# Legal Practice and Its Continuity

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## Abstract

This thesis has a particular and a general aim. The particular aim is to provide a satisfactory account of constitutional crises. Available accounts tend to either exaggerate the disruptive character of such crises or, conversely, to deny it; the challenge is thus to acknowledge the disruption without blowing it out of proportion.

The general aim is to outline a theory of law from which such a satisfactory account would follow. The available accounts oscillate between the two extremes because they are attached to the idea that law is a system of legal norms. I critique this idea—not to reject it, though, but to show that it is only one element in a complete account of law. Instead of viewing legal practice as governed by a system of norms, posited and administered by state institutions, we may view it as a collective practice among the general population, whereby they make sense of each other's actions in legal terms so as to know how best to navigate their mutual interactions. The legal system does have a place in this latter picture, but this place corresponds to the important yet limited role of the state in wider social practice.

Articulating and substantiating this proposal takes up the better part of the thesis, eventually to yield an understanding of legal continuity which translates into a satisfactory account of constitutional crises. The continuity of legal practice is not a direct function of the continued efficacy of some normative system, but

depends on whether participants in the practice can make enough legal sense of their interactions to know how to carry on with them. In a constitutional crisis, no such legal sense can be made of at least certain practices of constitutional actors; but many everyday interactions may still make perfectly good legal sense.

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# Table of Contents

**I. Approaches and Aims ..... 1**

1. APPROACHES ..... 1

A. Legal Practice ..... 8

B. Its Continuity ..... 13

2. AIMS ..... 19

**II. The Problem of Continuity ..... 29**

1. CASE STUDY: THE POLISH CONSTITUTIONAL CRISIS OF 2015–16 ..... 30

A. The Facts ..... 32

B. The Conflict ..... 39

C. Constitutional Revolution ..... 45

D. Continuity in Change ..... 53

E. Legal Dualism ..... 56

F. The Problem Restated ..... 60

2. THE IDEA OF A LEGAL SYSTEM ..... 62

A. Unity ..... 63

B. Consistency ..... 64

C. Discreteness ..... 66

D. Norms ..... 68

E. Legal Systems and the Problem of Continuity ..... 69

**III. Legal Practice (Take One) ..... 72**

1. HART'S NOTION OF PRACTICE ..... 74

A. Social Rules and the Hermeneutic Point of View ..... 75

B. Legal Systems and a Shift in Perspective ..... 77

2. THE LIMITS OF PRACTICE ..... 85

A. Is There Law in a Sheeplike Society? ..... 86

B. Are Legal Rules Social Rules? ..... 97

3. LEGAL PRACTICE AND LEGAL NORMS ..... 101

**IV. The Normative Picture ..... 104**

1. THE PICTURE ..... 105

A. The Metaphysical Thesis ..... 107

B. The Logical Thesis ..... 109

C. Restatement ..... 112

2. AGAINST THE METAPHYSICAL THESIS: DOES LAW EXIST? ..... 116

A. A Paradox to Do with Norms ..... 116

B. First Way Out: Legal Norms Need Not Be Binding ..... 118

C. Second Way Out: No Norms Need Be Binding ..... 124

D. Third Way Out: Laws Need Not Be Norms ..... 124

3. AGAINST THE LOGICAL THESIS: FROM NORMS TO MEANING ..... 127

A. Is There a Semantic Difference? ..... 128

B. What Is the Semantic Difference? ..... 133

C. A Halfway House? ..... 139

4. LAW BEYOND LEGAL SYSTEMS ..... 150

**V. Legal Discourse ..... 152**

1. LEGAL MEANING ..... 154

A. Legal Acts ..... 154

B. Explaining Legal Meaning ..... 160

C. Theoretical Explanation and Rules of Legal Discourse ..... 162

2. LEGAL MEANING AND DESCRIPTIVE JURISPRUDENCE ..... 170

3. SUMMARY ..... 187

**VI. Legal Practice (Take Two) ..... 189**

1. THE PRACTICAL LOGIC OF LEGAL MEANING ..... 190

A. Orientational Reasoning and Two Qualifications ..... 193

B. Decisional Reasoning and Practical Necessity ..... 197

C. Acts Under a Description ..... 201

D. Practical and Legal Meaning ..... 204

E. Legal Meaning and Law's Guidance ..... 211

2. FROM LEGAL DISCOURSE TO LEGAL PRACTICE ..... 220

A. Decisional Reasoning as Explanatory Reasoning ..... 220

B. From Legal Practices to Legal Practice ..... 224

**VII. Legal Continuity ..... 228**

1. THE POINT OF LAW ..... 229

2. THE CONTINUITY OF LEGAL PRACTICE ..... 239

A. Definition ..... 239

B. Legal Continuity Is Dynamic ..... 242

C. Legal Continuity Is an Objective Matter ..... 245

D. The Overall Continuity of Legal Practice Is a Matter of Degree ..... 268

3. REVISITING THE PROBLEM ..... 271

**VIII. Opportunities and Objections ..... 279**

1. OPPORTUNITIES ..... 281

A. Discursive Guidance in the Law ..... 281

B. Putting the State in Its Place ..... 286

2. OBJECTIONS ..... 293

A. The Limits of Law ..... 293

B. The Limits of a Legal Practice ..... 297

**Bibliography ..... 301**

# Table of Cases


DECISIONS OF THE POLISH CONSTITUTIONAL TRIBUNAL

Judgment K 1/20 of 22 October 2020, DzU 2021 poz 175 ..... 122

Judgment K 34/15 of 3 December 2015, DzU 2015 poz 2129 ..... 32, 33, 34, 35

Judgment K 35/15 of 9 December 2015, DzU 2015 poz 2147 ..... 34

Judgment K 39/16 of 11 August 2016, DzU 2018 poz 1078 ..... 39

Judgment K 47/15 of 9 March 2016, DzU 2018 poz 1077 ..... 34, 36, 37, 38, 41

OTHER CASES

Collins v Minister of the Interior 1957 (1) SA 552 (A) (South Africa) ..... 31

Harris v Minister of the Interior 1952 (2) SA 428 (A) (South Africa) ..... 31

Judgment III OSK 2528/21 of 16 November 2022 (Poland) ..... 42

Lakanmi v Attorney-General (West) (1970) SC 58/69 (Nigeria) ..... 49

Madzimbamuto v Lardner-Burke NO 1968 (2) SA 284 (RA) (Southern Rhodesia) ..... 49

Minister of the Interior v Harris 1952 (4) SA 769 (A) (South Africa) ..... 31

The State v Dosso, PLD 1958 SC 533 (Pakistan) ..... 49

Uganda v Commissioner of Prisons, ex p Michael Matovu [1966] 1 EA 514 (Uganda) ..... 49

Xero Flor v Poland, App no 4907/18 (ECtHR, 7 May 2021) ..... 42

# Table of Statutes

POLAND

Constitution of 2 April 1997 ..... 32, 33, 34, 35, 37, 38, 39, 41, 42, 43, 44

Statute of 19 November 2015, DzU 2015 poz 1928 ..... 34

Statute of 20 July 2000, DzU 2000 Nr 62 poz 718 ..... 39

Statute of 22 December 2015, DzU 2015 poz 2217 ..... 34, 35, 36, 37, 38, 40, 41

Statute of 25 June 2015, DzU 2015 poz 1064 ..... 33, 34

# Table of Abbreviations

| | |
|---|---|
| *AL* | Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) |
| *CL* | HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) |
| *CLS* | Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2nd edn, OUP 1980) |
| *GTLS* | Hans Kelsen, *General Theory of Law and State* (Anders Wedberg and Wolfgang Herbert Kraus trs, Harvard University Press 1945) |
| *PRN* | Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) |
| *PTL* | Hans Kelsen, *Pure Theory of Law* (Max Knight tr, 2nd edn, University of California Press 1967) |

# I. Approaches and Aims

> In my own long experience as a teacher and to some modest extent a practitioner of law I have never once been asked the question 'What is law?'.[1]

> The deep perplexity which has kept alive the question, is not ignorance or forgetfulness or inability to recognize the phenomena to which the word 'law' commonly refers.[2]

## 1. APPROACHES

Jurisprudence is a curious discipline. The central question that animates it—'what is law?'—is at once trivial and perplexing: trivial because, once asked, it is relatively easy to answer; but perplexing because so difficult to ask. The great challenge facing a student of the field lies not in deciding which answers to the question are sensible and which not; most noteworthy answers, at any rate, are only noteworthy because they *are* sensible in this way or another. The problem lies rather in identifying the questions they *really* answer; placing these questions in relation to one another; and, finally, situating them against the big background issue of what law is. Often enough,

[1] AW Brian Simpson, *Reflections on The Concept of Law* (OUP 2011) 80.

[2] *CL* 5.

the difficult question is not 'who is right?', but 'what are the stakes?'; sometimes it is not even clear there is a disagreement to begin with.

To these latter questions there can be two broad approaches: one revisionary, so to speak, the other incremental. To some extent they are exemplified by Ronald Dworkin and HLA Hart, themselves parties to perhaps the most famous 'debate that never was'.[3]

Dworkin, when he first launches his attack against Hart (and more generally, legal positivism), makes it clear that it is a 'general attack' that he is launching.[4] This is how he closes it:

> [The positivist's] picture of law as a system of rules has exercised a tenacious hold on our imagination, perhaps through its very simplicity. If we *shake ourselves loose* from this model of rules, we might be able to build a model truer to the complexity and sophistication of our own practices.[5]

He is an intellectual conqueror: here, as in later work, Dworkin is set not only to propose an illuminating way of looking at law, not only to provide new insights, but also to establish that the other model—in this instance, positivism; in another, 'semantic theories' of law[6]—is best 'shaken loose' from, rejected, abandoned. At the other end there is Hart, who in the opening pages of *The Concept of Law* cites some of his predecessors' 'paradoxical utterances', only to say of them:

[3] Nicos Stavropoulos, 'The Debate That Never Was' (2017) 130 Harvard L Rev 2082.

[4] Ronald Dworkin, 'The Model of Rules I' in *Taking Rights Seriously* (Duckworth 1977) 22.

[5] Dworkin (n 4) 45 (italics added).

[6] Ronald Dworkin, *Law's Empire* (Fontana Press 1986) ch 2.

> They throw a light which makes us see much in law that lay hidden; but the light is so bright that it blinds us to the remainder and so leaves us still without a clear view of the whole.[7]

This is not mere courtesy. While Hart, too, proclaims at the climax of his argument a 'fresh start',[8] he is at pains to remind his reader time and again that his model of law, however superior, 'is not the whole'; that there are, inevitably, 'elements of a different character' it cannot explain.[9] He is acutely aware that his theory, as it casts light on some phenomena, cannot but leave others in the shade; and that other accounts might have to be developed to fill in the gaps. He is no conqueror, in short, but an explorer: mindful of the limits of what a single person can achieve, he is more interested in filling in our philosophical map of law than in wiping anyone off that map.[10]

It is not difficult to guess where my sympathies lie. But I am mentioning the contrast neither to discredit Dworkin nor to praise Hart—in any case their views and attitudes are more complex than I have sketched them—but to draw attention to a simple but important fact about legal theory in general which is too often overlooked in the heat of argument. This fact is that the phenomenon of contemporary law—let alone law in general, across times and cultures—is simply too complex, multi-faceted, and ambivalent to admit of a single, comprehensive

[7] *CL* 2.

[8] *CL* 79–80.

[9] *CL* 99.

[10] cf Leslie Green, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) liv–lv.

model to explain it all at one sweep. A look at the recent history of jurisprudence reveals not a succession of theories, each rendering the previous one obsolete, but a sequence of genuine and intelligent attempts at dealing with the amazing complexity of our legal practices, carried out by thinkers of different temperaments and diverse outlooks. Each of these attempts contains a grain of truth, elucidating some parts of our experience of law, but also a chaff of falsehood, distorting our vision of other parts. The proportions have of course varied; not every contribution to legal theory is of equal quality. But then nor is there, nor can there be, a single answer to all our problems, doubts, and worries, and the reason why we find some explanations more convincing than others depends to some extent at least on our own predilections, attitudes, and interests.[11] Legal theory is, in a non-trivial sense, a product of who is doing it.

One might think this picture unattractive because it makes debate in legal theory less exciting. I suppose it might make it less spectacular. But this is a relatively low price to pay for a clearer appreciation that behind the 'plainly', 'surely', and 'undeniably' of so many arguments in jurisprudence lie basic differences of interests and attitudes: not just different answers to the question 'what is law?', but also different ways of asking the question in the first place. We all *know* what law is; there is really no great mystery about *this*. What divides us is how we *explain* what we know, and which elements of our experience we put at the centre of our explanations. We disagree not on what law is, but on how to talk about it. And

[11] cf Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 57–58, 68; Leslie Green, 'Introduction: A Philosophy of Legal Philosophy' in *The Germ of Justice* (OUP forthcoming).

there is, accordingly, a sense in which we can all be 'right': not thanks to some vapid 'agreement to disagree', but because we can all be giving right answers to our questions if these questions are themselves different; and so we can, in our diverse ways, all be contributing to the full picture.[12] The line dividing competition from cooperation in legal theory—as, no doubt, in many other disciplines—is fine indeed. Plotting and crossing it might not be spectacular, but exciting it surely should be.

The argument of this thesis should be read in this spirit. To begin with, it is an essay in descriptive and not normative legal theory. What I mean by descriptive legal theory is: legal theory which does not provide moral guidance or appraisal, but seeks only to throw light on our experience of law and develop a conceptual framework in which to make as much sense of it as can be made. Accordingly, I am not presuming anything, at least anything specific, about the sort of ends we should or may pursue through our laws, or about what we should or may do in the face of the law as we find it;[13] nor will I reach any such conclusions. I will generally express this contrast between statements about what is the case and statements about what someone ought to do by calling the former *descriptive* and the

[12] cf Liam Murphy, 'Better to See Law this Way' (2008) 83 NYU L Rev 1088, 1093–94. At 1104, Murphy says that 'we cannot live with the ambiguity', and 'need to disambiguate' between the various concepts of law we can operate with. Maybe we do need to disambiguate in certain contexts, eg to come up with decision procedures for courts. But in other contexts we might disambiguate differently, and in still other contexts—general legal theory looks like one—there may be no immediate need to disambiguate at all.

[13] In the interest of full disclosure, I should say I make two background assumptions of this sort, but both very general. The first is that of all the worthwhile and permissible courses of life, at least some—possibly many—involve living with and around others; in other words, that it is permissible for one to live in a law-governed society. I think this is so trivial as to be almost insubstantial. More contentious is the other one, perhaps: that it is possible that there is no obligation at all, even *pro tanto*, to follow at least some laws.

latter *deontic*.[14] In these terms, what distinguishes descriptive legal theory is that it reaches no deontic conclusions. It can, when it is good, give us some guidance on how we should *talk* and *think* about law; it cannot, however, tell us what we should *do* about it.[15]

Because this is an essay in descriptive legal theory, it is only meant to compete with other works of descriptive legal theory. So while I spend quite some space and energy dealing with those works of Hans Kelsen, HLA Hart, and Joseph Raz which I take to define the genre, I do not make any substantial arguments against theories current in contemporary normative jurisprudence. I have no reason to make such arguments and neither do I want to. My project is altogether different from that of, say, Ronald Dworkin in *Law's Empire*; any objections I could raise against his views on the nature of law are unlikely to be very good on the terms of his project, and I am open to the thought that on those terms he might be right. Now, maybe this does not yet mean that I could not meaningfully argue against his or anyone else's normative theory of law. Maybe there could be a 'master argument' of some sort to expose all normative legal theory as either impossible or useless, and

[14] The logical distinction is centred on the maxim that no deontic statement can follow from descriptive statements alone. I assume it is right, although it has not escaped controversy: see eg John R Searle, 'How to Derive "Ought" from "Is" ' (1964) 73 Philosophical Review 43. In the final section of 'Positivism and the Separation of Law and Morals' in *Essays in Jurisprudence and Philosophy* (OUP 1983), HLA Hart dissociates himself from certain ways in which to found the maxim, but does not appear to reject it. I was once told that Hart derives an 'ought' from an 'is' in *The Concept of Law*. I have since read the book at least twice and remain unconvinced; see esp section III.2.B.

[15] Ultimately, both types of statements are about what we *should* do, in the sense that thinking and talking, too, is a sort of doing: see Saul A Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Harvard University Press 1982) 37. So I take deontic and descriptive statements to be two different species within the same genus, distinguished by their mutual logical independence, as expressed in particular by the maxim discussed in n 14.

such 'master arguments' have sometimes been deployed by normative theorists—Dworkin prominently included—to prove *descriptive* jurisprudence pointless. But I do not think any such argument has ever been successful, and thankfully so. It would indeed be a pity if there were a way to effectively close us off from descriptive or, as the case may be, normative jurisprudence. This alone does not establish that there is no such way, of course, but it is reason enough not to look for one.

This then marks one dimension in which this thesis is animated by a desire to explore, rather than conquer, the intellectual field of legal theory: my ambition is not really to find the right theory of law, but at most the right *descriptive* theory of law. There is also a second dimension, which has to do more specifically with how the approach presented here competes with other approaches that a descriptive account of law may take. Roughly half of this thesis—chapters II to IV—is devoted to challenging the paradigm of law as a system of legal norms. This notion—that 'law' is for most purposes interchangeable with 'legal system'—currently pervades the work of most descriptive legal theorists, or perhaps of most legal theorists, full stop; and yet we will see that it might not deserve the predominance it enjoys. Before I outline the challenge in any more detail, however, let me say a few more words to clarify its nature.

The aim of the challenge is not to suggest that the idea of a legal system has no place in the best descriptive theory of law, let alone that we should 'shake ourselves loose' of it. The shift of focus onto legal systems has rightly been called a 'Copernican' moment in the history of descriptive jurisprudence,[16] and the idea of a legal system as it has been developed since remains a powerful analytical tool. Like

[16] Green (n 11).

any such general framework, however, it is not watertight; there are elements in our experience of living with law which slip through the cracks. The gist of my challenge is that some of these elements are important enough to look for alternative frameworks and paradigms to explain them. The objection is not that the idea of a legal system inevitably distorts our understanding of law, but that it is not enough to frame it all.

So my plan is not to obliterate the idea of a legal system in order to make room for an alternative conception. I have no ambitions of obliterating anything. What I want to do is, so to speak, to relax that framework a little by pointing out some problems with it; and then, once it is loose enough, to refasten it around a broader set of phenomena. The result is a descriptive jurisprudence different from that offered by Kelsen, Hart, or Raz. It is better for some purposes—including my own—though it may be worse for others. Either way, it is not meant to put their main findings into question, let alone render them obsolete, but to reinterpret these findings and paint a broader picture around them to explain things they cannot explain themselves.

We will see that among these things are legal practice and its continuity. Since both admit of a number of definitions I specifically do *not* want to refer to, I should now say a little about how I understand them. Some explanation now might prevent misunderstanding later; and in any case, I should not force the reader to figure this out as we go along.

### *A. Legal Practice*

There is a fairly uncontroversial assumption in most contemporary legal theory that the existence of law in a given society is constitutively connected to some

constellation of social facts.[17] When we say that there is law in a society, it is at least part of what we are saying that people in that society *do* certain things; and we take the fact that they do these things to be at least part of our reason for saying that the society is governed by law. This picture is simple enough, but there is a lot going on in it. Let me unpack it a little.

There are at least three aspects to this simple picture that might interest us. The first is the social *practice* itself: the very things people do that we suppose license our assertion that there is law in their society. The second is the sense in which the social practice is a *legal* practice, or a practice of *law*. What is it about this practice that allows us to make the assertion? What do we even mean when we say that there is law in this group and no law (or different law) in that one? Finally, there is *the* law and its *content*. What is the law according to which, say, judges are to decide cases? By what mechanism or method can its content be determined by looking at the practice? Is it enough to look at the practice, or should we also consider something else, like morality?

The three elements are of course tightly intertwined, and they will not always admit of neat compartmentalisation. Any student of analytical jurisprudence will readily appreciate this. But it is fair to say, I think, that contemporary legal theory usually focuses on aspect three and, so far as relevant, also on aspect two. It is normally framed as a general study of *the* law, its normative content, and of the ways in which that content can be constituted by or derived from social practice. It normally eschews detailed inquiry into that practice itself. No wonder: with its

[17] Stavropoulos (n 3) 2088–92.

aspiration to explain 'law in general, law as such, law wherever it may be found',[18] legal theory is understandably wary of delving too deeply into the chaotic contingencies of social life. But as a consequence, it loses sight of important features of 'there being law' which have a more tenuous connection with 'the law' understood as a systematic body of normative content. This thesis hopes to bring these to the fore; accordingly, my focus falls on aspects one and two.[19]

When I speak of 'legal practice', therefore, I refer to the practices characteristic of societies which have law. But then there is another question of how far and wide these practices are thought to extend within these societies. It might be thought, for example, that legal practice is limited to the practices of officials: especially judges, but also legislators, say, or government agents, or police officers, or other members of the state's administration more generally. Some such understanding of the phrase appears to inform those who subscribe to Hart's theory of law as a 'practice theory', grounding the existence and content of the law in legal practice.[20] Another suggestion could be that legal practice is the 'interpretive' practice of courtroom and courtroom-like argument about how best to engage the state's judicial and coercive apparatus. This is roughly how the term is employed by Dworkin in *Law's Empire*,[21] but it is also common in everyday speech. 'Legal practice' is often understood as referring to the business of 'practitioners', so litigation lawyers

[18] John Gardner, 'Law in General' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 270; cf Joseph Raz, 'Can There Be a Theory of Law?' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009). For an overview, see also Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 4 OJLS 565.

[19] See also n 4 in chapter V.

[20] I will say more about Hart's 'practice theory' of law in chapter III.

[21] See esp Dworkin (n 6) 93.

and judges. In this sense, one can run or join a legal practice, or be qualified for legal practice in one jurisdiction but not another.

I take a broader view. 'Legal practice' in this thesis may refer to any social practice whatsoever so long as it can be, and is, understood in distinctively legal terms. Legal practice, in this sense, includes things as varied as:

> the legislator's enactment of a statute that anyone who fails to repay a debt on time shall be liable to pay the creditor double the amount;
>
> NN's incurring a debt of £1,500 to AA;
>
> NN's failure to repay the debt he has with AA on time;
>
> the judge's decision that NN is liable to pay £3,000 to AA;
>
> NN's contempt of court as he refuses to discharge his liability to AA;
>
> NN's conviction for contempt of court;
>
> NN's imprisonment.

What these events have in common is that they cannot be fully made sense of without employing a number of concepts characteristic of legal discourse: in the example above, these concepts would be '(the legislator's) enactment', 'statute', 'pay' (also 'repay'), 'debt', 'liable' (also 'liability'), 'creditor', 'incurring (a debt)', '(a judge's) decision', 'contempt of court', 'discharge (a liability)', 'conviction', and 'imprisonment'.

Again, all this seems simple enough, but a closer look reveals two difficulties. The first is that exactly what it takes to 'make full sense of' some social events is, inevitably, to some extent a matter of what we are presently interested in: were we not lawyers or legal theorists, for example, but behavioural anthropologists,

we would probably care very little about all these legal terms; we would be more concerned with *who* exactly has made *what* sounds and movements, and *where*, and *when*, and *in what circumstances*. The second is that just because some action admits of some legal classification does not necessarily mean that knowing what that classification is will help us make full sense of it. Sleeping is, ordinarily, a lawful act, as is working night shifts; and yet, if someone asked us what most inhabitants of London do at night, we would probably forget to mention that as they sleep or work night shifts, they perform lawful acts. However true and accurate, this point about the legal classification of Londoners' nocturnal activities is neither necessary nor sufficient to make adequate sense of them. If anything, it is a distraction.

These difficulties do not make my understanding of legal practice unworkable, but they do make it necessary for me to complicate things a little. Put briefly, the complication is that 'legal practice' is itself a legal concept—a category of legal discourse.[22] We will see in due time, therefore, that the limits of legal practice cannot be specified otherwise than from within an actual practice of thinking of, talking about, and interpreting social reality in legal terms—that is, otherwise than from within a practice of legal discourse.[23] Legal practice, in short, consists of whatever actions we, as users of legal discourse, understand in legal terms.[24] In modern legal practice, of course, this might apply to virtually any action of virtually any human being. This does not mean that all human practice is legal

[22] See n 36 in chapter VI.

[23] See section V.2.

[24] This formulation hints at a circularity, explored in more depth in section V.2. I also explain there that the circularity is not vicious, because—and as far as—there is an actual practice of understanding social reality in legal terms that breaks the circle.

practice, only that it might be. Modern legal practice, like modern law,[25] is open-ended.

*B. Its Continuity*

At bottom, continuity is the absence of interruption over time.[26] Elizabeth II had continuously reigned in the United Kingdom between 6 February 1952 and 8 September 2022 because she had uninterruptedly been Queen between these dates. When one needs a continuous power supply, one runs a backup generator to take over immediately in the case of a power cut. To construct a continuous storyline, one ensures that any event in the plot makes sense against the background of what has happened before and also as the background to what happens next. And so on: while there are many things that can be continuous in one sense or another, the common denominator between them is that they *are* or *do* something *uninterruptedly*.

In other respects, however, the examples I have just given are not alike. Queen Elizabeth's reign, for one, can be characterised as continuous because the Queen Elizabeth II of 1952 *was the same* person as the Queen Elizabeth II of 2022. The backup generator, by contrast, is obviously not the same thing as the grid; it just has *the same function* of supplying electricity. And as far as the continuity of a storyline goes, we cannot even begin to explain it in terms of whether it is the same story as before or not: of course it is, whatever that could mean; the question is precisely whether its elements *make coherent sense* when put together into a single narrative.

[25] *PRN* 152–54; *AL* 119–20.

[26] Or, strictly speaking, over some other dimension. But we can safely limit ourselves to continuity over time here.

We can thus make a provisional distinction between at least three kinds of continuity, or perhaps three kinds of criteria that we can use to define and determine it: continuity may be based on *identity*, *function*, or *coherence*. We will shortly see that the continuity of law in particular has often been thought to be based on identity, namely on the identity of the legal system at one point in time with the legal system at another point in time.[27] Law is often thought to be continuous in roughly the same sense as the reign of Elizabeth II had been continuous between her ascent to the throne and her recent death; this is perhaps a relic of some once-fashionable theories of law which viewed all law as emanating from a sovereign, though it is interesting to note that part of the reason why these theories are no longer fashionable is that they cannot explain the continuity of law through changes on the throne.[28]

Relic or not, though, I think this way of conceptualising legal continuity is neither substantively right nor really an adequate characterisation of the different accounts of continuity and discontinuity we will encounter in this thesis. I therefore propose to understand the continuity of law in functional terms. Wherever there is law, I take it, it is there for some purpose; and its continuity basically consists in its uninterrupted ability to fulfil this purpose.[29] To put it differently: law is a social device—and as such, it exists (continuously) only insofar as it (continuously) works.

[27] See chapter II, esp section II.2.

[28] *CL* 52–55.

[29] I do not mean to deny thereby that law 'is a modal kind' rather than 'a functional kind': Gardner (n 18) 293. (I do not mean to agree with this either; I am undecided, and my indecision may be partly explained by section VIII.2.A.) But even if law's functions are not definitive or distinctive of it, its continuous existence may nonetheless be defined by its continuous ability to fulfil them.

We will therefore see that many accounts of legal continuity revolve around some notion of *efficacy* as the primary benchmark of a legal system's identity over time, or—as I propose to frame it—of law's continuous ability to serve its point. This certainly makes sense from the point of view of the state, its officials, and other professionals whose primary business is to advise, direct, or study the operation of state organs. To them, law may indeed appear as an elaborate machine of 'social control',[30] existing and operating in order to enact and enforce in society some 'social order';[31] it is then no wonder that they should see law's functional continuity as corresponding to its 'efficacy … that is, its capacity to control the population to which it applies'.[32] It will be a recurring theme of this thesis, however, that we would do well to distance ourselves from the point of view of the law and of those charged with its creation or administration. It is not that the focus on their perspective is necessarily wrong or yields no insight at all. Rather, the issue is that it makes legal theory narrower than it might otherwise be and hides from our sight things that are worth seeing.

One of these things is that law can also be useful to those who have neither the means nor the ambitions to control any sizeable population, and for the most part just seek control over their own lives. This is important because most of us are like that. I will thus argue that instead of framing law as a more or less centralised device of controlling society through a system of positive norms, we can think of it as a conceptual or discursive facility which enables a practically useful

[30] *CL* 39.

[31] See n 113 in chapter II.

[32] Thomas Adams, 'The Efficacy Condition' (2020) 25 Legal Theory 225, 225.

understanding of our own and others' actions. We have already had a glimpse of how this works: certain actions of certain people can, where there is law, be characterised as concluding a contract, or incurring a debt, or violating a criminal prohibition, or constituting contempt of court. By interpreting our interactions in these and similar ways, we get a better sense, first, of what others around us are up to; second, of how they are likely to react to us acting in this or that way; and third, finally, of what we could and should do in the situation.

So, while law may also be a means of social control in the hands of some power elite or other,[33] it is above all a device that we all can and do use to stay on top of our present social situation—whatever it happens to be, and regardless of whether we are ourselves members of the elite. To be sure, the other side of this coin is that the 'control' law thus affords us will often turn out to be minimal; it might indeed come down to knowing when to hide or flee abroad. But the point is not that law must by its essence empower everyone, let alone that it must empower everyone equally. This might be agreeable, but it is certainly not true. It is rather that however much power it gives to one, or however little, it allows one to get a better view of the practical setting for one's decision, of the range of options open to one, and of what these options involve. In this sense, we have reason to

[33] Perhaps it not only 'may' be that but *has to* be that in order to be rightly called 'law': eg because the role played by the coercive structures of the state in upholding the conceptual framework of law is simply too integral: see section VII.2.C. Ultimately the question is rather remote, because the difficulty in imagining how a society could lack a power elite is way more formidable than that involved in the argument that such a society would still have law.

understand our social practices in legal terms regardless of who we are: whether we are powerful or powerless, obedient or rebellious, good or evil.[34]

If law's primary point is to provide this conceptual or discursive facility, then its continuity consists in a sustained capacity to actually provide it. I therefore argue in chapter VII that legal practice is continuous when, and to the extent that, interpreting one's social situation in legal terms helps one make coherent practical sense of it. What I mean by this is that legal practice is continuous so long as legal discourse allows us, on the one hand, to interpret the actions of those with whom we interact as rationally flowing from their practical attitudes towards the world; and, on the other hand, to figure out what courses of action are rationally open to us in the light of the attitudes we happen to take ourselves.

Thus, the continuity of legal practice consists in law's giving us a workable discursive framework for practical understanding and deliberation. Like efficacy-based notions, this notion of continuity, too, has to do with law's capacity to *guide* us in our practical lives. And yet the guidance here is much more inchoate and leaves much more room for the variety of attitudes we might take towards it. It does not involve *determining* our conduct in any particular way; rather, it consists in *supporting* us, as we determine our conduct for ourselves, by bringing some order and

[34] This discussion of law's primary function, laid out more fully in section VII.1, deals with normative questions; and in addressing them, I rely on the assumptions outlined in n 13. But I still think that it can be kept within the perimeter of descriptive theory: first, because the normative questions addressed have to do with what reasons we have, if any, to *think* and *talk* in certain ways (as opposed to reasons to *behave* in certain ways); second, because we will see that the answers given reflect a position common to a very wide range of normative standpoints. These two points should show how the discussion need not force us past the 'point of no return'—as would, argues John Finnis, focusing on Hart's 'internal' or Raz's 'legal' point of view: *Natural Law and Natural Rights* (2nd edn, OUP 2011) ch 1, esp 11–18.

meaning into the context of our decision. It is the guidance of our deliberation, not the guidance of our agency.[35]

The topic of legal continuity has sometimes been thought to be a relatively niche concern that a successful theory of law can barely touch upon.[36] One idea animating this thesis is that when it comes to giving a theoretical account of legal practice, its continuity becomes central: for a social practice like legal practice is a dynamic phenomenon whose existence can only consist in the fact that it goes on—that is, in its continuity.[37] We will eventually see that the functional continuity of legal practice is in large part measured by the coherence of its legal discourse. Without pushing the analogy too far, we may say that as the function of a storyline is to arrange some events into a coherent narrative that reads or watches well, so the function of legal discourse, too, is to arrange the events that make up legal practice into a coherent narrative that provides useful and sound practical guidance.

And so we will end up with a conception of legal continuity quite different from those 'traditional' notions centred on efficacy and identity. As before, however, the intention is not to uproot these more established notions completely,

[35] See sections VI.1.E and VIII.1.A.

[36] See Raz (n 11) 58. At *AL* 98, Raz mentions (not uncritically) that HLA Hart was not concerned with the question of legal continuity in *The Concept of Law*. The matter is of course more complex. Some of the most important passages in Hart's book come from his discussion of legal continuity at *CL* 51–61; so Raz is best understood as suggesting merely (and rightly) that Hart does not have a workable distinction between legal continuity and discontinuity. But this is understandable insofar as Hart is concerned, like I am here, to explain our perception of continuity where other models entail discontinuity; though I do provide such a workable distinction in section VII.2.A.

[37] See section VII.2.B.

but only to put them in their proper place, less central and exposed than the place they have occupied so far.

## 2. AIMS

I thus want to give—or at least begin giving—a philosophical account of legal practice (understood broadly to include any action that we make sense of in legal terms) and of the functional continuity of that practice (understood in terms of its capacity to provide its participants with structured deliberative guidance). Why do I want that? Because the experience of participating in a continuous legal practice is central to the experiences of an ordinary person living in a society governed by law, and because I want to push for a legal theory centred around these experiences as opposed to the experiences of officials and professionals. Why do I want to push for such a legal theory? Because I believe it stays closer to the spirit and value of descriptive jurisprudence. The whole point of the enterprise, as I see it, is to provide a *neutral* account of legal phenomena: neutral in the sense that it leaves their moral appraisal to further debate; and also in the sense that it facilitates this debate by supplying a common theoretical vocabulary in which the different positions, whether supportive or critical of the law, can be formulated with mutual intelligibility.[38] A theory which distances itself from the viewpoint of professionals

[38] I take myself to follow Hart in this understanding of the aim and value of descriptive jurisprudence: see Hart (n 14); *CL* 207–12, 240; and see also 40, 91. Hart appears to err on the side of facilitating criticism of the law rather than support for it, in that he characterises the 'clear understanding' he seeks as 'an important preliminary to *any useful moral criticism* of law': *CL* 240 (italics added). See also Neil MacCormick, *HLA Hart* (2nd edn, Stanford University Press 2008) 40–41; Liam Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001); but contrast Murphy (n 12) 1099–102. For the notion of the theorist as 'underlabourer' more broadly in political and not just legal theory, see Adam Swift and Stuart White, 'Political Theory, Social Science and Real Politics' in David Leopold and

and officials—who, at least in their capacity as professionals and officials, tend to have a broadly positive and committed view of the law—can be expected to meet these objectives better than a theory which does not.

These are my motivations. They are evaluative, no doubt; I would even say they have an ethical flavour.[39] Interwoven with these ethical matters, however, is the sense that legal practice and its continuity, especially as they appear from the point of view of an ordinary participant in legal practice, simply have not received adequate theoretical treatment in contemporary descriptive jurisprudence. This is not to say that the legal practices of ordinary people have escaped theorists' attention, but rather that their existence and complexity have been treated as cumbersome anomalies, standing in the way of the elegance of the legal system; as things to be explained away and relegated to the fringe, rather than approached with independent theoretical interest. Yet there is both simplicity and richness in how ordinary, day-to-day, lay legal practice can be theorised; and there are also high-level puzzles that are much easier to address with a dedicated theory of legal practice.

In the next chapter, I take one of these puzzles as my test case. There is a theoretical problem which isolates very nicely the difficulties contemporary descriptive jurisprudence has with explaining legal practice and its continuity. I label it simply 'the problem of continuity'; roughly speaking, it is this. Sometimes a

Marc Stears (eds), *Political Theory: Methods and Approaches* (OUP 2008); relatedly, see also Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (OUP 2007) ch 7 for a discussion of why this 'underlabouring' is morally significant.

[39] cf Finnis (n 34) ch 1; Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001) ch 3; Dan Priel, 'Description and Evaluation in Jurisprudence' (2010) 29 Law and Philosophy 633, 647–48.

legal practice may undergo a constitutional crisis: find itself in a situation where there is a dispute among top constitutional actors as to how the constitution is to be understood and no agreed means by which the dispute could practicably be resolved. Such disputes are doubly critical, we might say, at least if we subscribe to the popular view that the identity and shape of a legal system fundamentally (indeed 'constitutively') hang upon its constitution. They are critical because they are disputes about the interpretation of the constitution—and so, by extension, about the identity and shape of the entire legal system. But they are also critical because they are practically irresolvable—and so represent a persistent failure of the legal system, in particular of its mechanisms of dispute resolution, to effectively regulate and maintain its own operation. A recent example I use to illustrate how such constitutional crises may come about is the Polish Constitutional Tribunal crisis of 2015–16, during which the judiciary—including the Constitutional Tribunal, in whose jurisdiction it technically lay to resolve competence disputes—came into conflict with the Polish government and president as to the composition and competences of the Tribunal itself.

Does a constitutional crisis like this break the continuity of law? In one sense, it surely does: it invariably marks a major failure of the constitution, potentially calling into question the identity of the whole legal order. And yet at the same time, the impact of a constitutional crisis such as the Polish one on wider legal practice is often limited, if at all discernible. This is not even because constitutional crises rarely last long enough to penetrate into other areas of legal practice. The Polish crisis, though it has long moved to arenas other than the Constitutional Tribunal, is arguably still ongoing. Rather, this seems to be because a constitutional crisis may simply be too far removed from other areas of legal practice to affect

them. The challenge is thus to fashion such a conception of law and legal continuity that it makes room for the possibility that some events—a constitutional crisis—may constitute a break in the continuity of constitutional practice, yet at the same time not only leave the overall continuity of legal practice intact, but be quite irrelevant to it. It is this challenge that I refer to as the problem of continuity.

We will see in chapter II that received conceptions of legal continuity fare rather poorly when it comes to addressing the problem. The reason for their failure on this front, I suggest, is that they subscribe to the notion that law is to be talked and thought of as a *legal system*, meaning a *unified*, *consistent*, and *discrete* body of legal *norms*. Chapters III and IV are devoted to a closer examination of this idea and its interface with the project of theorising legal practice. In chapter III, I discuss the account of law presented in HLA Hart's *The Concept of Law*. Hart's work represents a case in point for examining that interface, since he is at once minded to provide a theory of the legal system *and* to anchor it in an account of legal practice. As he pursues the former project, however—and it is that former project he prioritises—he fails to take the latter project seriously enough. Consequently, while Hart really does anchor the legal system in legal practice, he takes a thin cable to hold the anchor. His theory of law may rightly be called a *practice theory* of the legal system, but it falls short of a *theory of legal practice*.

The device which makes it possible for Hart, and others who share his broad approach, to liberate their neat theories of legal systems from the apparent chaos of actual legal practice is the notion that a legal system is made up of *norms*. After all, it goes to the core of what a norm is that its content need not be reflected in social reality; in fact, part of the reason why we speak of norms at all is precisely that they express certain aspirations as to what social practice should become. In

chapter IV, I argue that descriptive legal theory should abandon, or at least qualify, this notion—elaborated most fully by Raz in his reading of Kelsen—that law is by nature a body of legal norms. There are two reasons for this.

The first reason is that if we take the word 'norm' in 'legal norm' seriously, then thinking of law as a body of norms sits awkwardly with the central ambition of descriptive legal theory to offer a substantial but morally agnostic account of legal phenomena. Raz, we will see, develops his account of law from the 'legal point of view'—the normative perspective of a hypothetical person who regards as sound the various claims made by the law, and most of all the law's claim to our allegiance—and only preserves the neutrality of his account by taking a distanced or 'detached' attitude to that point of view. But this is risky. The legal point of view may present a false image of reality; as a consequence, any theory building on that image may itself come out distorted. The risk might be worth taking if there is no other choice; but if there is a viable alternative, the point presents a powerful consideration in its favour.

The second reason is there is such a viable alternative, and there is some irony in how it lies in wait between the lines of Raz and Kelsen's own arguments. Closer analysis reveals that they think of law not so much as a body of norms properly so called, that is, not as a body of aspirational and categorical standards of proper behaviour, but rather as a body of requirements placed, as a matter of social fact, by some individuals (whose actions are collectively hypostatised as the actions of 'the law') upon others. In other words, they do not divide legal practice into actions that ought to be done, or ought not to be done, or are permissible to do or not, but rather into 'legal' and 'illegal' actions, or along some similar lines: and by classifying an action as either they do not mean to indicate whether it ought to be

done or not, but only that the law requires or, as the case may be, permits it. This might sound fairly obvious, but we will have to do some digging beneath the surface rhetoric of 'legal norms' to arrive at this interpretation.

Why care? Because if the picture presented by Raz and Kelsen basically serves to classify any action in legal practice as either legal or illegal, then we might ask why we should not divide them further—into, say:

| *Legal actions:* | *Illegal actions:* |
|---|---|
| enacting a statute; | committing a crime; |
| contracting; | breaching a contract; |
| judging; | being in contempt of court; |
| incurring a debt; | defaulting on a debt; |
| using trust property; | breaching a fiduciary duty; |
| … | … |

Such further classifications, we have already seen, are the bread and butter of everyday legal discourse, and we have every reason to expect that they will be seen by a good number of participants in legal practice as relevant to their practical reasoning. In fact, the only kind of people who would have *no* practical interest in such further distinctions, and who would rest content with knowing only if their action is legal or illegal, would be the mythical 'legal men' from whose point of view Raz develops his account of law.[40] The account therefore has limited attention for

[40] See n 85 in chapter IV.

the practical experiences and concerns of many—probably most—participants in legal practice.[41] For a descriptive theory of law, this is way too narrow.

At that point I begin to develop an alternative picture. I start with the notion that legal statements essentially serve to classify the actions that make up legal practice into various conceptual categories of legal discourse. I call any statement which assigns an act into some such category a statement of that act's *legal meaning*. In chapter V, I spend some time clarifying what such statements themselves might mean and argue that there are two frames of reference in which they can be made sense of. The first, *internal* or *theoretical* frame of reference has to do with the relations abstract legal concepts have with each other. If one act enacts a criminal statute, for example, a certain other act—as specified by the statute's provisions—now counts as a crime; if that action is now criminal, yet another action now constitutes punishment for the crime. The second, *external* or *practical* frame of reference has to do with the conceptual relations between the legal meaning of actions and the practical attitudes of those who actually perform them. If an action is criminal, a person committed to obeying the law normally avoids it; and if the person does the action nonetheless, and we can be certain that they have full knowledge of, and control over, what they are doing, then we can conclude with some confidence that they are not so committed to obeying the law after all. In the latter part of chapter V, I examine the place of such statements ascribing legal meaning to social practice in a descriptive account of law.

[41] In section IV.3.C I consider, and reject, the thought that these further distinctions are all ultimately reducible to patterns of legality and illegality, which thought would appear to underpin any Razian (Hartian, Kelsenian) explanation of these further distinctions.

In chapter VI, I seize on the relations that link the legal meaning of an action to the practical attitudes of the agent who does it to explain how statements of legal meaning, though descriptive, can be practically relevant. Consideration of the legal meaning of our actions, I argue, cannot alone determine what we do, or ought to do; but together with the fact that we hold certain practical attitudes, or with their content, it can. An analogy might make this more palpable. A recipe for pasta alla norma[42] might say that we 'ought to' roast aubergines; what this means, however, is not that we must roast aubergines come what may, but only that it is necessary that we do so *if* we are to make pasta alla norma. Statements of legal meaning, too, can be seen to *necessitate* that *if* we are to hold to our practical attitudes, we *must* do this or that; and they can also be used to *explain* why we have acted thus and not otherwise. But they do not say thereby what we really ought to do.

These 'external' relations that obtain between the legal meaning of our actions and our practical attitudes can then be combined with the 'internal' relations that obtain between legal concepts in the abstract into a discursive structure thickly connected to our actual legal practices. By placing ourselves within this structure, we make sense of our own actions, as well as of the actions of those with whom we interact, and construe both our own and others' actions as done by rational, informed—and thus intelligible—agents. By furnishing this structure, law does us a service virtually regardless of who we are, what role we play, and what position we

[42] A Sicilian tomato pasta with aubergines and hard cheese. The name of the dish, the legend goes, comes from Bellini's *Norma*; apparently the pasta was better than the opera. So far as I have been able to find out, the given name, Norma, has ambiguous origins, and can be cognate with both 'norm' and 'north' (cf the male given name, Norman, of which Norma can be a female counterpart). We will later see that etymology is of little help when trying to figure out what a norm is: see n 29 in chapter IV.

occupy in legal practice. For it provides us thereby with a relatively stable framework in which to conduct our deliberations, make our decisions, and further—so far as possible—our individual projects and ambitions.

To provide this service, I finally argue in chapter VII, is law's primary point and purpose, and consequently the key to the continuity of legal practice. I therefore propose to understand legal practice as continuous so far as, in the context of any particular interaction within legal practice, legal discourse affords us an opportunity to make coherent practical sense of that interaction. Whether legal practice is continuous or not is thus no longer a flatly one-dimensional question of whether the law at one point in time is *the same* as the law at another point. It is a complex, context-sensitive inquiry into the actual *workings* of law's discursive facilities, and into their capacity to support the varied interactions that make up our social life. The coherence-based continuity *of legal practice* is therefore quite different from the efficacy-based continuity *of legal systems*. Unlike the latter, moreover, it makes the phenomena underlying the problem of continuity reasonably straightforward to explain as a direct consequence of the fact that discontinuity in some departments of legal practice—for example, in constitutional practice—is perfectly compatible with overall continuity in other areas. The continuity of law, on this understanding, is not the continuity of a single golden thread that runs through the fabric of legal practice. It is the continuity of the fabric itself, woven of many diverse—and some perhaps golden—threads: here more tightly, there more loosely.

So my argument goes along a circle or arc. I depart from a problem with the received conceptions of law and legal continuity and then come back to it right at the end with an alternative solution. In between, I traverse a number of

more general questions about the nature of law, legal practice, and legal discourse. In the end I hope to lay out a basic analytical framework in which we can make some general sense of *all* of our everyday legal practices, not just those of professionals and officials. Stated in general terms, that basic framework will be neither exhaustive nor all-purpose, but I hope to convince the reader that it can throw new light on at least some important elements of our experience of law. There is, after all, only so much that a single thesis may achieve.

I end this introductory chapter with a word of caution. There is another, radically opposed conclusion the reader might draw. I seek to develop in outline what I take to be the best general descriptive theory of law. I think the result of that exercise is a substantial and interesting account of law which opens promising avenues for further reflection and argument. But the reader might well agree with my arguments, accept the outcome as the best descriptive account of law, and then conclude that if *this* is the best that descriptive jurisprudence can offer, then it is a hopeless enterprise. Such a conclusion, too, would be important. I think it would also be false, but on this issue—as on many others—the reader might, I expect, differ.

## II. The Problem of Continuity

In *The Concept of Law*, HLA Hart writes:

> To complete this crude survey of the pathology and embryology of legal systems we should notice other forms of partial failure of the normal conditions, the congruence of which is asserted by the unqualified assertion that a legal system exists. The unity among officials, the existence of which is normally presupposed when internal statements of law are made within the system, may partly break down. It may be that, over certain constitutional issues and only over those, there is a division within the official world ultimately leading to a division among the judiciary. … The normal conditions of official, and especially of judicial, harmony, under which alone it is possible to identify the system's rule of recognition, [are] suspended. *Yet the great mass of legal operations not touching on this constitutional issue [goes] on as before.* Till the population [becomes] divided and 'law and order' [breaks] down it [is] misleading to say that the original legal system [has] ceased to exist: for the expression 'the same legal system' is too broad and elastic to permit unified official consensus on *all* the original criteria of legal validity to be a necessary condition of the legal system remaining 'the same'.[1]

The diagnosis made in this passage is for the most part correct. Yet there are two questions it opens and leaves unanswered. One is, as it were, quantitative: how is it

[1] *CL* 122–23 (italics added).

that law may partly break down but largely 'go on as before'—in what sense can its continuous existence be a matter of degree? The other, qualitative: how can any 'great mass of legal operations' not touch on a constitutional issue—how can the bulk of legal practice be left unaffected by a crisis of what is supposed to be its very foundations? Together, the two questions make up the crux of what I will call *the problem of continuity*. To answer them is one of the foremost ambitions of this thesis.

The aim of this chapter is twofold. In the first instance, I intend to make the problem more concrete by discussing it in relation to the recent Polish Constitutional Tribunal crisis of 2015–16. The discussion of the example should help us to isolate a more specific test for any given solution to the general problem of continuity. With that in place, I go on to consider a preconception, current in much contemporary legal theory, that law is to be conceptualised as a system of norms. My suggestion is that this preconception is one of the reasons, or even *the* reason, why constitutional crises like the Polish one are so challenging to account for, because it envisages law as conforming to a pattern which legal practice may—and in critical situations clearly does—elude.

## 1. CASE STUDY: THE POLISH CONSTITUTIONAL CRISIS OF 2015–16

Although for the most part I treat the problem of continuity as an abstract problem of legal theory, it might be useful to begin with an illustration from recent constitutional history. Hart's brief treatment of the issue is itself based on the South

African crisis of the 1950s—recent in his time; for my part, I shall take the Polish Constitutional Tribunal crisis of 2015–16 as my case study.[2]

On 25 October 2015 there was in Poland a general election as a result of which the centre-right coalition of the Civic Platform (*Platforma Obywatelska*, PO) and the Polish People's Party (*Polskie Stronnictwo Ludowe*, PSL)[3] lost their majority in the Sejm (lower house of the Polish parliament) to the extreme-right populist party, Law and Justice (*Prawo i Sprawiedliwość*, PiS).[4] The victory followed on from the presidential election, where PiS's candidate, Andrzej Duda, had taken over from the PO-backed incumbent, Bronisław Komorowski. The shift in government quickly brought about a number of changes to Polish politics: some out of the frying pan, almost all into the fire. But one of the most spectacular—partly because carried out with remarkable haste and insolence—was the *de facto* change of Poland's constitutional order.

[2] The South African crisis was sparked by *Harris v Minister of the Interior* 1952 (2) SA 428 (A); reached its climax in *Minister of the Interior v Harris* 1952 (4) SA 769 (A); and was defused in *Collins v Minister of the Interior* 1957 (1) SA 552 (A). Of the constitutional crises familiar to the English-speaking reader, the South African one is probably most closely analogous to the Polish one—especially the second *Harris* case and the events that led up to it. Nonetheless, in the South African crisis there was more readiness to reach an agreement. For example, the government in *Collins* was prepared to argue their case on the assumption that the first *Harris* decision was good law even though they declared it was not: see *Collins* at 557, 563–64; and the Appellate Division accepted the government's argument despite that declaration. Time will tell when, and if, the Polish crisis can be defused along some such lines. For commentary comparing the Polish crisis to the South African one, see also Mikołaj Barczentewicz, 'On the Looming Split in the Polish Constitutional Order: *Harris v Dönges* in Central Europe?' (*International Journal of Constitutional Law Blog*, 18 February 2017) <www.iconnectblog.com/2017/02/polish-looming-split/> accessed 20 December 2022.

[3] Also known as the Polish Peasants' Party.

[4] Technically, PiS led a coalition of right-wing parties, the so-called United Right (*Zjednoczona Prawica*), but it was PiS that held the reins. The situation has since become more complicated.

The precise extent and character of this change, as well as its effects and ramifications, are difficult to assess, since the struggle is multi-dimensional, complex, and very much ongoing.[5] My focus here is more limited and falls exclusively on the events that took place in the first months of PiS's rule, and in particular on the conflict that arose around Poland's top court, the Constitutional Tribunal.[6] This is because this part of the conflict has for most practical purposes reached a stalemate, and also because it illustrates the problem I want to consider with particular clarity.

### *A. The Facts*

The story begins just before the 2015 general election, when the then-in-power coalition of PO and PSL sought to elect five new judges to the Constitutional Tribunal.[7] The relevant resolutions of the Sejm were supposed to fill three vacancies to open up on 6 November 2015, just before the first session of the new Sejm, *as well as* two vacancies that would only open up later into the new term, on 2 and 8 December respectively.[8] Soon after, the Tribunal ruled the attempt to fill these latter two vacancies to have been unconstitutional and void;[9] in the meantime,

[5] As far as I know, the only English-language monograph on the crisis, which covers much more than I cover here, is Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019).

[6] Sadurski (n 5) ch 3.

[7] In accordance with art 194(1) of the Constitution of Poland: 'The Constitutional Tribunal shall be composed of fifteen judges elected individually by the Sejm' (all translations are mine unless otherwise noted).

[8] MP 2015 poz 1038–42 (8 October 2015).

[9] Judgment K 34/15 of 3 December 2015, DzU 2015 poz 2129.

however, the new parliamentary majority seized the opportunity to question, and (purport to) rescind the election of all five judges.[10]

Requesting President Duda—whose allegiance to the governing party was no secret—not to swear in the three judges validly elected by the previous majority, PiS went on to elect another three judges in their place.[11] In the early morning of 3 December—just hours after the relevant resolutions were passed by the Sejm and hours before the Tribunal confirmed that the three vacancies had in fact been already filled by the previous coalition[12]—President Duda took the oath from the three judges chosen by PiS, purporting to elevate these 'stand-in judges' (*sędziowie dublerzy*, as they are often called in Poland[13]) into full members of the Tribunal. They were only admitted to adjudication in December 2016, as soon as the court's president, Andrzej Rzepliński, had retired and Julia Przyłębska (herself validly chosen by PiS to take the vacancy of 8 December 2015) took over as

[10] MP 2015 poz 1131–35 (25 November 2015) (declaring the resolutions cited in n 8 null and void).

[11] By resolutions MP 2015 poz 1182–84, passed on the evening of 2 December 2015. Another two resolutions, MP 2015 poz 1185–86, electing the remaining two judges, have never been controversial. The request to the president is found in the resolutions cited in n 10.

[12] See Judgment K 34/15 (n 9), handed down at 9am on 3 December 2015, where the Tribunal also clarified that the president's statutory competence to swear in new judges, provided for by Statute of 25 June 2015, DzU 2015 poz 1064, art 21(1), could not, in the light of art 194(1) of the Polish Constitution (see n 7), extend to any competence to decide on the Tribunal's makeup: see s 5 of the operative part, s III.8 of the reasoning.

[13] The phrase is hard to translate into English: cf Sadurski (n 5) 89. *Dubler* normally corresponds to 'double', as in 'stunt double'; but the English word 'double' is ambiguous, and as a result of the ambiguity, the most literal translation ('double judges') is awkward, and suggests the wrong duality. 'Judge-doubles'—a translation I used in earlier drafts—has its own problems and in any case lacks elegance. 'Stand-in judges' is not quite perfect either, but it is tolerably accurate, and—I hope—somewhat clearer.

president.[14] The three judges elected by the previous coalition, on the other hand, have never been sworn in by the president; had they been, their term would end in 2024.[15]

This exercise in court-packing was accompanied by a steady stream of legislation meant to incapacitate the court as an independent constitutional agent and subject it to the government's directions. I will concentrate on one particular statute, enacted on 22 December 2015[16]—I will refer to it as 'the December statute'—and invalidated *en bloc* by the Tribunal's judgment of 9 March 2016.[17] The story of the statute, and especially of the judgment that struck it down, makes for a simple, clear, and useful illustration of the theoretical challenge posed by the Polish crisis.

The Polish Constitution provides in article 197 that 'the organisation of the Constitutional Tribunal, as well as the procedure before it, shall be specified by statute'. These had recently been regulated by a statute enacted on 25 June 2015, which had already been amended a few times,[18] and which the December statute amended yet again. Among the amendments introduced by the latter, two were of particular relevance: first, the Tribunal was generally to give judgments by a majority of two thirds,[19] with a minimum of thirteen (out of fifteen[20]) judges on the

[14] Sadurski (n 5) 64.

[15] Constitution of Poland, art 194(1).

[16] DzU 2015 poz 2217.

[17] Judgment K 47/15 of 9 March 2016, DzU 2018 poz 1077.

[18] Statute of 25 June 2015 (n 12) as amended by: Statute of 19 November 2015, DzU 2015 poz 1928; Judgment K 34/15 (n 9); and Judgment K 35/15 of 9 December 2015, DzU 2015 poz 2147.

[19] Statute of 22 December 2015 (n 16) art 1(14).

[20] Constitution of Poland, art 194(1): see n 7.

bench;[21] second, cases were to be heard by the Tribunal in the same order as they had been brought before it,[22] and no earlier than three months after the parties had been notified of the date of the hearing.[23] In March 2016, when the Tribunal came to review the December statute for constitutionality, it had to face the following difficulty. The statute had been enacted to enter into force immediately, so had been law since its promulgation on 28 December 2015.[24] Had the Tribunal applied the provisions just mentioned, however, it would have in practice disabled itself from deciding the case. This was, on the one hand, because there were at that time only twelve regularly elected judges in the Tribunal, the remaining three being kept on hold by President Duda's unlawful[25] refusal to swear them in; and on the other hand, because the December statute's timetabling provisions would either force the Tribunal to defer review until a number of other cases have been dealt with, or even (given that there were only twelve judges available to hear cases) prevent the Tribunal from working at all.

Here then was the silver bullet. The December statute was clearly unconstitutional: the procedure it provided for made it exceedingly difficult—and, in the circumstances, impossible—for the Tribunal to discharge its primary duty under article 188 of the Constitution to carry out constitutional review. But by the

[21] Statute of 22 December 2015 (n 16) art 1(9).

