A SOCIOLOGICAL ANALYSIS OF THE JURAL RELATION

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IV

LEGAL MEANING AND 'INSTITUTIONAL FACTS'

IV.1 Legal Meaning

It is both curious and paradoxical, though in the light of the preceding analysis we may perhaps immodestly assert that it is by no means inexplicable, that when an individual engages in a course of action which is subjectively meaningful to him by reference to whatever criteria of meaning he applies to his action (whether consciously or unconsciously) the action in question may, from the point of view of someone else, simultaneously bear a normative meaning by reference to different criteria of meaning, specifically, *legal* norms, and it may well be that the acting individual is wholly oblivious of these other meanings, or indeed any other normative meaning, which the action in question may reasonably bear.

It was to the possibility of this divergence between subjectively intended meaning and legal meaning that Neil MacCormick, though not in precisely those terms, drew our attention in 1973 in his inaugural lecture to the University of Edinburgh when he said:

> "...for every busload of passengers, there exist, in addition to the solid, physical bus and the stolid, palpable, passengers, as many contracts of carriage as there are passengers. The existence of a contract between each passenger and Edinburgh Corporation is obviously not a matter of physical or physiological fact, nor even indeed of psychological fact. Possibly some people on any bus know or believe that they have made a contract on entering and paying their fare to the driver; almost certainly some do not know it; and quite plausibly on some buses nobody at all knows or believes it. But the knowledge or opinion of particular passengers and drivers is totally immaterial to the proposition that there exist as many contracts as passengers." [1]

But the point that MacCormick was making here is rather more fundamental than the

assertion that the 'typical' (and perhaps, though not *ipso facto*, legally *uninformed)* man-in-the-street's interpretation of certain 'contract-instituting' acts or events may diverge from the 'typical' (and hopefully *ipso facto* legally *informed*) lawyer's interpretation of the same events by reference to legal criteria of meaning, that is, legal norms which are considered to be in some sense 'applicable' to the events in question. It is well recognised that this is only the approach road to MacCormick's theory of law as institutional fact. But it is *on* that approach road that several insights surface which, it will hopefully be affirmed, resonate with observations made in the preceding analysis. We will briefly consider these before giving closer attention to MacCormick's institutional theory of law.

The first of MacCormick's observations requires very little supplementary comment if only because it is, in a sense, the *raison d'etre* of the present analysis. It is that the individual who knows the law, which presumably includes any such individual who is sufficiently interested or motivated to do this, is "...concerned to perceive the *relationship* between bus operator and bus passenger in legal terms". [2] This is a reaffirmation of the relationality which, as we have noted earlier, generally inheres in the subjective meaning of social action, but in a focused and articulated form in legal thinking. Through this, an ideative linkage may be conceived between legal *personae* by reference to normative criteria which together with other criteria constitute a linking medium. Such linking media may include: (1) certain perceived facts consisting wholly or partly of human action or wholly or partly of 'natural occurrences' or other events attributed to human action, or even wholly or partly of other states of affairs or states of fact (e.g. 'status' conditions, or the holding of a position), and (2) legal norms 'applied' to those facts.

The second observation is that a 'contract instituting' act or event such as that exemplified by the Morningside omnibus scenario is significant especially to lawyers, though no doubt also to sociologists of law, because, crucially, "...*the law ascribes* certain rights and duties to individuals conditionally upon the existence of contracts." [3] But *who* does this ascribing? If 'ascribing' is the conceptual act of an individual, the suggestion is clear that if it is 'the law' that 'ascribes', then even in a figurative sense 'the law' must either be *equated* with an individual or, probably more accurately (but still figuratively) be *identified* with an individual whether determinate or indeterminate. Odd as this argument may seem, there must be some underlying truth in it even though *in* a figurative sense it is undoubtedly stretching, if not distorting, the idea of law to equate or identify law with one or more persons. We might then plausibly expect a serious answer to the question 'who is the law?' and should not be too disappointed if we find that the question is not accorded the seriousness which underlies our reason for asking it.

But how do we account for the fact that we are accustomed to talking about legal phenomena *as if* the law were a person: for example, 'the law *imposes* liability', 'the law *confers* a right', 'the law *allows* an exemption', 'the law *creates* an immunity' and so on. It seems reasonable to account for such linguistic usages by acknowledging the obvious truth that the law is an uniquely human phenomenon created and organised by human beings for human beings, and it should not therefore surprise us that there is a tendency in a sense to anthropomorphise the law.

But these linguistic usages also suggest a more arcane truth (if truth it is) which Glanville Williams uncovers in his essay *Language and the Law.*

> "For instance, Vinogradoff regarded a legal right as a kind of claim. Now a claim is a psychological fact, a state of mind; but legal rights can 'exist' in people who do not know of their existence, and so have not the mental attitude of claim. ...Rights and duties are mental states, but they are not states of mind of the subjects of the rights and duties; they are states of mind of the persons asserting the legal rules." [4]

It certainly seems true that rights and duties are indeed states of mind of persons asserting legal rules, or 'applying' the rules to situations of fact and conceiving of the relative position of legal *personae*, respectively of inherence and of incidence, in specifically relational terms.

But against Williams we should note that the subject of a right or a duty may at one and the same time be the person who asserts or 'applies' the appropriate legal rules. In other words, it is more accurate to say that while rights and duties are indeed states of mind of persons asserting or 'applying' legal rules, those asserting or 'applying' the rules in question might quite plausibly themselves be the subjects of the rights and duties and be fully apprised of their legal situation. Nevertheless, Williams' point is an important one. If law can be treated *as if* it is capable of 'performing' human functions ('imposing', 'conferring', 'allowing' and so on) and of being figuratively assigned a human identity (or of corresponding to someone whose 'state of mind', to use Williams' phrase, somehow embodies a legal 'state of mind'), then it should quite credibly be part of the theorist's task to identify some human individual or position-occupant who to a culturally significant degree epitomises the individual who might conceivably perform these functions. Such an individual would presumably, according to Williams, assert (or 'apply') the appropriate legal rules.

If no such person exists as such and we are nevertheless convinced of the necessity to 'create' him, then it certainly makes sense for heuristic purposes to conceive a theoretical construct, say in the form of a Weberian ideal type, which represents a synthesis of appropriate concrete phenomena. The need to construct such an ideal

type has of course been suggested at several points in the preceding analysis, and is specifically attempted in chapter VI . [5]

What Williams, then, fails to point out is that it can *matter* what the office, status or identity is of the person who does the asserting or the ascribing (or performs the other functions mentioned), for it may be sociologically more significant that one person, for example a judge, rather than another person, for example the man on the Morningside omnibus, ascribes rights and duties to legal *personae.*

This further point is noted by MacCormick because, as MacCormick says, it *matters* that the law ascribes rights and duties because in turn what makes *that* matter,

> "...is that sometimes people wish to assert legal rights and enforce legal duties, the procedures for doing which are established by further legal rules. And all that depends on the existence of organised groups of people, the legal profession, the courts, and enforcement officials, whose function is to give effect to such rules and whose actual practice is tolerably consonant with the announced rules." [6]

The basic point MacCormick makes here is that, as it so happens, it is culturally significant that certain organised groups of people orient their social action ('official' action) within a defined sphere of competence by reference to the meaning ascribed by virtue of legal norms to certain perceived states of 'fact,' and in consequence of which they ascribe rights and duties (for example) to litigants. Crucially, these conceptual acts take place with a view to the orientation of official action.

Now this connects with earlier discussion in which we considered how an individual, with a view to the orientation of his social action, may ascribe normative meaning to his action and as *part* of this process ascribe meaning by reference to similar criteria of meaning to the action of *others.* We may recall that the task of considering how an

individual so ascribes meaning to his own and others' action involves an assumption that in order to understand the action of actor A in terms of its subjective meaning we must often understand the meaning which actor A in a given case ascribed to the behaviour of actor B. From this we concluded that since the Weberian sociological task attempts to penetrate the subjective meaning of the action of a given individual (ego), then if and to the extent that ego himself ascribes meaning to the action of another individual (alter) and orients his action accordingly, the latter ascription of meaning should be treated as part of the subjective meaning of ego's action. [7]

The implications of this stance in the legal context should now be obvious. If we wish to investigate the action of a given *judge* (treated as 'ego'),or, say, to formulate an ideal-type construct of the incumbent of the ultimate judicial office with a view to understanding the adjudication process, we are probably justified in assuming that such a judge is involved in orienting his official action at least partly by reference to the evaluative meaning which he ascribes to perceived states of 'fact' (e.g. human action) that are attributable to one or more others (treated as 'alter'). Such meaning is ascribed by reference to *legal* rules or norms. The construction of such an ideal type may be based on investigations or undisputed assumptions about one or more individual judges. This meaning-ascribing process would of course involve a judge in conceiving of the normative positions of litigants in relational terms: that is, in terms of what one litigant ought to have done or ought now to do in a question with the other litigant.

The *ascriptive* nature of legal rights and duties, by which we mean that certain individuals such as occupants of judicial office engage in the conceptual act of ascribing 'rights' and 'duties', has been affirmed by jurists other than MacCormick,

such as, for example, the Polish legal philosopher Leon Petrazycki. In his Introduction to Petrazycki's work *Law and Morality*, Nicholas Timascheff remarks,

> "According to Petrazhitsky, the mental phenomena which form the reality of law, such as states of human minds ascribing rights and duties, possess the property of being projected onto the persons and things they concern; this property they share with many other phenomena. In other words, 'real' is the mental fact of ascribing a right or a duty to oneself or another; this ascription always depends on the acceptance of normative judgment of norms. The latter are also merely states of mind but are also projected into reality, in other words, ascribed reality." [8]

On a more comprehensive view, we might argue that the meaningful orientation of judicial action by reference to legal norms - norms which by reason of some factual criterion of identification such as source, origin or content [9] are capable of being identified as such - follows upon purely mental judgmental or evaluative acts consisting in the ascription by a judge of legal meaning either to:

1. the judge's past, present or (hypothetical) intended future action by reference to *adjective* legal norms (in the sense discussed earlier), or

2. the past, present or (hypothetical) anticipated future action of one or more others by reference to *substantive* legal norms (in the sense discussed earlier), the 'others' in question being, for example, litigants, enforcement officials and so on, or

3. a combination of the judge's past, present or (hypothetical) intended future action and the past, present or (hypothetical) anticipated future action of one or more others, by reference to a corresponding combination of adjective and substantive legal norms.

By this account, the conceptual act of ascribing rights and duties, as envisaged both by MacCormick and Petrazycki, falls into category 2 above and also category 3.

Hence, legal meaning as a subjective category may be said to constitute part of the subjective meaning of *any* given actor's social action where the action in question is oriented and/or evaluated by reference to legal norms. But if the category of legal meaning is to have any heuristic value it must, as we have already argued, be considered from a judicial perspective, especially an *ultimate* judicial perspective, rather than arbitrarily from the point of view of any actor at all. The judgments 'emanating' from this ultimate judicial actor, moreover, must be considered both 'authoritative' and 'final'. It is without doubt the action of the ultimate judicial social actor and the subjective meaning of that action that especially concern us in the present study.

IV. 2 Legal Meaning and the 'Institutional Fact'.

A theorist who may arguably be said to be pivotal between the sociological notion of meaning and the notion of meaning in legal theory is the Austrian legal philosopher Hans Kelsen (1881 - 1973). Kelsen actually uses the term 'legal meaning', though not necessarily in the sense defined in the present essay, and certainly not in a sociological sense since he would doubtless categorically reject a sociological approach.

Despite his espousal of an avowedly 'ideologically' neutral pure-norm epistemological position, [10] parts of Kelsen's work appear to be profoundly marked by the influence of assumptions which are inescapably those of the German *Geisteswissenschaften*

tradition in which, as we earlier considered at length, the individual is perceived as a 'meaningful actor' who orients his action by reference to some ideative or mental content. It is beyond the scope of this thesis to consider the difficulties we may encounter in reconciling Kelsen's pure-norm stance with his evident reliance upon some of the more obvious assumptions of the *Geisteswissenschaften* approach, and indeed to consider whether these are capable of reconciliation. Most of Kelsen's observations in this respect are illuminating whether or not we attempt such a reconciliation.

In his condensed version of *The Pure Theory of Law*, [11] Kelsen comments as follows:

> "This is a special characteristic of the material dealt with in social and in particular in juristic knowledge. A plant can convey nothing about itself to the research worker who is trying to define it. It makes no attempt to explain itself scientifically. But a social act can very well carry with it an indication of its own meaning. The person instituting the act himself attaches to it a definite meaning which he expresses in some fashion or other and which is understood by those towards whom the act is directed." [12]

The notion that meaning is capable of attachment to human acts both by an actor himself and by others towards whom the act is directed, or indeed anyone who is concerned to evaluate the act in question, is fashioned by Kelsen into a more specific conception of *legally* meaningful phenomena, especially 'acts' or 'events' or 'facts', [13] and also legal norms themselves (i.e. legal deontic propositions), the latter of which are presented by Kelsen as the meaning of certain acts of will: probably *law-creating* 'acts of will'. [14] Bernard Jackson draws attention to this ambivalent position, [15] but there is no suggestion on Jackson's part that it is invalid for Kelsen to identify more than one sense in which legal meaning may exist.

If Kelsen conceives of the norm in its role as deontic proposition as a meaningful

expression (in the semiotic sense) of some mental content embodying the idea of 'ought' in relation to human action then this is surely acceptable provided other senses of 'meaning', e.g. acts or events bearing a legal meaning, are also explored.

This sense - that of the norm as a 'scheme of interpretation' - is of particular interest in the present context and indeed plays a central role in the institutional theory of law developed by Neil MacCormick and by Ota Weinberger. [16] Kelsen gives expression to his conception of the legal norm as a scheme of interpretation at various points in different texts, but the essence of Kelsen's conception is conveyed in the following passage.

> "The specifically legal meaning of [a legal or illegal act]... is derived from a 'norm' whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation. ...The qualification of a certain act as the execution of the death penalty rather than as a murder - a qualification that cannot be perceived by the senses - results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure." [17]

To summarise the observations made at various points in the preceding discussion, 'meaning' can be said to be present on three levels (at least).

First, there is the meaning which the norm itself bears in its role as deontic proposition i.e. a linguistic utterance representing a meaningful expression of some mental content. In essence, the norm is the semiotic representation of this mental content. But meaning must also be ascribed to the norm in order that it may be comprehensible.

Second, there is the meaning of the norm *in its application to* specific, though also conceivably hypothetical, human acts, or events or 'facts'. [18]

Third, there is the corresponding meaning (i.e. 'normative meaning') of the acts, events or 'facts' themselves interpreted by reference to the norm.

Although these three categories of meaning are interdependent, the third category is especially important for present purposes since one of our concerns is to reach an understanding of the subjective meaning of human action so far as oriented in terms of such meaning.

Legal meaning in this third (Kelsenian) sense, as Jackson points out, is also linked with institutional meaning in the sense expounded by John Searle in a philosophical context, [19] and in a jurisprudential context by MacCormick and Weinberger. MacCormick gives a definitive statement of the nature of the 'institutional fact' when he says:

> "...a proposition whose truth depends not merely upon the occurrence of acts or events in the world, but also upon the application of rules to such acts or events, is a proposition of institutional fact. So the existence of a contract is, in a philosophical sense, a matter of institutional fact." [20]

Elsewhere, MacCormick gives an account of a university faculty seminar which is an 'institutional fact' in the same sense:

> "So the fact that we confront in this case is not a pure physical fact, a brute fact of the natural universe. It is a fact of the kind which results from the interpretation of human acts and other physical and psychological events in the light of a set of operative human rules and customs. Such facts belong to the class of 'institutional facts'..." [21]

What is implied by the concept of the 'institutional fact' is that the individual is not simply a 'recipient' of or one who perceives an accumulation of unstructured and meaningless 'facts', consisting of sense perceptions. The thinking individual, rather, *brings structure* to the mass of sense perceptions which confront him, and to that

extent ascribes meaning to the 'facts' which he perceives. Thus the concept of the 'institutional fact' appears to lie within the realm of the *Verstehende* epistemological tradition. That is to say, it lies within a tradition whose philosophical roots, through Weber, are to be found in the *Geisteswissenschaften* approach expounded by Dilthey and others. As MacCormick and Weinberger observe in their joint introduction to *An Institutional Theory of Law*: "There is always an element of *verstehen*, of understanding from the internal point of view, in our cognition of institutional facts..." [22]

Now without derogating from MacCormick and Weinberger's position, or for that matter, Kelsen's, it is important to identify precisely *what* 'facts' may be 'institutionalised', or ascribed normative, specifically legal, meaning, when they are described as 'institutional facts'.

Generally speaking, the 'intervention' in the adjudicatory sense of a judge, or of a judicial organ of some kind, whether it be in a dispute-resolving capacity or in a declaratory or advisory capacity, is dependent upon the happening of a complex and often discrete accumulation of human acts or events. Obviously, a judge will not intervene unless a number of procedural formalities have been complied with. The legal action or lawsuit must be at the instance of some determinate party, that is, a legal *persona* possessing legal personality, for example, a civil litigant or a prosecutor. This party must 'approach' the judge or the court in a special way by raising an 'action' in accordance with legal norms which stipulate (for example) whether any documents require to be lodged or filed with the court prior to the commencement of, or during, the action, and if so, the nature of these documents. Legal norms of this type normally also define the qualifications of, or other qualifying conditions which attach to, those who wish to argue a case before the court.

All of the situations described - judicial 'intervention', the existence of a dispute or the requirement for a judicial declarator, the raising of an action, the existence of persons qualified to be a judge or to be heard by a judge, the filing of documents in a court and the act of presenting argument to a court and so on - are situations of 'fact', and most, if not all, are 'facts' to which normative meaning must be or may be ascribed at some stage or another, with a view to the orientation of someone's action, often, specifically a judge's or that of a court official. They are also legal 'institutional facts' in the sense described in so far as interpreted by reference to legal norms.

Of course, as a matter of routine, many situations of 'fact' can simply be taken for granted and it may require very little effort consciously to ascribe normative meaning. But however 'routine' the situations of 'fact' may be, the perceiving of their occurrence and their interpretation by reference to whatever criteria of meaning are considered appropriate for that purpose, are always a *prerequisite* to some further appropriate action being taken.

In short, something must *happen* before a norm, legal or otherwise, is considered operative for the purpose of being applied towards the interpretation of 'events' that have occurred and for the consequent orientation of action thereon. (We must however always allow for hypothetical situations in which, strictly speaking, nothing need 'happen'). The class of situations of 'fact' which are prerequisite in the sense discussed we might call the class of 'operative' situations of 'fact' or 'operative facts'. These are 'facts' which are 'operative' as a basis for the orientation of human social action towards a given end, and in a legal context, judicial or other official social

action, pursuant to, or in accordance with, one or more legal norms.

It is well recognised that the term 'operative fact' is that used by Hohfeld, [23] but Kocourek employs a similar concept, that of the 'jural fact'. [24] The similarity between Hohfeld's concept of the 'operative fact' and Kocourek's concept of the 'jural fact' can be seen in the definition offered by each theorist respectively.

Thus, according to Hohfeld,

> "Operative, constitutive, causal, or dispositive facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously." [25]

According to Kocourek,

> "In a wide sense, a jural relation is a jural fact, but the term jural fact has a special and narrower meaning. In the strict juristic sense *a jural fact is any act or event which creates, alters, or extinguishes a jural relation.*" [26]

Thus, any act or event is an 'operative' or a 'jural' 'fact' if, on being interpreted by reference to a legal norm, it affords a basis (to the 'interpreter') for the ascription or non-ascription of a legal relationship. Here, the terms ascription and non-ascription refer to the perceiving of, or perceiving of no, relationship between one or more legal *personae* in relation to one or more other legal *personae* by reference to the linking medium of a legal norm. The occurrence of 'operative facts' therefore may afford a basis for asserting, for example, that A has a right in a question with B that B shall ø and B has a duty in a question with A that B shall ø. Neil MacCormick's example was that of the bus passenger stepping aboard a bus and carrying out a conceptually (rather than practically) complex sequence of acts. The result was that a 'contract' existed and a myriad of actual and hypothetical legal relationships were, in an ideative sense,

called into existence. [27] Here the relationships in question are substantive relationships in the sense of the previous discussion.

Kocourek's definition of 'jural fact' is broader than Hohfeld's definition of 'operative fact', the latter of which is in effect a 'fact' which calls into or out of 'existence' a legal relationship or jural relation, that is, a 'fact' which affords a basis for such a relationship to be, or not to be, ascribed. The breadth of the concept of the 'jural fact' can be seen in Kocourek's categorisation of what he calls 'duty acts' and 'contra-duty acts' as 'jural facts'. He gives as an example of a 'duty act' the tender of payment of money due, and of a 'contra-duty act', a criminal act. [28] A 'duty act' cannot be treated as an 'operative fact' in the Hohfeldian sense because if an 'operative fact' is a 'fact' or situation of 'fact' which, when interpreted by reference to appropriate legal norms, *calls into* or *out of* conceptual existence a duty (or, for that matter, a right or power and so on) then unless 'operative facts' have occurred at some *prior* time, 'duty acts' or 'contra-duty acts' cannot by definition themselves exist.

We should note, however, that a 'duty act' in the sense of an act complying with one legal norm may at one and the same time constitute an 'operative fact' for purposes of another legal norm. For example, in conveyancing practice in Scots law the delivery of an executed conveyance to a purchaser of heritable property both satisfies the contractual obligation to deliver the conveyance and also constitutes an act which in terms of the actual content of the conveyance, on registration in an appropriate public register of interests in land, creates an unfathomable network of property rights. The delivery of the executed conveyance (followed by its registration) is to that extent at least one of the 'operative facts' constitutive of the consequential property rights. [29]

It should be noted that there is a certain correspondence between types of 'institutional

fact' or 'jural fact' (in the broad sense) and the structural elements of the social norm identified earlier. These structural elements hold for the substantive right-duty legal norm also, but it is clearly true of all substantive legal norms, both right-duty and power-liability, that a further structural element may be added. Indeed this is suggested by separate analyses of John Finnis [30] and J.W. Harris [31] which were referred to in previous discussion. This further structural element specifies the factual conditions governing the applicability or other operative prerequisites of the legal norm. To take an example, a legal norm may provide: "*Under circumstances* n, A shall have a legal right in a question with B that B shall ø ...". Here, *circumstances n* would constitute the relevant 'operative facts' of the norm, and the happening of circumstances n would afford the necessary basis for asserting a right-duty legal relationship between A and B in terms of which B is under a duty to ø in a question with A.

Other situations or states of 'fact' which may be interpreted by reference to a legal norm and which correspond to structural elements of the legal norm may be identified. First, there are those situations or states of 'fact' which satisfy identification criteria of persons of inherence: e.g. those having a legal right that other persons should act in a prescribed manner. The norm may stipulate conditions which qualify the person of inherence *as* such, and these may be complex 'institutional facts' in their own right, e.g. a 'shareholder' or a 'residuary legatee' or a 'married woman'.

Second, there are those situations or states of 'fact' which satisfy identification criteria of persons of incidence: e.g. those having a legal duty to act in a prescribed manner. Again, the norm may stipulate similar conditions which qualify the person of incidence as such.

Third, there are those situations or states of 'fact' consisting of *human actions*, or 'facts' or 'events' attributed to human action, which satisfy (or fail to satisfy) the prescription in the norm. In this sense it may be thought that prescribed actions shall, or ought to, or should, be performed in the future, or that prescribed actions ought to have been performed in the past. These actions are 'duty acts' or 'contra-duty acts' in Kocourek's sense. To make matters more concrete, let us imagine that there is a legal norm in the law of delict which, to reflect legal relationality in the hypothetical situation which unfolds, is formulated as follows:

If B negligently collides his car with A's car:

1. A has a legal right in a question with B that B shall pay compensation to A, and

2. B has a legal duty in a question with A that B shall pay compensation to A.

We should first note that the concept of acting 'negligently' is itself intrinsically normative in that it involves a duty of care, the breach of which is categorised as 'negligence'. Thus we should assume that the norm as formulated above is *predicated* upon a prior duty on B to the effect that if B drives his car on the road (at all), this being the 'operative fact' of the 'negligence' norm, he is under a duty in a question with every road-user (including A) to drive 'carefully'. The question of what does, or does not, constitute driving 'carefully' would depend on the appropriate legal rules.

If we take it that B does indeed drive 'negligently' in breach of his duty to drive carefully and moreover collides his car with A's car then, in basic terms, these 'facts' constitute the 'operative facts' which, upon being interpreted by reference to the appropriate legal norms, afford a basis for conceiving of the legal normative situation of A relative to B and of B relative to A in terms that A has a right that B should pay compensation to A, and B has a corresponding duty to pay compensation to A. If the occurrence of the appropriate 'operative facts' affords a basis for conceiving a legal relationship between A and B, then it may be assumed that the meaning ascribed to a given set of 'operative facts' includes the conceptual linkage which such 'facts' enable to be conceived between any appropriate legal *personae*.

Apart from the occurrence of appropriate 'operative facts' there might otherwise be no reason to think that legally any given legal *personae* should be linked in any way at all, still less by reference to legal norms. Taking our example, if A and B are complete strangers, and if B had not collided his car with A's car, then neither A nor B, nor anyone else, would presumably have any reason to think that there might be some legal linkage between them.

Only when all necessary and relevant 'facts', whether 'operative' in the narrow sense or 'institutional' or 'jural' in the broad sense, have occurred or obtain can we assert the ideative existence of a legal relationship or jural relation between legal *personae*. When such 'facts' do obtain, and legal meaning is ascribed to them, i.e. they are 'institutionalised' in the sense of MacCormick and Weinberger, we may say that a jural relation 'crystallises' or becomes concrete with respect to identifiable legal *personae*. In contrast, a jural relation which is merely an hypothesis may have an ideative existence but has no application to actual concrete 'facts'.

