PHILOSOPHICAL FOUNDATIONS OF NORMS OF LEGAL METHOD

HAFSTEINN DAN KRISTJÁNSSON

UNIVERSITY COLLEGE

DPHIL

Trinity term 2021

ABSTRACT

PHILOSOPHICAL FOUNDATIONS OF NORMS OF LEGAL METHOD

HAFSTEINN DAN KRISTJÁNSSON, UNIVERSITY COLLEGE

DPHIL, TRINITY TERM 2021

Legal method is about identifying and applying the law in a particular legal system. Norms of legal method regulate that activity. They are about, among other things, sources of law, legal interpretation and conflicts of law. The thesis asks questions regarding their philosophical foundations, that is questions that are not limited to any particular legal system but concern law in general. The questions are, firstly, about the norms themselves: What do they do? How many norms can there be? Are any of them necessary? Of what kind are they? What is their normative character? What is their function? Then the thesis addresses questions about the norms' significance for some central issues in jurisprudence, namely legal validity and legal systems. It is claimed that understanding norms of legal method together philosophically is important to elucidate them as well as some questions or problems in jurisprudence.

What are the answers? Very briefly speaking, the norms have diverse roles and can be categorised accordingly. Norms of recognition and change address the issue of existence. Norms of interpretation address the issue of content. Norms of applicability address the issue of applicability. Norms of subsumption address the issue of application and norms of institutional decision-making address issues of institutional considerations and powers. The norms are united by sharing the overall role of identifying and applying the law. While there can be many (ultimate) norms in each category in a legal system, there must be at least one norm of recognition. Some of the norms are legal norms but others are so-called interpretive norms. While some norms are duty-imposing, permission-granting and power-conferring, others are so-called qualifying norms. The norms partly constitute the law. The norms are also important for legal validity and the structure and foundations of a legal system.

102.000 words.

Acknowledgements

The thesis is dedicated to Leslie Green. I am incredibly grateful for his inspiring teaching and supervision. I have benefitted immensely from his critical and penetrating thinking, his provocative questions, his wit and kindness as well as always encouraging 'close reading, clear thinking and careful argument'. (Leslie Green, 'Introduction' to H.L.A. Hart's *The Concept of Law* 3rd edn, 2012 liii.) Neither the thesis nor the journey would have been the same without him. Any and all failures to live up to these standards are entirely mine, of course.

I am very grateful to Julie Dickson and Thomas Adams for taking on co-supervision in Michaelmas and Hilary term 2018-2019 and Trinity term 2021 respectively. Their comments were very helpful.

I am also grateful to Timothy A.E. Endicott, Julie Dickson, Nicos Stavropoulos and Paul Yowell for very helpful comments at my Transfer and Confirmation of Status examinations.

Finally, I've benefitted from my discussions and companionship with Joshua Pike, Sebastian Lewis, Tom Kohavi and Gehan Gunatillek, with whom I began the DPhil.

TABLE OF CONTENTS

TABLE OF LEGISLATION

European Union Legislation etc.

Conventions of the Council of Europe

United Nations Conventions etc.

Austrian Legislation

French Legislation

German Legislation

Icelandic Legislation

Italian Legislation

Prussian Legislation

Spanish Legislation

Swiss Legislation

TABLE OF CASES

Cases of the Court of Justice of the European Union

Cases of the European Court of Human Rights

English Cases

German Cases

Canadian Cases

1 In Search of the Law

The thesis is about the philosophical foundations of norms of legal method. What is that? Legal method is about determining the law in a particular legal system. Norms of legal method regulate that activity. They are about, for example, the role and relevance of legal materials, practices or other factors for the existence and content of legal norms, the status of and the relationship between legal norms as well as their application to the facts. In other words, norms of legal method are about legal norms. They are about various aspects of identifying and even applying them. In that sense, they are secondary norms (l. *legis legum*), meta-norms or methodological norms. Legal norms that are not about determining the law are primary norms from this perspective.

Some norms of legal method identify sources of law. An example is: 'Customs are sources of law'. Others identify interpretive factors and specify their role. An instance is: '*Travaux préparatoires* are a part of the context of a statute within which it is interpreted.' Yet others are about conflicts of laws, such as: '*Lex posterior derogat legi priori*'.[1] The norms bear various names, such as the doctrine of sources of law, rules of precedent and canons of interpretation.[2] They are also different between legal systems and even eras within one and the same legal system. Questions about their philosophical foundations are not focused on specific norms in particular legal systems but their nature and function in general, that is for all legal systems.

---

1 This description is inspired by the approach taken in Nordic law. See e.g. Ármann Snævarr, *Almenn lögfræði* (Bókaútgáfa Orator 1989). For English law, see e.g. John W. Salmond, *The First Principles of Jurisprudence* (Steven & Haynes 1893) 219-245. For German law, see e.g. Reinholdt Zippelius, *Introduction to German Legal Method* (Kirk W. Junker and P. Matthew Roy tr, CAP 2008).

2 For examples of the terminology in the order they appear, see Alf Ross, *On Law and Justice* (Stevenson & Sons Ltd. 1958) 75, Rupert Cross and J.W. Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991) 5, and Rupert Cross, *Statutory Interpretation*. With John Bell and George Engle (3rd edn, Lewis Law Publisher 1995) 3.

The overarching question is this: what are norms of legal method? More specifically: what is their nature, role and significance? It is impractical to explore all issues about the norms in a single thesis. Instead, certain important topics have been chosen to elucidate their foundations. The topics are of two sorts. The first type of topics is about the norms themselves, so to speak. What do they do? How many are they? Are any of them necessary? Of what kind are they? What is their normative character? What is their function? The second type of topics concerns the norms' significance for some central questions of general jurisprudence, namely issues about legal validity and legal systems. The questions will be further explained or demarcated in the relevant chapters as needed.

Before addressing the questions, we need to know more about norms of legal method. This chapter introduces legal method and its norms. Since legal method is about identifying or determining the law, we need some view or conception of the law. For this purpose, the chapter presents the building blocks of what will be called the simple image of the law. After that, the chapter asks and answers two questions. What, if anything, unites norms of legal method? Why is it worthwhile to examine them together philosophically?

Our introduction of the norms begins with two lawyers searching for the law. They seek to identify the relevant legal norm for some factual situation in their legal system. It is suggested that a search for the correct legal norm leads to a search for the correct norms of legal method, which ultimately leads to a search for the relevant features of the legal system in question or general truths about law and adjudication.

1.1 Searching for the Law

How does law work? Suppose a lawyer –call him Justus– claims it is a legal norm that no landowner may destroy a natural wonder on his land, such as a waterfall or a hot spring. What makes his claim true or false? Or what makes it the correct legal norm?[3] That depends on how the law is determined. Let us say that Justus maintains the legal norm in question is based on a statute about the protection of the environment as it is properly interpreted. One of its provisions says: 'Everyone has a duty to treat nature well and must show caution so it will not be damaged.' Justus also says the existence of the statute as a whole with its overarching aim of environmental protection is a reason for the existence of an unwritten general principle of law about the protection of the environment. The principle is, figuratively speaking, 'behind' or 'above' the statute. Is he right or wrong?

Now imagine another lawyer –Lexie– that disagrees with Justus. She claims the relevant legal norm is that a landowner is competent to do what he pleases with his land save for explicitly laid down exceptions, which do not include Justus' examples. She states that Justus has interpreted the statute much too broadly and no unwritten general principle of law with that content exists and certainly not in the field of property law. So, Justus and Lexie disagree on the correct legal norm.[4]

This sort of disagreement happens in practice.[5] Perhaps they can solve it by analysing their supporting arguments. Suppose that Justus asserts the statute should be

---

3 For a similar type of inquiry, see e.g. Ronald Dworkin, *A Matter of Principle* (HUP 1985) 146, Ronald Dworkin, *Law's Empire* (HP 1998) 4, and Ronald Dworkin, 'Legal Theory and the Problem of Sense' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (OUP 1987) 9-10.

4 For a discussion about disagreements about law in a doctrinal sense, see e.g. Ronald Dworkin, *Justice in Robes* (HUP 2006) 2-7 and 232-241.

5 The point here is not whether or not such disagreements are common. It is to draw certain features of the search for the law into light. For a further discussion about this type of disagreements, see e.g.

interpreted purposively and dynamically but Lexie insists it should be read with the ordinary meaning of the words in mind as they were understood at the statute's enactment date. Justus says the enactment of this important statute had the consequence of introducing an unwritten principle of law with a wide scope whether the legislature intended it or not. Lexie, on the other hand, doubts that a principle comes into existence like this. She points out that no case enunciates the principle. Justus and Lexie, as is commonplace in practice, both support their claims about the correct legal norm with reference to legal materials they consider to be relevant in the context and their proper use. Norms of legal method, as we will learn more about later, are about the role and relevance of legal materials, practices and other factors for the existence and content of a legal norm. Justus and Lexie's contention indicates that they disagree about which norms of legal method are correct.[6] Which one is right?

That depends on how norms of legal method are determined. How might Justus and Lexie proceed and explain why their particular method, arguments or norms are appropriate or correct? Let us say that they mainly support their claims about the correctness of the norms in question with arguments about the content and characteristics of their legal system. They point to features of the constitutional order, the legislature and legislation as well as other characteristics of their legal system. Justus, for instance, says a statute is an instrument of the democratically elected representatives who have certain social and economic goals in mind. It should, therefore, be interpreted in a way that achieves these aims. Lexie, however, emphasises that the text is the outcome of a legislative process, which is filled with compromises, it is addressed to the citizens and is made accessible to

---

Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 14, Dworkin *MOP* (n 3), 147 and Dworkin *LE* (n 3), 3-6 and 11.

6 See e.g. Ronald Dworkin, 'No Right Answer?' in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society* (OUP 1977) 69. He says that lawyers disagree about canons of interpretation.

them by publication. That matters because the law is meant to guide the citizens. It follows that the statute should be interpreted in accordance with the ordinary meaning of the words. Unsurprisingly, Justus and Lexie are at variance about the relevant features of the legal system or certain elements within it and how they matter for determining the law. Which one is correct? Eventually they may wonder about how norms of legal method are determined in general, that is in all legal systems but not just theirs. From there is a short step to questions about law in general, such as about the identity and nature of law, and even questions about adjudication.

Justus and Lexie are, like most lawyers, searching for the law. They wish to identify the applicable legal norm governing some factual circumstance. Although perhaps more patient than the ordinary lawyer, their first steps are everyday occurrences in practice. They figure out what the legal norm is or support their claims about it with reference to some legal material, practice or factor identified and applied in accordance with norms of legal method. Since they are curious and do not see eye to eye, their search continues and traces the following steps. Searching for the correct legal norm leads to a search for the correct norms of legal method. That ends in a search for the relevant features of their own legal system or, if they have a wider approach, truths about law and even adjudication. Their answers at each step form a part of an explanation of how law works, that is how the existence, content and applicability of a legal norm in a legal system is determined. This seemingly simple question –how does law work?–, which lawyers knowingly or not engage with on a daily basis, is of an immense practical importance. It does not, however, have an obvious answer. Competent lawyers, as we have seen with Justus and Lexie's debate, can disagree.

The search for the law, as conducted in ordinary practice and partly demonstrated above, suggests that norms of legal method exist. They seem to have something to do with determining or discovering the law.[7] They seem to be somehow 'in between' a legal norm and features of the legal system or truths about law and adjudication. It is noteworthy that in Justus and Lexie's search for the correct legal norm it was not determined directly with reference to features of their legal system or truths about law or adjudication but by applying norms of legal method or with reference to certain kinds of arguments.[8] From their search emerges that norms of legal method appear to be a central feature of practice and they need to be properly explained.

1.2 Legal Method Introduced

Answering a Legal Question by Using the Legal Method

The underlying question that sparked Justus and Lexie's debate was this: what is the law on a landowner's use of natural wonders on his land? Questions about the law on a subject matter in a particular legal system are legal questions. They can be asked about more or less any subject matter covered by law. In order to answer a legal question, we need to know how law works in a particular legal system. By that is meant how the law is identified or determined in that system.[9]

---

7 The term 'valid law' will be discussed in Chapter Nine.

8 Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 YLR 1288, 1291.

9 Glanville Williams, *Learning the Law* (Stevens & Sons Ltd. 1957) 29, says: 'The man who wants to become a lawyer, and not merely to pass law exams (which is not at all the same thing), must learn to use legal materials.'

Legal method is about answering legal questions, that is identifying and applying the law in a particular legal system. A method is, loosely put, a way, an approach, an activity or a process to achieve an end.[10] Here the desired end is to identify the law on some subject matter in a particular legal system.[11] In light of that, legal method can be described as a way of working out what the law is.[12] More specifically, it is about determining the existence, content and applicability of the law in a legal system, either in general or with specific facts in mind.[13] Usually, it is about determining the valid law or the law as it is (l. *lex lata*) contrasted with law as it should be (l. *lex ferenda*), could be, will be or was.[14] Of course, legal method can be used to determine the law given the other premises as well.

A law student or a lawyer who wishes to figure out the law on a subject matter uses the legal method in his, her or their jurisdiction. Like Justus and Lexie, the law student or the lawyer needs to support his, her or their conclusion about the law with arguments about legal materials and their use. The appropriateness of the arguments brought to bear, the legal materials used and how they are used depends on the legal method of the legal system. This suggests that legal methods vary between jurisdictions. Does that mean that there is nothing fruitful to be said about it in general?

---

10 See e.g. Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in Matthias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 885.

11 See in this context C.K. Allen, *Law in the Making* (7th edn, Clarendon Press 1964) 308.

12 This phrasing is inspired by e.g. Greenberg (n 8) 1293, even though he seems to view this as a matter of epistemology. Other terminology can be used such as figuring out, determining, deciding, discovering or ascertaining the law. The terminology chosen may depend on one's view about the norms' function. See Chapter Seven for their function.

13 See in this context Vogeneaur (n 10) 870.

14 See e.g. Torstein Eckhoff, *Rettskildelære* (Tano 1989) 11, and Torstein Eckhoff and Niels Kristian Sundby, *Rettssystemer* (Tano 1991) 60 and 168.

Are Norms of Legal Method Pervasively Parochial?

As will be argued more fully in Chapter Three, norms of legal method appear in all legal systems although they vary in number, content and complexity. They may be called, thought of and categorised in different ways in different legal cultures.[15] In some jurisdictions, a legal method can be viewed and presented as a systematic or a schematic approach to determining the law across legal fields. A more fragmented approach may be prevalent in other jurisdictions where the norms are seen as loosely connected and methods are thought of as modes or kinds of arguments accepted or considered to be relevant. It might even be the case that the focus is on the arguments and the norms are hidden in the background.

In some legal cultures the norms are grouped together and form a part of a distinct subject about the general study of law in that legal system. Law courses are taught and textbooks are written about them. They are thought to be foundational for the study of the law and matter for all lawyers and anyone else who wishes to discover the applicable law for whatever reason.[16] Thinking about them as merely norms about how judges decide cases seems to be too narrow from this viewpoint. In other legal cultures the norms may be divided, taught and written about as a part of other subjects, such as legal interpretation in criminal or constitutional law as well as the common law method in private law. It might

---

15 See in this context Thomas Erskine Holland, *The Elements of Jurisprudence* (13th edn, Clarendon Press 1924) v, comparing methods of continental and English law. He says the former has universally accepted method but the latter is mosaic.

16 Germanic and Nordic legal cultures are examples of this. See e.g. Hans-Peter Haferkamp, 'Historical Conditions for the Contemporary Understanding of Legal Method in Germany' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014) 86-92.

be thought that they primarily matter for how judges decide cases.[17] How court-centric a legal culture is might be an explanatory factor of the different outlooks.[18]

Despite the varying approaches, the norms commonly form a part of the lawyer's arsenal. They indicate what is legal and appropriate and what is not. They guide the lawyer's working methods. And they seem to be essential for what it is to 'think like a lawyer'.[19]

But what does any of this have to do with general jurisprudence?[20] Unlike with Justus and Lexie, the focus here is not on determining specific norms of legal method in a particular legal system. Instead, the focus is on, among other things, how norms of legal method are determined in general, that is in all legal systems. Now, it might be wondered whether anything of interest can be said about norms of legal method for legal systems in general. It is the task of this thesis to argue that illuminating things can be said despite the fact that the norms are different between legal systems and internally diverse.

---

17 The English legal culture may be an example of this.

18 See in this context Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (6th edn, MacMillian 1929) 246, who says the early acceptance of supreme authority of justices is characteristic of English law. Frederick Schauer, *Thinking Like a Lawyer. A New Introduction to Legal Reasoning* (HUP 2009) 106, says a judge is a central figure in common law and it is judge centred. On p. 108, he says civil law is code centred. Thomas Henninger, 'Legal Culture and Common Principles of European Legal Method' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014) 415, says the legal method was developed by the courts in England, scholars in Germany but is defined in law in e.g. Switzerland.

19 For the term, see Frederick Schauer (n 18). For legal reasoning having its own logic, see Edward H. Levi, *An Introduction to Legal Reasoning* (The University of Chicago Press 1949) 104.

20 Aside from the issues just mentioned about legal validity and legal systems.

1.3 Humble Beginnings

Building a Simple Image of the Law

Some idea about the nature of *the* law is essential to get started. After all, a legal method identifies or determines that sort of thing. Giving an account of the concept of the law and arguing for it is, though, a thesis in its own right. In order to begin somewhere, a simple image of the law will be built from five observations about the identification, determination or the treatment of the law in practice. It is called an image because it is only supported with the observations and it is controversial. It is simple because the concept of the law is more complex as we will learn in part in the next pages. By building a simple image of the law and supplementing it in the next chapters, we get closer to a concept of the law. And the more we learn about norms of legal method, we get closer to a part of a concept of law (or a legal system). Clearly, though, some views about the concept of law are in the background exerting their influence on the claims and arguments made in the pages that follow.[21]

Some of the observations below are familiar from Justus and Lexie's search for the law. The focus here, though, is more on the law than norms of legal method. And the observations will be described in more general terms. The reason is not to prejudge the matter too much and to keep distinct the observations and a theory that explains them.

