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Editorial

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This is the second issue of NILQ in two years with a particular focus on jurisprudence. The centrepiece of the issue is the book symposium on Neil MacCormick's *Rhetoric and the Rule of Law*, the second of four volumes of his "Treatise on law, state and practical reason". The papers derive from a one-day workshop that was organised under the aegis of the Forum of Law and Philosophy on the 28 April 2006 at Queen's University Belfast and was generously funded by the NILQ and QUB School of Law. I am very much indebted to all authors and in addition to Sir Neil who has taken the time to comment on the papers.

This edition is supplemented by six state-of-the-art papers addressing contemporary issues in legal philosophy. In selecting those, I placed the emphasis on demonstrating the continuity between the endeavours of a generation of younger scholars currently working around Europe. Despite thematic differences, I found it striking how much these papers resemble one another in terms of argumentative rigour and an interest in the genuine philosophical questions about the law.

Looking at the contents of the issue one cannot help noticing what have become, over the past few years, the distinct features of jurisprudential thinking at Queen's: first, a shift towards central philosophical questions, such as go beyond the standard debates one encounters in Anglo-American universities and are, perhaps, more reminiscent of the classical debates amongst continental legal philosophers in the first half of the 20th century; then, what may be an indirect consequence of this "philosophical turn", engagement with a much broader community of scholars working outside the Anglo-Saxon world who, however, remain faithful to the high standards of reasoning that are commonly associated with the tradition of analytical philosophy; and finally, a genuine scepticism towards particular labels and categorisations of schools of thought – far from focusing on what is a "legitimate", "mainstream" or "trendy" form of scholarship, the emphasis is placed on the quality and rigour of the arguments put forward. Experience teaches that such an approach fosters imaginative and fresh scholarship. The publication at hand serves as solid proof of this!

Good fortune has it that the editing of this prestigious issue is my farewell act at the School of Law, Queen's University Belfast. The last six years in Belfast, the first in my professional life, have been most rewarding, not only in scholarly but also in broader intellectual terms. A great deal of credit for this is owed to the Forum for Law and Philosophy which sprang from a small reading group back in 2001 and grew to become an

international, albeit informal, forum for debate and scholarly exchange. I am indebted to the entire community of colleagues at Queen's for having made this possible, but would be unfair if I did not make special mention of Jonathan Gorman, Robin Hickey and Tarik Kochi, who have made my experience at Queen's most rewarding.

George Pavlakos, Belfast and Antwerp, Summer 2007

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Rhetoric and the Rule of Law: an author's day with Neil MacCormick

Introduction*

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MacCormick's legal theory has consistently represented the most serious effort in the common law world to defend the concept of legal reasoning as the key concept in any effort to understand legal phenomena. As such it is a theory that resists classification in terms of the simplistic distinction between positivism and non-positivism. However, when one compares the early with the late phase of his thought, one realises that MacCormick has come to endorse more of the key ideas shared by non-positivist lawyers. That said, he rarely conducts his analysis in the vocabulary of the positivism-non-positivism debate; far from it, in *Rhetoric and the Rule of Law* (RRL)[1] the author underpins his non-positivist turn with important insights on logic, deduction and analogy, and the function of statute and precedent in legal reasoning. In the brief introduction that follows, I shall try to draw some connections between the two phases of MacCormick's work as well as to highlight some of the main points our speakers will be raising today.

Legal Reasoning and Legal Theory (LRLT),[2] the book that established MacCormick as the leading legal theorist of his day, represents an effort to break away from the static view of law that (Hartian) positivism is infected with. Pertinent to positivism is the view that law consists of determinate propositions (rules) which demarcate the domain of the legal. When these rules run out, so does law. What makes this view static is the emphasis on a test of recognition which purports to identify exhaustively the rules that make up a legal system. In disregarding the application of rules, this model fails to account for whatever belongs to the legal realm, albeit not forming part of the content of rules. In contrast to the static view, MacCormick attempted to put rules in action, by focusing on the domain of persuasive reasons which underpin the application of rules. Such reasons comprise consequentialist

* This introduction and the three papers following it were originally presented at a symposium at the School of Law, Queen's University Belfast on 28 April 2006. The fourth paper is a response from Sir Neil MacCormick.

1 N MacCormick, *Rhetoric and the Rule of Law*, Oxford: OUP, 2005.

2 N MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon, 1978.

arguments as well as arguments from principle and other evaluative considerations which feature alongside the legal syllogism each time lawyers and judges reach their normative conclusions. All those different types of persuasive reasons fill the gaps the static picture of positivism leaves in our understanding of the law.

Already in that first book on legal reasoning we discern the tension between the antithetical concepts that feature in the title of the latest one: "rule of law" stands for the static aspect of rules, while "rhetoric" purports to capture the domain of persuasive argument. The two aspects are reconciled as two distinct, albeit interconnected, levels of legal reasoning: rules work through deduction and syllogistic reasoning, while persuasive argument works in a less formalised way, yet one that is capable of rational persuasion, along the lines of Perelman's conception of Rhetoric.

When those ideas were advanced in 1978 they were offered as a defence of positivism vis-à-vis what had already started to emerge as Dworkin's interpretivist challenge. While Dworkin exploited the gap between rules and persuasive argument (most notably, putting his emphasis on principles of political philosophy) with a view to showing that the static model breaks down (and, in a further step, to arguing that, if we want to uphold the ideal of the rule of law we had better conceive of it in terms of principles), MacCormick, in a more sombre tone, defended the possibility of co-existence of rules and principles (evaluations) as two aspects of the same process of legal reasoning, hence the view that positivism was not fundamentally flawed but merely elliptical.

In this context, and contrary to what John Gardner has argued in a recent book review in the *Times Literary Supplement*, MacCormick's use of the terms "rhetoric" and "rule of law" in the title of his sequel (RRL) is not merely fanciful (also, I should add, the further accusation by the same reviewer that rhetoric hardly features in the book is misplaced, unless one has not understood the project McCormick has embarked on since 1978). RRL revisits the tension between the static and the dynamic aspects of legal reasoning in the light of a series of prominent criticisms that took shape in the 28 years after the appearance of LRLT. Given that critics have mainly insisted on the precariousness of MacCormick's reconciliatory project, MacCormick's recent replies illustrate an effort to take the edge out of the tension with a view to demonstrating the viability of his earlier project. How much do these replies deviate from earlier views and to what extent does the later work constitute a revision of the earlier one?

The most important revision or addition RRL undertakes is in arguing that what belongs to the domain of persuasion (principles, evaluations) admits of universal justification to a much larger extent than he had admitted in his early work. Along these lines persuasive reasons may amount to universal justifications, bridging thus the gap between a static and a dynamic account of law. Three key considerations may be identified in this context.

First, MacCormick arrives at a more expansive understanding of what universalisation may comprise by moving away from a Humean explication of value and accepting that it is possible to assess the universality of evaluative propositions independently of the psychology of (particular) judging subjects. As a result, legal argument may be underpinned by evaluative reasons without risking a preposterous amount of indeterminacy, such that would endanger the ideal of the rule of law. A useful illustration of this point is put forward by Stefano Bertea in his comment on RRL.[3] In it Bertea argues that RRL puts forward something like an "argumentation thesis" or the view that legal reasoning is a constitutive element of the concept of law. Resting on this diagnosis Bertea suggests that the

3 pp. 5–20, this issue.

argumentative character of law necessitates the import of evaluative (moral) reasons into any account of law for, he assumes, such arguments are rationally justifiable (universalisable).

Second, in his belief that universal justifications may pertain to evaluative arguments, MacCormick departs from a strict deductive model: as it were, it is not deductive reasoning which performs the task of universalisation but, instead, reference to the particular aspects of a case. Through this link, normative claims become universal because of the characteristics of a case and not any abstract formula akin to the positivist understanding of rules (or, even, any a-contextual values postulated by Dworkin). Thus, albeit valid in a universal manner, principles are not valid in an a priori manner. They can still be revised and amended in the light of new data. Prominent in this respect is the case of the conjoined twins: this is an instance of a universally valid judgment, albeit valid for what may turn out to be a very limited number of cases. Giovanni Sartor's detailed contribution "Syllogism and defeasibility: a comment on Neil MacCormick's Rhetoric and the Rule of Law"[4] affirms MacCormick's belief in the possibility of justification of evaluative arguments. However, Sartor suggests that one need not abandon the domain of logic in order to achieve this. In fact to do so would give away a narrow understanding of the nature of logic as well as of the division of labour between logic and rhetoric. Conversely, Sartor suggests that many of the tasks delegated to rhetoric may be carried out by syllogistic reasoning, once we consider a number of modern views on logic and the nature of syllogistic reasoning.

Third, as a result of MacCormick's particularist explication of justification, analogical reasoning remains prominent in his revised theoretical edifice. Analogy and the use of precedent demonstrate in the best manner the new objectivism MacCormick advocates: a universality that is based on the particular features of a judgment rather than any a priori grounds (positivism) or a complete negation of the possibility to universalise at all (psychologism). Leonor Moral Soriano, in her essay "Precedents: reasoning by rules and reasoning by principles",[5] sets out to demonstrate the prominence of analogical reasoning in MacCormick's recent work by emphasising the argumentative character of legal precedents and, subsequently, taking stock with the common functions precedents perform in the common and civil law systems.

In conclusion, I view RRL as an effort to close the gap between two simplistic views of legal reasoning: the view that fixed rules can account for certain conclusions and the contrapuntal view that there are evaluations which are fixed independently of legal systems. The early MacCormick remained to a larger extent a captive of this dilemma, because his Humeanism gave rise to the dichotomy: either, a priori, strong objectivism or subjectivity of values; this was forcing him to retain a limited sphere of certainty, within rules, while rejecting the possibility of universal justification in the realm of evaluations. In the light of the new arguments put forward in RRL the dilemma need not stand: evaluations can be included within legal reasoning, for it is possible to assess them without evoking a preposterous amount of objectivity. This is best illustrated in the particularist structure of analogical reasoning. Most notably, the representative of universalist legal reasoning par excellence, Robert Alexy, has recently admitted that beyond deductive reasoning (rules) and balancing (principles) there is a third kind of legal reasoning, analogical reasoning.

4 pp. 21–32, this issue.

5 pp. 33–42, this issue.

Law and legal reasoning*

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1 Introduction

Reasoning within the law and about the law is a central activity in legal practice. Thus, legal scientists advance what they see as reasonable interpretations of laws and back these choices up with arguments – both of these tasks requiring reasoning. Lawyers, too, engage in reasoning, but their aims are more specific and concrete: when they bring cases to court they have to interpret norms and precedents, qualify concrete cases, and offer reasons in support of their conclusions. Judges decide cases, an activity that makes it necessary to find and reconstruct the rule of law, which means interpreting norms and applying them to concrete circumstances, weighing principles, settling conflicts between provisions in the same legal order, following precedents, ascertaining and qualifying facts, determining a solution to the case at hand, and justifying the chosen solution. All these operations are argumentative. And lastly, in any developed democracy, legislators tend to offer reasons that will make their deliberations more easily acceptable to the citizenry – which means that even lawmaking institutions engage in reasoning. Unsurprisingly, then, legal reasoning has attracted the attention of several leading researchers from different disciplines over the last few decades, to the point of taking hold as an autonomous field of research in its own right.[1] In jurisprudence, this interest in argumentation is most significant in the seminal works published from the late 1970s through the 1980s by a group of scholars seeking to arrive at a general doctrine of law informed by the recognition of the centrality of reasoning in legal practice.[2] Among these pioneers is Neil MacCormick who, in *Rhetoric and the Rule of Law* (RRL), has recently revised a theory of legal argumentation that he had originally put forward in 1978 in *Legal Reasoning and Legal Theory* (LRLT).

Here, I will address a particular aspect of MacCormick's revised theory of legal reasoning, namely, the way his latest views on legal argumentation carry implications for the concept of law. I will compare these views against those set out in his earlier LRLT, arguing that the recent revision of this theory in RRL conceptualises the law in a non-positivist

* Funding for this research has been provided by the Alexander von Humboldt Foundation. My indebtedness goes to several scholars who have supplied helpful comments to previous versions of this essay: I should therefore like to thank Robert Alexy, Francesco Belvisi and the scholars who took part in the Author's Day on MacCormick's Rhetoric and the Rule of Law, an event held at Queen's University Belfast on 28 April 2006 and organised by the NILQ and the Forum for Law and Philosophy. Needless to say, responsibility for the views expressed herein, as well as for any errors of form or content, rests solely with me.

1 Among those who have contributed to legal argumentation in recent years, we find not just legal scholars but also philosophers and argumentation theorists – their work has helped us gain a deeper understanding of practical and legal reasoning, in which regard the most valuable insights can be found in C Perelman and L Olbrechts-Tyteca, *The New Rhetoric: A treatise on argumentation* (Notre Dame: Notre Dame UP, [1958] 1969); S Toulmin, *The Uses of Arguments* (Cambridge: CUP, 1958); E van Eemeren and R Grootendorst, *Speech Acts in Argumentative Discussions: A theoretical model for the analysis of discussions directed towards solving conflicts of opinion* (Dordrecht: Foris, 1984); and J Habermas, *The Theory of Communicative Action*, vols 1 and 2 (Boston: McCarty, [1981] 1984 and 1987).

2 The most important contributions to the analysis of rational reasoning in law are A Aarnio, R Alexy and A Peczenik, "The foundation of legal reasoning" (1981) 12 *Rechtstheorie* 133–58, 259–73, 423–48; A Aarnio, *The Rational as Reasonable: A treatise on legal justification* (Dordrecht: Reidel, 1987); R Alexy, *A Theory of Legal Argumentation* (Oxford: Clarendon, [1978] 1989); A Peczenik, *On Law and Reason* (Dordrecht: Reidel, 1989); and N MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, [1978] 1994) (hereafter LRLT).

fashion. Thus, I will first present the main features of MacCormick's revised theory of legal reasoning, clarifying its nature and scope and showing that this revised theory makes legal reasoning a constitutive element of the concept of law. I will then argue that this conceptual link found to exist between legal reasoning and law is rich in theoretical implications not only for the study of legal argumentation (legal methodology) but also for our way of conceptualising the law (legal ontology). Now, in making legal reasoning constitutive of the concept of law, the revised theory embraces a foundational element of non-positivism, and that is the burden of my argument. Once we have established that fact, we will abandon the traditional image of MacCormick as the torchbearer of legal positivism and come to view him instead as the missing link between Hart's legal positivism and Dworkin's non-positivist research programme.

2 MacCormick's latest thoughts on legal reasoning

MacCormick's theory of legal reasoning is well known among legal scholars and so does not need to be explained in any detail. Still, a brief introduction that outlines its main features will help us see it in its most recent evolution. MacCormick initially advanced a study of legal reasoning that was highly consistent with H L A Hart's analysis of the concept of law, an analysis that pays little attention, if any, to the structure of reasoning in law.[3] This way, the study of legal reasoning is made out to consist in an investigation of the argumentative practices that decision-making authorities carry out to justify their decisions. This investigation is both analytical and normative, for it reconstructs the practices of adjudication in their concrete operation within a given order (analytical part), and it also sets out prescriptions about how legal decision-making should be justified from a rational point of view (normative part).[4] On these premises, MacCormick scrutinises the form of argumentation specific to law and identifies the structure and scope of the rational constraints to which actual adjudicative practices should be subjected.

There are some basic rational constraints that MacCormick imposes on legal adjudication. The first of these requires that justification in law be carried out in keeping with the principle of universalisability, a requirement that MacCormick has recently explained as presenting two sides:

> First, it demands universalisability of reasons – for the present instance of circumstances C to count as a reason now for reaching decision D, and acting on D, it would have to be acceptable to hold a decision of type D appropriate whenever an instance of C occurs. Second, it suggests a way of testing whether it is warranted to assert that D is appropriate whenever C obtains.[5]

Another basic rational constraint on legal adjudication consists in requiring that justification be carried out in keeping with deductive logic. Legal reasoning will take an

3 MacCormick himself states that his own account of legal argumentation in LRLT can be "represented as being essentially Hartian, grounded in or at least fully compatible with Hart's legal positivistic analysis of the concept of law . . . it was put forward as a theory of legal reasoning that upheld Hartian jurisprudence. . . . The centrality of rule-based reasoning in this book matched the centrality of the 'union of primary and secondary rules' in Hart's jurisprudence" (LRLT, pp. xiv–xv).

4 LRLT, p. 13.

5 N MacCormick, *Rhetoric and the Rule of Law* (Oxford: OUP, 2005), p. 21 (hereafter RRL). On the significance of the idea of universalisability for legal reasoning, see, among others: N MacCormick, "Formal justice and the form of legal arguments" (1976) *Logique et analyse* 110–11, pp. 103–18; N MacCormick, "Universalization and induction in law" in C Faralli and E Pattaro (eds), *Reason in Law* (Milan: Giuffrè, 1987) pp. 91–105, p. 91; N MacCormick, "Why cases have rationes and what these are" in L Goldstein (ed.), *Precedent in Law* (Oxford: Clarendon, 1987), pp. 155–82, p. 162; and LRLT, p. 84.

entirely deductive, or syllogistic, form on those occasions when no problems interpose as to relevancy, interpretation, classification, evaluation, or proof, and the justification of a ruling will therefore consist in constructing a legal syllogism, or a long-enough chain of legal syllogisms, in the form "if OF then NC, and OF, therefore NC".[6] But this kind of deductive reasoning – a first-order mode of justification – encounters limitations when brought into the realm of law. These limitations are owed to the fact that the premises of a legal syllogism can be questioned and to the fact that any attempt to work out the factual and legal matters of the case at hand will necessarily be narrative. Hence, when legal reasoning is made to follow a rational course, it will obey further criteria that expand beyond the domain of classical logic.

These further criteria are defined standards of second-order justification, in that their function is to guide us in choosing among rival rulings – all possible because equally valid in form – and in providing a justification for that choice. This is where MacCormick has given a major contribution to the study of legal reasoning: in setting out these criteria of second-order justification, and three fundamental ones in particular: namely consistency, coherence and the consequentialist mode of argumentation.[7] Consistency he describes as a relationship of non-contradiction: a ruling is consistent with other provisions of the normative system if it does not contradict any valid rule of that system. Coherence is a looser requirement that describes the ability of a part to fit into a whole; the parts are thus said to all cohere when – in figurative language – they "hang together" or "make sense as a whole".[8] Finally, the consequentialist criterion directs the decision-maker to justify the chosen rulings on the basis of their legal implications and whether these can be accepted. To put it in a formula, on MacCormick's account of the structure of legal justification, a decision is rationally justified if, once universalised, it proves consistent and coherent with previously enacted laws and carries implications that are acceptable from the legal point of view. In this justificatory scheme, a ruling must make sense both in its own legal system and in the outside world. In particular, a ruling's consistency and coherence with the other normative statements inhabiting a given legal system ensure that the ruling can make sense within the system; the acceptability of the ruling's consequences (the consequentialist criterion) ensures its ability to make sense in the world.

This scheme of legal justification has essentially remained the same since the publication of LRLT. In that respect the recent changes introduced with RRL are sparse

6 On this aspect, see N MacCormick, "Legal deduction, legal predicates and expert systems" (1992) *International Journal for the Semiotics of Law* 181–201, p. 182; LRLT, pp. 19–52; and RRL, pp. 33–48.

7 LRLT, pp 100–28.

8 The expressions "hanging together" and "making sense as a whole" are found in N MacCormick, "Coherence in legal justification" in A Peczenik (ed), *Theory of Legal Science* (Dordrecht, Reidel, 1984), pp. 235–51, p. 235. Other original attempts at elucidating the notion of coherence can be found in B Levenbook, "The role of coherence in legal reasoning" (1984) 3 *Law and Philosophy* 355–74; R Alexy and A Peczenik, "The concept of coherence and its significance for discursive rationality" (1990) 3 *Ratio Juris* 130–47; V Rodriguez-Blanco, "A revision of the constitutive and epistemic coherence theories of law" (2001) 14 *Ratio Juris* 212–32; and L M Soriano, "A modest notion of coherence in legal reasoning: a model for the European Court of Justice" (2003) 16 *Ratio Juris* 296–323. A critical approach to the role of coherence in law is found in J Raz, *Ethics in the Public Domain: Essays in the morality of law and politics* (Oxford: Clarendon, 1994), pp. 277–325, and K Kress, "Coherence" in D Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1999), pp. 533–52.

and mostly concerned with questions of detail, leaving the core of the view unaltered.[9] What instead does stand significantly affected is the picture that emerges of the relationship between legal reasoning and the concept of law. The discussion in RRL seems to suggest at several places that MacCormick is now committed to the view that the practice of legal reasoning is constitutive of the concept of law, and that law is therefore an argumentative domain through and through. I will call this claim the argumentation thesis – a thesis absent from MacCormick's original account – and will argue it to be deeply embedded in the revised theory.

The argumentation thesis – this new way of understanding the law as closely bound up with legal reasoning – carries a spectrum of theoretical implications. We can appreciate the full significance of this thesis if we consider that it can be used to distinguish the two main contemporary approaches to legal reasoning: the "traditional" approach and the "alternative" one. The traditional approach to legal argumentation acknowledges that most legal operations are argumentative and that legal reasoning accordingly plays a crucial role in shaping the features of legal orders – but the shaping hand of legal reasoning is not, on this view, understood to be so pervasive as to go to the concept of law. This concept can therefore be articulated independently of the main advancements made in the study of legal reasoning, precisely because legal reasoning is understood not as a ubiquitous practice – one that spreads across the whole of the realm of law – but as a specific component, and ultimately a peripheral one. The traditional approach, then, denies the argumentation thesis, and in fact falls in sympathy with legal positivism, which takes into account the various forms of legal reasoning that contribute to shaping the legal system but then rejects the claim that legal reasoning itself influences our way of conceptualising the law.[10]

By contrast, the alternative approach regards the theory of legal reasoning as a vantage point from which to analyse legal systems and tackle the main problems connected with their existence. Thus, rather than figuring as merely one component among others in a theory of law, as happens in the traditional approach, legal reasoning takes shape as an all-embracing activity whose consequences invest the study of legal issues across the board. So we can appreciate, on the alternative approach, that the reasoning that legal subjects engage in when seeking appropriate solutions to concrete cases is part and parcel of law, not an external component of it, and therefore no less constitutive of the nature of law than are the law's general and abstract rules. This view amounts to the claim that, in addition to shaping specific stages in the development of a legal system, legal reasoning also shapes the law as a whole, and incisively so. This can be expressed from the viewpoint of the argumentation thesis by saying that legal reasoning should be understood as a defining element of law and so as constitutive of the very concept of law.[11]

If we follow through on the argumentation thesis, we will arrive at a specific non-positivist idea of law that constructs the law as an argumentative social practice aimed at

9 This is what MacCormick underlines in his statement that despite, the changes made to his original account of legal reasoning, "the basic forms of legal argument" still seem to him to "have been well described in the 1978 book" (RRL, p. 1).

10 Two works that paradigmatically exemplify this conception of legal argumentation are H Kelsen, *Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, [1960] 1967), pp. 348–56, and J Raz, *The Authority of Law: Essays on law and morality* (Oxford: Clarendon, 1979), pp. 180–209.

11 This research programme was first explicitly set out in A Aarnio et al., "The foundation", pp. 266–70. The programme prompted several attempts to question the traditional concept of law and redefine law as an argumentative practice, and the most well-rounded of these attempts are R Dworkin, *Law's Empire* (London: Fontana, 1986) and R Alexy, *The Argument from Injustice* (Oxford: Clarendon, [1992] 2002).

finding reasonable solutions to legal cases.[12] Law can thus be defined as a dynamic articulation of defeasible reasons, a set of practices of deliberative reasoning, an order constitutively open to external influences.[13] This compels us to question the positivist "account of law in terms of the interplay of primary and secondary rules", where the legal is clearly marked off from the extralegal.[14] This positivist account should be replaced by one that recognises the constitutive function of deliberative reasoning in the definition of law. In fact, these two accounts prove ultimately incompatible, as we can appreciate from the fact that positivist theories, for all their variety, are grounded in the idea that law is autonomous from other spheres of practical reason.[15] No such autonomy can pertain to a concept of law proceeding from the argumentation thesis, because the idea of law as an enterprise shaped by deliberative reasoning entails that the legal domain is inherently permeable to external influences.

In summary of the main points made so far, there is theoretical momentum involved in endorsing the argumentation thesis, because this endorsement will in turn have us embrace a non-positivist account of the nature of law. And this is precisely what seems to happen in the recent evolution of MacCormick's thought: by endorsing the argumentation thesis, he sets his theory within the same theoretical horizon as that of the alternative approach to legal argumentation, and in so doing he winds up taking on board a fundamentally non-positivist element. Thus, once it is established that he has in fact endorsed this thesis, he can be said to have finally parted ways with legal positivism. This conclusion may sound astonishing if we consider that MacCormick has long championed legal positivism, or at least has long been regarded that way – and even his latest work on legal reasoning fails to

12 This concept of law is set out as follows in Dworkin, *Law's Empire* and Alexy, *The Argument*. Dworkin proposes to make due allowance for the conceptual scope of reasoning through "an interpretive concept" of law under which "judges should decide what the law is by interpreting the practice of other judges deciding what the law is" (*Law's Empire*, p. 410). Here, the law is made out to be primarily an argumentative practice: "Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process. . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense." (p. 413) In a similar vein, Alexy defines law as a "system of norms that (1) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution by and large socially efficacious and that are not themselves unjust in the extreme, as well as the totality of norms that are issued in accordance with this constitution, norms that manifest a minimum social efficacy or prospect of social efficacy and that are not themselves unjust in the extreme, and, finally, (3) comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness" (*The Argument*, p. 127). On this definition, the law is made to consist not only of rules but also of normative arguments and procedures for the application of law, and these elements – the normative arguments – require us to embark on deliberative reasoning.

13 This definition is far from incompatible with the statement – central to MacCormick's theory – of the institutional nature of law. See, in this regard, N MacCormick and O Weinberger, *An Institutional Theory of Law* (Dordrecht: Reidel, 1986), and RRL, pp. 2–7. In fact, legal reasoning will remain deeply institutional for as long as legal deliberation requires making reference to authoritative sources (a necessary but not a sufficient condition). Thus, far from losing sight of the institutional dimension of law, the argumentation thesis draws that dimension into the core level of legal reasoning, in the connection that must be established between a legal ruling and the institutional shape of the legal order in which that ruling is issued.

14 H L A Hart, *The Concept of Law* (Oxford: Clarendon, [1961] 1994), p. 82.

15 This idea is most clearly expressed in the words of Jeremy Waldron, who finds that, on a positivist approach, "law can be understood in terms of rules and standards whose authority derives from their provenance in some human source, sociologically defined, and which can be identified as law in terms of that provenance. Thus statements about what the law is – whether in describing a legal system, offering legal advice, or disposing of particular cases – can be made without exercising moral or other evaluative judgement." (J Waldron, "The irrelevance of moral objectivity" in R P George (ed.), *Natural Law Theory* (Oxford: Clarendon, 1992), pp. 158–87, p. 160.

show strong textual evidence on which basis to qualify his account of law as non-positivist. MacCormick makes at best the modest statement that the trajectory of his thought "has been away from some elements of the legal positivism expounded by H L A. Hart . . . that formed the backcloth to the argument in *Legal Reasoning and Legal Theory*".[16] By the same token, MacCormick's own definition of his theory as "post-positivistic" is a claim still too timid to support on its own the view that MacCormick has now paved the way to a non-positivist concept of law.[17] In fact, the expression "post-positivistic" is open to the ambiguity that it can refer to a range of legal theories whose only *trait d'union* consists in their stemming from legal positivism all the while distancing themselves from it. The expression can therefore be used to indicate that a theory continues to bear a strong connection with legal positivism, but at the same time it suggests that the connection is not so strong as to make the theory entirely traceable to legal positivism. These perplexities I address in the remainder of this paper, where I first argue that MacCormick has actually endorsed the argumentation thesis and will then argue that this thesis is deeply non-positivist. If these two claims prove correct, the conclusion will seem inescapable that MacCormick's recent developments force on him a non-positivist account of the nature of law.

3 MacCormick's endorsement of the argumentation thesis

In this section I offer some grounds in support of my claim that MacCormick's latest contribution to legal reasoning commits him to the argumentation thesis – a thesis that he does not anywhere explicitly articulate. The first ground in support of MacCormick's endorsement of the argumentation thesis consists in showing that MacCormick endorses two other claims that, taken jointly, entail the thesis. The first of these claims is that legal reasoning is omnipresent in legal practice and plays a pivotal role in shaping legal orders. The second claim is that legal reasoning is bound by a relationship of reciprocity with the concept of law, in that the way we account for this concept is going to depend on, and be influenced by, the theory we frame of legal reasoning, and vice versa.

This is not the first time, with RRL, that MacCormick presents legal reasoning as omnipresent in law, to be sure, but in no other work is he as insistent and emphatic in making the point that argumentation exerts a deep influence on law – so much so that the revised theory of legal reasoning presents the point as a truism: "Recognition of law's domain as a locus of argumentation, a nursery of rhetoric," is "no less ancient than recognition of the Rule of Law as a political ideal."[18] The argumentative nature of law should thus be seen as a platitude, an idea whose truth can be taken for granted and needs no theoretical support.[19] So there is no reason to doubt that "law is an argumentative discipline"[20] since the "quality of law" is "argumentative"[21] and the "character of legal proceedings" is "dialectical or argumentative".[22] Now, this general point is far from inconsistent with the core of MacCormick's theory of law. But the outright statement of the point and the centrality it is given in the argument represent a significant shift in emphasis in MacCormick's recent work.

16 RRL, p. 1.
17 RRL, p. 2.
18 RRL, p. 13.
19 RRL, pp. 14–15.
20 RRL, p. 14.
21 RRL, p. 16.
22 RRL, p. 26.

Clearly, there may well be historical reasons for MacCormick's decision of making explicit the view that legal reasoning is pervasive. In other words, MacCormick first set out his theory of legal reasoning when legal theory had just begun to address frontally and systematically the question of legal argumentation: few assumptions about legal argumentation could be taken for granted back then. But the situation today has changed almost beyond recognition: after decades of study, there is much more awareness that, practically at any stage of what is ordinarily considered the legal domain, we resort to reasoning. No longer is it so arbitrary to assume argumentation to be central in law now that the theory of legal reasoning has developed fully and enables us not only to recast longstanding debates in a new light but also to revise several basic notions in traditional jurisprudence.[23] But the historical perspective can at best explain why MacCormick has now placed a stronger emphasis on the argumentativeness of law – it cannot help us understand the theoretical reasons for this shift in emphasis. And a theoretical account of the shift is precisely what we are after, because it is in theoretical terms that MacCormick frames his revised attitude toward the ubiquity of legal reasoning, just as it is in theoretical terms (rather than historical ones) that the significance of the shift should properly be understood.

For a better theoretical grasp of MacCormick's new emphasis on the argumentativeness of law, we should read this emphasis in conjunction with another thesis, one that MacCormick has espoused since his seminal work on legal reasoning, and this is the thesis by which a conceptual connection is established between theories of legal reasoning and theories about the concept of law:

> A theory of legal reasoning requires and is required by a theory of law . . . Any account of legal reasoning . . . makes presuppositions about the nature of law; equally, theories about the nature of law can be tested out in terms of their implications in relation to legal reasoning.[24]

Now, when this thesis – the conceptual connection between the theory of legal reasoning and the theory of law – is made to work in combination with the thesis that argumentative practices are pervasive and shape the deep features of legal systems, the outcome is, I believe, that we must necessarily also conceive of law as an argumentative practice through and through. In fact, this last claim – a restatement of the argumentation thesis – adequately explains the two other theses and provides them with a direct foundation. We can elucidate the connection among the three theses by analysing the way the last of them (the argumentation thesis) singly relates to each of the other two.[25]

23 See S Bertea, "Legal argumentation theory and the concept of law" in F H van Eemeren, J A Blair, C A Willard and A F Snoeck Henkemans, *Anyone Who Has a View: Theoretical contributions to the study of argumentation* (Dordrecht: Kluwer, 2003), pp. 213–26, where I provide a deeper analysis of the ways in which the study of legal argumentation can influence other parts of legal theory.

24 LRLT, p. 229.

25 Remarkably, endorsing these three theses together also makes it possible better to appreciate the extent of MacCormick's sensitivity to legal argumentation: MacCormick's acknowledgment that law is argumentative comes even in the course of an analysis of the lawmaker's perspective – a perspective that, other things being equal, makes it more difficult (not less difficult) to appreciate the law's argumentative dimension. Even so, MacCormick cannot seem to underscore the importance of legislation (the lawmaker's perspective) without also pointing out that "the job of legislation is never completed when the text of a statute leaves the legislature" and that the "final process of concretization or determination . . . will still have to take place through judicial decision"; even more importantly, he observes that legislation "changes things in a certain direction, perhaps, but we cannot be sure exactly what change it will in the end have made, how broad its impact, with what exact effect in concrete situations as these will arise in the domains affected" (RRL, pp. 10–11). As I see it, what makes it possible to state this point in this context (an analysis carried out from the lawmaker's perspective) is a framework of thought shaped by the three related theses to the effect that argumentation is constitutive of law, and so is omnipresent in law, and hence that the theory of legal reasoning and the theory of law are interdependent.

First, the thesis that legal reasoning is constitutive of the concept of law can elucidate and ground the thesis that pervasive in law is the practice of arguing about the law and about questions of law generally. This link between the two theses is manifest in the widely acknowledged view that the concept of law ideally precedes all other questions of law, for it is here – in the concept setting out the nature of law – that many specific legal issues are rooted.[26] This view rests not only on theoretical considerations but on practical ones, too: We need to have a concept of law in place (a concept framing the nature of law) before we can proceed to distinguish what is law from what is not law. The distinction made on this basis will in turn be a direct influence on judicial decision-making and on the way cases should be decided. And how judges go about deciding cases (or how they *should* proceed in doing so) certainly does make a practical difference. So legal theorists and practitioners alike need to have a grasp of the nature of law – they need a general account of law, however tentative it may be – if they are to proceed in any satisfactory manner to take on the specific legal questions that confront them. This shows that questions concerning the nature of law occupy a central place in the legal domain and are indeed pervasive. Which in turn means that likewise central and pervasive are the elements constitutive of law (of the nature of law), in the sense that these elements are bound to bear on the solution to specific legal questions, whether directly or indirectly. The argumentation thesis counts legal reasoning among these constitutive elements, thereby explaining and justifying our belief that reasoning is central to and pervasive in law. In other words, in showing the concept of law to be dependent on legal reasoning, the argumentation thesis shows reasoning to be central to the legal enterprise – central because part of the concept of law, which in turn takes us to the core of legal practice. This amounts to recognising legal reasoning to be omnipresent in legal practice simply by virtue of its being constitutive of the concept of law, and by virtue of the fact that this question – of the concept of law – is widely recognised to be inescapable.

Second, the argumentation thesis can explain why legal reasoning and the concept of law have to be theorised together, in mutual dependence, in that no theory of legal reasoning can be worked out without a companion theory framing a concept of law (describing the nature of law) and, vice versa, no comprehensive understanding of law (of the concept of law) can be achieved without an accompanying account of legal reasoning. The most direct explanation of this two-way relationship between the two accounts consists in pointing out the conceptual link that binds their respective objects of study: the concept of law and legal reasoning. This link is one of mutual engagement – each object being constitutive of the other – and it is for this reason that we cannot have a full theoretical understanding of law without an account of legal reasoning. The constitutive connection between law and legal reasoning explains that in order to conceptualise one element of the pair we will necessarily have to make some theoretical assumptions about the other. Thus, by establishing a necessary link between legal reasoning and the concept of law, the argumentation thesis shows that no theoretical account of the nature of law can make sense independently of an account of legal reasoning, and vice versa. To put it otherwise, the object-level, or discourse-level, connection between law and legal reasoning, while not explicitly stated in MacCormick, should be espoused nonetheless because it ultimately justifies the methodological (or metadiscourse) connection, which he does instead make explicit.

In summary so far, the three theses – the argumentation thesis, the thesis of the omnipresence of argumentation in legal practice, and the thesis of the interdependence

26 This view is widely accepted among contemporary legal theorists. For a contrary view, see R Posner, *Law and Legal Theory* (Oxford: Clarendon, 1996), p. 3.

between the theory of law and the theory of legal reasoning – form, in my reconstruction, a tight-knit unit. Moreover, and more significantly, what gives coherence to this triad and cements it is the argumentation thesis which connects the two other theses and grounds their truth.

But the explanatory and justificatory power of the argumentation thesis goes beyond that. The argumentation thesis – and this is a further ground for the view that MacCormick has recently endorsed this thesis – provides as well the best explanation of the sympathetic attitude MacCormick has recently taken to Ronald Dworkin. Whereas in LRLT MacCormick takes a thoroughly critical approach to Dworkin's interpretive theory of law, without also engaging in any constructive interchange,[27] in his recent RRL he points up several convergences between his own thought and Dworkin's. MacCormick's recent turn toward the interpretive approach is not unqualified, to be sure: even in RRL we find significant criticisms of Dworkin's theory.[28] But these criticisms are made within an overall appreciation of Dworkin and should therefore be interpreted more as constructive than as dismissive. MacCormick's welcoming attitude, far from sporadic or occasional, emerges most clearly in his willingness to stress the similarities between his own method and Dworkin's, as well as to stress the substantial agreement in the conclusions reached. Thus, for one thing, MacCormick notes that the method he follows in his latest work on legal reasoning "chimes quite closely" with Dworkin's method, shaped by the idea that:

> . . . it is out of rival conceptions of legality rather than by way of some kind of empirical description of things as they are or of the semantics of ordinary language that we develop different possible philosophies of law.[29]

For another thing, these methodological similarities are supplemented by an agreement in substance, in the sense that MacCormick considers his own institutional approach "in a broad way compatible" with Dworkin's "interpretive approach to political philosophy".[30] In fact, when law is conceived of as "an institutional order", it "amounts to a shared framework of understanding and interpretation among persons in some social setting".[31] The convergence between the two approaches is thus warranted by their agreement that "as a normative order, [the law] is in continuous need of interpretation, and as a practical one, in continuous need of adaptation to current practical problems".[32]

MacCormick's revised attitude and framework can be explained by describing his recent views on legal reasoning as a move toward the same legal paradigm as that which underlies Dworkin's jurisprudence, a paradigm defined and delimited by the argumentation

27 LRLT, pp. 229–74.

28 In particular, MacCormick calls into question Dworkin's definition of law as an interpretive enterprise, and especially the notion that "every venture into discussion of what law requires . . . calls for an effort of 'interpretation'" (RRL, p. 140). MacCormick also takes issue with Dworkin's "thesis about 'constructive interpretation', according to which interpretation regards a whole activity within a certain genre, and seeks to understand it in such a way as to make it the best of its own kind that it can be" (RRL, p. 140). This way of understanding the relationship between law and interpretation is criticised as amenable to the risk of oversimplification insofar as it prevents us from realising that "there are different objects of interpretation in law, and differences of interpretative approach and interpretative arguments appropriate to different objects" (RRL, p. 140). Finally, MacCormick (RRL, pp. 140–1) finds that Dworkin fails to appreciate in full the role played by coherence in law, and fails as well to appreciate that the notion of constructive interpretation should at best be seen as an overarching concept enabling us to sum up more-specific argumentative practices revealed to us through the process of rational reconstruction.

29 RRL, p. 28.

30 RRL, p. 6, n. 5; cf. pp. 2–7 and 23–31.

31 RRL, p. 6.

32 RRL, p. 6.

thesis. On this reading, the critical attitude initially taken toward Dworkin is owed for the most part to the fact that MacCormick's early theory of legal reasoning, one that connects closely with Hart's orthodoxy, belonged to a theoretical horizon that did not include the argumentation thesis and so was altogether different from Dworkin's interpretive view. This prevented MacCormick from fully appreciating the interpretive turn that Dworkin had given to legal theory, and it also prevented MacCormick from engaging in any constructive interchange with Dworkin. But in MacCormick's latest work the situation has changed: the loosened connection with Hart's positivism and framework now does enable him to pay explicit and specific attention to Dworkin's contribution.[33] On this reading, then, MacCormick's recent adherence to the argumentation thesis – a defining trait of Dworkin's interpretivism – explains why MacCormick has recently become sympathetic to Dworkin's interpretive jurisprudence, and it more generally explains the relationships between MacCormick's and Dworkin's theories.

This claim that MacCormick's and Dworkin's theories belong to the same theoretical horizon can be corroborated by a critical appraisal of MacCormick's proposed methodology, namely, the methodology of rational reconstruction. This methodology and concept is reframed in MacCormick's latest work on legal reasoning and, in addition to innovating on his earlier theory, it also provides an additional reason to believe that he has finally come to endorse the argumentation thesis.

The methodology of rational reconstruction was placed at the centre of the legal-theoretical discussion in the early 1990s by some leading contemporary legal scholars, MacCormick being one of them.[34] But in his latest work on legal reasoning, MacCormick clarifies this method and further elaborates on it. The original methodology of rational reconstruction outlined a set of specific intellectual operations aimed at managing legal materials. This is a narrow conception of rational reconstruction understood as a local and parochial method of legal analysis, setting out a class of operations specifically carried out by legal practitioners and legal theorists (dogmatic ones in particular) when they are confronted with the problem of wading through, and making sense of, the mass of legal materials, sometimes a chaotic mass. In the revised and broader conception, rational reconstruction is instead presented as a comprehensive "method for dealing with the interpretation and elucidation of large bodies of data or material in the context of the humanities".[35] So the methodology now includes the intellectual activities that legal experts have to carry out to apply and elucidate legal materials, but it goes beyond these activities, referring more generally to the attitude that legally minded people have toward legal materials. Rational reconstruction can thus be defined as an all-embracing methodology, a comprehensive approach to legal issues that is alternative not to other ways of conceptualising specific legal operations but to the wide-ranging method of constructive interpretation put forward by Dworkin as the paradigm for the judges' handling of texts of law.[36]

MacCormick's broad conception of rational reconstruction is an improvement on Dworkin's method of constructive interpretation. Dworkin generically qualifies any treatment of legal material as "interpretation" and so fails to specify the variety of

33 RRL, p. 1.

34 I am referring here in particular to Z Bankowski, N MacCormick, R Summers and J Wroblewski, "On method and methodology" in N MacCormick and R Summers, *Interpreting Statutes: A comparative study* (Aldershot: Dartmouth, 1991), pp. 9–27.

35 RRL, p. 29.

36 MacCormick clarifies this point in his statement that his broad conception of rational reconstruction is intended "to address rather than avoid (far less declare misdirected) the challenge launched by Dworkin concerning interpretivism" (RRL, p. 29).

operations carried out by different legal subjects. This interpretation-centred method, then, lacks analytical precision and depth. In contrast, MacCormick's methodology can both enable us to grasp the hermeneutical nature of legal activities and make room for a more accurate and illuminating account of the multitude of activities that legal subjects need to carry out to make sense of raw legal materials. Unlike Dworkin's method, for which everything is interpretation and nothing else besides, MacCormick's methodology enables us to grasp not only the common denominator of legal practices, but also the distinctions among them: we can therefore use the method to distinguish such activities as selecting relevant bits from the unanalysed mass of normative provisions, making sense of these selections as parts of a coherent whole, describing the overall order starting from a state of normative disorder, justifying the chosen interpretive decisions, weighing and balancing different possible alternative rulings, ascertaining and systematising legal norms, resolving conflicts between directives in the same legal order, following precedents, constructing statutes, and providing legal classifications of facts. Compared with Dworkin's too vague and imprecise treatment, then, MacCormick's alternative method allows us to describe different legal activities analytically and to deal with them separately. MacCormick's approach therefore avoids the vagueness, imprecision and oversimplification inherent in Dworkin's theory, while at the same time it preserves an essential claim to comprehensiveness and unity.

But these advantages of MacCormick's theory cannot be reaped unless his methodology of rational reconstruction is coupled with the argumentation thesis, which alone can secure the comprehensive scope of that methodology. This is so because comprehensiveness is not an inherent attribute of legal methods but a property that a method acquires from a constellation of substantive assumptions. More specifically, the degree of comprehensiveness is bestowed on a method by the method's capacity to give us an understanding and an elucidation of objects that are likewise constitutively comprehensive. For this reason, rational reconstruction cannot work as a global method with which to attack legal issues, so it cannot be compared to the method of constructive interpretation unless it can be made to provide insights into the nature of law, rather than providing us with information about specific and less-than-comprehensive legal practices. And the only way rational reconstruction can gain this capacity is by coupling with the substantive assumption that the set of activities whose scope it contributes to clarifying must be recognised as constitutive of the very idea of law, rather than as constitutive of specific elements within the legal order. Indeed, even though rational reconstruction is concerned with different activities, these activities, for all their differences, are at bottom hermeneutical practices; that is, they are all a case of deliberative reasoning. Rational reconstruction, then, is aimed at elucidating key elements of legal reasoning, and can accordingly be understood to be comprehensive only insofar as legal reasoning can itself be recognised as a comprehensive practice, a practice capable of revealing something about the nature of law. But this only holds true if the argumentation thesis holds true. It is by endorsing the argumentation thesis, then, that we transfer to the method of rational reconstruction the same level of generality and comprehensiveness ascribable to Dworkin's constructive interpretation. Thus, rational reconstruction cannot *as such* claim the same comprehensiveness as constructive interpretation – it can do so only on the condition of recognising legal reasoning as constitutive of the concept of law.

Stated otherwise, if MacCormick wants to bestow on his methodology for dealing with argumentative practices – the method of rational reconstruction – the same comprehensiveness that Dworkin's interpretive reconstruction achieves, he will have to consider argumentative practices to be constitutive of the concept of law in the same way

that Dworkin understands interpretation to be constitutive of the same concept. Failing that, rational reconstruction would at best manage to clarify specific features of specific legal systems: the method would amount to no more than a technique for handling marginal problems in law and so could not stand in any real competition with constructive interpretation, nor would there be much point in comparing the two methods. In MacCormick and Dworkin alike, adherence to the argumentation thesis is the *conditio sine qua non* that makes it possible to generalise an otherwise case-specific and parochial method. MacCormick therefore finds himself having to endorse the argumentation thesis as a result of his theorising a broad conception of rational reconstruction. And this broad conception is itself what actually enables the method of rational reconstruction to work as a genuine alternative to constructive interpretation. The argumentation thesis thus ultimately proves to be the tacit presupposition of the claim to comprehensiveness that MacCormick, in his recent work, attributes to rational reconstruction.

In conclusion, MacCormick's revised theory can be shown to require at its core an acceptance of the argumentation thesis, as a device with which to both explain and justify the theory. Thus, on the one hand, we can explain and ground on this basis two views in legal reasoning that are foundational in MacCormick – namely the centrality of argumentation in law and the interdependence between legal reasoning and the concept of law – on the other we can use the argumentation thesis to make sense of the relationships between MacCormick and Dworkin, as to both method and substantive theory.

4 The non-positivist dimension of the argumentation thesis

My claim that MacCormick's revised theory of legal reasoning embeds a non-positivist element depends crucially on the claim that the argumentation thesis is a defining feature of non-positivism. This latter claim I will support here by showing that the choice whether or not to accept the argumentation thesis discriminates between positivism and non-positivism. So, too, legal positivism cannot accept the argumentation thesis without renouncing some of its foundational views.

The non-positivist dimension of the argumentation thesis emerges paradigmatically in the work of a champion of Anglo-American legal positivism, Joseph Raz. Raz grounds the concept of law on the strong version of the social thesis, or sources thesis, under which "what is law and what is not is a matter of social fact".[37] On the strong version of this thesis, which Raz embraces, the tasks of identifying the law and determining the contents of law "depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument".[38] This is tantamount to defending the conceptual separation, or separability, of law and morality; that is, to claiming that the criteria of legal validity need not necessarily consist, either partly or entirely, of moral standards.[39] In Raz's version of legal positivism, what requires a morally neutral definition of law is the authoritative mode by which legal institutions function: if the law is to exert any authority, it must be a sort of institution that in principle possesses the fundamental properties of an authority, meaning that like any other authority, it must be able to issue statements identifiable without having to rely on their underlying (moral)

37 Raz, *The Authority*, p. 37.

38 Raz, *The Authority*, pp. 39–40; cf. 46–7. This view is defended as well in A Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon, 1992), pp. 8 and 39.

39 The claim that the separability of law and morality lies at the core of legal positivism is defended in a number of places, among them K Himma, "Inclusive legal positivism" in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: OUP, 2002), pp. 125–65.

justification.[40] This requirement entails that the law can only be authoritative if its directives are independent of the moral reasons that justify them. Raz concludes on this basis that the nature of law is ultimately a matter of social fact, not of moral values.

But this morally neutral characterisation of law can only hold up on condition of making the concept of law autonomous from legal reasoning, because legal reasoning consists at least in part in "straightforward moral reasoning".[41] In particular, legal reasoning is understood by Raz to consist in two main practices: reasoning about what the law is and reasoning about how disputes should be settled under the law. The first practice is connected with the application of law, and to the extent that the contents of law are determined on the basis of the sources thesis, the practice is carried out without relying on moral considerations. Not so in the case of the second practice. Reasoning in compliance with the law is a broader, more complex activity than merely applying the law or establishing what the law is, and in this sense it does involve moral considerations. This argument can be rephrased as follows. Legal reasoning "is a species of normative reasoning. It concerns norms, reasons for action, rights and duties, and their application to general or specific situations."[42] As such, it is not unlike moral reasoning, and this similarity shows that legal reasoning enjoys only a relative and limited autonomy from moral reasoning. In fact, "legal expertise and moral understanding and sensitivity are thoroughly intermeshed in legal reasoning";[43] rather than being "impervious to moral reasons", legal reasoning is "an instance of moral reasoning";[44] therefore, if we make legal reasoning a constitutive component of the concept of law, as the argumentation thesis does, we are in effect letting morality into the law. But this contradicts the sources thesis – and the sources thesis is the core of legal positivism. Raz's treatment thus shows paradigmatically that the argumentation thesis is incompatible with the positivist stance: a legal positivist looking to frame a coherent concept of law understood as determined solely by social facts must keep this concept distinct from legal reasoning, which, in contrast, is a morally laden practice.[45]

It may be claimed, generalising Raz's argument, that the argumentation thesis should be considered a defining trait of non-positivism since the reasoning behind the argumentation thesis can be constructed as an instantiation of the thesis that denies the separability of law and morality, a separability that lies at the core of legal positivism. The close link the argumentation thesis bears with the thesis setting out a conceptual connection between law and morality can be made more explicit if we elaborate further on the reasons why legal reasoning cannot be conceived of as fully autonomous from moral reasoning – we will do so by looking at several theoretical approaches in both the positivist and the non-positivist camp. To begin with, the proposed picture of legal reasoning as a specialised type of technical reasoning obedient to its own rules bears no resemblance at all to the judicial practice of contemporary legal systems, because we know for a fact that courts engage and find themselves having to engage in practical reasoning, which by definition includes extralegal elements. It is essential to note here that this appeal to extralegal reasons is not a contingent feature of judicial practice but is rather demanded by the nature of law and the human being. This is something that we get from Hart in his observation that lawmakers,

40 See Raz, *Ethics*, pp. 194–221.

41 J Raz, "On the autonomy of legal reasoning" (1993) 6 *Ratio Juris* 1–16, p. 8.

42 Raz, "On the autonomy", p. 1.

43 Raz, "On the autonomy", p. 10.

44 Raz, "On the autonomy", pp. 14–15.

45 One such coherent account of legal positivism can be found in J Gardner, "The egality of law" (2003) 7 *Associations* 89–101.

particularly in certain branches of law, can only frame laws in broad terms, incorporating general standards into the texts of law, and crafting provisions that will not cover all the possible concrete cases of application. This is constitutive of the lawmaker's mode of operating and is due to the fact that legal systems:

> . . . compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.[46]

This compromise can take different shapes in different legal systems, in that:

> . . . in some systems at some periods it may be that too much is sacrificed to certainty . . . In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedent.[47]

But compromise we must, at least to some extent, for this is simply a "feature of the human predicament", the fact that:

> . . . we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions.[48]

The two handicaps Hart is referring to are our relative indeterminacy of aim and our ignorance of the future. What result from these two handicaps are both an inability to make rules that satisfactorily cover all possible future controversies and a need to have norms that are relatively undermined and open to an assessment made at the time the situation takes place. So human nature is such that it is beyond our reach, and is even undesirable, to frame laws so detailed that the question whether they apply or not to a particular case never requires a fresh choice. It is through this sphere of choice, incompleteness, and normative indetermination and openness that extralegal considerations seep into legal reasoning. We need these considerations in legal reasoning if we are to fill the unavoidable gaps in the indeterminate provisions of open-ended disciplines.