For present purposes, a jural relation will be treated as having 'crystallised' on the occurrence of relevant 'operative facts' in a *substantive* rather than adjective context. Adjective legal norms incorporate operative conditions in the same sense as substantive legal norms, but the operative conditions of adjective legal norms stipulate the 'facts' upon the occurrence of which the *legal apparatus* of courts, tribunals and enforcement agencies are mobilised to take official action. Adjective operative conditions are therefore two-layered. The first layer comprises substantive operative conditions in terms of which a substantive legal relationship obtains between (potential) litigants. The second layer comprises adjective operative conditions in terms of which adjective legal relationships obtain between litigants and the court.

Adjective operative conditions stipulate the 'dispute', or questioned issue requiring determination, and stipulate procedural prerequisites to be satisfied, including formalities attending the 'raising' of an action and other preliminary matters, e.g. jurisdiction, title and interest to sue, competency of the action, and so on.

A 'crystallised' legal right or duty conceived at a substantive level may be found to have no value at an adjective level, for example, because it is unenforceable on account of being time-barred. In such a case any 'operative facts' sufficient to found substantive relationships between potential litigants may be sufficient for inclusion among the 'operative facts' of the adjective relationships. But in the case of time-barred actions, the fact that a stipulated period of time has elapsed since the occurrence of 'operative facts' founding the substantive relationship constitutes an adjective 'operative fact' which is fatal to the successful pursuit of intended legal proceedings.

It might then be argued that on a narrow view a legal right or duty may be described as 'crystallised' only at the moment when judgment is given in favour of a pursuer or plaintiff, or against a criminal (and therefore 'in favour of' a prosecutor). But this might elevate to an unnecessarily important position the role of courts and enforcement agencies in conceiving of legal relationships, and may suggest that the only dependable basis for orientation of human action by reference to legal norms is orientation following the judgment of a court. An extreme position of this type, similar to that adopted by John Chipman Gray, [32] would ignore the possibility that many effective legally defined social relationships do not involve recourse to the courts because in some cases, often in the light of *previous* court decisions, there is a core of certainty as to the likely legal result of a given course of action. The sociological importance of courts and enforcement agencies often resides less in their function *actually* to take coercive enforcement action in specific instances (important though this is) than to lay down authoritative criteria which define the basis upon which, *if resorted to*, they might be *expected* to take coercive enforcement action.

A further reason for treating substantive legal rights and duties as 'crystallising' upon the occurrence of substantive 'operative facts', by way of justifying limiting the use of the term 'jural relation' to substantive legal relationships, is that substantive legal relationships are generally *re-defined* when they come before a court. Substantive legal norms are only *one* basis for appropriate enforcement action being adjudged necessary or appropriate by a court. Other factors may be taken into account when a court issues judgment.

Thus, for example, if there is a contract *ad factum praestandum* for building a wall,

the substantive relationship involves the services which are the subject of the contractual agreement. But if a dispute arises following a perceived breach of the contract, the court may seek to award *damages* and also perhaps expenses, to the successful pursuer or plaintiff, following determination of the cause. In such a case the award of damages is effectively a re-definition of a legal relationship or legally recognised normative relationship. This relationship originally entails performance of an act which according to our hypothesis consists of something other than payment of money (i.e. building a wall). It may also be the case that when the contracting parties enter into the contract and define the basis of their interaction the possibility of the 'non-building' of the wall leading to compensation (for whatever reason) as an alternative to building the wall may not enter their minds even as a remote likelihood.

By limiting the use of the term 'jural relation' to substantive legal relationships we do not diminish the importance of adjective legal relationships which, as we discovered from our earlier consideration of the chess game model, can have a significant impact either upon the content of the substantive relationship as defined by the court for its own purposes, or the content of that relationship as re-defined by the court.

V

THE JURAL RELATION

V.1 The Sociological Point of View

The narrower significance of Weber's assertion that all knowledge of cultural reality is always knowledge from particular points of view [1] can be seen in the legal context in the distinction, encountered already in chapter II [2] which Weber draws, on the one hand between the sociological point of view (to be adopted in speaking of 'law', 'legal order' or 'legal proposition') and on the other hand, the point of view of 'legal dogmatics' ('*dogmatische Rechtswissenschaft*') or jurisprudence. [3] The legal point of view, according to Weber, asks what significance or normative meaning ought to be attributed in correct logic to a verbal pattern having the form of a legal proposition. This point of view, according to Weber, also aims to discover "... the correct meaning of propositions the content of which constitutes an order supposedly determinative for the conduct of a defined group of persons: in other words, it tries to define the facts to which this order applies and the way in which it bears upon them." [4]

The sociological point of view, in contrast, asks:

> "What *actually* happens in a group owing to the *probability* that persons engaged in social action *(Gemeinschaftshandeln)*, especially those exerting a socially relevant amount of power, subjectively consider certain norms as valid and practically act according to them, in other words, orient their own conduct towards these norms?" [5]

The distinction which Weber attempts to draw between these contrasting points of view is blurred by the recognition that substantial parts of the *Sociology of Law*

are devoted to (what certainly appear to be) concerns lying squarely within the province of 'legal dogmatics' or the juridical point of view: for example, the traditional distinctions found in legal theory such as that between public law and private law, and between tort and crime. [6] But this alone would not be sufficient to support the claim that there is some overlap between the concerns of the sociological and juridical points of view respectively. What does lend support to this is the realisation that it is simply not *possible* to adopt a point of view which is concerned, among other things, with the ideative component of human action (subjective meaning and such like) without paying close attention to the concepts and conceptions which *make* such action meaningful to the participant actors. Weber reveals, however, that he had already grasped this possibility, and is apparently unaware that a concomitant of this is the overlap of the sociological and juridical points of view as he defines them. Thus, within a few pages of outlining these respective points of view, Weber remarks,

> "For a discipline such as sociology, which searches for empirical regularities and types, the legal guarantees *and their underlying normative conceptions* are of interest both as consequences and as causes or concomitant causes of certain regularities of human action which are as such directly relevant to sociology, or of regularities of natural occurrences engendered by human action which as such are indirectly relevant to sociology." [7]

A concern with the *underlying normative conceptions* of legal guarantees is arguably located quite centrally within the province of analytical jurisprudence, and it would almost appear pedantic to search for evidence of this were it not for the fact that there is at least a residuum of suspicion that Weber may have intended his definitions of the sociological and juridical points of view respectively to be mutually exclusive.

Taking Weber's *Sociology of Law* as a whole, though, this residual suspicion proves unfounded and serves as a warning not to place undue emphasis on isolated

observations considered out of context. In the opinion of at least one jurist, Roscoe Pound, the normative conceptions underlying legal phenomena are a central concern of analytical jurisprudence. Weber's analysis therefore *does* enable us to argue for a syncretism of the sociological and juridical points of view. As Pound argues, one of the tasks of analytical jurisprudence is to examine "...the structure, subject matter, and precepts of a legal system in order to reach by analysis the principles, theories, and conceptions which it logically presupposes, and to organize the authoritative materials of judicial and administrative determination on this logical basis. It postulates, or takes as the ideal, a body of logically interdependent precepts." [8]

Returning to Weber's sociological point of view, but always mindful of its syncretic possibilities, we find, then, that according to a judgment of sociological significance, a sociological analysis of legally relevant social action (and of underlying legal conceptual phenomena) should focus attention on persons engaged in social action who exert a *socially relevant amount of power.* Moreover, Weber's reliance on both the *Geisteswissenschaften* and *Naturwissenschaften* approaches is manifested in that those who exert a socially relevant amount of power, on the one hand, orient their conduct *subjectively meaningfully* by reference to norms which are considered to be valid, [9] and on the other hand, *act*, in a manner susceptible of 'external' empirical cognition. These elements are furthermore expressed in terms of probability.

The sociological point of view thus locates the centre of gravity of the sociological analysis in those social actors whose action may be considered 'socially relevant' in contrast to those actors whose action may be less significant or merely peripheral to the principal forces at work within the legal order. [10]

We have already identified the *judicial* social actor as a sociologically significant (and

also 'socially relevant') actor for purposes of our analysis, and, as we have previously mentioned, in chapter VI we will attempt to formulate an ideal-type construct of the incumbent of the ultimate judicial office (*Iudex*) in order to attain an understanding of the role played by the 'typical' judicial actor (admittedly, theoretically conceived) in mobilising the coercive forces of the legal order, and in shaping and delimiting the conceptual apparatus of the jural relation.

In this chapter we will consider the most fundamental juridical elements of the jural relation. To this end it will be assumed that, for theoretical purposes, the jural relation is conceived from the point of view of *Iudex*. Chapters V and VI should therefore be read 'in parallel' to enable the jural relation to be visualised as an 'emanation' from this ultimate perspective.

Thus we assume that the content of a substantive legal relationship (i.e. a 'jural relation') between legal *personae* in a given case is conceived not in terms of criteria of relationality employed by the legal *personae* in question, valid and interesting though they may be, but in terms of criteria employed by the personnel of the legal order, represented, according to our theoretical stance, by *Iudex*. From this perspective, the jural relation is conceived as being 'projected onto' or ascribed to legal *personae*, recalling Timascheff's reading of Petrazycki. [11] In relation to rights and duties, we should note this observation made by Petrazycki:

> "Legal phenomena consist of unique psychic processes...expressed, incidentally, in the unique form of ascribing to different beings (not only to people, but to beings of various other classes, conceived of in the mind), or to certain classes of such beings, 'duties' and 'rights'; so that these beings, so conceived of, are seemingly found in certain peculiar conditions of being bound or of possessing special objects ('rights'), and the like". [12]

As a starting point for discussion in this chapter we will attempt a definition of the

jural relation. The suggested definition extends beyond the brief one already formulated, [13] and necessarily draws upon aspects of the preceding analysis. 'Jural relation', then, may be defined as a substantive legal relationship conceived according to criteria of relationality employed by the personnel of a legal order, specifically courts, tribunals or other adjudicatory organs, and in the present context, *Iudex*. The jural relation is an ascriptive ideative device which, through the linking medium of a legal norm and upon the perceived occurrence of 'operative facts', projects a legal conceptual linkage between polarised legal *personae* in terms that a *persona* of inherence has a right (or a power) in a question with a *persona* of incidence that the *persona* of incidence shall act in a specified manner defined by the legal norm, and the *persona* of incidence has a duty (or a liability) in a question with the *persona* of inherence that the *persona* of incidence shall so act.

By adopting the point of view of *Iudex* and conceiving of the jural relation as an 'emanation' from this point of view, we do not diminish the importance of the point of view of those upon whom the law actually confers rights and duties. But when we consider that even when contracting parties enter into a contract whose terms are specifically agreed by the parties the law may nevertheless 'import' other terms into the contract or deny the 'contract' legal validity, it is apparent that a point of view other than that of the contracting parties is necessary. As P.S. Atiyah had said,

> "Every law student is taught from his earliest days that contractual intent is not really what it seems; actual subjective intent is normally irrelevant. It is the appearance, the manifestation of intent that matters. ....A party who signs an elaborate printed document is invariably held bound by it not because of anything he intended; he is bound in the teeth of his intention and understandings except in some very exceptional cases of fraud or the like. The truth is he is bound not so much because of what he intends but because of what he does." [14]

Elsewhere, in a similar vein, Atiyah makes this observation:

> "More broadly, I suggest that there is today a growing recognition that, even where parties enter into a transaction as a result of some voluntary conduct, the resulting rights and duties of the parties are, in large part, a product of the law, and not of the parties' real agreement." [15]

Atiyah's statement is perhaps a radical view of the role of legal institutions in defining or re-defining a contractual relationship which has been established between contracting parties. A more moderate stance might reveal that the legal order in many cases does indeed take account of the meanings and intentions of individuals whose action (or inaction) is relevant to an adjudication. This would seem to be true not only of the recognition accorded by the law to 'normatised' social or economic arrangements such as contractual agreements, but of the recognition given to the mental element of crimes or delicts, and generally to the concept of intentionality which permeates legal thought.

Returning to the example of contract, it is clear that although the law may infer matters not specifically agreed upon by the parties from the actions of the parties, and may further import terms into the agreement which were not the subject of negotiation, generally speaking the law will not so distort the agreement made between parties that the legal re-definition of the parties' agreement is conceptually and contentually remote from what the parties reasonably expected from their agreement. (If this were the case, courts would surely become obsolete so far as regards their involvement in granting remedies for contract based disputes).

Thus, to take an extreme example, it is unlikely that a Scottish court would give judgment in favour of a landlord in an action against a tenant for enforcement of a conventional irritancy in a commercial lease by making an award to the landlord of half a ton of topsoil. The point is that this in all probability is conceptually the

remotest remedy imaginable to the parties in terms of their expectations arising from the lease. But on the other hand, the court would (if relevant to the action) probably have regard to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 *contrary* to the terms of the lease as this makes provision for minimum notice to be served by the landlord on the tenant prior to the lease being treated as terminated. [16] If in accordance with the lease a notice is served on the tenant stipulating a period for remedying a rental default *shorter* than that prescribed by the 1985 Act, the court would look to the provisions of the *Act* as a determinant of the rights and duties of the parties rather than to the provisions of the lease, the former of which, according to normal rules of construction, overrules the latter. This would be in spite of the fact that the provisions of the lease might be thought in some sense to represent the intentions of the parties.

But even if in this specific respect the lease did not represent the intentions of the parties, the point here is that nevertheless the context in which a dispute arises is one in which a great range of subject matter could be considered to fall quite comfortably within the scope of what the parties reasonably intended should flow from their agreement. Thus, irrespective of whether the parties are fully conversant with the *minutiae* of the lease or of the law so far as bearing on the lease, a leasing arrangement (whatever that normally entails) is involved, and is known to be involved according to the knowledge and understanding of the parties. So unless the parties are commercially naive when they enter into this arrangement they must at least be taken to know that the relationship established between them involves in some way the use and enjoyment of land or of a building erected on the land, and so on. We must also credit the contracting parties with sufficient insight into the implications of their transaction that they appreciate that the document they have signed is, in all

probability, capable of being taken before a court of law in the event of a dispute and that either party may then, to use Weber's phrase, invoke "...in favor of his ideal or material interests the aid of a 'coercive apparatus' which is in special readiness for this purpose." [17]

On the other hand, there is a vast subject matter which the parties would consider completely irrelevant to the matters in issue. Thus according to the example given, not only would half a ton of topsoil be irrelevant under normal circumstances but so also would television sets, babies, old master paintings, sailing ships, Ming vases and grand pianos.

In criminal law, substantial recognition is given to the element of intentionality or more broadly, the 'criminality', of criminal conduct which, as a component of actions constituting a 'crime' or an 'offence', is taken into account in determining the content of any legal relationships that may subsist between an accused person and a prosecutor, representing the communal or public interest, in a prosecution brought against the person accused. [18]

The *prima facie* existence of a power-liability relationship between a prosecutor and an accused person (in the sense of power to 'prosecute' and liability to be 'prosecuted') is dependent upon the fact of an accusation being made against the person accused that he has committed an offence. This fact, by virtue of certain legal norms, may in turn depend upon the allegation that there exist certain 'operative facts' which may include the perceived existence of a certain degree of 'criminal intentionality' present at the time of commission of the offence. Given this background of assumptions, it could not then be claimed that the point of view of *Iudex* fails to take account of the

individual point of view i.e. that of the individual subjected to the 'prosecution' process.

But the examples drawn from contract law and criminal law should be qualified slightly. We should note that a distinction must be drawn between the conceptual acts involved in creating contractual relationships which are *directly* constitutive of the normative relationships obtaining between contracting parties, and the mental element of criminal conduct which is not in any acceptable sense directly constitutive of any normative relationship: not, at any rate, between the accused and his victim. (The victim does not normally 'agree' to be criminally wronged!) But we can draw approximate (if somewhat rudimentary) similarities between the way in which the law 'takes account' of the mental component in both criminal conduct and contract-constituting acts if we recognise that in each case the necessary mental component constitutes part of the 'operative facts' requiring to be established in order to assert the existence of a jural relation. A criminal law power-liability jural relation may be illustrated by an example. In the example the mental component of the criminal act takes the form of the rather colourful 'anglicisation' : 'with malice aforethought'. This represents the *mens rea* element of the 'operative facts' of the crime.

If B 'with malice aforethought', murders his brother,

1. A (in the role of prosecutor) has a legal power in a question with B that B shall subject himself to the prosecution process, and

2. B has a legal liability (Hohfeldian sense) in a question with A that B shall subject himself to the prosecution process.

Taking the contract example and basing this again on MacCormick's indefatigable Morningside commuter, the mental component of this resides in the intention expressed or implied by the commuter that he wishes transport to (say) Princes Street in return for payment to the bus owner of a 'fare'. Thus,

> If A (a commuter) on boarding a bus, evinces an intention or desire to be transported to Princes Street in return for payment of a fare to B (the bus owner) and pays B the required fare,
>
> 1. A has a legal right in a question with B that B shall transport A to Princes Street, and
>
> 2. B has a legal duty in a question with A that B shall transport A to Princes Street.

The fact of the matter, then, is that on a more moderate reading of Atiyah so far as concerning contracts or other legally relevant fields of interest, such as delict, property, criminal conduct and so on, the law *does* pay manifest regard to subjective meanings intended by litigating or other relevant parties and to wider contexts of meaning in which actions have been performed and intentions expressed or implied. But we should still be aware of those countervailing fields of interest in which the subjective component of actions is either not at all, or only partially, taken into account for legal purposes. For instance, in criminal law there are the areas of strict and absolute liability, [19] and the law of contract recognises the field of quasi-contract. [20] Of course these are only a few examples and many more instances

could be cited, following Atiyah, in which the subjective component of actions is only partially taken account of, the law often in a sense 'supplying' whatever else may be required to establish appropriate 'operative facts': for example, legal fictions [21] or presumptions, implied contractual conditions, inferences (from facts), requirements of formal (as against substantive) validity of written documents, [22] and so on. Clearly subjective facts are as much the concern of the law as are purely 'external' facts.

The conclusion to be drawn is therefore obvious. The theoretically conceived viewpoint of *Iudex* must reflect the possibility that so far as necessitated by legal norms, courts of law do take account of subjective components of human action. These components may comprise 'operative facts' to which the norms in question are applicable. But if the law does take account of such components, it is on terms *exclusively* set by the law according to any legal considerations establishing the terms of recognition of the subjective elements in question.

Taking the broad example in Scots law of *sponsiones ludicrae*, [23] parties may well enter into a gaming transaction, little realising that irrespective of any expectations they may have personally, any 'contractual' undertaking made by them may, as a matter of legal policy, be unenforceable on the ground that it is unworthy to occupy the time of the courts. [24]

The law, therefore, stipulates the terms of exclusion and the terms of recognition of subjective components of human action, and while the viewpoint of *Iudex*, representing 'authoritative legal meaning', does not necessarily exist in a conceptual vacuum remote from the meanings or understandings of litigants or potential litigants, *it may well do*, since this is a fundamental and unavoidable, yet fascinating, dimension

of the phenomenon of law.

V.2 The Jural Relation

The conceptual apparatus of the jural relation by no means originated in the juristic writings of Hohfeld and Kocourek, although the term 'jural relation' appears to have done. While these writers are certainly the principal *twentieth century* exponents of jural relational theorising, the notion of the jural relation, as we shall briefly consider in a moment, probably had its historical origins at least as early as the Roman Law concept of the legal bond (*juris vinculum*) which was employed by Justinian in the *Corpus Iuris Civilis.* [25] Yet if Hohfeld was not the first to put forward the notion of the jural relation there can be little doubt that his justly famous and unarguably brilliant configuration of jural relations represents one of the most articulate contributions to the literature of analytical jurisprudence, and indeed the veritable outpouring of secondary 'Hohfeldian' literature testifies conclusively to the influence which Hohfeld has had in twentieth century legal theory. [26]

But Hohfeld's contribution to legal theory, ironically, does not lie in the fact that he actually articulated a *theory* of jural relations, although he unquestionably *theorised about* jural relations. Hohfeld would probably have been the first to deny that what he was attempting in *Fundamental Legal Conceptions* was, in theoretical terms, anything more ambitious than a dissertation aimed at clarifying basic conceptions of the law, and indeed his dissertation, for all its theoretical importance, often amounts to no more than an attempt to clarify various terminological usages prevalent in practical legal discourse. Hohfeld made no great claims for his dissertation and even specified

that its readership should be 'law school students' rather than 'any other class of readers'. [27]

Yet in the light of its juristic significance one might well ask whether Hohfeld either unconsciously underestimated the likely impact of his dissertation, or realising its likely impact, in all modesty consciously understated his objective:

> "If ... the title of this article suggests a merely philosophical inquiry as to the nature of law and legal relations ... the writer may be pardoned for repudiating such a connotation in advance. On the contrary ... the main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, everyday problems of the law. With this end in view, the present article and another soon to follow will discuss, as of chief concern, the basic conceptions of the law ... ." [28]

Curiously, Hohfeld does not attempt to *define* the concept of the jural relation and this certainly adds weight to the view that his dissertation is essentially a practical one. Kocourek, on the other hand, whose approach is rather more scholarly, though not necessarily more enlightening, [29] undertakes a critical assessment of a number of possible definitions drawn mainly from the work of nineteenth century jurists. According to Kocourek, the jurist Puntschart, while recognising that Savigny had 'vaguely apprehended' the *juris vinculum* element of the jural relation, [30] relied upon this Roman law conception. Through the application of legal norms legal bonds were created "by which persons were gyved to persons and persons to things for definite purposes within the purview of the law." [31] Puntschart had also shown how the 'bond' idea runs through the whole system of Roman legal conceptions. As Kocourek says,

> "Puntschart... interposes a new mechanical element, the 'juris vinculum', as a kind of distributing center through which legal advantages are apportioned among the members of a legal society as the purpose of the law directs. The norm creates the legal bond and from the legal bond are derived such claims and duties as are appropriate." [32]

The Roman law notion of the *juris vinculum*, as we have already noted, derived from the emperor Justinian, who employed it in his definition of obligation:

> *"Nunc transeamus ad obligationes. Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura."*
>
> (Now let us turn to obligations. An obligation is a legal bond whereby we are constrained by the need to perform something according to the laws of our state.) [33]

In the *Digest*, in similar fashion, Justinian defines obligation as follows:

> *"Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut seruitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid uel faciendum uel praestandum."*
>
> (The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform something for us.) [34]

According to J.A.C. Thomas, the developed Roman law idea of a legal bond existing between parties contained no other subjection than that of the duty to perform or pay damages, but the language of the definitions given above had clear associations with bondage and this more literal connotation reflected something of the true nature of obligation as conceived in early Roman law. [35] It might be argued, then, that it required only a step, and not a great intellectual leap, to move from the notion of physical bonds or fetters to that of *conceptual* bonds in which the conceptual linkage, which gyved persons to persons and persons to things, to use Kocourek's phrase, was more important than the physical linkage. It is indeed often the case that in the development of a legal system the increasing sophistication of the law is accompanied by a corresponding movement from requirements centring on essentially 'physical facts' to requirements centring on 'ideative facts'. In Scots law an historical example of this is to be found in the act of giving 'sasine' or symbolic delivery of land in which the superior's bailie delivered earth and stone of the ground, or some other

appropriate symbol, to the attorney of the vassal. [36] With the development of the law, this ceremony became obsolete.

The Roman law notion of the legal bond, with its original connotations of dominance-servience is perhaps as enlightening on an heuristic level in characterising the jural relation as anything to have emerged during two millennia of legal philosophy. Puntschart's clarification of the Roman law idea of *juris vinculum* is without doubt a more concrete rendition of this notion but, more importantly, it emphasises the conceptual linkage element of the jural bond or *Rechtsverband* as Puntschart terms it. [37]

The notion of jural relation as conceptual linkage finds its expression in Hohfeld's arrangement of relations in the form of a scheme of correlatives and opposites, in which jural correlatives represent each side of one jural relation, viewed from the point of view of each party to the relation. [38] Austin had anticipated this correlativity when he defined 'legal right' as "... the creature of a positive law: and it answers to a relative duty imposed by that positive law, and incumbent on a person or persons other than the person or persons in whom the right resides." [39] Taking this further, Austin observed:

> "In other words, all rights reside in persons, and are rights to acts or forbearances on the part of *other* persons. Considered as corresponding to duties, or as being rights to *acts* or *forbearances*, rights may be said to avail *against* persons." [40]

The correlativity of jural relations means that one term of the relation (e.g. the right) implies the other term (the duty) and *vice versa.* It is not proposed to argue here that this correlativity or mutual dependence arises from anything that may conclusively be said to inhere in the nature of *all* rights or of *all* duties as such, for it has been

convincingly argued that some duties are not necessarily correlated with other people's rights. Joel Feinberg draws attention to three classes of such duties: duties of status, duties of obedience and duties of compelling appropriateness. [41] Similarly, MacCormick has argued that there are some rights (*legal* rights, no less) which, being logically prior to any correlative duties, are therefore, it follows, 'dutiless' rights. [42]

It may be that in the final analysis, many of these cases may resolve into disputes about the meaning of the words 'right' or 'duty' or of preferred usages of these words and it is, in any case, beyond the scope of the present analysis to consider these meanings or usages save to point out that for our present purposes it is proposed to focus attention only on the class of legal rights which (as it so happens) *are* correlative to duties, and correspondingly, the class of duties which are correlative to rights. Having said that, though, it is difficult to imagine any right which, having a *social* dimension, does not in some sense 'avail against' some other person or persons, whether determinate or indeterminate.