The first observation is that *the* law is often considered to be some sort of normative object. It is a legal norm, such as a rule or a principle, or a legal right or a duty. To give an

[21] Some of these are elaborated in Hafsteinn Dan Kristjánsson, 'The Plateau of Legality. What Makes Law 'Law'?' (2016) 62 SSIL 15-35. The author has also written a long paper at Harvard Law School (2013) called *The Concept of a Legal System*.

instance, it is a legal rule or someone has a legal right against self-incrimination in European Union law. The norm or the right is the law in that community.

The second observation is that only some factors or kinds of arguments are considered to be relevant in a particular place and time when the law is identified or determined. For instance, the right against self-incrimination is a legal right or a legal rule of European Union law because of the second paragraph of article 47 of the Charter of Fundamental Rights.[22] The paragraph states, among other things, that everyone is entitled to a fair and public hearing. When lawyers and judges identify or determine the law, they point to articles like this one as well as give arguments about its text, purpose and place in the overall scheme, to name just a few examples. Lawyers and judges argue with reference to factors like these when they claim that a particular legal rule or a legal right exists. They argue from the content and role of these factors to the law. They do not, however, generally reason with reference to religious scripts, teachings of philosophers, novels or opinion polls, at least not in the context of European Union law. These factors are irrelevant for the law in that community.

The third observation is that some of these factors are considered to be somehow 'foundational' whereas others are 'supportive'. Not every relevant factor is considered to have the same role. The foundational factors are the main reason why the law is what it is but the supportive factors influence it in some way. To give an example, the right against self-incrimination is a legal right or a legal rule of European Union law because of the previously mentioned article of the Charter. This factor is foundational. It is considered to be very important when identifying or determining the law. If the article or the Charter did

22 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

not exist, then the law on this matter would not exist either unless there were some other foundational factor. Other factors impact the law on this matter without being foundational in the same sense. They include, in our example, the explanations drawn up to provide guidance in the interpretation of the Charter,[23] corresponding rights in the European Convention on Human Rights[24] and judgments of the European Court of Human Rights about those rights, constitutional tradition common to the Member States, the two Treaties[25] that form the primary law with the Charter and, possibly, even cases of the Court of Justice. All these factors shape the legal rule or the legal right in question.

The fourth observation is implied in what has been said. These factors are not considered to be the law itself but its foundations. It is true that sometimes lawyers speak as if, say, the article or the Charter is the law. However, when phrasing it more carefully, it is often said that the legal rule or the legal right is based on, embodied in, conveyed with or it stems from the article. In our example, it could be said that it is a legal rule or everyone has a legal right against self-incrimination according to the article.

The fifth observation is that lawyers and judges, at least when prompted, give reasons for the role and relevance of a factor in determining the law. They say the factor matters because of some reason. Often, this seems to be because of a norm. As an example, the supportive factors mentioned above matter because of specific paragraphs of article 52 of the Charter. Sometimes lawyers and judges refer to an unwritten norm, that is a norm that is itself not based on a foundational factor like the Charter. An example is a norm about

---

23 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

24 Convention for the Protection of Human Rights and Fundamental Rights with later amendments and protocols. Rome, 4 November 1950.

25 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 and Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326/2012.

the significance of an article's place in the overall scheme for its meaning. In which case, as well as in other instances, lawyers and judges, or more likely scholars, sometimes give further reasons or even a theory of why the factor is relevant and how it is relevant.

The simple image of the law is constructed from these observations. According to it, the law is based on factors, which are relevant because of norms or reasons, and the law is determined by reasoning in accordance with the role and content of these factors by applying the norms or the reasons. The focus here will be on the norms about the factors. The next chapter will put flesh on the bones by giving a theory of the relationship between the law, the norms and the factors. The theory enriches the simple image and explains the bulk of the observations. Chapters Four and Five will give a theory of the norms and by that explain the last bit of the last observation. Even though more detail will be given later, we already have enough to present the elements of legal method.

Elements of Legal Method

A legal method consists of at least three elements. The first of these is factors on which the law is based. More specifically, they are legal materials, practices and other factors. Statutes, judgments and *travaux préparatoires* are illustrations of legal materials but customs of practices. The second element is norms of legal method. As already mentioned, they are about, among other things, the role and relevance of legal materials, practices or other factors for the law. For instance, norms of legal method may declare that judgments of high courts are foundational factors and *travaux préparatoires* are supportive factors. Foundational factors will be called here sources of law but supportive factors will be called

interpretive factors. The third element is legal reasons. Applying the norms to the legal materials in order to determine the law involves reasoning.

To give an example, Lexie might claim that a certain legal norm exists for the reason that a judgment with a certain content exists and that is relevant because of a norm or norms of legal method. Her legal argument is based on the existence and content of a legal material, which is relevant for the law in a particular way because of the existence and content of norms of legal method in her legal system. Similarly, someone might argue that the right against self-incrimination is a part of European Union law because of the existence and content of the article of the Charter as well as the existence and content of the explanations, article 6 of the European Convention on Human Rights, which is a corresponding right, cases of the European Court of Human Rights about article 6, common constitutional traditions of the Member States about the right against self-incrimination and cases of the Court of Justice. And these factors are relevant in a certain way because of norms of legal method, some of which are based on article 52 of the Charter.

Each of the three elements of legal method can be examined. The spotlight can be shone on legal reasons. It might be asked whether legal reasoning needs to be coherent or consistent. Also, it might be asked whether legal reasoning is a (special) branch of practical reasoning.[26] From here there is a short step to questions about rationality and the nature of reasons. Alternatively, the spotlight can be shone on legal materials, practices or other factors. It might be asked, for instance, whether they must be of certain kind.[27] Finally, as

[26] See e.g. Schauer (n 18) 2-13 and 31, Hans Kelsen, *General Theory of Norms* (Michael Hartney tr, OUP 2011) 268-272, and Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (CUP 2008).

[27] See in this context Joseph Raz, *The Authority of Law* (OUP 1979) 45-52, where he discusses the strong sources thesis.

will be done here, the spotlight can be shone on norms of legal method. The thesis is about them and not the other elements.[28]

A Brief Note on Terminology. Legal Method and a Norm as an Ought-Standard

Sometimes a different terminology than 'legal method' is used to refer to very roughly the same thing. Examples of that are 'legal reasoning', 'legal argumentation',[29] 'legal justification'[30] and even 'a theory of adjudication'. The terms may reflect different emphases or understandings. Therefore, they may refer to not exactly the same thing. For example, the terms 'legal reasoning', 'legal argumentation' and even 'legal justification' seem to emphasise the role of legal reasons. The term 'legal method' is used here because it seems to be neutral between the three elements and wider than some of the other terms.

Other key concepts or terms, such as a 'legal norm', a 'source of law' and an 'interpretive factor', will be explained in other chapters as well as their relationship with legal method and its norms. To avoid a confusion, a few remarks now on the term 'norm' are in order. A norm is an ought-standard. By that is meant that it directs (requires, forbids, permits or enables) a human act, belief etc.[31] For example, according to a norm some act should be done. Given its oughtness or its normativity, it might be thought that a norm exists if and only if it is or it gives the norm-subject a (normative or justifying) reason for

28 Although norms of legal method may matter for judicial discretion, it is not a focus of the thesis.

29 See e.g. Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994), and Robert Alexy, *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick tr, OUP 2010).

30 See e.g. Neil MacCormick, 'Why Cases have Rationes and What These Are' in L. Goldstein (ed), *Precedent in Law* (Clarendon 1987) 155-182.

31 Or is taken to prescribe or direct.

the action which the standard prescribes.[32] In other words, the norm exists in this sense if it is genuinely normative, that is reason-giving, for the norm-subject.[33] Here the term will be used in a wider sense. A norm is taken to exist if there is a standard or a measure according to the content of which some human act, belief etc. is directed or the standard is understood or used in that way irrespective of whether there is a (normative or justifying) reason for the norm-subject to act in the way the standard prescribes.[34] Of course, there might be such a reason but there need not be.

Often the term 'norm' could be replaced with the terms 'standard' or 'rule' in what follows. Those who are uncomfortable with using the word 'norm', for example, because they use the term in a narrower sense, can think of the word 'rule' instead. The term 'norm' has been chosen over the term 'rule' for the following reasons. Firstly, sometimes the term 'rule' is taken to refer to a fixed or strict rule.[35] By that is meant a general standard that is specific as to its conditions of application or effect.[36] A fixed rule is sometimes contrasted with a standard that is vague, variable or evaluative.[37] Other times a fixed rule is contrasted with a more general standard, such as a principle. Secondly, the term 'norm', unlike the

---

32 Assuming that reasons are facts, it is more accurate to say that it is the fact that the norm exists or it is some other fact, such as some institution legislated, that is a reason for an action. See Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) 51, which says: 'Since rules are objects and only facts are reasons rules are not, strictly speaking, reasons. The fact that there is a rule that p is a reason and not the rule that p itself.' The language of normative facts is not used here.

33 This does not preclude that it could be genuinely normative for someone else, such as an official.

34 See in this context Leslie Green, 'Escapable Law' (2019) 19 JRLS 110. John Gardner, *Law as a Leap of Faith* (OUP 2012) 154, on the other hand, says 'something is a norm if it can be used as norm'.

35 H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 259-263 and 130-134. Sometimes Hart uses the term, though, in a narrow sense, see e.g. p. 133.

36 See Dworkin (n 5) 14-46, who criticises Hart for having overlooked principles and Hart's response in the 'Postscript' (n 35) 263-268.

37 See in this context e.g. George Whitecross Paton, *A Textbook of Jurisprudence* (Paton and David P. Derham eds, 4th edn, Clarendon Press 1972) 236-237, and Roscoe Pound: 'Hierarchy of Sources and Forms in Different Legal Systems' (1932-1933) 7 Tul. L. Rev. 482-483. They use the term rule in a narrow way and differentiate it from principles.

term ‘rule’, includes both general and particular (individual) standards.[38] And it avoids drawing a line between the two.[39] Lastly, the term ‘norm’ is wide enough to encompass a variety of phenomena described by words like precepts, directives, commands, orders, decrees, mandates, rules, principles, guidelines, canons, maxims and prescriptions.

1.4 Why Norms of Legal Method?

From what has been said, it is clear that norms of legal method are different between jurisdictions. They are also internally diverse. Some of them are about foundational factors or sources of law, others are about interpretation and yet others are about conflicts of law. Naturally, two questions arise. What, if anything, unites norms of legal method? Why is it worthwhile to examine them together philosophically?

The answer to the former question is that while they are internally diverse, they share an overall role of determining the applicable law, either in general or in light of concrete facts. They each play their part in determining the law. Consider again Justus’ claim about the legal norm about natural wonders. He supported his claim by pointing to a statutory provision. Let us say that there is a norm of legal method in his legal system identifying statutes of Parliament as foundational factors or sources of law. Justus also interpreted the statutory provision. He claimed that it should be interpreted purposively and dynamically. Suppose he is correct and there are norms of legal method about purposive

38 Tony Honoré, ‘Real Laws’ in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society* (OUP 1977) 108, says that one-off laws, such as laws that repeal, are not general; they are not rules. On derogating norms or norms that repeal, see e.g. Kelsen (n 26) 106-115.

39 See Hart (n 35) 20 and 282, where he discusses generality as both to classes of individuals and acts. See also Timothy Endicott, ‘The Generality of Law’ in Luís Duarte D’Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart’s The Concept of Law* (OUP 2013) 15-37.

and dynamic interpretation in his legal system. Let us also say that there is an older statutory provision, which overlaps with the statutory provision in question. And Justus is correct in saying that the newer law applies in conflict with an older law because of the *lex posterior* norm. Therefore, it is the applicable legal norm for answering the legal question. While the norms about sources of law, interpretation and conflicts of law just mentioned are diverse, they are all relevant for answering the legal question albeit in different ways. Justus applies all of them in order to determine the applicable legal norm. More will be said about the diverse roles of the norms in the next chapter.

Although the norms can be viewed together from this perspective, they can be examined in a more isolated and fragmented way. For example, norms about sources of law could be viewed together and in isolation from other norms of legal method. Or norms about interpreting a statute could be viewed together and in isolation. Furthermore, the focus, for instance, could be on norms about interpreting the constitution or statutes imposing criminal liability. Which raises the latter question.

The answer to the latter question is twofold. By adopting a broader lens, we can see how the norms are together important for determining the applicable law even if they have diverse roles. And we can understand better the particular role that a type of norm has in that regard. In other words, it helps to elucidate the norms themselves as well as their role in determining the law. This in turn has consequences for several issues. An understanding of the diverse roles and how the norms fit together casts a new light on issues about legal validity and legal systems, to name examples. For these reasons, it is worth understanding the norms better as a whole and in general.

With a sense of what norms of legal method are and why they matter, it is now time to answer the questions identified at the beginning of this chapter.

2 WHAT DO THEY DO?

While norms of legal method are diverse, they are grouped together because they share an overall role of regulating the law in a particular way. Considering their diversity, the following question naturally arises: what are their specific roles in regulating the law? This question will now be answered.

By analysing the diverse roles, different categories of norms of legal method, or what will also be referred to as secondary norms, come to light. Before proceeding, a note on categorisation and presentation is in order. First, the norms can be categorised in various ways and for different purposes. Sometimes it is also an open question to which category a norm belongs and whether to group some norms together or to create a new category. Second, while the chapter seeks to map the different categories of secondary norms depending on their roles, it does not do so comprehensively. The different categories are identified but the norms belonging to them are not discussed in detail. A birds-eye view is adopted.

The norms will not be analysed from the point of view of a legal system or the concept of law. The idea is not to identify those secondary norms that are necessary or sufficient for a legal system to emerge or exist.[40] The focus here is on legal norms or the concept of *the* law.[41] To reiterate, some idea about the nature of the law, such as about its constitutive elements or ingredients, is essential to identify the way in which norms of legal

---

40 For such an analysis, see Hart (n 35) 92-97. See also Stanley L. Paulson, 'On the Implications of Kelsen's Doctrine of Hierarchical Structure' (1996) 18 The Liv. Rev. 49, 56-57. He describes Adolf Julius Merkl's article 'Prolegomena einer Theorie des recthlichen Stufenbau' from 1931. Merkl analyses the defects of a primitive legal system and introduces remedies to them. They include an empowering rule to make new law and institutional means to determine compliance with the law. Merkl and Hart seem to share, in the latter's vocabulary, rules of change and adjudication but Merkl is lacking the rule of recognition.

41 Dworkin (n 4) 2, also focuses on the law or the law in a doctrinal sense instead of the concept of law.

method regulate legal norms. For the purpose of the thesis, we return to and rely on the simple image of the law discussed in the last chapter. By studying the simple image of the law, we arrive at issues that are addressed by norms of legal method.[42] We begin by enriching and examining the simple image of the law through the lens of an example that is typical for the daily operation of the law in numerous legal systems. Once we have identified the issues, we move on to the different categories of secondary norms that address them.[43]

2.1 The Simple Image of the Law

The Example

Imagine that a grocery shop -let us call it the Corner Shop- has ordered two types of goods from a wholesale –let us call it Food Supply. The goods in question are bottles of tomato sauce and gift boxes of Belgium chocolate balls. Upon arrival the boxes carrying the tomato sauce bottles are crushed and torn but the bottles themselves are fine. Not only are the boxes carrying the gift boxes damaged but also the gift boxes themselves. The chocolate balls in their individual wrappers are intact though. The Corner Shop is dissatisfied and wants to know its legal position. A legal position of a person is the outcome of application

42 Compare with Salmond (n 1) 219-226, and Hart (n 35) 91-100.

43 This approach can be compared and contrasted with Hart (n 35) 91-100. Firstly, Hart focuses on the concept of law (and a legal system) and its necessary and sufficient conditions. Here the focus is on the existence and content of the applicable law (a legal norm). Secondly, Hart tells a just-so story of how a pre-legal society is transformed into a legal one. Here the focus is on the simple image of the law and a typical example of the actual operation of the law. Thirdly, Hart identifies three defects of a pre-legal society (uncertainty, static nature of the rules and inefficiency). His three types of secondary rules (rules of recognition, change and adjudication) are remedies to them. Here the focus is on issues that arise in determining the law and the different types of secondary norms that address the issues or do so in different ways.

of legal norms to the material facts. Suppose the law of the land is that a good in damaged packaging does not count as defective unless the packaging is important for its use or resale. If the good is defective, then the buyer has a right to a remedy from the seller. These legal norms need to be applied to the facts of the case in order to determine the legal position of the Corner Shop and Food Supply respectively. Let us say that the packaging is not important for the use or resale of the tomato sauce bottles because they are sold as bottles and appear as such on the store shelves but it is for the gift boxes of Belgium chocolate balls. They are intended to be sold in the decorative gift boxes and appear in that form on the store shelves. It follows that the shipment of the gift boxes of Belgium chocolate balls, as opposed to the tomato sauce bottles, is defective and the Corner Shop has a right to a remedy from Food Supply in that regard. That is their respective legal position.

Now suppose that Food Supply wants to know why exactly the legal norms about defective goods and packaging are the law of the land. Food Supply's lawyer points to article 34 of the Sale of Goods Act. The article states that 'the seller must deliver goods which are of the quantity, quality and description required by the contract' and goods do not conform with a contract if they, among other things, 'are not contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods'.[44] The article is the reason why the law in question exists.

