, the set of the four *potestative concepts*.

22.2.1. The Hohfeldian Potestative Set: Original Formulation

Hohfeld introduced through examples the potestative notions in Table 22.1 on the following page, without providing formal definitions. For instance, he presents the concept of power as follows:

> X, the owner of ordinary personal property "in tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) though the totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object—e.g., the power to acquire title to the latter by appropriating it. Similarly, X has the power to transfer his interest to Y—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest. So also X has the power to create contractual obligations of various kinds. (Hohfeld 1964, 51-2)

We shall characterise the Hohfeldian potestative square of concepts on the basis of our notion of abstract enabling-power (***AbstractEnablingPower***).[6]

22.2.2. The Hohfeldian Potestative Set: Logical Reformulation

Following Hohfeld's approach, we are interested in powers concerning normative positions. Let us write $\boldsymbol{Pos}_j$ to refer in general to any normative position which concerns agent j: It may be an obligation $\boldsymbol{Obl}\ Does{*}_j A$, a permission $\boldsymbol{Perm}\ Does{*}_j A$, an obligational right $\boldsymbol{OblRight}_j\, Does{*}_k A$, a permissive right $\boldsymbol{PermRight}^j\, Does{*}_j A$ or even a power $\boldsymbol{EnablingPower}_j A$.

[6] A different characterisation of the Hohfeldian notions, probably nearer to the original meaning of these notions can be obtained in terms of the more general notion of an action-power: Just substitute ***ActionPower*** for ***AbstractEnablingPower***in Table 22.2 on page 587 (and in the definitions for subjection, disability, and immunity).

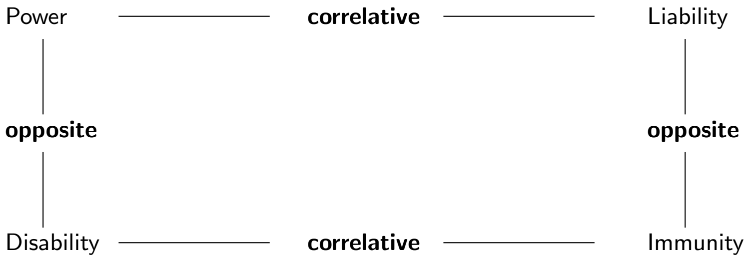


Table 22.1: *The second Hohfeldian square*

To refer to the normative position that Hohfeld denotes as *liability*, we shall use the term *subjection*, to avoid confusion with the notion of liability, as used in tort law. The notion of subjection can then be defined through our notion of abstract enabling-power.

Definition 22.2.1 *Subjection. That k is in a state of* subjection *toward j, with regard to normative position* **Pos***, means that j has the abstract enabling-power of determining* **Pos** *in the head of k:*

$$\boldsymbol{Subjection}_k^j\boldsymbol{Pos} \equiv \boldsymbol{AbstractEnablingPower}_j\boldsymbol{Pos}_k$$

For instance, debtor k is subject to creditor j in relation to j's power of freeing k from j's obligation.

The normative position of *disability* results from denying the concept of ***AbstractEnablingPower***.

Definition 22.2.2 *Disability. j has a* disability *toward k, with regard to the creation of position* **Pos** *exactly if it is not the case that j has the abstract enabling-power of creating* **Pos** *in the head of k:*

$$\boldsymbol{Disability}_j^k\boldsymbol{Pos} \equiv \text{NON}\ (\boldsymbol{AbstractEnablingPower}_j\boldsymbol{Pos}_k)$$

Also, the idea of an *immunity*, being equivalent to a disability, results from denying abstract enabling-power.

Definition 22.2.3 *Immunity. k has an* immunity *toward j with regard to the creation of position* **Pos** *in the head of k, exactly if is not the case that j has that power:*

$$\boldsymbol{Immunity}\ _k^j\boldsymbol{Pos} \equiv \text{NON}\ (\boldsymbol{AbstractEnablingPower}_j\boldsymbol{Pos}_k)$$

Given the connections between power, subjection, and disability, and immunity, we have the following equivalences:

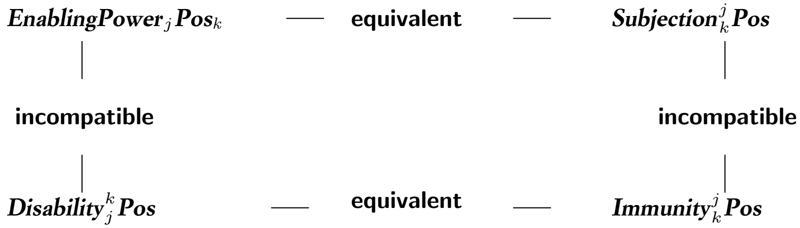


Table 22.2: *The second Hohfeldian square formalised*

$\textbf{\textit{Immunity}}\ {}^j_k\textbf{\textit{Pos}} \equiv \textbf{\textit{Disability}}^k_j\textbf{\textit{Pos}} \equiv \text{NON}\ \textbf{\textit{Subjection}}^j_k\textbf{\textit{Pos}}$
(⌈k has an immunity toward j with regard to ***Pos***⌉ is equivalent to ⌈j has a disability toward k with regard to ***Pos***⌉, which is equivalent to ⌈k has no subjection to j, with regard to ***Pos***⌉)

These definitions lead us to the result that is represented in Table 22.2.

Just to illustrate with an example the above definition, consider the power of a creditor j of releasing his debtor k from her obligation to do to A (i.e., j 's power of terminating k's obligation).

If j has this power we would say that:

$\textbf{\textit{EnablingPower}}_j([\textbf{\textit{Obl}}^j\, Does{*}_k A]\,\mathsf{terminates})$
(j has the power to terminate k's obligation toward j, to do A)

which amounts to say that:

$\textbf{\textit{Subjection}}^j_k([\textbf{\textit{Obl}}^j\, Does{*}_k A]\ \mathsf{terminates})$
(k has a subjection to j with regard to the termination of k's obligation toward j to do A)

To deny that such a power exists (as is the case when the debtor has a specific interest in executing the obligation), we would say that:

$\text{NON}\ (\textbf{\textit{EnablingPower}}_j([\textbf{\textit{Obl}}^j\, Does{*}_k\ A]\,\mathsf{terminates}))$
(j has no power to terminate k's obligation toward j to do A)

which can also be expressed as

$\textbf{\textit{Immunity}}\ {}^j_k([\textbf{\textit{Obl}}^j\, Does{*}_k\ A]\ \mathsf{terminates})$
(k has an immunity toward j with regard to the termination of k's obligation toward j to do A)

Chapter 23

PROCLAMATIONS

Often the law enables us to achieve normative results through a *declaration of intention*, that is, by expressing our intention to achieve such results, exactly in order to achieve them. After presenting this phenomenon, we shall introduce the notion of a *proclamation*, which expresses the general idea of the intentional production of normative results.

We shall argue that this idea, though being especially familiar to continental lawyers, has a broader application, since it expresses a feature that needs to be present in all advanced normative systems. Lastly, we shall provide a logical analysis of this notion, and of its function in legal reasoning.

23.1. The Intentional Production of Legal Results

Enabling individuals and collectives to achieve the legal results they want corresponds generally to the requirements of a market economy, but also to the value of individual and collective autonomy, as we shall see in the following. Thus, we shall argue, the intentional production of normative effects is a general aspect we can find in all legal systems, even in those which do not dedicate a particular attention to its doctrinal analysis and conceptualisation.

23.1.1. Rechtsgeschäft *and Contract*

The German legal doctrine refers to the intentional production of legal results through the general term *Rechtsgeschäft*.[1] Here is how Bernard Windscheid, a leading 19th-century German jurist, introduces this notion:

> A *Rechtsgeschäft* is a private declaration of will (*Willenserklärung*) directed at the production of a legal effect. A *Rechtsgeschäft* is a declaration of will. It declares the will that a legal effect should take place, and the legal system lets this legal effect take place, since this is wanted by the author of the *Rechtsgeschäft*. (Windscheid 1900, 266–7, my translation)

Some legal systems do not provide a general regulation for all kinds of declarations of will: They prefer to focus on the most important type of them, namely,

[1] *Rechtsgeschäft* is rendered in various ways in other languages. For instance, the Italian doctrine uses the expression *negozio giuridico*, while in English legal doctrine we find formulations like *juristic act*, *legal transaction*, or *act in the law*.

contract, and extend to other acts the discipline of contracts. This is the strategy adopted by French and Italian civil codes, and by common-law systems, as opposed to the German tradition.

However, the idea of the intentional production of legal effects undoubtedly describes something that is very common and extremely important in all legal systems. In fact, also in legal systems where this general idea is not usually expressed through a specific term, it is often approximated by enlarging the notion of a contract, so as to cover any kind of agreement, and even unilateral declarations (such as the promise to provide a certain reward to the person who will accomplish a certain action, like getting the best mark in the bar exam, or finding a lost pet).

Pollock (1961) uses the term *acts in the law*—as opposed to *acts of the law*—to mark the cases where the results one obtains are established by oneself, rather than by the law: In such cases the law does not directly establish the outcome of the agent's declaration of intention, but rather provides for the realisation of that intention.

> The rules leave a wide freedom to the parties of appointing at their own pleasure what the result shall be; the law makes itself, in fact the instrument of their intentions, and in a manner stands aside. (Pollock 1961, 78)

As this author observes, this idea has a long tradition, and is powerfully expressed even in the first written memory of Roman law, the twelve tables, which say (at table 6.1) that "when a party makes bond or conveyance, what he has named by word-of-mouth that shall hold by law."[2] Alf Ross uses in the same sense the French term *act juridique*:

> Competence is the legally established ability to create legal norms (or legal effects) through and in accordance with enunciations to this effect [...] Those enunciations in which competence is exercised are called *acts juridiques*, or acts-in-the-law, or, in private law, dispositive declarations. (Ross 1968, 130)

In the last decades the theory of *Rechtsgeschäfte* has undergone various criticisms, even in the legal systems that have traditionally adopted it. In particular, it has been observed that the notion is too broad: There so are many different kinds of acts falling under it (promises, contracts, marriages, wills) that it is difficult to find a general discipline for all of them. Such acts have so different social functions that it is impossible to bring them under the same rationale, so that treating them in a unitary way may lead to inappropriate legal conclusions (see, among the others, Galgano 1977, and Zweigert and Kötz 1992, 352). Some authors also raised some politically oriented objection—often linked to

[2] The Latin original: "Cum nexum faciet mancipiumque, uti lingua nucupassit, ita ius esto."

the Marxist criticism of bourgeois ideologies—against the notion of a *Rechtsgeschäft*. They have observed that lumping all acts aimed at the producing legal results under the same heading has the ideological function of providing a general justification for all of them (as instruments for normative autonomy), and of hiding the different economic and social functions they play in a capitalistic system.

Contrary to these critiques, we believe that the general idea of an act that produces intended legal effects can represent a useful analytical tool for lawyers and legal theorists, without having any particular ideological implication, once it is distinguished from specific subtypes of it, and its content and logical function is clarified and separated from connotations that are only appropriate to certain domains and contexts.

23.1.2. Contracts and Autonomy

Empowering agents to establish what normative relations will hold between them corresponds to the needs of any complex and dynamic society, especially in the framework of a market economy. Under such conditions it must be left to private agents themselves (both individual and corporate ones) to decide what normative relations are appropriate to their needs, or required for the fulfilment of their tasks.

This is a fact that has frequently been brought to the lawyers' attention by historians and sociologists, and most famously by Maine (1912). According to this author, a fundamental aspect of social evolution consisted in the passage from *status* to *contract*, that is, in the move from a social arrangement where anyone's legal entitlements are fixed, being permanently pre-established according to one's societal position and role, into a social arrangement where legal entitlements are dynamic, being created, terminated or modified by agreements between the involved parties.

In fact, contracts are the main form of normative self-organisation. Typically, a contract may be viewed as a statement jointly performed, or accepted, by all parties whose legal positions are going to be changed by that statement. For example, the Italian civil code Art. 1321 establishes that "the contract is the agreement between two or more parties to create, regulate, or terminate [...] legal relationships between them" (my translation). This means that, through a contract, the parties can create new legal positions (duties, powers or rights), they can extinguish such positions, and they can transfer them (for example, property rights) from one party to another.

Note that the law does not establish what changes a contract will make to the legal positions of the parties. It is up to the parties to establish these changes, and the law will in principle recognise their will. This means that the contract will in principle produce the results that the parties stated in their contractual terms, though the law may void, integrate, or modify these results for reasons

of general interest, or when one of the parties is not in a condition to evaluate properly the content of the contract, or may be exploited by the other party.

The idea of *contractual autonomy*, also called *freedom of contract*, finds a larger expression in certain domains rather than in others (for example, it is usually very limited in work and consumer contracts), but still expresses an important general principle.

The legal recognition of the autonomy of the parties explains, for example, why single contracts frequently do not instantiate only one of the types of acts which the theories of performative acts usually distinguish (commissive, commands, declarations, and so on; for a classification, see Searle and Vandervecken 1985, chap. 9): A single contract usually, at once, establishes new duties (for example, the obligation to pay the price), creates new rights (for example, the right to receive the price, or to be delivered the goods), transfers existing rights (for example, the property of the goods), and so forth.

The fact that the effects of a contract are determined by the contract itself marks the main difference between contracts and other actions through which one may exercise a power (like, for instance, the power of obtaining ownership of a wild animal, by catching it).

In ancient law, as a matter of fact, contracts were more similar to other power-exercising acts, since to achieve a specific legal result (obligation, transfer of good, etc.) one had to go through specific forms (saying specific words, making appropriate gestures, and so forth), which would bring about the legal effect linked to those forms regardless of the intentions of the speaker and of the way in which the speaker's words were understood by the counterparty.

This view, however, was overcome in developed legal systems, how the *Institutes of Justinian* tell us, with regard to the conclusion of contracts through spoken words:

> Once the words used in making this kind of contract were as follows: "*Spondes*? Do you engage yourself? *Spondeo.* I do engage myself" [...] Anciently indeed it was necessary to use the formal words just mentioned, but the constitution of the Emperor Leo was afterwards enacted which, removing formalities of expression, requires only that the parties understand one another, and mean the same thing, no matter what words they use. (*Institutes of Justinian*, 3.15)[3]

This does not exclude that the parties may want to establish—for reasons of precision and security of their contractual relations, and for preventing litigation—that in their contractual interactions certain contents need to be expressed in certain ways. This happens to the highest degree in automatic contracting, executed by computer systems, where the way in which contractual clauses are to be

[3] The Latin original: "In hac re olim talia verba tradita fuerunt: Spondes? Spondeo, [...] haec sollemnia verba olim quidem in usu fuerunt: postea autem Leoniana constitutio lata est, quae, sollemnitate verborum sublata, sensum et consonantem intellectum ab utraque parte solum desiderat, licet quibuscumque verbis expressus est."

formed and understood is minutely regulated, in order to enable the automatic production and processing of such clauses.

The fact that the effects of a contract are established by the contract itself makes contracts similar to legislation. Also the legal effects of an act of Parliament are exactly those effects which are stated in that act: To determine what rules and legal positions have been brought into existence by an act of Parliament, we need to look at the content of the act. As we shall see in the next chapter, this has lead some authors[4] to consider contracts—and more generally *Rechtsgeschäfte*—as pertaining to normative production. Here is how (Kelsen 1967, sec. 35.h, 257) introduces contracts:

> The legal order, by instituting the legal transaction (*Rechtsgeschäft*) as a law creating fact, authorizes the individuals subject to the law to regulate their mutual relations within the framework of general legal norms created by legislation or custom, by norms created by way of legal transactions.

23.2. The Notion of a Proclamation

We use the term *proclamation* for expressing in general the intentional production of normative effects.[5] In the following we shall first provide a precise definition of this notion, and then we shall analyse how proclamations connect psychological attitudes and linguistic utterances to legal results.

23.2.1. The Definition of a Proclamation

Our definition of a proclamation is centred upon their function, that is, on the functional link between what one expresses and what one achieves.

Definition 23.2.1 *Proclamation. We say that j* proclaims *A, and write $Procl_j A$, to mean the following:*

1. *j states A, and*
2. *this statement has the function to realise A, through the very action of stating A.*

We view proclamations as behavioural actions, so that $Procl_j A$ may be viewed as an abbreviation for:

$$Does_j[\text{proclaim } A]$$

As we did for actions in general, we use the same expression $Procl_j A$, both to express the propositions describing the performance of a proclamation, and to name that proclamation.

[4] For the doctrinal debate in this matter, see Rotolo, Volume 3 of this Treatise, sec. 7.3.1.1.

[5] We could also have used other terms, such as, for example, "declaration," but we prefer to use a new term to avoid confusion with other senses in which other words have been used.

Our notion of a proclamation covers any acts by which a subject may state a certain normative result, in order to achieve that result. For example, when I say to you "I donate this watch to you" or when I say "I cancel your obligation to pay me € 1,000," I am stating a certain transition (the passage of the watch's ownership from me to you, or the termination of your obligation toward me) exactly in order to perform that transition. This general notion is expressed by Larenz (1992, 186) as follows:

> The legal declaration of will does not only contain the announcement of a certain opinion or intention; it is, according to its meaning, a declaration of validity, namely, an act that aims to bring a certain legal effect into validity. (my translation)

As we shall see in next sections, Larenz's definition of a *legal declaration of will* matches our notion of a proclamation, if only we interpret the term *validity* as meaning *legal bindingness*, in the sense of cognitive bindingness (adoption-worthiness in legal reasoning), according to the ideas we developed in Chapter 12.

23.2.2. Proclamations and Intentions

The idea of a proclamation is neutral with regard to the distinction between theories of speech-act that are based upon intentional (psychological) notions (see, for all, Grice 1989) and those that are based upon institutional (social) notions (see, for all, Searle 1969; Searle and Vandervecken 1985).

In fact, by saying that *j*'s statement has the function to achieve *A*, we do not specify how *A*'s meaning is to be construed: This meaning may be determined by the intention of the speaker, by the intention attributed to the speaker by its interlocutor, by the meaning that the act has according to a public convention, and so on. What suffices, here, is that *A*'s performance has a *word-to-world direction of fit* (Searle and Vandervecken 1985, 52–3), namely, that it has the function of changing the current normative situation in such a way as to make it correspond to content of the act.

Thus, we need not enter into the debate concerning whether and to what extent the effect of a proclamation is determined by the intentions of its authors or by the public behaviour of the latter. It is up to the different legal systems (and to the different doctrinal opinions existing within them) to establish what relevance is to be given to various potentially relevant aspects: (*a*) the states of mind of the party making the proclamation, (*b*) the states of mind which are attributed to that party by the other party, (*c*) the standard linguistic meaning of the words that are used, (*d*) the extra-verbal context in which these words are stated, (*e*) the economical or social function proper to the proclaimed transaction, and so forth.

Thus, our model is also consistent with approaches to the *interpretation of*

contracts which affirm that to establish the content of a contractual term we should usually look only at how that term would be understood by an observer having an appropriate social and linguistic knowledge, rather than investigating how the term was understood by the parties in the particular context in which they were interacting.[6]

23.2.3. Proclamations as Attempts

The proclamation of a result A may be viewed as an *attempt* to achieve A, an attempt which is not necessarily successful. For the proclamation to be successful (for it to produce its result), it is necessary that the normative system *recognises* the proclamation, namely, that it provides for what is proclaimed to take place, as an outcome of the proclamation.

The result a proclamation attempts at producing may be characterised in different ways. It may consist in any of the following:

- the initiation of a normative state of affairs (for instance, I proclaim that I undertake an obligation, or that you are now my partner in a certain business, or that this object now belongs to you);
- the termination of a normative state of affairs (I proclaim that your debt is cancelled, or that your lease is terminated); or
- the emergence of an action (I proclaim that I donate something to you).

In any case, saying that a normative system recognises a proclamation $Procl_j A$ simply means that, according to this normative system, the performance of a proclamation, which we denote as:

$(Procl_j A)$ *happens*
(it happens that j proclaims that A)

or simply as:

$Procl_j A$
(j proclaims that A)

would realise the proclamation's content A (or rather, as we shall see, would make this content legally binding).

A proclamation that is not legally recognised is unable realise its content (it only is an unsuccessful or void attempt to produce that result).

For example, assume that Tony and Mary make a contract (under Italian law) according to which Tony undertakes the obligation to provide Mary with one of his kidneys, and she undertakes the obligation to give him € 10,000. This

[6] These approaches are particularly popular in common-law jurisdictions; see, for instance, Devlin 1962.

is still a contract (a bilateral proclamation), but it is a non-effective (void) one: Tony and Mary's have tried to create the reciprocal obligations they proclaim, but they have failed to do so.

To give a more general example of an unsuccessful proclamation, consider that there is a tradition going back to Roman law, according to which the obligations one undertakes without getting any advantage (*nuda pacta*) are not legally binding, unless under certain restricted conditions and forms which we cannot consider here: "A naked promise does not bear an obligation"(*The Digest of Justinian*, 7.5).[7]

This tradition corresponds to the modern assumptions that a contract, to be legally binding, needs to have a *cause* (as in certain civil law systems) or a *consideration* (as in common-law systems).

We cannot examine here the notion of cause or consideration (or other indications of seriousness in the commitments of the parties), which would require us to discuss the foundations of different systems of private law (for some indications, cf. Zweigert and Kötz 1992, chap. 36). For us it is enough to observe that according to various legal systems proclaiming that one undertakes an obligation is not sufficient for initiating the obligation: When the promisor has no reasonable interest in undertaking the obligation, his promise is an attempted commitment, but no effective one.

23.2.4. Proclamation Rules

The law does not predetermine the content of a legally effective proclamation (though constraining it), but it needs to indicate what proclamations are successful—to specify the success conditions for an act of proclaiming—through general *proclamation rules*. Such rules govern any proclamation having certain features, and thus they abstract from the precise content of each proclamation.

No legislator, for instance, would state rules like the following:

- if two agents proclaim that one has the obligation to mow the other's garden, and that the other has the obligation to pay the first one € 10, then they will acquire those obligations,
- if two agents proclaim that one is permitted to use the other's garage, and that the other is bound to pay the first one € 15 per month, then the first one will acquire that permission and the other will acquire that obligation.

Using this legislative technique would lead us to stating and infinite number of rules, in order to specify the contents of all possible proclamations. On the contrary, we need to be able to express *content-general proclamation-rules*. These rules should state that, under certain constraints and given certain conditions,

[7] The Latin original: "Nuda pactio obligationem non parit."

whatever proclamation of a normative proposition realises the content of this proposition.

As we shall see in the following sections, there are various linguistic, logical and philosophical issues that need to be solved in order to precisely express proclamation rules, in ways that are both logically correct and easily understandable.

23.3. The Logic of Proclamation-Based Inference

In this section we shall discuss the logical structure of proclamation rules and of proclamation-based inferences. Our discussion will lead us to provide a model for the representation of such rules and a corresponding schema for executing *meta-syllogisms*, namely, the inferences leading to the endorsement of proclaimed propositions. The reader who does not want to follow step by step our analysis (which includes some logical technicalities), and prefers to go directly to our solution, is advised to jump directly to Section 23.3.4 on page 604.

23.3.1. The Naive Formulation

The most direct way for expressing content-general proclamation-rules consists in directly expressing the idea of normative determination: Under certain conditions, if any person x proclaims a proposition $\lceil\varphi\rceil$, then this will determine the state of affairs φ.[8] This idea is specified by the following formula:

FORANY (x, φ)
  WHEN $Conditions$
  THEN^n IF $Procl_x \varphi$
    THEN^n φ

(for any x and φ, when the conditions are satisfies, if x proclaims φ then φ)

where x is the individual or the group of individuals making the proclamation, and "φ" is the proclaimed proposition.

For example, a general rule stating that whatever is established by the parties in a contract (without violating the law) holds, as far as they are concerned, could be expressed as follows:[9]

[8] Logical precision would require that we use the expression "$\lceil\varphi\rceil$", to denote the proposition which is expressed by the symbol "φ", while using "φ" to describe the state of affairs corresponding to that proposition. However, when no confusion arises, we shall use simply "φ" also to denote to the proposition.

[9] As we shall see in Section 23.4.3 on page 609, we view a contract as an agreed, or consented proclamation.

(1) FORANY $(\{x, y\}, \varphi)$
WHEN φ does not violate the law AND
φ only concerns x and y
THEN^n IF $Procl_{\{x,y\}}\varphi$
THEN^n φ

(for any two persons x and y, and any normative proposition φ, when φ does not violate the law and φ concerns x and y, if x and y jointly proclaim that φ, then φ)

Let us observe that this rule is quite odd. Not only is the rule badly formed according to the usual syntax of predicate logic—since φ plays a double role, it is a quantified variable and also a component proposition—but it is also difficult to parse (to analyse syntactically).

The oddness remains if we consider the natural language version of this rule:

(2) For any parties x and y, and any normative proposition φ,
when φ not violate the law and φ only concerns x and y,
then if x and y agree on φ,
then φ

By substituting pronouns for variables, we obtain:

(3) Whenever something does not violate the law and only concerns two persons
then if these two persons agree on it
then it

23.3.2. The Problem of Substitutional Quantification

The oddness of the three formulations we have just presented depends on the fact that they mix the use and the mention of a proposition. Proposition φ (in the last example represented by the pronouns "something" and "it") is both an object the proclamation rule speaks about (in the rule's antecedent) and a propositional component of that rule (in the rule's consequent):

- The antecedent of the rule speaks about a generic proposition φ. It presents the hypothesis that proposition φ has certain properties, such as not being against the law and being what two persons have agreed upon.
- The consequent of the rule, on the other hand, is constituted by proposition φ. It does speak about φ, but it is φ itself.

Natural language—like most formalised languages—does not allow us to substitute pronouns (variables) for propositions: Pronouns stand for the names of the things one speaks (or reasons) about, they cannot substitute the propositions one uses to speak (or reason) about such things. Violating this constraint

leads to the kind of awkwardness that is usually referred to under the heading of *substitutional quantification* (cf., for all, Haack 1978; Horwich 1998, 25ff.).

The awkwardness of substitutional quantification makes it difficult to express the type of reasoning that leads us to endorse certain propositions on the basis of the fact that these propositions have certain properties. This kind of reasoning, which we call *meta-syllogism*, can take place both in epistemic and in practical reasoning.

The most immediate way of performing a meta-syllogism reproduces what we have called the "naive formulation" (and corresponds closely to usual syllogism):

Reasoning schema: *Meta-syllogism (naive version)*

(1) proposition A satisfies predicate P;
(2) FORANY (φ),
IF proposition φ satisfies predicate P
THEN^n φ
——— IS A REASON FOR
(3) A

where φ is a variable ranging over propositions, and by "proposition A satisfies predicate P" we refer to a meta-proposition that applies predicate P to proposition A. For instance, if P is predicate:

[1] has been issued by the legislator

and A is proposition:

It is forbidden to smoke in public offices

then "proposition A satisfy predicate P" becomes:

⌈It is forbidden to smoke in public offices⌉ satisfies the predicate
⌈[1] has been issued by the legislator⌉

or more simply:

⌈It is forbidden to smoke in public offices⌉
has been issued by the legislator

The schema above can correspondingly be instantiated by the following inference:

(1) ⌈It is forbidden to smoke in public offices⌉ has been issued by the legislator;
(2) FORANY (φ)
IF ⌈φ⌉ is issued by the legislator
THEN φ

---

(3) It is forbidden to smoke in public offices

As an epistemic example of such a way of reasoning, consider how one, having the belief that a person says the truth (which we naively express as ⌈if a person states a proposition, then it⌉), and that this person has stated a proposition, is led to conclude believing this proposition. Assume for example, that Martin, a police officer, affirms that Mary has crossed while the red light was on, and Mary denies the charge, so that the case is brought to court. The reasoning that leads the judge to accept what Martin says can be described as follows:

(1) Martin says that ⌈Mary crossed while the red light was on⌉;
(2) FORANY (φ)
IF Martin says that ⌈φ⌉
THEN φ

---

(3) Mary crossed while the red light was on

According to this piece of reasoning, given the premises (1) and (2) above, the judge concludes endorsing the reasonable belief that ⌈Mary crossed while the red light was on⌉. This is indeed a reasonable conclusion, but it is obtained through an awkward way of reasoning.

Similarly, assume that Mary and Martin made a contract according to which Mary gives Martin permission to park his car in her garage and Martin undertakes the obligation to pay Mary € 10 per month. Assume also that they believe that agreements are generally effective. This means that they endorse the meta-rule that ⌈if two people proclaim some normative propositions φ, then this proposition is realised (the corresponding normative situation is generated)⌉. By using the naive representation this meta-proposition can be expressed by saying that ⌈if two persons proclaim a normative proposition, then it⌉.

FORANY (φ)
IF $Procl_{\{x,y\}}\varphi$ THEN^n φ
(for any person x and y, and proposition φ, if x and y proclaim φ, then φ)

The reasoning leading Mary and Martin to conclude that they now hold the normative positions they have agreed upon, takes the following form:

(1) $Procl_{\{Mary, Martin\}}$
Perm [Martin parks] AND ***Obl*** [Martin pays € 10];
(2) FORANY $(\{x, y\}, \varphi)$
IF $Procl_{\{x,y\}}\varphi$ THEN^n φ

---

(3) ***Perm*** [Martin parks] AND ***Obl*** [Martin pays € 10]

Meta-syllogism, in both its epistemic and its practical applications, seems to be a sound pattern of inference: It leads us to conclusions which appear to be supported by its premises. However, when expressed the form we have just used, *meta-syllogism* looks logically awkward: In its major premise the same variable occurs both as an object one speaks about and as a constituent proposition.

Note that these hybrid major premises express the peculiar subreason which enables meta-syllogisms: They express the endorsement of all propositions having certain properties (for any φ, if Martin has said φ, then φ; for any φ, if Martin and Mary have agreed on φ, then φ; and so forth).

Correspondingly, these badly formed major premises play the pivotal function in the naive representation of meta-syllogism: They allow one to move along the conceptual-linguistic ladder. At the conceptual level they enable us to pass (through detachment) from having beliefs about propositions into believing those very propositions. At the linguistic level they enable us to pass from speaking about propositions into stating them.

Thus, if we want to provide a better way of conceptualising meta-syllogisms we need to find a better way of representing their major premises.

23.3.3. How to Climb Ramsey's Ladder

A less awkward way of expressing the major premise of a meta-syllogism consists in having a meta-predicate M which applies to a proposition A exactly when that proposition holds. In other words, we need to assume all instances of the following schema:

$M(A)$ IFF A

Accordingly, when we view a proposition as an object we are speaking (reasoning) about, we can apply predicate M to it: We write $M(A)$, rather than A.

In the epistemic domain, the predicate that usually performs this function is the predicate *true*. In particular, according to the so-called disquotational theories of *truth* the proposition

[9] We should write $M(\ulcorner A \urcorner)$, to specify that the meta-level property which is expressed by predicate M concerns proposition $\ulcorner A \urcorner$, rather than the state of affairs A which is represented by that proposition. Others, who view such meta-level properties as concerning sentences, rather than propositions, would prefer the formulation $M(\text{“}A\text{”})$. For simplicity's sake, however, we just write $M(A)$.

A is true

expresses the same content which would be expressed directly by proposition A.

More modestly, but sufficiently for our purposes, deflationary or minimalist theories affirm, for any proposition A, the logical equivalence between ⌈A is true⌉ and A. We do not need to distinguish these approaches, both of which have their origins in the work of Frank Ramsey (a new understanding of which is provided by the new edition of his manuscript materials; see Ramsey 1991). It is rather sufficient that we endorse, for any proposition A, the following equivalence:

IT IS TRUE THAT A IFF A

Accordingly, we can move from expressing (thinking) meta-proposition:

IT IS TRUE THAT ⌈Mary crossed while the light was red⌉

into saying directly proposition:

Mary crossed while the light was red

More generally, according to the deflationary view, we make no substantial progress, we express no new content is expressed, when we move down this ladder:

(1) A
(2) IT IS TRUE THAT A
(3) IT IS TRUE THAT ⌈IT IS TRUE THAT A⌉
(4) and so on.

Therefore, using this understanding of the notion of truth, there should be no problem in applying the predicate *true* also to normative propositions.

In fact, by stating that a normative proposition A is true one would simply convey proposition A. Thus, stating that ⌈A is true⌉ should be as legitimate as stating that A, and it should imply no additional ontological assumption, and in particular no assumption concerning the existence of normative states of affairs.[10] The same holds when, rather than using the predicate *true*, we use other expressions sharing with *true* the property that their application to a proposition only produces a restatement of that proposition.

As Blackburn (2002) observes (see also Blackburn 1998, 294–7):

[10] This is the characteristic assumption of deflationary or minimalist ideas of truth, on which see Horwich 1998, and for an application to norms, cf. Volpe 1999.

Ramsey's minimalism comes out in the view that a certain apparent progress in fact takes us nowhere. I call the progress Ramsey's ladder, and the doctrine is that the ladder is horizontal.

> p
> True p
> Really True p
> A fact that Really True p
> Really a fact that Really True p
> In registering p our minds resonate with the objective and absolute norms that govern the reason of things.

All this takes us no further than p.

The discussion on the philosophical relevance of the flattening of Ramsey's ladder would take us far away, as shown by the interesting debate between Dworkin (1996) and Blackburn (1996). For our purpose it is sufficient to draw from it two conclusions.

The first is a negative one. Once we have agreed on using predicate *true* (or a similar one) only as a useful dummy, it makes sense to use it only to the extent that this helps in better expressing our ideas (for instance for avoiding substitutional quantification).

The second is a positive one. Since there are no metaphysical or ontological commitments in using predicate *true*, it seems that we can use it whenever it is useful. Though minimalist theories of truth (together with deflationary, disquotational, or redundancy theories) seem to be gaining an increasing recognition, they are still competing in the philosophical discussion with other important ideas, such as those founding the notion of truth upon the ideas of correspondence, verification, coherence, or utility. This debate has a huge philosophical relevance, but it does not matter for our current purposes, since we are only interested in finding a linguistic device that allows us climb Ramsey's ladder.

Moreover, for our limited concerns even the minimalist equivalence:

$M(A)$ IFF A

is too much.

For our purposes, it is sufficient that we have a predicate M such that for any proposition A, one may endorse any conditional having the following form:

IF $M(A)$ THEN A

Then, by applying a simple detachment step,

(1) $M(A)$;
(2) IF $M(A)$ THEN A

---

(3) A

we can move up the ladder from $M(A)$ to A.

For this purpose, as we shall se in the following section, we already have a solution at hand, namely, the notion of cognitive bindingness, which we introduced and discussed in Chapter 3.

23.3.4. Our Representation of Meta-Syllogism

By saying that a certain content is cognitively binding or adoption-worthy (see Section 3.1.1 on page 88) or *Binding* (see Section 3.1.5 on page 93), we mean that this content deserves to be adopted in our practical reasoning: We are *bound*, or *due* to adopt it.

As we have seen in Section 3.1.2 on page 89, a rational reasoner should move from the idea that a certain content is binding, into endorsing this content. This is the inference which is authorised by the schema we called *de-doxification*. When one is dealing with beliefs (as is the case also for doxified practical reasoning), *de-doxification* acquires the following specific form:

Reasoning schema: *Binding-elimination*
(1) believing $\lceil$*Binding* $A\rceil$
——— IS A CONCLUSIVE REASON FOR
(2) believing $\lceil A\rceil$

This reasoning schema may also be viewed as implicitly containing detachment step, assuming that for any proposition A, the reasoner endorses the conditional:

IF *Binding* A THEN A

Given this assumption, the schema *Binding-elimination* becomes indeed the abbreviation of the following detachment-step:

Reasoning instance: *Detachment*
(1) believing $\lceil$*Binding* $A\rceil$;
believing $\lceil$IF *Binding* A THEN $A\rceil$
——— IS A CONCLUSIVE REASON FOR
(2) believing $\lceil A\rceil$

Using the idea of bindingness, we can view proclamation rules as normative conditionals having the following content: If a certain proposition is proclaimed, then that proposition is binding.[11] For instance, the rule above concerning the efficacy of bilateral contracts, becomes:

FORANY $(\{x, y\}, \varphi)$
IF $Procl_{\{x,y\}}\varphi$ THEN^n *Binding* φ
(for any person x and y, and proposition φ, if x and y proclaim φ, then φ is binding)

Meta-syllogism can then be performed in two steps.

The first step consists in inferring that a certain normative proposition is binding. This inference step takes place according to usual syllogism. For instance, assume that Mary and Martin have agreed that Martin is allowed to park his car in Mary's garage, and that he will pay her € 10. Using the rule above we can perform the following inference:

(1) $Procl_{\{Mary,Martin\}}$
Perm [$Martin$ parks] AND
Obl [$Martin$ pays $Mary$ € 10];
(2) FORANY $(\{x, y\}, \varphi)$
IF $Procl_{\{x,y\}}\ \varphi$ THEN^n *Binding* φ

---

(3) *Binding*
Perm [$Martin$ parks] AND
Obl [$Martin$ pays $Mary$ € 10]

The second step consists in eliminating the predicate *Binding*, that is, in moving from believing that a normative proposition is cognitively binding (that it is adoption-worthy, that it requires being adopted), into believing that normative proposition.[12] This can be done through schema *Binding-elimination*, as we have just seen:

[11] The efficacy of the proclamation may depend to various conditions. For example a term in a contract is only effective if it concerns the contracting parties, which usually cannot modify the legal entitlements of others. For simplicity's sake, we omit including such conditions in the following examples.

[12] A similar approach, though using the term *validity* rather than *bindingness*, has been proposed by Yoshino 1995.

(1) *Binding*
  Perm [Martin parks] AND
  Obl [Martin pays Mary € 10]

---

(2) ***Perm*** [Martin parks] AND
  Obl [Martin pays Mary € 10]

By merging the two inferences, we get the following reasoning schema for meta-syllogism with proclamations:

Reasoning schema: *Meta-syllogism with proclamations*
(1) $Procl_j A$;
(2) FORANY (ϕ)
  IF $Procl_j \phi$
  THEN^n *Binding* ϕ
——— IS A REASON FOR
(3) A

This schema indicates that when one believes that j has proclaimed a proposition A, and that whatever proposition is proclaimed by j is binding, one may conclude by believing proposition A. This schema is exemplified in the following inference:

(1) $Procl_{\{Mary,Martin\}}$
  Perm Martin parks AND
  Obl Martin pays Mary € 10;
(2) IF $Procl_{\{x,y\}}\phi$ THEN^n *Binding* ϕ

---

(3) ***Perm*** ⌈Martin parks⌉ AND
  Obl ⌈Martin pays Mary € 10⌉

Through this inference, given that Mary and Martin have agreed that Martin may park in Mary's garden and that he shall give her € 10, and given that agreements (joint proclamations) are binding, we can conclude that indeed he may park in her garden, and shall give her € 10.

23.4. The Analysis of Proclamations

In the previous sections we have identified the idea of a proclamation as the pivotal notion in our model of the intentional production of normative results. In the next pages we shall provide an account of some significant aspects of

proclamations: their content, their effectiveness, their (multiple) authors, their logic.

23.4.1. The Content of Proclamations

The idea of a proclamation is neutral in regard to what is proclaimed. So *Procl* can play the function vested by different speech acts, as they are usually classified by speech act theory (for example, in the taxonomy of Searle and Vandervecken 1985):

1. $Procl_j$([**Obl** $Does*_j A$] *initiates*): j proclaims that her own obligation to do A initiates.
2. $Procl_j$([**Obl** $Does*_k A$] *initiates*): j proclaims that k's obligation to do A initiates.
3. $Procl_j$([**Obl** $Does*_j A$] *terminates*): j proclaims that her own obligation to do A terminates.
4. $Procl_j$([**Obl** $Does*_k A$] *terminates*): j proclaims that k's obligation to do A terminates.

According to the usual classifications:

- (1) is j's attempt to commit herself to do action A (it is making a promise);
- (2) is j's attempt to command k to do A (it is issuing an order);
- (3) is j's attempt to free herself from the obligation to do A (it is the withdrawal of a promise);
- (4) is j's attempt to free k from his obligation to do A (it is the withdrawal of an order).

Obligations can be created toward specific persons, by using the device of directed obligations and rights (see Chapter 19).

Note that rather than proclaiming a result, one may also proclaim that one is performing an action (like selling a book). The two ideas are indeed equally subsumed by our notion of proclaiming. Thus, to obtain the result that John's exemplar of the *Brothers Karamazov* belongs to Mary, John could act in two ways. The first consists in John's proclaiming that it now initiates that the books belongs to Mary:

P_1: $Procl_{John}$
  [$Brothers\ Karamazov$ belongs to Mary] *initiates*

The second consists in John proclaiming that he brings it about that that the book now initiates belonging to Mary

P_2: $Procl_{John}$
  $Brings_{John}$
    [$Brothers\ Karamazov$ belongs to Mary] *initiates*

In both cases, if the enabling rule holds, John will achieve the result he intends to achieve through his proclamation (the result that his exemplar of *Brothers Karamazov* becomes Mary's). Assume that the enabling rule is a general empowerment to make small gifts:

$$\begin{aligned} R\text{:}\ & \textsc{forany}\ (\varphi, x) \\ & \quad \textsc{when}\ [\mathit{Procl}_x\varphi \text{ concerns making a small gift}] \\ & \quad \textsc{then}^n\ \textsc{if}\ \mathit{Procl}_x\varphi\ \textsc{then}^n\ \textsf{\textit{Binding}}\ \varphi \end{aligned}$$

For our purposes, we do not need to investigate what making a small gift is: We assume that it consists in transferring to another a property having a modest value, without any reward. We also assume that both proclamations P_1 and P_2 concern making small gifts.

Then, according to schema *meta-syllogism*, the performance of proclamation P_1 (together with rule R) entails the following conclusion:

$$C_1\text{: } [\mathit{Brothers\ Karamazov} \text{ belongs to Mary}]\ \ \textsf{\textit{initiates}}$$

Similarly, according to the same schema *meta-syllogism*, the performance of the proclamation P_1 leads to the conclusion:

$$C_2\text{: } \mathit{Brings}_{John}([\mathit{Brothers\ Karamazov} \text{ belongs to Mary}]\ \ \textsf{\textit{initiates}})$$

However, according to schema *success of productive actions*, $\mathit{Brings}_j A$ entails A, since completed productive actions necessarily deliver their results. Therefore, also C_2 entails C_1. In conclusion, both proclamations P_1 and P_2 lead to the same conclusion:

$$[\mathit{Brothers\ Karamazov} \text{ belongs to Mary}]\ \ \textsf{\textit{initiates}}$$

23.4.2. Effective and Void Proclamations

The notions we have introduced above enable us to precisely characterise what it means for a proclamation to be effective.

Definition 23.4.1 *Effectiveness of a proclamation. A proclamation is* effective *if its performance would determine the bindingness of its content. More exactly,* $\mathit{Procl}_j A$ *is* effective *when it holds that:*

$$\textsc{if}\ \mathit{Procl}_j A\ \textsc{then}^n\ \textsf{\textit{Binding}}\ A$$

In this definition, A may consist in any type of legal proposition. It may express the initiation or the termination of a new legal position, the happening of an action, or even the holding of a normative conditional.

By denying the effectiveness of a proclamation, we obtain the notion of its ineffectiveness.

Definition 23.4.2 *Ineffectiveness of a proclamation. A proclamation is* ineffective *when it is unable to realise its content. More exactly* $Procl_j A$ *is* ineffective *when it holds that:*

$$\text{NON } (\text{IF } Procl_j A \text{ THEN}^n \textsf{ Binding } A)$$

In fact, proposition:

$$\text{NON } (\text{IF } Procl_j A \text{ THEN}^n \textsf{ Binding } A)$$

expresses the negation of the normative conditional:

$$\text{IF } Procl_j A \text{ THEN}^n \textsf{ Binding } A$$

which, according to the analysis we provided in Section 20.3 on page 532, indicates the antecedent A normatively determines consequent $\textsf{Binding } A$. Thus, the negative proposition can also be expressed as:

$$Procl_j A \text{ DOES NOT DETERMINE } \textsf{Binding } A$$

The performance of an ineffective proclamation is thus the act through which one person proclaims that he is achieving a certain result, but fails to achieve this result: It is a failed attempt to achieve that result.

When a proclamation is ineffective we also may say that it is *void*, though some doctrinal writers would prefer to speak of voidness only when the ineffectiveness does depend on a defect of the proclamation (rather than on the fact that some preconditions of its effectiveness do not obtain yet).

It is more difficult to specify what it means for a proclamation to be valid or invalid. Usually, the difference between effectiveness and validity is affirmed with regard to voidable contracts, which though producing what they proclaim (and thus being effective), are said to be invalid. By qualifying such contracts as invalid we mean that they are indeed defective and their defect is so serious that it may lead to their annulment (if the party which is entitled to request the annulment decides to ask for it). Typically, annulment will be provided by a judicial decision, though in some cases other procedures may be sufficient.

For example, if I bought a ring believing that it was made of silver, while it was made of copper, and the seller knew of my mistake, then the contract is voidable. This means that I become the owner of the ring and have the obligation to pay the price, though I also have the power (by requesting the annulment) of putting the judge under the obligation to cancel these normative positions.

23.4.3. Multi-lateral Proclamations (Agreements)

A proclamation may be collectively performed by two or more parties. When this is the case, we call such a proclamation an *agreement* or also a *con-*

tract.[13] This notion seems to correspond to a famous definition of a contract by Friedrich von Savigny:

> [A] contract is the union of two or more people in an agreed declaration of intention directed to altering their legal relations. (Quoted in Zweigert and Kötz 1992, 352)

For example, consider a contract through which j takes the obligation toward k to provide an exemplar or the CD "The Beatles" and k undertakes the obligation toward j to pay the price of € 10. This contract corresponds to the following proclamation:

$$\begin{array}{l} \mathit{Procl}_{\{j,k\}} \\ \quad \boldsymbol{Obl}^{k}\,\mathit{Does}_j[\text{deliver "The Beatles" to } k] \text{ AND} \\ \quad \boldsymbol{Obl}^{j}\,\mathit{Does}_k[\text{pay € 10 to } j] \end{array}$$

When such a proclamation is recognised by the legal system (when conditions established for it to be effective exist), then the proclaimed results will take place.

23.4.4. The Logic of Proclamations

We shall assume that proclamations have certain logical properties, which we shall use in Chapter 24.

First of all, we assume that proclaiming a conjunction of contents involves making separate declarations concerning each of the conjunct contents:

$$\frac{(1)\ \ \mathit{Procl}_j(A \text{ AND } B)}{(2)\ \ (\mathit{Procl}_j A) \text{ AND } (\mathit{Procl}_j B)}$$

This is a questionable assumption, since as we have seen in Section 16.2.2 on page 442 the logic of action does not always allow us to split conjunctive actions. However, this inference seems to be intuitively correct with regard conjunctive proclamations, which may be viewed as including the proclamation of each conjunct.

In addition, we assume that, when a group of agents X jointly proclaim that A, then each agent j belonging to group X ($j \in X$) makes such a proclamation:

[13] Though the notion of a contract, as used in law texts (like the Italian civil code) or in legal doctrine is often limited to agreements having an economic function, and is sometimes extended it to certain unilateral proclamations.

$$\frac{(1)\ Procl_X A \quad (2)\ j \in X}{(3)\ Procl_j A}$$

This is also a debatable inference. It might indeed be argued that this entailment only holds when the proclamation of a set of agents consists of a set of identical utterances. However, it seems to us that when we focus on the meaning of the proclaimers' utterances—rather than on the syntax of such utterances—we can accept this inference: When I say "yes" in reply to your proposal, we can view our proclamations as concerning the same proposition, though we have used different words.

Note that the converse of the above inference does not hold: Making a set of individual proclamations does not entail in general making a collective proclamation: A joint declaration is more than a set of parallel declarations having the same content.

Chapter 24

PROCLAMATIVE POWER

The notion of a proclamation leads us to the general idea of a *proclamative power*, namely, the power to achieve, through a proclamation, exactly what one is proclaiming.

In this chapter, we shall examine this notion, its inferential role, and its applications in different domains of the law.

24.1. The Notion and the Inferential Role of Proclamative Powers

The notion of a proclamative power expresses the link between an effective proclamation and its binding content, that is, the fact that the performance of such a proclamation would normatively determine the bindingness of its content (and thus the corresponding normative state of affairs). Under such circumstances, we say that the author of the proclamation has the *proclamative power* of realising the content of the proclamation.

Definition 24.1.1 *Proclamative power. We say that j has the* proclamative power *of realising A, abbreviated as* $\mathbf{ProclPow}_j A$*, when j would make A binding by proclaiming A. More precisely:*

$$\boldsymbol{ProclPow}_j A \equiv \text{IF } Procl_j A \text{ THEN}^n \textsf{ Binding } A$$

([j has the proclamative power of realising A] is equivalent to [if j proclaims A then A is binding])

The idea of a proclamative power plays an important inferential function in legal discourse, as we shall see in the following sections.

Before that, we need to go into some terminological considerations, since different terms have been used to denote the specific kind of power that is exercised through proclamations.[1]

For example, the German jurist Ernest Rudolf Bierling (like Alois Brinz, which we mentioned in Section 22.1.6 on page 583) expresses the same concept by using the term *juristische Können*, which we may translate as *legal power* or *legal ability*:

Beside the simple legal permission [*das einfache rechtliche Dürfen*], the content of which is, in essence, purely negative, [i.e.,] not being legally forbidden [. . .] stands, according to the prevailing

[1] For a discussion of various theories concerning what we call a *proclamative power*, see Lindahl 1977, chap. 6.

opinion, the so-called legal ability [*das rechtliche Können*], i.e., the ability, following from some provisions of positive law, to produce certain legal effects by acts-in-the-law. (Bierling 1883, 211, as translated in Lindahl 1977, 196)

To convey a similar idea, Hans Kelsen uses the term *Ermächtigung in engsten Sinnen*, which we may translate as *authorisation (or empowerment) in strict sense*, to refer to the "ability [*Fähigkeit*] to produce and apply legal norms" (Kelsen 1960, sec. 30c, 156, my translation).

Similarly, Alf Ross uses the term *competence* to refer to the "legally established ability to create legal norms (or legal effects) through and in accordance with enunciations to this effect" (Ross 1968, 130).

Given that many diverse terms have been used to denote the specific kind of power that is exercised through proclamations—though with different shades of signification, also depending on the fact that some of these terms, like *competence* or *authorisation* already have established meanings in the legal discourse—we prefer to introduce here the neologism *proclamative power* to refer unambiguously to this idea.[2]

24.1.1. Proclamative Power and Legal Inference

When we believe that:

- j has the proclamative power of achieving A, that is, $\textbf{\textit{ProclPow}}_j A$, and
- j has exercised this power through an appropriate proclamation $Procl_j A$,

we can infer that the content of the proclamation is binding, that is, $\mathsf{Binding}\ A$, which leads us to conclude endorsing A.

This inference results from merging three ingredients (see Table 24.1 on the next page): (*a*) the definition of ***ProclPow***, (*b*) the schema *detachment*, and (*c*) the schema $\mathsf{Binding}$-*elimination*. We synthesise this inference pattern through the following reasoning schema, where given that a subject j has the proclamative power of realising a proposition A, and that j has performed the proclamation, we conclude by endorsing A:

Reasoning schema: *Power application*

(1) $\textbf{\textit{ProclPow}}_j A$;
(2) $Procl_j A$
——— IS A REASON FOR
(3) A

[2] In Gelati et al. 2002b, the locution *declarative power* denotes what we here prefer to call *proclamative power*.

1.	$\textbf{\textit{ProclPow}}_j A$	⟨premise⟩
2.	$Procl_j A$	⟨premise⟩
3.	IF $Procl_j A$ THEN^n *Binding* A	⟨from 1, and Definition 24.1.1⟩
4.	*Binding* A	⟨from 2 and 3, by *detachment*⟩
5.	A	⟨from 4, by *Binding-elimination*⟩

Table 24.1: *Inference concerning the exercise of power*

Here is an example. We start with the following beliefs: (1) Tom proclaims that Mary's obligation to pay him € 1,000 terminates and (2) Tom has the power of terminating Mary's obligation towards him. From these premises we can infer that indeed Mary' obligation is terminated.