Now the correlativity of the class of right-duty and cognate jural relations resides in that the *content* of someone's right is precisely equivalent to the *content* of someone else's duty in terms of the subject matter of the prescribed act. Similarly, in such a case, the content of someone's duty is precisely equivalent to the content of someone else's right. But we should not think that this contentual equivalence enables us to argue that a right *is* a duty or a duty *is* a right. This is precisely the mistake that Max Radin makes when he says:

> A's demand-right and B's duty in I are not correlatives because they are not separate, however closely connected, things at all. They are not even two aspects of the same thing. They are two absolutely equivalent statements of the same thing. B's duty does not follow from A's right, nor is it caused by it. B's

> duty *is* A's right. The two terms are as identical in what they seek to describe as the active and passive form of indicating an act; 'A was murdered by B'; or 'B murdered A'. The fact that A and B are wholly distinct and separate persons must not be allowed to obscure the fact that a relation between them is one relation and no more. [43]

Radin's error is compounded by his assertion that the fact that A and B are distinct persons may *obscure* the fact that the relation between them is one relation. It is *because* the parties to whom a jural relation is ascribed are different that each side of the relation requires a different term to describe the position of the party who occupies that side.

Although A's right that B should ø is in terms of content (i.e. the prescribed act of ø-ing) equivalent to B's duty to ø, if the right were *identical* to the duty in that case the relation would be meaningless. The point is that although there is identity with respect to the content of the prescribed act, there is non-identity with respect to other aspects of the relation. For example if A has the right (that B shall ø) in many cases he may have an accompanying feeling of expectation that B should ø but no accompanying feeling of obligation or of duty that he (A) should do anything at all.

On the other hand, if B has the duty (to ø) in many cases he may have an accompanying feeling of duty that he should ø, in order to fulfil A's anticipated expectation. But it would not make sense to say that he (B) had any expectation (of himself) that he (B) should ø. He may of course expect A to feel 'satisfied' if he performs act ø in fulfilment of A's anticipated expectation. But this further expectation merely serves to demonstrate the differences between the parties in terms of their respective positions.

Nevertheless, Radin should be given credit for accentuating, admittedly by overstatement, that there does exist identity of subject matter within a jural relation,

in particular, that the act which is the subject of the duty is also the subject of the right. Indeed we earlier considered other 'identities' occurring within the normative relationship [44] and, briefly stated, these include: (1) that each party acknowledges that a given act is to be performed by the *same* person (the duty-bearer), (2) that each party is presumed to know the identity of his 'opposite number', [45] and (3) that each party is (normally) aware of the content of the norms that govern his conduct.

The terms 'right' and 'duty' therefore correspond to two quite distinct perspectives or normative positions of parties who stand in a jural relation with respect to one another. Although we may recognise the main areas of identity or equivalence within a jural relation, the disparity between the positions of the respective parties must also be carefully noted, and Radin's error of equating right with duty should not be uncritically accepted.

If we accept that each term of a jural relation, whether it be right or duty, implies the other term of the relation (i.e. A's right implies B's duty and *vice versa*) then it seems to follow that if we wish to understand either term, we must at the same time understand the correlative term.

It follows from this that each term is *inherently* relational. Thus 'right' has been defined as an expectation, [46] a protected interest, [47] an advantage, [48] a manifestation or exertion of the will, [49] a claim or demand, [50] and a power. [51] But whether in a given case a right may more appropriately fall within one definition or another, or be more readily explained by one or other competing theories of a right, the notion that a right implies a correlative duty in the context of a right-duty relationship means that in theorising about rights it is necessary to accept that the content of the right is an

act which is the subject of a duty incumbent on *other* persons. The term 'right' therefore in this context, in a sense, *contains* the notion of another's duty, even if other competing versions of the concept of the right are nonetheless valid.

Similarly, if a duty may be defined as an ought, [52] or a disadvantage, [53] or a debt, [54] or that which is obligatory or due, [55] in the context of a right-duty relationship it also contains the notion of another person having the right or expectation or claim or demand that the person obligated should act in a particular manner in fulfilment of the other person's right, expectation, or other condition.

Thus to the extent that a duty is owed to someone else, as it would be in the context of a right-duty relationship, then 'duty' itself is a *relational* notion in that it contains the notion of the other person who is in the position of right-holder.

The result of this is that if each term of a jural relation can be defined independently yet can also contain the other term of the relation, then to be comprehensible the jural relation must be treated as *one conceptual unit*. This does not lead to vicious circularity because each term is independent of the other term according to its own definition. In any case, as we have stressed earlier, neither term is capable of being defined *as* the other term.

This, then, recalls Parsons' remark that it is crucial to attend to the relations between actors in order to reveal the structure of the social system. [56] The relation itself is something comprehensible in its own right and also something that aids comprehension. To conceive of legal phenomena in terms of *legal relationships* rather than in terms of *legal norms* is one of the first steps towards gaining an insight into the essentially

social nature of those phenomena. Of course, this is not to minimise the legal norm as a medium which defines legal relationships, and indeed we cannot overlook how the structural elements of the legal norm, considered earlier, facilitate our understanding of legal relationships as relationships between persons, whether 'natural' or 'juridical'. Nevertheless the *conceptual unit* of the legal relationship should be seen as the *primary unit* of social thinking or sociological theorising about the law.

V.3 The Legal Relation as Social Relationship

The Russian jurist N.M. Korkunov who died in 1902 did not by any means advance a sociological analysis of law based on the notion of social relationality, but at several points in his *General Theory of Law* [57] he demonstrated that he had grasped the essential correspondence between legal relations and social relationships. For instance, he says,

> "Since legal relations are also social relations, but governed by a legal rule, it is necessary in order to explain them satisfactorily to treat first of the relations in general." [58]

Korkunov then elaborates on the notion of the legal relation as social relationship by arguing that social relationships are transformed into legal relations by means of the conceptual apparatus of rights and duties:

> "Men, so far as they aid themselves by legal rules, transform their social relations into legal ones, social dependence into a legal obligation, and the power of influence which they have over each other into rights. The legal rules fixing human interests delimit necessarily the realization of those interests and impose upon each man some obligation of guaranteeing the realization of others' interests. So the law adds to the existing bases of mutual dependence a new one, a legal base. If my relations with other men are fixed by law, the realization of my interests depends not only upon social conditions, but also

> upon my legal rights and my legal duties. At the same time, conformably to these obligations there is created for others a possibility of influencing me in a particular way under the form of legal claims." [59]

Korkunov's theoretical stance leads him to postulate not only that every legal relation is composed of a right and a duty, [60] but also that legal relations subsist only between persons, whether juridical or natural, and not between persons and *things*. This position seems to be a concomitant of Korkunov's more general posture in terms of which legal relations are conceived of as (in a sense) 'juridicised' social relationships.

Thus, as Korkunov insists:

> "We cannot in this matter subscribe to the opinion of Dernburg, Regelsberger, Mouromtzev and some others who recognize the existence of juridical relations with regard to things. The relation of the proprietor of a thing with that thing is not distinguishable from the relation of that thing towards one who has no right over it. The proprietor, just like one who has no ownership but uses it, employs the object according to fixed technical rules and according to personal taste. The only difference between the one and the other is in relation to other persons." [61]

Korkunov holds that legal relations exist "not between an individual and a thing, but only between several individuals on account of the use of a thing " [62] and this clears the way for his more fundamental statement of the nature of legal relations as essentially social relationships.

> "Legal relations, it is readily seen, are possible, then, only between individuals. Only individuals can be subjects of juridical relations. They alone are capable of them." [63]

Korkunov is right to insist that the only 'true' legal relations are essentially social relationships defined by legal norms, if that is indeed what he holds. As we suggested earlier, a social norm is a deontic proposition which functions as a reference point for the orientation by an actor of his social action (that is, his action with respect to other individuals). It follows then that if a relationship between one social actor and another is defined at least partly by such a norm, the relationship so defined is one subsisting

between individuals and not one subsisting between individuals and inanimate objects. The point here is not that one *cannot* 'take account of' an inanimate object in acting, in the same way as one 'takes account of' another individual in acting socially, because one can. The point is rather that in acting with respect to the property (say) of someone else, and in so acting making reference to social norms, for example, property laws, it is of greater significance, both legally and sociologically, that the actor in question is acting socially and taking account of the property-owning individual, than that he is acting, in any strict sense, 'with respect to' the property, which of course he *is* as well. The property laws in question are conceived for the benefit of the *property owner*, not for the 'benefit' of the property *as such.*

This is not to say, though, that a relationship of the type envisaged in the present context (i.e. a 'conceptual linkage') cannot subsist between individuals and inanimate objects. This is not denied, nor can it plausibly be argued that individuals do not perceive themselves in countless situations as standing in a relation to an inanimate object. It is a basic human instinct to conceive of something as 'one's own' or 'his' and this would still in all probability be so even if someone lived completely outside a social context. A desert island scenario comes readily to mind in which a stranded seafarer surrounds himself with his 'possessions' irrespective of the absence of 'others' on the island.

Korkunov, then, perhaps overstates his case slightly, because the law *does* recognise the conceptual linkages which individuals make between themselves and inanimate or even animate objects such as animals. According to John Finnis, the Hohfeldian approach which translates all relations into relations subsisting between individuals, may fail to provide a full elucidation of lawyers' ascriptions of rights. [64] As Finnis

says,

> "Lawyers frequently talk about rights, not as three-term relations between two persons and an act of a certain type, but as two-term relations between persons and one subject- matter or (in a broad sense) *thing*: for example, someone's right to £10 under a contract... . The reason why such a two-term ascription of rights is preferred by lawyers, in many contexts, is this: it gives an intelligible unity to a temporal series of the many and varying *sets of* Hohfeldian rights which at different times one and the same set of rules provides in order to secure and give substance to one *subsisting* objective." [65]

The point here is that the right is seen as 'attaching' to the thing. But this is merely conceptual shorthand, for the thing is not the holder of a right or bearer of a duty. It does not, in other words, occupy any 'side' of a jural relation as this is the exclusive domain of individuals or juridical persons. The relationship therefore between a person and a thing (in so far as, for example, a person conceives of something as 'his own') is not a *jural relation.* It may often be a relation which is in some sense recognised by the law, but it is not a normative relationship in the sense of the present analysis.

Having clarified some of the essential features of the jural relation and placed the notion in the context of its historical development to the point to which Hohfeld and his followers brought it, it is convenient now to give more thorough consideration to the definition of the jural relation suggested earlier.

According to our definition, the jural relation is a substantive legal relationship conceived according to criteria of relationality employed by the personnel of a legal order, and therefore in terms of the present analysis, 'emanating' from the construct *Iudex.* Such criteria of normative relationality as are employed by *Iudex* may be directly specified in legal norms where, for example, a duty is directly imposed on legal *persona* A to perform act ø in a question with legal *persona* B. Thus, in terms of

section 111 of the Rent (Scotland) Act 1984:

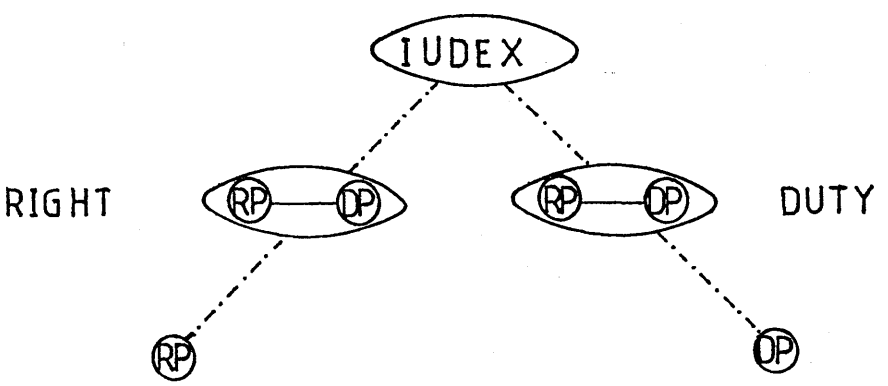
> "It shall be a condition of a protected tenancy of a dwelling-house that the tenant shall afford to the landlord access to the dwelling- house and all reasonable facilities for executing therein any repairs which the landlord is entitled to execute". [66]

But this provision also shows that relational criteria may be indirectly specified in legal norms in that a contractual duty is afforded legal *recognition* even though the law has not *directly* specified the content of the duty. Thus, section 111 presupposes that the parties have *already* stipulated norms defining how each shall act in relation to the other. The norms in question are not in any accepted sense legal norms, although they are, by and large, recognised and enforced by the legal order. [67]

Many examples can be given of situations in which the law affords recognition to normative arrangements 'posited' by individuals: wills or other testamentary writings, conveyances, memoranda and articles of association of companies, deeds of trust and club constitutions and, of course, contracts.

As a jural relation is also defined as an ascriptive ideative device which projects a conceptual linkage between polarised legal *personae*, it may be helpful to visualise this in the context of our chess game model. To this end, we may substitute for Hamlet the ideal-type construct *Iudex*. It is also necessary to substitute for Rosencrantz a right-inherent legal *persona* (whom we shall call 'RP'), and for Guildenstern, a duty-incident legal *persona* (whom we shall call 'DP'). By this means, *Iudex* assumes the role of the umpire in the model. We may also assume that the relationships obtaining between Hamlet and each of Rosencrantz and Guildenstern respectively also obtain between *Iudex* and RP and DP respectively.

Making all necessary substitutions, then, the diagram takes on the following appearance.



Let us assume that RP has a substantive legal right in a question with DP that DP shall ø and that DP has a substantive legal duty in a question with RP that DP shall ø. Each 'arm' of the model represents the respective poles of the individuated right-duty jural relation. (This is shown in the diagram, the left arm being designated 'RIGHT' and the right arm being designated 'DUTY').

It can readily be seen that the adjective legal relationship obtaining between *Iudex* and RP 'contains' the substantive legal relationship obtaining between RP and DP (i.e. the RP-DP jural relation). Similarly, the adjective legal relationship obtaining between

Iudex and DP also 'contains' the substantive legal relationship obtaining between RP and DP. Thus the position of *Iudex* vis-à-vis either party (whether it be RP or DP) must always take account of the position of that party vis-à-vis the other party. Based on the diagram in chapter III, the broken lines represent adjective legal relationships, while the continuous lines represent substantive legal relationships, or jural relations.

Simply put, the adjective legal relationship ('containing' the jural relation) defines what *Iudex* will 'do' in a question with RP and in a question with DP, firstly on account of RP's having a substantive legal right in a question with DP that DP shall ø, and secondly on account of DP's having a substantive legal duty in a question with RP that DP shall ø.

But we should also note that each term of the substantive legal relationship obtaining between RP and DP (i.e. the right and the duty respectively) also 'contains' the notion of its correlative term in the sense discussed earlier. To be more concrete, the act of DP's ø-ing is at one and the same time the subject both of RP's right and DP's duty. Of course, the substantive legal relationship between RP and DP is conceived according to the understanding of *Iudex*, not according to the understanding of RP or DP. Indeed in the present study the essence of legal relationality consists in that the jural relation is conceived by, and from, the unique perspective of *Iudex*.

Against this background, it is appropriate now to consider Hohfeld's scheme of jural relations, firstly *as* a *scheme* of jural relations (i.e. as an arrangement of jural correlatives and jural opposites) and secondly as substantive legal relationships which are capable of individuation and which, at least in principle, are separate and distinguishable from one another.

V.4 Hohfeld's Scheme of Jural Relations

Hohfeld's celebrated arrangement of jural relations as a table of jural correlatives and jural opposites has been reproduced in countless monographs and textbooks and is the part of his work to which reference is most frequently made, whether in general writings on analytical jurisprudence, or in writings specifically addressing the subject of jural relations.

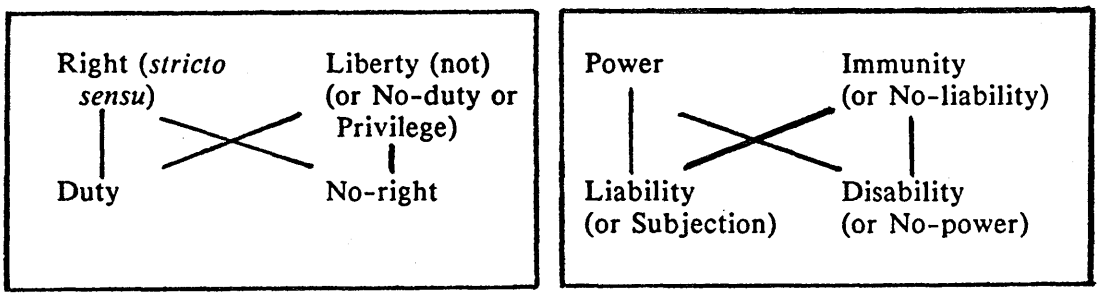
In *Fundamental Legal Conceptions*, Hohfeld's arrangement of jural relations takes on the following appearance: [68]

Jural Opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

Subsequent writers have preferred to show jural correlativity and jural opposition (or jural 'contradiction' [69]) subsisting *together* in two tables, one table applying to the right '*stricto sensu*' family of jural relations, and the other applying to the power family of jural relations. [70] The following tables are based loosely on the tables which appear in the eleventh edition of *Salmond on Jurisprudence.* It should be noted that Glanville Williams, the editor, argued that Hohfeld's 'privilege' was best conceived of as a 'liberty (not)', [71] and Salmond himself preferred to substitute 'subjection' for Hohfeld's 'liability'. [72] The two tables are arranged within rectangles, yet there is no necessary relationship *between* the rectangles, for, as Salmond says:

> "As we shall see, the four concepts within each rectangle are intimately related to each other, whereas there is not the same relationship between the concepts in the one rectangle and the concepts in the other rectangle."[73]

In the tables, correlativity resides in the vertical lines, while opposition or contradiction resides in the diagonal lines.



The derivative Hohfeldian arrangement of jural relations in the form of two tables reflecting the dichotomy between the right and power families of jural relations, rather than Hohfeld's arrangement which reflects the dichotomy between jural opposition and jural correlativity, is substantially in line with what has become a distinctively twentieth century theoretical position in which a principled distinction has been drawn between, on the one hand rights (and duties) and on the other hand powers (and 'liabilities'). This distinction has only relatively recently been brought to the forefront of jurisprudential writing by H.L.A. Hart and has become so widely accepted that it is now almost 'trite jurisprudence'. Writing in 1964, Lon L. Fuller noted the coincidence of Hohfeld's analysis and Hart's distinction between duty-imposing and power-conferring rules:

> "The Hohfeldian analysis discerns four basic legal relations: right-duty, no-right-privilege, power-liability, and disability-immunity. Of these, however, the second and fourth are simply the negations of the first and third. Accordingly the basic distinction on which the whole system is built is that between right-duty and power-liability; this distinction coincides exactly with that taken by Hart."[74]

But Fuller's assertion of an exact coincidence between the Hohfeldian and Hartian analyses of legal powers is perhaps over-confident, because on a closer examination of *The Concept of Law* Hart's power-conferring rules are, on any ordinary language account, certainly power-conferring rules of a *kind*, but not of an *Hohfeldian* kind. Hart's distinction between power-conferring and duty-imposing rules centres upon differences in the social functions which the respective rules perform.

> "Legal rules defining the ways in which valid contracts or wills or marriages are made do not require persons to act in certain ways whether they wish to or not. Such laws do not impose duties or obligations. Instead, they provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law." [75]

The point here is that Hart's power-conferring rules are not, in any strict sense, *relational* power-conferring rules, though clearly the process of (for example) making a will does involve the creation of (among other things) power-conferring norms some of which may not be legal norms in any accepted sense.

If, therefore, we cast aside stricter and more sympathetic possible readings of the Hartian analysis of legal powers and assert, for example, that A has a legal power to make a will, this is not, without considerable analytical extension, a relational power. The point is this: in a question with whom does A have this power? If A has a power to make a will who has a liability, for example, that the will be made? Taking Hart's example of marriage, if A has a power to marry, who is under a liability to be married to A ?(!) Can A, by exercising his power to marry, compel a Sheherazade to marry him - a Sheherazade who is, incidentally, labouring under a correlative liability to be married?

But Hart's example of testamentary powers *may* be presented in terms of Hohfeldian

powers, and a first clue as to what might be involved in this is suggested by MacCormick:

> "It might be objected that it does not take the law to enable people to make their own arrangements. Colin and Flora can set up house together and rear a family without regard to the law's formalities. On his deathbed Colin can tell Flora and the children what he wants done with his possessions, and they, full of conjugal or filial piety, may conceive themselves duty-bound to do as he has said, and do it. The law of the land, the positive law, does not *facilitate* such simple and natural transactions. It fetters and restricts them with burdensome requirements - and with costs." [76]

In short, the law sets conditions for the *recognition* of legal powers created by a testator in favour of an executor. The testator empowers the executor to deal with his property in a certain way. On the death of the testator there is no question of a power-liability relationship existing as between the deceased testator and the executor. There are, however, legal powers created in the executor in a question with beneficiaries (whether potential, apparent or real), and anyone else having, or purporting to have, an interest in the deceased person's estate. Depending on the nature, scope and content of his powers, which are often determined by *legal* rules rather than 'testamentary norms', an executor is legally capable of carrying out innumerable transactions and of subjecting persons to (Hohfeldian) 'liabilities' at his discretion. Thus, for example, if a bank has legal control of funds which belonged to the deceased testator, the executor normally has a power in a question with the bank to direct the bank to transfer the funds to the executor, or make some other appropriate transfer. Upon the valid exercise of this power, the bank then has a legal duty in a question with the executor to transfer the funds in accordance with the executor's direction, and the executor has a legal right in a question with the bank that it so transfer the funds.

But the matter is rather more complex than this. Innumerable other relationships are created: between one beneficiary and another, between each beneficiary and 'all the world', between the executor and 'all the world', between individual fund-holders and the executor, and between individual fund-holders and each beneficiary, and so on, *ad infinitum*. MacCormick makes a similar observation in the course of a discussion of individuation of legal rules:

> "Even stronger is the case where I make a will which is valid in law. Only after my death does it become incumbent on or open to anyone to do anything about implementing my will. And then there are several different classes of people affected. Named executors can seek or decline judicial confirmation; if the court confirms their appointment, they incur the duty of executing the provisions of the will. Tax officials have also duties and powers in respect of the estate. And so forth". [77]

Thus we may conclude that there are no Hohfeldian powers *as such* to make wills, contracts or to enter into marriage. Instead there are legal rules which stipulate recognition or validity conditions, or procedures for the formal constitution, of wills, contracts or marriages, such institutions being by and large entered into voluntarily upon terms created by the parties and in terms of powers, liabilities, rights and duties set out (if at all) in the written documents or oral statements of the parties. In the case of testamentary arrangements, if there are *any* Hohfeldian powers, they exist between the executor and the beneficiaries, or between the executor and fund-holders, or between the beneficiaries and the executor, and so on. There are also rights, duties, immunities, liberties and disabilities which are independent of the terms of any will. There may indeed even be terms deemed to be incorporated in the will which the testator may not have contemplated. For example the Succession (Scotland) Act 1964 provides:

> "Every testamentary disposition executed after the commencement of this Act by

> which provision is made in favour of the spouse or of any issue of the testator and which does not contain a declaration that the provision so made is in full and final satisfaction of the right to any share in the testator's estate to which the spouse or the issue, as the case may be, is entitled by virtue of *jus relicti*, *jus relictae* or legitim, shall (unless the disposition contains an express provision to the contrary) have effect as if it contained such a declaration." [78]

The conclusion to be drawn from this extended digression into Hart's usage of the term 'power' in *The Concept of Law* is that although Hart may be given considerable credit for having accentuated the distinction between duty-imposing and power-conferring rules, an essentially similar distinction had already been acknowledged by Hohfeld, and indeed, such was the importance of the distinction to *Kocourek* that he asserted that there are only *two* ultimate jural relations:

> "According to the above table [of jural relations], there appear to be four fundamental types of jural relation, but a closer examination of the matter shows that there are in fact only two fundamental types - claims and powers." [79]

It is worth noting that analyses of legal powers have not, by any means, been *confined* to twentieth century jurisprudential writing, for, as Hart points out in his later work *Essays on Bentham*, [80] Bentham had anticipated much of Hohfeld's work in his analyses of rights and powers in his juristic treatise, *Of Laws in General.* [81] Perhaps we should also note the apologia which Hart offers for what he describes as his 'previous inadequate approach' to the subject of legal powers in *The Concept of Law.* According to Hart, he (Hart) made no attempt in *The Concept of Law* to analyse closely either the notion of a power or the structure of the rules by which powers are conferred. [82]

We shall return to the distinction between rights and powers later, but in the meantime it is helpful to continue discussion of three notions which play an important part in Hohfeld's scheme of jural relations: the first is the notion of jural *correlativity* (which has already been discussed at some length); the second is the notion of jural *opposition*

or jural *contradiction*; and the third is the notion of jural *negativity* (that is, the utility, or otherwise, of terms such as 'no-right').

Dealing first with the notion of jural correlativity, Glanville Williams in the eleventh edition of *Salmond on Jurisprudence* observes that the question whether rights and duties are *necessarily* correlative has resolved itself into two schools of thought according to one of which there can be no right without a corresponding duty, or duty without a corresponding right "any more than there can be a husband without a wife, or a father without a child". [83]

> "For, on this view, every duty must be a duty *towards* some person or persons, in whom therefore, a correlative right is vested. And conversely every right must be a right *against* some person or persons, upon whom, therefore, a correlative duty is imposed. Every right or duty involves a *vinculum juris* or bond of legal obligation, by which two or more persons are bound together. There can therefore be no duty unless there is some one to whom it is due; there can be no right unless there is some one from whom it is claimed; and there can be no wrong unless there is some one who is wronged, that is to say, whose right has been violated." [84]

The other school of thought does not deny the correlativity of many rights or duties, or types of right or duty, but distinguishes between correlative rights or duties (termed *relative* rights and duties) and rights and duties which are termed *absolute*. Absolute rights in this sense have no duties corresponding to them, and absolute duties similarly have no rights corresponding to them. According to Williams, the dispute between the two schools is a typical example of a 'verbal controversy' which is devoid of practical consequences. [85] The point Williams appears to be making is that the dispute between the two schools probably depends more upon how the words 'right' or 'duty' are *used* in a particular context or are defined for purposes of that context than upon the existence of any principled difference between relative rights (duties) and absolute rights (duties).