Let us say that Food Supply accepts that the article regulates defective goods and packaging but doubts that damaged packaging can ever result in a defect of a good if the good itself has not been damaged. In other words, Food Supply does not doubt that a legal norm exists about defective goods and packaging but it questions the exact content of the

[44] This hypothetical statutory provision is inspired and modelled after the United Nations Convention on Contracts for the International Sale of Goods (CISG). Vienna, 11 April 1980, s 35, and the corresponding Sale of Goods Act No. 50/2000, s 17, in Iceland.

supposed legal norm. Its lawyer responds that that this is how the article is interpreted. She directs Food Supply to the explanatory note on the article in the *travaux préparatoires* that says it does not constitute a defect if the packaging is damaged as long as the goods contained in it are undamaged. In that case, the packaging has served its purpose of preserving and protecting the good. However, if the packaging is important for the use or resale of the good, then damaged packaging constitutes a defect.[45] The lawyer tells Food Supply that the legal norm is the outcome of interpreting the article in light of other factors, such as the information in the *travaux préparatoires*. Damaged packaging can, therefore, be a defect in the sense of the article in some circumstances.

Food Supply might accept all of this but still resist since neither the legal norm presented nor the explanatory note state which packaging is important for the use or resale of the good. It may contend that the good is not defective since the chocolate balls in their individual wrappers are unscathed. The lawyer explains to Food Supply that evaluative legal standards in their legal system, as well as other types of legal standards, must be applied to the material facts in a certain way. First, the evaluative term or standard must be isolated, which is the term 'important' in this case. Then the relevant factors or considerations need to be identified. In this situation, they include whether the packaging is mainly meant to protect and preserve the good during transport and storage, whether a good is contained in a gift box in which the good is intended to be sold or the packaging is otherwise an integral part of the good. Finally, the factors or considerations need to be applied to the facts of the case and, if they conflict, they must be balanced or weighed. In other words, the legal norm requires an evaluation and it takes place in light of factors or considerations, on the one hand, and facts, on the other hand. When the evaluative legal

[45] This explanatory note is inspired and modelled after the *travaux préparatoires* accompanying s 17 of Iceland's Sale of Goods Act.

standard is applied to the facts of this case in light of the considerations, it is clear that the packaging for the tomato sauce bottles was intended to preserve and protect them but the Belgium chocolate balls are intended to be sold in the gift boxes.

Food Supply might, in addition, inquire about various other issues relating to the law. It might, for instance, ask why a more lenient albeit an old precedent, which it has learned about and is also a part of the law of the land, does not apply. Suppose the precedential rule is that a buyer must accept goods in damaged gift boxes if he can resell them without the gift boxes. To which the lawyer responds that the Sale of Goods Act as an instrument of Parliament outranks the precedent and the precedent is inapplicable since it conflicts with the Act. Food Supply might also point to a favourable international convention it has come across and ask why it does not apply. The lawyer replies that the international instrument is not a part of the law of the land or not applicable in the jurisdiction. Furthermore, Food Supply might ask whether the Sale of Goods Act has been published in accordance with law and satisfies multiple other conditions to be applicable (or enter into force). The lawyer checks and answers that it has and it does.

Finally, Food Supply might contend that this part of the Sale of Goods Act violates the Constitution, namely the freedom to choose an occupation. The lawyer repeats the exercise for the constitutional provision and comes to the conclusion that while the right protects businesses to a certain extent, it is unlikely that the Sale of Goods Act amounts to a disproportionate interference with the right. She points out that the courts grant the legislature a wide discretion in choosing the best way to regulate transactions.

The Issues

A plain wish to know the legal position or the applicable law leads to numerous issues that must be addressed. With this example in mind, it is now time to summarize and examine the simple image of the law in order to identify the issues to which it gives arise. A law or the law is, for simplicity's sake, taken to be a legal norm.[46] When someone like the Corner Shop or Food Supply asks about the law, they are inquiring about the existence and content of the applicable legal norms. A legal norm is sometimes said to be a standard that guides or directs behaviour.[47] It is, for a lack of a better term, a kind of abstract entity or thought-object of a certain sort.[48] In some instances, it can be hard to formulate or describe the exact content of a legal norm but let us say in the example above that it or a part of it is this: 'A good in a damaged packaging does not count as defective unless the packaging is important for its use or resale'.

Nothing is a legal norm of a legal system unless it has a sufficient basis in one or more sources of law of that legal system. In other words, all law is source-based.[49] A source is a legal material, practice or factor that grounds a legal norm or is a reason or a justification for its existence as a law of the legal system. Sources are, figuratively speaking, like vessels for the law. Statutes, judgments and customs are sources of law in

---

46 Legal rights and duties are taken to be the material structures of legal norms.

47 See e.g. G.H. von Wright, *Norm and Action. A Logical Enquiry* (Routledge & Kegan Paul 1963) 70, Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 165, Alf Ross, *Directives and Norms* (The Lawbook Exchange, Ltd. 1968) 82-83 and 106-110, and Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 Harv. L. Rev. 44, 50-51. See also Green (n 34) 110-120. See also Chapters One and Six.

48 See e.g. Scott J. Shapiro, *Legality* (HUP 2011) 103, and Grant Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (2014) 59 The American Journal of Jurisprudence 25, 39. For a legal system as a thought-object, see e.g. Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 3. For further elaboration, see Chapters One and Six.

49 As will become evident in a moment, the term a 'source of law' and 'source-based law' are used in a different way than Raz (n 47) e.g. 45-52 and 62, does, for example.

this sense.[50] Sources can be thought of as resembling frames.[51] Only the putative legal norms inside of the frame, that is those that are supported by the source, can exist as laws of the legal system. If a putative legal norm is partly or wholly outside of the frame, then it, or a part of it, does not exist as a law of the legal system unless it has a basis in a different source.

The term 'source of law' has multiple meanings.[52] It is important not to confuse the sense used here with some of its other meanings. Among the other meanings of a source of law are the institution or person it stems from, such as the sovereign, the Parliament or the courts; the act or event that brings law into existence, for instance, the enactment of a statute or deciding a case; or a criterion or a method for creating a legal norm.[53] The different meanings are, though, closely related. As an example, Parliament (an institution) acting according to powers and procedures laid out in law (criteria) enacts (an act or event) a statute (a legal material).[54] The statute is here understood as the source of law but not the law itself. So-called statutory laws are the legal norms embodied in or based on statutes. Similarly, customary laws are the legal norms based on practices. The practices are not the law but sources of law. In the example, article 34 of the Sale of Goods Act is the relevant source of law or the relevant part of the source.[55] The legal norm about defects and

---

50 For sources of law, see e.g. Alf Ross, *On Law and Justice* (2nd edn, OUP 2019) 89-93, and Frederick Schauer, *Thinking Like a Lawyer. A New Introduction to Legal Reasoning* (reprint, HUP 2012) 66-67.

51 The metaphor of a frame is inspired by Hans Kelsen, 'On the Theory of Interpretation' (1990) 10 Legal Studies 127, 128-131 and 133, who uses it for a legal norm.

52 See e.g. G.W. Keeton, *The Elementary Principles of Jurisprudence* (2nd edn, Isaac Pitman & Sons, Ltd. 1949) 73.

53 For sources as occasions or events, see e.g. Salmond (n 1) 221 and 229, and Raz (n 47), 62 and 151-152. Hart (n 35), 100-110, seems to use the term in this sense as well. For sources as methods of creating law, see e.g. Hans Kelsen, *Pure Theory of Law* (Max Knight tr, The Lawbook Exchange, Ltd. 2005) 232-233. For sources as e.g. legal materials, see Ross (n 50) 89-93.

54 This applies, at least, if the law is created in an authorised manner.

55 For present purposes it does not matter whether the article or the statute is the source.

packaging exists because article 34 exists with the content it has. It fits within its frame. This raises the issue of what makes the article or the statute a source of law of the legal system.

Other legal materials, practices or factors, such as *travaux préparatoires*, influence the content of a legal norm. They can be called interpretive factors and, at least in some cases, they form their context. A source is interpreted in its context, that is in the light of interpretive factors, and the outcome of the process is a legal norm. The information in the explanatory note about the article of the Sale of Goods Act in the example is an interpretive factor and the outcome is the legal norm about defective goods and packaging. Another example is a precedent (a source), which may be interpreted in light of, for example, a reasoned decision of the Supreme Court to reject an appeal in a case concerning a similar subject matter (an interpretive factor). Both sources and interpretive factors are among the constitutive ingredients of a legal norm but they have different roles. A legal norm cannot exist as such if it only has a basis in an interpretive factor.[56] For example, if the information in the explanatory note has no or insufficient basis in the article, then it cannot ground a legal norm in the legal system. In that case, it is not a part of the law of the land. This raises the issue about what makes a legal material, practice or factor an interpretive factor or a part of the relevant context of a source as well as what determines their role or weight.

Often the application of a legal norm to the material facts is not governed by norms of legal method. It simply requires matching the facts to the law. However, sometimes there are special norms governing the application of a legal norm to the facts. That is sometimes the case with applying, for instance, evaluative legal standards and legal principles in some

[56] For Icelandic literature about statutory interpretation on this point, see e.g. Róbert R. Spanó, *Túlkun lagaákvæða* (Bókaútgáfan Codex 2007) 151-155, and Hafsteinn Dan Kristjánsson, *Að iðka lögfræði. Inngangur að hinni lagalegu aðferð* (Bókaútgáfan Codex 2015) 71-72 and 149.

legal systems.[57] Determining whether packaging is 'important' for the use or resale of a good requires identifying factors or considerations and evaluating the facts in light of them. The issue arises what determines the application of a legal norm to the facts or how an evaluation is conducted.

Furthermore, various matters emerge in relation to the applicability of a legal norm. A legal norm may, for instance, be not applicable if it has not been published in the correct way or if it is retroactive. Moreover, even if a legal norm is generally applicable, it may not apply in the specific instance, for example, if it conflicts with another legal norm. The questions about the applicability of the precedent and the international convention in the example as well as whether the Sale of Goods Act has been published according to law are of this sort. The issue arises what determines the applicability of a legal norm.

The final issue concerns the role of particular institutions in determining and applying the law. Granting another institution discretion in deciding the compatibility of a statute with a constitution, as was the case in the example, is an institutional consideration. The issue arises what determines the powers and roles of particular institutions in identifying and applying the law.

By examining the simple image of the law, we arrive at five issues. They are the existence, content, application and applicability of the law as well as the relevance of institutional considerations and powers.[58] The issues can be put in the form of questions:

---

57 See e.g. Erik Boe, *Grunnleggende juridisk metode* (Tano 2005) 35-49 and 73-81, for the Norwegian legal system and Kristjánsson (n 56) 176-177, for the Icelandic one.

58 Compare with Salmond (n 1) 219-226. He asks three questions: does the law exist? What is its content? What is the extent of its application? Then he states that there are three types of secondary rules that answer these questions. Hart (n 35) 91-100, focuses on, as previously stated, three defects of a pre-legal society and his three types of secondary rules are remedies to these defects. See also e.g. Roscoe Pound, *Courts and Legislation* in *Science of Legal Method* (The Boston Book Company

does the law exist? What is the content of the law? How does the law apply to the facts? Is the law applicable? Are institutional considerations or powers relevant for determining and applying the law? Norms of legal method are about the law in the sense that they address these issues and partly answer these questions. They do so in part because other factors, such as the existence and content of legal materials, are relevant as well but they will not be discussed here. Norms of legal method can be categorised depending on which issue they address or how they address the issue. We now turn to these five issues and the categories of secondary norms that about them.

2.2 Existence of the Law

The first question is: does the law exist? In order for a legal norm to exist, according to the simple image of the law, it must have a sufficient basis in a source of law of the legal system. The question, then, becomes whether a supposed legal norm has a sufficient basis in a source of law of the legal system. That question requires answering the further question of what the sources of law are or, approached from another angle, whether some legal material, practice or factor is a source in that legal system. The first category of secondary norms or norms of legal method is about this issue.

The norms can be called *norms of recognition*.[59] They address the issue of the existence of the law by identifying sources of law, that is legal materials, practices or

1917) 208, and Karl Gareis, *Introduction to Science of Law* (Albert Kocourek tr, The MacMillan Comp. 1924) 88.

59 The terminology signals that the norms are closely related to Hart's rule of recognition, which in turn is related to Kelsen's basic norm, see e.g. Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, The Lawbook Exhange, Ltd. 2011) 115, and Salmond's ultimate principles, see (n 1) 222. See Hart (n 35) 292-294. There are, though, some differences including these: Firstly, norms of recognition identify sources of law, that is legal materials, but rules of recognition identify the law (or primary rules of obligation of the group) as such. Even if it is done by pointing to sources,

factors that are reasons for the existence of legal norms.[60] They recognize some legal materials or parts of them as having a specific function for the existence of legal norms. It is important to remember that the simple image of the law does not equate the law with its source even though there is a close and inseparable connection between them.[61] These are different entities. Norms of recognition identify sources but not the legal norms themselves. In other words, they identify a constitutive element of a legal norm that is a reason for its existence. By identifying a source of law, a legal norm has not necessarily been fully determined. Other factors may shape its content. That means that once the source has been

---

the term refers to the act or the event in virtue of which the law is valid. In other words, they identify different entities and use the term 'source' in different senses. See in this context, Hart (n 35) 100-101 and 246. Secondly, whereas rules or, at least, Hart's rule of recognition include criteria for the hierarchy of laws, norms of recognition do not. Thirdly, while rules of recognition may include canons of interpretation, norms of recognition do not. Fourthly, contrary to Hart's view on the rule of recognition, there can be many norms of recognition in a legal system. Fifthly, norms of recognition are called norms but not rules for two reasons. The former reason is to indicate the difference between them and rules of recognition. The latter reason is trivial but it highlights that norms of recognition can have various forms, such as be rules, principles, standards, considerations and so on. Sixthly, as will be argued later, norms of recognition form the foundations of a legal system in a (slightly) different way than Hart's rule of recognition. Seventhly, as will be argued later, norms of recognition matter for validity in a (slightly) different way than Hart's rule of recognition. Eighthly, as will be discussed later, non-legal norms of recognition are interpretive norms but not social conventions (or rules).

60 There is a relatively long tradition of thinking about rules having the function of recognizing other rules or sources of law. Before Hart there were theorists who spoke of law not only in terms of rules but also in terms of recognition of rules or sources of law and their relationship to the courts. See e.g. A.V. Dicey, 'Private International Law as a Branch of the Law of England' (1890) 6 L.Q.R. 3, who says: 'The law of every country consists of all the principles, rules or maxims enforced by the courts of that country. See also John W. Salmond, *Jurisprudence* (9th edn, Sweet & Maxwell 1937) 200 and 205. He says that the formal sources of law depend on general recognition by courts as binding upon them. Glanville Williams, *Salmond on Jurisprudence* (11th edn, Sweet & Maxwell 1957) 135, speaks about rules about changing law and their link to rules recognizing new rules as well as rules establishing sources. M.J. Sethna, *Jurisprudence* (Lakhani Book Depot 1959) 169, says: 'And if we wish to lay our finger at some particular sole and ultimate source of civil law, it is custom ...' See further Frederick Pollock, *Jurisprudence and Legal Essays* (Millian and Co., Ltd. 1961) 16, Thomas Erskine Holland, *The Elements of Jurisprudence* (10th edn, OUP 1906) 19 and 60, and Paul Vinogradoff, *Common-Sense in Law* (Williams & Norgate 1914) 39. See also N. Falk, *The Scientific Study of Law* in *Outline of the Science of Jurisprudence* (T & T Clark 1887) 180, 183 and 194. On the last page he says: 'The legal character of a rule ... arises from its recognition in the Civil Union ...' See in this context also Hermann Kantorowicz, *The Definition of Law* (CUP 1958) 21.

61 To clarify, this is not the same view as that of John Chipman Gray, Roland Gray, *The Nature and Sources of the Law* (2nd edn, The MacMillan Company 1948) 124-125. The law is not whatever the courts say it is. The claim is merely that the legal norm is not the same as the legal material on which it is based. Given the role of sources, a legal norm cannot be detached from its source without losing its status as law of the legal system.

identified we are not, thereby, at the journey's end. The source still needs to be interpreted.[62]

How do norms of recognition identify sources of law? They do so mainly in two ways. They either point to a source or provide criteria for the identification of any source, for example, by describing their general characteristics.[63] Here are two examples of ostension: 'This stone tablet contains the law' and 'This document called the Constitution is a source of law'.[64] When norms of recognition provide criteria, a source is identifiable by applying it. The norms can provide criteria in, at least, two ways. The first way is by referring to a legal norm that regulates the creation of other legal norms, such as norms empowering Parliament to enact a statute or a minister to enact a regulation. These norms of recognition can be more or less general. An example of a more specific norm is the following one: 'What the Minister enacts in the manner and form laid down in article 20 of the Infectious Diseases Act is a source of law.' This criterion is quite specific since it refers to a particular legal norm. It comes close to pointing to a particular source. Norms of recognition can also have more general criteria that refer to a type of legal norm. An example is this norm: 'What administrative authorities lay down according to legal norms empowering them to enact regulations are sources of law.' It follows from this criterion that if there is a legal norm empowering a minister to enact a regulation and the minister

---

62 Interpretation is here understood in a very wide sense. It includes the textual interpretation involved in reading a statutory provision.

63 Hart (n 35) 94-95. If the reader thinks that ostension is providing criteria, then this should be read as 'other' criteria.

64 Since the norms are often unformulated and can be expressed in various ways, sometimes a confusion reigns and sources and the law are spoken of interchangeably. For instance, the norms might be inaccurately phrased as: 'This stone tablet is the law' and 'The Constitution is the law'. This equates the law with its source, which is understandable given their close and inseparable connection. When nothing hangs on the difference, sometimes this will be done here as well. See in this context Gardner (n 34) 58 and 79, where he, among other things, talks about confusing a legal norm with its formulation. See also in this context Frederick Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (OUP 1991) 63.

has enacted it, then the regulation is a source of law of the legal system and a basis for regulatory law.