(1) $\textbf{\textit{ProclPow}}_{Tom}$
($\textbf{\textit{Obl}}^{Tom} Does_{Mary}$[pay Tom € 1,000])*terminates*;
(2) $Procl_{Tom}$
($\textbf{\textit{Obl}}^{Tom} Does_{Mary}$ [pay Tom € 1,000]) *terminates*

---

(3) ($\textbf{\textit{Obl}}^{Tom} Does_{Mary}$ [pay Tom € 1,000]) *terminates*

One further inference step can be added to *power application*. The premise of this inference step consists in a general power-proposition:

FORANY (φ) $\textbf{\textit{ProclPow}}_j A[\varphi]$
(for any proposition φ, j has the proclamative power of realising $A[\varphi]$)

where $A(\varphi)$ indicates that the propositional content of the power contains variable φ. The conclusion, which is obtained through schema *specification* is a specific power-proposition:

$\textbf{\textit{ProclPow}}_j A[\varphi/p]$
(j has the proclamative power of realising $A[\varphi/p]$)

where $A[\varphi/p]$ denotes the result we obtain substituting, within A, variable φ with p. By embedding this inference into schema *power application* we obtain the following reasoning schema:

Reasoning schema: *General-power application*

1. FORANY (φ) $\textbf{\textit{ProclPow}}_j A[\varphi]$;
2. $Procl_j A[\varphi/p]$

——— IS A REASON FOR

3. $A[\varphi/p]$

For instance, assume that we endorse the belief that ⌈Tom has the power of terminating the obligations of his debtors⌉:

FORANY (x, φ)
$\qquad$ ***ProclPow*** $_{Tom}$
$\qquad\qquad$ (***Obl*** $^{Tom}Does_x\varphi$) *terminates*

(for any person x, and any action φ, Tom has the power of terminating x's obligation toward Tom to do φ)

and that ⌈Tom has proclaimed the termination of $Mary$'s obligation, toward him, to pay him € 1,000⌉

$Procl_{Tom}$
$\qquad$ (***Obl*** $^{Tom}Does_{Mary}$ [pay Tom € 1,000]) *terminates*

From these beliefs, we can infer—according to *general-power application*—that Mary' obligation to pay Tom such sum has indeed terminated.

(1) FORANY (φ, x)
$\qquad$ ***ProclPow*** $_{Tom}$
$\qquad\qquad$ (***Obl*** $^{Tom}Does_x\varphi$) *terminates*);

(2) $Procl_{Tom}$
$\qquad$ (***Obl*** $^{Tom}Does_{Mary}$ [pay Tom € 1,000]) *terminates*

---

(3) (***Obl*** ^{Tom}($Does_{Mary}$ [pay Tom € 1,000]) *terminates*

If we substitute ***ProclPow*** with its conditional *definiens*, we can easily see that schema *general-power application* is an instance of the schema *meta-syllogism*. In fact, it allows us to infer a proposition, from the fact that the proposition has a certain property (the property of having been proclaimed by a certain agent).

24.1.2. Proclamative Power and General Inferences

The schema *power application* can also be combined with the schema *syllogism*, which allows us to move from a general power-rule to a specific power-rule.

For instance, consider a rule attributing to every worker the power of terminating his or her employment-contract:[3]

FORANY (x)
$\qquad$ IF [x is a worker]
$\qquad$ THEN^n ***ProclPow*** $_x$[x's employment-contract terminates]

(for any x, if x is a worker, then x has the power of making so that his or her employment-contract terminates)

[3] Usually this power is conditioned to particular circumstances, such as giving a timely notice, which we do not consider for simplicity's sake.

If we know that John is a worker, we can infer (according to *syllogism*) that he has the power of terminating his own employment-contract:

$\textbf{\textit{ProclPow}}_{John}[John\text{'s employment-contract terminates}]$

Finally, if we know that this power has been exercised through an appropriate proclamation:

$Procl_{John}[John\text{'s employment-contract terminates}]$

then according to schema *power application* we can conclude with endorsing the content of the proclamation:

$John\text{'s employment-contract terminates}$

24.2. Kinds of Proclamative Power

Let us briefly consider some general powers that are usually available to everybody, in most legal systems. We shall characterise these power through general power-propositions.

24.2.1. The Power to Create and Terminate Obligations

There seems to exist, in most legal systems, a general power to undertake (initiate) obligations concerning oneself, whenever one has a cause or a consideration (an interest) for doing so. We may characterise this as follows:

FORANY (x, ϕ)
WHEN x has an interest in undertaking $\textbf{\textit{Obl}}\ Does{*}_x\varphi$
THEN^n $\textbf{\textit{ProclPow}}_x$
$(\textbf{\textit{Obl}}\ Does{*}_x\varphi)$ *initiates*

(whenever a person x has an interest in undertaking the obligation to do an action φ, then x has the power of initiating x's obligation to do φ)

For instance, assume that John has an interest in undertaking the obligation to give € 1,000 to the person who will find his beloved dog Fido (who is been missing for some time):

$John$ has an interest in undertaking
$\textbf{\textit{Obl}}\ (Does_{John}[\text{give € 1,000 to the finder of Fido}])$

(John has an interest in initiating his obligation to give € 1,000 to the finder of Fido)

This leads us, according to schema *normative syllogism*, to conclude that John has the proclamative power of undertaking this obligation:

$\textbf{\textit{ProclPow}}_{John}$
$(\textbf{\textit{Obl}}\ Does_{John}$[give € 1,000 to the finder of Fido]) *initiates*
(John has the proclamative power of initiating his obligation to give € 1,000 to the finder of Fido)

Assume that John makes the following proclamation:

$Procl_{John}$
$(\textbf{\textit{Obl}}\ Does_{John}$[give € 1,000 to the finder of Fido]) *initiates*
(John proclaims the initiation of his obligation to give € 1,000 to the finder of Fido)

According to schema *power application*, we may then conclude that he is under that obligation:

$(\textbf{\textit{Obl}}\ Does_{John}$[give € 1,000 to the finder of Fido]) *initiates*

One has also in general the power to terminate other people's obligations towards oneself, that is, to release them from their debts:

FORANY (x, y, ϕ)
$\textbf{\textit{ProclPow}}_x$
$(\textbf{\textit{Obl}}^x Does{*}_y \phi)$ *terminates*
(for any persons x and y, and any action φ, x has the power of terminating y's obligations towards x concerning action φ)

Since, as we know, an obligation directed towards a person can also be viewed as an interest-right of that person. The principle above can also be stated as asserting that one can terminate one's own rights:

FORANY (x, y, ϕ)
$\textbf{\textit{ProclPow}}_x$
$(\textbf{\textit{OblRight}}_x Does{*}_y \phi)$*terminates*
(for any persons x and y, and action φ, x has the power of terminating x's obligational right that y does action φ)

24.2.2. The Power to Confer Permissions

As a general principle, it seems that in modern legal systems one has the proclamative power to make it permitted that other people perform any action upon oneself, even when this action would be forbidden without one's permission (like parking in one's garden, engaging in intimate contact with one, copying one's intellectual property, and so on):

FORANY (x, y, φ)
$\textbf{\textit{ProclPow}}_x$
$(\textbf{\textit{Perm}}^x Does_y \varphi)$ *initiates*
(for any persons x and y, and any action φ, x has the proclamative power of initiating the permission, toward x, that y does action φ)

This principle has some limitations with regard to certain rights, the so-called *inalienable* rights, such as the right to life, or the right to physical integrity. For instance one's consent is not sufficient to remove the prohibition that other people harm one (unless, at least according to some opinions and some legal systems, under special conditions, such as when euthanasia, violent sports, or masochism are at issue).

However, the principle that one's permissive acts can override others' obligations towards oneself has a large application: It includes economic relationships but also extends beyond them.

As a recent example of such a power to permit, consider the consent to access and process one's personal data, which is a precondition for the permissibility of such operations, according to EC data protection legislation (though this power also has some limitation, for instance with regard to sensitive data). Thus, though in principle agent j has the obligation towards k not to process information concerning k, k has the power of making it permitted that j processes the information, according to the formula above.

On the contrary, there cannot exist, in any reasonable legal system, a general principle according to which one has the power of creating permissions for oneself upon others. This would make obligations useless: Whenever one does not want to comply with an obligation, one could initiate a permission to omit the obligatory action, which amounts to terminating the corresponding obligation.

24.2.3. Empowerment to Command

A proclamative power of commanding consists in the power of creating obligations upon other people by proclaiming that they have (or acquire) these obligations. Consider, for instance, the following examples:

- a parent tells his teenage child: "You are obliged to stay at home tonight!";
- a judge issues the order that an Internet provider is obliged to cancel some pornographic information from its web-server;
- a tribunal decides a case by stating that an employer is obliged to take measures to stop one of her workers being mobbed by his colleagues;
- an employer tells one of her employees to perform a certain task.

Among private persons the normal situation (or at least the starting point) is that of legal equality: According to Art. 1 of the Universal declaration of human rights, "All human beings are born free and equal in dignity and rights." Since it does not make sense that equality should consist in everyone being able to unilaterally create obligations over everybody else (chaos would result immediately), it must be the case that none has such a power, unless special conditions obtain.

In particular a power to command may be established with the consent of the person who is subjected to this power (for example, when one enters an employment contract one accepts a certain power to command of one's employer). Such a power can also be established or by the law itself, for the benefit of the subjected person (as for parents' powers over their children).

Public authorities usually have a certain power of commanding, within their competence. For example, a traffic officer has the power of creating obligations, concerning a driver's behaviour in the road, in order to govern the traffic:

FORANY (j, k, A)
IF [action A concerns the driving behaviour of k] AND
[j is a police officer]
THEN ***ProclPow***$_j$
(***Obl*** $Does_k A$) *initiates*

24.2.4. Empowerment to Renounce a Power

As one can renounce one's interest-rights, so generally one can renounce one's powers toward other persons. Thus in general terms we may say that one has the power or renouncing one's potestative rights:

FORANY (x, φ)
ProclPow$_x$
(***PotestativeRight***$_x \varphi$) *terminates*

(for any person x and any proposition φ, x has the proclamative power of terminating x's potestative right to realise φ)

This only is a defeasible principle, since there are non-renounceable powers. For instance, one cannot usually renounce those powers that one is granted in the interest of other people, like a parent's powers over his or her children.

24.2.5. Power to Transfer Property

We do not usually have the proclamative power to transfer the ownership of a thing to another person without the consent of the latter, and in some cases without special formalities (for some goods, for example, a written contract may be required). In some legal systems, moreover, under certain circumstances, for the ownership of a chattel to be transferred it is also required that the new owner acquires the possession of the thing.

Abstracting from these special conditions, however, we may endorse a general normative proposition according to which one can transfer one's ownership of a thing to another through an agreement with the latter. Usually an interest is required in the owner, unless the conditions for donations are satisfied:

FORANY (x, y, w)
IF $[x$ owns $w]$ AND
$[x$ has an interest in transferring w's ownership to $y]$
THEN^n ***ProclPow***$_{x,y}[w$'s ownership is transferred from x to $y]$
(for any persons x and y, and any object w, if x owns w and x has an interest in transferring w's ownership to y, then x has the proclamative power of transferring w's ownership to y)

where by $\lceil w$'s ownership is transferred form x to $y\rceil$ we mean that:

$([x$ owns $w]$ *terminates*) AND $([y$ owns $w]$ *initiates*)

24.3. Empowerment to Empower

A flexible arrangement of legal relationships is facilitated, if people have the *power of conferring their powers* to other people. This meta-level power is the starting point for analysing some important legal notions and, in particular, for introducing the fundamental idea of *representation*.

24.3.1. Conferring Powers

Let us start with the idea that a person can proclaim that another person has the power of achieving a certain legal result. Assume, for instance, that Tom proclaims that Mary—who will be staying in his house while he is away on holiday—has the power of permitting other people to visit his house, if she wishes so:

$Procl_{Tom}$
FORANY (x)
ProclPow$_{Mary}$
Perm $(Does_x$[visit Tom's house]$)$ *initiates*
(Tom proclaims that for any person x, Mary has the power of bringing it about that x is permitted to visit Tom's house)

Usually, entering one's house without one's consent would be illegal and even a crime, but if Tom's proclamation is effective, then entering with Mary's consent will not be illegal. The effectiveness of Tom's proclamation may be explained by assuming that any one (x) has the power of giving to any other person (y) the power of initiating permissions towards oneself, an assumption that can be expressed as follows:

FORANY (x, y, w, φ)
ProclPow$_x$
ProclPow$_y$
$[$***Perm***$^x Does_w \varphi]$ *initiates*
(for any persons x, y, and w, and any action φ, x has the proclamative power to create the proclamative power of y to realise that w is permitted toward x to do φ)

What kinds of powers is one empowered to allocate to others, according to a general principle? A very liberal choice would consist in stating that each person x has the proclamative power of giving any other agent y any powers x has. Such a general empowerment to empower seems to be a general principle of modern private law, at least for powers that are intended to serve the interest of the power-holder, namely for what we called *potestative rights*. Usually, on the contrary, this does not hold with regard to powers that are to be used for the benefit of another. Thus we can assume the following personally-general attribution of legal meta-power.

FORANY (x, y, φ)
IF ***PotestativeRight***$_x \varphi$
THEN^n ***ProclPow***$_x$([***EnablingPower***$_y \varphi$] *initiates*)

(for any persons x, y, and any proposition w, if x has the potestative right of realising φ, then x has the proclamative power of initiating y's enabling power to realise φ)

A general empowerment to transfer powers was not recognised by ancient legal systems. In Roman law (but also in ancient Anglo-Saxon law) personal rights could not be transferred to others: This means that the creditor could not transform the debtor's duty into a duty towards an assignee, and transfer to the assignee his powers related to that duty. More specifically, ancient legal systems did not know the idea of representation. According to ancient Roman law "no one can stipulate for another" (*Institutes of Justinian*, 3.19).[4]

The possibility to transfer rights to others, and in particular to confer powers on them, on the other hand, represents a critical aspect of modern legal systems. Let us now focus on the idea of conferring one's proclamative powers to other people.

For instance, assume that Tom wants his CD-player to be sold, but cannot do this personally since he is leaving for another country. To achieve this result indirectly he chooses to confer to Lisa his power of selling his CD-player. According to the principle above, he performs this power-conferral by performing the following proclamation:

$Procl_{Tom}$
FORANY (x)
ProclPow$_{\{Lisa,x\}}$ [Tom's CD-player is sold to x]

(Tom proclaims that, for any buyer x, Lisa has the proclamative power of bringing it about that Tom's CD-player is sold to x)

where x refers to any buyer Lisa may find for Tom's CD-player.

Consequently, when Lisa and Mary (the buyer) perform the following proclamation:

$Procl_{\{Lisa,Mary\}}$ [Tom's CD-player is sold to Mary]

[4] The Latin original: "Alteri stipulare [. . .] nemo potest."

it will happen that the CD-player is effectively sold (transferred) to Mary.

One's ability to confer one's powers to others may lead to chains of power-conferrals. This happens when x, confers to y both of the following powers:

1. the power of performing a certain proclamation
2. the power of transferring to others the same powers y has received from x.

For instance, assume that Tom transfers to Lisa both of the following proclamative powers:

1. the power to sell Tom's old CD-player, and
2. the power to transfer powers (1) and (2) to others (in case Lisa is unable to sell the CD-player).

Then, if Lisa is unable to sell the CD-player, she can transfer these powers to Martin, who will be in the following situation:

a. using power (1) Martin can sell the CD-player to another, and
b. using power (2), can transfer both powers (1) and (2) to another.

The chain of power transfers, enabled by power (2), can continue until one of the transferees finally sells the CD-player.

24.3.2. Representation

In the previous section, we have seen how one can to confer to another the power to perform a proclamation, rather than performing it directly. This leads us to the idea of *representation*. As is well known, representation basically concerns the situation "where a principal is held to declarations, especially contracts, made on his behalf" (Zweigert and Kötz 1992, 460–1).

This idea that was rejected by ancient legal systems, and in particular by Roman law. In such systems one could perform legal actions only in one's own name (or in the name of the group to which one belongs). On the contrary, modern legal systems allow to everybody the ability to give to others (their representatives), a power of action in their name.

It is usually said that the essential aspect of representation consists in the conferral of an *authority* (of a *proclamative power*): The representative's declarations directly bind the principal, since they count as if they were the principal's declarations (contrary to the fact that one person's declaration normally can only bind that person).

In most cases, one confers one's representation to another by accompanying it with a *mandate*, namely, the obligation, of exercising (in a certain way) the power of representation. So, the idea of mandate concerns the situation where the mandatee is obliged towards the the mandator to perform a certain act in a certain manner.

Usually a mandate presupposes that the mandator has a power to command over the mandatee (according, for instance, to an employment contract), or that a contract has been signed between them for the execution of a specific business: The command of the mandator or the contract between mandator and mandatee has established the mandatee's duty to act in a certain way, in order to achieve the goals of the mandator.

It is often remarked that in common-law systems representation and mandate tend to conflate into the idea of *agency* (intended as the situation when one is acting in the interest of another), whereas in the civil law tradition the distinction between representation and mandate has become commonplace since the XIX century, when German legal doctrine introduced it (Zweigert and Kötz 1992, 461ff.). The distinction, however, is perceived also by common lawyers, though it is not reflected in a precise terminology. As Salmond and Williams (1945) say:

> We are here concerned with agency not in its aspect as a relationship or contract between principal and agent imposing and conferring rights and obligations between the parties, but in its aspect as a grant by the principal to his agent of authority to represent him in the exercise of his power of making contracts with third persons.

In our framework, both the conferral to k of the power of representing j, and the mandate that k exercises this power in a certain ways, specified by j, can be viewed as resulting from proclamations. We do not need to specifically discuss the idea of a mandate, since this is a contract that establishes obligations for the mandatee and possibly for the mandator, according to the principle that one can undertake obligations concerning oneself. Let us focus on the notion of representation.

The first element of the notion of representation is the following: When k represents j, then k's power was conferred by j, with regard to a legal result that j could achieve by himself (and that k could not achieve without j's conferral).[5] For instance, given that Tom has the power of selling his CD-player to anybody, the following statement would represent a (attempted) conferral of representation to Lisa.

$Procl_{Tom}$
FORANY (x)
ProclPow$_{\{Lisa,x\}}$ [Tom's stereo is sold to x]

(Tom proclaims that, for any buyer x, Lisa ha the proclamative power, together with the buyer x, of bringing it about that Tom's CD-player is sold to x)

Such a conferral will in general be effective only when the person conferring

[5] For simplicity's sake we do not consider the cases where the power to performs legal acts having legal effects upon another's entitlements is conferred by the law (consider for instance the case where parents manage the assets of her underage children).

representation (Tom) was empowered to transfer his power to the representative (Lisa).

We may wonder whether this is really a satisfactory notion of representation. It seems that for k to represent j it is not sufficient that k achieves a legal result that j could achieve on his own. It is also required that k *acts in the name* of j, namely, that k's action is viewed as if it were j's action.

Thus, a more appropriate formalisation of the idea of representation can be obtained by viewing it as being the representative's power to bring it about that her actions count as the actions of the represented person. In general we may provide the following definition of representation:

Definition 24.3.1 *Representation. A person j* represents *a person k, with regard to action A, whenever j has the proclamative power of bringing it about that j's performance of A normatively determines k's performance of A, that is, whenever:*

ProclPow$_j$
IF $Does{*}_j A$ THEN^n $Does{*}_k A$
(j has the proclamative power of bringing it about that ⌈IF ⌈*j does A*⌉ *then normatively* ⌈*k does A*⌉⌉*)*

Thus a representative is a person that by proclaiming that she is acting in the name of the represented person would achieve the result of effectively acting in the name of the represented person (of realising an action of the represented person through her own action). With regard to the terminology we introduced in Section 21.1.1 on page 549, this notion of representation is an instance of *event-emergence*: The action of the represented person emerges upon the action of his representative. Using the *counts-as* terminology, we may also say j is k's representative with regard to action A whenever:

ProclPow$_j$
$Does_j A$ COUNTS-AS $Does_k A$
(j has the proclamative power of binging it about that j's doing A counts as k's doing A)

From the latter perspective, Lisa's power to sell Tom's stereo (to participate in the sale, in the name of Tom) can be represented as follows:

FORANY (x) ***ProclPow***$_{Lisa}$
$Procl_{\{Lisa,x\}}$ [Tom's CD-player is sold to x]
COUNTS-AS
$Procl_{\{Tom,x\}}$ [Tom's CD-player is sold to x]
(for any buyer x, Lisa has the proclamative power of bringing it about that ⌈her proclamation (together with x) that Tom's CD-player is sold to x⌉ counts as ⌈Tom's proclamation (together with x) that Tom's CD-player is sold to x⌉)

According to this way of understanding the notion of representation, that Lisa has the power of representing Tom means that she has the proclamative power

of realising the following: Her declaration that Tom's stereo is sold determines (counts as) Tom declaration that his stereo is sold. After having issued this proclamation (that is, after having declared that she is acting in the name of Tom), her subsequent proclamation that she is selling the stereo will determine Tom's proclamation, and thus succeed in transferring the stereo (which can be sold only by its owner).

Lisa in general will have the power of representing Tom only if he has given this power to her. More precisely, to create her power of representation, Tom must have issued the following proclamation:

$Procl_{Tom}$
FORANY (x)
ProclPow$_{Lisa}$
$Procl_{\{Lisa,x\}}$ [Tom's stereo is sold to x]
COUNTS-AS
$Procl_{\{Tom,x\}}$ [Tom's stereo is sold to x]

24.3.3. Limitations to Individual Legal Autonomy

In the previous pages we have considered the logic of individual legal autonomy, intended as the possibility that individuals shape their normative environment through their own proclamations.

In doing this, we have sketched the constitution of a liberal, or better a libertarian society, where every agent is able to look after his or her interests, and where any normative relation can be created via the consent of the interested parties. This society is characterised by the principle of *freedom of contract* or *contractual autonomy*: The individuals by themselves can establish what normative propositions shall be binding upon them (more generally, we can speak of *proclamative autonomy*, since this power also concerns unilateral proclamation).[6]

The recognition of contractual autonomy has the effect that the content of contracts is determined by the skill and bargaining powers of the parties involved, according to the information they have, their need to enter the contract, and the alternative opportunities that are available to them. Contractual autonomy often leads to arrangements with are acceptable also with regard to collective interests, especially in the framework provided by a competitive market economy. However there are many contexts where contractual autonomy needs to be restrained.

In all legal systems various limitations to individual legal autonomy are provided, for a number of reasons: preventing frauds, protecting the weaker party,

[6] The original meaning of the word *autonomy* (from the Greek words *auto* "self" and *nomos* "law") is indeed *self-regulation*.

preventing mistakes, avoiding exploitation, limiting monopolistic dominance. Unfortunately, there is not much that we can say in general with regard to the content of such limitations, without entering the details of specific areas of the law (labour law, consumer protection, anti-trust and so on), in particular legal systems.

Let us just observe such exceptions to the principle of contractual autonomy are often opportune and sometimes necessary. Thus, we do not side with Jeremy Bentham in assuming that the advantages of the unlimited recognition of contractual autonomy—even to such extremes as usury—would always surpass their social costs (Bentham 1787). We rather agree with von Jhering (1913, chap. 7, sec. 3) in considering that "an unlimited freedom in commerce is a patent of immunity for blackmailing," a "hunting permission for robbers and pirates, with a right of free capture over those who fall into their hands: woe to the vanquished."

However, we believe that contractual autonomy is a fundamental aspect of individual liberty and self-determination (and a prerequisite for the development of a market economy): Its limitations though opportune and necessary should be viewed as exceptions to a generally valuable principle (we shall discuss how to represent exceptions and how to reason with them in Chapter 26).

24.4. Public Powers as Proclamative Powers

In the previous examples, we have applied our model of proclamations and proclamative powers to private autonomy, and in particular to contracts. However, our analysis is also applicable to various statements of public agencies, from judicial decisions, to administrative acts, to legislative acts.

All such statements appear to have the function of intentionally creating normative positions and connections: They state certain normative propositions, and in order to realise them. Thus, also many public powers can be viewed are instances of the general concept of a proclamation.

Let us consider, for example, the principle that is stated in the *Institutes of Justinian*, 1.2, which is usually considered to express the idea of absolutism:

> That which seems good to the emperor has [...] the force of law.[7]

We may express the absolutist principle as follows: The Emperor has the power to make legally binding (and thus to realise) any normative content, by proclaiming it.

$\text{FORANY } (\varphi) \; \boldsymbol{ProclPow}_{Emperor}[\varphi]$
(for any propositions φ, the Emperor has the proclamative power of realising φ)

[7] "[Q]uod principi placuit legis habet vigorem."

Assume, for instance, the following: (1) Publius, a judge in ancient Rome, believes that the emperor has an absolute proclamative power (as expressed by the principle we just mentioned), and (2) Publius knows that the Emperor has proclaimed a particular rule, for instance, the rule that ⌈masters killing their slaves are to be punished for homicide⌉.[8] According to these premises, Judge Publius would conclude that masters behaving in this way ought indeed to be punished for homicide:

(1) FORANY (φ) $\textbf{\textit{ProclPow}}_{Emperor}[\varphi]$;
(2) $Procl_{Emperor}$[masters killing their slave are to be punished for homicide]

---

(3) masters killing their slaves are to be punished for homicide

24.4.1. Proclamations and the Dynamics of the Law

Our idea of a proclamation rule, and the logic of its application, enable us to understand the dynamic functioning of legal institutions, as conceptualised in Hans Kelsen's theory of the dynamics of law.[9]

Assume that I endorse the following propositions, according to which the Constitutional Assembly has the proclamative power or realising whatever normative content (or making any content binding by proclaiming it).

1. FORANY (φ)
   IF $Procl_{Assembly}[\varphi]$
   THEN *Binding* $[\varphi]$

(for any normative proposition φ, if the Assembly proclaims φ then φ is binding)

which, as we know, can also be expressed as

2. FORANY (φ) $\textbf{\textit{ProclPow}}_{Assembly}[\varphi]$

(for any normative proposition φ, the Assembly has the proclamative power of realising φ)

Assume that, besides believing (1), I know that the Constitutional Assembly has proclaimed that the Parliament has the proclamative power of realising any normative content, that is, I know that the Constitutional Assembly has performed the following proclamation:

$Procl_{Assembly}$
FORANY (ψ) $\textbf{\textit{ProclPow}}_{Parliament}[\psi]$

[8] This rule was indeed issued by emperor Antoninus, derogating the previous Roman law (which allowed masters to do whatever they wished with their slaves).

[9] See, in particular, the fourth chapter of Kelsen 1967, which is dedicated to the "dynamic aspect of law," or more literally, to the dynamics of law (*Rechtsdynamik*).

This allows me to perform the following inference (by applying first schema *specification* and then schema *power application*) and conclude for the existence of a general parliamentary power (a parliamentary power of efficaciously proclaiming any proposition φ).

(1) FORANY (φ) $\textbf{\textit{ProclPow}}_{Assembly}[\varphi]$;
(2) $Procl_{Assembly}$
FORANY (ψ) $\textbf{\textit{ProclPow}}_{Parliament}[\psi]$

---

(3) FORANY (ψ) $\textbf{\textit{ProclPow}}_{Parliament}[\psi]$

Similarly, assume that I know that the Parliament has proclaimed that, in every city, the city council (abbreviated as *Council*) has the power of regulating the traffic: for any city x, when any normative proposition φ concerns traffic in x, then $x's\ Council$ has the proclamative power of realising φ. This would allow me to conclude that city councils, have indeed such power:

(1) FORANY (ψ) $\textbf{\textit{ProclPow}}_{Parliament}[\psi]$;
(2) $Procl_{Parliament}$
FORANY (φ, x)
IF [φ concerns traffic in city x]
THEN^n $\textbf{\textit{ProclPow}}_{x's\ Council}[\varphi]$

---

(3) FORANY (φ, x)
IF [φ concerns traffic in city x]
THEN^n $\textbf{\textit{ProclPow}}_{x's\ Council}[\varphi]$

Finally, assume that I believe that the proposition ⌈any driver entering Bologna is obliged to pay € 10⌉ concerns traffic, and that the City Council of Bologna has proclaimed this proposition. This allows me to conclude that ⌈any driver entering Bologna is obliged to pay € 10⌉ (see Table 24.2 on the next page).

In conclusion, a reasoner which (1) endorses the proposition the Constitutional Assembly has the proclamative power of realising whatever normative proposition, and (2) believes that various proclamations have taken place (by the assembly, the Parliament, the municipality), will conclude (3) endorsing a substantive normative proposition (⌈any driver entering Bologna is obliged to pay € 10⌉). The whole of this Kelsenian inference-chain is represented in Table 24.2 on the following page.

Through a further syllogism step, and adding the specific belief that ⌈Mary is a driver entering Bologna⌉, the reasoner can conclude that Mary has to pay € 10.

1. $\text{FORANY}\ (\varphi)\ \textbf{\textit{ProclPow}}_{Assembly}\varphi$ ⟨normative premise⟩
2. $Procl_{Assembly}(\text{FORANY}\ (\varphi)\ \textbf{\textit{ProclPow}}_{Parliament}\varphi)$ ⟨factual premise⟩
3. $\text{FORANY}\ (\varphi)\ \textbf{\textit{ProclPow}}_{Parliament}\varphi$
   ⟨from 1 and 2, by *general-power application*⟩
4. $Procl_{Parliament}$
   $\text{FORANY}\ (\varphi, x)$
   IF [φ concerns traffic in x]
   $\text{THEN}^n\ \textbf{\textit{ProclPow}}_{x's\ Council}\varphi$ ⟨factual premise⟩
5. $\text{FORANY}\ (\varphi, x)$
   IF [φ concerns traffic in x]
   $\text{THEN}^n\ \textbf{\textit{ProclPow}}_{x's\ Council}\varphi$ ⟨from 3 and 4 by *general-power application*⟩
6. [any driver entering Bologna is obliged to pay € 10]
   concerns traffic in *Bologna* ⟨factual premise⟩
7. $\textbf{\textit{ProclPow}}_{Bologna's\ Council}$
   [any driver entering Bologna is obliged to pay € 10]
   ⟨from 5 and 6, by *Syllogism*⟩
8. $Procl_{Bologna's\ Council}$ [any driver entering Bologna is obliged to pay € 10]
   ⟨factual premise⟩
9. [any driver entering Bologna is obliged to pay € 10]
   ⟨from 7 and 8 by *general-power application*⟩

Table 24.2: *Kelsenian inference*

Note that the only normative assumption is here given by premise 1 (the *Grundnorm*, as Kelsen would say). All other lines of the Table 24.2 are either facts or conclusions derived from previous lines of the inference.

24.4.2. Legal Dynamics and the Applicability of Logic to the Law

Our discussion of the Kelsenian inference in Section 24.4.1 on page 628 seems incompatible with the view that logic is not applicable to the law, a view which was defended by Hans Kelsen in his last contributions.[10]

The idea that logic is not applicable to the law is linked to another famous Kelsenian distinction, which also appears in previous contributions by Kelsen, namely, the distinction between *static normative systems* and *dynamic normative systems*:[11]

According to the nature of the reason for the validity two types of norm systems may be distinguished: static and dynamic ones. The norms of the order of the first type are valid on the strength of their content: because their validity can be traced back to a norm under whose content the

[10] This view is extensively discussed in Kelsen 1979, published posthumously.

[11] This distinction has generated a considerable debate in legal philosophy. For a collection of recent contributions, see Gianformaggio 1991.

content of the norms in question can be subsumed as the particular under the general. Thus, for example, the validity of the norms "do not lie," "do not give false testimony," "do fulfil a promise" can be derived from a norm that prescribes to be truthful [. . .] by way of a logical operation, namely a conclusion from the general to the particular.

The dynamic type is characterised by this: the presupposed basic norm contains nothing but the determination of a norm-creating fact, the authorisation of a norm-creating authority, or (which amounts to the same) a rule that stipulates how the general and individual norms of the order based on the basic norms ought to be created. For example a father orders his child to school. The child answers: Why? The reply may be: Because the father ordered and the child ought to obey the father. If the child continues to ask: Why ought I to obey the father, the answer may be: Because God has commanded "Obey Your Parents" and one ought to obey the commands of God. [. . .] [T]he basic norm is limited to authorize a norm-creating authority, it is a rule according to which the norms of this system ought to be created. The validity of the norm that constituted the starting point of the question is not derived from its content; it cannot be deduced from the basic norm via a logical operation. (Kelsen 1967, sec. 34.b, 196–7)

Kelsen's extract seems to imply that logic can only be used to derive normative propositions (norms, as Kelsen calls them) in static normative systems, through a deduction which produces new normative propositions on the basis of other normative propositions. It seems that, according to Kelsen, logic is useless in dynamic systems, where new rules need to be stated by a norm-giver (though in accordance with the authorisation of a higher norm).

We agree with Kelsen that certain normative systems, the ones he calls *dynamic*, recognise certain facts—and in particular, certain proclamations—as sources of new binding normative proposition. This is undoubtedly an important feature of such normative systems (among which legal systems are to be included), a feature which distinguishes them from those other systems, the ones he calls *static*, that happen not authorise such ways of creating new binding rules. However, we do not believe that this distinction entails the implications that Kelsen derives from it. On the contrary, both kinds of systems require logical inference, and both need to take into account factual information.

First of all, logic is also required with regard to dynamic normative systems. The type of reasoning which, according to Kelsen characterises dynamic normative systems results from the adoption of what we called proclamation rules. Such rules enable legal reasoners to perform what we called *meta-syllogism*, in particular, according to schema *general-power application*. They enable the derivation of new normative propositions on the basis of two premises:

1. somebody proclaims these propositions,
2. the proclaimer has the proclamative power of realising this kind of propositions.

Therefore, Kelsen's idea that logical reasoning is inapplicable to dynamic normative systems seems to be self-defeating. Logical inference is indeed required for establishing what rules are binding in (belong to) such systems: Logical inference enables us to endorse proclaimed proposition (to view it as belonging

to a dynamic system) on the basis of premises (1) and (2) above (this idea is extensively discussed in Weinberger 1981).

Secondly, also with regard to what Kelsen calls static normative systems, normative propositions are not the only input to normative reasoning. To conclude that Tom is forbidden to tell Mary that he passed the exam, it is not sufficient that I adopt the rule that everyone is forbidden to tell falsities. I must also know that Tom has not passed the exam (that it is false that he passed the exam). Moreover, also a static normative system is not really static: it can change as society changes and new technologies become available, so that the values which characterise such a system have to be pursued in different ways. For instance, it can be argued that hunting certain animal species nowadays (like for instance whales)—when alternative sources of food are available and these species are on the verge of extinction—is morally wrong (forbidden), while doing the same thing two hundred a years ago was irreproachable. Similarly, it may be argued that now, when sufficient resources are available, it is morally obligatory that a community intervenes to remove certain severe deprivations (providing, for instance, health care and education), which the same community would be permitted to tolerate two hundred years ago.

Finally, contrary Kelsen' view, legal system are both dynamic and static: They enable logical syllogisms and other logical inferences not only with regard to proclamation rules and acts of proclamation (this provides their dynamic aspect), but also with regard to substantive rules and their preconditions (this is their static aspect). In fact, once we admit the application of inference schemata such as specification and detachment with regard to proclamation rules (these inference steps are included in *general-power application*), it would be odd to reject these very inference schemata with regard to other kinds of normative propositions (such as the proposition that ⌈anyone driving into Bologna ought to pay € 10⌉). For instance, it will be odd to be ready to perform all inferences in Table 24.2 on page 630, while rejecting the following one:

(1) FORANY (x)
    IF [x is driver entering Bologna]
    THEN^n [x is obliged to pay € 10];
(2) [$Mary$ is a driver entering Bologna]

---

(3) [$Mary$ is obliged to pay € 10]

As we shall see, normative syllogism only leads to defeasible conclusions, but this holds both when the major premise is a proclamation rule and when it is a substantive legal rule.

In conclusion, Kelsen's analysis of static and dynamic normative system is deeply misleading since it conceptualises the distinction between two compat-

ible ways of establishing that a normative proposition is binding, as being the distinction between two mutually-exclusive kinds of normative system.

Let us use the locution *source-based derivation* to refer to the kind of inference which Kelsen associates to dynamic normative systems. A *source-based derivation* consists in concluding that a certain normative proposition is legally binding since it was expressed by (it was embedded in) a certain social fact, the source-fact. A source-fact, as we shall see when analysing the sources of the law in general terms (see Section 25.2.4 on page 657) can consist not only in an authoritative proclamation, but also in a different kind of fact, like the adoption of a certain *ratio decidendi* by a court, or the existence of a customary practice. However, the paradigmatic reasoning in source-based derivation results from the adoption of what we called proclamation rules and in their syllogistic application (according to schema *meta-syllogism*).

We can instead speak of *non-source-based derivation* to refer to the reasoning Kelsen associates to dynamic normative systems. A non-source-based derivation leads us to conclude that a normative propositions is binding on the basis of our previous endorsement of other normative propositions and our belief that certain facts exists (though these facts do qualify as sources of the law). As examples of non-source-based derivations, we can consider the specification of a general rule (schema *normative specification*), the detachment of the conclusion of a normative conditional (schema *normative detachment*), or the endorsement of a normative proposition according to teleological reasoning (schema *teleological bindingness*). Also in non-source-based derivations there may be factual components: the fact that the conditional's antecedent is satisfied, with regard to *normative detachment*; the fact that the endorsement of a certain normative proposition would advance certain legal values, with regard to *teleological bindingness* (an additional factual element may be represented by the chance that one's endorsement would contribute to general endorsement).

These two ways of deriving legal conclusion—source-based derivation and non-source-based derivation—can and do indeed coexist in many normative systems, and in particular they coexist in all legal systems. Moreover, both ways can be qualified as logical procedures, and in particular, both of them consist in defeasible inferences.

24.4.3. Judicial Powers and Logic in the Law

One further objection against the use of logic in the law is connected to the idea that only judges have the power of deciding individual cases. This power is confined to the specific issues that are submitted to the judges, but is not conditioned to the substantial correctness of their decision: Whatever specific normative conclusions judges reach in a case, these conclusions are binding for the parties of that case. Judges have the duty of deciding cases according to the law, but the mere fact that they proclaim a certain decision of a case, within

certain formal and procedural constraints, makes the content of that decision binding (at least when no further appeal is available, or when the legal system establishes that the decision can be enforced, though appeals are still pending).

We agree with this analysis of judicial powers, but we deny that it entails that logic cannot be applied to the law.

From our perspective, the fact that a proposition is the content of a judicial decision is a (defeasibly) *sufficient* but *not a necessary* condition the proposition to be legally binding. This is expressed by the following proclamation rule, which states that judges have the power of taking whatever decision in a case submitted to them (within the boundaries of their competence):

FORANY (x, φ)
IF [x is a judge] AND
[φ is the decision of a case submitted to x]
THEN^n ***ProclPow***$_j[\varphi]$

We need to endorse a rule of this kind, if judicial decisions are to play the function of definitively solving legal disputes. If the bindingness of a judicial decision were conditioned to its substantive correctness, then any dispute concerning a substantive legal conclusion would automatically transform into a dispute concerning the bindingness of the corresponding judicial decision.

However, we deny that a judicial decision is necessary for a specific normative proposition to be binding, in the sense in which we are her using the notion of bindingness, namely, in the sense of "adoptable in legal reasoning." The contents of judicial decisions are legally binding (according to the rule above), but so are also the conclusions one can infer from legally binding rules.

Therefore, there are two main ways by which one can come to endorse a specific normative proposition:

1. through applying normative meta-syllogism to the proclamation-rule empowering judges, and the factual proposition that a judge proclaimed a certain proposition;
2. through applying normative syllogism to a general substantive rules and specific factual propositions which satisfy the rule's antecedent.

This double way of coming to legal conclusions leads to a contradiction whenever the judge's decision of a case is different from what would be the conclusions following from the substantive rules one endorses and the facts one knows to be true.

Such conflicts are to be solved by giving priority to the decision of the judge (when all remedies against such decision have been tried in vain), even when the judge's decision is wrong, that is, when a different normative proposition could be correctly derived before the judge adopted its decision. However, this does not prove that it is wrong to derive legal conclusions from substantive rules: It

only proves that such conclusions may be overridden by judicial decisions to the contrary.

Consider, for example, the following story. Lisa buys a new expensive high-definition monitor from Martin's computer-shop. While she is bringing the monitor to her house, she inadvertently drops it on the floor. She then brings the monitor back to the shop and tells Martin that the screen is not working owing to a fault, and asks to have her money back. Martin refuses and the case goes to court. The judge believes Lisa's story and orders Martin to give the money back to Lisa.

Given these circumstances, we can say that Martin, before the decision of the judge, had no obligation to give the money back to Lisa: He had correctly performed his obligation, by delivering a faultless product, and the law permitted him to keep Lisa's money. Thus, his conclusions were correct with regard to both the facts of his case and the binding normative propositions applicable to these facts.

Unfortunately, this is no longer the case after the judge's decision: Martin is now under the obligation to give the money back, on the basis of the wrong decision of the judge, which provides a new binding normative proposition.

Thus, the definitiveness of this judicial decisions does not entail that Martin was wrong in deriving a substantive legal conclusion through his own reasoning, and in viewing this conclusion as legally binding: It only shows that judicial decisions may override the outcome of substantive syllogisms, even when such syllogisms are correct.

Chapter 25

NORMATIVE TEXTS AND SOURCES OF LAW

In this chapter we shall provide some applications and extensions of the notion of a *proclamative power*. We shall first consider that a proclamative power—besides being the ability to realise (determine) certain results—also consists in the ability to make certain normative texts become binding. This will lead us to address briefly the notion of *legal interpretation*. Then we shall try to develop a broad notion of *sources of law*, which goes beyond the exercise of a proclamative power.

25.1. Proclamations and Their Interpretation

We shall focus on the process through which proclamations produce normative results. This will allow us to distinguish in particular, the production of textually binding sentences, and the production of binding propositions.

25.1.1. The Efficacy of Proclamations

In the previous pages the process through which a proclamation produces its effect has been viewed as consisting in a three-step sequence:

1. the *proclamation of a proposition*, which determines
2. (belief in) the *bindingness of the proclaimed proposition*, which determines
3. (belief in) the *realisation of the normative content* expressed by that proposition.

For instance, when Tom gives his girlfriend Lisa a bracelet, saying "I donate this bracelet to you," or more simply, "this is yours," the following happens:

1. Tom proclaims the proposition that ⌈the bracelet now belongs to Lisa⌉, which determines
2. the bindingness of this proposition, which determines
3. the normative state of affairs consisting in the fact that the bracelet now belongs to Lisa.[1]

This three-step process corresponds to the inference in Table 25.1 on the next page.

[1] This three-step process is compressed into a two step process according to the reasoning

(1) ***ProclPow***$_{Tom}$[the bracelet now belongs to Lisa];
(2) *Procl*$_{Tom}$[the bracelet now belongs to Lisa]

---

(3) *Binding* ⌈the bracelet now belongs to Lisa⌉

---

(4) the bracelet now belongs to Lisa

Table 25.1: *From proclamations to legal effects: the three-steps process*

According to the detailed inference we have just represented, all effective proclamations determine both of the following outcomes:

a. a direct outcome, the bindingness of a normative proposition, and
b. an indirect outcome, the existence of a normative state of affairs (this being, as we saw in Section 3.2 on page 99 the "ontological" counterpart of the normative proposition).

25.1.2. The Double Effect of Proclamations

When looking at different types of proclamations we tend to emphasise sometimes outcome (*a*) and sometimes outcome (*b*).

Outcome (*a*) is normally emphasised when a public authority proclaims a general conditional proposition. Consider for instance the case when the mayor of a city issues the traffic order: "Whenever one enters the city with a car, one is obliged to pay a fee of € 10." We tend to view this order as directly producing the legal bindingness of the proposition (the rule) that ⌈Whenever one enters the city with a car, one is obliged to pay a fee of € 10⌉. The fact that people are now obliged to pay a fee for entering the city is viewed as resulting from the bindingness of this proposition (from the "existence" of this rule).

Outcome (*b*) is normally emphasised when an individual proclaims a specific unconditioned proposition. Consider for instance, the utterance of the following sentences: "I renounce my credit," "I sell you my old camera for € 50," "I donate you this ring." In all these cases, we focus on the change on the resulting normative situation (the fact that I lose my credit, transfer the camera for the money, transfer the ring without a consideration) and view this situation as a direct outcome of the proclamation, forgetting about the bindingness of the proposition representing this situation.

There are cases where one is uncertain about what outcomes to emphasise.

schema *power-application*, where, as we have seen, the belief that a power has been exercised by proclaiming a proposition, directly leads to endorsing that proposition.

This happens in particular when a contract proclaims content-general normative propositions concerning particular individuals.

Assume, for example, that a contract between j and k contains the following clause: "j will deliver 20 litres of milk to k's café every morning, and k will pay j € 200 every month."

When we focus on outcome (*a*), namely binding normative propositions, we view this contract as providing for the bindingness of the following two rules:

1. whenever morning comes, j is obliged to deliver litres 20 of milk to k's café;
2. whenever the end of month comes, k is obliged to pay € 200.

When we focus on aspect (*b*), namely normative states of affairs, we view the same contract as realising a causal-like determinative connection between the coming of morning and j's obligation to deliver the milk, and between the coming of the end of the month and k's obligation to pay the price.

When a contract proclaims propositions that are both content-general and personally-general, we tend to focus more on aspect (*a*).

Consider for instance the following contractual clause between a union and an employer: "Any member of the union is entitled to an additional payment of € 10 per hour, when working after hours." This clause is likely to be viewed as directly producing the bindingness the corresponding normative proposition:

FORANY (x, n)
WHEN [x is a member of the union]
THEN^n IF [x has worked n extra hours]
THEN^n [x's pay is increased by € 10 per n]

rather than a causal-like connection between the fact of being a member of the union that has worked extra hours and the pay increase.

We are uncertain whether to focus on binding propositions or on normative states of affairs, with regard to statements issued by legislative bodies, but only concerning particular individuals. Assume, for instance, that the Parliament proclaims that ⌈Company c in entitled to a subsidy of € 100,000⌉. In this case, do we emphasis the bindingness of the parliamentary proposition, or the fact that the company is now entitled to the subsidy?

The distinction between focusing on the (belief in the) bindingness of a proposition, rather than on the (belief in the) realisation of its normative content, has lead some doctrinal writers to distinguish two kinds of proclamations:

1. proclamations that are sources of the law (which produce binding normative propositions), and
2. proclamations that directly produce substantive normative results.

In particular, only proclamations of the first type are said to have a normative character, to produce norms (on this aspect, see Rotolo, Volume 3 of this Treatise, sec. 7.3.1).

Unfortunately, it is not clear how this distinction can be drawn: Sometimes it is based on the content of the stated proposition (a proclamation is normative only if it states personally-general rules), sometimes on the identity of the author of the proclamation (a proclamation is normative only if it is adopted by a public authority).

It seems to us that the failure to find a satisfactory test for distinguishing between normative and non-normative proclamations proves that this distinction is basically ill-conceived. All effective proclamations produce binding normative propositions (they all are normative, in the sense of determining the bindingness of normative propositions) and all of them produce the corresponding states of affairs (in the sense indicated in Section 3.2 on page 99). It is true that we tend to focus on one aspect or on the other, according to the way in which a proclamation is performed and according to its content, but this seems to be a psychological tendency which does not have an analytical significance.

It is true that some legal systems label certain kinds of proclamation as *sources of law*, and treat them in a particular way on the basis of this qualification (for example, allowing or disallowing certain kinds of judicial reviews). Such distinctions however, seem to be significant only within the legal system that has introduced this classification, and only for the specific purposes for which the classification has been introduced. The fact that the label *source of law* is used in legislation or in doctrinal writings in this way does not license, we believe, drawing significant theoretical distinction between the so-labelled proclamations and other proclamations.

25.1.3. Proclaimed Sentences

Our analysis of proclamations has so far omitted to consider a very important issue: How shall we establish what propositions are expressed by a certain proclamation?

In a telepathic society, where each agent had access to the minds of all others, the problem would be easily solved by looking into the proclaimer's mind and accessing the proposition the proclaimer intended to express (or what meaning he intends now that his past proclamation expresses). In case of collective proclamations, all proclaimers would unify their minds into having a shared intention, and this shared intentions will accessible to all those who are interested in understanding it.

Unfortunately,[2] this only happens in science fiction (see, for instance, Asimov 1968). In our world, we only have direct access to observable behaviour, and we can read other people's minds only in the sense that we make hypotheses concerning the mental states of other people on the basis of the behavioural elements to which we have access. This does not imply behaviourism—so long

[2] Or fortunately, since shared access to everybody's minds would mean the end of individuality.

as the behaviour of others is seen as providing clues for building models of their minds—but requires us to focus on observable behaviour.

Among the various ways in which a proclamation may be expressed, linguistic behaviour usually plays a dominant role: The problem of attributing an intentional meaning to a proclamation tends to be transformed into the problem of establishing the correct interpretation of the statement through which the proclamation has been expressed.

Consequently, it seems that a proclamation does not directly produce the bindingness of the proclaimed proposition. Rather, its direct effect consists in making so that the proclaimed words become what we call a *textually binding statement*, which we can define in a way which is derivative upon the idea of a binding proposition.

Definition 25.1.1 *Textual bindingness. We say that a statement is* textually binding *when it determines the bindingness of the propositions it expresses.*

From this perspective, Tom's proclamation that the bracelet belongs to his girlfriend Lisa still results in her ownership of the bracelet, but this would be the outcome of a four-step process:

1. Tom's *proclamation of the statement* "this bracelet is yours," which determines
2. the *textual bindingness of this statement*, which determines
3. the *bindingness of the proposition* which is expressed by that statement, i.e., the proposition that ⌈the bracelet now belongs to Lisa⌉, which determines
4. the *realisation of the state of affairs* which is expressed by that proposition (the fact that now the bracelet belongs to her).

In front of this proliferation of entities (proclamations, textually binding statements, binding propositions, normative states of affairs) one may wonder whether Occam's razor—the parsimonious prescription that entities are not to be multiplied beyond necessity—might be a useful device. However, it seems to us that all such entities are needed, since each one of them plays a distinctive cognitive role in legal reasoning. Thus we shall adopt the corresponding ontology, according to the so-called *anti-razor*: Entities are to be multiplied according to necessity.

25.1.4. The Bindingness of Proclaimed Sentences

Let us try to analyse more carefully the logical passages that are involved in the inference we sketched in the last section.

The first passage consists in moving from the fact that a token-sentence was proclaimed (by a certain person, in a certain context, after certain other events,

though certain procedures) to the conclusion this token-sentence is textually binding. This passage presupposes a proclamation rule (see Section 23.2.4 on page 596) to the effect that a proclamation of that type determines the textual bindingness of what it states.

This leads to a second view of proclamation rules, that is, as rules establishing the textual bindingness of proclaimed sentences, under certain conditions: Such rules state that if a certain proclamation is performed (under the appropriate conditions), then the proclaimed sentences will be textually binding. We can represent the structure of textually-oriented proclamation-rules as follows:

FORANY (ψ)
  WHEN $[Conditions$ for $TextuallyProcl_j[\psi]$ are satisfied$]$
  THEN^n IF $TextuallyProcl_j[\psi]$
    THEN^n $\mathit{BindingText}[\psi]$

(for any sentence ψ, when the appropriate requirements $Conditions$ are satisfied, if j textually proclaims that ψ, then ψ becomes textually binding)

where $TextuallyProcl_j[\psi]$ is the action through which j proclaims sentence ψ and $\mathit{BindingText}[\psi]$ means that ψ is textually binding.

This kind of rules enables us, given appropriate preconditions, to conclude that a statement is textually binding though schema *syllogism*. More exactly, we can conclude that a sentence is textually binding on the basis of the following assumptions:

1. the endorsement of a rule stating that under certain conditions the proclamation of a sentence determines its textual bindingness,
2. the belief that those conditions are satisfied, and
3. the belief the proclamation was performed.