But it is difficult simply to dismiss the argument between the schools on the ground of an apparent semantic disagreement without entertaining at least a suspicion that there may be a *substantive* disagreement between them, the elucidation of which might aid our understanding of rights and duties in general. Despite this, there is a natural inclination, on the one hand, to conceive of rights as, for example, the 'protected' expectation or claim or demand which one person (or *persona*) has against or in a question with *another* person (or *persona*). On the other hand, it is difficult to think of duties other than as that which one person (or *persona*) ought to, or must, do in a question with another person (or *persona*).

These inclinations, it must be said, have their origins in the recognition of the intrinsic relationality of social action in terms of which social action is conceived as alter-oriented activity. This in turn is reflected in the structure of the social norm. It therefore seems difficult to visualise a social right inherent in or social duty incident to someone (whether 'natural' or 'juridical') that does not avail against some *other* person (whether 'natural' or 'juridical'). This is a concomitant of the whole conceptual and theoretical apparatus underlying the concept of the 'social'. It may be that arguments favouring a concept of absolute rights or duties may turn less on the denial of the possibility that such rights and duties avail against 'another' than on the *determinacy* (or indeterminacy) of the 'other' against whom they avail.

The fact that there is probably no-one in particular against whom I might assert a social right 'to life' does not undermine the fact that in asserting such a right in relevant circumstances I am at least conscious of the fact that such an assertion would be completely meaningless were it not for the existence of 'others' (possibly multitudes

of indeterminate 'others') who are, minimally, rational and intelligent beings, more or less capable of appreciating the implications of such an assertion albeit vague and imprecise. The fact of making such an appeal involves a presupposition on my part, possibly banal, of the 'social nature' of these other beings, and that they are capable of responding to, or at least recognising the *social* meaning of, my appeal.

It may then be the lack of determinacy in the sense of difficulty of ascertainment of 'others' against whom absolute rights or duties may avail that lends support to the school of thought that argues for the possibility of a concept of the absolute right or duty. Mere lack of determinacy, however, should not lead us to deny what appears to be an unavoidable consequence of the social dimension of social rights and social duties. This social dimension *necessarily* entails that the rights or duties in question avail against one or more individuals, *other than* respectively the right-holder or duty-bearer. It cannot therefore be maintained that lack of determinacy of such 'others' *means* no-one at all. It may indeed be difficult to ascertain the specific individual (or more broadly, *personae*) or class of individuals (or *personae*) against whom a social right or duty avails, but 'difficulty' should not be taken to mean 'impossibility'.

Furthermore, we should note that in the legal context the problem of identifying a party who is 'correlative to' the holder of an absolute legal right or bearer of an absolute legal duty may in some cases arise from a failure to visualise the right or duty in question in its 'crystallised' form in the sense discussed previously, that is, on the occurrence of appropriate 'operative facts'. In such a case, an 'uncrystallised' right or duty merely exists as an indeterminate hypothesis.

The problem of indeterminacy also arises naturally in the context of Hohfeld's distinction between 'paucital' and 'multital' rights, [86] corresponding to the distinction between rights *in personam* and rights *in rem*. The apparent lack of determinacy in the case of rights *in rem* leads Kocourek to identify 'polarity' as the root of the distinction. A right *in rem* is therefore classified as an 'unpolarized' right while a right *in personam* is seen as a 'polarized' right. [87]

Hohfeld's 'numerical' test is convincingly rejected by A.M. Honoré [88] who argues in effect that the number of persons subject to a legal duty (corresponding to a right *in rem*) is irrelevant to the essential character of the right *in rem*. Polarity also seems doubtful as a basis of the distinction given that on the 'crystallisation' of a right, whether it be *in rem* or *in personam*, there will almost certainly be, on the one hand, an identifiable *persona* of incidence and an identifiable *persona* of inherence.

The most perceptive account of the nature of the distinction between rights *in rem* and rights *in personam* seems to have been offered by A.H. Campbell [89] who examines the competing accounts put forward by Hohfeld and Kocourek. As Campbell puts it,

> "Hohfeld appears to have overlooked an important point. Even if we agree that it is better to speak of several rights correlative to several duties, what we call a right *in rem* is not just one which *happens* to coincide with many other rights of similar content against other persons. A right *in rem* is *presumed* to exist against 'all the world', and therefore against any particular defendant unless he can prove the contrary; a right *in personam* has to be proved to exist against the particular defendant." [90]

Although Campbell seems to imply that the essential distinction lies in adjective legal norms which determine what must be *proved* in order to substantiate a right *in rem*, the real distinction in fact lies in his assertion that there is a *presumption* that the right

avails against 'all the world'. To be more precise, the right *in rem* is *presumed* to avail against the category of legal *personae* being the 'universe' of legal *personae* (both 'natural' and 'juridical') with the obvious exception of the right-holder himself and any other legal *personae* specifically excluded from that category on legal grounds.

Hohfeld's distinction concludes this brief discussion of jural correlativity. The two remaining notions which are central to Hohfeld's scheme of jural relations are those of jural opposition or contradiction, and of jural negativity.

Hohfeld uses the term 'jural opposite' to denote a term which is the negative of another term. This yields two jural correlatives: the 'negative' jural relation of no-right-privilege (i.e. the 'jural opposite' in the right *stricto sensu* family of relations) and the 'negative' jural relation of disability-immunity (i.e. the 'jural opposite' in the power family of relations). Max Radin, [91] and Glanville Williams both refer to Hohfeld's jural 'opposites' as jural 'contradictories'. As Williams says,

> "...what Hohfeld called opposites...can better be called contradictories, because taken together they exhaust the relevant field (universe of discourse). For example, a no-right means the absence of a right. Either *A* has a right in a particular respect or he has no right (a no-right); there is no third possibility." [92]

At first sight, Williams' remark seems obvious, but seems less so on reflection when we consider that the concept of the no-right has been criticised on the ground that there is conceivably nothing to prevent a no-right from being an *elephant*(!) The point here is that a no-right is capable of being anything that is not a right: a dog, a bookcase, a piece of musical notation or an electromagnetic force. Presumably this criticism, by extension, could be directed at the notion of the no-power (i.e. disability [93]).

Against this criticism, Williams argues that negative terms are often useful as

alternative ways of stating propositions involving negatives: "For instance, the terms 'alien', 'cold' and 'dark' are all negative or privative, because their meaning includes the idea of absence of something else." [94]

Persuasive though it is, however, Williams' counter-argument overlooks a more important principle underlying the use of terminology such as no-right and moreover, underlying the endeavours of theorists such as Hohfeld who have accentuated the role of legal concepts such as the no-right, or for that matter no-duty or liberty not, no-power or disability, and no-liability or immunity. It is that terms such as no-right (or no-duty, or no-power or no-liability) are not *simply* useful terms which denote an *absence* of something. They are more than merely useful negative terms. They are, rather, terms which denote *'relational situations'* which may be in their own right (positively) endowed with legal significance. Thus, in general terms, when we speak of (for example) a no-right - no-duty (liberty not) 'situation' we are not referring to an absence of a relationship *simpliciter*. We are instead referring to an absence of a relationship in which, in the context of the specific 'situation' envisaged, and only in that context, there are good reasons for attributing particular legal significance to that absence. A no-right is therefore intelligible in a context in which the absence of the right is, in specified circumstances, of some importance. It is likewise in the case of the no-duty (liberty not or privilege), no-power (disability) and no-liability (immunity).

It is possible to imagine two types of case though there are doubtless others, in which a 'negative relationship', which is, after all, an *absence* of a relationship, may be intelligible *as* a 'relationship' by reason of the significance attributed to the absence of a 'positive relationship'.

First, there is the case where the absence of a legal relationship for example, a right-duty relationship gives someone grounds (e.g.) for negotiating a legal relationship between himself and someone else. For instance, it may be that between A and B there is no contractual relationship of any kind and A wishes (for example) to acquire something, say, a car, from B. If we assume that B is willing to sell his car, A may wish to enter into negotiations with B for the purchase of the car such that any relationship established between A and B receives the benefit of legal recognition, provided, of course, that certain conditions are met, i.e. 'operative' conditions.

In a case such as this, it may be of some importance to A and B (or at any rate to A) that, prior to contracting, no legally recognised relationship exists between them, and it may even be a matter of considerable significance to A that, before entering into negotiations with B, he conceives of his situation in relation to B as one in which he (A) has no right (or a 'no-right') that B should 'surrender' his car to A. The no-right - no-duty 'situation' which A and B find themselves in may well furnish them with a pretext for seeking to 'regularise' the situation by entering into a contract.

The second case is where the absence in question (i.e. a 'negative relationship' in the Hohfeldian sense) constitutes an *exception* to a 'positive relationship', and thereby partially determines the scope of the 'positive relationship'.

For example, under circumstances n, A may have a right in a question with B that B shall ø, *provided* that A is not less than 18 years of age. If A is concerned to know whether he has a right in a question with B under circumstances n he must establish whether in terms of his status he falls within the proviso to the rule. The point here

is that it may be important for A, and indeed for B, to rule out potential 'no-right-holders' such as A himself if, for example, A is 15 years of age by making reference to the appropriate proviso. A and B may furthermore wish to rule out potential 'no-duty-bearers' such as B, if A indeed happens to be only 15 years of age. By this means, A will be able to establish whether the rule applies to the effect of conferring a right upon *him*, and therefore a duty upon B. Moreover by examining the proviso to the rule (and considering the possible no-right - no-duty 'situations') A may confidently assert that the rule confers a right only upon A's who are aged at least 18 years, and imposes a duty only upon B's if the A's in question satisfy the appropriate age criterion. A is thus able to determine the scope of the right by reference to a no-right which constitutes an *exception* to the right.

We should also note that a right may be meaningfully delimited through the expedient of an exception to a no-right. To give a statutory example, section 4(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 provides *inter alia* that:

> "...A landlord shall not, for the purpose of treating a lease as terminated ...be entitled to rely ...on a provision in the lease which purports to terminate it, or to enable him to terminate it, in the event of a failure of the tenant to pay rent, or to make any other payment, on or before the due date therefor..." [unless the landlord has served upon the tenant a notice in prescribed form requiring payment to be made]. [95]

It can readily be seen that in an 'Hohfeldian situation' such as that envisaged in this example, a landlord would ordinarily have a right in a question with a tenant to terminate a lease without notice, if the lease so provided. Indeed the lease may provide for *automatic* termination merely by virtue of the occurrence of a terminative event.

Now the crucial feature of section 4 is that the landlord's right to terminate is

conceived as a 'blanket' *no-right* subject to an exception in the case of determination effected by the prescribed form of notice. But why does the Act adopt *this* legislative strategy rather than, for example, define the right in question by means of (positive) rights terminology?

The answer to this is that it is perhaps legislatively expedient and (what is more important) legally *necessary* to define, or re-create the landlord's right as an exception to a no-right precisely because any provision in the lease which is at variance with the statutory provision must first be *negated.* However the Act does not actually nullify the provisions of the lease, for the lease might well establish a procedure for termination which is fully in accordance with the statutory procedure or be even more favourable from the tenant's point of view. In that case, the lease provisions would prevail.

The Act, rather, in effect negates any rights the landlord may have under the lease to the extent that the lease fails to provide for termination by means of notice in the prescribed form. The landlord is therefore deprived of his right (i.e. he has a 'no-right') to terminate the lease in accordance with the terms thereof unless the notice formalities are complied with. *Only* in that event does he have the right to terminate. The point here is that but for the statutory provision, the landlord *would* have a right to terminate in accordance with the terms of the lease, and it is therefore necessary to make unambiguous counter-provision against the contractual terms. In a sense, the statutory provision 'derogates' from the realm of no-right into the realm of right, but the relationship between landlord and tenant must first be conceived *as* a no-right in order meaningfully to establish the boundaries of the (positive) right.

This concludes our brief consideration of Hohfeld's scheme of jural relations. It is convenient now to consider from a Weberian sociological perspective the element of social power which we will argue resides in the jural relation. This will be an appropriate introduction to our discussion at the end of this chapter of the Hohfeldian legal power. For it is as relationships of social power that the conceptual proximity of the legal right *stricto sensu* and the legal power can readily be seen.

V.5 The Jural Relation as a Relationship of Social Power

It may be recalled from earlier discussion that in his *Sociology of Law* Weber discusses the manifestations in ordinary legal relationships of legitimate authority or superiority, termed '*Herrschaft*', which has traditionally been translated as 'domination'. [96] According to Weber, 'domination' as a species of social power in the wider sense, is manifested in legal relationships in that rights (or 'claims', as Weber's translators occasionally call them) which the law grants to one person in a question with one or more others may be conceived as powers to 'issue commands' to the other or others in question. As Weber himself puts it:

> "Domination in the quite general sense of power, i.e., of the possibility of imposing one's will upon the behavior of other persons, can emerge in the most diverse forms. If, as has occasionally been done, one looks upon the claims which the law accords to one person against one or more others as a power to issue commands to such others or to those to whom no such claim is accorded, one may thereby conceive of the whole system of modern private law as the decentralization of domination in the hands of those to whom the legal rights are accorded. From this angle, the worker would have the power to command, i.e., 'domination', over the entrepreneur to the extent of his claim for wages..." [97]

Weber, however, stresses the distinction between 'commands' directed by the judicial

authority to an adjudged debtor and 'commands' directed by the claimant himself to a debtor prior to judgment. [98] In essence, Weber appears to recognise here the distinction between a substantive legal relationship (such as that which would subsist between, for example, litigating parties), and an adjective legal relationship (such as that which would subsist between, for example, a tribunal and litigating parties). Both relationships are relationships of social power but clearly differ both in terms of context and content. At the level of content we have earlier noted that the adjective legal relationship 'subsumes' the substantive relationship in certain cases.

Weber offers several primary definitions of the concept of 'domination' (*Herrschaft*), and also offers a definition of the wider concept of 'power' (*Macht*). Thus in *Economy and Society* he furnishes what appear to be competing definitions. One definition stresses the *de facto* or causal element of social power, expressed in terms of probability:

> "'Power' (*Macht*) is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests. ...'Domination' (*Herrschaft*) is the probability that a command with a given specific content will be obeyed by a given group of persons. ...The concept of power is sociologically amorphous. All conceivable qualities of a person and all conceivable combinations of circumstances may put him in a position to impose his will in a given situation. The sociological concept of domination must hence be more precise and can only mean the probability that a *command* will be obeyed." [99]

A different definition, appearing in Appendix I of *Economy and Society*, [100] tends towards a more *'Verstehende'* notion of power and lends weight to Alan Hunt's characterisation of power in the Weberian sense as a relational concept, concerned as it is with the impact of one person upon another in so far as the behaviour of the one may be analysed as having been determined by the other. [101] Weber's alternative definition of *Herrschaft* is as follows:-

> "*Herrschaft* (domination) does not mean that a superior elementary force asserts itself in one way or another; it refers to a meaningful interrelationship between those giving orders and those obeying, to the effect that the expectations toward which action is oriented on both sides can be reckoned upon..." [102]

Guenther Roth in a footnote to *Economy and Society* [103] takes this notion of relationality further by characterising *Herrschaft* in the sociological sense as a "structure of superordination and subordination, of leaders and led, rulers and ruled". This has special importance because superordination and subordination are mutually dependent and *correlative* notions. If A is superordinate to B, then B is subordinate to A; if B is subordinate to A then A is superordinate to B.

Georg Simmel also presents superordination and subordination as relational concepts. Such relationships are to be found specifically in the context of social interaction. According to Simmel, even the absolute despot interacts socially within a context of superordination and subordination. In Simmel's view, if the despot "...accompanies his orders by the threat of punishment or the promise of reward, this implies that he himself wishes to be bound by the decrees he issues. The subordinate is expected to have the right to request something of him; and by establishing the punishment, no matter how horrible, the despot commits himself not to impose a more severe one." [104] The point here, as Simmel goes on to say, is that provided there is *spontaneity* within the relationship, that is, *some* element of freedom, the parties are in a meaningful sense interacting socially. As Simmel observes:

> "...although the superordinate wholly determines the subordinate, the subordinate nevertheless is assured of a claim on which he can insist or which he can waive. Thus even this extreme form of the relationship still contains some sort of spontaneity on his part." [105]

The ultimate denial of the social and of the interactional is to be found in a

relationship of superordination in which the group "simply *disposes* of its members". This must surely be the 'purest' case of power *de facto* and completely negates any possibility of meaningful interaction. [106]

In the context of legal authority, Weber's concept of superiority or 'domination' has resonances both of relationality, and, more intriguingly still, of *correlativity* in the Hohfeldian sense. Domination in this context is identical to authoritarian power of command, according to Weber. [107] 'Domination', then, comes to mean the situation in which:

> "The manifested will (*command*) of the *ruler* or rulers is meant to influence the conduct of one or more others (*the ruled*) and actually does influence it in such a way that their conduct to a socially relevant degree occurs as if the ruled had made the content of the command the maxim of their conduct for its very own sake. Looked upon from the other end, this situation will be called *obedience*." [108]

It is clear from the observations which follow this remark that Weber is not necessarily referring to a situation of 'rule' as 'governance' in the sense of, for example, democracy, monarchy or oligarchy. It is apparent that 'domination' of this kind can be manifested in simpler and more modestly scaled situations. Weber gives the example of officials in different departments of modern bureaucracies where each is subject to the others' powers of command in so far as the latter have jurisdiction. [109] He even considers such a 'command structure' to be present where a customer places with a shoemaker an order for a pair of shoes. [110] Thus, given the scope of Weber's concept of 'domination' or '*Herrschaft*', it can come as no surprise that this provides theoretical underpinning to Weber's sociological conceptualisation of the legal right. This is to be seen in the passage quoted earlier. [111]

There are two passages in particular in *Economy and Society* (both of which are also in

the *Sociology of Law*) in which Weber, in a sense, synthesises the defining sociological elements of the legal right. In those passages Weber defines the concept of the right in terms which serve to accentuate the element of social power inherent in the legal right, i.e. the 'invocation' of a 'coercive apparatus'. The definition also stresses relationality and correlativity in the legal right-duty relationship conceived as a relation of social power, and finally, recalling earlier discussion, emphasises the expectational-obligational element of the legal relationship. In the first passage, Weber presents a basic sociological definition of a right.

> "Sociologically, the statement that someone has a right by virtue of the legal order of the state thus normally means the following: He has a chance, factually guaranteed to him by the consensually accepted interpretation of a legal norm, of invoking in favor of his ideal or material interests the aid of a 'coercive apparatus' which is in special readiness for this purpose. This aid consists, at least normally, in the readiness of certain persons to come to his support in the event that they are approached in the proper way, and that it is shown that the recourse to such aid is actually guaranteed to him by a 'legal norm'". [112]

The next passage stresses the 'duty' or 'obligation' aspect of a relationship and does not specifically mention the legal right, but it is clear that the right-duty legal relationship is the subject of discussion. In order to accentuate in the following passage the *relationality* of the situation described by Weber, it is helpful for references respectively to the person of inherence or right-holder and person of incidence or duty-bearer ('A' and 'B') to be inserted within square brackets in the text, thus:

> "The fact that a person 'owes' something to another can be translated, sociologically, into the following terms: a certain commitment (through promise, tort or other cause) of one person [B] to another [A]; the expectation [of A], based thereon, that in due course the former [B] will yield to the latter [A] his right of disposition over the goods concerned; the existence of a chance that this expectation will be fulfilled." [113]

At this stage, we should also note Weber's definition of 'legal relationship': "The term 'legal relationship' will be applied to designate that situation in which the content of a

right is constituted by a relationship, i.e., the actual or potential actions of concrete persons or of persons to be identified by concrete criteria." [114]

In Weber's sociological definition of a legal right the element of social power appears to lie more in the 'readiness' of a 'coercive apparatus' to be mobilised in favour of a right-holder's ideal or material interests than in any quality that attaches to the right-holder personally. Weber would doubtless have been aware that certain potential right-holders (or duty-bearers) can possess enormous social power in their own right, whether economically or on account of rank, status or other condition, and that this would be another dimension to be added to any 'calculus' of social power obtaining within a relationship in a given case.

However, while Weber's definition emphasises that the dimension of social power within a legal relationship lies essentially in the availability of a 'coercive apparatus' to take enforcement action in appropriate circumstances, it seems paradoxical that Weber apparently adopts the point of view, not of the 'coercive apparatus' or 'legal order' but of the right-holder. Thus it is the *right-holder* who has a chance factually guaranteed to *him* of invoking in favour of *his* ideal or material interests the aid of a 'coercive apparatus'.

But it is surely the case that where a right-holder invokes the aid of a 'coercive apparatus', the power both *de facto* and *de jure* resides, at least according to a rudimentary view, in the 'coercive apparatus', rather than in the right-holder, otherwise the right-holder might conceivably dispense with the aid of the apparatus. Why then does Weber give prominence to the point of view of the right-holder?

It is arguable that by giving prominence to the right-holder's perspective Weber may have overlooked that the 'legal relationship', or more specifically, the jural relation, obtaining between a right-holder and duty-bearer must ideally be conceived from the point of view of one or more individuals who *possess* and exercise a more significant degree of social power than the right-holder or duty-bearer. That is, a legal relationship must be conceived from the perspective of the *legal institution* (represented in the present analysis by the type-construct *Iudex*) if and only if the investigator is concerned with exercises of social power 'measured' in terms of *degree* or *significance*. Furthermore, any relationship so conceived must be tested against a criterion of validity. This establishes the legitimacy of the legal institution's coercively guaranteed power to give effect, by enforcement action, to a right-holder's ideal or material interests.

The dimension of legal social power inherent in the notion of coercive guarantee must be isolated from other dimensions of social power existing within a legally protected right-duty relationship, such as for example 'personal authority' of a right-holder and 'deference' of a duty-bearer. By this means the legal coercive dimension is seen to be a significant force in its own right, giving support to superordination-subordination relationships of social power consisting in measurable probabilities that 'commands' with a given content will be 'obeyed' by certain groups of persons. The factual dimension of social power, then, consists in that it is not merely the 'obedience' of litigants that can be relied upon for the execution of the valid judgment of a court of law. If that were the case it may be impossible for Weber's empirical probability of 'obedience' to be established.

Of course, the 'obedience' in question may refer to that of litigants who are prepared

to accept an adverse court decision. But 'obedience' must presumably also refer to that of the personnel of a coercive legal order who execute judgments of the court. An official's motive for rendering 'obedience' would doubtless differ from that of a litigant (even an 'obedient' litigant who has been the subject of an adverse judgment).

Despite his apparent adoption of the point of view of the right-holder in his sociological definition of legal right, Weber's conception of the importance of adopting the theoretical perspective of a position-occupant endowed with social power is given unambiguous expression in his characterisation of the sociological point of view. In this context the investigator's concern is to discover what actually happens in a group owing to the probability that persons engaged in social action (e.g. judges), "*especially those exerting a socially relevant amount of power*" subjectively consider certain norms as valid and orient their conduct by reference to those norms. [115]

This may be taken as an exhortation to focus sociological attention on an actual or hypothetical position-occupant, and one, moreover, possessing 'social power' in the sense discussed, who conceives legal rights or legal duties as obtaining between legal *personae*. It would surely be a mistake to make the legal *personae* themselves or any one of them, e.g. the right-holder, the focus of attention.

This much has been argued already at various points in the preceding discussion as a justification for adopting the perspective of *Iudex*. *Iudex* is seen as a possessor of significant social power by virtue of office. He conceives rights, duties, powers and liabilities as obtaining between actual, potential or hypothetical litigants or other legal *personae*. Furthermore, according to this theoretical perspective, certain courses of social action can to an empirically determinable extent be relied upon to be performed

in response to the judgment or other official act of *Iudex*. Often such performance is wholly independent of the volition of litigants, and this must render all the more remarkable any theoretical stance in which precedence is accorded to the perspective of the litigant *qua* right-holder or duty-bearer. Such a perspective may, of course, be unobjectionable in an investigation which is not, or is only marginally, concerned to attach sociological significance to the ramifications of exercises of social power. But an individual litigant's perspective may well be unobjectionable even in the context of a sociological investigation of the consequences of power-exercises if the litigant in question, for example, a multinational corporation, happens to possess demonstrable attributions of social power.

Often the existence or non-existence of instances of social power depends on the extent to which (if at all) an individual perceives an exercise of power to be either inherently 'legitimate', or 'legitimate' by virtue of the office, status or position of the individual exercising the power. In an illuminating discussion of 'legitimacy' in a context of social power, sociologist Herbert C. Kelman [116] gives an account of various ways in which a 'power-target' may come to accept, and therefore to act upon without challenge, a 'legitimate' request, command or order of a 'power-source'. The subjective meaning of such 'acceptance' in this context perhaps corresponds to Weber's notion of 'obedience', which, it will be recalled, exists in a situation in which the action of the person obeying follows such a course that the content of the command may be taken to have become the basis of action for its own sake. [117] Furthermore, and crucially, 'obedience' is rendered "without regard to the actor's own attitude to the value or lack of value of the content of the command as such."

Against this background *Iudex* may be postulated as a 'power-source', and either, on

the one hand, litigants, or on the other hand, enforcement personnel, may be postulated as 'power-targets'. The enforcement personnel of a legal order are expected to render 'obedience' to the judgment of a court just as are litigants, although the 'obedience' rendered by such personnel is intrinsically of a different nature linked as it is with the execution of an official function. However distanced individual litigants may be from the exigencies of litigation in a given case, they nevertheless have a personal interest in the outcome of the case, and this is surely reflected in the nature of the 'obedience' they are bound to render, and in the 'performance acts' required of them, in satisfaction of an order of the court.