[22] Statute of 22 December 2015 (n 16) art 1(10).

[23] Statute of 22 December 2015 (n 16) art 1(12)(a); the period is six months in cases heard *en banc*, which art 1(9) makes the default position.

[24] Statute of 22 December 2015 (n 16) art 5.

[25] As confirmed by Judgment 34/15 (n 9): see n 12.

same token it made *itself* effectively immune from review, so long at least as the court refused to give in and admit the three 'stand-ins' PiS had nominated.

Above and beyond these practical difficulties, there was also a more theoretical worry on the Constitutional Tribunal's part that

> One cannot accept a situation where the subject-matter of a legal dispute before the Tribunal is at the same time the constitutional and procedural basis for the resolution of that dispute. Were the Tribunal to declare the provisions under review unconstitutional, the very process of adjudication would become open to question as conducted on an unconstitutional basis (and so would, in consequence, its product—the judgment).[26]

The paradox was as follows. It was accepted that the December statute was already in force at the time of adjudication and was, until and unless otherwise declared by the Tribunal, presumed valid.[27] The Tribunal could then either follow the procedure prescribed by the statute or not follow it. If the Tribunal followed the procedure and found the December statute constitutional, there would be no problem. But if the Tribunal followed the procedure and found the December statute *un*constitutional, its finding would be defective as reached under an unconstitutional procedure. In this way, following the procedures prescribed by the December statute would make it not just *practically* but also *juristically* impossible for the Tribunal to meaningfully review the statute and discharge its duty under article

[26] Judgment K 47/15 (n 17) s III.1.3 of the reasoning.

[27] The presumption of constitutionality is not explicitly mentioned in the Constitution: for extended discussion, see Aleksandra Dębowska and Monika Florczak-Wątor, 'Domniemanie konstytucyjności ustawy w świetle orzecznictwa Trybunału Konstytucyjnego' (2017) (2) Przegląd Konstytucyjny 5. The presumption is referred to in Judgment K 47/15 (n 17) ss III.1.6, III.1.8 of the reasoning.

188. On the other hand, if the court declined to follow the procedure prescribed by the December statute, it would in principle be open for it to decide either way (although a finding of constitutionality could force it to consider the matter anew under the new procedure). But a refusal to follow the procedures would in turn appear to put the Tribunal in breach of article 197. So it seemed that the Tribunal could not at the same time comply with both article 188 and article 197.[28]

The Tribunal's solution was eventually quite simple. Without denying the general binding force of the December statute, the Tribunal declined to follow some of the provisions insofar as they disabled it from adjudicating the case.[29] Apart from article 188, the court based this move on article 195(1) of the Constitution, which specifies that judges of the Constitutional Tribunal are 'independent and subject only to the Constitution'.[30] The reasoning went along the following lines:[31]

(1) Under article 195(1) of the Constitution, the Tribunal is subject only to the Constitution in carrying out its duties.

[28] For an argument that the paradox is a version of the liar paradox, see also Tomasz Gizbert-Studnicki, 'A State of Constitutional Necessity versus Standard Legal Reasoning' (*Verfassungsblog*, 3 June 2017) <https://verfassungsblog.de/a-state-of-constitutional-necessity-versus-standard-legal-reasoning/> accessed 20 December 2022. I think this is something of an exaggeration, essentially because of what I mention in n 38 and text.

[29] Judgment K 47/15 (n 17) ss III.1.6–1.14 of the reasoning. The Tribunal partly disapplied all the provisions mentioned in nn 19–23 as well as Statute of 22 December 2015 (n 16) art 1(16).

[30] Judgment K 47/15 (n 17) s III.1.6 of the reasoning, draws attention to the fact that an analogous provision in relation to ordinary judges, art 178(1) of the Constitution of Poland, makes the latter 'subject only to the Constitution and statutes'.

[31] Judgment K 47/15 (n 17) ss III.1.6–III.1.14 of the reasoning.

(2) Under article 188 of the Constitution, the Tribunal's primary duty is to conduct constitutional review—*inter alia*, under article 188(1), of statutes.

(3) The Tribunal's procedure is to be determined according to the Constitution, and also—but, in keeping with (1), only because and insofar as the Constitution so provides—by statutory regulations passed under article 197. This includes the December statute, since it is in force and presumed constitutional.

(4) However, following some provisions of the December statute would make it practically and juristically impossible for the Tribunal to carry out its primary duty, specified in (2), in relation to the December statute itself.

(5) Therefore, while the Tribunal must review the constitutionality of the December statute according to a procedure determined in keeping with (3), it must disapply, for the purposes of conducting that review, those provisions of the December statute which have the effect specified in (4).[32]

And so the Tribunal did; in consequence, it struck down the December statute in its entirety.[33]

[32] cf European Commission for Democracy Through Law (Venice Commission), 'Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' (Opinion No 833/2015, CDL-AD(2016)001, 11 March 2016) paras 39–41.

[33] The statute as a whole was found to infringe arts 2, 7, 112, and 119 of the Constitution of Poland, and the provisions cited in nn 19, 21–24 were found to infringe arts 2, 10, 45(1), 173, 188(1), and 190(5) of the Constitution of Poland: see Judgment K 47/15 (n 17) ss I.1, I.12, I.13, I.14, I.15, I.18 of the operative part.

The government were of course dismayed to see their bullet dodged so lightly, so they refused to publish the judgment in the official Journal of Laws (*Dziennik Ustaw*).[34] The argument was—to no one's surprise—that the judgment had been given without proper legal basis, and so was null and void: not a judgment at all, but a mere private opinion of a group of judges.[35] The judgment remained unpublished throughout the period discussed here. Yet even when the government finally put it on the books in 2018, they did so only with the caveat that it had been handed down 'in violation of the law' and so, supposedly, with no legal consequences.[36] For the government, it remained a mere curiosity of Poland's judicial history.

*B. The Conflict*

These then are the facts.[37] The more difficult question is what to make of them.

[34] Much like President Duda's refusal to swear in the three judges (see n 12), the government's refusal to publish the judgment was based on the false assumption that the grant of an exclusive competence, even when parasitic on a duty to exercise the competence in a particular way, necessarily implies that the competence-holder is also competent to determine when and how the competence is to be exercised: cf European Commission for Democracy Through Law (Venice Commission), 'Poland: Opinion on the Act on the Constitutional Tribunal' (Opinion No 860/2016, CDL-AD(2016)026, 14 October 2016) para 90. Here, the competence to publish judgments derives from art 190(2) of the Constitution of Poland, which states that the Tribunal's rulings 'shall be published immediately' read together with Statute of 20 July 2000, DzU 2000 Nr 62 poz 718, arts 9(1)(6), 21(1). But to read it in the way in which the government read it is to ignore art 2(1) of the statute as well as art 190(1) of the Constitution: on this last point, see also Judgment K 39/16 of 11 August 2016, DzU 2018 poz 1078, s III.9 of the reasoning; and cf art 144(3)(7) of the Constitution.

[35] See Małgorzata Szuleka, Marcin Wolny, and Marcin Szwed, 'The Constitutional Crisis in Poland 2015–2016' (Joanna Smętek tr, Helsinki Foundation for Human Rights 2016) ch 12.

[36] See Sadurski (n 5) 76–79. At 78, Sadurski notes that the annotation to the published version in fact refers to the judgment as a 'ruling' (*rozstrzygnięcie*). The term actually used by the Tribunal was *wyrok*.

[37] My storytelling ends here: my present tense from now on refers to the situation as it was between March and December 2016. Once the Tribunal had been *de facto* overtaken

To be sure, the issue is not at all problematic from the Tribunal's perspective, nor indeed from the government's. For the Tribunal and those who side with it, the legal situation is clear: by not swearing in the three judges properly elected by the previous PO-PSL coalition, President Duda breached his constitutional duty; PiS's election of the three 'stand-in judges' to these positions and their oath to the president were irregular and had no legal effect; as a result, there were only twelve judges in the Tribunal when the case was decided; and so the reasoning outlined above could take hold. The government's position, though different, is equally unequivocal: the three judges elected by the previous coalition were elected irregularly and in any case never took the oath; PiS's election of the three 'stand-in judges', on the other hand, was conducted in accordance with the law, and they were then properly sworn in by the president—so they were no 'stand-ins', in fact, but full judges; there were therefore fifteen judges in the Tribunal when the case was decided, three of them arbitrarily held back by the court's president; point (4) of the Tribunal's reasoning was thus unlicensed, since it was by all means possible for the court to admit at least one of the supposed 'stand-ins' and then plough through the Tribunal's backlog to eventually review the statute. Moreover, as regards the supposed paradox whereby following the December statute in reviewing its constitutionality would impugn the validity of a possible finding of unconstitutionality, the Tribunal has itself underlined that the validity of its

by PiS, the conflict here described, while not resolved, would repeatedly shift to other forums and recentre itself around other actors: see n 41. This is a complex and unfinished story, and to tell it in any more detail would serve me no purpose.

judgments could not be tainted by procedural defects.[38] In a word, the procedural provisions of the December statute had perhaps made it inconvenient for the Tribunal to review the statute's own constitutionality, but certainly not impossible. For the Tribunal to disapply them was therefore to knowingly and unnecessarily circumvent valid laws, and the judgment was consequently invalid: a mere 'private meeting' of judges who 'inaptly tried to deliver a ruling', but failed.[39]

Let me be clear: I do not mean to present the two interpretations as equally sensible, or to suggest any difficulties in deciding which is the right one. This latter question lies beyond my immediate concerns (though I have my views, and these can no doubt be gleaned from what I have said so far). What I want to emphasise instead is, first, that there are in fact two ways in which the events have consistently[40] been understood by the key actors in the Polish constitutional setup:

[38] Judgment K 47/15 (n 17) s III.1.4 of the reasoning: 'The Constitutional Tribunal recalls that—according to art 190(1) of the Constitution—its judgments [*orzeczenia*] have general binding force and are final. The Constitution does not provide for any procedure for the review or dislodgement of the Tribunal's judgments [*orzeczeń*] on account of procedural defects (the provision in art 190(4) of the Constitution for the reopening of proceedings where a judgment has been issued [*w razie wydania orzeczenia*] in an individual case on the basis of provisions [later] deemed unconstitutional, has no application to [the Tribunal's judgments]).' The context of these remarks, however, makes clear that there is no inconsistency between them and the passage cited in n 26: later in s III.1.4 of the reasoning, the Tribunal says that 'in view of the aforementioned irreversibility of procedural defects in the Tribunal's judgments [*wyroków*], it is most important that any potential constitutional doubts as to the basis of [the Tribunal's] adjudication [*orzekania*] be cleared before these provisions are applied'. The court thus admits the possibility of defects and only denies the possibility of remedying them; cf *CL* 141–47.

[39] Words of Zbigniew Ziobro, Poland's Justice Minister, reported in Szuleka, Wolny, and Szwed (n 35) at 34.

[40] Whether the government are also sincere in their interpretations, in the sense that they privately agree with what they declare in public, is up for debate but ultimately immaterial. However, so far as I know, there are—perhaps astonishingly—no serious reasons to doubt that the declarations are in fact sincere, and PiS has generally gone to great lengths to hide its misdeeds under a cloak of formal legality: Sadurski (n 5) 6–7, 19–20, 254–55; Marcin Matczak, 'Poland's Constitutional Crisis: Facts and Interpretations' (The Foundation for Law, Justice and Society 2018) 6–7; 'The Clash of Powers in Poland's Rule

on one side, the Constitutional Tribunal with its authority to interpret the Constitution and review primary legislation;[41] on the other, the government backed by the president and the parliamentary majority, together in possession of—or in position to usurp—all supreme legislative and executive power in the country.

Second, the conflict between them is not just a legal controversy like any other but represents a disagreement as to the constitutional foundations of the legal order, and so—if we assume for now that the identity of the legal order is determined by these constitutional foundations—as to the identity of the order itself. For the dispute is really between the following two views:

T: The law is the Constitution, as interpreted and applied by the Constitutional Tribunal following a procedure it determines for itself under the sole authority of the Constitution, and with particular regard to the constitutional duty to conduct constitutional review under article 188 and to the statutory

of Law Crisis: Tools of Attack and Self-Defense' (2020) 12 Hague Journal on the Rule of Law 421, 427–35.

[41] Later, once the Tribunal had been effectively captured by PiS (see n 37), this side of the dispute would be represented, among others, by the regular judiciary (especially through their professional associations), the Ombudsman (*Rzecznik Praw Obywatelskich*), inter- or supranational institutions (the Venice Commission of the Council of Europe, the European Commission), NGOs, universities, numerous commentators academic and otherwise, and a large part of the public opinion. There have been two particularly interesting developments in relation to the issue of 'stand-in judges'. First, in *Xero Flor v Poland* App no 4907/18 (ECtHR, 7 May 2021), the European Court of Human Rights found that a company whose case had been heard by the Tribunal with one of the 'stand-in judges' on the bench had been denied its right to a 'tribunal established by law' under art 6(1) of the European Convention of Human Rights. Second, in Judgment III OSK 2528/21 of 16 November 2022, the Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*) denied a motion to stay proceedings pending proceedings before the Constitutional Tribunal, essentially repeating the reasoning of the Strasbourg court in *Xero Flor* (though with spicier language: 'the presence of irregularly appointed judges in the Constitutional Tribunal brings about [a situation where] the entire Polish constitutional court has been, as it were, "infected" with unlawfulness, and thus has lost its material capacity to adjudicate according to the law').

regulations of the Tribunal's procedure provided for by article 197; and whatever the Constitution thus interpreted and applied recognises as the law.

G: The law is the Constitution, as interpreted and applied by the Constitutional Tribunal following a procedure determined by statute, the Tribunal's compliance with which is to be determined by the prime minister in the exercise of their exclusive statutory competence to publish the Journal of Laws;[42] and whatever the Constitution thus interpreted and applied recognises as the law.[43]

Finally, what makes this dispute into a full-blown crisis is the fact that there is no mechanism through which it could be settled in practice. As a matter of law, of course, there is an easy way out: it is the Tribunal that the Constitution charges with resolving competence disputes in Poland,[44] and in the usual case a judgment does the job. But where the Tribunal is itself a party to the dispute, and where the other party is the executive, the case is anything but usual; for here, the principal procedure for settling regular legal disputes—the court decides the law, the executive enforce the decision—no longer works. So although both institutional

[42] See n 34. The Constitution does not mention who is to be in charge of publishing the Journal of Laws.

[43] These are two views on what *the law* is (in Poland), not on what *law* is, still less on what *the word 'law'* means. In his argument against the 'semantic sting', Ronald Dworkin suggests that these questions have often been confused: see *Law's Empire* (Fontana Press 1986) 31–44. I doubt it—and note on the side that other European languages make it even harder than English to confuse them; see also *CL* 246–47; Timothy AO Endicott, 'Herbert Hart and the Semantic Sting' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001) 44–45.

[44] Constitution of Poland, art 189.

elements in this mechanism claim that the conflict is easy to resolve, or even has already been resolved, the fact is that unless and until they can also agree on *how* it has been resolved—it remains practically irresolvable.

In short, the events of 2015 and 2016 have given rise to a *constitutional crisis*:[45] an *interpretive conflict* between key constitutional actors which concerns the *constitutional foundations*[46] of the legal order and is *practically irresolvable* within the mechanics of that order. The paradigmatic constitutional crisis is one where the judiciary and the executive come apart on issues of constitutional interpretation and show no intention to come back together, undoing the central cooperative device with which legal and constitutional disputes are ordinarily settled. In such situations, the constitution applied by the courts is, so to speak, no longer the constitution enforced by the government.[47]

[45] 'Constitutional crisis' is a capacious phrase. I use it relatively narrowly to refer to situations which are undeniably within the term; and which, to my mind, represent the most interesting variety of constitutional crises as far as legal theory is concerned. Still, it would be short-sighted of me to pretend that there are no events which might in some contexts merit the label 'constitutional crisis' even though they do not exhibit the features I present as definitive of constitutional crises.

[46] Whether the system's 'constitutional foundations' are just the same as the constitution depends on what the constitution contains. The Polish Constitution, for example, includes the notorious art 18 which, on some—implausible, but unfortunately prevailing—readings, bans gay marriage in Poland. An interpretive dispute about art 18 would arguably not be a dispute about the constitutional foundations of the legal system. Still, any *irresolvable* interpretive dispute about that provision I can imagine would touch upon these constitutional foundations sooner or later, because sooner or later it would touch upon the competences of the organs charged with resolving the dispute.

[47] This paradigm could be described with the help of WJ Rees's notions of 'legal sovereignty' and 'coercive sovereignty' by saying that the legal sovereign—more or less plausibly identifiable with the courts—comes into conflict with the coercive sovereign—the government or some department thereof: see WJ Rees, 'The Theory of Sovereignty Restated' (1950) 59 Mind 495, 507–11. Whether or not it is useful to formulate the issue in this way, other possible instances of constitutional crisis may be imagined by playing with analogous notions of 'split sovereignties' which might clash with each other. One example of such a conception, well known to students of British constitutional law, would be Stephen

The challenge is now to supply a plausible characterisation of such events within a broader framework in which to make sense of the nature of law: in other words, to produce a credible theoretical account of constitutional crises, and in particular specify their significance in terms of a conception of legal continuity. The usual answers to this challenge tend to fall into three principal categories. Accounts of the first sort focus on the disruptive aspect of constitutional crises and emphasise the change they bring to the identity of the legal order as a whole. The view characteristic of the second category is that constitutional crises are in fact less consequential than they are made out to be, and that what dominates the picture is the overall continuity of law. The third way, finally, is to attempt a synthesis of the former two into a sort of legal dualism, framing the crisis as a transitional coexistence of two legal orders competing for supremacy. I will now discuss these three approaches in turn and give some reasons why the answer to the challenge must lie elsewhere.

### *C. Constitutional Revolution*

A first reaction to a constitutional crisis may be to pronounce that it effectively amounts to a 'constitutional revolution', even if only in a 'technical sense'.[48] The thought behind this claim is that the continuity of law is tied to some stable understanding or attitude, shared among key constitutional actors, as to how the

Sedley's 'bi-polar sovereignty of the Crown in Parliament and the Crown in its courts': 'Human Rights: A Twenty-First Century Agenda' [1995] PL 386, 389.

[48] HWR Wade, 'Sovereignty—Revolution or Evolution?' (1996) 112 LQR 568, 568; cf his discussion of the South African crisis (n 2) in 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172 at 190–93. A broadly similar point in the Polish context is made by a former judge of the Constitutional Tribunal, Jerzy Stępień, in 'A Revolution—Conscious or Unconscious' (2016) (1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 19 at 29–31.

system's valid laws should be identified. When that understanding or attitude becomes unstable, as in the case of the Polish crisis, then so must the integrity of the entire legal system. The constitutional change thus brought about may well have little *material* effect on the law as a whole—but from a *formal* standpoint, the legal system's existence is ruptured, and a whole new system comes in to replace it.

The thinker most commonly associated with this kind of explanation is without doubt Hans Kelsen. He classifies as revolutionary any 'not legitimate change of [the] constitution or its replacement by an other constitution',[49] any constitutional change introduced 'in a way which the former [constitution] had not itself anticipated'.[50] A change of this sort is successful, he argues, whenever the former constitution ceases to be 'actually applied and obeyed',[51] and the new constitution becomes the point of reference for anyone wishing to understand the relevant society as governed by a legal order.[52] But then it is 'never the constitution merely but always the entire legal order that is changed';[53] for even if it might appear that 'a large part of the statutes created under the old constitution remains valid', the truth is that 'the expression does not fit':[54]

[49] *PTL* 209.

[50] *GTLS* 117.

[51] *PTL* 212.

[52] In Kelsen's jargon, this is when 'legal scientists' begin to presuppose a new 'basic norm' prescribing that coercive sanctions be applied in accordance with the changed constitution and the laws whose creation it authorises: *PTL* 193–214; *GTLS* 110–11, 115–21; JW Harris, 'When and Why Does the Grundnorm Change?' (1971) 29 CLJ 103, 116–27; Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing 2015) 102–03.

[53] *GTLS* 118.

[54] *PTL* 209.

> The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other.[55]

So the old laws do not as such survive the introduction of the new legal order, but are merely 'received' by it, analogously to how Roman law has been received by modern Continental law. Such reception is of course quite unlike ordinary modes of law-creation, but it is law-creation all the same. It represents not an assimilation of the old laws within a new constitutional framework, but a reproduction of their content in completely new laws.[56]

How should we apply this model to the Polish case? To begin with, we could argue that by effectively assuming the authority to control the legality of judicial appointments to the Constitutional Tribunal, as well as of the Tribunal's very decisions, the Polish executive have changed the Polish constitution in a way for which the constitution itself did not provide.[57] On the strength of Kelsen's maxim that any unauthorised change to the constitution brings about a constitutional revolution, we should then conclude that the Polish constitutional

[55] *GTLS* 117–18.

[56] *PTL* 209; *GTLS* 117–18.

[57] Sadurski (n 5) 64–65, 77–78; cf Paweł Bała and Adam Wielomski, 'Prawnicy o sporze wokół TK: Kto jest obrońcą konstytucji?' *Rzeczpospolita* (Warsaw, 12 December 2015) <www.rp.pl/Sedziowie-i-sady/312129996-Prawnicy-o-sporze-wokol-TK-Kto-jest-obronca-konstytucji.html> accessed 15 December 2022. Note that the putative change concerns not only what John Finnis calls the 'rules of succession to office', but also 'rules of competence': 'Revolutions and Continuity of Law' in *Philosophy of Law: Collected Essays, Volume IV* (OUP 2011) 410–12; cf *PTL* 275–76; Sadurski (n 5) 14.

crisis has effected just such a revolutionary change, replacing the old legal order—call it $S_T$—with a new one, $S_G$.[58] To see legal practice in Poland as governed by $S_G$ makes more sense of it, we could argue, than to insist that it is still governed by $S_T$.

There are three major problems with this argument. The first is that it overstates the degree of legal change brought about by the crisis in Poland.[59] To be sure, Kelsen welcomes and shares the intuition that the better part of the law is usually left untouched by a constitutional crisis, however dramatic. The manner in which he explains the intuition away, on the other hand—that *actually*, no law can ever be *retained* when the constitution is changed unconstitutionally, as opposed to being *reproduced* in the new legal order—is unconvincing. There is nothing incoherent about characterising these laws as laws whose validity, traced to the previous and now defunct constitution, has simply not been questioned in the course of the supposed constitutional transition.[60] And while Kelsen's references to 'reception' could in principle be construed in this way,[61] he insists—for reasons which are hard to discern and even harder to accept—that they should not.

The second problem is that this is simply not the way in which the conflict is understood by the parties to the conflict themselves. In particular, neither of them views the crisis as occasioning the thorough remaking of the legal order

[58] For completeness, we can define the basic norm of $S_T$ as: 'coercive acts ought to be performed under the conditions and in the manner which the law, as identified by T, prescribes'; and the basic norm of $S_G$ by analogy. For T and G, see n 43 and text. For the general formulation of the basic norm of a legal order, see *PTL* 200–01.

[59] More generally, see NW Barber, *The Constitutional State* (OUP 2010) 140–41.

[60] Finnis (n 57) 423–25; cf Spagnolo (n 52) 115–16.

[61] HLA Hart seems to think so: 'Lon L Fuller: *The Morality of Law*' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 362–63.

envisaged by Kelsen's model. To oversimplify a little, the Tribunal acknowledges no break in the continuous validity of $S_T$, while the government's position rests on the notion that $S_G$ has been the Polish legal system all along.[62] The bone of contention between the Tribunal and the government is not 'are we still governed by $S_T$, or have we now, as a result of a successful revolution, effectively turned to $S_G$?', but 'what is our legal order, $S_T$ or $S_G$?'.[63] So, as I will clarify when discussing the dualist approach, the dispute which animates the Polish constitutional crisis plays out not between two rival legal orders, but between two ways in which to construe the single legal order Poland has.

The third problem, finally, is that there are other elements in Kelsen's model which seem to suggest that the Polish constitutional crisis is not a revolution after all. These are the two central principles which largely define Kelsen's theory of legal continuity and discontinuity: the principle of legitimacy, which holds that 'legal norms … remain valid as long as they have not been invalidated in the way which the legal order itself determines';[64] and the principle of effectiveness, which holds that 'the efficacy of the entire legal order is a necessary condition for the

[62] cf n 40.

[63] This marks an important *dis*analogy with cases like *The State v Dosso* PLD 1958 SC 533 (Pakistan); *Uganda v Commissioner of Prisons, ex p Michael Matovu* [1966] 1 EA 514 (Uganda); *Madzimbamuto v Lardner-Burke NO* 1968 (2) SA 284 (RA) (Southern Rhodesia); or *Lakanmi v Attorney-General (West)* (1970) SC 58/69 (Nigeria); the first three of which refer to Kelsen explicitly. *Lakanmi* is particularly remarkable in how the Supreme Court of Nigeria rejected the Attorney-General's argument that the military regime was a revolutionary government by drawing attention to the fact that the military regime had failed to present itself as revolutionary from the start; and how the Court distinguished the Ugandan case on this basis. I owe the *Lakanmi* example to Timothy Endicott.

[64] *GTLS* 117; cf *PTL* 209.

validity of every single norm of the order'.[65] The former principle is, says Kelsen, 'limited' or 'restricted' by the latter;[66] at the same time, it appears that the principle of effectiveness is the only such limitation and otherwise the principle of legitimacy serves as the sole guide to deciding whether the existence of a norm—or a whole normative order—continues or not. In a word, it is for Kelsen both sufficient and necessary for the demise of a legal order that it has lost its efficacy:[67] that its norms can no longer be credibly characterised as 'by and large effective'.[68]

The problem here is that if the respective contents of the old and new legal orders are in a high enough degree identical, the fact that the new order has become 'by and large effective'—under the principle of effectiveness, a necessary condition of its supposedly acquired validity—can as much be seen as an indication that the old order had never lost its efficacy in the first place. So in the Polish case, given that the laws of $S_T$ and $S_G$ share most of their content,[69] it seems that it is conceptually (and not just empirically[70]) impossible to conclude that $S_T$ has been

[65] *GTLS* 119; cf *PTL* 210–11.

[66] *PTL* 211; *GTLS* 119.

[67] I bracket the possibility that the basic norm of a legal order should provide some time limit for its own validity (which could in principle terminate the legal order in accordance with the principle of legitimacy)—this would certainly be strange, and perhaps impossible.

[68] *PTL* 212 (italics omitted).

[69] The efficacy Kelsen is referring to is not the efficacy of the constitution alone, but of the 'legal order as a whole': *PTL* 212. In fact, Kelsen writes there 'the constitution … that is the legal order as a whole based on the constitution', so he arguably has no intelligible notion of 'the constitution alone'; cf Pablo E Navarro, 'The Efficacy of Constitutional Norms' in Luís Duarte d'Almeida, John Gardner, and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 87–90.

[70] The impossibility does not lie in the impossibility to gather all the relevant empirical data; nor, I think, in the vagueness of 'by and large effective'. Even if we had a precise method of calculating the efficacy of a legal order and fixed a threshold (say, at 95

superseded by $S_G$. The outward manifestation of the new system's existence is for all practical purposes indistinguishable from the manifestation of the old system's subsistence; if it makes enough sense of Polish legal practice to understand it as governed by $S_G$, then to see it as governed by $S_T$ will also do. On account of the principle of legitimacy, then, $S_T$ has never lost its efficacy and, as far as legal science can tell, remains in place as the Polish legal order. Even if to put $S_G$ in that role would in principle make *more* sense of what is going on,[71] so long as $S_T$ has not ceased to be by and large effective, it stands.

On the whole, the constitutional crisis in Poland appears to present a problematic case for Kelsen's model of constitutional revolution. The Polish government have arguably changed the Polish constitution, and they have done so by blatantly illegal means. Yet neither do they claim to have made any change at all, nor does the Tribunal acknowledge that they have; and on top of this the substantive change itself, when set against the background of the whole legal order, has been relatively shallow. As Kelsen elaborates his model, he seems to have in mind either an overt revolution, introducing a wholly new constitutional arrangement by unconstitutional means, or an overt *coup d'état*.[72] Where, on the

per cent) below which a legal order is no longer 'by and large effective', we would still be barred from pronouncing a revolution if eg the old order were 95 per cent effective and the new one—100 per cent. For Kelsen, 'a legal order *ceases* when it loses efficacy, … [but] efficacy *alone* does not establish legitimacy [ie validity, existence]': JM Eekelaar, 'Splitting the Grundnorm' (1967) 30 MLR 156, 171; cf Harris (n 52) 119–22, 123–24; *CLS* 203–05.

[71] So even in the situation in which legal science, if it abstracted completely from Poland's constitutional history, would presume the basic norm of $S_G$ and not that of $S_T$.

[72] Kelsen explicitly includes a *coup d'état* in his understanding of 'constitutional revolution': *PTL* 209; *GTLS* 117. Because in the Polish case the executive have usurped a competence it never had, and because the competence is one which the Constitution does not vest in any other institution, the putative constitutional revolution in Poland could be

other hand, the one party to the conflict never admits having revolutionary ambitions, and where the other party never allows that the whole affair could end up having revolutionary consequences, the imagery of a total remaking of the entire legal order is not very helpful in understanding the crisis or evaluating its outcome.

At a more general level, the discussion of Kelsen's model in relation to the Polish crisis underlines the patent fact of legal and political history that there can be—and have been—constitutional crises with rather little effect on the law's overall content. For this reason, anyone wishing to conceptualise all constitutional crises as involving a revolutionary break in the continuity of law must rely on some more or less explicit distinction between the formal and material continuity of law, and endorse the premise that it is the formal continuity of the legal order that counts.[73] As I have sought to show, however, even if the premise appears to be sound, the distinction that underpins it is not: even the most sophisticated accounts of formal constitutional change—and I take Kelsen's to be among the strongest such accounts—will ultimately have to adopt *some* threshold of material change below which formal change cannot take hold. Otherwise, one is forced to accept the bizarre thought that a legal order may in principle undergo constitutional revolutions all the time, without anyone noticing: say, by switching back and forth between two different basic norms that happen to validate precisely the same body of substantive law.[74]

construed as involving both a *coup d'état* and a substantive alteration of the constitutional structure; see also n 57.

[73] For a book-length argument against this position, see Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020).

[74] cf JW Harris, 'The Basic Norm and the Basic Law' (1994) 24 Hong Kong LJ 207, 212: 'If it makes no difference as to the content of the laws described, more than one starting-

In short, Kelsen's model of constitutional revolution is inapt to provide an adequate account of constitutional crises such as the Polish one because it excludes the possibility that a constitutional crisis might change constitutional law, perhaps even fundamentally so, while leaving the overall continuity of law intact. An openness to that possibility is, in effect, the first quality that a good account of constitutional crises must exhibit.

*D. Continuity in Change*

One way in which to meet this challenge is to accept, in one form or another, the 'inertia principle'[75] which appears to follow from the interplay of Kelsen's principles of legitimacy and effectiveness. If below a certain threshold of material change we cannot really say the old legal order has lost its grip, then it is natural to conclude that in such cases it simply carries on, though perhaps more precariously, or just differently. Maybe what the Polish crisis serves to illustrate is that the constitution may be modified in ways which it does not explicitly anticipate, but which are nonetheless too shallow to license the conclusion that the legal order as a whole has been replaced with an altogether new one.

The general idea may be cashed out in two ways. On the one hand, one may maintain that while a constitutional crisis does change the constitutional

point [basic norm] may be made the basis of a theoretical reconstruction of actual juristic statements.' This could suggest that the material threshold lies as low as logically possible: that a formal change of the basic norm would admittedly be unintelligible as such if the 'new' basic norm made *no* 'difference as to the content of the laws' whatsoever, but that it would become intelligible as soon as it made any. As the above argument shows, the threshold actually appears to be higher than that, fixed at the point where the old system ceases to be 'by and large effective'.

[75] Spagnolo (n 52) 131–32.

arrangement in place, it does not change the identity of the legal order as such. Recall how HLA Hart maintains that, in such a case,

> it [is] misleading to say that the original legal system [has] ceased to exist: for the expression 'the same legal system' is too broad and elastic to permit unified official consensus on *all* the original criteria of legal validity to be a necessary condition of the legal system remaining 'the same'. All we could do [is] to describe the situation … and note it as a substandard, abnormal case containing within it the threat that the legal system will dissolve.[76]

This view relies on the notion that any legal system's ultimate criteria of validity have a 'fringe of vagueness or "open texture" ' to them, and that constitutional crises like the Polish one tend to play out within that fringe.[77] What is at issue in such conflicts is the *content* of these criteria; their *identity*, by contrast, and the identity of the system they define, are left in place whichever way the dispute is settled, if it is settled at all.[78] A constitutional crisis may well involve a change *to*, but not necessarily *of*, the system's ultimate criteria of validity, since these are in any case essentially and 'constantly open to change'.[79] So the changes brought about by a constitutional crisis may be already provided for, as it were, within the 'broad and elastic' understanding given to the identity and integrity of a legal system.

[76] *CL* 123.

[77] *CL* 123.

[78] cf *CL* 153.

[79] *AL* 94. In '*Miller*, Structural Constitutional Review and the Limits of Prerogative Power' [2017] PL 48 at 65–66, Paul Craig points out that the dynamism and flexibility of these criteria may also have to do with how they can be formulated on different levels of generality.

Alternatively, one may draw a similar conclusion not from the plasticity of law's boundaries, but from their institutional rigidity. Joseph Raz,[80] for instance, remarks that 'it is an essential feature of legal systems that they are institutional, normative systems' and that the 'final authority to declare what is the law' rests with the 'law-applying' institutions, as opposed to the 'law-creating' ones.[81] On this understanding, a constitutional conflict between the judiciary and other institutions, like the one in Poland, may perhaps be a conflict, but not yet a crisis: an instance of some constitutional actors going against the law as recognised and applied by the courts, but really nothing more than that. So long as the judges continue to identify the law in the same way as before, there cannot be talk of even a threat to the continuous existence of the old system. And should anyone attempt to question that in practice, their endeavours would count as not revolutionary, but illegal.[82]

Accounts of this second sort have the obvious advantage that they capture the sense in which accounts of the previous sort are overly dramatic, and carefully avoid this mistake themselves. If this is all they are meant to achieve, then the insight they bring to the understanding of constitutional crises is crucial, and indeed—as I have indicated at the outset of this chapter—one which marks the

[80] Raz holds some views which inspire the following argument, but it is not one which he himself makes. He takes 'the continuity of a legal system [to be] tied to the continuity of the political system', and more generally, of the 'complex forms of social life' which law serves to define: *AL* 100; *CLS* 188. More generally, see *CLS* 187–89; *AL* 98–100; Spagnolo (n 52) 178–93. A broadly similar view is expressed in Finnis (n 57) at 428–34.

[81] *AL* 88.

[82] cf *PTL* 210–11; *GTLS* 118. In Poland, a similar notion underpinned the argument that once the Tribunal had been 'neutralised', ordinary courts should take over and engage in dispersed constitutional review: Sadurski (n 5) 83–84, 86, 96–98; Paweł Bravo, Interview with Marcin Matczak, 'Nie odwiązujcie Odyseusza' *Tygodnik Powszechny* (Kraków, 11 March 2016) <www.tygodnikpowszechny.pl/nie-odwiazujcie-odyseusza-32718> accessed 22 December 2022.

point of departure for my own inquiry. If, on the other hand, they are meant to explain constitutional crises away, if they seek not so much to isolate the problem as to deny that there is a problem at all—then it seems to me that they are throwing the baby out with the bathwater. After all, a constitutional crisis is invariably a pivotal juncture for the constitutional practice in question, and rarely one which leaves it unaltered. Crudely put, one's focus on the overall continuity of law, though otherwise sound, may overshadow the vital fact that constitutional crises *are* crises, and that they normally *do* involve a discontinuity, just not one which extends to all legal practice. The observation that a constitutional crisis need not be a revolution is only the beginning of wisdom; it is far from the end.

The second hurdle that a good account of constitutional crises must pass is therefore that it must explain how a constitutional crisis, no matter how inconsequential, always constitutes a failure of law's machinery, a break in its functioning—in a word, a discontinuity of some sort. It is on this count that this second approach fails.

*E. Legal Dualism*

I have so far identified two tests for an adequate account of constitutional crises: first, that the account should make room for crises whose effect on the broader practice of law is rather limited; and second, that it should not do so by simply resorting to a notion of continuity which obfuscates the disruption such crises nonetheless bring about. Accounts of the third sort go some way towards meeting these concerns with the argument that although a constitutional crisis need not necessarily call the continued existence of the old legal order into question, it nonetheless opens the path for a new, alternative order to take hold and replace the old. In other words, if a constitutional crisis fails to overthrow the existing legal

system, the result is a sort of legal dualism,[83] where both the old and the new legal orders exist, as it were, alongside each other, each seeking to exclude the other and claim supreme authority for itself.[84]

Though perhaps theoretically underdeveloped,[85] on its face the dualist explanation has some common-sense appeal, and it has in fact been invoked by those involved or interested in the Polish crisis.[86] The explanation, drawing selectively on Kelsen's analytical model, could go along the following lines. The original system $S_T$, upheld by the Tribunal, continues in existence as it remains 'by and large effective'; however, because the institutions controlled by the party in power take exception to an important part of $S_T$'s constitutional law, and persist in their defiance, another legal system $S_G$ is born and operates alongside $S_T$. Of course,

[83] Or, when there are more than two sides to the conflict, pluralism.

[84] cf *AL* 118–19.

[85] Note that I am not referring to 'legal dualism' or 'pluralism' as understood in the anthropological and sociological investigations of non-state law and its interactions with state law: see eg John Griffiths, 'What is Legal Pluralism?' (1986) 18 Journal of Legal Pluralism and Unofficial Law 1; Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney L Rev 375; William Twining, 'Legal Pluralism 101' in Brian Z Tamanaha, Caroline Sage, and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (CUP 2012). Rather, I am referring to the coexistence of two competing systems of state law, and indeed of two competing legal systems of a single state. See also n 87.

[86] Both those backing the Tribunal and those on the government's side: see, respectively, Kamil Popiela, 'Prof. Zoll: Każda władza ma tendencję do rozpychania się łokciami' *Gazeta Wyborcza Kraków* (Kraków, 4 April 2016) <https://krakow.wyborcza.pl/krakow/1,44425,19867406,prof-zoll-kazda-wladza-ma-tendencje-do-rozpychania-sie-lokciami.html> accessed 20 December 2022; and Janusz Schwertner, 'Marek Ast: od tej pory mamy w Polsce dualizm prawa; to bardzo niedobra sytuacja' (*Onet.pl*, 26 April 2016) <https://wiadomosci.onet.pl/tylko-w-onecie/marek-ast-od-tej-pory-mamy-w-polsce-dualizm-prawa-to-bardzo-niedobra-sytuacja/wt975g> accessed 20 December 2022. See also Barczentewicz (n 2).

$S_T$ does not recognise $S_G$ and *vice versa*;[87] whether it is possible that both should 'exist' at the same time, in the same place, and for the same people—and in what sense—are therefore difficult questions which would have to be addressed in detail. For my part I put them aside, since a dualist account is in any case not the one I wish to defend. In principle, however, none of them appears unsurmountable, at least so long as we remember that the whole point of the dualist picture is that the two systems coexist not in harmony, but bitter tension.

Still, it is clearly a background assumption of any dualist explanation that $S_T$ and $S_G$ coincide to a very large degree, that most of the latter's content mirrors that of the former—otherwise, they could not both be effective at the same time and place—and precisely in this notion of similarity-in-tension lies the apparent strength of the dualist explanation. For while it records the disruptive moment of a constitutional crisis, the presupposition of substantive overlap between the two systems allows us to account for the overall continuity of law. Consider a simple example. Were Andrzej Rzepliński, the Tribunal's president, to buy a horse from the prime minister, Beata Szydło, they would in all probability experience little trouble in drafting, concluding, and executing the contract of sale. Nor should they have any real disagreement about their legal situation: their contract would be regulated by the applicable provisions of the Polish Civil Code, and those would

[87] This point marks a vital distinction between the dualist view of constitutional crises and the legal or constitutional pluralism deployed to explain the interaction of the various legal systems of the EU. The peculiar situation of the EU has been characterised as an 'interlocking of legal systems, *with mutual recognition of each other's validity*' (Neil MacCormick, 'Juridical Pluralism and the Risk of Constitutional Conflict' in *Questioning Sovereignty* (OUP 1999) 102; italics added) and 'a political compromise; a tacit agreement to disagree' (Barber (n 59) 170) 'premised upon mutual recognition and respect between national and supranational authorities' (Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317, 337). This is far removed from the case of a domestic constitutional crisis, such as the one in Poland.

have the same content in both $S_T$ and $S_G$. Their constitutional animosity would have no bearing on their interaction at all; in this context it would be not only unimportant, but outright irrelevant. And the advantage of the dualist account, it seems, is that it can make sense of all this.

But can it, really? The dualist view might perhaps explain why Rzepliński and Szydło manage to avoid material conflict as to their rights and obligations, but it does a poor job at explaining what they actually take themselves to be doing. Suppose that Szydło called Rzepliński and said: 'I was thinking about the contract all afternoon'; would it not be strange for him to interrupt: 'sure, but which one—the one signed under $S_T$ or $S_G$?'? Or suppose things go sour, and they end up in court; would it not be odd for the judge to even consider if it is $S_T$'s Civil Code that applies or $S_G$'s? A proponent of the dualist explanation may of course reply to this that it would indeed be so because nothing at all hangs upon these questions. Yet this would still be off the mark, for these questions would lack not only a point, but meaning. There is only one Civil Code at play, and only one contract; to ask 'which one?' here is simply to see double.

There is of course a point at which these questions may become important, perhaps because there may be an issue of contractual interpretation which turns on our understanding of the Constitution, or perhaps for some other reason. Unless and until that point is reached, however, the question of *which* of the two legal systems, $S_T$ and $S_G$, we accept as valid, is—as I said—not just immaterial, but irrelevant: as it were, a question not to be asked. An analogy with natural languages might help. Upon hearing 'the judge took the subway', we may well ask 'do you mean "subway" as in British or American English?'—the judge might have come from across the street or across the city. But if we asked the very same question

about the word 'judge' instead of 'subway', the natural response would not be 'oh, it doesn't matter', but 'what on earth do you mean?'; the question would not only be pointless, but also disclose our failure to grasp the distinction between British and American English. For these are not two discrete languages or 'linguistic systems', but two ways of speaking one language, English; and they do not just 'overlap' over a vast array of expressions, but *share* them in the fullest sense of the word.[88] It is sensible to distinguish between British and American English in order to mark their differences, but senseless when there are none; and so it is with the legal systems $S_T$ and $S_G$. A dualist account of constitutional crises would construe them as two distinct entities, but the truth is that for the most part, they are one.[89]

*F. The Problem Restated*

Each of the three accounts just reviewed has its own faults; each of them also remedies, for better or worse, the shortcomings of the other two. The question arises if there could be an account to solve the problems of all three at one sweep—which question, when spelled out, becomes

[88] There are passages in Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 MLR 1 at 7–9 which could be read to envisage that some 'rules' could be 'the same' in $S_T$ and $S_G$; but then there are other passages there which seem to rule out such a possibility (or at least indicate that he is not dealing with the problem discussed here), as indeed does his vocabulary of 'overlap'. In any case, see n 87.

[89] Barber (n 59) argues at 158–64 that constitutional crises could be understood as involving the notion of 'a pluralist legal system'. His argument in principle meets the concerns just outlined; but, first, it may be difficult to square with the broader understanding of what a legal system can be, and certainly with the understanding defined in section II.2.B; and second, it is somewhat unclear to me what the conceptual dividing line is between the existence of a pluralist legal system and the existence of plural legal systems: contrast 162–64 with 161–62. I thus struggle to see how Barber's account applies to the Polish case.

*The problem of continuity:* Descriptive legal theory must have an account of constitutional crises—understood as interpretive conflicts concerning the constitutional foundations of the legal order for whose resolution there is no agreed procedure—which acknowledges that

(1) they normally involve a discontinuity in constitutional practice, but

(2) may not only leave the overall continuity of legal practice materially intact, but

(3) be in fact irrelevant to it.

In this form, the problem of continuity is really a particularised version of the two general questions posed at the beginning of this chapter. First, how can legal practice be generally continuous, yet also to some degree discontinuous? Second, how can a constitutional discontinuity possibly be irrelevant to the overall continuity of legal practice? It is not difficult to see that any solution to the particular problem will also need to address these bigger, more general issues. Because the converse need not necessarily hold, however, I will take the particular problem rather than these general questions as my ultimate point of reference. The eventual objective of this thesis is therefore to solve the problem of continuity as I have just defined it.

The eventual objective, but not the only one, nor necessarily the most important. In order to figure out a way in which a good account of constitutional crises can be given, we will have to reconstruct a broader theoretical framework from which that account would follow; and in the course of reconstructing that framework, we will have to address a range of questions not just about the nature of legal continuity, but about the nature of law generally. In the problem of

continuity we have, as it were, an initial piece of a complex jigsaw puzzle: and though in the end the objective is to put the piece in its right place, the right puzzle has first to be found and put together. Most of this thesis, in fact, is spent on this latter problem. Let me now sketch the background against which it arises.

## 2. THE IDEA OF A LEGAL SYSTEM

The reader might have noticed a terminological inconsistency in my treatment of the three accounts that have been given of constitutional crises. When discussing and explaining them, I would generally speak of the continuity of legal 'orders' or 'systems'; but when setting out my criticisms, I would sometimes refer to continuities and discontinuities of legal or constitutional 'practice'. Similarly, where others have often seen the question of legal continuity as concerned with 'the search for criteria providing a method for determining whether two momentary legal systems are part of one, continuous, legal system',[90] or with 'the diachronic identity of legal systems',[91] I have myself given it a formulation which refers to 'the overall continuity of legal practice' and postulates the theoretical need to reconcile it with the 'discontinuity of constitutional practice' necessarily implicated in a constitutional crisis.

I think this is no mere difference in terminology, nor just a matter of exposition. I think so because I would struggle to formulate the three accounts in terms of legal practices, or my criticisms in terms of legal systems. If so, it seems that the distinction between the continuity of legal systems and the continuity of legal

[90] *AL* 81; cf *CLS* 188.

[91] Spagnolo (n 52) 1.

practice is somehow theoretically salient. Before we can address the problem of continuity head-on, we must carefully unpack this distinction.

In the remainder of this chapter, I would like to begin the unpacking by articulating a tension behind the distinction. The tension largely revolves around a preconception—which all three accounts criticised in the previous section share, and which I reject—that law is by definition a *legal system*, in the sense of a *unified*, *consistent*, and *discrete* system of legal *norms*.[92] Let me briefly discuss these four features in turn.

*A. Unity*

To begin with, a legal system is taken to exhibit 'some kind of unity'.[93] What this means is that there is in every given system a central element which 'constitutes the unity of the multiplicity of [its] norms',[94] and supplies some 'common mark' to transform them from a loose 'set of separate standards' into a 'legal system' truly deserving of the term.[95] This central element itself has been identified in myriad ways: as a sovereign, whose 'direct or circuitous' commands together make up all 'positive laws';[96] or a 'basic norm', presupposed in order to view law 'as a

[92] The word 'system' may mean many things, as may 'legal system'. There is no denying that both can be used in a relatively casual manner without implying anything particular about the nature of law. In this chapter and the next two, I use these expressions in the sense about to be outlined. I try to articulate a related but slightly adjusted understanding of 'legal system' in sections VII.2.C (esp at n 40) and VIII.1.B.

[93] *PRN* 9.

[94] *PTL* 205.

[95] *CL* 92, 95; cf 232–37.

[96] John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, CUP 1995) 118.

meaningful whole and to describe it in noncontradictory statements';[97] or a social 'rule of recognition', apparent 'in the way in which particular rules [of the legal system] are identified, either by courts or other officials or private persons or their advisers';[98] or a body of institutions 'which mutually recognize the authoritativeness of their determinations'.[99] The debate between these different views has in itself been perennial and fierce. Yet the background assumption that there is *something* which endows law with unity has on the whole remained unquestioned, and on the contrary has been treated as the prime mark of law's systematic nature.

This unity of law can in turn be understood to involve two aspects. Internally, a legal system is unified in that it is consistent; externally, its unity consists in its discreteness.

*B. Consistency*

The consistency of a legal system, on the most general level, means that its elements are arranged in some harmony with each other. The point has been argued most robustly by Kelsen, who claims that

> Two legal norms are contradictory and can therefore not both be valid at the same time, if the two rules of law

[97] *PTL* 206.

[98] *CL* 101.

[99] *PRN* 147. Raz rejects the idea that there must be just one rule of recognition or any other single normative foundation for all law: *CLS* 200; *PRN* 147; *AL* 96; yet he preserves the unity of law through the recognition-practices and/or duties of what he calls 'primary organs' or 'primary institutions': *CLS* 191–92; *PRN* 149; *AL* 87–88, 96n, 112–13, 115; see also G MacCormack, ' "Law" and "Legal System" ' (1979) 42 MLR 285, 289–90; Spagnolo (n 52) 174–78.

> [*Rechtssätze*[100]] that describe them are contradictory; … To say that *a* ought [in law] to be and at the same time ought not to be is … meaningless[101]

In short, there is no place in a legal system for any standing conflicts between its constituent norms; and whenever such a conflict appears to arise, it 'must be solved by interpretation', for it can be nothing but mere 'sham' which proper interpretation ought to expose.[102]

These arguments have not escaped criticism,[103] and to see them as integral to the idea of a legal system would be a step too far. Kelsen himself admits in his last book that 'there can be no doubt that conflicts [between valid norms] occur' and 'play an important role in morality as well as in law'.[104] Still, his critics usually challenge his notion of consistency in a manner which preserves its essence. First, it is conceded that there may be 'laws which interact with one another, modifying and qualifying each other', but 'the legal system includes some means of resolving such conflicts … [which] means usually determine which one of any two

[100] Hans Kelsen, *Reine Rechtslehre* (Matthias Jestaedt ed, 2nd edn, Mohr Siebeck 2017) 147 [77]. *Rechtssatz* is more naturally translated as 'legal statement', 'proposition of law', or some such: see Eugenio Bulygin, 'Kelsen on the Completeness and Consistency of Law' in Luís Duarte d'Almeida, John Gardner, and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 226–27; Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1965) 17 Stanford L Rev 1128, 1132–33.

[101] *PTL* 74, 206.

[102] *PTL* 206; *GTLS* 375. See further *PTL* 206–08, 267–78 (though see also 25–26); *GTLS* 153–62, 402–07.

[103] Including from Hans Kelsen himself: *General Theory of Norms* (Michael Hartney tr, OUP 1991) 123–27, 213–14, 223–24, 225; see also HLA Hart, 'Kelsen's Doctrine of the Unity of Law' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999); Bulygin (n 100).

[104] Kelsen (n 103) 124.

conflicting laws prevails, and the same law always prevails when the two conflict'.[105] Second, though a legal system may fail to include any such means and leave some inconsistencies unsettled, such situations are then conceptualised as involving a legal gap,[106] so that any 'interpretation' resolving such a normative conflict 'necessarily takes [us] beyond the law'.[107]

In this way, the sense of harmony in a legal system is qualified but maintained. It is maintained, in the first instance, by observing that most conflicts between legal norms are straightforwardly settled by some ranking criteria, either peculiar to the system's constitution (Acts of Parliament override the common law), or generally acknowledged in most jurisdictions (*lex posterior*, *lex specialis*); and in the second instance, by insisting that when the ranking criteria run out, then so does the law itself. Conflicts of legal norms are either resolved by the legal system or else remain outside its proper scope; Kelsen's original notion that legal systems are characterised by consistency and harmony is not so much denied as it is refined.

*C. Discreteness*

The sense in which legal systems are discrete is more difficult to capture. To begin with, what I mean by this is not that the limits of a legal system must always be (capable of being) given a razor-sharp definition; chances are no one would defend

[105] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823, 832; cf *PRN* 145–46. Apart from *CL* 95, 101, 106, and Hart (n 103), Hart is rather reticent on the issue.

[106] *AL* 75. The position in Kelsen (n 103) still seems to be that there are in such cases no 'gaps' because there is valid law to be applied: for this understanding of 'gaps', see 363; for the claim that conflicting norms are not invalidated by the conflict, see 124–25, 214; and see also 221–22, 225, 394–95. The cumulative effect of these passages appears to be that Kelsen's late departure from his earlier arguments is more radical than Raz's.

[107] John Gardner, 'Legal Positivism: 5½ Myths' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 46.

this view. Nor is it that legal systems must necessarily be complete, or 'closed': for it has been argued, and convincingly so, that legal systems are characteristically 'open' in that they can and do recognise and give effect to other (legal and non-legal) normative systems.[108] Both these issues touch on substantive debates about *how* legal systems are discrete, and about *how* to draw the line between a given legal system and other normative and social phenomena. Behind these debates, however, lies the understanding that there *is* a line at all, however fuzzy. It is this background understanding that I want to underline here.

In itself, the notion is so rudimentary that it rarely receives explicit formulation.[109] It could be expressed by saying that it makes sense to speak of legal *systems* in the plural, and to look for some criteria to distinguish them from each other;[110] or that a single, individual legal system is not only conceivable, but indeed one of the basic units of descriptive legal theory.[111] However, the notion is spelled

[108] *PRN* 152–54; *AL* 119–20.

[109] Raz writes that 'there are limits to law … [so that] it is meaningful to ask of rules and principles whether they are legal rules and principles or not': *AL* 115. But this is best understood as making the familiar point that there is some line to be drawn between the law and other norms, such as ethical norms, which might bear upon one's evaluations.

[110] Kelsen, save for Kelsen (n 103), is a methodological monist: he maintains that only one normative order may be perceived as valid by presupposing its basic norm, and any norm which is thus made valid is taken to be part of this universal normative system. So for him to speak of normative systems in the plural means not that there are multiple normative systems which exist side by side, but that there are multiple points of view—each defined by the particular basic norm presupposed—from which the existence of norms may be appreciated. See *PTL* 328–44; *GTLS* 363–88, 407–12.

[111] One of the basic units, not *the* basic unit. Raz, for instance, distinguishes further between a momentary legal system, ie a legal system considered synchronically, and a legal system which is a diachronic union (in the sense of set theory) of such momentary legal systems: *CLS* 34–35; *AL* 81. A momentary legal system is for Raz a set of individual laws; these, in turn, so far as they are norms, can be 'explained in terms of reasons for action': *PRN* 10; cf *AL* 63–64. So it is a legal reason for action, or else an individual law, that seems to be the most elementary unit of Raz's theory.

out most sharply—if also obliquely—in the distinction drawn between the validity of a law and its membership in a legal system, as well as in treating the issue of membership as substantial in itself: as, for instance, when one asks whether a law of one system, once recognised as valid (adopted, incorporated) by another system, remains a law of the former, or is duplicated as a law of the latter.[112] Were it not possible—and sensible—to distinguish legal systems from each other, such questions simply would not be worth anyone's time.

*D. Norms*

Finally, a legal system is made up of norms. The basic notion here is that any legal system postulates a certain 'social order',[113] a 'legally ideal' pattern of social behaviour which *ought to* be enacted in actual legal practice.[114] I will say much more about this later in the thesis,[115] so here I limit myself to only one observation.

A legally ideal pattern of social practice, like any such ideal pattern, is by definition distinct from the (non-ideal) legal practice that we find in the real world; and it is not just capable of diverging from this reality in significant ways, but indeed expected to do so. A legal system thus enjoys a degree of independence or autonomy from the social practices that give rise to it and that it is meant to regulate—autonomy corresponding to the logical distance between the deontic 'ought' and

[112] See n 108; *AL* 102, 148–49; Joseph Raz, 'Incorporation by Law' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 193–95, 198–99; Hart (n 103) 580–81; cf *GTLS* 243–48.

[113] *PTL* 24–58; *GTLS* 3–4, 15–30.

[114] cf Robert Mullins's recent work on the semantics of legal discourse: 'Detachment and Deontic Language in Law' (2018) 37 Law and Philosophy 351; 'Presupposing Legal Authority' (2022) 42 OJLS 411.

[115] See chapter IV, esp section IV.1.

the descriptive 'is'.[116] This autonomy, in turn, enables the idea of a legal system as a whole to gain a firm foundation: for it allows one to insist on the unity, consistency, and discreteness of a legal system even in the face of fragmented, conflicted, and open-ended social practice. In this sense, the notion that a legal system is made up of norms is the lynchpin that holds the other elements of the broader idea together.[117]

*E. Legal Systems and the Problem of Continuity*

We should abandon the general preconception that law constitutes a unified, consistent, and discrete system of norms. This is not because the idea of a legal system will always conjure up a distorted picture of law—after all, it is the preconception that we ought to abandon, not the idea as such. The idea, on the contrary, remains a powerful and important analytical tool worthy of further study and refinement. For many projects, it is indispensable; for some it is enough. But for other projects, it may be a hindrance; and as it happens, theorising constitutional crises is one of these projects.

Why is it a hindrance? Because the idea not only underpins the three accounts discussed in the previous section, but is also largely to blame for their failure.[118] Recall how the first account, based on Kelsen's model of the legal order, has postulated that the whole legal order is replaced *because so is its basic norm*; or how

[116] Kelsen is particularly outspoken about this autonomy: see eg *PTL* 10–11, 85–89, 112–13. Hart's views on the matter are more difficult to figure out, but I conclude in sections III.1.B, III.2.B, and III.3 that they are similar.

[117] cf section III.3.