This transition is expressed by schema *textual bindingness*:

Reasoning schema: *Textual bindingness*

(1) FORANY (ψ, x)
  WHEN $[Conditions$ for $TextuallyProcl_j[\psi]$ are satisfied$]$;
  THEN^n IF $TextuallyProcl_x[\psi]$
    THEN^n $\mathit{BindingText}\ [\psi]$;
(2) $Conditions$ for $TextuallyProcl_j[\psi]$ are satisfied;
(3) $TextuallyProcl_j[\psi]$
——— IS A REASON FOR
(4) $\mathit{BindingText}[\psi]$

For example, the inference leading one to conclude that for the textual bindingness of a particular clauses in a statute issued by the Parliament, presupposes

(1) FORANY (ψ)
IF $TextuallyProcl_{Parliament}[\psi]$
THEN^n *BindingText*$[\psi]$)
(2) $TextuallyProcl_{Parliament}$ [Art. 171 bis. Whoever abusively duplicates a computer program to obtain a gain from it [...] is punished with detention from six months up to three years]

---

(3) *BindingText* [Whoever abusively duplicates a computer program to obtain a gain from it [...] is punished with detention from six months up to three years]

Table 25.2: *The derivation of textual bindingness: a statutory rule*

one's adoption of the rule that the Parliament makes any statement, this statement is binding (we omit for simplicity to specify the preconditions for this to hold, which include the requirements concerning the legislative procedure):

FORANY (ψ)
IF $TextuallyProcl_{Parliament}[\psi]$
THEN^n *BindingText*$[\psi]$)

Let us consider for example, the rule issued in 1992 (Legislative decree n. 518/1992) by the Italian Parliament, which introduced in the Italian copyright law the following text:

Art. 171 bis, Section 1. Whoever abusively duplicates a computer program to obtain a gain from it [...] is punished with detention in the range from six months up to three years [...]

Knowledge that this statement has been proclaimed leads the legal reasoner to perform the inference in Table 25.2, and conclude that Art. 171 bis is textually binding.

Let us consider a constitutional rule, Art. 3 of the Italian Constitution:

Art. 3, Section 1. All citizens possess an equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions, and personal or social conditions.

We assume to adopt a general rule to the effect that the proclamations of the Italian Constitutional Assembly are textually binding. Since the Assembly has adopted Art. 3, this article is textually binding, according to the inference in Table 25.3 on the following page.

This same analysis also applies to contracts and international treaties, both of which fall under our notion of a proclamation. Let us consider, for instance, Art. 2, Section 3 of the UN Convention:

(1) FORANY (ψ)
IF $TextuallyProcl_{Assembly}[\psi]$
THEN^n *BindingText*$[\psi]$;
(2) $TextuallyProcl_{Assembly}$ [Art. 3. All citizens possess an equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions, and personal or social conditions]

---

(3) *BindingText* [Art. 3. All citizens possess an equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions, and personal or social conditions]

Table 25.3: *The derivation of textual bindingness: a constitutional rule*

(1) FORANY (ψ)
IF $TextuallyProcl_S[\psi]$
THEN^n *BindingText*$[\psi]$
(2) $TextuallyProcl_{UN\ members}$ [Art. 2, Section 3. All Members shall settle their international disputes by peaceful means in such manner that international peace, security, and justice are not endangered]

---

(3) *BindingText* [Art. 2. Section 3. All Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice are not endangered]

Table 25.4: *The derivation of textual bindingness: an international rule*

Art. 2, Section 3. All Members shall settle their international disputes by peaceful means in such manner that international peace, security, and justice are not endangered.

Let us assume the principle that international agreements are to be observed (*pacta sunt servanda*), which we express by saying that if a set of agents S (here meant as States) makes a joint proclamation, then the proclaimed sentence is binding for them. This principle, in combination with the fact that a particular proclamation was performed—namely, the proclamation of Art. 2, Section 3 of the UN Convention—leads us to conclude that Art. 2. Section 3 is textually binding, as shown by the inference in Table 25.4.

The common core of these examples can be expressed through the general idea of textual proclamative power (***TextualProclPow***), by which we mean the

power of issuing binding normative sentences. This is the proclamative power of obtaining the textual bindingness of the sentences one is proclaiming, according to the following definition.

Definition 25.1.2 *Textual proclamative power. j has the* textual proclamative power *of issuing sentence ψ iff j's proclamation of sentence ψ determines ψ's bindingness:*

$$\textbf{\textit{TextualProclPow}}_j[\psi] \equiv$$
$$\text{IF } \textit{TextuallyProcl}_j[\psi] \text{ THEN}^n \; \textsf{\textit{BindingText}}[\psi]$$

(⌈j has the textual proclamative power *of issuing sentence ψ⌉ is equivalent by definition to ⌈if j textually proclaims ψ then ψ is textually binding⌉)*

A textual proclamative power can be conditioned to various circumstances concerning the content of the proclaimed text, the quality of the author of the proclamation and of its addressees, and so forth. For example, we can express as follows the rule that every head of a university has the textual proclamative power of issuing regulations concerning the functioning of his or her University:

$$\begin{aligned}&\text{FORANY } (x, y, \psi)\\&\quad \text{IF } [x \textsf{ is the head of university } y] \text{ AND}\\&\quad\quad [\psi \textsf{ concerns the functioning of } y]\\&\quad \text{THEN}^n \; \textbf{\textit{TextualProclPow}}_x[\psi]\end{aligned}$$

(for any person x, any university y, and any sentence ψ, if x is the head of the university y and ψ concerns the functioning of that university, then x has the textual declarative power of issuing sentence ψ)

A more general power of this kind pertains to other normative bodies, like a national Parliament, a power concerning any possible content (for simplicity's sake, we do not consider constitutional limitations to the competence of the Parliament):

$$\text{FORANY } (\psi) \; \textbf{\textit{TextualProclPow}}_{Parliament}[\psi]$$

The determination of the textual sentences to be taken into account may sometimes require a further step, which we cannot consider here: taking into account the changes a textual unit has undergone. As a matter of fact, the name of a textual unit, like Section x of Statute y does not identify a fixed textual content, but it rather identifies, with regard to a given time, the result of all textual modifications which have been performed up to that time upon the original textual content of Section x. Moreover, one also needs to consider rules establishing that a certain textual unit is or is not to applied within a certain time-frame.[3]

[3] On textual modifications and on the determination of the time-frame for the application of legislative sentences or propositions, see Sartor 1996.

25.1.5. The Interpretation of Proclamations

Let us now consider the next inference step: The belief that a statement is textually binding leads us to the belief that a particular proposition expressed by that statement is binding. Let us first introduce the following definition.

Definition 25.1.3 *Interpretation and interpretant. By the* interpretation *of a sentence ψ we mean the set of propositions which ψ (conjunctively) expresses, and by an* interpretant[4] *of ψ we mean any such proposition.*

The rule below (which follows from the very definition of what it means for a text to be binding) says that whenever a statement is textually binding, and a certain proposition is a *binding interpretant* of that statement, then that proposition is binding:

FORANY (ψ, φ)
IF *BindingText*$[\psi]$ AND
$[\varphi$ is a *binding interpretant* of $\psi]$
THEN *Binding* $[\varphi]$

Note that by requiring that a proposition is a *binding interpretant* (rather than an *interpretant tout court*), we clarify that we are not concerned with linguistically possible meanings, but with *binding meanings*, namely, those meanings that would be ascribed to the statement (taking into account its function) by optimal practical cognition. According to the notion of cognitive bindingness we developed in Section 3.1.5 on page 93, proposition $\lceil B \rceil$ is a *binding interpretant* of a sentence A, if it is cognitively binding that $\lceil B \rceil$ is an interpretant of A, i.e., if optimal cognition would lead to accept proposition $\lceil B \rceil$ as a component of A's meaning.

Note that also in this regard, we must consider that practical cognition is situated in a particular context. Its *situatedness* does not consist in the contingency of its inferential procedures (which, we believe, correspond to the universal idea of rationality), but in the fact that its inputs are not restricted to the particular circumstances of the case: They also include customs, conventions, attitudes, decisions which characterise the particular community within which, and for the purposes of which, practical cognition is exercised.

Thus the universality of practical reason is consistent with the fact that, for instance, different results may be obtained, in the interpretation of the same contract in the English system, which construes the parties' intentions by focusing primarily on the text of the contract, and in continental systems, which

[4] We take the liberty of using the Peircian expression *interpretant* to refer to propositions, though Peirce uses it to refer more generally to the "proper significate outcome of a sign" (Peirce 1966, vol. 5, par. 473), namely the meaning of the sign, or also its effect on the mind of the interpreter, or also a further sign to which the first sign refers (the latter notion is endorsed and developed for instance by Eco 1975).

consider to a larger extent the behaviour of the parties (for a clear discussion of this issue, see Devlin 1962). Similarly, the universality of practical reasoning is consistent with the possibility of obtaining significantly different results, in various areas of the law (like family law, or bank law), in Western legal systems and in Islamic ones.

25.1.6. Problems in Legal Interpretation

We cannot here consider in general terms the problems of legal interpretation.[5] We shall just exemplify our definitions by considering two examples. The first example concerns the interpretation of certain Italian laws concerning software protection, and in particular, the issue of whether duplicating software in order to make a profit constitutes a crime.

In Italy copyright protection of computer programs was established by Act (legislative decree) n. 528 of 1992 (implementing European directive 91/250 CE), which explicitly affirms that "computer programs are protected as literary works." Before the enactment of this law there were many discussions concerning the application of Italian copyright act (n. 633 of 1941) to the unauthorised duplication of computer programs. In particular, the debate concerned Art. 171 of the Italian copyright law, stating the following rule:

Art. 171. Whoever, without being entitled to it, duplicates [...] a work belonging to another [...] is to be punished with a fine [...]

The Italian copyright act provided the following textual clues:

- Art. 1 characterises the notion of a *protected work* as including "creative works belonging to literature, music, figurative arts, architecture, theatre and cinematography."
- Art. 2 specifies that "literary, dramatic, scientific, didactic, religious works, both in written and in oral form, are included within protected works."

Different opinions emerged with regard to computer programs. Most judicial decisions excluded that the expression "protected work" had to be interpreted in such a way as to include also computer programs, when criminal punishment was at issue.

However, the *Corte di Cassazione* (the Italian highest Court for civil and criminal cases), on 24 July 1986, adopted a different view. It affirmed that:

[5] Legal interpretation is extensively discussed in Peczenik, Volume 4 of this Treatise, sec. 1.4, 1.5. For a comparative discussion of the methods of legal interpretation, see MacCormick and Summers 1991. For a recent concise account and for some references to the vast literature on this subject, see also Greenawalt 2002.

1.	*BindingText* [Art. 1]	⟨premise⟩
2.	⌈computer programs qualify as protected literary works⌉ is a *binding interpretant* of Art. 1	⟨premise⟩
3.	FORANY (ψ, φ) IF *BindingText*$[\psi]$ AND [φ is a *binding interpretant* of ψ] THEN *Binding* φ;	⟨premise⟩
4.	*Binding* ⌈computer programs qualify as protected literary works⌉	⟨from 1, 2, and 3, according to *meta-syllogism*⟩
5.	computer programs qualify as protected literary works	⟨from 4, by *Binding-elimination*⟩

Table 25.5: *Meta-syllogism: interpretative inference*

computer programs are protected according to civil and criminal copyright law, since they belong to sciences and are expressed in a technical language that can be conceptually assimilated to the alphabet.

According to this interpretation of Art. 1 and 2 of the copyright law—an interpretation including the *interpretant* that computer programs qualify as protected literary works—the *Corte di Cassazione* concluded that the duplication of computer programs was punished, according to Art. 171. In Table 25.5 we represent this reasoning as based upon schema *meta-syllogism*.

Other judges and most legal scholars (and the same *Corte di Cassazione*, in other cases) held different views, and concluded that computer programs were not to be considered as being literary works. The two opposed conclusions were supported by different arguments, referring to the literal meaning of the expression "literary work," to the purposes of Art. 1 and Art. 121 of the Italian copyright act, to the function of copyright protection, to the solution adopted in other countries and in particular in most EC-Member States (which had already extended copyright protection to computer programs), to the fact that criminal provisions (like Art. 171 of the copyright act) cannot be analogically extended. In our framework, all of these considerations would appear as factors for or against including in the interpretation of Art. 2 the proposition that computer programs qualify as literary works.

This interpretative controversy was in the end solved by the legislator, who expressly stated that computer programs are protected by copyright as literary works (so confirming the interpretation adopted by the *Corte di Cassazione*), and moreover introduced a specific sanction concerning the duplication of computer programs (Art. 171 bis of the Italian copyright law):

(1) *BindingText* [*Art. 171 bis*];
(2) ⌈if one duplicates a computer program for saving costs within a commercial activity, then one duplicates the program in order to obtain a gain⌉ is a binding interpretant of *Art. 171 bis*;
(3) FORANY (ψ, φ)
    IF *BindingText*[ψ] AND
      [φ is a *binding interpretant* of ψ]
    THEN *Binding* φ

---

(4) if one duplicates a computer program for saving costs within a commercial activity, then one duplicates the program in order to obtain a gain

Table 25.6: *Interpretative statement and substantive conclusion: a statutory rule*

Art. 171 bis. Whoever, without an authorisation, duplicates computer programs in order to obtain a gain,[6] [. . .] is subject to a penalty of detention from 6 months to 3 years, plus a fine from € 2,582 to € 15,493.

This provision too raised many interpretative doubts.

First of all, since the new rule only concerned duplication intended to obtain a gain, there was the problem of understanding whether duplication that was not intended to obtain a gain was still punished with the fine introduced by the old Art. 171 (establishing a small fine for the duplication of any protected work).

Moreover, there was a discussion concerning whether unauthorised duplication of computer programs taking place within a business unit, for the purpose of using the software in multiple copies (while saving the cost of buying multiple licences), rather than for reselling the copies, was performed "in order to obtain a gain."

With regard to this second issue, the *Corte di Cassazione* affirmed that also duplication performed for the purpose of saving purchase costs (rather then for reselling), within a commercial unit, was to be understood as being performed "in order to obtain a gain." From this interpretative assertion (this statement concerning a binding interpretant of a Art. 171 bis) the judges derives the corresponding substantive conclusion, according to the pattern we have outlined above, as you can see in Table 25.6.

Also in this case, the Italian legislator (pressed by the lobby of software producers) intervened to put an end to this legal debate, by confirming the interpretation that had been adopted by the *Corte di Cassazione*. In particular, the

[6] The locution used in the Italian text for "in order to obtain a gain" is "a scopo di lucro."

(1) *BindingText* [*Art. 2, Section 3 of the UN treaty*];
(2) proposition ⌈any State is forbidden to wage preventive war⌉ is a *binding interpretant* of *Art. 2, Section 3 of the UN treaty*;
(3) FORANY (ψ, φ)
    IF *BindingText*$[\psi]$ AND
        $[\varphi$ is a *binding interpretant* of $\psi]$
    THEN *Binding* φ

---

(4) any state is forbidden to wage preventive war

Table 25.7: *Interpretative statement and substantive conclusion: an international rule*

legislator substituted, in the text of Art. 171 bis, the word "gain" (*lucro*) with the word "profit" (*profitto*).

A problem of interpretation does not arise only for legislation, but also for treaties and contracts. Consider for instance the problem on interpreting Art. 2. Section 3 of the Charter of United Nations:

Art. 2, Section 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.

Does the interpretation of this sentence include the *interpretant* that any war waged by a member State against another member State (except in case of self-defence) is prohibited?

We cannot here discuss this question, which we need to leave to students of international law. However, we can observe that, if its answer is positive, we have to conclude that any preventive war is a violation of the UN treaty, according to the inference in Table 25.7.

Our analysis of interpretative reasoning allows us to establish a connection between the notion of *proclamative power* and the notion of *textual proclamative power*, according to which textual proclamative power is prior to proclamative power: The proclamative power of realising a normative proposition φ may be viewed as the textual proclamative power of making a statement ψ having proposition φ as its binding interpretant.

$$\textbf{\textit{ProclPow}}_x\ \varphi \equiv \text{FORSOME}\,(\psi)\ \textbf{\textit{TextualProclPow}}_x\ \psi\ \text{AND}\ \varphi \text{ is a } \textit{binding interpretant} \text{ of } \psi$$

(⌈x has the proclamative power of realising proposition φ⌉ is equivalent to ⌈there is a sentence ψ such that x has textual declarative power of making ψ binding, and φ is a binding *interpretant* of ψ⌉)

25.1.7. Criteria for Interpretation

The distinction between proclaimed sentences and their binding meaning (*interpretant*) is important, since determining what propositions are expressed through (the correct interpretation of) a certain statement is no trivial issue.

A person unacquainted with the law may assume that the correct interpretation of a legal statement needs to be the real intention of the issuer of that statement, as it can be identified on the basis of all existing behavioural clues (regardless of whether these clues were accessible to the addressee of the statement or to others at the time of when the statement was performed).

However, we know that this is not always a sensible choice from the legal perspective, since one has to consider also the interests of the people who have relied upon the fact that the proclamation had a certain meaning on the basis of the only clues that were accessible to them, and thus have expected that it would create a corresponding legal effect.

Moreover, in the case of a collective declaration, the proclaimers may have wrongly believed that they were expressing the same intention: They uttered the same words, wrongly assuming that they were sharing the same thought. Thus, even when we can identify the real intentions of all authors of a proclamation, this may be insufficient to assign a unique meaning to the proclamation.

In general, when identifying the correct interpretation of a proclaimed statement one has to consider, in a legal context, various aspects. We may say that a certain *interpretant* of a statement is favoured to the extent that it presents the following features:

1. It corresponds to the intention of the issuer of the statement, that is, to the proposition the issuer meant to express through that statement (when there is more then one issuers, as it normally the case for contracts and legislation, one needs to consider their possibly different intentions);
2. It corresponds to the literal sense of the words and grammatical connections in the stated sentences, abstracting from the extra-linguistic context in which the statement was issued;
3. It is coherent with the extra-textual context in which the statement took place (previous commercial relationships between the parties, for contracts; parliamentary debates for legislation, and so on);
4. It is coherent with the set of normative propositions (the normative system, or a specific section of it) in which the *interpretant* is to be included;
5. It is coherent with practices, beliefs, goals, and attitudes of its addressess;
6. It enables the application of the statement to achieve the specific goals it should serve, according to the intentions of the issuers, or to values inherent to the legal system.

Besides these primary grounds, we may also say that, for the sake of coordination (and also for the consideration due to tradition and to the cognitive merits

of social cognition), an interpretation of a proclaimed statement is favoured to the extent that it corresponds to the meaning which was generally attributed to the statement by third parties (by judges, doctrinal writers, citizens), taking into account their role in legal decision-making and their cognitive competence. In this regard, one has further to distinguish between the third party's interpretation:

- at the time when the statement was issued;
- at a later time (precedent has a special importance in this regard);
- at the present time.

We cannot here analyse any further this list of factors (which has no pretension of being exhaustive), since this would lead us to address the very difficult problem of the interpretation of different kinds of legal texts (contracts, laws, international treaties, and so on), nor can we address the connection between this list of factors and other proposals of criteria for legal interpretation.[7] Let us just observe that, from a logical perspective, these factors are to be viewed as *dimensions*, increasingly favouring the adoption of the *interpretant* implementing them.

This leaves us with the task of establishing how we should compromise such different dimensions. We believe that not much can be said in general with regard to this evaluation, which is context-dependant to the highest degree. In this evaluation, different goal and values need to be considered, which underlie the factors we have just listed: Enabling the proclaimer to achieve the intended state of affairs, protecting those who have relied upon the assumption that a certain content was conveyed, preserving current conventions, encouraging proclaimers to be clear and precise, avoiding difficult psychological and contextual inquiries, preventing exploitative behaviour, achieving the particular legal goals at issue and the general values of the legal system, and so forth.

Moreover, besides the problem of balancing different dimensions, there is also the problem of taking their interference into account. For example, the idea that a statement is to be understood in such a way as to ensure that certain goals are promoted, takes us back to the idea that a statement is to be understood according to the intention of its issuer, whenever the goal to be promoted is

[7] For a detailed lists of interpretation criteria, see for example Tarello 1980, 341ff., which lists various interpretation arguments: *a contrario*, analogical, *a fortiori*, from completeness, from coherence, from the intention of the legislator, from historical persistency, *reductio ad absurdum*, teleological, from non redundancy, from example or precedent, systematic, from the nature of things, from general principles (on these arguments, see also Lazzaro 1970, and Perelman 1979, sec. 33). Another list is provided in Wróblewski 1992, 97ff., which distinguishes the three categories of linguistic, systemic and functional interpretations, and specifies a set of interpretation directives for each one of them. Bobbitt (1982) distinguishes, with regard to constitutional law, historical, textual, structural (from institutional requirements), prudential (teleological), doctrinal, and ethical arguments.

the self-determination of the issuer of that statement (which may be the self-determination of individuals with regard to contract, or the self-determination of a political body with regard to legislation). Similarly, the idea of interpreting statements according to the understanding of their addressees takes us back to the intention of the issuer, when the addressee's understanding was determined by the addressee's attempt to construe the issuer's intention.

These considerations seem to underlie the following statement:

> The argument from the intention of the law-giver [. . .] is transcategorical in the sense that the *objects* of intentions [. . .] include all of the objects—language use, systemic context, purpose, and value—that figure in the other major categories of argumentation. (MacCormick and Summers 1991, 27)

In conclusion, it seems that it is not useful to transform interpretative factors into rules, nor that it makes much sense to find meta-rules establishing what combinations of interpretative factors prevail in what circumstances. With regard to conflicts between criteria of interpretation, we need to accept the uncertainties of factor- (and dimension-) based reasoning. This fact may be viewed as a failure of legal method, which appears to be unable to pre-determine the outcome of legal reasoning through precise rules (and meta-rules). However, it may also be viewed as a significant (though constrained) opportunity for normative reflection, for the critical examination of legal values, for a reassessment of their relative importance and the merit of the ways of implementing them (for a favourable view of conflicts between criteria of interpretation, see for instance Bobbitt 1991, 184, and Zagrebelsky 1992, chap. 7, sec. 2).

25.2. Sources of Law

As we have seen above, proclamations have a particular feature: They produce the normative situation they express (though this takes place through the mediation of an interpretation). This feature, however, does not pertain only to proclamations; it also concerns, for instance, custom, precedent, and more generally any sources of law. On the basis of the analysis of this feature we shall characterise in general terms the notion of a *source of law*.

25.2.1. Custom

Let us consider the following statement, which opens the page that is dedicated to customary humanitarian law on the web site of the International Commission of the Red Cross:

> Unlike treaty law, customary international law is not written. To prove that a certain rule is customary one has to show that it is reflected in State practice and that there exists a conviction in the

international community that such practice is required as a matter of law. In this context, "practice" relates to official State practice and therefore includes formal statements by States. A contrary practice by some States is possible because if this contrary practice is condemned by other States or denied by the government itself the original rule is actually confirmed. (Henckaerts 1999)

This idea seems to correspond to the traditional notion of custom as resulting from two elements, a psychological element, the *opinio juris ac necessitatis*, and a practice element (on custom, see also: Pattaro, Volume 1 of this Treatise, sec. 6.1; Shiner, Volume 3 of this Treatise, chap. 4). We believe that this traditional characterisation is indeed appropriate.

However, the necessity that is mentioned here, is not the opinion that a certain action is obligatory or legally obligatory. The necessity concerns the broader idea of legal bindingness we have discussed in Chapter 12, namely, the idea that a certain normative proposition *is adoption-worthy* (deserves to be adopted) in legal reasoning. In fact many customary rules do not express obligations, but rather permissions or powers. We may thus provide the following (quite crude, but sufficient for our purposes) definition of a custom.

Definition 25.2.1 *Custom. A normative proposition φ is a* custom *(a customary rule) in community C if most members of C:*

1. *have the common belief that φ is legally binding and*
2. *usually act on the basis of such belief.*

Accordingly, the idea that custom is a source of law can be expressed in the following way:

FORANY (φ)
IF [φ is a national or international custom]
THEN^n *Binding* φ

Let us consider, for example, the prohibition of the use of chemical weapons, which seems to have finally become an international custom (though there are still tragically significant violations). On the basis the assumption that this is the case, we may draw the following inference (according to schema *metasyllogism*):

(1) FORANY (φ)
IF [φ is the content of an international custom]
THEN^n *Binding* φ
(2) [everybody is forbidden to use chemical weapons] is the content of an international custom

---

(3) everybody if forbidden to use chemical weapons

(1) FORANY (φ)
IF [φ is the content of a contractual custom]
THEN^n *Binding* φ;
(2) [compound interests are to be paid, for overdue bank-loans] is the content of a contractual custom

---

(3) compound interests are to be paid, for overdue bank-loans

Table 25.8: *Meta-syllogism: the endorsement of custom*

The same type of inference can also be applied to domestic customs. For instance, the Italian *Corte di Cassazione Civile* observed (in *Calistro vs Banco Sicilia* 1987) that:

in relations between banks and their clients, anatocism (compound interest) is generally applied through the behaviour of the generality of the interested parties, with the belief of fulfilling a legal precept.

From this premise, given that custom, according to Italian law, is binding for parties in contracts, the judges concluded that compound interests are to be paid upon overdue interests. Again, this inference can be recast according to schema *meta-syllogism*, as you can see in Table 25.8.

25.2.2. Precedent

The inference schema *meta-syllogism* is also applicable to precedent: If we assume that certain precedents are binding, then we can conclude by endorsing their *rationes decidendi*.

For example, assume that we adopt the view that (as in common-law jurisdictions) *rationes decidendi* of appeal and higher courts are binding.

As a classical example, consider the famous case *Donoghue vs Stevenson* (1932). Assume that the *ratio decidendi* of that case is expressed by the concluding statement of Lord Atkin:

[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left his premises with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to consumer's life and property, owns a duty to the consumer to take responsible care. ([1932] A.C. 599)

which we can crudely synthesise as:

(1) FORANY (φ)
IF φ is a *ratio decidendi* of the House of Lords;
THEN^n *Binding* φ
(2) ⌈a manufacturer of products [...] owns a duty to the consumer to take responsible care⌉ is a *ratio decidendi* of the House of Lords

---

(3) a manufacturer of products [...] owns a duty to the consumer to take responsible care

Table 25.9: *Meta-syllogism: the endorsement of a* ratio decidendi

[A] manufacturer of products [...] owns a duty to the consumer to take responsible care.

An English lawyer, for whom *rationes decidendi* of the house of Lords are binding, will then reason according to *meta-syllogism*, as you an see in Table 25.9.

25.2.3. Legal Doctrine as a Source of the Law

The idea of *meta-syllogism* can also be applied to the opinions of legal scholars, when these are sources of the law. This was the case, for example, in Roman law:

[A]nciently it was provided that there should be persons to interpret publicly the law, who were permitted by the emperor to give answers on questions of law. They were called jurisconsults; and the authority of their decisions and opinion, when they were all unanimous, was such, that the judge could not, according to the constitutions, refuse to be guided by their answers. (*Institutes of Justinian*, 1.2) [8]

This would be expressed through the following rule:

FORANY (φ)
IF ⌈φ is an unanimous opinion of all jurisconsults⌉
THEN^n *Binding* φ

which can be applied through schema *meta-syllogism*.

Similar notions were also part of medieval law, which developed the idea that a view which was shared by all legal scholars or by a qualified majority of them

[8] The Latin original: "Antiquitus institutum erat, ut essent qui jura publicae interpretarentur quibus a Caesare jus respondendi datum est, qui jurisconsulti appellabantur. Quorum omnium sententiae et opiniones eam auctoritatem tenebant, ut judici recedere a responso eorum non liceret, ut est constitutum."

(*communis opinio*) was binding upon judges, and was indeed to be "observed as a statute, and as part of the law" (*pro lege et tamquam ius servatur*, Coratius III, tit. XII, n. 10, quoted in Lombardi Vallauri 1967, 180), though it would be overridden by a contrary statute or custom (ibid., 177ff.).

Similar ideas concern today the so-called *soft law*, which is particularly important in the international domain, and includes sources like the following ones: resolutions of the United Nations and other international bodies, international agreements which do not qualify as treaties, rules adopted by international chambers of arbitration, codes of conduct, and so forth.

It is true that some authors believe that such rules are only binding when they satisfy the conditions which are required for the bindingness of customary rules, that is, when they qualify as customary rules. However, others affirm that the bindingness of soft laws may result from different (and quicker) processes, which do not require the degree of compliance and acceptance that would be ordinarily required for the formation of a custom. For instance, the adoption of a certain non-binding resolution by an international organisation, accompanied by the acquiescence of the concerned parties, may substitute continued practice and *opinio juris*.

This is not the place for taking a doctrinal position on soft law at the international level (this is a task which we must leave to experts in international law). What we shall try to do in next section is instead trying to provide a general notion of a *source of law*.

25.2.4. The General Idea of a Source of Law

Our discussion of various sources of law—legislation (more generally, proclamations), custom, precedent, doctrinal opinion, soft law—leads us towards a general notion of a *source of law*.

Definition 25.2.2 *Source of law. By a* source of law *we mean any fact that embeds normative propositions, and determines the bindingness (adoption-worthiness) of these propositions, by virtue of such an embedment.*

The link between the source-fact and the embedded propositions may be different: These propositions may consist in what is expressed by a proclamation (as in legislation or contracts), in what is practised and considered binding (as in customary law), in what justifies a judicial decision (as in case law), in what is affirmed by most, or most authoritative, jurists (as in doctrinal law), in what is stated in a non-binding but acquiesced upon international resolution, and so on.

This leads us to the problem of establishing what facts have the property of being sources of law, that is, the ability of determining the bindingness of the propositions they embed.

Let us first observe that, according to our definition, establishing what is a source of law is no factual issue. It is a normative issue (we need to establish what facts produce adoption-worthy normative propositions), but a normative issue that may only be answered by taking into account the relevant factual information. Since we have already extensively discussed this matter in Chapter 12, we shall now just recall the main results we achieved there. We have observed that the adoption of a legal rule can be based upon the following piece of teleological reasoning:

Reasoning schema: *Teleological bindingness*

(1) v is a set of communal values;
(2) my community's endorsement of rule r as legally binding is a sufficiently good way to advance values v;
(3) my adoption of rule r has a sufficient chance of contributing to r's adoption by my community

——— IS A REASON FOR

(4) rule r is legally binding

This pattern of teleological reasoning can lead us to recognise certain facts as sources of law, that is, to endorse meta-rules establishing the legal bindingness of all rules (more generally, all normative propositions) which are embedded in certain ways in certain kinds of facts.

Let us consider the three items which provide the pre-conditions for the reasoning schema *substantive bindingness*, and examine, for instance, whether this schema may support the conclusion that acquiesced-upon UN-resolutions are legally binding in international law.

Item (1) is purely normative: It concerns the evaluation of certain results (state of affairs) as communal values to be pursued. For instance, the values involved may be peace, international co-operation, protection of human rights.

Item (2) is teleological: It concerns the assessment that the practice of a certain rule is a sufficiently good way to achieve those values. This is the Kantian issue of establishing whether one may want a rule (in this case a meta-rule) to become a universal law. For instance, we may consider whether the fact that UN-resolutions where considered legally binding by all States would be a good way to achieve the values we just mentioned

Item (3): It concerns the chance that by individually adopting this rule one may contribute to its general adoption. This concerns the feasibility of the Kantian assumption, namely, whether the rule has any chance of really becoming a universal law (more modestly, of being adopted by the community ad issue). For instance, we need to consider whether there is any chance that all or most States become committed to endorse UN-resolutions as being legally binding.

From our perspective, the Kantian pre-condition (item 2) is a necessary, but insufficient for deriving a bindingness conclusion, since the solitary adoption

of a rule (and of a meta-rule) can be disruptive, even when its universal adoption would be beneficial. For example, if nobody accepts the idea that UN-resolutions are binding, the solitary attempt (by one or more states) to implement a resolution against its violators may result in war and disaster.

Similar considerations, though in a less dramatic context, may apply to a civil lawyer who has to establish whether precedents are to be considered binding within his or her jurisdiction. In a common law country, following a precedent which one considers to have been badly decided (though not so badly as to justify overruling) may be a good practice, which contributes to generate certainty, maintain the institution of precedent, and stimulate a legislative change of the law.

Doing the same in a country where most judges feel free to depart from badly decided precedents might on the contrary contribute to legal uncertainty, by violating existing expectations (since citizens and lawyers expect that judges will depart from precedents that appear to have been badly decided).

In concluding our discussion of legal sources, we need to observe that according to our model not all legally binding propositions need to be the content of a legal source: The judgement that a normative proposition is legally binding may be directly based upon teleological considerations concerning the value-impact of the collective endorsement of a certain propositions, and on the chance that collective endorsement will be obtained. Finally, also when one is referring to a legal source, the data provided by the source may need to be integrated with further components, which may not be (fully) determined by other sources (this is what generally happens in legal interpretation).

25.3. A Logic for Legal Pluralism

In the following section, we shall provide a *pluralist extension* of legal logic, in order to enable a legal reasoner to deal with the interactions between different legal systems, through a unitary reasoning process. First we shall explain why this extension is needed and how we can index normative propositions to different normative systems. Then we shall present an example, and will identify some basic reasoning patterns that are required for *pluralist legal reasoning*.

25.3.1. The Need for a Pluralist Legal Logic

In our increasingly interconnected world, lawyers need frequently to take into consideration different normative systems.

First of all, we need to deal with different national legal systems. In particular, according to the rules of the conflict of laws, domestic judges are bound to apply foreign laws in many circumstances.

Secondly, there are various form of transnational or international law: rules produced by various international organisations (the United Nations, the Word

Trade Organisation, the European Community, and so on), various forms of transnational customary or soft law (Internet law, *lex mercatoria*, and so forth).

Thirdly, there are various kinds of subnational laws: laws of autonomous member States and regions, of tribal or ethnic communities, of religious persuasions, and so on.

One may wonder to what extent one may properly speak of laws with regard to such diverse normative materials. We do not need to enter into the old discussion concerning legal pluralism, and consider whether only State law is real law, or whether any social organisation has its own "legal system".[9] What matters for us is that when one engages in legal reasoning—in a situation where different normative systems overlap, interact, and sometimes compete—one must be able to distinguish different normative systems, to explore the perspective peculiar to each one of them, but also to understand their interactions, namely, the ways in which each normative system takes into account the content and implications of other normative systems.

In other terms, we need a way of modelling both the reciprocal closure and openness of different normative systems: How a normative system may disregard the normative qualifications determined by other normative systems, or may on the contrary accept such qualifications, replicate them within itself, and use them as premises for further inferences.

Finally, we need a way of showing how each normative system not only takes into account its own conclusion, but is also able to recognise empirical evidence, and link legal effects to events in the world: All normative systems share the same empirical and social world and may thus take into account the same events, though possibly linking to such events different normative qualification.

It seems that we have outlined a tremendous task for legal logic. However, in the following we hope to show that a simple solution is available, at least for our limited concerns.

In representing normative propositions belonging to different systems, we shall use the symbol $\odot$ as an abbreviation for the locution *relatively to* (or, if you prefer, an abbreviation for "from the perspecive of," or "from the viewpoint of", as the eye-like shape $\odot$ indicates). Thus, to specify that proposition φ holds relatively to the normative system (relatively to the perspective) S we write:

$$\varphi_{\odot S}$$

When φ is a long formulas, written in more then one line, we shall prefix the locution $\odot S$, and write;

$$\begin{array}{l}\odot S \\ \quad \varphi\end{array}$$

[9] As claimed for instance by Romano (1977), whose pluralist views had a significant impact on the Italian legal culture. In particular, the idea that the customs of Sardinian shepherds, with regard to revenge, could be viewed as a legal system was developed by Pigliaru 1959.

As we shall see in the following example, we shall allow a proposition of a normative system to include propositional constituents which hold relatively to a different normative system, and which are to be established accordingly. Thus, to express that, relatively to system S_1, the fact that antecedent A holds relatively to system S_2 determines consequent B, we write:

$(\text{IF } \mathsf{A}_{\odot S_2} \text{ THEN } B)_{\odot S_1}$

or equivalently

$\odot S_1$
IF $\mathsf{A}_{\odot S_2}$
THEN B

25.3.2. *An Example in Pluralist Normative Reasoning*

For exploring pluralist legal thinking, we shall consider an example concerning the interaction between Canon law (the law of the Catholic church) and Italian law. For simplicity's sake, we shall provide very rough approximations of the rules of such normative systems.

Canon law includes a rule according to which the expression of intention of the spouses plus the declaration of a priest determines marriage:[10]

$\odot$*Catholic*
FORANY (x, y)
IF [x and y declare that they intend to be married]
AND
[a priest proclaims that x and y are married]
THEN^n [x and y are married]

Similarly, there is a rule of Italian law to the effect that if two people declare that they are married, and the city mayor proclaims their marriage, then they are married (other countries give this power to other officials, such as justices of peace, but this is not relevant to our example):

$\odot$*Italian*
FORANY (x, y)
IF [x and y declare that they intend to be married]
AND
[the city mayor proclaims that x and y are married]
THEN^n [x and y are married]

Moreover, there is rule for Catholic marriage saying that married people have the obligation to try to have children (or at least not to prevent this from happening).

[10] to keep our example simple, we omit many preconditions of Catholic marriage, such as the spouses having different sexes, not having certain kinds of family links, and so on.

$\odot$*Catholic*
FORANY (x, y)
IF [x and y are married]
THEN^n [x and y must try to have children]

There is also a rule of Italian law saying that a Catholic marriage (the fact that two people are married according to the Canon law) is recognised as an Italian marriage (under certain conditions that we omit here):

$\odot$*Italian*
FORANY (x, y)
IF [x and y are married]$_{\odot Catholic}$
THEN^n [x and y are married]

This is a case of *non-deontic emergence*: Being married relatively to the Catholic Church determines being married relatively to the Italian state, according to Italian law.[11]

Finally, there is also a rule of Italian law saying that marriage can be dissolved by divorce:

$\odot$*Italian*
FORANY (x, y)
IF [x and y are married]
THEN^n [x and y can divorce]

The intuitive implications that a legal reasoner should derive according to the above-mentioned rules are clear. Assume that two persons—let us call them *John* and *Mary*—have gone through a Catholic marriage.

One should be able to conclude all of the following:

- they are married relatively to Catholic law;
- they are married relatively to Italian law;
- they have the obligation to try to have children (only) relatively to the Catholic law; and
- they their marriage can be terminated through divorce (only) relatively to Italian law.

25.3.3. An Analysis of Pluralist Normative Reasoning

To approach pluralist reasoning we need to differentiate two ways in which a reasoner can endorse a proposition.

[11] More exactly, we may say that this is a case of *non-deontic initiation*: Getting married relatively to the Catholic church starts being married relatively to the Italian state, but being married relatively to the Italian state can be terminated (by divorce) when one still is married relatively to the Catholic church.

First of all, a reasoner can endorse a proposition *absolutely*, that is, without linking one's endorsement to a particular point of view in which one is participating (or may participate). When one is absolutely endorsing a proposition, one may use this proposition in whatever inference one is performing, from whatever perspective, unless one has specific reasons to not to use it: We view absolute endorsement as being *defeasibly universal*.

This is usually the case for epistemic propositions, though also with regard to epistemic proposition one may distinguish the results one obtains according to different probatory standards, pertaining to different perspectives one is adopting (for instance one may distinguish conclusions obtained according to science or religious faith). To remark that a proposition is absolutely endorsed, we add to it the prefix or the suffix *absolute*.

Secondly, one may endorse a proposition *relatively*, that is, with regard to a specific point of view one takes (one participates in). This is usually the case for normative propositions. We have remarked how one may have different roles (a self-centred individual, a member of a family, an employee, a citizen, a member of humanity, and so forth), and how one may reach different practical conclusions when reasoning in each one of these capacities.

Similarly, one may reason according to different legal systems. With regard to each different system one is considering, one needs to adopt premises suitable to that particular system and reach conclusion that are relative to that system.[12]

Let us now consider how absolutely and relatively endorsed propositions can be combined in reasoning. Assume that the reasoner j believes that the normative conditional $\lceil$IF A THEN^n $B\rceil$ holds relatively to the normative system S_1. In other words j endorses the relativised normative conditional:

$$(\text{IF } A \text{ THEN}^n\ B)_{\odot S_1}$$

We need to distinguish three different ways in which j may endorse the precondition A of this conditional, and consider what inferences are correspondingly licensed:

1. j endorses A *absolutely*. On the ground (the reason) that (*i*) $\lceil$IF A THEN^n $B\rceil$ holds relatively to S_1 and (*ii*) A holds absolutely, j *can* conclude that (*iii*) B holds relatively to S_1.
2. j endorses A holds *relatively to* S_1. On the ground that both of (*i*) $\lceil$IF A THEN^n $B\rceil$ and (*ii*) A hold relatively to S_1, j *can* conclude that (*iii*) B holds relatively to S_1.
3. j endorses A *relatively to a different normative system*, let us call it S_2. In this case, on the ground that (*i*) IF A THEN^n $B\rceil$ holds relatively to

[12] Note that our notions of *absolutely endorsed proposition* and *relatively endorsed proposition* may be connected to notions of *brute fact* and *institutional fact*, which one can find in Searle (1969; 1989). We prefer our notions, since they are more general and have an epistemic, rather than an ontological characterisation.

(1) [$John$ and $Mary$ declare that they intend to be married]$_{\odot absolute}$;
(2) [a priest proclaims that $John$ and $Mary$ are married]$_{\odot absolute}$;
(3) $\odot Catholic$
FORANY (x, y)
IF [x and y declare that they intend to be married] AND [a priest proclaims that x and y are married]
THEN^n [x and y are married]

---

(4) [$John$ and $Mary$ are married]$_{\odot Catholic}$

Table 25.10: *Relative conclusion on the basis of mixed (relative and absolute) preconditions*

S_1 and (*ii*) A holds relatively to S_2, j *cannot* conclude that (*iii*) B holds relatively to S_1.

The inference that is licensed according to item (1)—the relative endorsement of a rule, and the absolute endorsement of the rule's antecedent lead to the relative endorsement of the rule's conclusion— is exemplified in Table 25.10: On the basis of the relative endorsement of the rule on Catholic marriage, and of the absolute belief that the rule's preconditions are satisfied we conclude that that two spouses are married relatively to the Catholic Church.[13]

Table 25.11 on the next page exemplifies the inferences that are licensed according to item (2). The endorsement of a rule relatively to a system and the endorsement of the rule's antecedent relatively to the same system lead to the relative endorsement of the rule's conclusion: On the basis of the Catholic endorsement of the rule that spouses have the obligation to try to have children and of the Catholic belief that John and Mary are married, we can conclude that they have the obligation to try to have children, relatively to the Catholic Church.

According to item (3), inferences are not licensed by premises being endorsed relatively to different systems. For instance, being married according to the Italian law does not determine the procreative obligation between spouses according to Catholic law. Canon law attributes this obligation to people that count as spouses from the perspective of Canon law, and, according to Canon law, being married according to Italian law does not determine marriage.

Thus, the fact that a certain normative qualification Q (John and Mary are married) holds relatively to a normative system S_1 does not determine the ef-

[13] This is an instance of non-deontic initiation, but for simplicity's sake we omit specifying this by using temporal and deontic predicates.

(1) [$John$ and $Mary$ are married]$_{\odot Catholic}$;
(2) $\odot Catholic$
FORANY (x, y)
IF x and y are married
THEN^n ***Obl*** [x and y try to have children]

---

(3) [***Obl*** x and y try to have children]$_{\odot Catholic}$

Table 25.11: *Relative conclusion on the basis of relative preconditions*

fects that another normative system S_2 links to the same qualification Q. These effects are only generated when S_2 specifically recognises Q relatively to S_1, that is, when a rule of S_2 states that Q's holding relatively to S_1 determines Q's unqualified holding. In our example, this is done by the rule of Italian law that recognises Catholic marriage, while there is no corresponding rule of Canon law recognising Italian marriages.

For providing a logical account of this way of reasoning, we introduce three reasoning schemata which you can see in Table 25.12 on the following page. The first schema in Table 25.12 on the next page, *relativisation*, deals with absolute endorsement. It says that when one absolutely believes a proposition, then one may (defeasibly) endorse that proposition relatively to any specific point of view or perspective (in particular, any normative system). Note that we write "believing that $A_{\odot absolute}$" to mean ⌈believing A relatively to the absolute perspective⌉, and "believing that $A_{\odot S}$" to mean ⌈believing A relatively to the perspective of system S⌉.

The second reasoning schema in Table 25.12 on the following page, *relativised detachment*, states that, when believing both a relativised conditional and a relativisation of its antecedent, one may endorse a relativisation of its consequent. Note that we write "believing that S: IF A_1AND ... AND A_nTHEN^n B" to mean ⌈believing that ⌈IF A_1AND ... AND A_nTHEN^n B⌉ relative to the perspective of system S."

By combining *specification* with *relativised detachment* we obtain the third reasoning schema in Table 25.12 on the next page, *relativised syllogism*.

This is not the only possible formalisation of the logical interactions between normative systems.[14] However it seems to us that our approach is sufficiently

[14] An alternative approach consists in assuming that from a relativised conditional connection ⌈S: IF A THEN^n B⌉ one may infer a non-relativised conditional connection between relativised proposition, ⌈IF $A_{\odot S}$ THEN^n $B_{\odot S}$⌉. Then one can reason using the latter proposition and detach $B_{\odot S}$ according to usual syllogism. The issue of the logical connections between different normative systems is also discussed, though adopting different formalisations, in Jones and Sergot 1996, and Gelati et al. 2002b.

Reasoning schema: *Relativisation*

(1) believing that $A_{\odot absolute}$

——— IS A DEFEASIBLE REASON FOR

(2) believing that $A_{\odot S}$

Reasoning schema: *Relativised detachment*

(1) believing that (IF A_1 AND ... AND A_n THEN^n $B)_{\odot S}$;

(2) believing that $(A_1)_{\odot S}$, ..., $(A_n)_{\odot S}$

——— IS A DEFEASIBLE REASON FOR

(3) believing that $(B)_{\odot S}$

Reasoning schema: *Relativised syllogism*

(1) believing that

(FORANY (x) IF A_1 AND ... AND A_n THEN^n $B)_{\odot S}$;

(2) believing that $(A_1[x/a])_{\odot S}$, ..., $(A_n[x/a])_{\odot S}$

——— IS A DEFEASIBLE REASON FOR

(3) believing that $(B[x/a])_{\odot S}$

Table 25.12: *Reasoning schemata for pluralist normative reasoning*

intuitive and general. In particular, it can be viewed as an application of the logic of beliefs in a multi-agent framework, where each perspective counts as a different reasoner (in the logic of belief, from j believes that A, and j believes that IF A THEN B, one usually infers that j believes that B). Thus, the reasoning of a single agent—who is considering different perspectives and taking in account their connections—proceeds like the reasoning of different persons who take into account the beliefs of others. Unfortunately we cannot now develop further this idea, going into the logical technicalities of multi-agent reasoning.

Let us content ourselves with an application of these reasoning schemata to our marriage example, as you can see in Table 25.13 on the facing page. The table shows why John and Mary, who made a Catholic marriage, can now divorce according to Italian law.

We hope that this example suffices to show how our approach enables a reasoner to adopt the perspective of different legal systems (to identify with each one of them), but also to take into account their differences and their connections.

Our model does not only apply to the connection between the law of a state and another kind of normative system (like Canon law, or Muslim law). It also applies when a conflict of state laws is at issue.

1. $[John$ and $Mary$ declare that they intend to be married$]_{\odot absolute}$
2. $[John$ and $Mary$ declare that they intend to be married$]_{\odot Catholic}$
   ⟨from 1, by relativisation⟩
3. [a priest declares that $John$ and $Mary$ are married$]_{\odot absolute}$
4. [a priest declares that $John$ and $Mary$ are married$]_{\odot Catholic}$
   ⟨from 3, by relativisation⟩
5. $\odot Catholic$
   FORANY (x, y)
   IF [x and y declare that they intend to be married] AND
   [a priest proclaims that x and y are married]
   THEN^n [x and y are married]
6. $[John$ and $Mary$ are married $]_{\odot Catholic}$
   ⟨from 2, 4 and 5, by relativised detachment⟩
7. $\odot Italian$
   FORANY (x, y)
   IF [x and y are married$]_{\odot Catholic}$
   THEN^n [x and y are married$]_{\odot Italian}$
8. $[John$ and $Mary$ are married $]_{\odot Italian}$
   ⟨from 6 and 7, by relativised detachment⟩
9. $Italian$:
   FORANY (x, y)
   IF [x and y are married$]_{\odot Italian}$
   THEN^n [x and y can divorce$]_{\odot Italian}$
10. $[John$ and $Mary$ can divorce$]_{\odot Italian}$
   ⟨from 8 and 9, by relativised detachment⟩

Table 25.13: *Catholic marriage and Italian divorce*

Consider for example the domain of contract law, where the parties have the possibility of choosing what law should govern their relationship. Assume that an Italian and a US company agree that Italian law applies to their contract. Then the US judge will have to apply Italian rules, like for instance the rule saying that any clause stating that one is not liable in case of serious negligence is void. This means that the qualification established by the Italian law in such a case (the voidness of the clause) will determine the same qualification according to US law.

Chapter 26

ARGUMENTATION FRAMEWORKS

In this chapter we shall integrate the logical tools we have so far introduced in order to provide a broader picture of *inferential legal argumentation*, namely, the ratiocinative process through which a reasoner reaches justified legal conclusions.[1]

We shall focus on what we called *inferential justifiability* (see Definition 3.3.1 on page 106), referring justification to the reasoner's current beliefs. Our purpose is to establish what legal conclusions one is rationally licensed to endorse, through ratiocination, on the basis of the information one currently has.

This means that when considering what conclusions are justified we shall abstract from the possibility that one uses non-ratiocinative processes (heuresis) for expanding one's beliefs, and that one gets new cognitive inputs through perception or interaction with others. Consequently, our analysis of inferential justification will not address the appropriateness of the process through which the reasoner has acquired the cognitive inputs he or she is processing according to ratiocination.[2]

Obviously, we do not exclude that non-ratiocinative processes take place. On the contrary, we view heuresis, perception, and interaction as the key aspects of cognition, since they provide the necessary inputs to ratiocination. However, for any set of such inputs, it is up to ratiocination to build inferential derivations, according to its own methods. Such derivations will need to be computed again when new relevant inputs are provided.

[1] This chapter is based upon joint work with Henry Prakken. In particular various sections are adapted from the following contributions: Prakken and Sartor 1995; Prakken and Sartor 1996; Prakken and Sartor 1997. I am very grateful to Henry for his generosity in allowing me to make use of the outcomes of our effort. I must take responsibility for the modifications I have made in order to embed our model of defeasible reasoning into the overall framework of this book, and in order to simplify its presentation avoiding as much as possible logical technicalities. In general in the account here presented we have favoured simplicity over rigour. The reader who wants to have a full formal introduction is advised to go back the contributions we have just mentioned. In the last years there has been a large number of contributions to defeasible reasoning based upon the idea of argumentation. See for instance: Simari and Loui 1992; Dung 1993; Dung 1995; Gordon 1995; Kowalski and Toni 1996, Hage 1997; Bondarenko et al. 1997; Governatori and Maher 2000. For a review of defeasible logics, see Prakken and Vreeswijk 2002.

[2] We have considered this issue, to some extent in Section 11 on page 303, in particular when addressing dialectical models of legal procedures.

26.1. From Inference Steps to Arguments

While in the previous chapters we have only focused on single reasons and inference schemata, now we want to capture broader forms of reasoning. We shall do that by combining inference steps into arguments.

26.1.1. The Notion of an Argument

By an *inferential argument* we mean a sequence of inference steps, where each step is the application of a reasoning schema, that is, the transition from a reason to a corresponding conclusion. More precisely, focusing on the propositional contents forming the preconditions and the postconditions of these inference steps, we can provide the following definition.

Definition 26.1.1 *Inferential argument. An* inferential argument *is a sequence of propositions that satisfies the following conditions:*

1. *each proposition is either a premise or a conclusion derived from previous propositions in the argument, according to a defeasible or conclusive inference schema;*
2. *no proposition is repeated;*
3. *all propositions, except the last one, provide a subreason for the derivation of a subsequent conclusion in the argument.*

Condition (1) requires an inferential connection between the components of an argument. With regard to conclusive schemata, we are going to use all inference schemata we have introduced for classical logic. With regard to defeasible inference schemata, we shall mainly employ schemata *normative specification* and *normative detachment*, and their combination into *normative syllogism*. In the following sections, we shall start by studying arguments that only contain defeasible inferences, and then consider how to accommodate also conclusive inferences.

Condition (3) ensures relevance. It requires that an argument does not contain information that is irrelevant to establishing the argument's final conclusion.

When no ambiguity arises, we shall use the term *argument* to mean *inferential argument*, though the term *argument* is often used in a broader sense, also including heuresis or multi-agent disputations (as observed, for instance, by McCarty 1997).

Moreover, we shall use the term *discourse* to mean any *set of arguments*, though this term too is used in different senses both in common and in theoretical language (like in the so-called discourse-theory, where it rather refers to dialectical interaction, see Section 11 on page 303).