We might also note at this stage that in the usual case a judge does not stand exclusively in *superordinate* relationships with others. Normally he stands in a relationship of subordination to the impersonal legal order in which he holds office. He may not 'owe obedience' to any individual in particular, but may nevertheless 'owe obedience' to identifiable individuals of a given class.

Returning to Kelman's analysis, then, social power or social influence refers to socially induced behaviour change. Social influence occurs whenever a person (P) changes his behaviour as a result of induction by another person or group, the influencing agent or 0. [118] Induction occurs whenever 0 offers or makes available to P some kind of behaviour and communicates something about the probable effects of adopting that behaviour. Induction may involve persuading, ordering, threatening, 'expecting' or providing guidelines. [119] From this fundamental starting point, Kelman turns to consider influence under conditions of legitimate authority. [120]

In Kelman's view, situations of legitimate influence are distinctive in that the

influencing agent 0 is perceived as having the right to exert influence and to make demands by virtue of his position in the social system. [121] For present purposes a judge, such as *Iudex*, may be considered to be an influencing agent such as Kelman envisages. According to Kelman, once a demand of the influencing agent is categorised as 'legitimate', the 'power-target' P finds himself in a situation in which his preferences are more or less irrelevant for determining his actions. [122] Ordinarily, 0 would have to convince P that adopting the induced behaviour is preferable for him, assigning to P a measure of freedom of choice in pursuing a given course of action. Thus:

> "In situations of legitimate influence, by contrast, 0 does not have to convince P that adopting the induced behavior is preferable for him, given the available alternatives, but merely that it is required of him." [123]

The ability of an influencing agent acting within a given 'system' to elicit desired responses is, in Kelman's view, dependent on the extent to which the system itself is perceived as legitimate. If it is perceived as legitimate it may function on a basis of consent, "with relatively little need to resort to coercion or to confront constant challenges." [124]

In the course of his discussion, Kelman postulates a model of processes of social influence which is of interest in the present context. Although it is beyond the scope of our present concern to give an exhaustive account of this model in view of its complexity, we should nevertheless note three modes of *integration* which Kelman outlines. These modes are indicative of the basis upon which 'obedience' might be rendered either by a litigant or by an enforcement official in response to an order of a court. However, as we have noted earlier, there are differences between the basis of 'obedience' in the case of each type of actor respectively. We should also be aware

that Kelman does not single out these types of actors for specific treatment since his analysis deals generally with influence under conditions of legitimate authority, not specifically with legal influence. But Kelman's model is instructive in its application to the present study.

The first mode of integration in Kelman's analysis, then, is *ideological* integration. According to Kelman:

> "An individual who is ideologically integrated is bound to the system by virtue of the fact that he subscribes to some of the basic values on which the system is established. These may be the cultural values defining the national identity, or the social values reflected in the institutions by which the society is organized, or both." [125]

Ideological integration entails that the individual *internalises* system values by incorporating them into a personal value framework. By this means, any demand for behaviour supportive of the system is likely to be met with a positive response provided the demand is consistent with the underlying values of the system, and is therefore consistent with the values to which the individual has subscribed.

The second mode of integration which Kelman considers is *role-participant* integration.

> "An individual who is integrated via role-participation is bound to the system by virtue of the fact that he is personally engaged in roles within the system - roles that enter significantly into his self-definition." [126]

This mode of integration may involve the individual in emotional or functional participation in a role which is central to his self-identity. If emotionally involved, he may be, in a sense, drawn into the symbolistic and possibly ritualistic trappings of the role. If functionally involved, he may be responsible for the performance of various

roles considered necessary for maintaining the system in existence. This may entail that the individual identify with powerholders since he has a stake in maintaining the system-related roles in which his self-definition is anchored. His preparedness to respond positively to the system's demands therefore has its origins in the fact that his role also demands this response.

The third mode of integration is *normative* integration.

> "An individual who is normatively integrated is bound to the system by virtue of the fact that he accepts the system's right to set the behavior of its members within a prescribed domain." [127]

According to Kelman, this involves legitimacy in its 'pure form'. In this context questions of personal values and roles are irrelevant. The individual may accept the system's right to be rendered 'obedience' based on his commitment to, for example, the state as a sacred object in its own right, or on his commitment, as Kelman puts it, to the necessity of law and order as a guarantor of equitable procedures. [128]

The individual faced with demands to support the system is likely to comply without question provided he believes that the demands are 'authoritatively' presented as the wishes of the leadership or the requirements of law. In Kelman's view, an indication of authoritativeness is the existence of a positive or negative sanction to control proper performance.

The existence of a sanction with its connotations of a coercive apparatus standing in readiness to take enforcement action places Kelman's third mode of integration firmly in the realm of legal authority. But in varying degrees of appropriateness, each of Kelman's three modes of integration is manifested in the relationships of social power

that exist at all levels in the legal context. Thus *litigants* may well, but need not necessarily, be ideologically integrated in the system although they do not participate in any of the system's roles. It is likely, though, that an ideologically integrated litigant would also be normatively integrated in the system, since normative integration is arguably a specific manifestation of ideological integration. It seems difficult to imagine a normatively integrated individual accepting the system's right to set norms of behaviour for its participants while simultaneously rejecting the more general values whch are a prerequisite of allegiance to the system.

An individual holding an office or performing a specified function within the system, such as a judge or an enforcement official, is likely to be integrated in the system in all three of the senses envisaged by Kelman, though in differing degrees of strength. Clearly, role-participant integration will be an important influence upon the behaviour of an official, and to a lesser extent may influence the action of a litigant who perceives himself as a 'law-abiding citizen'. Such a litigant must, of course, subscribe to the value of 'law abidingness' which may well be a particular manifestation both of ideological and normative integration.

If any conclusion can be drawn from this brief discussion of the jural relation as a relation of social power, it is that for purposes of sociological theorising about the jural relation the perspective should be adopted of a position-occupant (in the present context, *Iudex*) who exercises significant social power and whose conception of the jural relation obtaining between legal *personae* in a given case is the operative one for purposes of the mobilisation of a coercive legal apparatus. But we must at the same time recognise that unless the system, specifically the legal order, is invested with 'legitimacy' and therefore attracts to a greater or lesser extent the willing allegiance of

those subject to it, it can maintain itself in existence only by countless exercises of sheer coercion in response to perpetual challenge. A system of governance of this type surely maintains only a pretence of 'true' social power, for as Anthony T. Kronman has observed:

> "In a word, the real strength of the most important and lasting forms of domination depends on the ideas or beliefs of the dominated, and this is likely to seem puzzling to anyone used to thinking of ideas as relatively weak and fragile things compared with the robust reality of physical force. How are we to explain the important role played by ideas in the creation and maintenance of the strongest and most enduring power relationships?" [129]

Thus a perspective such as that of *Iudex* may be worthy of adoption for purposes of sociological theorisation only if *Iudex* stands in a position in which, in a factual sense, he truly exercises significant social power. This may well depend on the extent to which his authority is perceived as *legitimate*.

V.6 The Hohfeldian Legal Power

Sociologically, the conceptual proximity of the jural relations of right-duty and power-liability is to be found in the recognition that jural relations are relationships of social power in the broad sense that in a context of legal authority they are substantive legal relationships which constitute part of the adjective legal relationships obtaining between a superordinate party (in the present context, *Iudex*) and a subordinate party (for example, a litigant). (We should be aware moreover that *within* the substantive relationship a state of superordination and subordination obtains, for example, between right-holder and duty-bearer). But while this conceptual 'levelling' of Kocourek's "two ultimate jural relations", [130] can be sustained in a *sociological* reading of jural relations, it is quite untenable in a *juridical* analysis in which the distinction between

the legal right *stricto sensu* and the legal power must be carefully examined. One theorist who appears to have subscribed to a *juridical* 'levelling' of legal rights and legal powers is George W. Goble. Writing in 1935, Goble asserted:

> "The basic legal concept is *power*. All other legal concepts are derivatives of this one. ...All acts or omissions legally significant involve the exercise of powers. [131]
>
> ...*Right-duty* as a legal relation would therefore seem not to be basic, but a description of a certain sequential combination of power- liability relations. The entire legal phenomenon involved in a right- duty could be expressed by the use of the terms *power* and *liability*." [132]

A subsumption argument such as this is probably misleading. The legal right *stricto sensu* and legal power are concepts which serve manifestly different functions but which, at the level of practical application, do indeed converge at certain points. This convergence, however, should not lead us to assume uncritically that the 'strict' legal right and 'Hohfeldian' (if not equally 'strict'!) legal power are conclusively equivalent and thus presumably also interchangeable. That there is, irrefutably, a juridical distinction between these concepts has been adverted to at various points in earlier discussion. Indeed, the distinguishing features of the legal power were briefly outlined in chapter III. [133] It therefore seems appropriate to consider from a juridical perspective the precise nature and structure of legal powers and to differentiate the legal power from the legal right in the strict sense. The main points of convergence between the two generic concepts will become clear from the discussion.

Our starting point, then, is Roscoe Pound's definition of legal power. According to Pound:

> "A power is a legally recognized or conferred capacity of creating, divesting, or altering rights, powers and privileges and so of creating duties and liabilities. It has been called a capacity of altering the sphere of rights or jural relations of

persons, using these terms to mean rights in the broader sense." [134]

Certain aspects of Pound's definition are reflected in the definition of power suggested in the eleventh edition of *Salmond on Jurisprudence*. Here, power is defined as an "ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons". [135]

What is clear from these definitions is that a legal power is a *capability* of some kind which enables 'alteration' or change to be effected by some means by the legal *persona* upon whom the power has been conferred. An understanding of the juridical nature of this legal capability must presumably lie in an understanding of the nature of the 'change' that may be effected by virtue of the power. In the light of the definitions given above, at *least* three situations of 'change' can be distinguished:

1. the alteration, by virtue of the power, of the incidence, scope, application or effect of *existing* legal rights or legal powers;

2. the extinction, by virtue of the power, of existing legal rights or legal powers;

3. the creation, by virtue of the power, of completely *new* legal rights or legal powers.

If, by definition, the legal power involves a situation in which 'alteration' or 'change' occurs, a temporal dimension must of necessity be introduced into the analytical frame of reference. For purposes of discussion, this temporal dimension entails that the investigator should note any significant differences between the legal situation obtaining at a given time, Ti, and that obtaining at a later time, Tii, in consequence of

the exercise of a legal power *at* time Tii. More specifically, the investigator's concern will be to compare the legal position of a given *individual* (e.g. legal *persona* A) at time Tii with that at time Ti. In this context, legal *persona* A may be either a *persona* of inherence or a *persona* of incidence, or indeed anyone else whose legal position is affected by the power exercise.

This requirement that a legal power be 'exercised' focuses attention upon a crucial feature of the legal power. It is that in a context of legal power, no legally recognised 'change' of any significance occurs *unless* the power in question is *'exercised'*. The exercise of the legal power induces a 'change' in the legal situation of specified legal *personae*. An unexercised legal power is merely a *potential* legal capacity, but it has no legal consequences *per se* in so far as it *remains* unexercised. If a power exercise occurs at time Tii, the investigator may attempt to identify the category of 'change' effected by virtue of the power exercise in terms of one or more of the three categories outlined above, or any other practicable category. We should note that these categories should be taken as inferring the entire range of Hohfeldian concepts (e.g. immunity, no-right, privilege, liberty- not, and so on) and not merely the two ultimate concepts of legal right *stricto sensu* and legal power. It follows, then, that the exercise of a legal power may, for example, cause a legal immunity to be extinguished or narrowed.

The ability of a power exercise to effectuate legal 'change' gives an indication of the purpose and utility of power in a legal context. From the point of view of law creation, it is inconceivable that a legislator or judge could foresee and make provision for every combination of circumstances considered worthy of regulation by legal means. Hence, the law confers legislative powers upon government ministers and

other officials. Furthermore, it is often expedient and desirable for a 'private individual' to confer upon one or more other individuals a power to act on his behalf and to perform certain functions defined by the power. The acts of the individual so empowered, if performed in the capacity of 'agent', may by a legal fiction be accorded legal recognition by being treated for legal purposes as the acts of the 'principal'.

Many of the law's aims can be facilitated or fulfilled by the device of investing an individual with a capacity to act, within a defined sphere of competence, to the effect of creating, altering or extinguishing legal rights and duties, and other legal states or conditions. In this way, the power-holder has discretion to 'respond' to situations which confront him and to regulate or otherwise make appropriate legal provision for those situations as they arise.

But as we briefly observed in chapter III, a power exercise cannot be accorded legal recognition unless it is *valid* in the sense that it is *intra vires* or 'conceptually within' the scope of the power as defined in the enabling legal norm. It follows that a purported exercise of power which is *ultra vires* would not be recognised for the purpose of giving effect to any 'change' in the legal situation of the parties affected by it or in relation to whom it is directed.

The notion that legal powers have a 'scope' suggests that in some sense they possess 'conceptual boundaries'. It is, of course, true of legal powers that there is granted to the power-holder a range or spectrum of possible 'power-acts' (i.e. a realm of possible exercises of power), all of which may qualify as valid in terms of the power-liability norm. Those 'power-acts' which lie *on* the 'conceptual boundary' may well require adjudication to determine whether they are valid or invalid in relation to the norm.

Returning to the previous discussion, then, if legal 'change' occurs at time Tii by reason of the exercise of a legal power, what can be said about the nature of that 'change'? In other words, what is entailed by the three categories of 'change' outlined earlier?

As expected, a prerequisite of the theoretical assessment of legal 'change' by virtue of a power exercise is the adoption (by the investigator) of the perspective of *Iudex*. To this end, an attempt is made to 'visualise' the legal effect of the power exercise which *ex hypothesi*, is treated as occurring at time Tii. Thus we hypothesise, according to the unique point of view of *Iudex*, the legal position of (say) legal *persona* B, such position being treated as having 'crystallised' at time Tii in consequence of a power exercise by (say) legal *persona* A. We must assume further that *but* for the power exercise at time Tii, the legal situation obtaining at time Ti would continue to obtain.

If the effect of the power exercise (i.e. a 'primary' legal power) is to alter, extinguish or create another legal power (i.e. a 'secondary' legal power) then strictly speaking this does not *per se* bring about any 'change' in the legal position of any legal *persona*. Certainly, if we take, for example, the case of a (primary) power exercise by which a new (secondary) legal power is created, this invests the power-holder only with a *potential* to effectuate 'change' upon the exercise of the conferred (*secondary*) power, presumably at a still later time (e.g. Tiii or Tn). A power-conferring act (in exercise of an existing power) is akin to a legislative act and there is in theory no limit to the length of the chain of authorisation by which legal power may be conferred upon an ultimate power-holder. It is useful to note that in his study of legal systems, Joseph Raz identifies the category of legal norms which confer legislative powers. He

designates these norms 'PL-norms':

> "[Norms conferring legislative powers, or PL-norms]... are characterized by the fact that the reaction to the performance of the norm-act is prescribed by other norms, but these do not exist when the PL-norm is created; they are created by the norm-acts of the PL-norm themselves." [136]

But if a (primary) legal power, exercised so as to create another (i.e. secondary) legal power (e.g. a delegation of ministerial functions), invests the (secondary) power-holder only with a *potentiality* to effectuate legal 'change', it follows that the converse will also be true. That is, the exercise of a (primary) legal power to the effect of *divesting* a power-holder of (secondary) legal power deprives the (sometime) power-holder of the potential to effectuate 'change' if he should purport to exercise the (secondary) power then divested.

More generally, the recognition that an unexercised legal power consists only in a *potentiality* to bring about legal 'change' is reflected in Hohfeld's analysis, in terms of which 'power' is correlated with 'liability'. 'Liability' in the Hohfeldian sense has connotations of 'likelihood' or 'probability', or, more specifically, of 'susceptibility-of-being-subjected-to' a power exercise. This susceptibility becomes an actuality at the moment of exercise of the power, for this is, in a sense, the moment of 'crystallisation' of the power.

Crucially, though, from the point of view of *Iudex*, 'crystallisation' in the sense envisaged here occurs at the moment when legal relationships *other than power-liability relationships* become fixed for legal purposes, for it is then and only then that someone (or some legal *persona*) becomes subject to a legal *duty* to act in a specified manner. Since, as we have already considered, an exercise of (primary) power which merely alters or extinguishes an existing (secondary) power, or creates a new

(secondary) power, affects only a potentiality to bring about legal 'change', the (secondary) legal power being a 'potentiality' in this sense, it cannot be said that in such a case anyone is directly obligated to act in a specified manner in consequence of the exercise of the (primary) power.

It is only when in consequence of the power exercise someone *is directly obligated* to act (or refrain from acting) by being subject to a legal duty in a question with a right-holder that court intervention to compel that act (or forbearance) is competent. Hence, the fixing of right-duty legal relationships is of greater significance than the 'fixing' of power-liability legal relationships since the latter must then be exercised (and even exercised again until the occurrence of an *ultimate* power exercise) in order to create the possibility of a 'settled' legal position in which one legal *persona* has a *duty* to act in a specified manner in a question with another legal *persona.*

In a context of legal power, then, the ultimate 'settled' legal situation is one in which, by reason of the exercise of a legal power, a right-duty legal relationship subsists between given legal *personae*, and one, moreover which is itself in a state of 'rest'. Indeed, for this reason, it might be arguable that of Kocourek's 'two ultimate jural relations', the right-duty jural relation is the 'more ultimate'(!)

As stated earlier, the exercise of a legal power may induce legal 'change' whereby the incidence, scope, application or effect of an *existing* legal right may be altered. Furthermore, an existing legal right may be extinguished, and a wholly new legal right created.

To make the discussion more concrete, let us imagine that an individual A has a legal

power to impose a duty to ø upon a class of individuals (defined by the norm) under given circumstances, n. Let us imagine further that upon the occurrence of the appropriate operative circumstances, A in his discretion considers that individual B (a member of the relevant class) should be obligated to ø, and accordingly exercises his power to that effect, by ordering him to ø. We might then say that A by virtue of the exercise of a legal power under relevant circumstances, n, has a right in a question with B that B shall ø, and B has a duty in a question with A that B shall ø. The performative utterance "you are under arrest", when in appropriate circumstances it is followed by an act of arrest is a more concrete rendition of this example. Here the arresting party exercises a power which confers upon him a right in terms of which the arrested party is duty-bound to submit himself to the 'process' of being arrested.

We should, of course, recognise that the exercise of a power often does not vest in the power-holder a direct right against a liability-bearer (or duty-bearer) that the latter should act in a specified manner, i.e. in a question with the power-holder. If, for example, the power-holder (individual A) has a legal power to alter the terms of a contractual relationship obtaining between individual B (a right-holder) and individual C (a duty-bearer), individual B would be a liability-bearer in a question with A notwithstanding that he is a right-holder in a question with C, and this would be true irrespective of whether A affected B's interests adversely or favourably.

It follows that C is also a liability-bearer in a question with A at the same time as he is a duty-bearer in a question with B, and this holds whether A affects C's interests adversely or favourably. However, if the legal power conferred upon A enables A (say) to extinguish B's legal right in a question with C, then clearly if A exercises his power to that effect, the right-duty relationship between B and C will no longer

subsist, although a consequential relationship of some kind may be established depending upon the terms of exercise by A of the legal power.

So in the light of the preceding discussion, what structural elements might be suggested for a (primary) power-liability legal norm? As with the structural elements of the (right-duty) social norm suggested in chapter III, the following suggested elements should not be treated as being exhaustive:

1. specification of operative facts: i.e. generally any facts which condition the operation of the power;

2. identification criteria of *personae* of inherence: i.e. those having a legal capability to act within a specified 'sphere of competence' to the effect of inducing 'change' in the legal position of other legal *personae* (and often of the *personae* of inherence also);

3. identification criteria of *personae* of incidence: i.e. those having a liability to have their legal position 'changed' by virtue of an exercise of legal power;

4. specification of conditions under which the power may be 'exercised': i.e. any requirements which relate to the manner of exercise of the power;

5. specification of a 'sphere of competence' either to:

   (a) alter the incidence, scope, application or effect of existing legal rights or existing (secondary) legal powers; or

(b) to extinguish existing legal rights or existing (secondary) legal powers; or

(c) to create completely new legal rights or new (secondary) legal powers.

Any (secondary) legal power, altered or created by virtue of the (primary) legal power would have the same structure as that specified above. Furthermore, any legal right so altered or created would have the same structure as that specified in previous discussion.

The complexity of this structure is such that it is not possible to suggest a conceptually neat typical abstract formulation of the power-liability legal norm, such as was suggested earlier for the right-duty legal norm. Nevertheless, cumbersome as it may be, the following is an attempt to incorporate all the elements set out above, and may hopefully serve to clarify the structure of the power-liability legal norm. Thus:

> Under circumstances n, A (a *persona* of inherence) [or a member of a class of *personae* possessing defined characteristics] has a legal power in a question with B (a *persona* of incidence) [or B and C... etc.], the 'exercise' of which [in manner x] may induce legal 'change' [within a specified 'sphere of competence'] in the legal position of B [etc., and in certain cases, of A also]. B [etc.] has/have a legal liability in a question with A to have his/their legal position so 'changed'.

While this may, for theoretical purposes, 'typify' a power-liability norm by expressing at length the elements of the relationship obtaining between a power-holder and a liability-bearer, in practice it would be rare to find all these elements together in a legal norm as in the abstract formulation suggested above. Many of these elements would normally be left unexpressed. For instance, section 4 of the Trusts (Scotland) Act 1921 [137] provides *inter alia*:

> "...In all trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust...To sell the trust estate or any part thereof... ."

In this example, although a class of *personae* of inherence is specified (trustees), there is no specification of any *personae* of incidence. This may well be because it is expedient *not* to specify any such *personae* as it might unduly limit the range of parties 'in a question with whom' the power may be exercised. For example, is the power in a given case exercisable by a trustee in a question with a beneficiary, or in a question with the truster or parties transacting with the trustee? The answer to this is probably that relationships between the trustee and *all* other 'interested parties' are in appropriate circumstances governed by the power-liability legal norm and by any rights or powers altered, created or extinguished in consequence of the exercise of that power. It would doubtless be impracticable to make specific reference to all of these *personae* of incidence (or any other such *personae*) in the power-liability norm.

As it happens, the mode of exercise of the power of sale conferred by section 4 of the Act is governed by section 6: "All powers of sale conferred on trustees by the trust deed or by virtue of this Act may be exercised either by public roup or private bargain... ." More often, the manner of exercise may be, by implication rather than express stipulation, at the discretion of the *persona* of inherence.

The description of the power act in section 4 ("to sell the trust estate") makes no reference to specific 'existing' rights or powers which are 'changed' by virtue of the exercise of the power. This 'sphere of competence' leaves considerable scope for the *persona* of inherence, at his discretion and by implication, to execute any of the power acts considered earlier. For example, by entering into a contract for the sale of any

part of the trust estate the trustee acts in a manner that is creative of completely new legal rights and duties.

Indeed, the 'sphere of competence' conferred by a power-liability legal norm may give the power-holder a capability to *select personae* of incidence normally out of a class of such *personae* liable to be affected by the exercise of power. The 'sphere of competence' may also endow the power-holder with discretion as to the manner of exercise of the power or as to the nature of the (operative) circumstances that induce an exercise of power. Thus, as a structural element, the 'sphere of competence' of a power may well subsume *other* structural elements.

This brief consideration of the nature and structure of the power-liability legal norm concludes discussion in this chapter of the two fundamental jural relations. One last point should however be made. It is that while it is arguable that the notions discussed earlier in this chapter of jural opposition (or jural contradiction) and of jural negativity apply, without any conceptual distortion, to the legal power, the notion of jural correlativity is more difficult to accommodate unless a distinction is drawn between 'exercised' and 'unexercised' legal powers. In the case of 'unexercised' legal powers, it would seem legally meaningless to postulate that an almost unfathomable number of potential liability-bearers *might* be under a legal liability in a given case to have their legal position altered by a power-holder *if* the power were 'exercised'. Why should this be treated as a 'relationship' at all, let alone one possessing legal significance?

On the other hand, an 'exercise' of legal power (especially an 'ultimate' one which in some way alters or affects a legal right-duty relationship) *can* meaningfully be said to

give rise to a correlative legal relationship. This is perhaps because the 'exercise' of the power 'crystallises' the power-liability relationship in such a way that a 'relationship' can be ascribed to identifiable parties.

With this in mind, it is appropriate now to consider a perspective from which, for theoretical purposes, jural relations may be treated as being ascribed. The final chapter, as we have previously mentioned, considers the perspective of the incumbent of the ultimate judicial office, *Iudex*, and hopefully, draws together the disparate elements of the preceding analysis.

VI

THE INCUMBENT OF THE ULTIMATE JUDICIAL OFFICE

VI.1 *Iudex* as Ideal Type

It will be recalled from earlier discussion that one of the consequences of Weber's epistemological stance against the neo-Kantians of the so-called Baden or Southwest German School was his adoption of the view that social science, as a *nomothetic*, as opposed to an idiographic, discipline, could validly evolve a methodology in which abstraction and generalisation, and the formation of sociological concepts (in particular, the ideal type), were a key to knowledge of the world of human actions and behaviours. As Weber observes in *Economy and Society*:

> "It has continually been assumed as obvious that the science of sociology seeks to formulate type concepts and generalized uniformities of empirical process. This distinguishes it from history, which is oriented to the causal analysis and explanation of individual actions, structures, and personalities possessing cultural significance." [1]

Critics of Weber have argued that his stance in relation to the neo-Kantians (the 'protagonists' of the School being Wilhelm Windelband, Heinrich Rickert and Emil Lask) was neither unproblematic nor free of contradiction. One commentator has concluded that Weber failed to grasp some of Rickert's most important arguments in *Die Grenzen der naturwissenschaftlichen Begriffsbildung (The Limits of Concept Formation in Natural Science* - Rickert's major work). [2] It might therefore be thought, in the light of the evident significance which Weber accorded to Rickert's (among others') work, that any valid accusation of 'aberration' on Weber's part might in some sense undermine the Weberian scholar's confidence in Weber's epistemological and methodological teachings. How seriously Weber's teachings may be thought to be thus undermined, of course, must depend on the weight to be accorded to criticisms

directed against them, but it seems to remain perversely true that for as long as there is controversy and debate as to the import of Weber's writings, the more reassurance there is that those writings will achieve an authority which surpasses even that which they presently enjoy.