The second way of providing criteria is by laying down other identifying marks or features of sources. The identifying marks can be of various sorts and the criteria can be in the form of conditions or considerations. The identifying marks are not limited to the origin or manner in which a source is created. It follows that norms of recognition are not limited to so-called pedigree tests.[65] The identifying marks can also be clear or vague. Here is an example of a norm with multiple and vague identifying marks: 'A practice is a legal custom or a source if it is stable, consistent, continuous, reasonable and involves a matter of legal significance.'

There is also nothing to prevent a norm of recognition from being mixed, for example, by both pointing to a source and providing criteria or tests that need to be satisfied as well. Additionally, more than one norm of recognition can regulate one (type of) source and they may be of different kinds. For instance, a non-legal norm, which will be discussed in the Chapters Four and Five, may identify a legal material as a source and a legal norm may require further conditions to be satisfied in order for the law to come into existence.

Norms of recognition can be both positive and negative.[66] Positive norms of recognition identify sources of law of the legal system. Examples of them are: 'Local custom is a legal source' and 'The *ratio decidendi* of a case embodies the law'. Negative norms of recognition state what does not count as a source of law. Article 12 of the Austrian

---

65 On pedigree tests, see e.g. Dworkin (n 5) 32-33 and 57-68, and Hart (n 35) 247-248 and 250.

66 Salmond (n 1) 220. See also Schauer (n 50) 77, on prohibited authorities.

Civil Code 1811 is exemplary.[67] The article states that judgments never have the force of law and cannot be extended to other cases.[68] A norm of recognition can also have both positive and negative elements. Article 10 of the Austrian Civil Code is a good example. It states that customs can only be taken into account where the law refers to them.[69]

The second category of norms of legal method also concerns the existence of the law. The norms can be called *norms of change*.[70] They confer a power on someone to create, change or cancel laws. Whereas norms of recognition identify sources, norms of change affect their existence in particular ways. As an example, a constitutional norm may confer a power on Parliament to legislate. When Parliament legislates, it enacts a statute, which is a source of law and the basis for statutory law. Parliament creates new law by bringing a statute into existence in accordance with the procedure laid out in the constitution and possibly other laws as well. Norms that repeal laws are norms of change since they abolish laws.[71]

Norms about creating, changing or cancelling laws have a positive aspect in the sense that they are about the law-creator's power to change the law. A constitutional amendment clause is an example of positive norm of change. Some norms of change, however, are negative or there are norms that relate to norms of change, which have a

---

67 Allgemeines Bürgerliches Gesetzbuch (ABGB) 1811.

68 See also article 5 of the French Code Civil 1804 banning judge-made law, the introduction to the Prussian Allgemeines Landsrecht 1794 about not using court decisions and article 265 of the Italian Codice Civile 1942 prohibiting the authority of legal writers. See e.g. Allen (n 11) 180-186, and Vogenauer (n 10) 880-882.

69 A final stance is not taken here on whether the Austrian norms are best understood as norms of adjudication. For that issue, see section 2.6 and Chapter Six. See also Hart (n 35) 97, discussing the close connection between rules of recognition and adjudication.

70 See Hart (n 35) 95-96. See also in the context Salmond (n 1) 221. Norms of change might partly explain the sense that there is 'a pedigree test' since they are about creating the law.

71 Hart (n 35) 95. For derogation, see e.g. Kelsen (n 26) 106-115.

negative aspect. The norms in question are about the law-creator's disability. An example is an express limitation of amendment powers. The third paragraph of article 79 of the German Basic Law is an illustration.[72] It states that amendments to the Basic Law concerning certain subject matters shall be inadmissible.[73]

There is a puzzle about norms of change that will be discussed more fully in Chapter Eight. The puzzle is this: what makes that what is created by norms of change the law? Another aspect of the puzzle is how norms of change can be identified amidst the numerous other norms that confer a power to create a norm or an act that do not count as sources of law, such as internal rules, judicial and executive decisions, contracts and laws of corporations. Maybe norms of change both confer a power to create something and identify that what is created as the law. In that case, they share a function with norms of recognition, that is of identifying something as a source of law (or the law). Perhaps they are simply those power-conferring norms that are referred to by norms of recognition as the criteria of identification of sources of law. In either case, they are closely related to norms of recognition and are as such relevant for identifying sources of law and the issue of the existence of the law.

---

72 Grundgesetz 1949.

73 A stance is not taken here on whether the German norm is better understood as a duty-imposing norm. See Chapter Six for the normative character of norms.

2.3 Content of the Law

The second question is this: what is the content of the law?[74] Recall that a source of law is like a frame. It supplies the law with its main content and sets the boundaries for possible legal norms.[75] Other materials, practices and factors are relevant for determining the more exact content of the law. Sometimes the source is clear and precise and leaves little space but in other cases it is open-ended, vague or ambiguous and leaves more room for other factors to contribute to the law's content. *Norms of interpretation* identify these interpretive factors and specify their role, including their internal relations, such as how they are ranked, weighed or balanced.[76] They govern the process of interpretation of a source of law; they regulate legal interpretation. Sometimes the norms are called canons of interpretation or construction and on occasion they or, at least some of them, are referred to as maxims or presumptions. Norms of interpretation are a common or a salient feature of, at least, modern, sophisticated legal systems. Where they exist, they are treated as important for determining the law.

Why not simply treat norms of recognition as identifying the law and look at norms of interpretation as norms of recognition in that sense?[77] After all, it is better to have fewer

---

74 The phrase is misleading since the law is, strictly speaking, its content. For a similar classification for interpretation, see Salmond (n 1) 226-227.

75 By this is not meant that the boundaries cannot be fuzzy or continuous.

76 Hart seems to emphasise language in legal interpretation, see Hart (n 35) 126-134. He does, though, say: 'the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on aims or purposes which may be attributed to the rule.' And he continues: 'To characterize these would be to characterize whatever is specific in or peculiar to legal reasoning.' See p. 127. So, he seems to allow for the possibility that there is space for legal reasoning and factors other than language to influence the content of the law. In the 'Postscript' 259, Hart confesses he said much too little about e.g. legal reasoning. In *Essays in Jurisprudence and Philosophy* (OUP 1983) 5-8, 98-103 and Essay Four, Hart spoke more about the issue of legal reasoning and, in the 'Introduction', not merely in linguistic terms. See also Leslie Green, 'Notes' on *The Concept of Law* 309-310. Furthermore, see in this regard Nicos Stavropoulos, 'Words and Obligations' in Luís Duarte D'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (OUP 213) 123-155.

77 For such a view, see e.g. Cross (n 2) 42.

and simpler categories to understand the law. Moreover, issues of existence and content are interwoven. For example, a legal norm cannot exist without some content. The reasons for this more complex picture are, firstly, that the norms have disparate roles. As stated before, norms of recognition identify sources of law but norms of interpretation identify interpretive factors and specify their role. The former norms are about the existence of the law but the latter norms are about its (more exact) content; they address different issues. Even though the issues are closely related, they are still distinct. Their significance for determining the law is unalike. Treating these diverse standards as being of the same type, distorts, misleads or obscures. For instance, an interpretive factor can contribute to the content of the law but it cannot on it is own justify its existence as a legal norm of the legal system. These are different roles. An earlier example illuminates this. A legal norm that only has a basis in *travaux préparatoires* does not exist as the law in a legal system that only identifies the legal material as an interpretive factor and not as a source of law.

Secondly, there is no standard that identifies the law as such. Instead, there are diverse standards that address different issues for identifying the law and they, as well as the legal materials they recognize, are woven together through interpretation (and other types of legal reasoning). Consider for example the norm: 'What the chieftain declares is the law.' Even though the declarations have been identified as relevant in this regard, that is as sources, there is still a need to figure out their meaning, that is the norms they contain. To reiterate, norms of recognition identify sources of law but not the law itself. The source still needs to be interpreted to identify the legal norm. Norms of interpretation regulate its interpretation but not the existence-conditions of the law as such. Together the two types of standards contribute to identifying the law and they share that overall function. That is what makes them both norms of legal method.

Thirdly, to categorise them as two different types of standards better captures how they are thought of, spoken of and used in many legal systems. While there may be legal systems that treat every or most factors as both sources and interpretive factors in the sense already described,[78] most do not.[79] However, this does not mean, for example, that a statutory provision cannot both be a source for a particular legal norm and an interpretive factor when another statutory provision is interpreted.[80]

Earlier it was said that the image of the law is too simple. Legal norms are not only the outcome of an interpretation of a source. A prominent example is analogical reasoning. It has, at least, two important features in this regard. First of all, an analogy is made from a legal norm but not its source. Second of all, analogy concerns, arguably, both the existence and content of the law. At minimum, there is a common feature, though. Both legal norms are the outcome of legal reasoning. One is the conclusion of interpretive reasoning, the other analogical reasoning.

At least two issues arise about the nature of analogy in law. The former issue is whether analogy is law-creation. If it is, then it is a method to create law, not to identify it. This issue will not be addressed here since it requires drawing up the boundaries between identifying and making the law (judicial law-making). The latter issue will be discussed, though. It is about whether analogical reasoning is simply a matter of logic. If so, then there are no special norms directing it.[81]

---

78 See e.g. the Norwegian legal system that uses the concept of source of law factors (n. rettskildefaktorer) and Eckhoff (n 14).

79 See e.g. most of the other Nordic legal systems and Germanic systems. See e.g. Snævarr (n 1) and Zippelius (n 1).

80 Often, it is more accurate to refer to the legal norm based on the provision as the interpretive factor.

81 See e.g. Raz (n 47) 201-206, for both issues as well as the powers mentioned in a moment.

There can be norms that regulate analogy in a legal system. They are, at least, of two sorts. First, there are norms about whether analogy is allowed at all and, if it is, then when. In some legal systems, the use of analogy is banned but it is allowed in others. In some legal systems, it is allowed or banned from some types of laws or allowed or banned within some legal fields. Examples are legal systems that only permit the use of analogy from statutes, on the one hand, or cases, on the other hand, and legal systems that ban or restrict the use of analogy from laws that impose taxes or criminalize a conduct.[82] Secondly, there may be norms about the use of analogy. If the answer to the first issue above is that analogy is a matter of law-creation, then these are norms of change or discretion. If analogy is one way to identify the law already in existence, then it is harder to classify them. It could be said in that case that the norms about whether analogy is allowed are more about the existence of the law but the norms about its use are more about its (more exact) content. The same classificatory problem applies to, for instance, *e contrario* arguments, at least to the extent that they involve the opposite of analogy.

82 See e.g. Robert S. Summers and Michele Taruffo, 'Interpretation and Comparative Analysis' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (Darthmout 1991) 472, for limitations of the use of analogy in criminal and tax law. On p. 471, they point out that there is more of a tendency to fall back on the use of analogy in the United States than in many civil law jurisdictions. They also point out that analogy is used more from precedents in common law jurisdictions but statutes in civil law jurisdictions. The place or ranking of analogy is also different. Analogy comes before the use of customs in Switzerland but it is the other way around in Iceland. See e.g. Rafael Häcki, 'An Introduction to the Application of Law in Switzerland' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014) 261-262, and Sigurður Líndal, *Um lög og lögfræði* (Hið íslenzka bókmenntafélag 2003) 185.

2.4 Application of the Law

In practice, the applicability of a legal norm is often determined before it is applied to the facts. Despite that, the issue of application will be treated before the issue of applicability because of its close connection to the content of the law.

The third question is: how does the law apply to the facts? As stated previously, subsumption of facts to legal norms is often not regulated by norms of legal method. Instead, it requires understanding the legal norm as well as general skills and knowledge, such as of language, logic and common sense. However, sometimes there are special norms about the application of legal norms to the facts. This is sometimes the case with the application of evaluative legal standards and balancing and applying legal principles.[83] These norms will be called *norms of subsumption*. This type of reasoning is common in deciding whether an interference with a human right, such as in the European Convention on Human Rights, or a free movement right in European Union law is justified.[84] For example, in order to decide whether a restriction of freedom of expression is necessary in a democratic society, several considerations or factors need to be identified and balanced in light of factual circumstances.[85]

---

83 For the former, see e.g. Hart (n 35), 130-134 and 263, that uses the term 'variable legal standards'. For jurisprudential literature on balancing legal principles and their character in contradistinction with rules, see e.g. Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) e.g. 47-57, and Dworkin (n 5), 41-45.

84 See e.g. article 10 of the European Convention on Human Rights on freedom of expression and articles 34-36 on free movement of goods in the Treaty on the Functioning of the European Union.

85 A one case out of many, randomly chosen, is *von Hannover v. Germany (no. 2)* [GC] Appl. nos. 40660/08 and 60641/08 (ECHR, 7 February 2012), paras. 104-107, where the Grand Chamber discusses cases 'which require the right to respect for private life to be balanced against the right to freedom of expression', see para. 106. See also the judgment of the Federal Constitutional Court of Germany of 5 May 2020 in the cases of 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15 and 2 BvR 1651/15, where the court criticises the methodology of the Court of Justice of the European Union in applying the principle of proportionality. See e.g. paras. 119, 133 and 141-142.

The process of identifying the relevant factors or considerations for evaluation is sometimes called filling.[86] It goes beyond interpretation. In spite of that, evaluation and interpretation have a common feature. They both identify the content of the law. For this reason, norms of subsumption can be seen as regulating the issue of the content of the law. They are treated separately here because they identify the content of the law in the context of some specific facts. The full content of the law in some instances cannot be determined except by applying them to the facts or, at least, in light of some types of facts. Norms of subsumption regulate the application of the law to the facts in a particular way.

2.5 Applicability of the Law

The fourth question is this: is the law applicable?[87] Various issues about the status and relationship of legal norms boil down to the question of applicability. The connection to legal validity will be discussed in Chapter Nine. The norms that govern the applicability of legal norms, either in general or in a specific instance, will be treated under three headings for convenience. They address different aspects of the issue of applicability. They are norms of internal relations, norms of external relations and other norms of applicability.

Norms of internal relations regulate the status of a legal norm within a legal system and its relationship with other legal norms of the same legal system. In a nutshell, they are about three sub-issues. The first is about hierarchy. These norms rank the diverse legal norms, usually depending on the type of source on which they are based. For example, 'Constitutional law is the supreme law of the land' or 'Statutory law is ranked higher than

86 Kristjánsson (n 56) 177.

87 Salmond (n 1) 223-226, discusses conflicts of law under the heading of the application of the law.

customary law'. The hierarchy of the law primarily matters when laws come into conflict and the issue of which applies arises.[88]

The second issue is about priority in a case of conflict. Examples of norms about priority are *lex superior*, *lex specialis* and *lex posterior*. They state which legal norm takes precedent in case of conflict. The categorisation of so-called implied repeal depends on its legal effect. If there is a legal norm the content of which is that older law conflicting with a younger law is abolished or obliterated in a similar way as laws that expressly repeal, then it is a norm of change. However, if there is a legal norm the content of which is that the younger law 'blocks' or 'overrides' the older law's legal effect to the extent there is a conflict, then it is a norm of internal relations.[89]

The third is other issues about status and interrelations between legal norms of the same legal system. Among them are norms about the status or relationship of legal norms in time, that is the temporal scope of a legal norm (l. *ratione temporis*). An example is: 'The procedural law in force when civil proceedings were initiated continue to apply to a civil case that has not been concluded even though the law is replaced with new procedural law.'

It might be considered desirable from the standpoint of a neatly organised legal system that one and the same norm or type of norm performs two functions, that is to identify sources and hierarchize them (or the law that stems from them).[90] This kind of

---

88 This is not to say that it cannot matter in other instances. For example, sometimes the lower source is interpreted in light of higher laws, such as statutes that are interpreted in light of constitutional law. That is, though, regulated by norms of interpretation.

89 For implied repeal in English law, see e.g. *Ellen Street Estates Ltd v. Minister of Health* [1934] 1 KB 590, CA. Kelsen (n 26) 111, says: 'The fact that two conflicting norms cannot be applied together is no reason for assuming that one of them repeals the validity of the other.'

90 See e.g. Raz (n 47) 95-96, for the point of desirability.

organisation of a legal system may be possible. Perhaps article 1 of the Swiss Civil Code 1907 comes closest to be an example of this.[91] The article lists sources and methods for a judge to use when deciding a case and the list is considered to be indicative of the order in which they should be used.[92] Nevertheless, there is no compelling reason to think that one and the same norm or that one and the same type of norm necessarily has those two disparate functions. Desirability does not entail necessity. What norms of recognition and norms of internal relations share is an overall role of determining the applicable law but they play different parts. While they are both norms of legal method, since they share the overall role, they are distinct categories of secondary norms because they address different issues. To repeat, norms of recognition identify sources and are about the existence of the law but norms of internal relations address the applicability of the law, including the hierarchy of laws. Furthermore, in many legal systems the different standards are not thought of, spoken of or used in the same way.[93] Lastly, if norms that hierarchize should be treated as norms of recognition, then it stands to reason that various other norms addressing the applicability of legal norms, such as those that prioritize, should as well.

Norms of external relations regulate the status and relationship of legal norms of one legal system with legal norms of another legal system or even other kinds of norms (of other kinds of regulative orders). The norms regulate the interaction between legal systems from the point of a view of a particular legal system.[94] Examples of the norms are:

---

91 Schweizerisches Zivilgesetsbuch (ZGB) 1907.

92 Examples of other codes that both list sources and their hierarchy are the Spanish and Italian Civil Code. See e.g. Vogenauer (n 10) 880.