26.1.2. Some Notational Devices

Since in this chapter we are going to use many formulas, it is opportune to introduce some terminology and some notation, which are exemplified in Table 26.1 on page 673.

The premises of our arguments are taken from *premise sets*, which we denote through lowercase Greek letters ($\alpha, \beta, \ldots$). In general, a premise set contains the information, or the noemata, that one endorses as being relevant to a certain issue, and which one is ready to use when reasoning about that issue. As one may (and usually does) endorse conflicting reasons, a premise set can contain premises that allow the construction of different, and often incompatible arguments.

A premise belonging to a certain premise set is denoted by a label combining the name of the premise set and a serial number. For instance, the first premise in premise set α is denoted by label α_1, the second premise, by α_2, and so on (Table 26.2 on page 673). The possibility of naming linguistic entities is particularly important in the legal domain, since it allows us to refer to such entities, and also to give different names to different tokens of the same abstract linguistic object (for instance, to different instances of the same sentence, included in different legal sources).

We adopt the following convention: Each proposition in an argument is preceded by a number indicating the proposition's place in the argument (see, for instance, argument $\mathcal{A}^\alpha$, in Table 26.1 on page 673).

With reference to a labelled quantified proposition

$$p\text{:} \quad \text{FORANY}\ (x_1, \ldots, x_n)\ A$$

we denote as $p(a_1, \ldots, a_n)$ the formula we obtain by specifying the universal proposition p with regard to individuals named $a_1, \ldots, a_n$. This formula is the result we obtain by dropping the universal quantifier and substituting all occurrences of variables $x_1, \ldots, x_n$ in p with individual names $a_1, \ldots, a_n$.[3] For instance, given premise:

p_1: FORANY (x, y)
IF x is the owner of y
THEN x is responsible for y

which expresses the fundamental principle of the owner's responsibility, the expression $p_1(Tom, Fido)$ refers to the application of the universal proposition p_1 to Tom and his dog $Fido$, that is, to the proposition:

[3] The idea of substitution (a concept which also plays a fundamental role in logic programming, see Lloyd 1987, sec. 4) could be made more general and precise, but this characterisation is sufficient for our purposes.

$p_1(Tom, Fido)$:
IF [Tom is the owner of $Fido$]
THEN [Tom is responsible for $Fido$]

Some further notational devices will be used in symbolic formulas.

As is usually done in formal logic, we write $Pr(a)$ to mean that entity a has property Pr, namely, that a is a Pr. Similarly, we write $Rel(a, b)$ to mean that a and b are in relation Rel. For instance $dog(Fido)$ will be read as the proposition that ⌈Fido is a dog⌉ and $owns(Tom, Fido)$, as the proposition that ⌈Tom owns $Fido$⌉.

Moreover, besides expressing normative conditionals in the form we have adopted so far:

IF A THEN^n B,

we shall also use the following abbreviation, whenever a more compact notation is convenient:

$A \Rightarrow B$

Finally, we assume that connectives AND and OR have the highest priority, followed by IF ... THEN^n and finally by the quantifiers FORANY and FORSOME. This means that:

FORANY (x) IF A AND B THEN^n C

will be read as:

FORANY (x) (IF (A AND B) THEN^n C)

All these notational stipulations are used in the sequence of symbolic formulas in Table 26.1 on the next page. This sequence satisfies all conditions indicated in Definition 26.1.1 on page 670, and thus qualifies as an argument.

26.1.3. The Lebach Example

Let us now apply the notion of an argument in an extensive example. We shall analyse a judgement of the German Constitutional Court, the *Lebach Urteil* (1973), to which debate on legal argumentation has frequently referred, following the discussion in Alexy 1980. This decision concerned a television documentary about a serious crime, the murder of four soldiers during an attack to a munitions deposit of the German army, in the city of Lebach. The documentary mentioned the names of participants in the crime and showed their photos. One participant (who had a minor role in the offence) affirmed that the documentary violated his privacy and compromised the chances of his social rehabilitation, and therefore violated his personality right (right to the free development of the

Argument $\mathcal{A}^{\alpha}$

1.	α_1:	$p_1(a)$	⟨premise⟩
2.	α_2:	$p_2(a)$	⟨premise⟩
3.		$p_1(a)$ AND $p_2(a)$	⟨from 1 and 2, by AND *introduction*⟩
4.	α_3:	FORANY (x) $p_1(x)$ AND $p_2(x) \Rightarrow p_3(x)$	⟨premise⟩
5.	$\alpha_3(a)$:	$p_1(a)$ AND $p_2(a) \Rightarrow p_3(a)$	⟨from 4, by *specification*⟩
6.		$p_3(a)$	⟨from 3 and 5, by *detachment*⟩
7.	α_4:	FORANY (x) $p_3(x) \Rightarrow p_4(x)$	⟨premise⟩
8.	$\alpha_4(a)$:	$p_3(a) \Rightarrow p_4(a)$	⟨from 7, by *specification*⟩
9.		$p_4(a)$	⟨from 6 and 8, by *detachment*⟩

Table 26.1: *Symbolic argument*

Premise set α

α_1: $p_1(a)$
α_2: $p_2(a)$
α_3: FORANY (x)
$p_1(x)$ AND $p_2(x) \Rightarrow p_3(x)$
α_4: FORANY (x)
$p_3(x) \Rightarrow p_4(x)$
α_5: $p_5(x)$
α_6: $p_5(x) \Rightarrow$ NON $p_3(x)$

Table 26.2: *Symbolic premise-set*

personality), protected by the German Constitution. The German Federal Constitutional Court (*Bundesverfassungsgericht*) prohibited the broadcast. As Alexy (1980) observes, the constitutional judges ground their decision in three steps:

1. They admit that in the Lebach case a comparative evaluation is necessary, since two conflicting constitutional propositions are applicable: (*a*) the right to privacy, excluding the publication of personal information, and (*b*) the right to communication, granting the liberty of propagating information. Moreover, they observe that neither of these rights is to be unconditionally preferred to the other. Only the particular circumstances of a case allow a choice to be made.
2. They affirm that the interest of the public in being informed by television about crimes usually outweighs the serious violation of privacy regularly caused by television programmes concerning criminal offences. This predominance, nevertheless, is not to be recognised when these offences are no longer actual.

Argument $\mathcal{A}^{\beta}$

1. β_1: *Lebach documentary* is a television programme ⟨premise⟩
2. β_2: *Lebach documentary* mentions *Tom* as the author of a criminal offence ⟨premise⟩
3. β_3: FORANY (x, y)
   IF [x is a television programme] AND
   [x mentions y as the author of a criminal offence]
   THEN^n [x violates y's privacy] ⟨premise⟩
4. [*Lebach documentary* violates *Tom*'s privacy]
   ⟨from 1, 2, 3, by *extended syllogism*⟩
5. β_4: FORANY (x, y)
   IF [x violates y's privacy]
   THEN [y has the (absolute obligative) right that x is not broadcast]
   ⟨premise⟩
6. *Tom* has the (absolute obligative) right that *Lebach documentary* is not broadcast ⟨from 4 and 5, by *syllogism*⟩

Table 26.3: *Privacy argument*

3. They conclude that it is not permissible to broadcast a documentary concerning a no-longer actual criminal offence (as the Lebach murder), if this can cause a new or additional prejudice to the offender.

In the following, we take the liberty of developing the Lebach example freely, without concerns for historical truth. In particular—and also in order not to violate the very privacy regulations we are discussing—we denote the involved persons through fictitious names.

A simple argument (in declarative form) we can extract from the reasoning of the German court is indicated in Table 26.3. The reader can check that the sequence of propositions in Table 26.3 qualifies as an argument, by satisfying the conditions of Definition 26.1.1 on page 670.

Similarly (we are now developing the Lebach example, without reference to the real facts of the case), we can build an argument for the right to broadcast the program on the head of Mary, the author of the television program (or on the head of the company for which she works), as shown in Table 26.4 on the facing page.

26.1.4. Arguments and Premise Sets

By a *premise* of an argument we mean any proposition (more generally, any noema) that is contained in the argument, without following from other propositions in the argument.

Argument $\mathcal{B}^\beta$

1.	β_5:	*Lebach documentary* reports factual information	⟨premise⟩
2.	β_6:	FORANY (x) IF $[x$ reports factual information$]$ THEN^n $[x$ can contribute to informing the public$]$	⟨premise⟩
3.		*Lebach documentary* can contribute to informing the public	⟨from 1,2, 3, by *extended syllogism*⟩
4.	β_7:	$[Mary$ is the author of the *Lebach documentary*$]$	⟨premise⟩
5.	β_1:	*Lebach documentary* is a television programme	⟨premise⟩
6.	β_8:	FORANY (x, y) IF $[x$ is the author of $y]$ AND $[y$ is a television programme$]$ AND $[y$ can contribute to informing the public$]$ THEN $[x$ has the (absolute permissive) right to broadcast $y]$	⟨premise⟩
7.		$Mary$ has the (absolute permissive) right to broadcast *Lebach documentary*	⟨from 5, 1, 4 and 6, by *syllogism*⟩

Table 26.4: *Freedom-of-information argument*

In our examples, arguments are built with premises that are extracted from premise sets and are labelled accordingly. When all premises of an argument are taken from a premise set, we say that the argument is *based upon* that premise set.

Definition 26.1.2 *Argument based upon premise set. An argument $\mathcal{A}$ is* based upon *the premise set θ iff every premise of $\mathcal{A}$ is contained in θ.*

For any premise set θ, we shall use the expression $\widehat{\theta}$ to denote the set of all arguments based on θ. Thus, rather than saying that argument $\mathcal{A}$ is based upon θ we may also say that $\mathcal{A}$ is contained in $\widehat{\theta}$ (abbreviated as $\mathcal{A} \in \widehat{\theta}$).

We also use the convention of denoting arguments with labels having the form $\mathcal{A}^\theta$, where θ is the premise set the argument is based upon. For instance, both arguments $\mathcal{A}^\beta$ and $\mathcal{B}^\beta$ (Table 26.4 and Table 26.3 on the facing page) are based upon premise set β (Table 26.5 on the next page), since both belong to $\widehat{\beta}$.

We shall always assume that arguments are based upon particular premise sets, though we shall mention this only when necessary to avoid ambiguities. In our psychology-based perspective, we may say that the premise set θ is a portion of the memory of the reasoner, possibly integrated by external sources of information (books, computers, etc.).

Thus, selecting a proposition as a premise amounts to inferring it from one's memory, or from that portion of one's memory that reflects a specific concern or a specific position of the reasoner.

One's premises also include the hypotheses one provisionally adopts as the

Premise set β

β_1: *Lebach documentary* is a television programme;
β_2: *Lebach documentary* mentions *Tom* as the author of a criminal offence
β_3: FORANY (x, y)
  IF [x is a television programme] AND
   [x mentions y as the author of a criminal offence]
  THEN^n [x violates y's privacy]
β_4: FORANY (x, y)
  IF [x violates y's privacy]
  THEN [y has the (absolute obligational) right that x is not broadcast]
β_5: *Lebach documentary* reports factual information
β_6: FORANY (y)
  IF [y reports factual information]
  THEN^n [y can contribute to informing the public]
β_7: Mary is the author of *Lebach documentary*
β_8: FORANY (x, y)
  IF [x is the author of y] AND
   [y is a television programme] AND
   [y can contribute to informing the public]
  THEN ⌈x has the (absolute permissive) right to broadcast y

Table 26.5: *The Lebach premise-set*

basis for further inquiries possibly leading to their confirmation (or to their refutation).

26.1.5. Subarguments

To complete the basic notions we need for analysing argumentation, we have to introduce subarguments:

Definition 26.1.3 *Subargument.* $\mathcal{A}^*$ *is a* (proper) subargument *of argument* $\mathcal{A}$ *iff:*

1. $\mathcal{A}^*$ *is an argument,*
2. $\mathcal{A}^*$ *is (strictly) included in* $\mathcal{A}$*, and*
3. *the order of the premises in* $\mathcal{A}^*$ *matches their order in* $\mathcal{A}^*$*.*

By "$\mathcal{A}^*$ is included in $\mathcal{A}$," which we abbreviate as $\mathcal{A}^* \subseteq \mathcal{A}$, we mean, as usual, that all elements in $\mathcal{A}^*$ are also in $\mathcal{A}$ ($\mathcal{A}^*$ is a subset of $\mathcal{A}$). Similarly, by "$\mathcal{A}^*$ is strictly included in $\mathcal{A}$", which we abbreviate as $\mathcal{A}^* \subset \mathcal{A}$, we mean that all elements in $\mathcal{A}^*$ are in $\mathcal{A}$, but some elements in $\mathcal{A}$ are not in $\mathcal{A}^*$ ($\mathcal{A}^*$ is a strict subset of $\mathcal{A}$). By "the order of the premises in $\mathcal{A}^*$ matches their order in $\mathcal{A}^*$"

Subargument of $\mathcal{A}^{\alpha}$

1.	α_1:	$p_1(a)$	⟨premise⟩
2.	α_2:	$p_2(a)$	⟨premise⟩
3.		$p_1(a)$ AND $p_2(a)$	⟨from 1 and 2, by AND *introduction*⟩

Table 26.6: *Symbolic subargument*

Subargument of $\mathcal{B}^{\beta}$

1.	β_5:	*Lebach documentary* reports factual information	⟨premise⟩
2.	β_6:	FORANY (x) IF [x reports factual information] THEN^n [x can contribute to informing the public]	⟨premise⟩
3.		*Lebach documentary* can contributes to informing the public	⟨from 1,2, 3, by *extended syllogism*⟩

Table 26.7: *Substantive subargument*

we mean that whenever a proposition B_1 precedes a proposition B_1 in $\mathcal{A}^*$, then B_1 must precede B_2 also in $\mathcal{A}$.

As you can see in Table 26.6, a strict subargument of $\mathcal{A}^{\alpha}$ (Table 26.1 on page 673) and in Table 26.7 a strict subargument of $\mathcal{B}^{\beta}$ (Table 26.4 on page 675).

26.2. Meta-Level Arguments

It has often been affirmed that logical reasoning can only provide *first-level* or *internal justifications* of legal decisions: According to this opinion, logic can justify the results that are obtained by applying rules but it cannot justify the applied rules (see Section 14.2.5 on page 401).

Our logical model does not have this limitation, since it includes the logical derivation of rules (see Section 23.3.2 on page 598). In particular, we provide higher-level logical justifications according to schema *meta-syllogism*, which is a compound inference rule combining reasoning schemata *syllogism* (which includes, in its turn, *detachment* and *specification*) and *de-doxification* (in particular, *Binding-elimination*).

In our model, consequently, one can build arguments that combine the inference of rules and the use of the inferred rules.

Premise set γ

γ_1: FORANY (ϕ)
IF $[Procl_{Parliament}\phi]$
THEN^n [*Binding* ϕ]
γ_2: $Procl_{Parliament}$
r_1: FORANY (x)
IF [x is on public premises]
THEN^n [x must not smoke]
γ_3: Tom is on public premises

Table 26.8: *Premise set for meta-reasoning*

Argument $\mathcal{A}^\gamma$

1. γ_1: FORANY (ϕ)
IF $[Procl_{Parliament}\ \phi]$
THEN^n [*Binding* ϕ] ⟨premise⟩
2. γ_2: $Procl_{Parliament}$
r_1: FORANY (x)
IF [x is on public premises]
THEN^n [x must not smoke] ⟨premise⟩
3. r_1: FORANY (x)
IF [x is on public premises]
THEN^n [x must not smoke] ⟨from 1 and 2, by *meta-syllogism*⟩
4. γ_3: *Tom* is on public premises ⟨premise⟩
5. *Tom* must not smoke ⟨from 3 and 4, by *syllogism*⟩

Table 26.9: *Meta-syllogism argument (synthetic version)*

26.2.1. A Meta-Level Argument

Assume that Tom endorses all propositions in premise set γ (Table 26.8):

- he believes that the Parliament has the power of issuing rules,[4]
- he believes that the Parliament has issued the rule that ⌈any one is forbidden from smoking when one stays on public premises⌉, and
- he is aware that he is now staying on public premises.

Using only the information in premise set γ, Tom can build argument $\mathcal{A}^\gamma$ (see Table 26.9) and conclude that he must not smoke.

[4] Remember that, according to the ideas we presented in Chapter 23, we use the locution $Procl_j\varphi$ to mean that j has proclaimed proposition φ. Thus $Procl_{Parliament}A$, it to be read as "Parliament proclaims that A," to wit, as "Parliament issues A."

26.2.2. Synthetic and Analytic Arguments

In Table 26.9 on the facing page, argument $\mathcal{A}^\gamma$ is presented in synthetic form, that is, using compound inferences. In Table 26.10 on the next page, we reproduce the same argument indicating all elementary inference steps composing the compound schemata *normative meta-syllogism* and *normative syllogism*.

In the following, to avoid excessive detail (which will compromise readability), we shall only provide a synthetic representation of arguments, leaving the reader the task of unpacking compound inferences.

However, it is important that we remember that compound inference schemata are only abbreviations of the combination of their component elementary schemata. As we shall see, a compound inference can is also impaired when a component elementary inference is attacked, and in such a case we may need to unbind the compound inference to precisely locate the conflict.

26.2.3. Another Meta-Level Argument

To conclude our discussion of meta-inferences, let us address again the Lebach example. Assume for instance that the premise set concerning the Lebach case (Table 26.5 on page 676)—rather than directly containing premise 3 (rule β_3)—contains premises 3.1 and 3.2 in subargument $\mathcal{A}_2^\beta$ (Table 26.11 on page 681), stating that rule β_3 is the *ratio decidendi* of a precedent, and that *rationes decidendi* are binding.

The reasoner endorsing such premises would still be able to derive the conclusion of argument $\mathcal{B}^\beta$ (Table 26.3 on page 674), but through a modified argument, where rule β_3, rather than being inputted as a premise, is derived according to subargument $\mathcal{A}_2^\beta$.

26.3. Collisions between Arguments

We now need to go back to our analysis of collisions between reasons (Section 2.2 on page 55), and extend it to collisions between arguments. First of all we need to define a general notion of a collision between arguments.

26.3.1. The Idea of a Collision between Arguments

Let us recall that in Section 2.2.5 on page 62 we distinguished two kinds of collisions:

1. *rebutting collision*, where two reasons support incompatible conclusions;
2. *undercutting collision*, where one reason leads to the conclusion that another reason is unable to support its own conclusion.

Argument $\mathcal{A}^{\gamma}$

1.	γ_1:	FORANY (ϕ)	
		IF $Procl_{Parliament}\phi$	
		THEN^n *Binding* ϕ	⟨premise⟩
1.1.		IF $Procl_{Parliament}$	
		(r_1: FORANY (x)	
		IF [x is on public premises]	
		THEN^n [x must not smoke])	
.		THEN^n	
		Binding	
		(r_1:FORANY (x)	
		IF [x is on public premises]	
		THEN^n [x must not smoke])	
			⟨from 1, by *specification*⟩
2.	γ_2:	$Procl_{Parliament}$	
		r_1:FORANY (x)	
		IF [x is on public premises]	
		THEN^n [x must not smoke]	⟨premise⟩
2.1.		*Binding*	
		r_1: FORANY (x)	
		IF [x is on public premises]	
		THEN^n [x must not smoke]	
			⟨from 1.1 and 2, by *detachment*⟩
3.1.		r_1: FORANY (x)	
		IF [x is on public premises]	
		THEN^n [x must not smoke]	⟨from 2.1, by *Binding eliminatio*⟩
3.2.		IF [Tom is on public premises]	
.		THEN^n [Tom must not smoke]	⟨from 3.1, by *specification*⟩
4.	γ_3:	Tom is on public premises	⟨premise⟩
5.		Tom must not smoke	⟨from 3.2 and 4, by *detachment*⟩

Table 26.10: *Meta-syllogism argument (analytical version)*

We have also observed that in rebutting collisions the stronger reason prevails, while in undercutting collisions the undercutter prevails, regardless of its comparative strength.

These ideas can be directly transferred to arguments, considering that an argument is a sequence of inferences, where each inference is a transition from a reason to its conclusion: All propositions in an argument are sub-reasons or conclusions of inferences in the argument. Remember a *reason* is a set of preconditions which is sufficient to support a conclusion, according to a reasoning schema. Thus, when a reasoning schema requires the joint combination of certain propositions, for establishing a conclusion, each of such proposition is not a reason, in relation to that inference schema, but only a *subreason*.

Subargument $\mathcal{A}_2^{\beta}$

3.1. $\beta_{3.1}$: FORANY (φ)
IF [rule φ is a *ratio decidendi* of the Supreme Court]
THEN^n *Binding* φ ⟨premise⟩
3.2. $\beta_{3.2}$: (rule β_3:
FORANY (x, y)
IF [x is a television programme] AND
[x mentions y as the author of a criminal offence]
THEN^n [x violates y's privacy])
is a *ratio decidendi* of the Supreme Court
⟨premise⟩
3.3. β_3: FORANY (x, y)
IF [x is a television programme] AND
[x mentions y as the author of a criminal offence]
THEN^n [x violates y's privacy]
⟨from 3.1. and 3.2, by *meta-syllogism*⟩

Table 26.11: *Meta-syllogism subargument*

In particular, in our model:

- Any premise φ in argument $\mathcal{A}^{\theta}$ may be viewed as a reason supporting itself, that is, both as a reason and a conclusion. More exactly, the presence of φ in premise set θ (this is what we express by qualifying a proposition as a premises from θ) is the reason why we adopt φ as a premise in any argument based upon θ.
- The reason for a derived conclusion ψ, with regard to argument $\mathcal{A}$, is the set of propositions which, within argument $\mathcal{A}$, directly leads to ψ.

We say that an argument rebuts another argument when the two arguments contain reasons leading to incompatible conclusions (reasons rebutting each another).

Definition 26.3.1 *Rebutting collision between arguments. Argument $\mathcal{A}_1$* rebuts *argument $\mathcal{A}_2$ iff*

1. *$\mathcal{A}_1$ contains a reason having conclusion φ_1,*
2. *$\mathcal{A}_2$ contains a reason having conclusion φ_2, and*
3. *φ_1 and φ_2 are incompatible.*

Similarly, we say that an argument undercuts another argument when the first argument contains a reason concluding that a reason in the other does not support its conclusion (so that the first reason undercuts the second).

Definition 26.3.2 *Undercutting collision between arguments. Argument $\mathcal{A}_1$* undercuts *argument $\mathcal{A}_2$ iff*

Argument $\mathcal{C}^{\alpha}$

1.	α_5:	$p_5(a)$	⟨premise⟩
2.	α_6:	FORANY (x)	
		$p_5(x) \Rightarrow$ NON $p_3(x)$	⟨premise⟩
3.		NON $p_3(a)$	⟨from 1 and 2, by *syllogism*⟩

Table 26.12: *Symbolic counterargument*

1. *$\mathcal{A}_2$ contains reason R_2, having conclusion φ, and*
2. *$\mathcal{A}_1$ contains reason R_1 concluding that R_2 does not support φ.*

To cover both rebutting and undercutting between arguments, we introduce the notion of an attack.[5]

Definition 26.3.3 *Attack and counterargument. Argument $\mathcal{A}_1$* attacks *(is a* counterargument *to) argument $\mathcal{A}_2$ iff*

- *$\mathcal{A}_1$ undercuts $\mathcal{A}_2$, or*
- *$\mathcal{A}_1$ rebuts $\mathcal{A}_2$.*

26.3.2. Rebutting Collisions

As an example of rebutting, consider arguments $\mathcal{A}^{\alpha}$ (in Table 26.1 on page 673) and $\mathcal{C}^{\alpha}$ (in Table 26.12): Proposition (3) in $\mathcal{C}^{\alpha}$ contradicts proposition (6) in $\mathcal{A}^{\alpha}$.

Similarly, argument $\mathcal{A}^{\beta}$ (Table 26.3 on page 674) rebuts argument $\mathcal{B}^{\beta}$ (Table 26.4 on page 675). This is also an instance of rebutting, since the conclusions of the two arguments are incompatible: ⌈Tom has the right that the documentary is not broadcast⌉ contradicts ⌈Mary has the right to broadcast the documentary⌉. In this case, the incompatibility between the two conclusions does not immediately emerge as a logical contradiction.

To obtain a plain contradiction (to derive both propositions A and NON A) we need to extend the two arguments through conclusive inferences, based upon the deontic notions we defined in Chapter 17 and 19, as we shall see in Section 27.4.3 on page 732.

26.3.3. Undercutting Collisions

In the normative domain *undercutting* is usually based upon the *inapplicability* of a general rule. By saying that a rule is inapplicable to certain entities, we

[5] Our notion of an attack corresponds to that of Prakken and Sartor 1997. Some argumentation theorists have used the word “attack” in a different sense, that is, to denote what we call *defeat* (see Dung 1993 and 1995).

Argument $\mathcal{C}^{\beta}$

1. β_9: Tom agreed to the transmission of $Lebach\ documentary$ ⟨premise⟩
2. β_{10}: FORANY (x, y)
   IF [x agreed to the transmission of y]
   THEN^n [β_3 *is* NOT *applicable to* x and y] ⟨premise⟩
3. β_3 *is* NOT *applicable to* Tom and $Lebach\ documentary$
   ⟨from 1 and 2, by *syllogism*⟩

Table 26.13: *Undercutting counterargument*

precisely claim that we are not authorised to infer the instances of that rule which concern these entities.

Thus, an inapplicability argument directly undercuts the inference specifying the general propositions, as we shall see in Section 26.3.4 on the following page. Accordingly, it also undercuts the syllogism that embeds the specification.

This is exemplified by the collision between $\mathcal{A}^{\beta}$ (in Table 26.3 on page 674) and $\mathcal{C}^{\beta}$ (in Table 26.13).

Undercutting happens according to the defeating schema *inapplicable syllogism*, where v is a sequence of variables, σ is a sequence or terms, and $A(v/\sigma)$ is instance of A which is obtained by substituting in A all occurrences of variables in v with terms in σ.

Defeating schema: *Inapplicable syllogism*

(1) r *is* NOT *applicable to* σ

——— IS A UNDERCUTTING DEFEATER AGAINST

(2) (*a*) r: FORANY (x)
   IF A
   THEN^n B;
   (*b*) $A(v/\sigma)$
   ——— IS A REASON FOR
   (*c*) $B(v/\sigma)$

You can see an instance of this defeat-schema in Table 26.14 on the next page.

This kind of undercutting does not correspond exactly to the original idea of undercutting as introduced in Pollock 1995 (we have presented Pollock's views in Section 2.2.7 on page 65), where undercutting follows from general epistemological principles.

However, we believe that undercutting on the basis of inapplicability conclusions can be added to undercutting on the basis of general epistemological principles.

This way of reasoning corresponds not only to the peculiarities of legal reasoning, but also to the way of proceeding of a critical reasoner, who is able to

Defeating instance: *Inapplicable syllogism*

(1) β_3 *is* NOT *applicable to* ($Lebach\ documentary$, Tom)

——— IS AN UNDERCUTTING DEFEATER AGAINST

(2) (*a*) β_3 : FORANY (x, y)
IF x is a television programme AND
x mentions y as the author of a criminal offence
THEN^n x violates y's privacy;

(*b*) $Lebach\ documentary$ is a television programme;

(*c*) $Lebach\ documentary$ mentions Tom as the author of a criminal offence

——— IS A REASON FOR

(*d*) $Lebach\ documentary$ violates Tom's privacy

Table 26.14: *Defeating by undercutting*

question the appropriateness (the reliability) of his or her single inference steps, according to the context in which these steps take place, and the premises they include.

In the following section, we shall discuss how a syllogism is defeated by undercutting its implicit specification-step. The reader who is not interested in logical technicalities can jump directly to Section 26.4 on the next page.

26.3.4. Locating Undercutting Attacks

To locate $\mathcal{C}^\beta$'s undercutting attack against $\mathcal{A}^\beta$, we need to unpack the inference we performed in $\mathcal{A}^\beta$ according to the compound schema *syllogism*, that is, we need to rewrite the first part of the argument, using the combination of *specification* and *detachment*, as is shown in Table 26.15 on the facing page).

The analytical representation of Table 26.15 on the next page shows proposition 3.1, which specifies premise β_3 with regard to Tom and $Lebach\ documentary$. It is exactly the inference of 3.1 from 3 (by *specification*) which is undercut by the conclusion that premise β_3 is not applicable to such entities.

Undercutting attack takes place according to the defeating schema *inapplicable specification*, which says that any reason for the inapplicability of a proposition to certain entities is a defeater against the specification of that proposition with regard to such entities.

Defeating schema: *Inapplicable specification*

(1) r *is* NOT *applicable to* y

——— IS AN UNDERCUTTING DEFEATER AGAINST

(2) (*a*) r: FORANY (x) φ

——— IS A REASON FOR

(*b*) $\varphi(x/y)$

Analytical subargument of argument $\mathcal{A}^{\beta}$

1. β_1: *Lebach documentary* is a television programme ⟨premise⟩

2. β_2: *Lebach documentary* mentions *Tom* as the author of a criminal offence ⟨premise⟩

2.1. [*Lebach documentary* is a television programme] AND [*Lebach documentary* mentions *Tom* as the author of a criminal offence] ⟨from 1 and 2, by AND *introduction*⟩

3. β_3: FORANY (x, y)
   IF [x is a television programme] AND
   [x mentions y as the author of a criminal offence]
   THEN^n x violates y's privacy ⟨premise⟩

3.1. β_3 (*Lebach documentary*, *Tom*):
   IF [*Lebach documentary* is a television programme] AND
   [*Lebach documentary* mentions *Tom* as the author of a criminal offence]
   THEN^n [*Lebach documentary* violates *Tom*'s privacy]
   ⟨from 3, by *specification*⟩

4. *Lebach documentary* violates Tom's privacy
   ⟨from 2.1 and 3.1, by *detachment*⟩

Table 26.15: *Analytical inference*

Defeat schema *inapplicable specification* is particularly significant with regard to rules: It defeats the application of a rule to particular cases (that is, its application with regard to certain particular individuals, entities and occasions). By undercutting the specification-step we also undercut the syllogism embedding the specification step, as you can see in Table 26.16 on the following page, concerning the inference of propositions (4) from propositions (1), (2), and (3), in $\mathcal{A}^{\beta}$, by schema *normative syllogism*.

26.4. Argument Defeat

As we saw in Section 2.2.5 on page 62, attack (collision) leads to *defeat*: When one inference attacks another inference, necessarily at least one of them is defeated. Since defeat of an inference leads to the defeat of the argument containing such inference, we may transfer the notion of defeat to arguments.

The notion of *argument defeat* provides us with a way of adjudicating conflicts between two arguments. This is still insufficient for determining the final status of an argument, since other arguments may interfere: In particular, as we shall see, a defeated argument can be reinstated when its defeater is strictly defeated by another argument.

Defeating instance: *Inapplicable specification*

(1) β_3 *is* NOT *applicable to* $\langle Lebach\ documentary, Tom\rangle$

——— IS AN UNDERCUTTING DEFEATER AGAINST

(2) (a) β_3:

FORANY (x, y)

IF [x is a television programme] AND
[x mentions y as the author of a criminal offence]

THEN^n [x violates y's privacy]

——— IS A REASON FOR

(b) β_3 $(Lebach\ documentary, Tom)$:

IF [$Lebach\ documentary$ is a television programme] AND
[$Lebach\ documentary$ mentions Tom as the author of a criminal offence]

THEN^n [$Lebach\ documentary$ violates Tom's privacy]

Table 26.16: *Defeating by undercutting: inapplicability of the specification of a rule*

26.4.1. The Notion of Argument Defeat

In Section 2.2.4 on page 61 we have introduced the notion of *defeat*: A reason R_1 defeats a reason R_2 when the endorsement of R_1 prevents the endorsement of R_2's conclusion. We have observed that this happens in the two kind of conflicts or collisions we have just considered, *undercutting* and *rebutting*.

We also observed that undercutting reasons always prevail over the undercut reasons. On the contrary, in the case of a rebutting collisions, we need to examine whether we can establish that one rebutter prevails over the other:

- if our preferential information leads us to establish that one rebutter outweighs the other, then only the latter is defeated;
- if we cannot achieve any relevant preferential conclusion, then we must view both rebutters as being defeated.

As an example of a rebutting collision, consider arguments $\mathcal{A}^\delta$ and $\mathcal{B}^\delta$ (Table 26.17 on the next page).

Also argument $\mathcal{A}^\beta$ (Table 26.3 on page 674) and argument $\mathcal{B}^\beta$ (Table 26.4 on page 675) rebut one another, and thus they defeat one another, unless preferential information is provided.

Our analysis of the notion of defeat leads us to Definition 26.4.1 on the facing page.

	Argument $\mathcal{A}^\delta$			Argument $\mathcal{B}^\delta$	
1.	δ_1:	A	1.	δ_5:	D
2.	δ_2:	$A \Rightarrow B$	2.	δ_6:	$D \Rightarrow$ NON B
3.		B	3.		NON B
4.	δ_3:	$B \Rightarrow C$			
5.		C			

Table 26.17: *Two mutually rebutting arguments*

Definition 26.4.1 *Defeat. Argument $\mathcal{A}_1$* defeats *argument $\mathcal{A}_2$, relatively to a discourse (a set of arguments) Σ, in the following two cases:*

1. Defeat by undercutting*: $\mathcal{A}_1$ defeats $\mathcal{A}_2$ by undercutting iff $\mathcal{A}_1$ contains a reason R_1 which undercuts a reason R_2 in $\mathcal{A}_2$.*
2. Defeat by rebutting*: $\mathcal{A}_1$ defeats $\mathcal{A}_2$ by rebutting iff:*
   (a) $\mathcal{A}_1$ contains a reason R_1 which rebuts a reason R_2 in $\mathcal{A}_2$;
   (b) Σ does not justify the conclusion that $\lceil R_2$ outweighs $R_1 \rceil$;
   (c) $\mathcal{A}_1$ is not undercut by $\mathcal{A}_2$.

By saying that discourse Σ does not justify the propositions that $\lceil R_2$ outweighs $R_1 \rceil$, we mean that this proposition is not the conclusion of any argument in Σ which is justified relatively to Σ.

By requiring that $\mathcal{A}_2$ does not undercut $\mathcal{A}_1$, we indicate that undercutting prevails over rebutting: When we have reasons to conclude that one inference is unreliable, then this inference cannot be used to attack these very reasons.

Note that defeat by undercutting is independent of preferences (and more generally it is independent on the content of Σ). On the contrary, defeat by rebutting relatively to Σ is dependent on preferences, as established by discourse Σ: Argument A_1 fails to defeat argument A_2 (there is no defeat) if A_1's rebutting reason is outweighed by the incompatible reason in A_2, according to Σ. Thus, defeat by rebutting is dependent on Σ's content, and more exactly, on the fact that a certain piece of preferential information is no justified conclusion of Σ.

On the basis of the notion of defeat, we may understand *strict defeat* as consisting in the fact that an argument defeats another argument without being defeated by it (see Section 2.2.8 on page 66).

Definition 26.4.2 *Strict defeat. We say that $\mathcal{A}_1$* strictly defeats *$\mathcal{A}_2$, relatively to discourse Σ, under the following conditions:*

1. *$\mathcal{A}_1$ defeats $\mathcal{A}_2$ relatively to Σ, and*
2. *$\mathcal{A}_2$ does not defeat $\mathcal{A}_1$ relatively to Σ.*

	Argument $\mathcal{A}^\delta$			Argument $\mathcal{B}^\delta$			Argument P_1^δ	
1.	δ_1:	A	1.	δ_5:	D	1.	δ_4:	$\|1, 2$ for 3 in $\mathcal{A}^\delta\|$
2.	δ_2:	$A \Rightarrow B$	2.	δ_6:	$D \Rightarrow$ NON B			OUTWEIGHS
3.		B	3.		NON B			$\|1, 2$ for 3 in $\mathcal{B}^\delta\|$
4.	δ_3:	$B \Rightarrow C$						
5.		C						

Table 26.18: *Rebutting defeat: symbolic example*

Argument $\mathcal{P}_1^\beta$

8.	β_9:	$\|4, 5$ for 6, in $\mathcal{A}^\beta\|$
		OUTWEIGHS
		$\|1, 4, 5, 6$ for 7, in $\mathcal{B}^\beta\|$

Table 26.19: *Substantive preference*

An example of defeat is provided in Table 26.18, where we adopt the following conventions:

- We refer to a reason for a conclusion (within an argument), by listing the numbers of the propositions that constitute the reason (in that argument), followed by the number of the corresponding conclusion. For instance, the fact that propositions (1) and (2) constitute the reason for endorsing proposition (3) in argument $\mathcal{A}$, is represented as $\|1, 2,$ for 3 in $\mathcal{A}\|$.
- We write R_1 OUTWEIGHS R_2 to express that reason R_1 is preferable to reason R_2.

According to the preferential argument $\mathcal{P}_1^\delta$, the reason (for conclusion B) constituted by propositions (1) and (2) in argument $\mathcal{A}^\delta$ outweighs the reason (for conclusion NON B), which is formed by combining propositions (1) and (2) in argument $\mathcal{B}^\delta$.

Similarly, argument $\mathcal{A}^\beta$ (Table 26.3 on page 674) strictly defeats argument $\mathcal{B}^\beta$ (Table 26.4 on page 675), according to preference argument $\mathcal{P}_1^\beta$ (Table 26.19).

A preferential argument can consist in a multi-step structure. In particular, a preferential proposition may be derived on the basis of considerations pertaining to the nature and the content of the competing reasons. For instance, according to preferential argument $\mathcal{P}_2^\beta$ (Table 26.20 on the facing page), reason $\|4, 5$ for 6, in $\mathcal{A}^\beta\|$ outweighs reason $\|1, 4, 5, 6$ for 7, in $\mathcal{B}^\beta\|$, since reasons based upon privacy outweigh reasons based upon the right to information.

Argument $\mathcal{P}_2^\beta$

1. β_{10}: reason $\|$4, 5 for 6, in $\mathcal{A}^\beta\|$ is based upon privacy
2. β_{11}: reason $\|$1, 4, 5, 6 for 7, in $\mathcal{B}^\beta\|$ is based upon the right to information
3. β_{12}: FORANY (φ, ψ)
   IF [reason φ is based upon privacy] AND
   [reason ψ is based upon the right to information]
   THEN [φ OUTWEIGHS ψ]
4. $\|$4, 5 for 6, in $\mathcal{A}^\beta\|$
   OUTWEIGHS
   reason $\|$1, 4, 5, 6 for 7, in $\mathcal{B}^\beta\|$
   ⟨from 1, 2, and 3, by *syllogism*⟩

Table 26.20: *Derivation of a preferential proposition*

26.4.2. *Decisive Subreasons and the Evaluation of Colliding Reasons*

The issue we need now to address is how to evaluate colliding rebutters, so as to establish which reason outweighs its competitor. This problem is particularly difficult, and intrinsically controversial, for compound reasons, including multiple subreasons.

Various alternative techniques to perform this comparative evaluation have have been proposed, and choosing one of them seems to be quite arbitrary. For instance, we may assume that the strength of a reason corresponds to the strength of the weakest of its sub-reasons, or alternatively that it is a numerical value to be computed on the basis of the numbers that are assigned to each subreason (as in probability calculus).

Fortunately, it seems that in the legal domain this problem can be simplified and made tractable, with regard to *syllogism* (or *detachment*), by focusing on normative conditionals, rather than on their antecedents.

This seems to be the way in which common-sense reasoning (and in particular normative reasoning) proceeds, when applying rules. After establishing whether the preconditions of a rule are satisfied, we move to applying the rule, without questioning any longer its preconditions: If we have reasons against endorsing the rule's conclusion, we usually assume that these reasons question the application of the rule, rather than the satisfaction of its preconditions. Thus, reasons contradicting the consequent of a rule need to be matched against the strength of the rule, rather than against the strength or its antecedent preconditions.[6]

For instance, our conclusion that Mary has the right to broadcast the Lebach

[6] This idea was adopted by Prakken 1991 and subsequently in the logic of Prakken and Sartor 1997 (for an early discussion, see also Sartor 1992).

documentary should lead us to question the application of the privacy rule that ⌈a television program that violates one's privacy, by mentioning one's name in connection with a crime, ought not to be broadcast⌉. This conclusion should not lead us to deny that the program violates privacy, or to deny that it mentions the name of the author of a crime.

Thus, in the following we shall assume that the decisive element for comparing compound reasons in normative reasoning is represented by certain specific propositions in these reasons, which we call *decisive subreasons*. This is detailed in the following definitions.

Definition 26.4.3 *Decisive subreasons. Proposition φ in reason R ($\varphi \in R$), is the* decisive subreason *of R iff:*

1. *φ is the only proposition in R, or*
2. *φ is the specific conditional* IF A THEN^n B*, and R is reason* $\{$IF A THEN^n B; $A\}$*, leading to conclusion B according to schema* normative detachment*;*
3. *φ is the general conditional* FORANY (x) IF A THEN^n B*, and R is reason* $\{$FORANY (x) IF A THEN^n B; $A(x/a)\}$*, leading to conclusion $B(x/a)$ according to schema* normative syllogism*.*

Definition 26.4.4 *Preferences between reasons. Reason R_1* OUTWEIGHS *reason R_2 if R_1's decisive subreason* is stronger *than R_2's decisive subreason.*

According to these definitions, the comparative strength of certain particular sub-reasons (the decisive ones) allow reasoners to determine what reasons outweigh their competitor and thus what arguments preferentially rebut other arguments. This determination (the passage from preferences between conditionals to preferences between the reasons containing these conditionals) may indeed be viewed as an additional inference step, though we shall prefer to leave it implicit when representing arguments, unless it is necessary to spell it out.

Reasoning schema: *Decisive subreason*

(1) s_1, the decisive subreason of R_1, is stronger than s_2, the decisive subreason of R_2

——— IS A CONCLUSIVE REASON FOR

(2) R_1 OUTWEIGHS R_2

Obviously, we assume that one is able to know whether a reason is a decisive subreason by inspecting one's own reasons, without the need to input this information from a premise set (this follows from the idea that we are dealing with reflexive reasoners, which are able to access their mental states and reasoning processes).

26.4.3. The Preference Relation over Reasons

We use the symbol $\succ$ to express comparative evaluations of propositions (subreasons). We write

$x \succ y$
(x is stronger than y)

to mean that proposition x is preferable to (stronger than) proposition y. As usual, we view the $\succ$ relations as being a strict partial order, that is, as enjoying the properties of transitivity and asymmetry:

$trans$: FORANY (x, y, w)
IF $(x \succ y$ AND $y \succ w)$ THEN^m $x \succ w$
$asymm$: FORANY (x, y)
IF $x \succ y$ THEN^m (NON $y \succ x$)

These general axioms do not express normative determination: They are material conditionals (IF ... THEN^m), rather than normative conditionals (IF ... THEN^n). Thus, they enable conclusive inferences, according to classical logic.

Let us go back to the examples we have considered in the previous section, and rephrase them on the basis of the idea that preferences between reasons can be inferred from the comparative strength of their decisive subreasons.

Consider first the example of Table 26.21 on the next page, which extends the example of Table 26.18 on page 688. Observe that argument $\mathcal{P}_2^\delta$ differs from argument $\mathcal{P}_1^\delta$, since its first line now concerns preferability of subreason δ_2 (in A^δ) over subreason δ_6 (in $\mathcal{B}^\delta$). The preferability of the corresponding reason is inferred in the second line.

Also in Table 26.22 on the next page—extending Table 26.19 on page 688—we infer a preference between reasons from a preference between subreasons. However, in this case, even the preference between the involved subreasons is inferred from further premises. These include:

- the fact-proposition that the crime is not actual (β_{10}),
- the value-proposition that when a crime is not actual, then the pro-privacy rule β_4 has a better value impact[7] than the pro-information rule β_8,
- and the general preference-rule saying that propositions having a better value impact are preferable (the principle of axiological preference, pr_{axio}).[8]

[7] (On the notion of value-impact, see Section 7.2.6 on page 208.

[8] We shall freely introduce in our inference some general preference principles, denoted as pr_n, where n is name with distinguishes one preference principle from another. We assume that these principles are available to any reasoner or, if you prefer, that they are implicitly included in any premise set.

Argument $\mathcal{A}^\delta$			Argument $\mathcal{B}^\delta$		
1.	δ_1:	A	1.	δ_5:	D
2.	δ_2:	$A \Rightarrow B$	2.	δ_6:	$D \Rightarrow$ NON B
3.		B	3.		NON B
4.	δ_3:	$B \Rightarrow C$			
5.		C			

Argument $\mathcal{P}_2^\delta$

1.	δ_4:	$\delta_2 \succ \delta_6$
2.		$\|1, 2$ for 3 in $\mathcal{A}^\delta\|$ OUTWEIGHS $\|1, 2$ for 3 in $\mathcal{B}^\delta\|$ ⟨from 1, by *decisive subreason*⟩

Table 26.21: *Extended rebutting-defeat: symbolic example*

Argument $\mathcal{P}_2^\beta$

1.	β_{10}:	the crime is not actual	⟨premise⟩
2.	β_{11}:	IF [the crime is not actual] THEN^n [β_4 has a better value impact than β_8]	⟨premise⟩
3.		β_4 has a better value impact than β_8	⟨from 1 and 2, by *detachment*⟩
4.	pr_{axio}:	FORANY (φ, ψ) IF [φ has a better value impact than ψ] THEN^n $\varphi \succ \psi$	⟨premise⟩
5.		$\beta_4 \succ \beta_8$	⟨from 3 and 4, by *syllogism*⟩
6.		reason $\|4, 5$ for 6, in $\mathcal{A}^\beta\|$ OUTWEIGHS reason $\|3, 4, 5, 6$ for 7, in $\mathcal{B}^\beta\|$	⟨from 9.5, by *decisive subreason*⟩

Table 26.22: *Extended rebutting-defeat: substantive example*

This argument (see Table 26.22) completes our formalisation of the judges' reasoning in the Lebach case.

26.4.4. The Reinstatement of Defeated Arguments

As we have observed above, the fact that an argument A_1 defeats or is defeated by another argument A_2 does not yet determine the final status of these arguments, since other arguments may interfere.

In particular, a defeated argument can be *reinstated* (see Section 2.2.9 on page 68) when its defeater strictly defeated by another argument.[9]

[9] For a discussion of reinstatement in logical systems for defeasible reasoning, see Horty 2001.

This situation is exemplified in Table 26.23 on the following page. Observe the defeat relations:

a. $\mathcal{A}^{\delta}$ strictly defeats $\mathcal{B}^{\delta}$, by preferentially rebutting it according to $\mathcal{P}_1^{\delta}$, and
b. $\mathcal{C}^{\delta}$ strictly defeats $\mathcal{A}^{\delta}$, by preferentially rebutting it according to $\mathcal{P}_2^{\delta}$.

The defeat relation of item (*a*) is due to the fact that $\mathcal{A}^{\delta}$ contains reason $\|1, 2$ for $3\|$, which collides with, and outweighs, reason $\|1, 2$ for 3 in $\mathcal{B}^{\delta}\|$, according to $\mathcal{P}_1^{\delta}$. The outweighing takes place since $\mathcal{A}^{\delta}$'s decisive subreason, δ_2, is stronger than δ_6, the decisive subreason of $\|1, 2$ for 3 in $\mathcal{B}^{\delta}\|$.

The defeat relation of (*a*) is due to the fact that $\mathcal{C}^{\delta}$ contains reason $\|1, 2$ for $3\|$, which collides with, and outweighs, reason $\|1$ for 1 in $\mathcal{A}^{\delta}\|$. This happens since $\mathcal{C}^{\delta}$'s decisive subreasons, δ_8, is stronger than δ_1.

We need now to establish what is the outcome that one should rationally endorse, given all arguments in Table 26.23 on the next page. Our intuition tells us that we should endorse both arguments $\mathcal{B}^{\delta}$ and $\mathcal{C}^{\delta}$, and reject argument $\mathcal{A}^{\delta}$. It is true that $\mathcal{B}^{\delta}$ is preferentially rebutted by $\mathcal{A}^{\delta}$, but the latter argument is ruled out by $\mathcal{C}^{\delta}$, and thus $\mathcal{B}^{\delta}$ (having been freed from its only defeater) should regain its credibility, that is, should be reinstated.

For reinstatement in our Lebach example, consider, for instance, arguments $\mathcal{A}^{\beta}$ (Table 26.3 on page 674), $\mathcal{B}^{\beta}$ (Table 26.4 on page 675) and $\mathcal{C}^{\beta}$ (Table 26.13 on page 683), and the preferential argument $\mathcal{P}_2^{\beta}$ (Table 26.20 on page 689). Also in this case, the intuitive result emerging from the interaction of our four arguments seems to be clear:

1. Given that Tom's crime is not actual, argument $\mathcal{A}^{\beta}$, concluding for Tom's right that the documentary is not broadcast, outweighs argument $\mathcal{B}^{\beta}$, concluding for Mary's right that the documentary is broadcast, according to preferential argument $\mathcal{P}_2^{\beta}$. Thus, the first argument strictly defeats the second, by rebutting it and outweighing it according to argument $\mathcal{P}_2^{\beta}$. Thus it seems that we must conclude that Tom has the right that the documentary is not broadcast.
2. However, argument $\mathcal{C}^{\beta}$ says that, since Tom agreed to the broadcast of the Lebach program, then the rule that ⌈the broadcast determines the violation of Tom's privacy⌉ is inapplicable. This inference strictly defeats (by undercutting) the inference that, within argument $\mathcal{A}^{\beta}$, concludes that the broadcast violates Tom's privacy. Thus argument argument $\mathcal{A}^{\beta}$ is ruled out.
3. Argument $\mathcal{B}^{\beta}$, having been freed of its only defeater, regains its believability. Thus we are to endorse its conclusion, that is, we are to conclude that Mary has the right that the documentary is broadcast.

In Chapter 27 we shall analyse in detail the logic of reinstatement, providing a full account of the kind of reasoning we have just exemplified.

Argument $\mathcal{A}^\delta$			Argument $\mathcal{B}^\delta$			Argument $\mathcal{C}^\delta$		
1.	δ_1:	A	1.	δ_5:	D	1.	δ_7:	E
2.	δ_2:	$A \Rightarrow B$	2.	δ_6:	$D \Rightarrow$ NON B	2.	δ_8:	$E \Rightarrow$ NON A
3.		B	3.		NON B	3.		NON A
4.	δ_3:	$B \Rightarrow C$						
5.		C						

Argument $\mathcal{P}_1^\delta$			Argument $\mathcal{P}_2^\delta$		
1.	δ_4:	$\delta_2 \succ \delta_6$	1.	δ_9:	$\delta_8 \succ \delta_1$
2.		$|$1, 2 for 3 in $\mathcal{A}^\delta\|$ OUTWEIGHS $|$1, 2 for 3 in $\mathcal{B}^\delta\|$ $\langle$from δ_4, by *decisive subreason*$\rangle$	2.		$|$1, 2 for 3 in $\mathcal{C}^\delta\|$ OUTWEIGHS $|$1 for 1 in $\mathcal{A}^\delta\|$ $\langle$from δ_9, by *decisive subreason*$\rangle$

Table 26.23: *Reinstatement*

Chapter 27

ARGUMENT LOGIC

In Chapter 26 we have analysed the notion of an argument and we have discussed various possible interactions between arguments. In particular, we have seen that arguments may collide, that collisions may determine defeat, and that further collisions may reinstate the defeated arguments.

However, we have not yet provided a precise way for determining the cognitive outcome of a set of interacting arguments: What arguments and what conclusions should a rational reasoner (defeasibly) endorse when his or her beliefs allow the construction of colliding arguments?

This is the issue we shall tackle in this chapter, and our answer will consist in providing an *argument logic*, which determines what outcomes are justified relatively to sets of possibly conflicting arguments.

27.1. The Status of Arguments

When we face interacting arguments, our intuitions are usually clear—at least as to the type of conflicts we are likely to find in real life—and reasonable people tend to converge on the same evaluations. Thus, evaluating arguments may appear to be a natural competence, which is part of our reasoning endowment.

However, it is not easy to provide a precise theoretical reconstruction of this competence. It may seem that it is sufficient to state that an argument is inferentially justified when all of its defeaters are defeated by justified arguments. This statement if true, but unfortunately it provides a circular definition: To establish whether $\mathcal{A}$ is justified, we need to establish whether each of $\mathcal{A}$'s defeaters are justified, which may depend on whether $\mathcal{A}$ is justified.