[118] See Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (OUP 2017) ch 5 for a broadly similar diagnosis that the idea of a legal system may hinder our understanding of constitutional crises and revolutions.

the second account has tried to escape this conclusion by seeking to tie the continuity of a legal system to the stability of *its rule of recognition*, or of *the institutional practices of its courts*. The failure of these first two accounts to appreciate, respectively, the overall continuity of law and the disruptive character of constitutional crises, is rooted in their understanding that legal systems exhibit unity, and in their inability to sever the totality of law from what they suppose to be its central unifying element. The alternative, dualist approach, on the other hand, would easily avoid its troubling implications if it could only accommodate the possibility that there can be in a single system two conflicting constitutions,[119] or that there can be 'two' systems which quite literally share a large part of their laws. But it cannot, because it takes legal systems to be consistent and discrete.

We are left with the impression that the problem of continuity cannot be properly understood, never mind solved, within the theoretical framework offered by the idea of a legal system. This is because the framework leaves no space for the key insight in Hart's treatment of constitutional crises that 'the great mass of legal operations not touching on [the] constitutional issue' at the core of the crisis may simply '[go] on as before'.[120] For one, the unity understood to characterise legal systems does not allow that the larger part of such a system may be left unaffected when the integrity of its central element is in peril. But at a more fundamental level, the preconception that law is a system of legal norms is at odds with the very notion that the continuity of law could at all be defined by reference to 'the great mass of legal *operations*', to legal *practice*. After all, the problem of

[119] cf n 89.

[120] *CL* 122.

continuity as I have formulated it does not depend on the view that a legal *system* can 'go on as before' in spite of a constitutional crisis. It rests on the realisation, rather, that the legal practice of ordinary people—their use of the infrastructure of the law in their daily lives—may retain a good deal of detachment from constitutional practice, so from how law structures the interactions of key political actors and institutions; and that thanks to this detachment, it may indeed 'go on as before' despite a breakdown of the latter. So long as we work with the idea of a legal system, however, this realisation is both unintelligible (because of the presumed unity of law) and irrelevant (because the law is understood to consist of norms). Unless we look elsewhere, we will not get off the ground.

What the problem of continuity calls for is therefore not another theory of legal systems, but a substantial theory of legal practice. I will try to give the first outline of such a theory in chapters V–VII. Before I can do that, however, I should address the following worry. After all, the idea of a legal system is not just some idea, but in many senses *the* idea that has driven and informed much or indeed most contemporary legal theory. If it can otherwise offer a plausible framework for general descriptive jurisprudence, the fact that it is poorly suited to formulate and address some particular problem may just be a sign that the problem itself is bogus. The theoretical cost of transcending the idea, so to speak, might outweigh the cost of being unable to deal with the problem. In the next two chapters I will try to convince the reader that this is not so.

## III. Legal Practice (Take One)

In the previous chapter I defined the problem of continuity as the challenge of providing an adequate descriptive account of constitutional crises, that is, of situations where there is a practically irresolvable dispute between key political actors as to the constitutional foundations of the legal order. I have also suggested that much of the difficulty in accounting for such situations comes from the idea that law is, by its very nature, a unified, consistent, and discrete system of norms. To solve the problem, I have suggested, we must regard law as a social practice instead; and we must remain open to the thought that this practice need not adhere to any such preconceived format.

Some may now worry: is it worth it? The contexts and problems where the idea of a legal system proves useful are countless; why should we question it for the sake of one seemingly minor problem? I concede that if the idea of a legal system is really as attractive a framework for descriptive jurisprudence as it is often supposed, then the fact that the problem cannot be solved within this framework might simply mean that the problem itself is a sham. But in this chapter and the next, I want to argue that the idea is not *so* attractive after all. If all goes well, that should allay the present worry.

The argument proceeds in two stages. This chapter discusses and criticises HLA Hart's practice theory of law.[1] I have several reasons for this initial focus. For one, and obviously, Hart's theory has exerted immense influence on descriptive legal theory; it has certainly been formative of how contemporary descriptive jurisprudence conceptualises legal systems. More importantly, however, Hart's project in *The Concept of Law* represents perhaps the single most impressive attempt at explaining how social practice may bring into existence a legal system properly so called. In doing so, Hart has articulated for descriptive legal theory a serious ambition to pay close attention to, and make good sense of, the actual practices of a society which has law.

In the end he fails the ambition, because the role he accords to social practice ends up so slim that he might well be said to be a 'practice theorist' only in name.[2] But his failure is instructive on a number of levels, and most of all because it isolates the fundamental reason why the idea of a legal system is ill-suited to explain legal practice. The problem, we will see, lies in the notion that law is necessarily made up of norms. I deal with that notion at length in chapter IV.

[1] The view that Hart had offered a 'practice theory of rules' had long gone unchallenged, even by Hart: *CL* 254–59. This has changed more recently, and for the better: see eg Kevin Toh, 'Erratum to: Four Neglected Prescriptions of Hartian Legal Philosophy' (2015) 34 Law and Philosophy 333; Thomas Adams, 'Practice and Theory in *The Concept of Law*' in John Gardner, Leslie Green, and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 4* (OUP 2021). I agree with both Toh and Adams so far as interpretive questions go, and in particular, that Hart does not intend the relevant passages to give an exhaustive theory of what rules are. This agreement should emerge in the text. Still, I think it is fair to attribute to Hart a (thin, as it will also emerge) practice theory of *law* along the lines outlined in section III.1. In any case, in the context of my broader argument, this characterisation of Hart's theory is meant to be generous rather than compromising.

[2] For an extended survey of the relationship between the 'social-fact' and 'analytic-philosophical' aspects of Hart's work, see Nicola Lacey, 'Analytical Jurisprudence versus Descriptive Sociology Revisited' (2006) 84 Texas L Rev 944.

## 1. HART'S NOTION OF PRACTICE

The idea that law is best conceived as a complex social practice, firmly anchored in the realm of describable material events, is not new or alien to descriptive legal theory; on the contrary, we may perhaps single it out as *the* characteristic mark of modern English jurisprudence, certainly traceable to John Austin and arguably all the way back to Thomas Hobbes.[3] It is in HLA Hart's *The Concept of Law*, however, that this 'practice theory of law' takes its most sophisticated form: most descriptive legal theory to come after Hart either takes his conception for granted or, perhaps more commonly, replaces it for these or other reasons with some more robustly normative alternative. In any case, practice theories of law have not seen too much development since that seminal book;[4] so it is only natural that I should take Hart's conception as the starting point for developing my own notion of legal practice.

Hart's theory of legal practice in *The Concept of Law* can be summarised as follows. While Austin argued that the existence of law consists in a bilateral practice, played out between the sovereign and their subjects, of issuing and habitually obeying 'commands',[5] for Hart law is *a practice of a legal system*:[6] a 'complex social situation' whereby legal rules are, 'as a matter of fact', so reflected in social

[3] John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, CUP 1995); Thomas Hobbes, *Leviathan* (Richard Tuck ed, rev student edn, CUP 1996), esp chs 1–16; but see also David Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20 Law and Philosophy 461.

[4] At least in descriptive jurisprudence: Ronald Dworkin's *Law's Empire* (Fontana Press 1986) might also be thought to give a 'practice theory of law' (where the 'practice' is one of interpretation and argument), but its ambitions are decidedly not descriptive.

[5] Austin (n 3) lecture VI.

[6] The phrase 'the practice of a legal system' does not appear in *CL*, but it can be found in Hart's earlier work: see HLA Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 25.

practice as to warrant 'the assertion that a legal system exists'.[7] Two distinct elements merge in this idea. The first is the notion of social rules and the conditions for their existence in a given group; the second is the argument that the existence of certain social rules in certain groups justifies talk of a legal system. So at its simplest, Hart's practice theory of law consists of two sets of criteria: one for the existence of social rules, another for the existence of legal systems.

*A. Social Rules and the Hermeneutic Point of View*

For Hart, the existence of a social rule in a given group has an external and an internal aspect. To begin with, there must be a regularity in the behaviour of the group's members: their actions must by and large converge.[8] But even if that allows us to say that the group's members do something '*as* a rule', such habitual convergence does not yet mean that in the group *there is* a rule.[9] More is required to make a mere external *regularity* into a *rule*: it must also be 'thought of, spoken of, and function as such',[10] so that the group's members regard their own as well as others' deviations as not only occasions but indeed good reasons for criticism.[11] And when such a 'critical reflective attitude' is widely shared among them—when they

[7] *CL* 100, 110, 117.

[8] *CL* 55.

[9] *CL* 9–10.

[10] *CL* 231.

[11] *CL* 55–56.

generally look upon the regularity as supplying a standard of proper behaviour—only then can we say that there exists in that group a social rule.[12]

This critical reflective attitude, though 'internal', is apparent in that deviations are *in fact* criticised and 'normative language' is *in fact* employed to that end.[13] Hart's point here is subtle. While the terms in which he characterises the critical reflective attitude powerfully suggest that it is not simply reducible to its external socio-linguistic manifestations,[14] he also emphasises that the question of whether the members of a certain group take the attitude can be given a full answer by reference to 'externally observable physical behaviour' only.[15] Such behaviour does not *constitute* the critical reflective attitude; yet it *indicates* its presence.

Hart's position is thus no crude behaviourism about rules. It is true that the existence of the critical reflective attitude manifests itself in an externally observable pattern of behaviour, but it must still be a pattern of behaviour intelligible as a pattern of *criticism* employing *normative* language. So to appreciate the existence of a social rule, the theorist must be able to recognise criticism *as* criticism

[12] *CL* 55–57; cf *PRN* 52–53. Hart initially discusses the second condition as three—so he names four and not two conditions for the existence of a social rule. However, he himself soon turns to treating all three as one. A simplification similar to mine is offered in Grant Lamond, 'The Rule of Recognition and the Foundations of a Legal System' in Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013) at 101–02.

[13] *CL* 57.

[14] See also the summary of *CL* 56–57 in the postscript, where Hart characterises the acceptance of rules as a 'distinctive normative attitude' and a 'standing disposition of individuals to take [regular] patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity': *CL* 255.

[15] *CL* 57, discussed in Neil MacCormick, *HLA Hart* (2nd edn, Stanford University Press 2008) at 48–49. Hart seems prepared to accept that some psychological states (or 'feelings') may commonly be involved in the acceptance of a rule; still, he clearly denies that their presence (or absence) can be decisive of whether the social rule exists.

and normative language *as* normative. They must take the 'theoretical' (and thus 'external'), but 'hermeneutic' (and not 'behaviouristic') point of view on the practice of following the social rule.[16] In short—and this is a key takeaway—Hart thinks that, to settle the question whether some social rule exists in a given group, the social theorist 'must *understand* what it is to adopt the internal point of view' of the group's members 'and in that limited sense … put himself in the place of an insider', but need not 'share or endorse' that point of view 'or in any other way … surrender his descriptive stance'.[17] They must be a receptive and sympathetic observer, but an observer all the same: their sole and only domain is that of 'ordinary, observable facts'.[18]

A more thorough survey of Hart's conception of social rules would take us too far afield. This much should be enough to understand how Hart engages the conceptual apparatus of social rules to state the 'minimum conditions necessary and sufficient for the existence of a legal system'.[19]

*B. Legal Systems and a Shift in Perspective*

For Hart, law is firmly grounded in social rules, whose existence can be determined by an external observer along the lines just described. This is what makes it possible to characterise the existence of law as a matter of social fact and Hart's theory as

[16] *CL* 88–90, 291; HLA Hart, 'Introduction' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 13–14; MacCormick (n 15) 52–53; Brian Bix, 'HLA Hart and the Hermeneutic Turn in Legal Theory' (1999) 52 SMU L Rev 167, esp 176; Scott J Shapiro, 'What is the Internal Point of View?' (2006) 75 Fordham L Rev 1157, esp 1160–61.

[17] *CL* 242.

[18] *CL* 84.

[19] *CL* 116.

descriptive. But Hart famously does *not* hold that law is simply a collection of social rules, enforced only by 'that general attitude of the group towards its own standard modes of behaviour in terms of which [Hart has] characterized [social] rules of obligation'.[20] To be sure, 'primitive' communities governed by such loose collections of standards can, and do (or perhaps used to), exist.[21] Hart's claim, however, is that any such 'social structure … of primary rules of obligation'[22] does not yet have 'law' in the ordinary sense of the word. To constitute a 'legal system', that 'simple regime of primary rules'[23] must be enhanced by three types of secondary rules. Of these, the most important one is the rule of recognition, setting out the criteria by which to tell of any rule whether or not it is a valid rule of the legal system;[24] the other two types are rules of change and adjudication.[25] The resulting 'union of primary and secondary rules' forms 'the heart of the legal system',

[20] *CL* 91.

[21] *CL* 91–92.

[22] *CL* 91.

[23] *CL* 98.

[24] *CL* 94–95.

[25] *CL* 95–98. Jeremy Waldron argues that the rule of recognition already presupposes some rules of adjudication, and that the function of the rule of recognition is in an ordinary modern legal system fulfilled by its rules of change: 'Who Needs Rules of Recognition?' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (OUP 2009) 328, 339–49. John Gardner opposes the latter point on the fallacious ground that 'a relationship of necessary implication between rules [which obtains between rules of recognition and change] can hold only if there are (at least) two rules for it to hold between': 'Can There Be a Written Constitution?' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 105–06; I say fallacious, because the relation Gardner mentions can be reflexive. See also MacCormick (n 15) 136–41. My own view is that Hart singles out the rule of recognition—for there can be no doubt that he does single it out—in the first place because of the logical and metaphysical role it plays in his theoretical explanation of the existence of law; I try to clarify this role later in the text.

argues Hart, and gives us 'a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist'.[26]

This central *analytical* thesis of *The Concept of Law*, that law is a union of primary and secondary rules, is probably Hart's single most enduring contribution to legal theory. My principal interest, however, lies in a related but distinct *metaphysical* claim, laid out in chapter VI of the book, that a legal system can be said to *exist* in a society whenever the following two 'minimum conditions' are satisfied.[27]

The first condition is that the bulk of the population must obey the primary rules of behaviour identified as valid by the rule of recognition, even if 'each "for his part only" and from any motive whatever'.[28] They need not adopt the critical reflective attitude and thus make those primary legal rules into independently existing social rules; nor do they need to have any awareness of the secondary rules at play, or the complexities of the legal system, or other like technicalities.[29] So long as the second condition is met, it is entirely sufficient that they simply act as required by those rules which satisfy the legal system's criteria of validity.

That second condition, by contrast, relies directly on the theoretical apparatus of social rules: it is that the system's officials—and especially judges[30]—

[26] *CL* 98.

[27] *CL* 116; more generally, see 112–17.

[28] *CL* 116.

[29] *CL* 113–14, 115–16.

[30] Lamond (n 12) 110–12; Scott J Shapiro, 'What Is the Rule of Recognition (And Does It Exist)?' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (OUP 2009) 241; *PRN* 134–37, 147.

must treat the rules of the system 'as common standards of official behaviour and appraise critically their own and each other's deviations as lapses'.[31] So regardless of the attitudes prevalent among the wider population, it is necessary (and together with general obedience, sufficient) for the existence of a legal system that its officials take the critical reflective attitude towards its rules, and most of all towards the rule of recognition:[32]

> the assertion that a legal system exists is … a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour.[33]

As this stage, we might be excused for thinking that given what has been said in the previous section about the existence of social rules, the most that these 'minimum conditions' can establish is the existence of a legal system's *secondary* rules among its officials, but not yet the existence of *all* the system's rules—*as rules*—for the entire population. But it seems we would be wrong. Hart is at pains to emphasise that private individuals may be bound by the system's primary rules of obligation even when they refuse to acknowledge their binding character.[34] And this, given that 'the statement that someone has or is under an obligation … [implies] the *existence* of a rule',[35] forces him to maintain that *all* the system's rules exist for

[31] *CL* 117.

[32] *CL* 114–17.

[33] *CL* 117.

[34] See eg *CL* 83–84, 88, 103.

[35] *CL* 85 (italics added).

everyone in the relevant society as soon as the two 'minimum conditions' are satisfied. How can this be?

Hart's explanation is temptingly straightforward. Whenever a rule of recognition exists, he says, so do all the rules it identifies as valid. So the existence of these 'subordinate' rules, as Hart calls them, is no longer directly a matter of social fact, but turns on the factual existence of the rule of recognition *as well as* its application:

> Where … we have a system of rules which includes a rule of recognition … this brings with it a new application of the word 'exist'. The statement that a rule exists may now no longer be … an external statement of the *fact* that a certain mode of behaviour was generally accepted as a standard in practice. It may now be an internal statement applying an accepted but unstated rule of recognition and meaning (roughly) no more than 'valid given the system's criteria of validity'. … A subordinate rule may be valid and in that sense 'exist' even if it is generally disregarded …[36]

Despite its seeming simplicity, this is a most tantalising passage whose significance for Hart's practice theory of law is difficult to overstate. It is therefore all the more perplexing that he mentions the point as if only in passing, merely to underline what he appears to regard as a more exciting observation: that the rule of recognition itself may only exist as a matter of fact. For this other point that the existence of any other legal rule can only consist in its *validity*[37] is of comparable consequence for Hart's endeavour, and it is regrettable that he should only give it such cursory treatment in the main body of the book (he briefly returns to it in the postscript,

[36] *CL* 110.

[37] cf n 6 in chapter IV.

acknowledging that 'the practice theory [of social rules] is not applicable to [enacted legal rules]'[38]).

I say that the existence of subordinate rules can *only* consist in their validity because immediately before the quoted passage Hart makes it clear that 'if [a social rule is] found to exist in the actual practice of a social group, there is no separate question of [its] validity to be discussed'.[39] It must follow that if a rule is found to be valid under a given rule of recognition, then there can be 'no separate question' of its existence as a social rule either; for otherwise it would be a social rule as to whose validity there would in fact be a 'separate question'. Now, it is of course possible, indeed commonplace, that the requirements imposed by a valid rule of some legal system may be widely complied with and accepted by those to whom it applies. But we cannot then say that the valid rule exists *also* as a social rule; rather, there exist then *two* rules—one is a valid rule of the system, the other is a social rule—albeit both have the same content.[40] On Hart's picture, no single rule can exist both as a valid rule and as a social rule.[41] As far as the subordinate rules

[38] *CL* 256.

[39] *CL* 109. In context, the claim could perhaps be read as an overgeneralisation, intended to apply only to the social rule of recognition but casually extended to all social rules. But then the problem is that, quite apart from the fact that the extension is explicit, Hart suggests no reason why the claim should not be so extended (nor can I, for my part, think of any).

[40] cf nn 76–77.

[41] The idea is evident especially in Hart's opposition to Kelsen's transcendental argument for the validity of the basic norm: *CL* 108–10, 234–36. It is arguably an error: Toh (n 1) 343–44, 359–60; but I do not think it is 'unforced' or merely a 'wrinkle' in Hart's thinking, because it directly reflects Hart's espousal of two very different conceptions of what it takes for a rule to exist: cf n 76. At the same time, I do not think it commits Hart to two different concepts of what a rule *is* (as opposed to what it takes for a rule to *exist*): so I would agree with Adams that *CL* 55–57 sets out 'what it [is] for a group to accept a rule, or perhaps how such acceptance differs from behavioural regularity, but not what a rule is', but find it implausible—and inconsistent with Hart's own words—that Hart is there merely

of a legal system go, therefore, *their* existence can only be asserted by 'internal statements applying [the] … rule of recognition'; these, we are told elsewhere, '[are] characteristic of the internal point of view', and their use 'manifests [one's] acceptance of [particular rules of the system] as guiding rules'.[42]

The passage quoted before[43] thus discloses a dramatic but understated shift in Hart's theoretical perspective. The 'receptive and sympathetic observer' from the previous section is of course capable of determining the factual existence *of the rule of recognition*; but as soon as they turn to the existence *of the legal system*—composed as it is of the rule of recognition *and* the subordinate rules it identifies as valid—they must[44] adopt the 'internal point of view' towards that rule if they are to

setting out a 'condition on the *acceptance* of a rule' and not its '*existence*': Adams (n 1) 22, 23. Hart *is* there concerned with the existence of rules, only with one of the two possible modes in which a rule may exist, namely, with the *qua*-social-rule mode. He thus says *something* about 'what a rule is', just not everything there is to be said.

[42] *CL* 102; see Kevin Toh, 'Hart's Expressivism and his Benthamite Project' (2005) 11 Legal Theory 75 for the argument that Hart understands the semantics of internal statements in expressivist terms.

[43] At n 36.

[44] MacCormick argues (though eventually concedes that 'Hart's view of this matter is different') that a theorist looking from the 'hermeneutic point of view' should be able to make an internal statement of law without the approving attitude that would normally animate it—effectively ascribing to Hart Raz's notion of 'detached statements': MacCormick (n 15) 53–55. Hart's 'valid given the system's criteria of validity' could in principle be read in this way, but not if we accept, as we should, Toh's (n 42) argument that Hart is an expressivist about internal statements; for on that understanding, an internal statement expresses nothing if it does not express the acceptance of the rule in question. Thus the word 'given' in Hart's formulation must mean 'because of' rather than, as it would for Raz, 'on the (provisional) assumption of'; and so the formulation as a whole commits the theorist using it to the *internal* point of view. This conclusion can be escaped by adopting a cognitivist understanding of (non-external) legal statements and supplying the analysis with the notion of detached legal statements. This is what Raz does; I discuss his views in the next chapter.

determine for themselves that the subordinate rules exist as well.[45] This move need not be a fatal mistake—I will later argue that some cautious acceptance of the rules is amply warranted by the theorist's task.[46] But Hart otherwise rejects such a possibility,[47] so the shift he makes in accounting for the existence of subordinate legal rules presents serious difficulties for his own project.

I will discuss these difficulties in more detail very shortly. For now, I just note that on the Hartian picture: subordinate legal rules *do* exist, but only because so does the rule of recognition; and to appreciate their existence, one must *apply* that latter rule and thereby adopt the internal point of view towards it.

The existence of a legal system is therefore twice removed, so to speak, from the pre-legal situation where primary rules of conduct are practised as social rules by the whole community. In the first place, the rules of the system need only be practised as such by its official strata, however narrowly defined. Second, what these official strata must practise is in the end only the rule of recognition: once the factual existence of *that* rule is established, the existence of all the other rules, including the secondary rules of change and adjudication, follows of itself. So in concluding his discussion, Hart says:

[45] cf Eugenio Bulygin, 'Norms, Normative Propositions, and Legal Statements' in *Essays in Legal Philosophy* (Carlos Bernal and others eds, OUP 2015) 197–98, 199–201. The significance of this step may be obscured by the fact that although the rule of recognition is for Hart a fully normative, indeed a duty-imposing rule, he generally tends to present it as a definitional criterion or test (or, to use a term introduced in section V.1.C, a rule of legal discourse): see Shapiro (n 30) 239–40; Eugenio Bulygin, 'On the Rule of Recognition' in *Essays in Legal Philosophy*.

[46] See section V.2.

[47] See nn 16–18 and text.

> In an extreme case the internal point of view with its characteristic normative use of legal language … might be *confined to the official world*. In this more complex system, only officials might *accept and use the system's criteria of legal validity*. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.[48]

It is important to keep in mind that this is 'an extreme case'; it is just as important, however, to realise that it is this extreme case that isolates with most precision how Hart takes social practice to sustain the existence of a legal system. It does that insofar as the system's officials practise the rule of recognition and the wider population generally abide by the subordinate rules satisfying that rule's criteria of validity. There is often more, of course, but in principle there need not be.

## 2. THE LIMITS OF PRACTICE

Despite its lucid style, *The Concept of Law* is not an easy book, and the passages pertinent to my concerns are especially difficult to interpret. I still think the above reconstruction is fair and manages to capture the substance of Hart's view on the relationship between social practice and law. I now want to survey what is good about it, and what is bad.

Let me start with the good things. For one, there is a clear sense in which Hart's theory of law really is a 'practice theory'. His seemingly banal observation that the existence of law can be nothing but a 'complex social situation' is more momentous than it sounds; so is his concern to explain how the subsistence and integrity of a legal system depends on the practices of the society whose legal system

[48] *CL* 117 (italics added).

it is. In short, Hart's great and lasting contribution to contemporary descriptive legal theory has been to establish the problem of characterising and explaining the distinctive social practices of those societies which have law as one of the foremost challenges that lie before descriptive jurisprudence.[49] This thesis, too, is in large part inspired by that contribution.

What is bad, on the other hand, is that Hart eventually accords so little space to social practice in his theory of legal systems that the sense in which it is a practice theory, though clear, is also extremely thin. There are at least two reasons why this is so. On the one hand, Hart appears to underestimate the significance of certain social practices for the existence of law: he limits his focus to how the existence of law regulates behaviour, and largely[50] overlooks the ways in which it establishes new ways of talk and thought. On the other hand, Hart's legal system cannot really be characterised as 'an order of … a particular variety of social rules',[51] because there are very few legal rules in Hart's model that are also social rules. Both these problems suggest that Hart's preoccupation with providing a theory of law as a system of norms ultimately trumps his ambition to make sense of legal practice. Let me consider them in turn.

*A. Is There Law in a Sheeplike Society?*

It is evident that Hart's interest in the social practice of law centres around the ways in which legal rules may regulate human conduct. What is less evident is how this

[49] This might be one way to read Hart's notoriously puzzling claim that '[his] book may … be regarded as an essay in descriptive sociology': *CL* vi; cf n 2.

[50] cf n 47 in chapter VI.

[51] MacCormick (n 15) 42.

is a shortcoming. One way to bring this out, which I will pursue here, is to examine more closely Hart's 'extreme case' of law and question whether there is really 'little reason' for thinking that there is no law in a society where only the officials practise and use the rule of recognition and the rest of the population is wholly ignorant of, or indifferent to, that rule and the conceptual framework it grounds. I will do this by picturing a group which functions as though it were regulated by law, but whose members are not even oblivious that there is law regulating them, but outright hostile to the thought. Before I continue, however, a word of caution. There is no doubt that the example to be developed is far-fetched, and I do not intend it as a serious countermodel to Hart's theory.[52] Its more modest role is simply to bring into view an aspect of the existence of law which Hart's overall preoccupation with 'social control'[53] keeps out of focus, and which I take to be key.

Imagine then that a group of people comes under the sway of a charismatic heresiarch, Frank, who preaches that modern society has gone astray and a thorough renewal of human and social existence is necessary. Convinced by their leader, the group set sail to a remote island where they create a 'no-society' without any social organisation in the form of law or otherwise. This no-society of theirs is nonetheless not free from regulation: the trick is just that instead of being subject to a system of general norms—be it social rules or laws—the sect's members are governed by individual directives imposing on their continued human existence

[52] I would note, without detracting from the caveat, that there are historical examples where the situation was not too dissimilar from what I am about to sketch. These are discussed, in a similar context but in support of different conclusions, in Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) 145–46.

[53] *CL* 39.

a set of divine 'terms and conditions'. Supposedly authored by the sect's god, the directives are personally received 'through' Frank by each member and kept in strict secret from each other. The sanction for their breach is death, and it is understood to be handled by supranatural forces; in other words, the demise of any person is seen by the sect's members as divine punishment, administered by some godly mechanisms of justice.

The group is therefore governed by a set of mutually unknown 'orders backed by threats', addressed by the 'sovereign' god to each person individually.[54] This is at any rate how these regulations are viewed by their subjects.[55] Frank, on the other hand, who routinely updates and distributes the divine directives, cannot but see through his own teachings. He is well aware of his responsibility for coordinating the group, and he lives up to it: not only does he make the divine conditions substantively identical for each member of his sect, but indeed fashions them in such a manner that many institutions familiar from developed legal systems—such as private wrongs, contracts, some forms of property—are clearly discernible to the lawyer's eye. Bound by his theology, however, he does not frame his directives this way; instead, he just issues elaborate conditional orders of the form 'if so-and-so, do this and don't do that'. So rather than go by a general norm that, say, contracts should be kept, Frank's no-society works with a multitude of complex individual directives, each stating that if some events (which to the lawyer would constitute a 'contract') occur, then some things (which the lawyer would call 'the

[54] cf *CL* chs 2–4.

[55] Or this is how the subjects' perceptions would be translated into jurisprudential jargon.

content of the contractual obligation') ought to be done by the addressee, and some other things ('breach') ought not to.[56]

In short, while the members of Frank's sect might look like they are practising a simple legal system—while they may *act* as if they were—they do not actually *understand* their behaviour in these terms. On the contrary, those of them who could understand any such suggestions would fervently deny that this is what is going on. They would sincerely maintain that they have rejected law in favour of a pure and holy form of life based on the individual relationships they each have with their god.

Not just a capable manager, Frank is also an avid reader of *The Concept of Law* and decides to conduct a little metaphysical experiment in the spirit of Hart's book. He invites three prodigious students of jurisprudence—call them Gwen, Herb, and Ike—to an abandoned shed and asks them to set up an official practice to endow his sect with a legal system. Gwen is to be the legislator: Frank discloses his directives to her, and she in turn enacts their normative content as general rules framed in legal language, that is, as *laws* mirroring Frank's divine 'terms and conditions'. Herb becomes the judge: he monitors the sect's members to let his friends know whenever anyone transgresses against Gwen's legislation and so, *ex hypothesi*, against Frank's directives. Finally, Ike acts as the executor: his is the morbid role of sneaking around the camp at night and injecting wrongdoers with a deadly poison. Fortunately he is not busy: on the whole, the sect's members are anxious to satisfy the demands placed on them by their god and so, incidentally, to obey

[56] That is, Frank parses well-known legal institutions into general conditional duties along the lines familiar from Alf Ross, 'Tû-Tû' (1957) 70 Harvard L Rev 812 (see esp 817–22) or *PTL* pt IV.

Gwen's laws. The three prodigies carry on with their grisly game for quite some time, and the sect's members soon find out about their antics. Still, they more or less consciously reject the students' intellectual framework, deny that 'whatever Gwen enacts is the law', and prefer to stand by Frank's bizarre theology instead.[57]

Now, if it strikes us as odd that there should be in the sect a practice of law—however nonstandard—then this is because it *is* in fact odd to suggest that. And of course Hart would agree; plainly he has something else in mind when he mentions the 'deplorably sheeplike' society of his 'extreme case'. It is nonetheless difficult to escape the conclusion that if we took him at his word, we would have to at least entertain the thought that the three prodigies' practice transforms Frank's sect into a legal system: a crude and strange one, perhaps, but a legal system all the same. After all, both 'minimum conditions' appear to be satisfied: on the one hand, Gwen's legislative activity, Herb's adjudication, and Ike's meticulous execution *do* constitute a simple official practice with a social[58] rule of recognition, as well as some rules of change and adjudication;[59] on the other hand, the members of Frank's sect

[57] See also the scenario discussed in Gerald J Postema, 'Conformity, Custom, and Congruence: Rethinking the Efficacy of Law' in Matthew H Kramer and others (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (OUP 2008) at 50–51. Unlike in Postema's scenario, however, Frank's directives *do* engage 'the capacities of [their] addressees for intelligent self-direction'; my point in developing the example is however that it is a condition of the existence of law that this 'intelligent self-direction' employ a distinctively legal conceptual framework, which point Postema touches upon at 55–56, 59–60.

[58] The fact that the group in question consists of only three (or two, if Gwen does not count) members is, to my mind, no obstacle to there being in it a social rule. Should the reader think otherwise, the scenario can easily be tweaked to feature an assembly of Gwens instead of just one Gwen, and a larger number of Herbs and Ikes.

[59] These could be roughly formulated as follows: 'whatever Gwen has enacted and not repealed is the law' or 'Herb and Ike ought to apply the law as enacted and not repealed by Gwen' (rule of recognition); 'whatever Gwen enacts becomes the law and whatever she repeals ceases to be the law' or 'Gwen has the power to enact and repeal laws' (rules of

*do* obey Gwen's legislation, at least in the sense that they do whatever her laws demand. If there really is law in Hart's sheeplike society, then it seems there must also be law in Frank's sect.

I pause here to consider two immediate objections. The first is that if all of Gwen's legislation ultimately derives its content from Frank's directives, it might appear that Frank is the true legislator in the students' practice, not Gwen. But this is really nothing more than an appearance. Herb and Ike do not know what Frank's directives are[60]—were they less prodigious than they are, they might even fail to notice that there is a Frank at all—and in any case they do not care. If Gwen made a mistake in translating Frank's commands into laws, for instance—though she never does—they would have neither the knowledge to correct these mistakes nor any reason to do so. What matters under the rule of recognition they follow and accept is solely what Gwen has promulgated, not what the (supposed) source of her legislation happens to be. Parliament, too, might (purport to) legislate according to the ethical demands of natural law or the economic demands of capital, but this would not mean that Britain's 'true' legislator is somehow hidden behind it. These ethical or economic demands, even if they are the source and inspiration of Parliament's legislation, play no part in identifying what that legislation in fact is.[61]

change); 'whatever Herb issues as a judgment is a judgment' and 'whenever Ike carries out a sanction prescribed by a judgment, he is understood to enforce the judgment', or 'Herb has the power to issue judgments' and 'Ike has the power to enforce judgments' (rules of adjudication).

[60] Frank only discloses them to Gwen.

[61] They may play a part in interpreting that legislation or figuring out its normative impact, but that is a different question which I leave open.

The second objection is that the members of Frank's sect obey Gwen's laws for reasons that are wildly different from the ones ordinarily employed by legal subjects. The point can be made even stronger: we might observe that there is an intelligible distinction to be made between *obedience* and *conformity* which has to do with the practical reasoning behind acting as the law requires;[62] and that once we have taken the distinction on board, the sect's members can only be said to *conform* to, not to *obey*, Gwen's legislation. But while it is true that there is such a distinction, it is not one Hart makes himself.[63] And in any case, nowhere in stating his minimum conditions does Hart demand that the reasons for obedience be this or that; what counts is that people act as required, no less and no more. So if we want to take the distinction on board, we have to rewrite all the references to 'obedience' in Hart's discussion of the 'extreme case' to refer to 'conformity' instead. Either way, the conclusion that there is in Frank's sect a legal system stands all right.

The conclusion stands, but it is embarrassing. How can we escape it? My provisional suggestion is that an extra requirement should be introduced that there be among the wider population a degree of legal consciousness;[64] that they frame some of their practical deliberations using concepts and categories characteristic of legal discourse; and that they know and accept, when they obey,

[62] See eg Joseph Raz, 'The Obligation to Obey: Revision and Tradition' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev edn, OUP 1995) 343. At *AL* 30, Raz calls it a 'truism' that the law does not require obedience in this sense. I leave open the question of how the distinction should be drawn: for an argument that Raz draws it in the wrong place, see Scott Hershovitz, 'The Authority of Law' in Andrei Marmor (ed), *The Routledge Companion to the Philosophy of Law* (Routledge 2012) 65–70.

[63] See text to n 28; *CL* 112–16.

[64] Though I am not here making a direct reference to it, a related idea of legal consciousness has been developed by a whole stream of socio-legal scholarship: see eg Susan S Silbey, 'After Legal Consciousness' (2005) Annual Review of Law and Social Science 323.

that it is the law that they are obeying. I will say much more about what such a requirement could involve in chapters V–VII. For now, let me only say that if law is to exist in a given group, the following two conditions (among others, if any) have to be satisfied.

First, the group's members must generally be able to use (understand, make, agree or disagree with, and so on) *legal statements*: for a social practice to be a practice of law, those participating in it must on the whole be able to take propositional attitudes towards statements which involve legal concepts, such as:

'The law prohibits murder.'

'I have a contract for the flat.'

'The court ruled that you pay damages to the car's owner.'

Of course, such legal statements need not be formulated in English or refer to English legal concepts. But if they can be translated into, or approximated by,[65] legal statements in the language which the theorist happens to use, or if they can be explained in terms of statements which are so translatable,[66] then they may be profitably understood to be part of the group's legal discourse. The degree of

[65] Here is what I mean by this proviso. Joseph Raz, in 'Can There Be a Theory of Law?' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) at 39 argues that '[one's] possession of the concept [of law] is logically independent of the fact that [one lives] in a political community governed by law' and at 40–41 gives the example of Jewish law in support of this argument. Surely, however, Orthodox Jews do have *a* concept of law—*halakha*—as well as many concepts which can be approximated to 'our' legal concepts. As Raz himself admits at 41, 'to show that our concept of law [can also identify] as legal systems practices existing in societies which had no concept of law whatsoever [and not just 'our' or 'the' concept of law] … would be more difficult to show by example. The case rests on the absence of a reason to think otherwise.' The example of Frank's sect is, among other things, meant to show there is 'reason to think otherwise'.

[66] The concept of estoppel is alien to Polish legal discourse, for instance, but can be easily explained to a Polish lawyer by means of legal statements in Polish which they will readily recognise as such.

flexibility and open-mindedness to be allowed here will to some extent depend on our precise theoretical purposes, but in most cases it will be clear enough whether the group's members have some command over legal concepts or not.

The second condition is that the group's members must actually use these legal statements *in practical deliberation*: not only as theoretical interpretations of their practice, but as practical interpretations which can help them decide what they should next do. After all, some members of Frank's sect might have even been lawyers in their former lives: they may well understand the prodigies' framework and even admit that it makes good sense of what the sect are doing. They will deny, however, that this framework has any practical import; they will banish it completely from their own practical worldview.[67]

In short, though Hart may be right that it is not necessary for legal rules to be universally 'thought of, spoken of, and function as' *rules*,[68] they surely must be widely thought and spoken of as *law*. And I do not take Hart to disagree. It is clear enough that he never contemplates in *The Concept of Law* that the majority of the population, never mind the whole, may obey the law without any hint that this is what they are doing: even when he wants to contrast their attitude to the law with that of a meticulous and informed citizen, he says of them that 'the law which [they

[67] It should become clear in chapter VI, and esp section VI.2, that this latter condition has to do less with what the participants in the practice understand and think, but more with what practical attitudes they take in their lives. The ex-lawyer in Frank's sect may understand very well *that* legal statements have some practical significance but deny that they have practical significance for *them* (much like a Pole may understand the practical significance of estoppel in English law and yet ignore it, not unreasonably, in their own practical life).

[68] See n 10.

obey] is something which [they know] of only as "the law" '.[69] The objection is therefore not so much to the substance of Hart's theory as to its focus and exposition. The missing element whose absence keeps Frank's sect from being a legal system—the widespread and conscious use of legal terms, categories, and concepts—*is* present in Hart's thinking, but barely (if at all) receives specific mention. It is taken for granted instead: not unjustifiably perhaps, but with the consequence that its character and complexity are kept in the dark. There is therefore a whole dimension of legal practice Hart's theory leaves largely unaccounted for.

Moreover, it is not enough to simply add this dimension to the picture and rest the case; in fact, it is not even a viable option. This is because Hart's relative neglect of that background *practice of legal discourse*, missing from Frank's sect and present in any law-governed society, reflects some of his deepest theoretical commitments. His preoccupation in laying down the minimum conditions for the existence of legal systems is to defend two ideas—first, that the existence of law is grounded in social practice; second, that law is a system, unified by the rule of recognition—against the patent reality that most people are unaware of the intricacies of legal doctrine, and lack the cultivation needed to practise the rule of recognition themselves. The discourse of any legal practice is ordinarily a lively cacophony, where refined and systematic dogmatic argument mingles with laypeople's conceptions, which conceptions—though often crude, sometimes contradictory, and generally ignorant of the achievements and problems of juristic

[69] *CL* 114.

science—usually do the job for those who just want to see their business done.[70] Such a cacophony simply has no place in Hart's foremost project of developing a practice theory *of legal systems*. He can tacitly acknowledge its existence, but he cannot subject it to more focused consideration without putting his primary aim in jeopardy.

We could (and will, eventually) try a different approach. Descriptive legal theory could take the existence of law to depend not on the efficacy, however defined, of a system of norms, but instead tie it to people's widespread—though often 'vernacular'—understanding of their social existence in legal terms, as well as on their recognition of the practical relevance of that understanding. On such a view, law's dependence on social practice would not only have a wider basis, encompassing the practices of a much broader group and not just the official or professional elite, but also become much thicker, in that law's existence could plausibly be seen to depend on something more substantial than bare conformity by the general population to a certain scheme of proper behaviour.

Such a legal theory would be able to explain why there is no law in Frank's sect, and why there is law in those other 'extreme' cases Hart seems to have had in mind. Even in the more standard cases it would be able to explain much more, since it could explain how the law can be practically significant not only to those who administer or obey it, but to people of all sorts and outlooks who use legal concepts in making sense of their social dealings with each other. And as a bonus,

[70] See chapter VII, esp section VII.2.C. By the way, this is a feature of many other sorts of discourse: think, for instance, of how we use the language of physics (force, power, weight) in ordinary speech. Surely, we often say of such usage that it is 'unscientific'; by contrast, a 'vulgarised' notion of crime or contract seems to me to be as much a part of legal discourse as a more learned one, even though it falls outside the perimeter of 'legal science'.

it would allow us to circumvent the dreaded, and patently irresolvable, quantitative question of exactly how much efficacy is enough for a legal system to subsist. To develop such a theory, however, we would have to query the centrality of the legal system, and that is a step Hart is not prepared to take.

What might be thought to justify this reluctance is the notion that for all that has been said, the connection Hart makes between law and social practice is still fairly thick and wide. This is because legal rules are, after all, social rules: on the strength of Hart's practice theory, they are all constituted by (or at the very least spring out of) the relevant practices of the society in question, and they extend to each and every member of that society. And so, we might think, the connection is just as thick and wide as on the alternative view I have just canvassed, only different in nature. Everything here turns on whether Hart's legal rules really are social rules.

*B. Are Legal Rules Social Rules?*

The short answer is that they are not; more precisely, there is in Hart's model of a legal system exactly one legal rule which is also a social rule,[71] the rule of recognition.[72] If other legal rules were also social, the emerging picture of law would be so unattractive, and so inconsistent with what Hart says, that it cannot be ascribed to him in good faith. But there are other claims that need to be ascribed to

[71] I understand the phrase 'social rule' narrowly to refer only to rules whose existence can be established as a matter of fact using the model outlined in section III.1.A. A broader understanding is possible: see eg MacCormick (n 15) 42, where he defines social rules as rules which 'derive from social sources and exist in virtue of social practices'. Ultimately this is a matter of labelling, and my argument could be rewritten to replace all references to 'social rules' *tout court* with 'social rules *sensu stricto*' or something similar.

[72] Or, if one prefers, exactly one set of legal rules which are also social rules, ie the rules of recognition: cf n 99 in chapter II.

him as a result, and it is therefore important that we investigate the matter more closely.

Suppose for a brief moment that all legal rules are social in the sense that Hart uses the term, and recall that for a social rule to exist, or for a rule to exist as a social rule, two elements have to be present: first, the relevant group must tend to follow a specifiable pattern of behaviour which aligns with the pattern of behaviour mandated by the rule; and second, the group's members must take a critical reflective attitude towards the rule, that is, regard it as a standard of proper behaviour. Now consider the following legal rule: it is a traffic offence, punishable by a £100 fine and a few penalty points, to drive over 70 miles per hour on the motorway. Does it exist? Certainly not as a social rule: speeding on the motorway is all too common, and all too easy to get away with; if the average offender gives any thought to their offence at all, they tend to take it rather lightly. On the other hand, it would surely be odd to maintain that because the rule does not exist as a social rule, it does not exist at all. And it would be odd not only to the jurist, but to the offender, too—because for all their recalcitrance, they understand that they would be wise to slow down when they see the police or a radar, for instance, and know what they are getting a ticket for if they end up getting one.[73]

Not only is this view odd, it is also not Hart's. He is as explicit as one can be that 'there is no necessary connection between the validity of any particular

[73] In section VII.1 I argue that all these things demonstrate that the offender, too, should be taken to accept a legal rule here, though the rule should no longer be construed as a rule of conduct (as Hart construes it), but a rule of legal discourse, so a rule of talk and thought.

rule and *its* efficacy'.[74] The issue here comes down to the silent change in theoretical perspective, identified above,[75] which happens as he makes the step from social to legal rules. Recall that in investigating the existence of a social rule, the Hartian social theorist must understand the point of view of the group's members with its accompanying normative language, but may themselves remain an external observer who shares neither the normative outlook nor the semantic framework of those whose rule it is. So the theorist's perspective, though hermeneutic, remains external; and their observation that such-and-such a rule exists means something else than the very same assertion when made by a participant in the relevant social practice of rule-following. The latter affirms the acceptance of a rule understood as a *guiding standard of conduct*; the former is a mere factual claim that a certain *social practice* can be discerned.[76] The insider's claim is one the theorist must understand and describe, but not one they may make themselves.

Whatever its merits or demerits, it should be clear that we cannot simply carry this device over to legal theory. For Hart, there is only one legal rule which exists as a social rule, namely the rule of recognition; all the other rules of the legal system, we have seen, owe their existence as such to the fact that the rule of

[74] *CL* 103; cf 83; Adams (n 1) 12–16.

[75] In section III.1.B.

[76] So, in terms of the distinction drawn in n 41, though the social theorist and the insider may have rules with the same content in mind, they are different rules which exist in different ways. By the way, I think this makes more sense than saying that the theorist and the insider appreciate the existence of a single rule from two different points of view, respectively external and internal; for they are using different conceptions of a rule's existence, and the criteria these conceptions yield need not align in any given case. It is true that an object may sometimes exhibit different qualities depending on perspective—an opal may appear blue from this angle and green from that angle—but *existence* is not such a quality (if it is a 'quality' at all). This is why Hart's 'error' here, if indeed an error, is not 'unforced'.

recognition identifies them as valid, even if some of them may also be mirrored by social rules properly so called.[77] Consequently, were the legal theorist to keep austerely to the social theorist's external point of view, they would be forced to restrict their claim that a legal system exists to mean only that there exists the social rule of recognition. Of course, it would be part of even this limited claim that the group's members apply the rule to identify some subordinate legal rules as valid and thus in existence. At the same time, the legal theorist would be barred from making such identifications themselves, for that would be for them to adopt the internal point of view towards the rule of recognition. Their 'hermeneutic' approach would allow them to state, for instance, what 'in England they recognise as law', but not what in England *is* the law.[78]

To put it differently: *if* the legal system were really a system *of social rules* whose existence could be asserted from the external hermeneutic point of view, then it would only contain one rule—the social rule of recognition—and so would be no system at all. And since that would amount to yet another absurdity, again

[77] According to John Gardner, '[Hart] … argued that each legal system has *at least* one social rule': 'Law in General' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 280 (italics added). There is some support for this interpretation in the postscript, where Hart says that 'conventional social rules … include, besides ordinary social customs (which *may or may not be recognized as having legal force*), certain important legal rules *including* the rule of recognition': *CL* 256 (italics added). At the same time, it is inconsistent with the idea, put forward in the main body of the book and reinforced by what Hart says in the next sentence, that no single rule may exist *both* as a social rule *and* as a valid rule *at the same time*: see nn 39–41 and text. The inconsistency can best be solved, I think, by distinguishing the claim that a single rule is both a social rule and a legal rule and the claim that there is a social rule and a legal rule which both have the same content. The first claim can only be made of the rule of recognition (which, according to Hart, is not valid). The second claim can be made of potentially very many rules, and this is what I take Gardner and Hart to have in mind in the passages quoted above.

[78] See *CL* 102–03. As MacCormick puts it, 'Hart's error … is in supposing that those who are outsiders to a particular rule or rule system are restricted to stating facts *that* … or facts *about* the rule', and barred from making any 'statements *of* … [the rule]': MacCormick (n 15) 55.

inconsistent with Hart's own words, we cannot really read him like that. The alternative, however, is that the legal theorist must bite the bullet and bring subordinate rules into the picture by adopting the internal point of view towards the rule of recognition. They must assert that the subordinate rules exist as valid standards of conduct and thus adopt the critical reflective attitude of those who participate in the practice of following the social rule of recognition.

The larger part of the legal system, in a word, consists for Hart not of social rules, but guiding standards of conduct. To be sure, all law hangs for Hart upon the rule of recognition, and *that* rule is a social rule *par excellence*; but most law, if not indeed *all* substantive law,[79] retains a degree of 'relative autonomy … from the practices of the community'.[80] Ultimately, the connection made by Hart between law and practice does not seem to be any thicker than it appeared at the end of the previous section. If anything, it now looks even thinner.

## 3. LEGAL PRACTICE AND LEGAL NORMS

I have tried to show that although Hart should get due credit for bringing the significance of legal practice to the attention of contemporary descriptive jurisprudence, he fails to give a satisfactory account of what this practice involves because of his near-exclusive focus on the official practice of following a legal system's rule of recognition. The broader social practices distinctive of a society which has law go largely unnoticed in Hart's legal theory; and most of what he takes to be the society's law has at most an indirect connection to those broader practices.

[79] If the rule of recognition is understood to have no substantive legal content and only do metaphysical and logical work: see n 25.

[80] Adams (n 1) 13.

For these reasons, if Hart's theory of law deserves to be called a 'practice theory', then only in a very thin sense, more in recognition of his contribution than by way of accurate characterisation. Those of Hart's successors who consider the term 'practice theory' a reproach will no doubt welcome this conclusion. For my part, I see this as a failure: a failure to meet an aim for descriptive legal theory whose clear identification is at the same time one of Hart's great achievements.

The reason for this failure, as the previous section shows, is the fact that Hart is above all else a theorist of legal systems: his ambition to give a substantial account of legal practice is clearly secondary to his principal project of explaining how that practice can give rise to the existence of a legal system. This is already an important conclusion, because it underlines how the idea of a legal system can be a straitjacket, holding descriptive legal theory back from giving a substantial explanation of legal practice. Behind this conclusion, however, lies a much more fundamental issue which goes to the core of what descriptive legal theory should be about.

What makes it so easy for Hart to give up his attention to legal practice in favour of the idea of a legal system is ultimately the notion that the law is made up of norms, and more specifically, the metaphysical and logical distance this notion creates between the law on the one side, and social practice on the other. The thought goes: the content and existence of legal norms may well depend on the actions of some social agents like legislators or judges, but need not depend on how legal rules are actually used by the general population. This allows Hart, first, to divorce the existence of law from the cacophonous and disorderly discursive practices that pervade any ordinary life under law, and to define law's dependence on general social practice by reference to bare, but largely uniform, conformity; and

second, by elevating all but one legal rule into some autonomy from social practice, to escape the difficulties of regarding law as a system of purely social rules of conduct. The flipside is that descriptive legal theory gives up on any closer examination of the actual social practices of a law-governed society. For whatever it is that these practices may be thought to involve, it is clear enough that the ways in which ordinary people actually use law and legal discourse in their daily affairs should make up a considerable part of it.

In short, while the problem with Hart's theory is that he remains in the grip of the idea of a legal system, the source of the problem lies in the more specific notion—which, as will be recalled, forms a prominent element of the general idea—that the law must be thought of as consisting of norms. Let us now look at this notion with a more critical eye.

# IV. The Normative Picture

I have argued in the previous chapter that in *The Concept of Law*, HLA Hart introduces into descriptive jurisprudence the crucial ambition of characterising the social practices that distinguish societies which have law. I have also argued that he ultimately fails this ambition because he is attached to the idea of a legal system, and that the failure is largely owed to the more specific notion that any legal system is made up of norms. This is because it is this latter notion that allows legal theory to open up a logical gap between the content of a legal system—what people *ought (legally) to do*—and the social practice it is supposed to govern—what people *actually do*. We have seen that Hart himself gives this aspect of the idea of a legal system rather ambiguous treatment. In contrast, it is central to the writings of both his greatest predecessor, Hans Kelsen, and his greatest successor, Joseph Raz.

For want of a better term, I shall refer to this general notion that the law is made up of norms as the *normative picture of law*; the aim of this chapter is to subject this picture to closer critical scrutiny, and to argue that it is either unhelpful, or not quite what it claims to be, or most probably both. In so doing, I hope to achieve two further objectives. First, I hope to establish at last that there may be, and are, substantial and interesting theoretical inquiries within descriptive jurisprudence which transcend the idea of a legal system. Second, through a careful analysis of

Kelsen and Raz's normative picture I wish to draw the first contours of an alternative conception of the subject-matter of descriptive jurisprudence. For a cautious and charitable consideration of their views on the matter will reveal that, despite their claims to the contrary, they might well be read to conceive of the law not in terms of legal norms, but rather in terms of the meaning that the law confers upon our social practices.

Whether or not this is how *they* understand their own project, however, it is how *we* should understand it—and we ought in fact to go further in making sense of law in this way. I spend the final sections of this chapter sketching out what these further steps could be. In chapters V–VII, I try to take at least some of them myself.

## 1. THE PICTURE

Let me first isolate my target. I have said that I want to argue against the general notion that law is made up of norms, but this is not an entirely precise way to put the point. More specifically, I want to argue against the normative picture in its strong form—the discussion will reveal that there is also a more modest form, which I will try to refine rather than reject—and, for the avoidance of doubt, it is to this strong form that I refer to whenever I speak of 'the normative picture' without specifying which of the two forms I have in mind.

I will reconstruct the strong form of the normative picture in part directly from the relevant writings of Kelsen, in part from Raz's reading of Kelsen, and in part from Raz's original ideas. To be clear, though, it is in the first place Raz that I turn myself against. I do not treat Kelsen separately, because if Raz's reading of Kelsen is correct, then their views are so closely related that my arguments against

Raz are also effective against Kelsen; and if Raz's reading of Kelsen is incorrect, then it is not so clear to me that I want to argue against Kelsen at all.[1] Nor do I devote any more space to Hart's attitude to the problem;[2] for one, because *The Concept of Law* is nowhere as explicit about it as is either Raz or Kelsen's work, but also because Raz is a faithful and skilled glossator of Hart's work who often brings out what is implicit in Hart's arguments and corrects mistakes that Hart himself failed to notice.[3]

The reader will no doubt appreciate that the normative picture lies at the foundation of much, maybe most contemporary legal positivism; but because the label 'legal positivism' is so pregnant with ambiguity,[4] I generally eschew it save for a few occasions. Whether or not it is associated with positivism—and whatever positivism is—the picture I want to challenge is best characterised by two central theses, one metaphysical and the other logical.

[1] The most substantial and obvious difference between Kelsen and Raz in this context results from the fact that the former, unlike the latter, is a hard-line relativist for whom there is no such thing as what actually (ie not relative to any particular basic norm) ought to be done. The most thorough defence of this relativism can, so far as I know, be found in Hans Kelsen, *Was ist Gerechtigkeit?* (Franz Deuticke 1953); cf *PTL* 17–23, 63–65; *GTLS* 6–8, 40–41, 47–49, 393–95. This has implications for the semantics of deontic statements in Kelsen's thought. These implications are notoriously difficult to figure out, however, especially in the context of his notions of 'ought in the descriptive sense' and 'legal meaning': see, respectively, nn 13, 103. Whether or not Raz's reading of Kelsen is correct depends, to my mind, on what these implications are.

[2] The relevant ideas of Hart's are discussed in sections III.1.B and III.2.B.

[3] See eg n 44 in chapter III.

[4] Timothy AO Endicott, 'Raz on Gaps: The Surprising Part' in Lukas H Meyer, Stanley L Paulson, and Thomas W Pogge (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 100–01, 115; cf Joseph Raz, 'Comments and Responses' in the same volume, 253; 'The Argument from Justice, or How Not to Reply to Legal Positivism' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) 20.

### *A. The Metaphysical Thesis*

The metaphysical thesis of the normative picture is that law consists of norms,[5] and as a consequence, that the existence of law is somehow bound up with the existence of the norms that make it up. This is usually couched in terms of *validity* conceived of as the 'specific existence' of norms:

> By the word 'validity' we designate the specific existence of a norm … we can [express] the validity of a norm by saying: Something ought to, or ought not to, be done. … To say that a norm is 'valid' … means something else than that it is actually applied and obeyed; it means that it *ought* to be obeyed and applied … [That] a norm … is 'valid' means that it is binding—that an individual ought to behave in the manner determined by the norm.[6]

[5] 'Consists of', not 'is a set of', because to say the latter would be to assume what Raz at *CLS* 72–73 calls a '[doctrine] of the individuation of laws' specifying what is to count as 'just one complete law'—and it is not clear if Kelsen, for instance, has one: Luís Duarte d'Almeida, 'In Canonical Form: Kelsen's Doctrine of the "Complete" Legal Norm' in Luís Duarte d'Almeida, John Gardner, and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 265. Raz also argues for such a doctrine of individuation that 'there are laws which are not norms'; but he accepts that 'in every legal system there are norms' and that the 'sole legal relevance' of those laws which are not norms 'is in the way in which they affect the existence and application of legal norms': see *CLS* 169; cf 75. While my reconstruction of the metaphysical thesis slides over this complication, I hope the imprecision is tolerable in its context.

[6] *PTL* 10–11, 193; the interpolations are based on Hans Kelsen, *Reine Rechtslehre* (Matthias Jestaedt ed, 2nd edn, Mohr Siebeck 2017) 36 [10], 346 [196]. See also *GTLS* 30; Hans Kelsen, *General Theory of Norms* (Michael Hartney tr, OUP 1991) 171–72; cf *PRN* 80–84; *AL* 146–50. Recall *CL* 108–10; Grant Lamond argues that Hart disagrees with Kelsen on this point and has a different notion of validity: 'The Rule of Recognition and the Foundations of a Legal System' in Luís Duarte d'Almeida, James Edwards, Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013) 112–14. My own reading is presented in sections III.1.B and III.2.B; but see also HLA Hart, 'Introduction' in John Austin, *The Province of Jurisprudence and The Uses of the Study of Jurisprudence* (Weidenfeld and Nicholson 1955) xi–xii. If Hart adopted the understanding of validity which Lamond ascribes to him, he would be forced into the problematic conclusion that the only normatively relevant element of the legal system is the rule of recognition: Lamond notes this at 114–17.

It is then claimed that a valid *legal* norm is valid—that is, exists—'because it belongs to a legal system in force in a certain country or is enforceable in it'.[7] So wherever there exists a legal system, so do the norms it is made up of.