Against this background, we should recognise that the brief account of Weber's methodological teachings given in chapter II serves only as an elementary 'expository' presentation of the main features of Weberian sociology, but sufficient nonetheless to enable Weber's device of the ideal type to be recognised as the culmination of various strands of Weberian sociology. We should at the same time recognise in the ideal type of the incumbent of the ultimate judicial office, *Iudex*, the culmination of various strands of the preceding analysis.

Starting with the ideal type as heuristic device, we may recall that for Weber a scientific reproduction of the reality of the social world is a practical, if not a logical, impossibility. Hence the investigator necessarily utilises concepts which embrace only parts of the reality considered to be of significance. [3] We may further recall that Weber's doctrine of value-relevance (or *Wertbeziehung*), which derived from Rickert, entails that values which contain criteria of significance serve the investigator as a point of reference for the *selection* of phenomena from the inexhaustible plurality of possible objects of cognition.

Again, we may remember that in Weber's view the values which govern the choice of phenomena of interest and guide the investigator in the formulation of generalising principles that apply to the subject matter of his investigation are those adopted by the investigator himself. According to this view, the investigator is in the best position to

assess significance and importance, influenced as he is by the nature of the problems under investigation, the nature of the subject matter, and the particular questions requiring solution.

The ideal type, then, as we may recall from previous discussion, articulates similarities found in numerous individual cases and subsumes these under the generalising terms of the construct. As Weber remarked, the ideal type is formed by the synthesis of a great many discrete concrete individual phenomena which are arranged according to "one-sidedly emphasized viewpoints" into a unified analytical construct. [4]

An ideal type may incorporate a theoretically conceived pure type of subjective meaning, and one, moreover, which is attributable to an hypothetical actor in a given type of action. [5] As we noted earlier, the actors are 'hypothetical' because the theoretically conceived subjective meaning does not correspond to any specific actor but incorporates similarities found in a plurality of typical cases. This is of course the essence of ideal-typification. To concentrate on the *unique* attributes of a *specific* actor would clearly be a denial of the rationale of type formulation through generalisation and abstraction.

As we might expect, it is at the level of subjective meaning that the ideal-type construct assumes particular significance. This is especially true of the formulation of a judicial ideal type. In the present context, the narrower function of the type is as a vehicle through which to reach an understanding of the ideative device of the jural relation. Furthermore, the ideality of the *rational* ideal type serves as a theoretical justification for placing emphasis upon those elements of judicial social action which achieve 'self-realisation'. Such action is 'successful' according to the criteria of

'success' which the actors themselves define for the action in question.

The notion of subjective meaning and its relationship to the device of the jural relation was examined in detail earlier, first in terms of a Parsonian chess game paradigm and then in terms of a rudimentary model of judicial action, based on an analogy with the much simplified situation of an umpire. The simplified model provided us with a fundamental starting point for the incorporation of ideal-typical subjective meaning into a type construct of *Iudex*. Our first assumption is of an hypothetical judge (treated as 'ego') who orients his official action partly by reference to the evaluative meaning which he ascribes to perceived states of 'fact' that are capable of attribution to others (treated as 'alter'). Generally speaking the 'others' in question will normally be litigants. This ascribed meaning is the 'legal meaning' of the states of 'fact' in question, that is, the meaning which such states of 'fact' bear by reference to legal norms.

One aspect of this meaning-ascribing process is the activity of conceiving of the normative position of litigants in relational terms. For present purposes we may further assume that *Iudex* conceives of the relative position of one litigant with respect to another in terms of the action which one litigant ought to have performed or ought now to perform in relation to another litigant. Furthermore, these conceptual acts form a basis for the meaningful orientation of judicial action.

But the ideal-typical subjective meaning associated with judicial action involves more than conceiving of the legal position of litigants or others in relational terms. This is only *part* of the specialised activity known as *adjudication*. This activity involves making judgments about human action or events attributed to human intervention.

Judges do not, though they often may, simply and mechanically declare that one litigant stands in a specified relationship with respect to another litigant. If that were the case, there would presumably be no need for society to create legal institutions such as courts, tribunals, arbiters or umpires. It is because adjudication utilises an unique array of conceptual techniques that the act of conceiving of jural relations between legal *personae* cannot be treated as simply a mechanical conceptual act.

The fact of the matter is that even in the case of relatively straightforward legal disputes (so-called 'hard cases' aside [6]) the act of conceiving of jural relations as obtaining between legal *personae* is as much an act *constitutive* of those relations as it is an act *declaratory* of them. One reason for this is that by virtue of adjective legal norms a litigant's substantive claim against another litigant is 'transformed' into a claim against the court for a remedy which may involve performance of a different kind from that prescribed by substantive norms. For example, an obligation *ad factum praestandum* may be 'converted into' an obligation to pay damages. Furthermore, a court may validly and quite properly place a nuance of meaning on substantive norms which litigants had not contemplated at any prior stage in the proceedings even though until this stage the litigants may have oriented their action by reference to these norms. The substantive claims of litigants (as they conceive them) are seldom left 'intact' following an adjudication because compromises must be made, interests must be weighed and balanced, and competing interpretations of legal norms and of factual occurrences to which legal meaning is ascribed must be resolved in favour of one or other party. Moreover, the court's power to classify or re-classify legally relevant 'facts' for legal purposes by reference to legal norms may also lead to the constitution anew of legal relationships between litigating parties.

For these reasons an examination of the process of adjudication is indispensable to the task of comprehending the jural relation. It seems necessary, then, on the assumption that adjudication is not by any means an arbitrary, nor even largely a discretionary, process to identify at least some of the guiding principles which inform this activity.

Fuller [7], MacCormick [8] and Dworkin [9] have all stressed the importance of the adjudicatory process in human affairs. As Fuller says,

> "It is customary to think of adjudication as a means of settling disputes or controversies. This is, of course, its most obvious aspect. The normal occasion for a resort to adjudication is when parties are at odds with one another, often to such a degree that a breach of social order is threatened.
>
> More fundamentally, however, adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated." [10]

Since the conceptual act of perceiving of jural relations between litigating parties is expressed in the process of adjudication, this process is central to our formulation of the ideal-type construct *Iudex*, and is dealt with later in this chapter.

Another requirement for the construction of an ideal type as Weber conceives it is the incorporation of *causal* relationships within the type. It will doubtless be recalled that Weber posited a twofold requirement for an 'adequate' interpretation or typification of a given mode of social action: causal adequacy and adequacy on the level of meaning. [11]

These requirements must be presumed to apply in the formulation of an ideal-type construct of *any* mode of social action, including judicial action. As mentioned previously, in order to accord with a strict reading of Weber's methodological position, it appears necessary for the investigator to draw upon data consisting of 'concrete

individual phenomena' and to make generalisations from these data for inclusion in the construct. Furthermore, Weber's theoretical stance requires that typical sequences of causally linked 'events', determined from observation of one 'event', overt or subjective, being followed or accompanied by another 'event', [12] should be cast in terms of probability.

In formulating an ideal-type construct of the ultimate judge, *Iudex*, in order to perceive the jural relation from that perspective, the requirement of causal adequacy is to an extent satisfied in terms of the 'causal' dimension of Weber's sociological definition of *legal right*, according to which there exists a 'chance' or 'probability' that the aid of a 'coercive apparatus' may be invoked in support of a right-holder's ideal or material interests. [13] This probability or chance resides in the fact that as part of the so-called Weberian 'coercive apparatus' of the legal order, a judicial organ can normally be relied upon (in a causal sense) to respond to a valid request on the part of the right-holder for intervention on his behalf. Following such a 'request' the court can normally be expected (again in a causal sense) to interpret legal norms and also legally relevant 'facts' established in evidence, and to 'apply' those norms to the 'facts' so established. Following this, 'judgment' is given accordingly. The Weberian causal 'probability' therefore refers to that of a legal order being mobilised to take action in the manner described.

As we may recall, a Weberian 'probability' also resides in the power element of the jural relation in terms of which, in a context of 'domination' or *'Herrschaft'*, there exists a probability or chance that a command (e.g. of a court) with a given specific content will be obeyed by a given group of persons (e.g. litigants or enforcement personnel, or both). [14]

The reiterative remarks on the nature of the Weberian ideal type in this chapter have presupposed the crucial element of *rationality*. As we may recall, according to Weber, the ideal type attempts to hypothesise what course a given type of action would take *if* it were strictly rational, unaffected by errors and emotional factors. [15] The rational elements of the ideal type were discussed in chapter II but no attempt was made to consider Weber's application of the notion of rationality in the legal context. Anthony T. Kronman's remarks are useful here as he undertakes an examination of Weber's various applications of the term 'rationality' in reference to characteristics of law and legal thinking. [16]

In Kronman's view, the term may, depending on context, refer to any one of several related characteristics of law and legal thinking. These are briefly summarised below to assist us in identifying the criteria of rationality that may inform a rational judicial ideal-type construct. On this basis, *Iudex* should be looked upon as functioning in a legal system to which the term 'rational' may be applied. We should be aware, however, that these criteria may not necessarily be found to exist together in any specific legal system, although it is possible in theory that they might.

First, according to Kronman, Weber uses the term 'rational' to denote the state of being governed by rules or principles:

> "For a legal order to be rational in this sense, it is only necessary that the rights and obligations of individuals be determined by principles having some degree of generality and that the principles in question be identifiable." [17]

In Kronman's view if a legal order approximates to a "collection of idiosyncratic judgments or decrees" incapable of subsumption under one or more general rules, it is to that extent less 'rational'. The system's predisposition towards the determination of

issues by reference to legal norms must entail that a judge occupying office in a legal order which is 'rational' in this sense would apply pre-existing laws or general principles in the disposition of all or most of the cases before him. This would presumably distinguish such a 'system-rational' judge from one possessing discretionary powers to dispose of cases according, perhaps to his own sense of 'propriety'.

According to Kronman, Weber also uses the term 'rational' to designate the systematic quality of a legal order. Kronman calls this 'system-building'. According to Kronman's reading of Weber, this involves,

> "...the construction of a comprehensive, gapless and internally consistent body of rules deliberately arranged so as to give every actual or conceivable event a determinate legal meaning." [18]

We have already seen that it was Weber's belief that this type of 'systematization' of the legal order found its highest expression in five postulates derived from the Pandectists' Civil Law. [19]

The first of these postulates, as we may recall, is that every concrete legal decision is an 'application' of an abstract legal proposition to a concrete 'fact situation'. [20] The fifth postulate is that every social action of human beings must always be visualised as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof. [21] Taking these two postulates together, we may conclude, as Kronman does, that any human action or any event or state of affairs, which is in some sense legally significant, should be distinguished from one which lacks legal significance altogether. Those actions, events or states of affairs which *have* legal significance should then be "assigned a specific juristic meaning through the construction of legal rules or

propositions". [22]

The conceptual act of ascribing legal meaning to human actions, or to events or states of affairs which may be attributable to human intervention, is an inherently rational process according to this view and certainly justifies the incorporation of the meaning-ascribing function into a rational ideal type of *Iudex*. We should note that Weber makes explicit reference to the process of ascribing legal meaning to human action (or the 'institutionalisation' of 'facts' in the sense of the preceding analysis) in the context of his discussion of rationality, and particularly, of 'systematization':

> "The specifically modern form of systematization, which developed out of Roman law, has its point of departure in the logical analysis of the meaning of the legal propositions as well as of the social actions." [23]

Presumably, in this context Weber does not refer to 'social actions' in the limiting sense of 'social action' as defined in Part I of *Economy and Society* [24] involving in some sense the *meaningful* orientation of action. We may recall that 'social action' so defined also involves the individual in taking 'account' of the 'behaviour of others'. Much human action may, of course, be legally meaningful while falling outside Weber's definition of social action.

The third and fourth senses in which Weber uses the term 'rational' are briefly dealt with by Kronman. The third sense refers to the method of legal analysis based upon the 'abstract interpretation of meaning'. [25] Now although Weber fails to elaborate upon this, it is probable that he is referring here to methods of interpretation of legal propositions or of states of 'fact' which are independent of the perceived factual content of legally relevant issues presented to the court, but depend on attributions of meaning through purely intellectual ratiocination, for example, deduction, induction,

analogical reasoning, inference, and so on.

Weber's fourth sense of 'rationality' presupposes a context of primitive legal institutions. Here 'rationality' refers to techniques of dispute resolution which are subject to 'control by the intellect' in contrast to those which merely employ 'magical means'. [26] For Weber the use of magic is an abnegation of earthly control to a supernatural agency and is thus a denial of the 'rational' as he conceives it.

Weber's various usages of the term 'rational' in reference to legal phenomena provide some guidance for the selection of criteria of rationality for inclusion in a judicial ideal type. But rationality is a 'relative' concept. If, as Harold Fallding argues, rationality is one of the conditions of 'successful' social action in a context of action that is capable of achieving 'self-realisation', [27] then the criteria of rationality to which an investigator might look for guidance are those set by the actors themselves. The measuring rod of what the actor regards as 'successful' or 'unsuccessful' may be identified then articulated by the investigator. If rationality is relative to the action under investigation, it would be pointless for the investigator to postulate criteria of rationality which are inappropriate to the legal order under investigation. Thus it would be meaningless to advance a model of a developed western legal order as an ideal-typical standard of measurement of legal procedures operative in a system of tribal law. In the present context, we should assume that *Iudex* as a jurisprudential model is more closely associated with Anglo-American jurisprudence and legal thought than any other system of jurisprudential thought.

In the remainder of this chapter, we will attempt to outline what are considered to be the 'ideal-typical' components of the social action associated with the judicial office

by ascribing such action to a fictive 'ultimate' judge. This will be the beginnings of the ideal type *Iudex*.

We will deal firstly with the sociological concept of the 'office' and then give consideration to the activity of adjudication. Thereafter we will consider the notion of 'ultimacy' in relation to the judicial office, and finally we will attempt to draw conclusions from the ideal type *Iudex* as characterised in this chapter so far as throwing light on the concept of the jural relation.

VI.2 The Concept of the 'Office'

The 'typical' judicial 'functionary' of a western legal system, for example, a legal system in the Anglo-American mould, occupies a position to which there are attached obligations, more commonly referred to as 'duties'. These determine the tasks, actions and behaviours associated with the position which the occupant of the position is expected (by others) to perform and which he to a greater or lesser extent may himself feel bound to perform. This position is more usually called an 'office', and this is reflected in the chosen designation of the hypothetical heuristic construct *Iudex* as the incumbent of the ultimate judicial *office*. As mentioned earlier, adjudication and ultimacy will be discussed later in this chapter, but for the moment it is the concept of the 'office' that concerns us.

Weber does not actually *define* the concept of 'office', but he gives what has come to be accepted as a classical account of its main features in the context of his ideal typification of bureaucracy: more specifically in his ideal type of legal authority employing a bureaucratic administrative staff. [28]

It is clear from Weber's analysis that 'office' (as indicated in our introductory remarks) involves a position, status or institutionalised role, [29] to which expected performances or functions attach which are in some sense separate or detached from the person of the incumbent of the office. These performances or functions are generally considered to subsist notwithstanding any change of incumbent, and the 'identity' which attaches to the office *as such* (e.g. the office of President) is considered to be conceptually independent of the identity as such of the incumbent for the time being. The American sociologist Robert Merton remarks illuminatingly on the nature of the formal organization and the place of the office as a component of the organization:

> "A formal, rationally organized social structure involves clearly defined patterns of activity in which, ideally, every series of actions is functionally related to the purposes of the organization. In such an organization there is integrated a series of offices, of hierarchized statuses, in which inhere a number of obligations and privileges closely defined by limited and specific rules. Each of these offices contains an area of imputed competence and responsibility. Authority, the power of control which derives from an acknowledged status, inheres in the office and not in the particular person who performs the official role. Official action ordinarily occurs within the framework of preexisting rules of the organization." [30]

Weber recognises the clear division between the 'functionary' (or 'official') in his official capacity and in his individual capacity. For Weber, the typical person in authority occupying an office is subject to an impersonal order towards which his actions are oriented. This is true, according to Weber, not only for persons exercising legal authority but "for the elected president of a state". [31] According to Weber, anyone who obeys such a person in authority does not owe obedience to him as an individual, but rather, owes obedience to the impersonal order. [32] The separation of the official's individual and official capacities is also manifested (in terms of Weber's pure type) in the complete separation of the property belonging to the organization, which is controlled within the sphere of office, and the personal property of the

official. [33]

Furthermore, the incumbent of an office cannot 'appropriate' his official position, that is, it does not 'vest' in him personally and is not transferable by him to whomever he should designate, although an official may often delegate authority. Thus, as Weber says,

> "In the rational type case, there is also a complete absence of appropriation of his official position by the incumbent. Where 'rights' to an office exist, as in the case of judges, and recently of an increasing proportion of officials and even of workers, they do not normally serve the purpose of appropriation by the official, but of securing the purely objective and independent character of the conduct of the office so that it is oriented only to the relevant norms." [34]

Because specialised training is usually necessary to qualify an individual for occupancy of an official position, [35] this must restrict the candidature for a position to a circle of persons who hold the necessary qualifications. But *within* this circle, a principle of perpetual replaceability may apply such that one position-occupant can always be replaced by another holding similar qualifications. This means that although the possession by a candidate of unique attributes may often be desirable, it may not be a prerequisite of official tenure.

A further characteristic of rational legal authority is the conferment on officials of what Weber calls a "specified sphere of competence". According to Weber, the obligation to obey an official applies only within the sphere of the rationally delimited authority which has been conferred upon the official. [36] This sphere of competence involves:

> "...(a) a sphere of obligations to perform functions which has been marked off as part of a systematic division of labour. (b) The provision of the incumbent with the necessary authority to carry out these functions. (c) That the necessary

means of compulsion are clearly defined and their use is subject to definite conditions". [37]

The three characteristics of the office discussed above, i.e. separation of official from individual identity, 'perpetual replaceability', and conferment of a specified sphere of competence, as we might expect, have implications in the judicial context for the concept of the jural relation. The remarks to follow should be considered in the light of our previous claim that the jural relation obtaining between litigants may be perceived as a partial determinant of the relationship obtaining between a judge (*qua* official) and litigants, in terms of establishing to a greater or lesser extent the content of any judgment which the judge may render in a question with a given litigant.

Since the office establishes the action entailed in the execution of the office and sharply differentiates between the official in his individual and official capacities, the judge as 'judicial functionary' must be looked upon in the ideal case as one whose conception of the jural relation obtaining in a given instance is moulded and shaped by requirements imposed by the judicial office, and not by considerations personal to the judge as an individual. In the ideal case, then, the judge adopts the 'official line' and does not engage in unbridled creativity. This is not, of course, to deny the element of judicial discretion which is not necessarily inconsistent with the adoption by a judge of an 'official line'.

The principles of identity separation and 'perpetual replaceability' add weight to the view that the ideal holder of judicial office by, in a sense, transcending the uniqueness of his own individuality, establishes a pattern of judicial activity which is stable and not given to arbitrariness or caprice. What this means is that unless an exercise of judicial discretion is called for in a given case, the personal identity of the judge who decides the case will make little practical difference to the outcome. Furthermore, the criteria for selection of candidates for judicial office must ensure uniformity among

those holding judicial office by eliminating those who would be unlikely to discharge the duties of the office in accordance with the objective or inter-subjectively acknowledged requirements of the office.

The further requirement that matters within the scope of the official function be reduced to writing, as Weber points out, [38] would result in greater stability of official action within the judicial office. Commitment of official acts to writing would also increase awareness of the need to achieve consistency in judicial acts and to minimise contradictory decision-making.

The jural relation is thus in many ways not an ideative device that 'emanates' from an individual in the accepted sense. It is, rather, an 'emanation' from, or the product of, an essentially synthetic *persona*: the holder of judicial 'office'. This *persona* conceives the jural relation in terms of officially posited criteria and filters out extrinsic criteria. Thus, 'idiosyncrasies' of the judge as an individual may well be kept in check.

Furthermore, the fact that the judge must act within a 'sphere of competence' means that many of his official acts will be 'duty-acts' in the sense of acts complying with norms determining what he may or may not do.

The conclusion to be drawn from this brief discussion is that the typical judge occupying an office is largely an instrument of the impersonal order of which he is part. Within this order, each member exerts a constraining influence upon every other member. Furthermore, as it happens, the judicial office is a public office. Hence the typical holder of judicial office is to a greater or lesser extent subject to political constraints and to the vagaries of public opinion.

VI.3 Adjudication

As a species of social action, the activity of 'judging' human behaviour, that of 'adjudication', involves, in Weberian terms, 'taking account of' the behaviour of others in a quite unique way. The normal context in which recourse to the process of adjudication may be appropriate is, as Fuller implies, [39] a factual situation in which at least two parties are in dispute relative to a particular issue and at least one of the parties wishes the dispute to be resolved by means of the rendering by a designated person e.g. a judge or arbiter, or body of persons, of a 'decision' or 'judgment' which disposes, or purports to dispose, of the dispute, hopefully to the satisfaction of the disputants. In this context, 'dispute' may also denote a situation in which the exaction of a criminal penalty may be appropriate. In that case, the 'disputants' are, on the one hand, a criminal suspect, and on the other hand, a private or public prosecutor.

We may recall, however, that Fuller believes that the adjudicatory function involves, at a more fundamental level, the ordering and governance of "the relations of men to one another". [40] Now it might be objected that human social relations may be governed and regulated without the *necessary* intervention of an adjudicatory mechanism. But this is not Fuller's point. What he appears to be saying is that in so far as adjudication *is* employed in human society as a means of settling disputes, it fulfils this function by making use of a technique in which human relationships are conceived in a certain way. That is, they are conceived as jural relations: social relationships whose content is defined by reference to legal norms or to norms which possess 'validity' [41] for purposes of a given judicial decision, and in terms of which

one litigant or other legal *persona* had, now has, or will have a duty to act in a certain manner in a question with another litigant or other legal *persona.* This simplifying account of adjudication is perhaps the essence of what is for present purposes the central feature of adjudication, that is, the technique, which is by no means exclusive to adjudication, of conceiving of jural relations as obtaining between parties to a dispute. If jural relations are an indispensable component of the activity of 'judging' human behaviour, or 'institutional facts', i.e. 'facts' attributable to human behaviour, it follows that by understanding the ways in which the adjudicatory process both incorporates and creates jural relations, we may discover how this process therefore also fashions and moulds the jural relation.

In this chapter we can attempt only the briefest possible consideration of the adjudicatory process, consistent only with our aim to understand that process so far as shedding light upon the ideative device of the jural relation. To that end, the adjudicatory process, according to the most fundamental analysis, will be treated as involving *three* related processes:

1. the ascertainment of *'facts'* considered relevant in the context of the adjudication;

2. the ascertainment by processes of law-finding or law-creation of legal *norms* considered relevant in the context of the adjudication;

3. the *'application'* of the legal norms so ascertained to the 'facts' so ascertained.

The first two activities, ascertainment of 'facts' and of legal norms, are essential

preliminaries to the third activity: the 'application' of legal norms to 'facts'. We considered aspects of this third activity earlier in the context of our discussion of legal meaning. We may recall that the legal meaning of a human act or an event or 'fact' is the meaning which it bears by reference to legal norms specifically applied towards its interpretation. Recalling our discussion of Kelsen, [42] the legal norm functions as a 'scheme of interpretation' of acts, events or 'facts'. This meaning, as we considered earlier, may form part of the subjective meaning of judicial action. More specifically, in the present context, legal meaning may form part of the subjective meaning of the action of *Iudex*, in terms of which *Iudex* orients his judicial action to the effect of granting or issuing a judgment, decree, sentence or other court order.

Hence, the third activity mentioned above is, in a sense, the 'end' of adjudication. This activity involves the determination of the content of jural relations obtaining between litigants and any other interested parties. Adjudication is thus concerned with the ascertainment for legal purposes of the content of any rights, duties, powers, liabilities or other jural relations conceived, in the present analysis by *Iudex*, between litigants and other interested parties. On being so conceived, such jural relations determine for *Iudex* an appropriate course of action to take in the discharge of his official functions.

We will now consider in turn each of the three activities associated with the adjudicatory process outlined above.

Adjudication, then, is firstly a process concerned with the ascertainment or 'finding', and the interpretation, of 'facts' considered relevant to the subject matter of the adjudication. According to Paton's *A Textbook of Jurisprudence*, [43]

> "The task of the court in almost all actual litigation is to ascertain the issues in dispute between the parties and to determine those issues usually in favour of one or more of the parties to them and against the others." [44]

The determination of 'facts' (in the legal sense) is an integral part of this activity:

> "In the course of ascertaining and determining those issues the court must make such findings as to matters of fact as are relevant to the issues and as are permitted by the evidence adduced by the parties ..." [45]

Hohfeld categorises facts as either 'operative' or 'evidential'. [46] We considered 'operative facts' in chapter IV, [47] and should perhaps state here that for present purposes 'operative facts' are considered to be legally relevant 'facts' whose occurrence 'triggers' the operation of a legal norm in the sense that there exist grounds for the ascription by *Iudex* of a jural relation to appropriate legal *personae*. [48]

On the other hand 'evidential facts' are defined by Hohfeld as facts which, on being ascertained, afford some logical basis for inferring some other fact (e.g. an 'operative fact'). [49] More concretely it is probably safe to say that 'evidential facts' are legally relevant 'facts' other than 'operative facts', which must be proved or ascertained in order to satisfy legal requirements. For example let us assume a legal norm of the form: Under circumstances n, persons categorised as X shall have a right... . Here, the 'operative facts' which must be established in order to substantiate the right are circumstances n, while the 'evidential facts' which must be established are categorisation conditions X.