Among the extralegal reasons that make their way into legal reasoning, a prominent and crucial place is occupied by moral reasons. The most straightforward statement to this effect is Robert Alexy's special-case thesis,[49] whereby "legal discourse is a special case of general practical discourse" and so belongs in the same sphere with moral reasoning.[50] Thus, while legal reasoning proceeds under constraints that set it apart from moral reasoning, it takes up the same questions as moral reasoning – namely, the practical question of what should or may be done or avoided – and lays a claim to correctness that is partly moral. The moral quality of the claim to correctness advanced by legal discourse is owed to the fact that this claim incorporates a reference to criteria of rationality and reasonableness, criteria that are shaped, among other things, by moral considerations. The permeability between legal reasoning and moral reasoning therefore results from the ultimate unity and systematic connectedness of

46 Hart, *The Concept of Law*, p. 130.

47 Hart, *The Concept of Law*, p. 130.

48 Hart, *The Concept of Law*, p. 128.

49 On the special-case thesis, see Alexy, *A Theory*, pp. 212–20 and R Alexy, "The special case thesis" (1999) 12 *Ratio Juris* 374–84.

50 Alexy, *A Theory*, p. 212.

practical reasoning.[51] The features that legal reasoning shares with moral reasoning – the sphere in which they both operate, the basic questions they both deal with, and the kinds of claims they both advance – make these two activities only partially and limitedly independent of one another.[52] This means that legal reasoning enjoys only an apparent autonomy, but even more importantly, it means that legal reasoning, insofar as it is constitutive of the concept of law, makes the law permeable to moral influences. Accordingly, on a view shaped by the argumentation thesis, the law cannot be understood as an independent and separate sphere of practical reason the way legal positivism would have it.

5 Conclusion

In this paper, I have claimed that MacCormick's recent account of legal reasoning incorporates a non-positivist element deriving from his endorsement of the argumentation thesis: this is the thesis that legal reasoning is constitutive of the concept of law, and the non-positivist element it carries consists in its being instrumental to the thesis establishing a conceptual connection between law and morality. In the result, MacCormick's endorsement of the argumentation thesis distances him from the legal positivist account he initially gave of legal argumentation and brings his revised account in line with the non-positivism theorised by scholars like Alexy and Dworkin.

But this interpretation of MacCormick's revised theory carries as well a more general implication, that is, it corroborates the idea that planted in Hart's legal positivism are the seeds of a non-positivist yield: Hart, perhaps more unwittingly than not, has sown seeds out of which non-positivism has finally grown stronger. And what in particular (on this reading) brought down the legal positivist project, thus enabling non-positivism to flourish, was the attempt to graft a theory of legal reasoning to Hart's general theory of law. As the development of MacCormick's thought shows paradigmatically, developing a theory of legal reasoning consistent with Hart's legal positivist concept of law is an enterprise without prospects: no matter how much we may wish to remain faithful to Hart's concept of law, we are bound to change this concept fundamentally in any attempt to supplement it with a theory of legal reasoning, even if only to fill a gap. In other words, the moment we set out to investigate legal reasoning from within Hart's jurisprudence, as MacCormick has set out to do, we will find we have to question some central assumptions of legal positivism. What also seems to follow from this reading of the development of legal positivism, though I cannot lay out the case here, is that, in Dworkin's interpretive approach, we have a much less incoherent development of Hart's reflection on the nature of law than is generally understood. On this reading, Hart's idea of law as a social practice resulting from the combination of primary and secondary rules does not stand in a relationship of mere contrast with Dworkin's account of law as an argumentative social practice: a tension may be present, to be sure, but the relationship can also be understood as one of continuity and transition from one theory to the other.

51 Interestingly, the special-case thesis finds MacCormick in agreement with it, for he describes interpretation as "a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decision. Hence legal interpretation should be understood within the framework of an account of argumentation, in particular, of practical argumentation." (N MacCormick, "Argumenation and interpretation in law" (1993) 6 *Ratio Juris* 16–29, p. 16. See also RRL, pp. 139–41.) This claim amounts to acknowledging the dependence of legal reasoning on practical reasoning – a dependence that in turn makes up the core of the special-case thesis.

52 In the terms of discourse theory, this interdependence can be expressed by presenting legal reasoning as exhibiting both a discursive, morally laden element and an authoritative (or institutional) one that cannot be kept separate from the former. This makes the discursive element the common ground of law and morality, and its incorporation in the authoritative discourse of law therefore becomes a decisive obstacle to the conceptual separation between legal and moral reasoning.

This introduces a further reason why MacCormick's theory bears remarkable theoretical interest: this theory constitutes the missing link between Hart and Dworkin, the intermediate stage in the progressive transition from a dominant legal positivist approach to an argumentation-based one. The evolution of MacCormick's legal theory sheds new light on a contemporary debate that has engaged analytical legal theorists in regard to the concept of law, drawing much interest and causing an equal degree of puzzlement: on one side are those who understand law (the bare bones of law) as an interplay of rules; on the other side, those who understand it as "an interpretive concept",[53] one "not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour" but rather defined by an "interpretive, self-reflective attitude addressed to politics in the broadest sense".[54] This is why I think MacCormick's work has been considered so interesting as to receive "the benefit of many critical reviews and comments (both supportive and corrective)"[55] and why it deserves further reflection and critique.

53 Dworkin, *Law's Empire*, p. 410.

54 Dworkin, *Law's Empire*, p. 413.

55 RRL, p. iv.

Syllogism and defeasibilty: a comment on Neil MacCormick's Rhetoric and the Rule of Law

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Abstract

This paper provides a review of Rhetoric and the Rule of Law*, by Neil MacCormick, focusing on the role of logic in legal reasoning. In particular, it considers the connection between syllogism, formal methods and rhetoric, and it distinguishes various aspects of legal defeasibility.*

1 INTRODUCTION

In the book entitled *Rhetoric and the Rule of Law*,[1] Neil MacCormick provides an account of legal reasoning which admirably reconciles different aspects of legal reasoning, aspects that are often presented as expressing incompatible ideological or theoretical approaches. This is the case for the main opposition addressed in the book: namely that between the rule of law and the arguable character of law. And for a second opposition, too, which completes and explains the first one: namely that between logic and rhetoric.

The book addresses many important issues in legal theory and doctrine (from legal values to the idea of reasonableness, to the notion of a ratio decidendi), combining the discussion of foundational themes with precise analyses of judicial cases. I will only address one such issue – the role of logic in legal reasoning and, in particular, the connection between logic and defeasibility.

2 SYLLOGISM AND RHETORIC

The main thesis of the book is that a reconciliation is possible between the rule of law and the arguability of legal decisions. Achieving such a reconciliation is the task of rhetoric, which is seen as a theory of rational non-deductive argumentation, namely, a theory of how we can draw non-deductive, yet rationally supported conclusions (rhetoric deals with rational persuasion, rather than with effective persuasion). After expounding this idea of rhetoric in the first chapter of the book (referring to various approaches, such as Viehweg's topic, Perelman's new rhetoric, Toulmin's idea of an argument, Alexy's procedural legal argumentation, and Scanlon's model of moral justification), MacCormick provides an account of the role of deduction (syllogism) in legal reasoning that develops and expands the views he expressed almost 30 years ago in *Legal Reasoning and Legal Theory* (LRLT),[2] a book which has constituted one of the major references for the debate in legal theory.

In MacCormick's account, the role of deduction in legal reasoning is linked to the idea of a rule. A legal rule is described as a conditional statement, linking a normative consequent to a set of operative facts: any instance of the rule's operative facts determines a corresponding instance of the rule's normative consequent,[3] that is, whenever the operative facts take place, the consequent effect is produced. This view of legal rules leads us to the idea of the normative syllogism: given a rule, and given an instance of its operative facts (the belief or assertion that such an instance has taken place), one can derive the rule's

1 Oxford: OUP, 2005 (hereafter RRL).

2 Oxford: Clarendon, 1978 (hereafter LRLT).

3 RRL, pp. 42–3.

normative consequent. The idea of the legal syllogism is linked to the value of the rule of law: only if we can cast legal reasoning in the form of a combination of rule-based syllogisms is the rule of law satisfied:

> . . . at the heart of the liberal idea of free government and at the heart of the distinction between free and despotic government is the idea that when governments act towards citizens their action must be warrantable under a rule.[4]

3 Perelman's challenge to the legal syllogism

Having so characterised the importance of rule-based reasoning in the law, MacCormick has to face the usual challenge to syllogistic approaches to the law, that is the idea that syllogistic inference, though possible, and indeed incontrovertible, has little importance for legal reasoning. This was the fundamental claim of Chaim Perelman, who did not question the permissibility of applying logic to legal contents but rather questioned the significance of the resulting inferences:

> 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 the conclusion 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 concern only 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 the role of legal logic to show the acceptability of the premises. This results from comparing the pieces of evidence, arguments, and values which are opposed in the litigation; the judge must arbitrate in order to take a decision and to justify his or her judgment.[5]

MacCormick indeed recognises that the legal syllogism does not solve the problems involved in the applications of the law: according to him, it is up to rhetoric, rather than to logic, to provide input to syllogism, namely, to provide and justify the facts and the rules to which syllogism is to be applied.

Thus, the distinction between logic and rhetoric seems to match, in MacCormick's view, the traditional distinction between *internal* and *external* justification of legal conclusions (decisions) where the internal justification consists in deriving a legal conclusion from general legal rules and corresponding particular factual propositions (according to the syllogistic model), and external justification consists in supporting through non-logical (rhetorical) arguments the endorsement of these rules and factual propositions. As I have observed,[6] this idea tends to downplay the role of logic in legal reasoning. We should not underestimate the complexities which may be involved in legal syllogism (in certain areas of the law, like tax law, we may need to chain multiple syllogisms in order to come to a specific conclusion), but, undoubtedly, all interesting and controversial issues in legal reasoning seem to pertain to external justification. Thus, the assumption that internal and external justification find respectively in logic and rhetoric their exclusive intellectual tools would leads us to conclude that all interesting issues lie outside the domain of logic and belong to the empire of rhetoric (as Perelman would say).

Against the assimilation of the dichotomy between internal and external justification to the dichotomy between logical and rhetorical reasoning, it must be observed, on the one

4 RRL, p. 24.

5 C Perelman, *Logique juridique: Nouvelle rhétorique* (Paris: Dalloz, 1979), p. 176 (my translation).

6 G Sartor, *Legal Reasoning: A cognitive approach to the law*, vol. 5 of *Treatise on Legal Philosophy and General Jurisprudence* (Berlin: Springer, 2005), ch. 14.

hand, that logic has a broader application than just internal argumentation and, on the other hand, that logic (understood in a narrow way) and rhetoric fail to cover all aspects of legal justification.

In fact, logic, when appropriate, also applies to the justification of concrete factual propositions and to the justification of norms (most trivially, when we argue that a certain rule is valid having been issued in a certain way by an authority that has the power to issue norms in that way, or when we argue that a certain reconstruction of the facts of a case is logically consistent). Logical reasoning cannot substitute for trained intuition, nor can it cover the whole field of plausible argumentation, but it can indeed find application both in arguments concerning the justification of norms and in arguments concerning the proof of facts.

With regard to the exhaustiveness of the combination of logic and rhetoric, we have to ask ourselves how we understand the notion of logic, namely, where we draw the borders of such a discipline: does logic only cover deductive reasoning, or does it also cover formal models of other kinds of reasoning (inductive reasoning, defeasible reasoning, probability calculus, decision theory, game theory, and so on)? It would seem quite strange to put all these formal approaches to reasoning and problem-solving into the domain of rhetoric (unless rhetoric is understood in a very broad way), and it would be arbitrary to argue that the lawyer should not make use of such formal tools when approaching legal issues. In many contexts, such methods will be useless or irrelevant (as when we lack the data which is required for their application), but in some other contexts they are indeed both applicable and useful. Only by using the notion of logic in a very broad sense (as covering all formal methods for rational justification) can we view it as covering all the areas of legal reasoning which rhetoric fails to capture. However, if we understand the notion of logic in a broad sense (so that it covers, for instance, the defeasible logics used in artificial intelligence and law, the statistical methods used in DNA analysis, or the application of game theory or probability theory in law and economics), we need to recognise for logic an application in the legal domain much wider than legal syllogism.

4 Logic as a structuring tool

Though MacCormick's focus on syllogism may express too limited a view of the role of logic (or formal methods) in legal reasoning, his account of the judicial syllogism has the merit of emphasising one important function of logic in the law: syllogism gives structure to legal reasoning, and in particular, it determines the object of rhetorical thinking. More exactly:

> . . . if the legal syllogism is taken as exhibiting the framework of all legal reasoning that involves applying the law, there is a limited number of ways in which problems can arise that require in-principle non-deductive, that is, rhetorical or persuasive, reasoning to resolve them . . .[7]

MacCormick lists four possible problems requiring a rhetorical solution: the problem of proof (establishing whether the alleged facts have taken place); the problem of classification or qualification (establishing whether the alleged facts are an instance of the operative facts in a rule); the problem of interpretation (of establishing the correct reading of an acknowledged textual rule); and the problem of relevancy (of establishing whether there is a rule which deals with the alleged facts).

Thus, MacCormick's reply to Perelman's statement that logic, though legitimate, is unimportant seems to be the idea that syllogism plays an important role in legal reasoning even if it does not provide a solution to controversial legal issues: this role consists in providing a structure to legal discourse, and so in determining the agenda for legal inquiries.

7 RRL, p. 42.

This is a very important insight in the nature of legal reasoning. I would, however, complement this idea with the indication that logic, intended in a sufficiently broad sense, has a content and a domain of application which is much broader than syllogistic internal justification. One way to develop MacCormick's ideas, which I think is consistent with the general framework he provides, is that of viewing rhetoric not as an alternative to logic, but rather as providing a set of reasoning schemata (and of strategies for their uses), schemata which may contain logical and formal patterns among their ingredients.[8]

5 Logic and particularism

There is a second objection to legal syllogism from Perelman that we need to consider, namely, the idea that a logical model of legal reasoning is linked to a certain value hierarchy, privileging certainty over equity, or more generally to a certain psychological and methodological preference, favouring an anticipatory approach to problem-solving over a responsive one. This is how Perelman opposes a logical approach to a practical approach to 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. . . .
>
> 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.[9]

This issue is addressed by MacCormick in chapter 5, entitled "Universals and particulars". I cannot here repeat the detailed and careful arguments which exemplify and discuss, on the one hand, the importance of a particularistic attitude (the capacity to take into account all

8 See, e.g. D N Walton, *Argumentation Methods for Artificial Intelligence in Law* (Berlin: Springer, 2005).

9 C Perelman and L Olbrechts-Tyteca, *The New Rhetoric: A treaty on argumentation*, J Wilkinson and P Weaver (trans) (Notre Dame, Ind: University of Notre Dame Press, 1969, 1st edn in French 1958), pp. 197–8.

relevant features of individual cases) and, on the other hand, the need for a universalistic justification (which applies to all cases having the same relevant features).

There are, however, two aspects of "rule-based" decision-making on which we need to focus, to provide a full reply to Perelman. The first aspect, on which MacCormick is not, I believe, sufficiently detailed, concerns the justification for developing and applying rules. The second, on which instead he does provide a convincing answer, by appealing to the idea of defeasibility, concerns the need to make the endorsement and the application of rules consistent with the fact that the "the unforeseen" has not "been eliminated" from the law. I shall address the first aspect in the next section and the second immediately after.

6 Theory construction

The use of rules is certainly linked to justification, but the requirement of justification is only a part of the story: in fact legal decisions can also be justified without appealing to rules (for instance, teleologically referring to the values that would be advanced by a certain decision, or analogically referring to previous decisions of similar cases), and the construction-application of rules does not only occur for the purpose of justification. Rule-based thinking in the legal domain can also be supported on additional grounds.

First of all, the application of rules can contribute to the efficiency and impartiality of decision-making and to the creation of congruent expectations on their potential addressees.[10]

Moreover, rule-based thinking also involves a cognitive aspect: constructing rules, applying them in concrete cases, and testing them may contribute to practical knowledge, and even improve the decision of individual cases. This is not to deny the importance of intuitive assessments and casuistic decisions, but rather to stress the need that a balance (a reflective equilibrium) is realised between rules and particulars. Let me characterise this aspect of rule-based thinking by quoting Robert Nozick (who uses the word *principle* in a way that also covers rules, as they are usually understood in legal theory):

> Principles can guide us to a correct decision or judgment in a particular case, helping us to test our judgment and to control for personal factors that might lead us astray. The wrongness that principles are to protect us against, on this view, is individualistic – the wrong judgment in this case – or aggregative – the wrong judgments in these cases which are wrong one by one.[11]

Interestingly, Nozick (who attributes to the practice of principles, besides a teleological utility, an evidentiary and a symbolic utility) establishes a connection between the use of rules in law and morality on the one hand, and scientific laws, on the other – a connection which was also observed by Alchourrón,[12] who has emphasised the parallel between the deductive view of the law (where the content of a legal decision should be a conclusive consequence of a set of pre-existing factual and normative premises, where the normative premises set should be general) and the nomological model of the natural sciences (where, according to Hempel,[13] the facts to be explained, the *explanandum*, should be

10 See M Jori, *Il formalismo giuridico* (Milan: Giuffrè, 1980) and F Schauer, *Playing by the Rules* (Oxford: Clarendon, 1991); for a balanced discussion of the comparative merits of rules and analogies, see C R Sunstein, "Political conflict and legal agreement" in G B Peterson (ed), *Tanner Lectures on Human Values 1995,* vol. 17 (Salt Lake City, Utah: University of Utah Press, 1996) pp. 139–249, especially pp. 244ff.

11 R Nozick, "Decisions of principle, principles of decision" in G B Peterson (ed.) *Tanner Lecture on Human Values 1991* (Princeton, NJ: University of Utah Press, 1991) pp. 117–202, p. 124.

12 C E Alchourrón, "On law and logic" (1996) 9 *Ratio Juris* 331–48, p. 334.

13 C G Hempel, *Philosophy of Natural Sciences* (Englewood Cliffs, NJ: Prentice-Hall, 1966).

logical consequences of a set of premises, the *explanans*, containing general laws along with specific prior facts).

Though MacCormick extensively addresses the importance of justification according to general rules (and the requirement of predictability which is intrinsic to the rule of law) his emphasis on particularism makes him possibly disregard the cognitive and structuring function of rules in legal reasoning, namely, the insights obtained by articulating legal knowledge in general rules (though this can be, and often is, done in connection with the decisions in particular cases). Focusing on this aspect would emphasise an aspect of rule-based reasoning, that is its contribution to the rational decision of a particular individual case, an aspect which coexists with its other functions, namely that of providing a backward-looking justification and a forward-looking contribution to the coherence of future problem-solving.

I now take the liberty of briefly mentioning my own attempt to provide a model of legal reasoning, a model involving, on the one hand, the construction of theories (of abstract views of the law, including factors, rules and values, as well as dependencies and priorities between them) out of concrete decisions and, on the other hand, the application of such theories in making such decisions.[14] From this perspective, theory-construction and theory-usage are connected through the process of mutual adjustment and influence between particular concrete decisions and abstract determinations.

As Figure 1 shows (opposite), legal reasoning, when seen in this perspective, takes the shape of a circle, including two main movements: an ascending movement, toward abstraction; and a descending movement, toward concretisation.

The ascending movement starts with concrete cases, which may be real ones (so that the facts of the case are coupled with a corresponding judicial outcome) or hypothetical ones (so that the facts of the case are coupled with the outcome suggested by our "sense of the law" or our "sense of the right" which the Germans call *Rechtsgefühl*).

Given a particular case, accompanied by a corresponding outcome, we try to extract (abstract) the relevant aspects of the case which favour a certain issue, relevant to the case, being decided in a certain way or other.

When a case contains factors pushing the decision of an issue in opposite directions (for instance, in intellectual property, the originality of a work pushes toward the conclusion that the work is covered by copyright, while a work's significance for didactical purposes pushes towards allowing its free use), the outcome of the case shows (a) that the factors in the case favouring its decision are sufficient to determine that decision, and (b) that these factors prevail over the contrary factors which were present in the case.

We then come to view our case as governed by a rule. The case-rule collects a combination of all or some of the factors supporting the outcome associated to the case, and establishes, for any instance of such a combination, an instance of that outcome. Moreover, by assuming that the case-decision is explained according to such a rule, we imply that this rule outweighs the opposite rule collecting all factors favouring a different decision of our case.

The fact that a certain factor favours a certain outcome can be explained with reference to values which would be advanced by recognising that factor (for instance, by recognising

14 T J M Bench-Capon and G Sartor, "Using values and theories to resolve disagreement in law" in J Breuker, L R Winkels and R Winkels (eds), *Proceedings of the Thirteenth Annual Conference on Legal Knowledge and Information Systems (JURIX)* (Amsterdam: IOS, 2000), pp. 73–84, ch. 29; T J M Bench-Capon and G Sartor, "A model of legal reasoning with cases incorporating theories and values" (2003) 150 *Artificial Intelligence* 97–142; J C Hage and G Sartor, "Legal theory construction" (1996) 7 *Associations* 171–83.

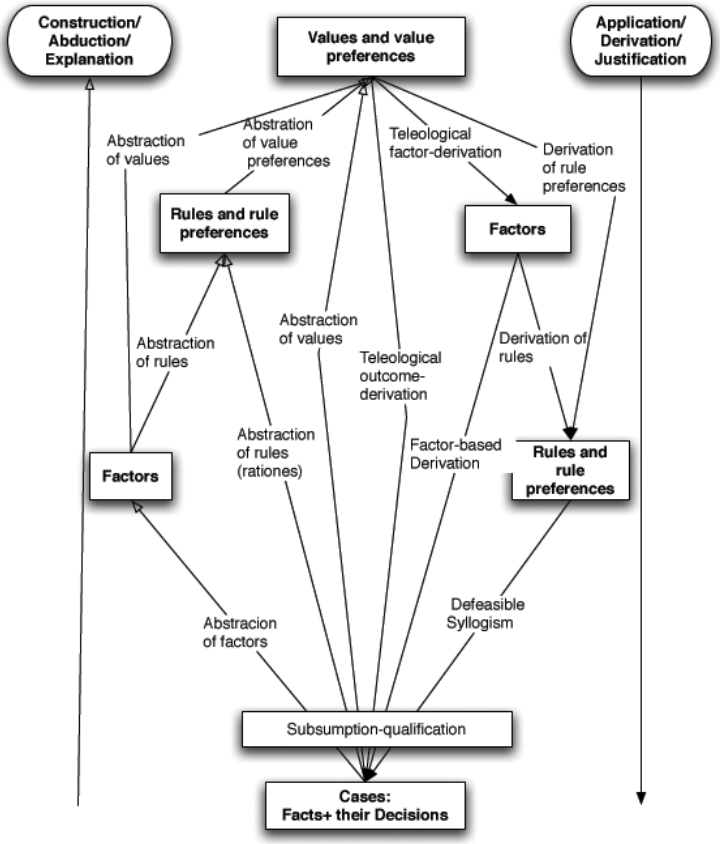

Figure 1: The circle of legal reasoning

that original works should be protected, we advance the values of art and creativity, while by recognising that works should be available for teaching purposes, we contribute to education and culture) and thus can be taken as evidence that such values are legally relevant.

The fact that a rule prevails over another rule shows that the values advanced by that rule outweigh the values that are advanced by the competing rule.

The ascending process is a process of construction which may be supported by reasons of various kind according to different reasoning schemata (different *theory constructors*, as I have called them). This construction process may go through all the steps we have indicated, but may also be shortcut, so that one jumps directly from a decision to the rules it embeds, or to the values it advances.

The output of this ascending process is not uniquely determined: each step can be performed in different ways – for instance, a precedent can be explained according to different rules (rationales) which can be viewed as instantiating different values. However, the requirement of coherence allows us to identify that certain abstract construction moves are better than others, since they lead to more-coherent theories (which explain a larger number of cases, take into account a larger number of relevant factors, provide simpler explanations, possess a higher degree of connectedness, etc).

Let us now consider the descending movement, where, given certain values, we identify the factors whose recognition could advance these values, we then combine these factors into rules, and, on the basis of the ranking of the corresponding values, give priorities to the rules. We can then argue in favour of a specific decision in different ways: either by performing a teleological derivation (namely, by arguing that a certain decision would advance a certain value) or by referring to factors (namely, by arguing that the case at issue presents a sufficient number of factors supporting a certain outcome, which outweigh the factors to the contrary), and finally by the syllogistic application of a rule (an application which, I would claim, is defeasible rather than deductive, as I shall show in the following section).

In conclusion, it seems to me that rule-based legal reasoning gains its full legal significance only when it is seen in its dialectical connection with the particularistic appreciation of individual cases, rather than as an alternative to it. The same also holds for the intuitive appreciation of individual cases, whose importance is stressed by Philip Heck, a leading representative of the anti-formalistic movement of the end of the 19th century:

> The intuitive feeling [namely, the *Rechtsgefühl*] can provide the very decision of the case, but also major premises and value judgements [sic] that then lead to the decision of the case by way of 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 life interests in question.[15]

However, the *Rechtsgefühl* is not infallible, as Heck continues: "even the intuitive feeling can make mistakes and under the influence of reflection it can be recognised as misleading, so that it disappears completely". Thus its outcomes should be controlled through trained reflection:

> The claim of the *Rechtsgefühl* is in a large measure accessible to the control of reflection and needs such control. Only an appropriate verification protects against mistakes and ensures that the law is respected.[16]

The same fallibility also inheres, however, in the attempts to provide an explanation-justification of a certain individual decision according to general rules: the very decision-maker may fail to appreciate the real legal grounds of his or her decision (all the legally relevant factors that pushed toward a certain outcome) and may thus provide a mistaken or partial account of such grounds when formulating the corresponding ratio decidendi.

In conclusion, it seems to me that it is possible to view universalistic rule-based thinking and particularistic evaluations as complementary components of a unique cognitive process.

7 Logic and defeasibility

As I have observed above, Perelman criticises the "logical" approach to problem-solving as being based upon a wrong assumption: resorting to a rule-based (anticipatory) approach requires assuming that "the unforeseen has been eliminated, that the future has been mastered, that all problems have become technically soluble".[17] How can we frame and apply universal legal rules (according to the syllogistic model) if there could always be exceptional situations in which the application of a rule appears to be iniquitous, inappropriate, unjust?

15 P Heck, "Gesetzesauslegung und Interessenjurisprudenz" in R Dubischar (ed.), *Das Problem des Rechtsgewinnung, Gesetzesauslegung und Interessenjurisprudenz, Begriffsbildung und Interessenjurisprudenz* (Bad Homburg vor der Höhe: Gehlen, 1968, 1st edn 1914), section 16.9 (my translation).

16 Heck, "Gesetzesauslegung", section 16.9.

17 Perelman, *The New Rhetoric*, p. 197.

Here MacCormick's answer consists in affirming that legal rules are both universal but defeasible: the universality of the reasons they express is consistent with the idea that under particular circumstances these reasons may be countered and possibly outweighed.

The subject of defeasibility is addressed again in chapter 12 of RRL, entitled "Arguing defeasibly".

At first MacCormick attaches defeasibility to particular legal arrangements (like a contract or a will). He says that such an arrangement may be subject to "invalidating events" which may bring about its defeasance.

He then considers various forms of defeasibility. First of all there is *express defeasibility*, which arises from the fact that a legal provision expressly makes a legal result dependent upon "some exception or proviso".[18] Express defeasibility, he argues, does not consist in adding negative conditions to the rule establishing that result since it also impacts on the burden of proof.

However, MacCormick argues, what is more interesting is implicit defeasibility: there are situations in which a legal result, though stated in an explicit legal provision, does not take place, since "it is trumped by recourse to some unstated condition that is deemed to be implicitly overriding, given the principles and/or values at stake".[19] MacCormick views implicit defeasibility as being connected to the way in which the law is formulated: the express formulation of the law does not (and cannot) take explicitly into account all possible exceptions. Not only would this assign to the legislator an impossible task, but it would also compromise the clarity and conciseness of the law.

According to MacCormick, defeasibility is linked to the burden of proof, and thus has a pragmatic content, being concerned with what is to be done to argue a legal case successfully. However, he criticises the idea that defeasibility only concerns the pragmatics of law enforcement, namely, the idea that legal conclusions are defeasible since the courts may contradict our expectations. For him, defeasibility does not consist in the fact that the courts may reject a claim, but it rather consists in the fact that there are "legally justifiable exceptions to ordinarily necessary and presumptively sufficient conditions, exceptions which ought to be made when the question is put to a court".

It is not clear, however, whether, for MacCormick, a normative result subject to a defeating condition exists or not, in the case that the defeating condition has taken place, but a judge has not yet established the existence of the condition. Is a person responsible or not, when he caused damage in a state of incapability, but the judge has not (yet) established that the person was incapable? Is a person entitled or not to inheritance, when she killed the testator, but the judge has not yet established that this was the case? My view is that an exception is effective (it has an impact on the legal states of affairs, on the law as an "institutional reality"), even when the judge has not yet established it (and even when the issue of the existence of such an exception will never be brought to the attention of a judge). There may indeed be cases where a judge is vested with the power to cancel a legal outcome (consider, for example, the cases where a judicial decision is required in order that a contract is voided or that an administrative decision is annulled), but this does not apply to defeasible legal conclusions in general. It is true, a judge may be called to decide whether a defeating circumstance obtains and only if this judgment is positive will the judge deny that the result obtains. However, this is a general feature of any legally relevant fact: the judge will consider a fact established and decide accordingly only if he or she believes that

18 LRLT, p. 241.

19 LRLT, p. 243.

the fact has been proved in the judicial proceedings, but this is no reason for concluding that the fact does not exist and has no legal effect, unless and until a judge declares that it has taken place.

As a general evaluation of MacCormick's account of defeasibility, I may say that he is able to provide in a few pages a clear introduction to the most significant legal issues involved in legal defeasibility, an introduction that will be useful for anybody who intends to address this issue, and that it is especially useful for the way in which it connects a general overview of it to the discussion of concrete cases.

The aspect which could undergo critical scrutiny is the direct link which MacCormick establishes between defeasibility and pragmatics, both the pragmatics of legislative texts (where a defeasible formulation may contribute to clarity) and the pragmatics of judicial decision-making (where defeasibility is connected to the burden of proof).

I believe that it is possible to give a broader account of defeasibility which distinguishes three different aspects of it, which I shall consider in the following sections. They are ontic defeasibility, cognitive defeasibility and procedural defeasibility.

8 Ontic defeasibility

First of all, defeasibility has an *ontic* aspect, namely, an aspect which is related to the nature of morality and law: there are facts (empirical or institutional states of affairs or events) that are normally sufficient to determine certain legal or moral outcomes, but can be made irrelevant (undercut) or can be outweighed (rebutted) by further facts. Thus, when seen from the ontic perspective, defeasibility neither pertains to conclusions nor to rules, but rather to facts, in the sense of relevant aspects of the situation at issue, and it concerns their ability to constitute normative (legal or moral) qualifications and effects. Here is how the celebrated philosopher Ross puts it:

> Any possible act has many sides to it which are relevant to its rightness or wrongness; it will be pleasure to some people, pain to others; it will be the keeping of a promise to one person, at the cost of being a breach of confidence to another, and so on. We are quite incapable of pronouncing straight off on its rightness or wrongness on the totality of these aspects; it is only by recognising these different features one by one that we can approach the forming of a judgement on the totality of its nature.[20]

Thus each of an act's aspects, according to Ross, is only a defeasible *ontic reason* (or constitutive reason) for the act's moral qualification (as being right or wrong). Similarly, the features and circumstances of an act may represent ontic reasons for its legal qualifications (as being permitted, obligatory, or prohibited; as being valid or invalid, etc.) and for its effects (as producing obligations, liabilities, etc.). Ontic reasons (both moral and legal ones) may support incompatible outcomes, and they may have different strengths so that the weaker reasons may be outweighed by stronger ones.

9 Cognitive defeasibility

Ontic reasons, when recognised as such (that is as facts which normally determine moral or legal qualifications), become cognitive reasons. More exactly, the belief that an ontic reason exists (is present in the situation at hand) is a cognitive reason for inferring the belief that the constituted normative outcome exists: as the fact that one intentionally damages another

20 W D Ross, *Foundations of Ethics* (Oxford: Clarendon, 1939), p. 84.

is a constitutive reason determining one's liability, so the belief that one intentionally has caused damage is a cognitive reason for inferring that one is liable.

Consequently, ontic defeasibility is translated into *cognitive* defeasibility: whenever the ontic reason for a certain outcome is defeated by a contrary ontic reason, then the corresponding cognitive reason (namely, the belief that the ontic reason exists) for inferring the existence of that outcome should be defeated by a corresponding contrary cognitive reason (namely, by the belief that the corresponding contrary ontic reason exists). Thus, the ontic defeasibility of ontic reasons is translated into the cognitive defeasibility of the corresponding cognitive reasons (as being able to lead a rational reasoner to endorse the belief that the outcome supported by such reasons obtains).

Cognitive defeasibility influences the ordinary process through which one proceeds when applying the law to a concrete case. When one is interested in establishing a certain legal result in a certain context, first one will look whether there are, in the context at issue, appropriate grounds supporting that outcome (according to a rule, a principle, etc.). On the basis of the belief that there are such grounds, one would then look to see whether there are explicit or implicit exceptions, namely, reasons undercutting or rebutting the grounds supporting that result. Then one will consider whether there are exceptions to such exceptions, and so on. This cognitive process will produce only pro tanto results, that is results that can be controverted by continuing the inquiry. At a certain point, however, the inquiry will have to terminate, and one will have to be content with the results obtained at that point.

The reasoning process of defeasible reasoning appears to be a logical process when one only considers the way in which a reasoner uses the knowledge they possess to make defeasible inferences and to adjudicate their conflict.[21] Obviously, defeasible inquiries go beyond logic when one also considers the need to obtain new information (empirical or normative) for the purpose of constructing new relevant inferences.

Consider, for example, the case of a person who asks his tax lawyer whether he should pay taxes on income he earned abroad. Assume that the lawyer finds a rule stating that even foreign-earned income should be taxed. However, the lawyer is aware that a number of exemptions exist, concerning different countries and different types of income (though she is not aware of the content and the preconditions of such exemptions) which provide exceptions to ordinary taxation. Therefore, she should tell the client that she can only pro tanto (that is on the basis of the information she has so far considered) conclude that the income he earned abroad is not taxable. She needs to look further into tax law to provide a sufficiently reliable answer. However, at a certain point, the inquiry needs to stop, and the pro tanto conclusion will have to be endorsed (if the inquiry is believed to have been sufficiently accurate). Thus, defeasible reasoning consists in 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: (a) it focuses the inquiry on relevant knowledge; and (b) it continues to deliver provisional pro tanto results while the inquiry goes on.

10 Procedural defeasibility

Finally, cognitive defeasibility is connected to *procedural* defeasibility, namely, to the defeasibility of the outcomes of legal proceedings, depending on the distribution of the burden of proof between the parties. According to the idea of the burden of proof, the

21 Among the logical accounts of defeasible legal reasoning, see, e.g. J C Hage, "A theory of legal reasoning and a logic to match (1996) 5 *Artificial Intelligence and Law* 199–273; H Prakken and G Sartor, "Rules about rules: assessing conflicting arguments in legal reasoning (1996) 4 *Artificial Intelligence and Law* 331–68.

elements which concur in determining a legal result are split into two sets: (a) elements that need to be proved (in the general sense of being established through justified arguments) in the legal proceedings in order to enable the judge to derive that result; and (b) elements that do not need to be proved, but the proof whose complement (the complement of a positive fact A is its negation ¬A, and the complement of a negative fact ¬A is A) prevents the judicial derivation of that result. Thus, the party interested in establishing a certain result has the burden of proving the facts of the first kind, while the counterparty has the burden of proving the complements of facts of the second kind.[22]

In general, procedural defeasibility tracks cognitive defeasibility: when there are no specific rules or ground to the contrary (such as the need to protect the weaker party, or to support the party who usually lacks the opportunity to prove the facts at issue) the facts to be proved for establishing a legal result are the reasons supporting that result, while the facts whose proof would prevent deriving that result are the reasons defeating the former reasons.

However, this general (defeasible) principle can be derogated on various grounds. For instance a legislator with regard to product liability can either establish that a company is liable for damage only if the company's negligence is proved, or establish that negligence need not be proved but that the proof that there was no negligence prevents the derivation of liability. According to the second policy (but not according to the first), the company will be declared liable also when neither negligence nor its absence could be established.

11 Conclusion

MacCormick's book represents a very important contribution to the theory of legal reasoning, a contribution in which the author competently, with admirable style and deep insight, leads us through the complexities of legal theories, doctrines and cases. It is significant not only for legal theorists, but also for lawyers, and even for experts in legal logic and legal informatics. Let me, however, conclude my discussion of it by mentioning a couple of points where I find that something is missing.

With regard to the role of logic in legal thinking, MacCormick's analysis could possibly be integrated, on the one hand, with a broader view of logic and, on the other, with an additional emphasis on the fact that legal abstractions arise from particular intuitive reactions to concrete cases but also contribute to shaping and controlling such intuitive/particularistic reactions.

With regard to MacCormick's account of defeasibility, it seems to me that, though capturing the main features of legal defeasibility, such an account leans too much toward procedural defeasibility, while I believe that the latter should be integrated with, and even viewed as dependent upon, what I called ontic and cognitive defeasibility.

22 For a formal model of the burden of proof, see, e.g. H Prakken, "On formalising burden of proof in legal argument" in *Proceedings of the Twelfth Annual Conference on Legal Knowledge and Information Systems (JURIX)* (Nijmegen: Gerard Noodt Instituut, 1999) pp. 85–97.

Precedents: reasoning by rules and reasoning by principles

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1 Introduction

In European continental legal systems, fruitful studies on precedents only started when the Bielefeld Kreis decided to launch a research project on the use of prior decisions in European and United States legal systems. Indeed, the fact that legal theorists were confronted with the interpretation of precedents favoured new questions being put about old issues. These "new questions" were not novel for MacCormick who was an active member of the Bielefeld Kreis. As he says in the opening words of Chapter 8 of his *Rhetoric and the Rule of Law* (RRL),[1] he is intrigued by the question of why precedents are used to justify legal decisions.

This question was of extraordinary novelty in European continental legal systems, such as the Spanish, where the focus was on the binding nature of prior judicial decisions. Indeed, Spanish law students are taught that prior decisions are not binding, that is, prior decisions are not a source of law. However, no tool was provided to explain why, despite their non-binding nature, prior judicial decisions are used to justify new decisions. In this sense, MacCormick stresses that we should not exaggerate the differences between case-law systems and continental legal systems[2] and abandon the recourse to the binding force of prior decisions to construct a theory of precedents: their argumentative use in common law and continental legal systems must be the starting point of a sound theory of precedents.

Indeed, MacCormick rightly sets the framework to answer the question on the use of precedents: legal justification. That is, if prior decisions, despite their lack of binding force, are used to justify decisions, attention has to be paid to the way in which legal reasoning goes. This, again, was of great novelty in European continental legal systems, because judicial cassation had provided the institutional framework to support the use of prior decisions. Initially, cassation was thought of as a tool to control judges' role in the application of statutes – they were defined as being *la bouche de la loi* – however, the institution evolved to what is its main feature nowadays: it promotes the unification of judicial application of law by providing authority for higher courts' decisions. Lower judges and tribunals should follow the line of reasoning upheld by the cassation court at the risk of being subject to appeal. This model, however, stresses the authority feature of prior decisions and this is difficult for the appeal court to apply when it follows its own prior decisions.

Hence, MacCormick rightly set the point(s) of departure to elaborate a theory of precedents within legal justification. However, this paper will argue that the reconstruction of a theory of precedents made by MacCormick in his *Legal Reasoning and Legal Theory* (LRLT)[2] and his RRL does not fully explore his own theory of legal justification, since he provides a too legal-positivistic approach to precedents in Chapter 8 of RRL. Indeed, MacCormick focuses on how his theory of precedents makes it possible to reconstruct the ratio decidendi of precedents, that is "[a] ruling expressly or impliedly given by a judge

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1 N MacCormick, *Rhetoric and the Rule of Law. A theory of legal reasoning* (Oxford: OUP, 2005) (hereafter RRL).

2 N MacCormick, *Legal Reasoning and Legal Theory* 2nd edn (Oxford: Clarendon, 1994), p. 219 (hereafter LRLT).

which is sufficient to settle a point of law put in issue by the parties's arguments in a case, being a point on which a ruling was necessary to his/her justification of the decision in that case".[3] This is almost necessary because statutes lay down rules "in fixed verbal forms" and precedents do not.[4] This leads to the idea of normative syllogism: given a conditional rule, and given an instance of its operative facts, one can derive the rule's normative consequence. However, to MacCormick, legal reasoning also involves rhetoric. As he states in the foreword to the second edition of LRLT:

> . . . an account of rational practical discourse can be constructed that derives a justification for legal institutions and legal reasoning from the exigencies of general practical reason, and subjects legal reasoning through and through to the general principles of practical rationality.[5]

This leads, as MacCormick puts it in the foreword to the second edition of LRLT, to the notion of legal reasoning as a species of practical reasoning and, although deductive reasoning is at the core of it, it is encapsulated in a web of anterior and ulterior reasoning from principles and values.[6]

The principle of justice is strongly linked to the use of previous judicial decisions. Indeed, the mandate to treat similar cases alike is the reason that moves judges from prior cases to future ones. However, we should not only ask the question "why do we rationally follow prior judicial decisions?" but also "why do we rationally abandon prior judicial decisions?" because it would be deplorable to advocate a theory that justifies unjust decisions by following precedents. The answer to the former question is not so much linked to the notion of ratio decidendi of precedents and their use in legal syllogism, but, as I shall argue, to the idea of the special case thesis.

I shall argue that precedents are followed because similar cases ought to be treated alike (formal justice), and they have rationally to be distinguished and even abandoned if there appears to the court good reasons to do so (moral justice). These reasons are in the nature of the case controversial and the values that they necessarily incorporate change over time.[7] That is, using precedents, even to abandon them, confronts courts with the defeasibility of the principle of formal justice as dispositional feature.[8] I will consider precedents as techniques of argumentation founded on the principle of justice. That is, using precedents in legal argumentation not only entails using their ratio decidendi to judge the case, but also using the principle of justice to justify either following or not following precedents. I will conclude with analysing the impact that this theory of precedents may have in the practice of three continental legal systems – namely, German, Spanish and Dutch – which share a non-binding doctrine of prior decisions.

2 The principle of justice

Perelman identified the argument of formal justice as one of the foundations of judicial precedents (arguments *ab exemplo* and authority are also related to the argumentative use of precedents). According to this argument, similar individuals or similar situations ought to be treated in a like way. To be valid and accepted, the principle of formal justice has to be accompanied by the principle of *inertia*: sameness may be broken if it is well justified.

3 RRL, p. 152.

4 LRLT, p. 221.

5 LRLT, p. xvi.

6 LRLT, p. xiii.

7 LRLT, p. 224.

8 A García Figueroa, "La incidencia de la derrotabilidad de los principios iusfundamentales sobre el concepto de Derecho" (2003) 3 *Diritto e questioni pubbliche* 197–227, www.dirittoequestionipubbliche.org.

Formal justice is the first requirement of rationality, and provides a rational foundation for precedents. In this sense, it is argued that precedents founded on the principle of formal justice contribute to the *justification* of judicial decisions. Moreover, formal justice and inertia provide specific criteria about how to use prior decisions in rational legal justification.

For the purposes of this argument, I differentiate the *logical* or formal dimension of justice from its moral feature. The two aspects correspond to the levels of internal and external rationality respectively, or as MacCormick calls them, logic and rhetoric. This distinction will be elaborated by arguing that the logical aspect of justice concerns first the essential requirement of *universalisability* of normative statements, and second, the basic requirement of *consistency* of reasoning. Further, it will be argued that the moral aspect of justice deals with *coherence* of reasoning.

Therefore, the rule of justice consists of the following requirements of practical legal reasoning: universalisability of normative statements, consistency and coherence of justification. All these features contribute to (i) strengthening the role that prior judicial decisions play in legal justification and (ii) enhancing the role of precedents as argumentative techniques.

2.1 Universalisability

To understand the relationship between the principle of universalisability and the foundation and use of precedents, MacCormick adopts the point of view of justification.[9] From this perspective, the first requirement of rational justification is the universalisability of normative statements;[10] this requirement must also be met if precedents are to prove their importance in legal reasoning.

MacCormick further explores the requirement of universalisability and attributes to it the so-called *backward* and *forward-looking* effects.[11] Backward-looking is a well-known notion: judges ought to decide in the same way as in similar previous cases. More challenging, however, is the forward-looking effect: "That I must treat like cases alike implies that I must decide today's case on grounds which I am willing to adopt for the decision of future similar cases."[12] Thus, for the sake of the rationality of a judicial decision, it has to be supported by reasons that justified a previous decision reached in a similar case, but even more so by the fact that it will be a precedent for future similar cases. Therefore, formal justice as backward and forward-looking shows an inescapable connection with universalisability:[13] backward and forward-looking effects are likely only when the ruling of the case, that is, the grounds that support a judicial decision, is enunciated in universal terms.

The crucial implication of the principle of universalisability for precedents becomes clear: whenever a judge refers to a prior decision, she or he refers to the universal rule contained in this decision. Furthermore, since judicial decisions contribute to stating the meaning of legal norms, when a judge refers to previous decisions, she or he refers to the interpretative rule established previously. As already mentioned, for the sake of its

9 LRLT, ch. 4.

10 LRLT, ch. 4.

11 LRLT, pp. 75ff., also F. Shauer, "Precedents" (1986) 39 *Standford Law Review* 571–605, pp. 572ff.

12 LRLT, p. 75.

13 "The notion of formal justice," says MacCormick, "requires that the justification of decisions in individual cases be always on the basis of universal propositions to which the judge is prepared to adhere as a basis for determining other like cases and deciding them in the like manner to the present one." (N MacCormick, "Formal justice and the form of legal arguments" in C Perelman (ed), *Èstudes de logique juridique* (Brussels: Centre national de recherches de logique, 1976)).

rationality, this rule is to be enunciated in universal terms: indeed, using a prior case to decide a present one is likely only if the (interpretative) rule is universal.

In summary, once precedents can be shown to meet the universalisability requirement, they start to play a role in legal justification. The role they play is also justified by the principle of formal justice.

2.2 The principle of formal justice: the role of precedents in internal justification

While universalisability introduces precedents into the justificatory domain, two further dimensions of the rule of justice – namely the principle of *formal* justice and the principle of *inertia* – answer the question of how to use them. Principles of justice and inertia support a relatively binding system of precedents: a system that combines both following and departing from precedents.

In discussing this idea, a distinction has to be drawn: that between internal and external levels of justification, or between logic and rhetoric.[14] The internal level concerns the logical-deductive foundation of judicial decisions; the external level focuses on the foundation of given premises.[15] Precedents play an important role at both levels of justification. In particular, it is argued that the formal or logical aspect of the rule of justice supports the importance of precedents at the internal level of legal justification: following precedents becomes a rational practice that contributes to the consistency of legal reasoning. Moreover, the moral aspect of the rule of justice, that is, the so-called principle of inertia, supports the role of precedents at the level of external justification. Here, departing from precedents is considered a rational practice that contributes to the coherence of legal reasoning.

Legal reasoning developed at the internal level adopts the form of a legal syllogism. Two requirements set an important test for the rationality of this structure of (logical) justification: the universalisability of the premises (which has already been analysed) and the logical support between premises.[16] That is, a judicial decision is justified (at least from its internal point of view) if it derives logically from a universal norm, and if the logical inferences are correct.

In addition, as far as the legal validity of a legal syllogism is concerned, it has to meet a further requirement relating to the major premise: it must not only be enunciated in universal terms, but also be recognised by the legal system as a *must-source* of law.[17] Since precedents, unlike statutes, are not considered must-sources of law by civil law systems, one may conclude that they cannot give rise to a legal syllogism. However, far from rejecting the relevance of precedents in legal reasoning, I shall argue that the principle of *formal* justice

14 RRL.

15 J Wróblewski, "Legal syllogism and rationality of judicial decisions" (1974) 3 *Rechtstheorie* 33–46, p. 33; R A Alexy, *A Theory of Legal Argumentation*, R Adler and N MacCormick (trans.) (Oxford: Clarendon, 1989), p. 221; J Wróblewski, *The Judicial Application of Law* (Dordrecht: Kluwer, 1992), ch. 10; RRL.

16 A Peczenik, *Grundlagen der juristischen Argumentation* (Wien New York: Springer-Verlag, 1983), p. 167. Alexy considers the foregoing requirements as rules of argumentation. In particular, he refers to J.2.1, "At least one universal norm must be adduced in the justification of legal judgment", and J.2.2, "A legal judgment must follow logically from at least one universal norm together with further statements" (*A Theory*, p. 223).

17 Peczenik argues that sources of law may be classified as *must*, *should* and *may*-sources, depending on the justificatory strength the legal system attributes to them. In fact, in all civil law systems, statutory laws are must-sources: judges must refer to them as major premises in order to develop a correct supportive structure. Precedents, however, are considered should-sources of law; that is, notwithstanding their justificatory relevance, they are not accepted as major premises. In other words, precedents cannot give rise to a legal syllogism.

justifies precedents contributing to two requirements of internal justification, namely universalisability of premises and correctness of deductive inferences.

As far as the correctness of a legal syllogism is concerned, both *consistency* and *formal correctness* of logical inferences must be considered. Formal justice establishes a constraint for consistency.[18] This constraint is twofold: simultaneous consistency and consecutive consistency.[19] The former avoids two mutually contradictory premises being used in the same diagram of reasoning; the latter avoids two similar and consecutive cases being treated in a different way. Obviously, the practice of following precedents contributes to the consecutive consistency of legal argumentation, and, therefore, they contribute to the rationality of legal reasoning.

Along with the requirement of consistency, formal correctness of logical inferences also governs internal justification. To illustrate the effect of precedents in this sense, the concept of *transformation inside the law* developed by Peczenik is introduced here:[20]

> The solution of many cases does not follow deductively from statutes or/and sources of law, including the already established non-written rules and principles, together with a description of the facts of the case. In those cases, the lawyer must choose that solution which he considers to be the best one from the legal point of view. He must perform a transformation of a new kind, which will be referred to as "decision-transformation"; that is, he "jumps" to the decision, a concrete legal judgment expressing or implying a "legal ought".[21]

Peczenik identifies four kinds of decision-transformations:[22] precise interpretation; elimination and reduction; creation of new norms; and solution of collisions. Jumps or non-logical steps in legal reasoning are overcome by adding to the original diagram of legal reasoning those premises which guarantee the formal correctness of the argumentation, namely: precise interpretation; elimination or reduction; creation of new norms; and, finally, solution of collisions. The results of the incorporation of more premises into the reasoning are twofold: (i) premises derive logically from other premises (hence, no unjustified jumps in the reasoning have been found); and (ii) logical inferences are reinforced by sets of sub-premises. The outcome is the so-called complex legal syllogism where a set of premises[23] is used to guarantee the correctness of deductive reasoning.

18 Some authors (for all, see A Peczenik, "Sui Precedenti Vincolanti" (1996) 6 *Ragion Pratica* 35–43, p. 37) argue that *analogy*, instead of formal justice, justifies the relevance of precedents. Such a foundation demands from judges an extra justificatory exercise concerning the similarity between the prior case and the case to be decided in their relevant features. Analogy, in relation with precedent, supplies the following rule: whenever a judge decides to follow a precedent, he or she should justify the similarity of relevant features between the prior case and the case to be decided. Despite the justificatory exercise established by analogy, it is not considered here, as the foundation of precedents as analogy does not explain why, in those cases which are analogous to prior ones, precedents are not followed. In other words, analogy does not provide a justification for departing from precedents. Unlike analogy, the rule of formal justice, developed below, provides divergence techniques: essential instruments in modifying or abandoning precedents.

19 G H Wintgens, "Coherence and understanding" (1993) 79 ARSP 483–519, p. 504.

20 Peczenik distinguishes between transformation *into* the law, and transformation *inside* the law. The former occurs when a jump is performed from a non-legal premise to a legal one. A clear example goes as follows: from the premise "equality is good", it does not follow logically that equality "is a fundamental right". This kind of transformation or jump attributes legal validity to a legal system. A transformation *inside* the law appears when a jump between two legal premises has been performed. So, the last premise does not follow logically from the first one. These transformations ascribe validity to sources of law and judicial decisions.

21 A Aarnio, R Alexy and A Peczenik, "The foundation of legal reasoning" (1981) 12 *Rechtstheorie* 133–58, 257–79, 422–48, p. 152. A jump ($p \rightarrow q$) is performed, Peczenik says, when the following conditions are fulfilled: (i) p is brought forward as a reason for q; and (ii) p does not deductively entail q (p. 137).

22 Aarnio et al, "The foundation", pp. 152ff.

23 Aarnio et al, "The foundation", pp. 152ff.

Premises that are inserted into the complex syllogism can either be created *ex novo*, or be contained in prior decisions. This last possibility says much about the relevance of precedents at the level of internal justification. Using precedents to refer to rules of interpretation, elimination, reduction or solution of collisions, which are embodied in prior decisions, paves the way to a completed logical chain: precedents justify legal transformations or jumps and generate long and complex chains of reasoning.