Without insisting that the existence of law is identical with the validity of its constituent legal norms, I would nonetheless claim that the following metaphysical connection is minimally assumed by the normative picture. Although the norms of a certain legal system might perhaps exist (be valid) even where the system itself does not, only not as legal norms,[8] the inverse does not hold: the non-existence of the system's constitutive norms is a conclusive indication that the system does not exist either. For example, it could perhaps be that all the norms of Roman law continue to exist though the system itself is long dead: maybe because they are included in some other legal system now in existence, or because they are ethically sound. But it is, on the normative picture, logically impossible that Roman law should exist if its norms do not; it is a logically necessary condition for the existence of Roman law that the norms of Roman law are valid. Surely, a necessary condition need not be sufficient, and in this case, there is good reason to think it is not.[9] All the same, the point is that on the normative picture, it is impossible that a legal system should exist where the legal norms that make it up do not.

[7] *AL* 153.

[8] By the way, if the proponent of the normative picture insists that the identity of a norm is coterminous with its membership in a particular normative system or order (see eg the discussion of Kelsen in section II.1.C), so that it is not true that 'the norms of a certain legal system might exist (be valid) even where the system itself does not', then I am happy to incorporate this stronger claim into the metaphysical thesis. It would probably make my job a little easier. But I do not think it is necessary for them to make this stronger claim.

[9] Efficacy would be a good candidate for another such necessary condition: see *PTL* 208–14; *GTLS* 118–21; *CLS* ch 9; *AL* 103–04; for recent discussion, see also Thomas Adams, 'The Efficacy Condition' (2019) 25 Legal Theory 225.

If this really is impossible, the question of what it is for a norm to exist becomes key to the question of whether law as such exists. We will see that this presents a serious challenge to the normative picture. But because one may respond to the challenge by invoking the picture's peculiar logical framework, a brief characterisation of the latter is called for first.

*B. The Logical Thesis*

The gist of the logical thesis is that legal statements are deontic: that they state what ought to be done, as opposed to what is the case.[10] Raz writes:

> Though there is no linguistic form the use of which is necessary to express legal statements, all of them can be expressed by deontic sentences (ie sentences about what is or is not to be done, what rights, duties, permissions, liberties, powers people have or lack, what transactions were effected, etc) preceded by 'Legally…' or 'It is the law that…' and sentences obtained from such sentences by the operations of sentential, quantificational, and modal logic. Such sentences can be viewed as the canonical form of legal statements.[11]

To be sure, this passage could be understood to specify a canonical *linguistic* form of legal *sentences*, without saying anything as to the statements they can be used to make, and specifically if these statements are descriptive or deontic. But Raz immediately proceeds to include legal statements in 'deontic statements generally' and argues

[10] For the distinction between descriptive and deontic statements, see nn 13–15 in chapter I and text.

[11] *AL* 63.

that they can be always be analysed in terms of 'statements *of* legal reasons'.[12] More generally, he insists that 'positivists can and should adopt' the thesis 'that normative terms like "a right", "a duty", "ought" are used in the same sense in legal, moral, and other normative statements'.[13] It is thus clear that it is not just in form that legal statements are deontic, but also in substance. They state what one ought to do or, in Raz's own preferred terms, what there is reason to do.[14]

Or at least this is the first step in their analysis. For, as is well known, Raz nuances his understanding of deontic statements in general, and legal statements in particular, by allowing that they may be made merely 'from a point of view':

> Statements of what ought to be done according to law … state what one has reason to do from the legal point of view, namely, what ought to be done if legal norms are valid norms … [and not simply] what ought to be done. … They are like statements made on the assumption that something is the case, for example, that a certain scientific theory is valid … We could say that they state what is the case from the point of view of the theory or on the assumption of the theory.[15]

[12] *AL* 63 (italics added). Raz's earlier work employs the premise that 'a complete description of a [legal] system' is provided by 'the set of all the pure [normative] statements referring to … that system': *CLS* 49; more generally, see 45–50.

[13] *AL* 158, 159; cf *PRN* 154. Contrast this with Kelsen's notion that the 'ought' of legal statements (cf n 100 in chapter II) has a 'descriptive sense' or 'character': *PTL* 71–75, 79; *GTLS* 45; Kelsen, *Theory of Norms* (n 6) ch 38, lv–lvi (translator's comments); see also HLA Hart, 'Kelsen Visited' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 70–76.

[14] Although see n 17.

[15] *PRN* 175; cf 170. See also *AL* 140–43, 153–57; *CLS* 234–38; Joseph Raz, 'The Purity of the Pure Theory' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 245–49. I have omitted the

Legal statements may, though need not, be in this sense 'detached': they may state 'what legal rights and duties people have' without carrying 'the full normative force of … ordinary normative [statements]'.[16] In this way, the detached legal statement 'legally, *x* ought to ϕ',[17] though certainly not identical with the 'ordinary' deontic statement '*x* ought to ϕ', nonetheless can be seen to fall within the same semantic category of deontic statements. Such is Raz's claim, at least.

He gives the reader surprisingly little by way of direct argument in its support: on the one hand, he observes that detached legal statements make use of the conceptual armoury of reasons, prohibitions, permissions, and the like in the same sense as ordinary deontic statements;[18] on the other hand, and apparently for this very reason, he insists that they cannot be 'reduced' to mere statements of social facts.[19] These are interesting and convincing points, to be sure; but, as we will see, they are not decisive—for there may be descriptive statements *about* social facts

sentence '[detached legal statements] do not presuppose that the law is valid' from the quoted fragment. It sits awkwardly with the allegedly Kelsenian pedigree of the conception and, in the light of Raz's later writings, is probably best treated as a slip of the pen: cf *PTL* 218n, approvingly cited at *AL* 156; *PTL* 204n, commented upon by Raz, though with less enthusiasm, in 'Purity' at 247.

[16] *AL* 153; cf 156.

[17] On the equivalence between '*x* ought to ϕ' and 'there is (a) reason for *x* to ϕ', see *PRN* 29–33; I opt for '*x* ought to ϕ' mainly on considerations of style and conciseness, but in the light of the passage cited I think Raz would agree that my choice does not make a difference. Kelsen understands 'ought' more broadly to include also 'may' and (normative) 'can': *PTL* 5, 118–19; like Raz, I do not adopt this broader understanding. What they have in common is the notion that all deontic discourse, at least in the legal context, can be analysed in terms of simple ought-statements or statements of reasons, though their approach to the task differs according to what they take to be in need of analysis as well as their differing understandings of 'ought': see *PTL* pt IV; *AL* 63; *PRN* chs 2–3. I accept this notion—for the sake of argument, but also because I think it is correct.

[18] See n 13.

[19] *AL* 53–54, 153–54; Raz, 'Purity' (n 15); cf Luís Duarte d'Almeida, 'Legal Statements and Normative Language' (2011) 30 Law and Philosophy 167, 170–72.

which are not reducible to statements *of* these facts. By contrast, what seems decisive here is the consideration that if the normative picture is to be metaphysically plausible, then the logical thesis, too, must hold.[20] If law consists of norms, the thought goes, and if norms are stated by deontic statements, then the content of the law too must be stated by deontic statements; but because stating what the law is cannot without more commit us to endorse its requirements, there must be a category of 'detached' deontic statements which carry no such commitment.

Later in the chapter I will spend some time trying to make sense of this device and conclude that things do not quite work like this—which is a bad thing for Raz's positivism, perhaps, but a good thing for legal theory. At this stage, I just want to emphasise the connection that binds the metaphysical and logical theses together. Without the logical thesis, the metaphysical thesis loses its grip; accepting the former is therefore necessary to accept the latter.

*C. Restatement*

A restatement of the two theses will help keep things tidy.

> *The metaphysical thesis:* Wherever and whenever there is law, there also exist (are valid) the norms it consists of. (By the same token, wherever and whenever legal norms do not exist, there or then the legal system they make up does not exist either.)

[20] This becomes especially clear when Raz speaks of 'the interpretation of detached legal statements' as one of the two '[difficulties] facing the justification view [of legal validity: see n 6 and *AL* 150]', and characterises 'the analysis of detached normative statements' as 'a crucial test for any positivist theory of law': *AL* 153.

*The logical thesis:* All legal statements, including statements which state what the law is, can be analysed in terms of deontic statements of the form 'legally, *x* ought to ϕ'.

I will argue that both these theses, and so the strong form of the normative picture they define, should be rejected. The metaphysical thesis should be rejected because any description of law which seriously endorses it thereby opens itself to the possibility that what it describes may be a fiction—that law might turn out not to exist after all, or to exist only in fragments. The logical thesis, on the other hand, should be rejected because to reduce all legal discourse to statements about what one ought in law to do is neither necessary, nor particularly useful, nor faithful to how law is actually talked about and thought about. So while I will stop short of claiming that the normative picture is incoherent or otherwise untenable, I will suggest it is a burden which descriptive jurisprudence need not take upon itself and has no good reason not to shed.

Does this mean that I want to argue that law is not normative? There are at least two senses in which it does not. For one thing, there is no disputing that the normative picture might present a useful framework for considering some weighty questions in normative jurisprudence; one such question, for example, is whether law's requirements ought to be complied with, and why (not).[21] For another, there is a trivial sense in which law is normative in the sense that it can

[21] See eg Leslie Green, 'Law and Obligations' in Jules L Coleman, Kenneth Einar Himma, and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 521 (first full paragraph).

frame and impact on one's practical reasoning[22]—as can, say, one's language or the fact that it is raining. And yet, owing to a curious feature of the English language, to claim that law *consists of norms* is to claim something more than just that law *is normative* in this trivial sense.[23] For law can involve *normative standards* which are not *norms*: they may be (and later will be[24]) called *rules*, or perhaps some other name;[25] or they may be left in the background and never receive explicit mention. In any event, I reserve the use of the word 'norm' for *aspirational* (as opposed to merely classificatory[26]) and *categorical* (as opposed to hypothetical[27]) standards which determine one's *behaviour* (as opposed to one's talk and thought[28]) in some particular way.

[22] I address this issue at length in chapter VI. See also David Enoch, 'Reason-Giving and the Law' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (OUP 2011) 26–27.

[23] There are other senses of 'normative' beyond the 'trivial' and the 'non-trivial'. Each of the following employs the word 'normative' in a slightly different sense: 'language is normative' (has something to do with what one does and has reason to do, whatever that something is; this is the trivial sense), 'rules of grammar are normative' (constitute some standards), 'morality is normative' (sets out what one ought to do), 'gender is normative' (represents some societal standard which might be outdated, and certainly tends to escape critical attention).

[24] See esp text to nn 33–37 in chapter V.

[25] One may agree with my arguments but insist that a better way to put my conclusions is to say simply that *legal* norms are norms *sensu lato* but not *sensu stricto*, much like an imaginary friend is, strictly speaking, not a friend: cf Enoch (n 22) 17n. I think that such a formulation may mislead and that talk of 'legal norms' is unnecessary, but I neither can nor want to legislate against it.

[26] cf Niko Kolodny, 'Why Be Rational?' (2005) 114 Mind 509, 555–56; n 20 in chapter VI.

[27] cf Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (HJ Paton tr, Routledge 2005) 55–57.

[28] cf Eugenio Bulygin, 'On the Rule of Recognition' in *Essays in Legal Philosophy* (Carlos Bernal and others eds, OUP 2015) 117–18.

This may appear stipulative, but I think the stipulation has sound foundations in actual usage. For instance: rules of language differ from linguistic norms in that the former tell one *how to* use language at all and the latter prescribe how language *ought to* be used. There can be offensive or impolite expressions which, although perfectly correct in terms of the former, offend against the latter. To take another oft-used example: a game, say tennis, is usually said to have rules, not norms; and while it so happens that there *is* such a thing as the norms of tennis, these have to do with standards of sportsmanship and decorum—with how tennis *ought to* be played—and not with how it *is* played. Numerous other examples could be adduced, and counterexamples too.[29] The more important consideration is that the understanding of 'norms' as not just any normative standards, but aspirational and categorical standards of proper behaviour, tracks the understanding generally employed by Raz and Kelsen.[30] It is this consideration that ultimately convinces me to adopt it here and elsewhere in the thesis.

With that in mind, let me now challenge the two theses in turn.

[29] One counterexample is that the word 'norm' can also refer to some standard—'normal'—practice or usage. In order to evoke this sense, the definite article has to be used ('This is the norm.'). Also, as far as I understand, both 'rule' and 'norm' come from Latin words for tools, only that *regula* was more like a ruler and *norma* was more like a set square; in this connection, cf Leslie Green's understanding of the word 'norm' in 'Escapable Law' (2019) 19 Jerusalem Review of Legal Studies 110 at 111–16, where he also discusses John Gardner's views.

[30] See *PRN* 9: 'Rules … are a variety of logical types and the present study is concerned with only some of them, which I shall call "norms". These include … categorical rules, ie rules which require that a certain action be performed, as well as rules granting permissions'; cf *CLS* 75. I think Raz's understanding of the word 'norm' corresponds to mine, though not his understanding of social institutions; and thus the fact that he would call the scoring rule in football a norm where I would insist it is only a rule reflects our different understanding of the scoring rule, not of the word 'norm'. See also *PTL* 4–10; *GTLS* 35–37.

## 2. AGAINST THE METAPHYSICAL THESIS: DOES LAW EXIST?

### *A. A Paradox to Do with Norms*

Consider the following

> *Impact thesis:* The existence of a norm has some normative impact, makes some specific difference to the normative situation;[31] this impact is, moreover, what the norm's existence consists in.

Or, to use a different formulation:

> For any norm, then there is at least one ('ordinary') deontic statement synonymous with the statement that the norm exists.

For example, if there is a norm to the effect that, say, one ought not to eat meat, then the norm's existence is coextensive with the fact that one ought not to eat meat. If, on the other hand, the putative 'norm' exists even though it is in fact permissible to eat meat, then it is no norm at all. Maybe it is a requirement, or a commitment of some sort; and perhaps it *could be* a norm, and *would be* one if there were reason to comply with the requirement or undertake the commitment. Indeed, it may be that this would be enough for us to say of the requirement or commitment that it *is* a norm, though only *in a sense*;[32] and it may sometimes be useful to think and talk like that, though we should carefully distinguish talking in some way because it is useful with talking in some way because we are used to it. But if we stick to primary, strict senses, we should see that such a requirement or commitment is no norm.

[31] To borrow Raz's phrase: *PRN* 136; *AL* 12, 109–10, 156.

[32] cf n 25.

Norms exist in that they bind; if they do not bind, they either do not exist or are something else than norms.[33]

To my mind, the impact thesis is not only eminently plausible, but a straightforward consequence (or even a reformulation) of the aforementioned equation of a norm's existence with its validity.[34] Yet it raises the following difficulty. Suppose that, in an ordinary polity with a working legal system, the legislature passes a law—call it the Veganism Act—with just one simple section:

> 'It is a criminal offence, punishable by a fine or imprisonment up to three years, to publicly promote veganism.'

and that all the social criteria for validity are satisfied, so that on the normative picture, the enactment creates a valid legal norm prohibiting the promotion of veganism. Suppose further, not implausibly I hope, that it is in fact just as permissible to promote veganism now that the Act has been enacted as it had been before. The paradox is then as follows. On the one hand, on account of the metaphysical thesis and the notion that valid legal norms are created by acts satisfying the system's social criteria of validity, the legislature brings into existence a valid legal norm. On the other hand, the supposed existence of this norm fails to have any impact on the normative situation. If the impact thesis is true, this cannot be.[35]

[33] The impact thesis is not the 'incredible … general proposition … that an unjustified norm is no norm at all': Green (n 29) 111. Rather, it is that a norm which does not *bind* or *hold* is not a norm, whether or not it is also justified (or justifiable, followed, accepted, etc).

[34] See n 6.

[35] The paradox arises not because legitimate authority is a contradiction in terms (cf the positions Raz critiques, rightly to my mind, in *AL* ch 1), but because the law can, and

I can think of three ways out of the paradox. One is to maintain that the impact thesis is broadly true, but unapplicable to norms of the special kind that are legal norms. Another is to reserve for it an even narrower range of application or deny that it is true at all. The third, finally, is to endorse the impact thesis in its entirety and accept that whatever else it may have achieved, the Act's enactment has never created any norms. Let me discuss them in turn.

*B. First Way Out: Legal Norms Need Not Be Binding*

Let us consider first the proposal that the impact thesis is by and large true but does not apply to legal norms. There are two points to be made here. The first is that there appears to be no independent theoretical reason why legal norms should be singled out in this way. It is true, of course, that it would save the normative picture from raising doubts about the existence of law, but that without more cannot be reason enough.[36] What I am probing is not how the picture could be so saved, after all, but precisely whether it ought to.

There is one potential such reason I should discuss, though I will explain that it might not be an independent reason after all. Some logicians have made a distinction between two senses in which to understand a deontic sentence like '*x* ought to ϕ' or 'it is permissible that *x* ϕ'.[37] On the one hand, they say, such a

probably always does, claim more authority than it really has. Raz himself goes further than that in *AL* ch 12.

[36] Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 Yale LJ 1160.

[37] See eg Zygmunt Ziembiński, 'O zdaniowym charakterze norm tetycznych' (1961) 11 Studia Logica 37; Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (Routledge & Kegan Paul 1963) 104–06; Carlos E Alchourrón, 'Logic of Norms and Logic of Normative Propositions' (1969) 12 Logique et Analyse 242; Carlos E Alchourrón and Eugenio Bulygin, *Normative Systems* (Springer-Verlag 1971) 121.

sentence may express a demand (or, as the case may be, a permission), which cannot really be true or false; in that case, it expresses a *norm* in the strict sense of the term. On the other hand, a deontic sentence may merely inform the hearer of what some (supposedly authoritative) agency has demanded or promulgated in the form of a norm *stricto sensu*; it is then said to express the *normative statement* that the norm 'exists'. For example, when the owner of a house tells me 'you ought not to park in front of this house',[38] they might be exercising their power to prohibit me from parking there; but it is just as possible that they are merely letting me know that there is some parking regulation in force, to discourage me, perhaps, or maybe just to warn me. In the first case, the owner has issued a genuine norm by their utterance. In the latter, by contrast, they have given me a mere report that some authorities had promulgated the norm. So a normative statement is in this sense synonymous with, or at least equivalent to, an ordinary factual statement that an agent has placed some requirement upon another agent, and has not taken it back since.[39] The norm's 'existence', in turn, amounts to nothing more than that fact.

What should we make of this? Certainly, the distinction allows us to clear up a number of misconceptions which ordinary deontic discourse is bound to produce.[40] But as an objection against the impact thesis, it either misses the point or begs the question. For if the objection is only that we sometimes use deontic

[38] The example is from von Wright (n 37) 104.

[39] von Wright (n 37) 116–18; cf Ziembiński (n 37) 40–42; Alchourrón (n 37) 249. Raz and Kelsen have taken exception to this 'reductionism': see n 19; cf n 77.

[40] In the field of legal philosophy, Eugenio Bulygin has written extensively about the implications of the distinction: see eg 'Kelsen on the Completeness and Consistency of Law' in Luís Duarte d'Almeida, John Gardner, and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013); 'Norms, Normative Propositions, and Legal Statements' in *Essays in Legal Philosophy* (Carlos Bernal and others eds, OUP 2015).

sentences elliptically to convey the information that someone else has made or retracted such-and-such demands, then I can readily concede the point (though with the caveat that such usage is pregnant with misunderstanding and, for reasons to be given shortly, might be risky). If, on the other hand, it is maintained that a social fact, however complex, can genuinely constitute the existence of some norm, then the argument simply presupposes the conclusion it is meant to substantiate: that the impact thesis has to be either rejected or qualified because the existence of at least some norms can be a matter solely of what someone *has* done, as opposed to what someone *ought to* do.

Moreover, the distinction can do its job without presupposing this conclusion. In a nutshell, the puzzle it is meant to solve lies in the fact that a person with presumed practical authority can issue two conflicting norms.[41] If the person's authority is nonetheless to be done justice to, it is supposed, the norms must have some sort of existence which would *not* consist in their being 'true', 'valid', or otherwise 'right' as the impact thesis has it. But this is no more necessary than postulating that simply because someone with theoretical authority can utter two inconsistent statements, both within their expertise, there must be some special sort of existence granted to the incompatible states of affairs asserted. An authority on European fauna could begin their lecture by denying that there are lions in the Carpathians and end by saying that Carpathian lions hunt rabbits and sleep on trees. This would neither annihilate Carpathian lions nor summon them into existence,

[41] Say, the norm that *x* ought not to ϕ and the norm that it is permissible for *x* to ϕ. See Alchourrón (n 37), esp 254–58; Alchourrón and Bulygin (n 37) 119–25; Georg Henrik von Wright, 'Is and Ought' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 370–74; 'Deontic Logic: A Personal View' (1999) 12 Ratio Juris 26, 32–33.

in however qualified or 'quasi-' a sense. The only mystery in such situations is indeed why anyone would treat these 'authorities' as such; but whether or not there is a good answer to that question, there is no reason to endow with any special 'existence' the content of the incoherent pronouncements which they, as a matter of plain fact, make.

Georg Henrik von Wright, whose work has cemented the distinction between norms (or norm-formulations) and normative statements in deontic logic, traces it back to the Swedish philosopher Ingemar Hedenius, who, in the context of legal norms, calls these two kinds of statements 'genuine' and 'spurious' legal sentences.[42] This original terminology sounds more felicitous: for the use—or misuse—of deontic sentences to make 'normative statements' of social fact is merely elliptical, indeed spurious. Surely, in ordinary speech such misuse of deontic language is usually innocuous. But this need not impinge on any philosophical consideration of the existence of norms, and it certainly does not compel us to abandon the impact thesis.[43]

I now turn to the second point I wanted to make. Behind all these conceptual considerations, there is also an ethical reason not to exempt legal norms from the impact thesis. Imagine a paradigmatically unjust law: the Veganism Act might not be enough, so let it be a criminal law prohibiting the provision of basic

[42] von Wright (n 37) 105.

[43] cf *PRN* 80, where Raz says that 'existential sentences about norms are used for a variety of purposes', the 'three … most important' of which are either to say that the norm 'is valid', or 'practised', or 'prescribed by a certain person or body'; after discussing these three purposes, he says at 84 that 'of the three dimensions [validity, being practised, having been prescribed], that of validity is beyond doubt the primary one'.

medical care to women.[44] Does it 'create a norm' to that effect? For my part, I cannot see how it could. It is obvious enough that it is permissible to provide basic medical care to women, and there can exist no norm to prohibit that, either before or after the bill has been passed. The law, of course, *is* a law, and what it prohibits, no doubt, *is* a crime; there is no denying that and nor need there be. But if what it prohibits is also clearly and unambiguously the right thing to do, if the crime ought to be committed with neither regret nor hesitation,[45] then it appears that the law—though clearly recognisable as such—has no normative impact whatsoever: and not because the norm it has created is cancelled out or outweighed by some background morality or other, but because it has failed to create any norm in the first place.[46] Or such is at least the conclusion that suggests itself if we do not take the normative picture for granted.

[44] The example is loosely based on the Polish Constitutional Tribunal's Judgment K 1/20 of 22 October 2020, DzU 2021 poz 175, effectively introducing a blanket ban on abortion in Poland. That a blanket ban on abortion is so ethically repugnant could nonetheless be difficult to accept for some readers, and this is not the place to prove them wrong (for wrong they are): hence 'basic medical care', which may (and should) be read to include abortions, but need not.

[45] The law might stipulate a sanction, and that in turn may qualify the necessity to oppose it ('oppose the law as long as you can avoid getting caught—but make sure to do everything you can to avoid getting caught!'). Still, no obligation to obey is ever created by the law's enactment; it is just that compliance may nonetheless be permitted or even required in some circumstances by a different obligation (say, to protect oneself) whose existence is independent of the enactment.

[46] cf Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26 OJLS 1, esp 7. Radbruch's mistake, characteristic in more or less stark form of most natural law theories, is to suppose, falsely, that all law, if valid, has *some* claim on our conscience: see *CL* 207–12; HLA Hart, 'Positivism and the Separation of Law and Morals' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 72–78. But he is quite right to think that positive laws which fail to live up to some minimum standards of justice cannot be rightly thought of as binding despite the fact, which he fails to recognise, that they are valid laws. See also John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) ch 12.

Should we try to escape this conclusion, and seek ways in which to assert that an unjust law does create a norm after all? Well, there seems to be no great reason why we should, as Hart clear-headedly notes:

> it will often be pointless to acknowledge or point out a legal obligation, if the speaker has conclusive reasons, moral or otherwise, to urge against fulfilling it.[47]

To which I would add: not only pointless, but sometimes misleading; and when misleading, harmful. Part of what accounts for the moral risk of having laws is that they tend to present themselves as creating genuine norms and imposing genuine obligations;[48] and part of what accounts for the wickedness of wicked laws is that they do so falsely and deceitfully.[49]

The moral trouble with the normative picture is that it may sometimes uphold this deception, even lend it credibility.[50] Qualifying the impact thesis could present one way of averting this risk, but it is arbitrary and, partly for that reason, probably ineffective. Searching for an alternative to the normative picture appears a much more promising avenue here.

[47] *CL* 203.

[48] That the law does so present itself is the argument of *AL* pt I; see also John Gardner, 'How Law Claims, What Law Claims' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012); Scott J Shapiro, *Legality* (Harvard University Press 2011) 216–17.

[49] Frederick Schauer, 'Critical Notice' (1994) 24 Canadian Journal of Philosophy 495, 504.

[50] Though let me be clear that it is no part of my argument that any proponent of the normative picture (let alone Raz: see esp *AL* pt IV) would actually disagree about the (null) normative impact of morally repugnant laws.

*C. Second Way Out: No Norms Need Be Binding*

The second option, I have said, is to place even stricter limits upon the impact thesis, or to reject it altogether. Here, it should be clear that the argument of the previous section, and especially the second point, applies *a fortiori*. To qualify the impact thesis any further in order to save the normative picture from metaphysical trouble is to reject a proposition which for other purposes looks eminently reasonable and buy consistency at the price of even more disconcerting abuse of the language of norms. It is, in a word, a non-starter—and I leave it at that.

*D. Third Way Out: Laws Need Not Be Norms*

So it seems that legal theory had best embrace the impact thesis. This is embarrassing for any theory of law committed to the normative picture, because it calls the existence of its subject-matter into question. If there are things which the law prohibits but fails to make impermissible in fact, or things it permits but fails to make permissible—then, to that extent at least, the law does not exist; for its demands and directives fail to call into existence those norms it is supposed to consist of. Thoroughly unjust legal systems do not exist at all, it appears. Even fairly just legal systems seem to exist only in part. For a legal system to exist, *tout court*, all its norms would have to be sound; and that is in turn virtually unheard of.

Kelsen and Raz recognise the challenge. With characteristic candour, Kelsen concedes in his last book that all systems of positive norms, legal systems among them, are based on a 'fiction … whose characteristic is that it is not only contrary to reality, but self-contradictory'.[51] Raz for his part never quite associates

[51] Kelsen, *Theory of Norms* (n 6) 256; cf Hans Kelsen, 'On the Pure Theory of Law' (1966) 1 Israel L Rev 1, 6–7; *PTL* 9–10, but note that the corresponding passage in the original

himself with these words, though he vaguely appears to endorse the idea under a different name.[52] In later work, however, he addresses the challenge directly, albeit also very briefly: after outlining a 'rival view'—roughly, a view endorsing *both* the metaphysical thesis of the normative picture *and* the impact thesis[53]—he says:

> For my part I have suggested a view very close to this. … The difference between my view and its rival is that I believe that far from non-committed [ie detached legal] statements being relatively rare, and an extension of the discourse of law to describe political systems which are not legal *strictu senso* [*sic*], detached statements are prevalent in legal discourse about our own or any other legal system. This makes it possible for me to say that there are legal systems in the world even if we are mistaken about which ones, if any, enjoy moral legitimacy. On the alternative view, if all legal systems lack legitimacy then all the statements to the effect that there are legal systems are simply false.[54]

I confess to some difficulty in seeing how exactly it is that the sheer prevalence of detached statements allows Raz to solve the problem. But as I understand it, his

(Kelsen, *Reine Rechtslehre* (n 6) 35 [9]) is markedly different and contains no reference to reality (the 'real act of will' is just *ein Willensakt*) or imagining ('we can imagine a norm…'). Also, the original contains (at 378–83 [215–18]) an intriguing (and very long) footnote dealing with Alf Ross's criticisms in *Towards a Realistic Jurisprudence* (Einar Munksgaard 1946). Towards the end of the note there is the following passage: 'The belief in … the objective ought-validity of the law is not the belief in the existence of a reality that does not exist. It is a certain interpretation of the meaning [*des Sinns*] of real acts. This interpretation cannot be erroneous [as Ross characterises it], it can only be unfounded. But it is founded if one … presupposes a basic norm which legitimises the subjective meaning [*Sinn*] of the law-positing acts as their objective meaning [*Sinn*]': 383 [218]. See also Stefan Hammer, 'A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 183–193.

[52] Raz, 'Purity' (n 15) 247.

[53] Which 'rival view' is of course not a view I intend to defend, because I think that of these two, only the impact thesis is true.

[54] Joseph Raz, 'On the Nature of Law' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 113–14.

claim is something like this: the impact thesis is only partly true, not because legal norms are somehow exempt from its application, but because its formulation overlooks the logical domain of detached legal statements, and it is precisely such statements that legal theory employs to describe its subject-matter. The first metaphysical question of jurisprudence is, in other words, not 'do legal norms exist?', but 'do legal norms exist *from law's point of view*?', and the answer to this question—trivially, yes[55]—is unaffected by the impact thesis, at least in the (supposedly incomplete) formulation I have given it.

This explanation is disappointing even if accepted at face value. For even if 'existence from a point of view' is not just another name for fiction[56]—and I suspect it might be—it still reduces law's existence to a mere *claim* to existence:[57] a claim which reality may vindicate, but equally may not. If sound, Raz's manoeuvre does manage to preserve the coherence of his normative picture and defend it against my objection to the metaphysical thesis, but at a steep price: for it narrows the range of perspectives from which we may meaningfully look at the law down to the perspective of officials and law-abiding citizens; and for a neutral characterisation of the law as a real social phenomenon, it substitutes a

[55] My criticism is not that the question 'does law exist?' is made trivial on the normative picture. On the contrary: if we accept the picture, *that* question (as opposed to 'does law exist from law's point of view') is not trivial at all; and hardly any intellectual discipline can carry on if it has sustained doubts about the existence of its subject-matter. See also Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22 Ratio Juris 339, 345.

[56] For an argument that it is, see Andrei Marmor, 'Law as Authoritative Fiction' (2018) 37 Law and Philosophy 473. Fiction does not normally *claim* to be true in the way law does; but then fiction of certain genres—mythologies, legends—does so claim.

[57] Gardner (n 48) 133.

'psychological simulation' of how the law looks from that narrow perspective.[58] This is not an incoherent approach to legal theory, to be sure; but nor is it the best, especially if our ambitions are descriptive.

In any event, the explanation should not be taken at face value. The logical thesis on which it so heavily relies[59] does not withstand closer examination. This is because legal statements, at any rate statements which state what the law is, are not deontic. Even if they speak of 'oughts' or 'obligations', they do so only 'in a descriptive sense'.[60] And even though they cannot be reduced to mere statements of social fact, that is only because they are in fact statements of social facts' legal *meaning*.

## 3. AGAINST THE LOGICAL THESIS: FROM NORMS TO MEANING

We have just seen that Raz relies on the notion of detached legal statements to escape the paradoxical metaphysical consequences of employing the normative picture in descriptive legal theory. He places particular reliance on the claim that detached legal statements are deontic—state the existence of norms—but at the same time do not commit the speaker to endorse or follow these norms. But the claim is bad because detached legal statements are not deontic. To see this, let us start with the question of how the 'detached legal' statement 'legally, *x* ought to ϕ' compares with the 'ordinary deontic' statement '*x* ought to ϕ'.

[58] Kevin Toh, 'Raz on Detachment, Acceptance and Describability' (2007) 27 OJLS 403, 411–14.

[59] See n 20 and text.

[60] See n 13.

*A. Is There a Semantic Difference?*

One point to get out of the way is that the contrast I am interested in here is between detached legal statements and ordinary deontic statements, *not* between detached and committed legal statements.[61] It is clear enough that this latter distinction is in the first place drawn at the level of pragmatics. In a recent reconstruction offered by Robert Mullins—which, he claims and I agree, is 'both faithful to Raz's initial presentation and linguistically plausible' in its own right[62]—detached legal statements, unlike their committed counterparts, are statements 'in which [the] implicature [to the effect that the speaker endorses the rules in question] is either explicitly or contextually cancelled'.[63] In a similar vein, David Enoch makes the point that 'detached and non-detached legal statements behave logically as if there is no semantic difference between them', in that a statement of one type may be used to object to a statement of the other type; and he takes this to suggest 'strongly' that the 'normative flavor of internal, committed legal statements is not a part of their semantic content, but rather a part of their pragmatic features'.[64] Finally, Raz too is at pains to emphasise that detached legal statements are made in certain

[61] This distinction between distinctions is clouded by the fact that all three kinds of statement can be made with the simple sentence '*x* ought to ϕ': Joseph Raz, 'The Problem about the Nature of Law' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev edn, OUP 1995) 198; 'Can There Be a Theory of Law?' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 30. Moreover, because in the usual case the disambiguation between an ordinary deontic statement and a (detached or committed) legal statement is itself a matter of pragmatics, we may think that the very distinction between ordinary deontic and legal statements, too, is a matter of pragmatics. But we will soon see that this is not so.

[62] Robert Mullins, 'Detachment and Deontic Language in Law' (2018) 37 Law and Philosophy 351, 383.

[63] Mullins (n 62) 365–66.

[64] Enoch (n 22) 23.

characteristic contexts and for certain characteristic purposes.[65] So whatever other differences there might also be between them,[66] the different pragmatics of committed and detached legal statements are clearly quite prominent in what sets them apart.

By contrast, the divide between legal statements (committed or detached) and ordinary deontic statements is more difficult to locate. My own view is that it is semantic: that even though the terms used in these statements mean the same, the statements themselves do not state the same thing. We can view the relationship between 'legally, *x* ought to ϕ' and '*x* ought to ϕ' as broadly analogous to the relationship between 'it is possible that *p*' and *p*: while they are neither synonymous nor equivalent, *p* itself means the same whether it stands alone or inside the modal operator, 'it is possible that'. To put the matter this way, moreover, makes good sense not only of the distinction between legal and deontic statements as such, but also of what Raz has to say about it. But this last point may surprise, so let me dwell on it for a minute.

To begin with, Raz uses the operators 'it is the law that', 'legally', 'in law', or 'according to law' as modal operators indicating a semantic difference of

[65] *AL* 155–56; *CLS* 238; see also the passages cited in n 61.

[66] In what follows I assume with Enoch that there is no semantic difference between committed and detached legal statements. Note, however, that the phenomenon he has observed could in principle be squared with a semantic distinction so long as some committed legal statements *entailed* some detached legal statements, and *vice versa*. This could for instance be if a committed legal statement were construed along the lines of '*because* the (detached legal) statement "legally, *x* ought to ϕ" is true, *x* ought to ϕ'. The truth of that committed statement would then entail the truth of the detached legal statement it refers to, and conversely, the falsity of the detached statement would entail the falsity of the committed one; at the same time, it could be that the committed statement be false though the detached statement is true, for example where the law ought not to be followed.

some sort.[67] That there is such a semantic difference can be gathered from the following two passages:

> A detached statement normally made by the use of a certain sentence is true if and only if the committed statement normally made by the use of the same sentence is true—given the non-normative facts of this world—if all the ultimate rules of the legal system referred to are binding and if there are no other binding normative considerations.[68]

> [Legal statements] are true or false according to whether there is, in the legal system referred to, a norm which requires the action which is stated to be one which ought to be done; secondly, if the statement is true *and the norm in virtue of which it is true is valid*, then one ought to perform the action which according to the statement ought legally to be performed.[69]

They are both fairly dense, but they enable the following three observations.[70] The first is that if, as the first passage suggests, a detached legal statement is semantically distinct from the committed legal statement 'normally made using the same sentence',[71] then *a fortiori* it is distinct from the corresponding ordinary deontic

[67] As far as I know, Raz never calls these operators 'modal'; still, this is effectively how he characterises them; cf Scott J Shapiro, 'What Is the Rule of Recognition (And Does It Exist)?' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (OUP 2009) 258–59.

[68] *CLS* 237–38.

[69] *PRN* 177 (italics added).

[70] cf Matthew H Kramer's discussion of these passages in connection with the distinction between committed and detached statements: 'In Defense of Hart' (2013) 19 Legal Theory 370, 391.

[71] This conclusion would of course go against our previous assumption that committed and detached legal statements are semantically alike: see n 66 and text. It could be avoided were we to rewrite 'the committed statement normally made by the use of the

statement. The second is that if the condition mentioned in the italicised bit of the second passage is not to be trivially satisfied, then it must at the very least be a logical possibility that a legal statement be true while the corresponding ordinary deontic statement is false.[72] The third is, again, that the semantics of a legal statement, as contrasted with the corresponding ordinary deontic statement, bears some superficial resemblance to the semantics of 'possibly *p*' as contrasted with *p*. Much as the truth of 'legally, *x* ought to ϕ' is for Raz determined by the truth of '*x* ought to ϕ' in a world where legal norms actually should be followed, so the truth of 'possibly *p*' depends on the truth of *p* in some envisaged possible world.[73] In sum, it appears that a simple statement of what someone ought to do becomes a statement of something else when we prefix it with 'legally'.[74]

This, in turn, fits rather well with another two central features of Raz's thought. The first is his unswerving denial of the 'semantic [thesis] … that legal statements are moral statements'[75] and his insistence that 'one may know what the

same sentence is true' in the passage as, say, 'the ordinary deontic statement implied by the committed use of the same legal statement'. I find this interpolation plausible.

[72] The point is repeated in *CLS* at 236n, where Raz says that the detached statement ' "Legally one ought to ϕ" … is compatible with "but one has no reason whatsoever to ϕ" '.

[73] According to one established textbook, 'in any given conceivable state of affairs, "Possibly *p*" counts as true iff *p* itself would be true in *at least one* state of affairs which is possible relative to that one': GE Hughes and MJ Creswell, *A New Introduction to Modal Logic* (Routledge 1996) 17. Nonetheless, the analogy has its limits: most succinctly, because 'it is possible that *p*' follows from *p*, but 'legally, *x* ought to ϕ' obviously does not follow from '*x* ought to ϕ'. The analogy could be more far-reaching if applied to detached and committed statements as construed in n 66.

[74] cf *PRN* 172–73.

[75] *AL* 158. This denial should be read in the context of Raz's remarks to the effect that we can only understand the meaning of a legal statement once we appreciate how it can be used to make a moral claim: see 'Purity' (n 15) 248–49, esp 249: 'I find it impossible to resist the conclusion that most internal or committed legal statements, at any rate those about

law is without knowing if it is justified'[76] (again: as one can know if *p* is possible without knowing if *p*). The second is Raz's sources thesis, which in this context receives the following formulation:

> The existence of the appropriate source … is the ground for the truth of statements of the form 'Legally *x* ought to ϕ' … These are essentially existential statements asserting that there is some [social] fact which is a legal reason for *x* to ϕ.[77] … To the positivist the identification of the law and of the duties and rights it gives rise to is a matter of social fact.[78]

The sources thesis means that legal statements either are themselves descriptive statements of social fact or at least can follow from such statements. The passage just quoted appears to support the first option, but this would be blatantly at odds with Raz's (well-founded) hostility towards 'reductive' interpretations of legal statements[79]—so I am happy to exclude it. If legal statements can follow from descriptive statements of social fact, however, they cannot be ordinary deontic statements either,[80] so they must belong to some third category. Raz insists that this must be a sub-category of deontic statements, I think it is a class of descriptive

the rights and duties of others, are moral claims'; Joseph Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 OJLS 123, 129–31; for criticism, see Toh (n 58) 416–20.

[76] *AL* 158.

[77] My own understanding of this sentence is that the legal statement 'legally, *x* ought to ϕ' is for Raz true if and only if so is 'there is an (actually existing) fact *p* such that, if on the whole one ought to follow the law, then if *p*, then *x* ought to ϕ'. Note that the truth of the latter statement is independent of whether it is true that one ought on the whole to follow the law, or indeed of whether *x* ought to ϕ.

[78] *AL* 66, 158.

[79] See n 19.

[80] cf Shapiro (n 48) 415–16.

statements. The question of who is right here thus hinges not so much on *whether* there is a semantic difference between legal statements and ordinary deontic statements—we both accept there is one—but on *what* this difference is.

*B. What Is the Semantic Difference?*

So, what is it? A good way to probe this is to look at the sorts of statements with which a legal statement—for example, 'legally, one ought not to promote veganism'—would be inconsistent.[81] One obvious candidate (and as far as I can see, the only plausible one[82]) would be the statement 'the law does not prohibit one from promoting veganism'. Its negation, on the other hand—'the law prohibits one from promoting veganism'—seems to me if not synonymous with, then at least equivalent to the initial legal statement.[83] In fact, I can think of no legal statement '*x* ought in law to ϕ' which would not come down to saying that the law requires that *x* ϕ.[84] If so, the semantic difference between '*x* ought to ϕ' and 'legally, *x* ought to ϕ' begins to look exactly like the difference between '*x* ought to ϕ' and 'the law requires *x* to ϕ'.

Perhaps the following could best capture the point. The difference between Raz's legal statements on the one hand, and statements asserting what the

[81] cf nn 64, 72.

[82] Recall that if we adopted the alternative reading outlined in n 66, the present discussion would be limited to the semantics of detached legal statements.

[83] At one point, in fact, Raz seems to say as much. See Joseph Raz, 'Incorporation by Law' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 189: 'Such discourse [discussing and describing the law from a detached point of view] … *is the equivalent of* talking of what people demand of others without implying that these demands have any normative standing, that the others have reason to comply with them as they are intended to do' (italics added).

[84] Duarte d'Almeida (n 19) 185–86.

law requires on the other, is clear. They are, for one, distinguished by their syntax. Statements of the former category, unlike those of the latter, either incorporate a deontic statement, or at least make use of the characteristic conceptual toolbox of deontic discourse. The two categories may well be irreducible to each other, either because there is no sense in which any one is more 'primary' or 'basic' than the other, or because the syntactic difference between them is just too important to be passed over. Yet none of this gives us any reason to expect that there must also be a *semantic* difference between 'legally, *x* ought to ϕ' and 'the law requires *x* to ϕ', and the fact is that there appears to be none. Much like direct and indirect reported speech, these are just two distinct ways of saying the same thing, whatever else may separate them, and however impossible it may be to reduce any one to the other.

A few points to clarify. It may be objected that prohibiting, demanding, permitting, and other like things are actions, proper to social agents like parents or teachers, not to social phenomena like law. This is true, and statements that the law does all these things do require some (substantive or reductive) account of its agency to back them up—but then so does Raz's conception of the legal point of view,[85] and in any case Raz agrees that statements of what the law 'does' can simply be read to summarise more or less complex constellations of real or hypothetical social facts.[86] The puzzle, if there is any, is only about how such summary statements are

[85] Raz himself relies on the 'legal man' to that end: *AL* 140–43; *CLS* 237. Note that Raz is generally anxious to emphasise the institutional perspective (in practice, the perspective of the courts) as *the* vantage point of legal theory: see esp Raz, 'Problem' (n 61); cf n 99 in chapter II. At the same time, this centrality of the courts is relevant for the purposes of *defining the limits of law*, not *explaining law's normativity*. For the purposes of the latter project, Raz treats 'legal men', lawyers, judges, and so on as all sharing the same 'legal point of view'.

[86] Raz, 'Can There Be a Theory of Law?' (n 61) 38–39. Note a related discussion in Gardner (n 48) at 125–32.

arrived at, not about their semantics. They are descriptive statements concerned with social facts,[87] and more specifically—I will shortly say more about this—descriptive statements which ascribe to these facts some legal meaning.

A more serious worry lies in the problem of inconsistent demands.[88] We might think, for example, that the law could prohibit the promotion of veganism and at the same time permit it: for instance, if such a permission were explicitly included in a second section of the Veganism Act.[89] On the other hand, this would not make the statement that legally, one ought not to promote veganism compatible with the statement that it is legally permissible to do so; rather, the issue would then become indeterminate.[90]

As before, this is a false problem. Surely, the law may *place requirements* upon us that are inconsistent; but it does not thereby *require* that we do inconsistent things. Suppose that an older brother says to his younger brother: 'do the dishes—but don't do the dishes'; their mother then comes about and asks the younger one: 'well, didn't he tell you to do the dishes?'. The younger brother will be at a loss to answer. Perhaps the older brother was *trying* to tell the younger one to do the dishes, perhaps not; whatever it was that the older brother wanted to achieve, he failed. And so it is with the law: it may issue any demands it pleases, but this without more does not mean that there is anything it actually manages to require. After all, to

[87] Raz himself considers talking 'of that which one is required by law to do' to exemplify the 'rich non-normative vocabulary for describing legal situations' we have at our disposal: *CLS* 235; Duarte d'Almeida (n 19) 190–91.

[88] Already discussed in text to nn 37–94.

[89] cf section II.2.B.

[90] *AL* 74–75.

speak of what the law requires is always to make *some* coherent sense of the social facts at hand, only not in terms of what one *ought* to do about them, but in terms of what, given that they are what they are, the law *requires* one to do (and keeping completely open the question of whether one should comply).[91] This, at any rate, is what it takes to speak of what the law requires in the same sense as Raz speaks of what one legally ought to do.

Finally, one could raise an objection along the following lines. Even if the legal statement 'legally, *x* ought to ϕ' is semantically the same as 'the law requires *x* to ϕ', to understand the latter statement (and all the more so the former) we have to understand what it takes to comply with the law's requirement; and to understand that, in turn, we have to assume in one way or another the normative viewpoint of the law, or of the 'legal man' who takes all law to be unqualifiedly binding.[92] The objection fails because it proves too much. There is of course no doubt that to understand the law as requiring *x* to ϕ we have to grasp what it is that the law requires—what it takes for *x* to ϕ—but then we can grasp that just as well by reference to what the law *prohibits*—to what it takes for *x* to *not* ϕ.[93] If the argument works, therefore, and if, in order to identify what the law requires, it is necessary to presuppose the normative perspective of the 'legal man', then it is just as necessary

[91] cf *PTL* 205–08, esp 207 ('If neither the one nor the other … legitimized by the basic norm').

[92] See n 85.

[93] I read Kelsen to evoke a similar point when he argues that 'the delict [is] a condition, not … a negation of the law … not a fact standing outside, much less in opposition to, the law, but a fact inside the law and determined by it … the delict can *legally* be understood only as law [*so kann … das Un-Recht juristisch nur als Recht begriffen werden*]': *PTL* 113; Kelsen, *Reine Rechtslehre* (n 6) 217 [119]; cf *GTLS* 53; Kelsen, 'On the Pure Theory' (n 51) 1–2.

to presuppose the attitudes of his 'illegal' or 'anti-legal' counterpart; for whatever role the former presupposition is thought to play, can also be played by the latter. In any event, what that role should be remains obscure, and my impression is that it is none.[94] We can understand perfectly well what it takes to fulfil a requirement without ever considering, let alone deciding, whether we ought to do so or not. The normative perspective of the legal man is as epistemically redundant here as is the viewpoint of the meticulous lawbreaker.

My understanding of what Raz calls detached legal statements, and the contrasts drawn between them and statements of other, related kinds, can be summarised by the following table, specifying what differences can be found between statements of the different kinds we have considered:

| | Ordinary deontic statement '*x* ought to ϕ' | *Committed* legal statement '(legally) *x* ought to ϕ' | *Detached* legal statement '(legally) *x* ought to ϕ' |
|---|---|---|---|
| *Committed* legal statement '(legally) *x* ought to ϕ' | semantic difference | – | pragmatic difference |
| *Detached* legal statement '(legally) *x* ought to ϕ' | semantic and pragmatic difference | pragmatic difference | – |
| Statement of what the law requires 'the law requires *x* to ϕ'[95] | semantic, pragmatic, and syntactic difference | pragmatic and syntactic difference | syntactic difference |

[94] Duarte d'Almeida (n 19), esp 190–93.

[95] In principle, any such statement could also carry the implicature definitive of committed legal statements (see n 63); the picture could thus be complicated by

I think that such a characterisation of the four kinds of statements is plausible in its own right, and also fair to Raz: it appears to make good sense of almost all the claims he makes around these issues.[96] What it does *not* support, however, is the notion that detached legal statements open up some special logical space where we can assert the existence of legal norms—and by extension, of systems of legal norms—independently of what anyone ought in fact to do, of what actual norms there are. Statements of what one ought in law to do state nothing more than that there are some social facts whose meaning it is that the law requires one to do it, and that there are no social facts whose meaning it is that this requirement is qualified or cancelled.[97] They may implicate that what the law requires ought actually to be done—that there exists a norm to that effect—but they may equally leave this question open. They characteristically employ elements of deontic discourse, and it may for that reason be worthwhile to put them in the spotlight and elucidate their peculiar features. But this is all there is to it.

And so it turns out that legal statements are not deontic after all, no matter how often 'spurious' deontic language may be used to make them. They do not state what ought to be done or not, looking from the point of view of the law; rather, they state the meaning of those actions we count as the law's own, which meaning can be appreciated from any point of view, legal or not. If we adopt this interpretation of legal statements, we can steer clear of the troubling proliferation

distinguishing between committed and detached statements of this type. For simplicity, I bracket this possibility and treat all statements of what the law requires as detached.

[96] The main exception being Raz's repeated claims that legal statements are (or must be) deontic; but see also n 71.

[97] cf n 77.

of logical and ontological modalities involved in the notion of 'statements from a point of view'; but at the same time, we can also avoid the crude reductivism that Raz and Kelsen correctly reject.[98]

The conclusion itself, however, is not half as remarkable as the fact that we can see how it follows from what Raz himself has to say on the matter. Surely, he makes numerous and repeated declarations to the contrary. Upon closer examination, however, it becomes clear that he, too, treats legal statements of the form 'legally, *x* ought to ϕ' as what they are: descriptive statements interpreting social facts in terms of what the law requires, prohibits, and so on.[99]

*C. A Halfway House?*

Strictly speaking, this disposes of the logical thesis of the normative picture, and so of the normative picture itself—at least, we recall, in its strong form. If legal statements are not deontic, then they do not state norms, and the two theses just cannot be a plausible characterisation of how descriptive jurisprudence should make sense of its subject-matter.[100] But perhaps the analysis uncovers a more modest version of the normative picture which is still open for descriptive legal theory to adopt. According to that more modest conception, though law is not composed of norms and not stated by deontic statements—at least not in the strict

[98] See n 19.

[99] See esp n 83.

[100] To repeat: that a description of the law is not a description of norms does not mean that the description (or the statements which it comprises) cannot be normative in the trivial sense adumbrated in nn 22–25 and text. Which, again, may lead one to the linguistically awkward, but otherwise perfectly fine conclusion that legal statements are not deontic, but normative, or in other words practically significant. For my part, I prefer this latter formulation, not least because it escapes the many ambiguities that lurk in the word 'normative': see n 23.

sense—it is nonetheless adequately characterised as a body of requirements (permissions, prohibitions, and so on), and so can be exhaustively stated with the help of descriptive statements of what the law requires. Indeed, perhaps this is what most proponents of the normative picture have in mind anyway.

Now this conception really is more modest than the picture drawn by the metaphysical and logical theses, and so my objection to it is accordingly less radical: while I do not wish to deny that descriptive legal theory can make quite good sense of the law in terms of what it requires and permits, I will suggest that the resulting picture is a little flat, so to speak, and that there is a relatively easy and intuitive way to make it deeper. But the purpose of the objection is to gesture towards an account which will ultimately accommodate this modest version of the normative picture in full. After all, my intention is not so much that we 'shake ourselves loose'[101] of that picture as it is that we see what is there to be seen beyond it.

Let me begin by articulating the vocabulary I will use from now on. In the previous section I would claim time and again that to speak of the law in terms of what it requires and permits, as opposed to what ought to be done or not, is not necessarily to reduce legal talk and thought to mere statements *of* social facts; instead, such statements of what the law requires and permits can be construed as attributing to social facts and practices some *legal meaning*. I take the phrase, and the rough notion, from Kelsen,[102] who writes in the opening paragraphs of *Pure Theory of Law*:

[101] cf n 5 in chapter I.

[102] Although Kelsen himself might have introduced the notion in reaction to Fritz Sander's 'Rechtsdogmatik oder Theorie der Rechtserfahrung? Kritische Studie zur Rechtslehre Hans Kelsens' (1921) 2 Zeitschrift für öffentliches Recht 511: Christoph Kletzer,

> If you analyze any body of facts interpreted as 'legal' or somehow tied up with law, such as a parliamentary decision, an administrative act, a judgment, a contract, or a crime, two elements are distinguishable: one, an act or series of acts—a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, *the legal meaning of this act, that is, the meaning conferred upon the act by the law*. … The specifically legal meaning of this 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.*[103]

Now, Kelsen appears to recognise two basic sorts of legal meaning: an action can have the meaning of either a *legal* or an *illegal* act.[104] This, to my mind, would map exactly onto the more modest version of the normative picture that has emerged so far: to say that the law requires such-and-such an action appears to me synonymous with saying that abstaining from the action is an illegal act; and to say that the law permits such-and-such an action is simply to say that the action is a legal act.

If this is correct, then we can reformulate the modest version of the normative picture as such a description of some given set of social facts[105]—some

'Kelsen, Sander, and the *Gegenstandsproblem* of Legal Science' (2011) 12 German LJ 785, esp 800–04.

[103] *PTL* 2, 4 (italics added).

[104] *PTL* 4 contains a reference to 'the meaning of legality or illegality', but this seems to me a (very) minor infelicity in translation; the original reads 'die Bedeutung eines Rechts- (oder Unrechts-) Aktes', so 'the meaning of a legal (or illegal) act': Kelsen, *Reine Rechtslehre* (n 6) 26 [3].

[105] If we admit the existence of legal gaps, the set must be only of 'regulated social facts', by analogy with 'regulated cases': *AL* 181–82. If we do not, the set is simply legal practice. The existence of legal gaps itself is controversial between Kelsen and Raz: see section II.2.B.

social practice—that it assigns to each act[106] in the set the meaning of either a legal or an illegal act; that is, such that it says of each act in the set if (or when) it is legal or illegal, but without saying or implying thereby whether it ought to be done or not. The idea is that social practice can in principle be given a complete legal description by using only statements of the form:

'The fact that *x* ϕ-s amounts to a legal act.'

'The fact that *x* ϕ-s amounts to an illegal act.'

And although there may of course be other, auxiliary statements and concepts, such as

'The fact that *x* ϕ-s amounts to the exercise of a legal power by *x* to place *y* under a legal duty to ϕ.'

they will all be analysable in the end as describing shifts in the legality and illegality of social facts along some pattern recognisable as, say, the exercise of such-and-such a legal power. It is probably wildly impracticable to give a full statement of the law made up solely of such statements of legality or illegality, but on the modest version of the normative picture, it is theoretically possible to do so.

Such a picture of law and legal practice is not *false*—but it is incomplete. Suppose we are trying to explain the effect of the Veganism Act, and we say that it prohibits—makes *illegal*—the public promotion of veganism. Our interlocutor then asks: 'illegal *how*?'. This is not a senseless question. As it happens, the Act makes the public promotion of veganism a *crime*; but it could as well have made it into a contractual breach, or a tort, or an administrative offence, or something else still.

[106] The shift from 'fact' to 'act' in this sentence is intentional, and licensed: see nn 13–15 in chapter V and text.

We might say that whenever the law makes some act illegal, it makes it illegal *qua* something; and it certainly makes sense for one to ask what that something is.

Nor is the question trivial: much may turn, practically, on what the answer to it is. Conveniently, the Veganism Act should illustrate this with particular clarity: as would any other legislation which is morally suspect, not egregiously unjust but then not just either, and likely to evoke a range of reasonable responses. Imagine that there live in the polity an Ada, a Bernie, and a Clara, all of whom had been completely indifferent to the public promotion of veganism before the Act was passed. Now, on the other hand, they are anything but indifferent. Ada, to begin with, tenaciously and resolutely breaks the law, distributing vegan pamphlets almost as a full-time job: perhaps she does that as an act of civil disobedience, or because she hopes other will follow and clog the polity's apparatus of coercion ('you can't lock us all up!'); or, to entertain a wildly different possibility, because she seeks work with a local gang and wants to prove she is not scared of the police.[107] Bernie and Clara, by contrast, go out of their way not to break the Act. They have educated themselves as to what veganism exactly is and now take extra care not to say anything that could get them in trouble. Here is the difference between them. Bernie does all that because he has a strong sense of civic duty and avoids anything that the law brands as criminal. But he otherwise has no qualms about doing what the law prohibits, for instance when breaching contracts or committing torts: a ruthless businessman, he simply budgets for his liabilities and carries on. Clara, on

[107] See also WH Davies's 'Super-Tramp', as discussed in Neil MacCormick, *HLA Hart* (2nd edn, Stanford University Press 2008) at 99.

the other hand, always does whatever the law requires her to do. She might not be a 'legal woman' in Raz's sense,[108] but she comes close enough to being one.