93 Nordic legal systems are examples of this. See e.g. Eckhoff (n 14).

94 See in this context Julie Dickson, 'Towards a Theory of European Legal Systems' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) e.g. 47-50, and Julie Dickson, 'How Many Legal Systems?: Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union' in *Legal Research Paper Series*, paper no. 40/2008, at <http://ssrn.com/abstract=1279612> accessed 5 June 2020. See

'International conventions that have been ratified are a part of the law of the land and prevail over legislation', 'Regulations of the European Union are directly applicable' and 'European Union law takes precedent in a conflict with the law of a Member State'.[95] These norms state, for instance, whether foreign or international law is applicable within a legal system and regulate its status vis-a-vis domestic law.

Other norms of applicability are about other conditions of applicability than those regulated by norms of internal and external relations. They are often closely associated with the requirements of the rule of law. Among them are norms about promulgation, accessibility and clarity of the law as well as norms banning or limiting retroactive laws. It is not always obvious to which group some types of norms belong. To the extent they do not regulate the status and relationship between legal norms, they are other norms of applicability. Among these norms are those that regulate the material scope (l. *ratione materiae*) of other legal norms, such as sections in statutes about the situations to which they apply. 'This statute applies to real estate sales between consumers.' Furthermore, they include norms that regulate the personal (l. *ratione personae*) and territorial scope (l. *ratione territoriae*) of legal norms. 'This statute only applies to public officials' and 'This regulation applies in the capital region'.

Complex issues about the connection between applicability and legal validity can arise, which will be mostly deferred to Chapter Nine. It might, for example, be contended that 'To whom does the law apply?' and 'To whom has it been published' are two distinct

---

also in this context Pavlos Eleftheridis, 'The Law of Laws' (2010) 1 Transnational Legal Theory 579.

95 For the first example, see e.g. article 55 of the 1958 French Constitution. See e.g. Vogenauer (n 10) 880. For the second example, see article 288 of the Treaty on the Functioning of the European Union. For the last example, see e.g. case 6/64 *Flamino Costa v. E.N.E.L.* [1964] ECR 585.

questions. Laws may be 'complete as laws' or 'laws are validly made' before they are published.[96] However, promulgation may appear as if it is a condition of validity in a legal system and a law 'validly made' may not be treated as 'valid' until it published in the correct manner. An act may state that the law 'becomes valid' or 'comes into force' on a particular date after it has been published. Whether or not this is a matter of validity depends on what is meant by the term. For now, the issues are treated without referring to the term validity.[97] Instead, norms of recognition are about the existence of the law but the other norms its applicability.[98] A legal norm can be inapplicable for various reasons. Among them are that another legal norm 'blocks' it or its legal effects, which is the case with conflicts of laws, and another norm regulates when or how it is 'in force' in the legal system, that is when or how it applies or is applicable in general in the legal system.[99]

2.6 Institutions and the Law

The fifth and the last question is this: are institutional considerations or powers relevant for determining and applying the law? This issue concerns the role of particular institutions in deciding the other issues of existence, content, application and applicability.[100] This is best explained by giving an instance. In a legal system there may be norms of deference that dictate that one institution shall defer to the evaluation of another institution or grant it

96 Hart (n 35) 22.

97 Hart's notion of validity is being a part or member of a legal system. See Hart (n 35) 103. It is not in the sense of laws being in force or applicable. That indicates that the rule of recognition does not absorb every condition of applicability in this sense. It only concerns certain criteria of validity. See also in this context, Raz (n 47) 95.

98 See in this context Raz (n 47) 95.

99 See e.g. the Icelandic Act on the Official Journals No. 15/2005, s 8.

100 See in this context Pound (n 37) 475.

discretion. For example, perhaps in a given jurisdiction a court must grant the legislature a margin of appreciation in determining whether an interference with a human right was necessary. That norm regulates how 'far' the court goes in determining and applying the applicable law.

Since law-applying institutions are important for understanding the operation of the law, a wide view will be taken on institutions and powers to apply the law. From this broader lens, the norms can be called *norms of institutional decision-making*. There is an open question whether they should be divided by type of law-applying power. From that perspective, they can be sub-categorised into, firstly, *norms of adjudication*, which confer a power on an institution or a person to authoritatively and finally determine whether the law has been violated and specify the consequences of the violation. The norms regulating this activity establish and define the adjudicative power. Norms that impose a duty on an institution to adjudicate and regulate how a court is to identify and even apply the law are norms of adjudication. The same applies to the other categories of norms of institutional decision-making, to which we now turn.[101]

Secondly, there are *norms of executive action*.[102] They confer a law-applying power on, for example, an administrative organ to make an administrative decision. But this it is not the same type of law-applying power as the adjudicative power; it is the executive

---

101 Norms of adjudication are inspired by Hart (n 35) 96-98 and his rules of adjudication. Both types of norms are about legal powers and they include norms that identify the individuals that yield the power as well as define important legal concepts. However, there are some differences. Norms of adjudication are both a wider and a narrower category. Firstly, rules of adjudication include the procedures to be followed but they are only relevant for norms of adjudication in so far as they matter for identifying and applying the law. Secondly, while rules of adjudication do not include duties, including the duty to adjudicate, norms of adjudication do. These differences may entail that some norms that might be classified as rules of recognition according to Hart's scheme are treated as norms of adjudication (or institutional decision-making) on this account.

102 Endicott (n 39) 20, points out that Hart is missing executive rules.

power.[103] Finally, there may be other law-applying powers, for instance, to issue legal opinions or reports. Institutions belonging to the legislative branch can be mentioned, such as Parliamentary committees, investigative committees and the institutions of Parliamentary Ombudsman. Not all law-applying powers have the same status or significance within a legal system. Norms of institutional decision-making are about these diverse law-applying powers and the institutional considerations that apply to particular institutions or persons concerning the determination and application of the law.

Norms of discretion as closely related to law-applying powers. A law-applying institution may have a power to decide a case even though it is a (partly) unregulated dispute. In that situation, there may, but need not be, a norm that guides or directs the use of the discretion. Norms of discretion are not simply norms of change for law-applying institutions since they do not empower them to create new laws as such.[104]

---

103 The difference will not be spelled out in detail here. Among the distinguishing features is the finality of the decision within the legal system. See Hart (n 35) 93. On p. 97, he says that rules of adjudication confer 'a special status on judicial declarations about the breach of obligations.'

104 See Raz (n 47) 96-97, where he discusses ultimate laws of discretion.

3 How Many Norms? Are They Necessary?

As the previous chapter indicates, a strenuous effort is needed to capture the surprising complexity involved in determining the applicable law, at least in some modern, sophisticated legal systems. Norms of legal method (or secondary norms) are about the diverse issues of the existence, content, application and applicability of the law as well as institutional considerations and powers. The norms can be categorised into norms of recognition and change, interpretation, subsumption, application and institutional decision-making. When faced with the multiplicity of the norms and categories, two questions awaken. How many norms of legal method can there be in a legal system? And are any of the norms necessary? These questions will now be refined and very briefly addressed.

3.1 How Many Norms?

As the example with Food Supply and the Corner Shop demonstrates, many norms can be involved in identifying and applying the law. There can be, at the very least, one norm of each category, that is one norm of recognition, interpretation, application and so on. The question arises whether any category must consist of a single norm or whether there can be many norms within each category in one and the same legal system. For example, whether there must be a single norm of recognition in each legal system, however complex, or whether there can be many such norms.

Two preliminary points need to be mentioned. First, questions about what counts as a single norm will be mostly set aside. It is assumed, for example, that a criterion identifying statutes as sources and a criterion identifying precedents as sources can be two distinct norms. Secondly, it is clear that there can be many norms within each category

since there can be many legal norms based on many (types of) sources that are relevant for determining the law. Therefore, the focus of the question is on whether any category must only have a single ultimate norm. As will be elaborated in Chapter Eight, an ultimate norm is not derived from or based on another legal norm.

In order to answer the question, we need to figure out whether there is a reason why there must be a single ultimate norm in any of the categories. There is nothing about the concept of the law or, more accurately for our purposes, the simple image of the law that necessitates a single ultimate norm in any category. The main reason why there might be a need for a single ultimate norm in any category is that the concept of law or the concept of a legal system require something to constitute a (single) legal system. A single ultimate norm is a candidate for that.[105] However, if there is something else that unifies laws into a single legal system, then there is no such conceptual need. Desirability of a neatly organised legal system does not change that.[106] Chapters Eight to Ten will argue that a legal system need not have and is not constituted by a single ultimate norm. In light of that, there need not be a single ultimate norm in any category.

---

105 See in this context Hart (n 76) 359-360, H.L.A. Hart, *Essays on Bentham* (OUP 1982) 155-156, and Green (n 76) 317. It is not clear in what sense Hart's ultimate rule of recognition, which is a social rule and can be quite complex, counts as a single rule.

106 See e.g. Alf Ross, 'Review of The Concept of Law by HLA Hart.' (1962) 71 YLR 1185, 1186. He says in a footnote that the logical unity of a legal system into one rule of recognition is a fiction. See also Lon L. Fuller, *The Morality of Law* (HUP 1977) 141, Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 95, onwards where he discusses the principle of origin, Raz (n 47) 95-96, and Tony Honoré, *Making Law Bind* (Clarendon Press 1987) 23. See also John Finnis, *Philosophy of Law. Collected Essays: Volume IV* (OUP 2011) 419, who says it is 'a complex of disparate elements'. Before Hart, Salmond (n 1) 222, and John W. Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 170, had said that there can be any number of ultimate legal principles in a legal system but there is necessarily one. For Hans Kelsen (n 59) 115-120, every legal system has one basic norm. Allen (n 11) 58-59 and 64, criticizes the view. The first pages are on the basic norm but on the last page he says that we cannot study sources of law with the preconception that they are derived from a single origin.

As to the question of an upper limit of the norms' number in a legal system, there is nothing in the concepts of the law, law or a legal system that sets a definitive boundary. However, there might be practical problems if the norms are so many that it is excessively difficult or impossible to identify the law.

Finally, since at least some of these norms change over time, they can be described as series of separate norms.[107]

3.2 Are They Necessary?

The Question Refined

Clearly, norms of legal method can exist in great numbers and variety in a legal system but at the same time not every legal system has the same norms, either in number or content. The second question that awakens is, therefore, whether any of the norms are necessary. The question here is not whether any particular norm of legal method is necessary, such as a norm that identifies constitutions as sources, but whether any particular *type* of norm is, such as norms of recognition or interpretation.

That question can only be answered with reference to some premise or from a certain perspective. It makes sense to ask: necessary for what or necessary in what sense? For instance, are any of the norms (conceptually/naturally/practically) necessary for a legal system to exist? The perspective here is the law. So, the question becomes whether any of

[107] For this view on the rule of recognition, see e.g. Honoré (n 106) 23.

the norms are necessary for determining the applicable legal norm. In light of the approach taken here to the concept of the law, the focus will be on the simple image of the law.

Norms of Recognition and Change

According to the simple image of the law, all law is source-based. Nothing can be the law without having a sufficient basis in a source of law, that is a legal material, practice or factor that is a reason for its existence as law.[108] Nothing is a source of law unless it is recognized as such and norms of recognition are those norms that identify them. It follows from these premises, assuming that they are accepted, that wherever there is law in this sense there must be at least one norm of recognition, at least if law is a distinct and limited domain.[109] A norm of change is, on the other hand, not necessary for the existence of the law. Not all legal norms are created in an authorised manner. One possible counterexample to the claim that no source-based law exists without a norm of recognition will be addressed to test the claim. The example concerns the status of customary laws and whether the simple image of the law can explain it.

The basic idea behind the counterexample is that a society can have 'a set of customary rules' without being identified or unified by a norm or norms of recognition (and according to the categorisation here a norm of internal relations regulating hierarchy).[110] 'Such rules do not form a system but a mere set' and there is 'no ultimate

108 The word law can, though, be used for different phenomena. See in this context Hart (n 35) 213.

109 See in this context Raz (n 47) 97.

110 Hart (n 35) 233.

rule of the system'.[111] Moreover, it is 'a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or "binding" rules.'[112] In a society with a simple form of social structure of customary rules, a norm of recognition can be seen as 'an empty repetition', 'useless reduplication' or an 'empty restatement' of the fact that the customs are accepted and practiced.[113] Such societies have law only insofar as they are sufficiently analogous in content to paradigm examples of law.[114] To summarise, customary rules can be laws without being identified as such by a norm of recognition and in that case a norm of recognition is superfluous. Or so the objection goes.

It may be true that there is no single norm unifying the set of rules into a system in the counterexample. And it is certainly correct that rules of obligation, 'binding' rules and customary rules can exist without norms of recognition. A norm of recognition is not necessary to show the validity or existence of a custom. It would indeed be 'an empty repetition' if that were its role. But the question is not whether a norm, such as a social norm, exists but whether a *legal* norm exists. Not all customary rules of a group are customary laws of the group. If a group has customary laws, then there is at least one norm of recognition that identifies certain practices as legal customs and by that distinguishes them from other customs or social rules of the group.[115] Since norms of recognition have this role, they are not 'a useless reduplication'; they make the customary rule a legal one, which is something which the simple fact of accepting and practicing the rule cannot do on

111 ibid 234.

112 ibid 235.

113 ibid 236.

114 ibid 237.

115 See in this context Hart (n 35) 44-45. This entails for Hart's view that there is at least one custom *in foro* (of officials) referring to other customs as sources (or laws), which may be customs *in pays* (of the general public).

its own.[116] This should not be confused with the further issue of whether the group has a relatively organised set of legal norms.[117]

According to what has been said, a legal custom is distinguished from other customs by being recognized as a source of law by a norm of recognition.[118] The norm can identify it by ostension ('This custom is a source') or by providing identifying marks ('Customs that are based on a long, consistent and established practices are sources'). There is, however, no norm of change authorising their creation and, therefore, the criteria of the norms of recognition do not refer to legal norms. The question arises whether a legal custom can be recognized as a source of law without a norm of recognition. The main contender is the subjective element often called *opinio juris sive necessitatis*. It should be noted that its exact nature is debated but, roughly speaking, it refers to being accepted as law.[119] According to this suggestion, a custom is accepted as a rule but a legal custom is accepted as a rule of law.[120] But what does that mean? It is not enough that people treat

---

116 A possible objection is that one cannot identify the law without first identifying it as a part of a legal system. It is assumed here that the community has norms that either form a legal system or, at least, they are analogues to a paradigm case of law and the question is whether a custom in such a community is a legal one, for example, whether it belongs to the set or the system.

117 When discussing international law, Hart (n 35) 214, focuses on features of a legal system, such as whether there is a legislature (rules of change), courts with compulsory jurisdiction (rules of adjudication) and a unifying rule identifying its rules (the ultimate rule of recognition). It follows from what has been said here that international law has source-based law (and had at the time Hart wrote) if there is (or was) a norm or norms of recognition identifying, for example, customs as sources of law. It does (and did) not merely have law in an analogical sense to municipal law. It lies outside the confines of the thesis to demonstrate the existence of norms of recognition of international law but it is maintained that international law has them. See in this context e.g. Jeremy Waldron, 'International Law: A Relatively Small and Unimportant Part of Jurisprudence?' in Luís Duarte D'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (OUP 2013) 209, 220. Kelsen (n 59) 339-341, considers international law to be law. He distinguishes between centralized and decentralized orders.

118 See in this context Raz (n 47) 95.

119 See e.g. Raphael M. Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 Isr. L. Rev. 344. Another contender is the concept of law but it will not be discussed here.

120 On 'accepting as law' see e.g. *Draft conclusion on identification of customary law, with commentaries 2018*, A/73/10, by the International Committee of Lawyers. If *opinio juris* can turn a custom into a legal one, then surely the rule of recognition itself can be a legal rule in that sense and not merely a social rule. It would be source-based in that sense. It would be a further question

something as having a binding character or being a rule.[121] That is also true of other customary norms. So, there has to be something more to *opinio juris* in order for it to perform the recognizing function.[122]

A promising answer is that the rule is accepted as a rule that should be applied or enforced by officials of the community. Legal customs as opposed to other customs and social rules are enforced by officials. Imagine a chieftain who asks himself: 'Which of the rules of the group should I apply and enforce?' If he decides to apply those rules that the people believe that he should apply (who have *opinio juris* in that sense), then that is a criterion for identifying the rules.[123] If he himself believes he should apply the rule, then that overlaps with or is an act of applying a norm of recognition by ostension ('This is a rule I should apply').

Another solution is that the rule is accepted as belonging to a set or a system of norms. Curiously, it is unusual to speak of rules being accepted as rules of morality, etiquette, style or religion (with corresponding Latin names) as it is in the case of legal custom. Rules form a set of rules in various ways. For example, they may share a subject-matter. A social norm about wearing pants primarily belongs to a set of norms about style

---

whether the rule of recognition necessarily needed to be accepted as law as opposed to merely as a rule.

121 For instance, Hans Kelsen, *Principles of International Law* (The Lawbook Exchange, Ltd. 1959) 307, says: 'They must believe that they apply a norm, but they need not believe that it is a legal norm…'

122 *Opinio juris*, meaning accepting as a rule of law, is not a necessary feature of a legal custom. We can imagine a legal system where acceptance as a rule is enough and a norm of recognition identifies the customs as legal customs.

123 General public international law is an intriguing case. A norm of recognition, or a part of it, in that arena could be that those customs that states accept as law count as law. The norm is premised on the idea that only states create law and, therefore, what they believe to be law matters. The norm is not superfluous since it identifies a specific belief of specific agents as relevant for identifying legal customs. Without the norm and the idea, the arrangement might be otherwise. See more about ideas about law in the next two chapters.