By an *argument logic* we mean a formalism that hopefully can explain and rationalise our intuitive argument-evaluations.

27.1.1. Requirements of an Argument Logic

Our argument logic needs to take into account the fact that defeating arguments can in turn be defeated by further arguments: Comparing arguments by pairs is not sufficient to find out what arguments are to be rationally endorsed.

We rather need to provide a way of determining the *status of an argument* on the basis of all ways in which all relevant arguments interact.

In particular, our model should allow for reinstatement of defeated argu-

ments, when their defeaters themselves are (strictly) defeated by further arguments.

Moreover, the model should respect the *weakest-link principle*: An argument cannot be justified unless all of its subarguments are justified.

27.1.2. Justified, Defensible, and Overruled Arguments

The notion of the status of arguments will be the central element of our argument logic. We shall divide all arguments in certain *discourse* (by a discourse we mean in general any set of arguments) into three classes, according to their status in the discourse, the justified, the defensible, and the overruled ones:

1. *Justified arguments* have no viable attackers in the discourse.
2. *Overruled arguments* are attacked by justified arguments and therefore are deprived of any relevance in the discourse.
3. *Defensible arguments* are undecided, since their attackers are neither justified nor overruled.

From our point of view, the status of an argument in a discourse does not depend on the intrinsic qualities of the argument. It rather depends on whether other arguments in the discourse attack the argument we are considering, and in particular on whether these attackers succeed in defeating that argument. This implies that arguments are defeasible, in a double sense.

First there is *internal defeasibility*, or defeasibility *in a discourse*, that is, relatively to a given set of arguments. An argument $\mathcal{A}$ is defeated in a discourse, when other arguments in the discourse defeat $\mathcal{A}$, relatively to the discourse, and no further arguments in the discourse provide for $\mathcal{A}$'s reinstatement. Thus, the status of an argument cannot be decided by looking at that argument alone. We must rather consider all relevant arguments in the discourse, through a dialectical process that goes from the thesis (the argument) to the antitheses (its defeaters), to the antitheses of the antitheses (the defeaters of the defeaters), and so on. Each step in this process may overturn the results that were obtained in the previous step, and only when the process is over, and no further relevant argument is to be considered, we can express our final judgement.

Thus, internal defeasibility does not prevent us from achieving a unique evaluation for every argument in a given discourse: We just need to consider all arguments of the discourse (so that we shall be sure that no additional argument in it can modify our evaluation).

However, besides internal defeasibility, we also need to consider *external defeasibility*, namely, defeasibility *of a discourse*. What is justified in a discourse Σ_1 may not be justified in a larger discourse Σ_2, which is obtained by adding further arguments to Σ_1: These further arguments may defeat discourse Σ_1, in the sense that they may undermine some arguments which were justified in Σ_1. External defeasibility prevents the possibility of ever obtaining safe conclusions.

We can never exclude that further arguments are put forward which question the results so far obtained.

The possibility of defeat does not exclude that rationality requires endorsing defeasible conclusions, according to their degree of justification. Rational endorsement depends on the combined outcome of all cognitive processes we have been describing: extracting relevant information from the environment, making heuristic hypotheses, constructing arguments, and comparing the available arguments. However, we need to distinguish such aspects, when we look at practical cognition from an analytical perspective.

In particular, with regard to external defeasibility, we need to distinguish whether the new arguments originate from premises (beliefs) that already are endorsed by the reasoner, or whether they include new external inputs obtained through perception (there included the perception of other people's utterances).

Here we shall focus on the justification of an argument relatively to a set of available argument. We shall extend this idea to consider all arguments that can be built on the basis of a certain premise sets, so as to provide a formalisation of the notion of *inferential justifiability*, as defined in Definition 3.3.1 on page 106. Therefore, when we say that an argument is *justified*, relatively to a certain premise set, we mean that we are required to endorse the argument, if we endorse the premise set: The only way to cast doubt on a justified argument (without rejecting is premises) is by providing additional premises, giving rise to new, defeating counterarguments.

After defining when an argument is inferentially justified, we shall characterise the losing, or *overruled* arguments, and the undecided or *defensible* arguments.

27.1.3. Semantics and Proof Theory

We shall present our notion of a justified argument in two versions: The first versions will be based upon a semantics for premise sets; the second version, upon a proof-theory.

By the *semantics* of a premise set θ, we mean here the characterisation of the set of arguments, constructed with premises in θ, that are inferentially justified relatively to θ: This set of arguments expresses the meaning we can extract from θ, being supported by θ. By a *proof theory* we mean a method for determining whether an individual argument is a member of this set.[1]

Since our semantic and proof-theoretic characterisations are proved to be equivalent (see Prakken and Sartor 1997), and the first one requires some formal

[1] Others, like Loui and Norman 1995, rather than distinguishing between semantics and proof theory, prefer to use the similar distinction between *declarative* and *procedural* systems. Note that our adoption of an inferential semantics for premise sets is consistent with the adoption of a model-theoretic semantics for single arguments; for some considerations in this regard, see Prakken and Sartor 1997.

analysis, the reader who prefers to avoid logical formalisms, is advised to jump to Section 27.3 on page 704, just after reading Section 27.2.1.

27.2. The Semantics of Inferential Justifiability

Our semantics is based on the notion of *acceptability*, originally defined by Dung (1993). This notion captures the idea of *relative justification*, namely, the idea of being justified with reference to a certain set of argument: That an argument $\mathcal{A}$ is acceptable, relatively to a set of arguments Σ, means that any critique (any counterarguments) against $\mathcal{A}$ can be defeated on the basis of arguments in Σ.

We aim at identifying what consistent set of arguments one can endorse, out of all the arguments one can construct with the information at one's disposal. Thus, the arguments which one uses as a standard for evaluating the acceptability of other argument must be mutually consistent: When we consider whether an argument is justified relatively to a set Σ, we assume that Σ is *conflict-free*, namely that it does not include arguments attacking one another (by undercutting or rebutting).

From the notion of acceptability, we shall then move to the idea of *admissibility*, a qualification that does not apply to individual arguments, but to sets of them. To be admissible, a conflict-free set of arguments must be capable of strictly defeating, according to its own standards (its own preference arguments), any criticism against any of its components.

By referring to the notions of acceptability and admissibility, we shall be able to capture the notion of *inferential justifiability*, that is, to identify what arguments and conclusions one should endorse, given that one endorses a certain set of premises.

27.2.1. Prima-facie *defeat*

The notion of defeat we introduced in Definition 2.2.5 on page 63 (and we specified in Definition 26.4.1 on page 687) is inappropriate for providing the basis for a formal definition of inferential justification, since it presupposes the notion of a justified inference.

In fact, the assessment provided by defeat is dependent, with regard to rebutters, on *justified preferential information* (see condition (2 (b)) in Definition 26.4.1 on page 687): When two argument A_1 and A_2 rebut one another, but $\lceil A_1$ outweighs $A_2 \rceil$ is a justified conclusion, then only the weaker argument (A_2) is defeated. However, to assess whether $\lceil A_1$ outweighs $A_2 \rceil$ is a justified conclusion, we need to use all our reasoning resources, according to the notion of an inferential justification (we need to take into account that also preferential arguments can be attacked, defeated, and reinstated).

For providing a non-circular formal definition, we need to have a less demanding way of looking at rebuttals. This less demanding way consists in deter-

mining whether one rebutter outweighs its competitor according to *any* particular preferential argument, regardless of whether this preferential argument is justified (or rather impaired by arguments to the contrary).

This leads us to the idea of *prima-facie defeat.*

Definition 27.2.1 *Prima-facie defeat. We say that* $\mathcal{A}_1$ prima-facie defeats *argument* $\mathcal{A}_2$*, relatively to a discourse* Σ*, in the following two cases:*

1. Prima-facie defeat by undercutting*:* $\mathcal{A}_1$ prima-facie *defeats* $\mathcal{A}_2$ *by undercutting iff* $\mathcal{A}_1$ *undercuts* $\mathcal{A}_2$*.*
2. Prima-facie defeat by rebutting*:* $\mathcal{A}_1$ prima-facie *defeats* $\mathcal{A}_2$ *by rebutting iff:*
   (a) $\mathcal{A}_1$ *contains a reason* R_1 *which rebuts a reason* R_2 *in* $\mathcal{A}_2$*:*
   (b) *no argument in* Σ *concludes that* R_2 *outweighs* R_1*;*[2]
   (c) $\mathcal{A}_1$ *is not undercut by* $\mathcal{A}_2$*.*

Note that only condition (*2 (b)*) makes a difference between *prima-facie* defeat and defeat tout court (as introduced in Definition 26.4.1 on page 687). However, this is a significant difference: Some preferences which prevent defeat according to *prima-facie* defeat may not be available according to defeat *tout court* (which only takes into account justified preferences, as impediments to defeat). Thus, some arguments will succeed in defeating their competitors, though they do not *prima-facie* defeat the latter.

On the basis of the notion of *prima-facie defeat*, we can introduce the notion of *strict prima facie defeat*.

Definition 27.2.2 *Strict prima-facie defeat. We say that* $\mathcal{A}_1$ strictly prima-facie defeats $\mathcal{A}_2$*, relatively to discourse* Σ*, under the following conditions:*

1. $\mathcal{A}_1$ prima-facie *defeats* $\mathcal{A}_2$*, relatively to* Σ*, and*
2. $\mathcal{A}_2$ *does not* prima-facie *defeat* $\mathcal{A}_1$*, relatively to* Σ*.*

27.2.2. Acceptability of Arguments

The first notion we need is the Θ-acceptability of an argument $\mathcal{A}$, relatively to a discourse Σ, were Θ is the *reference-discourse*, including all arguments one is examining and Σ is a subset of Θ. By saying that an argument $\mathcal{A}_1$ is Θ-acceptable relatively to Σ, we mean that a reasoner who already endorses all arguments in Σ, should also endorse $\mathcal{A}_1$. This holds under the conditions that are specified in Definition 27.2.3 on the next page.

[2] This notion can be refined to take into account preferences which are not established by arguments in Σ, but follow from other preferences in Σ, according to transitivity (if $x \succ y$ and $y \succ z$, then $x \succ z$). See Prakken and Sartor 1997, where a refined version of what we call here *prima-facie defeat* is called *Args-defeat*.

Definition 27.2.3 *Acceptability of an argument. An argument* $\mathcal{A}_1$ *is* Θ-acceptable *relatively to a* conflict-free *discourse* Σ *iff for every argument* $\mathcal{A}_2$ *in* Θ *attacking* $\mathcal{A}_1$*, one of the following conditions is satisfied:*

- $\mathcal{A}_1$ *strictly* prima-facie *defeats* $\mathcal{A}_2$ *relatively to* Σ*; or*
- *there is an argument* $\mathcal{A}_3$ *in* Σ *that strictly* prima-facie *defeats* $\mathcal{A}_2$ *relatively to* Σ.

The rationale of the notion of acceptability (Definition 27.2.3) is the idea that arguments can help one another. Assume that an argument $\mathcal{A}_1$ is attacked by another argument $\mathcal{A}_2$, which is in Θ but not in Σ. $\mathcal{A}_1$ can still be acceptable, relatively to Σ, when:

1. $\mathcal{A}_1$ itself counters the attack and strictly defeats $\mathcal{A}_2$ (possibly with the help of preferential arguments from Σ); or
2. Σ contains a different argument $\mathcal{A}_3$ that strictly defeats $\mathcal{A}_2$, relatively to Σ.

In both cases we may say that, on the basis of the information in Σ, every counterargument to $\mathcal{A}_1$ is taken care of (is strictly defeated relatively to Σ, by arguments in $\Sigma \cup \mathcal{A}_1$), and thus we are in a condition to accept $\mathcal{A}_1$ (assuming that we already endorse all arguments in Σ).

An interesting aspect of our notion of acceptability is that it refers to the simpler notion of *prima-facie defeating*, rather than to the notion of defeating *tout court* (which embeds the notion of a justified argument). This is made possible by the fact that the two notions coincide with regard to a *conflict-free* set, namely, a set of arguments which do not attack one another. In fact, Σ being conflict free means that, when an argument in Σ establishes that $\mathcal{A}_1$ outweighs $\mathcal{A}_2$, this conclusion cannot be further questioned by any other arguments in Σ: It is a justified conclusion relatively to Σ. Thus, to check that $\mathcal{A}_1$ succeeds in strictly defeating $\mathcal{A}_2$ through rebutting—with regard to incompatible reasons R_1 in $\mathcal{A}_2$ and R_2 in $\mathcal{A}_2$—it is sufficient that we have any preferential argument in Σ concluding that R_1 outweighs R_2.[3]

More generally, focusing on a conflict-free discourse Σ (rather than on the whole reference discourse Θ), allows us to set aside the problem of reinstatement, with regard to the determining the justified conclusions of Σ. When an argument $\mathcal{A}_1$ in Σ strictly defeats another argument $\mathcal{A}_2$, relatively to Σ, $\mathcal{A}_2$ cannot be reinstated, relatively to Σ: Reinstatement requires that an argument in Σ attacks another argument in Σ (either $\mathcal{A}_1$, or a preferential argument favouring $\mathcal{A}_1$), and the arguments in Σ do not attack one another.

[3] The analysis needs to be slightly more complex if we consider arguments having multiple collisions. In this case, to achieve strict defeat through rebutting the winning argument needs to prevail in all collisions. Thus, it must be the case that, for every rebutting collision between R_1 in $\mathcal{A}_1$ and R_2 in $\mathcal{A}_2$, R_1 outweighs R_2 according to an argument in Σ.

Assume for example that the discourse under consideration is

$$\Sigma_\delta = \{\mathcal{A}^\delta,\ \mathcal{B}^\delta,\ \mathcal{C}^\delta,\ \mathcal{P}_1^\delta,\ \mathcal{P}_2^\delta\}$$

which contains all arguments in Table 26.23 on page 694. First of all, we need to observe that, relatively to the empty discourse $\emptyset$, only the preferential arguments $\mathcal{P}_1^\delta$ and $\mathcal{P}_2^\delta$ are Σ_δ-acceptable: They have no attackers in Σ_δ.

Let us now consider what arguments are acceptable relatively to the set of these two arguments, which we already know to be acceptable. You can easily check that relatively to $\Sigma_1 = \{\mathcal{P}_1^\delta, \mathcal{P}_2^\delta\}$, also $\mathcal{C}^\delta$ is Σ_δ-acceptable: It strictly defeats its only counterargument $\mathcal{A}^\delta$ according to $\mathcal{P}_2^\delta$, which belongs to Σ_1.

Note that relatively to Σ_1, neither $\mathcal{A}^\delta$ nor $\mathcal{B}^\delta$ are acceptable:

- the first fails to strictly defeat its attacker $\mathcal{C}^\delta$, according to any preferential argument in Σ_1, and the second similarly fails to strictly defeat its attacker $\mathcal{A}^\delta$;
- none of theirs attackers is strictly defeated by arguments already in Σ_1.

However, when we expand Σ_1 with $\mathcal{C}^\delta$, we obtain $\Sigma_2 = \{\mathcal{P}_1^\delta, \mathcal{P}_2^\delta, \mathcal{C}^\delta\}$. With regard to Σ_2 also $\mathcal{B}^\delta$ is acceptable, since $\mathcal{A}^\delta$, its only attacker, is preferentially rebutted by $\mathcal{C}^\delta$, which belongs to Σ_2. Thus we have come to recognise the acceptability of all arguments in $\Sigma_3 = \{\mathcal{P}_1^\delta, \mathcal{P}_2^\delta, \mathcal{C}^\delta, \mathcal{B}^\delta\}$, and to reject $\mathcal{A}^\delta$.

27.2.3. Admissibility of Sets of Arguments

Discourse Σ_3, in the last paragraph of the previous section, has an interesting peculiarity: All arguments in Σ_3 are acceptable relatively to Σ_3. Thus Σ_3 identifies a discourse which is in a way self-sufficient: When one is endorsing Σ_3, one is justified in maintaining the acceptance of each argument in Σ_3, without the need to appeal to arguments external to Σ_3. This idea is captured by the notion of admissibility.[4]

Definition 27.2.4 *Admissibility of a set of arguments. A conflict-free discourse* Σ *is* Θ-admissible *iff all arguments in* Σ *are* Θ*-acceptable relatively to* Σ.

Thus, an admissible set Σ is a discourse which satisfies the following conditions:

1. it is internally coherent (there are no collisions between its arguments), and
2. it succeeds in strictly defeating every attacker (in the reference set Θ) against any of its arguments.

[4] The related notions of acceptability and admissibility were introduced in Dung 1995, but our definitions deviate from Dung's, in order to take into account priority arguments (see, for a more rigorous analysis, Prakken and Sartor 1997).

The reader can check that besides Σ_3, also Σ_2 and Σ_1 are Σ_δ-admissible (as obviously is $\{\varnothing\}$).

For a substantive example of admissibility, consider the connections among arguments $\mathcal{A}^\beta$ (Table 26.3 on page 674), $\mathcal{B}^\beta$ (Table 26.4 on page 675), $\mathcal{C}^\beta$ (Table 26.13 on page 683) and $\mathcal{P}_2^\beta$ (Table 26.22 on page 692). Remember that the symbol formed by the name of a premise set with a hat above refers to all arguments which can be constructed with premises taken from that premise set: For instance $\widehat{\beta}$ refers to all arguments which can be constructed with premises in β (see Table 26.5 on page 676).

The reader can check that the set of argument $\{\mathcal{A}^\beta, \mathcal{C}^\beta, \mathcal{P}_2^\beta\}$ is $\widehat{\beta}$-admissible, since $\mathcal{B}^\beta$, the attacker of $\mathcal{A}^\beta$, is undercut by $\mathcal{C}^\beta$.

On the contrary, the set $\{\mathcal{A}^\beta, \mathcal{B}^\beta\}$ is not $\widehat{\beta}$-admissible, since it is not conflict-free (its two arguments defeat each other). Similarly, the set $\{\mathcal{A}^\beta\}$ is not $\widehat{\beta}$-admissible: $\mathcal{A}^\beta$ is rebutted by $\mathcal{B}^\beta$, which $\mathcal{A}^\beta$ is unable to strictly defeat relatively to $\{\mathcal{A}^\beta\}$ (which does not contain preferential arguments).

27.2.4. Justified Arguments

We shall now investigate how we can expand as much as possible the set of arguments we endorse, without making vicious circles (that is, without making our endorsement an argument, dependant upon the assumption of that argument). The way to achieve this goal is to start from scratch, and progressively extend acceptance to all arguments that are acceptable relatively to the arguments we have already accepted.

Therefore, at the start the set of arguments we view as justified, with regard to the reference set Θ, will be empty: Our initial set, J_0, will contain no argument ($J_0 = \varnothing$). We shall then progressively accept any arguments in Θ that are acceptable relatively to the arguments we have already accepted as being justified, until no further arguments can be added:

- Firstly, we add to $J_0 = \varnothing$ the arguments which have no counterarguments in Θ, and obtain set J_1;
- Secondly, we add to J_1 the arguments which are Θ-acceptable relatively to J_1 and obtain J_2;
- Thirdly, we add to J_2 the arguments which are Θ acceptable relatively to J_2, and obtain J_3, and so on.

This constructive process terminates when it provides a set J_n of arguments that cannot be further Θ-extended (this is what mathematicians call a *fixpoint*, see Section 27.2.5 on the next page). This set contains all arguments which are justified (relatively to Θ). We shall refer to is as $JustArg^\Theta$.

This idea is particularly interesting when the set Θ is constituted by all arguments that can be constructed out of a given premise set θ, which we denote as

$\widehat{\theta}$. Then $JustArgs^{\widehat{\theta}}$ includes all arguments constructible from θ that appear to be justified in the framework of all arguments constructible from θ.

Having identified the set $JustArgs^{\widehat{\theta}}$, we can distinguish justified, overruled and defensible arguments.

Definition 27.2.5 *Statuses of arguments. For any premise set θ and argument $\mathcal{A}$ we say that with regard to θ:*

1. *$\mathcal{A}$ is* justified *iff $\mathcal{A}$ is in $JustArgs^{\widehat{\theta}}$;*
2. *$\mathcal{A}$ is* overruled *iff $\mathcal{A}$ is attacked by a justified argument;*
3. *$\mathcal{A}$ is* defensible *iff $\mathcal{A}$ is neither justified nor overruled.*

Only justified arguments have the capacity of establishing justified conclusions, on the basis of the premise set we are considering, that is, conclusions that are supported or entailed by the information contained in that set. Defensible arguments are uncertain: They cannot be relied upon, but can effectively defeat other arguments, so preventing the latter from being justified. Overruled arguments, finally, are useless, having been defeated by stronger arguments, which are justified.

On the basis of the status of an argument (relatively to a premise set), we can also qualify its conclusions.

Definition 27.2.6 *Status of a conclusion. A proposition is*

1. justified *if it is a conclusion of a justified argument;*
2. defensible *if it is not justified and it is a conclusion of some defensible argument;*
3. overruled *if it is neither justified nor defensible, and it is the conclusion of an overruled argument.*

If the reader is interested in having a precise mathematical characterisation of these ideas, we invite him or her to read the following section, which may be safely skipped if one does not have this cognitive desire.

27.2.5. A Formal Characterisation of Inferential Justifiability

Justified arguments can be precisely identified by an operator that returns, for each set of arguments, all arguments that are acceptable relatively to that set. Since the operator is *monotonic*,[5] we can define the set of justified arguments as the least fixpoint of this operator.[6]

[5] An operator is monotonic when for a larger input it provides a larger output. More exactly, for a monotonic operator F, whenever $S_1 \subseteq S_2$, then also $F(S_1) \subseteq F(S_2)$

[6] This operator is introduced by Dung (1995), who calls it the *characteristic function* of an ordered theory.

Definition 27.2.7 *Characteristic function over sets of arguments. Let θ be a premise set and Σ be any subset of $\widehat{\theta}$. The* characteristic function *of θ is defined as follows:*

1. $F_\theta : Powerset(\widehat{\theta}) \longrightarrow Powerset(\widehat{\theta})$*; and*
2. $F_\theta(\Sigma) = \{\mathcal{A} \in \widehat{\theta} \mid \mathcal{A}$ *is acceptable relatively to* $\Sigma\}$.

The first item of Definition 27.2.7 simply says that function F_θ, given one set of arguments in $\widehat{\theta}$, returns a similar set ($Powerset(\widehat{\theta})$ denotes the family of all subsets of $\widehat{\theta}$).

The second item says for any input set Σ of such arguments, the output provided by F_θ will be constituted by all those arguments in $\widehat{\theta}$ which are acceptable relatively to the input set Σ.

In this definition, the notion of acceptability captures reinstatement: Even when an argument $\mathcal{A}$ is defeated by a counterargument $\mathcal{B}$, $\mathcal{A}$ can still be included in the justified arguments, when $\mathcal{A}$ is acceptable relatively to the arguments that are already known to be justified. This happens exactly when $\mathcal{B}$ is strictly defeated by one of these arguments.

For circumscribing what argument one should rationally endorse (among those in $\widehat{\theta}$), we need to find a a set of argument (a discourse) Σ that only includes acceptable arguments (relatively to Σ itself), and which cannot be extended with further acceptable arguments in $\widehat{\theta}$. This idea is mathematically characterised through the notion of a fixpoint of the function F_θ, namely, a value v such that, F_θ, when applied to input v returns v again as its output. To say that set Σ is a fixpoint of F_θ means that all arguments in F_θ are $\widehat{\theta}$-acceptable relatively to Σ, and no further argument in $\widehat{\theta}$ is $\widehat{\theta}$-acceptable relatively to Σ.

Since monotonic operators are guaranteed to have a least fixpoint, we can assume that F_θ's least fixpoint identifies the set of all justified arguments, and we can define the notion of a justified argument as follows.

Definition 27.2.8 *Justified argument. For any premise set θ and argument $\mathcal{A}$, $\mathcal{A}$ is* justified *on the basis of θ iff $\mathcal{A}$ is contained in the least fixpoint of F_θ, denoted by $JustArgs^{\widehat{\theta}}$.*

27.3. A Proof-Theory for Inferential Justifiability

The semantic characterisation we have just presented provides a precise definition of justifiability, but it does not provide a workable method for evaluating arguments.

In fact, to establish whether an argument is justified, we should first build the set of all justified arguments, and then check if our argument is included in this set. This is an unfeasible task, even for relatively small premise sets.

Fortunately, there is an easier way to establish justifiability, as we hope to show in next sections, where we shall provide a method for proving justifiability, and thus an inferential notion of justifiability. The basic idea is that an argument is justified if there is a proof of its ability to sustain all possible attacks. The correctness of this method is guaranteed by its correspondence with the semantic notion of justifiability we have introduced in the previous pages: All and only the arguments for which we can build such a proof are included in the set of the semantically justified ones.

27.3.1. Proof Trees

Proving inferential justifiability of a statement requires a two-levels proof-procedure:

1. at the lower level, conclusions are supported through arguments;
2. at the higher level, arguments are supported by being proved to be justified.

Our proof that an argument is justified refers to the discourse (the set of arguments) we are considering. With regard to a premise set θ, the discourse we are referring to is constituted by $\widehat{\theta}$, that is, by all arguments such that their premises are taken from θ.

The proof that an argument is justified relatively to a certain discourse Σ takes the form of an inverted tree of arguments from Σ, where each node attacks its predecessor, and each node has a certain *level*, the level of a node being its distance from the root, which is node level 0 (nodes directly connected to the root are at level 1, their immediate successors are at level 2, and so on). Nodes located at an odd level attack, directly or indirectly (that is, by attacking its supporters), the root argument. Nodes located at an even level indirectly (that is, by attacking its attackers) support the root node.

Let us qualify each argument in the tree as follows:

- The argument is a *pro-node*, abbreviated as *p-node*, if it located at an even level in the tree, and thus it supports the root argument, by countering the direct or indirect challenges against it. Additionally, the root argument (the 0-level argument) itself is a *pro*-node.
- The argument is a *con-node*, abbreviated as *c-node*, if it is located at an odd level, and thus it challenges, directly or indirectly, the root argument.

This characterisation of the nodes in an argument-tree leads us to the following definition of a *proof tree*.

Definition 27.3.1 *Proof tree.* *A* proof tree *for an argument $\mathcal{A}$, relatively to a discourse Σ, is a tree of arguments from Σ that satisfies the following conditions:*

1. *$\mathcal{A}$ is the 0-level node (the root);*
2. *each pro-node A_i is followed by all of A_i's attackers;*
3. *each con-node A_i is followed by one of the following:*
   (a) *nodes $A_{j_1}, \ldots, A_{j_n}$ such that A_{j_1} strictly* prima-facie *defeats A_i relatively to $\{A_{j_2} \ldots, A_{j_n}\}$ or*
   (b) *nodes $A_{j_1} \ldots, A_{j_n}$ such that A_i's parent node A_p strictly* prima-facie *defeats A_i relatively to $A_{j_1} \ldots, A_{j_n}$;*
4. *pro-nodes are not repeated in the same branch of the tree.*[7]

Let us consider condition (*1 (a)*) in Definition 27.3.1 on the preceding page which subsumes different cases. The main ones are those when there is just one collision between A_{j_1} and A_i.

- the case when A_{j_1} undercuts A_i. In this case no preferential argument is required. Thus $A_{j_1}, \ldots, A_{j_n}$ will consist of A_{j_1} alone.
- the case when A_{j_1} rebuts A_i. In this case a preferential argument A_{j_2} is required according to which A_{j_1} rebuts A_i

When there are more then one rebutting collisions between A_{j_1} and A_i, then A_{j_1} needs to be accompanied by more than one preferential argument.

The conditions for inserting a *pro*-node in the tree are more stringent than those required for inserting a *con*-node. A *pro*-node, for contributing to the proof must be certain: Whenever the *pro*-node has a rebutter, there must be preferential information according to which it prevails over the rebutter. This information can be provided at the time when the *pro*-node, is inserted (according to item 3 (*b*) in Definition 27.3.1 on the page before), or subsequently (according to item 3 (*c*) in Definition 27.3.1 on the preceding page). A *con*-node just needs to defeat a *pro*-node, regardless of preferential information. This is indeed sufficient to make the rebutted *pro*-node not justified, so that it cannot contribute to the proof (unless preferential information is provided by the subsequent *pro*-node).

Table 27.1 on the next page displays an argument tree and a proof tree. Note that all branches in the proof tree terminate with a *pro*-$\mathcal{A}$ node. This means that $\mathcal{A}$ is safe (justified): All its (direct and indirect) attackers have been strictly defeated.

27.3.2. The Proof of an Argument

On the basis of the notion of a proof tree, we can view the *proof of an argument* as being provided by proof tree where no attack against the root argument $\mathcal{A}$ is

[7] By a *branch of a tree* we mean a sequence of nodes (a path) that starts from the top (the root) of the tree and reaches its bottom (a leaf), always passing from a node to one of its immediate successors. Thus the requirement of item (4) in Definition 27.3.1 on the page before is that there are not two *pro*-nodes with the same content among the same branch.

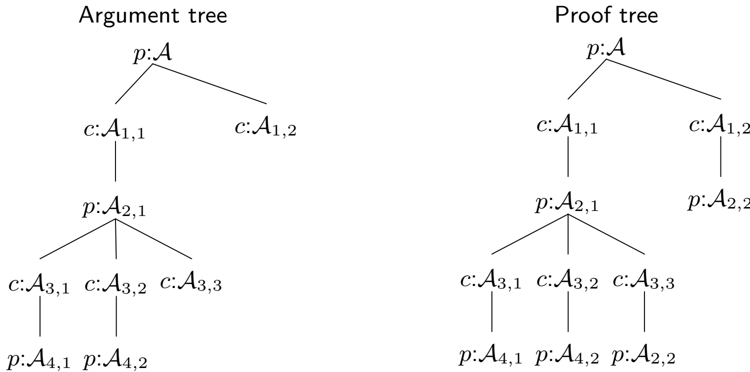


Table 27.1: *Argument trees*

successful. This is the case when every branch of the tree terminates with a *pro*-node, that is, either with $\mathcal{A}$ itself (which is unchallenged) or with an odd-level argument, and no further attacks are possible.

Definition 27.3.2 *Proof of an argument. A proof tree for $\mathcal{A}$, relatively to a discourse Σ is a* proof *of argument $\mathcal{A}$, relatively to Σ, iff it satisfies the following conditions:*

1. *each branch of the tree terminates with a pro-node, and*
2. *it is not possible to add further nodes.*

The notion of a justified argument can be defined on the basis of the notion of a proof.

Definition 27.3.3 *Justified argument. An argument $\mathcal{A}$ is* justified *relatively to a discourse Σ iff there is a proof for $\mathcal{A}$ relatively to Σ.*

For instance, let us consider the discourse $\Sigma_\delta = \{\mathcal{A}^\delta, \mathcal{B}^\delta, \mathcal{C}^\delta\}$ of Table 27.2 on the following page. The reader can check that relatively to Σ_δ, the tree of Table 27.2 on the next page is indeed a proof tree. This exemplifies the idea of *reinstatement*: Argument $\mathcal{B}^\delta$ is justified, since the *con*-argument (defeater) $\mathcal{A}^\delta$ is strictly defeated by the p-argument $\mathcal{C}^\delta$.

Let us consider a further variation on the Lebach example. Remember that we had:

- argument $\mathcal{A}^\beta$, concluding that Tom has the right to prohibit the broadcast of the documentary, since the broadcast would represent a violation of privacy;
- argument $\mathcal{B}^\beta$, concluding that Mary has the right to broadcast it since this contributes to information;

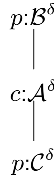


Table 27.2: *Proof tree: reinstatement*

Argument $\mathcal{D}^\beta$

1. β_{11}: *Tom* was incapable when agreeing to the transmission of *Lebach documentary* ⟨premise⟩
2. β_{12}: FORANY (x, y)
   IF [x is incapable when agreeing to the transmission of y]
   THEN^n [β_{10} *is* NOT *applicable to* x, y] ⟨premise⟩
3. β_{10} *is* NOT *applicable to Tom*, *Lebach documentary*
   ⟨from 1 and 2, by *syllogism*⟩

Table 27.3: *New counterargument*

- argument $\mathcal{C}^\beta$, concluding that the prohibition to broadcast for privacy reasons does not apply when the concerned person agrees to the broadcast.

The reader can check that the proof of argument $\mathcal{B}^\beta$, relatively to discourse $\{\mathcal{A}^\beta, \mathcal{B}^\beta, \mathcal{C}^\beta\}$, is also a proof with regard to $\widehat{\beta}$, since it includes all the relevant arguments constructible from that set. That this is a proof follows from the fact that the bottom nodes of the tree (its leaves) are all *pro*-nodes. This shows that all attacks against argument $\mathcal{B}^\beta$ are strictly defeated.

Let us now consider an extension of Lebach. Consider the following argument:

1. Tom was incapable of understanding what he was doing when he gave his agreement to the broadcast (and Mary profited from such situation);
2. these circumstances determine the inapplicability of the rule that agreement prevents violations of privacy;
3. thus, this rule is inapplicable.

This argument—let us call it $\mathcal{D}^\beta$ (Table 27.3)—would strictly defeat $\mathcal{C}^\beta$ by undercutting it. Consequently $\mathcal{C}^\beta$ would be unable to attack effectively $\mathcal{A}^\beta$, so that $\mathcal{A}^\beta$, would still be able prevent the justification of $\mathcal{B}^\beta$. If we add to premise set β the premises in argument $\mathcal{D}^\beta$, the justification of $\mathcal{B}^\beta$ is bound to fail.

Relatively to the extended set of arguments $\{\mathcal{A}^\beta, \mathcal{B}^\beta, \mathcal{C}^\beta, \mathcal{D}^\beta, \mathcal{P}_1^\beta, \mathcal{P}_2^\beta\}$ we can build a proof for argument $\mathcal{A}^\beta$, and cannot build a proof for argument

Table 27.4: *Successful and failed proof*

$\mathcal{B}^\beta$ (Table 27.4). This happens because there is no argument which can attack argument $\mathcal{D}^\beta$.

This general idea can be given a more dialectical flavour by viewing *pro* and *con* arguments as being put forward by two parties (or by the same reasoner, playing two roles): the *Proponent* and the *Opponent* of the argument (see Section 11.1.3 on page 308). Then the definition we have just presented may be interpreted as the protocol for a dialogue between these two parties (for this approach, see: Prakken and Sartor 1997; Prakken 1997).

27.3.3. Applications of the Proof-Method

In this section, we shall apply our method for proving justifiability to some examples.

First we propose a systematic way of formalising preferential reasoning about the multiple orderings or preferences we introduced in Chapter 7. The usual three general priority principles for solving legal collisions can be represented as follows:

1. *Superiority.* Superior laws prevail over inferior ones (*lex superior derogat legi inferiori*), denoted as pr_{sup}.
2. *Specificity.* More special (specific) laws prevail over more general ones (*lex specialis derogat legi generali*), denoted as pr_{spec}.
3. *Posteriority.* Subsequent (posterior) laws prevail over earlier ones (*lex posterior derogat legi anteriori*), denoted as pr_{post}.

To these traditional principles we add the two further principles we examined in Chapter 7:

4. *Exceptionality.* Exceptions prevail over the norms they refer to, denoted as pr_{exc}.

pr_{sup}:	FORANY (φ, ψ) IF [φ is superior to ψ] THEN $\varphi \succ \psi$
pr_{spec}:	FORANY (φ, ψ) IF [φ is more specific than ψ] THEN $\varphi \succ \psi$
pr_{post}:	FORANY (φ, ψ) IF [φ is later than ψ] THEN $\varphi \succ \psi$
pr_{exc}:	FORANY (φ, ψ) IF [φ is an exception to ψ] THEN $\varphi \succ \psi$
pr_{axio}:	FORANY (φ, ψ) IF [φ is has a better value-impact than ψ] THEN $\varphi \succ \psi$

Table 27.5: *Priority rules*

sup1:	FORANY (φ, ψ) IF [φ is a constitutional proposition] AND [ψ is a statutory proposition] THEN^n [φ is superior to ψ]
spec1:	FORANY $(\varphi, \psi, A, B, C, D)$ IF [φ has content ⌈IF A THEN^n B⌉] AND [ψ has content ⌈IF C THEN^n D⌉] AND [A entails C] AND NON [C entails A] THEN^n [φ is more special than ψ]
post1:	FORANY $(\varphi, \psi, t_1, t_2)$ IF [φ was issued at time t_1] AND [ψ was issued at time t_2] AND $t_1 > t_2$ THEN^n [φ is later than ψ]
exc1:	FORANY (φ, ψ, A, B, C) IF [φ has content ⌈IF A THEN^n B⌉] AND [ψ has content ⌈IF C THEN^n NON B⌉] THEN^n [ψ is an exception to φ]

Table 27.6: *Priority-conditioning rules*

5. *Axiology*. Laws having a better value impact prevail over laws having a worse value impact, denoted as pr_{axio}.

These five principles can be expressed through the rules in Table 27.5 Other rules, like those in Table 27.6, indicate when the antecedents of the priority-rules hold: They specify when the conditions of a certain kind of priority obtain. These priority-conditioning rules do not provide necessary conditions for a priority to exist, but only sufficient ones. Thus further rules may provide for further cases, for instance, of superiority and exceptionality.

In our model, we may apply preferences also to preference principles, specifying for instance that superiority prevails over specificity, and specificity prevails over posteriority, according to the meta-priority rules of Table 27.7 on the next page.

Let us now formalise an example taken from Italian law, which concerns a

$meta_{pref1}$: FORANY (φ, ψ) $pr_{sup}(\varphi, \psi) \succ pr_{spec}(\varphi, \psi)$
$meta_{pref2}$: FORANY (φ, ψ) $pr_{spec}(\varphi, \psi) \succ pr_{post}(\varphi, \psi)$

Table 27.7: *Meta-priority rules*

Premise set ϵ

ϵ_1: $Villa_0$ is a protected building
ϵ_2: $Villa_0$ needs restructuring
ϵ_3: FORANY (x)
IF $[x$ is a protected building$]$
THEN^n $[x$'s exterior may NOT be modified$]$
ϵ_4: FORANY (x)
IF $[x$ needs restructuring$]$
THEN^n $[x$'s exterior may be modified$]$
ϵ_5: ϵ_3 concerns the protection of artistic buildings
ϵ_6: ϵ_4 concerns town planning
art_{pref}: FORANY (φ, ψ)
IF $[\varphi$ is concerns the protection of artistic buildings$]$ AND
$[\psi$ concerns town planning$]$
THEN^n $\varphi \succ \psi$
pr_{post}: FORANY (φ, ψ)
IF $[\varphi$ is later than $\psi]$
THEN $\varphi \succ \psi$
$postArt$: art_{pref} is later than pr_{post}

Table 27.8: *The town-planning premise-set*

conflict between a rule saying that ⌈if a building needs restructuring, its exterior may be modified⌉, and an earlier rule saying that ⌈if a building is on the list of protected buildings, its exterior may not be modified⌉.

When trying to apply priority rules to solve this conflict, we are led into a new conflict, that is, a conflict between the *posteriority* principle that ⌈later rules have priority over the earlier ones⌉ and a particular priority-rule of the law of cultural heritage ⌈rules protecting artistic building prevail over land-planning rules⌉ (see Table 27.8).

Interestingly, this conflict can be solved again according to posteriority, which can be applied to the conflict between itself (more correctly, one instance of itself) and other priority rules: The specific priority rule (preference for rules protecting artistic buildings) prevails over the posteriority principle, being posterior to the latter. The reasoning leading to this conclusion proceeds as follows:

- Let us start with argument $\mathcal{A}^{\epsilon}$ (Table 27.9 on the next page), which establishes the substantive conclusion that ⌈ $Villa_0$'s exterior may NOT be modified⌉.

Argument $\mathcal{A}^\epsilon$

1.	ϵ_1:	*Villa₀* is a protected building	⟨premise⟩
2.	ϵ_3:	FORANY (x) IF $[x$ is a protected building$]$ THEN^n $[x$'s exterior may NOT be modified$]$	⟨premise⟩
3.		$Villa_0$'s exterior may NOT be modified	⟨from 1 and 2, by *syllogism*⟩

Table 27.9: *Argument for modification*

Argument $\mathcal{B}^\epsilon$

1.	ϵ_2:	$Villa_0$ needs restructuring	⟨premise⟩
2.	ϵ_4:	FORANY (x) IF $[x$ needs restructuring$]$ THEN^n $[x$'s exterior may be modified$]$	⟨premise⟩
3.		$Villa_0$'s exterior may be modified	⟨from 1 and 2, by *syllogism*⟩

Table 27.10: *Argument against modification*

- Unfortunately, argument $\mathcal{A}^\epsilon$ is rebutted by argument $\mathcal{B}^\epsilon$, establishing the contradictory substantive conclusion that ⌈$Villa_0$'s exterior may be modified⌉ (Table 27.10).
- Argument $\mathcal{A}^\epsilon$ is helped by the preference argument $\mathcal{P}_1^\epsilon$ (Table 27.11 on the next page), according to which argument $\mathcal{A}^\epsilon$ prevails over $\mathcal{B}^\epsilon$, because of the specific preference rule art_{pref}.
- However, argument $\mathcal{P}_1^\epsilon$ is rebutted by argument $\mathcal{P}_2^\epsilon$ (Table 27.12 on the facing page), according to which $\mathcal{B}^\epsilon$ prevails over $\mathcal{A}^\epsilon$, because of pr_{post}.
- The question becomes which one of $\mathcal{P}_1^\epsilon$ and $\mathcal{P}_2^\epsilon$ prevails. The answer is provided by the meta-priority argument $\mathcal{P}_3^\epsilon$ (Table 27.13 on page 714), which states that $\mathcal{P}_1^\epsilon$ wins out, because of pr_{post}.
- Thus argument $\mathcal{A}^\epsilon$ is proved to be inferentially justified: Argument $\mathcal{P}_3^\epsilon$ is justified having no couterarguments, and according to $\mathcal{P}_3^\epsilon$'s evaluation $\mathcal{P}_1^\epsilon$ strictly defeats its only counterargument $\mathcal{P}_2^\epsilon$; thus $\mathcal{P}_1^\epsilon$ is also justified, and according to $\mathcal{P}_1^\epsilon$'s evaluation $\mathcal{A}^\epsilon$ strictly defeats its only counterargument $\mathcal{B}^\epsilon$; thus argument $\mathcal{A}^\epsilon$ is also justified, and so is its conclusion that ⌈$Villa_0$'s exterior may NOT be modified⌉.

The dialectical interaction of all these arguments is represented in Table 27.14 on page 714 which provides the inferential justification of argument $\mathcal{A}^\epsilon$.

Argument $\mathcal{P}_1^\epsilon$

1.	ϵ_5: ϵ_3 concerns the protection of artistic buildings	⟨premise⟩
2.	ϵ_6: ϵ_4 concerns town planning	⟨premise⟩
3.	pr_{art}: FORANY (φ, ψ) IF [φ concerns the protection of artistic buildings AND [ψ concerns town planning] THEN^n $\varphi \succ \psi$	⟨premise⟩
4.	$\epsilon_3 \succ \epsilon_4$	⟨from 1, 2, and 3, by *syllogism*⟩
5.	$\|1, 2, \text{for } 3 \text{ in } \mathcal{A}^\epsilon\|$ OUTWEIGHS $\|1, 2, \text{for } 3 \text{ in } \mathcal{B}^\epsilon\|$	⟨from 4, by *decisive subreason*⟩

Table 27.11: *First priority argument*

Argument $\mathcal{P}_2^\epsilon$

1.	ϵ_7: ϵ_4 is later than ϵ_3
2.	pr_{post}: FORANY (φ, ψ) IF [φ is later than ψ] THEN $\varphi \succ \psi$
3.	$\epsilon_4 \succ \epsilon_3$
4.	$\|1, 2, \text{for } 3 \text{ in } \mathcal{B}^\epsilon\|$ OUTWEIGHS $\|1, 2, \text{for } 3 \text{ in } A_2^\epsilon\|$

Table 27.12: *Second priority argument*

27.3.4. Ross's Paradox of the Self-Amending Constitution

Ross (1969) proposed an interesting paradox to the attention of legal theorists. Ross invites us to endorse the following reasonable assumptions:

- provision p_1, in constitutional text T, establishes that T can only be amended according to procedure pr_1;
- a new provision p_2, is issued, according to procedure pr_1; and
- p_2 says that constitutional text T can only be amended according to a procedure pr_2, which is different from procedure pr_1.

These reasonable assumptions unfortunately seem to lead us to paradoxical conclusions:

1. being a constitutional amendment, provision p_2 is valid if and only if it is issued according to provision p_1, to wit, according to procedure pr_1;
2. if p_2 is valid having been issued according to procedure pr_1, then it succeed in derogating p_1, and in substituting the old procedure pr_1 with the new procedure pr_2;
3. however p_2 itself has not been issued according to the new procedure pr_2, and thus it is not valid.

Argument $\mathcal{P}_3^\epsilon$

1.	ϵ_8:	pr_{art} is later than pr_{post}	⟨premise⟩
2.	pr_{post}:	FORANY (φ, ψ) IF [φ is later than ψ] THEN $\varphi \succ \psi$	
3.		$pr_{art} \succ pr_{post}$	⟨from 1 and 2, by *syllogism*⟩
4.		$\lVert$1, 2, for 3 in $\mathcal{P}_1^\epsilon \rVert$ OUTWEIGHS $\lVert$1, 2, for 3 in $\mathcal{P}_2^\epsilon \rVert$	⟨from 3, by *decisive subreason*⟩

Table 27.13: *Meta priority-argument*

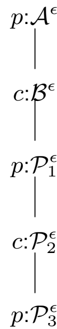


Table 27.14: *Proof through meta-preference*

In conclusion, it seems that if provision p_2 is valid then it is not valid.

This normative puzzle seems to correspond to the well-known epistemic *paradox of the liar*. The latter paradox, according to tradition, is due Epimenides, the Cretan, who kept logicians busy by uttering the statement [s: I am lying].[8] The question that we need to answer is the following: Is statement s true or false? Given that lying means to utter a false statement, we can make the following considerations. Clearly, if statement s is true (Epimenides is lying), then the statement is false (because Epimenides is not lying: He is uttering a true statement, namely the statement s that he is lying). On the contrary, if statement s is false (Epimenides is not lying), then this statement is true (because Epimenides is lying: He is uttering a false statement, namely, the statement s that he is lying).

We shall not here investigate the connection between Ross's paradox and the paradox of the liar, nor shall we review the literature on Ross's paradox.[9] We

[8] There are many variants of this utterance but this will do for our purposes (as a matter of fact, the version we propose is attributed not to Epimenides, but to Eubulides).

[9] On Ross's paradox of self-amendment, see among the others: Conte 1989; Sauber 1990.

shall limit ourselves to providing a formalisation of the paradox and a solution to it, according to our logical model for normative reasoning. Let us consider a specific instance of Ross's paradoxical assumptions:

- provision η_{p1} says that ⌈the constitution can only be modified through a vote of the Parliament⌉;
- the Parliament votes provision η_{p2}: ⌈The constitution can only be modified through a referendum⌉.

We need to ask ourselves whether provision η_{p2} is valid. This question is paradoxical since it seems that the following holds. If η_{p2} is valid, having been approved by the Parliament according to η_{p1}, then constitutional modification are to be adopted through a referendum. But then η_{p2} is not valid since it has not been approved through a referendum (but rather through a parliamentary vote): If η_{p2} is valid, then it is not valid.

Let us try to map Ross's paradox into our model of normative knowledge and reasoning: We represent amendment-regulations as rules (normative conditionals) which establish the bindingness (in our sense of *cognitive bindingness*), or the non-bindingness, of normative propositions enacted in certain ways.

Let us first express provision η_{p1} in our formalism. We do that by extracting two rules from the text of η_{p1}.[10]

The first rule—which we call the *positive part* of the amendment provision p_1 and denote as η_{r1Pos}—says that a constitutional modification is binding (starts to be binding) if it is approved by the Parliament:[11]

η_{r1Pos}: FORANY (t) FORANY (r)
 IF [r is a constitutional provision] AND
 [r is enacted through *parliamentary vote*]
 happens at time t
 THEN^n *Binding* r

The second rule—which we call the *negative part* of the amendment provision p_1 and denote as η_{r1Neg}—says that if a constitutional modification is enacted without a vote by the Parliament, then it is not binding.

[10] We choose a representation that is simple enough to allow us to focus only on Ross's paradox. A more accurate representation would require us to view particular token-statements as being, or not being, textually binding. The bindingness of a certain proposition would then result from the bindingness of the token statement expressing it in the enactment-act. This would allow the same proposition to be expressed, through different token-statements, at different times, the later enactment resulting in a binding statement and a binding proposition, though the first one resulted in a non-binding statement and failed to produce a binding proposition. Moreover we could view the enactment of a statement as initiating bindingness, rather than simply determining it. The latter refinement however, would not entail significant changes in our example, given our distinction between cognitive bindingness and temporal applicability.

[11] In this rule, as in the following, we distinguish the temporal variable by applying a distinct quantifier to it. This is irrelevant to the logical content of the rule, since FORANY (x, y) is just an abbreviation for FORANY (x) FORANY (y).

η_{r1Neg}: FORANY (t) FORANY (r)
IF [r is a constitutional provision] AND
[r is enacted without *parliamentary vote*]
happens at time t
THEN^n NON (*Binding* r)

Similarly, provision η_{p2} needs to be represented through the combination of two rules. The first rule—the *positive part* of the amendment provision η_{p2}, denoted as η_{r2Pos}—says that a constitutional modification is binding (starts to be binding) if it is approved by the Parliament:

η_{r2Pos}: FORANY (t) FORANY (r)
IF [r is a constitutional provision] AND
[r is enacted through *referendum*]
happens at time t
THEN^n *Binding* r

The second rule—the *negative part* of the amendment provision η_{p2}, denoted as η_{r2Neg}—says that if a constitutional modification is enacted without referendum then it is not binding.

η_{r2Neg}: FORANY (t) FORANY (r)
IF [r is a constitutional provision] AND
[r is enacted without *referendum*]
happens at time t
THEN^n NON (*Binding* r)

Besides these rules, we also need a rule stating that the provisions in the original constitution are binding from the time of their enactment.

η_{r0}: FORANY (t) FORANY (r)
IF [r is a constitutional provision] AND
[r is enacted through *original constitution*]
happens at time t
THEN^n *Binding* r

Let us also assume that—according to the new procedure laid down in η_{r2Pos}—a new substantive constitutional provision η_{r3} was issued, for instance a rule saying that everybody has a right to data protection.

η_{r3}: FORANY (t) FORANY (x)
[x has a right to data protection] *holds at time* t

We need to add to our knowledge base the fact that the first couple of our amendment-rules (η_{r1Pos}, η_{r1Neg}) were included in the original constitution, which was enacted on 01.01.1960. The second couple (η_{r2Pos}, η_{r2Neg}) was enacted on 01.01.2000, through parliamentary vote, and without a referendum.

Premise set η

η_{f1}: [η_{r1Pos} is a constitutional provision]
η_{f2}: [η_{r1Pos} is enacted through *original constitution*]
happens at time 01.01.1960
η_{f3}: [η_{r1Neg} is a constitutional provision]
η_{f4}: [η_{r1Neg} is enacted through *original constitution*]
happens at time 01.01.1960
η_{f5}: [η_{r2Pos} is a constitutional provision]
η_{f6}: [η_{r2Pos} is enacted through *parliamentary vote*]
happens at time 01.01.2000
η_{f7}: [η_{r2Pos} is enacted without *referendum*]
happens at time 01.01.2000
η_{f8}: [η_{r2Neg} is a constitutional provision]
η_{f9}: [η_{r2Neg} is enacted through *parliamentary vote*]
happens at time 01.01.2000
η_{f10}: [η_{r2Neg} is enacted without *referendum*]
happens at time 01.01.2000
η_{f11}: [η_{r3} is a constitutional provision]
η_{f12}: [η_{r3} is enacted through *referendum*
happens at time 01.01.2001
η_{f13}: [η_{r3} is enacted without *parliamentary vote*
happens at time 01.01.2001
η_{r0}: FORANY (t) FORANY (r)
IF [r is a constitutional provision] AND
[r is contained in the original constitution]
THEN^n *Binding* r

Table 27.15: *Premise set for Ross's paradox*

The last rule (η_{r3}) was adopted on 01.01.2001, through referendum and without a parliamentary vote.