My point here is that if we only say that any public promotion of veganism is *illegal*, then we can perhaps explain Clara's behaviour, but not Ada's or Bernie's. As far as Ada goes, she cannot commit an act of civil disobedience, or hope to clog the criminal justice system, or prove her disregard for law enforcement otherwise than by committing crimes: so to explain her resolve, we need to say not only that what she is doing is unlawful, but also that it is unlawful in the specific sense of the criminal law. Likewise with Bernie: unless we add that the prohibition is criminal, his anxiety to comply is inexplicable. Of course, anyone could easily understand what is going on by *inferring* or *guessing* from Ada's and Bernie's decisions what the situation is.[109] But this only reinforces my point: if there is really something to be inferred or guessed here, then to say of something that it is illegal *qua* crime must be to convey some substantial information above and beyond the fact that it is illegal *tout court* (or, for that matter, that legally, one ought not to do it).

What could this additional information be? A natural first answer might go as follows. The difference between, say, a crime and a contractual breach is substantial, but ultimately possible to formulate in terms of legality and illegality alone: it simply boils down to the difference in the respective procedural and remedial requirements triggered by committing a crime on the one hand, and breaching a contract on the other, and perhaps also in the sort of powers involved in making the act in question illegal in the first place. Now, while the practical

[108] See n 85.

[109] See section VI.2.B.

significance of distinctions that cut deeper than the bare dichotomy of legality and illegality is not discounted in any way by this first answer, it is still maintained that these deeper distinctions can all be analysed as—and reduced to—shifting patterns of legality and illegality. In more precise terms, the hypothesis is that for any legal description of some social practice formulated by saying of each act in the practice if (or when) it is legal (or illegal) *qua* this-and-that, there will be an *equivalent* description of some social practice (which may or may not be the same practice) formulated by saying of each act in the practice if (or when) it is legal (or illegal) *tout court*: equivalent in the sense that the former description is true if and only if the latter description is true.

I am almost certain the hypothesis is not necessarily correct,[110] and I am not even sure if it is correct as things are. Still, we can grant it for the sake of argument. What does it establish? Well, it establishes that any legal description of social practice formulated in terms of distinctions that run deeper than the dichotomy of legality and illegality can always be *deduced* from a description formulated solely in terms of that dichotomy. By contrast, it does *not* establish that any description of the former type can by the same token be *reduced* to a description of the latter type. This is, to put it crudely, because those deeper distinctions really *are* deeper. They are made at a different level, for they express a different way in which we engage with the law and with what we know about it. In particular, they

[110] Imagine a legal practice almost identical to the law in England and Wales, different only in that certain instances of negligence (as we call it) are negligence, and certain others—shmegligence. There is nothing in the normative consequences of shmegligence that would distinguish it from negligence; the distinction is there just because (perhaps there used to be a better reason, but not anymore). It would be a bizarre legal practice, perhaps, but it is not unimaginable. In such a practice, there could be no pattern of legality and illegality which would allow us to decide if a given act is negligence or shmegligence.

express the way in which *we*—who are generally not like 'legal men' and tend to take more nuanced attitudes towards the law and its claims—make sense of the law and figure out its place in our practical lives.

Consider the following analogy. Perhaps there could be an exhaustive description of, say, Rousseau's *Tiger in a Tropical Storm* such that it would only map the distribution of pigments on the canvas and specify the wavelengths these pigments reflect. There are machines, maybe also people, who could deduce from such a description what the painting looks like and do so with complete precision. In one sense, therefore, the description would give all the information there is to be given about the painting; but then in another sense, if we were asked to describe it ourselves, we would likely have none of that. We would say instead that the painting depicts a tiger, that the tiger is orange, that the colours are vivid, that the style is naive. For a printer, all this is redundant and probably meaningless. But we are people not printers: we see the painting as a colourful depiction, composed and executed in a certain manner and style, evoking certain attitudes and emotions; and any description which omitted all that information would seem—*to us*—seriously incomplete.

The same goes for a description of legal practice formulated solely in terms of legality and illegality. It too would lack the colour and depth, so to speak, of a description formulated in terms of legal concepts such as crime, contract, ownership, and so on. When we hear that Ada's doing so-and-so is criminal, we understand a great deal more than when we are told that she is doing something she has a legal duty not to do, and that her doing so triggers such-and-such procedural powers in such-and-such people, and such-and-such liabilities on Ada's part, and so forth; and if the we are told these things and nonetheless manage to

understand everything, then only because we grasp that we are just being told, in a strangely roundabout way, that what she is doing is criminal. So even if it is unnecessary to go beyond the concepts of legality and illegality to specify what the law is, full stop, it is nonetheless necessary to explain what the law is *to us*: to throw light on how we actually understand, discuss, and evaluate the legal practices in which we take part.[111] There are elements in our thinking about our laws which the normative picture, even in its modest version, simply does not capture. This is what I mean when I say it is flat.[112]

My proposal is therefore to take Kelsen's basic idea that at bottom we think of the law as conferring *meaning* upon our social practices; but to also allow that the sort of meaning thus conferred need not be limited to, or translatable into, legality and illegality. On the picture I am proposing here, a full description of legal practice can only be formulated if we include statements of the form:

'The fact that *x* ϕ-s amounts (in law) to *L*.'

where *L* stands for a legal concept or category assigned in legal discourse to the fact that *x* ϕ-s. This can be 'a legal act' or 'an illegal act'—like on the modest version of

[111] More generally, cf Charles Taylor's remarks about the 'specific force' of 'thinking of something *as* an *X*' in *The Explanation of Behaviour* (Routledge 2021) at 68–71. Whether or not we agree that this is something unique to human as opposed to animal agency, Taylor's broader point—that the way in which we classify our actions in practical deliberation is *ipso facto* important in theorising human practice, and that we should not seek to reduce it to something else—is, I think, compelling.

[112] cf *CL* 38–42; Finnis (n 46) 282–83, where he makes a similar point, albeit in the context of a very different project. In an earlier piece, he writes: 'that jurisprudence can differentiate concepts such as "tax", "tort" and "crime" is a mark of its partnership in Western rationality': John Finnis, 'Abortion and Legal Rationality' (1967–70) 3 Adelaide L Rev 431, 434. I cautiously agree if the words are taken to mean no more than that the distinctions we make in legal discourse are anchored in a collective way of life which extends beyond legal practice into other aspects of our culture; and if we are mindful of the fact that not all of 'our culture' has to be 'Western rationality'.

the normative picture—but also 'a crime', 'a contractual breach', 'a breach of fiduciary duty', 'enacting a statute', 'concluding a contract', 'setting up a trust', and so on. I shall call such statements—*statements of legal meaning*. A more thorough survey of the nature and meaning of such statements will be the task of the next two chapters. At this point it should be enough that we observe that statements of legal meaning are an integral and irreducible element of our legal discourse; and so indispensable to any theory of law that takes the phenomenology of how we engage with our legal practices seriously.

And once again, in the background there is a related ethical consideration. As the examples of Ada, Bernie, and Clara show, there are various stories to be told about the normative impact of law, and in the ordinary course of things these stories will not only be different, but irreconcilable. To accept the normative picture—in whichever version—is to sift out a good number of these narratives, and focus instead on those who make the law, whom the law favours, and in whose interest it is that its requirements be enforced. It is to confuse 'legal reality' with 'the claim made on behalf of the state'[113]—to tell the story of the law from the perspective of the powerful and push the powerless to the periphery of reflection.

Now perhaps there is *a* sense in which this story represents the 'central case' of law, or its 'ideal-type';[114] the question is only if this sense is one to which

[113] John Griffiths, 'What is Legal Pluralism?' (1986) 18 Journal of Legal Pluralism and Unofficial Law 1, 4.

[114] On the application of the method of Aristotle's 'central cases' or Max Weber's 'ideal-types' in jurisprudence, see Finnis (n 46) 9–19.

legal theory should give so much weight.[115] For there is also quite another sense in which the law is of just as much interest to the judge, barrister, or policeman as to the strike leader, rebel, or slave[116]—only that while the former have above and beyond their power a vast body of doctrinal jurisprudence to help them articulate their attitudes towards the law, the latter lack a parallel vocabulary in which to voice their own projects and predicaments. I have said before that to provide a neutral and impartial vocabulary to talk about law is part of the very point of descriptive legal theory.[117] The normative picture, with its avowed reluctance to look at the law from any perspective other than that of the law itself, fails on this front: maybe not as a theory of law generally, but certainly as a descriptive theory.[118]

Does a descriptive analysis in terms of legal meaning fare any better? I think it does. We have seen, for example, that the statement that to publicly promote veganism is a crime is as much part of Ada's story as it is part of Clara's. In fact, I think that this statement and others like it must be part of *anyone's* story. I cannot prove this, but I will in due course give reasons why I think it reasonable to expect that this is so.[119] If I am right, then a descriptive theory of law formulated in terms of statements of legal meaning will not only will lay a more credible claim to normative agnosticism than Raz's positivism, but also keep in sight those engaged

[115] Raz, in 'Can There Be a Theory of Law?' (n 61) at 36, claims that the concept of law 'is not a concept regarding which the courts have special authority'. So why take their practical attitude towards the law as so decisive in making sense of its nature?

[116] Dan Priel, 'Description and Evaluation in Jurisprudence' (2010) 29 Law and Philosophy 633, 652–53; cf *CL* 40, 91, 201–02.

[117] See text to nn 38–39 in chapter I.

[118] cf n 21 and text.

[119] In section VII.1.

in a legitimate struggle with the reality it describes. This alone is reason enough to explore it in more depth; though I hope to have shown that it is not the only reason.

## 4. LAW BEYOND LEGAL SYSTEMS

This concludes my critique of the idea of a legal system. It started in chapter II with the observation that the idea might make it difficult for legal theory to formulate, let alone address, the problem of continuity, and with the suggestion that what the problem calls for is a theory of legal practice and not of legal systems. In this chapter and the previous one, I have tried to make this suggestion more palatable: first, by identifying with Hart the ambition that descriptive jurisprudence should give a substantial account of legal practice; second, by arguing that what stands in the way of this ambition is the enduring attachment of much legal theory to the practical perspective of those who use or accept the law as a means of regulating others' behaviour; and third, by subjecting this attachment to critical scrutiny and showing that it is excessive.

In effect, it appears that the idea of a legal system is less integral to our thinking about the law than we have often supposed, and that there may be inquiries in descriptive jurisprudence where it is positively unhelpful. After all, if Raz himself says that

> when trying to clarify the notion of a legal system, the legal theorist does not aim at defining clearly the sense in which the term is employed by legislators, judges, or lawyers. He is, rather, attempting to forge a useful conceptual tool, one

> which will help him to a better understanding of the nature of law.[120]

then how far must that theorist be from describing how all those who are *not* 'legislators, judges, or lawyers' engage and interact with the law? And why should he not try to 'forge' other 'useful conceptual tools' if they can help address problems that the notion of a legal system obscures?

In the next three chapters, I shall try my hand at this 'forging' and outline a simple descriptive account of legal practice, viewed now as a practice where people make theoretical and practical use of legal discourse in making sense of their interactions with each other. So far, I have attempted to show that there can be such a thing as law beyond the legal system. I would now like to show also that this thing can be sensibly theorised—and how.

[120] *AL* 78–79.

# V. Legal Discourse

At this point, I have concluded the polemical part of the thesis and begin to elaborate a positive conception of legal practice and its continuity. Let me take stock and indicate the way forward.

Chapter II introduced the problem of continuity: the challenge of framing constitutional crises in such a way as to see them as involving a genuine discontinuity in constitutional practice, and yet one which may be irrelevant to the overall continuity of wider legal practice. We have seen that one of the sources of this challenge is the conception that law is by definition a legal system, so a unified, consistent, and discrete body of norms; and I have suggested that the puzzle might be solved by focusing instead on the notion of legal practice. In chapter III, we have considered HLA Hart's practice theory of law, which appears at first to bridge this dichotomy between system and practice, or at least to expose it as false. On closer inspection, however, it fails do to either of these things; still, the failure helps us to isolate what it is about the idea of a legal system that makes it so ill-suited to make sense of legal practice. It is the notion, dealt with in the previous chapter, that law is made up of norms—which notion, I have argued, is metaphysically and logically troublesome, and can lead us into morally risky territory. A more fruitful way of understanding law could focus instead on how, where there is law, our actions are

endowed with a special sort of meaning; and on what that legal meaning is. Such a focus should lead us towards a more neutral theory of law and ensure that this theory pays close attention to the actual practices of a law-governed society.

In the next three chapters, I develop this last thought to sketch a framework for theorising the practices characteristic of societies which have law. I do so by addressing three key issues. The first issue is the issue of *legal discourse*. What are statements of legal meaning, and legal statements more generally? How can we understand and explain what they mean? What makes it possible for us to make them or include them in a descriptive theory of law? The second issue is that of *legal practice*. How can legal discourse be practically relevant? How can it guide our decisions and actions? And how can we explain all that if we have supposed that legal discourse does not state norms? The third issue, finally, is *legal continuity*. What are we referring to when we say that in a law-governed society, 'there is law' or that it 'exists'? What does it mean for legal practice to be continuous? What does it mean for it to be discontinuous? Can it be both—and if so, in what sense?

Each of the three chapters deals with one of the three issues in more detail, though some themes and problems recur. One key question that will return time and again is that of what gives us licence to accept or assert certain legal statements as *true*. In this chapter, we will have a closer look at what allows descriptive legal theory to make such assertions, and what the character of these assertions then is.[1] In the next, we will consider how a person may be taken to accept certain legal statements as true merely by participating in legal practice.[2] In chapter

[1] See section V.2.

[2] See section VI.2.

VII, finally, we will see how the truth or falsity of legal statements depends on the purpose and context of their use, and how the very same legal statement may be true or false depending on what portion of social reality it is supposed to make sense of.[3] In the end, therefore, while each of the three chapters is meant to constitute a relatively independent stage in the broader argument, some questions will only receive a full answer after that argument has been laid out in its entirety. Other questions still, though important, I will have to leave unanswered.[4]

In any event, this chapter focuses on legal discourse. I begin with the simple question: what is the meaning of legal statements? Or perhaps: what is legal meaning?

## 1. LEGAL MEANING

### *A. Legal Acts*

Many events, especially those that make up our social life, admit of different interpretations on different levels. Suppose, for instance, that someone utters a certain sound. We can describe it by tracking the movement of air around their

[3] See section VII.2.C.

[4] I have in mind especially the question of what Ronald Dworkin, in *Law's Empire* (Fontana Press 1986) at 4, calls the 'grounds of law', at least insofar as it is different from the question of what licenses one's acceptance of certain legal statements as true. The main reason I have for avoiding this question is that, like Dworkin, I think the truth or falsity of legal statements depends on the purpose for which they are being made; but unlike him, I also think there are several such purposes which may be legitimate, and so several workable standards of truth in legal discourse: see section VII.2.C, esp n 42. The purpose identified by Dworkin as *the* purpose of legal discourse—to find the best principled justification for the state's use of force—may be one such legitimate purpose, so long as we are open to the thought that the search may be fruitless. But (and here is my other reason for skipping the question) the sort of legal discourse aimed at this falls beyond the scope of the descriptive project of this thesis.

mouth and nose; or by recording the wavelengths and how they change over time. But we can also say that the sound's phonetic value is /pliːz/; or that the person is uttering the English word 'please'; or that, as the case may be, they are thereby making a request, or extending an invitation, or using the word as a verb in a longer sentence ('do as you please, but leave me out of it'). Each one of these reports serves a different purpose and no two of them are synonymous. Yet what unites them is that they are all concerned with a single event, namely, the making of a certain sound by a certain person. They are just different ways to make sense of what it was that happened.[5]

There is, moreover, a special class of events which can be made sense of in this way using specifically *legal* concepts. For example: two people take a piece of paper with some words printed on it and, having read the words, sign at the bottom. This is one way to describe what has happened. But we are more likely to report it by saying that the two have made an agreement, or that they have exchanged promises to act as the document specifies; and in legal discourse, we say they have made a contract. Or when a person drives a car at 80 miles per hour and passes a board on which the number 70 is printed inside a red circle, we could in principle leave it at that; but we can be expected to understand that the driver has broken the speed limit, and so committed a traffic offence. Or a sequence of events could be reported which starts with someone submitting a document of a certain specification to a certain office and ends with the head of state signing the document; normally, however, this complex occurrence is more concisely referred to as the passing of a statute.

[5] I return to this notion in section VI.1.C.

Of such events, I say that they are *legally meaningful*, that they have *legal meaning*.[6] The legal meaning of an event can be, and often is, used to report its occurrence: this is, for example, what I did when I said in chapter IV that the legislature of our imaginary polity had passed the Veganism Act.[7] Equally, however, the legal meaning of an event can be predicated of it, yielding a statement of the form:

'The fact that *p* amounts (in law) to *L*.'

'The fact that *p* amounts (in law) to *not-L*.'

For simplicity, I will treat the second form to constitute a special case of the first; so any references to statements of the first form should be read to include statements of the second form, too.[8] In any such statement, *L* stands for a *legal concept* determining the event's legal meaning:

[6] I stick to legal 'meaning', rather than 'relevance' or 'significance', for two reasons. First, this is how Kelsen's *rechtliche Bedeutung*, after which my notion of legal meaning is roughly modelled (see nn 103–104 in chapter IV and text), is rendered in Max Knight's translation: *PTL* 2–3; cf Hans Kelsen, *Reine Rechtslehre* (Matthias Jestaedt ed, 2nd edn, Mohr Siebeck 2017) 22–23 [2]. Second, 'meaning' is conveniently ambiguous between the natural and non-natural sense of the term: HP Grice, 'Meaning' (1957) 66 Philosophical Review 377. Kelsen often uses *Bedeutung* interchangeably with *Sinn*, and the two words—as Kelsen uses them, and he does not use them in the same way as Frege—seem to trace the natural/non-natural meaning distinction. I have managed to find only two points where *Bedeutung* and *Sinn* appear together, and at both points Knight renders them respectively as 'significance' and 'meaning' (*PTL* 7, 10; cf *Reine Rechtslehre* 31 [7], 35 [9]; see also Hans Kelsen, *General Theory of Norms* (Michael Hartney tr, OUP 1991) lvi–lvii (translator's comments)). Whenever I speak of legal 'meaning', I mean to use it in a broad sense which includes, or is interchangeable with, 'significance', 'relevance', 'sense', etc. I think this usage generally follows Kelsen.

[7] In section IV.2.A.

[8] 'Amounts (in law) to *not-L*' is not identical with 'does not amount (in law) to *L*'; the former predicate attributes legal meaning to a fact while the latter does not. But I am not claiming here that there is, for any legal concept *L*, an independent, 'opposite' legal concept *not-L* (nor am I denying that; I am simply not sure if such a claim would be licensed). At this introductory stage I still lack the means to explain and defend these remarks: but see section VI.1.C, where I introduce the notion of performing one act *by* performing another act; and n 34 in chapter VI, where I return to the meaning of 'amounts to *not-L*'.

> 'The fact that Ada has been distributing vegan pamphlets counts as a *crime*.'
>
> 'What happened in the legislature amounts to the *enactment* of the Veganism Act.'
>
> 'Driving under 20 miles per hour in central London is *not speeding*.'

I refer to such statements as *statements of legal meaning* and treat them as basic to *legal statements* more generally. Of course, there are many other statements that can be called legal:

> 'Ada has committed a crime.'
>
> 'The legislature ought not to have passed the Veganism Act.'
>
> 'Not speeding in central London is a wise thing to do.'

and they make up a good part of legal discourse. Still, they all rely on statements of legal meaning for their sense; statements of legal meaning are thus logically prior to all other legal statements. They are, as it were, the basic building blocks of legal discourse, and hence the special attention I pay to them.

I should pause here to clarify that I am not going to define 'specifically legal concepts' beyond what I have just said: that what distinguishes some practical concepts as *legal* is how a statement which presents a fact as an instance of some such concept is by the same token a *legal* statement, so part of our practice of *legal* discourse. Why not? One reason is that I just do not know how a fuller definition could be found; what I do know is that others' attempts to find one, if they were

really that, have been either unconvincing or incomplete.[9] If I *had to* try, I would probably say that all legal concepts are always and necessarily characterised by some logical relation to the concepts of a legal and illegal act, though not always or necessarily reducible to that relation;[10] but that too would be far from complete, and I am not even sure it would be true. In fact, I expect that the quest would soon take us far beyond legal theory and into the history of ideas and other such disciplines. I cannot develop the point further here, but I will briefly return to it in chapter VIII.[11]

The second and more important reason is that I can carry on with the argument without a more exhaustive definition. I probably share with the reader a broad common understanding of which practical concepts qualify as legal concepts and which not—I will explain the significance of this fact towards the end of this chapter—and even if this shared understanding is rough around the edges, we

[9] When I speak of unconvincing definitions of law, I have in mind Hans Kelsen's definition of law as a by and large effective, normative, and *coercive* order of human behaviour: see generally *PTL* 30–58. I think it is unconvincing because it is not to my mind impossible to imagine a legal practice which no longer involves coercion, or an effective, normative, and coercive order which is not understood in legal terms. When I speak of incomplete definitions, I have in mind HLA Hart, who openly admits in *The Concept of Law*, at *CL* 17, that '[the book's] purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested'; and rightly so, because the book indeed does not provide any such definition. Hart's views on the nature of legal systems have been read as providing criteria for distinguishing legal systems from other similar systems: see eg John Gardner, 'The Legality of Law' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 179–80. For why these criteria are incomplete, see *AL* 115–21, where Raz develops an alternative notion of 'the uniqueness of law'; for a later view on the issue, see also Joseph Raz, 'On the Nature of Law' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 101–02. Raz's views are difficult to apply in the present context and for several reasons, but most of all because he does not think law operates with a distinctive conceptual framework: *AL* 158–59; Joseph Raz, 'Can There Be a Theory of Law' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 30.

[10] See section IV.3.C.

[11] In section VIII.2.A.

should not come anywhere near those edges in what follows. In short, I prefer to leave the question open: unsure, and perhaps a little doubtful, if an illuminating answer to it can ever be given by legal theory; but convinced, at any rate, that there is presently no need for such an answer.

Let me then carry on. Statements of legal meaning, I have said, attribute legal meaning to facts;[12] these may in turn be called *legal facts*. They may include natural events, such as a severe storm or a house fire: the former might frustrate a charterparty, the latter—enable the owner to claim insurance. The most important legal facts, however, are those which can be stated by saying that some person or agent *does* or *refrains from* some legally meaningful action; these we may single out as *legal acts*.[13] The reason for this centrality of legal acts is simple. We attribute legal meaning to facts—whether natural or social—because doing so helps us make sense of and guide our own practices;[14] and practices, in turn, are made up of acts. We attribute legal meaning to natural events only because, and insofar as, it bears upon our attribution of legal meaning to human behaviour; our attribution of legal

[12] Do statements of legal meaning themselves state any fact (ie *the fact* that the fact that *p* amounts (in law) to *L*)? In principle I see no harm in putting it this way, especially in English (with its ubiquitous 'the fact that…'), so long as we are clear that to speak of such a fact is to add nothing to what would be said otherwise. But it does not follow that there are some facts that stand behind legal statements, as it were, merely because such statements can be used to *describe* legal practice: on which point, cf Ludwig Wittgenstein, *Philosophical Investigations* (PMS Hacker and Joachim Schulte eds, GEM Anscombe, PMS Hacker, and Joachim Schulte trs, 4th edn, Wiley-Blackwell 2009) ss 290–92. When not forced by English grammar, I will myself refrain from speaking in this way.

[13] The so-called Poznań school of jurisprudence in Poland has developed a broadly similar notion of a 'conventional act' (*czynność konwencjonalna*): for an overview, see eg Stanisław Czepita, 'On the Concept of a Conventional Act and Its Types' (2017) (1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 86.

[14] I return to the question of why and how it helps in chapter VII: see esp sections VII.1 and VII.2.C.

meaning to natural facts can thus be said to be parasitic or dependent on, and possibly also reducible to, our attribution of legal meaning to acts.[15] For this reason, in developing my account of legal practice I shall focus on statements attributing legal meaning to acts:

'*x*'s ϕ-ing (the fact that *x* ϕ-s) amounts (in law) to *L*.'[16]

What do they mean?

*B. Explaining Legal Meaning*

'Meaning is what is given by an explanation of meaning',[17] and legal meaning is no different. Take for instance the statement:

'To distribute vegan pamphlets is to commit a crime.'[18]

and think how we could go about explaining what it means. I believe there are broadly two ways in which we would do this. The first would be to say things like:

'The legislature has enacted a law criminalising the distribution of vegan pamphlets.'

[15] cf *PTL* 12, 14–15, 99–100; *GTLS* 3.

[16] Readers acquainted with Searle's theory of institutional facts might see a parallel between this formulation and Searle's formulation of constitutive rules: see eg John R Searle, *The Construction of Social Reality* (The Free Press 1995) 43–51; *Making the Social World: The Structure of Human Civilization* (OUP 2010) 10–11, 96–97. The reason why I do not find Searle's framework particularly helpful for my present purposes lies in the entanglement of institutional facts in deontology which he accepts and I, for reasons laid out in the previous chapter, want to abstract from: see *Construction of Social Reality* 70–71, 100–01; *Making the Social World* 80–86, 90–92.

[17] GP Baker and PMS Hacker, *Wittgenstein: Understanding and Meaning: Volume 1 of an Analytical Commentary on the Philosophical Investigations, Part I: Essays* (2nd rev edn, Wiley-Blackwell 2005) 33; cf Wittgenstein (n 12) s 560.

[18] Using the 'canonical form' given above, this could be reformulated as: 'for any *x*, if *x* distributes vegan pamphlets, then *the fact that* x *distributes vegan pamphlets amounts (in law) to a crime*'. But from now on I ignore any such 'canons' and try on the whole to render statements of legal meaning as naturally sounding as possible.

'If you distribute vegan pamphlets, you might be put to trial and convicted.'

'You can go to jail for distributing vegan pamphlets.'

Explanations of the second sort, by contrast, would go along these lines:

'Distributing vegan pamphlets is what criminals do.'

'If you want to obey the law, you'd better not distribute vegan pamphlets.'

'Go ahead and distribute your vegan pamphlets—but not if you mind doing some time.'

The first mode of explanation is *internal* to legal discourse: it explains the legal meaning of distributing vegan pamphlets by reference to the legal meaning of other events which may have happened before, or might happen after, but exhibit, in law at least, some kind of connection with the action in question. Internal explanation builds, in other words, on the conceptual links that tie legal concepts together into a more or less elaborate conceptual framework. On the other hand, the second mode is *external* to legal discourse: it explains the legal meaning of distributing vegan pamphlets by reference to the characteristic practical attitudes of those who actually do so. It thus builds on how legal discourse is used to make sense of a social reality where agents act—or refrain from action, as the case may be—on account of their commitments, intentions, projects, and personalities. Since internal explanation has to do with the peculiar conceptual framework of legal discourse, I will also call it *theoretical*. External explanation, on the other hand, because it refers to the practical attitudes of those who participate in legal practice, I will also refer to as *practical*.

The external, or practical, frame of reference for understanding legal meaning receives detailed treatment in chapter VI, where I discuss the logical relations which may obtain between statements like:

> 'For Ada to distribute vegan pamphlets would be to commit a crime.'
>
> 'Ada distributes vegan pamphlets.'
>
> 'Ada does not intend to obey the law.'

where the first statement attributes some legal meaning to an act, the second states that the act is performed, and the third describes the practical attitudes of the person performing the action. I will argue that statements of the first two types can often be put together to *infer* statements of the third type;[19] that the simultaneous truth of statements of the first and third type can in a sense *necessitate* that a statement of the second type be true, or false, and so make it necessary that the act in question be done, or that it not be done;[20] and that a combination of statements of the first and third type can also *make sense of* or *explain* statements of the second type, and in particular supply rationally intelligible grounds for the actions they describe.[21]

Before I get there, however, I would like to deal with the internal, or theoretical, frame of reference first and examine the peculiar problems it presents.

### *C. Theoretical Explanation and Rules of Legal Discourse*

Statements of legal meaning can be explained by other statements of legal meaning; I have called such explanation internal or theoretical. My impression is that this sort

[19] In section VI.1.A.

[20] In sections VI.1.B and VI.1.E.

[21] In section VI.2.A.

of explanation is more common, at least among students and practitioners of law. At a certain level of acquaintance with legal discourse, we usually grasp the meaning of a new legal concept by reference to how it relates to the legal concepts we already know, so by reference to its place in the complex web of relations which constitute the conceptual framework of legal discourse.

What enables this mode of explanation is the fact that statements of legal meaning, like the legal concepts they refer to, are logically related to each other. The statement that Ada's failure to mow Bernie's lawn is a breach of their contract, for instance, implies that Ada and Bernie have performed some acts by which they have entered into a contract; and it entails that for Ada to mow Bernie's lawn is to discharge at least part of her obligation under the agreement. With further assumptions, the statement can also substantiate the inference that mowing lawns is not illegal, that neither is not mowing Bernie's lawn, that Ada and Bernie have capacity to conclude a contract, and so on.[22] The legal meaning of an act thus *determines*, and is in turn *determined by*, the legal meaning of other acts in the practice; and so to perform any legal act, however trifling or base,[23] is always to bring about *some* change to the legal meaning of other legal acts that were performed in the past or, more commonly, might be performed in the future.[24]

[22] In practice, such inferences are rarely made explicitly and are evident, rather, in the questions we *need not* (and do not) ask. For example, if we are told 'Ada didn't mow Bernie's lawn and so breached her contract with him', we ask immediately 'what does the contract say?' and not 'is there a contract between them?'. We already know what the answer to that latter question would be; and if, contrary to our expectations, the response is 'what makes you think there is a contract?', we will normally conclude that our interlocutor is confused.

[23] See n 93 in chapter IV.

[24] The relations that underpin theoretical explanation in legal discourse enable what Kelsen frames as the basic intellectual principle of legal science, imputation (*PTL* 76–91;

We may nonetheless distinguish a peculiar—and doubtless central—category of legal acts whose significance consists almost entirely in the change they bring to the meaning of other legal acts. These include, for instance: enacting constitutions, statutes, or statutory instruments; giving judgments; making contracts; executing wills, trust deeds, or other like documents. They are characterised, first, by the fact that they are almost invariably carried out with the explicit intention to alter the legal meaning of some other legal acts; and second, by the relative unambiguity of their impact on the legal meaning of those other acts, which unambiguity is ordinarily achieved with writing. We may call such acts *regulative acts*.[25]

A few clarificatory remarks about regulative acts should help us get clearer about legal meaning more generally. The first and most important point is that, although a regulative act commonly involves some written (or spoken) text, its

*Zurechnung* in the original: Kelsen, *Reine Rechtslehre* (n 6) 152–77 [79–95]), whereby we 'impute' (or perhaps 'attribute'; *zurechnen* is ambiguous between 'assign' and 'impute', much like 'attribute', and Kelsen exploits the ambiguity in a way which the standard translation, to my mind, may obscure; cf Stanley L Paulson, 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 102) a certain legal 'consequence' to certain legal 'conditions', by analogy to causal reasoning in the natural sciences. I differ from Kelsen, first, in that I do not think the consequence is best described by an ought-statement, but by an is-statement that certain acts now have such-and-such legal meaning; and second, in that I would not limit it to the connection between a delict and a sanction. It is true that the commission of a legal wrong ordinarily means that certain acts will now count as sanctions, but then also: the consequence of the passing of a criminal statute is that certain acts are now criminal; the conveyance of a plot of land means that certain acts are now trespass; and so forth.

[25] The category corresponds roughly to what Kelsen calls acts whose meaning is a norm: see *PTL* 4–10. I neither need nor want to insist that there can be no important distinctions drawn within, or across, the category of regulative acts. One such distinction, returned to in chapter VII, is between the regulative practices of state actors and those of non-state actors.

*legal* meaning is not the *linguistic* meaning of the text involved in it.[26] Think, for example, about how the legal meaning of enacting the Veganism Act can be distinguished from the linguistic meaning of:

> 'It is a criminal offence, punishable by a fine or imprisonment up to three years, to publicly promote veganism.'

One sense in which they are different is that there are questions that can be asked about the act's legal meaning and yet are largely or wholly irrelevant to the text's linguistic meaning. For instance, it may be unconstitutional for the legislature to criminalise anything but violence or enact statutes which have fewer than three sections; but whether or not the act of passing the Veganism Act is constitutional is a question which need neither be asked nor answered in order to understand the linguistic meaning of the statute's text. Similarly, the meaning of the text need not in principle differ whether Parliament enacts it in the Palace of Westminster or I promulgate it in Westminster tube station;[27] but the legal meaning of the former act is of course dramatically different from that of the latter.

Another interesting sense in which the legal meaning of a regulative act is distinct from the linguistic meaning of the regulative text is that while the latter meaning may—and invariably will—be vague and leave some questions unanswered, the legal meaning of the regulative act cannot be ambiguous in the

[26] Hart seems to notice the distinction in his treatment of the rule of recognition (see eg *CL* 101, 148), but his otherwise brilliant discussion of the 'open texture' of law (*CL* ch 7) for the larger part ignores it: see Nicos Stavropoulos, 'Words and Obligations' in Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013) 143–44. On the distinction, see also *PTL* 71–75; GP Baker and PMS Hacker, *Wittgenstein: Rules, Grammar and Necessity: Volume 2 of an Analytical Commentary on the Philosophical Investigations* (2nd rev edn, Wiley-Blackwell 2009) 46–55.

[27] I say 'in principle', because reflection on this or some similar example might reveal that the legal context of the utterance may impact on its linguistic meaning.

same manner. The words of the regulative text, though usually *certain*, will commonly be *vague*; the legal meaning of the regulative act, by contrast, will never be *vague*, but often *uncertain*. When we speak of vagueness in the law, therefore, we refer to the vagueness of the *linguistic* meaning of regulative texts. When we speak of uncertainty or indeterminacy,[28] we refer to the uncertainty of regulative acts' *legal* meaning.

An illustration should make this point more transparent. Suppose that Ada, as before, wishes to break the Veganism Act; but because she is one lazy activist, she wants to distribute her vegan pamphlets to the fewest people possible for it to still count as 'public promotion'. The latter phrase is naturally vague, and even with the best of interpretive guides, there will always be a 'fringe of vagueness or "open texture" '[29] to it; so when she asks herself, say, 'will seven people be enough—will I commit a crime when I distribute my vegan pamphlets to seven people?', she can legitimately answer 'well, I'm not sure; perhaps, but then perhaps not'. By contrast, when it comes to her *deciding* whether or not to give her pamphlets to anyone beyond seven people, she cannot 'do so, but then perhaps not'. She may be unsure in her talk and thought—*as a matter of discourse*—as to whether seven is enough; but *as a matter of practice*, if she eventually distributes her pamphlets to *this many* people (which may be seven, or more, or less), she must be taken to have accepted that *this many* is indeed enough.[30] Her conclusion might be controversial,

[28] I think the distinction I am drawing here is related, or even analogous, to the distinction drawn by Timothy AO Endicott between the vagueness of some law or formulation and indeterminacy in its application to particular cases: see *Vagueness in Law* (OUP 2000) 9–10.

[29] *CL* 123.

[30] I will say more about this 'must be taken to have accepted' in section VI.2.

and she might have second thoughts. She might even think that there are no 'right' answers here. But regardless of all that there has to be *an* answer: because she ultimately *has to* decide,[31] she must also, by her decision, determine the legal meaning of the Act as it applies to her decision.[32] In action, her doubts must be resolved.

So much for the contrast between regulative acts and regulative texts. Now consider the following idea. It is often thought that regulative acts 'create' or 'bring into existence' or 'force' some 'rules', 'norms', or other 'standards'. If so, we can also explicate the legal meaning of enacting the Veganism Act by saying that it has *created a rule* that it is a crime to publicly promote veganism. Now, whether this is a good explanation depends on what it is supposed to mean. As we have seen in chapter IV, it is not very helpful to say that the enactment of the Act has made it the case that one *ought not to* publicly promote veganism. On the other hand, the formulation is unobjectionable if the point is merely that now that the Act has been passed, it is a crime for anyone to publicly promote veganism. In this sense, we could say that a statement such as 'it is a crime for one to publicly promote veganism' not only attributes a legal meaning to a more or less defined class of acts, but also expresses thereby a *legal rule*.

[31] By contrast, if she read the Veganism Act as a historical source, say, she would be entirely free to shrug off the issue of whether distributing vegan pamphlets to seven people is, according to the Act's linguistic meaning, criminal.

[32] Of course, the purpose and status of this determination is different from a similar determination by, for example, a court. The nature of this difference is examined at length in section VII.2.C.

What kind of rule is it? Clearly, it is not an imperative to do so-and-so; it is not an aspirational and categorical standard of proper conduct, so not a *norm*.[33] It is not in doubt that statutes or other regulative acts are ordinarily enacted with the intention to bring some such norm into existence, but we have seen in chapter IV that this intention is not always fulfilled, and that descriptive legal theory can hardly tell when it is and when not.[34] Nor is it useful to conceive of the rule as an abstract entity standing, as it were, 'in between' the act of enactment and the fact that concrete acts of publicly promoting veganism are now criminal.[35] If anything, the rule *is that latter fact*—the fact that we now have reason to *talk* and *think* about such actions in such a way.[36] Or, more precisely, that we must talk and think about them in this way in order to understand the social practices of the group as they are understood in legal discourse; after all, we may have reason to—or no reason not to—make sense of that practice in some other way, or even in no way at all.[37]

In this sense, talk of legal rules created by regulative acts can easily be recast in terms of legal meaning. In many contexts it might also make for a useful

[33] In the sense fixed in section IV.1.C.

[34] See section IV.2. Kelsen makes a similar point that it is 'irrelevant for the concept of the delict' that 'the legal authority regards this behavior as … undesirable', even if it is also 'self-evident': *PTL* 112.

[35] cf *PRN* 77–80; *AL* 62.

[36] cf *PTL* 7: 'To say that acts, especially legislative acts, "create" or "posit" a norm, is merely a figure of speech for saying that the meaning or the significance [*der Sinn oder die Bedeutung*] of the act or acts that constitute the legislative process, is a norm.' One way to understand what this 'norm' might be is to say that the occurrence of the act whose meaning is a norm serves to establish a 'normative' relation between two acts: see *PTL* 90 ('Since the specific meaning [*Sinn*] of the act … when it is used in a moral and legal law.'). For more general discussion, see Baker and Hacker (n 26) ch 3.

[37] cf *PTL* 218; Kelsen, *Reine Rechtslehre* (n 6) 382n [218n]; Brian H Bix, 'Kelsen, Hart, and Legal Normativity' (2018) 34 Revus 25, 29–32; contrast section VII.1, where I argue that people generally have good reason to take legal discourse seriously.

expository device. In what follows, however, I generally avoid such language: first, because not all legal acts—not even all regulative acts—are naturally made sense of as creating rules; and second, because not all rules of legal discourse are created by regulative acts. A comprehensive theory of legal practice needs to be more than a theory of regulative acts within that practice, and excessive attention to legal rules may obscure that need.

All the same, the discussion brings to the fore a crucial characteristic of legal discourse. It is not only, as I have said already, a practice of making sense of social practice with the use of legal concepts, but a *rule-governed practice* of the same: there are in the practice rules we can use to assess if we are, or would be, *correct* in making sense of the facts in this way and not another. These rules fall into (or are explicable in terms of rules which fall into) the following three types:

> *Criteria for the correct application of legal concepts* which specify, for any given fact and any legal meaning, if the fact has the meaning or not.[38]
>
> *Rules of theoretical legal reasoning* which specify, for any two legal statements, first, if they are consistent; second, if the truth of one may be inferred from the truth of the other; and third, if it may, when.
>
> *Rules of practical legal reasoning* which specify, for any statement that an agent has performed an action, statement of the action's legal meaning, and statement that the agent takes such-and-such practical attitudes—if the truth (or falsity) of the last one follows from the truth (or falsity) of the former two. (This

[38] The rule created by enacting the Veganism Act would fall into this type.

probably makes little to no sense at this stage, but it will be explained in detail in the next chapter.)

Together, they determine for any given set of statements of legal meaning—which I will also call a *structure of legal meaning*[39]—if it is, first, substantively correct; second, internally coherent with those legal statements which are known to be true; and third, externally coherent, that is, consistent with the known facts as to the actions and attitudes of participants in the practice.[40] If the structure is correct, moreover, the rules give us a tool for extending our knowledge of the law and legal practice. They thus mark the shape and limits of our conceptual framework of legal discourse, but also indicate how it may develop.

## 2. LEGAL MEANING AND DESCRIPTIVE JURISPRUDENCE

Theoretical explanation of legal statements, I have said, is the bread and butter of legal discourse, and rarely presents any difficulties in practice. Once we start to philosophise about that practice,[41] however, we face a familiar puzzle. *How* is theoretical explanation founded? *Whence* the rules of legal discourse?

The usual story behind the puzzle is well known. Suppose that Ada asks us '*what does it mean that* what I'm doing is a crime?'. We might start by telling her that the legislature made it so by passing the Veganism Act. If Ada asks further '*what*

[39] cf the definition of 'structure' in Claude Lévi-Strauss, *Structural Anthropology* (Claire Jacobson and Brooke Grundfest Schoepf trs, Basic Books 1963) at 279–80.

[40] The question of what it takes for a structure of legal meaning to be correct is picked up again, and treated at much greater length, in section VII.2.C.

[41] Michael Steven Green, 'Kelsen, Quietism, and the Rule of Recognition' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (OUP 2009) 375.

*does it mean that* the legislature passed the Veganism Act?', our answer will probably refer to some constitutional enactment whereby the legislature can pass statutes by following such-and-such procedures. If, even after getting all that, Ada is still confused about the legal meaning of her own act, we can try the other direction and say 'what you're doing is a crime in that you can be indicted for it; and then you can also be convicted for it; and then you can also be punished for it; in short, you can end up in jail'. If this does not dispel her doubts, we may supply the details: we may cite the precise words of the relevant regulative texts, for instance, or describe more closely the circumstances of their enactment. And if even this is not enough, we might repeat our explanations, or rephrase them to make them easier to understand.

At one point or another, however, we will have nothing left to say other than 'well, this is just how things are'.[42] The chain of theoretical explanation in legal discourse cannot ever be *exhausted*; rather, it must eventually be *cut short*, perhaps because we reach a dead end where we simply have nothing new to say,[43] or perhaps because we grow impatient with our interlocutor and conclude that it serves no point to carry on. These may not be great reasons, but they are the best we can have. All legal theory, at any rate, appears to proceed on the tacit understanding that it cannot explain its subject-matter to someone who has no clue whatsoever as to what law is. Its primary task, to elucidate legal concepts and the relations between

[42] cf *PI* s 217.

[43] As where the explanation becomes circular, eg: that Ada's action is a legal wrong can be explained by saying that doing it makes her liable to suffer a sanction; but the notion of a sanction, if unclear, will in turn be explicable only by reference to the wrong, the very concept it was meant to illuminate.

them, is substantial enough; that it should establish these concepts *ex nihilo* would be too much to expect of it.[44] At the same time, any legal theory may be expected to have some considered answer to the following two questions. First, where—at what point—should we cut the explanation short? Second, why—on what grounds—is it acceptable for us to do so?

My answer to the first question is: wherever appropriate. Unlike Kelsen,[45] Hart, or Raz, I see no reason to suppose that there must be any specific foundational point upon which all law hangs, be it a presupposed basic norm authorising the historically first constitution, or the social practice of a rule of recognition, or the rules of recognition binding on the law-applying organs.[46] If, upon hearing that her act is criminal because the Veganism Act has been enacted, Ada says 'oh, I see', then there is 'no practical need to go farther',[47] and it is perfectly fine—probably best, in fact—to stop there.[48] One may of course retort that 'there is a standing possibility of [going further]',[49] and indeed there is. But then can there

[44] cf *CL* 2–3, 13–14; HLA Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 21–22.

[45] Although here, not for the first or last time in this thesis, I am not quite sure to what extent I am disagreeing with Kelsen and to what extent I am just reinterpreting his ideas. I come back to this question in the text to nn 81–87.

[46] As discussed in section II.2.A. In a sense, perhaps, I do subscribe to the claim that one's involvement in legal discourse and practice always rests on one's conscious performance of a legal act: see section VI.2. But this is really only 'in a sense', and too obscure a claim to make at this stage (if it has to be made at all).

[47] *CL* 107.

[48] cf Wittgenstein (n 12) s 87: 'an explanation serves to remove or to prevent a misunderstanding—one, that is, that would arise if not for the explanation, but not every misunderstanding that I can imagine'; see also Baker and Hacker (n 17) 33.

[49] *CL* 107.

ever be a point at which there is no longer any such possibility?[50] There is nothing wrong in explaining the legal meaning of, say, the social practice of the rule of recognition by reference to the legal meaning of the laws it validates. The rule of recognition might be an 'unauthorised authoriser', but it is no 'unexplainable explainer';[51] in elucidating the law, we may always 'go further', though we might then be going backwards.[52] When we stop, this is not because it is no longer possible to go on, but because there is no longer any need, or no longer any point. Where that is depends on the situation, but it is rarely difficult to locate.[53]

My answer to the second question, the question of what gives us licence to cut our explanations short, is a little more complicated. Let me first clarify what I meant when I said that chains of theoretical explanation cannot ever be 'exhausted'. In what sense could they be 'exhausted' if it were possible? Answers of

[50] cf Wittgenstein (n 12) s 29; Ludwig Wittgenstein, *On Certainty* (GEM Anscombe and GH von Wright eds, GEM Anscombe and Denis Paul trs, Blackwell 1969) ss 95–99, 125.

[51] Certainly, Hart would not want to argue that upon asking 'what does it mean that these and these facts constitute our rule of recognition?', the only possible answer we could get would be 'well, it just means that these facts constitute out rule of recognition'. His book is the best evidence that a more illuminating answer can be given.

[52] To 'go backwards' need not amount to idle reduplication or circularity; sometimes going back to one's previous explanations can really be a step further, as when it provides a synthesis of what one has said so far. In fact, is this not what Hart (Kelsen) is doing at *CL* 105–10 (*PTL* 198–208; *GTLS* 115–17)? Their exposition goes along the following lines. *This* is the law because it is validated by another law, in turn validated by another law, etc—up to the rule of recognition (basic norm) which itself is not validated by anything, because it is a social fact (because it is presupposed as valid). But how do we explain the significance of the rule of recognition (basic norm)? By saying that it makes valid all those laws mentioned before.

[53] Though ostensibly framed in response to Hart, the argument of this paragraph can easily be adapted to take Kelsen's or Raz's conceptions as its target. The truth is however that the argument is not so much directed *against* these conceptions as it is meant to highlight that chains of *explanation*, as opposed to *authorisation*, may in principle end anywhere.

two broad kinds come to mind.[54] Answers of the first kind would fall back on some basic 'principles of practical reasonableness' or indeed of 'reasonableness' more generally.[55] According to answers of this first sort, our chains of explanation terminate at the point where we reach certain 'undemonstrated, indemonstrable, but self-evident' truths about human good, rational nature, and the like.[56] Answers of the second sort, by contrast, fall back on social facts. They hold that at the end of explanation there is an ultimate social fact or practice which, once observed and understood, renders further legal explanation not only unnecessary, but inappropriate.[57] We might note on the side that there is some room for intersection between these two kinds of answers. For if the social fact or practice that an answer of the second sort takes to be the foundation of all legal explanation can be interpreted in more than one way—and in fact, we have good reason to expect that this will always be so[58]—then it seems that the 'right' interpretation has to be determined with the help of some further criteria which may well boil down to some

[54] Readers will appreciate that the discussion to follow is heavily informed by the so-called 'rule-following considerations' of Wittgenstein (n 12) (see esp ss 185–202) as well as the subsequent discussion in general philosophy, and especially in the philosophy of language and mathematics, about what it means for one to follow a rule. The approach eventually argued for in here is inspired by Wittgenstein as interpreted in Baker and Hacker (n 26) chs 3–6; and in John McDowell's 'Wittgenstein on Following a Rule' (1984) 58 Synthese 325, 'Meaning and Intentionality in Wittgenstein's Later Philosophy' (1992) 17 Midwest Studies in Philosophy 40, and 'Non-Cognitivism and Rule-Following' in Steven Holtzman and Christopher Leich (eds), *Wittgenstein: To Follow a Rule* (Routledge 2005); and see also Paul Boghossian, 'The Rule-Following Considerations' (1989) 98 Mind 507.

[55] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011).

[56] Finnis (n 55) 32.

[57] See eg *CL* 107–10.

[58] Mark Greenberg, 'How Facts Make Law' (2004) 10 Legal Theory 157, 178–84; Ronald Dworkin, 'The Model of Rules II' in *Taking Rights Seriously* (Duckworth 1977) 54–58. See also n 67.

'self-evident' principles of reasonableness, logic, and the like. Whether these principles have to be principles of *practical* reasonableness, that is moral or ethical principles,[59] is an interesting question, but not one we need to address here. Suffice it to say that answers of the second kind sometimes rely, albeit silently, on ideas similar to those which form the substance of answers of the first kind.[60]

The reason why we might be tempted to give some such answer—and maintain that chains of theoretical legal explanation *can* be exhausted at some point after all—is that it would allow us to ground our account of law in some facts or truths whose appreciation does not in any way depend on our own participation in the practice of legal discourse. It would allow us, in other words, to talk about the foundations of legal order from the perspective of an outside observer who does not participate in the practice themselves. The attractiveness of being able to do so is clear enough if we accept that the descriptive legal theorist should not 'share the participants' acceptance of the law', but rather only 'describe such acceptance'.[61] Still, we should resist the temptation. There are at least two reasons why, and both have to do with the danger of excluding from our view practices and understandings which are at odds with the principles or practices we suppose to be foundational of legal discourse. In other words, if we give in to the temptation, we risk ending up with an incomplete picture of legal practice.

[59] As argued by both Greenberg and Dworkin (n 58).

[60] cf the contrast between 'essentialism' and 'conventionalism' in George Pavlakos, *Our Knowledge of the Law: Objectivity and Practice in Legal Theory* (Hart Publishing 2007): on essentialism, see esp ch 6, 216–17; on conventionalism, see esp ch 5, 213–16.

[61] *CL* 242. What Hart understands as 'acceptance' here is 'accepting the law as providing guides to … conduct and standards of criticism', so not exactly what I am talking about. But the line is fine.

The first reason is that if we proceed on the basis of some supposedly self-evident, underived, axiomatic principles of practical or other reasonableness, we cannot even begin to make sense of those who fall foul of these principles. This is not problematic because there is a sense in which everyone is right. There is not; some people are very clearly wrong; I am not advocating any ethical or even epistemological relativism. Still, if we are serious about *describing* legal practice, we must develop for ourselves a conceptual toolkit which allows us to record and give space even to those who hold the legal equivalent of the view that two plus two is five.[62] We may, to be sure, be giving them that space in describing their mistakes as such;[63] even then, however, we must be equipped to see them as engaged in a good faith attempt to make good legal sense of their own and others' social practices.[64] And we are hardly equipped to do that if we take them to be transgressing against some self-evident basic principles defining what it is to be a reasonable creature at all.[65]

[62] In characterising the basic principles of practical rationality, Finnis likens them to the principles of mathematics: Finnis (n 55) 24; cf Baker and Hacker (n 26) 216–17. For an argument that such 'platonism' is not a viable approach even in the philosophy of mathematics, see McDowell, 'Wittgenstein on Following a Rule' (n 54); 'Non-Cognitivism and Rule-Following' (n 54). I would only add that controversy is much more common in legal than in mathematical discourse.

[63] So long as possible: see n 70.

[64] For instance, I have treated the Polish government's view on the Constitutional Tribunal's judgment as such a good faith attempt, even though I have some doubts as to whether it is one: see n 40 in chapter II and text.

[65] The role of these principles is, conversely, to provide a presumptive background against which we exclude certain interpretations of what people around us are doing, rather than exclude these people from among rational creatures: see Donald Davidson, 'Incoherence and Irrationality' in *Problems of Rationality* (OUP 2004) 195–98 and n 6 in chapter VI.

So what are we to do instead? Well, we might slide into a scepticism of sorts and come to think that the only measure—if we can even call it that—of what is right or wrong in legal discourse is what participants in legal discourse accept as such in fact. Especially when we recall the point that any legal practice may in principle be interpreted in different ways, that there is no unique set of rules of legal discourse that *have to* be accepted in order to make coherent legal sense of any given social practice,[66] we might be driven to deny that there are any such rules at all. We might maintain that the practice of legal discourse may go on in this or that way, and that this is all there is to it; that there is no standard by which it *should* go on in this and not that way.[67] And yet this approach is just as problematic, or even more. For this sort of scepticism makes it impossible to frame legal discourse as, after all, a rule-governed practice; and as we have seen in the previous section, any account of legal discourse should take the task of framing it in this way seriously.[68] Here then is the second reason to resist the temptation.

[66] See n 58.

[67] There is an obvious resemblance between this scepticism and the rule-scepticism criticised by Hart: see *CL* 83–91, criticising Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard L Rev 457; and *CL* 136–47, criticising KN Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana 1951) 12–15; but see also 8–10; and Brian Leiter's argument that this 'conceptual' rule-scepticism cannot fairly be attributed to these authors: 'Legal Realism and Legal Positivism Reconsidered' in *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007). More broadly, see eg Saul A Kripke, *Wittgenstein on Rules and Private Language* (Harvard University Press 1982); Crispin Wright, 'Rule-Following, Objectivity and the Theory of Meaning' in Steven Holtzman and Christopher Leich (eds), *Wittgenstein: To Follow a Rule* (Routledge 2005).

[68] cf the notion of 'thick description', developed by Clifford Geertz in 'Thick Description: Toward an Interpretive Theory of Culture' in *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) from Gilbert Ryle, 'Thinking and Reflecting' and 'The Thinking of Thoughts: What is "Le Penseur" Doing?', both in *Collected Papers, Volume 2: Collected Essays 1929–1968* (Routledge 2009).

The broader problem may be summarised as follows. If we suppose that there is a way in which chains of theoretical explanation in legal discourse can be exhausted, we must suppose that there is always a point at which we are eventually brought to say 'well, this is so-and-so because of *that*; now surely you *must* see what I mean'—and that we are then right to say so. But the truth is that there is not always such a point; sometimes we are forced to say 'you *should* now see what I mean, but you *don't*, and I there's nothing I can do about it'. To think that there is an external foundation for the practice of legal discourse is to make the assumption that the point at which we reach that foundation marks the point at which our interlocutor *has to* and so *will* accept our explanations. When there is no such point, however, the assumption drives us to conclude that our interlocutor is unreasonable, or alternatively, that the enterprise as such is futile, that all our explanations are up in the air. Neither option is attractive.

If so, we might as well question the assumption. There is no external foundation to which our practice of legal discourse could be 'responsible'.[69] Instead of thinking that there is always a point at which our interlocutor *has to* accept our explanations, we should say that there is often—though not always—a point at which our interlocutor *does* in fact accept them. And that is that. When there is such a point, it marks the foundation of a practice of legal discourse that we share with our interlocutor. When there is none, there is no such foundation, because there is no such practice that we share. We might still share with our interlocutor a broader practice of making legal sense of social practice in *some* way, and yet conclude that

[69] Baker and Hacker (n 26) 146; cf Nicos Stavropoulos, *Objectivity in Law* (OUP 1996) 179–86.

their ways differ from our own; or it may be that they do not use legal concepts at all.[70] If they do not use legal concepts at all, we may legitimately refuse to pay them any attention when doing legal theory (perhaps with the exception of when they do not use legal concepts at all not because they cannot understand them, but because they claim to have reason not to use them[71]). If they just use legal concepts differently, we may judge that they use them mistakenly and describe their mistake. Or we may try to imagine what it would be like to use legal concepts like them, and we might then discover that their practice of legal discourse, too, has a point and logic to it which give us a different measure of correctness. We will later see that both reactions can sometimes be warranted to cast light on and deal with certain problems.[72]

I can now try to formulate my answer to the second question. We recall that it was the question of what justification we have, if any, to cut short our theoretical explanations in legal discourse. The answer could go along the following lines. We are justified in doing that because *of what our practice just is*: because we have reached certain rules of legal discourse which define our practice, and which our interlocutor either accepts (and then shares a practice of legal discourse with us) or

[70] This may sometimes be gathered from the absurdity of their apparent views. Think of how children sometimes use 'adult' words. When I was a child, a friend once glued stamped paper scraps all over my Scrabble box and, when asked to explain, solemnly replied he was 'making fakes'. I had no idea what he was talking about, and some time later I realised that *neither did he*; he might as well have said that he was legislating. Ultimately, the criterion of what counts as using legal concepts is not one's use of some particular words, but rather our ability to understand them as actually expressing a view *on the law* which agrees or disagrees with our own. Their use of certain words may help us in that, but it is not decisive either way. See also nn 65–66 in chapter III and text.

[71] See section III.2.A.

[72] In section VII.2.C.

rejects (and then participates in an altogether different practice of legal discourse, if they participate in one at all). These rules of legal discourse *we just accept* or, in other words, *presuppose*. Why do we presuppose them? Because we have reason to make sense of social reality in legal terms, and it is necessary that we accept some such rules if we are to do that. What reason do we have to do that? Well, there can be different good answers to this question.[73] But as far as the project of this thesis goes, the answer is that we want to understand how legal discourse can inform, structure, and support a continuous practice of law.

The descriptive theorist, in short, must step into the shoes of an insider to the practice of legal discourse. Perhaps paradoxically, this is necessary if they are to give a descriptive account of legal practice which is at once neutral (and so not exclusionary of some participants) and substantial (and so not sceptical). There are, however, three important qualifications to this answer which mark out the proper limit of the descriptive theorist's involvement in legal discourse. In fact, they may well be more important than the answer itself.