Hence, although prior decisions do not start a logical syllogism, they contribute to long and strong chains of reasoning: overlooking precedents certainly weakens legal justification. However, an objection may be raised against the use of the principle of formal justice as the foundation of a theory of precedent: it does not deal with the content of precedents and, therefore, formal justice justifies following precedents even when they are wrong (due, for example, to a mistake in their deductive structure) or are incorrect (due to changes in values or principles which make the prior decision incoherent). This objection does not deny the importance attributed to the rule of justice. It rather highlights that the formal dimension of the rule of justice must be complemented in order to allow departure from wrong and incorrect precedents.[24] That is the role reserved to the principle of inertia, considered here as the *moral* dimension of the rule of formal justice. Inertia introduces precedents at the level of external justification.

2.3 The principle of inertia: the role of precedents in external legal justification

If precedents perform a justificatory function at the level of internal justification, this justificatory aspect is reinforced and enhanced at the level of external justification. Here, precedents are to be considered as arguments that justify a judicial decision, even when prior decisions are modified or abandoned. As set out above, the foundation of this argumentative use of precedents is the rule of justice, or even better, the moral dimension of the rule of justice: the *principle of inertia*.

For Perelman, the principle of inertia states that a criterion that has once been accepted cannot be rejected without providing a sufficient reason for it.[25] The relevance of Perelman's concept of inertia for rational argumentation is twofold. First, it provides a necessary starting point for the argumentation: to follow an existing criterion is a practice that does not require justification, since the rational actor (the judge) presupposes its justification.[26] Second, the principle of inertia determines that changing the criterion does need justification. The consequences upon rational argumentation could not be more

24 Using precedents, even to abandon them, confronts courts with diachronic coherence and the defeasibility of the principle of formal justice. Indeed, the principle of formal justice is applied as a rule as soon as no further reasons defeated it. This means that the defeasibility of principles is not a categorical feature, but a dispositional feature: it only comes about if a given requirement is met, namely, in t2 a reason, which collides against the principle of formal justice, excludes the application of this principle, and this exclusion was not foreseen in t1 (García Figueroa, "La incidencia", p. 215).

25 C Perelman and L Olbrechts-Tyteca, *Traitè de l'argumentation. La nouvelle rhètorique* (Brussels: University of Brussels, 1944), p. 142.

26 Notice that, apparently, there is not much difference between the principle of formal justice and the principle of inertia since both justify the same practices: following an existing criterion and, therefore, treating similar cases in a similar way. However, it can be argued that their scope in rational argumentation is different. On the one hand, formal justice provides the first requirement for rationality since to treat similar cases in a similar way is the first barrier against arbitrariness; on the other hand, the principle of inertia provides what Perelman calls the foundation of the stability of our intellectual and social life (Perelman and Olbrechts-Tyteca, *Traitè de l'argumentation*, p. 144). Indeed, to justify would become an impossible activity if every time that the rational actor had to decide and justify a decision, she had to do it as though nothing had been done, that is, as though she faced a *tabula rasa*. Without presupposing something, Perelman concludes, no argumentation can start.

important: first, the rational actor may doubt the correctness of an existing criterion; second, the rational actor may challenge the existing practice;[27] and third, the rational actor must justify the change of criterion.[28]

Hence, formal justice and inertia provide a rational foundation for a relative binding system of precedents: to take precedents into consideration entails not only following, but also being ready to depart from them.[29] As Alexy puts it, "the techniques of divergence are the constituent parts of the techniques for the application of case law".[30]

Such a relative binding model based upon the principles of formal justice and inertia contributes to the *coherence* of legal reasoning. Moreover, it will be held that the principle of inertia is considered as having a *moral* dimension that connects the use of precedents with the level of external justification.

In order to elaborate the former ideas, let us start from an elemental notion of coherence: synchronic coherence. Synchronic coherence represents the perspective of a time-independent coherence. According to this, both simultaneous consistency and consecutive consistency are necessary requirements of legal reasoning. A more elaborate notion of coherence is provided by the concept of diachronic coherence: a time-dependent kind of coherence. From this perspective, logical contradictions between consecutive cases are permitted and, therefore, similar consecutive cases may be treated in a different way. Consecutive inconsistencies of legal reasoning are likely to happen due to the introduction of the principle of inertia in rational argumentation: in that case different treatment of similar cases is possible (and rational) if good.

That consecutive consistency is simultaneously a necessary condition (referring to synchronic coherence) and not a necessary condition (in the case of diachronic coherence). This can be understood only if it is accepted that "coherence is a matter of degree".[31]

> Sometimes coherence is preferred to consistency. In other terms, first level coherence or consistency as the lowest level of coherence, is sometimes abandoned in favour of other levels of coherence . . . Then, only the search for more *coherence* can justify inconsistencies over time.[32]

The principle of inertia paves the way for a divergence from precedents since it establishes that a change of criterion must be justified. It also implies that the consecutive inconsistency that entails the changing of criterion can be justified by a different (higher) degree of coherence. Thus, when reasons are given to justify a consecutive inconsistency, for example modifying or departing from precedents, this logical contradiction is valid:

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27 In this sense, Perelman understands inertia as the guarantee that the argumentation can go on even if an existing criterion is abandoned. If this is the case, the main requirement is to provide reasons for the change.

28 Alexy (*A Theory*) considers inertia as a rule of the burden of argumentation, that is, a rule that determines who has to justify what (in this case, she or he who doubts a prior criterion has to justify the change).

29 A relative binding notion of precedents can only take place within an argumentative and justificatory model of legal reasoning, such as the one proposed below. In fact, if prediction of legal decisions were a principal requirement of legal reasoning, then any consecutive inconsistency (only possible by inertia) would have to be rejected. This is not the case: civil law and common law systems adopt rational justifiability rather than predictability as the core of legal reasoning.

30 Alexy, *A Theory*, p. 278.

31 Wintgens, "Coherence", p. 491. The gradual notion of coherence held by Wintgens has been chosen in this article since it reconciles two essential ideas in philosophy. The first idea is that consistency is a minimum requirement of coherence (a first degree according to Wintgens' terminology) and, therefore, similar cases ought to be treated in a similar way. The second is that sometimes coherence is preferred to consistency and, therefore, sometimes similar situations have to be treated in a different way for the sake of coherence in rational argumentation.

32 Wintgens, "Coherence", p. 504.

> Other reasons could be counterbalanced to justify a decision that is inconsistent with, but not necessarily worse than, *earlier* decisions. They can become better, and justified with new arguments in which another (combination of) rule(s) or precedent(s) is thought of as more appropriate.[33]

At the level of external justification – concerning the validity or correctness of given premises – inertia establishes two further requirements in relation to precedents: first, inertia provides a rule of *burden of argumentation*; second, it is the basis of a *criterion of coherence* that guides the justification of the divergence (a moral criterion).

The principle of formal justice leads to a more than useful rule of burden of argumentation: existing interpretative criteria are justified, and whenever they are applied in future similar cases no further justification is required.[34] This burden of argumentation either exempts or obliges justifying the application of a precedent, because it determines that whoever follows an existing and justified rule embodied in a precedent does not need to justify it again. However, not following these decisions requires rational justification.[35]

Departure from prior criteria or precedents is justified when good reasons have been put forward. In particular, departing from precedent implies (i) justifying the incorrectness of the prior decision, and (ii) justifying the correctness of the newly adopted criterion. It is crucial to highlight that, at the level of external justification, *correctness* must be thought of as the second level of coherence, that is, as the relation between the new ruling or interpretative criterion and the rest of norms, values and principles.

I believe that, since MacCormick acknowledges the special case thesis, a criterion of coherence is required which urges an equilibrium between both institutional reasons – such as statutes, precedents and even doctrinal opinions – and non-institutional reasons – such as moral, social or economic reasons. This equilibrium is possible only if several circumstances are given: a coherent system of norms so that judges' intervention may increase this coherence; individuals that support their decisions by arguments and reasons; and, finally, a procedure that guarantees the correctness of legal argumentation.

If a concept of coherence that describes a relationship between several elements of issues is the preferred coherence in legal argumentation, it seems to become a question about the correctness of argumentative procedure, of discussion and, finally, of rationality. In this sense, a rational and supported divergence from precedents increases the coherence of the argumentation and the value of legal certainty, not because consistency is more relevant but rather because the rationality of the justification is controlled.

3 Impact in Continental legal systems

A doctrine of precedents founded on the principles of formal justice and inertia is not novel to German and Spanish Constitutional Courts (BVerfG and CC respectively). The BVerfG has established that the principle of equality[36] justifies following precedents if the cases are similar, whereas abandoning or distinguishing precedents is always possible for the sake of the correct evolution and formation of law. The Spanish CC has also had recourse

33 Wintgens, "Coherence", p. 505.

34 Presuppositions of the justifiability of prior interpretative criteria, far from being rejected in legal argumentation, are thought of as points of departure: "Argumentation cannot begin without presuppositions." (Alexy, A *Theory*, p. 173)

35 The requirement of justifying the change from precedents is enunciated by Alexy in the following burden of argumentation rule: "(J.14) Whoever wishes to depart from precedents carries the burden of argumentation." (Alexy, *A Theory*, p. 278)

36 Art. 3.I GG.

to the principle of equality[37] to justify following previous decisions and to require further justification when these are abandoned.

Although the practice of the BverfG and the CC in the use of prior decisions runs along the lines of the doctrine of precedents sketched out above, the practice of the German Bundesgerichthof (BGH) and the Spanish Supreme Court (SC) focuses on the legal institution of appeal. Indeed, the foundation for using prior decisions is the authority of these courts whose function is to control the application of law made by other (lower) judges and courts. Hence, prior decisions are thought of as techniques of control rather than as techniques of argumentation: First instance courts follow the SC's prior decisions because, otherwise, their decisions will be subject to appeal; the SC follows its prior decisions to unify legal doctrine. However, this foundation does not apply to the following or abandoning of its own prior decisions, and as a result, multiple contradictory lines of reasoning coexist, increasing legal uncertainty and making the SC the last instance tribunal rather than a court of appeal.

Adopting a theory of precedents such as the one described above would improve the practice of the SC as an appellate court because prior decisions would have to be referred to when following and when abandoning them. The SC would have to identify the interpretative line embraced and the interpretative line abandoned or distinguished. Hence, the new foundation of appeal would be unity in the application of law thought of not only as repeating prior criteria but, even more, as identifying lines of reasoning by abandoning others in a rational and justifiable manner.

The symbiosis between the doctrine of precedents outlined here and the foundation of appeal also affects the rationality of lower courts' decisions. Indeed, if appeal is founded on the notions of unity and hierarchy, lower courts' decisions which do not follow prior SC lines of reasoning are bound to be appealed, even if abandoning the SC's prior decisions is justified. Taking on board the principles of formal justice and inertia, however, allows lower courts' decisions that do not follow prior decisions of the SC to be subject to appeal only if the justification given to abandon a precedent is incorrect. The focus of the appeal becomes the rationality of the contested decision rather than the repetition of prior decisions. Further, this new foundation of Spanish appeal would leave the door open for lower judges to become motors of new lines of reasoning, favouring their evolution by contributing new evaluative elements without being accused of not fulfilling their obligation to respect the SC's prior decisions.

The practice of the BGH is similar to the model outlined above for a new appeal in Spain. Although very much focused on the role of the BGH as an appellate court, it recognises that, apart from controlling lower courts and judges, the BGH plays a key role in the development and formation of law. A strict binding model of precedents is rejected precisely because it is perceived as an obstacle to the development and formation of law, although the BGH has not elaborated explicit rules concerning the distinguishing and abandoning of precedents. To the BGH, the values of legal certainty and legitimate expectations (*Vertrauensshutz*) must be balanced against the evolution of law. Only if decisive reasons arise, can the prior decision be abandoned or distinguished (BGH 85, 64 (66); 106, 34 (37); 125, 218 (222); y 128, 85 (91)). Precedents are prima facie binding:[38] they are used either to be followed or to be abandoned/distinguished. In this case, the BGH not only requires the elaboration of a new interpretative criteria which substitutes the prior one,

37 Art. 14 Spanish Constitution.

38 Alexy, *A Theory*, p. 261.

but, almost, the justification of the abandoning/distinguishing old criteria. Using precedents becomes, therefore, a matter of justification.

Finally, in the Dutch system, two different practices can be highlighted: using precedents as rulings to govern a case; and using precedents to interpret the law. The first use presupposes that judges, and in particular the Hoge Raad (HR), play a key role in forming the law. Indeed, the HR understands its adjudicatory function as a substitute for the legislator, undertaking an active role in the development and formation of law, even in those cases where the legislature has not ruled or has failed to do so.[39] The second use, more traditional within European continental systems, also has a peculiarity: the strong importance of particularism in legal adjudication which compels judges to take into account all relevant features of the case in order to make the correct decision. The features of previous cases become irrelevant for they may not be taken into consideration in a new case. Further, no justification is needed to distinguish or modify previous cases: the fact that the relevant features do not match is enough to found a new ruling for a new case. Hence, distinguishing, overruling or even modifying precedents depends on the particular features of the case. This particularism seems to be incompatible with a rational model of using precedents as a legal justification that also promotes the evolution of law.

4 Conclusions

The theory of precedents sketched out here owes very much to MacCormick's considerations on the constraint of formal justice and second-order considerations.[40] It further explores his embracing of the special-case thesis as stated in his RRL and argues that precedents are followed because similar cases ought to be treated alike (formal justice), and they have rationally to be distinguished and even abandoned if there appears to the court good reasons to do so (moral justice). These reasons are in the nature of the case controversial and the values that they necessarily incorporate change over time. That is, using precedents, even to abandon them, confronts courts with diachronic coherence and the defeasibility of the principle of formal justice as a dispositional feature.[41] Using precedents in legal argumentation not only entails using their ratio decidendi to judge the case, but also using the principle of justice, which has the disposition to defeasibility, to justify either following or not following precedents.

39 The HR has interpreted the failure to legislate on euthanasia as an implicit mandate to the judiciary to state the relevant rules.

40 LRLT.

41 García Figueroa, "La incidencia", p. 215.

A reply to comments on Rhetoric and the Rule of Law

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I am more than grateful both to the three commentators whose papers appear together with this response, and also to Dr George Pavlakos and his colleagues in Queen's University Belfast for organising a "meet the author" seminar to discuss *Rhetoric and the Rule of Law* (RRL),[1] The three authors are at least partly in agreement with main themes of the book, essentially suggesting ways to develop the argument further and better, or to clarify further its basis. So replying to them is not a matter of adopting a defensive posture in front of a citadel of beliefs under attack. There is much to be welcomed in the exhortations to take the case further, or to expand it.

Giovanni Sartor's own high standing as an expert in logic, norm-logic and formal elements of legal reasoning gives weight to his endorsement of three points I hoped to establish between chapters 3 and 4 of RRL. These are that:

- it is possible to apply formal deductive logic of an essentially syllogistic kind in reasoning about the application of norms;
- that there is, accordingly, scope for deductive reasoning in legal justification;
- that respect for the rule of law requires that any legal claim or accusation in the context of civil litigation or a criminal trial must have an underlying (even if not superficially explicit) syllogistic structure.

It has on many occasions been vigorously denied that any of these propositions is or even can be true. Generation by generation it is solemnly intoned that the law is not logical at all, and that it is unprofitable to trouble the minds of young students, far less established lawyers, with the disciplines of logical thought or formal reasoning. Critics of my earlier *Legal Reasoning and Legal Theory* (LRLT)[2] lined up in reasonable number to attack the claims about deductive reasoning I advanced there (one, however, offered valuable constructive criticism, to which I have also attended).[3] Therefore, there seemed to me to be good reason to try to tie down all these fallacious attacks on "logic" once and for all and refute them, even though this led two critics to accuse me of excessive attention to "academic" points, or undue "courtesy" to other authors.

Sartor's corroboration of the essence of this part of my message is therefore extremely welcome. He is right, moreover, to urge that there is a much wider scope for recognising the useful, even essential, character of various other types of formal reasoning in legal justification, including reasoning about proof of facts using statistical or other means, as with DNA evidence. I agree with this, and regret only that my confined expertise makes it unlikely I shall contribute much to analysis of this expanded domain of formal reasoning myself. At least the refutation of the anti-logicians may help to clear the intellectual space in which such studies can thrive.

Sartor is also correct to draw attention to a certain difference between Chaim Perelman and myself, for all the respect I give the former, in regard to the connection or opposition between rhetoric and logic. Perelman inclined to treat the two as mutually oppositional or exclusive. Yet in my view, if we take the domain of rhetoric to be that of argumentation

1 N MacCormick, *Rhetoric and the Rule of Law* (Oxford: OUP, 2005).

2 N MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978).

3 P White, "Book review" (1979–80) *Michigan Law Review* 737–42.

that is rationally persuasive, it may be that formal arguments belong within the larger domain as one subsection of it. This will be so for the reasons that Sartor expresses in his paper, and that one may also find in Stephen Toulmin's account of the uses of argument.[4] It is not the case that legal reasoning is sometimes logical, sometimes rhetorical. It is both together, or rather, the persuasive reasons that tell for or against a legal conclusion may, and in some cases must, include demonstrative or "logical" elements, for example the "legal syllogism". For, all the problems that cannot be handled in a purely demonstrative way (problems of relevance, of classification and evaluation, or of interpretation) are necessarily, in the litigious setting, mapped onto an essentially syllogistic formulation of the case for decision. Still I do not think it is in conflict with the essentials of Perelman's life-work to assert that logical reasoning is a necessary but insufficient part of the whole fabric of rational persuasion and argumentation in the legal context (as in others).

So far as concerns the dialectic between universalistic and particularistic reasoning in law and the uses of particular analogies as against general principles expressly formulated, I find Sartor's graphic presentation very illuminating. It certainly captures the way in which reflection about problems moves upwards and downwards from particular to universal and back again. On the other hand, each of the elements in such an overall presentation may need its own explanation. At any rate when working within the structure of a traditional printed book, this entails a linear investigation of elements that in the activity of thinking may enter into rational reflection more in the kind of circular way that Sartor exhibits than in a book-like linear fashion. I do not pretend to have in any sense anticipated his way of presenting this (indeed, it is more likely that I culpably failed to reflect on it in finalising the text of RRL). Yet I think I might claim that the successive chapters of RRL from 5 to 13 do the necessary work of unpacking and analysing the elements he represents. At least I would suggest (as I think he agrees) that our contributions are better considered as mutually complementary, than as rival or opposed accounts of the very same thing.

On defeasibility, he rightly suggests that a purely pragmatic representation of defeasibility is incomplete, for there are ontic and cognitive aspects also to be taken into account. Nevertheless the pragmatic aspect is important and not to be underplayed (as I am sure he agrees). Indeed, I am not sure how far the pragmatic differs from the cognitive, if at all. That is to say, one goes ahead with arrangements, taking on trust that all is well with them, but aware that problems can arise and being in some sense ready for them if they do. In legal life this can be formulated in terms of the defeasibility of rules, or in terms of whether they are of absolute, strict, or discretionary application, and much the same may go for principles.

However that may be, there is certainly the ontic or ontological issue also to be considered. Does that which is defeasible exist until defeated, or does its defeat mean that it is as if it never had been? Is nullity *ab initio* simply a grand case of nullifiability, as Kelsen contended? These are questions I was not ready to deal with in writing RRL, partly because I had consciously reserved the treatment of them for *Institutions of Law*,[5] preparation of which was already far advanced at the time of the Belfast seminar in April 2006. Perhaps the best I can do here is to quote the conclusion I have reached in the more recently published work:

> It is necessary to differentiate different sorts of failure or imperfection in power-exercising acts. Some involve attempts to make arrangements that never achieve even presumptive validity, for example, because purportedly carried out by

4 S E Toulmin, *The Uses of Argument* (Cambridge: CUP, 1958).

5 N MacCormick, *Institutions of Law* (Oxford: OUP, 2007).

> persons wholly lacking relevant capacity or competence. Some are carried out by competent persons, but with defects of procedure or form of a grave kind. Such arrangements are sometimes simply ignored because of their obvious defectiveness, but sometimes it may be more prudent to treat them as valid, or possibly valid, until the fact of the defectiveness is established and appropriate judicial declarations have been granted indicating the nullity *ab initio* of the purported arrangement. Some are cases of legal imperfection rather than radical defectiveness. In law, this can justify a nullification of the act or arrangement from the moment at which the complaint of imperfection was first raised. Looked at in the perspective of normative ontology, norms and normative arrangements of the former two kinds are not valid and do not exist, though in respect of the second kind it is pragmatically prudent to treat them as at least possibly existing until they have been declared non-existent. Imperfect arrangements do exist until such time as they are revoked or nullified.[6]

In that same book, I advance reasons for thinking it necessary to go beyond positivism even if one is inclined to start out from reflections on work in the tradition of H L A Hart and Hans Kelsen. In short, I confess to being or having become a post-positivist, whether or not that makes me now a proponent of natural law. This makes it easy for me to face up to the challenge of Stefano Bertea when he argues that "in making legal reasoning constitutive of the concept of law, the revised theory embraces a foundational element of non-positivism". Quite simply, I plead guilty as charged.

Bertea thinks that this conclusion is one forced upon me because I am "committed to the view that the practice of legal reasoning is constitutive of the concept of law, and that law is therefore an argumentative domain through and through". This is a very interesting and insightful suggestion, yet one which makes me wonder in which direction the argument runs. Is argumentation and reasoning "constitutive" of law, or does the practice of argumentation arise within legal life because of some more fundamental and (as it were) primitive quality that makes law "law"?

Both in RRL and in *Institutions* (as also in the earlier *Questioning Sovereignty*),[7] I characterise law as "institutional normative order". In expounding the institutional theory in full detail in *Institutions*, I treat this as an explanatory definition, in the final chapter giving a methodological defence of this way of proceeding. The point is that human beings are in all their co-ordinated social activities norm-users: a fact most spectacularly exhibited in the human capacity for speech that is activated in children between infancy and puberty through presence in a community of language-speakers. As speakers, we are norm-users, using norms that no one ever deliberately made. We are norm-users before we are norm-givers. Nevertheless, by a process of institutionalisation, humans, or some of them anyway, can become norm-givers, and others norm-appliers and decision-makers. Institutional normative orders are complexes of institutionalised norms and the activities that they facilitate or mandate. A special case of this is to be found in the modern constitutional state (alias "*Rechtsstaat*" or "law-state").

Institutionalisation of order in such states involves some form of the separation of powers, most importantly securing the independence of a judiciary and determining legislative and executive powers, to whatever degree these are kept separate with a view to securing the accountability of the executive. This in turn makes possible the securing of a

6 MacCormick, *Institutions*, pp. 155–6. The account offered there follows that of Dick W P Ruiter in his *Legal Institutions* (Dordrecht/Boston: Kluwer Academic Publishers, 2001, p. 169 and preceding pages) – note his distinction between "revocatory, voiding, suspensive, and invalidating legal acts".

7 N MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999).

realm of ordered liberty under law, which is the other side of the establishment of the rule of law. Laws are essentially made prospectively by the legislature, and executive action cannot exceed the limits of legislative or constitutional empowerment. These laws are applied by independent judges in civil and criminal courts, as well as in tribunals of public law (whether or not these are considered to be "courts" in the ordinary sense of the term). For this to secure "ordered liberty", it is essential that citizens have unimpeded access to law courts, and a full right to defend themselves in the face of any kind of accusation or complaint laid before a court. The application of law is perennially capable of giving rise to problematic issues of interpretation. Accordingly, the rights of a free citizen include the right to present one's own case, or have it presented by an advocate of one's own choosing, and this entails a right to argue for whatever seems the most appropriate and favourable interpretation of laws or precedents.

Thus, it is in this context that the argumentative character of law becomes most fully developed. It is the law of the constitutional state that exhibits the dualism of, on the one side, insistence on the rule of law and, on the other side, acknowledgement of the law's intrinsically arguable character. Taking institutional normative order in its broadest and most generic sense, one may say, certainly, that all norms involve some use of reason and all norms do form the basis of judgments that can be reasons for action. To judge that a certain statement is false is to judge that it would be wrong to assert it as true, with reference to some general norm about the duty to tell the truth. And that is a reason not to represent the relevant statement as true. So one may also say that simply as norm-users we are necessarily practical reasoners. Action and judgment by reference to norms and values is a central part of practical reasoning. In this wider sense also, one can subscribe to Bertea's propositions about the character of law as this emerges from the theoretical reflections in RRL and *Institutions*. If this entails that the institutional theory in this form is the "missing link" that bridges the gap between Hartian analytical jurisprudence and Dworkinian interpretivism, that will be all to the good. Anyway, I have to acknowledge my general agreement with Stefano Bertea's friendly and insightful account of the trajectory of my thought over several decades, and his analysis of where I have ended up.

Perhaps this also opens up an opportunity for some fresh thinking about Leonor Moral Soriano's more specialist topic of precedent in the legal practice and reasoning of different legal systems, specially referring to the contrast of civilian and common law systems in this context. From a standpoint of pure practical reason, in the context of an institutionalised legal order with a trained and independent judiciary arrayed into first instance tribunals and one or two levels of appellate or cassational tribunals, precedents deserve to carry some weight in the reasoning of tribunals. It is a waste of everybody's time and of the litigants' money if lower tribunals ignore prior decisions by, or, especially, established lines of decision-making by, hierarchically superior tribunals. Economy of effort itself dictates that tribunals not go back and repeatedly re-decide essentially the same matter, in addition to which, the justice of treating like cases alike is always something that tells in favour of adhering to prior rulings on disputed points. Again, the "rule of law" ideal, that advocates reasonable certainty and constancy as well as prospectiveness of law, suggests that, all things equal, it is better to follow precedent than to ignore it. As Moral Soriano points out, this can be justified in two ways, by the independent but related principles of formal justice and of inertia.

The critical question then becomes that of when the qualifying condition "all things equal" is not satisfied. There can be circumstances in which a precedent or a line of precedent may come under reasonable criticism, so that it should be distinguished or heavily qualified, or even in an extreme case abandoned or overruled on grounds either of justice

or of expediency. This is a process that is properly handled by the courts only where the argument from coherence applies. That is, the underlying and acknowledged principles and values of the branch of law in question tell in favour of the ruling in this case that departs from or distinguishes the ruling in the unsatisfactory precedent. Usually, this will mean in addition that there are competing analogies available in the previous case-law which can be appealed to in preference to the rejected precedent.

Such are considerations that apply to any law-state, regardless of legal tradition and inheritance. On the other hand, one reading of the "separation of powers" doctrine (one that has been influential, for example, in Spain and France) insists that law-making power not be in any way entrusted to the judiciary, whose task is applying the law, not making it. Article 2 of the Napoleonic Code seeks explicitly to break with the old freewheeling practices of the pre-Revolutionary parlements by prohibiting judges from making the law under the pretext of interpreting it, and threatening them with penalties if they venture into making *arrêts de règlement*. In these circumstances, to acknowledge judicial precedent as a "source of law" would be to subvert a fundamental constitutional understanding. Nonetheless, it remains the case, as we have noted, that there are reasons why a regard to precedent is as reasonable in French or Spanish settings as in any other.

I therefore very much welcome the highly interesting account that Leonor Moral Soriano gives of the variable institutional contexts found in different systems. How does control of lower court decisions by cassation square with acknowledging a critique by lower courts of precedents that were originally established by decisions of the court of cassation (however named in a given legal system)? How can advocates make a case for reconsidering precedents if the pretence is maintained, in public at any rate, that precedents are not followed or are never a sufficient ground for a decision? Germany, Spain and the Netherlands, as she points out, share similarities but have also local differences, and none fully resembles the French model. Constitutional courts are different again.

The most important lesson she teaches me is to be less positivistic, and less home-bound in my treatment of this issue. The reasons which make it just and prudent to respect precedents always fall short of authorising any kind of absolutely binding precedent. In the context of a richly developed theory of argumentation as justification – but justification of individual law-applying decisions made by judges – one can see reasons why any court ought to consider relevant prior decisions as genuinely persuasive whether or not technically binding. But the same reasons are relevant to not-following some precedents, namely, those which are insufficiently persuasive considered in their substance, not their form. In discussing common law systems, one may be tempted to include precedents among "sources of law", and to connect this up to Hart-like theories about a rule of recognition that contains a variety of criteria of validity of law. This is, however, very implausible in respect of the types of system Moral Soriano discusses – but then her insights turn back against even the common law version. For, many of the uses of precedent among common lawyers parallel quite closely what goes on elsewhere. They are rooted in a common sense of justice and practical reasonableness in decision-making. In respect of this, I am very grateful to have been reminded that I need to attend far better to some of the work that my late friend Aleksander Peczenik did a quarter of a century ago, working along with Aulis Aarnio and Robert Alexy.

What is clear is that one should follow the recommendation of Leonor Moral Soriano (and also of RRL) by separating a theory of precedent from a doctrine of binding precedent. Doctrines of precedent link up with constitutional principles and values, and are

system-specific. A theory of precedent should elucidate what makes it possible and reasonable to have regard to precedent and the extent to which the treatment of precedents ought to be variable according to other systemic differences among legal systems.

Such a conclusion links back both to Sartor's paper and to that of Bertea. Where precedents are not recognised as a "source of law", the idea that there could here be a formal method of applying them, on the model of a "rule plus facts" type of legal syllogism would be unacceptable. No rules as such are to be extracted from precedents. But, as Sartor points out, formal reasoning can have a wider scope than that postulated in that model, and in particular argument by analogy is susceptible of at least some formal modelling of some kind. On the other hand, Bertea's suggestions about the "argumentation thesis" suggests that we mislocate the theory of precedent if we seek to wedge it into a doctrine about "sources" of law. Even in the common law systems it has been vigorously, and rather convincingly, argued that the "model of rules" simply fails to capture the character of common law.[8] The common law and the use of precedents in the common law are better conceived as a style of reasoning and an approach to decision-making rather than as some systematised aggregate of rules.

This would then motivate a further reconsideration of the Hartian inheritance. The idea of a "rule of recognition" as the ultimate rule of every legal system, whereby all the other rules of a legal system can be identified, deserves reconsideration. For a start, "recognition" is tribunal-relative. There is a single French state and a single body of law that is French law. But the Cour de Cassation and the Tribunaux de l'ordre juridique justify their decision-making by reference to quite different grounds from those used in the Conseil D'Etat and inferior administrative jurisdictions. In some federal states, such as the USA, central courts apply different bodies of law from those that are binding on the superior courts of the states in the federation. The Kelsenian construction of a *Grundnorm* behind the federal or the state constitution is a much more credible candidate as the ultimate unifying norm of the legal order of a *Rechtsstaat* than is a "rule of recognition", though treating basic norm as mere presupposition in the Kelsenian style is unconvincing.

What courts do have to have, in the light of the "argumentation thesis", is not a rule for recognising rules. What they must have is a practice of acknowledging a normatively appropriate range of grounds and forms of argument applicable to justify the way in which they fulfil their duty of applying those norms that the constitution requires them to treat as "laws". This in turn requires that they have clarified how they have to interpret this duty. Here is where we should seek for the materials to construct doctrines of binding and persuasive precedent, set against the background of an overarching theory of precedent that is itself grounded in an account of practical argumentation in law.

8 A W B Simpson, "The common law and legal theory", in A W B Simpson (ed.), *Oxford Essays in Jurisprudence* 2nd series (Oxford: Clarendon, 1973) Ch. 4.

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Positivism as a statist philosophy of law*

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> . . . we shall take legal positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.[1]

This statement, by H L A Hart, has had a considerable and lasting influence on modern jurisprudence. The question of law's relationship to morality is most clearly addressed in the context of adjudication, for it is here that questions relating to the law's legitimacy and binding authority arise in their most distinctive forms: if it is sometimes necessary for a judge to reach beyond the settled law in order to produce judgment in a difficult case, then how can the authority of legal decisions be considered an aspect of their legitimacy? The authority of judicial decisions would then seem to be associated with the official powers of a judge (conferred by rules of adjudication) rather than the legal merits of judicial opinions. This forces us to confront the possibility that judicial deliberations must focus on conventional rules and standards which might conflict with general principles of justice and fairness.

The focus on adjudication is unfortunate, for although it allows the basic questions to be posed in a clear-cut way, it also considerably narrows the scope for informative answers: general questions pertaining to law's authority are unhelpfully bound up with the more specific rule-based authority of judges to render decisions. The issue becomes whether the law can be said to exhibit principles of justice which are interpreted and expounded as they are applied; or whether legal judgments should be recognised as entailing moral choices about the applicability of legal rules and principles *in place of* general considerations of justice. Yet if we turn our attention away from the adjudicative context in which the law is applied, and focus instead upon the context in which the law is expounded and studied, the basic questions imposed by Hart's suggestion are much less clearly posed and responded to.

When we consider the law from the perspective of the jurist rather than the judge, it becomes manifestly less easy to separate the formal authority of law from its perceived legitimacy. The common law system of doctrinal precedent is one in which scholarly exposition has generally involved the exploration of received ideas and entitlements rather

* I would like to express my thanks to Amanda Perreau-Saussine and Fiona Smith for helpful discussions on the issues raised in this essay, and to Neil Duxbury and George Pavlakos for their incisive comments and suggestions on an earlier draft.

1 H L A Hart, *The Concept of Law* 2nd edn (Oxford: Clarendon 1994), pp. 181–2.

than the enumeration of settled rules. Hence it is difficult to separate the humanly created aspect of law from the thought that doctrinal scholarship consists in the tracing out of principles and entitlements which need to be "dug out" and interpreted from the mass of existing writings and ideas rather than consciously laid down or invented. Because the jurist aims to shed light on the whole mass of legislative rules and decided cases, his writings reveal perspectives on (and hence raise questions about) the principled aspect of law which are not evident from familiarity with the primary legal materials.[2] How might Hart's suggestion help us to reconcile the posited, rule-based character of law with its principled, systematic qualities?

There are two distinct ways in which Hart's statement might be understood. In the first place, it might be read as suggesting that the content of *particular* laws can fail to satisfy or embody particular moral demands: it might be morally necessary for promisors to fulfil their undertakings (at least in normal circumstances) irrespective of the content of the promise, but it is not inevitable that the laws of contract currently in force will replicate such conditions (for instance by making legal liability dependent on consideration or other formalities, or on the legality of the undertaking). In this way, the law may set out a scheme of rights and liabilities which differ from that which morality itself demands.

If this *is* how the above statement is to be read, then it seems too banal to constitute an effective intellectual foundation for legal positivism. For we might accept that law and morality sometimes demand different things without abandoning a view of law as a moral idea. The law of contract may operate on the basis of principles which differ, in various respects, from the moral standards we bring to bear on ordinary cases of promising, but that mundane truth does not force us to give up the belief that law inevitably and intrinsically embodies moral ideals: we might continue to believe that the meaning of legal rules is clarified only through interpretations of their underlying point or purpose in the light of the general values which the law is thought to serve.[3] Legal scholarship, in this way, embodies both the human face of law *and* its moral, principled character: for the activity of the legal scholar in interpreting and expounding the law preserves the intuition that law derives from intellectual endeavour, without forcing us to see it as the product of conscious decision.

Jeremy Bentham is famous for exhibiting hostility to just this idea. For Bentham, the appearance of scholarly reliability and objectivity in expounding the law is undercut when we consider that the fulfilment of the jurist's task (that is, the provision of a principled context within which to comprehend and justify legal rules and decisions) depends upon an obvious disregard for the limits of exposition. Bentham's distinction of "censorial" from "expository" activities anticipates an alternative way of understanding Hart's suggestion: for we may read Hart's statement as proposing a conceptual distinction between law and morality in a more general sense. In this second sense, the statement suggests that propositions of law are not recognised as valid legal rules on the basis of their moral qualities, but according to rules of recognition which identify legal rules by virtue of their basis in one of the formal sources of law. The substance of legal rules is, on this view, determined independently of any moral judgments we might make about the context of underpinning values that the rules are thought to serve. This thought *does* serve to

2 See in particular Blackstone's remarks on the virtues of a common legal education: *Commentaries on the Laws of England* (various editions) vol 1, p. 32.

3 Someone might conceivably object, for example, to the postal acceptance rule on the ground that it sometimes allows individuals to evade their moral responsibilities; but although we might distinguish legal liability from moral duty in this way, we can still accept that the postal acceptance rule serves particular standards of fairness (standards which differ from ours), and that an appreciation of those standards is essential to an understanding of how the rule works in practice.

distinguish legal positivism as a significant philosophical position, but it has the disadvantage of rendering obscure or newly problematic much that was central to traditional understandings of the jurist's and the lawyer's task. Just as Bentham responded to the problem of doctrinal writing by denying its possibility, so it is tempting to view later positivists as highlighting the humanly created aspects of the legal order, whilst downplaying or suppressing those elements of legal scholarship which defy a positivist explanation.

In this essay, I aim to explore some of the intellectual conditions which led to the emergence of legal positivism. I shall suggest that positivism was made possible, in part, by a changing conception of the moral basis of a system of laws. Once seen as a rational reflection of human nature, law gradually came to be viewed as an artificial product of the state. A statist view of law creates an immediate problem for the relationship between authority and legitimacy: how can a body of imposed rules provide a legitimate basis for the rule of law? Legal positivists have tended to respond to this problem by drawing a distinction between the law's formal, rule-based authority and moral questions pertaining to its legitimacy, concentrating largely on the former as the proper domain for jurisprudential enquiry. This has had the unfortunate effect of hindering the development of informative accounts of law's moral nature by focusing attention on the analysis of conceptual distinctions and definitions.

The statism apparent in the writings of Hobbes and his intellectual descendants in some sense makes such conceptual distinctions inevitable; but the direct focus on conceptual connections is in an important sense a product of the 20th century: the analytical philosophy which Hart brought to bear on jurisprudential problems was consciously formulated as a new departure, heralding a fresh approach to the set of problems inherited from the philosophical failures of the past. The attempt to understand the moral nature of law was largely abandoned in favour of the more limited aim of clarifying the concept of "law" *prior* to engagement in the moral and political questions in which the law is immersed; the thought being that such clarified understandings better prepare us for the journey when the time comes. From this perspective, the nature of Bentham's (or Austin's) contrasts between the legal and the moral are much more limited in scope and purpose than the application of the label "analytical jurisprudence" might imply.[4] Bentham and Austin continued to operate in a world in which jurisprudential reflection aimed at a greater understanding of law's role in bringing about progress and social change. Clarifying conceptual categories (such as "law" and "morality") may have played a part in paving the way to such an understanding, but the idea that such clarifying activities form the main focus for jurisprudential concern would have struck the 19th-century legal writer as absurdly misguided.

Doctrinal science and positivist ideas

The jurisprudential thinking of the modern day is characterised by its attachment to conceptual analysis as a means of unearthing the intellectual foundations of legal practice and legal reasoning. By revealing the conceptual presuppositions of legal practice, it is thought, we gain important insights into the form and structure of the legal order; insights that stand apart from the doctrinal disputes confronted by ordinary lawyers, and that supply the general framework of ideas which make such doctrinal disputes intelligible and possible. The modern view of legal practice as being open to general analysis in this way has

4 Bentham, for example, was mainly preoccupied with the goal of demystifying a legal order still largely understood in terms of natural right, and with establishing a scientific approach to legal scholarship which would clarify and distinguish the task of reporting the law from that of judging and reasoning. (One should therefore be wary of assuming that the category of "expository" jurisprudence is a direct precursor of "analytical" jurisprudence.)

encouraged an understanding of law as an arena to which rival conceptual and ethical theories must be applied, rather than a source of moral or political insight in its own right.

Suppose, however, that we think of the moral nature of a society as being shaped and determined not just by the way it addresses questions of human interaction, but also in respect of the aspects of human interaction that are considered to be worth addressing. We might then think of the legal order as a reflection of the moral life of the polity, and its institutional arrangements as a source of moral insight. Older forms of jurisprudential inquiry repay examination in this regard: for they primarily concern, not the presence or absence of conceptual associations between different modes of reasoning, but rather a philosophical investigation into law's moral nature. Within early modern juristic thought, that nature was conceived as being intrinsically bound up with the moral nature of human beings.

Any human society in which individuals live in close proximity to one another is likely to act *both* as a locus of human flourishing and mutual achievement *and* as a source of frictions and conflicts of interest. If social order is a value worth preserving, but can only be secured through the imposition of rules which restrict a naturally free will, then an organised body of legal rules and standards seems both necessary and highly problematic. Classical juristic understandings thus rested on the assumption that the possibility of governance through law was dependent upon that law being, in some sense, *our* law: that is, as embodying shared standards of conduct which emerge, not from "above" by the arbitrary fiat of a political overlord, but from the shared attitudes and understandings of the people to whom the laws apply.

During the course of the 17th century, these assumptions were laid increasingly open to doubt as forms of legal scholarship emerged to challenge the possibility of grounding collective obligations in a shared moral experience. Such approaches developed a concern with law's systematic qualities, and with its posited, rule-based nature, rather than with the substance of customs and usages which evolved to deal with social problems where they arose. These developments were not without long-term consequences for our understanding of the legal order: the central task of the juristic scholar became that of explaining the law's status both as a systematic body of principles and rights, and as an organised body of imposed rules and standards. Jurisprudential theories became increasingly centred upon the structural properties of the legal order, and upon investigations into the ultimate bases of legal authority. The moral basis of a system of laws was seen as something distinct from, and perhaps prior to, the substance of particular laws as such, and hence as something open to rational and scientific investigation in its own right. The move towards a "rational science" of the law therefore entailed a shift away from a conception of law as based on social custom and practice, and towards a conception of law as serving rational principles which transcend those practices.

The pursuit of such rational explanations of law's nature brought about an intellectual climate in which reflection on the substance of customs and established rules was thought incapable of yielding any lasting insights into the moral foundations of law's authority. The foundations of legal authority were instead sought elsewhere: either in the system of rights and principles which derive from the natural law, or else from the state itself, in the form of legislated commands emanating from a sovereign will. Yet the intellectual shifts which distinguish the modern view of the legal order from the medieval are themselves products of various social and political forces which repay close examination.

In the medieval world, the dominant understanding of law's nature viewed the legal order as a product of reason. The intellectual background to this understanding was broadly Aristotelian: rationality (in practical matters, at least) did not in general concern the

deduction of rules from more general principles, but was instead thought to be rooted in experience and the ideal of the examined life.[5] It was therefore in the substance of the customs, rules and maxims that made up the classical common law, rather than in the ultimate foundations or sources of customary rules and ideas, that lawyers looked for evidence of the law's rational nature. The traditional form of moral reflection at common law hence took rules and customs to be an immanent source of moral insight rather than the product of some more basic or transcendent moral ideal.

The legal scholarship of the medieval period was sustained by a number of related assumptions about the nature of reason, and about the place of law within society. The medieval lawyer moved within a conception of law as a reflection of God's eternal law. Legal rules and customs were thought to be the expression of human understandings of the divine will: though reason cannot establish beyond doubt what God's will demands, yet we might hope to approach an understanding of that will by bringing our collective intelligence to bear on the questions of how to live wisely and act righteously in this vale of tears.[6] The common law represented the accumulated wisdom of a society engaged in the attempt rationally to comprehend the application of justice in specific situations.

These assumptions about the character of law could only be made against a background of universally accepted ideas about the nature and ends of moral thought. Christian theology supplied the framework within which lawyers and non-lawyers alike reasoned about moral matters, and as long as that framework continued to shape the fabric of moral thought, it was possible to view law as giving an authoritative and definite expression to justice and the moral good. By the mid-17th century, the realities of sustained religious conflict had considerably eroded faith in the ability of reason to supply insights into the moral good. Rival moral understandings emerged which displaced Aristotelian notions of wisdom and necessity and instead placed human beings with diverse interests and agendas at the centre of the moral universe. Law ceased to be regarded as the expression of universally accepted moral truths and instead came to be seen as an instrument through which the activities of individuals with competing interests and needs might be regulated and coordinated.

The intellectual landscape of the modern era is defined by the shift away from a view of civil society as a world in which human beings strive for the good life through their collective endeavour, to one in which society represents a divided and fragmentary association of individuals who articulate and pursue private conceptions of the good which vie and compete with the rival conceptions of their neighbours. This shift suggested a different basis for law's authority and the need for new explanations of law's binding force. The idea of natural rights supplied one way of interpreting law's binding nature in this divided world: by viewing the standards of justice and rationality necessary for social life as transcending social order rather than being immanent within it, the natural lawyers were able to suggest principles of social order whose origin in the divine will guaranteed their immutability and objectivity. Law could no longer be understood as a loose assortment of decrees and customary remedies, but instead came to be seen as giving expression to

5 See Aristotle, *Nicomachean Ethics*, book 4, ch. 8. On the Aristotelian basis of medieval law in general, see S Siegel, "The Aristotelian basis of English law 1450–1800" (1981) 56 *New York University L Rev* 18, especially 30ff.; also J W Tubbs, *The Common Law Mind: Medieval and early modern conceptions* (Baltimore: Johns Hopkins UP, 2000), ch. 8.

6 See C St German, *Doctor and Student; Or dialogues between a doctor of divinity and a student in the laws of England* 18th edn (S Sweet, 1815), p. 80. St German provides several examples of common law rules and maxims which clarify or supplement the rather limited outpourings of speculative reason, but he also makes the general observation that while reason can warn us against doing evil, it is up to collective experience and custom to establish which particular acts are evil, and to establish earthly penalties for their commission.

universal principles of justice which required systematic explanation. The customary basis of common law scholarship was gradually replaced by the development of a doctrinal science of law and, through a changing conception of juristic speculation, as a series of questions *about* doctrinal legal science.[7]

The purpose of doctrinal legal science was accordingly to trace out the system of justice implicit within the rules of the common law. An individual's rights were seen as deriving from universal principles which structure the social world prior to the establishment of concrete forms of political association. Forms of human association came to be viewed as both expressive of principles of the good and as being governed by such principles. The juristic assumptions of the medieval period, in which moral insights were gained by reflection upon the life of the polity, were gradually replaced by a picture in which morality is seen as a matter of speculative insights upon the nature of the good itself, apart from the various social forms in which moral values participate. This encouraged jurists to develop bolder classificatory schemes which represented the common law not merely as collection of procedures and remedies, but as a body of doctrine giving systematic expression to general principles which underpin the customary forms of redress. Understandings of legal authority hence became more formal: the binding force of particular laws no longer emerged, as it were, from below (from long-established and common usage) but from universal moral principles which imposed duties from the top-down. Political and social life were perceived to be governed *by* law rather than *through* law.

These developments suggested just one way in which a descending model of political authority might be understood. Other philosophical standpoints emerged in which alternative understandings of descending authority were explored and considered. Surprisingly, the most significant of these alternative accounts was also presented as a series of deductions based on natural rights: Hobbes, like Grotius and other natural law writers, based his account of political origins on the thought that human beings possess natural rights to their own preservation and survival. Despite this common starting point, Hobbes was to view the presence of natural rights as giving rise to a conception of legal authority as the product of artifice, and of law as the creature of the state. "The Right of Nature", Hobbes proclaimed,

> is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently of doing any thing, which in his own Judgment, and Reason, he shall conceive to be the aptest means thereunto.[8]

This way of understanding natural rights suggested a very different underpinning for civil authority from that proposed by Grotius and his intellectual heirs. Grotius's own theory was based on the view that the law of nature demanded the mutual recognition of basic rights possessed by human beings, both to self-preservation and to the material means to sustain life. Natural laws thus simultaneously permit human action and set limits to permissible action in ways that allow for collective flourishing.[9] Insofar as the natural law reflected man's social nature, the means by which lasting forms of social order could be achieved were not thought to be fully distinct from the ends in view: many forms of social

7 The idea of a "juristic science" of legal principle came increasingly to prominence in the 18th century, partly under the pressure of developments in the natural sciences. Stair's *Institutions* (1681) was one of a growing body of jurisprudential commentaries whose goal was to present the law from the standpoint of a "rational science" (see *Institutions* 1.1.17).

8 T Hobbes, *Leviathan*, R Tuck (ed.) (Cambridge: CUP, [1651] 1991), I.14.91 – subsequent page references are to this edition.

9 H Grotius, *De Iure Belli ac Pacis*, "Prolegomena" (Leiden: Kluwer Law International, 1952), pp. 8–9.

order, from primitive customary orders to complex totalitarian or market societies, might develop as manifestations of this nature as long as basic rights continued to receive recognition and forms of human flourishing remained possible. But although human sociability might be given expression in different ways, the Grotian theory clearly presupposed the existence of basic agreement (through rational reflection) on a framework of moral ideas by which peaceful forms of association could develop.

The philosophical standpoint developed by Hobbes had no place for such a suggestion. For although he shared with Grotius the idea that everybody would recognise a basic right for each person to preserve and defend themselves, he argued that such a recognition could do nothing to prevent fundamental conflicts of belief about the actual circumstances in which defensive actions are justified.[10] Accordingly, Hobbes interpreted such conflicts as creating conditions of permanent and pervasive conflict in which each person must rely on their own judgments as to how their preservation is to be secured. The recognition of this necessity can thus be interpreted as the possession by every person of "a Right to every thing; even to one another's body".[11]

This use of the language of rights is in some ways misleading, for Hobbes's assertion that "right" signifies an area of liberty wholly outside that of "law" makes it unclear whether he intended to describe a juridical situation at all.[12] The conflicts Hobbes has in mind are those of belief: our moral judgments, he believed, were rooted not in any external moral qualities of actions or events, but in desire itself, and thus claims about the good (or evil) "are ever used with relation to the person that useth them," there being "no common Rule of Good or Evil, to be taken from the nature of the objects themselves . . .".[13] It followed that specific implementations of the right of self-preservation are incapable of being characterised as "just" or "unjust" in any significant sense.[14]

Hobbes believed that the sole means of escape from the conditions of boundless conflict lay in the realisation that each person's beliefs about the morality of their actions are products of the imagination which possess no foundation in reality. The fact that each person holds different and opposing beliefs about justice and the good should indicate to the wise that their assumptions are no more secure than anyone else's. The possibility of stable social relations thus depends upon the joint relinquishing of powers of moral judgment, and the passing of those powers onto a judge or arbiter "whom men disagreeing shall by consent set up, and make his sentence the Rule thereof".[15] Hobbes's proposed understanding of political authority is based on the priority of form over content: since there is no secure basis for ethical reflection from which shared moral perspectives might emerge, law must take the form of explicitly prescribed rules laid down by some recognised authority.[16]

10 See R Tuck's "Introduction" to Hobbes, *Leviathan* (p. xxix); also Hobbes, *Leviathan*, I.13.89–90.

11 Hobbes, *Leviathan*, I.14.91.

12 Hobbes, *Leviathan*, I.14.91: "For though they that speak of this subject, use to confound *Ius* and *Lex*, *Right* and *Law*, yet they ought to be distinguished; because RIGHT consisteth in the Liberty, to do or to forebear, Whereas LAW, determineth and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent."

13 Hobbes, *Leviathan*, I.6.39.

14 See Hobbes, *Leviathan*, I.13.90: "To this war 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." I have suggested elsewhere that this reading of Hobbes needs some qualification: see S Coyle and K Morrow, *The Philosophical Foundations of Environmental Law – Property, rights and nature* (Oxford: Hart Publications, 2004), ch. 2.

15 Hobbes, *Leviathan*, I.6.39.

16 'It is not Wisdom, but Authority that makes a Law.': T Hobbes, "Dialogue between a philosopher and a student, of the common laws of England" in A Cromartie and Q Skinner (eds), *Thomas Hobbes: Writings on common law and hereditary right* (Oxford: Clarendon Press, 2005), p. 10.

This approach to the problem of political origins suggests a different, more formal understanding of legal authority from that proposed by natural rights theory: rather than the laws of the polity deriving from substantive principles of the good on which all, in principle, could agree, we are invited to think of the binding force of legal rules as being a matter of their origin and of the fact of their constituting authoritative, clear-edged propositions which each person agrees to accept as a shared basis for social order in the absence of agreed moral perspectives. Law might then be viewed, not as a body of ideas expressive of shared conceptions of the good, but instead as a framework of imposed rules, entitlements and permissions which make the joint pursuit of competing conceptions of the good life possible.

Posited rules and formal authority

The justification of powerful, source-based rules as a consequence of moral disagreement is not without problems. We need such rules because, on this view, we are incapable of otherwise reaching agreement on basic norms which could serve as a foundation for social order: each person pursues their own narrow self-interests, and the endless diversity which exists between personal conceptions of the good would exclude the possibility of developing settled rules for addressing shared moral concerns in abstraction from the circumstances of particular conflicts. Suppose we accept the view that in the absence of authoritative, black-letter rules, the social world would be characterised by a chaotic struggle between subjective understandings and intentions. How can precisely stated posited rules bring about social order in such conditions?