By putting together our premises we obtain the set η in Table 27.15.

This premise set allows us to build argument A^η for the bindingness of the new amendment-rule η_{r2Pos}, which was enacted by the Parliament (without a referendum), but which states that constitutional provisions enacted through referendum are binding, as shown in Table 27.16 on the following page.[12]

Unfortunately argument $\mathcal{A}_\eta$ is defeated by argument $\mathcal{B}^\eta$ (in Table 27.17 on page 719), which concludes that rule η_{r2Pos} is not binding, by using the negative part of provision p_2, namely, rule η_{r2Neg} (constitutional provisions enacted without a referendum are not binding), as shown by argument B^η Table 27.17 on page 719.

[12] To draw the attention to the bindingness conclusions, which generate Ross's paradox, we frame their numbers.

Argument A^η

1.	η_{f1}: [η_{r1Pos} is a constitutional provision]	⟨premise⟩
2.	η_{f2}: [η_{r1Pos} is enacted through *original constitution*] *happens at time* 01.01.1960	⟨premise⟩
3.	η_{r0}: FORANY (t) FORANY (r) IF [r is a constitutional provision] AND [r is enacted through *original constitution*] *happens at time* t THEN^n *Binding* r	⟨premise⟩
4.	*Binding* η_{r1Pos}	⟨from 1 2, and 3, by *syllogism*⟩
5.	η_{r1Pos}: FORANY (t) FORANY (r) IF [r is a constitutional provision] AND [r is enacted through *parliamentary vote*] *happens at time* t THEN^n *Binding* r	⟨from 4, by *Binding-elimination*⟩
6.	η_{f5}: [η_{r2Pos} is a constitutional provision]	⟨premise⟩
7.	η_{f6}: [η_{r2Pos} is enacted through *parliamentary vote*] *happens at time* 01.01.2000	⟨premise⟩
8.	*Binding* η_{r2Pos}	⟨from 5, 6, and 7, by *syllogism*⟩
9.	η_{r2Pos}: FORANY (t) FORANY (r) IF [r is a constitutional provision] AND [r is enacted through *referendum*] *happens at time* t THEN^n *Binding* r	⟨from 8, by *Binding-elimination*⟩

Table 27.16: *The inference of the new amendment-rule (in its positive part)*

Argument $\mathcal{B}^\eta$ preferentially defeats argument A^η, according to the principle of posteriority (see Table 27.18 on page 720): The conclusion that η_{r2Pos} is not binding (not having been enacted through referendum) is derived using rule η_{r2Neg}, which is posterior to rule η_{r1Pos} (according to which we should conclude that η_{r2Pos} is binding having been enacted through parliamentary vote). More precisely, according to the posteriority-based preference-argument $\mathcal{P}^\eta$, rule η_{r2Neg} is stronger than rule η_{r1Pos}, and thus reason ||9, 10, 11, for 12 in $\mathcal{B}^\eta$|| outweighs reason ||5, 6, 7 for 8 in A^η||. Note that argument $\mathcal{P}^\eta$ also contains the common-sense rule[13] that a rule r_1 is later than a rule r_1 if r_1 was issued (in whatever ways w and z) at a later time than r_2.

Finally, there is a third main argument that is relevant to our analysis, argument $\mathcal{C}_\eta$ in Table 27.19 on page 721, according to which rule η_{r2Neg} is not binding, according to η_{r2Neg} itself.

[13] We freely us in our example, common sense assumptions, indicating them as $cs_1, cs_2, \ldots$

Argument B^η

1. η_{f1}: [η_{r1Pos} is a constitutional provision] ⟨premise⟩
2. η_{f2}: [η_{r1Pos} is enacted through *original constitution*]
   happens at time 01.01.1960 ⟨premise⟩
3. η_{r0}: FORANY (t) FORANY (r)
   IF [r is a constitutional provision] AND
   [r is enacted through *original constitution*]
   happens at time t
   THEN^n *Binding* r ⟨premise⟩
4. *Binding* η_{r1Pos} ⟨from 1, 2, and 3, by *syllogism*⟩
5. η_{r1Pos}: FORANY (t) FORANY (r)
   IF [r is a constitutional provision] AND
   [r is enacted through *parliamentary vote*]
   happens at time t
   THEN^n *Binding* r ⟨from 4, by *Binding-elimination*⟩
6. η_{f8}: [η_{r2Neg} is a constitutional provision] ⟨premise⟩
7. η_{f9}: [η_{r2Neg} is enacted through *parliamentary vote*]
   happens at time 01.01.2000 ⟨premise⟩
8. *Binding* η_{r2Neg} ⟨from 5, 6, and 7, by *syllogism*⟩
9. η_{r2Neg}: FORANY (t) FORANY (r)
   IF [r is a constitutional provision] AND
   [r is enacted without *referendum*]
   happens at time t
   THEN^n NON (*Binding* r) ⟨from 8, by *Binding-elimination*⟩
10. η_{f5}: [η_{r2Pos} is a constitutional provision] ⟨premise⟩
11. η_{f7}: [η_{r2Pos} is enacted without *referendum*]
    happens at time 01.01.2000 ⟨premise⟩
12. NON (*Binding* η_{r2Pos}) ⟨from 9, 10 and 11, by *syllogism*⟩

Table 27.17: *The inference that the new amendment-rule (in its positive part η_{r2Pos}) is not binding*

Argument C^η is paradoxical in the sense that it is self-defeating. More precisely, the argument's final conclusion:

11. NON *Binding* η_{r2Neg}

rebuts a previous step in the argument, that is, the intermediate conclusion

8. *Binding* η_{r2Neg}

However, for getting to proposition (11), we must have previously obtained proposition (8). Thus, we can express the paradox as follows: If η_{r2Neg} is binding according to argument C^η (proposition 8), then according to C^η it is not binding (proposition 11).

Note also that that the reason leading to the final conclusion of C^η preferentially defeats the reason leading to the intermediate conclusions, according to

Argument P^{η}

1.	η_{f2}: [η_{r1Pos} is enacted through *original constitution*] *happens at time* 01.01.1960	⟨premise⟩
2.	η_{f9}: [η_{r2Neg} is enacted through *parliamentary vote*] *happens at time* 01.01.2000	⟨premise⟩
3.	cs_1: FORANY (t_1, t_2) FORANY (r_1, r_2, w, z) IF [r_1 is enacted through w] *happens at time* t_1 AND [r_2 is enacted through z] *happens at time* t_2 AND $t_1 > t_2$ THEN^n [r_1 is later than r_2]	⟨premise⟩
4.	η_{r2Neg} is later than η_{r1Pos}	⟨from 1, 2, and 3, by *syllogism*⟩
5.	pr_{post}: FORANY (φ, ψ) IF [φ is later than ψ] THEN $\varphi \succ \psi$	⟨premise⟩
6.	$\eta_{r2Neg} \succ \eta_{r1Pos}$	⟨from 4 and 5, by *syllogism*⟩
7.	‖9, 10, 11, for 12 in $\mathcal{B}^{\eta}$‖ OUTWEIGHS ‖5, 6, 7 for 8 in A^{η}‖	

Table 27.18: *Priority argument based on posteriority*

the principle of *posteriority* (as defined in the previous section), given that the adoption of rule r_{2b} is subsequent to the adoption of rule r_{1a}, according to the preference argument P^{η}.

We need to establish the following:

- whether, on the basis of the information we have, any argument supports the conclusion that the new amendment rule is binding—especially in its positive part η_{r2Pos} (binding constitutional provisions can be enacted through referendum)—and
- whether this argument is justified.

The first question can be easily answered: We can derive the conclusion that η_{r2Pos} is binding according to A^{η} in Table 27.16 on page 718. To answer the second question, we need to establish whether A^{η} is justified, that is, whether is a proof for it. Our attempt to construct a proof develops in the following way:

- the starting *pro*-node is A^{η};
- A^{η} is defeated by the *con*-node B^{η};
- B^{η} is preferentially defeated by the *pro*-node $\mathcal{C}^{\eta}$, combined with P^{η} (preference by posteriority);
- $\mathcal{C}^{\eta}$ is defeated by the *con*-node formed by $\mathcal{C}^{\eta}$ itself;
- no further *pro*-node can be added to the proof tree.

Argument C^{η}

1.	η_{f1}: [η_{r1Pos} is a constitutional provision]	⟨premise⟩
2.	η_{f2}: [η_{r1Pos} is enacted through *original constitution*] *happens at time* 01.01.1960	⟨premise⟩
3.	η_{r0}: FORANY (t) FORANY (r) IF [r is a constitutional provision] AND [r is enacted through *original constitution*] *happens at time* t THEN^{n} *Binding* r	⟨premise⟩
4.	*Binding* η_{r1Pos}	⟨from 1, 2, and 3, by *syllogism*⟩
5.	η_{r1Pos}: FORANY (t) FORANY (r) IF [r is a constitutional provision] AND [r is enacted through *parliamentary vote*] *happens at time* t THEN^{n} *Binding* r	⟨from 4, by *Binding-elimination*⟩
6.	η_{f2b0}: [η_{r2Neg} is a constitutional provision]	⟨premise⟩
7.	η_{f2b1}: [η_{r2Neg} is enacted through *parliamentary vote*] *happens at time* 01.01.2000	⟨premise⟩
8.	*Binding* η_{r2Neg}	⟨from 5, 6, and 7, by *syllogism*⟩
9.	η_{r2Neg}: FORANY (t) FORANY (r) IF [r is a constitutional provision] AND [r is enacted without *referendum*] *happens at time* t THEN^{n} NON (*Binding* r)	⟨from 8, by *Binding-elimination*⟩
10.	η_{f10}: [η_{r2Neg} is enacted without *referendum*] *happens at time* 01.01.2000	⟨premise⟩
11.	NON (*Binding* η_{r2Neg})	⟨from 6, 9, and 10, by *syllogism*⟩

Table 27.19: *The new amendment rule (negative part): being binding leads to not being binding*

This proof tree (see Table 27.20 on the following page) fails to provide a proof of $\mathcal{A}^{\eta}$: It terminates with a *con*-node and cannot be further extended with a *pro*-node (remember that *pro*-nodes cannot be repeated in the same branch of a proof).

Thus it seems that we are unable to conclude that the new amendment provision is binding (in its positive part), which impedes us from recognising the bindingness of constitutional provisions enacted according to the new procedure (through referendum).

This analysis needs to be completed with some considerations concerning self-defeating arguments. One view is that self-defeating arguments are completely irrelevant: Since they defeat themselves they cannot support any conclusion, and thus, *a fortiori*, they cannot attack any conclusion. According to this view, which we endorsed in Prakken and Sartor 1997, sec. 10.1, argument $\mathcal{C}_{\eta}$

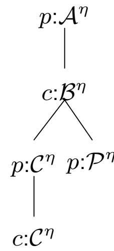


Table 27.20: *There is no proof for the argument that the new amendment rule (positive part) is binding*

fails to be usable in proofs.[14] However, argument $\mathcal{A}^\eta$ still is defeated by $\mathcal{B}^\eta$: There is no proof for $\mathcal{A}^\eta$, regardless of the status of $\mathcal{C}_\eta$. Thus the conclusion we reach concerning the justifiability $\mathcal{A}^\eta$ (and the bindingness of r_{2a}) is independent of what view we adopt on self-defeating arguments.

27.3.5. A Solution to the Self-Amendment Paradox: Non-Retroactivity

Our solution to the self-amendment paradox is based upon the analysis of some temporal aspects in legal rules.

We need to distinguish two time-frames, with regard to a conditional rule r:

- The *creation time*, namely the time when the events happen which initiate r's bindingness. For enacted rules, this is the time of the completion of the enactment procedure.
- The *applicability duration*, namely, the time-intervals during which the rule operates, by determining normative effects for events taking place during those intervals. These are the time-intervals during which the realisation of instances of r's antecedent determines the realisation of instances of r's consequent.

The relevant meta-rule mr—establishing that r's enactment initiates r's bindingness—needs to be applicable at r's creation time: At this time r's enactment must be able of determining the initiation of r's bindingness. After r's bindingness has been initiated it will continue even if meta-rule mr is not applicable to subsequent enactments: The subsequent inapplicability (or defeat) of the mr does not impact on r's bindingness.

The creation time of a rule r does not need to fall within r's application-duration. For instance I may consider as now binding, having been created

[14] We can make self-defeating arguments irrelevant, by requiring that an argument is not self-defeating, for it to rebut or undercut other arguments.

at the beginning of this year all of the following: (*a*) a retroactive rule according to which the tax on bank interests is 15% during last year, (*b*) a currently-applicable rule according to which the tax on bank interests is 14% during this year, and (*c*) a futurely-applicable rule according to which the tax on bank interests will be 14.5% during next year. The first of these rules, for instance, will be represented as follows:

FORANY (t)
  IF [01.01.2003 $\leq$ t $\leq$ 31.12.2003]
  THEN^n
    FORANY (x)
      IF [x is a loan]
      THEN^n [x's interest rate is 5% *holds at time* t]

According to our notion of cognitive bindingness all three rules, which have the same creation time (31.12.2003) are currently binding (they all have to be accepted in legal reasoning), though they will be applicable in different time intervals, as specified by their temporal antecedents.[15]

It is true that many normative propositions are stated in universal terms: They do not include the specification of a limited applicability-duration, so that they seem to be applicable to events or situations holding at any time, in the past and in the future. However, the assumption that normative proposition are temporally universal is limited by the principle of non-retroactivity.[16]

According to this principle, a rule is only applicable after the time when it was enacted (more generally, after the time when the rule has initiated to be binding).[17] The rationale of this principle is obvious: It would usually be unfair (or even irrational) to assume that the qualifications established by a rule are also determined by events which happened at a time antecedent or contemporary to the enactment of a rule, when the concerned people could not adapt their behaviour to the rule being aware of its legal bindingness.

[15] Others may want to use the notion of *validity* or *force* of a rule in a more restricted sense than our notion of bindingness, that is, to speak of a valid law (a law in force) only to denote the rules which are applicable to current and future state of affairs (this is usually the case for temporally-general statutory rules which have been enacted and have not yet been abrogated). We have no objection against this terminology, as long as it coexists with our more basic analysis, which distinguishes the cognitive bindingness of a rule and the scope of its temporal application.

[16] Further limits to the temporally-general application of a legal rules is provided by the possibility that a rule is abrogated or suspended. For a discussion of the temporal applicability of rules, though in a partially different conceptual framework, see: Sartor 1996; Hernandez Marín and Sartor 1999.

[17] Various legal systems have specific rules establishing until when an enacted rule still is inapplicable (for instance, applicability only starts one month after enactment, according to the Italian civil code).

Argument D^η

1.	η_{f9}: [η_{r2Neg} is enacted through *parliamentary vote*] *happens at time* 01.01.2000	⟨premise⟩
2.	*nonretro*: FORANY (t) FORANY (r, w) IF [r is enacted through w] *happens at time* t_0 AND [$t \leq t_0$] THEN r *is* NOT *applicable at time* t	⟨premise⟩
3.	η_{r2Neg} *is* NOT *applicable at time* 01.01.2000	⟨from 1, 2, and 3, by *syllogism*⟩

Table 27.21: *The new amendment rule (negative part) is not applicable to itself at the time of its enactment*

nonretro:
FORANY (t_0, t) FORANY (r, w)
IF [r is enacted through w]
happens at time t_0 AND
$t \leq t_0$
THEN^n r *is* NOT *applicable at time* t

According to our formalisation of the non-retroactivity principle, this principle works as a defeater against the use of instances of a rule concerning any time no later than (abbreviated as $\leq$) the time when the rule was enacted. Thus it undercuts in particular the instances of the schema *normative syllogism* where the rule's antecedent is satisfied exactly at the time when the rule was adopted.

The non-retroactivity principle undercuts in particular the syllogism constituted by lines 9, 10, 11 and 12 in argument argument B^η in Table 27.19 on page 721, namely, the syllogism concluding that the positive part of the new amendment-rule is not binding on the basis of the negative part of the same rule: This syllogism concerns the application of rule η_{r2Neg} exactly at a time when it was enacted, thus at a time no later than its enactment. You can see the corresponding argument in Table 27.21.

Argument $\mathcal{D}^\eta$ in Table 27.21 is able to strictly defeat argument $\mathcal{B}_\eta$ in Table 27.19 on page 721 by undercutting its last step. Thus, argument $\mathcal{A}^\eta$, having been freed of its only counterargument, is proved to be justified: Its proof indeed terminates with an undefeated p-argument, namely $\mathcal{D}^\eta$, as you can see in Table 27.22 on the next page.

Moreover, the same argument $\mathcal{D}^\eta$ also undercuts the paradoxical argument $\mathcal{C}^\eta$, thus making it overruled. $\mathcal{D}^\eta$ excludes that η_{r2Neg} is applied exactly at the time when it is enacted, and thus it excludes that η_{r2Neg} is applied to its own enactment, as in $\mathcal{C}^\eta$.

Table 27.22: *The effects of argument $\mathcal{D}^\eta$, based on non-retroactivity*

Thus, when coupled with the non-retroactivity clause, Ross's paradox is no paradox at all: We can derive the justified conclusion that both rules η_{r2Pos} and η_{r2Neg} are binding, since the non-retroactivity argument prevents η_{r2Neg} from being applied to η_{r2Pos} and to η_{r2Neg} itself.

27.3.6. A Second Solution to the Self-Amendment Paradox: An Interpretative Assumption

According to our analysis of the temporal applicability of legal norms, Ross's paradox seems to be a real menace only in very unlikely case of a new amendment provision which is retroactive, namely an amendment provision that is declared to apply also to amendments-acts enacted at or before the time of its adoption.

Even in this case, however, we can avoid Ross's paradox, if we directly assume that the negative part (η_{r2Neg}) of the new amendment provision is inapplicable to the positive part (η_{r2Pos}) of the same provision. This assumption can be viewed as an interpretative proposition, which we are required to endorse for capturing the (real or counterfactual) intention[18] of the constitutional legislator and for satisfying that values which underlie an updatable constitutional arrangement. Given that we want to have a modifiable constitution, it would be absurd adopt at the same time the two following attitudes:

- to accept the rule ⌈constitutional provisions cannot be enacted without a referendum⌉.
- to exclude the bindingness of the rule that ⌈constitutional provisions can be enacted through a referendum⌉, and

The joint adoption of these two attitudes entails the conclusion that constitutional provision can be enacted in no way, nor with a referendum neither without

[18] By the *counterfactual intention* of a legislator we mean the solution that the legislator would have intented to adopt, had it considered this problem. Identifying a counterfactual intention is an issue which pertains to vicarious reasoning (see Section 10.2.3 on page 284).

Table 27.23: *Proof-trees after excluding self-application of the new amendment rule*

it. But, in our framework the unrestrained application of the first rule (η_{r2Neg}) leads exactly to exclude the bindingness of the second one (η_{r2Pos}) which was enacted without a referendum.

Under this condition, a reasonable interpreter, while accepting both rules, would exclude that η_{r2Neg} applies to η_{r2Pos}.

Thus, such an interpreter would endorse the following assumption, which represents an exception to η_{r2Neg}:

η_{exc1}: η_{r2Neg} *is* NOT *applicable to* η_{r2Pos}

This assumption represents indeed an undercutter against $\mathcal{B}_\eta$, and in particular against the inference of conclusion (12) from premises (9), (10), and (11).

The argument $\mathcal{E}^\eta$, which only includes η_{exc1} undercuts $\mathcal{B}_\eta$, allows a proof of $\mathcal{A}_\eta$ to be completed, as you can see in Table 27.23.

Similarly, we can assume that the negative part of the amendment rule (η_{r2Neg}) does not apply to itself (clearly, it would be absurd to exclude the bindingness of the rule that ⌈constitutional provisions cannot be enacted without a referendum⌉, through the application of this rule (an application which depends upon the assumption that this rule is binding).

η_{exc2}: η_{r2Neg} *is* NOT *applicable to* η_{r2Neg}

This second exception provides an argument $\mathcal{F}^\eta$ undercutting the paradoxical $\mathcal{C}^\eta$, and thus making it overruled.

Thus our conclusion concerning Ross's paradox of the self-amending clause is that it is no paradox at all, or rather that it is a paradox only under the following highly improbable conditions:

- the new amendment-rule is retroactive;
- its negative part is intended to apply also to its positive part (and to itself).

Under the above conditions, we shall not be able to derive justified conclusions neither concerning the bindingness of the new amendment-rule, nor consequently of rules issued according to the new amendment-rule. However, since

it seems to us that both conditions above are quite odd (we are indeed inclined to reject both of them, at least with regard to reasonable contexts), we can dismiss Ross paradox and maintain our faith in the validity of constitutional provisions, even after their amendment-procedure has changed.

27.4. Extensions of the Basic Model

In this last section we shall quickly go through some issues concerning the formal representation of legal arguments. We cannot provide here an account of the vast debate on formal models of legal reasoning which has taken place in the last years, especially in the domain or Artificial Intelligence and law (for a review, see Prakken and Sartor 2002). Thus, we shall only consider a few aspects that are particularly relevant to the model we have presented in the previous pages. This will require us to analyse some technical aspects. The reader who does not want to deal with logical technicalities can jump to the next chapter.

27.4.1. Representing Non-Provability

Some legal rules establish that a certain proposition holds unless it can be shown otherwise (like: innocent until proved guilty), or under the condition that something is not proved. This traditional form of legal language and reasoning has been recently modelled through formalisms—taken from non-monotonic logic and computer programming—which are based upon the idea of *non-provability*.

In particular, the notion of non-provability plays an important role in representations of the law based on logic programming. In fact standard logic programming is based upon the language of extended Horn clauses,[19] and deals with negations through the operator of negation by failure, which we write as FAILED (see, for instance, Sergot et al. 1986).[20] The proposition ⌈FAILED A⌉ is proved, relatively to a certain premise set (a program), exactly by establishing that A is not entailed by that premise set (by showing that any attempt to prove A is bound to fail). Negation by failure allows for non-monotonic reasoning, since when further information is added, which allows to infer A, then FAILED A (and what depends from it) can no longer be established.

Consider a provision of the Italian civil code, which says that messages are presumed to have been known by their addressee when they arrive at the addressee's domicile unless he or she proves to have been, without fault, in the impossibility of accessing them. In logic programming this may be represented as follows: [21]

[19] Extended Horn clauses are conditional propositions having an atomic consequent, and an antecedent consisting of atomic propositions and negations of such propositions.

[20] Negation by failure is usually denoted by *not*, but we prefer to write FAILED to avoid confusion with usual negation. On logic programming, a classical reference is Kowalski 1979.

[21] For keeping our formulas short, we abbreviate "is without fault, in the impossibility of accessing" with "is unable to access."

μ_1: FORANY (x, y)
IF [message x reaches the domicile of y] AND
FAILED [y is unable to access x]
THEN [y is presumed to have received x]

(for any message x, and any person y, if x reaches the domicile y and it cannot be proved that y was unable to access x, then y is presumed to have received x)

Let us consider how an automatic theorem-prover based on logic programming would process rule μ_1, when trying to determine whether Tom is be presumed to have received Mary's acceptance letter. After establishing (on the basis of the available information) that the letter has reached Tom's domicile, the theorem prover will try to establish whether Tom was unable to access the letter. If the theorem prover fails to achieve this result (the available information does not entail this result), it will draw the following conclusion:

FAILED [Tom is unable to access $Mary's\ letter$]

Consequently, the theorem prover will be able to conclude that Tom is presumed to have received the letter.

Assume however that we add some new information to the knowledge base, information that is accessible to this theorem-prover and allows it to infer (to prove) the proposition:

x is unable to access x

Then it is no longer the case that

FAILED [x cannot x]

and consequently we can no longer establish that

Tom is presumed to have received $Mary's\ letter$

In our model we do not need to explicitly add negation by failure to our system. We can model it through the mechanism of undercutting. A rule:

r: IF (A_1 AND FAILED A_2) THEN B

can be viewed as an abbreviation for the following combination of two rules :

r_a: IF A_1 THEN B
r_b: IF A_2 THEN [r_{1a} *is* NOT *applicable*]

For instance the rule μ_1 above can be viewed as an abbreviation for the following combination:

μ_{1a}: FORANY (x, y)
IF [y reaches x's domicile]
THEN [y is presumed to have received x]
μ_{1b}: FORANY (y, x)
IF [y is unable to access x]
THEN [μ_{1a} *is* NOT *applicable to* y and x]

27.4.2. Non-Provability and Burden of Proof

The view we presented in the previous section—namely, the idea that the legal non-provability of a proposition A consists in the impossibility to infer A from the available knowledge—has been criticised by various legal theorists. In particular, Allen and Saxon (1989) have argued that in a legal text requiring that something is not shown, the word "shown" does not mean "logically proven from the available premises," but rather "shown by a process of argumentation and the presenting of evidence to an authorized decision-maker." Thus, they argue the legal notion of "showing" does not refer to logical non-provability but to legal-procedural non-provability.

This criticism has been further developed by Prakken (1999; 2001a), who has argued that logical models of defeasible reasoning cannot capture the burden of proof, as only a procedural model of legal reasoning can do.[22] Prakken's basic contention is that the outcome of failing to prove something (which one has the burden to prove) is different from outcome of failing to derive something according to a defeasible logic. Let us try to express (a simplified version of) his main argument in our framework.

According to Prakken, when one party j has the burden to prove A—in order to prevent the conclusion C of a rule r IF B THEN^n C—failure to prove A is sufficient to enable the derivation of C (assuming that the preconditions B of rule r is satisfied). And such failure also exists (so that C can be derived) when we are incapable to adjudicate the conflict between arguments for and against A.

On the contrary, in our model of defeasible reasoning, when such a balance between arguments for and against A exists, we are unable to build a justified argument for conclusion C according to rule r. For us, the argument for C only is *merely defensible* (it is defensible but not justified), since it is defeated by a merely defensible argument, namely, by the argument concluding for the inapplicability or rule r, on the basis of the merely defensible derivation of A.

Assume that we are unable to establish, on the basis of the available information, whether Tom was unable to access Mary's letter, since we have arguments

[22] For a discussion of different procedural ways of modelling the burden of proof, see also Leenes 2001.

Argument $\mathcal{A}^\mu$

1.	μ_{1a}:	FORANY (x, y) IF [y reaches x's domicile] THEN [y is presumed to have received x]	⟨premise⟩
2.	μ_2:	$Mary's\ letter$ reaches Tom's domicile	⟨premise⟩
3.		Tom is presumed to have received $Mary's\ letter$	⟨from 1 and 2, by *syllogism*⟩

Table 27.24: *Initial argument*

for and against this conclusion. For instance, assume that we are unable to establish which one of the two following incompatible inferences prevails:

- Tom was out of town, thus he was *unable* to access Mary's letter,
- Tom could easily come back, thus he was *able* to access Mary's letter.

Prakken affirms that under such conditions, there is no proof that Tom was in the impossibility of accessing Mary's letter (Tom has failed to discharge his burden of proof), and thus one is licensed to draw the justified conclusion that Tom is presumed to have received the letter. On the contrary, according to our model, we cannot establish this conclusion since our basic argument $\mathcal{A}^\mu$ (Table 27.24) is defeated by the argument $\mathcal{B}^\mu$ (Table 27.25 on the next page).

It is true that in our model, $\mathcal{C}^\mu$ (Table 27.26 on the facing page) defeats $\mathcal{B}^\mu$, since $\mathcal{C}^\mu$ concludes that Tom was able to reach the letter, contradicting line (3) $\mathcal{B}^\mu$ (which asserted that he was able to do that). However, this is case of mutual defeat (by reciprocal rebutting), and it not sufficient to make the $\mathcal{B}^\mu$ overruled (and $\mathcal{A}^\mu$ justified). So long as the conflict between $\mathcal{B}^\mu$ and $\mathcal{C}^\mu$ is not settled, we cannot view $\mathcal{A}^\mu$ as being justified: We must consider it as being merely defensible (neither overruled, nor justified). In fact, we cannot build a proof for $\mathcal{A}^\mu$, according to our definition of the notion of a proof, since this would require that $\mathcal{B}^\mu$ were strictly defeated.

Prakken, on the contrary, argues that under these conditions one is entitled to endorse argument $\mathcal{A}^\mu$: It was required, for blocking argument argument $\mathcal{A}^\mu$, that rule μ_{1a} was proved to be inapplicable (or, if you prefer, a proof was required of proposition $\lceil Tom$ is unable to access access $Mary's\ letter\rceil$) and such proof has not been provided.

We cannot provide here a thorough analysis of this difficult matter, which would require us to go into very technical aspects. However, we tend to believe that the criticism of Allen and Prakken against the ideas of provability as derivability (according to defeasible argumentation) can be countered, at least to some extent.

In particular, Allen's critique can be overcome by circumscribing, according to procedural constraints, the set of beliefs relatively to which provability has to

Argument $\mathcal{B}^{\mu}$

1.	μ_3:	FORANY (x, y) IF [x is far away when y reaches x's domicile] THEN [x is unable to access y]	⟨premise⟩
2.	μ_4:	[Tom is far away when $Mary's\ letter$ reaches Tom's domicile]	⟨premise⟩
3.		Tom is unable to access $Mary's\ letter$	⟨from 1 and 2, by *syllogism*⟩
4.	μ_{1b}:	FORANY (x, y) IF [x is unable to access y] THEN [μ_{1a} *is* NOT *applicable to* x, y]	⟨premise⟩
5.		μ_{1a} *is* NOT *applicable to* Tom, $Mary's\ letter$	⟨from 3 and 4, by *syllogism*⟩

Table 27.25: *Defeater of the initial argument*

Argument $\mathcal{C}^{\mu}$

1.	μ_3:	FORANY (x, y) IF [x can easily go back shortly after y arrives] THEN [x is able to access y]	⟨premise⟩
2.	μ_4:	Tom can easily go back shortly after $Mary's\ letter$ arrives	⟨premise⟩
3.		Tom is able access $Mary's\ letter$	⟨from 1 and 2, by *syllogism*⟩

Table 27.26: *Defeater of the defeater*

be established. In fact, we view argumentation procedures as governing what inputs are to be adopted by a certain decision-maker, but having a limited impact on the way in which these inputs are going to be processed when they have been correctly provided. Thus, when the set of the propositions which provide the premise set of the reasoner (the beliefs that are binding for the reasoner) have been identified according to the correct procedure, it should be possible to apply logical inference to such beliefs, and thus to view proofs as chains of steps performed through ratiocination.

More generally, as we observed, legal reasoning has a larger relevance that just being a technique for skilful behaviour in a procedural framework. Assume that I am a businessman, and I know that I have received the acceptance of an offer—though I also know that the other party will not be able to prove my reception of the offer "by a process of argumentation and the presenting of evidence to an authorised decision-maker," since they have kept no evidence. Am I acting legally if I refuse to implement the contract, affirming that I have not received the letter? Similarly, am I acting legally if I steal some money with the awareness that I could never be discovered?

It seems that, to answer such questions correctly, we must sharply distinguish the issue of the existence of a normative position from the chance of proving it in a dispute. The first issue concerns individual (or collective) legal cognition, and it needs to be solved by a reasoner, using all the available cognitive resources at his or her disposal. The second issue concerns anticipating how other agents are going to use the resources that are available to them, within the limits in which legal procedures allow them to use such resources. Thus, substantive answers to legal issues (Have I concluded the contract?) need to be distinguished from the ways and the constraints through which issues can be addressed in certain types of procedural settings (Will my adversary be able to lead the judge to endorse this proposition?).

In this spirit, we can accept Prakken's contention that the burden of proof is essentially a procedural notion—though it has an impact outside the courtroom, as long as people anticipate the possible outcomes of litigation. This notion specifically refers to a disputational context, and offers a way of taking a stand where declarative reasoning leaves the decision-maker in a state of perplexity.

In certain cases the rules on the burden of proof have an epistemic foundation: The party having the burden of proof is likely to be in a condition of knowing and proving the truth of a certain proposition, which is in its interest to establish. Thus, if that party does not provide the evidence, that proposition must be false. In other cases, other justifications can be found—for instance, a justification for the so-called presumption of innocence can be found in the values of individual liberty and security.

There seems to be an interesting interaction between defeasible reasoning and the burden of proof. On the one hand, rules on the burden of proof help us in circumscribing what may be viewed as the antecedent of a defeasible normative conditional: If one party has the burden of proving A in order to establish C, and the other party has the burden of proving B for preventing C from being established, we can assume that there is a defeasible rule IF A THEN^n C, plus an undercutting exception to this rule, for the case that B holds. On the other hand, rules on the burden of proof demand decisional outcomes that are not commanded by defeasible reasoning alone, as applied only to the substantive rules and the facts of the case.

27.4.3. Combining Defeasible and Conclusive Inferences

Let us finally consider the problem of combining defeasible and conclusive inferences. Let us go back to our Lebach case to illustrate it with an example. Consider the conclusion of argument $\mathcal{A}^\beta$:

6. *Tom* has the (absolute obligational) right that *Lebach documentary* is not broadcast

and the conclusion of argument $\mathcal{B}^\beta$:

Extension of argument $\mathcal{A}^\beta$

6.	FORANY (y) Tom has the obligational right that ⌈y does NOT broadcast $Lebach\ documentary$⌉ ⟨by the definition of an absolute obligational right⟩
6.1.	Tom has the obligational right that ⌈$Mary$ does NOT broadcast $Lebach\ documentary$⌉ ⟨from 6, by *specification*⟩
6.2.	It is obligatory toward Tom that ⌈$Mary$ does NOT broadcast $Lebach\ documentary$⌉ ⟨from 6.1, by the definition of an obligational right⟩
6.3.	It is forbidden toward Tom that ⌈$Mary$ broadcasts $Lebach\ documentary$⌉ ⟨from 6.2, by the equivalence of ***Obl*** NON A and ***Forb*** A⟩
6.4.	It is not permitted toward Tom that ⌈$Mary$ broadcasts $Lebach\ documentary$⌉ ⟨from 6.2 by the equivalence of ***Forb*** A and NON ***Perm*** A⟩

Table 27.27: *Conclusive extension of the privacy argument*

7. $Mary$ has the (absolute permissive) right to broadcast $Lebach\ documentary$

These conclusions do not directly contradict each other. To obtain a plain contradiction, namely, two propositions such that one is the negation of the other, we need to perform further inference steps, referring to our definitions of normative notions, and to the corresponding schemata.

Let us rewrite proposition 6 of argument $\mathcal{A}^\beta$ according to such definitions, and extend argument argument $\mathcal{A}^\beta$ with the lines in Table 27.27.

Similarly argument $\mathcal{B}^\beta$ can be extended through conclusive inference steps, as shown in Table 27.28 on the following page. In this way we get two contradictory conclusions: On the one hand we conclude, according to argument $\mathcal{A}^\beta$, that it is permitted toward Tom that Mary broadcasts the documentary; on the other hand we conclude, according to argument $\mathcal{B}^\beta$, that this is not permitted.

As we have observed, when we face a collision of conclusive reasons R_1 and R_2 (by a conclusive reason, we mean the precondition of a conclusive reasoning step), we cannot endorse both of them. Thus we need to question the elements of such reasons, that is, their subreasons. If a subreason is, in its turn, the conclusion of a conclusive reasons R_R, we must examine R_R, and examine similarly the reason supporting its elements. The backward search stops when we reach defeasible reasons (i.e., preconditions of defeasible inference-steps), since, as we know, a defeasible conclusion may be withdrawn without rejecting its reason. Thus, in order to adjudicate the conflict between conclusive reasons R_1 and R_2, we need to:

Extension of argument $\mathcal{B}^{\beta}$

7.	FORANY (y) *Mary* has the permissive right toward y that *Lebach documentary* is NOT broadcast ⟨by the definition of an absolute permissive right⟩
7.1.	*Mary* has the permissive right toward *Tom* that *Lebach documentary* is broadcast ⟨from 7, by *specification*⟩
7.2.	It is permitted toward *Tom* that *Mary* broadcasts *Lebach documentary* ⟨from 7.1 by the definition of a permissive right⟩

Table 27.28: *Conclusive extension of the information argument*

1. start our search from R_1 and R_2;
2. keep moving backward (from each subreason to its preconditions) while we reach conclusive reasons, stopping when we get to defeasible reasons;
3. collect all defeasible subreasons we can reach this way; and
4. compare the set of defeasible subreasons that lead us to endorse R_1 with the set that has lead us to endorse R_2.

This comparison, as was argued in Prakken and Sartor (1996; 1997), must take into account the weakest defeasible reasons in each of these sets, and preference must be given to the argument such that its weakest defeasible subreasons are better than the weakest defeasible subreasons in the other.

In our example, for instance, we need to go backward from the directly conflicting conclusions 6.4 in the extension of argument $\mathcal{A}^{\beta}$ and 7.3 in the extension of argument $\mathcal{B}^{\beta}$ to the reasons supporting the first defeasible elements of those inferences, that is, reasons 6.1 and 7.1 respectively. By adjudicating this conflict we obtain the comparative evaluation of the competing arguments (for a discussion of this issue, including formal definitions, see Prakken and Sartor 1997).

Chapter 28

CASES AND THEORY CONSTRUCTION

This chapter addresses *case-based reasoning* in the legal domain by merging various ideas we have discussed in the previous pages: heuresis, rationalisation, preferential reasoning, teleology, factor-based reasoning, and argumentation.

In particular, our analysis of case-based reasoning will allow us to develop the idea of *theory-construction*: We view cases as inputs for building a *practical theory* (see Section 4.1.4 on page 125) of a legal domain, namely, a body of knowledge that, while explaining previous experiences, provides guidance for future legal decision-making.[1]

28.1. Case-Based Reasoning as Theory Construction

In this section we shall present the idea of theory-construction, as applicable to legal cases, that is, we shall discuss how cases can be explained and justified through theories.

28.1.1. Cases and Theories

Legal doctrine often approaches case-based reasoning by focusing on the distinction between civil-law and common-law jurisdictions—a distinction which seems to lie mainly in the different value that is attributed to *rationes decidendi*.

According to the civil law tradition, or rather to its stereotyped representation, *rationes* of precedents do not provide reasons for drawing legal conclusions.[2] At most precedents provide examples: They only have a heuristic function. This means that their decision and their justification indicate some possible ways of solving new cases, and some possible normative rules supporting such decisions. However, the normative force of *rationes decidendi* does not depend on the fact that they were used in the precedents: The fact that a rule is a *ratio decidendi* is no normative ground why one should endorse that rule. The

[1] This chapter is based upon joint work with Trevor Bench-Capon (see: Bench-Capon and Sartor 2001a; 2001b; 2003). In particular, various paragraphs had been taken literally (or almost literally) from Bench-Capon and Sartor 2003. I am very grateful to Trevor for his generosity in allowing me to make use of the outcomes of our effort. However, I must take responsibility for the modifications I have made in order to embed this analysis of case-based reasoning into the overall framework of this book.

[2] Though the opinion that *rationes decidendi* have a certain degree of bindingness is gaining increasing acceptance in civil-law jurisdiction; see Rotolo, Volume 3 of this Treatise, sec. 7.3.1.2.

precedent only helps in retrieving legal contents that may be useful in certain contexts. Whether such legal contents are normatively binding (whether they should be endorsed, and thus support a certain conclusion) depends on their legislative (or customary) source and possibly on their content. For instance, a rule should be endorsed if it was stated by the legislator, or if its adoption would advance certain legal goals and values, regardless of the fact that it provides the *ratio* of a precedent.

In the common-law tradition, on the contrary, it is usually assumed that the fact that a rule is the *ratio* of a precedent supports its endorsement. This very fact provides a (sub-)reason for the endorsement of that rule in new cases, regardless of what other merits that rule may have had: Besides having a heuristic function, precedents also have a justificatory function. We have described this attitude as consisting in the endorsement of a meta-rule saying that *rationes decidendi* are binding (see Section 25.2.2 on page 655). By combining this attitude with the belief that a rule is a *ratio decidendi*, we obtain indeed a reason for the adoption of that rule.

Here we are not going into the comparative debate on the bindingness of precedents, an aspect which has been discussed by Shiner, Volume 3 of this Treatise, chap. 3.[3] We would rather like to stress that, when focusing on comparison, we tend inevitably to emphasise differences between different legal systems, and forget their commonalities, which are usually deeper and more significant from a theoretical perspective. The different degree of bindingness of *rationes decidendi*, and the different ways in which they constrain judicial decision-making should not lead us to forget that there is much in reasoning with precedents that remains outside the application of certain *rationes* according to the degree of their bindingness.

First of all, in all legal systems, the facts of a case are not givens: Cases need to be interpreted, and different lawyers will interpret them in different ways. The *rationes decidendi* that justify the outcome of the cases are also not in plain view: A case may interpreted in a variety of ways, at different levels of abstraction,[4] and the interpretation of a precedent may change in the light of subsequent cases.[5] Moreover, cases give rise to inherently defeasible rules: When we come to apply them, we shall typically find conflicting rules pointing to differing decisions, so we need a means of resolving such conflicts. Thus none

[3] For an exhaustive discussion of the role of precedent in different legal systems, see MacCormick and Summers 1997.

[4] See Twining and Miers 1991 and, for a computational analysis, Branting 1994 and 2000.

[5] As Levi (1949) stresses (see also Twining and Miers 1991, 311ff.). As a famous example of a case which was interpreted in a way which seems to be much broader than its expressed *ratio*, we can mention *Brown vs Board of Education* (1954), a case which—though having been justified with regard to the specific requirement not to segregate African-American children in schools (since this would have a detrimental effect on the education of these children)—was then applied to prohibit the most diverse cases of official segregation (in golf courses, beaches, public transportation, and so forth).

of describing the facts of the case, extracting rules from precedents and applying these rules is straightforward. Besides and before consisting in the application of pre-existing *rationes decidendi*, reasoning with cases consists in a process of analogical reasoning. This process can be viewed in different ways.

One may be content with the comparison of individual cases. Correspondingly one may approach a new situation by comparing the particular combination of factors in that situation, with the combinations that characterised specific past cases, and by evaluating the importance of similarities and differences.[6] However, the comparison of individual cases fails to capture appropriately the need to justify analogical conclusions, and to organise the outcomes of analogical reasoning in a coherent view. We think that the process of analogical reasoning needs (also) to be understood as a way of constructing and using theories.

These theories may contain not only rules but, as we shall see, also other pieces of normative information. They are corroborated by their ability to explain past cases, and they provide justifications for deciding future cases. The construction of such theories is an important component of a lawyer's job, as McCarty (1997, 285) observes:

> The task for a lawyer or a judge in a "hard case" is to construct a theory of the disputed rules that produces the desired legal result, and then to persuade the relevant audience that this theory is preferable to any theories offered by an opponent.

These theories are no substitutes for the intuitive ability to understand and evaluate commonalities and relevant differences: This ability is required both to provide inputs to the theory-construction effort, and to assess the merits of its output.

The view of case-based reasoning as theory-construction applies both to common law and to civil law, though the two models diverge in what significance they assign to the constructed theories, and in particular, to their ability to explain past cases and justify new decisions. It is, we believe, at the level of theory-construction that we may hope to advance our project of capturing some general patterns of legal rationality, as we shall try to do in the next pages.

[6] This is the idea we have explored in Section 6.2 on page 181, though admitting that formal models can capture only to a small extend the capacity of human intuition, as fine fined-tuned by experience. This may mean that the ability of dealing with cases is to be seen as a skill that is learned through adaptation, as an implicit kind of knowledge that cannot be fully translated into conceptual and symbolic structures. This approach has been adopted in some computer models of legal reasoning based upon neural networks (see, for instance: Zeleznikow and Stranieri 1995; Bochereau et al. 1999).

28.1.2. Levels of Explanation and Justification

Suppose we have a case and know no statute that provides a ready-made solution. We may still feel that the case requires a certain outcome, that one of the parties deserves to win. However, we may want (or need) to give reasons for our intuitive reaction. This happens when our view is contested, but also because we are victims of our "passion for reason" (Peczenik 1997), and feel the need to provide rational support for our positions.

The first way of rationalising our intuition is to resort to *factor-based reasoning* (see Section 6.2 on page 181). We identify the factors of our cases, that is, those features of them that lead to one outcome or the other, and describe our cases through the relevant factors. Such descriptions do not come "written on" the cases: They involve a degree of interpretation. At this point it is possible to argue over the factors that should be used to describe the case, but let us suppose that we have resolved this. We now have a case with a number of factors to decide it one-way and a possibly also a number of factors to decide it in the other way. We feel indeed that the factors supporting our favourite outcome are strong enough to support that outcome, in the given circumstance. But this may be insufficient to satisfy our drive towards rationality. Why were these factors sufficient to support our favourite outcome? And how could they outweigh the factors to the contrary?

At this point we must ascend a level and introduce *precedent cases*. Precedents represent past situations where these competing factors were weighed against one another, and a view of their relative importance was taken. On the assumption that new cases should be decided in the same way as precedent cases, we can take the following view: If we can find a precedent with the same factors as we have in the current case, then we have a ground for deciding the new case in the same way as the precedent. If no precedents exactly match or subsume the current case, we need to reason about the importance of the differences.

The fact that a precedent had a certain outcome in the presence of factors leading to that outcome makes us assume that these factors were indeed sufficient to decide that way, that is, to construct and endorse a *rule* (a *ratio decidendi*) to the effect that such combination of factors produces that outcome. We may, however, want to be more daring and assume that only a subset of the factors in the case were sufficient to produce its outcome. In this way, we attribute to the precedent a rationale (a *ratio*) which can also apply to cases that do not share all factors in the precedent (though this will expose our precedent to the risk of being distinguished, as we shall see). Various further ways of building rules are available, to bridge the differences between different cases. For instance, we can bridge certain differences between cases, by arguing that the same abstract (intermediate) qualifications are expressed by different lower level properties (as we shall see in Section 29.4 on page 773).

When a precedent case also contains factors that go against the decision of that case, we have a further clue to use in theory-construction. We may assume that the set of factors which supports the outcome of the case is stronger than the combination of the factors to the contrary: The decision of the cases reveals an *ordering over sets of factors*, and thus certain *preferences over the rules* we can build on the basis of those factors.

The rationalisation process does not stop at the level of rules, or *rationes decidendi*. We wonder why a factor is a reason for a certain outcome. We argue that this is because drawing that outcome (when the factor is present) contributes to promote or defend some value that we wish to be promoted or defended. And a rule including certain factors may be assumed to favour all values linked to such factors. Thus, our rules reveal certain *values* that the legal community appears to pursue through the adoption of such rules.

Moreover, the assumption that certain rule-preferences exist (as revealed by the decision of the cases) discloses an *ordering over (sets of) competing values*: If rule r_1 prevails over rule r_2, we can assume that the values advanced by r_1 outweigh the values that are advanced by r_2. Thus, the solution to the conflict is finally stated in terms of competing values rather than competing cases or factors, or rules.

The picture we see is roughly as follows:

- Factors provide a way of describing cases.
- Combinations of factors appearing in past cases ground defeasible rules (*rationes decidendi*).
- Past decisions express preferences between such combinations of factors, and thus indicate priorities between the corresponding rules.
- From these priorities we can abduct preferences between values.

Thus the body of case law as a whole can be seen as revealing an ordering on values, a *value hierarchy*. This upward movement is indeed what we have represented in the left side of Figure 28.1 on the following page.

Once we have moved up to identifying values and their hierarchies, we have completed the process of rationalisation. We may then move down, following the justification or derivation path, which is shown in the right side of Table 28.1 on the next page: Values ground rules and factors (according to teleological reasoning), and rules justify the decision of the cases (according to syllogistic reasoning).

Note that the process we have described is not to be viewed as being deterministic, especially in its upward going phase. Different possibilities can be available for identifying factors, for building rules, for assessing their conflicts, for identifying the corresponding values. Thus, different theories may be developed, given the same cases. To emphasise how the theory-construction process may lead to different incompatible results, we shall assume an adversarial

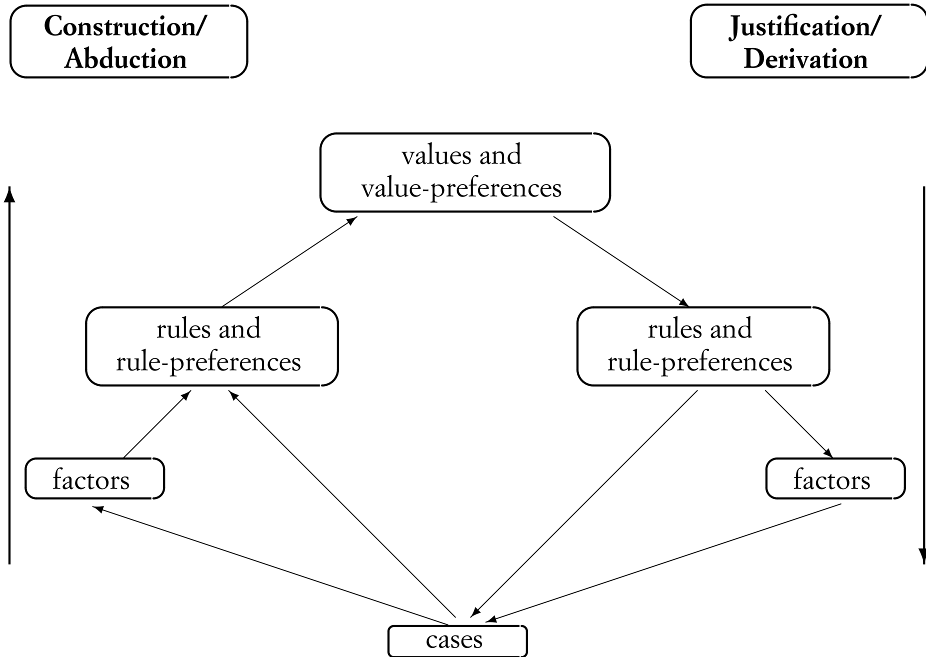


Figure 28.1: *The cycle of theory-construction-application*

framework, where each party tries to develop the theory that mostly advances its position.

However, the possibility of building different theories does not mean that all these theories are equivalent: Some are more coherent than others. Thus, the idea of coherence constrains and directs the theory-construction process: It is the criterion for choosing between alternative theories. Moreover, the coherence judgement, being anticipated by the reasoner who is producing the theory (though unconsciously, in the form of a positive or negative feeling one has towards one's achievements), directs the reasoner toward the most promising constructions.

28.2. The Construction of a Theory

In this section we shall describe the elements of a theory, provide a set of operators for constructing theories, and describe how theories can be used to explain past outcomes and predict new ones.

28.2.1. The Example

We shall illustrate our discussion with an example consisting of three cases involving the pursuit of wild animals.[7] In all of these cases, the plaintiff (π) was chasing wild animals, and the defendant (δ) interrupted the chase, preventing π from capturing the animals.

The issue to be decided is whether π has a legal remedy (a right to be compensated for the loss of the game) against δ or not.

1. In the first case, *Pierson vs Post* (a case decided in England in 1707), π was hunting a fox on open land in the traditional manner using horse and hound. Before π could gain possession of the fox, δ killed it and carried it off. In this case π lost (δ won): π was held to have no right to the fox.
2. In the second case, *Keeble vs Hickeringill* (tried in New York, in 1805), π owned a pond and made his living by luring wild ducks there with decoys, shooting them, and selling them for food. Out of malice δ used guns to scare the ducks away from the pond. Here π won: He was granted a remedy for the loss of the ducks.
3. In the third case, *Young vs Hitchens* (an English case of 1884), both parties were commercial fishermen. While π was closing his nets, δ sped into the gap, spread his own net and caught the fish. In this case π lost (δ won).

28.2.2. The Background of Theory Construction

We assume that our theory-construction process starts from a store of available information, the *background*. This background will include two basic elements, cases and factors, which we denote respectively as *case background* and *factor background*.

The starting blocks of our theories are decided cases, the *case background*.

A case can be initially seen as a set of facts, together with a decision (an outcome) made on the basis of these facts.

However, facts are in themselves neutral, they may be too specific and not necessarily relevant to the outcome. For the purpose of case-based reasoning a more abstract representation is required, where factors, rather than facts are used.

As we said in Section 8.1 on page 221, factors are an abstraction from the facts: A given factor may be held to be present in the case on the basis of several different fact situations. Moreover, factors are taken to favour one or the

[7] The example is taken from Berman and Hafner 1993, who use it to illustrate the idea of a teleological approach to case-based reasoning (see also Hafner and Berman 2002). For an extended discussion of this example, where further aspects and cases are considered, see Bench-Capon and Rissland 2001.

other of the possible decisions of the new case, and generally one or another qualification of the case. For instance, in the above cases one such factor is that ⌈plaintiff π has no possession of his quarry⌉. This single factor is an abstraction covering all the following facts: the hounds not yet having caught up with the fox, the ducks not yet having been shot, and the fish still swimming in the sea rather than landed on the boat. The factor points to what all these situations have in common: Plaintiff π has no possession of the game, and this favours the conclusion that π has no right over it.