Interestingly, in a footnote Hohfeld lists four possible modes of *ascertainment* of facts, both 'operative' and 'evidential':

> "1. By judicial admissions (what is not disputed); 2. By judicial notice, or knowledge (what is known or easily knowable); 3. By judicial perception (what is ascertained directly through the senses; cf. 'real evidence'); 4. By judicial inference (what is ascertained by reasoning from facts already ascertained by

one or more of the four methods here outlined)." [50]

The problem of *selection* or *choice* of 'facts' out of the limitless flux of everyday life is, from a practical point of view, at least partly solved by a test of *relevancy* of legal norms considered to have a bearing upon the issues before the court, and by a test of relevancy *and materiality* of facts. The latter test involves the rational evaluation of facts by reference to any value criteria considered reasonable or appropriate in the circumstances. This process is designed to filter out those facts considered relatively unimportant or trivial and to give precedence to those facts considered weighty or material. This point is expressed thus in Paton's *Textbook*:

> "Just as the relevancy of a particular fact is determined by the hypothesis which the scientist is investigating, so out of the tangled web of human affairs the law must decide what facts are material to the issue. ...In one sense we do not know what principles of law are applicable until we know the material facts, but what facts are material in a given claim is determined by the framework of principles we call the law. To prove every fact would be futile, and the lawyer is guided in his proof by the particular rules that he thinks are applicable." [51]

Kelsen draws our attention to a further peculiarity of 'facts' in the context of adjudication. For according to Kelsen there is no 'fact in itself' in the world of law. 'Facts' are not 'absolute' in adjudication. In Kelsen's view, "...there are only facts ascertained by a competent organ in a procedure prescribed by law". [52] Kelsen does not, of course, deny that legal procedures may attempt so far as possible to apprehend the 'real facts' which confront a court in a given case. The point Kelsen is making is, rather, that generally speaking the 'facts' ascertained by a court in accordance with evidence-adducing legal procedures are treated as *conclusive* for all legal purposes. Indeed this would still be so if there were no (or only partial) correspondence between the 'facts' so adduced and 'actuality'. Futhermore, this would hold in cases where the judge is procedurally excluded from the process of determining the truth or falsity of 'facts' established in evidence, as in the case of jury trials or where questions are submitted for determination by a court of appeal.

Where a 'division of labour' such as this does exist within the legal system, the judgment of an hypothetical *Iudex* (which is presumed to be the 'ultimate' judgment of the system) is no less *his* judgment because others at a lower level in the hierarchy have made decisions (e.g. as to truth of 'facts') which may be treated for legal purposes as conclusive both for that and for superior levels in the hierarchy.

Thus, recognition must be given in hypothesising the judgment of a theoretically conceived ideal-type construct *Iudex* to the procedural reality of a legal hierarchy in which 'ultimate' judgments may themselves be composites or syntheses of *many* decisions, or 'holdings' of law or 'fact', taken at different levels in the adjudication process. This procedural reality necessarily calls for special legal rules. As A.M. Honoré says:

> "The notions of a *decision* and a *reason for a decision* apply primarily to individuals. When they are applied to a group, such as a court consisting of several judges, artificial rules are needed to determine what shall count as a decision or reason of the group." [53]

Thus, on the one hand the epistemological assumptions of ideal type construction in a Weberian version of social science incline towards conceiving theoretical constructs (individuals or modes of behaviour) which need not correspond to the actuality of a particular individual or of his behaviour in a given case. These constructs, as Weber claims, consist of a synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena. [54] But, on the other hand, having recognised the degree of abstraction demanded by the Weberian ideal type, we should also recognise that judges themselves may 'act' in a manner which *according to the legal system's own artificial rules* is *itself* a synthesis of the 'action' (decisions, judgments, 'holdings' and so on) of numerous actors within the adjudicatory process.

This must be reflected in the theoretical entity *Iudex*.

We may therefore conclude that for purposes of theory 'facts' in the legal sense as conceived by *Iudex* (or theoretically ascribed to *Iudex*) are 'facts' as determined in accordance with legal procedures which prescribe methods for the selection and 'filtration', and interpretation or reinterpretation of 'actual facts', whatever they may be. As the American Legal Realist Jerome Frank, advocating a doctrine of 'fact-skepticism', has observed, evidence adduced by a court may be oral and conflicting, witnesses are humanly fallible and may make mistakes in the observation of what they saw and heard. Indeed, trial judges and jurors may have prejudices, both conscious and unconscious, for or against witnesses or parties to the adjudication. These factors may well colour the court's perception of the 'actual facts'. [55]

Turning now to consider the second activity associated with adjudication, we find that the task of ascertaining legal *norms* considered relevant to an adjudication is no less important than that of ascertaining 'facts' considered relevant in that context. Indeed, in a given case involving the 'application' of legal norms to 'facts' it is not at all clear whether the process of ascertaining relevant 'facts' logically precedes the process of ascertaining relevant legal norms, or *vice versa*, since both processes are often inextricable.

This point has already been drawn to our attention in a passage quoted from Paton's *Textbook*. As Paton says,"...we do not know what principles of law are applicable until we know the material facts, but what facts are material in a given claim is determined by the framework of principles we call the law." [56]

Although the applicability of appropriate legal norms is in some sense guided by the

perceived occurrence and 'materiality' of 'facts', generally speaking analytical jurisprudence has tended to treat the notion of *legal validity* as having a significant bearing upon the process of ascertaining legal norms considered relevant to an adjudication in a given case. For present purposes, legal validity may be taken to refer to that 'quality' (e.g. 'origin') which attaches, or is ascribed, to an individual legal norm and which determines more or less conclusively whether that norm is to be treated as one by reference to which the legal personnel (including *Iudex*) of a given legal system may orient and evaluate their official action and evaluate the behaviour of 'others' such as litigants with a view to the orientation of their official action.

H.L.A. Hart's notion of the *rule of recognition*, postulated in *The Concept of Law*, is a criterion of legal validity in the sense of the present discussion. However, Hart does not attempt an elaborate delimitation of the rule of recognition and indeed it could be said that Hart rather under-analyses this notion in *The Concept of Law*. In the context of a discussion of 'validity' and 'existence' of legal rules, Hart makes the following observation which sheds some light on the notion of the rule of recognition.

> "Where, on the other hand, as in a mature legal system, we have a system of rules which includes a rule of recognition so that the status of a rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition, this brings with it a new application of the word 'exist'". [57]

Hart furthermore asserts that the rule of recognition exists "as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria". [58] Now Hart's commentators have persuasively demonstrated that the concept of the rule of recognition is by no means unproblematic on the level of analysis. Marcus Singer in particular has found considerable difficulty in accepting the notion that the rule of recognition can 'be' a practice.

> "How can a *rule* be a *practice*? I should have thought that a practice would be defined by rules, and find it odd that a rule should be *identified* with a practice. For this seems to me to imply that it is not a rule at all, in any accepted sense. Can such a 'rule' (practice) be broken? violated? formulated?" [59]

If there is indeed a judicial practice in which recognition criteria are customarily or constitutionally invoked, it must surely follow that norms of some kind or another *govern* this practice rather than actually constitute the practice. After all, is not a practice, at least in one sense, a course of action followed or adhered to by virtue of norms of usage or custom? By this account, a practice would have to be treated as being *governed by* norms and could not, without considerable conceptual distortion, be *equated with* those norms. On the other hand, it is often difficult to separate the *de facto* component of a practice from the *de jure* component, and in conceptual terms 'practice' may well comprehend the *norms* which govern the *de facto* component and which are quite simply inextricably enmeshed with that component.

But even if the rule of recognition is expressed in or governs the judicial practice to which Hart refers there is still an even more intractable problem for Hart's *wider* analytical stance. For according to Hart a legal system also contains a rule of adjudication which authorises or regulates all official judicial action. How would the rule of adjudication be distinguished from the rule of recognition if each rule in some way defines judicial practices or activities? If judges are duty-bound to apply 'valid law' by virtue of a rule of adjudication, does this not suggest that the rule of adjudication itself contains recognition or identification criteria? If so, would it not then follow that a rule of adjudication must in some respect subsume a rule of recognition? If *that* in turn is correct, could it not be convincingly maintained that the rule of recognition is *redundant* in Hart's scheme, and that if criteria of validity exist at all (which is not disputed) they reside within a rule of *adjudication*?

Quite apart from these difficulties, the normativity of the rule of recognition seems to be questionable and indeed this is arguably borne out by Hart's own analysis. For Hart gives as an example of an elementary rule of recognition the following proposition: "What the Queen in Parliament enacts *is* law". [60] Now this proposition is strikingly non-deontic and certainly possesses all the hallmarks of a proposition of *fact*, albeit one of 'institutional fact'. It is quite simply a mystery that recognition criteria of the type advocated by Hart should be thought to assume the *form* of a rule at all. A criterion of what *is* a valid law does not seem to fit at all comfortably within the notion of a norm (or for that matter a 'rule' in the Hartian sense).

Admittedly we cannot doubt the need to accept that recognition criteria of *some* sort have a place in legal thinking in general and judicial thinking in particular. There must be some means whereby legal personnel and others may conclusively identify what is to count as a valid norm of a given legal system for purposes of mobilisation of the coercive apparatuses of that system. But whatever form the criterion of recognition may take, it necessarily specifies *factual* identificatory criteria even if the criteria in question are nevertheless incorporated within a legal norm such as, for example, Hart's rule of adjudication. Such a criterion may thus take any of a number of forms. For example, a document of description X *is* a statute, or a judgment of the court of appeal, or a bye-law, and so on. The criterion of recognition may furthermore require that certain procedural formalities have been satisfied such as, for example, that a particular 'institutional fact' obtains (or has obtained) whereby a statute is conclusively recognised as having been duly 'passed' or otherwise promulgated in accordance with a specified procedure.

Then as we move deeper into the realm of adjudication and discover that there is more to judicial decision-making than 'finding' applicable legal norms which are tailor-made for 'application' in a given case, the problems that confront us are of a thornier nature. Thus, the typical judge may be called upon to identify the *ratio decidendi* of a previously decided 'case'. [61] The judge may also have to decide whether a general principle overrides a specific rule in a given instance or he may have to weigh up the merits of competing legal arguments, all of which are equally plausible (or implausible). Moreover, as Joseph Raz has shown, laws are usually systematically ordered and are thus so inter-related that special interpretive techniques must be applied to attain an understanding of their meaning. [62] Law-creation is also part of the judicial function, so it can come as no surprise that the ascertainment of legal norms considered relevant to an adjudication is a task of considerable complexity. For this reason it seems safer to assume that criteria of recognition do not reside in a conceptually neat rule of recognition as Hart suggests.

Indeed Neil MacCormick suggests that 'criteria of recognition', however defined, in fact establish what may be invoked by a judge (which may presumably include *Iudex*) as a valid ground for his official judgment:

> "It cannot then be said that the *validity* of rules or other standards as such is determined by the rule of recognition or that the rule of recognition is the ground of validity of, or determines the existence of, the rules or other standards to which it refers. 'Criteria of recognition' determine what are valid *as grounds for judicial decisions*". [63]

The third major activity involved in adjudication, that of 'applying' legal norms to 'facts', as we have previously observed, is quite fundamental to the conceptual technique of ascribing jural relations. For it is at the level of judicial law-application that the rights and duties of litigants are authoritatively stated. But a concomitant of

the authoritative statement of rights and duties is the formulation by the court (*Iudex*) of a judgment. An essential feature of the judicial decision-making process, as Kelsen points out, is that factual conditions conceived *in abstracto* under the generalising terms of a legal norm must be found to be present *in concreto* in the 'actuality' of the case presented to the court. [64]

Kelsen argues that this in turn involves the creation of an individual norm which addresses the specific facts of the individual case. As Kelsen says,

> "When settling a dispute between two parties or when sentencing an accused person to a punishment a court applies, it is true, a general norm of statutory or customary law. But simultaneously the court creates an individual norm providing that a definite sanction shall be executed against a definite individual". [65]

This process, as Kelsen observes, involves the concretisation of the general norm in its 'application' to 'reality':

> "The general norm which, to certain abstractly determined conditions, attaches certain abstractly determined consequences, has to be individualized and concretized in order to come in contact with social life, to be applied to reality". [66]

Law-application, however, is also *causally* significant in that the coercive apparatuses of the legal order are set in motion conditionally upon the 'finding' and articulation by the court (*Iudex*) of rights and duties (and other relationships) considered to obtain between a given legal *persona* A and legal *persona* B.

Iudex occupies an unique position on the causal and temporal continuum that has its origins in the perceived occurrence of 'operative facts' and its resolution in the enforcement action that follows upon the judgment of an (*ex hypothesi*) ultimate court. In a sense, *Iudex* is involved (though not necessarily *actively*) at *all* points on this

continuum.

First, evidence tending to establish the prior occurrence of 'operative facts' and relevant 'evidential facts', to use Hohfeld's term, is presented to the court. Second, the court is involved in assessing the procedural validity of 'lawsuit-instituting' 'events' and other procedural steps attending the conduct of the case. Third, the court itself (ultimately, *Iudex*) grants a 'judgment', and fourth, this 'judgment' under certain conditions constitutes a basis for the orientation of the official action of 'coercive agencies', for example, a police force, prison or probation officers and so on. To the extent, if at all, that each 'event' on this causal continuum is capable of individuation, we can imagine a sequential progression in which one 'event' is seen to lead inevitably to another (later) 'event'.

We may recall that such a progression is at least envisaged by Weber's causal rendition of the legal right in which there exists a probability that an individual (a natural or juridical person) may invoke the aid of a 'coercive apparatus' for the enforcement of his (or its) legal right.

Furthermore, each plausibly individuated 'event' on the causal continuum culminating in the enforcement of a legal right is also an 'institutional fact' in the sense discussed earlier. *Iudex* ascribes legal meaning to each component 'event'. The investigator, for his part, must attain an understanding of the legal meaning which forms part of the subjective meaning of the judicial social action of *Iudex*.

As causal explanation and the ascription of subjective meaning are mutually verifying processes, [67] the investigator must examine whether his ascription of meaning is

substantiated by the causal regularities which he observes, and correspondingly whether these 'external facts' are borne out by his interpretive hypotheses.

The interpretive and causal explanations of judicial social action thus find their expression in the ideal-type construct *Iudex* in terms that the judgment of a court of law is to be seen not merely as something meaningful in its own right and a product of 'events' (e.g. 'operative facts') to which meaning has been ascribed. The grant of a judgment must also be conceived as at least a *likely* outcome of certain conditioning 'events' (such as 'operative facts') and therefore as an 'event' itself which is capable, to a greater or lesser extent, of probabilistic determination.

As we have suggested earlier, the judgment of a court may be causally and interpretively significant *beyond* the immediate range of parties directly affected by it, i.e. beyond litigants and officials concerned with enforcement. The decision, or more accurately, the *ratio decidendi* of the case may constitute a basis for the orientation of action subsequent to the decision. Strictly speaking, though, these causal regularities, which are also meaningful actions, lie *beyond* the scope of an ideal-type construct concerned more narrowly with the explanation of *judicial* action. But their causal and interpretive significance should be recognised.

These brief remarks conclude the present discussion of law-application and, more generally, of adjudication. It remains now only to consider the sense in which the ultimate judicial office is 'ultimate'. This will complete our model of the ideal type *Iudex* formulated in this chapter.

VI.4 Ultimacy

It is as much a practical as a rational requirement that a system of adjudication, however rudimentary, should be so organised that at one or more stages in the litigation process it is capable of yielding a determination which, for purposes of the system, conclusively establishes or disposes of an issue of law or 'fact' (or one combining law *and* 'fact') which has been the subject of litigation between the disputants.

From the point of view of practicality, the system would undoubtedly break down if every 'finding' of 'fact', interpretation of law and 'application' of law to 'fact' were perpetually open to reconsideration. If such a system existed, there could be no faith in the certainty of the decision-making process. Furthermore, litigants would be unable to *act* in reliance upon judgments made by a court at any given time.

From the point of view of rationality, a precedent-based system of adjudication that permitted the perpetual reopening of cases for reconsideration would surely generate a meaningless collection of inconsistent and contradictory decisions which could not possibly constitute a secure basis for the orientation of social action.

An hierarchical structure of adjudication normally makes provision for *certain* elements of an issue in dispute (usually 'findings' of 'fact') to be disposed of at a designated level of the hierarchy (which is generally *non-ultimate*). Other elements (usually determinations of law or 'applications' of law to 'fact') may in general be conclusively disposed of only at the highest or ultimate hierarchical level. The system's final and authoritative declaration of the legal rights and duties obtaining

between litigants is treated for all purposes as being incapable of appeal to a superior level of the hierarchy, and it is, in a sense, the existence of this Hohfeldian 'disability' or 'no-power' (to pursue the issue further) which actually establishes the finality of the system's determination.

In some systems of adjudication a principle of finality is enshrined in the doctrine of *res judicata* in terms of which a judgment that has been appealed to an ultimate hierarchical level exhausts the merits of the issue in dispute. Such a judgment may not normally be subject to further review. As Karl Olivecrona puts it,

> "When a claim is definitely rejected by the court, the matter comes to an end. The judgment debars the plaintiff for all time from getting his claim accepted by any court. According to the law of procedure the judgment will always be a cause for rejecting a new petition based on the same ground (the principle of *res iudicata*)." [68]

The position of *Iudex* as the occupant of the judicial office at the ultimate level of the adjudicatory hierarchy in a sense guarantees the finality of any judgment granted by *Iudex*. What this means is that adjudicatory ultimacy is actually a *concomitant* of hierarchical ultimacy. The qualities of authoritativeness and finality are thus *attached* to, or inhere in, the position of the incumbent of the ultimate judicial office.

For theoretical purposes, though, as we have already indicated, it is convenient to assume that every 'ultimate judgment' is exclusively attributable to *Iudex* even though the judgment may in a practical sense incorporate many other decisions, interpretations of law or 'findings' of 'fact' adopted at *prior* stages in the adjudication process.

From this it follows that every actual or potential judicial act of *Iudex* may be treated for theoretical purposes as constituting the 'definitive' statement of the rights and

duties obtaining between litigants in a given case, certainly in terms of mobilising (or potentially mobilising) the coercive apparatuses of the legal system. It does *not* follow that such a judicial act constitutes a 'definitive' statement of the 'legally *correct*' decision, but it is beyond the scope of the present discussion to consider this question. It would perhaps suffice to say that 'legal correctness' and 'legal authoritativeness' are not necessarily co-extensive.

VI.5 Conclusion

The present examination of the ideal type *Iudex* seems an appropriate place to conclude this analysis. The perspective of *Iudex* represents, in a sense, the paradigm viewpoint for a theoretical consideration of the jural relation. The Weberian theoretical framework presented in chapter II culminated in an examination of the ideal type as a methodological device facilitating social explanation. Fittingly, the culmination of this sociological analysis of the jural relation is the Weberian ideal-type construct *Iudex*. This judicial ideal type has served as a means of approaching an understanding of the terms upon which significant coercive social forces in society are mobilised (to take official action), expressed through the ideative device of the jural relation which itself incorporates the linking medium of the legal norm.

As we discovered, *Iudex* may employ an unique array of conceptual techniques for conferring legal meaning upon legally relevant 'facts', but this meaning need not, and often does not, take account of the perceived subjective meaning of the action of individuals, where the action in question is material to a litigated issue. The causal dimension of the role which *Iudex* plays in the process of 'mobilising' coercive

institutional forces was also examined in earlier discussion.

Aside from these questions and more fundamental was an assumption which has been implicit throughout this essay that our understanding of the analysis of the jural relation offered by Hohfeld and developed by Kocourek and others is considerably advanced by a Weberian sociological approach. The corollary of this is that the explanatory power of certain distinctly 'Hohfeldian' aspects of Weber's sociology of law is heightened when seen, as it were, in the 'light' of the Hohfeldian analyses. On this basis, it has seemed plausible to argue for a *syncretism* of analytical jurisprudence and sociology of law.

More generally, if this essay has an overarching thesis, it is that the legal relationship and specifically the jural relation should be treated as the *basic conceptual unit* of social thinking and sociological theorising about legal phenomena. The rejection of the legal norm as the primary conceptual unit of legal sociological thought and the recognition of syncretic possibilities for sociology and jurisprudence may combine to 'liberate' analytical jurisprudence from the rigidity of purely juridical conceptions which often elevate legal phenomena to an impersonal and even sterile Kelsenian realm in which 'purity' of reason is seen as a desirable, though surely misconceived, aspiration. The relationality of human social behaviour, as Hohfeld perhaps unwittingly taught us, *is* revealed in the concepts and conceptions ordinarily employed in legal thinking. Once recognised, this intensely *human* dimension of the phenomenon of law serves only to affirm the belief that where human social structures exist, anything that is uniquely social and uniquely human will surely be manifested therein.

REFERENCE NOTES to VOLUME II

For abbreviations used in these reference notes see key to reference notes, Volume I.

CHAPTER IV

1. Neil MacCormick 'Law as Institutional Fact' (1974) 90 Law Q. Rev. 102 at pp. 103-104; this paper is reprinted and revised in Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law*, D. Reidel Publishing Company, Holland, 1986, p.49.

2. Ibid. p.104 (emphasis added).

3. Ibid. loc. cit. (emphasis added).

4. Glanville Williams, 'Language and the Law', (1946) 62 Law Q. Rev. 387 at pp. 398-399.

5. Weber also stresses the importance of recognising that all knowledge of cultural reality is knowledge from a particular point of view: OSS, pp. 81-82. See also John Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, pp. 11-15. According to Weber, "All knowledge of cultural reality, as may be seen, is always knowledge from *particular points of view.* When we require from the historian and social research worker as an elementary presupposition that they distinguish the important from the trivial and that he should have the necessary 'point of view' for this distinction, we mean that they must understand how to relate the events of the real world consciously or unconsciously to universal 'cultural values' and to select out those relationships which are significant for us. If the notion that those standpoints can be derived from the 'facts themselves' continually recurs, it is due to the naive self-deception of the specialist who is unaware that it is due to the evaluative ideas with which he unconsciously approaches his subject matter, that he has selected from an absolute infinity a tiny portion with the study of which he *concerns* himself." (Weber's emphasis)

6. Neil MacCormick, op. cit. p. 104.

7. See chapter III p. 85 *supra.*

8. Nicholas Timascheff, Introduction to Leon Petrazycki, *Law and Morality* (Trans. Hugh W. Babb), Harvard University Press, Cambridge, Mass., 1955 pp. xxvii-xxviii.

9. Hart's rule of recognition is such a criterion. See H.L.A. Hart, *The Concept of*

Law, Clarendon Press, Oxford, 1961, pp. 92-93, 94-96, 97-107; Neil MacCormick, *H.L.A. Hart*, Edward Arnold (Publishers) Ltd., London, 1981, pp. 21-23, 105-112; Hans Kelsen postulates the notion of the *basic norm*: see for example, *General Theory of Law and State*, (Trans. Anders Wedberg) Russell & Russell, New York, 1961, pp. 110 et seq; See further, Joseph Raz, 'Legal Validity', (1977) 63 A.R.S.P. 339; Joseph Raz, 'The Identity of Legal Systems', (1971) 59 Cal. L. Rev. 795; Carlos Santiago Nino, 'Some Confusions around Kelsen's Concept of Validity', (1978) 64 A.R.S.P. 357; and Graham Hughes, 'Validity and the Basic Norm', (1971) 59 Cal. L. Rev. 695.

10. For an excellent critical discussion of Kelsen's methodology, see Donald C. Galloway, 'The Axiology of Analytical Jurisprudence: A Study of the Underlying Sociological Assumptions and Ideological Predilections', in Thomas W. Bechtler (Ed.), *Law in a Social Context*, Kluwer, The Netherlands, 1978, pp. 49-98, esp. pp. 55-61.

11. Hans Kelsen, 'The Pure Theory of Law', (1934) 50 Law Q. Rev. 474 (Part I) and (1935) 51 Law Q. Rev. 517 (Part II).

12. (1934) 50 Law Q. Rev. at p. 478 and pp. 480-481; see also Hans Kelsen, *Pure Theory of Law* (Trans. Max Knight), University of California Press, 1967, pp. 2-3 (Trans. of *Reine Rechtslehre*, 1st Ed. 1934). Compare Weber's observation (TSEO p. 94): "[In sociological analysis we] ... can accomplish something which is never attainable in the natural sciences; namely the subjective understanding of the action of the component individuals. The natural sciences on the other hand cannot do this, being limited to the formulation of causal uniformities in objects and events and the explanation of individual facts by applying them. We do not 'understand' the behaviour of cells, but can only observe the relevant functional relationships and generalize on the basis of these observations."

13. See, for example, Hans Kelsen, *Pure Theory of Law* (op. cit.) pp. 2-5.

14. Thus, see Hans Kelsen, *Pure Theory of Law* (op. cit.) at p.5: " 'Norm' is the meaning of an act by which a certain behavior is commanded, permitted, or authorized. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an *ought*, but the act of will is an *is*"

15. Bernard S. Jackson, *Semiotics and Legal Theory*, Routledge & Kegan Paul, London, 1985, pp. 227-228 and 229 et seq.

16. See generally Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law*, D. Reidel Publishing Company, Holland, 1986.

17. Hans Kelsen, *Pure Theory of Law* (op. cit.) p.4.

18. See chapter VI p. 108 *infra.*

19. John Searle, *Speech Acts*, Cambridge University Press, Cambridge, 1969.

20. Neil MacCormick, 'Law as Institutional Fact' (1974) 90 Law Q. Rev. 102 at p. 105.

21. Neil MacCormick, 'On Analytical Jurisprudence', Ch.IV of Neil MacCormick

and Ota Weinberger, *An Institutional Theory of Law*, (op. cit.) p. 93 at p. 99.