First, reflection on the necessity to accept some rules of legal discourse as given should push the descriptive theorist to reflect more generally on their role as a theorist, and on the character of the claims they make. It is true that, as they try to explain legal discourse, they must make use of their own understanding of it. (I have myself done so, for instance, when I branded Ada's acts as criminal, or when I interpreted some imagined course of action as enacting the Veganism Act.) Yet it

[73] I discuss the reasons that participants in legal practice have to make sense of their social reality in legal terms in section VII.1. Their participation in legal discourse is grounded not so much in a presupposition—as is the theorist's participation—but in action: see section VI.2; cf Wittgenstein, *On Certainty* (n 50) s 110, 204, and numerous other sections where the point is reiterated.

is also true that this understanding may attract controversy: not in the sense of being genuinely open to doubt—sometimes it will be, sometimes not—or even widely contested, but merely in that it may, as a matter of fact, be controverted by some participants in legal practice. And in that case, what the theorist themselves happens to think about the legal meaning of this or that fact, or about the truth and falsity of such or other legal statement, is in the end of only secondary interest.

Why? Because the descriptive legal theorist engages in legal discourse for purposes very different from those of an ordinary participant or a doctrinal scholar.[74] In particular, the theorist need not be so concerned about getting it right or being consistent. The understanding of legal practice they assume and develop serves only to reflect, through agreement or disagreement, the understandings of those who actually take part in that practice. While necessary for the enterprise, therefore, it is in itself no substantial part of what descriptive jurisprudence has to offer. It is the remit of doctrine to argue how we should use legal concepts and why; legal theory has neither any authority nor any responsibility when it comes to these questions. Rather, it seeks to illuminate—in part on its own example—what these questions and arguments are all about; what it is like to attribute legal meaning to social facts; what it is like to agree or disagree about it; and so on. The theorist's own capacity to understand and apply the categories of legal discourse to social facts serves only as an explanatory device, showcasing how that very same capacity plays out in others' lives. Their impartiality consists, therefore, not in standing outside the

[74] cf section VII.2.C.

practice, but in a standing awareness that their engagement with it is, though necessary, also necessarily tentative.[75]

I emphasise again: none of this should be taken to mean that the proper use of legal concepts is a mere matter of opinion, or that descriptive jurisprudence should embrace some form of relativism. No doubt, *de legibus est disputandum*: it would be a serious error to think that 'every' view on the law is 'right', or that 'really', there is 'no such thing' as correctness in legal discourse.[76] My point is quite different: it is that no matter how glaringly right the theorist might be, and how blatantly wrong those actually participating in legal practice, the foremost task of the former is not to correct the latter, but to describe them and their understanding of the practice of which they are part. *That* (as opposed to *how*, or *why*) some of them are mistaken is therefore, though true, of limited consequence. It is certainly no licence to ignore them.

The second qualification has to do with what it actually is that is presupposed. Rules of legal discourse, I have said, are not *norms*. They do not require that any action be in fact done, or any state of affairs sought; they only specify a certain conceptual framework, a peculiar 'scheme of interpretation'[77] in which to make sense of social practice. Of course, our preferred understanding of legal concepts is commonly motivated by our pursuits and attitudes, by a conviction that it would be somehow *better* if this understanding were to prevail and not another.

[75] cf the conception of philosophy expressed in Wittgenstein (n 12) ss 124, 130–32.

[76] cf Bernard Williams, *Morality: An Introduction to Ethics* (CUP 1993) 17. See also Wittgenstein (n 12) ss 202, 258 for the distinction between following a rule and thinking that one is following a rule.

[77] *PTL* 3–4.

We sometimes spend enormous amounts of time and effort on disputes about whether an act is, say, a crime or a not; and if we cannot reach an agreement, we sometimes prefer not sharing a practice of legal discourse with someone to giving up our own understandings. In many cases, moreover, this is partly due to certain background convictions we have as to what people are likely to do about the law being this or that: that, for instance, people tend to avoid criminal acts, or that criminal acts tend to be punished. But there is no reason to think that these pursuits and attitudes, or these background assumptions, are part and parcel of the understanding they, respectively, motivate and inform.[78] There is accordingly no reason to think that they, too, must be presupposed by descriptive jurisprudence (though they may well be taken note of so far as relevant to the task of describing legal discourse and practice).

Finally, although descriptive legal theory must look at legal practice from within the *practice of legal discourse*, it need *not* look from within *legal practice* itself. The descriptive theorist must consider law from the perspective of someone who uses the conceptual framework of legal discourse to make sense of social facts, but it does not follow that they must also assume the point of view of someone in the business of actually deciding, in the light of some acts' legal meaning, whether or not these acts are to be done. In particular, the theorist need not accept as part of their theory any practical viewpoints necessary to substantiate such decisions. Together with the previous one, this third point marks off the view I am proposing

[78] 'You are speeding!'—'I know, so what?'—'Well, you *ought not to* be.'—'Why not?' There is no disagreement or misunderstanding as to the legal meaning of the driver's actions, but only a misunderstanding on the level of practical attitudes towards speeding, as well as assumptions made about these attitudes.

from Kelsen and Raz's 'positivism' on the one side,[79] and Dworkin's robustly normative 'interpretivism' on the other.[80] Unlike them, I do not propose that legal theory must necessarily presume or construct or develop any conception of what ought to be *done* in the face of the social practice of law, but only that it must accept some guidelines for *making sense of* that social practice in terms characteristic of legal discourse. The robe that the descriptive theorist must be ready to don belongs not to a judge, but—at most—to a jurist.

The solution I am proposing to the initial puzzle is thus that legal theory, descriptive jurisprudence included, must necessarily presuppose some rules of legal discourse or other, though not as much for the purpose of establishing the truth or falsity of particular legal statements as in order to elucidate their meaning and significance for legal practice. In doing so, the legal theorist must demonstrate a readiness and capacity to take part in legal discourse and actively make legal sense of some real or imaginary social facts. They need not, however—and if their ambitions are descriptive, should not—share in any particular practical attitude towards legal practice. They need not, that is, presume anything as to what anyone ought to do in the face of that practice.

Despite differences, I take this solution to be true to the spirit of Kelsen's legal epistemology, albeit not to its letter. Together with Kelsen, I take it that legal theory need not 'prescribe that one ought to obey the commands of' lawmakers, and may legitimately remain 'a merely cognitive'—or descriptive—'discipline'.[81]

[79] As discussed at length in chapter IV.

[80] Set out in detail in Dworkin (n 4); cf Ronald Dworkin, 'Hard Cases' in *Taking Rights Seriously* (Duckworth 1977).

[81] *PTL* 204.

Like Kelsen, I also think that it is one of the tasks of legal theory to '[make] conscious what' participants in legal discourse 'do … when they understand' social facts 'not as causally determined, but instead interpret' them as legally meaningful;[82] and I subscribe fully to the notion that 'this interpretation is a cognitive function, not a function of the will'.[83] Unlike him, I do not think that jurisprudence should only '[make] conscious what *legal scientists* do', nor do I agree that the only interpretation of the social material that should interest the legal theorist is the one whereby 'the constitution-creating act, and the … acts performed in accordance with the constitution are interpreted … as [creating] objectively valid *norms*, that is, as [setting up] a *normative* legal order'.[84] So I agree that legal theory must 'presuppose' a certain 'scheme of interpretation' used by those whose practice it describes, but not that this scheme is a single 'basic' *norm*. Or, to put the point another way, I broadly accept Kelsen's 'transcendental' approach to legal epistemology[85] but with the reservation that if our theoretical project is only to give a description of law, this

[82] *PTL* 204–05.

[83] *PTL* 204n.

[84] *PTL* 204–05 (italics added).

[85] *PTL* 201–05. In relation to Wittgenstein's rule-following considerations (see n 54), see also McDowell, 'Wittgenstein on Following a Rule' (n 54); Michael Luntley, 'The Transcendental Grounds of Meaning and the Place of Silence' in Klaus Puhl (ed), *Meaning Scepticism* (De Gruyter 1991); Paul Boghossian, 'Blind Rule-Following' in Annalisa Coliva (ed), *Mind, Meaning, and Knowledge: Themes from the Philosophy of Crispin Wright* (OUP 2012).

transcendental method only requires us to accept some[86] rules of legal discourse, not a binding norm of any kind.[87]

Whether or not it is Kelsenian, though, I think the solution is a good one, and at any rate the best there can be. Invariably, there is a background of understanding the legal theorist will share with their addressees, and these background conceptions which are safely left unexplained effectively mark the theoretical foundations of the legal theory in question, the 'bedrock' on which the 'spade is turned'.[88] Roughly, what all this comes down to is that if legal theory is to have a point, both the theorist and their addressees must already have some rudimentary idea of what they are talking about. When they do, the initial puzzle turns out to be largely illusory. When they do not, the illusion is that they are doing legal theory.

[86] Stanley L Paulson argues that Kelsen's transcendental argument for the basic norm fails because it cannot establish the impossibility of other ways to account for the normativity of law: see Paulson (n 24) 71–77; 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 OJLS 311; 'The Great Puzzle: Kelsen's Basic Norm' in Luís Duarte d'Almeida, John Gardner, and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013). In the latter two papers, Paulson concludes that Kelsen's transcendental argument has to be read as aimed at analysing and explaining our legal interpretations of reality more so than at establishing their validity. I think this is right and reflects a concern analogous to that behind my first qualification above.

[87] Although whenever I read Kelsen, I cannot help the impression that he might not disagree with me here. This difficulty stems, I think, from the tension between, on the one hand, Kelsen's apparent conflation of the validity of a norm and its binding force, and on the other hand, his commitment to 'the purely cognitive enterprise of methodological positivism': Riccardo Guastini, 'The Basic Norm Revisited' in Luís Duarte d'Almeida, John Gardner, and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 68. For an argument that this conflation between validity and bindingness in Kelsen is in fact only apparent, see Paulson (n 24) 85–92.

[88] Wittgenstein (n 12) s 217. See also Baker and Hacker (n 26) 156; McDowell, 'Wittgenstein on Following a Rule' (n 54) 348–49.

## 3. SUMMARY

This rounds off my initial characterisation of legal discourse. Because I have made quite a few claims along the way and introduced quite a few expressions, and because they will all play an important role in the following two chapters, it might be useful to offer a short synthetic summary of the chapter before we go on.

(1) *Legal discourse*, as opposed to legal practice itself, is a rule-governed practice of making sense of social practice in legal terms—of construing social practice *as* legal practice.

(2) Rules governing legal discourse include *criteria for the correct application of legal concepts*, as well as *rules of theoretical* and *practical legal reasoning*. Some such rules must be presupposed by any substantial theory of law: they then mark the theoretical foundations of that theory of law.

(3) It is characteristic of legal discourse to view facts—and especially social facts—as legally meaningful, that is, as possessing *legal meaning*. The basic form of a legal statement made by participants in legal discourse is thus 'the fact that *p* amounts (in law) to *L*', where *L* designates a *legal concept*. A set of such *statements of legal meaning*, attributing legal meaning to a set of facts, can be called a *structure of legal meaning*.

(4) When *p* in 'the fact that *p* amounts (in law) to *L*' describes some agent's action or omission, the statement is said to attribute legal meaning to an act, accordingly called a *legal act*. Legal practice is made up of legal acts.

(5) The legal meaning of an act can be explained either by reference to the legal meaning of other facts, or by reference to the practical attitudes of whoever performs it. The former mode of explanation is *internal* to legal discourse and can also be called *theoretical*; the latter mode, by contrast, can be characterised as *external* or *practical*.

This chapter has focused on the theoretical mode of explanation in legal discourse. In the next, I turn to the practical mode to show how legal discourse ties into the practice of actually performing and reacting to legal acts, and how it can be practically—or normatively—significant.

# VI. Legal Practice (Take Two)

In the previous chapter I examined at length the principal premise of my account of legal practice, namely that legal practice consists of legally meaningful acts. I have addressed the questions of how facts can have legal meaning;[1] how that legal meaning is explained within the practice of legal discourse; and finally, how it is that descriptive legal theory, too, can speak in legal terms without giving up neutrality. This has laid the ground for the question animating this chapter. How—and in what sense—can the legal meaning of an act be practically significant? What role does legal discourse play in practical deliberation?

I hope to achieve two things. First, I wish to explain how legal statements can be descriptive—as opposed to deontic—and at the same time practically relevant. Second, I want to examine more critically the distinction I have made in the previous chapter between legal discourse and legal practice and throw some light on how the two practices, though not identical, are inextricably bound up with each other. As I discuss these issues, I consider three roles that statements of legal meaning can play in our practical lives: that of allowing us to get some orientation in the projects and attitudes of those around us; that of limiting the range

[1] Though I return to this question for a moment in section VI.1.D.

of our options and thus guiding our practical deliberation (and, indirectly, also our action); and that of explaining our own and others' decisions. Eventually, the discussion will pave the way for a renewed consideration of legal continuity as a sort of harmony between legal discourse and practice: a harmony which, on the one hand, allows us to make coherent sense of what is going on in our life under law, and on the other, ensures that this life can carry on in an orderly, intelligible, and predictable manner. I take a closer look on how that harmony comes about in chapter VII.

## 1. THE PRACTICAL LOGIC OF LEGAL MEANING

I have said in the previous chapter that the most basic of all legal statements are statements of legal meaning:

'*x*'s ϕ-ing amounts (in law) to *L*.'

Such statements, I have also said, are descriptive: if they are understood to assert a standard of any sort, that standard is at most a rule of talk and thought, not a norm of behaviour.[2] And yet their significance is ultimately practical: they not only feature in much practical argument and deliberation but occupy there a central spot. How can that be?

In one obvious sense, statements of legal meaning may be directly involved in some familiar schemes of practical reasoning. Recall Clara, Ada's law-abiding compatriot.[3] If she considered, for example, whether she should distribute vegan pamphlets or not, she might reason as follows:

[2] See section V.1.C, esp n 33.

[3] See section IV.3.C.

'I ought not to commit crimes.

For me to distribute vegan pamphlets is to commit a crime.

Therefore, I ought not to distribute vegan pamphlets.'

Where the major premise is a deontic statement expressing her commitment to obeying the criminal law, the minor premise is a legal statement that a potential act of hers would have a particular legal meaning, and the conclusion is a deontic statement to the effect that she ought not to perform that act. In this way, statements about legal meaning may play a part in syllogistic schemata leading from deontic statements that express the content of one's practical attitudes[4] to conclusions (whether correct or not) as to what one has reason to do.

Interesting as such reasoning may be, I will not discuss it here: most of all because I want to keep away from deontic premises and particular normative viewpoints, but also because the logical validity of such inferences has not escaped controversy.[5] I focus instead on the logical relations that may obtain between statements *that an agent performs some action*:

'*x* ϕ-s.'

statements *that the agent's action has some legal meaning*:

'*x*'s ϕ-ing amounts (in law) to *L*.'

and, finally, statements *that the agent takes some practical attitude*:

'*x* takes the practical attitude A.'

[4] For what I understand by 'the content of a practical attitude', see section VI.1.D.

[5] See eg the so-called 'Jørgensen's dilemma': Jörgen Jörgensen, 'Imperatives and Logic' (1938) 7 Erkenntnis 288. Whether or not there is a dilemma here largely depends on whether we accept the notion that deontic statements are not truth-apt. For my part I do not, but the discussion of that view's merits and demerits is precisely the sort of discussion I want to avoid here.

when made against the background of the following *rationality condition*:

> in ϕ-ing, *x* acts in such a way that *x* might have acted in the same way if *x* were a fully rational agent with all the relevant knowledge (which includes the knowledge that *x*'s ϕ-ing amounts (in law) to *L*, as well as anything else that can be reasonably expected of an agent in *x*'s position; but not necessarily the knowledge that *x*'s ϕ-ing is also an instance of some other ϕ-ing, or any knowledge whatever as to what anyone actually ought to do or not);

or, to use a shorter formulation intended to mean the same thing:

> in ϕ-ing, and thereby performing an act which amounts (in law) to *L*, *x* acts in a manner fitting for a rational and informed agent.

I am interested in two sorts of reasoning we may pursue with such statements. The first is when we infer that *x* takes the practical attitude A, or that *x* does not take that attitude, from the fact that *x* ϕ-s and *x*'s ϕ-ing counts in law as *L*. The second is when we infer that *x* does not ϕ (or rather *must* not ϕ—more on that in a minute) from the fact that *x*'s ϕ-ing amounts (or would amount) to *L*, and also from either the fact that *x* takes the practical attitude A or the fact that that *x* does not take that attitude.[6] Let me label these two generalised schemes of practical legal

[6] The reader might observe that both the overarching method of presuming, so far as possible, that agents are rational and informed and the account of how practical meaning connects such an agent's actions with their practical attitudes, bear some similarity to Donald Davidson's accounts of the interpretation of linguistic utterances presented in 'Radical Interpretation', 'Belief and the Basis of Meaning', and 'Thought and Talk', all in *Inquiries into Truth and Interpretation* (OUP 2001); see esp the last of these essays at 162. Davidson's: holding a sentence true, the meaning of the sentence, and beliefs; are analogous,

reasoning as, respectively, *orientational* and *decisional* reasoning, and discuss them in turn.[7]

*A. Orientational Reasoning and Two Qualifications*

I start with an example of orientational reasoning—reasoning I:

I-P1: For Clara to distribute vegan pamphlets is to commit a crime.

I-P2: Clara distributes vegan pamphlets.

I-C: Therefore, Clara is not committed to obeying the law.

By following reasoning I and others like it, we can infer, from what Clara does and from the legal meaning of her action, what her practical attitudes and projects are. We can thus *orient ourselves* in what she is up to and what she is after, and even—if we manage to reach some recognisable picture of these matters—in what sort of person she is.

However sensible at first blush, reasoning I is defeasible: there are two broad categories of situations where the conclusion does not follow from the premises. The first is where Clara takes some other practical attitude, and that fact explains how she might commit a crime *in spite of* her ongoing commitment to obey the law. For example: her religion requires its followers to actively promote veganism through any possible means; or she is more committed to free speech than she is to the law, and decides to join Ada's protest against the Veganism Act;[8] or she

respectively, to: performing a legally meaningful action, the legal meaning of that action, and practical attitudes.

[7] In the final passages of section V.1.C, I define rules of practical reasoning as specifying only what counts as a valid scheme of orientational reasoning. It will emerge very shortly that this also serves to determine the validity of any decisional reasoning.

[8] See text to n 107 in chapter IV.

had promised her vegan friend to distribute some pamphlets way before the Act was passed, and now—a woman of her word—she has to honour her promise.

Depending on how we choose to individuate practical attitudes, we will describe such situations by saying either that the other attitude *outweighs* Clara's commitment to obey the law or that it *qualifies* that commitment. But only on the former description is the conclusion of reasoning I really defeated. On the latter, the point is rather that the conclusion has to be made more specific, along the lines of 'Clara is not committed to obeying the law *insofar as* she also takes such-and-such practical attitudes and they conflict with her commitment to obeying the law'. Even on the former description—so even if we assume that the other practical attitude genuinely outweighs Clara's commitment to obeying the law rather than qualifies it—not every practical attitude of Clara's that would explain *why* she breaks the law will also explain *how* she can break it *in spite of* her commitment to obeying it. If, for example, she distributes the pamphlets merely because she feels like it, merely because she happens to have formed an intention to do so, then we cannot rely on that feeling or intention of hers to explain how she can nonetheless stand by her commitment to obeying the law. If anything can be an indication that she does not hold the commitment after all, her readiness to act on an inconsistent wish or whim is surely one such thing; not every practical attitude is a plausible candidate for outweighing a commitment to obeying the law. So the defeasibility of reasoning I in situations of this first sort does not make it useless or its conclusion empty—for it still forces one, if one wishes to escape the conclusion, to point to some practical attitude that is not only *in fact taken* by Clara, but is also *of the right sort*; and if one cannot come up with any such attitude, the conclusion is (subject to what I will say in a moment about the rationality condition) inescapable.

This last point is the reason why, without denying the importance of this first category of exceptions, I generally leave it in the background in what follows. Maybe I could explicitly add some '*unless*…' clause to the conclusion of reasoning I, or another premise like

> I-P3: Clara does not take any practical attitude which explains why she distributes vegan pamphlets and is a plausible candidate for outweighing Clara's commitment to obey the law.

Or perhaps I could reframe the conclusion of reasoning I to say that Clara is not committed to obeying the law *or* holds her commitment to be outweighed by such-and-such practical attitudes she also takes (though that would, it seems to me, ultimately reduce to the view that those other practical attitudes qualify rather than outweigh Clara's commitment—on which view, we have seen, the conclusion of reasoning I is just too broad, not defeated). Either way, the complication involved in making any such explicit provision for conflicting practical attitudes would exceed the theoretical gains: for reasons just discussed, such a provision would have relatively narrow effect, and in any case, it would not play too substantial a role in the discussion to follow.

This is in contrast with the second category of situations where reasoning I fails. These are situations where the rationality condition is not made out, so where Clara's capacity to make a choice that is informed and rational—in the relatively thin sense of being based on some intelligible reasons, whether or not these reasons are themselves sound[9]—and to act on that choice, is somehow

[9] I understand this notion of rational agency to be closely aligned with that proposed in TM Scanlon, *Being Realistic about Reasons* (OUP 2014) ch 3: see esp 54–56, 64; and see also his *What We Owe to Each Other* (Harvard University Press 1998) 22–30.

impaired: either because she lacks some relevant knowledge and understanding or because she loses meaningful control over her own actions. For example: Clara is unaware of the fact that the Veganism Act has been enacted because she is ignorant of some relevant facts or their significance; or she thinks, mistakenly, that her act does not count as promoting veganism for the purposes of the Veganism Act, or that the Act has been struck down by the constitutional court; or she is overpowered and unable to act on her previous intention not to distribute vegan pamphlets—she might have been blackmailed, she might have got drunk.

Again, most of the time I just assume that the relevant rationality condition *is* satisfied and omit explicit reference to it. I do so not just for convenience, but also because the assumption is necessary if we are even to begin interpreting the actions of those around us as their individual or collective *practices*[10]—we must generally presume that the conditions are such that these actions are *explicable in the ordinary way*, as flowing from conscious decisions of rational agents.[11] Even so—and here is the contrast with the first category—we will need to pay considerable attention to some situations where we are driven to lift the presumption. In such situations, the agent's actions are not *inexplicable* or *unintelligible*, but they are inexplicable and unintelligible *as the agent's own*—so that we are left either with some

[10] cf Scott J Shapiro, 'The Bad Man and the Internal Point of View' in Steven J Burton (ed), *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr* (CUP 2000) 208–09, where he refers to Davidson (n 6).

[11] cf GEM Anscombe, *Intention* (2nd edn, Harvard University Press 2000) ss 6–18. The condition of rational and informed agency appears more exacting than a condition of intentional agency. An action performed under duress could be intentional but may still compromise one's capacity to act on reasons—and one's own reasons, we might add, at least in the sense that we would let the constrained agent disown the action. Of course, how much the agent may disown will depend on the sort of action involved and, maybe more importantly, on the sort of agent. What a child can get away with numerous times, a politician may not get away with even once.

*extraordinary* explanation for why they happened or with the need to give one.[12] At that point, when we are brought to question our normal assumption that the rationality condition is satisfied, we reach the limits of intelligible practices in general, and intelligible legal practices in particular. I will have more to say about why this is important towards the end of this chapter and, at more length, in chapter VII.

These two qualifications are not just to orientational reasoning—they apply to any scheme of practical legal reasoning considered in this chapter—but orientational reasoning should make for a relatively self-explanatory illustration of the sort of logical relationship I am interested in and of the general conditions under which it obtains. Still, it is only the starting point. Far more interesting, though also more elusive, is decisional reasoning.

*B. Decisional Reasoning and Practical Necessity*

Let us suppose that the conclusion of reasoning I is false, so that

II-P1: Clara is committed to obeying the law.

If reasoning I is valid, then by contraposition it follows from II-P1 (not-I-C) that

> For Clara to distribute vegan pamphlets is *not* to commit a crime; or Clara does *not* distribute vegan pamphlets. (not-I-P1 or not-I-P2)

Suppose further that I-P1 is true:

II-P2: For Clara to distribute vegan pamphlets is to commit a crime.

It follows that

[12] cf Charles Taylor, *The Explanation of Behaviour* (Routledge 2021) 21–22.

II-C: Clara does not distribute vegan pamphlets.

Reasoning II is then a valid decisional reasoning in legal discourse derivable from the validity of the corresponding orientational reasoning, reasoning I. This much is easy; more difficult is the question of how reasoning II should be interpreted. After all, how can it 'follow' that Clara 'does not' distribute vegan pamphlets merely because it would be a crime for her to do so and she does not want to commit one? Indeed, what if she does?

Well, if she does, then there must be something wrong with our assumptions. In particular, we may question the extent, strength, and sincerity of her commitment; or her capacity to make and act on a rational and informed choice.[13] As we have seen in the previous section, there is a narrow but substantial range of explanations that might be given of how she might have distributed the pamphlets in spite of her commitment; these range from pointing to some other practical attitude of hers that might have plausibly outweighed that commitment, through identifying a source of Clara's action other than an exercise of rational and informed agency on her part, to the bare assertion that she has simply acted irrationally—as people sometimes do. In any event, there has to be *something*, because if distributing pamphlets really is a criminal offence, then the three statements:

'Clara distributes vegan pamphlets.'

'Clara is committed to obeying the law.'

[13] A third option is to reinterpret the conclusion as not about whether or not Clara does the action, but about what that action is: as something like 'what Clara does is not distributing vegan pamphlets'. To simplify matters, however, I shall assume throughout that this is never a plausible option; so—in the instant case—that what Clara does (or might do) undoubtedly *does* (or *would*) constitute distributing vegan pamphlets.

> 'In distributing vegan pamphlets, and thereby committing a crime, Clara acts in a manner fitting for a rational and informed agent.'

cannot just all be true. Clara cannot simply decide to distribute vegan pamphlets and yet hold on to her commitment. Why? Because it is criminal to distribute vegan pamphlets, so no longer rationally open to a rational and informed agent committed to obeying the law. The fact that the action has the legal meaning it has introduces conditions on its rational performance.

We may even, cautiously, put the point in stronger terms. A statement ascribing some legal meaning to some action, though purely descriptive, establishes a *practical impossibility* limiting the field of one's practical deliberation: for it entails that it is rationally impossible to *both* perform the action *and* hold on to certain practical attitudes with which the action, given its meaning, is incompatible.[14] The flipside is that it also establishes a *practical necessity* that one make a choice between the action and those incompatible attitudes.[15]

A very brief digression may help us make a first approximation of the nature of that practical necessity. Ancient Greek had two words which could be translated as 'necessity': *deon* and *ananke*. The first word, familiar from the term 'deontic', referred to 'that which is binding, needful, right';[16] the second,

[14] We could borrow a useful phrase from Matthew H Kramer, *The Quality of Freedom* (OUP 2003) and say that by ascribing legal meaning to actions, we narrow the range of 'conjunctively exercisable' options available to the agent.

[15] cf Bernard Williams, 'Practical Necessity' in *Moral Luck: Philosophical Papers 1973–1980* (CUP 1981), esp 129–31.

[16] 'δέον' in Henry George Liddell and Robert Scott, *A Greek-English Lexicon* (Henry Stuart Jones and Roderick McKenzie eds, rev edn, OUP 1940).

recognisable as the name of the mythological deity,[17] meant 'force, constraint, necessity', and also 'necessity in the philosophical sense' or 'logical necessity'.[18] The practical necessity asserted in a statement of legal meaning is related to the second sense, not the first: the relation in which it consists is not *deontic*, so to speak, but *anankastic*.[19] So when we say that for Clara to distribute vegan pamphlets is criminal, we are saying that she *cannot* distribute them as a rational and informed agent committed to obeying the law—that we are unable to see her this way if she does—but *not* that she *ought not to* distribute vegan pamphlets, or even that she *ought not to* distribute vegan pamphlets *if she is committed to obeying the law*.[20] It may very well be preferable that Clara give up or qualify her commitment to obeying the law, or even act irrationally in this instance—and while it is probably impossible for her to *choose* to act irrationally, we might then be justified in lying to her about the meaning of her action, say, or in not correcting her error.

That statements of legal meaning can establish such anankastic relations is key to understanding how they can be practically relevant in spite of their

[17] Whose Roman counterpart, by the way, is called Necessitas.

[18] 'ἀνάγκη' in Henry George Liddell and Robert Scott, *A Greek-English Lexicon* (Henry Stuart Jones and Roderick McKenzie eds, rev edn, OUP 1940).

[19] The latter term is Georg Henrik von Wright's: *Norm and Action: A Logical Enquiry* (Routledge & Kegan Paul 1963) 10.

[20] Granted, we often express the thought by saying things like 'well, if so you're so law-abiding, then you *ought not to* have done that'. But the 'ought' here is what Georg Henrik von Wright calls a 'technical Ought', as contrasted with 'the Ought of genuine norms': 'Is and Ought' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 377; cf von Wright (n 19) 101 in connection with my reinterpretation of Raz's legal statements in section IV.3. See also Niko Kolodny, 'Why Be Rational?' (2005) 114 Mind 509, esp 555–60. In Kolodny's terms, the 'anankastic ought' of 'legally, ought' is a 'classificatory ought'; but in relation to a particular agent whose practical attitudes are known it may become 'the ought of rationality' (and from their own perspective, as we have seen in the opening of this section, becomes 'transparent' as the 'ought of reasons').

descriptive character. In the remainder of this section, I will try to defend with a little more rigour and generality the claim that they do establish such relations, and the claim that these relations are substantial—and substantial enough—to tell us something about the practical relevance of legal discourse.

*C. Acts Under a Description*

We begin with a complication. So far I have treated acts, legal acts among them, as events attributable to some personal agency. The problem is that there are ordinarily several different levels at which any such event can be specified.[21] Suppose I am now drinking green tea. This single event can be described as: my drinking green tea; my drinking tea; my drinking; drinking green tea; drinking tea; or drinking. The picture can be convoluted further by adding details about the variety of tea I am drinking; about the history of where, when, and how I got it; about the sort of vessel I am using; about my intention in drinking it; and so on. The possibilities are countless. The reason why we have to attend to this complication is that the legal classification of an action often depends on how that action is described. If the law criminalised drinking green tea, for instance, but not drinking tea generally, much would depend on how we described my present action. Or if I had a contract under which I had undertaken not to drink tea, it would matter if the action were described as specifically *my* drinking tea or not.[22]

[21] As we have already seen in the opening paragraph of section V.1.A.

[22] Another area where the way in which an action is described becomes relevant is where we try to explain an action by reference to the intention or reason that lay behind it: see eg Anscombe (n 11) ss 6, 19, 23, 26; Donald Davidson, 'Actions, Reasons, and Causes' in *Essays on Actions and Events* (OUP 2001) 4–5; 'Intending' in the same volume, 85–87. This is of course also part of the reason why the issue is relevant in the present context. On the topic of individuating events more generally, see Davidson, 'The Individuation of Events' in the same volume.

We thus need to refine our notion of an act and add that an act is an event attributable to a person *under some description*.[23] So whenever I say '*x* ϕ-s'—and this applies to what follows as much as to what has been said already—what I mean by this is that *x* performs the action in question *and also* that the action is understood as falling under the description designated by 'ϕ-s'. I mean this in a very broad sense. The description may in principle refer to any action, activity, omission, or state which the agent may perform or be in; it may be specified at any level of generality; and it may also include details about the agent or any other circumstances as might be relevant. So '*x* ϕ-s' may, to my mind, stand for '*x* drinks' just as much as it may stand for '*x* is the Prime Minister and drinks Da Hong Pao tea, which he got from the President of China, sitting in his favourite armchair on a Thursday morning in early November'.

It is clear from the foregoing that a person may, while they are doing a single thing, be acting under several distinct descriptions: so they may be ϕ-ing and ψ-ing at the same time. But we should distinguish two situations here. The first is where the fact that the person is ψ-ing has nothing to do with the fact that they are also ϕ-ing. Suppose that as I am drinking my green tea (ϕ-ing), I am also sitting in my room (ψ-ing). There is no connection between the two descriptions other than that they both happen to apply to the same action. It is perfectly imaginable and possible that I might drink the tea somewhere else; and likewise, I can be sitting in my room even when I am not drinking tea.

Contrast this with the situation where I am drinking a tea I got from my friend (ϕ-ing) and in doing so, I am also pleasing them (ψ-ing). Here, the fact that I

[23] So far as I know, the phrase comes from Anscombe (n 11).

am pleasing my friend depends in some way on the fact that I am drinking the tea they gave me; for part of the reason why I can be said to be pleasing them is precisely that I can also be said to be drinking the tea. 'To drink the tea' describes a *way* in which I might please my friend. This need not be the only way, to be sure, so we cannot really say that if I did not drink the tea, I could not otherwise please my friend. I could compliment them, say, or play backgammon with them. But first, there would have to be *something* I would do instead; I could not please my friend just so, by neither drinking the tea nor doing any of these things. And second, other things being equal,[24] it is impossible for me to drink the tea and yet not please my friend. So while my ϕ-ing here is not a necessary condition of my ψ-ing, it is one of a number of actions such that doing at least one of them is; and on top of that it is a sufficient condition.

An alternative way to distinguish this second situation is to say that I ψ *by* ϕ-ing. I single it out because many social and cultural institutions depend on this notion that we can do certain things by doing certain other things. Consider making promises. When someone tells us 'she gave me her word', this already tells us something important about what she did. But we might be interested in what she did to make the promise. This is because, first, there are only so many ways in which one may normally make a promise to someone else: if our interlocutor maintained that she made the promise by eating lunch, we would have to conclude that there has been between them either confusion or some secret code. Second, and more importantly, we want to know how she gave them the promise because we might

[24] This is to bracket such possibilities as where I drink the tea but tell my friend I hate tea, or worse, that I hate *the* tea.

then discover *what* promise she gave them. If she gave them her word by saying 'I promise you a hundred pounds if you get that tea for me', then the situation is quite different than if she had done it by saying 'I promise you that tea if you give me a hundred pounds'.

Very similar considerations, we will see, apply to legal acts. But before we get there, let us ask the question: why—and how—is that latter situation 'quite different' from the former?

*D. Practical and Legal Meaning*

We now make the following further observation. When certain actions, considered under certain descriptions, are performed by certain people, we have reason to assume that these people take certain practical attitudes and do not take others. An analogy might be helpful here. When someone says that the cat is on the mat, we can ordinarily take them to believe that the cat is on the mat; similarly, when they sit down and pet the cat, we can ordinarily take them to believe that petting the cat, at least in this instance, is permissible all things considered.[25] Of course, the person may also express that latter conviction verbally; or they may disclaim it, in seeming contradiction with their deeds. But if there is substance to the saying that actions speak louder than words,[26] then it is this substance that I am now trying to capture.

[25] See n 6. Either of these beliefs may be had as a result of illusion, or temptation, or represent wishful thinking; they may be subsequently—even immediately—renounced as unfounded. None of that detracts from my general point.

[26] Or that 'we can read a man's purposes in his actions': Taylor (n 11) 49; see also PMS Hacker, 'Davidson on First-Person Authority' (1997) 47 Philosophical Quarterly 285, 294–95. Of course, words speak as loudly as other words, and a verbal disclaimer has a different effect when it is of a belief we attribute to someone as a result of what they have said. This is where the analogy, introduced in n 6, between the meaning of an utterance and the meaning of an action runs out; an important reason for this is that the practical

Let me put it like this. If we can infer, from the fact that someone ϕ-s and does so as a rational and informed agent, that they take some practical attitudes, and if we can also infer that they do *not* take some other practical attitudes, then we may say that this is because such is the *practical meaning* of their action *under that description*, that is, because such is the *practical meaning of their ϕ-ing*. We may also, and I will in what follows, refer to that first set of attitudes as attitudes *expressed* by the act's practical meaning and to the latter one as attitudes which that meaning *precludes* or which are *incompatible* with it.

I interject here to briefly clarify what I mean when I say that someone takes such-and-such a practical attitude. Roughly, to take a practical attitude is, first, to be disposed to agree with some deontic statement, or with some compound of deontic statements or deontic and descriptive statements; which statement or compound we may call the *content* of the practical attitude. It is crucial that we distinguish the descriptive statement *that* a person holds some practical attitude—which is the sort of statement we have been dealing with—from the deontic (or mixed) content of that attitude. Second, to hold a practical attitude is to accept its content in a certain manner or mood. There is a difference between, say, *morally demanding* that people ought to treat animals with dignity and merely *wishing* that it be so, even though both attitudes involve the acceptance of the statement 'people ought to treat animals with dignity'.[27] I suspect that many of these different moods can be distinguished by pointing to the fact that on closer inspection, the accepted

meaning of an action is usually more 'natural' than the linguistic meaning of an utterance (for the distinction, see n 6 in chapter V).

[27] See the remarks on the notions of 'attitude' and 'wanting' in Davidson, 'Actions, Reasons, and Causes' (n 22) at 4, 6; cf Davidson, 'Radical Interpretation' (n 6) 135.

content turns out to be different. This could be either because the deontic content as such is different (a moral demand is ordinarily accompanied by acceptance for punishment or censure, say, while a wish is not), or because there is also some non-deontic content added to it (a person who hopes for something cannot be certain that it would eventually come to be the case, for then their attitude would be anticipation not hope).[28] Still, there are other distinctions that are more difficult to make on the level of content alone, especially those that have to do with how the acceptance of that content changes over time (commitments cannot shift every other day, for instance, while wishes or intentions can),[29] so I prefer to leave the issue open.

The practical meaning that an act has under a description consists, among other things, in a rational connection between that act and the practical attitudes of the person performing it. To say of an act that it has such-and-such practical meaning is to say that for people with some practical attitudes, it makes sense to do the act; and that for people with certain other practical attitudes, it does not make sense.[30] This is the general idea. The nature of that rational connection asserted in this way may however be diverse: it may be owed to some perceived

[28] See eg how intention is singled out from other 'pro attitudes' in Davidson, 'Intending' (n 22) at 102; cf 97–98.

[29] Another interesting problem arises when we consider the fact that different attitudes may sometimes be distinguished by how a person reacts later. 'Turns out I wasn't just hoping for that appointment, I was really counting on it!' We cannot really distinguish hoping for from counting on otherwise than by how we react to it when things turn out not the way we would like; and so we can tell whether we are hoping for something or counting on it only by *predicting* how we will react. Our prediction might then turn out to be right or wrong, but also—if things go our way—may never be verified.

[30] Which, to reiterate, is distinct from saying anything about what ought to be done by anyone: see Scanlon, *Being Realistic* (n 9) 64 and TM Scanlon, 'Reasons: A Puzzling Duality?' in R Jay Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2004) 233–34.

causal relationship, or a relationship of ends and means; or to some cultural code, such as our notions of integrity and hypocrisy; or to something else still, or perhaps to nothing specific at all. And we may be interested in the practical meaning of an act even though we are not interested in that rational connection and what it entails: for example, when the agent performing the action is not rational and informed, but considering the action's practical meaning helps us understand or explain the practical meaning of some other fact.[31]

This latter point is especially pertinent in relation to institutional practices such as law, but also, say, promising or courtesy; and we might also note that it is generally only in the context of such institutional practices that we take the trouble to give the practical meaning of an action specific mention. In such contexts, we feel that the rational connections between one's acts and one's attitudes, or between one's acts and the acts of others, are not self-evident, but rather seem to derive from some complex 'tacit conventions'; and yet, though we could not lay out these 'tacit conventions' in detail, we navigate them with relative ease[32]—which ease we may, if we choose, express in terms of the act's practical meaning. In other contexts, however, these connections are so transparent that any such talk feels outright strange. When a person climbs the stairs, we just say that they want to go up, not that it is the practical meaning of their action that they do. We could add that, perhaps, but it would be a waste of words.

This is then one reason why in institutional contexts it feels more natural to speak of an act's practical meaning as distinct from what the act just is: in such

[31] In the course of what I have called theoretical explanation: see section V.1.B.

[32] See Anscombe (n 11) s 43.

contexts, the notion of practical meaning provides a (real or apparent) solution to the (real or apparent) complexity of the 'tacit conventions' that govern how we think about the act. Here is another reason. In institutional contexts, there is no 'what the act just is' that would be interesting in itself. To grasp the act's significance, we must attend to it in both its dimensions, the institutional and the non-institutional one; and we may often find the vocabulary of meaning helpful in expressing this complexity.

To explain, let me go back to the example of promising and note a few more things. First, we have already seen that not all acts can constitute the making of a promise. Second, the way in which a promise is made—most of all, the words used—can have tremendous impact on what it means, practically, to make it. If the promisor has said 'I promise you a hundred pounds if you get that tea for me', part of the practical meaning of her act is that she cannot now maintain, at least not without additional explanation, that she has never had a duty to give the promisee a hundred pounds for that tea; but had she said instead 'I promise you that tea if you give me a hundred pounds', it would be no part of that practical meaning at all. Third, there is scope to consider what the practical meaning of someone's action *would* be if it *were* a promise, even though for some reason it is not. Imagine a five-year-old who is learning English and says to their teacher 'I promise to give you all my favourite toys, always'. There are numerous reasons to think that what the child has said is not a promise at all: perhaps because it was just an exercise; perhaps because they do not yet understand the word 'promise' or the word 'give', or are too small to be held to their promises; or because the 'promise' is so preposterous that it must have been an exaggeration. All the same, we could sensibly entertain

what it would mean for the child to succeed in making a promise here and what the practical meaning of such success would be.

The distinction between institutional and non-institutional contexts is blurry, and in any event not all institutional contexts need to resemble promising in all these respects. But what I am getting at is this. We find it useful to speak separately of the practical meaning of an action in the following situation: *x* ϕ-s and by ϕ-ing, ψ-s; but we are not interested in what we can infer about *x*'s attitudes from *x*'s ϕ-ing, nor even from *x*'s ψ-ing, but specifically *from* x*'s ψ-ing by ϕ-ing*. Return to the promising example again. We are interested neither in the practical meaning of the promisor saying 'I promise you a hundred pounds if you can get that tea for me', nor in the practical meaning of the promisor's making a promise, but in the practical meaning of the promisor's *making a promise by uttering these words*. We can then say that the promisor said these words *and* that this *had the practical meaning of making a promise*; or, in generalised terms, that *x* ϕ-ed, *and x*'s ϕ-ing *had the practical meaning of ψ-ing by ϕ-ing*. In institutional contexts, in short, there are often situations where we cannot understand or explain the action's practical significance in full merely by redescribing it in terms of the institution,[33] situations where we must instead *add* the institutional dimension to the description we have already. And then, in such situations and contexts, we may find it useful to frame that institutional dimension in terms of some 'meaning' we 'attribute' to the 'action', and to think of that 'action' as such in abstraction from the institutional 'meaning' it has.

[33] Unlike in the ordinary case, where redescription often serves to explain an action: see eg Taylor (n 11) 37–38; Davidson, 'Actions, Reasons, and Causes' (n 22) 9–10.

It is hopefully clear by now where I am going with this. What I have just said allows us to define legal meaning as *the practical meaning an act, under a certain description, has under another description which subsumes it under, or excludes it from, a legal concept*. So: *x* ϕ-s, and by ϕ-ing, ψ-s; if 'ψ-s' stands for something like 'performs an action which amounts (in law) to *L*', then *the practical meaning of ψ-ing by ϕ-ing is a legal meaning of* x*'s ϕ-ing*. Or: *x* ϕ-s, and by ϕ-ing, does *not* ψ; then *the practical meaning of not-ψ-ing by ϕ-ing is a legal meaning of* x*'s ϕ-ing*. (In both cases I say '*a* legal meaning', because an action may come under, or be excluded from, several different legal concepts.)[34] Like practical meaning generally, legal meaning is not some self-standing entity we can take and 'attach' to this or that act; the point is just that by redescribing the act in these or those legal terms, we can show it to have a different, richer practical meaning than it has under a description which does not mention its legal classification.

Still, the considerations that applied to promising and other institutional concepts apply here as well, and similarly make it natural for us to speak of the legal meaning of an act as separate from its description. We can rarely grasp the practical significance of a legal act if the only thing we know about it is that it is an instance of such-and-such a legal concept. Suppose, for instance, that someone points to Ada wearing a red jacket and distributing vegan pamphlets, and exclaims: 'look—that's criminal!'. We will be keen to know *what* it is that is criminal here, the jacket or the pamphlets; and not just out of curiosity, but in order to know what to think of Ada,

[34] In terms of the contrast drawn in n 8 in chapter V and text: where 'ψ-s' stands for 'performs an action which amounts (in law) to *L*', '*x*'s ϕ-ing counts (in law) as *L*' is synonymous with '*x*'s ϕ-ing is a way of ψ-ing'; and '*x*'s ϕ-ing counts (in law) as *not-L*' is synonymous with '*x*'s ϕ-ing is a way of *not*-ψ-ing'. So *not-L* does not represent a legal concept separate from *L*.

what to expect to happen next, and so forth. In other situations, we will *need* to know how the legal act was performed in order to make even the most basic sense of it. This is especially so when the act in question is regulative:[35] in the usual case, if someone told us that the legislature 'enacted a statute' but could not specify *what* sort of statute it was—so what words had been used to enact it, or at least what their general sense or impact had been—we would not understand their point, and we would indeed doubt they had a point at all. Much like with promising, the practical meaning of a regulative legal act can differ quite dramatically depending on what one actually does to perform that act.[36]

*E. Legal Meaning and Law's Guidance*

In these terms, we can now restate more generally—assuming throughout that the applicable rationality condition is satisfied, and abstracting from any other practical attitudes *x* happens to take—that any orientational reasoning of the form:

[35] See section V.1.C.

[36] Another way to express all this could be to say that any legal concept *L* is a *function* from a set of facts into a set of practical meanings (a practical meaning M, in turn, could be provisionally defined as the set of all the statements we may validly infer from the statement '*x* ϕ-s and the practical meaning of *x*'s ϕ-ing is M'). The domain of the function would be the set of facts which could amount (in law) to *L*; *L* could take different values for different acts; and the value of *L* for an act would be independent of whether or not the act were *L* (and actually had the meaning assigned to it by *L*) or not. Now recall from section IV.3.C that a description of legal practice assigns to every member of a set of acts its legal meaning. We may now define a function *F* from a set of sets of acts into a set of statements of legal meaning such that for any set of acts S in *F*'s domain, *F* assigns to S *a full description of S as legal practice*. Because any statement of legal meaning, assigning the legal concept *L* to some act, assigns to that act the legal meaning which is the value of *L* for that act, we can also define *G* as assigning to any set of acts S in *F*'s domain a set of ordered pairs, each pairing an element of S with the full legal meaning (the union of all legal meanings) assigned to that element by the statements in *F*(S). Now observe that *G*(S) describes a function from S into a set of practical meanings, because each member of S is paired in *G*(S) with exactly one full legal meaning; *G*(S), in other words, is a legal concept! We may understand it as the concept of being *part of the legal practice S*. In this connection, see my remarks in section I.1.A, esp at n 22.

For *x* to ϕ is to perform an act which amounts (in law) to *L*.

*x* ϕ-s.

Therefore, *x* takes the practical attitude A.

is valid if A is an attitude expressed by the legal meaning *x*'s ϕ-ing has by virtue of being an instance of the legal concept *L*; and so is any orientational reasoning where the conclusion:

Therefore, *x* does not take the practical attitude A.

is drawn from the same premises, but where A is precluded by that same legal meaning.

Transforming these two general schemes by analogy with how the validity of reasoning II has been derived from the validity of reasoning I,[37] we can also say that any decisional reasoning of the form:

*x* does not take the practical attitude A.

For *x*, to ϕ is to perform an act which amounts (in law) to *L*.

*x* does not ϕ.

holds if A is expressed by the legal meaning *x*'s ϕ-ing has as an instance of *L*; and so does any reasoning of the form:

*x* takes the practical attitude A.

For *x*, to ϕ is to perform an act which amounts (in law) to *L*.

*x* does not ϕ.

[37] See section VI.1.B.

if A is incompatible with that meaning. Or to put it another way,[38] *it is a logically necessary condition that* x *not* $\phi$[39] if they are not to take any practical attitude expressed by the legal meaning *x*'s ϕ-ing owes to being *L*, or conversely, if they are to take any attitude this meaning precludes. Since the condition concerns action, moreover, the *logical* necessity is also *practical*: it is that *x must not* $\phi$ unless they are prepared to accept the practical attitudes expressed by the legal meaning of their ϕ-ing and give up those with which it is incompatible. Again, this does *not* mean that *x will not* $\phi$ or *ought not to* $\phi$; the necessity is neither (meta)physical nor deontic. It is logical—it reflects what we can think and say according to the standard rules of talk and thought we follow in our practical discourse in general, and legal discourse in particular;[40] and more specifically, it reflects our inability to avoid thinking, absent any explanation why these standard rules should not apply, that a person who, by ϕ-ing, performs an action amounting to *L* takes these practical attitudes and does not take those.

By seizing on this logical relation between one's actions and one's attitudes that a statement of legal meaning entails, descriptive legal theory can

[38] See Alfred Tarski, *Introduction to Logic and to the Methodology of the Deductive Sciences* (Jan Tarski ed, Olaf Helmer tr, 4th rev edn, OUP 1994) 26–27 for the various ways in which to state an implication.

[39] The fact that the practical necessity established by an ascription of legal meaning is always negative (ie that it is always *not*-ϕ-ing that is made necessary, never ϕ-ing) has something to do with the fact that we can rarely, if ever, establish some action as necessary simply because it has some attributes, for there are ordinarily many other actions which have the same attributes; but even then we may be able to establish some action as necessary to avoid, because then those other actions simply have to be avoided, too: cf Anscombe (n 11) 61–62. This looks worse than it really is. We must remember that there may well be a 'χ-ing' which stands for *not*-ϕ-ing; and then the 'negative' practical necessity to not ϕ becomes the 'positive' practical necessity to χ.

[40] cf GP Baker and PMS Hacker, *Wittgenstein: Rules, Grammar and Necessity: Volume 2 of an Analytical Commentary on the Philosophical Investigations* (2nd rev edn, Wiley-Blackwell 2009) 250–53, 262–70 (on the connection between logical necessity and 'norms of representation').

successfully account for the practical relevance of legal discourse without ever bringing up the question of what anyone has reason to do. The resulting model of law's practical significance may, I admit, appear thin. It probably cannot adequately handle 'the problem of explaining the use of normative language in describing the law or legal situations';[41] nor does it really explain how in a law-governed society, 'certain kinds of human conduct are no longer optional, but in some sense obligatory'—unless, as I will explain very shortly, we are happy to accept that this 'sense' is very far from the literal, robust sense in which, say, the imperatives of ethics are obligatory.[42] The existence of law, on my account, alters one's options, endows them with new meanings, and ties them in with social and cultural consequences which they would not otherwise have—but does not, in and of itself, take any of these options off the table. And yet I still claim the account is sufficient. How so?

Let me mention two things in its defence. The first is that what this thin account lacks in thickness, it makes up for in breadth. The thickness of a thicker explanation is bought at the price of adopting, however provisionally, some defined normative viewpoint: the 'internal' point of view of the 'legal man',[43] for example, or the 'external' perspective of the 'bad man', determined above all to avoid the trouble and pain that the law may bring upon him.[44] We have seen in chapters III

[41] That is, for Raz, 'the problem of the normativity of law': *PRN* 170.

[42] *CL* 6 (italics omitted). Hart *might* be happy to accept that, but then he might as well not, so I am unsure to what extent I disagree with him here. See further nn 47 and 53.

[43] See n 85 in chapter IV.

[44] The figure comes from Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard L Rev 457. Hart refers to the bad man at *CL* 40 and links him to the external point of view at 90. Stephen R Perry argues that the perspective of Holmes's bad man is just as

and IV that descriptive legal theory cannot afford that price. In contrast, the account given here focuses on quite another character—on the inconspicuous 'man who wishes to arrange his affairs'.[45] What distinguishes him from the other 'men' that inhabit jurisprudence books is just how little we know about his 'affairs', or about his outlook on the law and the world more generally. In particular, we do not know what his normative perspective is, so we cannot even hope to paint a picture of law from that perspective. The only thing we know about him is indeed that his affairs, whatever they are, have something to do with law. That the 'man who wishes to arrange his affairs' is such a generic character, standing for such a broad category of participants in legal practice—for virtually *all* participants, in fact—is precisely what makes him such an attractive protagonist for a properly general and descriptive account of law's practical relevance. At the same time, it is also what prevents that account from being as thick as those that focus on 'men' whose views and attitudes are more transparent. We must choose and either have or eat this cake.

The second thing is that the account of law's practical significance offered here, though thin, is still thick enough to carry the burden intended for it within descriptive jurisprudence. As far as I understand, the principal attraction of the thicker accounts is that they are supposed to highlight that law has some guiding force—that the law being so-and-so can make a specifiable difference to what we

'internal' as that of Hart's 'ignorant man': 'Holmes versus Hart: The Bad Man in Legal Theory' in Steven J Burton (ed), *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr* (CUP 2000), esp 164–66. This is what I mean when I say that the bad man's 'external' point of view, too, is a normative point of view.

[45] *CL* 40.

ultimately decide to do—and also that this force is, at least normally, considerable.[46] As far as the first point goes, the foregoing discussion has already established how the thin account can explain that the law may make a specifiable difference to an agent's decisions. It is true that such an explanation forces us to make the actual specification of that difference conditional on the agent's practical attitudes and their unwillingness to give up, or be thought of as giving up, these attitudes. But I think this is a perfectly fair price for being able to broaden the account's relevance beyond 'puzzled', 'legal', or 'bad men' to any 'man who wishes to arrange his affairs'.[47]

It remains to be explained why law's guiding force is so considerable. In essence, what explains this is the fact that we generally *are* unwilling to give up, or be thought of as giving up, our practical attitudes.[48] Why? Because the practical

[46] Hart is explicitly preoccupied with law's role in guiding conduct: *CL* 39–40, 88–90. Raz seems to take Hart's argument for granted (*AL* 154–55), and substantiates the importance of 'detached statements', made from the 'legal point of view', by pointing to their role in advising others how they should conduct themselves under law or some other system of norms: see *PRN* 175–77; *AL* 155–57. Kelsen is again a bit of an outlier. His apparent interest in how the law guides us, exemplified in the much-criticised passages of *GTLS* 15–29, fades away in his 'pure theory': see eg *PTL* 50–54, 108–19. Chances are it is too 'sociological': see Leslie Green, 'The Forces of Law: Duty, Coercion, and Power' (2016) 29 Ratio Juris 164, 169. Kelsen's preoccupation with law's normativity in *PTL* has to do not with how the law may guide, but with how 'legal science' may formulate its own 'scientific laws': *PTL* 85–99; Stanley L Paulson, 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 102–11.

[47] Admittedly, Hart can be read to give a similarly thin (and therefore versatile) account of law's guidance by placing emphasis—like I do—on its 'indirect' and 'epistemic' character: Shapiro (n 10) 206–09; cf Scott J Shapiro, 'On Hart's Way Out' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001) 173–75. On this reading, the outstanding difference between Hart's account and mine would be that he is still interested in the 'indirect' and 'epistemic' guidance of 'puzzled' and 'ignorant men' rather than of the 'man who wishes to arrange his affairs'.

[48] A third way of explaining this could be to emphasise the centrality (or even indispensability) of coercion. But such an explanation would have to be either incomplete

attitudes we take often go to the core of our personal and practical identities.[49] They fix an image, for both ourselves and others, of who we are and want to become; and because we tend to care about these things, and about their recognition by those around us, we tend to care about whether our actions make it possible to think of ourselves as taking these practical attitudes and not taking those. In a word, to give up a practical attitude is rarely a trifling affair. It commonly involves a temporary compromise of one's integrity and autonomy, and sometimes a permanent break in one's practical identity.

This constitutive connection between practical attitudes and social identities is all the more salient in the context of a complex institutional practice such as law, because any such practice brings with it the possibility of playing certain characteristic roles in it, and because one's fitness to play these roles usually depends at least in part on the practical attitudes one takes. To succeed as a judge, police officer, or 'good citizen', for example, one must, among other things, exhibit a broad commitment to obeying and enforcing the law's requirements; the opposite goes when it comes to success as an insurgent, anarchist, or 'made man'. Again, we tend to care about these roles and—especially when we happen to play them, or when we want to—about showing to the world that we are fit for them; or if, conversely,

or premised on some normative viewpoint after all: Thomas Adams, 'Coercive Law' (2022) 42 OJLS 661, 672; cf section IV.3.C.

[49] The point has some currency in contemporary practical philosophy: see eg Harry Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 Journal of Philosophy 5; Bernard Williams, 'Persons, Character and Morality' in *Moral Luck: Philosophical Papers 1973–1980* (CUP 1981); Christine M Korsgaard, *The Sources of Normativity* (Onora O'Neill ed, CUP 1996) 100–02.

we abhor them, that we are *not* so fit.[50] And that we so care further explains why the law being what it is normally has considerable impact on what we eventually decide to do.

This discussion admittedly comes very close to the line separating descriptive and normative legal theory, but I do not think it crosses that line. In saying that we *do* tend to care about our practical identity and its recognition by others around us, I am not saying that we *should* so care,[51] let alone that we should care about upholding any particular practical identity, say of a law-abiding citizen. The same applies to my claim that we *do* tend to care about maintaining our fitness to play some roles in legal practice and our unfitness to play certain other roles. All these arguments concern the moral salience of our practical identities and roles—not, however, their moral worth.[52]

Of course, there may well be genuine moral obligations that only arise when we happen to play certain roles in legal practice. A judge may, for example, come under a general moral duty to settle disputes wisely, fairly, and with due regard to the law's requirements. But these moral obligations should be distinguished from the necessity to act in certain ways and not others in order to confirm, to oneself and to others, one's fitness to successfully play the role in

[50] cf Raz's notion of 'expressive reasons' put forward in *AL* ch 13; see esp 255–56, 259. There is a broad analogy, but in line with the argument of chapter IV, and for similar reasons, I prefer to eschew Raz's vocabulary of reasons in this context.