There are two distinct senses in which explicitly formulated rules might be said to offer precision. The rules could be "precise" in the sense of possessing an authoritative verbal form; or they could exhibit precision in *applying* in a fully determined and unambiguous way to the particular circumstances of each disagreement of a certain kind. No realistic set of imposed rules could be said to exhibit precision in the latter sense: the legal rules of a large or complex society inevitably focus on types of behaviour rather than specific actions, so that the application of a rule depends not upon "matching" a set of facts to precisely worded descriptions enshrined in the rule, but proceeds instead from understandings and appraisals of action in the light of the purposes or policies which the rule is thought to serve. The possession of an authoritative verbal form is therefore in itself insufficient for reconciling divergent points of view about the demands of justice in specific situations.

Because no two situations are entirely identical, the application of general rules to particular circumstances involves the tracing out of quite fine differences between otherwise similar sets of facts in the light of the values that the rule promotes. Yet it is precisely these differences that disputing parties will seize upon to justify their divergent understandings of the rule: for their argument can be represented as one concerning the *relevant* respects in which one case can be distinguished from others in the light of the rule's purpose. Verbally formulated rules are thus just as likely to amplify interpretative disagreements as to resolve them.

The Hobbesian state of nature is often taken to exhibit these difficulties in an especially potent form. Outside the artificial bonds of civil society, Hobbes argued, men stand in relationships of "continual jealousies, and in the state and position of gladiators; having their weapons pointing, and their eyes fixed on one another".[17] In a world where each person poses an immediate threat to everyone else, shared interests and beliefs cannot establish themselves: for how could we communicate basic desires to one another when the

17 Hobbes, *Leviathan*, I.13.90.

only occasions for human contact involve tense face-offs and fights for survival? People in such circumstances would remain unreadable to each other, for our grasp of the beliefs and motivations of others would be forever formed from our private interpretations and the struggle for survival at all costs. The very possibility of men setting up by consent a ruler or judge whose sentence will become a source of rules for governing conduct, is undercut by the very conditions which make such rules necessary.[18]

Suppose such an authority laid down rules for regulating conduct in this way. Shared interpretations depend upon a reasonable degree of uniformity in experience and attitudes which allow for the possibility of shared understandings of how human beings adapt their conduct to the world around them. Without some measure of convergence on basic concerns, rules seeking to regulate conduct in specific ways would remain completely unintelligible. We can see this if we contemplate a rule forbidding children from smoking tobacco. In the absence of shared understandings, how might such a rule be regarded? Does it, for example, mean that children are allowed to chew cigars, since chewing is different from smoking? Does "smoking" refer to inhaling, or does it merely imply setting fire to something, so that children are free to purchase cigarettes and inhale their fumes so long as they do not themselves light the cigarette? By "tobacco" does the rule mean to refer only to actual tobacco leaves, so that children are forbidden from setting fire to tobacco plants (perhaps out of a concern for those plants) but are otherwise permitted to light and consume tobacco products? Does "smoking" include the ingestion of the smoke from other people's cigarettes, so that infringements of the rule may occur accidentally? Indeed, does the rule apply only where *more than one child smokes* tobacco at a given time?[19]

There is, in principle, no limit to the number of conflicting interpretations we could make of rules such as this one. The reason why we are able to disregard such interpretations lies in the shared background of understandings and concerns within which individuals in a stable community think and move: though we will inevitably differ with one another to a degree over the moral status of children, issues relating to liberty etc., we share enough in the way of ordinary concerns and ideas as to make the moral conceptions at work in the rule intelligible. We know, for example, that the rule serves to protect children from the consequences of a reduced decision-making capacity, and to promote their health and well-being in the face of avoidable harm. We know this, because we share basic understandings of what children are like, and because we value health and recognise that a free choice is not always appropriate or desirable. Without such understandings, expressly created rules contribute nothing to an orderly social existence.

The failure of authoritative, deliberately posited rules to bring about stable social relations by virtue of their supposed "precision" may lead us to contemplate another way in which expressly created rules might supply grounds of social order in a morally divided world. For, instead of bringing about a convergence in attitudes and concerns, such rules might be seen as offering neutral standpoints within which various, possibly conflicting visions of the good life can be formulated and pursued. Law, on this view, consists of a framework of rules and principles which prescribe no particular form for the good life, but instead establish pockets of right and liberty within which individuals are free to engage in their own projects and pursuits.

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18 For one thing, it is entirely unclear how the denizens of the state of nature could evolve a shared language through which such sentences would be understood. Shared interpretations of vocal sounds and utterances also depend upon some collective sense of how human beings perceive and understand the world around them. Without a shared language, of course, it would seem that human beings lack the ability to formulate reasoned propositions about what the laws of nature demand. See Hobbes, *Leviathan*, I.13.89.

19 For further discussion, see N E Simmonds, "Between positivism and idealism" (1991) 50 *Cambridge LJ* 311–18.

This proposal initially seems more promising than one which focuses on the precision with which deliberately created rules are expressed. Whereas the latter approach conceives of legal rules as bringing interpretative disagreements about the good to an end, the former seeks instead to contain such disagreements within the reasonable boundaries set by the rules. Indeed, the rule-based neutrality view need not be premised on a view of law as consisting in *posited* rules at all: we might, if we wished, think of morality or reason as suggesting an ideal distribution of entitlement and liberty under which each person can freely pursue his or her own ends without undermining the efforts of others.[20] The circumstances of disagreement from which the need for positive rules of law arises nevertheless reveal rule-based neutrality as a particularly attractive ideal in which to enfold a positivist view of law. A chaos of competing views and ideas would prevent any widespread recognition of neutral standpoints; yet the explicit creation of formal rules for peaceful social interaction would both furnish such standpoints and reveal the law's moral neutrality.

We might wonder whether, in the end, rule-based neutrality provides any better reasons for embracing legal positivism than the view that deliberately imposed rules create "precision". For rule-based neutrality to work, the rules of the legal order must not be constitutive of any particular form of the good, but must instead bring about conditions which facilitate the pursuit of diverse conceptions of the good by individuals who disagree about what the moral good requires. Suppose we think of a conception of the good life as being a matter of what each individual rationally prefers. Since there are no obvious means of establishing which set of rational preferences are the best, the laws of the polity must ensure that each person remains free and unmolested in their pursuit of their own preferences in their own way.

There are at least two difficulties with this suggestion. It is, first of all, unclear whether this ideal is really any different from one of "precision": saying that legal rules must not allow any one conception of the good life to dominate over others is the same as saying that the rules must not be capable of interpretation in the light of subjective conceptions of the good. As we have seen, however, the application of general rules to specific circumstances of disagreement is precisely an occasion for the emergence of rival interpretations of the rules in the light of the moral conceptions and experiences of disputing parties. The ideal of "neutrality" is thus of no more use than the ideal of "precision" in bringing such disputes within a firm regulatory framework.

Suppose it were possible for legal rules to establish precise, determinate standards, which would allow them to express moral neutrality in this way. The ideal of rule-based neutrality would still face a second, and seemingly insurmountable objection. Each person, on this view, formulates and pursues their private conception of the good life within the boundaries permitted by the rules. The formulation of each person's rational preferences therefore takes place within constraints and limits imposed by authority. Neutrality demands that the formulation of preferences remains independent of the content of legal rules; for the presence of causal links between rules and preferences would undermine moral neutrality. Yet we do not think of individuals as plucking preferences out of thin air: rather, we think of preferences as making sense only within the concrete possibilities established by a way of life. Since the framework of legal rules is instrumental in determining the form of life within the polity, a person's preferences are never fully independent of the rules which make social life possible.

20 See, e.g. Kant's "Metaphysical principles of the science of right" in I Kant, *Philosophy of Law*, W Hastie (trans) (Edinburgh: T&T Clarke, 1887).

The rule-based neutrality view overlooks the constitutive role played by legal rules in shaping the social life of the polity. A person's preferences relate to the choices which can be made about different paths in life. Law inevitably shapes such choices, by establishing limits to permissible conduct. Consider the rule banning children from smoking: even if we share enough in the way of cultural understandings to comprehend the meaning of such an injunction, how can it be presented as a neutral standpoint in a world in which concerned welfarists live alongside radical libertines? In such a world, disagreements about the positive rules would force the jurist to seek out "neutral" interpretations in ever more abstract and recondite forms. An image of rationality in which each individual adopts a free-floating attitude of "preferring", within the constraints established by posited rules, is thus of no value to an understanding of the complex relationship between law and the web of social life. For, we think of each person as formulating and making choices from a position of immersion within the ordinary meanings and shared understandings which the rules perpetuate.[21]

Positivism and statism

The attempt to understand law in terms of formal authority was a response to the circumstances of disagreement which characterise the modern world. The problem of peaceful coexistence in such a world was the problem of identifying neutral standpoints which could serve as a basis for social order. Legal positivists conceived of deliberately created standards as the unique means by which a peaceful and stable coexistence could be achieved.

Despite the problems with that suggestion, we may feel reluctant to give up altogether the idea that posited rules are in some sense necessary for the coordination and regulation of conflicting desires and interests. In conditions of prolonged controversy about the moral good, customary rules and practices will seem to offer too thin a basis for stable social relations, and the idea of natural rights will fail to stabilise expectations significantly in the absence of broad agreement as to how such rights should be traced out. Positive law might then be thought of not as a creative force, bringing about agreement through the imposition of rigid prescriptions on an otherwise shapeless social void, but as an instrument through which existing expectations and interpretations are reflected and refined.

A proposal of this kind requires substantial revisions to the positivist notion of formal authority. Suppose we were to turn the Hobbesian argument around: black-letter rules do not forge social consensus out of the chaos of competing moral visions, but instead prevent the breakdown of shared beliefs to the point where a chaotic anarchy of subjective claims threatens to engulf us all. Such rules cannot exist apart from shared understandings and beliefs, but they provide a focal point through which beliefs and understandings can be articulated and reinforced. This necessitates the recognition of the social world as something other than an anarchy of conflicting subjective visions. But such a recognition renders a purely *formal* conception of legal authority impossible: for it demands that we view many ordinary legal rules as being tied to underlying practices which treat the rules as expressive of the broad moral ideals which are implicit in our social relationships and dealings. Some degree of convergence in ethical judgments is a prerequisite for social relations of any kind; we might then think of the rules as offering further stability and refinement to ordinary expectations where reasonable people disagree about the precise implications of informal understandings.

21 A similar argument can be levelled at Ronald Dworkin's interpretivism: see Simmonds, "Between positivism", p. 325.

Legal positivism of this latter kind is captured neither by the thought that posited rules establish rigid and precise standards, nor by the idea that legal rules exhibit moral neutrality. Positivism of this kind is best understood as the suggestion that the law of a complex and morally diverse society must consist largely in rules articulated by the state: either in the form of general legislative frameworks devised to secure some collective advantage or goal, or through the binding judgments of courts in the adjudication of private interests and claims. A statist conception of law is thus indicative of a changing conception of the function of law. Law is no longer viewed simply as a collection of customary remedies for redressing private wrongs, but as an instrument for the general regulation of private life and for the pursuit and realisation of social goals. As the possibilities of law's regulatory function manifest themselves within the scholarly imagination, doctrinal legal rules are less easily presented as crystallised customs, their content increasingly seen instead as determined by official practices of recognition.

The shift towards a statist conception of law entails certain assumptions about official determinations of the content of legal rules. One persistent source of philosophical debate in modern jurisprudence is thus the notion of a "rule of recognition". In some respects, the rule of recognition offers a means of clarifying the legal order's place in intellectual life which is not vastly different in scope and purpose from the definitional manoeuvres of Austin and earlier positivists: exercises of political power constitute a permanent source of moral disagreement among the members of a polity, but (the positivist argues) our moral deliberations are considerably clarified by an understanding of which forms of political interference have the force of law.

If a rule of recognition is to produce such clarity, modern-day positivists believe, then it must establish criteria of legal validity which do not *inevitably* appeal to moral values: the criteria of validity which determine the law within a jurisdiction may include reference to moral criteria, but do not *necessarily* so refer. Hence many legal philosophers have sought to clarify the nature of law not by sustained reflection on the role of law within the political life of the polity, but through argument about the properties of the rule of recognition itself. Jurisprudential reflection has thus come to centre on the issue of whether or not the process of "recognising" the validity of legal rules is inherently a moral one.

Concern about law's moral nature is, of course, hardly new. The political writers and jurists of the Exclusion era constantly feared the development of "arbitrary" or absolute government: the fear that the monarch, as the supreme source of legal and political power, would seek to rule without Parliament and institute political and religious reforms fundamentally at odds with the established customs and moral life of the realm. Opposition to the idea of arbitrary rule received expression through the belief that the country was governed by an ancient constitution which safeguarded individual rights and established limits to the use of political power throughout the polity. The traditional focus on immemorial custom embodied the idea that the binding quality and ruling force of law in some sense emerge from the characteristics and practices of the people to whom it applies.[22] The possibility of law was thus thought to depend upon the positive law being underpinned by practices which treat those rules as expressive of a moral position drawn from the social life and customs of the realm.

22 This belief constituted the main strand of Whig opposition thought throughout the late 17th and early 18th centuries. Parallel notions of social contract and popular sovereignty were sharply distinguished from it, and were largely confined to the margins of British political life. For a useful, though not wholly reliable, account of Exclusion-era political thought, see L Ward, *The Politics of Liberty in England and Revolutionary America* (Cambridge: CUP, 2004). For a rather different take, see J C D Clark, *English Society 1660–1832* 2nd edn (Cambridge: CUP, 2000).

To a modern positivist, the fears of the Exclusion-era writers demonstrate the contingency of the association between law and morality: by deliberating and opposing the idea of arbitrary government, early modern thinkers displayed their awareness of absolutist rule as a *possible* form of social order. Hence (we might be led to suppose), the rule of law does not inevitably depend upon conformity to certain moral values, but may just as easily rest upon the shoulders of a powerful monarch whose very word is law. There are at least two good reasons for denying the validity of such suppositions.

In the first place, it is far from clear that arbitrary government in the positivist's intended sense *is* a possible source of stable social order. Where repressive, totalitarian or absolutist forms of government exist, they generally have to be sustained by a significant ruling class to whose values and interests the laws appeal. Not only will laws require interpretation in the light of those values and preferences, the legal order must also continue to regulate the wider moral, political and economic life of the polity. A system of laws is thus dependent upon the maintenance of existing social ties in respect of commerce, labour, religion, the recognition of property and familial relationships, and so on. An authoritarian regime with an aggressive agenda for social change will inevitably modify *some* established ties, but it must ensure basic continuity with previous patterns of social practice if it is to create a lasting form of social order. A system of posited laws (even under "arbitrary government") must therefore be rooted in widely acknowledged social practices which treat those laws as expressive of certain moral ideals. The ideals do not have to be bolshevik in cultural origin, but they must at least be menshevik. Lasting forms of social order thus do not invite classification as law because they conform to positivistic semantic criteria, but because they foster or perpetuate certain social and political practices which, in the case of absolutist regimes, allow the ruling caste to maintain dominance over the repressed majority.

The second point is that the forms of arbitrary government to which the positivist may appeal in support of the law/morality distinction do not represent the typical form of governance in the real world. The goal of jurisprudential reflection is to understand the role of law *within* the political life of the polity. The proper focus for philosophical inquiry is thus upon the forms of legal order most central to that life.[23] Since it is typically governance rather than "repression" as such which constitutes the point of law, philosophical reflection is best aided by concentration on instances of legal order which seek to promote stability and peaceful forms of human flourishing rather than those which undermine or suppress them. Analytical philosophers may, of course, develop and pursue conceptions of "law" in ways that are independent of particular political goals and ideals; but they do not thereby clarify law's role within political life: rather they obscure it. Notions such as "law", "right", "justice" etc. do not constitute self-standing ideas but form part of the canon of political ideas through which we understand and reflect upon our form of life. The idea that we can achieve an enlightening understanding of law prior to immersion in substantive moral and political forms is a chimera indeed.[24]

Statism and its limits

The statist idea of law came about as a means of addressing the problem of coordination and stability in conditions of moral pluralism and social disagreement. Early positivists such

23 Typical or central, that is, as opposed to merely most prevalent; although one would obviously expect forms of governance which are most central to the realisation of a form of social life to be also most prevalent among instances of that form of life.

24 One is reminded of Jeremy Waldron's suggestion that latter-day positivists seem intent on defending a position *called* "legal positivism", no matter what that position turns out to be (*Law and Disagreement* (Oxford: OUP, 1999), p. 166).

as Hobbes and Bentham are best understood as proposing a conception of law as an instrument for stabilising and securing moral consensus rather than suggesting the legal order's total separation from morality. Nevertheless, the move towards a more formal conception of law's authority is bound to invite progression beyond a view of the law's refining function, to one in which legal rules are viewed as modifying and supplanting existing moral practices (as is the case in Bentham's jurisprudence). The central problem of jurisprudence then becomes that of explaining how law can be both reflective and at the same time constitutive of social order.

The same circumstances of disagreement which propel the idea of posited black-letter rules into the centre of legal thought also render accounts of law's binding authority deeply problematic. It is not easy to offer systematic answers to these contradictory features of the legal order without presupposing either a narrow and constraining positivism or increasingly abstract versions of moral idealism. It is nonetheless possible to offer the following tentative suggestions.

(1) The law of a complex market society is no longer capable of being viewed as a body of customs reflecting shared practices and expectations; rather, law inevitably comes to be seen as consisting largely in a system of imposed rules which *restructure* expectations. A statist conception of law thus makes it impossible to understand legitimacy as deriving from the thought that the law is in some sense "our" law. Instead, (in the absence of any other obvious expedient), legitimacy becomes a matter of the law's conformity to standards of fairness, equality and the protection of individual rights etc. which exist in abstraction from the ordinary contexts of clashing understandings in which they figure.

This is inclined to suggest a picture in which the law is *either* seen as serving universal moral values which lie beyond the expressly formulated rules; or else as establishing conventions to which each person is subject in the same way, no matter what their personal status: the legal rules which apply to young hooligans are the same as those which apply to little old ladies.

The former view encourages the legal scholar to seek out the meaning of equality and fairness at ever-increasing levels of abstraction from the black-letter rules which are said to exhibit those virtues. Legal rules are then conceived as giving no more than partial expression to moral ideas which stand in need of elaboration in the light of more general ethical understandings and ideas of justice. Accordingly, the jurist's task is seen as that of offering an account of the general theory of justice which underpins the black-letter rules. Unfortunately, the entire corpus of legal rules (taken as a whole) is not usually thought to serve this or that specific moral purpose, but rather to regulate a whole range of social relations in the absence of shared moral perspectives on the questions to which the rules apply. Doctrinal principles of tort law can be viewed as expressing *the same* underlying principles of justice as rules relating to the operation of trusts only by espousing ideals of justice in the most glib and uninformative terms. The quest for unifying explanations of a body of rules is thus often wont to suggest the picture of an ideal order of moral principles quite at odds with the mundane reality of clashing interests and interpretations.

The second suggestion lately set out does not, however, fit with ordinary legal practice much more successfully. For the common law is not easily

viewed as consisting in the application of fixed standards to abstract bearers of rights and duties, but instead displays sensitivity to circumstance and to the peculiarities of the dealings between the litigating parties (think about the kinds of circumstances which affect a person's status as a bona fide purchaser, for example). Jurisprudential writers who favour this second understanding are then forced to resort to the pernicious idiom of distinguishing rigidly between "applications" of the rules versus formulated "exceptions" to those rules.

The formalistic conception of legal authority encouraged by the statist view is unfortunate in making abstraction at one of these points – either in the interpretation of rules, or in their application – seem inescapable.

(2) The conception of formal authority proposed by the statist idea of law is best viewed as a response to the problem of clashing moral visions which characterises the modern polity. Viewed in this way, it is possible to understand a positivist outlook on law as a symptom of the erosion of shared understandings, and of the realisation that customary practices alone are incapable of providing a stable basis for social order in the modern world. We have seen that a body of posited rules (as much as a putative body of natural rights) can offer no final way of resolving the conflict of interests which defines modern social existence. Much of the law thus exists to impose a level of order and regulation upon a body of interests and expectations which will continue to conflict even in the presence of deliberately posited rules. How such an understanding of law's role is connected to questions of authority and legitimacy remains fairly unclear, and it is possible to see a good deal of modern "analytical" jurisprudence as involving the avoidance of this question in favour of a series of attempts to locate moral understandings either within legal practice itself or else in the regulatory interstices created by the focus on deliberately formulated rules.

In fact, the presence or absence of conceptual connections between law and morality shed little light on an understanding of the contribution of deliberate black-letter rules to social order. Even if the application of legal rules does not presuppose some general commitment to the moral value of those rules (or to law generally), such rules still need interpreting in the light of their perceived point or purpose: except in extremely mundane contexts involving the application of precise technical rules to well-understood situations, this interpretative activity will amount to the tracing out of conceptions of morality or justice taken to be implicit within the express verbal form of the rules. Theoretical attempts to place such moral understandings outside the formal boundaries of the law are in the end of little significance to our ability to comprehend these interpretative activities.

(3) Modern outlooks on the legal order depend in some measure upon an understanding of the law's coordinating function. We might think of an official practice of recognition in this context as supplying an additional dimension of precision and stability to ordinary understandings. The harmonisation of divergent outlooks and interests in a large and complex society cannot, however, be achieved simply on the basis of imposed solutions, but instead implies compromise between a range of conflicting interests. For, suppose the legal order embodied an arbitrary preference for

one set of interests over another: those whose interests are trammelled and systematically overridden would have little motive for seeking the protection of their interests or the resolution of grievances *within* the law, and indeed would have few reasons for taking much interest in the law at all (except perhaps for the narrow purposes of the "bad man").[25]

These thoughts might lead us to feel some hesitation in embracing an official practice of recognition as a way out of the problems of fundamental disagreement. Officials, as much as the rest of us, think and function within the context of ordinary understandings and moral dilemmas, and the supposition of an "official attitude" towards the interpretation of rules can be viewed as an attempt to identify conditions of convergence and harmony in the way that the law is discovered and applied. We are encouraged to think of such official practices as existing in detachment both from the rules (which do not specify the conditions of their own application) and from the background of social understandings (which continue to diverge and conflict).[26] But how, we might ask, does such a free-floating interpretative attitude establish itself, and how are participants in that practice to identify it?

Any systematic practice of interpretation is likely to generate its own rules and conventions: conventions which will differ in certain respects from the background understandings and expectations which an ordinary person might possess. Yet (as we have seen) the interpretative activity needed for the application of general rules to particular situations does not consist merely in the application of static "canons of interpretation" in each case, any more than it involves the imposition of rigid propositions or imperatives. In the absence of a means of specifying general conditions for the application of fixed rules to all conceivable situations (or at least dispositive conditions for so doing), each official or judge must at some stage resort to his own complex moral understandings of the main features of the case.

We should therefore replace the "top-down" image, of legal officials making judgments about the application of law on the basis of settled *rules* of recognition, with an idea of judges and officials deciding cases from the bottom-up: the traditional form of common law reasoning is a mode of moral reflection in which the decision is reached by the contemplation of the relatively fine distinctions which might be drawn between otherwise similar cases.[27] The distinctions which count as morally *relevant* for these purposes are determined on the basis of fairly narrow doctrinal ideas and principles which are incapable of being fully articulated or understood outwith the immediate context of their application. A judge's deliberations are thus guided along paths which differ in various respects from those employed by the lay person, but the moral understandings which the judge brings to bear are firmly rooted both in the shared background of attitudes and beliefs in which all thinkers reflect upon their moral experience and in the rules and doctrines being applied.

(4) The recognition of the state as a distinct entity with the power to impose rules and alter entitlements naturally brings about a division of society into

25 O Wendell Holmes, "The path of the law" (1897) 10 *Harvard L Rev* 457.

26 Hart, *The Concept of Law*.

27 S Coyle, "Practices and the rule of recognition" (2006) 25 *Law and Philosophy* 417–52.

public and private realms. Legal rules for the regulation of private entitlements are then conceivable as a series of public interventions into the circumstances of private interests and choices. This is suggestive of an image of society in which the law is brought into conflict with the moral lives of individuals: an image which makes any attempt to resolve a shared sense of law's binding authority exceedingly difficult.

It is notoriously difficult to distinguish the public and private realms in an intellectually satisfactory way. Without collective recognition and control of private entitlements, individual rights, liberties and powers become illusory, and the private realm itself cannot exist apart from a general framework of regulation and governance which permeates the private lives of its citizens. At the same time, the modern view of the legal order is inclined to suggest the misleading notion of the individual as the locus of *private* rights and interests which are sharply distinguished from those of others, or from collective goals more generally. The legal order then exists to secure and balance those different kinds of interest.

This picture is misleading in various respects. When we speak of individuals having "private" interests, we usually mean only to distinguish such interests from collective goals in the basic sense that the individual concerned is acting out of his own, privately formulated needs and desires rather than altruistically pursuing some public good. We do not (in other contexts at least) think of private interests as being *fully* distinct from collective or interpersonal concerns: insofar as a person's interests are developed and expressed only *within* a context of social interaction, those interests will be formulated against a background of joint understandings and possibilities for personal flourishing. Just as others' interests affect my life in certain ways, my interests have effects (sometimes very pronounced) on other people in my social circle. My interest in a contented family life (for example) pervasively shapes my interests in other areas of my life, just as my interest in amassing great wealth might give way to interests in being a charitable, or likeable, or even honourable person. We generally understand and accept such social and familial ties when formulating and pursuing interests.

The notion of each individual pursuing his own atomistic interests in myopic isolation from the lives of others is thus not an illuminating way of proceeding when contemplating the legal order of a modern society. The dichotomy of "public" and "private" is apt to suggest a particularly intractable problem for the legitimacy and binding authority of the law: against such a background, the legal order will appear as a monolithic system of impositions which interfere directly in each person's moral life and choices. By recognising that such an account may offer too simplistic a view of the competition between public goals and private interests, might we not come to view the questions of legitimacy raised by that picture as being unnecessarily stark?

Statist impulses and moral visions

It is unclear whether these musings can blossom into a coherent understanding of the legal order. Indeed, we might view the statist conception of law as giving rise to a number of contradictory impulses which can only be jointly satisfied by imposing fixed theoretical frameworks for the understanding of law within the modern polity. If that is so, then a

fully coherent theory of law will be achievable only at the expense of a detailed and genuine cultural understanding. The rigid analytical dogmas of legal positivism (and moral idealism) might be considered anew in this light. For we can view the positivist as attempting to combine an account of the law's coherence and determinacy with an account of legal authority in a social world which continues to be divided along moral, political and religious lines.

Early modern jurists were clearly aware of the troubling implications of the positivism which they encountered in writings such as those of Hobbes. The fear of arbitrary government was perhaps the strongest influence on the shape of English political thought during the late 17th century, and this plainly affected lawyerly attempts to come to grips with Hobbes.[28] Reading such works, however, one is struck not so much by the near-universal rejection of Hobbesian jurisprudence, as by the deep and clearly widespread dissatisfaction with the contemporary state of common law reason. Support for the legal positivist view of black-letter rules imposed by the state came not from political sources but from within the legal order itself: lawyers, unequal to the attempt to impose clear order on the unsystematic mass of rules and procedures, increasingly turned to legislation as a means of demystifying the law.

The inability of lawyers to impose a rational framework for thought upon the body of common law customs and remedies had become, for many, something of a theoretical embarrassment.[29] As late as the mid-18th century, Blackstone struggled to accommodate the written rules of the legal order within a customary framework of standards and principles organised systematically under Roman law headings.[30] In the end, however, the analytical framework within which Blackstone sought to interpret the law remained little more than a free-floating set of abstract ideas, which remained separate from his substantive explanations of the law as a set of remedies.[31] It was becoming clear to most lawyers that the scientific precision increasingly demanded of the law was possible only through the interpretative lens of a "science of legislation".

It is tempting to suppose that a statist conception of law is in some sense made inevitable by the circumstances of the modern state. Nevertheless, the legal positivist view of authority at work in such a conception expressed hostility towards the customary forms of social order which early modern thinkers defended as the basis of liberty. If the validity of legal rules is a matter of their being established by official patterns of recognition rather than the reflection of shared standards and practices, then how is the binding authority of law to be explained? The positivists' understanding of law seems to presuppose a conception of authority under which questions pertaining to the validity of legal rules are unconnected to understandings of the moral nature and legitimacy of a system of laws.

I propose to conclude this essay by offering some thoughts on how a statist conception of legal authority might be linked to an account of law's moral nature. For, despite appearances, important connections might be made between those formal, posited features of the legal order which derive from its statist character, and the systematic, principled aspect of the law which is most evident in doctrinal commentary. The constitutive role

28 The most notable of these attempts is that of Matthew Hale, *A Brief Survey of the Dangerous and Pernicious Errors to Church and State in Mr Hobbes' Book Entitled Leviathan* (1676), but he was far from alone. See, e.g. the critical discussion of Hobbes in James Tyrrell's *Patriarcha, Non Monarcha* (1681), pp. 103ff.

29 See, e.g. Stair *Institutions* 1.1.17.

30 Blackstone, *Commentaries*, vol 1, p. 32.

31 M Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Clarendon, 1991), ch. 3.

played by legal and social practices in the development of moral thought that I wish to explore is, perhaps, most clearly evident in the context of Hobbes's political theory.

The solipsistic conditions of the state of nature might be thought to exhibit the barest conditions of natural right which remain after all that is culturally specific has been stripped away from agents nominally endowed with rationality.[32] In construing such rights as rights to self-preservation at all costs, Hobbes offered a picture of uncivilised existence which sharply diverged from that offered by Grotius; yet in spite of contrasting views on man's possession of an essentially social nature, both writers in fact presupposed a very similar account of the conditions which make moral thought possible. In both cases, it is through the creation and exploration of social bonds that moral knowledge is achieved. This is seen most starkly in Hobbes. If (in the state of nature) the typical occasions for interaction between human beings are occasions of conflict brought about by the "continual fear, and danger of violent death" at the hands of the other, then the creation of social bonds of even a primitive kind seems impossible. Hobbes suggests that it is through the exercise of reason that peaceful relations can be instituted: I must be prepared to lay down my pre-emptive rights if others are so willing. But if the state of nature represents conditions in which *all* cultural knowledge is absent, then how am I to communicate my willingness to others? How, indeed, am I to formulate the thought at all since the conditions for language and conceptual thought are among those that are excluded from the state of nature by hypothesis?

As noted earlier, the conditions of solipsism and continual fear that Hobbes describes are such as to make human beings completely unintelligible to each other. The uncivilised landscape is one in which human beings roam about like tigers in the forest. Moral thought is impossible in such conditions: for even if we assumed the existence of an intuitive moral sense by which human beings could grasp a platonic realm of moral forms, how would each human agent represent the content of such intuitions to themselves? The possibility of moral reflection is thus tied to the context of stable social relations which allow language and conceptual thought to flourish. More than that, it is reasonable to assume that a shared language of sufficient richness for moral reflection would emerge only through a common experience from which shared outlooks, beliefs and understandings have flowered. The social practices (including the legal practices) of such a society would then naturally be thought of not simply as contingent facts to which more permanent moral insights might be applied, but as a source of moral insight in their own right.

The thought that a society's social and institutional arrangements can act as a source of moral reflection in this way may help to explain the connection between the formal, rule-based elements of the law and its substantive, moral nature (for even posited rules, in this way, are the product of a history of shared understandings and values); but there might be a lingering suspicion that all of this undermines the objectivity or permanence of the moral insights which seem to be a feature of moral belief. Such an appearance is misleading however, both about the character of morality and about the nature and significance of law.

Modern philosophy (probably since Descartes and Leibniz) presupposes a conception of morality in which the objectivity of moral values derives from their invariance and their transcendental qualities: if moral insights are capable of evaluating human practices, it is

32 See R Tuck, *The Rights of War and Peace: Political thought and the international order from Grotius to Kant* (Oxford: OUP, 1999), pp. 6–7. Given the inexorable logic of pre-emptive self-defence, we might equally characterise the situation as one in which agents are precluded from exercising rational impulses whilst at the mercy of social forces beyond anyone's control.

thought, then they must ultimately derive from a source outside the practices themselves.[33] Moral philosophy then becomes the project of proposing, systematising and defending concepts of right and wrong in abstraction from the variable human situations to which they are to be applied. Alternatively, however, we might adopt a view of moral thought in which the objectivity of moral insights is grounded in rationality and value. Could we not then view moral reflection as the rational contemplation of human nature, as reflected in our social life and institutions? This reflects the thought that morality itself only makes sense within the context of a shared social existence, in which one person's actions have consequences for the lives of others. Once that thought is grasped, we might well regard the division of theoretical enquiry into two separate stages: empirical, social investigations, on the one hand, and normative investigations of those empirical arrangements, on the other, as a crude oversimplification.

Moral reflection of this kind was also present in Aristotelian ethics, in the thought that an understanding of the good can only come from pursuing and leading a good (morally worthwhile) life. This form of moral understanding owed much more to conceptions of practical wisdom (*phronesis*) than to ideas of speculative reason: we know virtue through living virtuously, and by reflecting upon those aspects of our lives that seem to us of most value. The moral philosophy to be found in Hobbes amounts to an almost complete rejection of Aristotelian thought, yet it retains (perhaps paradoxically) its key feature: the thought that moral understandings are possible only through immersion in the fabric of social relations. Abstract man from his social surroundings and morality ceases to have any meaning.[34] Moral inquiries therefore do not stand apart from and above inquiries into the content of human interests and practices, but identify concerns that are only possible within a context of overlapping and conflicting interests.

Law might be thought to represent a reflective engagement with human interests in an especially potent way. Indeed, the classical representation of the common law as the repository of a society's accumulated wisdom owed much to the Aristotelianism of the medieval jurists and legal commentators. Yet the focus on law as the pre-eminent example of a social institution through which we can reflect upon and explain our shared moral inheritance is not an inevitable one. In the customary order of medieval Europe, it was social institutions such as the family, property and the feudal order which were regarded as the primary sources of reflection upon human nature; law was simply a manifestation of authority which supported and sustained those structures, and accumulated knowledge of them so as to guide our understanding of the standards of proper conduct (and punish those who sought to transgress them). It is only when law is transformed from a collection of procedures and remedies into a body of systematic principles of justice that the legal

33 This idea is present in arguably its strongest form in the "original position" of John Rawls (*A Theory of Justice* (Oxford: OUP, 1972), p. 11ff.). Not all moral philosophers are satisfied with the extreme abstractionism of this position as a path to justice in the real world, but the general confidence in this form of rationalism nevertheless sustains a great many moral philosophies of the present day: see R Dworkin, "Objectivity and truth: you'd better believe it" (1996) 25 *Philosophy & Public Affairs* 87–139: "It is an interpretive question whether a general statement about morality is a positive moral judgment. A sociological account of other peoples' moral convictions is not, because it does not itself endorse or presuppose any moral assessment."

34 See Hobbes, *Leviathan*, I.13.90: "To this war 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 . . . Justice and injustice are none of the faculties, neither of the body nor mind. If they were, they might be in a man that were alone in the world, as well as his senses and passions." I am not suggesting that we understand Hobbes as proposing an Aristotelian conception of practical wisdom, for he clearly has in mind a more Protestant, even subjective notion. But if we subtract Hobbes's insistence on imposed meanings, we might see his arguments about the state of nature as leading to a partial resurrection of the Aristotelian conception of practical wisdom.

order becomes a natural focus for moral reflection on the ethical life and characteristics of the polity. It is, in short, doctrinal science which gives to law its profound importance as a source of ethical reflection.

Doctrinal legal science is both the most obvious manifestation of law's moral nature and its most problematic. The doctrinal scholar offers reasoned interpretations of the moral basis of a system of laws; but once abstract principles of justice are worked out into proposals about the content of interlocking rights and rules, it becomes less easy to regard the law as a repository of collective ideals and understandings. Instead, the legal order takes on the appearance of a body of standards which establish spheres of personal autonomy within which each person is free to discover their own form of the good life through introspective engagement with their own personal experience. The ideal of abstract legal equality which is the natural adjunct to a system of interlocking rights thus emphasises not what is shared by a political community, but what is personal and contestable. The descending model of legal authority hence gives expression to Protestant conceptions of autonomy and moral reflection which sit awkwardly with the idea of law's importance as a source of moral insights.

The positivistic conception of law as an instrument of the state can be seen as an attempt to contain the problems of moral Protestantism within reasonable limits. By construing the legal order as a complex body of posited rules and published decisions,[35] the positivist might hope to minimise the significance of individualistic reflection on moral problems by marginalising the need for such reflective engagement to situations in which the application of rules is hopelessly in doubt. In all other cases, juridical activity would be construed as resolving the penumbral uncertainty of the rules according to well-established juristic concepts (such as harm or reasonableness) or by explaining the bearing of one rule or concept upon another. In this way, a distinctive jurisprudence would grow out of the general mass of rules and decisions, which would both add to the completeness and certainty of law (by resolving meanings and closing "gaps"), and furnish the legal scholar with a distinctive subject matter for his ruminations: for the task of the legal scholar would then involve clarifying the significance of the principles and concepts relied upon in legal argument, and building up a coherent picture of the entitlements and duties established by the published rules and decisions.

Such a view might seem to possess a number of advantages. For one thing, it would help to explain the ambiguous status of the jurist's "clarifications" (for the juristic writer possesses no rule-based authority of his own): the doctrinal claims of the legal scholar would be seen as expounding the *sense* of the existing law (the rules and decisions), and thus as guiding and clarifying judicial deliberations, without constituting a finally authoritative statement of the law (until actually endorsed by a court or enshrined in statute). For another, it would provide some account of the possibility of law in a world of conflicting Protestant interpretations: the legal order would represent a source of insight into the moral life of the polity, not by directly reflecting the shared beliefs and customs of its inhabitants, but indirectly, by enshrining standards of behaviour and comity which sustain and make possible the joint pursuit of certain interests and goals whilst downplaying or suppressing others.

35 The publication of adjudicative decisions in yearbooks or case reports is not a necessary requirement for a flourishing doctrinal legal science; but it is a prerequisite for a doctrine of stare decisis which could ground such decisions within a positivistic conception of legal validity: without an authoritative source for adjudicative reflection, legal decision would inevitably rely on substantive claims about justice, common sense and the like rather than the "authority" of past decisions.

There are manifest problems with this approach. Not least, it is hard to suppress the sense that scholarly writings and judicial deliberations can be viewed as offering clarifications of penumbral uncertainties only at the price of considerable distortion: for they seem rather to concern the elucidation and application of principles of justice which defy translation into static or authoritative meanings. Ronald Dworkin has offered many arguments against this form of positivism.[36] Yet his own attempts to reconcile the statist elements of the legal order with its principled, moral character, despite being richly suggestive, are themselves problematic in various respects.

Dworkin emphasises the "interpretive" character of law over its conventional, rule-based aspects in a way which would seem to reveal the law's nature as a source of moral insight and reflection:

> Integrity [he says] expands and deepens the role individual citizens can play in developing the public standards of their community, because it requires them to treat relations among themselves as characteristically, not just spasmodically, governed by those standards.

Under this conception, political obligation "becomes a more Protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme".[37]

In this case, however, the positivistic understandings of the statist elements of law are reversed: rather than moral reflection being used to fill in gaps or rectify uncertainties left open by the body of legal rules and decisions, the legal rules are here considered as political markers which guide moral reflection towards principles which determine the way in which conflicting interests should be weighed and balanced. Dworkin believes, of course, that the scheme of justice implicit within the law in fact uniquely determines the judgment which should be given in each case. It is by no means easy to see why each person's "Protestant" interpretation of the legal order should converge on right answers, however. We can think of each person's interpretation as establishing good reasons for supposing the existence of permissions, duties and entitlements of a particular kind. But what reason is there for believing that standards of rationality impose a hierarchy on such reasons? For each person's reasoned interpretations of shared practices and institutions are as likely to emphasise divergent conceptions of the significance of shared values and beliefs as they are to establish clear criteria by which the value of conflicting principles may be weighed and balanced. The conception of rationality at work in the notion of "right answers" seemingly undercuts moral Protestantism rather than reinforcing it.

Dworkin suggests that a shared language, as well as common interests and convictions, are necessary if we are to make sense of each other's behaviour and beliefs.[38] He *could* claim, therefore, that the intelligibility of "fit" as a distinct determinant of legal decision (aside from the substance of interpretative judgments) testifies to the presence of settled interpretations which reflect shared insights into the nature of the good: the shared background of taken-for-granted assumptions establishes conditions which make possible widespread (if defeasible) agreement on what the right answers are.

This suggestion is problematic, however, for it fails to realise that there is no basis to shared interpretations *other than* the fact of agreement in judgments. By recognising the presence of common interests and convictions, we might hope to narrow the gap between rationality and Protestant autonomy: since moral thought is rooted in shared convictions, it

36 *Law's Empire* (London: Fontana, 1986), ch. 4.

37 Dworkin, *Law's Empire*, p. 190.

38 Dworkin, *Law's Empire*, pp. 63–4.

is then believed, such thought involves the recognition of common standards of rationality by which personal interpretations can be evaluated and compared. There seems to me no intelligible distinction between standards of reason or rationality and good moral reasons. Since moral reasoning does not take place in complete abstraction from the circumstances to which moral values are applied, it is impossible to sustain a distinction between two different stages of reasoning: the determination of good or sound moral reasons, and the subjection of those reasons to further, independent tests of rationality which apply in abstraction from the variable circumstances in which moral convictions are formed. On the contrary, the rationality or otherwise of moral convictions is a matter of acceptance of, or convergence upon, good moral reasons. The suggested resolution of the tension between Protestant autonomy and the presence of "right answers" thus fails because it does not acknowledge the constitutive role played by social practices and institutions in the furnishing of moral knowledge. Let me explain.

On the view we have been considering, the contingencies of human practices and associations establish pre-conditions which must hold if moral thought of a meaningful kind is possible, but they do not themselves contribute to the substance or appeal of moral views: the facts of human experience and human social arrangements are "mere" conventions which are devoid of moral significance until contemplated from the perspective of some act of moral interpretation. These facts or conventions then establish the boundaries of "fit" within which all acts of (otherwise unanchored) interpretation must move.[39] This picture of rationality is one in which the human will provides the only source of moral value, by breathing ethical life into otherwise mute facts. Understood in this way, human social arrangements are in no way constitutive of moral experience, since they constrain the available moral interpretations only by virtue of the significance with which human wills invest them. In the end, each person's introspective ideals address (that is, are "fitted" to) a shared experience, the nature and significance of which is exactly the subject of broad and complex disagreements.

In separating fit from substance (as distinct elements of legal decision), and in detaching moral values from the fabric of social institutions, Dworkin offers little insight into how a shared experience and shared social institutions play a constitutive role in the shaping of moral understandings and values. In this respect, the assumptions which underpin Dworkin's "interpretive" approach are not vastly different from those which drive modern versions of positivism which deny the presence of conceptual connections between law and morality: in both cases, moral values and insights are considered as detached from and independent of "mere" social conventions. It is perhaps the most important feature of Dworkin's writings that they raise squarely the question of the moral force of social conventions in the legal and ethical life of the polity. In practice, attention has been deflected from this issue as jurisprudential scholars have concerned themselves almost exclusively with the question of whether Dworkin has undermined the central insights of positivism.

In this essay, I have sought to bring to light an alternative understanding of the jurisprudential writer's task to that of establishing or denying necessary connections. For, I have endeavoured to illustrate the way in which substantive reflection upon the nature of law can shed light on our current practices and institutions. In these terms, we can see modern jurisprudence as a continuing attempt to come to terms with a descending model of legal authority, and to offer an account of the relationship between law's systematic, moral nature and its posited, statist character. On this view, investigations into law's nature

39 In fact, the dynamics of "fit" offer few intelligible constraints on the kinds of interpretation which might be offered (for the principles which underpin legal decision are rarely lucid enough to give definite form to legal entitlements).

cannot take place except by reflecting upon the historically extended practices within which the law develops.

Morality, I have argued, is not simply a report on the substance of our practices, but it is nevertheless rooted in those practices in the form of immanent ideas of justice, rightness and wrongness. Once that is understood, it becomes possible to shake ourselves free of the influence of a picture of morality as a set of transcendent principles which apply to all situations, whatever form human arrangements might take. We can then understand positivist accounts of law, and their rivals, as responding to differing interpretations of the moral basis of a system of laws. That, it seems to me, is a more fruitful way of reflecting upon the contribution of law to our social and moral existence.

It is possible to think of morality, not as a set of free-standing principles which *apply* to the facts of human experience (whatever form that takes), but as an essential *part* of that experience. Morality is then part of a continuous process of reflection on our collective experience, with law constituting one particular manifestation of that process of reflection. Morality cannot stand apart from the forms of human association which make reflection possible, but the problems and frictions which inevitably arise whenever human beings live alongside one another in close and permanent relations should not be thought of as admitting of general solutions: morality and law supply ways of dealing with the effects of the problems of collective living, but do not finally resolve those problems.

The moral perspectives which develop within a society are therefore reflective of that society's attempt to have its say about political and social problems which will continue to press on human beings even after present generations and civilisations have exited the mortal stage.[40] The moral nature of a society will in consequence be shaped and determined not just by the way it addresses questions of human social interaction, but also in the light of the aspects of human interaction that are considered to be worth addressing. Positivism and its rivals thus embody philosophies of law and government which throw considerable light on our form of human association. A philosophical perspective which seeks to pit legal positivist arguments against rival positions purely on the supposed strength of their conceptual claims seems in consequence a curiously blind way of reflecting upon questions about law and morality.

40 See L Fuller, "The case of the speluncean explorers" (1942) 62 *Harvard L Rev* 616.

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Positivism and political obligation

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1 Introduction: the rule of recognition and its philosophical motivation

As is well known, modern analytical legal positivism, contrary to its empiricist and utilitarian predecessors, does not aim to reduce the attitudes of legal practitioners to mere behavioural and/or psychological regularities that are generated by habitual obedience to the commands of a sovereign. Rather, it focuses on what it takes to be the non-reducible "internal" normative dimension of the legal phenomenon. It does this by attempting to bring out what is distinctive about the practical reasons by virtue of which those attitudes and behaviours are given a characteristically *legal justification*. When we say that we are under a *legal* duty to do such-and-such, we mean to say that, regardless of whether the content of the duty is under the circumstances a useful, prudent, or morally good thing to do, the mere fact that it is required by law is a special kind of reason for us to comply with that requirement.

According to an influential trend in modern analytical legal positivism, the ground for such legal reasons is the *rule of recognition*, a conventional rule setting out criteria that determine which standards count as binding legal rules. Legal rules derive their validity from the rule of recognition, by virtue of the fact that they satisfy its criteria, but the ground of the rule of recognition itself cannot be a further, even more fundamental rule. For that would involve us in an infinite regress.[1] Rather, the rule of recognition is grounded in the fact that it is accepted and practised by the members of a certain group. This raises the following question: how can the existence of a general, more or less stable social practice have the binding force of a fundamental but still legal rule? How can that practice be anything more than a happy coincidence, the contingent and provisional congruence of purely personal maxims or of concurring but independent moral views? As Hart himself stressed, for the rule of recognition to be a rule and indeed a conventional rule, it must be the case that at least those charged with enforcing the standards flowing from it treat their practice as providing them with "a public, common standard", and not a standard "which each judge merely obeys for his own part only".[2] In this essay I wish to explore further the nature of the rule of recognition, in order to give a satisfactory answer to the following

1 S J Sharpiro, "On Hart's way out" in J Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: OUP, 2001), pp. 149–91.

2 H L A Hart, *The Concept of Law* 2nd edn (Oxford: Clarendon 1997), p. 116.

questions. What are the conditions under which a social practice gives rise to public, common standards? And, in particular: what kind of connection between law and morality, if any, must we presuppose in order to explain the special normative force that the rule of recognition acquires over those who follow it?

Before I proceed to elaborate on the nature of this conventional rule, I wish to highlight two traditional strands of philosophical motivation for anchoring the study of the theory of law in the doctrine of the rule of recognition. The first strand is substantive. It has to do with the central tenet of all legal positivism, namely that law is a matter of social fact. The second is meta-ethical. It concerns the nature of the explanation of law's normativity. Let me start with the substantive motivation first.

According to the theory of Hart and his followers, the complex social fact of an active acceptance of the rule of recognition within a certain population is the distinctive mark of the existence of a legal system. Thus, while it accords with Kelsen's pure theory of law in that it preserves the hierarchical structure of legal norms, Hart's theory departs from it in that it attributes their unity and normative character to the empirically ascertainable social fact of a certain practical stance holding sway in a population and not to the mysterious – according to analytical legal positivism – entity of the *Grundnorm*. This shift aspires to bestow upon the legal phenomenon the ontological clarity of a social fact.

Now, let's move on to the meta-ethical motivation. This motivation can be traced back to the developments in the philosophy of language commonly associated with the later philosophy of Ludwig Wittgenstein and with J L Austin. As is well known, from these developments there emerged a view of ordinary language as the repository of meaning within a linguistic community. According to this view, the collective linguistic practices of the community form a normative horizon that transcends the conduct of individual participants and gives it its social meaning. Thus, by appeal to those practices, we can understand, appraise and correct individual usage. Importantly, for proponents of this view, it is open to an external observer to understand and report the standards governing linguistic usage in this or that community "from without", without him or herself participating in the life of that community. The observer then assumes what has come to be called the "hermeneutical point of view".[3] The hermeneutical point of view, which combines the internal point of view with the adoption of a neutral stance toward the practices to be understood, has become the methodological model for most of analytical legal positivism. It insists, to use Hart's words, that the account of the neutral observer is a "description, even when what is described is an evaluation".[4] Through the adoption of the hermeneutical point of view, contemporary legal positivism has taken on a characteristically meta-ethical dimension. Legal theory is a neutral description, or more accurately, a "descriptive sociology", which reports the criteria actually employed by a linguistic community to determine correct use of concepts like the concept "law". However, the claims it makes seem not to be part of ordinary legal discourse. They appear to occupy a higher level of discourse.

We now turn to law. The primary use of the normative language of law consists of internal legal claims, that is, claims that are being made by someone who holds that legal standards govern his or her conduct. Parasitic upon this primary use is the use of normative language for the purpose of making *detached* legal claims. These are the claims that someone makes as *if* adopting the internal point of view. It is this stance that the external observer

3 The term appears in P M S Hacker's "Hart's philosophy of law" in P M S Hacker and J Raz (eds), *Law, Society and Morality* (Oxford: Clarendon, 1977), pp. 9ff. It is then employed by N MacCormick in his *H L A Hart* (Stanford, California: Stanford UP, 1981), and finally adopted by Hart himself in *Essays on Bentham* (Oxford: OUP, 1982) p. 14.

4 Hart, *The Concept of Law*, p. 244.

assumes when reporting that a rule is a valid legal rule in this or that legal system in the sense that it satisfies the criteria of validity that the linguistic community employs.

The availability of the hermeneutical point of view – the ability to understand the attitudes of other people, as *they* view them, without necessarily accepting or endorsing them – is the key for the positivistic distinction between the law as it is and the law as it should be in its modern guise. Even if the reasons those who accept a rule invoke in their internal claims are moral, the fact that they manifest this attitude is a complex social fact. We can analyse and even simulate this attitude by making detached judgments. What is more important for legal positivism, the detached analysis of legal discourse presumably enables legal theorists to analyse legal systems without taking sides on whether there really is an objective moral reason to comply with the law as it is in a certain legal system. If this is true, it means that one can, at the same time, assert that there exists a legal rule whereby "we ought to ϕ", or that from the standpoint of the law "one ought to ϕ", and that nonetheless "we have no moral duty to ϕ", or even that "we have a moral duty not to ϕ". There is, so the argument goes, no contradiction between the two propositions. Even the criticism of existing law, it seems, presupposes the neutral meta-ethical point of view. For, arguably, it is this point of view that makes it possible to ascertain the existence of the legal rule whose reform or repeal we champion.

Obviously, the success of the legal positivist story doesn't depend solely on the abstract possibility supplied by the hermeneutical point of view to make morally neutral descriptions of other people's practical attitudes. It must also be the case that the adoption of the hermeneutical point of view helps us account, in a manner congruent with our basic moral intuitions, for salient features of legal practice; more specifically, for the fact that the law claims the compliance of legal subjects with its requirements, in other words for its normative character.

What kind of resources we need to bring in to explain the normative character of law and whether the detached hermeneutical point of view lives up to this task are two questions that figure prominently in this article. Leaving them aside for the moment, it is now important to stress the way in which the notion of the hermeneutical point of view has been taken by legal positivists like Hart to motivate the doctrine of the rule of recognition. First, it is not hard to see how the idea that the practice of a community gives rise to standards that govern the behaviour of individual participants is at work in Hart's conventionalist account of law. Second, since the criteria for membership in law are determined by the collective practice of legal practitioners, arguably, all the legal theorist needs to do is to "describe" the practice in order to uncover those criteria, without at the same time passing any judgment on the moral merit or demerit of the practice.