We make use of factors, and assume that a prior analysis of the cases has identified a set of applicable factors, and has established for each case whether the factor is present or absent. Such an analysis of the example cases is given in Berman and Hafner 1993.

For a lawyer, the case background may be assumed to include all cases that are accessible in his or her jurisdiction. However, since one's memory, energies and time are limited, one will only have access to the limited set of cases which one has been able to find and to recognise as potentially relevant. Identification of the factors included in the cases will be a complex and largely unconscious process, through which one brings to bear on the retrieved material one's legal knowledge, experience and ingenuity. This is a tremendous task, which we are happy not to tackle here, assuming that cases have already been selected and represented through factors.[8]

In our example, for the sake of simplicity we assume that our background only contains the three cases above: *Pierson*, *Keeble*, and *Young*. We also assume that each one of these cases only concerns a single issue, that is, whether the plaintiff (the hunter who lost the game he was pursuing) has a right to the game, denoted as R^π (*R*ight for π), or whether he has no such right, denoted as $\neg R^\pi$ (which is the combination of the symbol $\neg$, which we us as an abbreviation for the negation NON and R^π).

As far as factors are concerned, we adopt the analysis given by Berman and Hafner (1993) and identify four factors; πLiv (π was pursuing his livelihood); $\pi Land$ (π was on his own land), $\pi NPoss$ (π was not in possession of the animal), and δLiv (δ was pursuing his livelihood). In Table 28.1 on the next page, for each of these factors we indicate the cases in which it appears and the legal result it favours.

Our description of a factor needs to be integrated with a further element, that is, the indication of the value which is promoted by recognising that factor as favouring or disfavouring a certain outcome. With regard to our example, we may say that by recognising factor $\pi NPoss$ we reduce the number of the controversial cases and thus discourage litigation; by recognising factor $\pi Land$

[8] There have been studies where ways for identifying factors have been proposed and a factor-based analysis has been carried out with regard to significant domains of the law. For a discussion of some experiences in case-based reasoning, see Ashley 1992.

πLiv	=	π was pursuing his livelihood (Keeble, Young), favouring R^{π}
$\pi Land$		π was on his own land (Keeble), favouring R^{π}
$\pi NPoss$	=	π was not in possession of the animal (Pierson, Keeble and Young), favouring $\neg R^{\pi}$
δLiv	=	δ was pursuing his livelihood (Young), favouring $\neg R^{\pi}$

Table 28.1: *The factors*

$LLit$	=	Less Litigation
$Prop$	=	Enjoyment of property rights
$MProd$	=	More productivity

Table 28.2: *The values*

$(\pi Liv \uparrow R^{\pi}) \Uparrow MProd$
$(\pi Land \uparrow R^{\pi}) \Uparrow Prop$
$(\pi NPoss \uparrow \neg R^{\pi}) \Uparrow LLit$
$(\delta Liv \uparrow \neg R^{\pi}) \Uparrow MProd$

Table 28.3: *The factor background*

we promote the enjoyment of property; and by recognising factors πLiv and δLiv we safeguard socially desirable economic activities. We thus identify the three values in Table 28.2: $LLit$ (less litigation), $Prop$ (enjoyment of property rights), and $MProd$ (more productivity).

To completely describe our factors, we need to associate each of them to the outcome it favours and to the value promoted by its recognition. For simplicity, we assume that each factor is related only to one value, although our framework could, if desired, be straightforwardly extended to allow sets of values. We write:

$$F \uparrow O$$

to express that factor F favours outcome O. We also write:

$$(F \uparrow O) \Uparrow V$$

to express that the recognition that F favours outcome O promotes value V. In this way we obtain the set of factor descriptions indicated in Table 28.3.

$Pierson$: $\{\pi NPoss\} \mapsto \neg R^{\pi}$
$Keeble$: $\{\pi Liv,\ \pi Land,\ \pi NPoss\} \mapsto R^{\pi}$
$Young$: $\{\pi Liv,\ \pi NPoss,\ \delta Liv\} \mapsto \boxed{?}$

Table 28.4: *The case background*

By applying all those factors to our cases, we obtain the corresponding case-background, which is described in Table 28.4, where we use the symbol $\mapsto$ to connect the factors applicable to a case and its outcome.

Note that we have not indicated an outcome for $Young$, since we want here to model adversarial theory-construction. We assume, for the sake of the argument that $Young$ has not yet been decided, and consider now what theories the parties of $Young$, denoted as π and δ according to their position in the dispute, could develop to argue for the outcome they wish (π arguing for R^{π} and δ for $\neg R^{\pi}$).

28.2.3. *The Components of a Theory*

A theory consists of the following components:

- descriptions of the cases considered relevant by the proponent of the theory,
- descriptions of the factors chosen as relevant in those cases,
- rules, to be used in explaining the cases, and
- preferences between rules and values, to be used in resolving conflicts between rules.

A theory is thus an explicit selection of the material available from the background, plus further components that are constructed from the selected background-material.

We assume that legal reasoners construct theories by using a number of heuristic procedures, which we call *theory constructors*. In the following we list a few of these constructors. Our list is not intended to be exhaustive: On the contrary, we admit that it captures only a small portion of possible heuristic moves an ingenious reasoner may accomplish. We hope that nevertheless it may suffice to exemplify what we mean by theory-construction.

28.2.4. *Including Cases and Factors*

First of all, one can cite the cases one views as being relevant to the issue at stake, in order to support the point one is making. By *citing a case* we mean inserting

it in one's theory, using the factors (among those that are applicable to the case) that one views as relevant.

One is not bound to describe a case using all applicable factors: In an adversarial framework one will provide a description that is appropriate to one's strategy. When one chooses to describe a case by using certain factors, one also needs to include the descriptions of these factors. For instance, if one party includes the case *Keeble*, described by using only factors πLiv, and $\pi NPoss$:

$$Keeble\text{: } \{\pi Liv,\ \pi NPoss\} \mapsto R^{\pi}$$

that party will have to insert in the theory also the following factor descriptions:

$$(\pi Liv \uparrow R^{\pi}) \Uparrow MProd$$
$$(\pi NPoss \uparrow \neg R^{\pi}) \Uparrow LLit$$

28.2.5. Constructing Rules

Cases typically contain several factors favouring a given party. By deciding to view the conjunction of certain factors (having the same conclusion) as defeasibly sufficient to produce a certain result, one constructs a rule. Since factors only are contributory reasons, there is no logical warranty that, by joining more factors, one will obtain a sufficient condition (Section 6.2.6 on page 190).

Thus, building a rule involves a non-deductive step, a *jump*, to use the terminology of Peczenik (1996). For instance, by merging factors πLiv and $\pi Land$, we obtain the rule:

$$\pi Liv \text{ AND } \pi Land \Rightarrow R^{\pi}$$

(if π was pursuing his livelihood and he was on his own land, then π has a right to the game)

A rule combining a set of factors tends (usually) to promote all values that are separately promoted by such factors. Thus, when building the rule above we can assume that its application advances the values that are linked to πLiv and to $\pi Land$, that is, productivity (*MProd*) and property (*Prop*):

$$(\pi Liv \text{ AND } \pi Land \Rightarrow R^{\pi}) \Uparrow \{MProd,\ Prop\}$$

(the rule ⌈if π was pursuing his livelihood and he was on his own land, then π has a right to the game⌉ promotes the values of productivity and property)

We may thus describe our rule constructor as follows:

Theory constructor: *Rule from factors*

RELEVANT INPUT:

(1) $(F_1 \uparrow O) \Uparrow V_1;\ \ldots;\ (F_n \uparrow O) \Uparrow V_n$

CONSTRUCTIBLE OUTPUT:

(2) $(F_1 \text{ AND } \ldots \text{ AND } F_n \Rightarrow O) \Uparrow \{V_1,\ \ldots,\ V_n\}$

Sometimes, rather than building a new rule from factors, it may be convenient to construct a new rule by modifying an existing rule—though the same result, for rules obtained from factors, could also be achieved by using the constructor *rules from factors*. We distinguish two such modifications, which we call *specialisation* and *generalisation*. Specialisation consists in obtaining a stronger rule by adding additional factors (having the same conclusion as the rule), while generalisation consists in building a weaker rule by dropping some factors.

Theory constructor: *Specialisation*
RELEVANT INPUT:
(1) F_1 AND ... AND $F_n \Rightarrow O$;
(2) $F \uparrow O$
CONSTRUCTIBLE OUTPUT:
(3) F_1 AND ... AND F_n AND $F \Rightarrow O$

Theory constructor: *Generalisation*
RELEVANT INPUT:
(1) IF F_1 AND ... AND F_n AND F THEN^n O
CONSTRUCTIBLE OUTPUT:
(2) IF F_1 AND ... AND F_n THEN^n O

Various more complex kinds of specialisation or generalisation operations could be defined, such as substituting one factor with a more specific one or with a more general one (relative to the available conceptual organisation of the considered domain). For our purposes, however, it is convenient not to go into these details, which would distract us from the presentation of the core of the idea of theory-construction.

28.2.6. Constructing Preferences

A major role played by cases is to indicate preferences between factors and related rules. According to our model of defeasible argumentation, when we have a rebutting collision between two arguments and none of them prevails, we cannot derive any justified conclusion.

This is what happens when a theory contains conflicting rules applicable to the same case and we are incapable of establishing which rule is stronger: In such circumstances, the theory fails to explain the decision of the case. This happens, for instance, when theory T containing case *Keeble*:

$Keeble$: $\{\pi Liv, \pi NPoss\} \mapsto R^{\pi}$

also includes the following two rules, both of which are applicable to *Keeble*:

$\pi Liv \Rightarrow R^{\pi}$
$\pi NPoss \Rightarrow \neg R^{\pi}$

Under such conditions, however, case *Keeble* provides an indication on how to exit the predicament. When interpreted in the light of theory T, *Keeble* tells us precisely that the first rule was preferred to the second one. This is what one must presuppose, if one wants that T provides the basis of a decision in *Keeble*, i.e., if one assumes that T may have prompted the decision-maker of *Keeble* to decide for R^{π}. In other words, in the framework provided by T (including *Keeble*), we are authorised to assume (abduct) that the first rule is stronger than the second:

$$(\pi Liv \Rightarrow R^{\pi}) \succ (\pi Liv \Rightarrow R^{\pi})$$

This assumption is not arbitrary, but it is rather grounded on the evidence provided by precedent *Keeble* (similar to the way in which scientific theories are grounded in the evidence provided by empirical observations). Precedent *Keeble* supports (justifies) this extension of theory T with the above preference, for the following reason: T was incapable of explaining *Keeble* and T becomes able to do it once we add that preference. If, on the contrary, T already provided an explanation for *Keeble*, the preference above would not be supported on explanatory grounds (since it would not contribute to explain an unexplained case). This is the rationale of theory constructor *abduct rule-pref.*, which introduces in our theories such abductions based on the evidence of previous decisions.[9]

Theory constructor: *Abduct rule-pref.*
RELEVANT INPUT:
(1) theory T does not explain precedents C;
(2) T plus rule-preference $R_1 \succ R_2$ explains C
CONSTRUCTIBLE OUTPUT:
(3) $R_1 \succ R_2$

We can also use rule preferences to derive value preferences, and value preference to derive rule preferences. If a rule is stronger than another rule, then we may assume that the values promoted by the former rule are more important than the values promoted by the latter one, according to theory constructor *value preferences from rule preferences* (abbreviated as *value-pref. from rule-pref.*).

[9] We use here the notion of abduction in a generic sense, to mean the endorsement of a proposition on the grounds that it explains the available evidence. On abduction, the classical reference is provided by the work of Charles S. Peirce, for whom abduction covers "all the operations by which theories and conceptions are engendered" (Peirce 1966, vol. 5, par. 590). For a formal model of legal abduction, see Gordon 1991. For a recent reference on abduction in the law, see Tuzet 2003.

Theory constructor: *Value-pref. from rule-pref.*
RELEVANT INPUT:
(1) $R_1 \succ R_2$;
(2) $R_1 \Uparrow V_1$; $R_2 \Uparrow V_2$
CONSTRUCTIBLE OUTPUT:
(3) $V_1 \succ V_2$

Similarly, if a set of values is more important than another set of values, we may assume that a rule promoting the former set of values is stronger that the rule promoting the latter one.

Theory constructor: *Rule-pref. from value-pref.*
RELEVANT INPUT:
(1) $V_1 \succ V_2$;
(2) $R_1 \Uparrow V_1$; $R_2 \Uparrow V_2$
CONSTRUCTIBLE OUTPUT:
(3) $R_1 \succ R_2$

Sometimes one asserts a preference between rules or values on the basis of one's intuition (or because this serves one's aims), even though this cannot be justified on the basis of previous cases, or existing preferences between values. Given the limits of our model, we shall not consider how one may come to have such preferences (they are arbitrary, when seen from our limited perspective). We simply assume that one may express intuitive preferences and may want to include them in one's theory, using theory constructor *arbitrary rule-pref.*

Theory constructor: *Arbitrary rule-pref.*
RELEVANT INPUT:
(1) $\varnothing$
CONSTRUCTIBLE OUTPUT:
(2) $R_1 \succ R_2$

Similarly we may wish to assert an unreasoned preference between values, using theory constructor *arbitrary value-pref.*

Theory constructor: *Arbitrary value-pref.*
RELEVANT INPUT:
(1) $\varnothing$
CONSTRUCTIBLE OUTPUT:
(2) $V_1 \succ V_2$

These arbitrary preferences are required to enable a theory to justify a conclusion when no support can be derived from previous cases (or other legal material). They make the preferences explicit that are being used to justify that

conclusion. In this way they locate those aspects of one's viewpoint which one should critically investigate, to see whether they any support—namely, any rationalisation—can be found for them. Moreover, disagreement about arbitrary preferences indicates to reasonable disputants where they should develop their argumentative efforts, if they want to convince the other party.

Chapter 29

THEORY-BASED DIALECTICS

This chapter is dedicated to the application of the idea of theory construction (as defined in Chapter 28) to the dynamical modelling of case-based reasoning. First we illustrate our basic model of case-based reasoning, and then we provide various extensions and refinements of it.

29.1. The Basic Model

We assume that two parties, having access to a set of precedents, are discussing a new case; let us call it $CSit$ (Current Situation). Like the precedents, also $CSit$ is characterised by a set of factors, but its outcome is not determined. As a matter of fact, it is possible that $CSit$ too is a precedent case, but we consider it as being undetermined, since we want to use it as a test for our theory: We want to establish what outcome our model determines for $CSit$, and whether this outcome coincides with the decision of the judges, and with our intuitive judgement.

For instance, with regard to the example we introduced in Section 28.2.1 on page 741, we assume (see Section 28.2.2 on page 741) that $Pierson$ and $Keeble$ have already been decided, the first for plaintiff π and the second for the defendant δ). Our aim is to establish how $Young$ should be decided. Thus our $CSit$ is the following :

$$CSit = Young\colon \{\pi Liv,\ \pi NPoss,\ \delta Liv\} \mapsto \boxed{?}$$

The plaintiff π will try to provide a theory (an *explanans*, in the terminology of Hempel 1966, 51) that both explains the precedents (the *explanandum*) and gives $Young$ the outcome that he (π) desires, namely, the decision that the plaintiff has a right over the game, abbreviated as R^{π}. Let us use the expression π-theories to refer to such theoretical hypotheses advanced by the plaintiff.

The replies of defendant δ will consist in alternative theoretical hypotheses, the δ-theories, which still explain the precedents, but imply for $Young$ the outcome she (δ) desires (the $\neg R^{\pi}$ decision).

In the following paragraphs, after considering how a theory may explain or justify a case, we shall provide an extensive example.

Cases:	*Pierson*: $\{\pi NPoss\} \mapsto \neg R^{\pi}$	
	Keeble: $\{\pi Liv, \pi NPoss\} \mapsto R^{\pi}$	
Rules:	$\pi Liv \Rightarrow R^{\pi}$	⟨by *rule from factors*⟩
	$\pi NPoss \Rightarrow \neg R^{\pi}$	⟨by *rule from factors*⟩

Table 29.1: *Theory T*

29.1.1. Constructing Theories and Explaining Cases

The evaluation of a theory basically depends on its ability to explain cases (this is the key aspect of the notion of legal coherence, as we shall characterise it). We must therefore introduce the notion of *explaining a case* (or, better, a case-description). Our analysis of this notion will be based upon our theory of defeasible argumentation (see Chapters 26 and 27), which allows us to provide the following definition.

Definition 29.1.1 *Explanation of a case. A theory T* explains *a case description C: $F \mapsto O$, if O is a* justified conclusion *with regard to premise set $R^T \cup F$ (where F is the set of all factors used to describe C, R^T is the set of all rules in T).*[1]

Remember that an argument is (inferentially) justified, with regard to a premises set, if it is justified with regard to all arguments that can be constructed from that premise set, i.e., if it can withstand all counterarguments arising from the premises set.

For instance, we may say that theory T in Table 29.1 succeeds in explaining *Pierson*, but fails to explain *Keeble*. It succeeds in explaining *Pierson* since—with regard to $R^T \cup \{\pi NPoss\}$ (the premises set we obtain by merging the rules of the theory with the facts of the case)—there is the following justified argument for $\neg R^{\pi}$ (*Pierson*'s conclusion): Since π had no possession, then he should not be compensated. Using our logical language this inference is expressed as follows:

1.	$\pi NPoss$	
2.	$\pi NPoss \Rightarrow \neg R^{\pi}$	
3.	$\neg R^{\pi}$	⟨from 1 and 2, by *detachment*⟩

Theory T fails to explain *Keeble* since, with regard to premises set $R^T \cup \{\pi Liv, \pi Land, \pi NPoss\}$ besides the above argument for $\neg R^{\pi}$ there is also an argument for R^{π}, according to which, since π was pursuing his livelihood, he has a right to the game he is chasing:

[1] $R^T \cup F$ denotes the union of rules R^T and factors F.

1. πLiv
2. $\pi Liv \Rightarrow R^{\pi}$
3. R^{π} ⟨from 1 and 2, by *detachment*⟩

Since we have no criterion for solving the conflict of these two arguments, they defeat one another and consequently none of them is justified. Thus, we are not able to explain *Keeble*'s conclusion R^{π}, on the basis of theory T.

The logic of the theories put forward by the parties to the dispute (the logic we use for determining the conclusions that are derivable from such theories) needs to be a dialectical logic. This is because one must include in one's theory, besides the reasons (the factors) supporting the conclusion one is aiming at, also the reasons favouring one's adversary. If one just considered one's own reasons, one would appear to be biased and one-sided.

On the contrary, one's task is that of showing that a decision for one's side is implied by the (allegedly) most balanced account of the controversial domain, that is, by the account that gives the most thorough and impartial consideration to the circumstances favouring one's adversary. Therefore, one's theory will licence inferences for the adversary (inferences which, on the basis of factors favouring the adversary, conclude that the latter should win), though one will claim that these inferences are defeated by prevailing reasons favouring one's side.

Thus, the theory of one party and its logic will be dialectical in the sense of including reasons, counter-reasons and meta-reasons (reasons for preferring certain reasons to certain others) and of licensing an architecture of corresponding inferences, rather than in the sense of modelling or constraining a real dialogue. In particular, though we shall call the inferences available within one theory *arguments* (as usual in argumentation logics), we do not view these inferences as explicit statements of the parties to the dispute and, in particular, we do not assume that each party states all and only the inferences favouring his or her side. Similarly, the method for adjudicating the conflicts between such argument—also called *argumentation framework*—is no protocol for a dispute, but only a way of specifying what conclusions are justified (or implied) by a single theory.

Consequently, we need to distinguish on the one hand the dialectical exchange between the two parties, and on the other hand the dialectical semantics of their theories. The dialectical exchange concerns the articulation and the refinement of alternative competing theories, while the dialectical semantics, based upon an argumentation logic, concerns establishing the defeasible implications of each theory.

29.1.2. A Simple Theory

Let us now show through an example the dialectical construction of theories concerning the three wild animal cases. As we said in Chapter 28, we shall

CSit:	*Young*: $\{\pi NPoss\} \mapsto \neg R^{\pi}$	
Cases:	*Pierson*: $\{\pi NPoss\} \mapsto \neg R^{\pi}$	
Factors:	$(\pi NPoss \uparrow \neg R^{\pi}) \Uparrow LLit$	
Rules:	$\pi NPoss \Rightarrow \neg R^{\pi}$	⟨by *rule from factors*⟩

Table 29.2: *Theory* T_1

suppose that *Young* has not yet been decided: *Young* is our current case. With regard to *Young* the parties take different stands: The plaintiff π will construct theories according to which R^{π} (plaintiff has a right to the game) is the justified outcome of *Young*, while the defendant δ will construct theories according to which $\neg R^{\pi}$ (no right for the plaintiff) is the justified outcome of *Young*.

Let us start with the simple pro-δ theory T_1, presented in Table 29.2, which we construct by including appropriate descriptions for *Pierson* and *Young*. Theory T_1 contains just one rule:

$$\pi NPoss \Rightarrow \neg R^{\pi}$$

which has been constructed from the factor:

$$(\pi NPoss \uparrow \neg R^{\pi})$$

using constructor *rule from factors*. This theory expresses the view that the plaintiff π had no right in *Pierson* ($\neg R^{\pi}$), since π did not have possession of the animal ($\pi NPoss$), which is indeed a reason, together with the corresponding rule ($\pi NPoss \Rightarrow \neg R^{\pi}$) for concluding that also in Young π has no right. No preferences are necessary: In T_1 no argument for R^{π} is available, and thus $\neg R^{\pi}$ is a justified conclusion, according to T_1, in both *Young* and *Pierson*.

29.1.3. The Introduction of a New Case

The plaintiff can, however, reply by producing theory T_2, in Table 29.3 on the facing page. T_2 absorbs T_1, in the sense that it includes all information in T_1, though supporting a different outcome. Observe that theory T_2 expands theory T_1 with some information which has been inputted from the background, that is, case *Keeble* and factor πLiv. Moreover, it includes information that has been produced by using the appropriate constructors:

- the new rule $\pi Liv \Rightarrow R^{\pi}$,
- the preference according to which this rule is stronger that the contrary rule $\pi NPoss \Rightarrow \neg R^{\pi}$, and
- the corresponding value-preference according to which having more productivity is more important than having less litigation ($MProd \succ LLit$).

CSit:	*Young*: $\{\pi NPoss\} \mapsto R^\pi$	
Cases:	*Pierson*: $\{\pi NPoss\} \mapsto \neg R^\pi$	
	Keeble: $\{\pi Liv, \pi NPoss\} \mapsto R^\pi$	
Factors:	$(\pi NPoss \uparrow \neg R^\pi) \Uparrow LLit$	
	$(\pi Liv \uparrow R^\pi) \Uparrow MProd$	
Rules:	$\pi NPoss \Rightarrow \neg R^\pi$	⟨by *rule from factors*⟩
	$\pi Liv \Rightarrow R^\pi$	⟨by *rule from factors*⟩
RulePref:	$(\pi Liv \Rightarrow R^\pi) \succ (\pi NPoss \Rightarrow \neg R^\pi)$	⟨by *abduct rule-pref.*⟩
ValPref:	$MProd \succ LLit$	⟨by *value-pref. from rule-pref.*⟩

Table 29.3: *Theory* T_2

Like T_1, also T_2 explains why the plaintiff π had no right in Pierson. This happened since π did not have possession of the animal, and this entails having no right over it, according to the rule $\pi NPoss \Rightarrow \neg R^\pi$. However, T_2 also explains why π's right was recognised in *Keeble*: π was chasing the game while pursuing his livelihood, which entails have a right to the game, according to rule $\pi Liv \Rightarrow R^\pi$.

It is true that the rule $\pi NPoss \Rightarrow \neg R^\pi$ also applies to *Keeble*, but the contrary rule $\pi Liv \Rightarrow R^\pi$ is stronger, according to the rule preference in T_2 (a preference which enables T_2 to explain *Keeble*). Thus, with regard to T_2, conclusion R^π is justified, being established by the justified argument $\mathcal{A}_1$. In Table 29.4 on the next page you can see a proof of the justifiability of argument $\mathcal{A}_1$: $\mathcal{A}_1$ is attacked by $\mathcal{A}_2$ but succeeds in strictly defeating (by preferentially rebutting) the attack thanks to preference argument $\mathcal{P}_1$, against which no counterargument is available in T_2. Theory T_2, thanks to this proof, succeeds both in explaining why *Keeble* was decided the way it was, and in justifying why *Young* should be decided in the same way.

29.1.4. Theory-Based Distinguishing

Note that one factor in *Keeble* ($\pi Land$) and one factor in *Young* (δLiv) have not been used in describing such cases. According to the interpretation of plaintiff π, the proponent of T_2, neither of these factors is relevant.

Defendant δ can, however, consider them to be relevant. Let us assume that she focuses at first on $\pi Land$ and responds to T_2 with theory T_3, in Table 29.5 on page 757. This move is interesting, since it shows how δ may advance her position also by pointing to a factor favouring her adversary.

Consider the differences between T_2 and T_3. Also T_3 explains why *Keeble* had decision R^π, but in a different way, that is, by appealing to rule πLiv AND $\pi Land \Rightarrow R^\pi$ and preferring this rule over $\pi NPoss \Rightarrow \neg R^\pi$. In this

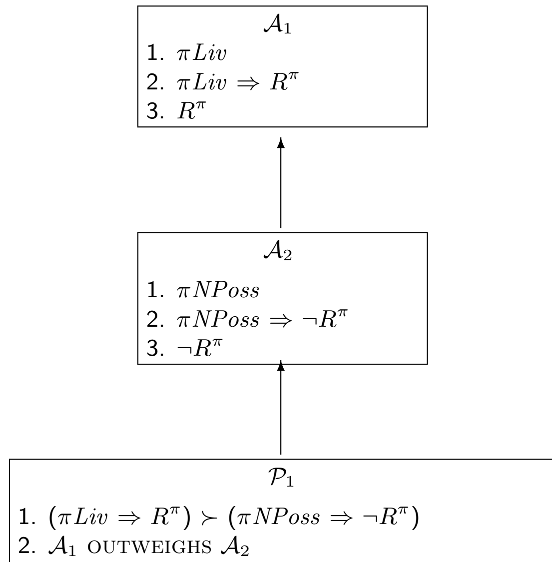


Table 29.4: *Explanation of a case*

way δ succeeds in distinguishing *Keeble* from *Young*: It explains why *Keeble* was decided for R^{π} without implying the same decision for *Young*.

In fact, according to this reconstruction, the reasoning of Keeble cannot be applied to Young, where there only πLiv (and not $\pi Land$) is present, and thus rule πLiv AND $\pi Land \Rightarrow R^{\pi}$ is not applicable.

29.1.5. Arbitrary and Value-Based Preferences

The plaintiff π can reply in two ways. Either he insists that $\pi NPoss$ is irrelevant (representing theory T_2), or he tries to absorb the theory of his adversary.

He may implement the latter strategy by distinguishing *Young* from *Pierson*. This can be done since *Young* contains a pro-π factor, namely, πLiv, which is contained in *Pierson*. In T_3 πLiv is not a sufficient reason for R^{π}: it determines R^{π} only together with $\pi Land$. The plaintiff—though admitting that $\pi Land$ is relevant, and contributes, when present, to determine R^{π}—may insist that πLiv is sufficient to achieve that result, also when factor $\pi NPoss$ has to be countered. Thus, π may correspondingly propose to expand T_3 with rule $\pi Liv \Rightarrow R^{\pi}$, and assume that this rule is stronger than *Pierson*'s rule ($\pi NPoss \Rightarrow \neg R^{\pi}$), so obtaining theory T_4, presented in Table 29.6 on the next page.

Note that in the framework of theory T_4, the latter preference cannot be justified (abducted) as being necessary to explain *Keeble*. It would be an arbi-

CSit:	$Young$: $\{\pi Liv, \pi NPoss\} \mapsto \neg R^\pi$	
Cases:	$Pierson$: $\{\pi NPoss\} \mapsto \neg R^\pi$	
	$Keeble$: $\{\pi Liv, \pi Land, \pi NPoss\} \mapsto R^\pi$	
Factors:	$(\pi NPoss \uparrow \neg R^\pi) \Uparrow LLit$	
	$(\pi Liv \uparrow R^\pi) \Uparrow MProd$	
	$(\pi Land \uparrow R^\pi) \Uparrow Prop$	
Rules:	$\pi NPoss \Rightarrow \neg R^\pi$	⟨by *rule from factors*⟩
	πLiv AND $\pi Land \Rightarrow R^\pi$	⟨by *rule from factors*⟩
RulePref:	$(\pi Liv$ AND $\pi Land \Rightarrow R^\pi) \succ (\pi NPoss \Rightarrow \neg R^\pi)$	⟨by *abduct rule-pref.*⟩
ValPref:	$\{MProd, Prop\} \succ LLit$	⟨by *value-pref. from rule-pref.*⟩

Table 29.5: *Theory* T_3

CSit:	$Young$: $\{\pi Liv, \pi NPoss\} \mapsto R^\pi$	
Cases:	$Pierson$: $\{\pi NPoss\} \mapsto \neg R^\pi$	
	$Keeble$: $\{\pi Liv, \pi Land, \pi NPoss\} \mapsto R^\pi$	
Factors:	$(\pi NPoss \uparrow \neg R^\pi) \Uparrow LLit$	
	$(\pi Liv \uparrow R^\pi) \Uparrow MProd$	
	$(\pi Land \uparrow R^\pi) \Uparrow Prop$	
Rules:	$\pi NPoss \Rightarrow \neg R^\pi$	⟨by *rule from factors*⟩
	πLiv AND $\pi Land \Rightarrow R^\pi$	⟨by *rule from factors*⟩
	$\pi Liv \Rightarrow R^\pi$	⟨by *rule from factors*⟩
RulePref:	$(\pi Liv$ AND $\pi Land \Rightarrow R^\pi) \succ (\pi NPoss \Rightarrow \neg R^\pi)$	⟨by *abduct rule-pref.*⟩
	$(\pi Liv \Rightarrow R^\pi) \succ (\pi NPoss \Rightarrow \neg R^\pi)$	⟨by *arbitrary rule-pref.*⟩
ValPref:	$\{MProd, Prop\} \succ LLit$	⟨by *value-pref. from rule-pref.*⟩
	$\{MProd\} \succ LLit$	⟨by *value-pref. from rule-pref.*⟩

Table 29.6: *Theory* T_4

trary preference, which π assumes just in order to justify the outcome he wishes. Moreover theory T_4 is defective since, with this addition, it provides two explanations for $Keeble$: one based upon rule $\pi Liv \Rightarrow R^\pi$, the second based upon rule πLiv AND $\pi Land \Rightarrow R^\pi$.

The defendant δ can do better: She can resort to value-based preferences. Assume that she accepts all of theory T_4, except for the arbitrary preference, and brings in one further factor, that is, δLiv. This allows her to propose a new rule, which only applies to $Young$:

> δLiv AND $\pi NPoss \Rightarrow \neg R^\pi$
> (if the defendant was pursuing her livelihood, and the plaintiff had no possession, then the plaintiff has no right)

For justifying $\neg R^\pi$, δ needs to assume that this rule prevails over the $Pierson$ rule. This preference cannot be abducted from cases, since it is not required

to explain either *Pierson* or *Keeble*, which already are explained in T_4. However, δ may still argue that this preference is not completely arbitrary. This is because $\{MProd, LLit\}$, is more inclusive than $\{MProd\}$ ($\{MProd\} \subset \{MProd, LLit\}$).[2] The idea is that if all values are good, then a more inclusive set of values must be better than a smaller one (Prakken 2000; Sartor 2002).

This idea could be adopted into our framework by adding a theory constructor that allows one to introduce preferences for any set of values over its own proper subsets. This follows indeed from schema *a fortiori* (see Section 8.1.2 on page 222 and Section 8.1.4 on page 225), if we extend its application also to values.

Theory constructor: *Value-pref. from value inclusion*
RELEVANT INPUT:
(1) Vs_1 is more inclusive than Vs_2
CONSTRUCTIBLE OUTPUT:
(2) Vs_1 OUTWEIGHS Vs_2

This is a very rough approximation of a full analysis of value comparisons. In particular, we discount interferences between values: If two values are incompatible, then promoting only one of them can be better than promoting both of them at the same time. However, it seems to be an acceptable schema for defeasible inference (or, at least an acceptable theory constructor). Thus, we may assume that δ wins the dispute, with theory T_5 (in Table 29.7 on the facing page).

29.1.6. Evaluating Theories

In the above discussion we produced five different theories. How do we choose between them? We believe that theories are to be assessed according to their coherence, following to the general ideas we introduced in Section 4.1.4 on page 125.

We shall not, however, attempt to develop a precise notion of coherence here, both because of the difficulty of this task, and because we are using a very broad notion of coherence, which does not commit us to a coherentist epistemology strictly understood.

On the contrary, we reject the conceptions of coherentism that view the connectedness of a set of beliefs as the only criterion for assessing the merit of such beliefs, regardless of their link to experience: Our idea of coherence includes all

[2] As usual, by a set Vs_1 being more inclusive than Vs_2 we mean Vs_2 is a strict subset of Vs_1 ($Vs_2 \subset Vs_1$).

CSit:	*Young*: $\{\pi Liv, \pi NPoss, \delta Liv\} \mapsto \neg R^{\pi}$	
Cases:	*Pierson*: $\{\pi NPoss\} \mapsto \neg R^{\pi}$	
	Keeble: $\{\pi Liv, \pi Land, \pi NPoss\} \mapsto R^{\pi}$	
Factors:	$(\pi NPoss \uparrow \neg R^{\pi}) \Uparrow LLit$	
	$(\pi Liv \uparrow R^{\pi}) \Uparrow MProd$	
	$(\pi Land \uparrow R^{\pi}) \Uparrow Prop$	
	$(\delta Liv \uparrow \neg R^{\pi}) \Uparrow MProd$	
Rules:	$\pi NPoss \Rightarrow \neg R^{\pi}$	⟨by *rule from factors*⟩
	πLiv AND $\pi Land \Rightarrow R^{\pi}$	⟨by *rule from factors*⟩
	δLiv AND $\pi NPoss \Rightarrow \neg R^{\pi}$	⟨by *rule from factors*⟩
RulePref:	$(\pi Liv$ AND $\pi Land \Rightarrow R^{\pi}) \succ (\pi NPoss \Rightarrow \neg R^{\pi})$	⟨by *abduct rule-pref.*⟩
	$(\delta Liv$ AND $\pi NPoss \Rightarrow \neg R^{\pi}) \succ (\pi Liv \Rightarrow R^{\pi})$	⟨by *rule-pref. from value-pref.*⟩
ValPref:	$\{MProd, Prop\} \succ LLit$	⟨by *value-pref. from rule-pref.*⟩
	$\{MProd, LLit\} \succ MProd$	⟨by *value-pref. from value inclusion*⟩

Table 29.7: *Theory* T_5

features that enhance the cognitive value of a theory, there included validation through experience.[3]

Firstly, we demand as much *explanatory power* as possible from our theories. In this context, explanatory power can be approximately measured by the number of cases explained. More exactly, since different cases may have different weights (one case being more recent, or having been decided by a higher court, etc.) we should consider also the relative importance of the sets of cases that the competing theories can explain.

We cannot consider here the details of the metrics for such a comparison, which is also dependant on the features of the legal system under consideration. At the very least, however, we can certainly say that theory T_a has more explanatory power than theory T_b, when T_a explains all precedents explained by T_b and some additional ones: The precedents explained by T_b are a proper subset of those explained by T_a ($T_b \subset T_a$).

Secondly we can require theories to be *consistent*, in the sense that they should be free from unsolved internal collisions. Note that we allow theories to include conflicting rules applicable to the same case, and we assume that these conflicts can be adjudicated through preferences (also contained in the theory). The contradictions we wish to avoid in a theory are those that remain undecided. Only these contradictions impair *consistency*, as we understand it.

A third classically desirable feature of legal theories is *simplicity* (a usual standard for evaluating scientific theories). This could be roughly measured

[3] As we observed in Section 4.1.4 on page 125. On the need to link coherence and experience, though from different perspectives, see Thagard 1992, and Haack 1993.

in terms of the number of factor-descriptions in the theory, or by the number of rules. Thus, a theory containing more general rules—that is, rules which consider fewer factors to be relevant—would provide simpler and more general explanations.

An argument could, however, be mounted for preferring theories which provide for a more accurate analysis of the cases, that is, an analysis which takes into account more factors. Whenever a theory does not consider a factor that was present in one of its cases, that factor can be introduced, so possibly jeopardising the previously-abducted rule preferences, and so threatening the theory's ability to explain the cases. The use of factor $\pi Land$ in T_3 above, to challenge T_2, is an example of this move.

Thus a theory is *safer* in accordance with the completeness of the factors it considers. Whether we should look for simplicity or safety depends on the status of the factors. If a factor contributes to the most plausible explanations of past decisions, it is certainly better to insert it, but if it appears to have played no part in previous decisions, it is preferable to omit it (at least when appealing to it is unnecessary to support the outcome one wishes).

Finally a theory is better in so far as it makes less recourse to *arbitrary* assumptions, namely, assumptions that are not required to explain, include, or rationalise valid input-information. The notion of valid input-information must be understood in a very wide sense. Such information includes first of all case-decisions (this is the aspect on which we have focused), but also the values, goals and rules which may be attributed to the legal community (being the content of legislation, or recognised values, shared customs, and so forth).

The fact that an item of information constitutes a valid input does not make this item necessarily decisive or even acceptable within the theory, but rather gives to it an independent importance, which is reflected in the merit of the theory: The more a theory succeeds in integrating such input information the better it is. For instance, the most coherent theory may fail to explain a case or to include a communal value, since this leads to conflicts with other components in the theory. However, given the same level of internal coherence, a theory including more cases and shared values is a better one.

It is not easy to find a way of combining these different criteria into a unique evaluation, given that they may lead to different results: T_1 may explain more cases than T_2, but may include fewer or less important values, T_1 may be simpler than T_2 but may provide a less accurate representation of the cases, and so on. We shall make some comments on that in Section 29.5.1 on page 783.

29.2. Argument Moves and Theory Construction

In this section we shall show how some classical moves of case-based argumentation can be viewed as theory-construction steps. We shall refer in particular to the model of case-based reasoning developed by Kevin Ashley and Edwina Rissland, with the help of their associates (in particular Vincent Aleven, David

Skalak, and Stephanie Bruninghaus). This model was implemented in two computer programs, *Hypo* (Rissland and Ashley 1987; Ashley and Rissland 1988; Ashley 1992), and *Cato* (Ashley and Aleven 1991; 1997). We shall occasionally refer to Hypo and Cato, but our interest here lies on their conceptual model rather than on their computational implementation.[4]

29.2.1. Citing a Case

The most basic reasoning move in case-based reasoning consists in citing a case, in order to strengthen one's position. From our viewpoint, this involves extending a theory with an additional precedent case. However, achieving the purpose of the citation also involves expanding the theory further, so that it is able to take into account the new case: This consists in adding factors, rules and preferences, so that the theory can explain the cited case and possibly others cases included in the theory, but also give indications on new cases

An example above is theory T_1, which cites *Pierson* in support of the defendant in *Young* by introducing case:

$$Pierson\colon \{\pi NPoss\} \mapsto \neg R^{\pi}$$

When introducing the case, the defendant also needs to introduce factor:

$$(\pi NPoss \uparrow \neg R^{\pi}) \Uparrow LLit$$

and the rule:

$$\pi NPoss \Rightarrow \neg R^{\pi}$$

(if π has no possession of the game, then he has no right over it)

which explains the case. This citation is particularly simple, since the theory does not contain any rule that would require the case to have a different outcome.

If the theory already includes such a rule, then the citation of a case also requires the introduction of a preference, explaining why the case deserved the decision it had as a matter of fact, through the constructor *preferences from case*. As an example of this more complex type of citation, consider how the plaintiff π constructs theory T_2 by citing *Keeble*. At this stage π introduces a case:

$$Keeble\colon \{\pi Liv,\, \pi NPoss\} \mapsto R^{\pi}$$

a factor:

$$(\pi Liv \uparrow R^{\pi}) \Uparrow MProd$$

[4] A computer application intended to assist in building legal theories, according to the model we shall present in the following pages, is presented in Chorley and Bench-Capon 2003.

a rule:

$$\pi Liv \Rightarrow R^{\pi}$$

(if π was pursuing his livelihood, then he has a right over the game)

and a preference:

$$(\pi Liv \Rightarrow R^{\pi}) \succ (\pi NPoss \Rightarrow R^{\pi})$$

The preference is necessary to enable the theory to explain Keeble.

Pragmatically, the best case to cite is the one that—besides having the outcome that the citing party wishes for the current situation—includes as many factors in common with the current situation as possible. This allows the most specific, and thus safest, rule to be constructed, and thus pre-empts several possible challenges. Thus citing a case is essentially a move of theory-construction, although considerations as to which is the best case to cite anticipate the evaluation of the theory.

29.2.2. Counterexamples and Distinctions

Following Hypo's model, we identify two different responses to a cited case: *providing a trumping counterexample* and *distinguishing* the case.

Let us first analyse providing a *trumping counterexample*. This is the stronger move to attack a theory. It consists in providing a new case which licenses a non-arbitrary way of absorbing the opponent's cases into one's own theory: This requires that the newly cited case has a larger set of factors in common with the current situation that any of the opponent's cases. The resulting theory will explain both the counterexample case and the previously cited ones, besides giving the current situation the result desired by the citing party. It thus wins on explanatory power. The use of $Keeble$ in T_2 is an example of this move. We need to distinguish a trumping counterexample from an *as-on-point counterexample* . An as-on-point counterexample provides an outcome opposed to a precedent's but does not contain all factors which the precedent shares with the current situation. Thus it does no more than display a failure to explain certain cases on the part of the theory, whereas the trumping counterexample gives rise to a new theory superior in explanatory power.

Let us now consider *distinguishing*. There are two main ways of distinguishing a case. The first way points to a factor favourable to one's opponent, which is present in the precedent case and absent in the current situation; the second points to a factor favourable to oneself, which is present in the current case and absent in the precedent.

The first way of distinguishing a case involves introducing a new factor F_{dis}, which favours the opponent, and which is not already considered in the opponent's theory. F_{dis} is not contained in the current case, but applies to a precedent

Prec which was decided for the opponent's side, and from which the opponent has abducted the rule and the preference which allow her to provide a certain solution the current case. Once the new pro-opponent factor F_{dis} is introduced, and *Prec* is described also through F_{dis}, a different explanation of *Prec* can be provided, an explanation that does not apply to the current situation.

Assume that the current situation *CSit* shares with precedent *Prec* factors F_1 and F_2. *Prec*'s was explained by the opponent assuming that rule $F_1 \Rightarrow O$ is stronger than rule $F_2 \Rightarrow \neg O$:

$$(F_1 \Rightarrow O) \succ (F_2 \Rightarrow \neg O)$$

Thus $F_1 \Rightarrow O$ was assumed to be the *ratio* of the present, a *ratio* determining (together with the corresponding preference) the outcome of the current situation. Distinguishing consists in substituting the *ratio* identified by the opponent with a more specific *ratio*:

$$F_1 \text{ AND } F_{dis} \Rightarrow O$$

and a corresponding preference:

$$(F_1 \text{ AND } F_{dis} \Rightarrow O) \succ (F_2 \Rightarrow \neg O).$$

The latter rule and preference do not apply to the current situation, which does not contain factor F_{dis}. Thus, once the new, more specific rule and preference are available, the old combination becomes unnecessary to explain the precedent, and so fails to provide a convincing ground for a decision in the current situation.

The introduction of factor $\pi Land$ in T_3 above exemplifies the distinguishing move. By introducing this additional factor, the defendant was able to transform the rule:

$$\pi Liv \Rightarrow R^{\pi}$$

(if π was pursuing his livelihood, then he has a right over the game)

into the rule:

$$\pi Liv \text{ AND } \pi Land \Rightarrow R^{\pi}$$

(if π was pursuing his livelihood and he is on his own land, then he has a right over the game)

saying that if the plaintiff was pursuing his livelihood *on his own land*, then he has the right.

The defendant can then use this rule to explain the case *Keeble* (as described through factors πLiv, $\pi NPoss$, and $\pi Land$) according to the following preference:

$$(\pi Liv \text{ AND } \pi Land \Rightarrow R^{\pi}) \succ (\pi NPoss \Rightarrow \neg R^{\pi})$$

The new rule (and the corresponding preference) is not applicable to the current case, *Young*. In fact, *Young* has factors πLiv, $\pi NPoss$, but misses $\pi Land$, which is required if the new rule is to be applied.

On the other hand, in the new theory (resulting from adding to T_3 the new rule and preference) one can dismiss both the old rule:

$$\pi Liv \Rightarrow R^{\pi}$$

and the corresponding preference:

$$(\pi Liv \Rightarrow R^{\pi}) \succ (\pi NPoss \Rightarrow \neg R^{\pi})$$

Therefore, through distinguishing δ constructs a new theory in which a R^{π} decision in *Keeble* does not entail a R^{π} decision in *Young* (which is what the plaintiff wanted to establish).

This way of distinguishing is less powerful than a trumping counterexample because it does not form the basis for a different decision in the current situation, but merely blocks the rule the opponent needs. In conclusion, this theory-construction move involves a factor rather than a case. The effect of the move is to make the opponent's theory arbitrary, by showing that an alternative explanation of the precedents is possible: This explanation provides a more accurate account of the factors in the precedents and fails to deliver the outcome wished by the opponent in the new situation.

An as-on-point counterexample can also be seen as the combination of a distinguishing move together with a case which grounds a new alternative theory, based on different factors. This new theory itself can, of course, be subject to a distinguishing move. We would then end up with two theories which both require arbitrary assumptions in order to justify a decision in the current situation.

The second and simpler way of distinguishing consists in pointing to a factor in the current situation which supports one's favourite outcome, and which was absent in the precedent. By using this factor one gets a new rule, only applicable to the current situation, which collides with the *ratio* the opponent wants to apply to both the precedent case and the current situation. One then argues that the opponent's *ratio*, though prevailing in the precedent, does not ensure the same outcome for the current situation, where there is a stronger rule (a larger set of factors) to the contrary.

For instance, the defendant—when replying to theory T_2 (Table 29.3 on page 755)—rather than introducing factor $\pi Land$ (and distinguishing *Keeble* on this basis), could have immediately introduced factor δLiv, which is only present in the current situation (*Young*). This would have allowed her to build rule $\delta Liv \text{ AND } \pi NPoss \Rightarrow \neg R^{\pi}$ (if the defendant is pursing his livelihood and the plaintiff has no possession, then the latter has no right to the game).

She could consequently admit that, according to *Keeble*, the rule concerning the plaintiff's economic activity ($\pi Liv \Rightarrow R^{\pi}$) prevails over the rule only

concerning the plaintiff's lack of possession ($\pi NPoss \Rightarrow \neg R^{\pi}$). However, she would say that *Keeble*'s rule does not prevail over the stronger rule concerning the combined effect of the defendant's economic activity and the plaintiff's lack of possession (δLiv AND $\pi NPoss \Rightarrow \neg R^{\pi}$), which is only applicable to Young.

29.2.3. Emphasising Strengths and Showing Weaknesses not Fatal

In the Cato system (Ashley and Aleven 1997) four additional argument moves are introduced: (1) emphasise strengths, (2) show weaknesses not fatal, (3) emphasise a distinction, and (4) downplay a distinction. Let us consider here the first two moves, since the last two require an extension to the basic model and will be considered in Section 29.4 on page 773.

The move *emphasise-strengths* consists in adding precedents that support one's point of view. In our framework, this simply corresponds to introducing more cases that are explained by the theory, with factors shared with the current situations, thus increasing the theory's explanatory basis. Again these moves can be seen as constructing a theory that will be evaluated as better.

Showing weaknesses not fatal consists in showing that the weaknesses of the current situation with regard to the desired outcome—in particular, the presence of factors against that outcome, or the absence of factors favouring it—are not decisive, since the desired outcome was obtained in precedent cases that shared the same weaknesses. In our framework, this move involves including cases with the desired outcome, but this time missing factors for that outcome or containing factors against it. In our terms, this move can be seen as an attempt to increase the safety of the explanations in the theory, by anticipating and pre-empting the introduction of additional factors. It is also possible that such cases may licence the introduction of preferences that contradict preferences arbitrarily introduced by the opponent.

29.3. Dimensions in Theory Constructions

A significant extension to the model we described in the above sections consists in embedding *dimensions* in the theory-construction process. We have already considered how dimensions differ from binary factors (see Section 8.1.4 on page 225). Let us now see how the difference between dimension-based thinking and binary thinking may affect theory-construction.

29.3.1. Dimensions and the Representation of Cases

Let us refer to our hunting example to shows the limitations of binary thinking. Consider, for instance, the *Pierson* case. Using the factors we identified, it

would appear that plaintiff π had no case to present: He did not get possession of the fox ($\pi NPoss$), and this is assumed to signal that he had no right over it.

However, let us further consider the factor $\pi NPoss$ (the plaintiff has no possession of the animal), and assume that it can be applied whenever the plaintiff has not caught the animal. As set up, this is an all or nothing affair, in which either plaintiff has not caught the animal (so that the factor does hold), or has caught it (so that the factor does not holds). Under the first condition (the animal has not been caught) it does not matter whether the plaintiff has seen the animal, whether he was in hot pursuit of it, or even whether he has wounded it (perhaps mortally). All of these situations are treated by $\pi NPoss$ as being equivalent ways of realising the pro-πfactor $\pi NPoss$, all of them favouring outcome $\neg R^{\pi}$.

We do not, however, have to see the situation this way. We could see instead a range (discrete or continuous) of positions between seeing the animal and actually possessing it, and the points on this range as being progressively more favourable the conclusion R^{π} (that π has a right over the game) and less favourable to the conclusion $\neg R^{\pi}$ (that he has no such right).

The binary perspective transforms this range into a yes/no alternative: According to $\pi NPoss$ having failed to catch the animal is a reason for finding for the defendant (for $\neg R^{\pi}$), whereas if the animal has been caught there is no such reason.

However, there is not only one way to transform the range of possible positions into a binary factor. Instead of the pro-$\neg R^{\pi}$ factor $\pi NPoss$ we might have introduced a pro-R^{π} factor, $\pi Chase$, which was intended to cover all cases in which the plaintiff has given chase: According to this choice, having pursued the animal is sufficient to establish a reason for the plaintiff, and only failing to start a chase would not instantiate this reason. Note that the situation existing in $Pierson$ (plaintiff was chasing the animal though he had not caught it yet), would favour the defendant when seen from the perspective of factor $\pi NPoss$, while it would favour the plaintiff when seen from the perspective of factor $\pi Chase$.

Consider also factor πLiv (the plaintiff was pursuing his livelihood). Also the choice of this factor is not the only possible one: Besides earning one's living one may be acting out of a number of progressively less favourable motives (with regard to acquiring a right over the animal), such as altruism (foxes are vermin and a threat to farmers), pleasure, or even malice (if it was the defendant's pet fox). Assume that in $Pierson$ the plaintiff's hunt was motivated by the desire to reduce the number of foxes, to safeguard the community's poultry. Perhaps the correct factor was one which would apply if the plaintiff was earning his living or acting out of concern for his neighbours. Had this factor been available, another pro-plaintiff factor would have been available in $Pierson$.

Considerations such as these are present in the text of the judgement in $Pierson$. The judgement speaks of "caught or mortally wounded" and a dis-

senting opinion expressed the view that the social utility of the fox hunting was so great that the activity should be encouraged and protected by law.

Thus for possession we could see a possible dimension $\pi Control$, representing the level of control which the plaintiff had over the animal, with a possible *dimensional spectrum* of degrees such as

$$\langle NoContact, Seen, Started, Wounded, MortallyWounded, Captured\rangle$$

which favours R^{π} according to the extent to which capture was approached (moving to the right), and favours $\neg R^{\pi}$ to the extent to which no-contact was approached (moving to the left).