(and even etiquette) because of its content. Possibly, beliefs about the sort of norm it is matter as well. Even in that case it is hard to describe the sort of beliefs about laws that are necessary in order for it to be law and it can be doubted that people who accept a standard as law share those beliefs. In any case, if the belief concerns the role of officials, we are back in the position of the chieftain. More needs to be said to conclusively set the option of *opinio juris* aside. But considering what has been said, it is suggested that *opinio juris* is best understood as an identifying mark according to a norm of recognition rather than a way of independently recognizing sources of law.[124]

Of course, much may depend on what the concept of 'law' is taken to refer. It is well known that the word is and can be used in a great number of ways. Furthermore, it is not obvious at which point a society with a simple social structure gains or has law.[125] A premise of what was said above is that a society does not have law unless it has emerged as a distinct set of norms from other norms of the society, such as norms about etiquette and style, moral conventions and some political norms. As will be elaborated in Chapter Seven, norms of recognition establish law as a distinct and limited domain.[126]

Norms of Interpretation and Subsumption

124 See in this context e.g. Ross (n 2) 93, John Finnis, *Natural Law and Natural Rights* (OUP 1980) 238-245, especially 244-245, and Raphael M. Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13 Isr. L. Rev. 86, e.g. 102.

125 The issue here is not that there is a single, exact point but how to demarcate the lower boundaries of the concept of law.

126 See e.g. Frederick Schauer, 'The Limited Domain of the Law' (2004) 90 Virg. L. Rev 1909, 1918 and 1951.

A bare existence of a legal norm seems possible since a source of law supplies it with its main content. Nothing like the array of norms of interpretation that appear in, at least, some modern, sophisticated legal systems is necessary. It may be the case in a primitive legal community that there are only customary laws and people lack all but the most rudimentary ideas about law. Nonetheless, as soon as the foundation for interpretive norms, which will be discussed in the next chapters, are in place they are determinable. Furthermore, as soon as the sources are interpreted, that is done in light of some elementary norm of interpretation, such as 'The words on the stone tablet have the same meaning as they ordinarily do in the language'. This is not to say that people will articulate or agree on the norm. It can be an unarticulated interpretive norm that guides or should guide the law-applying organ. This is based on the premise that interpretation, at least legal interpretation, is a norm-governed activity.[127] Beyond such minimal existence, norms of interpretation are not essential. As a practical matter, though, basic norms of interpretation tend to emerge. As a legal system matures and becomes more sophisticated, norms of interpretation develop. This is not the case with norms of subsumption that are neither necessary nor make appearances in all sophisticated legal systems. The law can be applied to the facts without them.

Norms of Applicability

Norms of applicability are also not necessary. The reason is that in a legal order there may be no hierarchy and conflicts of law are unregulated. In that situation, legal norms may

127 See in this context, although not exactly the same, Joseph Raz, *Between Authority and Interpretation. On the Theory of Law and Practical Reason* (OUP 2009) 321.

exist but overlap and it may be hard to determine which legal norms apply. Speaking of a set of norms instead of a system may be accurate in this context, at least if a system refers to a relatively organised set of norms. Although such a set of legal norms does not necessarily conflict with the requirements of the rule of law, conflicts and uncertainties may reach such a stage as to jeopardize them. It is no coincidence that norms of applicability often reproduce the requirement of the rule of law in one form or another. In a relatively organised and complex legal system, though, norms of internal relations tend to exist.

Norms of Institutional Decision-Making

Lastly, institutional considerations, such as norms of deference, are not necessary and they tend to only exist in relatively mature and sophisticated legal systems. The issue about whether, at least, norms of adjudication are necessary is best answered from the perspective of a legal system and will, therefore, be left untouched here.[128]

[128] See in this context e.g. Raz (n 32) 123-129, on institutionalised systems.

4 WHAT KIND OF NORMS? PART I

Of what kind are norms of legal method? The first thing to note is that they are not all the same. Some of them are clearly legal norms, for example, those that appear in constitutions, codes and statutes. The famous first article of the Swiss Civil Code 1907 is an example.[129] The norms have bases in sources of law in the same way as other legal norms. Conceptually speaking, they can have a basis in any type of source recognized in the legal system. It follows that they can have a basis in a custom or a precedent as long as these types of sources are identified by norms of recognition.

Not all norms of legal method can be legal norms in this sense. There must be at least one norm of legal method that is not a legal norm. Furthermore, in modern, sophisticated legal systems there tend to be, at least in some of them, multiple norms of legal method that are not obviously legal norms.[130] They do not have bases in sources of law identified by norms of recognition. The non-legal norms will also be called ultimate norms. As an example, consider this norm: 'The constitution is an interpretive factor for statutes.' Suppose the norm does not have a basis in a source recognized in the system but is still thought to be a relevant norm of legal method. What kind of norm is it?

---

129 The provision says the following in an English translation: '(1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision. (2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. (3) In doing so, the court shall follow established doctrine and case law.' See also e.g. articles 6 and 7 of the Austrian Civil Code, articles 1 and 3-5 of the Spanish Civil Code and articles 1 and 12 of the Italian Civil Code.

130 See in this context e.g. Salmond (n 1) 222.

This chapter and the next will examine the nature of the non-legal norms in this regard. There are several possibilities. They could be conceptually required.[131] They could be logical maxims,[132] presuppositions,[133] linguistic norms,[134] moral norms,[135] social

131 While there must be, at least, one norm of recognition in each legal system, that is a norm of that type, no particular norms of legal method are conceptually required. For instance, a norm about interpreting a statute in light of the constitution is not a necessary norm. Some norms are, though, related to conceptual features. A written legislation necessarily consists of a text, for example. It would be illogical if the text played no role whatsoever in the interpretation of legislation. Therefore, the text necessarily has relevance for statutory interpretation. However, the text can matter in more than one way and norms about textual interpretation are different between legal systems. No particular (concrete) norm of legal method about textual interpretation is conceptually required.

132 Most norms of legal method are clearly not logical maxims, such as the norm about interpreting a statute in light of the constitution. Lawyers use, though, logical maxims when they reason. After all, legal reasons are among the elements of legal method. Examples are *a fortiori* arguments and *argumentum ad absurdum*. However, these maxims are not norms of legal method strictly speaking. Even though they are brought to bear when lawyers reason, they do not as such clearly address the issues identified in Chapter Two. There is also a sense in which norms of legal method are special to law and in particular to the legal system in question. A norm identifying a source of law in the Italian legal system is special to that legal system. Logical maxims are not special to law in this sense. See in this context, Leslie Green, 'Law and the Role of a Judge' in Kimberly Kessler Ferzan and Stephen J. Morse (eds), *Legal, Moral, and Metaphysical Truths* (OUP 2016) 324-327.

133 Norms of legal method are not presupposed.

134 Something similar to what was said about logical maxims can be said about linguistic norms. Linguistic norms are relevant for law where language is used. See in this context Cross (n 2) 133-134. Many norms of legal method are clearly not linguistic norms, such as a norm identifying the constitution as a source. Not even all norms of interpretation are clearly linguistic norms. Instances are norms about the role and relevance of *travaux préparatoires* or interpreting criminal law restrictively in case of doubt. The relevance of linguistic norms, at least in part, depends on norms of legal method. Textual interpretation is governed by norms of interpretation, which determine, among other things, the role and relevance of the text. Linguistic norms matter and are brought to bear to the extent that they are in accordance with, for instance, norms about textual interpretation. For example, particular norms about the meaning of words matter because of a norm of interpretation declaring that the words of a provision have the same meaning as the usually do in the language.

135 It might, for instance, be claimed that norms of legal method are intermediaries or outcomes of moral reasoning that involves applying moral principles to social or historical facts with an eye to determining their role and relevance for the law. It is not claimed here that any theorist has this view. Dworkin *LE* (n 3) e.g. 255, discusses, though, working theories. There are, at least, three reasons to doubt the view that the norms are moral intermediaries or outcomes of applying moral principles. First, moral principles are the wrong sort of reasons to determine the norms and they do not seem to add anything to the content of the norms beyond other factors, such as social and historical facts. Second, if moral principles add to the content of the norms, then they are not precise enough to account for detailed norms of legal method and at the same time flexible enough to explain multiple and diverse, even contrasting, norms in different legal systems. If the explanation of the norms relies too much on the social or historical facts in each place, then there is a risk that the single explanation of the identity and the force of the law collapses into a two-stage explanation where moral principles explain the force but not the identity of the law. Third, moral principles are not distinct enough to determine norms that differentiate between what is a part of law and what is not as well as how it is a part of the law. For a view that moral reasons ultimately determine the law and a so-called monist, pure or non-hybrid explanation, see e.g. Nicos Stavropoulos, 'Legal Interpretivism' *The Stanford Encyclopedia of Philosophy* (Summer edn 2014) 4 <https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/> accessed 20 April 2018, Nicos Stavropoulos, 'Why Principles?' (2007) *University of Oxford Legal Studies Series* No.

conventions or a mixture thereof, to name some of the options.[136] Furthermore, they could be heuristics. There is no space here to properly explore these alternatives but a few remarks about heuristics will be made in Chapter Seven. Instead, a competing explanation will be given of the non-legal norms. They are interpretive norms of a certain sort. The focus of this and the next chapter is on introducing interpretive norms and laying the foundations for them rather than arguing for and defending them. The question of what they are will be at the centre but not the question of why the non-legal norms are best understood as being of this kind. Only the first steps in developing the view are taken here.

The interpretive character of the non-legal norms will be explained, firstly, by giving brief introductory remarks and offering an analogy to statutory interpretation. According to the simple image of the law discussed in the first chapters, statutory law is the outcome of an interpretation of a statute. The non-legal norms have a similar character. They are the outcome of an interpretation of legal materials and practices in a particular place and time. Secondly, examples will be given of interpretations of legal materials and practices in order to determine norms of legal method. Considerable time will be spent on the examples because they are a good way to give a sense of the norms' interpretive character. Finally, interpretive norms will be compared and contrasted with other kinds of norms to highlight some of their characteristics.

28/2007 2 and 7 <ssrn.com/abstract=1023758> accessed 20 April 2018, Nicos Stavropoulos, 'Obligations, Interpretivism and the Legal Point of View' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2015) 77, and Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 19 <ssrn.com/abstract=1400422> accessed 20 April 2018. See also in this context Nicos Stavropoulos, 'The Debate that Never Was' (2017) 130 Harv. L. Rev. 2082. See furthermore Scott Hershovitz, 'Integrity and Stare Decisis' in Scott Hershovitz (ed), *Exploring Law's Empire* (OUP 2008) and Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 YLR 1160.

136 Of course, much depends on how the term 'norms of legal method' is used. In what follows, the focus will be on norms that address the issues identified in Chapter Two but are not obviously one of the things just listed.

4.1 A Matter of Interpretation

The Interpretive Character of the Non-Legal Norms

The non-legal norms have an interpretive character in a particular sense. They are the outcomes of interpreting legal materials and practices in a particular place and time (the object), in their social, political, and historical settings (the context), in light of ideas about law (the normative element), where the sought-after meaning is an answer to one of the issues about determining the applicable law (the interpretive question).

An argument in support of why the norms are interpretations of this sort will not be given. Only an intuition is offered. The norms are the meaning attributed to legal materials and practices in a particular time and place about their role, relevance and the relations between them in the context of determining the law. The norms reflect the proper way to understand the legal materials and practices in that regard. They regulate the law and by that partly constitute it. They determine how law works in a particular place and time. Anyone who wishes to work out what the law is has a reason to engage with the norms and, to the extent they are unknown, in an interpretation of legal materials and practices in order to determine them. In other words, the norms partly constitute the law and they are themselves constituted in a certain way.

Before giving an overview of the norms' interpretive character, taking an example may be helpful. The more abstract interpretations about the role and relevance of various factors for the law, that is the non-legal norms, determine or guide, for example, the interpretation of a statutory provision in a particular instance. Suppose for a moment that

we ask ourselves a legal question but do not know whether a statute of Parliament is a source of law, what the relevant interpretive factors and their weight are and so on. In which case we would have to begin by figuring it out. We might look at the statute itself, other statutes, *travaux préparatoires*, the constitution and the practices of creating, identifying and applying statutes through the lens or in light of various ideas we have of law or are associated with law in that particular time and place. We do that with an eye to understanding the role of the statute and, for example, the relevance of the constitution for its interpretation. In other words, we might look at the social phenomenon of law widely and seek clues from both materials and practices associated with it in light of our interpretation of its features, including its self-understanding. A part of the self-understanding might be found in a legal material like the constitution describing the power to enact statutes as 'the legislative power'.

From these factors we might conclude that a statute is a source and the constitution forms a part of its context. We understand the materials and practices in that way. Of course, we could limit ourselves to a particular statute and the relevance of the constitution for it but often our conclusion is generalizable to other statutes as well. And we might express our conclusion with the norms: 'Statutes of Parliament are sources of law" and "The constitution is an interpretive factor for statutes'. These norms are interpretations of the materials and practices we looked at in order to figure out their role and relevance for the law. After that, we apply those norms as well as other relevant norms of legal method to the materials and practices, including the statute and the constitution, in order to determine a legal norm.

As will be discussed further in the next chapter, an object can be interpreted for different purposes, in light of different questions and in different ways. The purpose of the

interpretation here is to figure out norms that govern which materials and practices belong to the object, which parts of that object are sources of law, which parts are interpretive factors, what is their relations as well as the relationship between the legal norms based on them. The interpretive questions, which flow from this purpose, are the issues about determining the applicable law, which were identified in Chapter Two. The interpretation seeks to answer these questions. To give an example, a meaning is attributed to the legal materials and practices in a particular place and time that cases are sources of law in the legal system. Cases have that role and relevance for determining the existence of the law in the legal system. The object is understood in that way.

The object of interpretation, that is law, is taken to be a complex phenomenon with a social nature. This social phenomenon reflects or is taken to reflect a self-understanding of a sort. The self-understanding is observable from both social practices and legal materials, legal customs and other factors. There may be ideas, attitudes, views, opinions, beliefs and understandings of participants in the practice about law. And it can be discernible from the content and characteristics of legal materials, legal customs and other factors that they are based on ideas or they indicate how they should be understood as well as how they interact with other materials and practices. For instance, a constitution may refer to statutes of Parliament as ‘law’ or the process of enacting them as ‘law-making’ and declare itself ‘the supreme law of the land’. Or a code may refer to other codes, cases or customs and explicitly state or implicitly indicate their relationship. Or judgments may base legal norms on other cases. Both the explicit and implicit self-understanding observed from the content and characteristics of the materials and the social practices about them are relevant. They are among the features of the object, which are being interpreted.

A part of the purpose of the interpretation mentioned above is to understand the social phenomenon *as it is*. What it is depends on a conceptual argument or an argument about the nature of law. Instead of giving such an argument, a few comments about the relevant kind of interpretation are offered. The interpretation aims at explaining or understanding the actual features of the social phenomenon, whether they are considered to be good or bad, including its self-understanding. The interpretation sticks closely to these features and reflects them. The non-legal norms are the meaning or the understanding of the entire social phenomenon as it is.

What counts as the object of interpretation? It was just said that law is, at least in modern, sophisticated legal systems, a complex social phenomenon that can consist of various elements. They include social practices of officials about identifying, using or applying legal materials and customary practices in order to determine the law (law-identifying practices) as well as creating them (law-creating practices). They also include the legal materials, customary practices and other factors, which are the subject matter of law-identifying and law-creating practices. Legal materials are, for example, statutes, judgements and decisions. Legal practices are legal customs. The term practice is often used here for both social practices and legal customs. The legal materials, legal customs and other factors are the foundations or bases of legal norms, which form a system of norms that can regulate itself. The social phenomenon we are concerned with does not only consist of social norms, such as a convention about taking one's hat off in church, but it establishes, maintains and is about a system of norms.[137] Figuratively speaking, it could be said that a legal system is surrounded by social practices concerning it. All the elements listed above

[137] For the example of taking one's hat off in church, see Hart (n 35) 125, and Dworkin (n 5) 69-71.

are treated here as being relevant for figuring out the non-legal norms. They form the object of interpretation.

What is the relevant context? The legal materials and practices and the laws based on them are created, identified and applied in the context of the society of which it is the law. The legal system may have a history and a tradition, be a part of the political community, and embedded in society at large. Figuratively speaking, it could be said that the legal system and the social practices about it are themselves surrounded by other social practices and traditions. The legal system is embedded in a culture. The context of the legal system can shape our understanding of the legal materials and practices.

What are the relevant ideas about law, that is the ideas about the sort of thing that is being interpreted? The legal materials and practices are identified and interpreted through the lens or in light of ideas about law that explain or reflect the features of the object, including its self-understanding or self-image. The relevant ideas are those that best capture or illuminate the object. They help us to understand the social phenomenon as it is and guide our understanding of it. Often the ideas are, so to speak, plucked from the content and characteristics of the legal materials and the practices surrounding them. That is to say that they are oftentimes gotten from or inspired by the very self-understanding they are meant to explain as well as other features of the object.[138] The ideas can be reconstructed, developed or elaborated and imposed on the object. Identifying, reconstructing and

[138] The non-legal norms are not norms of social, constitutional or institutional morality as such. They are methodological norms determined by interpretation of a composite object. Social, constitutional or institutional morality, to the extent it is reflected in the legal materials and practices, may be relevant for determining methodological norms, for example, because it influences the determination of the law in a particular place and time or it may be considered a part of the self-understanding, which can inspire ideas about law and is among the features of the object being interpreted. For constitutional morality, see Wilfred J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (CUP 2007) 127-128. For institutional morality, see e.g. Dworkin (n 5) 111 and 126. For social morality in contrast to critical morality, see H.L.A. Hart, *Law, Liberty, and Morality* (SUP 1963) 20.

attributing the ideas is a part of the interpretation. The role and relevance of legal materials and practices for determining the applicable law is understood, refined or constructed in light of the ideas.