2 The idea of a public, common standard

a Identity

So, let's repeat our question: what conditions must be fulfilled for the settled practice of a group to constitute a rule in the sense of a public, common standard? To begin with, it must be the case that the behaviour of participants in the practice be perceived by the group, and by individual participants, as in conformity with a common standard. This means that all participants take it upon themselves to act on the same reason, namely the conventional rule, and that they are commonly understood as acting on that reason. In this sense, the standard is indeed common and public, at least in a weak sense, since everybody is understood to comply with it and everybody is aware that everybody else acts and thinks in the same way. Note though that the criterion of identity in itself does not preclude that,

although all participants are commonly understood as adopting that standard, each of them adopts it because he or she thinks that it is morally good or useful or, for some other idiosyncratic reason, wise to act on that standard.

B Reciprocity

A further feature of the rule of recognition is that each participant takes him or herself to observe it, thus actively accepting it, by virtue of the social fact that there exists a common practice within the group, that is, by virtue of the social fact that everybody else takes him or herself to be doing the same thing.

This condition of reciprocity in the practical attitudes of participants, that is, the dependence of everyone's participation in the common practice on the fact of everyone else's participation, is what renders the rule of recognition a *conventional* social rule. It is this condition that precludes the possibility that the convergence of behaviour is merely a manifestation of an overlap of concurring but independent individual moral views or even of self-interested prudence. Individual participants are not only aware that they all act on the same reason, but they also take this fact to be their *reason* to do their share. Thus, the rule of recognition is binding by virtue of the fact that it is common and public, that is, it is a rule that each participant individually and all participants collectively follow. Thus understood, the rule of recognition, being the foundation of the legal system, makes each participant individually and all of them collectively the ultimate source of legal authority.

C Moral character

The understanding of the rule of recognition in terms of reciprocity advanced in the previous section may seem to be too demanding for some legal theorists. For instance, Hart, to whom we largely owe this way of conceiving of law as a social phenomenon, that is, in terms of a social convention, seems to be content with a much weaker set of conditions for the rule of recognition. He insists that, for the rule of recognition to take hold, there need only be some pattern of convergent behaviour coupled with an attitude of acceptance. The kind of motive or reasoning that has generated this attitude is not crucial. For him, any practical stance that justifies acceptance in the eyes of an individual participant is as good as any other. That practical stance may be one of full endorsement but, often, it is merely one of *weak acceptance*.[5] A person accepts a standard weakly even if he or she is guided by it out of prudence or other non-moral reasons. Hart would therefore deny that compliance with the rule of recognition is something that each participant owes to everybody else, as was argued above. Compliance, he would maintain, may well be dictated by the belief that doing as everybody else does seems attractive or mandatory to a participant from some idiosyncratic or even self-interested viewpoint.

Such weak acceptance may indeed be sufficient for grounding other social rules, like rules of etiquette, but it is utterly inappropriate as a foundation of the legal system. Law is a coercive order that imposes duties on those to whom it is addressed, also assigning a group of people the power to coerce others into compliance. If the practical force of legal duties were grounded in non-public, idiosyncratic practical viewpoints, then nobody would be warranted to demand compliance. Something very important would then be missing. Legal statements are not only statements of what I ought to do under the law. Sometimes they aim to convey what others ought to do under the law. In the case we are examining, we could not make statements of the latter kind in order to demand some sort of behaviour from another participant or dictate some sort of behaviour to him or her. At best, we could

5 Hart, *The Concept of Law*, p. 160.

make such statements in order to report in a detached fashion what a person ought to do from *their own perspective*, or perhaps in order to give that person some practical advice. This is a point well made by Raz:

> The crucial point is that much legal discourse concerns the rights and duties of others. While we can accept the law as a guide for one's own behaviour for reasons of one's own preferences or of self-interest one cannot adduce one's preferences or one's self-interest by themselves as a justification for holding that other people must, or have a duty to, act in a certain way.[6]

Raz concludes: "To claim that another has to act in my interest is normally to make a moral claim about his moral obligations."[7]

Hart's response to this is that it is possible for a person to invoke the rights and duties of someone else, although, when that happens, the first person does not intend to say anything about what that other person ought to do. This is, according to Hart, the technically confined way in which judges speak in the exercise of their adjudicatory duties. To try to bring Hart's point home, let me employ the well-known "no-hat-in-church" example. Imagine the members of the community who follow this rule or the sexton of the church pointing out to a newcomer or absent-minded parishioner who enters the church wearing a hat that it should be removed by virtue of the no-hat-in-church rule. Imagine further that, when asked by the newcomer whether there really is any reason to remove the hat, the members of the community respond: "Not at all! What *you* ought to do is your own business. We didn't tell you to remove your hat because you ought to, but because, since we accept such a rule, your entering with your hat on gives *us* a reason to tell you what we did."

Such a response would surely sound artificial or even absurd in the context of a small parish. But maybe it doesn't sound so absurd in the context of a modern political community, in which state functions have acquired a strongly technical and bureaucratic character. This kind of sceptical or distanced attitude is in fact all too common in societies where politics has lost much of its appeal. Needless to say, nothing precludes that such an attitude could also be found amongst those who are entrusted with the administration of the law. Now, when it is ordinary citizens who manifest this attitude, this may only give rise to a concern on the part of those who yearn after a romantic and possibly authoritarian past. By contrast, when we think of legal officials who find themselves under its grip, we are more likely to treat this as symptomatic of a serious *flaw* in the way those officials understand their institutional role.

Of course, the point I am trying to make is not about political alienation in modern mass democracies, but about whether the attitude of a judge, who – upon rendering a decision – shrugs his or her shoulders and tells the accused "I'm just doing my job", can count as acceptance of the rule of recognition in the context of a theory of law. And further, even if this kind of attitude might be taken to count as a weak form of acceptance, as Hart insists, the more crucial question is whether the acceptance of the rule of recognition can be based *exclusively* on such an attitude. For, by maintaining that according to his own brand of positivism no type of practical reason – and especially no moral reason – is necessarily linked to the idea of the law, Hart is committed to the idea that there is a possible world where the acceptance of the rule of recognition and ultimately the existence of law can be exclusively a matter of weak acceptance, and not at all based on moral reasons.

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6 J Raz, "The purity of the pure theory", in R Tur and W Twining (eds), *Essays on Kelsen* (Oxford: Clarendon Press, 1986), pp 92–3.

7 Raz, "The purity", p. 93.

Perhaps one could envisage, as Raz urges, a possible world where neither legal subjects nor the officials of the legal system assign any real moral value to the project of sustaining legal practice, but where both legal subjects and officials by and large carry on following it *merely pretending* that they assign it some moral value.[8] Although the institutional life of such a political community would look more like a sad parody, this image doesn't seem to be far removed from the actual historical experience of political systems on the brink of total collapse or radical change. Hart, however, invites us to go even further than that. He invites us to envisage a world where, on the one hand, nobody – not even those entrusted with the administration of the law – believes in the moral merit of sustaining the rule of recognition and, on the other, there is *public* knowledge on the part of practitioners that this is so.[9] But such a world would definitely strike us as totally alien.

To ground and sustain the practice of following a public and common standard in the stronger sense that is suggested by our day-to-day use of normative language, participants need to share something stronger than this. They need to share the belief, first, that they all have the same practical reason to follow the common practice (that is, the same reason actively to accept the rule of recognition); and, second, that this fact (namely that everybody acts for the same reason) gives each of us at the same time a reason to do what everybody else does. This dual condition is encapsulated in the ideas of identity and reciprocity analysed above. From this it follows that at least those who invoke that reason think that it is a reason that applies to everyone within the group regardless of any individual's desires or any other peculiarities in the structure of individual preferences. In other words, they take this reason to be in some sense *categorical* or *objective*. They take themselves and are commonly understood by others to be under a duty to participate in the common practice by virtue of the fact that everybody else in the group takes him or herself to have the same duty for the same reason. By the same token, each one takes others in the group to be under the same duty, given that they find themselves in the same circumstances.

Let me pause here to recap the conclusion of the foregoing analysis. It was argued that a standard is public and common if and only if those who adhere to it believe that they have a moral reason to do so by virtue of the fact that everybody else adheres to it because they think that they have moral duty to do so. Thus, the reason to comply with the standard is not a reason that just happens to be shared by all participants but a reason that, given that everybody takes him or herself to have it, is one that everybody ought to have. In other words, it is a categorical, moral reason. At the basis of this view lies the image of a social practice that legitimates itself over time. This self-legitimisation is not possible in a practice that is produced by the mere coincidence of idiosyncratic maxims but only in a cooperative enterprise that stretches over time, whose terms are taken by participants to be in a sense morally binding. Playing by the rules of the practice, and also by the rules validated by the practice, is a *special duty*,[10] a duty that each participant owes in principle qua member of a certain group constituted by the acceptance of the rule of recognition. It is also a duty that each participant owes to every member of the group and only to them. Finally, it is a personal duty because it is owed to each member of the group *individually*, precisely by virtue of the fact that everyone else is also a member. The relationships between the members of the group as participants in the cooperative enterprise of law constitute the public sphere.

8 J Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979).

9 G J. Postema, "The normativity of law" in R Gavison (ed.), *Issues in Contemporary Legal Philosophy: The influence of H L A Hart* (Oxford: Clarendon Press, 1987) pp. 81–104, p. 100. Hart doesn't explicitly contemplate this consequence of his view. But one can infer from a number of remarks that he is willing to accept it. For even Raz's imagined legal system of widespread hypocrisy seems to him to compromise his commitment to the total conceptual independence of acceptance from the reasons for it. See Hart, *Essays on Bentham*, pp 158, 256.

10 On special duties, see R Dworkin, *Law's Empire* (London: Fontana, 1986), pp. 195–206.

This is the sphere where their common life, that is, the life of a political community, takes place. Participants express their moral commitment to carry on this cooperative enterprise with their use of normative language when they exchange recommendations and criticism.

As we saw, this commitment is of a special kind. It derives its moral character from the nature and terms of the cooperative enterprise that individual members actively participate in. So, when we say we have a legal duty to do *x*, we don't necessarily mean that doing *x* is in itself a morally attractive course of action but that we have at least a prima facie moral duty to do *x* just by virtue of the fact that this duty is dictated by law. We imply that, at least from the point of view of those who are members of the political community, the existence of a legal duty to do *x* is morally justified, in the sense that it passes certain tests that the members of the political community jointly treat as morally appropriate. Thus, the analysis of the practical attitudes of participants in legal practice suggests that a strong notion of legitimacy lies at the very core of law. The law necessarily claims that it is morally right. And even if, in fact, it isn't, it must pretend to be right, whatever one takes "morally right" to mean.

3 The complex neutrality of modern analytical legal positivism

H L A Hart, we have seen, refuses to embrace the conclusion of the foregoing analysis for fear that it might lead him to adopt views also espoused by his theoretical opponents. However, the acceptance of this weak conceptual link between law and morality leaves other legal positivists undisturbed. This is because the latter harbour more confidence in the descriptive dimension of the hermeneutical point of view. For them, the aforementioned conceptual link does not concern morality but ethics.[11] That is, they maintain that for a set of standards of action to add up to law it is necessary but also sufficient that a group of people believe or pretend to believe that it is morally required of them to comply with it. But it is not necessary that this belief is also true. In this way, legal positivism seems to preserve its ability to analyse legal phenomena without presupposing any substantive moral view.

Note though, that, thus understood, legal positivism is supposed to be neutral in two respects. On the one hand, the truth of its claims is supposed to be independent of the truth of any particular moral view. Let's call this type of neutrality first-order moral neutrality. This, you may recall, has the following consequence: from what, according to legal positivism, is law nothing follows in principle about what we ought to do, morally speaking. On the other hand, the neutrality of modern analytical legal positivism is of a meta-ethical character. The truth or falsity of its claims is not only independent of the truth of any particular moral view: in addition, it is independent of the question of whether there is any moral truth. Hence, it is intended to be compatible with moral relativism and even certain forms of scepticism like quasi-realism. It seems only to exclude mechanistic and more generally reductivist accounts of normativity. For these reasons, I will state that the neutrality of legal positivism is complex.

4 Modern analytical legal positivism: more committed than it can stand

So, despite the recognition of a conceptual link between law and morality, it would seem that the meta-ethical neutrality of modern legal positivism, which is arguably made available by the hermeneutical point of view, ensures the "descriptiveness" of its claims. In the rest of this essay, I intend to challenge the meta-ethical neutrality of the hermeneutical point of view and with it the neutrality of modern legal positivism, starting from the account of the rule of recognition expounded in the previous section. I will claim that the meta-ethical

11 For a classical statement of the distinction between the moral and the ethical, see P Strawson, "Social morality and individual ideal" (1961) 36 *Philosophy* 4ff.

neutrality by itself does not suffice to guarantee the distinction between law as it is and law as it should be, if it is not complemented by its first-order moral counterpart. And in the case of the version of legal positivism we are now examining, I will claim that the combination of the two types of neutrality fails.

A The necessary combination of moral and meta-ethical neutrality

In this section I will try to show that legal positivism needs the combined effect of moral and meta-ethical neutrality in order to stay away from what Hart has called the "jungle" of philosophical strife[12] and secure for its claims the status of descriptive non-committed statements. Suppose it turns out, on the one hand, that there are objectively right answers to moral questions and, on the other, that there is a general moral obligation to obey the law. Now recall that, according to the conventionalist understanding of law in the revised version summarised above, the idea of law is conceptually linked to the fact that members of a group take their common practice as a moral reason to do their share to sustain that practice. In this case, and assuming the philosophical debate is resolved in the direction I suggested, it would follow that the same circumstances that make it true that we have a moral obligation to obey the law also make it true that there is law. For legal conventionalism of the revised type to maintain its positivistic character, however, it must be the case that in such a situation this fact is merely contingent. That is, it must be only contingently true that under the same circumstances there is law and we have a moral obligation to obey it. The crucial test for this is whether there are cases where, although the conditions for the existence of law are satisfied, the conditions for the existence of a moral obligation to obey it are not. Again, this means that there must be a possible world where a legal system is in force, whereas the moral conception or conceptions underpinning the belief of legal subjects about the moral bindingness of their collective practice are false. Otherwise, if the truth conditions of claims about the existence of law are conceptually linked to the truth conditions about the existence of a moral obligation to obey the law (on the assumption that there is moral truth), then we could entail from the fact that a legal standard is valid that we also ought to follow it, morally speaking.

B What is the "fuel" of legal normativity?

Against the analysis of the previous section it may be argued that even deprived of moral neutrality the legal positivist still has one manoeuvre at his or her disposal. More specifically, it may be insisted that philosophical claims about the existence of law are made from a detached point of view. They merely describe certain complex social facts. But they don't have normative force. This response seems to sever the tie between the meta-ethical and the moral neutrality that I argued for in the previous section. It suggests that even if moral neutrality is not possible (because, say, there is only one right answer to moral questions), the legal theorist can always find resort in the meta-ethical neutrality of the hermeneutical point of view. In this and subsequent sections, I want to show that unless complemented by a robust type of moral neutrality, meta-ethical neutrality in itself is no more than mere pretence or a smokescreen whose sole aim is to conceal the failure of the positivistic enterprise.

Recall that the hermeneutical point of view presumably enables legal theorists to understand the practical attitudes of participants in legal practice without themselves passing any judgment on the truth of the moral conceptions that participants invoke to ground their belief in the existence of moral reasons that justify their practical attitudes. It is necessary

12 "Definition and theory in jurisprudence" in H L A Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon 1983), p. 21.

and sufficient for the existence of law in this respect that each participant is taken to justify his or her attitude, either sincerely or not, by appeal to *some* moral conception, even a false one. Arguably, the meta-ethical point of view imposes no constraint on the content of the moral conceptions that happen to support the crucial normative attitudes of participants. But it would be premature to infer from this that legal theory can indeed be morally neutral. Even if the meta-ethical point of view doesn't seem to privilege any one moral conception as suitable for that role, this doesn't entail that *any* moral conception is indeed suitable as a "fuel" of legal normativity. Quite the contrary, if a moral conception is to perform the role that the revised conventionalist understanding of law assigns to it, it must satisfy certain conditions. Thus, it must be able to present the fact that the law dictates a certain conduct as giving rise to a moral reason to adopt it. This doesn't mean of course that the moral conception must also be sound. At any rate, though, it must be such that it includes in the moral description of legal practices it offers all those circumstances that, according to the conventionalist understanding, constitute the idea of law.

Once again, against this line of reasoning the objection may be raised that we ask too much from participants in legal practice. This objection starts from the fact, often highlighted in the preceding analysis, that those who participate in the common practice need only pretend to believe they have a moral reason to sustain it, while in reality their reason is none other than purely self-interested prudence, adherence to tradition or plain imitativeness. The objection concedes, of course – as do many legal positivists – that the motives that actually drive participants are one thing and the practical reasons by appeal to which they are *taken* to justify their participation are quite another. But it insists that, since for legal positivists it is irrelevant whether the moral conception that participants are taken to espouse is sound, it must be equally irrelevant which moral conception more specifically they do adopt.

This reaction, however, would be out of order. It would be inconsistent both with the substantive views of modern legal positivists concerning the nature of law and with the methodology of the hermeneutical point of view. What matters according to the revised conventionalist understanding of law is not that legal practitioners are actually moved by moral reasons but that they are *taken* to act from such reasons. Only this kind of reasons, we have seen, can make sense of legal practice and the special normative force of legal reasons. These moral reasons constitute the internal normative horizon of legal practice, so to speak. They thus have the character of an ideal in the light of which the use of normative language by participants makes sense and is appraised.[13] This means that the question about whether the moral conceptions that fuel the normativity of law must take a certain shape and, further, the question about the moral neutrality of legal positivism need to be answered at the level of ideal practical deliberation and not at the level of actual motives. In turn, the objection of the previous paragraph that states that any moral conception will do fails precisely because it falls prey to the common confusion of actual motives (an explanation of human behaviour) and reasons (its justification), which enable us to view that behaviour as having some kind of meaning for the agent.

From this point of view, a moral conception is ill suited to fuel the normativity of law, unless those who adopt it can – from within that conception – regard the duties arising

13 Cf. J McDowell, *Mind, Value, and Reality* (Cambridge, Mass. and London: Harvard UP 1998) pp. 104–5.

from the common practice as morally justified.[14] In the following section, I will outline the main features of a moral conception that I will claim is up to this task. That is, it is in position to account for the fact that individual participants take it that they have a duty to follow the rule of recognition by virtue of the fact that everybody else likewise accepts such a duty, this being made manifest in their common practice. The constraints that I will argue flow from this structure of legal reasons, being a special kind of moral reasons, seem to undermine once and for all legal positivism's professed moral neutrality.

C The idea of a fair scheme of cooperation as the normative foundation of law

It has so far been argued that legal reasons are a special kind of moral reasons.[15] If a person has them, they do so by virtue of the special bond that ties them to a certain actual political community. Participants develop a special reflective attitude toward the practices of their political community. They regard them, even insincerely, as the manifestation of a cooperative enterprise. This, we have seen, is what it means for a group of people to treat their common practices not simply as the outcome of some form of social coordination but as a joint project governed by standards that they take to be public, common and binding on all. I have claimed that it follows from this that the binding force of these standards is categorical. Each of the participants, from the standpoint of a certain moral conception, must regard the terms of the cooperation as in principle fair. Now, the moral conceptions that inspire participants in the joint project must be reasonable. That is, they must have some internal adequacy and coherence. For, otherwise, they wouldn't really provide justification for any moral judgment.[16]

Let's take a closer look at the content of the attitudes participants take toward their political community. Each one of them considers him or herself to be bound to do their share in that project – namely to comply with the standards that govern it – because each person considers all the other members of the group to view themselves as likewise bound. In other words, the reason for everyone to participate in the practice is inevitably grounded (at least in part) in the moral attitude of their fellow-participants. To put it differently, fellow-participants qua moral agents are themselves the reasons for which each one ought to carry on with the practice.[17] Hence, the idea of a fair scheme of cooperation exemplifies an ideal of moral reciprocity: the practice of law is the practice of mutual public recognition on the part of the members of a certain political community. To say that the cooperative practice of a certain political community is the forum where the mutual recognition of its members takes place is just another way of describing how each member must regard him

14 This seems to be the relationship Rawls envisages in his later work between the political conception of justice on which various comprehensive religious and philosophical doctrines overlap. See J Rawls *Justice as Fairness: A restatement* (Cambridge, Mass: Harvard UP, 2001), p. 33: "For those who hold well-articulated, highly systematic, comprehensive doctrines, it is from within such a doctrine (that is, starting from its basic assumptions) that these citizens affirm the political conception of justice. The fundamental concepts, principles, and virtues of the political conception are theorems, as it were, of their comprehensive views."

15 On taking legal reasoning as a special case of moral reasoning, compare also the Sonderfall (special case) thesis of Robert Alexy (*A Theory of Legal Argumentation. The theory of rational discourse as theory of legal justification* (Oxford: Clarendon 1989) and the position of Gerald Postema ("Jurisprudence as practical philosophy" (1998) 4 *Legal Theory* 329–57).

16 John Rawls has famously contended that the notion of a set of fair terms of cooperation as well as that of a reasonable moral conception are already included in the idea of a cooperative activity that stretches over time. See J Rawls, *Political Liberalism* (New York: Columbia UP, 1995), pp. 16–17; and *Justice as Fairness*, pp. 6–7.

17 I draw the idea of persons as categorical practical reasons in the context of a soft form of moral realism from Christine Korsgaard, *The Sources of Normativity* (Cambridge: CUP, 1996), p. 166.

or herself and others from the point of view of an ideal practical deliberation: From this point of view each member accepts that it is a sufficient reason, both for him or herself and for others, to contribute to the common practice that members of the political community in general appear actively to manifest their belief that this practice constitutes a fair system of cooperation. In so doing, each member presupposes that everybody else also regards – on the basis of one's own moral conception – that the terms of the practice are just and therefore binding. Thus, members of the political community are understood as participating in the practice on the basis of a belief in its fairness and bindingness.

This way of conceiving of fellow-participants implies that, in order for someone to be regarded as participant in the cooperative enterprise and to be publicly recognised as member of the political community, it is necessary and sufficient that that participation is grounded in a reasonable moral conception, according to which the common practice is presented as a fair system of cooperation which lays binding claims on the individual. That person's status as participant, though, does not depend on the content of his or her reasonable moral conception in any further way. For what is crucial in this context is not which moral conception each participant adopts or whether that conception is right, but just the fact that someone's participation is understood by him or herself and by others to be *morally motivated*; to flow from their having adopted a certain moral conception, according to which the common practice is presented as a fair scheme of cooperation that lays binding claims on the individual. In other words, what is crucial is someone's *general capacity* to form and adopt such moral conceptions and to act on them.

This reflective capacity is made manifest by one's readiness to offer arguments in defence of one's actions by invoking abstract principles, or to criticise others, and also to accept criticism as justified. An equally important manifestation of this capacity is one's willingness to modify one's moral conception and adjust one's behaviour accordingly when one is offered convincing reasons to do so. Such a change, even if it is radical, does not affect one's continued status as member of the political community. For that status depends on one's capacity to occupy a critical reflective attitude toward one's own behaviour, aims and desires, and to evaluate and modify them in the light of abstract categorical principles. In the context of the practice of law, we have seen that this capacity is further specified as the capacity to view that practice as a cooperative activity, the terms of which meet certain standards of justice, on the basis of a reasonable conception of those standards, and also the capacity actively to contribute to the continuation of the practice, by adhering to its terms. Being equipped with this effective *sense of justice*, as this capacity is sometimes referred to,[18] is in turn typically manifested in one's tendency to make claims and, more importantly, to assume duties and other commitments that flow from the terms of the practice. But since, as we have seen, the practice itself constitutes the normative foundation of the law, the sense of justice is in essence the capacity to submit oneself under the governance of the law.

Undoubtedly, there is evident affinity between the idea of a composite reflective capacity of the kind outlined above and the idea of autonomy or *moral freedom*, which in the deontological tradition in moral philosophy acquires the status of a categorical property of persons. It is important to stress, however, that the argument of this essay does not depend on or flow from the truth of any particular metaphysical view on personality. The idea of the "moral powers" with which members of the political community are understood to be equipped, on which the argument of the essay does depend, is merely a reflective reconstruction of what those who engage in legal practice ought to presuppose, if legal

18 J Rawls, *A Theory of Justice* (Oxford: OUP, 1971), pp. 505ff.; J Rawls, "The sense of justice", in S Freeman (ed.), *John Rawls: Collected Papers* (Cambridge, Mass: Harvard UP, 1999), pp. 96ff.

practice is to make sense: to recap, they ought to presuppose that each member of the political community, themselves included, possesses the fundamental moral powers that constitute what we have come to call moral freedom. That is, they ought to presuppose that, since they are all understood to follow the practice for moral reasons, each member is at least minimally capable of forming their own moral conception and developing an effective sense of justice.

This means that, in the context of ideal deliberation, each person carries weight in the moral judgment of another, just by virtue of the fact that he or she is regarded as a moral person, with whom cooperation on the same terms is possible. As Rawls notes: "[w]e say that a person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life".[19] This being the only capacity in which members participate in ideal deliberation, everyone necessarily takes oneself and others to be radically *equal*. For, from the crucial normative point of view everyone is presumed to possess the requisite capacity.

The conclusion of the previous paragraphs is evidently supported by common experience. We typically recognise that under normal circumstances everyone above a rough age limit has the capacity for the moral powers that are necessary for full membership in the cooperative activity of law. But common experience is not a value-neutral empirical fact, which can by itself provide a criterion for selecting those from among the human species who are indeed capable in this sense. By contrast, common experience merely reflects our practices of mutual recognition.[20]

Hence, moral freedom and equality determine the special standing of persons in the context of ideal practical deliberation. At the same time, they constitute the moral reason that gives rise to a prima facie political obligation: From the ideal standpoint of justification, only persons who cooperate under conditions of freedom and equality may be, each one of them and all of them together, the source of moral authority and commitment. In this way, freedom and equality become the building blocks of the idea of a fair system of cooperation, which specifies, as we have seen, a notion of reciprocity, which is, in turn, constitutive of the idea of a categorical social rule. A term cannot be fair and therefore binding unless it guarantees freedom and equality, as understood above, between members of the political community. Thus, the conception of law as a fair scheme of cooperation models the framework of acceptable constraints on the content of the terms under which someone can have a political obligation.[21] Nonetheless, these constraints, however thick, do not uniquely determine a particular moral conception. Both our experience and the intellectual universe of religious and moral ideas can provide us with examples of conceptions that pass the test, while being as diverse as, for instance, natural law humanism and the anthropocentric theology encapsulated in the phrase "in His own image". Not all conceptions pass the test, though. So we have to exclude aristocratic or theocratic conceptions, insofar as they presuppose a hierarchical structure in society, as well as conceptions that deny moral personality to members of certain segments of the population. The same applies to many

19 Rawls, *Political Liberalism*, p. 18.

20 A persuasive account of such mutual recognition practices could be given along the lines of Donald Davidson's idea of radical interpretation. See, e.g. his "Psychology as philosophy" in *Essays, Actions and Events* (Oxford: Clarendon 1980) pp. 229 ff.

21 Rawls, *Justice as Fairness*: "[The device of the original position] models what we regard – here and now – as acceptable restrictions on the reasons on the basis of which the parties situated in fair conditions, may properly put forward certain principles of political justice and reject others."

versions of utilitarianism and most definitely to classical act-utilitarianism, if Rawls' famous objection against it is valid. [22]

In short, freedom and equality constitute a set of fixed points on which acceptable moral conceptions overlap. Although these two ideals don't pick out a single comprehensive moral conception, they define a particular normative conception about what can count as a fair term for the cooperative activity of law, a conception of justice grounded in the equality of free persons cooperating over time. At its core, any claim made in the course of legal practice is presumed to rest on some common and public standard that is acknowledged to be binding, because it is believed to accord with the principles of justice that ought to govern the scheme of cooperation between free and equal persons over time. Thus, the idea of a fair scheme of cooperation forms the normative horizon of legal claims. To use a rather old-fashioned philosophical idiom, it is a regulative idea of Practical Reason.[23]

What I have so far said should not be taken to suggest that a legal system exists only insofar as its requirements conform to the principles of justice, a claim commonly attributed to natural law theorists by legal positivists. All it suggests is that it is part of the nature of law that law must at least claim to be just – as defined above – or be presented as such.[24] To be sure, legal officials may be insincere, hypocritical or simply in error when they speak on law's behalf. However, a legal system that imposes or tolerates systemic discrimination in the standing of legal subjects, or a legal system that partially or totally excludes some of them from the life of the political community, or a legal system that doesn't adequately respect its citizens' moral freedom and its own institutional safeguards etc., such a legal system does not cease being a social phenomenon to which we would rightly refer as "law" or "state".[25] That's because, even when it is unjust, law still claims to be morally justified and worthy of the allegiance of its addressees. Of course, in that case its moral demerit seriously compromises its *all-things-considered moral* bindingness.

At any rate, the existence of this normative horizon constituted by the idea of a fair scheme of cooperation between free and equal persons implies that the effective "deep grammar" of every law is firmly grounded in a full-blooded conception of the principles of political justice. It is the bindingness of those principles that is presupposed in the participants' everyday use of normative language. Hence, in a crucial sense Hegel was right

22 Recall that, according to Rawls, utilitarianism does not take seriously the separateness of persons and instead treats them as substitutable and dispensable parts of a comprehensive system of desire-satisfaction that aims at the maximisation of aggregate utility. See Rawls, *A Theory*, pp. 22–7.

23 I Kant, *The Metaphysics of Morals* (Cambridge: CUP 1991), pp. 124–5.

24 That is why it would be deeply contradictory for a legal system to declare its unjust character, by including, for instance, such a declaration in its constitution. As is evident, I am borrowing this idea from Robert Alexy's famous thought experiment. See R Alexy, "On necessary relations between law and morality" (1989) 2 *Ratio Juris* 167–83.

25 One must therefore accept that the concept "law" also refers to extremely unjust legal systems, such as those that institute slavery or put into effect an official policy of systematic extermination of a segment of the population. It must be noted, though, that the extreme injustice of such legal systems affects the scope of the prima facie bindingness of its rules. So, for example, to the extent that the political institutions of Nazi Germany are presented as just vis-à-vis those they recognise to be members of the political community, they do constitute a legal system that properly makes a prima facie claim to their allegiance. This has the following consequence: the soldier manning a gas chamber has a prima facie duty to do his share in the programme of the physical extermination of the Jewish and gypsy population and of homosexuals. On the other hand, though, the people targeted by that programme do not have such a duty because they are not addressees of law's claim. Likewise, a slave in a 5th-century BC polity didn't have a prima facie duty to be put to death. But, in the case of a free citizen, such a duty existed and – as the example of Socrates demonstrates – was sometimes willingly fulfilled.

to say that every legal system claims to realise the Moral Idea.[26] Every legal system is necessarily understood to be the institutional embodiment of a certain conception of justice.

D The rejection of the obligation to obey the law and its price

The claim advanced above that conventionalist theories of law, far from being morally neutral, presuppose a conception of justice based on equality and liberty will hardly surprise anyone but the most committed legal positivists. It may be argued, however, that, even if we accept the conclusion of the preceding analysis, all is not yet lost for the type of analytical legal positivism under consideration. For, even if it is conceded that the principles of political liberalism constitute the normative horizon of every legal system, it doesn't follow from this that these principles are also true. For legal positivists like Hart, the objection will go on, it suffices that a group of people actively accept that there exists a moral obligation to follow the rule of recognition. Whether these people hold this attitude sincerely or not is simply irrelevant. The existence of such an attitude by itself is all that a positivist theory of law is committed to. And this attitude is still an empirical fact that the theorist can ascertain, understand and report in a non-committal fashion by occupying the hermeneutical point of view.

Hence, despite having to abandon its moral neutrality, Hartian legal positivism appears to retain at its disposal its methodological arsenal, namely its meta-ethical neutrality. From the meta-ethical standpoint, it seems, the statements it makes are purely descriptive, as Hart insists. They seem not to depend in any way on critical morality. Likewise, from the same standpoint lawyers seem to be able to expound legal doctrine in Kelsen's detached fashion.

But one may wonder: what is the point of this methodological possibility, when it is not backed by moral neutrality? The answer is that there is no point. Insofar as the bindingness of propositions of law presupposes the truth of a certain conception of justice, legal theorists cannot remain agnostic and abstain from tackling the question whether there really is a moral obligation to obey the law. The very idea of neutrality implies the existence of more than one alternative. One cannot be neutral toward a single option. What then are the alternatives that a legal theorist is supposed to be neutral to, if the only available option is that there is an obligation to obey the law? To insist on not taking sides in this case seems mere pretence.

Of course, there is still one route left open for Hartian positivism: to maintain that there is in fact no obligation to obey the law. But such a strategy faces serious obstacles. First, it seems to go against the fact that most people in their daily lives make manifest their belief in the existence of such an obligation. It must therefore come up with a plausible theory of error.[27]

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26 G W F Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge UP, 1991), § 257.

27 The burden on those who deny the existence of an obligation to obey the law to provide this kind of theory is underlined, among others, by Philip Soper, "Legal theory and the claim of authority" (1989) 18 *Philosophy & Public Affairs* 209–37, and, more emphatically, by Leslie Green, "Who believes in political obligation?" in J Narveson and J T Sanders (eds), *For and Against the State* (Lanham Md: Rowman & Littlefield, 1996), pp. 1–17, especially p. 5. Both reprinted in W A Edmundson (ed.), *The Duty to Obey the Law. Selected philosophical readings* (Lanham Md: Rowman & Littlefield, 1999), pp. 213ff. and 301ff. respectively. Leslie Green, who belongs to those who argue against the existence of an obligation to obey the law, based on a survey of public opinion in Chicago, observes that the mass belief in a moral obligation to obey the law is rather a myth. In fact, he argues, this belief is made up of a variety of attitudes, which, though syntactically similar, have very different content. It must be stressed, however, that the nature of legal reasons is not a matter of empirical research, a matter of reporting the attitudes toward the law shared in a certain population. Instead, it is more a question of exploring the philosophical presuppositions of those attitudes.

Let me pursue this point a bit further. The existence of an obligation to obey the law can be challenged on either meta-ethical or moral grounds. That is, one can either reject the idea of moral objectivity wholesale or accept that moral objectivity is in general possible but insist that there is no genuine moral obligation to obey the law. Of the two strategies the former seems to be no longer available to the modern analytical legal positivist of the Hartian type. For this kind of comprehensive moral scepticism will inevitably lead him to views that tend to reduce legal and in general social practice to behavioural regularities and habits of obedience. Insofar as legal positivism is committed to the independence of the internal point of view, it cannot but stay away from reductive accounts. Hence, the argument against the existence of a general moral obligation to obey the law must take the form of what Ronald Dworkin has labelled *internal scepticism*.[28] However, internal scepticism, with regard to the obligation to obey the law, will not get us very far either. To see why, it would be useful to start once again from the fact that members of a political community commonly believe that they have a moral duty to obey the law. I am not saying that this fact on its own counts against internal scepticism. Although the discovery of an instance of mass deception or of a widespread error causes much surprise and possibly distress, this is no reason to hold onto a false belief. More important for present purposes is the connection between this common belief and the existence of law. It has been argued that the fact that each member of a political community takes upon him or herself the common practice of identifying, applying and changing law as a moral duty (and is understood by others to regard this as such) is the moral reason for everybody else to do the same thing. It has also been argued that only in this way is it possible for certain standards to acquire the categorical bindingness that our day-to-day use of normative language assigns to legal standards. If, therefore, the obligation to obey the law is shown to be nothing but ideology, this "demystification" of legal practice is bound to have wide-ranging effects.

To begin with, it goes without saying that internal scepticism with regard to the obligation to obey the law cannot be part of common and public knowledge in the political community: public recognition of the non-existence of such an obligation would automatically break the special bond upon which membership in the political community is founded. In this case the law would give rise to duties, if it did, solely by virtue of calculations of personal interest or psychological identification. As a consequence, social life would be more of an association, based on the free choice of participants, rather than a system of cooperation, participation in which is mandatory, insofar as it is taken to be fair.[29]

But maybe we could instead envisage a world where members of the political community participated in the common practice of identifying, applying and changing law, pretending that they did so out of a sense of duty, while in reality they believed that such a duty never existed. In this case, the belief in the non-existence of that duty would be confined to the private sphere, even if it happened to be shared by everyone. For otherwise there would cease to be a political community. This scenario, as has already been noted, is not conceptually impossible, since all the conditions for the existence of law are in place, even if the requisite attitudes are mere pretence. Still, as I argued above, what we would be faced with in this case would not be a normally functioning political community, but rather one at the brink of total collapse or radical change, whose institutional life has deteriorated into parody, since nobody believes in the justice of its terms, which nonetheless each

28 On the distinction between internal and external scepticism, see Dworkin, *Law's Empire,* pp. 78–85, and R Dworkin, "Objectivity and truth: you'd better believe it" (1996) 25 *Philosophy & Public Affairs* 87–139.

29 In fact this is the view that Joseph Raz seems to hold in "The obligation to obey: revision and tradition" (1984) 1 *Notre Dame Journal of Law, Ethics and Public Policy* 139–55.

participant himself invokes, when he demands the compliance of others. In other words, if the rejection of a general moral duty to obey the law is taken to be sound, then one is committed to saying that law has an inherent tendency either to self-effacement or to its transformation into an extremely unstable social practice, which is for this reason very unlikely to last over time.

Thus, if they were to dismiss the moral bindingness of law as mere ideology, conventionalist theories of the Hartian brand would effectively reduce the life and existence of legal systems and political communities to a practice based on the immaturity of the masses and the hypocrisy of an enlightened elite. This of course is a consequence that is hard to swallow. Yet, this is what Hart seems to have in mind when, as a justification for his insistence on not accepting a minimal necessary connection between law and morality, he points out:

> [I]t seems to me to be unrealistic to suppose that judges in making statements of legal obligation must always either believe or pretend to believe in the false theory that there is always a moral obligation to conform to the law.[30]

But how unrealistic can the supposition be against which Hart's mistrust is directed? The presence of law is one of the most pervasive and, one might say, routine features of our everyday lives. We typically employ legal standards to appraise one another's conduct, to exchange recommendations, we invoke them to raise claims against one another and – at least in the main – abide by them, unless perhaps it is quite easy for us to avoid doing so. With our active participation in legal practice each of us is taken by others to accept the rule of recognition that governs our political community and organises our common life. In other words, these elementary attitudes and practices give rise to a presumption that all those who participate in legal practice regard law's authority as legitimate; put differently, that they treat the law of recognition and the rules validated under it as realising a conception of justice that all members of the political community embrace and accept as binding. On this point, natural law theorists as well as many legal positivists are in agreement. However, as has been argued, for this attitude (that members of the political community are taken to share) to be reasonable and coherent, it must be the case that the conception of justice that the institutions of the political community are taken to realise is made up of the principles of political justice that govern a cooperative enterprise between free and equal persons that stretches over time.

No doubt, many theorists believe that this conception of justice is deeply wrong. Even more theorists believe that the present political structure of many states is in fact unjust; and they may be right. But, however this may be, it doesn't change the fact that, if we want to conceive of legal practice as having a point and some internal coherence and not merely as raw behavioural data, we must suppose that it is taken by participants to constitute a fair scheme of cooperation between free and equal persons. This, we have seen, is the inescapable grammar of legal practice. So, regardless of who in fact believes in a moral obligation to obey the law or in the justice of the legal system, our social practices that supervene on the patterns of convergent behaviour *establish* the mutual recognition of members of our political community as persons and fellow-participants. By interpreting practitioners' behaviour as a manifestation of their active participation in a fair system of cooperation, we attribute to each practitioner – ourselves included – the status of a person equipped with the moral powers that are necessary for one's full participation in the common life of a political community. In this way, each one of us individually and all of us together form a public or political personality that transcends our fluctuating psychological

30 Hart, *Essays*, p. 10.

dispositions and personal views. Because it abstracts from contingencies, this personality provides an appropriately stable foundation of one's membership in the practice of mutual recognition and is capable of making each one of us an equal bearer of the moral authority of law. From this viewpoint, the coercive nature of law, its ability to bind us "externally", is merely a manifestation of the categorical force of being a free and equal member of the political community.[31] That is, it flows from the fact that moral persons are themselves capable of constituting "external" practical reasons, namely reasons that are objective and independent of our actual psychological dispositions.

So, when someone, by actively participating in legal practice, acknowledges their moral obligation to obey the law, that person is at the same time taken to accept all other participants, including him or self, as persons who are equally equipped with moral powers. Likewise, the individual's participation allows others to treat that person as a moral person. An analogy may be of some use here. When we sympathise with someone who is suffering, we treat him or her as a person and at the same time we allow others to treat us as someone who is capable of understanding what pain means. In the same vein, the recognition of a moral obligation to obey the law is part of what it means to be a moral person.[32]

So, if we deny a prima facie moral obligation to obey the law, we necessarily give up on our participation in the practice of public mutual recognition between moral persons. We prove ourselves unwilling to conceive of those with whom we cooperate in the context of our common political life as anything more than mere obstacles or means in our strategic calculations. No doubt, we do adopt this kind of attitude from time to time. However, its consistent and systematic adoption would deprive us of the possibility to ascend through the reciprocity of recognition to the status of person. Even more important than our social standing as persons, this attitude of a moral Robinson Crusoe would deprive us of our capacity to transcend in reflection our various experiences and to view ourselves as a self, a unified subject of perception and action among other subjects.[33] Our mutual recognition as persons and moral reasons for action is not an attitude that we choose but "simply what we do".[34]

Thus, Hart was wrong to claim that a general moral obligation to obey the law is unrealistic. In a sense, what is unrealistic is to deny the existence of a moral obligation to obey the law merely in order to avoid having to concede the moral presuppositions of the existence of law. The rejection of the categorical bindingness of the prima facie obligation to obey the law or its explanation in terms of an optional identification with a certain group, insofar as they deny the mutual recognition of those who coexist in a political community as moral persons, contradict something that each of us does and cannot but do. In view of

31 On the idea of external legislation and the fundamental distinction between duties of justice (*officia juris*) and duties of virtue (*officia virtutis*) that is made possible by this idea, see Kant, *Metaphysics*, pp. 64–5.

32 In the same vein, Rawls writes that the acceptance of a duty of fair play "is a necessary part of the criterion for their recognizing one another as persons with similar interests and capacities", "a reflection in each person of the recognition of the aspirations and interests of the others to be realized by their joint activity" ("Sense of justice", p. 62). Rawls also suggests the analogy between compassion and the duty of fairness, which he derives from a reading of certain remarks made by Wittgenstein regarding the idea of pain and private language.

33 Jürgen Habermas famously argues for the impossibility of moral solipsism ("Diskursethik: Notizen zu einem Begründungsprogramm" in J Habermas (ed.), *Moralbewußtsein und kommunikatives Handeln* (Frankfurt a M: Suhrkamp 1983), pp. 53–125). Drawing on the later philosophy of Wittgenstein, Thomas Nagel has made a convincing case in favour of the proposition that a self without the idea of being with someone else is inconceivable. See. T Nagel, *The Possibility of Altruism* (Princeton: Princeton UP, 1978), pp. 99–114.

34 L Wittgenstein, *Philosophical Investigations* (Harlow: Prentice Hall, 1973), § 217: "If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'"

this, it may be wise for proponents of contemporary analytical legal positivism to start getting used to the idea that there are moral truths and that the prima facie moral obligation to obey the law is one of them. In that case, however, it would certainly be worth considering further whether their supposedly descriptive accounts are really morally neutral, and hence also whether there is anything really positivistic left in legal positivism.

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The transcendental, the existential and the ethical: Alexy and Dworkin on the foundation of rights

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1 Introduction

What do we expect from a theory that professes to furnish a justification for human rights? Which goals do we want it to accomplish and which theoretical and practical concerns do we want it to address? These questions are not meant to invite or presuppose a thoroughgoing philosophical pragmatism. Instead, they aim to alert us to the fact that we can make sense of human rights at different levels and from different perspectives – cultural, historical, legal, political or philosophical, to name but a few – and, thus, that, depending on the level of detail our accounts are pitched to and the perspective we adopt, we ought to calibrate our theories accordingly. In other words, before we venture into this fascinating territory, we must be clear about our terms of reference.

The primary aim of this paper is to assess Robert Alexy's recent proposal for a discourse-theoretical justification of human rights.[1] Alexy does not seek to justify human rights in terms of political expediency or usefulness. The justification he offers is, as one might say, foundational. His aim is to establish that human rights are firmly anchored in human experience; that we cannot just do away with them whenever it would be inexpedient or less useful to stick to them. For this reason, Robert Alexy lists a demanding set of properties of human rights – as we understand them – that he thinks alternative conceptions of their foundation ought to respect and account for. These properties thus serve as desiderata with regard to which we should on his view measure the success of our conceptions. A conception is for him pro tanto deficient, if it fails to tell a plausible story for the fact that we associate the concept of human rights with one or more of those properties.

So, let's take a closer look at Alexy's list of desiderata. When thinking about human rights, says Alexy, we ought always to bear in mind: a) their universal application to all persons; b)

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1 This proposal is primarily to be found in R Alexy, "Diskurstheorie und Menschenrechte", in R Alexy, *Recht, Vernunft, Diskurs* (Frankfurt a M: Suhrkamp Verlag, 1995), 142ff. That chapter was subsequently translated into English as R Alexy, "Discourse theory and human rights" (1996) 9 *Ratio Juris* 3(September), 209–35. References will be made to the latter version (hereafter DTHR). The account was subsequently supplemented in R Alexy, "Menschenrechte ohne Metaphysik?" (2004) 52 *Deutsche Zeitschrift für Philosophie* 1, 15–24 (hereafter MoM).

the fundamental nature of the interests and needs they stand for or protect; c) their abstractness; d) their moral force: and e) their priority.[2] The first desideratum reminds us that the scope of human rights may not be truncated by appeal to geographical, cultural, racial or social circumstances. Such rights encompass all human beings just by virtue of the fact they are human. Justifications of human rights, thus understood, carry considerable ambition. They stand opposed to a group of theories that aim to tame them – and also blunt their practical edge – by restricting their applicability in various ways. Communitarians and historicists, as is well known, have pride of place in that group of theories.

Furthermore, human rights are not meant to protect just any interest human beings happen to have. Rather, they reflect interests that may reasonably be considered of the first importance for all human rights bearers. These interests typically correspond to very general features of what it means for someone to live well. The second and third desiderata allude to this property of human rights.

Finally, human rights, unlike rules of etiquette, are standards of special force. They belong to the realm of moral norms, that is, the norms that define the duties we owe one another (I take it that this is a widely shared definition of morality, but for our purposes nothing hangs on whether anyone adopts a different one). This is the import of the fourth desideratum. In addition to it, for Alexy human rights must be shown to enjoy some priority over other considerations; put differently, they must be shown to be equipped with a *heightened* moral force. As evidence of this priority, Alexy points to the power human rights are often recognised as having in constitutional democracies to defeat legal rules that are incompatible with them.[3] But we can generalise this observation so as to make it apply to non-legal contexts as well. For instance, we may say, with Alexy, that although rights "can . . . not only be limited because of other people's autonomy but also in favour of collective goods",[4] nonetheless "[a]utonomy does . . . have a *prima facie* priority over collective goods", at least "in the form of a burden of argument in favour of individual autonomy and against collective goods".[5] We need not settle for present purposes how exactly this priority is to be cashed out.[6] It suffices to stress that, unless our theories provide a basis for assigning rights *some* kind of priority, they will have failed one crucial desideratum for a foundational justification of human rights.

Of course, not everyone accepts that we must take moral imperatives seriously. Many theorists assume what we might call a radically sceptical outlook toward morality. As a consequence, they are unlikely to be drawn to the idea that human rights are something we have strong reason to care for just by virtue of the fact that they reflect *moral* requirements. Alexy does not dismiss the radical sceptical challenge out of hand. In fact, he contends that part of the aim of a foundational justification of human rights is to provide the resources to rebut it. This is, in fact, one of the distinctive aspects of his approach. Alexy's theory starts from bracketing out the firm intuition most of us have that both morality and human rights matter.[7] By contrast, heartened by an almost universal acceptance of human rights

2 MoM, p. 16.

3 MoM, p. 16.

4 DTHR, p. 226.

5 DTHR, p. 227.

6 Writing in the context of constitutional rights, Alexy has argued that rights function as principles, by which he means optimisation requirements. They give us a reason to realise them to the greatest extent that is a) factually possible and b) compatible with existing rules and the promotion of other principles, to which we are also committed. See his *A Theory of Constitutional Rights*, J Rivers (trans.) (Oxford: OUP, 2002), especially pp. 44–110.

7 MoM, p. 15.

norms, many contemporary conceptions of human rights take all this for granted and proceed directly to explain what it is that makes human rights matter. In this article, much attention will be drawn to what this choice of stage-setting entails for Alexy's argument – and its success.

It is not my intention to examine whether the list is exhaustive or whether it leaves out other important properties that we tend to attribute to human rights. Nor, in fact, shall I go into all the aspects of Alexy's intricate account. What I seek to do instead is suggest a couple of ways in which I believe Alexy's account falls short of generating the requisite philosophical support for two of the properties he mentions, namely the fundamental nature of the interests that underlie human rights, and the kind of force that we attach to claims based on them.

My argument will have the following structure. In the next section I shall present in some detail Alexy's proposal for a discourse-theoretical justification of human rights. I shall then launch two arguments that purport to show that this proposal does not meet the two desiderata mentioned above (sections 3 and 4). I will call them respectively the *incongruence argument* and the *argument of force*. Finally, building on some of Alexy's own remarks and then also drawing on Ronald Dworkin's theory of rights I shall outline an alternative model for a foundational justification of human rights (section 5).

2 A transcendental argument for the foundation of human rights

Robert Alexy invites us to distinguish two ways in which discourse theory may be employed in the service of a justification of human rights. One way, which he labels indirect justification, would be to stake out some human rights principle in an actual discourse that incorporates guarantees aiming to implement the general rules of discourse. If this principle is eventually agreed to under these discourse-friendly conditions, then the fact of our agreement is all the justification that our principle needs.

Alexy, however, is after what seems to be a more abstract and at the same time less contingent discourse-theoretical justification for at least some basic human right to liberty. It is a justification that will stand, however we decide to spell that right out in further detail. Alexy labels it direct, because it does not depend on any actual discourse having taken place. Rather, this type of justification starts from the fundamental presuppositions underlying all discourse and examines which attitude toward autonomy follows from these presuppositions, in the sense that an act or a norm that ran against that attitude would contradict the fundamental presuppositions of moral discourse. How would it contradict them? It would contradict them inasmuch as someone who performed an act or proposed a norm that was incompatible with that attitude would run into what is commonly referred to in the literature as a performative contradiction. He would be violating the norms that he is implicitly committed to just by taking part in discourse. Human rights, so established, would be in Alexy's terminology "discursively necessary in the narrower sense. Their non-validity [would be] discursively impossible in the narrower sense."[8]

Before we proceed, we need to distinguish the argument that we will be focusing on from two further and related arguments that Alexy also advances to justify human rights. The argument we will be considering – the argument of autonomy, as Alexy labels it – is based on the idea of there being certain necessary presuppositions of genuine participation

8 DTHR, p. 221. See also R Alexy, *A Theory of Legal Argumentation*, R Adler and N MacCormick (trans) (Oxford: Clarendon Press, 1989), pp. 207ff.

in discourse[9] Unlike the argument of autonomy, the arguments of consensus and democracy rather start respectively from "assumptions about necessary and impossible *results of discourses*",[10] and the necessity of a democratic form of government for the best realisation of the demands of discursive rationality.[11] Although I believe the two further arguments add considerable sophistication and supplement the general account, their assessment will have to wait for another occasion. I take it that the argument of autonomy is intended to have self-standing appeal and to explore a distinctive theoretical possibility, namely the possibility of a transcendental foundation of human rights. I therefore think that it merits special attention.

The distinction Alexy offers between direct and indirect justifications of human rights is part of a larger argument that aims to anchor human rights in discourse. So let me say a few words by way of situating Alexy's preferred *direct* justification of human rights in the bigger picture. The larger claim supplies a basis for the rules of discourse as well as an account of their normative force. It has two components, one transcendental and the other empirical. Let's take each one in turn. The first component establishes certain rules of discourse by way of a transcendental argument. For Alexy, transcendental arguments:

> . . . consist of at least two premises with the following structure: The first premise identifies the argument's starting point, which consists of things like perceptions, thoughts, or speech acts, and claims that this starting point is necessary in some sense. The second premise then says that some categories or rules are necessary if the matter or issue chosen as starting point is meant to be possible. The final conclusion is that these categories or rules are necessarily valid.[12]

Such a transcendental exercise reveals that discourse, by which we mean the practice of asserting, arguing and asking, is underlain by a commitment to the equality and freedom of participants and also to universality (that is, a requirement that certain rules be extended to all human beings, at least in principle). Without such a commitment it would be impossible to make sense of the idea that in discourse "everyone can decide freely and equally about what she is willing to accept".[13] It would also be impossible to make sense of our insistence that assertions made in discourse be backed by arguments, not intimidation, force, deception and the like, and also that they be justified in principle to everyone (so that nobody may be excluded from discourse).