[51] For some arguments why we should, see Bernard Williams, 'A Critique of Utilitarianism' in JJC Smart and Bernard Williams, *Utilitarianism: For and Against* (CUP 1973) 108–18; Williams (n 49); Thomas Hurka, 'Why Value Autonomy?' (1987) 13(3) Social Theory and Practice 361. I tend to agree with them, but my agreement is neither here nor there.

[52] If it is thought, however, that any such claims about moral salience need a normative argument to back them up, see section VII.1; and also nn 13, 34 in chapter I for why the argument stays within the boundaries of descriptive theory.

question—which necessity, to complicate matters, is also commonly referred to as constituting some 'official' or 'institutional duties'.[53] So a judge called on to apply a thoroughly unjust law may be under an 'official duty' to give effect to it—in the sense that this is what they must do in order to exhibit their ongoing readiness to play the role of a judge—and at the same time under a moral duty not to, or to find a way of sabotaging the enactment by reading it down or carving out a loophole in it. To flip the example: an insurgent may be under an 'official duty'—and to make this phrase more apt, let us suppose the insurgency is organised—to break certain laws or ordinances of the government they are rebelling against, yet at the same time under a moral duty to obey these laws and ordinances. But then again, this will not always be so; the 'official duties' of a person rebelling against an oppressive, murderous regime will tend to align with their moral duties or at least avoid conflict with them. And so on.

History, distant and recent, abounds in more concrete illustrations of how one's 'official duties' may match or mismatch one's moral obligations, even those that only arise *because* one plays the role one plays. All this means that these 'official duties' are 'duties' only figuratively; and so, that an explanation of law's practical relevance may account for their existence and strength without crossing the line that separates descriptive legal theory from its normative counterpart.

[53] HLA Hart's later conception of judicial obligations as based on 'authoritative legal reason[s]' which constitute 'the central duties of the office of a judge' employs a similar notion of role-based 'official duties' as distinct from, and possibly at variance with, moral duties: 'Legal Duty and Obligation' in *Essays on Bentham* (OUP 1982) 146–47, 158–60.

## 2. FROM LEGAL DISCOURSE TO LEGAL PRACTICE

In the previous section, I have analysed orientational and decisional legal reasoning to show how legal reasoning can be practical—and practically important—even though it is not premised on any deontic assumptions or viewpoints. I have argued that decisional legal reasoning can be interpreted as narrowing the range of options open to an agent, and in certain circumstances, facing them with a practical necessity to act in this or that way. In this section, I examine a different interpretation for decisional legal reasoning: namely, that it can not only *require* a particular decision in this sense, but also *explain* why it has in fact been made. This explanatory dimension of decisional reasoning is pivotal in making the step from an analysis of legal discourse to an understanding of legal practice.

### *A. Decisional Reasoning as Explanatory Reasoning*

Suppose now that Clara refrains from distributing vegan pamphlets after all, and we ask why. Suppose also that it is part of the answer to our question that she is committed to obeying the law. Note that we are interested here in an explanation of her action—of why she does what she does—rather than its justification; and so, as before, our interest here is in *the fact that* she takes the attitude rather than in its content.[54] I will refer to the situation as one where Clara refrains from distributing vegan pamphlets *on account of* her commitment to obeying the law.

[54] When asked 'why did you do it?', we often point to the reasons we (think we) had to do it. But this is a rare situation where our interlocutor would be more interested in the belief or attitude of which our answer is evidence than in the content of our answer as such. 'Why did you not take the steak back then?'—'Because eating meat is morally wrong; though, to be fair, I didn't know that yet.' Such an answer might justify the action, but it says too little about what the speaker's attitudes and beliefs were at the time to explain it.

For such an explanation to work, it must be necessary in the circumstances that Clara refrain from distributing vegan pamphlets if she is to hold on to her commitment; so, on the assumption that the rationality condition is satisfied and there are no relevant conflicting commitments—on the assumption that we can explain Clara's actions in the ordinary way as flowing from her agency—there must be a valid way of reasoning from

III-P1: Clara is committed to obeying the law.

to

III-C: Clara does not distribute vegan pamphlets.

That said, it is clear that III-C does not follow from III-P1 without more. So if reasoning III is to be valid and explain Clara's decision, there must be another premise describing the peculiar situation in which Clara's action does in fact become a necessary condition of her holding on to the commitment. That extra premise could be

III-P2: For Clara to distribute vegan pamphlets would be to commit a crime.

because reasoning III is then identical with reasoning II. But the truth is that there are other viable candidates. It could equally be

III-P3: For Clara to distribute vegan pamphlets would be to commit a civil wrong.

or

III-P4: For Clara to distribute vegan pamphlets would be to commit an administrative offence.

or, perhaps most comprehensively,

III-P5: For Clara to distribute vegan pamphlets would be to act illegally.[55]

Though the set of such candidate premises might be very large, at least *one* of them must be true for Clara's course of action to be explicable by III-P1 as flowing from an exercise on her part of rational and informed agency. If we further assume, as we do, that Clara generally seeks to always act in a manner which is so explicable—so as to maintain an image of herself as a rational and informed agent—then we can conclude with some certainty that she herself accepts at least one such attribution of legal meaning to her action.

Let us try to make this more general. If someone decides to ϕ on account of taking the practical attitude A, they must normally accept that their *not*-ϕ-ing would have a practical meaning that would *preclude* A. Likewise, if someone decides to ϕ on account of *not* taking the practical attitude A, they must normally accept that their *not*-ϕ-ing would have a practical meaning that would *express* A. Apart from that, it seems they must also accept that their ϕ-ing—the thing they actually decide to do—has such practical meaning that it does *not*, respectively, preclude or express A; for otherwise it would be as necessary for them to avoid ϕ-ing as it is necessary for them to avoid *not*-ϕ-ing.[56] Sometimes, moreover—depending on the practical attitude behind the decision—the practical meaning thus presumed will necessarily

[55] See section IV.3.C.

[56] cf n 39 and n 25 in chapter VII.

be legal. This is the case with Clara, since no attribution of non-legal practical meaning can license the inference of III-C from III-P1.[57]

When I say that Clara must accept such-and-such an attribution of legal meaning to her actions, I am of course not saying that she must—or does—give the matter any specific thought, let alone formulate or articulate the appropriate legal statement.[58] The sort of acceptance in play here is better captured by saying that we could *object* to Clara's decision or its explanation with a statement of legal meaning; we could say, for instance: 'but it would be perfectly legal for you to distribute vegan pamphlets'. Moreover, such an objection would not be that she had done something she ought not to have done; it could still bite if she had in fact done the right thing. Rather than a challenge to her *doing*, it would be a challenge to her *understanding*: to the structure of legal meaning on which Clara's decision is rationally premised, and so whose acceptance we can fairly attribute to her.[59] To defend herself against the objection, she would have to engage in substantive argument about the legal meaning of her action. At the same time, she could not just shrug it off; for she would then cast doubt not only on whether she were a

[57] There are situations in which it is neither necessary nor useful to attribute legal meaning to the act in order to explain the decision to do it: I said 'bless you' because she had sneezed; I bought aubergines because I want to cook pasta alla norma; I feed my cat because I care for her well-being. As we have previously seen, in such situations it may be out of place to even talk about the practical meaning of the act; simply describing (or redescribing) it in the appropriate manner usually leaves nothing to be explained.

[58] We can often omit to assign legal meaning to our decision when explaining it to others because we can usually be sure that our interlocutor either knows that this is its legal meaning or should be able to figure this out from the fact that we explain our decision in this way. See also Davidson, 'Actions, Reasons, and Causes' (n 22) 6–7.

[59] A structure of legal meaning, it will be recalled, is a set of statements attributing legal meaning to social facts.

rational and informed agent, but indeed on whether she cared about being one at all.

If the above argument is right, it leads to the following conclusion: the conscious performance of a legal act *qua* legal act normally necessitates an adoption, on the agent's part, of a structure of legal meaning which explains the action itself, and also—to anticipate a little—other facts which the agent would acknowledge as relevant to their decision. To put it another way: whenever one purposefully participates in legal *practice*, one takes part by the same token in the practice of legal *discourse*.

*B. From Legal Practices to Legal Practice*

This last point marks a pivotal moment in the transition from an elucidation of legal discourse to an account of legal practice and its continuity. To see this, consider the issue of *interpretive choice* faced by a participant in legal practice. If there is a number of different possible attributions which would explain their decision, which one should they adopt? Why should Clara opt for III-P2—and I am assuming it is clear that she should—and not III-P3 or III-P4?[60]

The natural response is of course 'because for her to distribute vegan pamphlets *is* a crime, given that the Veganism Act has been enacted'. This is also the right answer, but it remains to be seen why it is. We must now bring theoretical legal reasoning back into the picture and recall how to attribute legal meaning to an act is invariably to place it in more or less elaborate *structure* of legal meaning. If to participate in legal practice is always to attribute some legal meaning to one's

[60] III-P5 is a different matter, because it is not only compatible with, but indeed entailed by III-P2 (and by III-P3, and by III-P4).

own action, then it is also always to attribute legal meaning to other facts which constitute the context of one's participation. Here lies the reason for preferring III-P2 to the alternatives: III-P2, unlike III-P3 or III-P4, forms part of a structure of legal meaning which better explains (or, to use another popular expression, has better fit with) the other relevant facts we know about the practice. In short, it makes more sense of the practice as a whole and as such is preferable.

Why does this make it preferable? Because any rational and informed agent will not only strive to make as much sense as possible of their own practice, but also of the practices of those around them. Why will they strive to do that? Well, that is just what rational and informed agents do, at least those who want to know where they stand with others; that is, we recall, what it takes to see the actions of those around one as *practices* one can place oneself around and navigate. If we are to understand ourselves to participate in a collective—and not merely individual—practice of law, we must care about the intelligibility of not only our own actions, but also the actions of those with whom we interact. We must try to frame legal practice in such a way as will allow us to see not only ourselves as rational and informed agents, but also others.

What is slowly emerging from all this is an alternative picture of law no longer understood as a systematic collection of norms or requirements, but as a social practice of people who interact with each other and, as they interact, try to give some practical sense and structure to their interactions within the distinctive conceptual framework of legal discourse. If this picture deserves to be called a theory, then it is a theory of legal practice very different from the one presented by Hart or

his successors.[61] For one thing, it has no particular expectations as to how legal practice will be organised, and in particular, as to whether it will be organised in such a way as to lay the existential foundation for a unified, consistent, and discrete system of legal norms. For another, it does not presume any particular perspective from which to view legal practice, as for example the perspective of officials, professionals, and other such 'legal men'. In fact, the picture presumes very little of legal practice beyond that it is a *practice*, so a collection of actions rationally explicable as the actions *of* some person or group; and that it is a *legal* practice, so a social practice made sense of in legal terms (which does not mean, by the way, that it cannot be made sense of in any other terms). This is not very much—but enough, I think, to depict legal practice in a manner that is both interesting and faithful to its reality.

Still, there is a lingering sense that this emerging picture is liable to fall apart at any minute. In *Philosophical Investigations*, Ludwig Wittgenstein recalls:

> Someone once told me that as a child he had been amazed that a tailor could 'sew a dress'—he thought this meant that a dress was produced by sewing alone, by sewing one thread on to another.[62]

If our legal acts are fibres, so to speak, spun into the threads of our individual legal practices, then so far I have only explained how they are so spun, and how we can 'sew one such thread on to another'. Eventually, however, we need to understand

[61] See especially my first objection to Hart's practice theory, laid out in section III.2.A.

[62] Ludwig Wittgenstein, *Philosophical Investigations* (PMS Hacker and Joachim Schulte eds, GEM Anscombe, PMS Hacker, and Joachim Schulte trs, 4th edn, Wiley-Blackwell 2009) s 195.

how the threads are woven *together*, and how our *collective* practice of law may preserve its integrity. This brings us back to the question of legal continuity.

# VII. Legal Continuity

I have concluded the previous chapter with the suggestion that whenever we decide to do or forbear to do something on account of holding some practical attitude, we assume some practical meaning for the act; and that for some practical attitudes, the practical meaning assumed in this way will be legal. If we decide, say, not to drive faster than 70 miles per hour on a motorway *because* we do not want to break the law, then we must accept that to drive faster than that would somehow be an offence. If we sign a piece of paper *because* we intend to rent this flat, then we must assume that the signature concludes a tenancy agreement to that effect. Such attributions of legal meaning can be fairly read into our decisions because necessary to trace those decisions to an exercise of rational and informed agency on our part. So, as we take part in legal practice, we also take part in the practice of legal discourse by implicitly—sometimes perhaps inadvertently—accepting those statements of legal meaning that are operative in our practical reasoning.

I have also said that because legal concepts are conceptually tied together, we adopt not only those legal statements that attribute legal meaning to the very act we have decided upon, but also those that attribute such meaning to the facts constituting the context of our decision. So by keeping under the speed limit, we also accept that some act has enacted the traffic code, and that some other

act has made this road into a motorway. By signing the tenancy agreement, we construe certain potential actions of ours, and of our landlord, as being in breach of the agreement. And so on; as we take part in legal practice, we seek to adopt such *structures of legal meaning* as would allow us to view ourselves as making reasoned and intelligent decisions and also to construe as rational and informed those with whom we interact. This tendency to view others, and not only ourselves, as rational I have characterised as an attitude proper to all rational and informed agents, because it allows us to make as much sense of our practical situation as reasonably possible and see ourselves as taking part in a collective practice, such as the practice of law.

I still think this is a good enough way in which concisely to put the point, but I shall now develop it further and lay out why it is so important in modern legal practice that we be able to figure out what those around us are up to. Once that is in place, I will be able to propose a new way in which to conceive of legal continuity: not as the uninterrupted efficacy or applicability of a centralised system of norms, but as the continued utility and relevance of legal discourse in navigating our social lives. As we will eventually see, such a conception of continuity naturally accommodates the concerns behind the problem of continuity isolated in chapter II.

## 1. THE POINT OF LAW

Since law is continuous to the extent that it continues to serve its purpose,[1] it is natural that any notion of legal continuity should be sensitive to the *point* of legal practice. Before I proceed with my account of legal continuity, therefore, I want to

[1] See section I.1.B.

examine more closely what that point is against which the continuity of law should be gauged.

The question 'why have law?'[2] is not new; many innovations in the history of political thought consisted in giving new answers to it. So some have argued that legal and political institutions come into being to 'bring unity to the principles of the world',[3] or to help us 'out of from that miserable condition of Warre';[4] others would contend that 'every law is directed to the common good';[5] and others still would deride that 'common good' as mere cover for 'the common affairs of the whole bourgeoisie' or some other such ruling class.[6] As far as modern legal theory goes, law has usually been seen as a 'means of social control',[7] engineered to 'bring about the desired behavior of individuals by the enactment of … measures of coercion'[8] or 'subjecting human conduct to the governance of rules'.[9] Some have urged further that given the moral gravity of that 'social control'

[2] John Finnis, 'Describing Law Normatively' in *Philosophy of Law: Collected Essays, Volume IV* (OUP 2011) 24–25.

[3] Mo Di, *The Mozi: A Complete Translation* (Ian Johnston tr, Chinese University Press 2010) 99.

[4] Thomas Hobbes, *Leviathan* (Richard Tuck ed, rev student edn, CUP 1996) 117.

[5] Thomas Aquinas, *Political Writings* (RW Dyson ed and tr, CUP 2002) 80 [*Summa Theologiae* IaIIae 90:2]; for a more recent rendition, see John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 276–77.

[6] Karl Marx and Friedrich Engels, 'The Communist Manifesto' in Karl Marx, *Selected Writings* (David McLellan ed, OUP 2000) 247; again, for a more contemporary restatement, see Ralph Miliband, *The State in Capitalist Society* (Merlin Press 2009) (on 'national interest').

[7] *CL* 39.

[8] *GTLS* 18.

[9] Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 106.

law affords, the principal role of our practices of legal argument must be to help us find out what 'justifying connection' there may be, if any, 'between past political decisions and present coercion'.[10]

I will not survey these debates at any great length here but limit myself to two brief observations instead. The first is that the backdrop to these arguments, at least as they have carried on in Europe for the last five centuries or so, is the advent of the modern state, characterised by relatively centralised institutional mechanisms of coercion exercised by a relatively well-defined group over a relatively well-defined territory. That background has not always been assigned the same weight and significance, but I know of no recent treatment of the topic which would manage to abstract from it (and what follows, by the way, is no exception).[11] The second is that it has normally been assumed that the law by its very essence equips someone—whoever that is, and whether it is 'one', 'many', or 'it'—with some power to control society. Accordingly, the question of law's point has been construed to ask what purpose there might be for which anyone might possess that power, and what it takes for one to exercise it in accordance with that purpose.

Against this background, however—and especially against the background of this latter assumption, which I would like to query—the original question 'why *have* law?' becomes one which can be sensibly asked and answered only by those powerful enough to decide *not* to have it, or perhaps also those who

[10] Ronald Dworkin, *Law's Empire* (Fontana Press 1986) 98.

[11] The authors who can be read to argue that it is not conceptually necessary that there be organised sanctions for there to be law frame their arguments in relation to an explicitly imaginary 'society of angels' or 'saints' (*PRN* 157–61; Finnis (n 5) 266–70) or concede that it is nonetheless a 'natural' (*CL* 199–20) or 'human' (*PRN* 158–59) necessity. See also the discussion in Kenneth Einar Himma, 'The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' (2016) 7 Jurisprudence 593.

wish to secure some prospects they have of benefiting from its operation. But there are also those for whom the law does more harm than good, who might prefer to have no law at all;[12] and from their point of view, the question 'why have it?' may be too quick to assume that there is a reason where there might be none.[13] This is problematic. Treating law primarily, let alone exclusively, as a means of social control predisposes us to inquire into its point and purpose from the perspective of the powerful—to inquire into the point and purpose law has *for them*—and to exclude from the narrative a whole class of people whose attitude towards law is hostile, for good reasons or bad. The error in this approach obviously recalls the problems we have encountered before, when discussing the peculiar epistemology underpinning the normative picture.[14]

We can avoid the error if we ask a different question. I have said before that we must be able to understand our own and others' actions in legal terms if we are to take part in legal practice *qua* legal practice. But why should we care? Why could we not ignore legal discourse altogether and live as if there were no law?

A first answer could be: because we would then have a hard time avoiding prison or the gallows. There is an important truth to this first answer; for some it may be the only one. But for many—hopefully for most—there is also a

[12] cf *CL* 200–02.

[13] When Finnis poses the question in Finnis (n 2) at 25, he nominally leaves open the possibility that there might be no reason to have law: ' "Why have it?" is of course elliptical for "Why, if at all, should we have it?" The inquiry is nakedly about whether and if so why I … should want there to be this sort of thing, and be willing to do what I can and should to support and comply with it (if I should).' I say 'nominally' because his other methodological choices (as articulated in the remainder of Finnis (n 2) and Finnis (n 5) ch 1) make this possibility rather remote.

[14] See section IV.3.C.

more optimistic aspect to this story: that on the whole, it generally *makes life easier* to play along rather than not. By setting up a common framework of practical meaning, and in particular by enabling what I have called orientational reasoning,[15] legal discourse helps us make clear to others what our own projects are and in turn figure out what those others are up to themselves. It opens new avenues of meaningful action and marks other undertakings as unfeasible; it highlights opportunities to take advantage of others' pursuits as well as situations where our own efforts may go to waste. Participation in legal practice—by which, again, I do not mean any particular behaviour, only the use of legal discourse in our practical lives—thus brings more meaning and order to our social affairs, putting us in a better position to exploit the chances of living in society and avoid the perils that come with it. It allows us to exercise our agency more fully than we otherwise could.

Of course, none of this is to say that all participants in legal practice are involved in it on an equal footing. Some already possess great capacities to fulfil their projects and participate to enhance these even further; others participate only to preserve the very little that is left of their agency. All the same, it is normally wiser for one to understand the legal meaning of one's own and others' actions regardless of what powers and freedoms one happens to possess. To see how this can be, let us now briefly discuss four archetypal figures—the monarch, the serf, the rebel, and the citizen—each of which typifies a reason why one could think that at least *some*

[15] In section VI.1.A.

people would have no need to care about legal discourse.[16] Let us see why one would be wrong to think so.

We begin with the *monarch*. The monarch has absolute freedom and absolute power: whatever they want to do, the law permits; whatever they want the law to be, it becomes. Now it is clear enough that their enjoyment of unqualified freedom is in principle compatible with utter ignorance of legal discourse: otherwise, indeed, their freedom would no longer be unqualified. But the case is quite different with their absolute power. The monarch cannot exercise their vast prerogatives without understanding the legal meaning of their actions: they could not intend for anything to be the law, for example, or settle disputes as to what the law is, because they simply could not know what it is for something to 'be the law', or what it is to have a dispute about it. In a word, although their life would not be seriously threatened or disturbed if they decided to opt out of legal discourse, the monarch would live it as half the agent they could otherwise be. They would be fully free, perhaps, but hardly powerful at all.

Next comes the *serf*, the monarch's mirror image. Deprived of all freedoms and powers, the serf manages to live in peace only so long as the hostile society around them concedes. Since a good part of their daily struggle is to avoid any misdeeds upon which that concession may be withdrawn, they will be anxious

[16] I am not discussing here a fifth archetypal figure—we might call them the hermit—who manages to live in complete isolation and never interacts with other people. *That* sort of person would really have no reason to pay attention to legal discourse. But the figures discussed in the text are distinguished by their different *social standing*, whereas the hermit, who stands *outside society*, has none; this is why I leave them out: cf the remarks on anarchism in Bernard Williams, 'From Freedom to Liberty: The Construction of a Political Value' in *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn ed, Princeton University Press 2005) at 85.

to orient themselves in the legal meaning of their decisions, and to steer clear of anything that might provoke violence from those higher up the ladder. To be sure, they will often be disappointed: hostility might, and will, befall them even when least explicable and least expected. Still, though the serf cannot themselves count on the law to aid them, their persecutors can, and will;[17] and thus, while knowing the law cannot give the serf any guarantees, it can at least help them avoid some of the threats they have to face.

The serf thus resigns themselves to finding the safest path through their meagre existence. When they stand up to their oppressors and fight the injustice they have so far endured, they become the *rebel*: still living in a hostile society, but now returning the hostility. Although the rebel, an outlaw by choice and conviction, may at first blush have no real interest in the legal practice they want overthrown, they still want to understand their enemy. Crudely put, even the most rebellious of rebels must know the law to know when and where to hide; even those who hold the law in deepest contempt need to elude its coercive apparatus, and for that, they must understand the workings—and limits—of that apparatus. On top of that, the rebel might find legal discourse useful in formulating their goals and justifying their rebellion. Ironically, the law may often underline the injustice it perpetuates: sometimes because it explicitly encapsulates that injustice; sometimes because its

[17] NW Barber, in 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 Ratio Juris 474 at 483–85, suggests that in conditions of extreme inequality, the law may as well be said not to exist for the disadvantaged. This is surely right if we think of the law as a system of binding norms, and all the more so a vehicle for enforcing one's rights and interests. Even so, the law then remains an important instrument through which the inequality is sanctioned and upheld; and so the disadvantaged still have good reason to recognise its reality, though it is for them an alien reality.

high-flown claims stand in stark contrast with its less brilliant operation.[18] So for the rebel to expunge legal discourse from the conceptual infrastructure of their enterprise would be to disable themselves from figuring out the best tactics to achieve their goals, and at times even from keeping these very goals in sight. Until they win, this is a luxury they just cannot afford.[19]

So let us suppose finally that they do win after all and achieve democracy: they have now become the *citizen*, living in a society of equally powerful and equally free individuals. Unlike their predecessors, the citizen no longer needs legal discourse to evade or exercise oppressive power. They will nonetheless value the facilities for making sense of each other's actions and projects, and for co-ordinating them, offered by the relatively clear and stable conceptual framework of the law. They might also turn to that framework to define the limits of their—equal, but presumably not unlimited—freedom, and to settle any disputes to emerge about these limits. Finally, they might find legal discourse and practice vital to securing and entrenching their equal standing *vis-à-vis* each other. However difficult it may then be to imagine a society of truly free and equal individuals, there is no particular reason[20] to doubt that they too will find legal discourse useful in understanding and

[18] See eg Nicos Poulantzas, 'Marxist Examination of the Contemporary State and Law and the Question of the "Alternative" ' in *The Poulantzas Reader: Marxism, Law and the State* (James Martin ed, Verso 2008).

[19] This image of the rebel can be nuanced by distinguishing with Georg Lukács between the two attitudes of 'a romanticism of illegality' and 'unfettered independence *vis-à-vis* [the] law': 'Legality and Illegality' in *History and Class Consciousness: Studies in Marxist Dialectics* (Rodney Livingstone tr, Merlin Press 1971) 256, 269 (italics omitted). But unfettered independence need not (and should not) involve ignorance: see 262–63, esp the yachtsman metaphor.

[20] That *might* not be true: there *could* be such reasons that would have to do with the broader symbolic and cultural significance of law. But these would be reasons of a wrong sort; they would be reasons to come up with a new set of non-legal institutions that would

shaping their collective life, and that they will keep it as an important element of their practice.

To be sure: our world knows neither monarchs nor serfs, nor rebels, nor citizens. All this is crude fiction. But it is also handy fiction, for it highlights that the apparent reasons each of the four figures has for disregarding legal discourse are really only apparent; and that, as a matter of fact, each has positive reasons to employ the framework of legal discourse in their practical and social life. This is important, because the social standing of any one of us can always be thought of as a more or less balanced combination of these four paradigms. Whatever our lot in society, therefore, we invariably have reason to think and talk about it in legal terms—in this way, we can make more of our life with others than we could if we chose to ignore law instead.

This is no great discovery, really, but merely a reaffirmation from a less familiar angle of the familiar truth that before law can be anything else—say a vehicle for political control, or human rights, or commerce—it must in the first place be a *generally accessible facility for social interaction* furnishing us with a framework in which to give effect to our own projects and better understand the projects of others.[21] The primary point of participating in legal practice is to avail oneself of this facility; the primary function of law is to provide it.

*come in law's place* and *do some of law's work*. Later scholars would then discover how these new institutions are genealogically related to law, as scholars today explain law's origins in religion, etc. An example of what I have in mind is Marx and Engels (n 6) 262 (on 'public' and 'political'), later made by Engels into the notion that law and the state will eventually 'wither away': for illuminating discussion, see Shlomo Avineri, *The Social and Political Thought of Karl Marx* (CUP 1968) 202–20. See also Thomas Adams, 'Coercive Law' (2022) 42 OJLS 661, 677–78.

[21] I say it is a familiar truth because of how closely it corresponds to the notion that the rule of law is law's 'specific excellence' and a prerequisite to serving any other purpose:

This in turn marks the beginning of an alternative understanding of legal continuity. For we can now say: law fulfils its primary function so long as it actually allows us to make good sense of our own actions and the actions of those with whom we interact; and it fails as soon as, and as far as, it no longer equips us with reliable means of knowing what others around us are up to, and what we must do to have our own attitudes and projects understood and acknowledged. And so, remembering that the continuity of law depends on how well it fulfils its function, we can also say: legal practice should be seen as continuous so long as, and to the extent that, law facilitates social interaction by making people's actions intelligible to each other.

In chapter II, we have seen that current conceptions of legal continuity commonly define it by reference to the sustained efficacy of a system of norms and the ongoing functioning of its central institutions. Such conceptions may have a lot to recommend them if we think of law as a 'means of social control': they track, more or less closely, law's capacity to support and substantiate the exercise of centralised coercive power, since that is what they take to be law's point. By contrast, the alternative conception I want to present now views law as a means of controlling not *society*, but one's *social situation*; my focus accordingly falls on law's continued utility in structuring and informing the social affairs of an individual agent, whoever they are and whatever their business.[22]

*AL* 224–26; cf 167–68. We could say, if we wished, that the account of law's general point offered here is basically an account of the rule of law viewed horizontally (rather than vertically) and in abstraction from its political dimension. However, I suspect that to say anything like this would obscure more than it would illuminate.

[22] cf section VI.1.E.

On this approach, officials, decision-makers, and their professional advisors are no longer presumed to have any special, let alone exclusive, claim to law's services. They are treated like any other participant, whose projects are either facilitated by law's smooth operation or frustrated by its failure to make social reality intelligible. In this way, we should be able to take note of these people's impressive influence while keeping in sight also those who lack it.

## 2. THE CONTINUITY OF LEGAL PRACTICE

### *A. Definition*

Legal practice is continuous so long as it is open to a participant in it to attribute legal meaning to their own and others' actions in such a way as to view both themselves and those around them as rational and informed agents. Legal continuity obtains, that is, so long as and to the extent that accepted rules of legal discourse enable one to make good sense of one's own and others' participation in legal practice.

Let me try to be more precise. First, I define a certain *social interaction* as a situation where

$a_1$ $\phi_1$-s on account of taking the practical attitude $A_1$;[23]

$a_2$ $\phi_2$-s on account of taking the practical attitude $A_2$;

$a_3$ $\phi_3$-s on account of taking the practical attitude $A_3$;

…

[23] For the meaning of 'on account of' here, see section VI.2.A. For simplicity, I intend all references to taking some practical attitude to include, as the case may be, *not* taking some such attitude.

We can say that legal practice is *continuous over the social interaction* insofar as there is at least one *structure of legal meaning*, understood as a set of statements of legal meaning:

> '$a_1$'s $\phi_1$-ing amounts (in law) to $L_1$; and $a_1$'s *not*-$\phi_1$-ing would amount (in law) to $L_1$!'
>
> '$a_2$'s $\phi_2$-ing amounts (in law) to $L_2$; and $a_2$'s *not*-$\phi_2$-ing would amount (in law) to $L_2$!'
>
> '$a_3$'s $\phi_3$-ing amounts (in law) to $L_3$; and $a_3$'s *not*-$\phi_3$-ing would amount (in law) to $L_3$!'
>
> …

such that, first, the statements of the structure express what in the context of the interaction is a *coherent* attribution of legal meaning to the facts; and second, the structure *explains* the interaction, in the sense that if we take any participant in the interaction—say $a_n$—the decisional reasoning:[24]

> $a_n$ takes the practical attitude $A_n$.
>
> $a_n$'s *not*-$\phi_n$-ing would amount (in law) to $L_n$!
>
> Therefore, $a_n$ $\phi_n$-s.

is valid—*unlike* the decisional reasoning:

> $a_n$ takes the practical attitude $A_n$.
>
> $a_n$'s $\phi_n$-ing amounts (in law) to $L_n$.
>
> Therefore, $a_n$ does *not* $\phi_n$.[25]

so that $a_n$'s decision to $\phi_n$ on account of taking $A_n$ is intelligible as flowing from an exercise on their part of rational and informed agency. By contrast, legal practice is

[24] See sections VI.1.B and VI.2.A.

[25] cf n 56 in chapter VI and text.

*discontinuous over the interaction* when no such structure can be found, nor any other structure of practical—not just legal—meaning which would satisfy these criteria.[26]

The absence of legal continuity means that the rational and informed agency of at least one participant in the interaction—let it again be $a_n$—is open to question. This could be because to say that $a_n$ takes the attitude $A_n$ and that their *not*-$\phi_n$-ing would amount to $L_n'$ is simply not enough to explain $a_n$'s decision to $\phi_n$; their action may then appear arbitrary or random, but not necessarily irrational. Or it could be, more seriously, that the legal meaning of $a_n$ $\phi_n$-ing is incompatible with the attitude $A_n$, so that we could legitimately infer of a rational and informed agent who $\phi_n$-s that they do *not* take the attitude $A_n$—or at least that they $\phi_n$ in spite, not on account, of taking the attitude $A_n$.[27] In either case, the source of the discontinuity might lie in $a_n$'s mistaken attribution of legal meaning to their own (and probably others') actions; or in their general misunderstanding of legal discourse; or, finally, in a more fundamental failure on their part to live up to the standards of rational agency. Whatever the source, the discontinuity in legal practice comes down to a discontinuity in the legal discourse supposed to structure it.

Essentially, this is it: we shall soon see that in the above definition lies an adequate solution to the problem of continuity. But stated in these terms, it is

[26] This last caveat is meant to exclude from consideration those familiar situations where legal discourse, as a peculiar sort of practical discourse, cannot explain the decision of some person, but there is some non-legal explanation. When I cube tofu because I want to cook it in Gong Bao sauce, law might well furnish no explanation of my conduct. But this is obviously no reason to think that law is failing me: such decisions normally fall outside the scope of legal discourse, not because it is necessarily inapplicable to them, but because they can be readily explained without its help. In such situations, law is neither continuous nor discontinuous; the question of legal continuity does not arise.

[27] See the first qualification in section VI.1.A.

bound to look opaque. I would therefore like to discuss now in more detail three key features of legal continuity as I have just defined it: first, that it is a *dynamic* concept; second, that it is to be assessed *objectively*, so by reference to accepted rules of legal discourse, though in the context of a particular social interaction; and finally, that as a consequence, the overall continuity of legal practice is a matter of *degree*. Hopefully the discussion can clear some things up.

*B. Legal Continuity Is Dynamic*

In chapter II, I mentioned that the question of legal continuity is often posed in terms of 'diachronic identity', meaning that it can be answered by considering the law at *this* point in time, then considering the law at *that* point, and then comparing the two to find out if the law at this point is, in some relevant sense, the same as the law at that point.[28] The question of continuity is construed to ask if two 'momentary legal systems' can be subsumed under one 'legal system' that endures through time.[29]

Since I am not framing the question of continuity as having to do with identity, I also have different understanding of the role of time in our notion of legal continuity. I take continuity to be a measure of whether legal practice has, at a given point in time, the discursive resources to continue without interruption or intervention; of whether legal discourse can supply the parties to a social interaction with the conceptual infrastructure to go on with whatever they have been doing. To ask 'is law continuous?' is thus not to ask if law as it is *now* is the same as it was (or

[28] See section II.2.

[29] The terminology is Raz's: *CLS* 34–35; *AL* 81.

will be) *then*, but whether the interaction as it has unfolded up to now can be made enough legal sense of to be carried on with. Figuratively speaking, it is to ask if legal discourse can link the past of a social interaction to its future.

In this sense, inquiry into the continuity of legal practice is not diachronic—it is concerned with how legal practice is at a particular point of time, not with how it compares to how it was at some earlier point—but then nor is it synchronic if we take 'synchronic' to connote a static atemporality analogous to that involved in the notion of a 'momentary legal system'. Law's existence in time is best conceived of not as a sequence of static images, grouped together with the help of some identity criterion; but as a multilinear dynamic, whereby at any given point in time we make practical legal sense of our past interactions to know how to carry on into the future; and law's continuity, accordingly, is best thought of as the capacity to support this dynamic. The continuity of legal practice is more akin to the continuity of a melodic line[30] or a mathematical function:[31] it consists in an uninterrupted passage, along some intelligible path, from the past of a social practice into its future. To assert it—or, as the case may be, deny it—is therefore to make a Janus-faced statement which, though fixed at a given point in time, looks

[30] The parallels between law and melody, and especially a peculiar 'mindfulness of time' which can be discerned in both phenomena, are discussed in Gerald J Postema, 'Melody and Law's Mindfulness of Time' (2004) 17 Ratio Juris 203; see also Neil MacCormick, *HLA Hart* (2nd edn, Stanford University Press 2008) 39.

[31] A function $f(x)$ is continuous at a given point $x_o$ when the value of $f(x)$ approaches $f(x_o)$ as $x$ approaches $x_o$, or speaking more graphically, when there is an unbroken connection along the graph of $f(x)$ between the point $(x_o, f(x_o))$ and neighbouring points on that graph. For one thing, the continuity of $f(x)$ at $x_o$, though assessed at the single point $x_o$, can only be determined by reference to what immediately precedes $x_o$ as well as what immediately follows it. For another, it has nothing to do with whether there is a criterion by which $f(x_1)$ and $f(x_2)$ can be thought to be members of a single set (they can, of course, because they are both members of the set of the values of $f(x)$, however discontinuous $f(x)$ itself may be).

both towards what has happened up to that point and towards what is about to happen next.[32]

This dynamic, rather than diachronic, understanding of legal continuity has two important consequences. One is that there are certain situations in which the question of law's continuity is not to be asked at all, because there is no social dynamic to support and thus no sense in which law can fulfil or fail in its primary task. In particular, these include situations in which the social interaction in question has finished: as where the parties to the interaction have ceased to interact for whatever reason; or as where one of the parties has effectively left legal practice or has been removed from it. If the interaction has no future, there can be no question of law being continuous or discontinuous over it.

The second consequence is that the continuity of law can hardly be distinguished from its existence. Law exists dynamically: its existence at any given point in time is inextricable from the immediate past and the immediate future. Or in other words, law exists continuously: it is completely unimaginable, for instance, that there should be law at a point in time but not immediately before nor immediately after; or that law should only exist for a minute every hour, but not in the intervals. Maybe there is a sensible distinction to be drawn between the existence of law and its continuity. Even if there is one, though, it can be nothing but a distinction between two different aspects of a single phenomenon, that is, of law's continuous existence.

[32] This is of course a play on Hart: see n 33 in chapter III; but see also Postema (n 30) 214–17.

*C. Legal Continuity Is an Objective Matter*

As I have defined it, the question of whether legal practice is continuous over a social interaction or not has to be decided by reference to accepted rules of legal discourse and, in particular, to how a structure of legal meaning supposed to make sense of the interaction fares under these rules. These, we have seen in chapter V,[33] fall into three categories; correspondingly, there are three conditions the structure must satisfy if it is to accord with those rules. These are:

> *Correct application of legal concepts:* the structure of legal meaning *correctly applies legal concepts* to the social interaction if and only if each statement in the structure is true.
>
> *Internal (theoretical) coherence:* the structure of legal meaning is *internally coherent* if and only if for any two statements of legal meaning *p* and *q* in the structure, not-*p* does not follow (as things are) from *q*; and not-*q* does not follow (as things are) from *p*.
>
> *External (practical) coherence:* the structure of legal meaning is *externally coherent with the social interaction* if and only if for every participant $a_n$ in the interaction, the following orientational reasoning:
>
> > $a_n$'s $\phi_n$-ing amounts (in law) to $L_n$.
> >
> > $a_n$ $\phi_n$-s.
> >
> > Therefore, $a_n$ does *not* take the practical attitude $A_n$.
>
> is invalid.

Let me comment on these in reverse order.

[33] At the end of section V.1.C.

As far as the criterion of external coherence goes, it will be trivially satisfied if the structure of legal meaning explains the social interaction. For this means, we recall, that the following reasoning is *in*valid for any given participant $a_n$ in the interaction:

> $a_n$ takes the practical attitude $A_n$.
>
> $a_n$'s $\phi_n$-ing amounts (in law) to $L_n$.
>
> Therefore, $a_n$ does *not* $\phi_n$.

which means that it may be the case that: $a_n$ $\phi_n$-s; $a_n$ takes the practical attitude $A_n$; and $a_n$'s $\phi_n$-ing amounts (in law) to $L_n$. This in turn means that it may be the case that the conclusion of

> $a_n$'s $\phi_n$-ing amounts (in law) to $L_n$.
>
> $a_n$ $\phi_n$-s.
>
> Therefore, $a_n$ does *not* take the practical attitude $A_n$.

is false even though both its premises are true. So this last reasoning is invalid. It follows that if the structure of legal meaning explains the social interaction, then it is also externally, or practically, coherent.

On to internal coherence. Here, let me only remark that internal *in*coherence may refer not only to situations in which two members of a structure of legal meaning are flatly contradictory, but also cases when they are inconsistent owing only to some non-legal truths. For example, the statements:

> 'The fact that the Veganism Act has been enacted means in law that any public promotion of veganism is a crime.'
>
> 'Clara's distributing vegan pamphlets is not a crime.'

are inconsistent not because they are contradictory, but because it follows from the first statement as well as the (true, but maybe not legal) statement that public

promotion of veganism includes distributing vegan pamphlets that the second statement is false. At any rate, this is what the 'as things are' proviso is meant to capture.

Of the three conditions, it is the first that presents most difficulties. Under my initial definition, so long as the structure of legal meaning is (externally and internally) coherent and explains the social interaction, legal practice is continuous over that interaction. But surely the structure should also be *correct*? It would be strange indeed to argue that a substantively mistaken interpretation of legal practice can found legal continuity. I have myself argued against the normative picture that it rests on a fiction.[34] It would be disingenuous of me to argue now that fiction is acceptable in legal theory after all—just *this* fiction, not *that* one.

The matter is more complicated. Put briefly, it does not matter if I define continuity as I have—just by reference to the *coherence* and *explanatory potential* of the structure of legal meaning—or if I define it also by reference to its substantive *correctness*, because there is a sense in which the structure, if coherent and sufficient to explain the interaction, is correct *ipso facto*, and this sense is the relevant sense in the context of assessing the continuity of legal practice.

We have seen in chapter V that what makes our social reality legally meaningful is nothing else than our very practice of seeing it as such;[35] to paraphrase Kelsen, legal discourse has 'constitutive character' in that its subject matter—the law—has no existence and shape apart from the discursive practice of identifying

[34] See section IV.2.D.

[35] See section V.2.

its existence and shape as being such-and-such.[36] Of course this does not mean that we are completely free to attribute legal meaning to facts in any way we like; we engage in the practice of legal discourse because we have certain reasons to do so, and the substantive correctness, or truth, of our legal interpretations of reality must in the final instance[37] be measured against those reasons. It *does* mean, on the other hand, that if there are different such legitimate purposes that legal discourse may serve, there will correspondingly be different concurrent standards of truth in legal discourse. In other words, there is no 'what the law just is'[38]—'what the law is' depends on what the question 'what is the law?' is getting at.

We have seen earlier in this chapter that when the question is asked by a notional participant in legal practice who seeks to find their way around others, its point is to understand what those others are doing and, in turn, what they will make of the decision of the participant asking the question. That purpose will be satisfied—and not just barely, but as fully as it can be—by any answer that makes sense *as such* and makes sense *of* the situation in which the participant finds themselves; that is, by any answer that is theoretically and practically coherent, and explains the interaction. In a sense, therefore, any such answer is true; to fix a label for this sense, let us say *pragmatically* true.

[36] *PTL* 72.

[37] Though not immediately: of course the truth or falsity of our legal understandings does not directly depend on the reasons we have for forming them, as if these understandings were really *about* those reasons. The point is rather that the rules definitive of the particular practice of legal discourse we engage in are conditioned in part at least by the reasons we have for understanding social reality in legal terms—engaging in any practice of legal discourse—at all.

[38] Yet another way to put the point is that there are no 'facts' as to what the law is to which rules of legal discourse would be 'responsible': see section V.2 and n 12 in chapter V.

I say that this notion of pragmatic truth in legal discourse is the relevant one for the purposes of assessing the continuity of legal practice because, as argued before in this chapter, the primary point of law is to furnish one with what we may now call pragmatically true characterisations of one's social interactions. Still, it is worth dwelling on this notion for a while to get a better understanding of how it works, and of how it relates to more familiar notions of truth in legal discourse. To that end, I want to contrast it with what we may label *dogmatic* truth in legal discourse.[39]

Here then is another legitimate purpose we might have in asking what the law is: we might be interested not so much in how the interaction can be best made sense of in the light of what *the parties to it* do, but rather in the light of the legal practices of *the state*. We might be interested in how the situation appears in the light of 'the legal system', where 'the legal system' refers to how the law is systematically understood and acted on by the legislative, adjudicative, and coercive institutions of the state.[40] And since that understanding is above all to be gathered from the very legal practices of those institutions—just like anyone's understanding of the law can be gathered from their practices[41]—the answer we will be seeking will either be a

[39] The label is meant to evoke dogmat*ics* (see eg *PTL* 105) rather than dogmat*ism*, and it is certainly not intended to be pejorative.

[40] I suspect it is fair to say that the practices of adjudicative (as opposed to legislative or coercive) institutions constitute the hardest core of the legal practices of any modern state; and accordingly, that whatever is pragmatically true in the light of judicial practices is also the hardest core of dogmatic legal discourse; cf n 30 in chapter III. Still, I think that in the ordinary case, the 'state' that dogmatic legal discourse seeks to make sense of is understood to comprise not just the courts but other institutions, too. The degree to which one would focus on judges to the exclusion of these other institutions corresponds, to my mind, to the degree to which one is determined to show the legal system as exhibiting unity: see section II.2.A.

[41] See section VI.2.

pragmatically true attribution of legal meaning to those legal practices of state institutions or follow from such an attribution. Such an answer, if we can find one, will then be *dogmatically* true.[42]

The difference between pragmatic and dogmatic truth in legal discourse should not be overstated; legal discourse is legal discourse, after all, whether it is assessed by this or that measure of truth.[43] And they both ultimately appeal to whether an attribution of legal meaning can make workable sense of some chunk of social practice. The main difference between them lies in that dogmatic truth depends exclusively on what makes sense of the practices of state officials, and then proceeds from there to attribute legal meaning to other social practices so as to elaborate that initial attribution into a consistent and comprehensive system; a pragmatically true understanding, by contrast, seeks to make as much independent sense of those other social practices as such, and for this reason need not in principle

[42] In the text I focus on the distinction between dogmatic and pragmatic truth, but I think we could distinguish further if we liked. Legal discourse, for example, could also be used to articulate an understanding of legal practice which not so much *does*, but *should* inform the practices of state institutions; we could call the standard of truth corresponding to that purpose *doctrinal* truth, for instance. The distinction between dogmatic and doctrinal truth in legal discourse would then, to my mind, bear some distant resemblance to Joseph Raz's distinction between a theory of law and a theory of adjudication: see 'The Problem about the Nature of Law' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev edn, OUP 1995), esp 202–03 and 208–09. Another distinction could be made by recalling my argument about what attitudes to truth in legal discourse should be exhibited by descriptive jurisprudence: see the discussion between nn 74 and 75 in chapter V.

[43] To use a term of Wittgenstein's, the two notions of truth in legal discourse mark out two obviously related, but nonetheless distinct 'language-games', where the point of the activity is different, and so are the rules: see Ludwig Wittgenstein, *Philosophical Investigations* (PMS Hacker and Joachim Schulte eds, GEM Anscombe, PMS Hacker, and Joachim Schulte trs, 4th edn, Wiley-Blackwell 2009) s 7. See also *On Certainty* (GEM Anscombe and GH von Wright eds, GEM Anscombe and Denis Paul trs, Blackwell 1969) ss 63–65. Legal dogmatics, unlike ordinary legal discourse, presupposes the existence and general efficacy of some more or less centralised mechanisms of enforcement. In a legal practice lacking such mechanisms, the distinction between pragmatic and dogmatic truth in legal discourse would disappear because the latter would lose its *raison d'être*.

pay any special attention to—or at least start with—the legal practices of the state. In short: the two standards are not entirely different creatures, and the conceptual difference between them is for the most part a mere difference in focus. We need to tread lightly here because there are some common and familiar patterns of social practice—especially those that have to do with the sheer social power of public institutions and their influence on the legal discourse of the wider population—which we might be tempted to regard as constituting further conceptual differences between pragmatic and dogmatic truth in legal discourse. Generally, however important these are, they do not constitute such conceptual differences.

On the other hand, the difference should not be underplayed either. There is some measure of independence between the two standards. We have seen before that where a person acts on a certain interpretation of a vague provision which has never been decided upon by any agency of the state, there is a pragmatically true description of the situation though none that is dogmatically true.[44] Conversely, there may be situations where there is no pragmatically true description of the situation—as where there is a discontinuity in legal practice—and yet there is a dogmatically true understanding which follows from what is pragmatically true of the legal practices of the state. Finally, one and the same legal description may be pragmatically true and dogmatically false, or *vice versa*; this is the case where legal practice is continuous over some interaction, but that interaction itself is discontinuous with the legal practices of the state. In sum, the dogmatic correctness of an attribution of legal meaning is largely independent of its pragmatic correctness, quite like the truth of '*x* ought to ϕ' is independent of whether *x* really

[44] See text to nn 28–32 in chapter V.

ϕ-s. I suppose this is part of the reason why it is so natural to talk and think of the subject-matter of dogmatic legal discourse as made up of norms (though again, to talk and think in this way is also to risk losing grip of the fact that the subject-matter of dogmatic and pragmatic legal discourse—the legal meaning of social practice—is ultimately the same).[45]

This is to summarise a complex and difficult relationship in a very rough and abstract manner. At this stage, I owe the reader an illustration to make all this more palpable and cash out the above remarks at a slower pace.

Let us imagine two companies, Port Ltd and Quay Ltd, which own and operate river docks just next to each other. One day, owing to some poor workmanship by Port's dockers, a ship moored at their dock gets loose and, carried by the current, crashes into one of Quay's piers. The pier is badly damaged and takes several months to repair before it can be used again. The direct damage to property suffered by Quay is estimated for £150,000, and the total economic loss from not being able to operate the pier—for another £350,000. After an exchange of letters between the two companies, their representatives meet and agree to fully settle Port's liabilities to Quay out of court. After an initial impasse, with Port maintaining that it is only liable for the direct damage to property and Quay insisting on a total of £500,000, Port's representatives eventually get their way. The next day, Port transfers £150,000 to Quay's bank account, and Quay never sues Port for the rest.

Before I carry on with the story, I want to make two comments about what I have just said. The first is that the initial impasse is a good example of

[45] See chapter IV, but also sections II.2.D, III.2.B, and III.3.

discontinuity: there is no legal description of the situation under which what Port and Quay are doing could be explicable as rationally flowing from their shared intention to settle the matter without litigation. On Port's view, Quay is refusing to accept what is due to it; on Quay's view, Port is refusing to pay what it owes; and as far as I can see, there is no third view to hand which could help us avoid these difficulties. This is not to say that the situation is inexplicable. Each of the two parties is likely to construe the other as acting under a mistake of law, perhaps on purpose, to test the other side; and we for our part might also find some such explanation attractive. But even then, we would still lack the sort of understanding ordinarily sought by users of legal discourse, so an understanding that would allow one to understand what Port and Quay were trying to achieve so as to know how to plan one's affairs around them. Or rather, we would have to turn to social categories other than law for such an understanding and consider, say, the commercial reality of the situation; for in an important sense, so long as the situation does not have a pragmatically true legal description, it does not really have a 'legal reality' at all.

The second comment is that once the impasse is broken, the case provides as good an illustration of legal continuity: there is now a legal characterisation of the situation which is pragmatically true, namely the characterisation initially put forward by Port. What this comes down to is that someone who happens to interact with Port or Quay can expect the two companies' representatives to understand any such interaction in a manner which is at least compatible with Port's being liable to pay only £150,000 and construe the third party's intentions accordingly. For instance, if a solicitor—let us call him Sam—approached Quay's management and offered his help in suing Port for the remaining £350,000, he could expect Quay's management to be sceptical, and to

think that he only wanted to rip them off on fees for a piece of hopeless litigation. He would not have to accept this understanding himself, we expect, but to avoid misunderstanding he would do well to take it as his point of departure—and then come up with arguments why Port's view of the law had actually been wrong, or if not strictly speaking wrong then unlikely to be accepted by the court, and so forth. (Of course, he may find that Quay's management needs no convincing; it may turn out that they have changed their intention rather than their view of the law, and simply decided to accept only a part of what—they think—Port owed them. But we assume that this is not so and Quay's intention has all along been to settle the liability in full.)

So, what it means for Port's understanding of the law to be pragmatically true in the light of Port and Quay's interaction is that it is an understanding which may fairly be attributed to them on the basis of what they do, and on what intentions, because it allows one—including Port and Quay themselves—to view them both as acting rationally on the intentions they have. This does not necessarily mean that Port and Quay subjectively believe that the understanding is correct; it often will mean that, but that is strictly speaking neither here nor there. What matters is that it is objectively open to them to accept the understanding and thus view themselves as rational and informed agents; and so, that one has reason to accept the understanding too if one seeks to interact with them within a shared practical framework. Given that this is the sort of thing that most participants in legal practice seek, other things being equal, we can expect this reason to have some force. In particular, if one lacks any means of or interest in imposing or proposing an alternative framework, it may well be a conclusive reason.

Now let me develop the example a little and add another actor to the mix. Suppose that situations like the one between Port and Quay had been happening every now and then for some time already, and since the courts' unclear jurisprudence had contributed to lengthy and costly litigation around the issue, a regulation had been put in place some time before the incident which provided that where damage to a dock was caused by dockers employed in an adjacent dock, the operator of that adjacent dock was liable for any resulting economic loss suffered by the operator of the damaged dock. We should also suppose that there have been no actions by any state institutions which would cast any doubt that this is indeed the legal effect of the regulator's enactment. What then?

Then the case illustrates two further points. The first is that, as I have already said, one and the same understanding of the law can be pragmatically correct and dogmatically incorrect, or *vice versa*. Here, given the regulation, the dogmatically correct position is that initially proposed by Quay, namely that for Port to discharge its liabilities in full is to pay Quay the entire sum of £500,000. Why? Because it is pragmatically true, in the light of the legal practices of state institutions, that where a dock is damaged as a result of the actions of dockers employed by the operator of an adjacent dock, the operator of that adjacent dock is also liable for pure economic loss suffered by the operator of the damaged dock; and it follows from that, as well as from the facts of the case, that Port is liable to pay Quay the entire sum of £500,000. To put it another way: given that state institutions have reasons to accept a pragmatically true characterisation of their own legal practices, and given that one normally has reason to accept that which follows from what one has reason to accept, the state has reason to accept that Port is liable

to pay Quay £500,000, and to act on that.[46] And yet, for all that, there is no reason to doubt the pragmatic truth of Port's—dogmatically false—understanding of its interaction with Quay; or, for that matter, the continuity of legal practice over that interaction.

Or maybe we should say there is not *yet* any such reason; after all, it surely does make a big difference that dogmatically speaking, Quay's initial understanding of the law is right. Before I go on to the second point illustrated by the modified example, I want to spend some time on what that difference is in order to clarify a little better how more 'traditional' visions of law could fit into the picture I am now drying to draw.

Let us then imagine again that Sam the solicitor comes to Quay's office with an offer to represent it against Port and tells the management of the regulation. What is likely to happen next is that Quay will get in touch with Port and demand the payment of the remaining £350,000. We get back to the initial position which, we recall, was an impasse, but now the impasse may easily be broken, or even avoided, by simply pointing to the regulation. If Port's representatives are made aware of the regulation, that is, they can be expected to proceed on the dogmatically correct understanding of their legal position. Why? Because participants in legal practice, for reasons to be made clear in a moment (if clarification is needed), normally try to act on an understanding of the law that is dogmatically correct. To

[46] This reveals another way to think about dogmatic truth: an understanding of the law is dogmatically true if it is pragmatically true in the light of an *imagined* involvement of the state—imagined on the assumption that the state's agencies would think and act in accordance with an understanding of the law they already have reason to accept, but in abstraction from any further ethical or political reasons they may have to depart from it. The potential existence of such further reasons is what enables the distinction, as drawn in n 42, between dogmatic and doctrinal truth in legal discourse.

be sure, we are very often half-hearted about this ambition and simply act on our gut feeling. Just as often we simply lack the means or knowledge necessary to verify our convictions. This rarely affects our ability to live a successful life under law, even if as a result we sometimes get things (dogmatically) wrong. Still, we usually prefer to proceed on an understanding of the law that we know or expect—with good grounds or without—to be dogmatically true, and this is precisely what makes it so easy to convince someone to accept a certain understanding by just showing them the books.

But let us now suppose that Port's management is unimpressed all the same. Perhaps they think the regulation is void on this or that ground, or maybe they think their dockers have not really caused the damage, or disagree with the figures claimed. One way or another, the impasse persists. What Quay can then do—to Sam's considerable satisfaction—is sue Port for the remaining sum; and we can expect, given what the dogmatically correct position is, that the case will be easily won. Once the judgment is in place, Port will have a much harder time denying the liability.[47] As long as they accept the court as a court and the judgment as a judgment, they will have to transfer the money if they want to be seen as intending to discharge their liabilities to Quay. Here, once the state has directly involved itself in the interaction and determined its legal meaning *in concreto*, there is no longer room for ambiguity that might breed discrepancies between what is pragmatically and dogmatically true. The legal system has spoken, full stop.

[47] For simplicity, I disregard here any appellate infrastructure that might be in place.

So at the risk of making this far-fetched,[48] let us suppose finally that Port's management does in fact refuse to acknowledge the judge as a judge or the judgment as a judgment and maintains that its liabilities do *not* exceed the £150,000 already transferred. Then the case reveals a deeper discontinuity of legal practice between Quay and the state on one side, and Port on the other. That discontinuity may then be 'resolved'—though this is 'resolution' only figuratively—by some sort of coercion, for instance by depriving Port's representatives of liberty or legal capacity. Now, whatever such measures may also be meant to achieve, one of the effects of administering such sanctions is that Port's interaction with Quay is over, and the question of law's continuity or discontinuity over it, as we have seen,[49] disappears. More: Port's representatives are barred from *any* participation in at least some areas of legal practice, for at least some time; the state thus ensures that they will no longer have a chance to act and speak in discord with the state's determinations. Such coercive measures thus preserve, on the one hand, the continuity of informal, everyday legal practice *with* the legal practices of the centralised state; or, more bluntly, the state's domination in the field of legal discourse.[50] But on the other hand, they also preserve and encourage the continuity

[48] Though the facts of the Polish constitutional crisis, described in section II.1.A, show that where the sceptical party controls the state's coercive apparatus, such a turn of events may be uncommon, but not so far-fetched after all.

[49] In section VII.2.B.