Who is the interpreter? Anyone who wishes to identify the norms. In practice, though, it is most often judges, other officials, lawyers and scholars who seek to identify norms of legal method. A judge or a scholar, for instance, may have elaborate interpretations of their legal system that come in the package of a theory about its norms of legal method. Other interpretations are simply an insight or an understanding of an experienced lawyer that knows the legal system well. In many cases, lawyers and others simply follow what, for example, higher courts and professors say about the norms and do. They treat their interpretations or claims about the norms as correct. Nevertheless, the existence of the norms as interpretive norms does not (only) depend on them being practiced but on being the correct interpretations of the entire social phenomenon.

The correct interpretation is the best or the most convincing one. It is a meaning-content in the form of a norm about how law works in a particular time and place, which best explains and corresponds with the various features or components of the object, including its self-understanding. An interpretation often has the feature of being more-or-less convincing rather than being either convincing or not. When people disagree about which norm is the best interpretation of the legal materials and practices, that does not mean that one interpretation cannot be better than the other. And even if they disagree and end up using different norms, the norms might overlap or ultimately lead to the same legal norm. A judge that adheres to textualism, for instance, can reach the same outcome in a case as a judge that supports purposivism.

An Analogy to Statutory Interpretation

The basic idea behind the non-legal norms having an interpretive character can be explained by analogy to statutory interpretation. Recall the example of Food Supply and the Corner Shop? The legal norm governing their dispute was that a good in a damaged packaging does not count as defective unless the packaging is important for its use or resale. The legal norm was the outcome of an interpretation of article 34 of the Sale of Goods Act. The statutory provision is, as previously noted, a source of law. It is the object of interpretation.[139] The legal norm is not the same entity as its source. A statutory provision is embedded in a legal context in which it was created and of which it becomes a part. The article in our example was interpreted in light of information in the *travaux préparatoires*, which counted as an interpretive factor. The process was governed by norms of legal method, which identified the article as a source and the *travaux préparatoires* as an interpretive factor. In other words, the legal norm is the outcome of an interpretation of an object in its context in light of norms of legal method, namely norms of interpretation.

The basic explanation of the non-legal norms is the same. They are an interpretation of an object in its context in light of norms. However, the object, the context and the norms are different as well as the interpretive question asked. The outcome is not a primary norm like the one about defective goods, which is source-based, but a secondary norm, that is a norm about legal norms, which is itself not a legal norm in the same sense as (other) legal norms. The object is not only a source, such as article 34 in our example, but all relevant

139 Another view is to treat the act of enacting the statute as the object of interpretation. See in this context Gardner (n 34) 57.

legal materials and practices. It is based on law as a whole or the legal system in its entirety, so to speak. It is an interpretation of the entire body of sources, interpretive factors and other practices. Figuratively speaking, the latter is an interpretation at a higher or a more abstract level, with a wider lens or from a different angle. Even though the object of interpretation is the legal system or law as a whole, often only a part of the legal materials and practices are pertinent in answering a particular interpretive question. The interpretation need not be pervasively holistic.[140] For this reason, sometimes it can be difficult to see whether a norm of legal method is a legal norm or a non-legal norm. The context is not the legal context of the statute but the context of the legal system as such, its history and tradition as well as social and political settings. The norms are not norms of legal method but ideas about law that are relevant in explaining the object as it is. The interpretive question is not which legal norm is based on the source. Instead, there are several interpretive questions about the issues of existence, content, applicability, application and institutions discussed in Chapter Two. While the basic features are the same, the details are different.

The interpretation of legal materials and practices is seeking an answer to the aforementioned issues. It answers an interpretive question by attributing a meaning to the social phenomenon as to which parts of it count as sources, which parts as interpretive factors, what is their relationship as well as the relations between legal norms based on the factors. The norms reflect an understanding of how law works in a particular time and place. A non-legal norm of recognition, for instance, is the outcome of an interpretation of a complex social phenomenon about the issue of the existence of the law, that is whether some material, practice or other factor counts as a source of law of the legal system. The

140 See in comparison e.g. Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011) 134-135 and 154.

norm reflects an understanding of a particular legal system as to the role and relevance of particular material or practice for the existence of the law in that system.

Jus Regulates Lex. A Brief Note

Law regulates itself.[141] There can be legal norms about sources of law, interpretive factors, conflicts of laws and so on. The non-legal norms can be viewed as a part of law regulating itself albeit in a different way. How so? In some languages there are two terms for the word 'law', that is law in a narrow and a wide sense. An example is the Latin terms *lex* and *jus*.[142] We are not concerned here with the historical use of these terms. Rather, they serve as an inspiration to think about law in a narrow and a wide sense. In light of that, it could be said that legal norms are a part of *lex*, that is law in the narrow sense, but the non-legal norms are a part of *jus*, that is law in the wide sense.[143] Law in the wide sense includes the entire social phenomenon. The non-legal norms are a part of law in the wide sense regulating the law in the narrow sense.

Interpretive norms have now been briefly introduced and explained by way of analogy. Other ways to explain the norms include taking examples of interpretations of legal materials and practices in order to determine norms of legal method and by comparing and contrasting them with other kinds of norms. We now turn our attention to these tasks. It

141 See e.g. Kelsen (n 53) 209, and Kelsen (n 59) 124.

142 See e.g. Snævarr (n 1) 65-66.

143 See in this context Robert Alexy and Ralf Dreier, 'Precedent in the Federal Republic of German' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darthmouth 1997) 45.

should be noted that the examples of interpretation that follow are only indicative. They are not meant to be detailed or precise interpretations of legal materials and practices in a particular place and time. They are intended to give a sense of how the interpretation might be conducted.

4.2 Interpreting Legal Materials and Practices

Norms of Applicability

A *lex posterior* norm can exist as either a legal or a non-legal norm. As a legal norm, it can have a basis in a statute or a legal custom *in foro*, for example. The focus here will be on *lex posterior* as an interpretive norm. How is it determined?

We begin by asking an interpretive question: which law prevails in an irresolvable conflict? This is the issue of the applicability of the law. Next, we identify and demarcate the legal materials and practices that form the object of interpretation or the pertinent parts of the object in light of their relevance for the interpretive question. Suppose there are many statutes in the legal system under examination, each with multiple provisions and an institution that produces them. Suppose further that the institution is an assembly like Parliament, which views itself and is viewed by others as creating, changing and cancelling laws. Furthermore, there is a document called the constitution that lays down the foundation for Parliament and its law-making process. The constitution and the statutes are bases for legal norms of various sorts, such as about the selection of members of Parliament and the promulgations of statutes. Moreover, there is a practice of Parliament of creating the legal materials and a practice of other institutions or offices like courts and

administrative organs of using them. These legal materials, that is the statutes and the constitution, and the practice of creating and using them form the object of interpretation. We are seeking an understanding of the object as to the relationship between statutory provisions or, more accurately, legal norms based on them. Since a legal norm enacted by Parliament on a particular date can conflict with a legal norm enacted on another day, our interpretive question arises.

Suppose also that the legal system has a history. Before Parliament there was an absolutely powerful monarch and before that there were local lords. And before statutes and cases there were only customs. The legal system is, furthermore, embedded in a particular society with social norms and a political cultural. Members of the society view Parliament as an important political institution that governs by laying down laws. Members of Parliament are considered to be representatives of the people and accountable to them. The historical, political and social settings form the context within which the interpretation of the legal materials and practices takes place. It can colour our understanding of the legal materials and practices.

We also need to identify the relevant ideas about law. We are seeking an understanding of a social phenomenon that may project some self-understanding or self-image.[144] The ideas are often gotten or inspired by features of the object, including its self-understanding. The object is interpreted through the lens of the ideas. They shape the understanding of the legal materials and practices. The same object can be understood in different ways depending on the ideas brought to bear.

144 See in this context Honoré (n 106) 21-22, 27 and 31, where he discusses the abstract point of view of the legal system itself and the ideology of law.

Suppose the relevant ideas about law are, firstly, that law is both changeable and creatable.[145] This idea can be inspired by or gotten from the legal materials, the practice of creating and using them and the political, social and historical context of Parliament and law-making in the society. Parliament is taken to create, change and cancel laws. Hence law is taken to be the kind of the thing that can be created and changed by institutions like Parliament. These ideas may seem self-evident now but they have not always prevailed. In a different society, the law might be thought of as timeless and unalterable. Parliament might also be viewed as an institution that records the law, for example, to make it more accessible, but the law itself is and can only be unwritten. A new custom in such a society may be considered as an *abusus*.[146] A *lex posterior* norm would not be a good interpretation of the legal materials and practices in such a community.

Suppose that it can be discerned from the legal materials and practices in our example that the legislature can decide that a particular law shall come into force on a specific date and that a new statute shall replace an old one. A statutory provision could, for instance, say that article 15 of the Health Act does no longer apply or that the article shall be replaced with a new one. Members of Parliament give speeches stating that the old article shall be set aside for a new and improved one. They may even say that the old article is child of its time but the new one is in accordance with contemporary views. The legal tradition and culture support this. Clearly, these materials and practices are based on the idea, the view or the understanding that the legislature can not only change and abolish

145 See e.g. Kelsen (n 53) 206.

146 Example is the ancient law in Iceland. See e.g. Sigurður Líndal, *Réttarsöguþættir* (Hið íslenzka bókmenntafélag 2003) and Sigurður Líndal 'Um lög og lagasetningu í íslenzka þjóðveldinu' (1984) 158 *Skírnir* 121.

laws but also fix their force in time. The legislature can also change its mind. The relevant ideas are good explanations of the self-understanding of the social phenomenon.

Secondly, there may be ideas about the legislature and legislation. Suppose there is an idea about a rational legislature, the rule of law or that a legal system is a coherent whole. The legislature is taken to not intend that the law conflicts in an irresolvable way or the legal system is taken to sufficiently meet the requirements of the rule of law.

Thirdly, suppose it is clear from the legal materials and practices as well as their context that members of Parliament change, for example, due to periodical elections. The idea can be gotten from observing the features of the object that the will of the latest composition of the assembly is the more pertinent one. The 'new' Parliament can change or cancel laws of the 'old' Parliament at will. In another society, there might be a monarch that succeeds to the throne after the passing of the old monarch. And the law is considered to be the will of the absolutely powerful monarch who is not bound by the commands of the old one. In this society, too, the will of the current monarch is the more pertinent one.

As was stated above, the legal materials and practices -the object of interpretation- are understood in their context through the lens of ideas like these. They help us to understand or they guide our understanding of the relationship between statutory laws. The ideas can also shape which legal materials and practices are relevant. There is a back-and-forth relationship between the object and the ideas. An understanding of the relationship between statutory laws emerges. The object is seen or understood in a certain way. The newer law takes precedent in a conflict with an older law because that understanding best captures the legal materials and practices, its context and the relevant ideas about law.

Reasons might be given in support of the understanding. The reasons are derived from the object, the context and the ideas through interpretation. For example, it might be argued, firstly, that the later law in time is the latest expression of the rational legislature. Secondly, the legislature could have repealed the older law. Finally, applying the newer law is in better concordance with the democratic nature of the legislature or the idea that the monarch has absolute power.

Since the reasons supporting the understanding of the relationship between statutory laws apply generally, there is ground to conclude that there exists a general norm of *lex posterior*. It exists as the best interpretation of the legal materials and practices in their historical, social and political settings in light of ideas about law regarding the relationship between conflicting statutory laws. It is the best answer to the interpretive question given all of the relevant factors. And such a norm exists in all legal systems where the interpretive outcome is the same, for example, because the object has similar features and the relevant ideas are alike.

Similar reasoning applies to the *lex specialis* norm. The interpretive question is the same as before and the object, the context and even the relevant ideas about law are, roughly speaking, interchangeable. We are seeking an understanding of the legal materials and practices as to the relationship between statutory laws, which overlap or conflict but where one is more general than the other. Suppose that we can observe from the legal materials and practices that the legislature enacts provisions with varying material scopes. The legislature enacts general provisions as well as more specific ones that regulate particular situations even if they fall within the scope of the general provision. Some of them may even be tailor-made for particular situations. The relevant ideas may be that the legislature is rational or the legal system is a coherent, meaningful whole. When the legal

materials and practices are interpreted in light of ideas like these, the more specific legal norm can be seen as reflecting a more concrete or considered view on its subject matter than a general norm that covers it as well. The general norm is meant to apply except where there is a more specific one on the subject matter. For this reason, the specific norm applies in a conflict with the general norm. Since this is generally the case, it can be concluded that a general norm of *lex specialis* exists. It is the best interpretation of the object for situations like these.

The *lex posterior* and *lex specialis* norms themselves can be in tension. That happens when the newer law is also the more general one. If a general priority norm does not exist in the legal system for situations like these, then the two norms need to be applied in light of their rationale and their scope demarcated. We need to ask which interpretive secondary norm better applies or captures the situation at hand in light of the reasons for their existence. If the newer law was, for instance, meant to change the situation regulated by the older law irrespective of its material scope, then the *lex posterior* norm better captures the situation. It is the better interpretation of the interaction between the statutory laws for the particular situation. If the older law still reflects the more considered position on the subject matter, then the *lex specialis* norm applies. The applicability or the scope of the norms is sensitive to their rationale and their nature as interpretive secondary norms. The scope of the norms depends on, at least in part, whether they are good interpretations for the particular situation that arises. That depends on how the reasons in support of the norms apply in that context.

Earlier it was said that practice matters for norms of legal method. The practice of law-applying officials, such as judges, is a part of the object of interpretation. If there is a settled practice about applying the newer or the more specific law, then it is an important

feature of the object. In that case, the interpretation may be easy. But if the practice is unsettled or diffuse, then the interpretation is not as straightforward.[147] It is important to note that, according to this view, the object of interpretation is not limited to or exhausted by law-identifying practice of officials alone. There are still other parts of the object, such as legal materials and other practices, namely law-creating practices.

When considerations drawn from the object do not seem to be clear, an interpretive judgment may be needed about the direction in which they point, to the extent such a judgment is possible. When the considerations point in different directions, as is sometimes the case in interpretation, the grounds for a particular interpretation may be weak and an interpretive judgment needs to be made about which considerations are weightier. Often, they only have a rough weight. Words like 'weighty', 'significant' or 'trivial' are used to describe their weight. Clear considerations often weigh more than unclear ones. The clearer and more settled a social practice is, the more likely it is that considerations drawn from the practice will outweigh countervailing considerations drawn from other parts of the object, especially if they are unclear. When considerations drawn from different parts of the object, such as legal materials and social practices, point towards the same conclusion, the grounds of an interpretation are stronger. The different parts of the object align. In that case, a lawyer can arrive at the same conclusion by considering only parts of the object, such as only the social practice of law-applying officials about identifying the law. This is often the case in mature and stable legal systems, at least about some core issues.

When the relevant factors are vague or, for some other reason, indeterminate, the norm, which is the outcome of an interpretation of these factors, can be as well. It reflects

147 For hard and easy cases in a different context, see. e.g. Dworkin *LE* (n 3) 353-354.

or depends on the object. In that case, the norm may only point in a direction rather than specify a result.[148] Furthermore, a lawyer can identify the relevant norm or part of it for the purpose of his legal question even if he does not have full knowledge of the relevant factors. His partial interpretation is, then, good enough for his purposes. For example, he knows that the more specific norm applies in a particular conflict without knowing the full scope of the *lex specialis* norm.

The last priority norm considered here is *lex superior*. The object of interpretation is wider than before. It includes not only the constitution and statutes but also regulations and even other types of sources of law. A part of the object are those legal materials and practices that lay down the powers and procedures for their creation as well as the practices of creating and using them. They include the practice of using the legal norms of the constitution to create statutes and the norms of the statutes to create regulations. They also include legal norms about delegation. Other institutions or offices are added to the mix, such as a constitutional assembly, ministers and other administrative organs. The context covers the history of the constitution and the political and social practices about it as well as other branches of government. Among the relevant ideas about law is that not all laws have the same status. Some laws are more important than other laws or are higher laws. Without the idea the *lex superior* norm would make little sense. When the legal materials and practices are interpreted in its context in light of the idea, the outcome is a general *lex superior* norm. A legal norm of higher status or rank prevails in a conflict with a legal norm of a lower status or rank. When the reasons behind the norm are considered, it can be

148 See in this context e.g. Dworkin (n 5) 40-45, where he compares rules and principles.

concluded that the priority norm applies irrespective of whether the lower ranked norm is newer or more specific.

This brings us to an example of a hierarchy or a ranking norm. Suppose there is a document called ‘The Constitution’, which declares itself as the supreme law of the land and is treated as such in practice. It purports to lay down the foundation for the state and the government; it empowers and limits it. Suppose there is also a legal norm making it harder to change the norms laid down in the document; it entrenches them. Furthermore, the document might have been created in a special way. Now consider its context. There might be historical facts about or relating to the document, such as it was written after a declaration of independence or a revolution.

The relevant ideas need to be identified. Suppose they are the very idea of a constitution and limited government, the secular nature of governmental power and the rule of law. These or similar ideas may be a part of the self-understanding. The document may have been created in light of such views or it reflects them. Moreover, the views may be associated with the document in practice and political culture. When the legal materials, that is the constitution, statutes, judgments and so on, are interpreted in the context of the historical facts and political culture in light of these ideas about law, the conclusion can be reached that the constitution is the highest-ranking type of source. The outcome is a norm that ranks or hierarchizes constitutional law as superior to other laws. Taking this norm into account, it follows from the *lex superior* norm that constitutional law prevails in a conflict with, for example, statutory law.

Norms of Interpretation

Norms about *travaux préparatoires* as non-legal norms are next on the agenda. The interpretive question asked is this: is *travaux préparatoires* an interpretive factor (or does it form a part of the context of a statute)? This is the issue of the content of the law. The question might even be more general: what is its role and relevance for the law? The latter question allows for the possibility that *travaux préparatoires* is a source of law and includes issues about its weight.