The second component of the larger claim attempts to provide discourse – and thus also its rules, transcendentally derived – with a firm foothold in social life. It does this by, first, establishing the salience of discourse in the most general form of life. Indeed, few would object to Alexy's contention that:

> [a]part from extremely unusual circumstances, such as growing up in total isolation, it is probably factually impossible to opt out of the most general form of life of human beings by never making any assertion at all however trivial, never putting forward any kind of justification, and never asking the question "why?", this counterpart to assertions and justifications.[14]

As Alexy readily admits, this fact does not suffice to ground a comprehensive and overriding interest in discursive resolution of social conflict. But it does seem to warrant the

9 DTHR, p. 227.

10 DTHR, p. 227, emphasis added.

11 DTHR, p. 233.

12 DTHR, p. 213.

13 DTHR, p. 211.

14 DTHR, pp. 217–18.

more guarded claim that there exists among human beings a widespread – though obviously not unexceptional – and pervasive such interest, which induces people to engage in discourse.

This interest (argues Alexy) is, like any interest, linked to decisions about whether it will impose itself over other interests. These decisions have to do with the fundamental question whether we want to accept our discursive possibilities. They have to do with whether we want ourselves to be discursive creatures. These are decisions about what we are.[15]

The interest in correctness, in taking part in discourse aimed at arriving at universally acceptable and unenforced agreements, thus acquires what Alexy calls an "existential" hue. Besides, lacking such an interest, it would be difficult to imagine how our actual practices of discourse would be sustained over time.

Now, *given that interest*, claims Alexy, resort to argumentation can additionally be regarded as efficient and less costly than force. A person or a group of persons with such an interest will be more likely to acquiesce to policies that come attached with arguments rather than backed by the stick. Here Alexy appeals to considerations that would make argumentation an attractive strategy even for tyrants or other elites whose aim is to exercise power over a certain population.[16] He notes that the fact that tyrants and powerful elites may have recourse to argument out of strategic considerations, instead of a genuine sense of respect for citizens, and are all too willing to revoke this commitment when it no longer fits their purposes does not undermine the normative force of rules of discourse. Their validity does not hinge on the underlying motivation of participants (their "subjective validity" in Alexy's terminology), but rather on the web of attitudes and external behaviour that participants take to be called for when they join a discourse ("objective or institutional validity").

Granted then the two claims put forward in the preceding paragraphs – namely, first, that discourse transcendentally presupposes a commitment to universality and the equality and freedom of participants, and, second, that there is a strong (though not necessarily overriding) human interest in correctness – what follows about human rights? Remember that we are seeking to identify a direct justification of human rights, one that is not derived from outcomes of actual discourses. Alexy argues that, even at this level of abstraction, discourse properly understood may be said to ground a positive valuation of human autonomy. He quotes Carlos Santiago Nino who has construed the following "basic norm of moral discourse": "It is desirable that people determine their behaviour only by the free adoption of principles that, after sufficient reflection and deliberation they judge valid."[17]

For Nino, this norm follows from the assumption that "sincere participation in the practice [of moral discourse] implies assigning value to the free adoption of moral principles".[18] Alexy, however, insists that we need to sharpen our understanding of sincere participation. It cannot be taken to entail simply an interest in "moral truth or correctness and in nothing else".[19] This understanding would not rule out cases where a respectful attitude i*n the context of discourse* is coupled with reluctance to follow through discursively generated outcomes in actual practice. Alexy rightly points out that we would be offering a very weak foundation of human rights – or of any moral norm for that matter – if we were to allow their casual violation in reality, as long as lip-service is paid to them in the process

15 MoM, p. 21.

16 Alexy writes that only by establishing the existence of a general interest "can those who are merely interested in maximizing their advantage be bound sufficiently to the result of the transcendental argument" (DTHR, p. 213).

17 C S Nino, *The Ethics of Human Rights* (Oxford: Clarendon Press, 1991), p. 138.

18 Nino, *The Ethics*, p. 138.

19 DTHR, p. 223.

of argumentation. To anticipate situations of this type, we need, argues Alexy, to beef up our set of assumptions by maintaining that participants take discourse seriously only if they are willing to solve their conflicts in accordance with discursively generated resolutions.[20] With these assumptions in place, it seems to be only a short step to a general right to autonomy. When we manifest a willingness to adhere to discursively generated resolutions of social conflicts, we thereby tacitly recognise an interest on the part of our interlocutors to determine their own behaviour in accordance with principles that they themselves judge valid or correct or appropriate. Hence Nino's "basic norm". Further, if recognition of autonomy in the context of discourse is in the aforementioned sense necessary,[21] it can be said to ground (or, in Alexy's terminology, "correspond directly to") a "general right to autonomy, which is the most general and basic right".[22] This Alexy formulates as follows: "Everyone has a right to judge for himself what is right and good, and to act accordingly."[23]

What is the theoretical gain, if we couch the justification of human rights in terms of a direct justification flowing from the transcendental presuppositions of discourse? One advantage might be that by drawing on a feature of "the most general form of human life", namely discourse, and abstracting from the outcomes of particular discourses, a justification of this sort makes sense of the desideratum of universality. This feature marks out Alexy's justification from other possible approaches. One can here include justifications based on religious or cultural grounds and also on actual consensus.[24] All of them suffer from particularism and are thus made vulnerable to the objection that they provide a foundation of human rights that applies only to those who share the requisite religious or cultural background or who happen to have agreed to uphold human rights principles.

But for Alexy there is a further reason that recommends his strategy. That is, it rescues the justification of human rights from an alleged charge of circularity. Alexy starts from the assumption that any justification of human rights that appeals to morality would be necessarily circular, and thus impossible.[25] But he maintains that our predicament does not entail that our only alternative is evolutionary explanations about how our commitment to human rights and morality, more generally, came to arise – as he takes Nino to suggest.[26]

20 Here and throughout I assume that we are talking about discourses in the realm of action, that is, discourses for which it makes sense to say that their outcomes may be solutions to social conflicts.

21 For present purposes I ignore another crucial aspect of Alexy's analysis, which is his argument in favour of the necessity of law (see DTHR, pp. 220–1). My reason for doing this is that I am not so much interested in whether we must have a *legal* system of rights. My interest, one might say, lies with the "necessary demands to [law's] content and structure" (DTHR, p. 221) that general human rights principles impose, whether they actually shape its content and structure or not.

22 DTHR, p. 226.

23 DTHR, p. 226.

24 MoM, pp. 17–19.

25 DTHR, p. 212. Alexy makes reference to Nino here. He interprets him as regarding "the justification of [rules of moral discourse] as impossible as well as superfluous" (DTHR, p. 212). But I am not sure whether Nino's views can provide support for Alexy's contention. Nino does say that a justification of human rights will unavoidably depend on moral principles and therefore will not satisfy anyone who doubts whether he should care for morality at all. But his diagnosis is not that the project of moral justification is for that reason circular, let alone viciously so or even impossible. Rather Nino concludes that "[w]hat we must leave aside is the search for a non-moral justification of morality, since, according to the concept of justification that we actually employ, this is self-contradictory. The sceptic who maintains that, therefore, nothing constitutes a moral justification, is, as always, the frustrated seeker of unintelligible absolutes." (See Nino, *The Ethics*, p. 83.) There is, for Nino, just one type of justification of human rights, namely moral justification, and it's none the worse for that.

26 Again, it should be noted that although Nino does stress the importance of evolutionary explanations in an account of "why a society develops a moral system and a practice of moral discourse and why individuals tend to participate in that practice" (Nino, *The Ethics*, p. 83), he takes care to distinguish this type of account from any "justificatory claim". Justificatory claims must make appeal to moral principles.

The transcendental argument he proposes seems to open up the third way. On the one hand, unlike evolutionary explanations, it can account for the normative force of human rights by connecting them to the rules of discourse (evolutionary explanations are notoriously incapable of generating a normative reason why we should carry on doing what we have been socio-biologically programmed to do). On the other, it stops short of a fully fledged moral defence of human rights, thus not falling prey to the (alleged) charge of circularity. The ideas of freedom and equality of participants are no doubt, as Alexy concedes, already value-laden. Yet, in his transcendental approach they are not derived from a moral theory of freedom and equality but from a reflection upon what is necessary for discourse, a salient feature of social life, to be sustained and make sense.

We can see here how this methodological modesty, as it were, ties back to the way Alexy conceives of the agenda for a theory of human rights. For him, remember, the debate over the foundation of human rights is not a family brawl. It is a much noisier affair. The reason is that it is not conducted solely among people who share a basic commitment to the importance of human rights. Our justifications of human rights must be directed to – and hopefully also engage – the sceptic, either of the local or the radical variety.

3 The incongruence argument

For the purposes of my critique it would be useful to introduce a distinction that the structure of Alexy's argument brings into sharp relief. This is the distinction between, on the one hand, a) autonomy in the wide sense and, on the other, b) autonomy in the strict sense. Autonomy in the strict sense encompasses all those attributes that good-faith participants in moral discourse ought to attribute to one another for moral discourse to be genuine. I call it a kind of autonomy because it is built around the idea that in ideal discourse a view prevails only if all participants to the discourse freely accept it, after due reflection and consideration and not through such devices as force, threat, manipulation, or misrepresentation. And this is no doubt an idea that is heavily informed by a principle of autonomy. By contrast, autonomy in the wide sense can, *pace* Rawls, be defined as one's ability freely to adopt, shape, revise and pursue a conception of the good, or *pace* Alexy, as "the individual choice and realisation of a personal conception of the good".[27] Elsewhere, Alexy has included within the range of human rights that he hopes to justify by appeal to discourse theory:

> . . . the right to life and freedom from bodily harm and the rights to integrity of person, to basic freedom of action, of belief, of opinion and of assembly, to freedom of occupation and ownership, the right to basic equal treatment and participation in the process of the formation of political objectives [as well as] . . . minimal basic social rights . . . such as the right to a subsistence level.[28]

We may frame the distinction as one of subject matter, with one type of autonomy pertaining to moral discourse and the other, more broadly, to the full range of interests, needs and goals a person may have or embrace in the course of their life. Alternatively, we may couch the distinction as one between two statuses, on the one hand, the status of interlocutor in moral discourse and, on the other, the more comprehensive status of person. However we conceptualise the distinction, we can get a firm grasp of its purchase if we consider many of the preferences that we adopt in pursuit of our favoured conception of the good life, exercising our autonomy in the wide sense. Our having such preferences – like

27 DTHR, p. 209.

28 R. Alexy, "A discourse-theoretical conception of practical reasoning" (1992) 5 *Ratio Juris* 3(December) 231–51, p. 246. I will hereafter assume that the term "individual choice and realisation of a personal conception of the good" captures at least some of the most important of the rights enumerated in the text.

the preference to marry Suzie rather than Laurie – and acting on them is not directly implicated by our participation in discourse. Undoubtedly, we can imagine a discourse where someone puts forward the claim that we ought not autonomously to form preferences of this sort and that others may legitimately impose on us something that runs contrary to our preferences – they may oblige me to marry Laurie instead of Suzie. We would then have to defend not our preference itself but our being able to form and act on it, if we so please (assuming, of course, that the other party is likewise disposed). To make our case, we would also require that our autonomy in the strict sense be respected, for otherwise the discourse would be rigged. Nonetheless, that would be a case where our autonomy in the wide sense has become the subject of discussion, not one where the two types of autonomy have merged into one. Likewise, I don't mean to deny that the status of interlocutor may in many cases be itself ethically or morally loaded. In fact, it typically is. Imagine discussion in a political forum. We have the firm conviction that exclusion, intimidation or deception in discussions of this sort compromises the moral status of citizen. But again, in such cases the reason for the special ethical or moral importance of the status of interlocutor comes from the circumstances and the social role of specific types of discourse, and not from the transcendental presuppositions of discourse in general.

It is important not to lose sight of this distinction, not only for the purpose of the critique I am about to mount but also more generally for the sake of better understanding the structure of Alexy's argument. Alexy's argument would be hopelessly short-circuited if it were based on the assumption that the rules and presuppositions of moral discourse actually amount in themselves to a full-blown principle of autonomy in the wide sense. For, we intuitively want to distinguish the status of interlocutor from personhood. However fundamental we take discourse to be in our lives and however radical we think the consequences would be if we retreated from it completely,[29] it surely does not take up *all* our lives. We don't spend our entire lives asserting claims or engaging in resolution of social conflicts, and a theory that entailed that picture of our lives would no doubt sound deeply counter-intuitive.

As I have already noted, this is not an argument against Alexy. Alexy is conscious of the distinction and his claim is precisely aimed at finding a bridge that takes us from respect of autonomy in the strict sense to respect for the wider autonomy as well. He writes: "On the first level [the discourse-theoretical justification of human rights] must substantiate the rules of practical discourse in order to justify, on a second level, the human rights on these grounds."[30] The incongruence argument that I am about to present questions this bridging effort. It takes for granted that discourse presupposes strict autonomy and instead asks: does participation in discourse with its concomitant notion of strict autonomy involve or imply any specific attitude toward autonomy in the wide sense? I shall argue that it doesn't necessarily have such implications. I have suggested above that the incongruence argument takes issue with the extent to which Alexy's theory can accommodate the fact that we associate human rights with certain fundamental human interests. I take it that the interests underpinning

29 Alexy quotes Apel who associates retreat from argumentation with the loss of "the possibility of self-understanding and self-identification" and with "self-destruction". See K-O Apel, "Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik", in K-O Apel, *Transformation der Philosophie*, vol. 2 (Frankfurt: Suhrkamp, 1973) p. 358ff., p. 414. Habermas goes even further and talks about "schizophrenia and suicide" (J Habermas, "Diskursethik. Notizen zu einem Begründungsprogram", in J Habermas, *Moralbewußtsein und Kommunikatives Handeln* (Frankfurt: Suhrkamp, 1983) p. 53ff., p. 112). Alexy, as we have seen, opts for the more modest suggestion that participation in discourse is necessary for taking part in the most general form of life of human beings (DTHR, p. 217).

30 DTHR, pp. 210–11.

autonomy in the wide sense illustrate this feature of human rights, and thus that failure to generate philosophical support for them is a serious failing vis-à-vis this specific desideratum.

Let's consider the following example:

The stranger-in-the-train example

Jack, a professional moral philosopher, takes the train home. Jill, a complete stranger, sits in the same compartment. It turns out that she also takes a lively interest in moral philosophy. She tells Jack she has been thinking about the trolley problem lately. Jack reluctantly engages in a discussion over it. At the outset they disagree. However, they exchange arguments in good faith and finally come to agree that the one person should be sacrificed. At that point, the train arrives at Jill's stop, whereupon she gets off. They never meet again.

The stranger-in-the-train example aims to tease out the following intuition. Moral discourse does not necessarily bring in its train the load of presupposition regarding the autonomy of the interlocutors that Alexy and Nino seem to suppose. Let's see why. Although Jack and Jill debate an issue that no doubt belongs to the realm of action, they need presuppose – or respect, for that matter – little more than autonomy in the strict sense, in order to make their discussion meaningful. That is so for at least two reasons. First, consider the topic of Jack and Jill's discussion. Even if they take the trolley example seriously and their agreed upon solution as the morally right one, it is not entirely clear how any belief that they might come to have on this issue can affect the way they view their standing vis-à-vis one another in contexts other than the limited one of their discussion. The connection between autonomy in the wide sense and discourse would obviously work better in situations where the topic of discussion more closely engages one's conception of the good life. But, as already suggested, Alexy's claim would be gaining illicit support, if it depended on the topic of the discussion.

Second, the example is thus set to ensure that Jack and Jill know nothing about each other's lives and, as typically happens, they may safely assume that they need not – in a matter of hours they will part for ever. Although both appreciate the fact that the other is responsive to good arguments and neither makes an effort to deceive or force the other into accepting a position they disagree with, they can be agnostic about how the other conducts their own lives, whether, indeed, they have an interest in determining their behaviour "only by the free adoption of principles that, after sufficient reflection and deliberation, they judge valid".[31] The fact that they have such an interest, when it comes to the trolley problem, does not entail an analogous interest in other spheres. Indeed, something quite different seems to be the case. That is, their interest seems to stem from their commitment to solve a difficult practical problem together rather than from any interest in enjoying their autonomy in the wide sense – at least not necessarily so. It may of course be that in the course of their discussion they will invoke notions about the distinctness of persons in order to account for their intuitions regarding the trolley problem. And it may be, further, that these notions will eventually lead them to adopt jointly some principle of personal autonomy. This consensus is of course not to be denigrated. However, it is not what Alexy has in mind. For, their consensus on the principle of personal autonomy would at best furnish an indirect justification of personal autonomy, one that is contingent on the actual discourse.

But this line of argument may be objected to on the grounds that I have rigged my example. I have taken a peripheral case of moral discourse, which diverges from the standard case, insofar as Jack and Jill have an interest "in correctness or moral truth and in

31 Nino, *The Ethics*, p. 138. In making reference to interests at this point, I don't mean to commit myself to what has been called the interest theory of rights, or to any more specific theory of rights for that matter. I use the term "interest" in a philosophically loose sense.

nothing else"; they do not necessarily want "to solve social conflicts through discursively generated and controlled consensus".[32] This, recall, is for Alexy the benchmark that determines serious participation in moral discourse. Now, to begin with, there is nothing in the nature of the example that precludes Jack and Jill from having or developing something like the attitude Alexy refers to, at least in the sense of a standing disposition to act as one has agreed it is right to act if one happens to face a situation of the sort that is the subject of discussion. The fact that it is a highly unlikely situation – that one would find oneself in a position where it was necessary to decide between sacrificing one person or five by directing the train to one of two tracks – does not, it seems to me, make it the case that deontologists and consequentialists do not take their disagreement seriously in Alexy's sense. However this may be, I believe the problem persists in other, less stylised, contexts as well. So let's turn to one such context.

The obnoxious neighbour example

> Harvey shares a fence with Stanley. Stanley persistently raises disputes about how to set the boundaries between them, who must pay to mend the fence and so forth. However, he proves extremely accommodating in negotiation. Apart from that, Harvey and Stanley lead completely separate lives.

The obnoxious neighbour example models a situation of social conflict, where both parties to the dispute have the right kind of attitude toward one another as far as discourse theory goes. However, it still seems somewhat far-fetched to say in this situation that Harvey and Stanley need attribute autonomy in the wide sense to each other if they are seriously to participate in moral discourse. They can, I think, resolve their fairly circumscribed disputes drawing on a limited type of attitude that in no way implies anything about how they view the rest of one another's lives.

It gets worse. Consider the following complication to the obnoxious neighbour example. Let's suppose that Harvey never gets to meet Stanley. For, whenever Stanley wants to create trouble, he instructs his lawyer to notify Harvey and conduct the negotiations on his behalf. Surprisingly, Stanley's lawyer is quite reasonable in his dealings with Harvey. He knows that Stanley is pathologically fussy; Stanley does not so much care to win the argument as to settle things – all the things he pathologically thinks need settling. In this variant of the obnoxious neighbour example, Harvey has little reason to take his interlocutor's autonomy in the wide sense into account. In fact, for the purposes of the discourse, he has little reason to suppose that his interlocutor, the lawyer, has any life of his own. For all he knows, Stanley may have the lawyer locked up in the closet and only let him out when he needs someone to defend his interests. That is because the terms of reference of the discourse involve only an appeal to the interests of Stanley. The interests of the lawyer drop from the picture. This complication reinforces, I believe, a suspicion that much of the prima facie plausibility of Alexy's proposal comes from the fact that certain – indeed many instances – of discourse deal with problems that engage one's ability autonomously to lead one's life. This is a problem for Alexy, because he wants to derive his justification of human rights from the very notion of participation in discourse, and not from what the subject of discourse happens to be.

To repeat a point made earlier, this is not to say that there must be a perfect fit between the full-blown list of human rights that are currently recognised in liberal societies and the type of concern that we find presupposed in moral discourse. I don't think Alexy is committed to anything like this rather strong claim, nor is the thrust of my argument based on the assumption that he should be. I would obviously be making a bad argument if it

32 DTHR, p. 223.

boiled down to pointing to examples where a discourse establishes the importance of freedom of speech but not privacy. I readily agree that Alexy would be right to insist that he has made his case just as long as he has established that we could plausibly move from an examination of the fundamental presuppositions of moral discourse to a general and largely unspecified right to liberty. So, all I am saying is that there must in any case be a plausible connection between the role of interlocutor in moral discourse and the status of person entitled to certain basic liberties independently of moral discourse. Otherwise, the bridge from the prerequisites of moral discourse to a general principle of respect for one's autonomy (of the type I have labelled autonomy in the wide sense), however abstract we take that principle to be, collapses. The examples I have offered aim to sever this connection. They suggest that there may well be cases where moral discourse solely involves a narrow set of discourse-bound presuppositions that have no necessary bearing on one's attitude toward other people as far as their broader life, their status as persons and not interlocutors, is concerned.

At this point it may be objected that in setting out my counter-examples the way that I did I focused on specific – and rather peculiar – *instances* of discourse rather than *practices* of discourse. But, the objection goes on, if we turn to the social world, we are more likely to see that individuals engage in complex and sometimes wide-ranging practices of moral discourse that comprise many instances of discourse in very different contexts. It would certainly strike us as odd if someone's only experience of moral discourse came from random encounters in trains. Appeal to practices of discourse thus opens up the space for the defence that, in the course of one's engaging in such practices, peculiarities and aberrations pertaining to one type of setting may be compensated by participation in others.

Now, although the objection offers a very plausible characterisation of how individuals are actually steeped in moral discourse, it does not save the relevance of the discourse-theoretical argument for the purpose of the discussion. Transcendental arguments, we have seen, do not start from actual discourses having taken place. Instead, they elaborate what all discourse, any discourse, must presuppose, so that it may be conducted successfully and genuinely. By contrast, the sort of experience that being immersed in practices of discourse involves is in a very strong sense contingent. It does depend on actual discourses having taken place, although, of course, not on those discourses having produced certain results rather than others (as would be the case if we were attempting an indirect justification of human rights).

4. The argument of force

We have seen that one of the salient features of our understanding of human rights is that they have the force of moral requirements – in fact, requirements of considerable stringency. We tend to think we are morally obliged to care a great deal about human rights. This feature is encapsulated in the desiderata of moral force and priority. Following up on the argument of the previous section, I now want to argue that in fact Alexy's theory does not adequately square these desiderata, and primarily the former. The thrust of my argument in this section will be this: even if we managed to solve the incongruence problem, Alexy's account would still be vulnerable to the objection that it does not account for the special moral strength we are inclined to attribute to claims based on human rights. Before we begin, it would help to have in hand an upfront formulation of the argument:

Recall Nino's "basic norm of moral discourse": "It is desirable that people determine their behaviour only by the free adoption of principles that, after sufficient reflection and deliberation they judge valid."[33] In the previous section it was argued that the fact that we

33 Nino, *The Ethics*, p. 138.

may accept such a norm *for the purposes of discourse and within its context* does not mean that it need hold in other contexts, at least not for that reason. But we have to examine further whether acceptance of the basic norm of moral discourse by interlocutors in the above sense would anyway provide a compelling – though not necessarily always overriding – moral reason to respect human rights. I shall claim that it doesn't.

What are we after when we say that acceptance of the basic norm is compelling? Here is one suggestion: many theorists, including Alexy, point out that discourse belongs to the most general form of human life. Hence, it is in an important respect non-optional or necessary to engage in it. One may here recall the dramatic images that discourse theory invokes to convey the consequences of not taking part in any form of discourse whatsoever. The problem with this suggestion is that it mistakes two ways in which something or other might be non-optional. First, doing *x* might be non-optional in that I am morally required to do it (we can substitute morality with law or some other normative system). Second, doing *x* might be non-optional in that it is in some way intractable. So, for instance, I find it intractable to procrastinate. When I don't, I break down. But, obviously nothing in the realm of normativity follows from my tendency to procrastinate. It doesn't seem to me to make much of a difference if in the place of procrastination we put a rule-governed activity. A person might feel compelled in the second sense to play football on Sundays with his or her friends. Once that person starts playing football, he or she must no doubt follow the rules (and then be required in the first sense to do certain things). But there is nothing in this intractable desire to play football that makes the rules of football enjoy a heightened normative force (not, that is, for that reason).

In the previous paragraph I argued that "intractability" of the sort discourse theory associates with participation in the practice of discourse does not deliver the right kind of compellingness. It might now be objected that I have relied on too narrow an understanding of the importance philosophers like Alexy attribute to discourse. In support, it might be reminded that Alexy does not simply point to the pervasiveness of practices of discourse but instead goes to great lengths to establish the existence of a significant – indeed existential – *interest* in human beings to engage in such practices. He further argues that Machiavellian power-seekers also have an interest in at least pretending to be playing along and manifesting the attitudes that participation in discourse brings in its train as required. It goes beyond the scope of this paper to assess the argument Alexy advances to the effect that those who use argumentation as smokescreen share this interest in sufficiently strong form. I am after what I take to be a deeper ambiguity in Alexy's project. So, for present purposes, I shall assume the correctness of that argument and also of the argument that human beings by and large have an interest in engaging in discourse of the sort Alexy claims. I shall only examine what conclusions we may legitimately draw from these assumptions.

Upon closer inspection, it appears problematic to make the move from an interest, however substantial, in engaging in discourse to a strong moral commitment to respecting the autonomy of one's interlocutors. We are well acquainted with justifications of human rights in terms of interests and I will say something about this methodology in the next section. But Alexy's version of a connection between interest and human rights that was sketched in the previous paragraph diverges from that familiar approach. It doesn't identify certain interests which human rights are then taken to protect. Rather, it postulates an interest to take part in a practice, which practice is alleged transcendentally to presuppose a commitment to respect those rights. Nor, importantly, does Alexy's version suppose that the normative force we end up attributing to respect for rights is derived from the instrumental value such an attitude would have in enhancing discourse. To propose this instrumentalist justification would be to say that the value of human rights lies in their ability to facilitate

discourse. In some contexts (like democratic decision-making), such an instrumentalist justification might have some plausibility. And indeed, in some form or other it has been proposed by way of a defence of a set of constitutional rights. But it would be much more ambitious to subordinate autonomy in the wide sense to autonomy in the strict sense *across the board* – to say that we respect human rights *just (or even primarily) in order to facilitate* general discourse – and Alexy says nothing to align himself with this rather extreme view.

We have so far said a couple of things about what Alexy's version of the connection between interest and human rights *does not mean*. Can we say anything more informative about it though? To make progress with this question, we may take a lead from Benjamin Constant's famous assertion that "commerce inspires in men a vivid love of individual independence".[34] I take it that Constant does not just mean that commerce inspires in men a commitment to the freedom to do business. And he definitely does not mean that, if asked why autonomy matters to them, merchants may sensibly say that it matters by virtue of the fact that they engage in commerce or even that they have an interest to do so. He probably has in mind something like the following claim: a practice like commerce alerts us to the value of independence and illustrates its importance not just for the purposes of commerce but in general. It helps us appreciate individual effort and judgment, it imbues in us a desire to stand on our own two feet etc. When in the course of engaging in commerce we come to see the value in all these things, we recognise that they must also have appeal to those who never did and never will be involved in trading.[35] Likewise, we might say, discourse reveals something about the desirability of autonomy in the wide sense that might otherwise be concealed. Indeed, unlike commerce, discourse is a practice we all take part in.

The problem is that, as in Constant's example, commerce itself does not figure in the justification of the value of independence, so discourse cannot furnish a (direct) normative basis for autonomy in the wide sense (at least on this reading of the connection between discourse and human rights). Let me sharpen this statement. Discourse has rules, of course, and any interest we might have in engaging in it is no doubt a normative basis for the force of those rules in the context of discourse, much in the same way that economic self-interest may be understood to provide (some) normative basis for our respect for the rules of trade. But we want to go beyond that. We are interested in autonomy in the wide sense and we want to be able to cite a *reason* for our respect for it. To this effect the Constant-inspired reading of Alexy's proposal is of no avail. The relationship between commerce and independence may be regarded as *genealogical*, so to speak, but not foundational in the normative sense.

But do we really want to go beyond that? Are we really committed, in offering a foundational justification of human rights, to producing reasons for the compellingness of human rights? What would be the problem if we didn't achieve this? Let me repeat what I think we are presumably trying to achieve by following Alexy's path. Arguably, we take seriously the sceptical charge that we shouldn't care for human rights at all either because we don't belong to a community where respect for freedom and equality is widely and

34 B Constant, *Political Writings*, B Fontana (trans. and ed.) (Cambridge: CUP, 1989), p. 315. The quote continues as follows: "Commerce supplies their needs, satisfies their desires without the intervention of the authorities. Their intervention is almost always – and I do not know why I say almost – this intervention is indeed always a trouble and an embarrassment. Every time collective power wishes to meddle with private speculations, it harasses the speculators. Every time governments pretend to do our own business, they do it more incompetently and expensively than we would."

35 Of course I may be wrong in my exegesis of Constant's thesis, but this does not seem to me to affect the argument of this section. We can envisage the type of claim I describe in the text, regardless of whether we then attribute it to Constant or not.

institutionally accepted or because we don't care for morality. We give an account of the salience of human rights by appealing to a practice and a corresponding interest, which few could seriously question are universal, and thus rebut the sceptical move.

This shift of attention, however, comes at a substantial cost. Importantly for present purposes, by focusing on universality we lose sight of another goal of justifications of human rights, the desideratum of special moral force. To go back to a previous example, it may be that I have a vital interest in playing football on Sundays with my friends. Our football sessions relieve me from the stress of the week. They provide me with much-needed physical exercise and, besides, they are fun. Now, after a number of such sessions it comes to pass that playing football with my friends also strengthens our sense of camaraderie. But clearly, playing football does not add anything to the reasons I have – or should have – to hold camaraderie among friends in high regard. Suppose someone comes up to me and inquires why they shouldn't betray their friends when the opportunity arises. To talk that person out of this idea, it's no use pointing to my Sunday football sessions – let alone the interests I have in attending them. Or suppose someone acknowledges that camaraderie has value, but insists that it is a value that is easily outweighed by considerations of the slightest inconvenience. Again, unless I have independent reasons to offer about the centrality of camaraderie in relationships between friends, I will do a poor job at convincing that person if I merely recount the story of my Sunday football sessions.

But maybe, contrary to what I argue, Alexy is happy with that. Maybe that's all a direct justification of human rights is meant to supply. It points to a pervasive, distinctly human practice that, of necessity, sustains adherence to human rights norms, whatever "sustain" is taken to mean (recall that I am here assuming that the obstacle of incongruence has been overcome). Thus, at an abstract level it does manage to garner some support for respect for human rights. It need not also furnish reasons that we can employ in actual discourses to back our more specific claims about the application or force of human rights.[36]

Now, whatever the merits of this proposal, it is not, I believe, an accurate description of Alexy's position. Alexy, we have seen, wants to account for both the moral force and the priority of human rights. He explicitly states that the right to autonomy, established by means of the argument we have examined in this article, has not only prima facie force, but also prima facie priority,[37] and I think he is right to insist on that. When we try to justify our adherence to human rights, we seek to establish not just that we feel a normative pull to respect them, but at a minimum that they are of some special importance.[38] Thus, to make his case, it seems that Alexy must do more than just point to the fact that some respect for human rights is presupposed by our participation in practices of discourse. He must be able to say something about the place human rights occupy in our moral universe and the relation in which they stand to other values in moral argument. But the proposal of the previous paragraph would have Alexy delegate all such questions to the level of actual discourses. It thus invites us to narrow seriously the scope of Alexy's argument and consequently also its relevance to our philosophical and political concerns.

36 I am indebted to George Pavlakos for impressing upon me the need to address this objection.

37 DTHR, p. 227.

38 I have tried to put the point in as modest a form as possible. Of course, I am not saying that Alexy need come up with a metric that settles cases of conflict between human rights and other values.

5 To the rescue: An ethical foundation for human rights

Recall Alexy's point of departure. His transcendental argument, he says, is preferable, because, among other things, it supposedly avoids the circularity plaguing accounts that seek to ground human rights in morality. Now, this is not, strictly speaking, accurate. A fully moral justification of human rights is not circular, just in case it grounds human rights in a moral idea that does not presuppose the moral value of human rights. There is, it seems to me, no shortage of such moral ideas. But Alexy, we have seen, uses circularity in an idiosyncratic way. For him, moral justifications of human rights are circular in the sense that they must of necessity appeal to moral principles, thus not engaging the radical moral sceptic, who is indifferent to morality in general. To counter the radical sceptical position, as construed above, we then do well to invoke another approach that takes a broader view of the practical domain and generates the requisite philosophical support for human rights by recourse to very general ethical ideas about what it means to live a good life. I shall call this the *ethical* approach and I shall take Ronald Dworkin's recent articulation of the idea of liberal equality to exemplify it. The ethical approach has an advantage that is relevant to the theoretical concerns driving Alexy's thinking on these matters. It does not take the bindingness of morality for granted but instead addresses the question why we should care for human rights *together with* the more fundamental question about whether we should care for morality in the first place. It integrates both questions in an account of the good life.[39] It thus does not evade the sceptical charge. It purports to face it head on. Here is a characteristic formulation of the project, as Dworkin understands it:

> [A] theory of political morality . . . should be located in a more general account of the humane values of ethics and morality, of the status and integrity of value, and of the character and possibility of objective truth.[40]

The connection between ethics and morality is further highlighted in the following sentence:

> We should hope, moreover, for a theory of [the central political values] that show them reflecting even more basic commitments about the value of a human life and about each person's responsibility to realize that value in his own life.[41]

Dworkin identifies two principles which he believes underlie the domain of ethical and moral value. He calls them the two principles of ethical individualism. The first, the principle of equal importance, states that "it is important, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from that objective point of view, for each human life".[42] The second principle, which he labels the principle of special responsibility, he summarises as requiring that "though we must all recognize the equal objective importance of the success of a human life, one person [has] a special and final responsibility for that success – the person whose life it is".[43] Dworkin invites us to consider whether we can sensibly reject either of these principles, quite independently of how they are further fleshed out. If, as he supposes, the two principles are

39 Dworkin's approach might be thought to give rise to a charge of circularity at a higher level, insofar as it also defines certain ethical ideas in the light of moral ones. To meet this charge adequately, we would have to explore Dworkin's general interpretive methodology, which he places front and centre of moral reasoning. But such an inquiry would go far beyond the scope of this paper.

40 R Dworkin, *Sovereign Virtue: The theory and practice of equality* (Cambridge Mass.: Harvard UP, 2000), p. 4. The structure and details of this project are further analysed in his John Dewey Lectures delivered at Columbia University in 1998 under the title "Justice for hedgehogs".

41 Dworkin, *Sovereign Virtue*, p. 4.

42 Dworkin, *Sovereign Virtue*, p. 5.

43 Dworkin, *Sovereign Virtue*, p. 5.

indispensable in our thinking about ethical and moral value, we must then proceed to see how best to make sense of them in the light of each other. This task Dworkin pursues in many different directions and in the course of so doing proposes and defends the fundamental tenets of his own preferred conception of political morality, liberal equality. It would be impossible here to do justice to this complex enterprise. What I shall try to do instead is present one line of argument that I consider pertinent to the aims of this paper. This is the argument Dworkin provides in order to derive something like a general right to autonomy from an account of certain general conditions of living well.

Dworkin claims that the concept of success in one's life, the concept of living well, is governed by the *challenge model*. The challenge model states that "the goodness of a good life lies in its inherent value as a performance".[44] The performance, in turn, consists in the way one responds "to one's situation",[45] to the challenge of living well under the circumstances that one faces in one's life. On this model, then, a life is well spent, if the person whose life it is has made something good of their social position, skills and talents, the adversities and the opportunities that had to be reckoned with, and having been born in a certain period in history and in a certain place etc. Dependence of a life's value on one's situation, the fact that, to use Dworkin's apt term, this value is in such a way "indexed",[46] provides some of the explanation for our tendency to recognise value in very different lives. In one case, we may admire someone's success in combining career and family life. In another, we may appreciate the way someone has succeeded in overcoming a serious disability. The challenge each one of us faces is sensitive to our widely varying predicaments, our singular "places in the world".

With this conception of the good life in place, Dworkin then goes on to argue that "liberal equality does not preclude or threaten or ignore the goodness of the lives people live, but rather flows from and into an attractive conception of what a good life is".[47] It is this argument that furnishes the connection between his account of the good life and the concerns of this article, so we need to take a closer look at it. At first sight, there appears to be cause for suspicion. Dworkin's account focuses on persons who care about what he calls their "critical interests", namely their interests in "having or achieving what it makes [their] life a better life to have or achieve".[48] He contrasts our critical interests to our volitional interests. "Someone's volitional well being is improved," he writes, "when he has or achieves what he in fact wants."[49] So, unlike our volitional well-being, we cannot improve our critical well-being just by wanting something that we then get. It must be the case that what we get really makes our life better, given our circumstances. This is a judgment we can be wrong about. We may fail to identify what promotes our critical interests in the first place, or, even if we do identify it, we may fail appropriately to respond to it.

Would it then be ethically acceptable for others to impose on us the course of action that supposedly best tracks our critical interests every time they think we are mistaken about them? To answer this question affirmatively would be to accept, at least in principle, the legitimacy of paternalism. Such a concession, however, would seriously truncate individual autonomy. Now, the road to strong forms of paternalism is sometimes blocked by epistemic or pragmatic considerations, for example that, however fallible, we are better

44 Dworkin, *Sovereign Virtue*, p. 251.
45 Dworkin, *Sovereign Virtue*, p. 260.
46 Dworkin, *Sovereign Virtue*, p. 259.
47 Dworkin, *Sovereign Virtue*, p. 242.
48 Dworkin, *Sovereign Virtue*, p. 242.
49 Dworkin, *Sovereign Virtue*, p. 242.

judges of our own good than anybody else, or that granting this sort of power over our lives to other people would open the way to abuse. But Dworkin offers an argument of principle in favour of autonomy and against paternalism that he draws from the challenge model. He claims that the challenge model favours a strong – in fact constitutive – connection between a life well spent and a personal conviction that it was indeed so. Someone cannot be credited with a successful performance, unless he intended what he did. Likewise, we cannot think someone has lived well who does not endorse and even regrets the things he does. Thus, the challenge model of ethics assigns a high value to ethical integrity, the state where someone "lives out of the ethical conviction that his life, in its central features, is an appropriate one, that no other life he might live would be a plainly better response to the parameters of his ethical situation, rightly judged".[50] On the challenge model, lack of ethical integrity does not just make one's life pro tanto worse; rather, ethical integrity is assumed to enjoy special priority, in the sense that "a life that never achieves that kind of integrity cannot be critically better for someone to lead than a life that does".[51] In the course of one's life one may realise important values – one may produce sublime art, for instance, or change the fate of the nation for the better – but if one's life scores very low on ethical integrity, it cannot be considered superior – better spent –to a life that scores higher on this count, even if the latter has no comparable artistic or political achievements to commend it.

I do not pretend to be offering here more than a rough sketch of Dworkin's sophisticated account. But even this rough sketch makes plain the structure of the argument. By assigning ethical integrity absolute priority over other dimensions of value (in the determination of the goodness of a life), Dworkin seeks to offer individual autonomy a solid justification. We have rehearsed how the priority plays out in the case of paternalism, but the point is more general. If we are to be able to live well, it is necessary (though by no means sufficient) that we can make decisions for ourselves and act on those decisions without undue interference from other people, even if that interference is motivated by a belief that a different decision is better for us. Thus, we have to be able to choose from among the careers that are reasonably open to us – given the circumstances – the one we think best suits us; to pursue the type of intimate relationship that we find fulfilling; to be free from force in forming our own beliefs about the sacred and living the life that accords with those beliefs and so forth. In short, we have to be able to do all the things that comprise autonomy in the wide sense. It is quite evident that something like the recognition and guarantee of a right is a way to give expression to the importance of ethical integrity for our well-being. Of course, rights are not under threat solely from paternalistic attitudes and policies. Someone might lock us up just because that would further that person's own interest, narrowly conceived. But if ethical integrity is compromised, whenever we are forced to adopt an "objectively worthwhile" life-style we despise, it goes without saying that it is compromised in cases like this as well.

So, on the challenge model, a strong commitment to autonomy – and thus also to the rights that guarantee it – flows from the value of living well. We value autonomy because we have a stake in leading a rewarding life and because it is necessary for this that we live it in accordance with our convictions about what would make it go best, rather than against them. In this sense, Dworkin's account succeeds where Alexy's has failed. The foundation for human rights Dworkin proposes encompasses the range of fundamental interests that we tend to associate with them; it is thus impervious to the incongruence argument. And it also equips claims of human rights with the kind of moral force we intuitively believe they

50 Dworkin, *Sovereign Virtue*, p. 270.

51 Dworkin, *Sovereign Virtue*, p. 270.

must enjoy, thus addressing the argument of force. It says we care for human rights insofar as we have a strong reason to care for our well-being, because to violate autonomy entails a significant harm in the quality of life we lead that does not disappear just by an increase in the value thereby produced. In fact, the assignment of absolute priority to ethical integrity helps us get a grip of the heightened strength we attribute to claims of rights. We might even say that, like Alexy, Dworkin proposes an existential foundation for human rights, in the sense that he proceeds from an account of what it is for persons to live their lives, to be the beings they are. Unlike Alexy's, however, his account is such that, if we adopt it, we will be in a position to cite important reasons for our adherence to a system of basic human rights.

Equipped with this justification of autonomy, we may now offer it to the sceptic of either the radical or the local variety. We may ask: does the sceptic of either sort have reason to resist our offer? With respect to the radical sceptic, we will have to wonder whether Dworkin's account invites the by now familiar sceptical objection: "So what if respect for human rights is *morally required*?" If it does, we will have to examine further whether it has the resources to motivate adequately our allegiance to human rights norms and rebut this challenge. As far as the local sceptic is concerned, we will have to assess whether Dworkin's ethical outlook is perhaps parochial in the sense that it is alien to or inappropriate for cultures that are arguably less individualistic than modern Western societies to which it seems to be better attuned. These are large questions that cannot be addressed without a more thorough analysis of Dworkin's moral theory than the one attempted here. Still, there is reason to be optimistic. For, Dworkin, no less than Alexy, starts from an idea that is at the same time both universal and captivating, the idea of living well. It is the kind of idea that can engage even the most hard-nosed sceptic, if any can.

6 Conclusion

Discourse theory in various fields of philosophy has a venerable tradition, and Robert Alexy is among its most distinguished torchbearers. This article did not question either its validity or its fruitfulness in general. But it did raise some doubts about its relevance for the project of finding a foundation of human rights, especially when it comes in the form of a transcendental argument. Our concern for human rights, it seems, is at once more targeted and practically engaged, more intertwined with the vexed questions of relative importance that human rights typically give rise to than such an argument can allow. Taking the example of Ronald Dworkin's theory, I have suggested that we are more likely to find the ideas we are looking for further downstream. The idea of a good life may be a good place to start.

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Constitutionalism and transcendental arguments

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Abstract

In his A Theory of Legal Argumentation*, Robert Alexy lists four modes of justification for his rules of practical discourse. Of these, the only one that to him seems to have a true foundationalist capability is Apel's transcendental-pragmatic mode of justification. But there is another strategy, which Alexy calls "definitional", based on the concept of language game, that seems to have been employed by Ronald Dworkin, in his "Objectivity and truth. You'd better believe it", in order to reject moral scepticism. In this paper I will argue that these two modes of justification can be traced back, from a logical and genealogical perspective, to one form of argument, the transcendental argument. But I will also argue that there is a peculiar circularity in the way this kind of argument develops, a circularity possibly ascribable to certain idealising presuppositions.*

1 Why moral foundationalism is essential for constitutionalist approaches

As is well-known, in his *Begriff und Geltung des Rechts*, Robert Alexy argues for a necessary connection between law and morality. In a nutshell, his argument is as follows: the very act of enacting a norm, and pronouncing a judicial adjudication, conceived as speech acts, raises a claim to correctness, which can be formulated as a claim to justice. If it were not, it would contradict its pragmatic presuppositions and turn out to be self-defeating.[1]

This thesis alone cannot be the grounds for a necessary connection between law and morality: a legal norm which does not claim to be just would perhaps be a flawed one, but not necessarily a norm which for this very reason has lost its juridical status. In order to argue for a necessary connection between law and morality, it is necessary to show that a norm which contradicts some fundamental moral principle would not be a legal norm at all. This is why Alexy builds his "argument from injustice" (*das Unrechtsargument*), which is divided into eight sub-arguments.[2] Some of these – particularly the argument from legal certainty (*das Rechtssicherheitsargument*) and the argument from relativism (*das Relativismusargument*) – are grounded upon a "strong" conception of morality: a conception by which moral judgments can be shown to be, in a sense, objective and non-relative.[3] Further, according to Alexy's argument from principles (*das Prinzipienargument*), the claim to

1 R Alexy, *The Argument from Injustice: A reply to legal positivism* (Oxford: Clarendon, 2002), pp. 35–40.

2 Alexy, *The Argument*, pp. 40ff.

3 Alexy, *The Argument*, pp. 68ff.

correctness is essentially connected with a claim for moral foundation.[4] Thus, it seems that, from Alexy's point of view, the very possibility of a necessary connection between law and morality rests upon the possibility of some kind of moral foundationalism.

This seems to be the case for Ronald Dworkin, too. In his famous "Constitutionalism and democracy" (of 1995), Dworkin addresses the question of moral foundationalism as a necessary precondition for his conception of a "moral reading" of the American Constitution.[5] In particular, moral foundationalism proves to be necessary in order to spell out the objection of political inequality: according to this objection, if a moral reading of the constitution were applied, this would mean a great transfer of power to a minority of non-elected (non-representative) technicians, the judges. The objection, Dworkin says, hits the target only if moral foundationalism turns out to be false: in fact, only in this case could the thesis of a moral reading of the constitution be translated as an opportunity for judges to apply the result of their moral arbitrariness.

Thus, moral foundationalism seems to be essential for the constitutionalist approaches of both Dworkin and Alexy: hence, the question is how they intend this foundationalist strategy to be. In his *A Theory of Legal Argumentation* (of 1978), Alexy distinguishes four modes of justification for his rules of practical discourse: technical, empirical, definitional and universal-pragmatic (or transcendental-pragmatic). As empirical justification cannot be of any use for normative arguments, and as technical justification for the means implies an independent moral justification for the ends, the only two genuine ways to moral foundationalism seem to him to be the latter two.[6] And I think that, even if Alexy is not always coherent and Dworkin not at all explicit, we can attribute the transcendental-pragmatic mode of justification to Alexy and the definitional mode of justification to Dworkin.

In what follows, we will examine these two modes of justification as specific fruits of development from one type of argument, transcendental argument. We will try to show how both modes of justification are variants of this argument and how they are interconnected.

First, we will briefly discuss the development of transcendental arguments from Kant's *Critique of Pure Reason* to Apel's transcendental-pragmatic approach, through Wittgenstein's transformation of the original "theoretical" approach into a "pragmatic" one, and we will show how this discussion is relevant for the kind of moral foundationalism adopted by Ronald Dworkin and Robert Alexy, respectively. Then we will draw our conclusions about this line of development, and, finally, the question will be addressed as to whether the present discussion can make some further contributions to the debate on transcendental arguments.

2 Two classic transcendental arguments

We can start by looking at two examples of the "classic" transcendental argument, one of them quite well known, and the other not often recognised as such.[7]

4 Alexy, *The Argument*, pp. 68ff.

5 R Dworkin, "Constitutionalism and democracy" (1995)1 *European Journal of Philosophy*, pp. 5–6. See also R Dworkin, *Freedom's Law. The moral reading of the American Constitution* (Cambridge, Mass: Harvard UP, 1996).

6 R Alexy, *A Theory of Legal Argumentation* (Oxford: Clarendon, 1989), pp. 180ff.

7 On transcendental arguments, see, among many others: B Stroud, "Transcendental arguments", (1968) 65 *Journal of Philosophy* 241–56; B Stroud, "The goal of transcendental arguments", in R Stern (ed.), *Transcendental Arguments: Problems and prospects* (Oxford: Clarendon Press, 1999), pp. 155–172; S Paulson, "On the puzzle surrounding Hans Kelsen's basic norm" (2000a) 13 *Ratio Juris* 279–93; S Paulson, "On transcendental arguments, their recasting in terms of belief, and the ensuing transformation of Kelsen's pure theory of law" (2000b) 5 *Notre Dame Law Review* 1775–95; R Stern, *Transcendental Arguments and Skepticism* (Oxford: Clarendon, 2000).

The first example is the "transcendental deduction of pure concepts of understanding" which Kant presents in *Critique of Pure Reason* (§§ 16–20). In this deduction Kant wants to show that any representation of the senses must necessarily be made through certain basic formal concepts called "categories". He shows that the very possibility of our having a representation comes by way of the synthesis made by apperception on the basis of the categories of understanding.[8] But, according to Kant, this possibility (of our having a representation) is the same as the possibility of our conceiving of objects, since nothing can be known if not as an object of representation, and any object so conceived must consequently come under the rules of categorial synthesis.[9] Thus, with this theory of a necessary epistemic medium, a medium without which we can have no knowledge of the world and of reality, Kant can conclude that objects cannot but come under the rules of categorial synthesis.

This argument has two fundamental features. First, we start from a particular conception of representations as self-evident and show that something is true of such representations because, if it were false, this conception, too, would be false. This is a case of inference by *modus ponens* with its second premise set in contrapositive form: A; if it were that not B, then A would be impossible ($\neg B \rightarrow \neg \Diamond A$); therefore B.[10] This particular use of a *modus ponens* inference recalls a theory of *implicit presupposition*s: if we say that the unification under an apperception is necessary because, if there were no unification, we could not even speak of "my representations", then we also say that the concept of representation necessarily presupposes the unification under an apperception; but the informative character of this argument can be assured only if the presupposition which it shows was implicit.[11] Further, in order to draw conclusions about reality and objects from the conditions of our knowledge, we must presuppose a theory of an epistemic medium, a medium which is considered necessary in order to have knowledge of the world and of reality.

The second example of transcendental argument is the deduction of the simplicity of objects in Wittgenstein's *Tractatus Logico-Philosophicus*.[12] Just as with Kant we can infer some truths about objects from the condition of possibility of sensibility (where sensibility is conceived as an epistemic medium), with Wittgenstein we can make this inference by reasoning from the features of *language* conceived as an epistemic medium. In brief, this is Wittgenstein's transcendental argument for the simplicity of objects:

1 Any sentence has a definite meaning. Any sentence can be analysed in terms of more elemental sentences.

2 If, in this analysis, it were not possible to arrive at some elementary sentences, no sentence could have a definite meaning.

8 I Kant, *Critique of Pure Reason* (Cambridge: CUP, 1998), B 131–32, B 143.

9 Kant, *Critique*, B 137.

10 I am thankful to Carsten Heidemann for having suggested this reconstruction to me.

11 In Kant, this theory of implicit presuppositions is developed along the lines of an entire theory of constitutiveness of the categories. The question of the relation between transcendental arguments and constitutiveness is deep and complex and cannot be addressed here.

12 For an overall Kantian perspective on Wittgenstein's philosophy, see J Hintikka and M B Hintikka, *Investigating Wittgenstein* (Oxford: Blackwell, 1986) e.g. pp. 4, 7, 16–17. On Wittgenstein's conception of logic as transcendental in the *Tractatus*, see J Proust, "Formal logic as transcendental in Wittgenstein and Carnap" (1987) 21 *Noûs*, pp. 501–20.

3 But the very possibility of there being meaningful elementary sentences is the possibility of simple names designating simple objects.

4 Thus, "objects are simple".[13]

The main features of Kant's transcendental deduction appear again in this argument: the first is the *modus ponens* inference with its second premise set in contrapositive form. The inference here consists in taking the postulate by which any sentence has a definite meaning (A), and from it inferring that something must be true of objects because, if it were false, the postulate would be false, too ($\neg B \rightarrow \neg \Diamond A$; therefore B): and this means that simple objects are implicitly *presupposed* by meaningful discourse. The second feature is the theory of language conceived as an epistemic medium: according to this theory, we can infer something about objects from the means by which we talk of objects meaningfully – something about the world from the conditions of knowability of the world.

It should be sufficiently clear that, in the final analysis, the foundationalist capacity of a transcendental argument depends on the truth from which it starts: in the case of Kant, the unity of the manifold under the apperception, or *I think*; in the case of Wittgenstein, the determinacy of meaning of any sentence as the result of a perfectly developed analysis. As we have seen, both of these starting points are conceived as necessary, that is, true in any possible world. Furthermore, both arguments proceed to analyse the *implicit* presuppositions of the starting points conceptually considered. This is why we will call transcendental arguments of this kind "*global* transcendental-*theoretic* arguments".