22. MacCormick and Weinberger, op. cit. p. 16.

23. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (1919) (Ed. Walter Wheeler Cook), Yale University Press, 4th Printing, 1966 at p. 32.

24. Albert Kocourek, *Jural Relations* (2nd Ed.), The Bobbs-Merrill Company, Indianapolis, 1928 at p. 17. See also Chapter XVI (Conceptual Nature of Jural Acts) pp. 259 et seq.

25. Wesley N. Hohfeld, loc. cit.

26. Albert Kocourek, op. cit. p. 17 (Kocourek's emphasis).

27. Neil MacCormick, 'Law as Institutional Fact' (1974) 90 Law Q. Rev. 102 at p. 104.

28. Albert Kocourek, op. cit. p.18.

29. See Kenneth G.C. Reid, 'Ownership on Delivery', 1982 S.L.T. (News) 149.

30. John Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, pp. 218-219.

31. J.W. Harris, *Law and Legal Science*, Clarendon Press, Oxford, 1979 pp. 20-21 and p.84.

32. See generally, John Chipman Gray, *The Nature and Sources of the Law*, (2nd Ed.), The MacMillan Company, New York, 1938. (1st Ed. 1921).

CHAPTER V

1. OSS p. 81 (See chapter IV reference note 5).

2. Chapter II pp. 56-57 *supra.*

3. ES p. 311; LES p.11. According to Max Rheinstein, the term 'legal dogmatics' has frequently been used in German to mean "the legal science of the law itself as distinguished from such ways of looking upon law from the outside as philosophy, history, or sociology of law". (ES p. 337 n.1; LES p. 11 n.2).

4. ES p. 311; LES p. 11.

5. ES p. 311; LES p.11 (Weber's emphasis).

6. ES pp. 641-644; LES pp. 41-44 (public law and private law) ES pp. 649-651; LES pp. 53-56 (tort and crime).

7. ES pp. 331-332; LES pp. 33-34 (emphasis added).

8. Roscoe Pound, *Jurisprudence*, West Publishing Co., St. Paul, Minnesota, 1959, Vol. I p. 17.

9. See, for example H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961 pp. 92-93, 94-96, 97-107; Joseph Raz, 'Legal Validity', (1977) 63 A.R.S.P. 339.

10. In this context the term 'legal order' is used in Weber's sense. According to Weber's definition: "A 'legal order' shall... be said to exist wherever coercive means, of a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, wherever we find a consociation specifically dedicated to the purpose of 'legal coercion'". (ES p. 317).

11. Nicholas Timascheff, Introduction to Leon Petrazycki, *Law and Morality* (Trans. Hugh W. Babb), Harvard University Press, Cambridge, Mass., 1955 pp. xxvii-xxviii. See also chapter IV p. 7 *supra* and reference note 8.

12. Leon Petrazycki, op. cit. p. 8. See also Jan Gorecki (Ed.), *Sociology and Jurisprudence of Leon Petrazycki*, University of Illinois Press, 1975 (esp. Ch. 5 'Interaction, Law, and Morality: The Contributions of Leon Petrazycki', by Norman K. Denzin).

13. See chapter I p.2 *supra.*

14. P.S. Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 Law Q. Rev. 193 at p. 203.

15. P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979 at p. 734.

16. See Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73) ss. 4, 5

and 6.

17. ES p. 315; LES p. 15.

18. See generally Gerald H. Gordon, *The Criminal Law of Scotland*, (2nd Ed.), W. Green & Son Ltd., Edinburgh, 1978, Ch. 7.

19. Ibid. s. 8-03 (p. 269).

20. See William Murray Gloag, *The Law of Contract*, W. Green & Son Ltd., Edinburgh, 1914 Ch. XI (pp. 247 et seq.).

21. See Pierre J.J. Olivier, *Legal Fictions in Practice and Legal Science*, Rotterdam University Press, 1975; also Lon. L. Fuller, *Legal Fictions*, Stanford University Press, Stanford, 1967.

22. See Hans Kelsen, *Pure Theory of Law* (Trans. Max Knight), University of California Press, 1967 (Trans. of *Reine Rechtslehre*, 1st Ed. 1934) pp. 2-3: "The legal meaning of an act, as an external fact, is not immediately perceptible by the senses... . This subjective meaning may, but need not necessarily, coincide with its objective meaning, that is, the meaning the act has according to the law. For example, somebody makes some dispositions, stating in writing what is to happen to his belongings when he dies. The subjective meaning of this act is a testament. Objectively, however, it is not, because some legal formalities were not observed."

23. See William Murray Gloag, op. cit. p. 681.

24. Cf. e.g. *Wordsworth v. Pettigrew*, 1799 M. 9524.

25. See *The Digest of Justinian* (Trans. and Eds. Theodor Mommsen, Paul Krueger and Alan Watson) University of Pennsylvania Press, Philadelphia, Pennsylvania, 1985 (Vol. IV): D.44.7.3pr; *The Institutes of Justinian* (Trans. and Comm. J.A.C. Thomas) North-Holland Publishing Co., Amsterdam, Oxford, 1975: *Inst.* III. 13.pr.

26. Some of this literature is cited by Roscoe Pound in a footnote which is itself truly voluminous. See *Jurisprudence* (op. cit.) Vol IV, p. 83, n. 101.

27. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (1919) (Ed. Walter Wheeler Cook), Yale University Press, 4th Printing, 1966 at p. 27.

28. Ibid. pp. 26 - 27.

29. As Roscoe Pound says: "But one cannot but feel that [Kocourek]... carries out schematic exposition and terminology far beyond what is practically worth while." Op. cit. Vol. IV, p. 82.

30. Albert Kocourek, *Jural Relations*, (2nd Ed.), The Bobbs-Merrill Company, Indianapolis, 1928 at p. 42.

31. Ibid. p. 41.

32. Ibid. p. 44.

33. *The Institutes of Justinian* (op. cit.), p. 197: *Inst.* III. 13. pr.

34. *The Digest of Justinian* (op. cit.) p. 639: D.44.7.3.pr.

35. *The Institutes of Justinian* (op. cit), J.A.C. Thomas's commentary at p. 198. See also W.W. Buckland, *A Textbook of Roman Law* (3rd Ed., Peter Stein), Cambridge University Press, Cambridge, 1963, p. 406.

36. See George Watson, *Bell's Dictionary and Digest of the Laws of Scotland*, Bell & Bradfute, Edinburgh, 1890 (7th Ed.) p. 950 ('Sasine').

37. See Albert Kocourek, op. cit. p. 41; Puntschart, *Moderne Theorie des Privatrechts* (1893).

38. Consider, for example, George W. Goble's characterisation of the power-liability relation: "All acts or omissions legally significant involve the exercise of powers. The word describes a relationship of two persons from the viewpoint of the dominant or controlling party. The same relationship is described from the viewpoint of the servient or controlled party by the term *liability*". (See 'A Redefinition of Basic Legal Terms', (1935) 35 Col. L. Rev., 535, partly reprinted in Jerome Hall (Ed.), *Readings in Jurisprudence*, The Bobbs-Merrill Company, Indianapolis, 1938 pp.516 et seq.) As we shall later consider, *both* 'sides' of the jural relation are, for theoretical purposes, to be conceived from the point of view of *Iudex*. See also Hans Kelsen, *Pure Theory of Law* (Trans. Max Knight, of *Reine Rechtslehre*, 1st Ed. 1934), University of California Press, 1967, at p. 166: "The reflex right is only the legal obligation, seen from the viewpoint of the individual toward whom the obligation has to be fulfilled". In 'The Pure Theory of Law', (1934) 50 Law Q. Rev. 474, at p.493, referring to contractual legal rights, Kelsen says: "For no one can allocate rights to himself, since the right of the one exists only under the pre-supposition of the duty of another...".

39. From John Austin, *Lectures on Jurisprudence*, (3rd Ed.), London, 1869, reprinted in Jerome Hall (Ed.) *Readings in Jurisprudence* (op. cit.) at p. 442.

40. Ibid. p. 450.

41. Joel Feinberg, *Rights, Justice, and the Bounds of Liberty*, Princeton University Press, Princeton, New Jersey, 1980, pp. 137-139.

42. Neil MacCormick, *Legal Right and Social Democracy*, Clarendon Press, Oxford, 1982, p. 161.

43. Max Radin, 'A Restatement of Hohfeld' (1938) 51 Harv. L. Rev. 1141 at p. 1150. See also *Salmond on Jurisprudence* (Glanville Williams, Ed.) (11th Ed.), Sweet and Maxwell Ltd., London, 1957, p. 265 n. (i).

44. See chapter III pp.111-113 *supra.*

45. See chapter III p. 112 *supra.*

46. As we have already seen, Weber's sociological definition of 'right' equates the

concept of the right with *expectation*: ES pp. 666-667 LES pp. 98-99. See also A.H. Campbell, 'Some Footnotes to Salmond's Jurisprudence', (1941) 7 Cambridge L.J. 206 at p.207: "...a right might be defined simply in some such terms as: The expectation arising out of a rule of law that certain conduct shall or may follow on a given situation".

47. See Roscoe Pound, *Jurisprudence* (op. cit.) Vol IV, pp. 43, 56, 67. *Salmond on Jurisprudence* (op. cit.) p. 261: "A right is an interest recognised and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong".

48. See, for example, Albert Kocourek, 'Plurality of Advantage and Disadvantage in Jural Relations', (1920) 19 Mich. L. Rev. 47.

49. Neil MacCormick in 'Rights in Legislation' in P.M.S. Hacker and J. Raz (Eds.) *Law Morality and Society*, Clarendon Press, Oxford, 1977, Ch. 11 differentiates two pre-eminent schools of thought concerning the nature of rights: the 'will theory' and the 'interest theory'. See especially pp. 192 et seq.

50. See, for example, Albert Kocourek, *Jural Relations*, (op. cit.) p. 7. See also, generally, Hohfeld, *Fundamental Legal Conceptions*, (op. cit.) and Roscoe Pound, op. cit. Vol. IV, pp. 69-71.

51. See Roscoe Pound, op.cit. Vol. IV pp. 68-69; George W. Goble, 'A Redefinition of Basic Legal Terms' (op. cit.), (See reference note 38 of this chapter).

    See also, generally, Stanley I. Benn, entry entitled 'Rights' in Paul Edward (Ed. in Chief) *The Encyclopaedia of Philosophy*, MacMillan Pub. Co. Inc., 1967, Vol. 7-8 pp. 195-199.

52. For example, see Hans Kelsen, *Pure Theory of Law*, 1967 (op. cit.) pp. 4-5. See also ES p. 322.

53. Albert Kocourek, 'Plurality of Advantage and Disadvantage in Jural Relations' (op. cit.)

54. See Joel Feinberg, *Rights, Justice and the Bounds of Liberty*, Princeton University Press, Princeton, New Jersey, 1980, p. 137.

55. See *Salmond on Jurisprudence* (op. cit.) p. 260. See also, generally, Roscoe Pound, op. cit. Vol. IV Ch. 24 (pp. 165 et seq.) esp. p. 175.

56. Talcott Parsons, *The Social System*, Tavistock Publications Limited, 1952, p. 25.

57. N.M. Korkunov, *General Theory of Law* (Trans. W.G. Hastings), The Boston Book Company [The Modern Legal Philosophy Series, Vol. IV], 1909.

58. Ibid. p. 192

59. Ibid. p. 195

60. Ibid. p. 199

61. Ibid. p. 200

62. Ibid. pp. 200-201

63. Ibid. p. 201

64. John Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980 p. 201.

65. Ibid. loc. cit.

66. c.58

67. See Joseph Raz's discussion of rules which, despite being given *recognition* by a legal system, are nevertheless "not part of the system": 'Legal Validity', (1977) 63 A.R.S.P. 339 at p. 342; reprinted in *The Authority of Law - Essays on Law and Morality*, Clarendon Press, Oxford, 1979, pp. 146 et seq., at p. 149.

68. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919) (Ed. Walter Wheeler Cook), Yale University Press, 4th printing 1966, p. 36.

69. See generally Glanville Williams 'The Concept of Legal Liberty' in Robert S. Summers (Ed.), *Essays in Legal Philosophy*, Basil Blackwell, Oxford, 1968, pp. 121 et seq., esp. pp. 128 et seq.

70. A distinction between rights "in the strictest and most proper sense" and rights "in a wider and laxer sense" is drawn in *Salmond on Jurisprudence* (op. cit.) pp. 269-270.

71. *Salmond on Jurisprudence* (op. cit.) pp. 271-273. See also Glanville Williams, 'The Concept of Legal Liberty' (op. cit.).

72. *Salmond on Jurisprudence* (op. cit.) p. 270 and p. 275 n.(c).

73. Ibid. p. 270.

74. Lon L. Fuller, *The Morality of Law*, Yale University Press, New Haven and London, 1964, p. 134 n.50.

75. H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961 p. 27 (Hart's emphasis). See also in particular pp. 78-79 (primary and secondary rules).

76. Neil MacCormick, *H.L.A. Hart*, Edward Arnold (Publishers) Ltd., London, 1981, p. 83, and p. 84 et seq.

77. Ibid. p. 79

78. c. 41 s. 13.

79. Albert Kocourek, *Jural Relations* (op. cit.) p. 10.

80. H.L.A. Hart, *Essays on Bentham - Studies in Jurisprudence and Political Theory*, Clarendon Press, Oxford, 1982.

81. Ibid. p. 195. See also Hart's observations pp. 105 et seq. and p. 162.

82. Ibid. p. 196.

83. *Salmond on Jurisprudence* (op. cit.) p. 264.

84. Ibid. loc. cit. (editor's emphasis).

85. Ibid. loc. cit.

86. Wesley N. Hohfeld, op. cit. pp. 91 et seq. For a recent interesting debate as to the correspondence between the distinction between rights *in rem* and rights *in personam* and Hohfeld's distinction between multital relations and paucital relations, see the series of articles in the *Journal of the Law Society of Scotland* (J.L.S.S.) commencing with G. Maher, 'The Rights and Wrongs of Vesting' (1986) 31 J.L.S.S. 396. W.M. Gordon replies to this in an article entitled 'The Wrongs and Rights of Vesting ' (1987) 32 J.L.S.S. 218 and this is in turn re-appraised in Hamish Patrick, 'What is a Real Right in Scots Law?') (1988) 33 J.L.S.S. 98. In essence, Gordon advances, and Patrick endorses, the view that rights *in rem* are merely a 'proprietary' sub-category of the Hohfeldian category of multital relations in general. This is undoubtedly a sound reading of Hohfeld's analysis.

87. Albert Kocourek, *Jural Relations* (op.cit.) p. 201.

88. A.M. Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959/60) 30 Tul. L. Rev. 453 at p. 454.

89. A.J. Campbell, 'Some Footnotes to Salmond's Jurisprudence', (1941) 7 Cambridge L.J. 206.

90. Ibid. p. 212.

91. Max Radin, 'A Restatement of Hohfeld', (1938) 51 Harv. L. Rev. 1141 at p. 1148, and at n.7.

92 Glanville Williams, 'The Concept of Legal Liberty' in Robert S. Summers (Ed.), *Essays in Legal Philosophy*, Basil Blackwell, Oxford, 1968, p. 121 at p. 128.

See also Roscoe Pound 'Fifty Years of Jurisprudence', (1937) 50 Harv. L. Rev. 557 at p. 572.

93. See *Salmond on Jurisprudence* (op. cit.) p. 273 n. (u). For the use of the term no-power, see p. 277: "The correlative of immunity is disability (otherwise called inability, or, more clearly though less elegantly, no-power). Disability is simply the absence of power."

94. Ibid. loc. cit. See also George W. Goble, 'A Redefinition of Basic Legal Terms', reprinted in Jerome Hall (Ed.), *Readings in Jurisprudence*, The Bobbs-Merrill Company, Indianapolis, 1938 at p. 519. [(1935) 35 Col. L. Rev. 535].

95. c. 73

96. ES pp. 941-955, esp. p. 954; and LES pp. 322-337, esp. pp. 336-337.

97. ES p. 942; LES pp. 323-324.

98. ES p. 942; LES pp. 323-324.

99. ES p. 53

100. ES pp. 1375 et seq.

101. Alan Hunt, *The Sociological Movement in Law*, The MacMillan Press, Limited, 1978, p. 113.

102. ES p. 1378. See also ES pp. 212-213.

103. ES p. 61 n. 31 (at p. 62).

104. Georg Simmel, 'On Superordination and Subordination', in Talcott Parsons, Edward Shils and others (Eds.) *Theories of Society* (Vol. 1), Free Press of Glencoe, 1961 at p. 542.

105. Ibid. loc. cit.

106. Ibid. p. 543.

107. LES p. 328.

108. LES p. 328 (Weber's emphasis).

109. LES p. 328.

110. LES pp. 328-329.

111. See this chapter p. 63 *supra*, ES p. 942; LES pp. 323-324.

112. ES p. 315; LES pp. 15-16.

113. ES p. 327;

114. ES p. 319.

115. ES p. 311; LES p. 11 See this chapter p. 22 *supra*.

116. Herbert C. Kelman, 'Further Thoughts on the Processes of Compliance, Identification, and Internalization' Ch. 5 of James T. Tedeschi, (Ed.) *Perspectives on Social Power*, Aldine Publishing Company, Chicago, 1974, at pp. 125 et seq.

117. TSEO p. 300.

118. Herbert C. Kelman, op. cit. p. 128.

119. Ibid. loc. cit.

120. Ibid. pp. 160 et seq.

121. Ibid. p. 161.

122. Ibid. loc. cit.

123. Ibid. loc. cit.

124. Ibid. p. 162.

125. Ibid. p. 166.

126. Ibid. loc. cit.

127. Ibid. p. 167.

128. Ibid. loc. cit.

129. Anthony T. Kronman, *Max Weber*, Edward Arnold (Publishers) Ltd., London, 1983, p. 40.

130. See Kocourek, *Jural Relations* (op. cit.), p.341: "There are two ultimate kinds of jural relations. The first of these relations is the Claim-Duty relation... . The second of these ultimate relations is the Power-Liability relation...".

131. George W. Goble, 'A Redefinition of Basic Legal Terms', (1935) 35 Col. L. Rev. 535, partly reprinted in Jerome Hall (Ed.) *Readings in Jurisprudence*, The Bobbs-Merrill Company, Indianapolis, 1938, at p.516.

132. George W. Goble, (op. cit.) in *Readings* (op. cit.) p.521.

133. See chapter III pp. 118-119 *supra.*

134. Roscoe Pound, *Jurisprudence* (op. cit.) Vol. IV, p.93. Powers are discussed generally in Ch. 22 (pp.93 et seq.).

135. *Salmond on Jurisprudence* (op. cit.) p.274

136. Joseph Raz, *The Concept of a Legal System* (2nd Ed.), Clarendon Press, Oxford, 1980, p.163. See also H.L.A. Hart, *Essays on Bentham* (op. cit.) pp.200 et seq. ('powers of imperation')

137. c. 58.

CHAPTER VI

1. TSEO p.99

2. See Guy Oakes, 'Weber and the Southwest German School: The Genesis of the Concept of the Historical Individual' in Wolfgang J. Mommsen and Jürgen Osterhammel (Eds.), *Max Weber and his Contemporaries* (The German Historical Institute), Allen & Unwin, London, 1987, p.434 at p.444.

3. See chapter II pp. 18-20 and pp. 58 et seq. *supra*

4. OSS p.90. See chapter II p. 59 *supra.*

5. See chapter II p. 23 *supra.*

6. See Ronald Dworkin, *Taking Rights Seriously* (Fifth Impression) Gerald Duckworth & Co. Ltd., 1977, Ch. 4 pp. 81 et seq. See also Ronald Dworkin, *Law's Empire*, Fontana Press, London, 1986, e.g. at pp. 158-160.

7. See generally Lon L. Fuller, *The Principles of Social Order*, Duke University Press, Durham, N.C., 1981, esp. pp. 86-124 ('The Forms and Limits of Adjudication').

8. See generally, Neil MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1978.

9. See generally, Ronald Dworkin, *Taking Rights Seriously* (op. cit.).

10. Lon L. Fuller, op.cit. p.90.

11. TSEO p.90

12. TSEO p.90

13. ES p. 315; LES p.15. See also TSEO p.90 n.3 where Talcott Parsons (Ed.) notes that in translating Weber the terms 'chance', 'probability' and 'likelihood' have been used essentially to the same effect.

14. ES p.53

15. TSEO p.87

16. Anthony T. Kronman, *Max Weber*, Edward Arnold (Publishers) Ltd., London, 1983, Ch.4 pp. 72 et seq.

17. Ibid. p.73

18. Ibid. p.74

19. ES pp. 654-658; LES pp. 61-64.

20. ES p. 657; LES p.64

21. ES pp. 657-658; LES p. 64

22. Anthony T. Kronman, op. cit. p. 74

23. ES p. 656; LES p.62

24. TSEO pp. 80 and 102

25. Anthony T. Kronman, op. cit. pp. 74-75

26. Ibid. p. 75

27. Harold Fallding, 'Explanatory Theory, Analytical Theory and the Ideal Type', Ch. 39 of Kenneth Thompson and Jeremy Tunstall (Eds.), *Sociological Perspectives*, Penguin Books Limited, 1971 p. 505 (Excerpt from Harold Fallding, *The Sociological Task*, Prentice - Hall, 1968).

28. TSEO pp. 302 et seq.

29. See Robert Bierstedt, *The Social Order* (3rd Ed.), Tata McGraw-Hill Publishing Company Limited, 1957 (3rd Ed., 1970), p. 249.

30. Robert K. Merton, *Social Theory and Social Structure*, The Free Press, New York, 1957, p. 195.

31. TSEO p. 302

32. TSEO p. 303

33. TSEO p. 304

34. TSEO p. 304

35. TSEO pp. 304 and 306

36. TSEO p. 303

37. TSEO p. 303

38. TSEO p. 304

39. See Lon L. Fuller, *The Principles of Social Order* (op.cit.) p.90

40. Ibid. loc. cit.

41. On legal validity, see for example Joseph Raz, 'Legal Validity', (1977) 63 A.R.S.P. 339 reprinted in *The Authority of Law - Essays on Law and Morality*, Clarendon Press, Oxford, 1979, Ch. 8 (pp. 146-159)

42. See chapter IV, p. 10 *supra.*

43. George Whitecross Paton, *A Textbook of Jurisprudence* (13th Ed. by David P. Derham), Clarendon Press, Oxford, 1964 (Reprint, 1967).

44. Ibid. p. 175

45. Ibid. loc.cit.

46 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919) (Ed. Walter Wheeler Cook), Yale University Press, 4th printing, 1966, pp. 32-35.

47. See chapter IV p. 14 *supra*

48. As Leon Petrazycki says, "The essence of legal facts is held to be that they condition the emergence and existence of legal relationships. They 'produce' or 'evoke' legal relationships, and the like. The legal fact is the logical *prius* for the legal relationship: it should appear and be present in order that the legal relationship may arise". *Law and Morality* (Trans. Hugh W. Babb) Harvard University Press, Cambridge, Mass., 1955, p. 169. Although Petrazycki's view accords with the general stance adopted in this study, in fact Petrazycki goes on to attack this assertion on *logical* grounds purely on the basis that *other* writers have held legal facts and legal relationships to be *identical*. This error certainly gives substance to Petrazycki's attack, but the basic assertion in the passage quoted is without doubt true provided we recognise the essential *difference* between 'legal facts' and 'legal relationships' (however defined).

49. Wesley N. Hohfeld, op. cit. p.34.

50. Ibid. p.34 n.23.

51. George Whitecross Paton, op. cit. p.175.

52. Hans Kelsen, *General Theory of Law and State* (Trans. Anders Wedberg), Russell & Russell, New York, 1961, p. 136.

53. A.M. Honoré, 'Ratio Decidendi: Judge and Court' (1955) 71 Law Q. Rev. 196 at p. 201.

54. OSS p.90

55. Jerome Frank, *Law and the Modern Mind*, Stevens & Sons Limited, London, 1949 at pp. x-xi.

56. See this chapter p. 111 *supra*, and reference note 51.

57. H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961 pp. 106-107.

58. Ibid. p. 107

59. Marcus G. Singer, 'Hart's Concept of Law' (1963) 60 *Journal of Philosophy* 197 at p. 213.

60. H.L.A. Hart, op.cit. pp. 108 et seq.

61. On *ratio decidendi* see for example J.L. Montrose, 'The Ratio Decidendi of a Case' (1957) 20 M.L.R. 587; J.L. Montrose, 'Ratio Decidendi and the House of Lords' (1957) 20 M.L.R. 124; A.W.B. Simpson 'The Ratio Decidendi of a Case'

(1957) 20 M.L.R. 413; Neil MacCormick, 'Why Cases Have Rationes and What These Are' Ch. 6 of Laurence Goldstein (Ed.), *Precedent in Law*, Clarendon Press, Oxford, 1987, pp. 155 et seq.

62. See generally Joseph Raz, *The Concept of a Legal System*, Clarendon Press, Oxford, 1980. Cf. esp. pp. 140-141 and pp. 145-146.

63. Neil MacCormick, *H.L.A. Hart*, Edward Arnold (Publishers) Ltd., London, 1981 pp. 114-115 (MacCormick's emphasis).

64. Hans Kelsen, *General Theory of Law and State* (Trans. Anders Wedberg), Russell & Russell, New York, 1961, p.135 Ibid. p. 134

65.

66. Ibid. p. 135

67. See TSEO p.88

68. Karl Olivecrona, *Law as Fact*, Oxford University Press, London, 1938-9, p.107. See also Hans Kelsen op. cit. pp.158-159; Richard Wasserstrom, *The Judicial Decision*, Stanford University Press, Stanford, Calif., 1961, p.79.