Seen in this way, choosing a binary factor is not a matter of simply picking one feature favouring one outcome of a dispute from a pre-existing background-store of such features, but rather involves selecting a significant point within a dimension from which a binary-factor can be formed and linking that point to an outcome. This selection implies that the realisation of the dimension to that point starts to favour the chosen outcome.

Therefore all positions in the span from the chosen point toward the dimension's extreme (in the direction indicated by the chosen outcome), will also realise the factor.

29.3.2. Dimensions and Values

Also dimensions need to be related to *values* (like factors in general). We have seen that a factor is a reason for endorsing a particular outcome because to do so would promote some value. Correspondingly, a dimension is an increasingly strong reason for endorsing an outcome as its position approaches the corresponding extreme, since as the dimension goes toward the corresponding extreme that outcome more probably or more strongly promotes some value. Thus we should see the positions in a dimension as offering a stronger opportunity to promote some values (by endorsing the corresponding outcomes) as we move toward an extreme.

Two types of value need to be distinguished:

- those which are more surely promoted by deciding for the plaintiff as we approach the pro-plaintiff extreme, and
- those which are more surely promoted by deciding for the defendant as we approach the pro-defendant extreme.

This can be illustrated by analysing dimension $\pi Control$. When we move toward the left of the dimensional spectrum (there is less control over the chased animal), the dimension $\pi Control$ favours outcome $\neg R^{\pi}$, in order to promote the value of reduction of litigation $LLit$; while as we move to the right of the spectrum (there is more control over the chased animal), the dimension favours

outcome R^{π} in order to promote the (quite questionable nowadays) value of appropriation $Prop$ (encouraging private appropriation as the best way to exploit natural resources).

In fact, as we move toward the $\neg R^{\pi}$ extreme—that is, when the plaintiff's control over the animal is more tenuous—we approach less clear-cut situations. Deciding for the plaintiff in those situations would be likely to encourage litigation in other similar cases, and would increasingly do so, the less the plaintiff's control. If judges were to decide this way, hunters who missed the animal they were pursuing, which was captured by other hunters, would begin suing the latter, alleging to have been the first to wound, chase, start, or even see the animal.

Note that, from this perspective, if having wounded the animal is a form of control so tenuous that we have a reason to find for the defendant ($\neg R^{\pi}$), mere pursuit will be a stronger reason to find for the defendant.

Appropriation, on the other hand, is more surely promoted by deciding for the plaintiff when he has a stronger control over the animal: In this condition, deciding for the plaintiff means to give legal backing to the physical possession he has gained over the animal, and so to recognise and encourage private appropriation. If merely chasing a fox is a reason to find for the plaintiff, then mortal wounding will be a stronger reason.

29.3.3. *The Extraction of Factors*

Our discussion of the dimension $\pi Control$ has shown how one dimension can provide factors leading to opposite outcomes, outcomes that are more strongly promoted when one approaches the corresponding extreme of the dimensional spectrum.

We always need to choose a starting point for the factor, but the behaviour of the factor will be different. Factors favouring an outcome to the right of the dimensional spectrum (the outcome which is increasingly favoured by an increase in the dimension) will cover all positions in the range spanning from the chosen point to the right extreme. Factors promoting an outcome located to the left side of the dimensional spectrum (the outcome that is increasingly favoured by a decrease in the dimension) will include all positions in the range spanning from the chosen point to the left extreme.

Dimensions provide the input material for constructing factors. Before considering this aspect of theory-construction, let us see how we can describe a dimension. The *description of a dimension* d includes all of the following elements:[5]

- The *dimensional spectrum*, which is a continuum or discrete spectrum of positions $\langle p_1 \dots p_n \rangle$ realising increasing degrees of d (p_{i+1} realises d more than p_i).

[5] For a discussion of the structure of a dimensions see Section 8.1.5 on page 231.

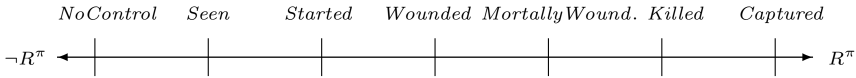


Figure 29.1: *The spectrum of dimension* $\pi Control$

- The *dimensional outcomes* $\langle \overleftarrow{O}, \overrightarrow{O} \rangle$, which are a pair of legal qualifications such that:
  - $\overleftarrow{O}$, the *leftward outcome*, is increasingly favoured by decreasing degrees of d ($\overleftarrow{O}$ is favoured by p_{i-1} more than it is favoured by p_i);
  - $\overrightarrow{O}$, the *rightward outcome*, is increasingly favoured by increasing degrees of d ($\overrightarrow{O}$ is favoured by p_{i+1} more than it is favoured by p_i).
- The *dimensional values*$\langle \overleftarrow{V}, \overrightarrow{V} \rangle$ is a pair of (sets of) values, such that:
  - $\overleftarrow{V}$, the *leftward value*, is more strongly promoted by $\overleftarrow{O}$ as d decreases ($\overleftarrow{O}$ under condition p_{i-1} promotes each $\overleftarrow{V}$ more strongly than $\overleftarrow{O}$ under p_i does);
  - $\overrightarrow{V}$, the *rightward value*, is more strongly promoted by $\overrightarrow{O}$ as d increases ($\overrightarrow{O}$ under condition p_{i+1} promotes each $\overrightarrow{V}$ more strongly than $\overrightarrow{O}$ under p_i does).

By applying our model of a dimension to $\pi Control$, we obtain the following dimension-based description:

Property:	$\pi Control$
Spectrum:	$\langle NoControl, Seen, Started, Wounded,$ $MortallyWounded, Captured \rangle$
Outcomes:	$\langle R^{\pi}, \neg R^{\pi} \rangle$
Values:	$\langle \{LLit\}, \{Prop\} \rangle$

In Figure 29.1 you can see the dimensional spectrum of $\pi Control$.

Assume that the background description of cases is now provided in terms of dimensions rather than factors. Each case will be characterised by a set of *dimensional positions* $\{p^{d_1}, \ldots, p^{d_n}\}$, where each p^{d_i} indicates the position (degree) at which dimension d_i was realised in the case.

Factor descriptions can be constructed out of dimensions by choosing one of the positions on the spectrum, one outcome, and one of the values promoted by

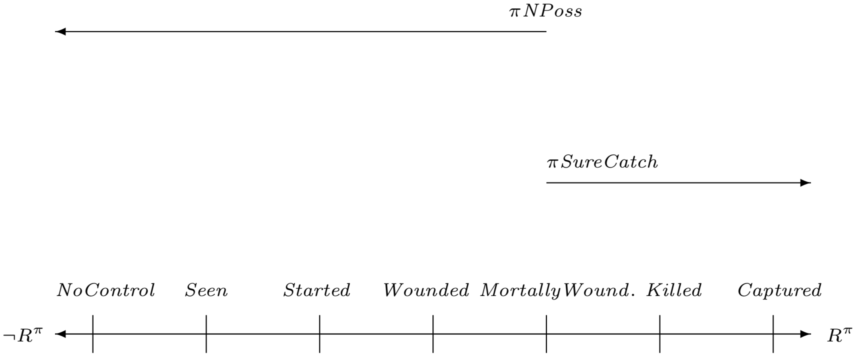


Figure 29.2: *Factors from dimension $\pi Control$: $\pi SureCatch$, $\pi NPoss$, $\pi Started$*

that outcome. The construction of a factor starting at position p_i with regard to dimension d, and having outcome Q entails the assumption that the realisation of the chosen position p_i of dimension d, supports the chosen outcome Q, but also that:

1. if $Q = \overleftarrow{O}$, then any p_j such that $j < i$ also supports Q,
2. if $Q = \overrightarrow{O}$, then any p_j such that $j > i$ also supports Q.

For example, given the dimension $\pi Control$, described above, one could construct the pro-R^π factor $\pi SureCatch$ (π is sure of the catch), which begins being realised when the game has been $MortallyWounded$, or the pro-$\neg R^\pi$ factor $\pi NoPoss$, also beginning when the game has been $MortallyWounded$, but going in the opposite direction, along the dimensional spectrum (see Figure 29.2).

It is important to stress that a factor—starting at a certain dimensional position p_i, and favouring outcome O—applies not only to the cases that exhibit the dimensional position p_i, but also to the cases exhibiting a position that more strongly favours O along the dimensional spectrum. In other words, p_i indicates an outcome O that which is also realised by more O-favourable positions. These are are the positions p_j such that $j < i$ when O is the leftward outcome, and the positions p_j such that $j > i$ when O is the rightward outcome.

For example, according to the dimension $\pi Control$, the pro-$\neg R^\pi$ factor $\pi NPoss$ is realised not only when the animal was mortally wounded, but *a fortiori* in all positions preceding $MortallyWounded$ in the dimension's list, whereas the pro-R^π factor $\pi SureCatch$ is realised not only when the animal

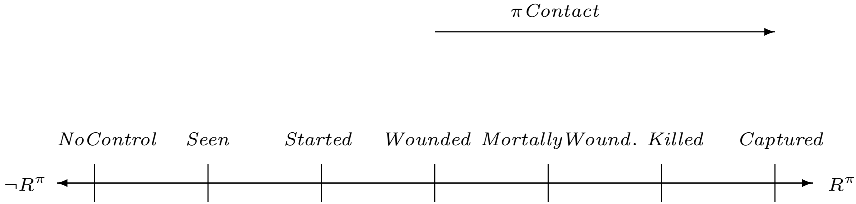


Figure 29.3: *Another factor from dimension* $\pi Control$: $\pi Contact$

was mortally wounded, but *a fortiori* when the animal was captured (on dimensional *a fortiori*, see Section 8.1.6 on page 233).

Thus, we may say that a factor *subsumes* all dimensional positions that precede (for leftward-going factors) or follows (for rightward-going factors) the initial positions for that factor. For example, factor $SureCatch$ above subsumes both $\pi Control^{Killed}$ and $\pi Control^{Captured}$, while it does not subsume $Control^{Wounded}$ nor $Control^{Started}$ (see Figure 29.3).

Note that building factors out of dimensions gives a degree of discretion: it requires setting the bound at which one outcome is supported along one dimension. Different choices in this regard would lead to different interpretations of the cases. So while the factor $\pi SureCatch$ favours outcome R^π only from the point where the animal is mortally wounded, the pro-R^π factor $\pi Contact$ (π had contact with the animal), with starting position $Control^{Wounded}$ would imply that just wounding the animal (and *a fortiori* mortally wounding it) supports the outcome R^π (see Figure 29.3).

29.3.4. Additional Reasoning Moves

A dimensional representation allows us to explore the creation of factors rather than taking them as given, and allows for additional reasoning moves. This is useful since limiting oneself to applying the already available factors can significantly bias one's view of a case.

In particular, a dimensional view allows for new ways of distinguishing. Assume that a new case $CSit$ is similar to $Pierson$, except that while in $Pierson$ π has started the fox, in the new case π has wounded it. Assume that the defendant δ has cited $Pierson$, and has provided a theory explaining $Pierson$ according to factor $\pi NPoss$ (π had no possession of the game), which δ describes as follows:

$$\pi NPoss\colon\ (Control^{MortallyWounded} \uparrow \neg R^\pi) \Uparrow LLit$$

This factor description means that $NPoss$ (the plaintiff has no possession of the game) starts to hold when one has mortally wounded the animal (rather than catching it) and favours the conclusion that the plaintiff has no right. This factor, favouring the leftward outcome $\neg R^{\pi}$, subsumes all position to the left of its starting point in the dimensional spectrum ($Wounded$, $Started$, $Seen \ldots$), as Figure 29.2 on page 770 shows. Factor $NPoss$ provides a ground why $Pearson$ was decided for the defendant, and thus a ground for deciding the new case in the same way, according to the rule:

$$\pi NPoss \Rightarrow \neg R^{\pi}$$

In his response, however, the plaintiff could take into account a different position in the dimension, and so would be able to point out that along the dimension $Control$, he is in a more favourable situation as compared to the $Pierson$'s plaintiff, and this requires a different solution than in $Pierson$. For instance, he could introduce the factor $\pi Contact$, meaning that π had contact with the animal, with description:

$$\pi Contact: \quad (Control^{Wounded} \uparrow R^{\pi}) \Uparrow Prop$$

According to this description, factor $\pi Contact$ favours the rightward outcome R^{π}, starting from the point where the animal was $Wounded$, and thus also covers positions $MortallyWounded$, $Killed$ and $Captured$ (see Figure 29.3 on the preceding page).

At the same time the plaintiff could also introduce a factor $\pi NoContact$, with description

$$\pi NoContact: \ (Control^{Started} \uparrow \neg R^{\pi}) \Uparrow LLit$$

According to this description, factor $\pi NoContact$ favours the leftward outcome $\neg R^{\pi}$, starting from the point where the animal was $Started$, and thus also covers positions $Seen$ and $NoControl$ (see Figure 29.4 on the next page).

Assume that the first factor is applicable in the new case and produces a rule

$$\pi Contact \Rightarrow R^{\pi}$$

while the second factor was satisfied in $Pierson$, and produces the rule

$$\pi NoContact \Rightarrow \neg R^{\pi}$$

which contributes to explaining $Pierson$'s outcome.

By substituting factor $\pi NPoss$, according to which $Pierson$ and $CSit$ are indistinguishable, with these two factors, the plaintiff has succeeded in distinguishing $Pierson$ and $CSit$: He has explained the outcome of $Pierson$ ($\neg R^{\pi}$) in such a way that he can continue to argue for the opposite outcome (R^{π}) in $CSit$. Similar moves are possible with respect to counterexamples and their rebuttals. This is a very important type of move, but one which obviously requires dimensions.

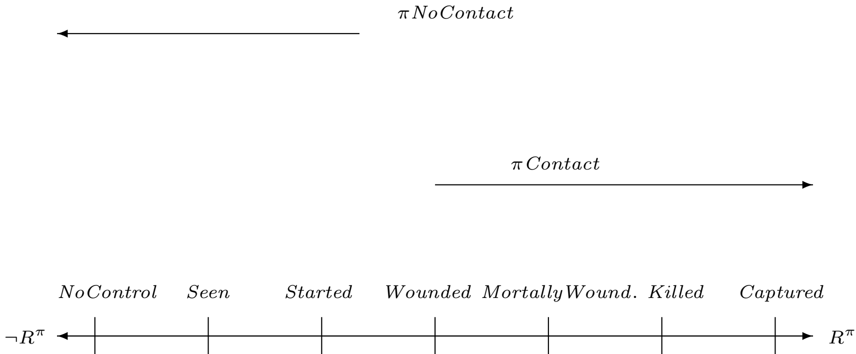


Figure 29.4: *Factors from dimension $\pi Control$: $\pi Contact$ and $\pi NoContact$*

Finally, let us observe, that if we wished, we could take a further step back, and bring the choice of dimensions into theory-construction: We could replace the dimensional descriptions with a set of pairs of attributes and unordered positions for these attributes, which would need to be turned into dimensions by choosing a subset of the possible positions, and ordering them according to some social value or values. We shall not, however, pursue this further here.

29.4. Stratified Legal Theories

So far we have considered "flat" legal theories, only including rules that directly link certain combinations of factors to the final outcome of a case. We now want to investigate how and why one may build a *stratified legal theory*, where legal qualifications bridge over the factors of a case and its final outcome.

This is a subject we have already addressed, when analysing the function of *cognitive instructions* (instruction prescribing to form mental states, rather than directly to behave in certain ways) and of *non-deontic normative propositions* (according to which the fact that an event or a situation has certain qualifications determines its having certain other qualifications).

The perspective of theory-construction enables us to understand some aspects of the function of intermediate normative concepts, and in particular to analyse their dialectical role.

Our main inspiration will be provided by the above-mentioned Cato system, but we shall reformulate Cato's ideas in our model and expand these ideas using the constructs at our disposal.

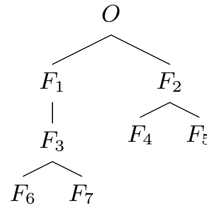


Table 29.8: *Factor hierarchy*

29.4.1. *Hierarchies of Factors*

The construction of intermediate rules will be based upon the information contained in the factor background. We shall allow our background knowledge to include factors favouring intermediate outcomes, besides the possible final outcomes of our cases. By an intermediate outcome, we mean a normative qualification which determines a further normative qualification, that is, a further step of the reasoning process that concludes with a final outcome. Such an intermediate result is what we call an *abstract factor*.

To model this, we need to allow for more than one factor description for a given factor: If factor F promotes a certain final outcome O (in order to advance value V), via an abstract factor (an intermediate outcome) F^a, it will have descriptions:

$$(F \uparrow O) \Uparrow V$$
$$(F \uparrow F^a) \Uparrow V$$

Note that we assume that the values promoted by the original factor remain the same. The abstract factors will, in their turn, favour further outcomes, which may still be intermediate, or may represent the final outcome for the dispute. By linking each factor to the outcome it produces, we obtain a tree where each intermediate node (each node, except the root and the leaves of the tree) represent an abstract factor: It is both an outcome (of a preceding factor) and factor (for a subsequent outcome), as you can see Table 29.8.

Abstract factors do not appear in our basic representation of cases, but they can be used in multi-step arguments, where the final outcome of a case is explained through a sequence of chained inference steps.

For example, suppose we have the hierarchy shown in Table 29.8. If a case containing factor F_6 had decision O, its explanation may be based on the argument in Table 29.9 on the facing page.

In our representation a factor does not support only its parent node: Via its parent node, the factors gives support to all of its ancestors (to avoid clutter, we have not represented these further links in the Table 29.8). Thus, the factor-background besides factor-descriptions connecting each factor to its parent:

1.	F_6	
2.	$F_6 \Rightarrow F_3$	
3.	F_3	⟨from 1 and 2, by *detachment*⟩
4.	$F_3 \Rightarrow F_1$	
5.	F_1	⟨from 3 and 4, by *detachment*⟩

Table 29.9: *Hierarchical argument*

$$(F_6 \uparrow F_3) \Uparrow V$$

will also contain factor-descriptions connecting each factor to all of its ancestors, shortcutting the intermediate links:

$$(F_6 \uparrow F_1) \Uparrow V$$
$$(F_6 \uparrow O) \Uparrow V$$

We may alternatively assume that these shortcuts do not need to be in the background knowledge, but can be introduced at the theory-construction stage. However, we shall avoid considering this additional theory-construction step for simplicity's sake (though it will be a very easy addition).

29.4.2. Downplaying a Distinction

A factor with multiple ancestors has multiple factor descriptions, and so provides the opportunity for the reasoning move that Ashley and Aleven (1997) call *downplaying a distinction*.

As we have seen above (Section 29.1.4 on page 755), distinguishing involves two steps:

1. adding the new, distinguishing factor F_{dis}, which applies to precedent *Prec* but does not apply to the current situation *CSit*,
2. explaining *Prec* by a rule including the distinguishing factor F_{dis}.

Downplaying the distinction of *Prec* consists in providing an explanation for both *Prec* and *CSit* through a rule including an abstract factor F^a, which is an immediate consequence both of the distinguishing factor F_{dis}, and of a different factor, the downplaying factor F_{dow}, which can be established in the current case.

Let us now go through the process of distinguishing and downplaying the distinction. We assume the factor-hierarchy of Table 29.10 on the next page, which corresponds to the factor-background of Table 29.11 on the following page.

Finally, we assume that the current situation is the new case $NewC$ while the relevant case is $PrecC$, which are characterised as in Table 29.12 on the next page.

Table 29.10: *Factor hierarchy: downplaying distinction*

$(F_1 \uparrow O) \Uparrow V_1$
$(F_{dis} \uparrow F_a) \Uparrow V_1$
$(F_{dis} \uparrow O) \Uparrow V_1$
$(F_{dow} \uparrow F_a) \Uparrow V_1$
$(F_{dow} \uparrow O) \Uparrow V_1$
$(F_a \uparrow O) \Uparrow V_1$
$(F_2 \uparrow \neg O) \Uparrow V_2$

Table 29.11: *Factor-background: hierarchical factors*

$NewC$:	$\{F_1, F_{dow}, F_2\} \mapsto \boxed{?}$
$PrecC$:	$\{F_1, F_{dis}, F_2\} \mapsto O$

Table 29.12: *Case-background: hierarchical factors*

Suppose the plaintiff argues that $NewC$ should have outcome O, because of the rule establishing O for antecedent F_1, which prevails, as shown by $PrecC$, over the rule establishing $\neg O$ for antecedent F_2. More exactly, his story is expressed by theory T_1 in Table 29.13 on the facing page .

With regard to this theory, the justified conclusion for the current situations $NewC$ is indeed O, as it was in $PrecC$, according to the same justified argument $\mathcal{A}$, which strictly defeats its counterargument $\mathcal{B}$ (see Table 29.14 on the next page), according to preference:

$$(F_1 \Rightarrow O) \succ (F_2 \Rightarrow \neg O)$$

The defendant would obviously reply by distinguishing precedent $PrecC$ from the current situation $NewC$. She affirms: “It is true, $PrecC$ had decision O, but this was not only because $PrecC$ had feature F_1. To reach conclusion (and to outweigh the argument to the contrary) also the distinguishing feature F_{dis} was required which is not present in $NewC$. Thus the precedent does not justify an O decision also in $NewC$.”

For substantiating such claim, she needs to transform theory T_1 into the theory T_2, in Table 29.15 on the facing page.

CSit:	$NewC$: $\{F_1, F_2\} \mapsto O$	
Cases:	$PrecC$: $\{F_1, F_2\} \mapsto O$	
Factors:	$(F_1 \uparrow O) \Uparrow V_1$	
	$(F_2 \uparrow \neg O) \Uparrow V_2$	
Rules:	$F_1 \Rightarrow O$	⟨by *rule from factors*⟩
	$F_2 \Rightarrow \neg O$	⟨by *rule from factors*⟩
RulePref:	$(F_1 \Rightarrow O) \succ (F_2 \Rightarrow \neg O)$	⟨by *abduct rule-pref.*⟩

Table 29.13: *Theory T_1: the starting point*

$\mathcal{A}$			$\mathcal{B}$		
1.	F_1		1.	F_2	
2.	$F_1 \Rightarrow O$		2.	$F_2 \Rightarrow \neg O$	
3.	O	⟨from 1 and 2, by *detachment*⟩	3.	$\neg O$	⟨from 1 and 2, by *detachment*⟩

Table 29.14: *Arguments from theory T_1*

CSit:	$NewC$: $\{F_1, F_2\} \mapsto \neg O$	
Cases:	$PrecC$: $\{F_1, F_{dis}, F_2\} \mapsto O$	
Factors:	$(F_1 \uparrow O) \Uparrow V_1$	
	$(F_{dis} \uparrow O) \Uparrow V_1$	
	$(F_2 \uparrow \neg O) \Uparrow V_2$	
Rules:	F_1 AND $F_{dis} \Rightarrow O$	⟨by *rule from factors*⟩
	$F_2 \Rightarrow \neg O$	⟨by *rule from factors*⟩

Table 29.15: *Theory T_2: distinguishing*

As we have seen in discussing the hunter's case, the latter theory allows the defendant to explain why $PrecC$ had decision O, while maintaining that $CSit$ should have decision $\neg O$. In fact, $PrecC$ is explained in T_2 by appealing to a rule, which is not applicable to $NewC$ (since $NewC$ does not satisfy factor F_{dis}).

Let us now consider the move *downplay distinction*. This move exploits the factors hierarchy, and in particular the fact that both factors F_{dis} in $Prec$ and factor F_{dow} in $CSit$ favour the abstract factor F_a, which favours O. The party using this strategy accepts that at the lower level the precedent case and the current situation appear to be different, as including different factors. However, he claims that when one better considers the precedent, one sees that the factor in the precedent has a certain relevance since it expresses an abstract property which the precedent shares with the current situation (though in the current situation the abstract property is expressed in a different way): Therefore the same

CSit:	$NewC$: $\{F_1, F_{dow}, F_2\} \mapsto O$	
Cases:	$PrecC$: $\{F_1, F_{dis}, F_2\} \mapsto O$	
Factors:	$(F_1 \uparrow O) \Uparrow V_1$	
	$(F_{dis} \uparrow F_a) \Uparrow V_1$	
	$(F_{dow} \uparrow F_a) \Uparrow V_1$	
	$(F_a \uparrow O) \Uparrow V_1$	
	$(F_2 \uparrow \neg O) \Uparrow V_2$	
Rules:	F_1 AND $F_a \Rightarrow O$	⟨by *rule from factors*⟩
	$F_{dis} \Rightarrow F_a$	⟨by *rule from factors*⟩
	$F_{dow} \Rightarrow F_a$	⟨by *rule from factors*⟩
	$F_2 \Rightarrow \neg O$	⟨by *rule from factors*⟩
RulePref:	$(F_1$ AND $F_a \Rightarrow O) \succ (F_2 \Rightarrow \neg O)$	⟨by *abduct rule-pref.*⟩

Table 29.16: *Theory T_3 downplaying a distinction*

ratio applies to both. More exactly, to downplay the distinction the plaintiff can build theory T_3 in Table 29.16.

To obtain this theory, the plaintiff has added to her theory two new factors, the intermediate factor F_a and the downplaying factor F_{dow} (which only applies to $CSit$) and has interpreted both factors F_{dis} and F_{dow} as expressing F_a. This allows him to solve the new case by applying the same rule he uses to explain the precedent:

$$F_1 \text{ AND } F_a \Rightarrow O$$

In theory T_3, the plaintiff can non-arbitrarily assume that this rule prevails over the contrary rule to which the defendant refers, according to the following inference:

$$(F_1 \text{ AND } F_a \Rightarrow O) \succ (F_2 \Rightarrow \neg O)$$

This preference is not arbitrary since it contributes to explaining $Prec$. Thus the plaintiff is justified in appealing to this preference to justify outcome O also in the current case $NewC$.

In this way, the plaintiff has achieved the result of disarming the defendant's attempt at distinguishing $PrecC$ from $NewC$: From the plaintiff's perspective the two cases are indistinguishable since their outcomes results from the same rule and the same rule preference.

29.4.3. Distinguishing, Downplaying, and Distinguishing Again

Let us now consider an example that allows us to see the dialectical process, typical of case-based reasoning, in which distinctions are introduced, countered by downplaying, and reintroduced in a different way.

CSit:	$NewC$: $\{HealthDamage, Omission\} \mapsto L^{doc}$	
Cases:	$PrecC$: $\{HealthDamage, Contract, Omission\} \mapsto L^{doc}$	
Factors:	$(HealthDamage \uparrow L^{doc}) \Uparrow Health$	
	$(Omission \uparrow \neg L^{doc}) \Uparrow Autonomy$	
Rules:	$HealthDamage \Rightarrow L^{doc}$	⟨by *rule from factors*⟩
	$Omission \Rightarrow \neg L^{doc}$	⟨by *rule from factors*⟩
RulePref:	$(HealthDamage \Rightarrow L^{doc}) \succ (Omission \Rightarrow \neg L^{doc})$	
		⟨by *abduct rule-pref.*⟩
ValPref:	$Health \succ Autonomy$	⟨by *value-pref. from rule-pref.*⟩

Table 29.17: *Medical-omission theory* T_1

Consider a case (the current situation) $NewC$ where a patient was treated by a doctor in a hospital, without there being a contract between the patient and the hospital (for instance, within a national-security program or in an emergency case), and the doctor omitted to give the patient a useful therapy, so damaging his health: The factors of $NewC$ are $Hospital$, $Omission$, and $HealthDamage$.

The issue to be decided is whether the doctor is liable for her omission. We use the following abbreviations:

$L^{doc} = \lceil \text{the doctor is liable} \rceil$
$\neg L^{doc} = \lceil \text{the doctor is not liable} \rceil$

Assume that there is a precedent case $PrecC$, where a doctor was considered to be liable for the damage suffered by a patient, a contract being in place, even though the damage was due to an omission: The factors in $PrecC$ were $HealthDamage$, $Omission$, and $Contract$.

With regard to the factors, we may assume the following:

- $HealthDamage$ favours outcome L^{doc}, in accordance with the value of $Health$;
- $Omission$ favours outcome $\neg L^{doc}$, in accordance to the value of $Autonomy$, which requires that nobody is punished unless for taking an initiative; and
- $Contract$ favours outcome L^{doc}, in accordance with the value of $Trust$, on the teleological ground that putting liability upon the defaulting party in a contract advances reciprocal reliance.

Assume also that the patient explains the doctor's liability both in $PrecC$ and in $NewC$ according to the theory that causing health damage produces the liability of the doctor, even when the damage is caused by omitting a therapy (rather than by providing a wrong therapy). In other words, he builds theory T_1 in Table 29.17.

CSit:	$NewC$: $\{HealthDamage,\ Omission\} \mapsto \neg L^{doc}$	
Cases:	$PrecC$: $\{HealthDamage,\ Contract,\ Omission\} \mapsto L^{doc}$	
Factors:	$(HealthDamage \uparrow L^{doc}) \Uparrow Health$	
	$(Contract \uparrow L^{doc}) \Uparrow Trust$	
	$(Omission \uparrow \neg L^{doc}) \Uparrow Autonomy$	
Rules:	$HealthDamage$ AND $Contract \Rightarrow L^{doc}$	⟨by *rule from factors*⟩
	$Omission \Rightarrow \neg L^{doc}$	⟨by *rule from factors*⟩
RulePref:	$(HealthDamage$ AND $Contract \Rightarrow L^{doc}) \succ (Omission \Rightarrow \neg L^{doc})$	⟨by *abduct rule-pref.*⟩
ValPref:	$\{Health, Trust\} \succ \{Autonomy\}$	⟨by *value-pref. from rule-pref.*⟩

Table 29.18: *Medical-omission theory* T_2

This theory allows the patient to provide the same explanation for the precedent case and the current situation: The rule that a doctor is liable for causing health damages applies to both cases, and this rule prevails over the rule that there is no liability for omissions (which also means that the value of health prevails over the value of autonomy).

The doctor now distinguishes precedent case $PrecC$ from the current case $NewC$. She points to the fact that in the precedent there was a contract between the doctor and the patient. Accordingly, she assumes that medical liability is explained by two factors: (*a*) causing health damage, and (*b*) being bound by a contract to provide adequate care. She argues that only the combination of these two factors prevails over the principle that there should be no liability for omissions. These ideas are expressed by producing theory T_2, in Table 29.18.

In theory T_2 there is an explanation why $PrecC$ had decision L^{doc}, an explanation which is not applicable to $CSit$. Thus $NewC$ can have outcome $\neg L^{doc}$ without contradicting the precedent. This is obtained according to the rule:

$$HealthDamage \text{ AND } Contract \Rightarrow L^{doc}$$

which is not applicable to $NewC$ (since in $NewC$ there is no contract).

The patient may downplay this distinction, by claiming that the existence of the contract implied that the doctor was warranting a careful performance, and that this was the real reason why a doctor should be held liable under a contract, according to the value of trust. He may also claim that the same warranty is also implicitly given by the practice of the medical profession in a hospital, regardless of the existence of a contract: The doctor in the current situation would still be liable for the same reasons—causing health damage after warranting an adequate performance—as in the precedent. This is the content of theory T_3, in Table 29.19 on the facing page:

This theory allows the patient to explain both $PrecC$ and $CurrC$ by using the same rule:

CSit:	$NewC$: $\{HealthDamage, Hospital, Omission\} \mapsto L^{doc}$	
Cases:	$PrecC$: $\{HealthDamage, Contract, Omission\} \mapsto L^{doc}$	
Factors:	$(HealthDamage \uparrow L^{doc}) \Uparrow Health$	
	$(Contract \uparrow Warranty) \Uparrow Trust$	
	$(Hospital \uparrow Warranty) \Uparrow Trust$	
	$(Warranty \uparrow L^{doc}) \Uparrow Trust$	
	$(Omission \uparrow \neg L^{doc}) \Uparrow Autonomy$	
Rules:	$HealthDamage$ AND $Warranty \Rightarrow L^{doc}$	⟨by *rule from factors*⟩
	$Contract \Rightarrow Warranty$	⟨by *rule from factors*⟩
	$Hospital \Rightarrow Warranty$	⟨by *rule from factors*⟩
	$Omission \Rightarrow \neg L^{doc}$	⟨by *rule from factors*⟩
RulePref:	$(HealthDamage$ AND $Warranty \Rightarrow L^{doc}) \succ (Omission \Rightarrow \neg L^{doc})$	⟨by *abduct rule-pref.*⟩
ValPref:	$\{Health, Trust\} \succ \{Autonomy\}$	⟨by *rule-pref. from value-pref.*⟩

Table 29.19: *Medical-omission theory* T_3

$\mathcal{A}$

1.:	$Contract$	
2.:	$Contract \Rightarrow Warranty$	
3.:	$Warranty$	⟨from 1 and 2, by *syllogism*⟩
4.:	$HealthDamage$	
5.:	$HealthDamage$ AND $Warranty \Rightarrow L^{doc}$	
6.:	L^{doc}	⟨from 3, 4, and 5, by *syllogism*⟩

Table 29.20: *Argument* $\mathcal{A}$*. Medical liability from a contract*

$$HealthDamage \text{ AND } Warranty \Rightarrow L^{doc}$$

in the two arguments of Table 29.20 and Table 29.21 on the following page.

These two arguments preferentially rebut (and thus strictly defeat) the counterargument of Table 29.22 on the next page according to the same preference:

$$(HealthDamage \text{ AND } Warranty \Rightarrow L^{doc}) \succ (Omission \Rightarrow \neg L^{doc})$$

which expresses the fact that the combination of values $Health$ and $Trust$ outweighs the value of $Autonomy$.

As we have just seen, downplaying takes place after one party distinguished a precedent from the current situation. After the distinction has been downplayed, it may still possible to reintroduce it, by claiming that the distinguishing factor also causes another abstract consequence, favourable to oneself, which does not hold in the current situation: The new distinction consists in showing that the distinguishing factor expresses another intermediate factor F_{a2} that is not expressed by current situation.

$\mathcal{B}$

1.:	$Hospital$	
2.:	$Hospital \Rightarrow Warranty$	
3.:	$Warranty$	⟨from 1 and 2, by *syllogism*⟩
4.:	$HealthDamage$	
5.:	$HealthDamage$ AND $Warranty \Rightarrow L^{doc}$	
6.:	L^{doc}	⟨from 3, 4, and 5, by *syllogism*⟩

Table 29.21: *Argument $\mathcal{B}$. Medical liability from practice in a hospital*

$\mathcal{C}$

1.:	$Omission$	
2.:	$Omission \Rightarrow \neg L^{doc}$	
3.:	$\neg L^{doc}$	⟨from 1 and 2, by *syllogism*⟩

Table 29.22: *No liability for omission*

For instance, the doctor may reintroduce the distinction by stating that the contract in the precedent also implied that there was a consideration (which requires liability according to the value of reciprocity), and that both consideration and warranty are required to ground liability for health damages in cases of omissions. This is done by the theory T_4, in Table 29.23 on the facing page. This theory again allows the doctor to explain $PrecC$ via a rule:

$$HealthDamage \text{ AND } Warranty \text{ AND } Consideration \Rightarrow L^{doc}$$

which does not apply to the present case. The dispute may then go on, with the patient still trying to downplay this further distinction (for example, by claiming that the doctor was going to be paid for her work at the hospital by the national health program, so that in a sense there was a consideration), and the doctor trying to introduce further distinctions, still based on the absence of a contract in the current situation.

In contrast with downplaying a distinction, emphasising a distinction does not give rise to new theories: It only draws attention to the non-availability of the downplaying move, and the consequent need for the opponent to resort to arbitrary preferences to repair his theory.

Prakken (2000) expresses this idea in terms of a difference between the values associated with the two sets of factors. The very difference in values alerts us to the significance of the distinction, which requires a consideration of the value preferences to resolve. The move is of course most effective, if the distinction relates to a more highly prized value. Some further moves that can be made to

CSit:	$NewC$: $\{HealthDamage, Hospital, Omission\} \mapsto \neg L^{doc}$
Cases:	$PrecC$: $\{HealthDamage, Contract, Omission\} \mapsto L^{doc}$
Factors:	$(HealthDamage \uparrow L^{doc}) \Uparrow Health$
	$(Contract \uparrow Warranty) \Uparrow Trust$
	$(Contract \uparrow Consideration) \Uparrow Reciprocity$
	$(Hospital \uparrow Warranty) \Uparrow Trust$
	$(Warranty \uparrow L^{doc}) \Uparrow Trust$
	$(Consideration \uparrow L^{doc}) \Uparrow Reciprocity$
	$(Omission \uparrow \neg L^{doc}) \Uparrow Autonomy$
Rules:	$HealthDamage$ AND $Warranty$ AND $Consideration \Rightarrow L^{doc}$ ⟨by *rule from factors*⟩
	$Contract \Rightarrow Warrant$ ⟨by *rule from factors*⟩
	$Contract \Rightarrow Consideration$ ⟨by *rule from factors*⟩
	$Hospital \Rightarrow Warrant$ ⟨by *rule from factors*⟩
	$Omission \Rightarrow \neg L^{doc}$ ⟨by *rule from factors*⟩
RulePref:	$(HealthDamage$ AND $Warranty$ AND $Consideration \Rightarrow L^{doc}) \succ$ $(Omission \Rightarrow \neg L^{doc})$ ⟨by *abduct rule-pref.*⟩
ValPref:	$\{Health, Trust, Reciprocity\} \succ \{Autonomy\}$ *rule-pref. from value-pref.*

Table 29.23: *Medical-omission theory* T_4

augment the notions of downplaying and up-playing distinctions are suggested by Roth (2000).

29.5. Further Extensions of Our Model

Let us conclude this chapter by listing a few important directions in which it might be possible to expand the account of case-based reasoning that we have provided.

29.5.1. Metrics for Theory Coherence

In Section 29.1.6 on page 758, we discussed the notion of theory coherence in qualitative terms, identifying a number of considerations that might lead us to think that a theory is better than another. Such comparison is unsatisfactorily vague, however, and it would be interesting to see whether there are ways of making it more precise.

Some steps toward this objective are reported in Bench-Capon and Sartor 2001a. This paper draws on the work of Thagard (1992), who has developed a model for assessing competing scientific theories (for a more recent statement of Thagard's view of coherence, and for references to the coherence literature, see Thagard 2001). The essential idea is to represent the evidence to be accounted for by a theory and the tenets of a theory as nodes connected by links representing support and conflict. A set of initial values (between 1 and -1) is assigned to

these nodes, and these values are then propagated, support links increasing the values of nodes, and conflict links decreasing them. Moreover, links are subject to a rate of decay so that isolated nodes decrease in value. This propagation is continued through a number of cycles, until the values of the nodes stabilise. In Thagard's interpretation of this process, nodes which end with a high activation can be considered part of a coherent, and hence acceptable theory, while those with a low activation do not form part of that coherent theory, and so should be rejected.

Bench-Capon and Sartor (2001a) apply this approach to theories of bodies of case law, taking cases as providing evidence, and taking cases, rules, and preferences as nodes. These nodes can support one another in several ways. In particular, rules are applicable to cases, give rise to intermediate conclusions, can explain cases, support and are supported by the values they express. On the other hand, a rule may conflict with a case if it appears to be applicable to the case, and yet would suggest the opposite outcome for that case.

To deal with preferences, however, we needed to extend Thagard's approach. The effect of a rule-preference is to prevent (according to the mechanism of preferential rebutting) that the conclusion of the weaker rule is derived (in those cases where the conflict arises). Thus a preference does not conflict with the rule it disfavours, but rather with the ability of that rule to conflict with the case to which it should be applied (a disfavoured rule is not to be applied to the case, according to the theory including the preference, and therefore it does not conflict with it). A preference thus should not decrease the value of the disfavoured rule, but rather as decreasing the value of the link between the disfavoured rule and the cases to which applies. In this model therefore the weights of links are not fixed, but can be affected by the propagation process. In particular preferences are in conflict with the links from the disfavoured rules to cases where the preference applies.

Following this approach, theories, such as those given in the previous section, have been modelled as a set of connected nodes. These nodes were assigned initial values, which were then propagated until they stabilised. At this point we could see the average level of activation as an indicator of the coherence of the theory.

These preliminary experiments yielded some encouraging results, and showed that the numbers that emerged from the process accorded largely with our intuitions. A number of technical issues were raised by the experiments, for which the interested reader is referred to the original paper. Additionally, the important question arises as to whether the approach has any cognitive validity with respect to the ways in which lawyers evaluate theories. Once the technical questions above have been answered, some kind of empirical study will be required to see how far the judgements on theories given by this approach can be seen as reflecting a shared intuition.

29.5.2. Comparison of Values

A central tenet of our account of theories for case-based reasoning is that preferences between defeasible rules are justified in terms of preferences between sets of values. This means that we need a principled way of comparing sets of values, and of assessing what impact the corresponding rules have upon the satisfaction of these values.

We cannot here address this enormously difficult task, on which we have commented when considering the problems of teleological reasoning (see Section 5.2 on page 150). Let us just recall that one needs to consider not only the comparative importance of different values, but also the extent to which different values are promoted by making certain choices, and the interactions between ways of satisfying different values.

Some simplifications may provide some tractable ways of approaching the tremendous task of assessing the value of different choices, as we observed in Section 5.2.5 on page 158. With specific references to case-based reasoning, we may mention the proposal of Prakken (2000), who views the most important value in a set of values as the primary determinant of the status of the whole set. He suggests a lexicographic order over sets of values: The set containing a more important value (which is missing in the other set) prevails, and lesser values are only used as tiebreakers with sets which contain exactly the same (or exactly equivalent) more highly rated values. This idea (a lexicographic order over values), though not being acceptable as a universal solution, as we observed in Section 5.2.5 on page 158, may provide in some cases an appropriate heuristic clue.

29.5.3. Changes in the Social Context

In the model above, an important aspect is missing, namely, an account of the development of case law, as it depends on the evolution of the socio-political context. This development seems to undermine the very possibility of constructing a coherent theory of a case-law domain: How is it possible to fit in a single coherent theory cases which were decided differently—though being characterised exactly by the same constellations of factors and dimensions—since different decisions were required by different social contexts?

One way of approaching this issue (developed in Sartor 2002) is to focus on the link between factors and values, which is represented in our factor descriptions. Let us recall that a factor description has the form:

$$(F \uparrow O) \Uparrow V$$

and means that by responding to factor F with outcome O, we would promote value V. A factor description expresses two contents:

a. an evaluative judgement, to the effect that V is a value, a socially beneficial goal, and
b. a factual or empirical judgement, to the effect that by endorsing the factor-outcome link (by reasoning and acting on the basis of it) we promote the value.

We shall not consider the evaluative judgement (*a*), in explaining the development of case law, since we do not want to enter here the dispute on whether ultimate values are eternal and universal or relative to particular times and places. We shall rather focus on the factual judgement, namely, on the question of whether and how much certain values are going to be advanced through certain practices. This is an empirical connection, which undoubtedly is dependent upon changing social conditions.

Thus, even if ultimate legal values remain unchanged, the ways in which the practice of a specific rule impacts on them may change over time (a similar change would also concern instrumental values). Therefore, focusing on changed empirical connections we can provide a model of the evolution of theories of case law that does not put into question the status of values, and faith in their objectivity.

For example, it may be argued that under the circumstances prevailing in modern industrialised countries, hunting has lost its ancient economic function: Rather than contributing to productivity, it detracts from it. This may be true especially when hunting hinders some forms of recreation (watching wild animals, hiking, and so on) and so jeopardises the livelihood of those involved in the corresponding economical activities (hotel personnel, tour operators, tourist guides, etc.). In such a context, a factor description such as the following:

$(\pi Liv \uparrow \neg R^{\pi}) \Uparrow MProd$

(the fact that plaintiff is chasing a wild animal for pursuing his livelihood favours an outcome for his side, since this decisional practice, by facilitating professional hunting, promotes more productivity)

is inappropriate and even false: Hunting does not promote social productivity, but rather impairs it.

To model the impact of social change on factors, we need to temporalise factor descriptions (and dimension descriptions), so as to be capable of building theories that can explain conflicting decisions, adopted on the basis of the same set of factors, but taken at different times. This explanation will be based on the fact that factor links (how and how much a factor favours a certain outcome) have changed over time. Taking this into account requires some changes and refinements in the analysis we have provided, but seems fully compatible with the core of our approach.[6]

The basic addition we should do to our framework is to specify the temporal interval within which a factor link holds (for simplicity we consider only one

[6] For a different attempt in this direction, see Sartor 2002.

such intervals). Thus a factor link would need to be expressed as:

FORANY (t)
IF $t_0 \leq \mathsf{t} < t_1$
THEN $((F \uparrow O) \Uparrow V)$ *holds at time* t

(in the interval between t_0 and t_1, it holds that the recognition that F favours outcome O promotes value V)

For instance, we express that hunting promoted value *MProd* from year 0 to year 1900 (excluded), through the following temporalised factor link:

FORANY (t)
IF 00/00/0000 $\leq \mathsf{t} <$ 01/01/1900
THEN $((\pi Liv \uparrow \neg R^{\pi}) \Uparrow MProd)$ *holds at time* t

Similarly, we need to add temporal specifications to cases. Thus the factors characterising each case need to be referred to the time of the decision of the case. More exactly, a case would be an event having the structure:

$(Prec\colon \{F_1, \ldots, F_n\} \mapsto O)$ *happens at time* t

(Case *Prec*, where factors $\{F_1, \ldots, F_n\}$ had outcome O, happened at time t)

For instance, we would describe Pierson as

$(Pierson\colon \{\pi NPoss\} \mapsto \neg R^{\pi})$ *happens at time* year 1707

We need also to change also the constructor *rule from factors*, so that the constructed rule only holds during the intersection of the intervals in which the input factors hold. Similarly, we need to change constructor *abduct rule-pref.*, so that preferences holding during different time intervals can be abducted (with the constraint that the case to be explained falls within the selected time interval).

These modifications, integrated with the appropriate refinements (we leave to the reader the task of completing the picture we have just sketched) will allow us to explain, through a unique coherent theory, cases which have the same facts and different decisions, but which happened at different times.

A similar extension of our framework can enable us to deal also with spatial specifications: Hunting at a certain time may contribute to productivity within a certain territory, but not within a certain other territory, so that different conclusions may be justified according to where hunting took place. For coping with such a spatial relativisation of legal conclusions, we need to add spatial specification to temporal specification—indicating that a factor link just holds for locations within a certain territory—and modify our constructors accordingly.

29.5.4. Links to Case-History

In the debate on precedents, a formalistic (strict) approach and an anti-formalistic (sceptic) approach are frequently opposed (cf. MacCormick 1987, 157, and Twining and Miers 1991, 311).

The first approach construes the binding meaning of the precedent on the basis of the text of the opinion and the plausible intention of the judge. The record of the case includes therefore the detailed argumentation that was developed at the time when it was decided. The meaning of the case is expressed by the relevant rules (the *rationes decidendi*) which can be extracted from that argumentation.

The latter approach looks beyond the text and its author, by considering interpretations given by subsequent judges, and more generally, by providing a holistic interpretation of the development of case law. The record of the case is therefore basically limited to the facts of the decision plus its outcome (according to the jurisprudential model proposed by Goodhart 1959). It is up to the interpreter, using all useful materials, to provide an explanation of the case in the framework of the body of the case law.

Our model of case-based reasoning is consonant with the anti-formalistic side: The explanation of a case is given by a theory that more coherently explains the body of the case law (there included subsequent cases).

This does not mean, however, that expressed opinions are necessarily irrelevant in a coherence-based approach. In fact, our model allows us to address also the concerns that underlie the formalistic approach.

For this purpose, we need to expand the background knowledge available to the parties, with information concerning the statements of the judges and the context of their utterance. This would lead us to a further theory-construction profile: The need to make sense of the history of the case, and in particular of judicial opinions, in the historical circumstances where they were stated.

Thus, the record of a case, besides the dimensional positions (or the factors) and the outcome of that case, may also include the rules and arguments asserted by the judges. An additional profile of the coherence of a theory consists in the way in which the theory can successfully incorporate the expressed rules and arguments into the explanations it provides.

How to implement this profile, and how to relate it to the aspects of coherence we have indicated above, and to balance it with them, is an object of further research.

29.5.5. Other Ways of Analogising

Finally, we need to state again that the theory-construction moves we have here described do not exhaust the multiple forms in which lawyers exercise their analogical competence.[7]

In particular, our analysis has failed to address various forms of analogical reasoning which have been discussed in the literature on artificial intelligence

[7] For a general discussion of analogy, see, for instance Holyoak and Thagard 1996. Among the many publications on analogy in artificial intelligence, see Hofstadter 1998. On analogy in the legal domain, see for instance: Atienza 1986; Nerhot 1991; Sunstein 1993; Brewer 1996; Rotolo 2001.

and law, like for instance the model of McCarty (1995), who examines the creation of new concepts by the deformation of prototypes, or the approach of Rissland and Skalak (1993), who introduce various ways of reasoning with open-textured predicates.

Additionally, we have not considered sub-symbolic information-processing, where analogies are performed without the mediation of a conceptual representation, as in connectionist models of cognition.

More generally, there are many new results now coming from the domain of artificial intelligence and machine learning, which could shed light on legal analogising. Unfortunately, given the limitations of both our knowledge and the available space, we must leave this as a matter for future research.

CONCLUSION

The Greek poet and librarian Callimachus famously criticised a lengthy work (the poem *Argonautica*, by Apollonius of Rhodes), saying that "a big book is a big evil."

After writing almost 800 pages we cannot hope to escape Callimachus's criticism. What we can now do, as partial reparation, is to provide a very short conclusion, where we shall just recall the direction of our inquiry.

Our main aim was bringing legal reasoning back to common-sense reasoning, to general practical cognition, and in this way to provide a comprehensive account of the cognitive processes of legal problem solving.

Thus we have started by considering rationality, and by analysing its two main components, ratiocination and heuresis. After distinguishing epistemic and practical rationality, we have focused on practical rationality, examining how it allows reasoners to acquire new practical mental states (preferences, desires, intentions and wants), given their current practical and epistemic mental states. While emphasising the role of rationality in practical reasoning, we have rejected the illusions of rationalism, affirming the need to recur to non-rational forms of cognition and to make the best use of our limited cognitive resources, as indicated by theories of bounded rationality. This has led us, in particular, to integrate conclusive reasoning with defeasible reasoning, and to complement teleological reasoning with factor-based inferences and analogies.

An important step for bridging the gap between general practical reasoning and legal reasoning has consisted in our analysis of doxification: Practical attitudes originate corresponding beliefs, which can legitimately be processed according to epistemic reasoning.

This has allowed us to map the basic practical attitudes (like preferences, desires, intentions, wants, and propensities) into the noemata which provide the contents of normative beliefs (like values, deontic propositions, non-deontic rules and factors). Moreover, our analysis of doxification has allowed us to introduce the idea of cognitive bindingness, namely, the cognitive duty to endorse a certain belief, an idea which has provided the basis for our analysis of meta-level legal reasoning.

Then we have explored social reasoning, examining the strategic dilemmas resulting from the interaction of autonomous agents. We have argued that collective intentionality is required for overcoming interaction problems and engaging in cooperation. In particular, we have discussed the attitude we have called the plural perspective, namely, the attempt to rationally participate into

collective intentionality. This attempt at rational participation into collective intentionality (concerning the adoption of enforceable practical determinations) is the distinctive feature of legal cognition.

In the second part of the volume we have developed a detailed analysis of the logical structures of legal thinking, and more generally of doxified practical thinking. After examining the limits of classical logic, we have investigated deontic notions, and have used them as building blocks for constructing more complex normative ideas, such as rights and powers. A key role has been given to normative conditionality, the determinative connection between legal conditions and legal effects). Normative determination has provided the basis for our analysis of the intentional production of normative results through contracts and legislation, and more generally, for a logical model of the sources of the law.

Finally, in the last, and more technical chapters we have investigated legal argumentation and the construction of legal theories. Our analysis of legal argumentation has determined how arguments can be constructed, by using normative premises (rules, values, preferences), besides factual information. Moreover, we have provided an account of how justified conclusions emerge out of the competition of colliding arguments.

Our discussion of theory-construction has focused on the realisation of theories of case-law domains, that is, on efforts to rationalise past decisions and current attitudes into coherent theories. These theories are to be built by extracting rules and preferences out of precedents' factors and decisions, according to theory constructors. They aim at explaining past decisions, and at providing suggestions for future choices. They do that through the justified conclusions they provide, according to the arguments they enable.

We hope that the reader, while excusing us for the many failures and omissions of our account of legal reasoning, will be able to appreciate it as an attempt to provide a comprehensive picture which brings together diverse aspects of legal thinking and recognises their diverse contributions to legal cognition.

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