It should also be clear that, as we have just seen, the overall structure of these arguments cannot be accepted by anyone who rejects any theory of an epistemic medium, that is, by anyone who thinks that no truth about the world can ever be deduced from the preconditions of our knowledge of the world itself: indeed, one of their distinguishing features is that of deducing a *metaphysical* truth from some necessary *epistemological* presuppositions.

In the following section I will try to show that what Alexy calls "definitional mode of justification" is the result of Wittgenstein's transformation of this original global transcendental-theoretic argument in terms of a weaker pragmatic perspective, developed in his *Philosophical Investigations* and *On Certainty*, and based on the concept of a language game. This will permit us to show that Dworkin's foundationalist strategy is of this weak transcendental kind, and possibly to point out what the flaws of this approach are.

3 Wittgenstein's language game argument

In his *Philosophical Investigations*, Wittgenstein rejects the postulate of the determinacy of meaning of any sentence.[14] The main problem with this postulate is that (a) it was the result of a somewhat idealised conception of language and (b) it was being used as the starting point of a transcendental deduction. This second problem is particularly important: if the starting point of a transcendental deduction can be shown to have a somewhat idealised nature, the overall structure of the argument will simply transfer this idealised nature to the conclusions drawn from it.

> We want to say that there can't be any vagueness in logic. The idea now absorbs us, that the ideal "*must*" be found in reality . . . We have got on to slippery ice where there is no friction and so in a certain sense the conditions are ideal, but

13 See L Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge & Kegan Paul, 1974), §§ 2.0211, 2.0212; see also §§ 2.01, 2.02, 2.0201, 2.15, 3.22, 3.23.

14 L Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1988), §§ 98, 99.

> also, just because of that, we are unable to walk. We want to walk: so we need *friction*. Back to the rough ground![15]

According to Wittgenstein's new conception in the *Philosophical Investigations*, no metaphysical truth can be drawn from language, because language is only the means by which we talk about things, and bears no connection at all to things in themselves. Consequently, the only truths that can be drawn from language are truths about language.[16] Note, however, that, according to Wittgenstein, these truths about language should not be taken to be truisms: As he observes in *On Certainty*, many things can be deduced from the fact that we are playing a language game; and this kind of deduction is, again, transcendental, though extensively modified.

The main feature of the argument against philosophical scepticism in *On Certainty* is the recognition of the pragmatic nature of sceptical doubts. In fact, Wittgenstein notes, sceptical doubts are uttered in the context of a language game, as any other sentence would be. But the meaning of a sentence in a language game cannot be separated from the means by which we arrive at this meaning in our learning process, and these means include the truth of certain particularly evident sentences. Recognising the truth of the sentence "this is my hand", when looking at my hand, is one of the means by which, according to Wittgenstein, I learnt the meaning of the word "hand", and is therefore, in a sense, *constitutive* of the language games we can play with this word.[17] Accordingly, the very meaning of some words in a language game is inherently intertwined with the truth of some basic sentences in which that word occurs.[18]

This has consequences for the possibility of expressing doubts within a language game, because, if the sceptic raises a doubt, the sceptic is presumed to use words meaningfully; but if the sceptic casts doubt on those basic truths failing which such meaningfulness would be impossible, the meaning of the sceptic's doubt will be disputable, and, consequently, the sceptic's assertion of doubt will be self-defeating.[19] We can see two similarities between this argument and the earlier examples of transcendental argument. First, we have, here too, a kind of *modus ponens* inference with its second premise set in contrapositive form: the sceptic's doubt on some basic truths must be meaningful (A), but, if we supposed that those truths were in reality false, we would not be able to ensure that the sceptic's doubt be meaningful ($\neg B \rightarrow \neg \Diamond A$; therefore B); hence, the sceptic's doubt is self-defeating because those truths are implicitly presupposed by the language game the sceptic himself is playing. The second similarity is that we again have a theory framing an epistemic medium, though considerably weakened and modified into a theory stating what the conditions of meaningfulness of a concrete utterance are.

There is room for much more discussion on this point, but I will limit myself to some remarks. In the final analysis, Wittgenstein's language game argument consists in showing the sceptic that the sceptic him or herself is actually breaking the rules of the language game the sceptic is playing. In the exposition of the above argument, I used the term "true" to qualify the conclusion, but it is necessary to ask whether, in Wittgenstein's view, we can actually derive truths in the world from the rules of the language game we play: and the answer is no. According to the later Wittgenstein (and in this sense his approach is very different from Kant's), it is a specific instance of philosophical fallacy to hide the

15 Wittgenstein, *Philosophical Investigations*, §§ 101, 107.

16 Wittgenstein, *Philosophical Investigations*, §§ 50, 104.

17 L Wittgenstein, *On Certainty* (Oxford: Blackwell, 2004), § 32.

18 Wittgenstein, *On Certainty*, §§ 126, 401.

19 Wittgenstein, *On Certainty*, §§ 456, 519.

grammatical nature of metaphysical sentences behind a substantive, empirical appearance.[20] No truth can be derived from grammatical rules; grammar is neither true or false, because "true" and "false" are predicates for speaking of correspondence of propositions to reality, and grammar is a precondition for the use of these predicates: "Grammar is not accountable to any reality."[21] Therefore, Wittgenstein's language game argument is very different from classic transcendental arguments in this respect: it does not try to derive substantive *truths* about the world from the pre-conditions of our knowledge; rather, it explains the implications of the language game, it shows grammatical rules. But then, what is the status of these grammatical explanations? Roughly speaking, according to Wittgenstein, grammar has at least three fundamental features. First, as we have seen, it is neither true nor false. Second, it is *arbitrary* in two different senses: on the one hand, many different grammars are conceivable and possible, meaning that there is not a *specific* grammar which is necessary; on the other hand, grammar is arbitrary because no reason can be given to justify it, since it is the very pre-condition of any justification.[22] But third, grammar is unavoidable, it is constitutive of our form of life (that is, of the way we act when we use language) and in this sense it is *necessary*. The arbitrary character of grammar, in Wittgenstein, is intertwined with its being necessary: "The only correlate in language to an intrinsic necessity is an arbitrary rule."[23] Grammar is arbitrary because it cannot be justified, and cannot be justified because it is necessarily presupposed by our use of language, and so even in the process through which we justify; grammar is therefore, properly speaking, the place where any justification ends.

In this sense, Wittgenstein's grammar is an epistemic medium: it is a precondition of our speaking about the world, and a condition of possibility of truth and falsity. As such, grammar is a necessary condition of knowability.[24] Accordingly, language games are particular and contingent mediums, each stating its own conditions for verifying and falsifying propositions, and thus stating the means by which we "appeal" to reality. Hence, the later Wittgenstein's language game argument can indeed be conceived as a form of transcendental argument, in that it shows some necessary implicit presuppositions of an epistemic medium.

But two features of this argument are new, and they profoundly modify its overall structure. First, for this argument to succeed, the sceptic must express a doubt concretely – in a pragmatic context, within a specific language game – and the truths on which doubt is cast must be among those in the bottom, or fundamental, layer of the language game, that is, they must be an essential part of the process through which the game is learned. Second, this argument effects a kind of *reductio ad absurdum*: it draws a conclusion from a

20 L Wittgenstein, *Preliminary Studies for the "Philosophical Investigations" Generally Known as the Blue and Brown Books* (Oxford: Blackwell, 1958), p. 55.

21 L Wittgenstein, *Philosophical Grammar* (Oxford: Blackwell, 2004), § 133.

22 Wittgenstein, *Philosophical Grammar*, §§ 133, 134. See also M N Forster, *Wittgenstein on the Arbitrariness of Grammar* (Princeton: Princeton UP, 2004), pp. 21ff.

23 Wittgenstein, *Philosophical Grammar*, § 133.

24 The twofold character of Wittgenstein's grammar has recently been discussed by Forster, where can also be found some important insights into the intimate relationship between Wittgenstein's and Kant's philosophies. According to Forster, Kant's concept of "synthetic a priori" propositions can fruitfully be related to Wittgenstein's grammatical rules (see Forster, *Wittgenstein*, p. 13). For another assessment of the relations between Kant and the later Wittgenstein's conception of "grammar", see also P M S Hacker, *Insight and Illusion: Themes in the philosophy of Wittgenstein* (Oxford: Clarendon, 1986), pp. 206ff.

contradiction, a particular kind of pragmatic contradiction brought about by doubting something that is senseless to doubt.[25]

Thus, Wittgenstein's language game argument is a modified transcendental argument.[26] But it is a weak one, because it concludes something only with reference to a specific language game (conceived as a "contingent" epistemic medium). The only thing this argument shows is that you cannot cast doubt on everything within a language game: there are some truths that are preconditions for the very assertion of doubt in that language game. This is not in itself a foundation: it is simply a clarification of the means of our representation and speaking, that is, the language game we play; but, again, this clarification is made through an analysis of the implicit presuppositions of an epistemic medium. This is why we will call transcendental arguments of this kind *local* transcendental-*pragmatic* arguments. The weak character of Wittgenstein's language game argument is well represented by Alexy's presentation of the definitional mode of justification:

> Another path which often cuts across other modes of justification is taken by those who analyse the system of rules defining a language game and propose the adoption of the system of rules worked out in this way . . . The definitional mode of justification suffers from one weakness which makes it a matter of some doubt whether it is to count as a mode of justification at all. No further reasons are adduced in favour of the system of rules to be justified; it is simply elucidated and presented. This is meant to suffice as a motive or a reason.[27]

4 Dworkin's moral foundationalism

Even if the language game argument is a weak one, it is not totally lacking in foundationalist capability. In fact, if it is possible to show that moral scepticism can be expressed only within the language game of morality, then we could use the language game argument in order to show moral scepticism to be self-defeating. This is, I believe, Dworkin's strategy in his "Objectivity and truth. You'd better believe it", in which he tries to employ the language game argument in order to reject moral scepticism.[28] In this paper, Dworkin distinguishes two kinds of moral scepticism: the one internal and the other external, or "Archimedean". Internal scepticism is that adopted by those who doubt moral assertions for moral reasons: for example, those who object to the point of view of the Catholic Church on abortion

25 It is perhaps worth noting that Kant would have rejected a transcendental argument based on a *reductio ad absurdum:* "The third special rule of pure reason, if it is subjected to a discipline in regard to transcendental proofs, is that its proofs must never be apagogic but always ostensive. The direct or ostensive proof is, in all kinds of cognition, that which is combined with the conviction of truth and simultaneously with insight into its sources; the apagogic proof, on the contrary, can produce certainty, to be sure, but never comprehensibility of the truth in regard to its connection with the grounds of its possibility." (Kant, *Critique*, B 817).

26 According to Habermas, the passage from Kant's original transcendental perspective to the later Wittgenstein's pragmatism can be characterised as a process of "de-transcendentalization": see J Habermas, *Wahrheit und Rechtfertigung. Philosophische Aufsätze* (Frankfurt am Main: Suhrkamp, 1999), pp. 26ff. On Wittgenstein's later approach conceived as a kind of Kantian pragmatism, see M Sacks, "Transcendental constraints and transcendental features" (1997) 5 *International Journal of Philosophical Studies* 164–86.

27 Alexy, *A Theory*, p. 184. As can be seen, according to Alexy, the language game argument can work only if the rules of the language game are explicitly, or conventionally, accepted. This is not the case with language games according to the later Wittgenstein: although language games are, in the *Philosophical Investigations*, a matter of fact, they are not a matter of explicit convention or acceptance; rather, they are implicit or presupposed in the way someone speaks at a given moment. Language games, according to Wittgenstein, are something we do, not something we accept: consequently, we must be certain of some things, even if we raise doubt about these things. The impossibility of the sceptic's doubt is shown in the language game we play, and is not in any sense the consequence of our explicit acceptance. On this, see Wittgenstein, *Philosophical Investigations*, § 241; *On Certainty*, § 344.

28 R Dworkin, "Objectivity and truth. You'd better believe it" (1996) 25 *Philosophy and Public Affairs* 87–139.

because they believe it to be morally wrong are, in Dworkin's view, internal sceptics. External scepticism is that adopted by those who do so for non-moral, and hence "external", reasons: those who question the point of view of the Catholic Church on abortion because they believe that no moral assertion can be objectively true are, according to Dworkin, external, or "Archimedean", sceptics.[29]

In order to set up his moral foundationalism, Dworkin presents a main point and then an auxiliary one. The main point is that while external scepticism might be coherent, internal scepticism is self-defeating: this is so for exactly the same reasons that we found in Wittgenstein's observations about expressing doubts within a language game.

> The internal skeptic can't be skeptical all the way down . . . because he builds his skepticism on some positive moral positions. If he claimed that no moral judgement or conviction or instinct of any kind could be true, he would condemn his own theory.[30]

The second, and auxiliary, point of Dworkin's foundationalism is that external scepticism is really internal scepticism concealed under a guise of neutrality and objectivity, which is tantamount to say that no language game external to the moral game can be morally relevant. The assumption, in more general terms, is that no higher-order game exists within which to discuss the criteria of validity of subordinate language games.[31]

This is a distinctively Wittgensteinian point, to be sure – the idea that no language game is subordinate to another, and so that we are operating within a non-hierarchical epistemology.[32] But the idea comes up against at least one objection: that the theory of the language games is itself advanced within a language game, so it is difficult to see how this language game (in which the theory is framed) might stand on the same level as the language games the theory speaks of. The point, then, is that there is at least one privileged language game behind the argument that no language game should be seen as superior to any other, and this is the language game within which the argument is advanced. Dworkin fails to notice the difference between at least two language games: (a) the language games the theory is speaking of, language games as *objects*, on the one hand, and (b) the language game within which the theory is asserted, a language game as a *precondition*, on the other. Now, if Dworkin argues that some language games are internally coherent and should not be discussed from the outside, he fails to notice that what he is doing in (b) is in fact *discussing them from the outside*.

Hence, the thesis of a non-hierarchical epistemology seems to be paradoxical, and the weak character of the language game argument may be strengthened accordingly. This is the content of the fourth of the foundationalist strategies that Alexy introduces in *A Theory of Legal Argumentation*, that is, Apel's transcendental-pragmatic approach.

5 Apel's transcendental-pragmatic argument

The first point of Apel's foundationalist strategy is connected with the objection we have seen with regard to (Wittgenstein's and) Dworkin's non-hierarchical epistemology. The overall idea of a plurality of different language games, with no hierarchy among them,

29 Dworkin, "Objectivity", pp. 89ff.

30 Dworkin, "Objectivity", p. 94.

31 Dworkin, "Objectivity", pp. 117ff.

32 See Wittgenstein, *Preliminary Studies*, p. 81: "We are not . . . regarding the language games which we describe as incomplete parts of a language, but as language complete in themselves, as complete systems of human communication." See also Wittgenstein, *On Certainty*, §§ 608, 609.

seems not to take into account that there is at least one privileged language game at work: the game in which the theory itself is put forward.[33]

If – as Wittgenstein, in fact, suggested – the innumerable diverse language games or forms of life as "given" (pre-)facts are also to be the ultimate quasi-transcendental rule-horizons for the understanding of meaning, then one cannot understand how these different rule-horizons themselves can be understood and hence "given" as language games. *One* language-game at least is excluded and presupposed as a transcendental language game when one speaks of given language games as quasi-transcendental facts (in the sense of a language game relativism).[34]

In consequence of this observation, Apel's epistemology is strongly hierarchical. According to Apel, the question of foundationalism must be solved within a specific language game – the language game of philosophy – which presupposes the language game of assertion and communication and which is superior to all other language games, because it is where their criteria of validity can be discussed, criticised or possibly justified.[35] Now, Apel observes, this question and those, closely related, of scepticism and relativism, in virtue of their universalistic character, are discussed by means of assertions which have the characteristic of self-reference: assertions such as "there is no truth", or "the truth of any statement is relative" which clearly include themselves in their domain of validity. But if these philosophical assertions, which are relevant for the question of foundationalism, on the one hand, must presuppose a transcendental language game and, on the other, must also refer to themselves, then they cannot contradict the constitution of this very language game which makes them possible.

> I believe that – within the framework of a transcendental-philosophical radicalization of the later Wittgenstein's work – one must point out that everyone, even if he merely *acts* in a *meaningful* manner . . already implicitly presupposes the logical and moral preconditions for critical communication.[36]

Up to this point, apart from the thesis of a strongly hierarchical epistemology, Apel's approach does not differ substantially from Wittgenstein's. But there is a new and original element that Apel adds to the transcendental-pragmatic perspective, that is, the *performative* aspect of assertion as treated in Austin and Searle's speech-acts theory. We might say that, according to Apel, the speech act of assertion can be subsumed under what Austin calls *verdictives*.[37] But Apel believes that the verdictive component is not the only one relevant for an analysis of assertion. As Austin, too, explicitly admits, verdictives are often inherently linked with *commissives*: an assertion's claim to truth entails a committment of the utterer to give reasons for justifying the assertion itself: indeed, asserting something is always equivalent to undertaking the obligation to justify it on request.[38]

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33 K O Apel, *Towards a Transformation of Philosophy* (London: Routledge, 1980), p. 165.

34 Apel, *Towards a Transformation*, p. 165.

35 K O Apel, "Fallibilismo, teoria della verità come consenso e fondazione ultima", in K O Apel, *Discorso, verità, responsabilità* (Milan: Guerini, 1997), pp. 132–3. This work is an Italian translation based on a revised version of K O Apel, "Fallibilismus, Konsenstheorie der Wahrheit und Letztbegründung", in *Philosophie und Begründung*, Ed. Forum für Philosophie Bad Homburg (Frankfurt: Suhrkamp, 1987).

36 Apel, *Towards a Transformation*, p. 269.

37 See J L Austin, *How to Do Things with Words* (Oxford: OUP, 1976), pp. 151–3. To be sure, according to Austin the speech act of assertion can be considered either as a "verdictive" or as an "expositive". This is one of the reasons why J R Searle criticised Austin's original taxonomy of performatives: see J R Searle, "A taxonomy for illocutionary acts", in J R Searle, *Expression and Meaning. Studies in the theory of speech acts* (Cambridge: CUP, 1979), pp. 10–11. Indeed, according to Searle, many verdictives and expositives can be subsumed under the class of "assertives".

38 Austin, *How to Do Things*, p. 154.

On this basis, we can introduce Apel's concept of performative contradiction. A performative contradiction is what happens when the locutionary content of a speech act contradicts what is implied by its illocutionary force. According to Apel's argument against moral scepticism, the assertion of the sceptic, in virtue of its intrinsically commissive character, is a performative contradiction. The performative contradiction can be shown by the following assertion: "I am morally obligated to justify that no objective morality could exist." But, as the assertion about the impossibility of moral objectivity entails a performative contradiction, moral scepticism is contradictory, and is therefore false.

Certain moral norms or imperative requirements cannot be placed in question with regard to a possible justification or non-justification so long as the validity of moral requirements in general is placed in question. Even here a transcendental critique of meaning is able to demonstrate that the *presuppositions of the validity of moral norms in general is a "paradigmatic" precondition for the possibility of the language-game associated with the justification of norms*.[39]

Now, the features common to Wittgenstein's language-game argument and Apel's transcendental-pragmatic argument should be clear. Apel borrows the pragmatic approach that Wittgenstein takes in *On Certainty* to confute philosophical scepticism. And Apel's performative contradiction is clearly a development of Wittgenstein's supposed emptiness of meaning of the sceptic's doubt, a development which replaces Wittgenstein's conditions for meaningful discourse with Austin and Searle's conditions for the happiness of speech acts. But, unlike Wittgenstein, Apel finds that from the impossibility of making certain statements can be derived some kinds of substantive truth; accordingly, he assumes that theory of an epistemic medium which allows us to derive a truth from a pragmatic or conceptual confusion.

Thus, the main features of a transcendental argument are still here. First, it is possible to observe the theory of presuppositions underlying it, namely a theory stating the pragmatic presuppositions of assertion conceived as a verdictive-and-commissive speech act. Second, we can express this theory in the form of a *modus ponens* inference with its second premise set in contrapositive form: the sceptic's assertion is meant to be a happy performance by the sceptic (who performs it) (A); but if the assertion did not entail a moral obligation to justify its claim to truth with respect to anyone who could object to it, then that would not be a happy performance of an assertion ($\neg B \rightarrow \neg \Diamond A$); then even the sceptic's assertion entails a moral obligation (B). Third, we have the usual implication which derives a truth from the conditions of meaningful discourse (here the conditions for the happiness of a speech act), that is, the implication which needs an underlying theory of an epistemic medium. Furthermore, the two distinctive features of the language game argument – and so of *local* transcendental-*pragmatic* arguments – can be found here as well: (a) the pragmatic condition, by which the sceptic must make an assertion in order to be refuted; (b) the *reductio ad absurdum* structure: in fact, from performative contradiction we derive falsity, and therefore the truth of what the sceptic denies. But, as we have seen, in this case the pragmatic condition is connected with a strongly hierarchical epistemology: the sceptic makes their utterance not in a particular and contingent language game, but in one

39 Apel, *Towards a Transformation*, p. 255. We have introduced the concept of performative contradiction on the basis of the verdictive and commissive character of assertion. Actually, Apel's strategy goes in the opposite direction: he argues for the commissive and verdictive character of assertion on the basis of the evidence of performative contradiction. Thus, Apel takes performative contradiction to be the primitive concept. In fact, if we tried to put a transcendental-pragmatic argument into deductive form, the result would be that it would clearly seem a *petitio principii*. On this, see Apel, "Fallibilismo", pp. 141–55.

superior to any other, namely, a language game considered to be universal. This is why we will call transcendental arguments of this kind *global* transcendental-pragmatic arguments.

6 Alexy's moral foundationalism

We can turn now to Alexy's moral foundationalism. This is an application of Apel's global transcendental-pragmatic argument,[40] although it should be said that Alexy has his doubts about Apel's arguments as a sufficient foundation for moral truths. These are explained in his *A Theory of Legal Argumentation* as follows:

> The mode of justification just described [i.e. transcendental-pragmatic mode of justification] gives rise to many problems. Not only are these concerned with the questions of which rules can be rightfully characterized as "general and unavoidable presuppositions of possible processes of understanding," which are constitutive of speech acts, and which speech acts are necessary for peculiarly human forms of behaviour; over and above that it is a question of importance from the standpoint of theory of science namely whether or not such justification is in the end possible at all.[41]

Nevertheless, Apel's transcendental-pragmatic approach and Habermas's discourse ethics constitute the core of Alexy's moral foundationalism: none of the other three modes of justification are presented by Alexy as having real foundationalist capacity.[42] Indeed, in his view, the empirical mode of justification is fruitful but ultimately based on a kind of naturalistic fallacy; the technical mode of justification (as we have seen) requires an independent justification of the ends by which we are justifying the means; the definitional mode of justification (which, as we have seen, may be interpreted as the result of a strongly conventionalist reading of the later Wittgenstein) is, in the final analysis, a matter of explicit and conventional acceptance. By contrast, on the transcendental-pragmatic mode of justification Alexy says:

> It can nevertheless be stated that where certain rules can be shown to be generally and necessarily presupposed in linguistic communication, or are constitutive of peculiarly human ways of behaviour, it is quite possible to speak of a justification of these rules.[43]

Alexy tries to give a justification of discourse rules on the basis of what he calls a "weakened transcendental-pragmatic argument".[44] His argument is intended to show that any sincere assertion implies the validity of discourse rules, and particularly of what he calls "rationality rules", that is, the rules which "express the universalistic character of the

40 An attempt to build a transcendental-theoretic argument (and not a transcendental-pragmatic one) for a necessary connection between law and morality has been made in G Pavlakos, "On the necessity of the interconnection between law and morality" (2005) 18 *Ratio Juris* 1, 64–83.

41 Alexy, *A Theory*, p. 186.

42 I will not treat here the many differences that can be found between Apel's and Habermas's approaches, nor will I enter into the details of Habermas's theory. Habermas himself has suggested that his approach to foundationalism can be seen in terms of Wittgenstein's language game argument of a weak transcendental kind. On this, see Habermas, *Wahrheit und Rechtfertigung*, pp. 27ff. and J Habermas, "From Kant's 'ideas' of pure reason to the 'idealizing' presuppositions of communicative action: reflections on the detranscendentalized 'use of reason'", in W Rehg and J Bohman (eds), *Pluralism and the Pragmatic Turn. The transformation of critical theory* (Cambridge, Mass: MIT Press, 2001), pp. 13ff.

43 Alexy, *A Theory*, p. 186.

44 R Alexy, "A discourse-theoretical conception of practical reason" (1992) 5 *Ratio Juris* 3, 231–51; R Alexy, "Discourse theory and human rights" (1996) 9 *Ratio Juris* 3, 217.

discourse-theoretical conception of practical reason in the cloak of a theory of argumentation".[45] These rules are:

> 1. Everyone who can speak may take part in the discourse. 2. (a) Everyone may question any assertion. (b) Everyone may introduce any assertion into the discourse. (c) Everyone may express his or her attitudes, wishes, and needs. 3. No speaker may be prevented from exercising the rights laid down in (1) and (2) by any kind of coercion internal or external to the discourse.[46]

Contrary to what Alexy explicitly says, his argument for the justification of discourse rules is not a transcendental-pragmatic but a transcendental-theoretic argument, which can be summarised as follows: (1) the language game of assertion and communication constitutes the "most general form of life of human beings"; (2) the speech act of assertion presupposes the validity of rationality rules; (3) hence, the validity of rationality rules is "highly general".[47] As usual with transcendental arguments, the justification of the second premise is crucial. In order to demonstrate thesis (2), Alexy builds a deductive argument in which any passage is (or is meant to be) the conclusion of a transcendental-pragmatic argument.[48] The overall deductive argument can be summarised as follows: (a) "Anyone who asserts something raises a claim to truth or correctness"; (b) "the claim to truth and correctness implies a claim to justifiability"; (c) "the claim to justifiability implies a prima facie obligation to justify what one has asserted, if asked to do so"; (d) "whoever gives justifying reasons for something raises claims to equality, freedom from force, and universality, at least as far as the justification is concerned".[49]

If Alexy's argument, as presented above, is to be considered foundationalist, then, as its starting point, the language game of assertion must be shown to be universal, or at least "highly general": as we have seen, this is one of the main points of global transcendental arguments. Hence, Alexy's approach, like Apel's, is based on a strongly hierarchical epistemology: only if we are able to show that the game of assertion and communication is universal, can we argue for a foundation of the discourse rules, and hence for the Kantian principles of universality and autonomy. As we have seen, Apel argues for the superiority of the language game of assertion on the basis of pure transcendental reflection: given that the very questions of scepticism, relativism and foundationalism presuppose it, the language game of assertion cannot be called into question. Alexy's approach to this question is very much weaker than Apel's, and it is more in line with that of Habermas; according to Alexy, the language game of assertion and communication corresponds to the *most general form of life of human beings*.[50]

Now, it is certainly possible to find many empirical situations in which the commissive character of assertion (and, in particular, the specific normative declination of this commissive character made according to rationality rules of discourse) does not hold. Two simple examples could be a game of soccer, in which a referee can decide without justifying his or her decisions, and a tribe, with reference to the decisions of a shaman. While the latter case can indeed be reduced to a form of taboo, the former cannot: in this case some limitations to rationality rules of discourse hold for perfectly rational reasons, that is, in

45 Alexy, "A discourse-theoretical conception", p. 236.

46 Alexy, "Discourse theory", p. 211. See also Alexy, *A Theory*, p. 193.

47 The fact that the starting point of this argument is a language game does *not* render it a transcendental-pragmatic argument. This argument shows the preconditions of a language game conceptually considered, and not the preconditions of a concrete utterance *within* a language game.

48 Alexy, "A discourse-theoretical conception", p. 240.

49 Alexy, "Discourse theory", p. 214–16.

50 Alexy, "Discourse theory", p. 217.

order to guarantee the concrete possibility of the game. Another, and perhaps more interesting, example could be scientific paradigms, as discussed for example by Thomas S Kuhn: according to Kuhn, taking for granted some theories and evidence, and temporarily ignoring possible confutations of them, is the condition of possibility of "normal" scientific discussion.[51] Consider this case, taken from Bertolt Brecht's *Life of Galileo*:

> PHILOSOPHER: . . . Mr. Galileo, before turning to your famous tube, I wonder if we might have the pleasure of a disputation? . . .
>
> GALILEO: I was thinking you could just look through the telescope and convince yourselves? . . .
>
> MATHEMATICIAN: One might be tempted to answer that, if your tube shows something which cannot be there, it cannot be an entirely reliable tube, wouldn't you say?
>
> GALILEO: What d'you mean by that?
>
> MATHEMATICIAN: It would be rather more appropriate, Mr. Galileo, if you were to name your reasons for assuming that there could be free-floating stars moving about in the highest sphere of the unalterable heavens.
>
> PHILOSOPHER: Your reasons, Mr. Galileo, your reasons.
>
> GALILEO: My reasons! When a single glance at the stars themselves and my own notes makes the phenomenon evident? Sir, your disputation is becoming absurd.[52]

In this context, Galileo might make the following assertion, apparently without falling into any contradiction: "Jupiter has some satellites, and I will accept any objection made by someone who accepts the evidence of the *cannocchiale* (Galileo's telescope), while completely ignoring any objection made by someone who does not accept it." But this assertion, as is clear, contradicts rationality rules of discourse, particularly rules 2(a) and 2(b).

This observation is meant to suggest that there may also be truth-oriented games in which the reference to some kind of evidence is not disputable, as it is on the contrary the intended starting point of the dispute. Hence, in these cases the discussion proceeds *against* the discourse rule of equality, because any reference to evidence taken as undisputable discriminates against those who do not accept it.

It seems that, in order to meet this objection, a generalised version of Alexy's special case thesis is necessary: according to it, all the language games in which some limitations to the discourse rules hold *for rational reasons* should be conceived as special cases of the more general game of assertion, argumentation and communication. Alexy explicitly defends such a position with regard to the transition from moral rules to legal rules.[53] Now, it seems that his theory of the language game of assertion and argumentation as the most general of human forms of life is closely connected with a generalised version of this special case thesis.

7 Conclusion: transcendental approach and idealised presuppositions

By pointing out that there are empirical situations in which rationality rules of discourse do not hold, we mean to stress the *ideal*, *counter-factual* nature of discourse rules. The point is very much discussed by discourse theorists. Apel notes that the situation in which these rules are effective is an example of what Kant calls a regulative idea, something which cannot exist in the empirical realm but which we should strive for in empirical situations all

51 T S Kuhn, *The Structure of Scientific Revolutions* (Chicago, Ill: University of Chicago Press, 1962).

52 B Brecht, *Life of Galileo* (London: Methuen, 1994), scene 4.

53 See, e.g. Alexy, *A Theory*, pp. 207–8; R Alexy, "The special case thesis" (1999) 12 *Ratio Juris* 4, 374–84.

the same. Although Kant, for his part, would probably have criticised the transcendental use of a regulative idea, Apel believes it is possible to modify Kant's transcendental philosophy in this way, following C S Peirce: "[Peirce] has put Kant's *regulative principles* of experience in the place of Kant's *constitutive principles* of experience, on the assumption that the regulative principles on the long run turn out to be constitutive."[54]

Habermas explicates the meaning of this modification of Kant's approach as follows:

> Giving up the background assumptions of Kant's transcendental philosophy turns ideas of reason into idealizations that orient subjects capable of speech and action. The rigid "ideal" that was elevated to an otherwordly realm is set aflow in this-wordly operations; it is transposed from a transcendent state into a process of "immanent transcendence."[55]

But then we should also observe here that this appeal to a counterfactual situation is risky. The risk would be that of returning to what the later Wittgenstein metaphorically called the "slippery ice where there is no friction", on which "the conditions are ideal", but on which "also, just because of that, we are unable to walk".[56] And if this is true, the transcendental strategy as a basis for moral foundationalism ends up in a circular, or looping, dialectic. Which is precisely what seems to have happened: we started out with classic transcendental arguments and their "strong" foundationalism, grounded on somewhat "idealised" conceptions. Then we arrived, through Wittgenstein, at a pragmatic and "weak" interpretation of transcendental arguments based on a non-hierarchical epistemology, but we found this epistemology to be somewhat paradoxical. And then, finally, we came to Apel and Alexy's strong transcendental-pragmatic argument: again a strong argument which deposits us once more in an idealised situation, a counterfactual situation serving a regulative function. The question, then, is: can the transcendental strategy escape what appears to be a circular dialectic?

8 Final remarks on transcendental arguments

By way of conclusion, we will summarise here some of the theses about transcendental arguments we have been arguing for.

(a) The first thesis is that there are some essential features of transcendental arguments, among which: (1) an inference similar to a *modus ponens* (with its second premise set in contrapositive form) based on a starting point taken as (necessarily or simply empirically) true; (2) an underlying theory of implicit presuppositions expressed by this inference; and (3) the use of a specific theory of an epistemic medium. In this regard, transcendental arguments are essentially connected with a kind of idealist or non-realist philosophy and with at least one truth, be it necessary or contingent.[57]

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54 Apel, *Towards a Transformation*, p. 88; see Kant, *Critique*, B 679.

55 Habermas, "From Kant", p. 20.

56 Wittgenstein, *Philosophical Investigations*, § 107.

57 Obviously, the kind of idealist philosophy that lies behind a transcendental approach may be given different labels. Compare, in this respect, Habermas's suggestion by which, from the point of view of "de-transcendentalisation", and so in the context of a (very Wittgensteinian) reconstruction of the pragmatic presuppositions of our linguistic practices, transcendental idealism can be replaced by internal realism: on this, see Habermas, *Wahrheit und Rechtfertigung*, pp. 40ff; Habermas, "From Kant", p. 17. I agree with Carsten Heidemann (2004) that Putnam's internal realism has a distinctively Neokantian stance: see C Heidemann, "Hans Kelsen and the transcendental method" (2004) 55 NILQ 4, 358–77.

(b) The second thesis is that transcendental arguments can be divided into "global" and "local", depending on the assumed universality of their starting point and of the conclusion they draw.[58]

(c) The third thesis is that transcendental arguments can also be divided into "theoretic" and "pragmatic". In general, transcendental-theoretic arguments effect an analysis of the implicit presuppositions of a given starting point, considered conceptually, or in the *abstract*: hence, they answer questions like: what are the implicit presuppositions of empirical knowledge? or what are those of meaningful language? Further, transcendental-theoretic arguments demonstrate *directly*, that is, their conclusion is a true proposition about the necessity of those preconditions the analysis has uncovered. By contrast, transcendental-pragmatic arguments effect an analysis of the implicit presuppositions of a *concrete* utterance of doubt in a pragmatic context and, as such, they work only if someone utters something within a language game. Furthermore, the conclusion of a transcendental-pragmatic argument is a performative contradiction, hence these arguments are *reductiones ad absurdum* and demonstrate only *indirectly*.

We need to discuss briefly two criticisms that can be addressed at these theses.

The first criticism is addressed at thesis (a). According to this criticism, as thesis (a) identifies the distinctive logical traits of transcendental arguments in a *modus ponens* inference, it reduces them to a special kind of logical deduction. This point is valid. But we said that the *modus ponens* inference is but *one* of the necessary features of a transcendental argument. On many occasions, Apel himself insisted that the potential of a transcendental argument cannot be explained through logical reduction.[59] As we have tried to argue, the characteristic features of transcendental arguments cannot be reduced to a simple matter of presupposition analysis; something more is needed. Transcendental arguments require an entire philosophical theory of an epistemic medium (hence, a non-realist philosophy), and the possibility of uncovering implicit presuppositions of this medium. Hence, they are not simply presupposition-analyses, but *analyses of the implicit presuppositions of an epistemic medium*.

This leads us to the second criticism, which is addressed to thesis (b). According to this criticism, a possible objection to the concept of *local* transcendental arguments may be that they are self-contradictory. In fact, unless we assume the necessary character of the starting point (hence, unless we assume that all transcendental arguments are global by definition), arguments of this kind become mere presupposition-analyses; but there are many presupposition-analyses which cannot properly be called "transcendental". The answer to this criticism is that, if the necessity of the starting point had been the main feature of transcendental philosophy, then probably transcendental philosophy would have died with Kant's first *Critique*. The concept of a local transcendental argument explains why, for example, Neokantianism is a kind of transcendental philosophy, and why, as we have seen,

58 The distinction between global and local transcendental arguments is different from Stroud's distinction between a strong and a weak transcendental approach, qualified by Hookway as a distinction between "immodest" and "modest" transcendental arguments: on this, see Stroud, "The goal"; C Hookway, "Modest transcendental arguments and skeptical doubts: a reply to Stroud" in R Stern (ed.) *Transcendental Arguments* (Oxford: OUP, 1999), pp. 173–87. In fact, according to Stroud, "immodest" transcendental arguments are those based on a kind of non-realistic philosophy: thus, in our view, all transcendental arguments are "immodest" in Stroud's sense. Indeed, "transcendental arguments might need an additional argument for the truth of non-realism (if they do not contain such an argument from the beginning)" (Heidemann, "Hans Kelsen", p. 266).

59 Apel, "Fallibilismo", pp. 142ff., 151–4.

the later Wittgenstein's conception of grammar leads to a sort of "Kantian pragmatism" which retains many transcendental features. As Carsten Heidemann notes, Kant himself distinguished between synthetic (or progressive) and analytic (or regressive) transcendental arguments, and Neokantian transcendental arguments can be seen as analytic (or regressive), in that "they are less ambitious, relying completely on a first premise that is not necessarily valid".[60] According to Paulson, Kelsen's transcendental argument for the category of normative imputation can also be identified as a Neokantian regressive transcendental argument.[61] Identifying the core meaning of a transcendental argument not in the assumption of a necessary starting point, but in the analysis of the implicit presuppositions of an epistemic medium, offers an explanation of all these different kinds of transcendental philosophy.

In conclusion, I present a taxonomy for transcendental arguments based on the above discussion and on the distinctions made. These distinctions create four possible kinds of transcendental argument: global theoretic, global pragmatic, local theoretic, local pragmatic. Two examples, drawn from the foregoing discussion, are given for each of these kinds, with the exception of local transcendental-theoretic arguments. I will not discuss here the possibility of these last arguments: let me say, however, that there are some candidates for this category, and Kelsen's Neokantian (regressive) transcendental argument is probably among them.

A taxonomy for transcendental arguments	THEORETICAL	PRAGMATIC
LOCAL	Kelsen's Neokantian transcendental argument?	Wittgenstein's language-game argument in *On Certainty* Dworkin's confutation of moral scepticism ("Objectivity and truth")
GLOBAL	Kant's transcendental deduction of categories in *Critique of Pure Reason* Wittgenstein's transcendental deduction of the simplicity of objects in *Tractatus Logico-Philosophicus*	Apel's transcendental-pragmatic argument for moral foundationalism Alexy's foundation of discourse rules ("A discourse-theoretical conception") and of human rights ("Discourse theory")

60 Heidemann, "Hans Kelsen", pp. 359–60, 368.

61 Paulson, "On the puzzle", pp. 287ff.

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The discourse-theoretic necessity of flexibility in the law*

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The containment of flexibility in the law has been a substantial goal of legal theory. Flexibility in the law could be completely contained if judges were able to discern "right answers"[1] to legal questions.[2] In this essay it will be shown from a discourse-theoretic perspective that no such complete containment is attainable. The cognition of "one-right-answer" in the law is impossible,[3] for flexibility in the law is unavoidable. This thesis respecting the necessity of flexibility in the law will be justified in what follows in discourse-

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1 Dworkin claims that there are right or correct answers in law (cf., e.g. R Dworkin, "No right answer?", in: P M S Hacker and J Raz (eds), *Law, Morality, and Society. Essays in honour of H L A Hart* (Oxford: Clarendon 1977), pp. 58–84; R Dworkin, *Taking Rights Seriously* 2nd edn (Cambridge Mass: Harvard UP, 1978), pp. 291–368 ("A reply to critics"), especially pp. 331–5. But these may only be perceived by an ideal judge, whom Dworkin calls "Hercules": "I have invented . . . a lawyer of *superhuman* skill, learning, patience, and acumen, whom I shall call Hercules." (Dworkin, *Taking Rights Seriously*, p. 105, italics added). On Dworkin's one-right-answer thesis cf., inter alia, D Buchwald, *Der Begriff der rationalen juristischen Begründung. Zur Theorie der juridischen Vernunft* (Baden-Baden: Nomos, 1990) pp. 241–4 (for Buchwald's arguments see n. 3 below); and U Neumann, *Wahrheit im Recht. Zu Problematik und Legitimität einer fragwürdigen Denkform* (Baden-Baden: Nomos, 2004), pp. 39–41.

2 Cf., e.g. R Christensen and H Kudlich, *Theorie richterlichen Begründens* (Berlin: Duncker & Humblot, 2001), p. 59, who speak of the "project of the classical methodology to show the way to the unique correct cognition". (NB all translations from quoted German language texts are my own.) Today, just as 25 years ago, Schwerdtner's assessment may be valid: "The 'Legal Determinacy', which portrays the legal system as a complete system in the sense that it offers one and only one answer to every conceivable legal question, is surely dead. The execution of the death certificate is still at stake." (P Schwerdtner, "Rechtswissenschaft und kritischer Rationalismus (I.)" (1971) 2 *Rechtstheorie* 67–94, p. 68). This essay claims to add a further line to the death certificate.

3 Buchwald holds the thesis of "one-right-answer" to be mistaken for three reasons: "(1) The language of moral norms and legal statutes, precedents and interpretations is vague, ambiguous and evaluatively open, that is, capable of different exegeses and evaluations. None of these evaluations can be justified beyond doubt; especially basic evaluations on what ought to be done or what is good, are not decidable by rational arguments." (*Der Begriff,* pp. 243ff.): (2) The necessary balancing of principles in complicated legal cases does not lead, in a finite amount of steps, to one definite decision (cf. *Der Begriff*, p. 244); "(3) There may be incommensurable ideologies, so that different interpretations of norms may reflect different controversies that may in any case have more than one solution." (*Der Begriff*, p. 244). This essay will provide a discourse-theoretic explanation for the thesis underlying these three reasons: practical questions cannot be decided rationally beyond doubt.

theoretic terms. Thus, I shall begin with (1) the declaration of the impossibility of an ideal discourse, and then (2) introduce the concept of discourse principles. Relying on that concept, I will (3) elaborate a three-level model of discourse, which shows, inter alia, that practical discourses cannot produce results apart from any authoritative decision. Then, the relevance of the necessity of decisions in law will be examined by taking up (4) Robert Alexy's four-stage procedural model of law. As a result, this essay will conclude with (5) the argument that the law cannot escape the discourse-theoretic weakness of the necessity of decisions either. By this means, the thesis of the discourse-theoretic necessity of flexibility in the law will have been justified.

1 The impossibility of the ideal discourse

Uniquely correct answers to legal questions are found, if at all, in an ideal practical discourse.[4] Alexy defines the ideal practical discourse as a search "for an answer to a practical question under the conditions of unlimited time, unlimited participation, and complete freedom of constraints", whereby one is in a position to achieve "complete linguistic-conceptual clearness, complete empirical information, complete ability and willingness to change roles and complete freedom from prejudice".[5] The realisation of these ideal conditions by the discourse participants is, in Alexy's words "not actually possible in fact".[6] Real or actual participants of discourses have only limited, as opposed to perfect, capacities. We do not have unlimited time for discussion. We cannot communicate with an infinite number of participants. As for practical questions, we are not able to achieve perfect linguistic-conceptual clarity due to our limited capacity for perceiving the world.[7] We can

4 On the relationship between practical questions and legal questions compare, on the one hand, R Alexy, *A Theory of Legal Argumentation: The theory of rational discourse as theory of legal justification* (Oxford: Clarendon, 1989), who claims, that "there exists legal reasoning orientated to solving practical questions", and, on the other, U Neumann, *Juristische Argumentationslehre* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1986), p. 86ff., for whom "in any case the discussion of legal doctrines has to be understood as a theoretical, not a practical discourse". This apparent contradiction may be overcome by means of two arguments: (1) where values are concerned, it is always a matter of a practical question; (2) legal questions are frequently decided by evaluations. It follows, then, from the fact that there are legal questions that there are practical questions.

5 R Alexy, "Problems of discourse theory" (1988) 20 *Crítica, Revista Hispanoamericana de Filosofía* 58, 43–65. In another paper Alexy lists five, instead of six, conditions of the ideal discourse: "Completely ideal conditions are given, if five idealizations are there: (1) that of unlimited time, (2) that of unlimited participation, (3) that of unlimited linguistic-conceptual clarity, (4) that of unlimited information, and (5) that of unlimited freedom from prejudice." (R Alexy, "Diskurstheorie und Rechtssystem" (1988) 5 *Synthesis Philosophica* 299–310, p. 304) The condition of the complete ability and willingness to change roles is missing; the condition of unlimited linguistic-conceptual clarity is freed from the element of complete absence of constraints. It has to be left aside, if one may abandon the missing condition and the missing element in a world that can be described as ideal by way of the remaining five conditions. But there are reasons to believe that they are in any case indispensable in the system of discourse principles that is to be elaborated here.

6 Alexy, "Problems", p. 49.

7 Our limited capacity of recognising and understanding our world leads to the defeasibility of the concepts with which we describe the world. Our concepts are always relative to our knowledge of objects or things. Infinite linguistic-conceptual clarity might be achieved in logic, mathematics or in an isolated linguistic system (e.g. the chess game), in which a linguistic sign achieves its meaning only by definition. For recent works on the defeasibility of legal norms compare, on one hand, P-H Wang, *Defeasibility in der juristischen Begründung* (Baden-Baden: Nomos, 2004), who tries to grasp the defeasibility by means of classical logic and theory-revision, and, on the other, B Brozek, "Law, defeasibility and logical consequence", in S Eng (ed.), *Proceedings of the 21st IVR World Congress, Part 2: Law and Practice* (Stuttgart: Franz Steiner Verlag, 2005), pp. 69–78, who uses non-monotonic logic with an eye to the same end.

never possess unlimited empirical information, and we are neither willing nor able to change roles, entirely unprejudiced, either.[8]

If these assumptions hold true of the human being, then the realisation of an ideal discourse is impossible. The ideal conditions of an ideal discourse are not only not fulfillable *in toto*, they are not fulfillable separately either. The ideal discourse, qua impossible discourse, therefore cannot provide answers to our existing practical questions at all and a fortiori cannot provide uniquely correct answers either.[9]

2 Principles of discourse

The realisation of an ideal discourse fails, as noted, owing to the insufficiency of the actually existing conditions. Given actual or real conditions, only a real discourse can take place. Real discourses, in contrast to ideal discourses, can be defined as non-ideal discourses. The conditions of real discourses, due to the limiting real conditions, are necessarily non-ideal.[10] This definition, negative in form, stands in need of further clarification concerning the conditions of a real discourse. Alexy's catalogue of rules and forms of the practical discourse in *A Theory of Legal Argumentation* offers several candidates for a positive definition of the conditions of a real discourse. The catalogue comprises 28 rules and forms, which include: "Basic Rules" such as "No speaker may contradict him or herself"; and "Rules for Allocating the Burden of Argument" such as "Whoever proposes to treat a person A differently from a person B is obliged to provide justification for so doing"; and also "Transition Rules" such as: "It is possible for any speaker at any time to make a transition into a linguistic-analytical discourse".[11] It is not entirely clear whether Alexy understands this catalogue to comprise the rules of a real or an ideal discourse. If Alexy's catalogue purports to list the rules of a real discourse, and in doing so purports to list the conditions under which a real discourse takes place, then a problem emerges: some of these rules, especially in the group of "Rationality Rules",[12] require ideal conditions. Two examples illustrate the point. One of the rationality rules reads: "Everyone who can speak may take part in discourse."[13] This, with the exception of those who are unable to speak, is one of Alexy's five conditions of ideal discourse: unlimited participation. Another rationality rule reads: "No speaker may be prevented from exercising . . . rights . . . by any kind of coercion internal or external to the discourse."[14] This, despite the restriction on particular rights, is

8 Alexy leaves open the question of whether the fulfilment of the conditions of the ideal discourse "is conceptually possible at all" ("Problems", p. 49). There are reasons to believe that in any case the fulfilment of all conditions at once is conceptually impossible.

9 Even if all the conditions Alexy lists were fulfillable, uniquely correct answers to practical questions would still not be guaranteed. Alexy maintains that even a discourse which is ideal in all aspects could produce "contradictory norms" as discourse results, for it is not clear "that there are no discourse-resistant anthropological differences of the human being, which even under the conditions of the ideal discourse may exclude consents in practical, meaning evaluative questions" (R Alexy, "Nachwort", in R Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Argumentation* 3rd edn (Frankfurt a M: Suhrkamp, 1996), pp. 399–435, pp. 412ff.).

10 This is not to say that the real conditions are necessarily non-ideal. The necessity of the non-ideal character of real discourse is relative to the non-ideal character of real conditions. It cannot be ruled out that we happen to live in a world that is, at least in some discourse-relevant aspects, an ideal world. But so long as this is not the case, the real discourse is necessarily non-ideal.

11 Compare the summarising table in Alexy, *A Theory of Legal Argumentation*, pp. 197–8.

12 Compare Alexy, *A Theory of Legal Argumentation*, pp. 191–2.

13 Alexy, *A Theory of Legal Argumentation*, p. 193.

14 Alexy, *A Theory of Legal Argumentation*, p. 193. Here, Alexy deals with those rights that emerge for the discourse-participants out of the heretofore introduced rationality rules.

another ideal condition: complete freedom from constraints.[15] The problem, however, is that a real discourse, as remarked above, can only be realised under non-ideal conditions. The ideal conditions that are demanded by the rationality rules cannot be realised in our world. Of course, Alexy is aware of this. Thus, he remarks that a realisation of these rules is in "reality . . . quite out of the question".[16] In "actual discussions" or real discourses these conditions may "only be approximatively satisfied".[17]

Other rules in Alexy's catalogue, which are not part of the rationality rules, can also be realised only approximately.[18] This applies to at least some of his "Justification Rules".[19] One of these rules shall suffice to illustrate this: "The consequences of every rule for the satisfaction of the interests of each and every individual must be acceptable to everyone." The short version of this rule reads: "Everyone must be able to agree to every rule."[20] This rule presupposes perfect conditions of unlimited time and unlimited participation, and perhaps of perfect linguistic conceptual clarity, too. Speaking of this rule Alexy says that it "shares the *ideal* character of the rationality rules".[21]

Are Alexy's rules of practical discourse rules of a real discourse or an ideal discourse? They are neither. The property of the rationality rules, as with other discourse rules in Alexy's catalogue, to be realised only approximately is owing to their norm-theoretic structure: they are not rules, but principles.[22] Principles are "optimization requirements".[23]

15 This ideal condition is no condition of the ideal discourse as Alexy defines it, although Alexy's definition cited above (p. 126 under subheading 1) may give rise to this impression. It is rather, as Feteris puts it, "a condition of realizing" (E T Feteris, *Fundamentals of Legal Argumentation. A survey of theories on the justification of judicial decisions* (Dordrecht/Boston/London: Kluwer 1999) p. 95) the conditions of the ideal discourse. These conditions of realising the conditions of the ideal discourse gain great significance in the system of discourse principles (compare p. 132 below, paragraph starting "A completely different problem . . .").

16 Alexy, *A Theory of Legal Argumentation*, p. 193.

17 Alexy, *A Theory of Legal Argumentation*, p. 194.

18 Cf. A Aarnio, R Alexy and A Peczenik, "The foundation of legal reasoning" (1981) 12 *Rechtstheorie* 133–58, 257–79, 422–48, pp. 263–4. Here, he refers to the "Rationality Rules" as the group of "rules of reason" (p. 264). This group "clarifies the ideal character of the practical reason, shown in the fact that it can only be realized in an *approximate* manner" (p. 263, italics added).

19 Alexy, *A Theory of Legal Argumentation*, pp. 202–3.

20 For both quotations, Alexy, *A Theory of Legal Argumentation*, pp. 203ff.

21 Alexy, *A Theory of Legal Argumentation*, p. 204, italics added.

22 Alexy has already remarked that his discourse rules are not only rules in the sense of his differentiation between rules and principles: "The concept of rule is used in a wide sense here, embracing both definite obligations and obligations concerning optimization." ("Problems", p. 48, n. 12). On the relationship between Alexy's discourse theory and the reconstruction presented here, cf. below section 3 (b).

23 R Alexy, *A Theory of Constitutional Rights*, J Rivers (trans.) (Oxford: OUP, 2002), p. 47. A detailed analysis of Alexy's norm-theoretic differentiation between rules and principles and a corresponding critique have to be left aside. Still, this must be said: according to the correct critique of J R Sieckmann (*Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990), pp. 62–75, especially p. 65) and A Aarnio, ("Taking rules seriously", in W Maihofer and G Sprenger (eds.), *Law and the States in Modern Times. Proceedings of the 14th. IVR World Congress in Edinburgh, August 1989*, ARSP-Beiheft 42 (Stuttgart: Franz Steiner Verlag 1990), pp. 180–92, p. 187), principles as well as rules impose definite obligations. Therefore, Alexy's confrontation of rules and principles cannot be based upon the feature of rules, namely, that they impose definite obligations. Principles, however, impose the definite obligation to optimise their object, while rules impose the definite obligation to realise their objects absolutely. Therefore, the differentiation of rules and principles still lies in optimisation. For the purpose of this inquiry, it will suffice to handle the characterisation of principles as optimisation requirements (cf. on the critique of Aarnio and Sieckmann, R Alexy, "On the structure of legal principles" (2000) 13 *Ratio Juris* 294–304, pp. 300–1).