[50] Even if there were no centralised state, however, there would still have to be some such 'elimination mechanisms' in place, though they would be more dispersed and possibly less drastic. This is because legal practice is a practice governed by rules of legal discourse, and some such mechanisms can be found in any rule-governed practice: if I refuse to follow the rules of chess, for instance, nobody will play it with me; if I refuse to follow the rules of our language, I will be deemed to speak gibberish; if I refuse to cook pasta alla norma with aubergines, I will end up cooking something else. In fact, any rule-governed practice will *necessarily* have such mechanisms: one's refusal to follow the rules that define and govern the

*of* those informal practices by solidifying a set of more or less accessible standards of legal discourse which people may rely on in their everyday interactions. There is therefore an ambiguity in the role played by state coercion in legal practice: by trimming, sometimes violently, the organic growth of everyday legal discourse, it also ensures that this very growth remains possible.[51]

I have complicated the story to illustrate how, for all its independence, the pragmatic standard truth in legal discourse will nonetheless track the dogmatic standard as a matter of course. In modern legal practice, dominated by the modern state, there are mechanisms in place through which the dogmatically correct view of the law may be freely imposed on virtually anyone, at least anyone who is not themselves the state—through which, so to speak, what is dogmatically true can be made also pragmatically true—and putting these mechanisms into motion may often be the only way out of a legal discontinuity. If so, it is only natural for one to ensure, so far as practicable, that what is pragmatically true of what one does reflects what is dogmatically true of it. After all, if that is the default position anyway—if one is going to be forced to accept it in the end—why would one risk the trouble and expense of litigation and not just accept it from the start instead?

This is actually not a rhetorical question, and upon there being a good answer to it hangs nothing less than the very sensibility of the distinction between pragmatic and dogmatic truth in legal discourse. But there can in fact be good

practice *must* in the end put one outside the practice, for otherwise there would be no sense in which the rules 'defined' the practice. If such 'sanctions' are thought coercive, then to that minimal extent legal practice—as any rule-governed practice—is necessarily and always coercive, even where everyone plays by the rules.

[51] cf Robert M Cover, '*Nomos* and Narrative' (1983) 97 Harvard L Rev 4, 53.

answers to it. The best one, perhaps, would be that there simply is not yet any dogmatically true understanding of the law that one could 'accept from the start', as where the state's practices are too vague or contradictory. We have seen before, however, that even in such a case it might be necessary for one to act on *some* understanding of the law, and while that understanding would not then become dogmatically true, it would become true pragmatically.[52] Another answer could be that the trouble and expense of finding out what the dogmatically true position is in itself considerable, and perhaps beyond reach. Yet another one could be that the risk of actual litigation is in fact negligible; putting the state into motion is often troublesome and costly. Another still could be that winning the case is possible—as where the dogmatically correct position is based on an outdated precedent—and the risk is worth taking. There could, in short, be good reasons to accept as true an understanding of the law which is not dogmatically true (quite apart from the reasons one might anyway have to accept it if it also happens to be pragmatically true[53]). These reasons delineate, on the one side, the overlap between pragmatic and dogmatic truth in legal discourse, and on the other side, the extent of their mutual independence.

To take dogmatic truth as the sole and only measure of truth in legal discourse, conversely, would be to make sense of legal practice as if its domination by the state were absolute, as if every single social interaction either already had, or were to have, the state's gaze cast upon it. For example, Liam Murphy writes that

[52] See the passage referred to in n 44.

[53] This caveat refers back to the point, made in n 42, that there may be further standards of truth in legal discourse beyond the pragmatic and dogmatic.

we act 'on beliefs about what the law is' because it gives us a measure of 'self-understanding of how [we] relate to [our] state and, *through it*, to others'.[54] This would be right if the italicised bit were struck out. It is a mistake to think that every legally meaningful social interaction has to be had either *with* or *through* the state; or that in every such social interaction, if the state is not already involved, the prospect of its involvement looms large. It may not. There may be interactions where the parties can be reasonably sure the matter will never end up in court, or with any other agency of the state. I am in fact inclined to think there are very many such interactions, and that law's smooth operation depends on this being the usual case.[55]

This finally leads me to the second point I wanted to illustrate with the modified example. It is that pragmatic truth in legal discourse, unlike dogmatic truth, is essentially contextual in nature. What is pragmatically true is pragmatically true only in the context of—or as I have been putting it, in the light of—a particular social interaction. This means that it is possible for two attributions of legal meaning to both be pragmatically true in the context of two different social interactions even though they are inconsistent if considered outside of these contexts. Or, to put the point another way, even though they could not both be dogmatically true.

To see this, let us roll back in time to when Sam the solicitor has not yet visited Quay's office. I have said that, in the context of Port and Quay's interaction, it is pragmatically true that Port is only liable to pay Quay for the direct damage to property. But I have also said that, in the context of the legal practices of the state,

[54] 'Better to See Law This Way' (2008) NYU L Rev 1088, 1107 (italics added).

[55] cf *CL* 38–42; Gerald J Postema, 'Conformity, Custom, and Congruence: Rethinking the Efficacy of Law' in Matthew H Kramer and others (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (OUP 2008).

it is pragmatically true that a dock operator in Port's position is liable to pay also for any resulting economic loss of an operator in Quay's position. We have also seen that the former statement's negation follows from the latter statement; they are therefore inconsistent—or rather, they would be if we disregarded the contextual nature of pragmatic truth in legal discourse.

Why then should we not disregard it? Because it reflects the fact that the social interactions we have with each other are not always connected—we do not interact with everyone, all the time—and that when they are not, we may well have good reason to engage in them on the basis of different, and possibly inconsistent, understandings of the law. Of course, we may also have some reason to avoid doing so, but I do not think it is anywhere near absolute. Sam the solicitor, for instance, may still have good reason to approach Quay, at least initially, on the basis of Port's understanding of the situation; and yet also have good reason to approach the court on the basis of the state's understanding of the matter. There is nothing particularly odd about this. Sam may simply have more to gain by finding a common language with Port and Quay on the one side, and another common language with the state on the other side, rather than sticking to just one language across the board, so to speak. By differentiating between contexts in this way, he can make more practical sense of the people with whom he interacts; and if he did not differentiate them, he would preclude himself from seeing at least some of these people as rational and informed agents genuinely acting on their professed practical attitudes. This is why pragmatic truth in legal discourse must be sensitive to context. (Dogmatic truth, too, has to be *somewhat* contextual insofar as it is premised on what is pragmatically true of the legal practices of this or that state. Still, since the concern behind dogmatic truth is much less about making sense of legal practice as such and

more about making sense of the legal practices of the state, the degree to which dogmatic truth in legal discourse depends on context is much more circumscribed—so circumscribed, in fact, that for the most part we can and do think of it as context-independent.[56])

Now, if pragmatic truth in legal discourse depends on context, then so must the continuity of legal practice (hence continuity *over* a particular social interaction). This can again be illustrated by our example, where there is continuity between Port and Quay, and also—we have supposed—between the regulator and other agencies of the state; and yet no continuity between Port, Quay, *and* the regulator, because when the actions of all three are considered together, there is no legal characterisation of them that would be pragmatically true. This discontinuity, we have seen, is eventually resolved because Sam comes to Quay's management, which then decides to call on the state to enforce the dogmatically correct understanding. But if Sam had never come, or if Quay had ignored him, the discontinuity could persist for quite a while—eventually to reach a very different resolution. The relevant limitation period could elapse, for instance, or Port and Quay could sign a formal settlement. Then it would not just be certain that the state would not get involved in the interaction—that could be certain anyway—but the state would have *barred itself* from intervening. The state would have for all practical purposes given in to Port's understanding, just like Quay before, and resolved the discontinuity—not by the use of authority or force, however, but by being flexible and, well, pragmatic.

[56] cf section VIII.2.B.

Let me now take a pause at last and attempt a synthesis of this rather long argument. The gist of it is that apart from the state-oriented legal discourse aimed at what legal understanding of social practice is *dogmatically* correct, we can also distinguish another, *pragmatic* notion of truth in legal discourse which would be sensitive to what I have argued is the primary purpose of engaging in legal discourse, namely, to get orientation in and understanding of the ways of those around one. This matters in that such a pragmatic notion of truth is naturally better suited to the task of assessing the continuity of legal practice, at least if continuity is understood to track law's ability to provide those who live under it with such orientation and understanding. Legal continuity is therefore a matter of whether there is an objectively true legal understanding of social practice, but the objective truth sought here is pragmatic, not dogmatic.[57] It follows that whether or not there is continuity in legal practice fundamentally depends, like pragmatic truth, on the context and scope of the inquiry.

Behind this argument stands the realisation that while the legal practices of the state may lie 'at the centre' of modern legal practice, they are 'not the whole' of it;[58] that much legal practice goes on without any intervention by the state's coercive institutions. As we have also seen, given the central role these institutions

[57] The pragmatically true attribution of legal meaning to any legal practice can of course be said to be 'subjective' in that it depends on the subject *of the practice*—the person whose practice it is—but it is not subjective in that it depends on the subject *of the attribution*—the person who does the attributing. This disambiguation becomes key if we compare my distinction between pragmatic and dogmatic truth in legal discourse with the analogous distinction that Kelsen draws between, respectively, subjective and objective legal meaning: see *PTL* 2–3; cf *GTLS* 404–05, where Kelsen draws the distinction between the 'objective meaning of legal material' and 'the subjective meaning presented by the materials when submitted to objective interpretation'.

[58] To paraphrase Hart: *CL* 99.

nonetheless play, we can expect that most of that non-state legal practice is either directly or indirectly structured by these institutions' understanding of the law. That is, most of it is premised on dogmatically correct understandings of the law and thus remains continuous with the legal practices of the state. And yet while some of it does not—while some non-state legal practice proceeds on understandings of the law which may go beyond, or even against, what the state does and says—this does not necessarily mean that to that extent legal practice is discontinuous. It is, to be sure, discontinuous *with* the legal practices of the state, but that is that. For, given its contextual nature, the continuity of legal practice may still be preserved over such interactions; and whether it is ultimately depends not on what the dogmatically correct understanding of them is, if any, but on whether there is one that is pragmatically correct.

As I say, in the normal case this area of legal practice, governed by understandings which go beyond what is dogmatically true, represents a fringe of legal practice as a whole—probably a substantial one,[59] but a fringe nonetheless. Still, it is crucial that we realise that it is there, because the problem of continuity, for all else it may be, is also an illustration of how the fringe may grow wider as soon as the state's legal practices themselves become discontinuous with each other. Then, when the dogmatic standard of truth in legal discourse is much more difficult to work with—or even make sense of—pragmatic truth gains much more prominence, and its role in maintaining the day-to-day continuity of legal practice becomes much easier to discern.

[59] Timothy AO Endicott, for example, argues that the law is necessarily vague: see *Vagueness in Law* (OUP 2000), esp 189–90; 'Law is Necessarily Vague' (2001) 7 Legal Theory 379.

All that said, I end this section with a word of caution and clarification. Distinguishing pragmatic and dogmatic truth, and establishing the former as a genuine and objective standard of truth in legal discourse, has taken us very close to a solution to the problem of continuity; in fact, there is now little left to do but articulate it, which I shall do very shortly. But the picture of legal practice we get as a result need not be any prettier for that. In some cases, pragmatic truth can hurt less than dogmatic truth; but in other cases, it can hurt a great deal more. Port and Quay's interaction may not afford any straightforward illustration of this (unless the reader has strong views on liability for pure economic loss in tort), but we need not stretch our imagination too far to come up with other examples. An employer might use their economic domination and force onto their employees an understanding of the law which serves only to perpetuate their exploitation; the workers' access to justice may be so impaired that the employer need not even exert themselves. A police officer may rely on their physical force and self-perceived authority to enforce the law as it is convenient to enforce, not as it is. A wealthy young man, perhaps the son of a famous lawyer, may bully the victims of his sexual abuse into thinking that he has not done anything illegal. And so we could, sadly, go on and on.

Now, in any such case the intimidation may be such as to impair its victim's rational and informed agency and thus make it inappropriate—even offensive—to interpret the interaction as a shared legal practice *of* the parties. The situation may be better made sense of in terms which not so much deny the victim's agency as acknowledge their inability to act on it.[60] But if it is not, and if the abusive

[60] See section VI.1.A, where I say that there may be certain vitiating conditions such as duress or intoxication which make it misguided to trace someone's actions to their exercise of rational and informed agency—to treat the actions as the agent's own.

party's understanding truly makes the most sense of the interaction, we must conclude that it is pragmatically true in the context of the interaction, even though it is at the same time morally abhorrent and may also be—we hope—dogmatically false.

Such a conclusion is of course troubling, but the trouble is moral not theoretical. There is no more reason to reject it in our legal theory than there is reason to reject the thought that the understanding of the law imposed upon a population by an evil and oppressive state is, for that state and population, dogmatically true. And conversely, there is a corresponding theoretical reason to embrace it. Just as it is important to realise that the state and its legal system can work great injustice even if some or even most legal systems we know are just, so we should see with clarity how even with a just legal system in place, law—as a discursive facility we use to structure our everyday interactions—can still work great injustice, albeit on a more local scale and away from the state's watchful eye.

We might be tempted to recast the point by saying that even a just legal system may sometimes fail to ensure justice in all arrangements between all people, and that the situations I mention are simply examples of that failure. The temptation would come from the fact that putting the matter this way would relegate the scenarios discussed here and other similar cases to the periphery of jurisprudential inquiry, indeed perhaps outside its limits. But while it would not necessarily be false or misleading, such a formulation would nonetheless miss a key element of the truth; for part of the trouble with these situations is precisely that the abusive party can enlist the conceptual infrastructure of law to further their abuse. Even if the understanding of the law they impose on their victims is dogmatically mistaken, it is still recognisable as an understanding *of the law*—otherwise it could

not be 'mistaken', not *as to the law* at least—and if it governs the interaction, it governs it in much the same way as it would govern it if it were dogmatically right. Of course, *should the state get involved*, there would be a world of difference, which is why we say that the understanding is in fact dogmatically mistaken. But there is also theoretical value in capturing the sense in which the understanding remains operative, and thus pragmatically correct, if the state does not get involved for whatever reason. For we can then better understand the complexity of the situation and the peculiar evil it instantiates—and identify this evil as in part at least a *legal* evil, possible only where there is law, because enabled by law's peculiar mode of operation.[61]

To identify such dangers is certainly part of the task of responsible descriptive jurisprudence; and, I would say, an important part. So there is also an ethical consideration in favour of the contextual approach developed here: the more realistic picture it gives us of legal practice, even when optimistic on the whole, preserves enough of the ugly detail to remind us that our optimism should never go unquestioned.

*D. The Overall Continuity of Legal Practice Is a Matter of Degree*

So far, I have been elaborating the notion of legal continuity *over* a particular social interaction. I have argued that it should be assessed objectively—by reference to accepted rules of legal discourse—but contextually, with a focus on the social interaction in question. However, it is surely not senseless to ask about the *overall* continuity of legal practice in relative abstraction from any such interaction. And

[61] cf Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 NYU L Rev 1035, 1052–58.

while the question of whether law is continuous over a specific interaction is a yes-or-no issue, this overall continuity of law appears to be a matter of degree: for example, had Port and Quay gone on the regulator's view of their situation from the start, the overall continuity of the legal practice of which their actions are part would seem to be *higher* than it is as I have initially described it.

The overall continuity of a legal practice is the degree to which it manages to secure continuity—or avoid discontinuity—over the particular interactions that make it up. The more interactions law supports, the more continuous it is.[62] There is here, of course, a minimum threshold below which we can hardly say that there is law at all: if legal discourse becomes practically useless as a framework for making sense of social practice, the overall continuity of legal practice is broken. Above that threshold, however, there is ample room for variation; accordingly, a legal practice may be sometimes more continuous, sometimes less.

All this is simple enough. What is more problematic is how to assess this overall continuity. Should we look to the degree to which legal discourse facilitates the *actual* interactions that make up the legal practice, or also the *potential* interactions which might come to form part of it? Is the question 'how well, as a matter of recent history, has legal discourse served to facilitate social interactions?', or is it rather 'how well, as a matter of institutional design, can legal discourse be expected to support social interactions in the future?'?

What seems to speak against the first option is that it makes the continuity of legal practice depend on the actual actions and projects of its

[62] I do not want to suggest that the point can be given precise statistical expression. I doubt it would be useful, even if it were possible. It is enough that we can tell with some confidence when a given legal practice becomes more continuous overall, when less.

participants, as well as the incidents of their lives. Had Port's management been different, for instance, and never taken exception to the dogmatically correct understanding of the situation, the legal practice from my example would be more continuous than it is as things are; the same would be the case had Port's dockers done their job right. But is this really a problem? There is of course an intuition that the continuity of a legal practice should depend on the conceptual architecture of its legal discourse rather than on the contingencies of social life; but it does not follow that it has to depend on that architecture *exclusively*. It is not obviously wrong to think of the overall continuity of legal practice as conditioned, on one side, by the quality of its discursive framework, and on the other side, by the facts to which this framework happens to apply. The intuition, while correct, is not decisive.

On the other hand, the second option involves the following theoretical problem. As a matter of bare logical possibility, a legal practice may go in infinitely many directions, and infinitely many so erratic that not even the most impressive Hercules could find any legal sense in them.[63] It is not just that no real legal practice will ever be discontinuity-proof—after all, nor will any be free from actual discontinuity—but that a truly discontinuity-proof practice, as an ideal, lies so desperately beyond the feasible that it is virtually empty. There is, in other words, no way in which an imaginable legal practice could ever come close to the ideal; and if the bar is set so high that we cannot even imagine what it would be to approximate it, then it makes for a poor benchmark and gives us a poor measure.

[63] I take the figure of Hercules from Ronald Dworkin, 'Hard Cases' in *Taking Rights Seriously* (Duckworth 1977) 15–30.

In the end, whatever mechanisms there may be in place to preserve the continuity of legal practice, they are not designed to maintain it come what may—for that would be impossible—but to maintain it in the face of those conflicts and controversies that are likely to—and *will*—ensue. They are not there to hedge against all logically possible scenarios, but those which are most humanly plausible. The better measure of how well they handle this task is the degree to which they enable the avoidance of actual discontinuity, not the degree to which they can solve problems they were never meant to solve. And it is the better measure not only because it is more manageable, but also because it reminds us that the conceptual quality of legal discourse can in the end depend only on how well it serves the social reality for which it is procured.[64]

## 3. REVISITING THE PROBLEM

I would now like to lay bare an analogy which the reader might have already discerned along the way. This is the analogy between the practice of speaking a language on the one hand, and of living under law on the other. Compare the following two stories.

The first is a (broadly true) story of modern Hebrew.[65] Hebrew is used among the Jewish communities of Ottoman Palestine as not only the sacred language of prayer, but also a loose *lingua franca*. A group of scholars and visionaries

[64] The argument of the preceding paragraphs draws on Ludwig Wittgenstein's notion of the 'scaffolding of facts': *Zettel* (GEM Anscombe tr, GEM Anscombe and GH von Wright eds, 2nd edn, Blackwell 1981) s 350; GP Baker and PMS Hacker, *Wittgenstein: Rules, Grammar and Necessity: Volume 2 of an Analytical Commentary on the Philosophical Investigations* (2nd rev edn, Wiley-Blackwell 2009) 211–14.

[65] With some changes this could be almost any modern language, but Hebrew lends itself to the analogy most naturally.

arrive from Eastern Europe and decide to 'codify' the language by writing up dictionaries, consolidating grammar, standardising pronunciation and spelling, and so on. They spend days and nights debating the precise shape of the rules that should govern the revived language and teaching it to the people. Eventually, their efforts pay off: as time goes by, as more and more Jews migrate to Palestine, Hebrew eventually becomes a fully functional and widely used language. But in the process, those who use it often do so against the rules laid down by the scholars and visionaries: they borrow words, botch grammar, keep their accents. So long as they manage to communicate, this is their only concern. After a while, even the scholars acknowledge that. The dictionaries get adjusted, some of the invented words are deleted or changed, rules are rewritten. Other words and rules are kept, only with annotations that they are often violated in colloquial usage. There is no point fighting that, the scholars think. After all, that is how a language lives.

The second is a (dramatically simplified) story of a modern legal practice. A group of officials, in one way or another, manages to monopolise power over a territory. They adopt for themselves a more or less hierarchical organisation, divide responsibilities and tasks between themselves, and over time form what we know as the modern sovereign state. Now they issue general laws in the form of codes, statutes, regulations, and so on. In a good number of cases, they manage to secure compliance with these general laws: first, by means of their wider political influence and perceived authority; second, by means of a sophisticated and complex apparatus of adjudication and enforcement. Even in those cases where they cannot secure compliance, they can often secure understanding: so that even those who violate know what they are doing and do not cause excessive trouble when called upon to make amends. And yet there remain quite a few cases where people

understand their actions otherwise than the state does—perhaps because they are simply ignorant of what the state thinks, or because they do not care, or because the state has never given consideration to the issue—and go on in ways which are, to a legal professional, heterodox, but nonetheless work well enough. The state sometimes pays these people a visit and reminds them of their mistakes. Sometimes, if they persist, the state may use force. But for the state to do these things is costly and cumbersome, so often enough it lets the matter rest.

There are of course numerous differences between the two situations. One is that there is a much more rigid hierarchy of power in legal practice than there is in linguistic practice; another is that while both are ethically salient, they are ethically salient in different ways and for different reasons. But are there also any features that they have in common? There are a few, in fact, and they are all instructive.

For one, both situations involve a multilinear practice of more or less complex *communication*. In the case of language this really need not be explained; if language is not communication, nothing is. The second case, that of legal practice, is a little trickier. But here, too, we have people who do meaningful things, and part of the reason why we say they are meaningful is that they *tell us* something about the people who do them: something about these people's plans, attitudes, projects, as well as about the expectations they may have of us. This last point is especially easy to see on the example of those who hold power: what they do—what laws they enact, what precedents they set—tells us a great deal about how we should act around them, and of course part of their point in doing these things is that we

understand this well.[66] But those who lack power, too, communicate their attitudes through their legally significant actions: they can thus demonstrate allegiance or resistance, acquiescence or defiance. As we have seen, people care about the legal meaning of their actions not because they are answerable to the legal gods, but because they live around others, because the legal meaning of their actions *says* something about them, and because those others around which they live understand and react accordingly. In this sense law, too, is a practice of communication.

Second, in both cases there is a fuzzy but discernible distinction between centre and periphery and a characteristic relationship of mutual influence between the two. The centre invariably seeks to give shape to the whole, to direct both itself and the periphery. These efforts are largely successful, but then there are certain sections of the periphery where they are not. The centre can do three things about this. It can try to enforce full conformity, though this is often costly and anyway Sisyphean. It can embrace some forms of non-conformity as correct after all and update the directions it issues to the periphery. Finally, it can simply turn a blind eye. The first reaction seems characteristic to law and the second to language (the third is characteristic to neither, because it represents a failure, though one which may be worth embracing[67]). But as we have seen in this chapter, and as we can see in the world around us, all three reactions are commonplace in our legal practices. There are so many things the law never enforces and never will.

[66] See the discussion and criticism of 'the communication theory' in Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011). I do not take myself to subscribe to the theory, by the way, because the communication I take to be involved in legal practice is not (just) linguistic communication; in this connection, see esp text to nn 26–32 in chapter V.

[67] cf NW Barber, 'Against a Written Constitution' [2008] PL 11, 15–18.

Third, in both cases it is not absurd to give an account of the practice by focusing on the centre. Were we to write a history of Hebrew, we could choose to pay more attention to the congresses and conferences and not to the streets of Tel Aviv and Haifa; were we to give a theory of legal practice, we might as well spend most of our time talking about the practices of officials. It is fine to do so, so long as we keep in mind that we are capturing but a fragment of the whole—a uniquely important one, perhaps, yet a fragment all the same. For as soon as we forget that, we either narrow down our vision beyond necessity or, worse, step into a world of fantasy where the centre is completely successful in leading the periphery. It never is, in fact; and that it never is remains an invariable feature of the practices in question.

Fourth, there are situations in which it nonetheless becomes obtuse to focus on that central element. There may be important phenomena that go on in the periphery only. In particular: the centre may be in a muddle, but the periphery may carry on nonetheless. The linguists and visionaries may have a dispute—say on whether tomatoes should be called 'love apples' or 'golden apples'[68]—but most speakers may ignore it and just use either or both. The officials of the state may get into an irresolvable constitutional crisis, but most users of legal discourse may just keep on making legal sense of their actions as they did before. This may be because they simply have not noticed the crisis; the state has never been too involved in their

[68] Tomatoes are not just controversial in English. The Hebrew word, *'agvaniyah*, was coined by Yechiel Michel Pines and is etymologically related to the archaic *'-g-v* root for 'lust' and 'love-making'; apparently this was related to the European perception that tomatoes were an aphrodisiac. Eliezer Ben-Yehuda insisted on *badura*, derived through Arabic *bandura* from the Italian *pomodoro*, literally 'golden apple' (*pomo d'oro*). Pines's coinage stuck. The controversy is attested in many places: see eg Malka Muchnik, *The Gender Challenge of Hebrew* (Brill 2014) 220.

legal practices in any event, so what difference does it make if it is in order or disorder? Or it may be that they just find it useful. They use legal discourse not because they have to do with the state on every corner—they do not—but because they have to do with each other on every corner, and legal discourse helps them bring order and sense into these encounters. They may thus have good reason to uphold the continuity of legal practice even though their state is having a legal battle with itself. And we, in turn, have good reason to expect they will.

But now it looks like the problem of continuity is no more. It looks like we have simply lacked the tools to capture these four points on which modern legal practice resembles, for all the differences, the practice of speaking a modern language. Once we have captured them, by contrast, the phenomena underlying the overall continuity of legal practice through constitutional crises such as the Polish one are no more mysterious than the overall continuity of linguistic practice through a dispute between lexicographers or grammarians. That is, they are no longer mysterious at all.

Let me be more explicit. In chapter II, I have formulated the problem of continuity as setting up three hurdles which a descriptive account of a constitutional crisis must pass.[69] The first is that it must acknowledge the disruptive character of the crisis: that it must construe it as a discontinuity in constitutional practice. Can we check this box? Without difficulty. If we have defined a constitutional crisis as a discursive conflict between state actors as to the right understanding of constitutional practice, then *by that definition* it is a discontinuity in legal practice. Moreover, because we have also defined it as practically irresolvable,

[69] See esp section II.1.F.

it is *by definition* a persistent discontinuity which cannot be cured by any of the mechanisms described earlier in this chapter. We may indeed recall from chapter II that the problem has been that the two agencies which are meant to cooperate in the deployment of these mechanisms—the executive and the judiciary—come apart in the course of the crisis. So we not only have clarity that the crisis *is* a crisis, but we can also articulate *why* it is a crisis. It is a crisis because discontinuity is ordinarily cured by the courts acting in tandem with the executive apparatus of coercion. When a discontinuity between them appears, there is no one to resolve it.[70]

The first box checked, let us proceed to the second one. Our account of the crisis, we recall, must leave room for the possibility that the overall continuity of legal practice nonetheless remains intact. The argument of this chapter makes it abundantly clear why this remains a possibility. The continuity of legal practice, we have seen, must be understood contextually, and its overall continuity is a matter of degree. From these two points we draw the following conclusion: a great deal of legal practice which does not involve the state may remain continuous even though the state's own practices are discontinuous with each other. In other words: legal discourse aimed at dogmatic truth, which seeks to give legal sense to the actions of the state, may be in shambles—we have seen in chapter II that it is in shambles when it tries to make sense of the constitutional crisis in Poland—but the practice of ordinary legal discourse, aimed at pragmatic truth, may carry on, and carry on just as well as before. It is true that some degree of state support is useful, or even necessary, to maintain the operation of everyday legal practice; in a constitutional crisis, some of that support may be lacking, with consequences which may spread

[70] See n 48.

beyond the state. The extent to which they will in fact so spread forms part of the contingent history of the particular crisis. But on a more general level, we have seen that much or even most everyday legal practice can go on without any support whatever; and insofar as it can, it can also continue despite the crisis. So we check the second box.

What of the third box? We recall that the final condition for the adequacy of our account of constitutional crises was that it capture not only how they can leave the continuity of everyday practice intact, but also be irrelevant to it. I have little to add on this. The above remarks not only show that everyday legal practice can carry on despite a constitutional crisis, but also that it can do that *because*, and *insofar as* the crisis is irrelevant to it—that is, insofar as it does not inhibit the state from giving whatever support is necessary, if any, for the continued functioning of everyday legal practice.

This solves the problem of continuity and concludes my argument. Our initial puzzle piece nicely fits into the broader picture. But that picture itself is at least as interesting as the fact that the puzzle piece fits into it. The next chapter attempts to summarise that picture, outline some opportunities it presents, and fend off some final objections to it.

# VIII. Opportunities and Objections

This thesis has sought to develop a descriptive account of law from the perspective of an ordinary participant in legal practice, that is, an ordinary person living in a law-governed society. We have seen that from this perspective, there is more to law than the legal system of officials, professionals, and scholars. We have also seen that this remainder—the informal and sometimes chaotic practices of everyday life under law—can be sensibly theorised. These practices are not just background noise we should mention and set aside. For just as we should, and do, have a theory of legal systems, we also can, and should, have a theory of these practices—a theory of legal practice.

I have tried to give a first outline of such a theory by developing the notion that our legal practices are made up of legally meaningful acts. By ascribing legal meaning to our actions, we begin to see how they connect to each other and how they connect to our own and others' practical attitudes and identities. As we come up with these structures to make sense of the social reality that surrounds us, we need not have made up our minds as to the direction in which this reality *ought to* go. Rather, our immediate interest when we assign legal meaning to social practice lies in how this reality *may* go on and how it is *likely* to go on. We can figure that out because we expect those around us to behave according to some shared

basic standards of rational and informed agency. Of course, people sometimes fail to live up to these standards, but in the usual case the expectation is well-founded. And in any case, without such expectations we can hardly see ourselves as participating in practices; not just legal practices, but generally. Having such expectations—and seeing that they are, on the whole, matched by reality—is a precondition of living a social life with and around others.

Thus, by seeing social practice as legally meaningful, we make it easier for ourselves to navigate; we make it easier for ourselves to take advantage of the opportunities that society gives us and to avoid the dangers it presents to us. That law can afford us this facility is the one general reason we all—or virtually all—have for using and referring to the law in our everyday lives. And so *law works* for us as long as we can use legal discourse in this way—as long as thinking and talking in legal terms helps us understand and navigate our interactions with others.

If we are officials who hold power, claim authority, and use legal discourse to control how the population behaves, law will only work for us if our pronouncements are followed and our demands met. Law will work for us, that is, if the legal system we create and uphold is efficacious. But if we are ordinary people who use legal discourse merely to get our everyday business done, we need not in principle care about the efficacy or integrity of that system at all. Our ambitions in using law are more circumscribed and usually limited to having orderly and intelligible social relations with each other. The existence and efficacy of the legal system, with its elaborate machinery of coercion and authority, can no doubt help us a great deal in these ambitions. But it is neither necessary nor sufficient, and it is certainly not everything. There is legal practice beyond the legal system, and it is important to understand how that practice works.

Finally, we have seen that one reason why it is important is that it is only once we have turned to this area of legal practice that we can understand how law can go on despite an ongoing constitutional crisis. It can go on not just because legal practice *can* carry on in a relatively unsystematic and decentralised manner, but because legal practice tends to carry on like that all the time.

## 1. OPPORTUNITIES

### *A. Discursive Guidance in the Law*

What lessons may we draw from all that?

The single most important one, I think, is that the law guides us in the first instance by telling us not what we should *do*, but how we should *think and talk* about what we do. This is not to say, of course, that those who make the law do not have any expectations as to how we will behave once we begin to think and talk in these ways. My point is not that lawmakers and officials intend the law in the first place to condition our talk and thought; it is that whatever they may intend, this is how the law actually guides us. For it is often up to us if we decide to obey the law or to break it, and more: we sometimes have good reason to break the law, or at least no particularly good reason not to. Even then, however, we usually have good reason to think and talk about our actions as the law does. We have seen in the previous chapter that this is not always the case; there are areas of legal practice where the law does not guide us at all. But when it does, it invariably does that by imposing a certain framework on our talk and thought, by offering to us new and useful ways of understanding our social situation; and what we then do is in turn determined by that understanding *together with* who we are and what practical attitudes we take towards the world.

The main significance of this lesson, for descriptive legal theory at least, lies to my mind in the simple explanation it gives of how the law may guide people of differing moral and practical outlooks, and regardless of these differences. I have already touched upon this topic in chapter VI and do not intend to repeat those arguments here. But let me by way of further illustration consider how the lesson may cast new light on the following puzzle.

Imagine a judge who decides cases according to the law but at the same time is an anarchist at heart and abhors the very institution of the law, let alone its directives.[1] There is a real sense in which the anarchist is guided by the law despite their moral disapproval of that guidance. And there is no doubt that this *is* possible; what is puzzling, though, is *how* this is possible.

There are a few explanations available in the literature. Kelsen, for one, draws a cryptic distinction between *positing* and *presupposing* the basic norm of a legal order and explains that an anarchist may presuppose the validity of a basic norm without ever affirming that its prescriptions ought *really* to be followed.[2] Hart for his part adopts a tantalising notion of acceptance, whereby we may fully accept certain rules of behaviour without ever bringing our *moral* appraisal of the rules into the picture.[3] Raz, drawing on both Kelsen and Hart, distinguishes between the 'weak' and 'full' endorsement of a rule: between the situation where one accepts the rule as a standard for oneself, and on any grounds, or on no grounds at all; and the situation where one also endorses the rule as a standard for others, and—if we take

[1] See *PRN* 148.

[2] *PTL* 204n (referring, as far as I understand, to 200), 218n.

[3] For the clearest statement of this notion, see *CL* 202–03; cf 243.

a cue from Raz's other writings[4]—necessarily on moral grounds.[5] He then argues that even when a judge accepts the law only weakly, they must at least *pretend* to give full endorsement to the law's requirements in the exercise of their office.[6]

More recently, this idea that the way in which the law can guide the anarchist judge is based on a pretence has been developed by Adam Perry, who compares the anarchist judge to 'an actor in a play'.[7] And in an even more recent article, Joshua Pike maintains that the guidance law affords to the anarchist judge is *physical* as opposed to *normative*: that it consists in the judge inducing certain mental states in themselves—which mental states reflect what the judge would have reason to do in a hypothetical world where the law actually ought to be followed—rather than in directly responding to the reasons that the law gives to the judge.[8] This understanding of the anarchist's predicament, Pike says, 'is the only way of avoiding' the evidently paradoxical conclusion that the judge could treat the fact that the law requires such-and-such a decision as a reason to reach that decision *even though* the judge does not, as a matter of fact, treat this requirement as constituting such a reason.[9]

Such a conclusion would indeed make no sense; but I disagree that the only way of avoiding it is to accept that the law involves the anarchist judge in some

[4] See esp Joseph Raz, 'Hart on Moral Rights and Duties' (1984) 4 OJLS 123.

[5] *AL* 155n.

[6] *AL* 155n.

[7] Adam Perry, 'The Internal Aspect of Social Rules' (2015) 35 OJLS 283, 293.

[8] Joshua Pike, 'How the Law Guides' (2021) 41 OJLS 169, 178–79.

[9] Pike (n 8) 179; more generally, see 176–81.

mental simulation or a game of make-believe. There is a very real, if also relatively inchoate sense in which the law guides the judge by giving them genuine reasons; it is only that these reasons are *reasons to talk and think in certain ways* and not reasons to make this or that decision. It is true that the fact that the judge has reason to talk and think in these ways does not yet explain why they might (think they) have a reason to ultimately comply with the law's requirements. But that further explanation, we have seen, is not so difficult to figure out;[10] and once it is in place, I am not sure there is anything the other solutions to the puzzle explain that my solution cannot. On the other hand, my solution has its simplicity to recommend it, as well as, if I may say so, a down-to-earth quality that the other solutions lack.

I hope this brief discussion of the puzzle may illustrate just how much descriptive jurisprudence has to lose if it insists on treating *reasons for action* as the main, indeed the only interesting kind of reasons that the law may give one. The typical train of thought behind this insistence is as follows. Reasons can be to do or avoid doing something, or to believe or doubt something, or perhaps also to feel in a certain way; but it is enough for legal theory to consider reasons for or against action only. This is because, first, whatever can be said of reasons for action will probably apply to reasons for belief or feeling, too—for there is no 'fundamental difference'[11] between these different kinds of reasons; and second, because reasons for action are in any case the most pertinent kind of reasons in the legal context.[12]

[10] See section VI.1.E.

[11] *PRN* 15.

[12] For a classic example, see *PRN* 15. For a recent example, see Pike (n 8) 175n (although Pike clarified in an e-mail exchange that the article was supposed to explore its topic from certain commonly accepted premises, to which Pike did not necessarily subscribe himself; for which clarification I am grateful).

Both these points are wrong. First, there *is* a fundamental difference between reasons for action and belief: it is that accepting the latter, unlike accepting the former, does not without more commit one to any particular course of action. Second, precisely because there is this difference, we need to give separate consideration to how the law can give us reasons to say and think certain things in certain ways—for only then can we fully understand how the law can provide guidance to people of dramatically varied attitudes towards its requirements.

Perhaps the law can and does give us genuine reasons to behave in certain ways, perhaps not. This question and others like it are for normative jurisprudence to answer. Apart from any reasons for action, however, the law also gives us reasons to interpret our social practices in certain ways and to assign particular legal meaning to them. We may, and do, accept these reasons whether we care to obey the law or not; and that we accept these reasons already says a great deal about the practical significance the law has for us.[13] It is indeed very strange that descriptive legal theory has so often overlooked this *discursive dimension of law's normativity*—the reasons the law gives us to talk and think of our social practices in certain ways—and focused instead on how the law can give us 'as-if' reasons for action even where it does not give us any such genuine reasons. After all, insofar as it is an intellectual discipline distinct from normative legal theory, descriptive jurisprudence grows from the realisation that legal practice can never be built around standards of proper behaviour which everyone (or even nearly everyone) would or should accept.[14] Standards of proper legal talk and thought, by contrast,

[13] See chapter VI.

[14] cf section III.2.B.

while not entirely uncontroversial either,[15] *are* in fact widely accepted. Legal practice is rarely—if ever—a normative community of action, but it is for the most part a normative community of discourse.

*B. Putting the State in Its Place*

The second important conclusion of this thesis is that there are areas of legal practice which can be explained, only not by a theory of legal systems. In chapter II and the final section of chapter VII, we have considered in detail one such phenomenon, the overall continuity of legal practice through a constitutional crisis. There are many others, and they pervade our everyday lives under law.

The point as such is not new. No less than a century ago, Eugen Ehrlich wrote:

> Legal Provisions cannot possibly cover the entire law. Judicial decisions flow only from those cases which are brought before the court. And even the jurists deal in their writings usually with only those legal questions which occupy the courts. But only a very few matters come before the court. Most affairs work themselves out without any dispute. There are unnumbered persons who stand or have stood in innumerable legal relations without ever having anything to do with courts or officers. … The modern science of society, sociology, … cannot limit itself to the Legal Provision as such. It must consider the whole of law in its social relations and must also fit the Legal Provision into this social setting.[16]

[15] Disagreement in legal discourse is an important topic which deserves a treatment fuller than what I have been able to provide in this thesis. Some indication of how controversy may arise—and be defused—is nonetheless given in section VII.2.C.

[16] Eugen Ehrlich, 'Sociology of Law' (1922) 36 Harvard L Rev 130, 141, 144.

If the argument of this thesis succeeds, however, we can see that this plurality and diversity of practices and understandings is not so much a blunt fact of social life which inevitably stands in contrast with our philosophical concept of law, but a feature of legal practice which can be appreciated in the course of a relatively abstract and general reflection on its nature. As soon as we accept that actual legal practice is made up of diverse people with diverse projects and concerns, and that the coercive apparatus of the modern state—for all its relative effectiveness—is not without its limits, we can see that legal practice cannot but also be diverse, and that there cannot but be parts of it, potentially very large parts, which play out at some distance from the legal practices of the state and their characteristically dogmatic modes of legal discourse.

I am not saying that descriptive general jurisprudence must reduce to sociology. This thesis is not a work of sociological jurisprudence; nor is it meant to be. Quite on the contrary, I am saying that we can work from descriptive analytical jurisprudence as it has traditionally been conceived and meet some of the pluralist concerns that sociological jurisprudence has held up against it. More: we can even, if we like, continue to focus our theoretical attention through the lens of the idea of a legal system. I have said at the outset that many findings enabled by this idea are well worth keeping; the theoretical framework outlined in this thesis is meant to allow that.

Nonetheless, it is worthwhile to articulate how the idea of a legal system may be reintegrated into this framework, since the critique in chapters II–IV shows that it must be reintegrated on an adjusted basis, as it were. This is to say: the idea of a legal system is not part of the nature of law; rather, it is a crucial (though not the only) element of the legal practices characteristic of modern society, governed

as it is by the centralised, organised, and efficient modern state. The systematic qualities of law—unity, consistency, discreteness, and normativity[17]—which the idea of a legal system tries to capture, are not the core of what law is, but a reflection of the systematicity and autonomy of the modern sovereign state. This need not make these qualities any less central, of course; but it does make them contingent on the prevalent mode of social organisation, and on how that social organisation shapes legal practice.

One interesting implication of this adjustment is that while legal theory may legitimately choose to focus on the idea of a legal system, it must do so on the assumption of a more or less articulated theory of the state. This then brings into focus two questions which analytical jurisprudence typically does not ask. First, does our theory of law actually fit the theory of the state on which it is premised? Second, is that theory of the state defensible? These are complex questions which I cannot possibly address here, but I would like to mention one current problem which may illustrate their significance.

I feel it is widely accepted that since Hart's seminal critique of Austin in the first few chapters of *The Concept of Law*, the concept of sovereignty ceased to enjoy the popularity among legal philosophers it had enjoyed before. The sovereign, Hart argues—if there is a sovereign at all—cannot but be constituted by the legal system and thus be subject to it; the conception whereby all law originates from the sovereign's will leads to absurd consequences and thus cannot be true.[18] In a similar

[17] These labels say very little by themselves; they are explained in section II.2.

[18] *CL* ch 4.

vein, Kelsen claims that sovereignty as a concept must be 'radically suppressed';[19] and in a later treatment, identifies it with 'the presupposition of a normative system qua highest system, not derivable in its validity from any higher system'.[20]

The problem with this move on Hart and Kelsen's part—as pointed out against Kelsen by Carl Schmitt (more famously)[21] and Hermann Heller (more helpfully)[22]—is that the elimination of *the sovereign* from our legal theory does not necessarily eliminate *sovereignty* as such. This transposition of ultimate, undivided, concentrated, and comprehensive authority to regulate affairs from a *sovereign person* onto a *sovereign legal system*, so to speak, or onto a *sovereign norm*, is perhaps most explicit in Kelsen;[23] still, echoes of the concept of *sovereignty*, as distinct from the concept of *the sovereign*, are loud and clear in Hart and Raz's writings, too.[24]

Why is this a problem? Because it can be argued that the concept of sovereignty in the final analysis necessitates a sovereign person—even if that person

[19] See David Dyzenhaus, 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought' (2015) 16 Theoretical Inquiries in Law 337, 341–42, referring to Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr 1920).

[20] Hans Kelsen, 'Sovereignty' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 528.

[21] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005) ch 2.

[22] Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (David Dyzenhaus ed, Belinda Cooper tr, OUP 2019) chs 1–4.

[23] Kelsen in fact explicitly identifies the state with its law: *PTL* pt VI; *GTLS* 181–92.

[24] As far as Hart goes, see *CL* 105–07 (characterising the rule of recognition as supreme and ultimate); although note Hart's insistence that the supreme and ultimate status of the *rule* of recognition does not import any idea of unlimited power on the part of any institution: *CL* 106. As far as Raz goes, see *AL* ch 2; Joseph Raz, *The Morality of Freedom* (OUP 1986) chs 2, 3 (on the law's claim to authority); *AL* 116–19 (adding that this claim is to comprehensive and supreme authority); also, compare *AL* 119–20 with the notion of 'adopted mandates' in Jeremy Bentham, *Of Laws in General* (HLA Hart ed, The Athlone Press 1970) ch 2.

is effectively hidden from view behind a 'sovereign legal system' or some such. What follows is a very crude and abbreviated reconstruction of this argument as made by Heller (and, with important differences, also by Schmitt[25]) and a comparably crude indication of how the argument may be affected by what I have said in the foregoing chapters.

There are two steps to the argument. First, any social order, if it is really to be a social order, 'must determine, implicitly or explicitly, that a particular person in a particular situation must behave in a particular way'.[26] Such a determination, in turn, is a *decision*, and a decision can only result from an exercise of human will:

> decision-making—and upon this depends nothing less than everything—is … exclusively a function of human, personal judgment. In this fact lies the final reason that an impersonal 'natural order' is forever incapable of taking on the decision-making function.[27]

Accordingly, if law is to be a social order, it too must be determined by human decision:

> only decisive law deserves the labels positivity, existence, validity, reality … A concrete, individual decision-making unit is a requirement for this legal certainty. We know of one only in the guise of human will.[28]

[25] Schmitt (n 21). On the differences, see Heller (n 22) 101–04; Dyzenhaus (n 19).

[26] Heller (n 22) 80.

[27] Heller (n 22) 81; cf Joseph Raz, 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev edn, OUP 1995).

[28] Heller (n 22) 89

The second step is this. Because law is taken to constitute a unity,[29] there must be a single 'ultimately decisive unit of will that positivizes … the highest legal rules binding on the community';[30] the jurist is, in a word, 'forced to demand a sovereign person',[31] for otherwise he 'loses the object of his science—positive law—and will be left hanging in the air with all his science and practice'.[32]

So, the argument goes, the sovereign person is indispensable because the law must be determined by human decision *and* because the law exhibits systematic unity. The argument works against those who—like Kelsen, against whom it is directed, but also, I would say, Hart and Raz—accept the second premise but reject (wrongly, it is supposed) the first premise. In this thesis, however, I have embraced the first premise but rejected the second one. On the one hand, I have accepted that the content of the law is in the final analysis fixed by human decision, namely the decision by a participant in legal practice to act on a certain (more or less consciously) presupposed understanding of the legal meaning of the action decided upon;[33] and on the other hand, I have concluded from this that the content of the law may vary between contexts, and in particular between different social

[29] Heller (n 22) 118–23; cf section II.2.A.

[30] Heller (n 22) 90, 95.

[31] Heller (n 22) 96.

[32] Heller (n 22) 95.

[33] See section VI.2. See also text to nn 28–31 in chapter IV on how one may resolve the legal meaning of a vaguely phrased regulative act. With the benefit of the discussion in section VII.2.C, we may now say that such a resolution is pragmatic, not dogmatic.

interactions where the centralising and unifying mechanisms of state enforcement are not engaged.[34]

In this way, I can not only escape the bite of Heller's argument, but in fact turn it on its head: for if I am right, then it looks as if the existence of a sovereign unit of will is not only a mere contingency in any ordinary legal practice, but a contingency which is never a reality. To put the point another way: if we apply the reconstructed version of Heller's argument to legal practice as I have characterised it, we have to conclude that virtually every social interaction has its own 'sovereign person' whose decision serves to fix—at least for the time being—the content of the law applicable to it. Legal practice thus begins to resemble a 'society of sovereigns', so to speak, which surely can mean nothing else than that there is in it just no sovereign at all.

The above is a lamentably cursory treatment of a topic of daunting complexity. But this conclusion I have just reached in the previous paragraph—if it is right, that is—has potentially far-reaching consequences in the realm of political and not just legal theory. Whether this conclusion counts in favour or against my account of law will of course depend on what place, if any, we assign to sovereignty in our preferred theory of the state. Either way, I hope to have shown at least that the argument of this thesis can reopen certain key questions at the interface of legal and political theory—questions which may have long seemed settled, but are in fact still worth asking.

[34] See section VII.2.C.

## 2. OBJECTIONS

I have said enough about the opportunities that this thesis should open up for legal theory. Let me now briefly turn to two objections it must face. Both have to do with the question of law's limits: one with how legal practice can be distinguished from other cultural practices, the other with how the legal practice of one society can be distinguished from the legal practice of another society. Both have to do with the fact that the account of legal practice I have given provides us with no reliable tools for drawing these distinctions. One might think this a serious problem, even a fatal one. Let me conclude with a few words about why one would be wrong to think so.

### *A. The Limits of Law*

Let me first say a few words about the problem, already mentioned in chapter V,[35] of how to distinguish *legal* concepts and practices from similar concepts and practices that are *not legal*.

One point I should get out of the way is that the problem does not lie in distinguishing legal discourse and practice from ethics if 'ethics' refers to what we should truly do and seek. *That* limit is well-defined. I have spent quite some time and space explaining how legal discourse frames legal practice in terms which leave open the question of what anyone ought to do. We have also seen how the law's capacity to guide us does not depend on how anyone answers that question. The difference between law and ethics is therefore a difference in kind: it is not that law on the whole resembles ethics but differs from it in certain respects; it is that law does not resemble ethics at all. This idea goes against certain intuitions, of course,

[35] See text to nn 9–11 in that chapter; cf n 24 in chapter I.

and requires some substantiation. I have provided that in chapters IV–VI. Here, I only want to bring this up lest we confuse the problem of distinguishing law from other cultural practices, which may include a practice of 'positive morality',[36] with the problem of distinguishing law from ethics, understood as what we actually ought to do.[37] That latter problem we have dealt with already; it is the former that we are concerned with now.[38]

I have characterised law as a practice where meaning is ascribed to actions so as to make human action intelligible and manageable. But there are other practices like that. We often describe our actions as rude or polite, as sins or good deeds, as proper or improper. We make and break promises, cultivate and neglect friendships, worship and insult gods. All these practical meanings and institutions are part of our practices of positive morality, etiquette, religion, tradition, and so on. Practices like that make up our culture. The question is: how do we distinguish law from them?

The best answer we can have to it, I think, is that we distinguish law from them because we just see law this way—and understand it to be something else than morality, religion, language, and so on. In a modern state we might also point to the existence of some specialised institutions characteristic of law, such as legislatures, courts, prosecution services, and so on. We might add that there is a highly professionalised and hermetic class of practitioners whom we call lawyers.

[36] To use John Austin's term: *The Province of Jurisprudence Determined* (Wilfrid E Rumble ed, CUP 1995) 20.

[37] I do not intend for the present distinction between 'ethics' and 'morality' etc to inform the understanding of the two terms as used earlier in the thesis.

[38] cf n 109 in chapter II.

We might also come up with a good explanation of how we first came to distinguish law from other parts of our culture, and perhaps with a good explanation of why we ought to maintain this distinction. Such explanations may well be sought by some history or anthropology of ideas. But it is less clear to me that they should be sought by a general theory of law: first, because I am unsure if an analytical theory of law can really have the resources necessary to find and articulate these explanations; and second, because I doubt if such explanations can at all be formulated at the appropriate level of generality. Just as the law's content is more indicative of its particular social, political, and cultural context than it is expressive of the general nature of law, so is the precise line that is being drawn between law on the one hand, and other cultural practices on the other.

This is in any case what the account of law given in this thesis would suggest: that the practice of law is distinguished from other cultural practices because and insofar as it is part of our general practice of culture to distinguish legal practice in this way. I think this conclusion is less troubling than it first sounds; after all, across times and places these lines have often been drawn differently. Roman law was inseparable from Roman religion, and to this day there are countries where the distinction between law and religion is either tenuous or non-existent. Some strands of contemporary liberal thought propose that law should enshrine 'public reason' which should also limit our practices of social morality.[39] These and other such examples show how in certain contexts only a blurry line is drawn between legal practice and the practices of religion or morality, or no line at all. Why should

[39] John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 University of Chicago L Rev 765.

we, in the face of all that, maintain that there must always be a firm distinction between legal practice and these other practices? Why should we feel forced to say that one's failure to make such a firm distinction marks a failure on one's part to possess the concept of law?[40] Why could one not just say that sometimes legal practice and, say, religious practice really are one and the same? Or that legal practice is part of some other practice, or has much in common with it?

More generally, I cannot see why it should be so important that jurisprudence produce a 'classificatory schema' for deciding what is law and what is not.[41] If this really were 'the most fundamental question for legal theorists',[42] then jurisprudence would make for a tedious discipline; thankfully it is not. Surely, we must have some idea of what counts as law before we can even begin doing legal theory. But first of all, we do; I suspect there has never been a reader of a work of jurisprudence who would not be able to say, generally, what counts as law. And second, we can engage in valuable jurisprudential argument without having answered the question of what does *not* count as law—that is, without having worked out a complete decision procedure to sort out all instances of law from instances of non-law.

Perhaps we get the idea that we need such a decision procedure because we think that we should develop our theories of law to fit all legal practices, in all places, at all times. But I have doubts if this is a feasible and worthwhile task. The

[40] cf Joseph Raz, 'Can There Be a Theory of Law?' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 36–41.

[41] Leslie Green, 'Jurisprudence for Foxes' (2012) 3 Transnational Legal Theory 150, 158.

[42] Dan Priel, 'Description and Evaluation in Jurisprudence' (2010) 29 Law and Philosophy 633, 660.

argument of this thesis, for example, is drawn from the experience of living in the legal practices of two relatively wealthy and technologically advanced European nation-states. The picture of law I draw is accordingly a picture of these two legal practices and of other legal practices like them. If it can also help make sense of legal practices which do not fit the description, or be adapted for that purpose without too much effort—all the better. If not, there is more work to do. But it would be pointless to water down our legal theories so as to accommodate *any* legal practice we might imagine; the result, I suspect, would be unhelpful and hardly recognisable as a theory of anything. And it is worse still to brush over the problem and simply proclaim that our experience of law drawn from modern, secular, democratic societies yields *the* concept of law, of 'law wherever it may be found'.[43] How should we know that—and why should it be so important? The reality is that we know and theorise our own legal practices anyway. We may hope that people whose experience of law is different will find our thoughts useful or illuminating, but we have neither reason nor authority to tell them that they should or must see them that way.

### *B. The Limits of a Legal Practice*

This brings us to the other question of how we should individuate the legal practices of different societies. Legal systems, we have seen, are discrete entities: thus we speak of Polish law, English law, Swiss law, Ukrainian law.[44] These distinctions would usually be explained by reference to whatever is taken to constitute the unity of a

[43] John Gardner, 'Law in General' in *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 270.

[44] See section II.2.C.

legal system: so one would point to the fact that the rules of recognition of these systems are different, or practised by different officials, or that we must presuppose different basic norms to interpret these systems as normative and legal. On my account of legal practice, by contrast, legal systems are discrete because and insofar as the underlying practices of different states are discrete. So: if we can distinguish between the practices of Polish, English, Swiss, and Ukrainian state officials; and if these practices are usefully understood as the practices of developing and enforcing, respectively, the Polish, English, Swiss, and Ukrainian legal systems; then there is nothing in what I have said that would bar us from distinguishing these legal systems from each other.

The only two caveats are, again, that the discreteness and systematicity of these legal systems is but a function of the discreteness and systematicity of the underlying legal practices of those different states; and that in the background there are also non-state legal practices which might not fit within this compartmentalised picture. And for these reasons it seems to me that it would be a mistake to search for comparably hard and fast distinctions between the legal practices of different societies. These, as far as I can see, simply are not discrete in the way in which the practices of different groups of officials, administering power on behalf of different states, may be discrete.

Consider the following example. A Swiss trader signs a contract with a Polish lorry company to deliver some wheat from Kyiv to London. They meet in Vienna and sign a contract, but they forget to include a jurisdiction clause. They act under it and everything goes well, so no state institutions are ever involved. Which legal practice is their transaction a part of? Is it part of Austrian legal practice because the contract was signed in Vienna? Swiss legal practice because the trader

is Swiss? Or maybe Polish legal practice because the lorry company is Polish? Or Ukrainian, or English legal practice? Perhaps it is part of all these practices; or rather part of a separate legal practice that groups cross-border transactions like this one? Or maybe it is also part of the legal practices of Germany, Belgium, and the Netherlands, since the lorry goes through these countries?

I tend to think there is no good answer to these questions. The best way to characterise the situation I can see is to say that the whole interaction is in the first place part of the legal practices of the trader and the lorry company, and that their legal practices may be continuous—in the sense defined in chapter VII[45]—with the practices of Austrian, Swiss, Polish, Ukrainian, and English officials. But I do not know how this characterisation answers the questions posed in the previous paragraph. As a matter of fact, I suspect it does not answer them at all.

The example, and others like it, shows that we cannot just divide all legal practice into discrete legal practices connected to discrete territories or nations. More: it shows that notions such as 'Polish legal practice' or 'English legal practice' are bound to be blurry around the edges, and that some people's legal practices may hang in between the legal practices of different societies. Just as the discreteness of official state practices corresponds to the discreteness of legal systems, so the interconnectedness of non-state legal practices means that they cannot be compartmentalised in a similar way. This is not a defect in the theory. It is a feature of the globalised, pluralist, and complex legal world we live in—and the theory merely reflects that feature.

[45] See section VII.2.

More generally, my point is this. While the idea of a legal system allows us to make perfectly good sense of some parts of legal practice—for some parts, in fact, it is probably indispensable—it also keeps other parts out of focus. As far as these other parts go, it leaves us with appearances. Spellbound by these appearances, we expect reality to reflect the patterns and distinctions that the idea suggests. But reality might disappoint these expectations, and if a theory of law helps us to see that with more clarity, then this should only count in the theory's favour.

To put the point in fewer words: in legal philosophy, as in all philosophy, we should sometimes not 'think, but look'.[46] If I have managed to show that we can profitably do jurisprudence this way, I shall consider myself successful.

[46] Ludwig Wittgenstein, *Philosophical Investigations* (PMS Hacker and Joachim Schulte eds, GEM Anscombe, PMS Hacker, and Joachim Schulte trs, 4th edn, Wiley-Blackwell 2009) s 66.

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