Optimisation requirements, according to Alexy, are "characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends . . . on what is factually possible".[24] Drawing on Sieckmann, principles can be qualified as norms that require the realisation of an ideal.[25] The ideal objectives of the principles are not to be realised absolutely or in a perfect manner, but only in an optimal manner.[26] Principles mark what Alexy has called "the world of the ideal Ought".[27] Alexy's concept of the ideal "ought" shows why at least some of his discourse rules may count only as principles: An ideal "ought" does not require that what is postulated be actually realisable in full, but only *approximately*.[28] It may thus be concluded: every discourse rule that can only be applied approximately, as in the case of rationality rules, is a principle.

24 Alexy, *A Theory of Constitutional Rights*, pp. 47–8. The quotation from Alexy suggests that the degree of satisfaction of legal principles depends "*not only* on what is factually possible *but also on what is legally possible*" (italics added). Concerning the pre-legal field of discourse principles, the legal possibilities are irrelevant. The satisfaction of discourse principles depends therefore only on what is factually possible. As far as that goes, discourse principles do not count as optimisation requirements but rather as maximisation requirements. According to Alexy, a principle is a maximisation requirement if it is "related only to what is factually possible" (*A Theory of Constitutional Rights*, p. 51, n. 37). But if there is more than one discourse principle and these are related to another, then there may be a collision between the individual maximisation requirements of the principles. I assume that there is more than one discourse principle, and that these discourse principles form a normative framework which is similar to one of the legal possibilities found in Alexy's definition of legal principles and which has effects on the satisfaction of each individual discourse principle. Therefore, discourse principles shall also be defined as optimisation requirements. In any case, the concept of discourse principle applied here differs from Alexy's concept of principles in so far as legal possibilities are concerned. I owe this clarifying thought to discussions with Virgílio Afonso da Silva, Matthias Klatt and Martin Borowski (cf., for the distinction between maximisation and optimisation requirements, Alexy, *A Theory of Constitutional Rights*, p. 51, n. 37; Sieckmann, *Regelmodelle*, pp. 66–7; and M Borowski, *Grundrechte als Prinzipien. Die Unterscheidung von prima facie-Position und definitiver Position als fundamentaler Konstruktionsgrundsatz der Grundrechte* (Baden-Baden: Nomos, 1998), p. 81).

25 Compare Sieckmann, *Regelmodelle*, p. 76: "Prinzipien enthalten ein ideales Sollen, d.h. sie sind Normen, die die Realisierung eines Ideals gebieten."

26 One has to distinguish between the objective or aim of an optimisation requirement, namely the optimisation-object or optimisation-aim, and the optimisation requirement itself. This corresponds to Alexy's differentiation between "*commands to be optimized and commands to optimize*" ("On the structure", p. 300, italics original). In a slightly simpler terminology, one could distinguish between objects of principles and principles. The object of a principle is the aim or the condition that is to be optimized (*Z*). The principle is the norm that states the command to optimize (*O Opt(Z)*). In addition, the formulation of the optimisation requirement or the principle-sentence has to be distinguished from the optimisation requirement or the principle. A principle-sentence marks one possibility of the linguistic expression of a principle. The distinction between principle and principle-sentence corresponds to the common distinction between norm and norm-sentence (cf. on this, Sieckmann, *Regelmodelle*, p. 29).

27 Alexy, *A Theory of Constitutional Rights*, p. 82. Alexy had abandoned the distinction between the ideal and real "ought" or the ideal and real world. Already in *A Theory of Constitutional Rights*, he uses this distinction "cautiously . . . on account of the ease with which it can be misunderstood" (p. 82, n. 148). In a more recent paper, however, he uses the term "ideal ought" again ("On the structure", p. 300), when he deals with the critique concerning the classification of principles as optimisation requirements (cf. above, n. 23).

28 Compare R Alexy, "Zum Begriff des Rechtsprinzips", in R Alexy (ed.), *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie* (Frankfurt a M: Suhrkamp, 1995), pp. 177–212, p. 204.

This norm-theoretic background gives rise to the concept of discourse principles. The objective of a principle, as discussed above, is always an ideal. The ideal conditions of the ideal discourse suggest themselves as objectives of discourse principles.[29] The discourse principles will then demand the optimal realisation of the ideal conditions relative to the given circumstances and to the other discourse principles.[30] All of these discourse principles, by demanding an optimal degree of the realisation of those ideal discourse conditions under non-ideal circumstances, constitute a real, non-ideal discourse.[31]

An example of the formulation of a discourse principle may serve to illustrate this. The discourse principle of unlimited participation may read: "As far as possible, anyone should participate in every discourse." This formulation expresses the required optimisation of participation relatively to the circumstances and to other discourse principles by using the expression "as far as possible".[32]

3 A three-level model of discourse

The introduction of discourse principles gives shape to a three-level model of discourse. This model expands the common distinction between ideal discourse and real discourse in several aspects. In particular, it distinguishes among three different levels: (1) that of ideal discourse; (2) that of real discourse; and (3) that of actual discourses. An ideal discourse at the first level is marked by an ideal discourse situation, in which, under ideal conditions, ideal results may be achieved. The weakness reflected at the first level stems from the fact that it is intelligible but not realisable. Our world is not a world in which all discourse-relevant ideal conditions can be met. On the second level, that of real discourse, the weakness stemming from the impossibility of realisation is eliminated. The conditions of the ideal-discourse situation become the objectives of discourse principles. They demand not a perfect realisation of their objects, but only an optimal one. By shifting from the non-realisable ideal conditions at the first level to objectives of discourse principles at the second level, realisability is achieved. Thus, the introduction of principles of discourse provides the missing link between non-existing ideal conditions and real possibilities. To be sure, the price to be paid in order to eliminate the non-

29 This idea can be traced back to Alexy's works. In his discussion on the discourse character of a legal process Alexy says: "It would only be possible to discover which structure of the various forms of process could *best satisfy* the criterion cited above through extensive empirical investigation." (*A Theory of Legal Argumentation*, p. 220, italics added) The considered criterion is the "claim to correctness and accordingly . . . [the] reference to ideal conditions" (p. 220).

30 At this point the model of principles gives rise to many questions. Not only the question of how many discourse principles exist is to be clarified but also to what extent they may be reduced to one another. A further question, prominent in the German discussion on legal doctrine, concerns the procedure for applying principles.

31 This is not to say that the real discourse is entirely described by those principles of discourse that contain the above-mentioned ideal conditions of the ideal discourse as objects. Further conditions, at least those concerning the structure of arguments or the motivation of the participants, need to be addressed. Promising candidates for such further conditions are the six principles of rationality that were introduced by Aarnio et al. ("The Foundation", p. 267): "(1) the principle of consistency, (2) that of efficiency, (3) that of testability, (4) that of coherence, (5) that of generalizability, and (6) that of sincerity." To what extent these principles of rationality overlap with the principles of discourse introduced here, and whether there are not further conditions to add, are questions that will have to be addressed in their own right, apart from the present inquiry (for one approach to these questions, cf. below, n. 48).

32 The discourse principle of unlimited participation does not become a principle by means of the expression "as far as possible". Normative character is not changed through a formulation. The expression serves only to make the character of a principle explicit in the principle sentence (cf. for the distinction between principle objective, principle and principle sentence above, n. 26).

realisability of the ideal discourse is the relativity of the discourse results vis-à-vis the non-ideal discourse circumstances.[33] At the third level, the level of actual discourses, the discourse principles are applied to actual discourse situations in our world. Thus, the ideal-discourse conditions at the first level, mediated by the discourse principles at the second level, are realised under the circumstances given by way of optimisation at the third level. The optimisation of the particular situation with the discourse principles serving as criterion leads to a variety of actual discourses.

In short, the three-level model offers a definition of discourse: A discussion is a discourse if and only if the rules[34] that underlie the discussion can be seen as the optimal realisation of the discourse principles under the circumstances given. Thus, the discourse principles offer a criterion for the correctness of actual discourses at the third level.

(a) Advantages and disadvantages of the model

The introduction of a new model is justified only if it offers advantages over the common model. The question as to whether the three-level model offers advantages and disadvantages over the common distinction between ideal and real discourse is addressed in the following subsections.

(i) Advantages of the model

An initial, technical advantage of the three-level model over the common two-part division is that the approximate character of some of Alexy's fundamental discourse rules can be justified from a norm-theoretic perspective. Second, Alexy's rules, which were only to be realised approximately, become operational in a strict sense only if they are seen as principles in the model of principles of real discourse. Until now, the discourse theory has faced a gap stemming from the distinction between, on the one hand, the ideal conditions of the ideal discourse, and, on the other, the real or factually existing participants of discourse.[35] It seemed as if one could overcome this gap only by constructing, from the actual participants, at least partially ideal participants.[36] The three-level model introduced here, in implementing discourse principles, pursues the opposite course: the conditions of discourse and, therefore, also the participants are not idealised but are, instead, realised. The criterion for the satisfaction of the discourse principles is no longer an unattainable ideal but an achievable optimum. This criterion alone makes it possible to determine whether a discussion may be perceived as a discourse or not.

(ii) Disadvantages of the model

Important disadvantages arise, however. An obvious one is that the application of the criterion of optimum realisation leads to the question of when, exactly, a given realisation has become optimal. This question, in turn, leads to two further questions: (1) which circumstances are to be taken into consideration in the optimisation?; and (2) which circumstances, where they collide with others, are to be optimised, and at what costs vis-à-vis other circumstances? The answers to these questions must be found in actual

33 The concept of discourse circumstances embraces discourse principles, the limited conditions of the world and the discourse procedure.

34 These rules may well be principles in the sense of the distinction between rules and principles. But these principles would be discourse principles of a second degree, which stem from the application of the discourse principles of the first degree that constitute the real discourse on the second level. To avoid conceptual confusion, the text pertains to rules alone.

35 Compare Alexy, *A Theory of Legal Argumentation*, p. 303.

36 Compare Alexy, *A Theory of Legal Argumentation*, p. 303.

discourses. However, actual discourses represent, at best, an optimal discourse relative to the given circumstances, the procedure of applying principles, and the discourse principles.[37] Therefore, the results of actual discourses are also relative to the given circumstances, the procedure of applying principles, and the principles of discourse.[38] Thus, actual discourses qua forms of real discourse can only produce relatively correct answers.[39] The relativity of the correctness of the results of actual discourses leads to the possibility of different discursively possible answers.[40] But the questions adumbrated in connection with the procedure of optimising demand a single answer each. Thus, the necessity for authoritative decisions comes into play. One has to decide on one out of the discursively possible answers. The degree of arbitrariness in such decisions may be reduced by institutionalising procedures for decision-making. This is possible, however, only to a certain degree, for the structure of these procedures for decision-making is once again subject to an actual discourse. In short, there is no escape from the necessity of decisions that infect the rationality of the entire optimisation process. The first disadvantage of the three-level model consists, therefore, in the necessarily non-perfect rationality of the procedure of optimisation. This, however, does not count as a particular disadvantage of the model presented here. Rather, necessity of decisions is a problem that accompanies every variant of discourse theory.

A completely different problem is the question as to which conditions ought to be seen as objectives of the discourse principles. As a starting point, Alexy's ideal conditions of the ideal discourse serve as a reliable solution. These conditions are neither completely justified (*letztbegründet*) nor inclusive of the whole set of possible objectives of discourse principles. It is possible that there are other conditions of a genuine ideal discourse, perhaps unknown until now, and it is possible, too, that the conditions referred to above may have to be reduced to one another. Again, this second disadvantage as to the level of certainty vis-à-vis the main conditions is not a particular disadvantage of the three-level model. It always exists when an ideal discourse is considered. What is new in this model is the necessity of conditions that take up the means of realising the ideal conditions and that, as such, become objects of discourse principles. An example would be the infinite freedom from constraints.[41]

37 The procedure of applying principles is the linking element between discourse principles and discourse circumstances. As remarked above, it is necessary to decide which circumstances in which relation are relevant for the satisfaction of discourse principles. In addition, it is only a procedure of application that offers a method making it possible to choose between different "similarly optimal" solutions.

38 According to Alexy, the relativity of the concept of correctness has four aspects: "(1) the discourse rules; (2) the degree of their fulfilment; (3) the participants; and (4) the point in time." ("Problems", p. 61) Aspects (3) and (4) of his relativity scheme correspond in my scheme to the circumstances, aspects (1) and (2) are part of discourse principles and the procedure of application.

39 A uniquely or perfectly correct answer might well be achieved only in a discourse that is in every aspect ideal. Compare Alexy, "Problems", pp. 58–9; and above, n. 9.

40 Compare, for the concepts of discursive possibility and discursive necessity or discursive impossibility respectively, Alexy, *A Theory of Legal Argumentation*, p. 17. Alexy's distinction refers to discourse rules. Discourse rules exclude some discourse results "(as 'discursively impossible' ones) from the class of possible normative propositions, and thereby establish the validity (as 'discursively necessary' ones) of the contradictories of those excluded". All other results are "entirely consistent with the rules of discourse ('discursively possible')". It remains an open question as to whether the distinction of discursive possibility vs discursive impossibility or necessity is categorical, or is to be understood simply according to degree. The discourse rules are themselves the results of higher-ordered meta-discourses (e.g. the discourse-theoretic discourse), and as such they are perhaps only (meta)discursively possible as well. Whether this regress may be brought to a halt cannot be discussed here. In any case, as discursively necessary or impossible results have the same degree of justification as the basing discourse rules, they therefore have a higher degree of justification than that of a merely discursively possible result.

41 Compare above, n. 15.

The sketched disadvantages of the three-level model, which have not been listed exhaustively, present at the same time a further advantage of this model: it brings to light urgent problems that have persisted in discourse theory, problems that require a solution quite apart from whether the discourse principles have been introduced.

(b) The relation to Alexy's discourse theory

A new model does not only face the question of whether it offers advantages or disadvantages when compared to older models, but, more fundamentally, whether it counts as a new model at all. The model presented claims to serve as a starting point for a comprehensive reconstruction of Alexy's discourse theory. Three observations may help to clarify the relation between Alexy's discourse theory and the three-level model presented here: one observation concerns Alexy's discourse rules as principles, a second concerns Alexy's concept of a discourse principle, and, finally, a third observation is addressed to Alexy's own model of principles of discourse. (1) Alexy has already remarked that his discourse rules contain not only rules in the sense of his familiar distinction between rules and principles, but also principles: "The concept of rule is used in a wide sense here, embracing both definite obligations and obligations concerning optimalisation."[42] As far as I know, Alexy never saw this observation as a reason to develop a system of discourse principles. (2) Still, in a probably little-known paper, Alexy presents a discourse principle that is to be applied by way of optimisation, very much in the manner that the discourse principles presented here are to be applied.[43] Unfortunately, Alexy does not take up the precise meaning or content of this discourse principle, and he does not say how it is related to the 28 rules and forms of practical discourse summarised in his catalogue either. In any case, these two observations suggest that the concept of discourse principles in the sense of Alexy's differentiation between rules and principles is at any rate not alien to Alexy's discourse theory. (3) In his paper with Aulis Aarnio and Aleksander Peczenik, Alexy presented a model of principles of discourse[44] that has certain similarities to the three-level model introduced here. His model of principles distinguishes three levels as well, of which the second level, just as in the model presented here, is that of principles. But the similarities fade as soon as one takes a closer look at Alexy's model. At his first level, "the level of ideas", we find the "very vague" "general idea of practical rationality".[45] Even if there are similarities between the idea of practical rationality and the ideal discourse, the differences between these levels are significant. The second level of his model, the level of principles, purports to describe the "conception of rationality . . . in its entirety by means of six principles".[46] These six principles are: "(1) the principle of consistency, (2) that of efficiency, (3) that of testability, (4) that of coherence, (5) that of generalizability, and (6) that of sincerity."[47] These principles are, at the very least, not identical to the discourse principles at the second level of the model presented here.[48] At the third level, the level of

42 Alexy, "Problems", p. 48, n. 12.

43 Alexy, "Diskurstheorie", pp. 307–8.

44 Aarnio et al., "The foundation", pp. 266–70.

45 Aarnio et al., "The foundation", p. 266.

46 Aarnio et al., "The foundation", p. 267.

47 Aarnio et al., "The foundation", p. 267.

48 It may be the case that two classes of discourse principles have to be distinguished in the presented model. The first class would be a material class, in which the objectives would be the conditions of the ideal discourse together with the conditions for realising these. The second class would be a procedural class, in which the objectives might well be Alexy's six principles of rationality. At the same time, both classes would be linked by the actual discourse: the procedural principles would supply the criterion for the correctness of the procedure of applying the material principles, and the material principles would supply the criterion for the correctness of the procedural principles. The various questions arising out of such a conception cannot be pursued here.

rules, "the relatively vague and frequently colliding principles are defined and coordinated into a system of rules".[49] The rules at this third level – and this reveals the differences as well as the ties between the two three-level models – are "expressed via the 22 rules and six forms of argument of practical discourse"[50] that are summarised in Alexy's catalogue in his *A Theory of Legal Argumentation*.

4 The four-stage procedural model of law

The relativity of the correctness of those results attainable by actual discourses is the main discourse-theoretic problem that a system of rules for action faces, where it is based on actual general practical discourse alone.[51] Where actual general practical discourse is concerned, there may be found two or more relatively correct answers to a single question. These answers might well contain "two incompatible normative statements".[52] Normative statements commanding that one do *p* or that one forbear from doing *p* are not suitable instruments for the control of human behaviour.[53] Thus, since it is possible to discern several relatively correct answers in actual discourse, one has to take a decision on behalf of one of these answers in order to control human behaviour. This decision may, in the end, be an arbitrary assessment.[54] A legal system provides for the possibility of minimising the discourse-theoretic weakness of the necessity of decisions or assessments in the field of

49 Aarnio et al., "The foundation", p. 266.

50 Aarnio et al., "The foundation", p. 271.

51 Altogether, Alexy points to three problems that a system of rules for acting faces if it is to be justified discursively: "the problem of knowledge, the problem of enforcement, and the problem of organization" (R Alexy, "Discourse theory and human rights" (1996) 9 *Ratio Juris* 209–35, p. 220; compare Alexy ("Nachwort", p. 430), where only two problems are mentioned, the problem of knowledge (*Erkenntnisproblem*), and the problem of compliance (*Befolgungsproblem*); compare, too, Alexy, ("Diskurstheorie", p. 307), where, in a slightly different terminology, he mentions the argument of knowledge (*Erkenntnisargument*) and the argument from force (*Zwangsargument*); and Alexy (*A Theory of Constitutional Rights*, p. 370, n. 97), where he adds to the "argument . . . based on the limits of practical knowledge" "an additional argument from force"). The problem of knowledge emerges from the relativity of correctness of the discursively possible results. It marks the weakness of the real discourse that "results from the fact that it does not offer a procedure which always allows for just one right answer by means of a finite number of operations" (Alexy, "Discourse theory", p. 220). The problem of enforcement is prompted by the insight that "the correctness or legitimacy of a norm is something different" from compliance with it. "From the fact that discourses can generate insights but not always their corresponding motivations follows the necessity of rules backed by force." ("Discourse theory", p. 221) The problem of organisation results from "the fact that many moral demands and desirable aims cannot be met by individual acting and spontaneous cooperation alone" ("Discourse theory", p. 221; Alexy gives examples of "the support of unemployed people or the help of a suffering country"). According to Alexy, the solution to these three problems consists in establishing a legal system. A legal system is capable of providing procedures of decision-making that contain the problem of knowledge; it may provide those norms that have been issued with compliance, so that a motivation of following those norms is produced, thereby overcoming the problem of enforcement; and it may solve the problem of organisation by providing forms of organisations that apply to assure the efficacy of certain ends. The problem of knowledge remains the main discourse-theoretic problem, for it emerges, owing to the weakness of discourse, as being only capable of producing relative correctnesses. Both other problems are nearly independent of the capacity of discourse (compare, for the problem of enforcement, Alexy, "Diskurstheorie", p. 307: "Even if there were only necessary or impossible results, the transformation of these results into legal norms would still be necessary, since a consent to a rule does not imply necessarily that it is being followed by all.").

52 Alexy, *A Theory of Legal Argumentation*, p. 207.

53 Compare Sieckmann (*Regelmodelle*, p. 84): "Mit der unmittelbar handlungsleitenden Funktion einer durch eine Geltungsaussage ausgedrückten Norm ist es . . . nicht vereinbar, daß zugleich *p* und nicht *p* geboten ist."

54 The unavoidable arbitrariness of this assessment is mitigated considerably by the fact that all the alternatives from which the decision maker may choose have been shown to be relatively correct answers by discourse. Therefore, even the arbitrary decision maker can make a rational choice only, while all choices remain rational relative to the discourse.

rules for action or practical questions. The legal system is capable of doing this, according to Alexy, by introducing an "institutionalized procedure of law-making".[55]

The "legislative procedure of a democratic state"[56] offers such an institutionalised procedure. But a law-making procedure "is not capable of establishing in advance just one solution to every case".[57] According to Alexy, there are at least two reasons for this: "the vagueness of the language of law and the possibility that a legal question is not regulated by the legislator".[58] This problem in the procedure of legislation justifies the "necessity of . . . legal discourse".[59] Those questions that remain open "even in legal discourse" are decided as rationally as possible by "institutionalizing a . . . form of court process"[60] that is as rational as possible. According to Alexy, these procedures of law-making and law-applying result in the realisation of the "ideal of discursive rationality as far as possible".[61]

By means of this, Alexy has outlined a four-stage procedural model:[62] "The four stages of the model are: (1) general practical discourse, (2) legislative procedure, (3) legal discourse, (4) court procedure."[63] In the first stage, in actual general practical discourse, practical questions are discussed. For those questions that are not capable of being answered conclusively, the legislator determines a legislative procedure at the second stage. The legislative procedure is an attempt to realise the discourse principles on the level of legislation, which highlights the interplay of the presented three-level model and Alexy's four-stage procedural model.[64] The high degree of abstraction of numerous laws, for example, fundamental rights, the finite character of our knowledge, which results inter alia in the vagueness of the language of law,[65] the constantly changing world, and the need for rapid decisions all lead to the fact that the legislator cannot decide on all open questions that arise in the application of laws. This task is relegated to the third and fourth stages. Legal discourse, at the third stage, offers possible solutions for those practical questions that still remain open after legislation. The third stage, that of legal discourse, differs from the first stage, that of general practical discourse, in so far as it reflects the limitations found in a

55 Alexy, *A Theory of Constitutional Rights*, p. 370. Alexy claims that there are good reasons facilitating the introduction of such an institutionalised procedure. "These reasons are not rational out of mere effectiveness, since they demand procedures of law-making, that do realize the ideal of discursive rationality as far as possible." ("Nachwort", p. 430) The introduction of such a procedure would then be rational not owing merely to effectiveness but owing to the demands of the discourse principles.

56 Alexy, *A Theory of Constitutional Rights*, p. 370, italics omitted. In another paper it becomes clear that Alexy strives, very much in the sense of the model of principles, towards an optimal realisation of the discourse ideal instead of a perfect or absolute realisation. According to Alexy, procedures of law-making are required that realise the ideal of discursive rationality as *far as possible* (compare Alexy, "Nachwort", p. 430).

57 Alexy, "Nachwort", pp. 370–1.

58 Alexy, "Diskurstheorie", p. 308.

59 Alexy, "Nachwort", p. 371, italics omitted.

60 Alexy, "Nachwort", p. 431.

61 Alexy, "Nachwort", p. 430.

62 With this model, Alexy claims to have combined "moral theory . . . with a theory of law" (*A Theory of Constitutional Rights*, p. 370).

63 Alexy, *A Theory of Constitutional Rights*, p. 370.

64 The formulation is adjusted to that introduced by Alexy ("Diskurstheorie", p. 307, italics added). It reads: "The institutionalization of the parliamentary procedure of legislation based on the general right to vote is to be understood as an attempt to realize *the discourse principle* on the level of governmental legislation."

65 Compare H L A Hart, *The Concept of Law* 2nd edn (Oxford: Clarendon 1994), pp. 124–36, especially pp. 127–8.

legal system in which legislation is prominent.[66] In legal discourse, one is not to ask "what is the absolutely most rational solution, but instead, what is the most rational solution in the legal system".[67] Legal discourse can be nothing more than an actual discourse; therefore, conflicting discourse results might well be justified even at the third stage. The necessary decision[68] for one of these solutions is relegated to the courts at the fourth stage.[69]

With this model, Alexy is in the position to contain the weakness of discourse-theoretic conceptions. Even more, he understands law as a "necessary medium of realizing practical reason in reality".[70] This means that legal discourse "in its whole structure" would be "a necessary element of realized discursive rationality".[71] Thus, legal discourse had to be understood as the realization of general practical discourse.

5 Legal discourse as actual discourse

Despite the question of whether legal discourse is truly the realisation of general practical discourse, legal discourse, like every factually realised discourse, can only be an actual discourse. Thus, since legal discourses are actual discourses, they are only capable of producing relatively correct answers. This is to say that it is always possible to give more than one relatively correct answer to a practical question in legal discourses. If it is always possible to give more than one relatively correct answers to a single practical legal question, this precludes a single uniquely correct answer to a single practical legal question. This impossibility of uniquely correct answers follows from the non-ideal nature of actual discourses, allowing as they do only for relative correctness. Flexibility in the law as negation of the "one-right-answer" thesis is thereby discourse-theoretically necessary.

In any case, the necessity of flexibility in the law does not mean the end of objectivity in the law.[72] Despite flexibility in the law there remains objectivity. The mistake is to suppose objectivity could be understood as obtaining absolutely, rather than relatively. The degree of objectivity to be reached in law depends on the circumstances of discourse, the

66 Compare Alexy (*A Theory of Constitutional Rights*, p. 371): "Just like the first procedure, this one is not institutionalized in any strict sense, but unlike the first it has obligations to respect statute, precedent, and legal doctrine." These obligations are the reason for the characterisation of legal discourse as a special case of general practical discourse, as claimed by Alexy's well-known and much-discussed special case thesis (compare *A Theory of Legal Argumentation*, p. 15).

67 Alexy, "Diskurstheorie", p. 307.

68 Here the open result is the main discourse-theoretic problem, and it is, therefore, the main argument for the necessity of the fourth stage. In addition, however, the problem of enforcement and the problem of organisation arise vis-à-vis the justification of the necessity of the second stage, the legislative procedure.

69 The four-stage procedural model is, of course, merely the scheme of a far more complex process. The four stages affect each other to varying degrees, with effects that may not be contained, so to speak, within the stage. Knowledge gained in legal discourse may have an impact on legislative procedure, and the general practical discourse may be of immediate significance for legal discourse and, thus, for the judicial process with respect to questions that have not yet been resolved in legislation. Further breakthroughs in this linear development can be found in the limiting obligations of legal discourse (cf. above, n. 66). While the obligation to respect statutes follows the linear development, the obligation to respect precedents represents a breakthrough. In spite of these and numerous further breakthroughs in the linear structure of this model, it retains its justification for presenting the basic relations of general practical discourse, legal discourse, legislation, and the judicial process.

70 Alexy, "Nachwort", p. 431.

71 Alexy, "Nachwort", p. 431.

72 The end of objectivity seems to be what Neumann fears when he states that the possibility of several relatively correct answers would render the judge's search for the right answer superfluous: "If the judge assumes that several alternative decisions are justifiable in the same way (!), then the search for the right answer is superfluous" (for this and all other following quotes cf. Neumann (*Wahrheit im Recht*, pp. 39–41). Neumann holds that it may be "an insight of legal theory that in at any rate numerous cases different

degree of satisfaction of the discourse principles, and the discourse principles themselves. As long as discourse participants have not become perfect agents, absolute objectivity is beyond reach. In so far as legal discourse can claim to offer the optimal form of legal discussion according to the discourse principles, however, law will be as objective as the circumstances permit.

72 [*continued*] decisions can be justified with good reasons", but this does not apply "as a maxim of judicial acting". Instead, the judge ought to "act in his praxis of decision *as if* only one single decision were correct in every case" (italics original). Although this does not correspond "to the 'objective results' of legal theory", it does correspond "to the perspective of the judge, who has to search for the right answer, not to throw dice with the eye to arriving at one of several justifiable results". In the justification of decisions, an "orientation aiming at a 'uniquely correct decision'" is indispensable, for a "'justification', according to which the judgment might have been different, would not only be strange but would indeed be *wrongful*" (italics added). Therefore, "the idea of the uniquely correct decision" had to be implemented "as a regulative idea" both "in legal science and in legal practice" (compare for the one-right-answer as regulative idea Alexy, "Problems", p. 58). The alternative to this "switch from a legal-theoretic to a legal-practical argumentation" consists in taking seriously the necessity of the flexibility in law. If it is accepted that always – or in Neumann's words at least in numerous cases – several alternative decisions are relatively correct – or in Neumann's terminology are justifiable – then it has to be accepted that in the end authoritative decisions are not only unavoidable but necessary for any legal system. He who, like Neumann, flirts with a legal-practical argumentation, shrinks back from this consequence. It is not wrongful to take the authority of the judge seriously as a consequence of the discourse-theoretic weakness of the necessity of decisions. It is wrongful, as Neumann proposes, to hide the authority of the judge behind the not realisable claim of being able to find, in every case, the right decision on the basis of juridico-practical considerations. Legal science, including legal theory, ought rather to concentrate on the limitation of the unavoidable, in the end arbitrary, area of the judicial decision as far as possible, instead of shrouding this area from view.

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Revisability versus defeasibility

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IN this paper I would like to address two issues. First, the problem of distinguishing between revisability and defeasibility will be investigated. I will try to argue that one should differentiate between the two. Second, the role of both concepts in the context of formal reconstruction of legal reasoning will be analysed.

Both aims are crucial from the point of view of the contemporary debates in legal theory. It is not difficult to find authors advocating the thesis that there is no difference between both concepts.[1] Furthermore, there are some other notions often associated with defeasibility and revisability, notably open texture and vagueness.[2] I believe it is important to differentiate carefully between those four concepts. This paper is, therefore, an attempt to fulfill partially this project and clarify the distinction between defeasibility and revisability.

1 Revisability and defeasibility from epistemological perspective

Let us consider the following example. A new illness has been discovered. Let us call it A. Let us assume, further, that the symptoms of A are denoted by SYMPTOMS_A. The following cognitive rule can be formulated on the basis of the above-mentioned facts:

(1) If x has SYMPTOMS_A, then x has illness A.

Whenever we meet someone with SYMPTOMS_A, we may conclude, on the basis of (1), that she has A. Imagine, however, that we meet a person, Arthur, who has SYMPTOMS_A, but the therapy that helps people with A does not help Arthur. We may reasonably suspect that Arthur has some other illness. We look for other symptoms and find a strange behaviour: whenever Arthur reads Hegel's works, he has spasms. Additional research leads to the conclusion that Arthur's illness should be treated in a different way to illness A. Let us call Arthur's illness *hegeliosis spasmatica* and the symptom that distinguishes *hegeliosis* from

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1 C Alchourrón, "Philosophical foundations of deontic logic and the logic of defeasible conditionals" in J Meyer and R Wieringa (eds), *Deontic Logic in Computer Science* (Chichester: Wiley, 1993) pp. 43–84.

2 J Hage, *Reasoning with Rules. An essay on legal reasoning and its underlying logic* (Dordrecht-Boston-London: Kluwer, 1997); H Prakken, *Logical Tools for Modelling Legal Argument. Study of defeasible reasoning in law* (Dordecht-Boston-London: Kluwer, 1997); B Brozek, *Defeasibility of Legal Reasoning* (Kraków: Zakamycze, 2004).

the illness A *Schopenhauer's Syndrome* (SS). Now we know that rule (1) is incorrect. We have to revise the rule in the following way:

(2) If *x* has $SYMPTOMS_A$ and it is not the case that *x* has SS, then *x* has illness A.

Imagine further that we meet another patient, John, who has $SYMPTOMS_A$, does not have SS, but the therapy for A does not help him. After a series of complicated blood tests we determine that John has an abnormal level of calcium in his blood. In this way we identify another illness: B. Therefore we revise our rule (2) once more:

(3) If *x* has $SYMPTOMS_A$ and it is not the case that *x* has SS and it is not the case that *x* has $SYMPTOM_B$, then *x* has illness A.

Such revisions of cognitive rules are typical. The most detailed description of these types of activities can be found in textbooks on the philosophy of science.[3] There is no doubt, however, that in this way we revise many cognitive rules that we use every day.

Logicians working on this problem developed what are called formal theories of belief revision (they concern a somewhat wider range of problems but nevertheless they include the problem of revision). Formal methods cannot determine how the new rule looks. They can tell us, however, what to abandon from our theory in order to keep it consistent after the introduction of the new rule.

For instance, if our previous theory contained, inter alia, rule (1) and we now introduce rule (2), then (1) together with (2) and some other assumptions would yield contradiction. Therefore, a theory of belief revision indicates that the introduction of (2) should result, speaking somewhat boldly, in the abandoning of (1) and of all the sentences belonging to our theory from which (1) follows.

What has been said may serve as a basis for formulating the following definition of revisability:

- (DEF1) A cognitive rule is revisable if and only if it can be substituted with a rule or a set of rules that:
  (a) grasp the reality better than the revisable rule; and
  (b) together with the rule yield a contradiction.[4]

Revisability should be carefully distinguished from defeasibility. The concept of defeasibility was introduced in 1948 by H L A Hart in his "The ascription of responsibility and rights". Here is the passage from Hart's paper where the concept is introduced and labelled:

> When the student has learnt that in English law there are positive conditions required for the existence of a valid contract . . . his understanding of the legal concept of a contract is still incomplete . . . For these conditions, although necessary, are not always sufficient and he has still to learn what can *defeat* a claim that there is a valid contract, even though all these conditions are satisfied. The

3 K R Popper, *The Logic of Scientific Discovery* (London: Hutchinson & Co/New York: Basic Books Inc., 1959); K R Popper, *Conjectures and Refutations: The growth of scientific knowledge* (London: Routledge & Kegan Paul/New York: Basic Books Inc., 1963).

4 The phrase "grasp the reality better" is somewhat vague. One can think of it in terms of the Popperian verisimilitude. Furthermore, a cognitive rule can be substituted with a single rule or a set of rules. Think of the following example: after identifying *hegeliosis spasmatica*, apart from introducing (2), we have to introduce also the rule: (R) If x has $SYMPTOMS_A$ and x has SS, then x has *hegeliosis spasmatica*. Both (2) and (R) together with (1) yield a contradiction – in the former case an obvious statement "if someone has *hegeliosis* it is not the case that she has the illness A" has to be added for the contradiction to occur. But one can also think of a situation in which we have to take both (or more) newly introduced rules together with the old one to derive a contradiction.

> 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. The words "conditional" and "negative" have the wrong implications, but the 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 or defeat in a number of different contingencies but remains intact if no such contingencies mature. In this sense, then, contract is a defeasible concept.[5]

The concept of defeasibility, introduced within the framework of legal and ethical theory, proved useful in general epistemology.[6] Moreover, it prompted important logical research resulting in the development of numerous defeasible logics.[7] The logical developments also caused a certain terminological shift. While Hart in his seminal paper speaks of the defeasibility of concepts, contemporary accounts investigate the defeasibility of rules. The shift is easy to explain and not as substantial as it may seem. We ascribe certain concepts to certain phenomena on the basis of some rule. For instance, we have a rule that says that if a given creature is capable of thinking then it is a human. So, according to that rule, we should ascribe the concept of being a human only to those creatures that are capable of thinking. If, then, the rule we use in the process of ascribing concepts is defeasible, so is the ascribed concept.

Let us come back to our initial problem. Imagine a patient comes to us who has SYMPTOMS_A. Moreover, he is in a critical condition and our withdrawal from applying a therapy will result in his death. Additionally, we cannot test whether SS or SYMPTOM_B are present (say, because there are no works by Hegel at hand and tests for SYMPTOM_B would take too much time). In such circumstances we know that the patient has one of three things: illness A, *hegeliosis* or illness B. However, we have to assume that the patient has A and immediately start therapy for A. Therefore we reason on the basis of (1):

(1) If x has SYMPTOMS_A, then x has illness A.

Applying (1) usually has some additional justification like, for example, the fact that A occurs far more often that either *hegeliosis* or B. The point is, however, that in particular cases we do not employ probabilistic reasoning (maybe with the exception of the first time we encounter the problem) because the patient has SYMPTOMS_A and we cannot check whether she has SS or SYMPTOM_B and illness A occurs more often than *hegeliosis* or illness B, therefore we apply the therapy for A. We reason simply using (1).[8]

The main logical problem is that we do not reason here with the use of (3):

(3) If *x* has SYMPTOMS_A and it is not the case that *x* has SS and it is not the case that *x* has SYMPTOM_B, then *x* has illness A;

for we cannot determine whether our patient has or does not have SS or SYMPTOM_B. A further point is that if we knew that the patient had SS we would not use (1) but a new rule:

(4) If x has SYMPTOMS_A and *x* has SS, then x has *hegeliosis spasmatica*.

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5 H L A Hart, "The ascription of responsibility and rights" in A Flew (ed.), *Logic and Language* (Oxford: Blackwell, 1951), p. 152. First published in *Proceedings of the Aristotelian Society*, 1948–49.

6 See J Pollock, "Defeasible reasoning" (1987) 11 *Cognitive Science* 481–518.

7 H Prakken and G Vreeswijk "Logical systems for defeasible argumentation" in D Gabbay and F Guenthner (eds), *Handbook of Philosophical Logic* 2nd edn, vol. 4 (Dordecht-Boston-London: Kluwer, 2002) pp. 219-318.

8 An even better example is the following: "It is sunny today, therefore I will go swimming." We reason very often using such a rule even though we know that there are various circumstances – apart from the weather – that can stop us going swimming, e.g. an uncle can ask for help, or we can break a leg, etc.

From this it is visible that a logic needed to model this kind of reasoning has to be nonmonotonic.[9] In the above example, from a set of premises containing (1), (4) and the statement of the fact that the patient has $SYMPTOMS_A$, the conclusion that the patient has A follows. From a superset of the previous set of premises, containing in addition the information that the patient has SS, the conclusion that the patient has A no longer follows.

The question arises why we have to use defeasible cognitive rules in our daily life. There are several possible answers. Some have to do with the lack of information. Sometimes we use simplified cognitive rules because it is impossible to collect all the information required to apply the full rule (for example, because of time limitations). Another reason for using simplified rules is effectiveness. Sometimes it would be ineffective to try to collect all the required information because the failure in applying a defeasible rule would cost much less than the process of collecting the missing information. A third possibility is that a full rule would be too complicated and therefore useless, let's say, because of our limited brain capabilities.

On the basis of what has been said a definition of defeasibility may be formulated as follows:

- (DEF2) A cognitive rule is defeasible if and only if there are situations in which its antecedent[10] is fulfilled but its consequent does not follow.

One can argue that the use of nonmonotonic logic for modelling reasoning with defeasible rules is unnecessary and, what follows, that the (DEF2) is wrong. The "classical logic" solution would look like this. In the case of our example we know that the patient has $SYMPTOMS_A$ but we cannot know whether he has SS or $SYMPTOM_B$. Nevertheless, the argument runs, we use (3):

(3) If x has $SYMPTOMS_A$ and it is not the case that x has SS and it is not the case that x has $SYMPTOM_B$, then x has illness A.

Two conjuncts of the antecedent – that the patient does not have SS and that he does not have $SYMPTOM_B$ – cannot be proved but they are assumed. In such a case the definition of defeasibility looks like this:

- (DEF3) A cognitive rule is defeasible if and only if there are situations in which it is applied with only assuming and not proving some of the conjuncts constituting its antecedent.[11]

Postponing the discussion about which of the two – (DEF2) or (DEF3) – is better, we can conclude (on the basis of (DEF1), (DEF2) and (DEF3)) that revisability is different to defeasibility.

2 Defeasibility and revisability in legal discourse

Having established the definitions of revisability and defeasibility, I would like to turn now to legal discourse and consider three problems that are usually discussed in connection with defeasibility. The problems in question are: (a) structural resemblance between legal texts and their formalisations; (b) the problem of the shifting burden of proof; and (c) theory of rules and principles. The aim of this part of the paper is to determine whether legal rules are defeasible and/or revisable in the senses explicated above.

9 Classical logic is monotonic. It means that if something follows logically from a given set of premises, it follows also from a superset of it. A logic which is not monotonic is called nonmonotonic. See J Horty, "Nonmonotonic logic" in L Goble (ed.), *The Blackwell Guide to Philosophical Logic* (Malden-Oxford: Blackwell, 2001) pp. 336-61.

10 "Antecedent" can be substituted here with "conditions of rule's application".

11 Or equivalently: "only assuming some of its application conditions".

2.1 Structural resemblance

Let us assume we have the following legal provisions:

- (§X) Whoever causes damage to someone is obliged to redress it.
- (§Y) Whoever acts in self-defence is not obliged to redress the damage caused by the action.

A first order predicate logic formalisation of the provisions would look as follows:

(4) $\forall x\ (Cx \rightarrow Rx)$

(5) $\forall x\ (Dx \rightarrow \neg Rx)$

where (4) is a formalisation of (§X), (5) is a formalisation of (§Y), C stands for "causes damage to someone", R for "has to redress the damage" and D for "acts in self-defence". There is an obvious difficulty with the proposed formalisation. Imagine John (denoted by *j*) has caused damage to someone

(6) C*j*

and that he acted in self-defence

(7) D*j*.

From (4) and (6) we obtain

(8) R*j*

and from (5) and (7) we have

(9)$\neg$R*j*

and therefore we have a contradiction.

A natural way out of this trouble would be to revise (4) in the following way:

(10) $\forall x\ ((Cx \wedge \neg Dx) \rightarrow Rx)$.

Now, the derivation leading to contradiction is blocked, for (10) together with the sole (6) does not yield (8). There is one problem with this solution, however. (10), as a formalisation of (§X), does not resemble structurally its natural-language counterpart. There is some information in (10) – namely $\neg Dx$ – which cannot be found in (§X). In order to save the structural resemblance between (§X) and its formalisation we have to stick to (4):

(4) $\forall x\ (Cx \rightarrow Rx)$[12]

But this leads to declaring (4) defeasible, for there are situations (like the one described above in which John has caused damage to someone but acted in self-defence) in which the antecedent of (4) is fulfilled (Cx obtains for a specific x), but nevertheless Rx (for a specific x) does not follow.

Observe that if we want to keep structural resemblance between legal texts and their formalisations we have to declare legal rules defeasible in the sense of (DEF2). (DEF3) would lead us to formalising (§X) in the form of (10):

(10) $\forall x\ ((Cx \wedge \neg Dx) \rightarrow Rx)$

and only assuming $\neg Dj$ in case we have no information concerning John's acting in self-defence.

It seems therefore that if one wants to keep structural resemblance between legal provisions and their formalisations one has to declare legal rules defeasible in the sense of (DEF2).

12 A better way of formulating (4) would be to write: (4) $\forall x\ (Cx \Rightarrow Rx)$, where "$\Rightarrow$" stands for the so-called defeasible implication. If the rule is defeasible in the sense of (DEF2), one cannot use the material implication "$\rightarrow$" of the classical logic to model it.

2.2. Burden of proof

The next problem I would like to investigate is how to give a formal account of the shifts of the burden of proof that occur in the process of legal argumentation. In a legal dispute there are two parties that try to win the case. When a party puts forward an argument to the effect that *p*, the burden of proof shifts onto the other party, which may attack either the conclusion or one of the premises of the first party's argument.

Let us come back to (§X) and (§Y):

- (§X) Whoever causes damage to someone is obliged to redress it.
- (§Y) Whoever acts in self-defence is not obliged to redress the damage caused by the action.

Imagine further that John has caused damage to Charles and that he acted in self-defence. In order to reconstruct formally the dispute between Charles and John it is natural to assume that Charles starts with an argument based on (§X). Which of the formalisations of (§X) should we choose? Observe that if we decided to use (10)

(10) $\forall x ((Cx \wedge \neg Dx) \rightarrow Rx)$

Charles – in order to argue to the effect that John has to redress the damage – would have to prove not only that John has caused him damage but also that John has not acted in self-defence. This result is incompatible with the idea of the shifts of the burden of proof. From this perspective one would expect Charles to prove only the damage caused by John, and John to show that he acted in self-defence.

A way out of this trouble is to declare (10) defeasible in the sense of (DEF3). In this case Charles would have to prove that John has caused him damage but he would only assume that John did not act in self-defence. Charles's argument becomes then:

(10) $\forall x ((Cx \wedge \neg Dx) \rightarrow Rx)$

(11) C*j*

(12) *assumed*: $\neg$D*j* therefore

(13) R*j*[13]

John's response would be to attack the premise assumed by Charles and prove that he acted in self-defence. The problem with this solution is that the formalisation of Charles's argument would have to take into account and assume all the possible exceptions to the general rule (§X). Therefore the structure of Charles's argument is (where EXC_i ranges over the respective exceptions to (§X)):

(14) $\forall x ((Cx \wedge \neg Dx \wedge \neg EXC_1 \wedge \neg EXC_2 ... \wedge \ldots \wedge \neg EXC_{n\neg}) \rightarrow Rx)$

(15) C*j*

(16) *assumed*: $\neg$D*j*

(17) *assumed*: $\neg EXC_1$

(18) *assumed*: $\neg EXC_2$

…….

assumed: $\neg EXC_n$ therefore

(19) R*j*

Similarly, John's counterargument would have to take into account all the possible exceptions to exceptions, becoming – in some cases – extremely complicated.

13 The obvious step of universal instantiation is omitted throughout the paper for the sake of readability.

Another way of dealing with the problem of the shifts of the burden of proof is to declare (§X) defeasible in the sense of (DEF2). Then Charles's argument becomes:

(20) $\forall x\ (Cx \Rightarrow Rx)$[14]

(21) C*j* therefore

(22) R*j*

And John's counterargument is:

(23) $\forall x\ (Dx \Rightarrow \neg Rx)$

(24) D*j* therefore

(25) $\neg Rj$

Of course with such a formal reconstruction we need a logical system – different from classical logic – capable of comparing both arguments and deciding which of the competing conclusions – R*j* or $\neg Rj$ – prevails. If John's argument wins then it is clear that the rule used in Charles's argument has to be defeasible in the sense of (DEF2) for there exists a situation in which Cx (for a specific x) obtains but Rx (for a specific x) does not follow.

One more observation that has to be added here is that revisability cannot help us in any conceivable way to deal formally with the problem of the burden of proof.

To summarise: in order to give a formal account of the shifts of the burden of proof, one has to declare legal rules defeasible either in the sense of (DEF2) or of (DEF3).

2.3 Rules and principles theory

The last problem I would like to address in the context of applying the notions of revisability and defeasibility to legal argumentation is the distinction between legal rules and principles. I will not go into the details of the distinction.[15] Instead I would like to concentrate on one particular issue, namely on the fact that legal principles can "produce" exceptions to legal rules.

Let us consider the following example.[16] Assume we have a legal rule stating that:

- (§Z) Vehicles are not allowed into the public park.

Let V stand for "is a vehicle" and P for "may enter the public park". The formalisation of (§Z) looks like follows:

(26) $\forall x\ (Vx \rightarrow \neg Px)$

Imagine now that we have an ambulance carrying a badly injured person. The shortest way to the hospital is through the park. If we applied (26), however – with an obvious assumption that an ambulance is a vehicle – the result would be that the ambulance cannot enter the park:

(26) $\forall x\ (Vx \rightarrow \neg Px)$

(27) V*a* (*a* stands here for our ambulance) therefore

(28) P*a*

14 For the reasons of using "$\Rightarrow$" see n. 12.

15 For details see: R Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard UP, 1977); R Alexy, *A Theory of Constitutional Rights*, J Rivers (trans.) (Oxford: OUP, 2002); B Brozek, "The logic of rules and principles" (forthcoming).

16 It is a modified version of H L A Hart's example from *The Concept of Law (*(Oxford: OUP, 1994, 1st edn 1961).

This answer to the question whether the ambulance can drive through the park is troublesome. It seems that the "correct" answer would be to let the ambulance through. The theory of rules and principles offers a very persuasive diagnosis of such cases. According to the theory we have here a legal rule, that is (26), which in this particular case is in conflict with a legal principle stating that human life and health should be protected by the law. Leaving aside the description of the exact mechanism of the interaction between rules and principles, one may say that in our case the principle produces an exception to the rule (26): vehicles are not allowed into the public park but ambulances carrying injured persons are.

The question we have to answer now is what the proper formal account of the described situation is. One way is to say that (26) is revisable. The revision occurs when there is a collision between the rule and a principle. Let A denote "is an ambulance carrying an injured person". Now, the collision between (26) and a principle in the above presented case causes the following revision of (26):

(29) $\forall x ((Vx \wedge \neg Ax) \rightarrow \neg Px)$

Such revisions have to occur in every single case in which the rule collides with a principle and the principle prevails. As the list of cases of collision is potentially endless, the potential number of revisions is likewise endless.

Another way of giving a formal account of the interaction between rules and principles is to say that legal rules are defeasible in the sense of (DEF2). In our example the rule

(26) $\forall x (Vx \rightarrow \neg Px)$

is defeasible for there are situations – like the one with the ambulance – when Vx (for a specific x) is fulfilled but $\neg Px$ (for a specific x) does not follow. Observe that now the formulation of (26) does not change. Having declared (26) defeasible in the sense of (DEF2), we have the rule "prepared" for any possible conflict with a principle. In case of such a conflict in which the principle prevails, the formulation of (26) stays intact but the logical system blocks the derivation of $\neg Px$ (for a specific x).

One more observation has to be added here. There seems to be no conceivable way of dealing with the problems of the theory of rules and principles with the use of the notion of defeasibility in the sense of (DEF3).

To summarise: collisions between rules and principles can be handled formally either with the use of the notion of revisability or the notion of defeasibility in the sense of (DEF2).

3 Conclusions

In this paper I have tried to distinguish between revisability and defeasibility and to show what role both notions play in legal discourse. I have defined revisability and distinguished between two senses of defeasibility. Out of the three legal-theoretic problems investigated, all can be accounted for formally with the use of the notion of defeasibility in the sense of (DEF2). Defeasibility in the sense of (DEF3) helps us to deal with the problems of the burden of proof. Finally, revisability offers a way of reconstructing formally collisions between rules and principles.

It is tempting to say, therefore, that the (DEF2)-defeasibility, which helps to deal with all three problems, is the concept to be used in addressing them. On the other hand, one may argue that as we have to do with three different phenomena, we should explain them with three different formal structures. The choice between the two strategies is not an easy one. A full discussion of the issue requires significantly more than this short essay. Nevertheless, the following observation can be made. Both the idea of structural resemblance between legal texts and their formalisation and the problems surrounding

shifts of the burden of proof require developing a formal theory of legal reasoning that adapts a different perspective than the usual theorising on legal argumentation.

The classical way of approaching legal reasoning is from the point of view of a judge justifying his or her decisions.[17] From this perspective a maximally rational procedure is needed and therefore fully reconstructed legal norms and indefeasible conclusions are desired. Theories of legal reasoning that adapt this attitude can be seen as purely normative and, moreover, counterfactual. In actual situations it is difficult for a judge to take into account all the possible exceptions to a norm that serves as the basis for a decision (think of a legal norm prohibiting killing, which usually has many exceptions of which only the relevant few are directly addressed in legal disputes).

Such unachievable, normative models of legal reasoning are well supported by the concept of revisability. On the other hand, nonmonotonic logics are designed for "subideal" situations, for example those in which there is limited access to information. Both the problem of structural resemblance and that of the shifts of the burden of proof are issues connected with such "subideal" and "dynamic" situations. Therefore it is reasonable to say that defeasibility in the sense of (DEF2) is well suited for dealing with the first two problems described above. (DEF3)-defeasibility is not a good answer to the troubles caused by shifts of the burden of proof because with the complicated argumentation structures it embraces it cannot be seen as a proper account of a "subideal" situation.

As to the problem of rules and principles it can be said that the choice between revisability and (DEF2)-defeasibility depends on the kind of theory of legal reasoning one wishes to construct. If an "ideal" theory is pursued, then revisability seems to be the answer. If, on the other hand, one develops a more descriptive theory then one should make use of defeasibility in the sense of (DEF2).

17 A Grabowski, A *Judicial Argumentation and Pragmatics* (Kraków: Ksiegarnia Akademicka, 1999).