Next, we identify and demarcate the relevant part of the object. The legal materials include statutes, *travaux préparatoires* and even the constitution. The practice of enacting and interpreting statutes matters as well. A part of the practice and the historical context is the legislative tradition. Then the features of the object need to be examined. Suppose that in the legal system in question statutes are brief and the provisions are couched in general and concise terms. There is a tradition of drafting them in this way. Furthermore, accompanying bills are detailed *travaux préparatoires*, which give further information and explain the content of the bill. There is a legal norm about legislation stating that *travaux préparatoires* shall explain the provisions and be attached to a bill. The *travaux préparatoires* are considered with the bill in the legislative process and are later published with the statute. They are accessible to interpreters of the statute. Suppose further that there is a practice of writing *travaux préparatoires* as guides for interpretation as well as a practice of officials of treating them as such. All of these features are relevant for interpreting the object.

We also need to identify the relevant ideas about law. We look at all the features already described. Suppose there is a prevalent view in practice that statutes are not exhaustive of the considerations that can be brought to bear in their interpretation and they need to be viewed in light of the information in the *travaux préparatoires*. The provisions

give the 'headlines' but the *travaux préparatoires* tell 'the story'.[149] The relevant idea explains or casts a light on the object's features, including its self-understanding. In light of this, we identify the idea that *travaux préparatoires* are an authoritative explanation of statutes. When the object is interpreted in its context in light of an idea like this, we can see a certain connection or unity between the statute and the *travaux préparatoires*. Since it generally applies, we can conclude that there is a general norm identifying *travaux préparatoires* as an interpretive factor.[150] It is a part of the context of the statute. The same or similar considerations can be used to conclude that *travaux préparatoires* are weighty factors in certain circumstances. It follows from this interpretation that *travaux préparatoires* is not a source of law in the legal system.[151]

Repeated interpretations like these, mainly by officials, become a part of the practice of interpreting statutes (law-identifying practice) and, thereby, change the very object of interpretation. After all, law is a social phenomenon; it is dynamic. Practice is a part of the object of interpretation. Once the practice of treating *travaux préparatoires* as an interpretive factor becomes settled, there are stronger reasons than before to conclude that such a norm exists. The interpretation folds back into the object and reinforces the conclusion for the future.

Consider next a norm about the constitution's relevance for the interpretation of codes. The interpretive question is the same as before. We want to know whether the constitution is an interpretive factor and, if so, its weight. Codes and the constitution are part of the object as well as the practice of interpreting codes. If other norms of legal

149 This characterisation comes from Folke Schmidt, see e.g. Summers and Taruffo (n 82) 477.

150 Although this description does not distinguish between different types of *travaux préparatoires*, something like explanatory memorandums is kept in mind.

151 Compare and contrast with Dworkin *LE* (n 3) 342-348.

method are known, then they are relevant as well. Among them are the norms ranking constitutional law as the highest law of the land and *lex superior*. Other legal norms matter, too. They include laws about the jurisdiction and powers of courts. Among them may be a norm of institutional decision-making stating that only a constitutional court can strike down legislation. The history and political context of the constitution is relevant as well. Perhaps it was created to ensure a high-level protection of human rights because of atrocities committed in the past. Furthermore, democratic values may be taken to be enshrined in the constitution and its political context that support interpreting a code in such a way that it harmonises with the constitution instead of striking it down.

Among the relevant ideas are familiar suspects, such as the idea of a strongly coherent legal system. Others are new. A part of the self-understanding in practice may be a view that the constitution lays down the value basis for the entire legal system and the political community. Moreover, there may be views about the sort of thing codes are. From the features of the object, including its self-understanding, we may identify, reconstruct and impose an idea on the object that codes are not a completely closed and internally coherent system but are a part of a larger order of which the constitution is foundational or the highest law. When the legal materials and practices are interpreted in its historical and political context in light of ideas like these, we can conclude that codes should be interpreted in light of the constitution insofar as possible. Given the ideas and the object's features, it can be concluded, furthermore, that it is a weighty factor.

Norms of Recognition

The last examples are about identifying sources of law. The first of them concerns the role and relevance of cases or judgments for the law. The interpretive question is this: are cases of a particular institution, such as the Supreme Court or the Court of Appeals, sources of law? This is the issue of the existence of the law. The object is comprised of cases and the practice of considering them when determining and applying the law to the extent such a practice exists. Legal norms about the institution in question, the court system, disputes and procedures matter as well.

Next, the main features of the legal materials and practices need to be examined. Suppose there is a clear hierarchy of courts where a single court resides at the top as the highest court of the land. This court can choose which cases it decides, for example, in light of their importance. It has a small number of judges that sit in a panel and its output is modest. Furthermore, the cases are accessible, for example, because they are published in an annual case book of the institution or even just on an official website. Suppose further that there is a practice of citing cases and treating them as grounds for determining the applicable law. The style of reasoning and writing the judgments is relevant as well. Let us say that judgments are reasoned in a detailed manner with frequent case analysis. Suppose further that there is a history of relying on cases and customs in the legal system. We also need to identify the relevant ideas about law. Suppose it is that judges have a limited, incremental law-making power or that the cases embody the law. A norm of recognition identifying cases of the highest courts as sources is a good interpretation of the object in this community.

A different interpretation is appropriate where the object, context or ideas are different. Suppose, instead, that there is a diffuse structure of the court system with multiple institutions as the highest courts, each within its field. There might be a highest

administrative court, civil court, constitutional court and so on, both at a federal and a local level. These courts cannot choose which cases to hear. Suppose further that, at least, some of these courts have a great number of judges, usually sitting in multiple chambers. There is voluminous output with so many cases each year stemming from the different chambers that it is hard to keep track of them all even for the judges of the court.[152] The judgments are also short and do not cite cases for the purpose of determining the applicable law. They are focused on other grounds. Moreover, not all of the cases are published. Leading cases or judgments of interest may be chosen for circulation, though. Imagine also that there is a history of codifying and an attempt to abolish or limit the use of other sources. And a part of the self-understanding in practice is a view that judges cannot and should not make the law; they should only identify and apply it. The relevant idea is identified in light of all these features that judgments apply but do not create the law. The norm of recognition stated above is not a good interpretation of the legal materials and practices in their context in light of this idea. It can be concluded that cases are not sources in this legal system.

In some jurisdictions, unwritten general principles are considered to be a part of law.[153] The interpretive question is the same as before. A part of the object is codes as well as a practice of continuing working with these materials when they do not explicitly provide

152 See in this context e.g. Ingvill Helland, 'Introduction to German Legal Method' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014) 191.

153 When general principles of law are listed among the sources, it is sometimes unclear whether they are considered to be the law, that is a general legal norm, or whether they are a source for a legal norm. If it is the former, then they are themselves not a source of law but a type of law. In which case they need a source. If it is the latter, then the distinction between a legal norm and a source is fuzzy. Here a general principle *as a source of law* is taken to be a value embodied in or related to some legal material, practice or factor that is a basis for a legal norm even if the value itself can be formulated as a general standard. For instance, the welfare of children is a value that can be formulated in the standard of taking the best interests of the child into account. The value or the standard can be a basis for a more specific legal norm, such as that the legal effect of a judgment ordering that a child be reunited with a family member in another country is suspended on appeal. A general standard can be enacted. In which case the legislation becomes the source and the general principle is written.

an answer. There is also a history of codification. Among the ideas in practice is that the law does not run out (l. *non liquit*). An idea can be gotten from the features of the codes, their history, and tradition that they form a complete, coherent and exhaustive system based on higher order premises. These general premises lie, figuratively speaking, 'behind' or 'above' the codes. Even when the codes do not explicitly provide and answer, there is an implicit answer. Moreover, even if written legislation has gaps, the legal system is thought to be gapless, that is providing answers to every legal question. The artificiality of these ideas is evident since the legal materials and practices do not actually have these features to the extent that they do according to the ideas. But the ideas are imputed to the object through the process of interpretation and a certain understanding is imposed on it.

When the legal materials and practices are interpreted in its historical context in light of these ideas, it can be concluded that there are unwritten general principles, which are connected to the legal materials in certain ways. Relying on similar considerations, it can also be concluded that general principles are ranked lower than the codes and they provide an answer when the codes do not. Furthermore, based on similar considerations it might even be concluded that there is a norm of interpretation that the codes should be interpreted in light of the general principles since that adds to their coherence and systematicity.

In another community, there might be a legal norm about identifying principles about a certain subject matter. Although the legal norm is limited to the subject matter, the same identifying mark is considered to apply to or be indicative of other principles as well.[154] For example, the second paragraph of article 340 of the Treaty on the Functioning

[154] For example, article 1 of the Swiss Civil Code has influenced other areas as well. See Häcki (n 82) 240.

of the European Union refers to general principles common to the Member States in the context of non-contractual liability of the European Union itself. One of the identifying marks of general principles of European Union law in other areas are the common principles and traditions of the Member States as they are adopted to the European Union context.[155] This example demonstrates that the identifying marks can be multiple and vague. If a principle is identified in accordance with these considerations, then it is considered to be a part of law before it makes its first appearance in a judicial decision.[156] Furthermore, ideas about the sort of thing a principle is can influence its identifying mark. European Union law can be taken as an example again. General principles must be general and comprehensive. Norms that do not have these characteristics cannot be general principles of European Union law.[157]

The final examples about sources of law concern a written constitution, statutes of Parliament and regulations of ministers. It might be thought to be quite obvious that statutes of Parliament are sources yet, as has already been mentioned in Chapter Two and will be discussed more fully in Chapter Eight, it is unclear why that is the case. Let us consider an interpretive norm of recognition. The object consists of the constitution and the statutes as well as the practice of creating and using them when determining the applicable law. The constitutional norms about Parliament and its law-making power are important. A part of the history may be a transfer of power from an absolute monarch to Parliament. A part of the social and political culture may be views about the role of Parliament. Among the relevant ideas are those of a legislature and legislation, including the idea that the law is

155 See e.g. Nigel Foster, *Foster on EU Law* (6th edn, OUP 2017) 113-114.

156 See e.g. Ronald Dworkin 'Hart's Posthumous Reply.' 130 Harv. L. Rev. 2096, 2124.

157 Case C-101/08 *Audiolux SA and Others v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* [2009 I-09823] para. 42.

creatable by an institution like this. Another idea is democracy. When all of this and more is taken into account, it may be concluded that there is a norm of recognition identifying statutes as sources. They are a way to create law according to that legal system. Often this is such an obvious interpretation that it is given little or no thought. A similar exercise can be done for regulations of ministers. In that case, norms or ideas about delegation of law-making power may be relevant.

The case of the written constitution is more complex. If it was created in accordance with the prior constitution, then the interpretation resembles the example of statutes and it may be quite obvious. Then the prior constitution is a part of the object. If it is the historical first constitution, however, then the interpretation to a greater extent depends on practice as seen in its social, political and historical context.[158]

4.3 Of Sameness and Differences

Further light can be cast on interpretive norms by comparing and contrasting them with some of the alternatives identified at the beginning of this chapter. We begin with social conventions. Then we will move on to moral norms and presuppositions.

Social Conventions

A social convention is here taken to be a standard, which participants in a social practice consider to be embodied in the practice or they take the practice to be a standard. It is a

[158] The term 'historical first constitution' is used in the same sense as e.g. Kelsen (n 59) 115-117, does.

practice-based norm. For example, the practice of vast majority of drivers 'round here' of driving on the right side of the road is taken to be or taken to embody a standard to drive on the right side. It is the done thing 'round here'.[159]

At least some legal norms, such as those with bases in statutes and regulations, are not social conventions in this sense. They do not exist and have the content they do because they are practiced by a group and that practice is taken as a standard.[160] Their existence depends on sources and their exact content on interpretive factors and considerations. Customary law is of this sort, though. Interpretive norms, in contrast to social conventions, exist and have the contend they do because they are the best interpretation of legal materials and practices in particular place and time. Their appropriateness or correctness partly depends on the content and characteristics of the object, the context and the relevant ideas about law.

Norms of different kinds can exist on the same subject matter. A social convention and an interpretive norm can co-exist on the same matter in the same place and at the same time. The same is true for a legal norm and a social convention. An example of the latter is a traffic act that sets the speed limit to 50 km per hour on certain roads. A social convention can either duplicate the legal norm or have a different content. There could be a social convention that no one should drive faster than around 70 km per hour in good conditions.

---

159 Andrei Marmor, *Social Conventions. From Language to Law* (PUP 2009) 1-30. For a distinction between habits and social rules, see Hart (n 35) 55-61. See also in this context Dworkin *LE* (n 3) 136-137 and 145. See also Gardner (n 34) 66-74, for customary law. For the rule of recognition specifically, see Julie Dickson 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27 OJLS 373-402.

160 See in this context e.g. Hart (n 35) 256, on enacted legal rules. However, the legal system of which they are a part must be, by and large, effective for them to be in force. For efficacy, see e.g. Kelsen (n 59) 39-42, Kelsen (n 47) 50-51, Raz (n 47) 152-153, and Hart (n 35) 108. That may include measuring whether the individual norms are obeyed or enforced. For a more detailed analysis of the efficacy condition, see Thomas Adams, 'The Efficacy Condition' (2019) 25 Legal Theory 225-243.

The actual speed of cars on the roads reflects the social convention but normally the police enforces the law. An example of the former is a *lex specialis* norm that can exist both as an interpretive norm and a social convention.

An interpretive norm can spur the development of a social convention. That happens when an interpretive norm is practiced, for example, by judges and the practice is taken as a standard. This tends to happen in mature and stable legal systems over time as has been already mentioned. Even if a social convention emerges, it does not replace the interpretive norm. The norms' existence-conditions are different. What happens, though, is that the social convention becomes part of and changes the object of interpretation. It may either reinforce or undermine the interpretive norm and, in the latter case, ultimately lead to its change or demise. Nevertheless, there are two norms, that is the social convention and the interpretive norm, which is the outcome of an interpretation of the object, including the social convention.

To reiterate, interpretive norms are not constituted solely by law-identifying-practices of officials. They are determined by other factors as well, that is legal materials and other practices, such as law-creating practices. While interpretive norms depend on and are shaped by practices, they are not limited to or exhausted by them. Consequently, it is possible to determine an interpretive norm even when the practice of identifying the law is unsettled, diffuse or non-existent as long as it is possible to draw weighty considerations from other parts of the object.

Interpretive norms and social conventions have some things in common. Both of them are contingent and vary in their content between legal systems and even between eras within one and the same legal system. The role and relevance of cases is one example. The

different social conventions about the role and relevance of cases in different legal systems are explained by pointing to varying practices alone. Interpretive norms, on the other hand, are contingent on the existence, content and characteristics of the object, the context and the relevant ideas about law. Different interpretive norms about cases are explained by pointing to different features of the objects, their dissimilar contexts, including different legal traditions, and contrasting ideas.

Moral Norms

For the purpose of this discussion, the existence and content of moral norms is taken to depend on genuine moral reasons or values. Abstract moral norms are derived solely from them. An example is the principle of fairness. Concrete moral norms, in contrast, are derived by applying, for example, moral principles to factual circumstances. An example is a norm about taking past decision of a court into account when deciding what to do. This concrete norm may be the outcome of applying the principle of fairness to past practices of a court.[161]

Interpreting legal materials and practices in light of moral principles is an instance of moral interpretation of law. Perhaps it is appropriate if the interpretive question or the purpose of interpretation is to justify public coercion.[162] However, if the interpretive question does not include or entail moral reasoning, then it is far from obvious that an object should be interpreted in light of moral principles. An example of that is an

[161] For contingent moral rights, see e.g. Mark Greenberg, 'The Standard Picture and its Discontents' (2011) 1 OSPL 39, 96.

[162] See e.g. Dworkin *LE* (n 3) vii, 52, 93, 98, 108-110 and 225, and Dworkin *MOP* (n 3) 160 and 164-166.

interpretive question that is focused on the actual operation of law as a complex social phenomenon in a particular place and time.[163]

Interpretive norms and moral norms have a common ground. As will be explained in the next chapter, interpretive norms are supported by reasons in favour of them as the best interpretation of the object. Moral norms, on the other hand, are based on moral reasons. Moreover, many ideas about law do not seem to be distinctively moral. For example, that the law is creatable, there are higher laws, a code is gapless and *travaux préparatoires* are authoritative explanations of statutes. Despite that, it may be hard to tease the two apart in some instances. This is especially the case when the relevant ideas about law overlap with political ideals, such as the rule of law, democracy, separation of powers and human rights. Nevertheless, the ideas and their precise content are not relevant because they are morally sound or the best moral justification of the practice but because they best explain or illuminate the actual features of the object, including its self-understanding. The interpreter is not committing to the moral soundness of the idea but its explanatory power of the social phenomenon.[164] The relevant idea of democracy for the United States' legal system, to give an example, is the one that best explains and corresponds to the features of that system. It is relevant because of its explanatory power and its ability to help us to understand how the United States' legal system actually works but not because it is the outcome of a sound moral reasoning, either in abstract (abstract norm) or in light of the legal practice in the United States (concrete norm). It is an artificial idea in a sense.

---

163 See in this context Kelsen (n 53) 201.

164 See in this context the example Waluchow (n 138) 127, gives of Apartheid in South-Africa to explain the difference between his theory and Dworkin's. In the context of moral commitments in methodology of legal theory, see also Julie Dickson, *Evaluation and Legal Theory* (HP 2001) 51-71, where she discusses indirect evaluative legal theory.

The question asked is not which moral principles best justify the legal materials and practices and the outcome is not a moral right or a duty of certain sort. Rather, the question asked is which idea best explains, captures or elucidates the actual features of the object, including its self-understanding, and the outcome is a norm of legal method, that is a norm about the law. The focus is not on seeing the object in its best light, where that is understood in light of genuine moral values or principles, but the best interpretation of the object as it actually is in light of ideas that capture and reflect its features.[165]

Presuppositions

The basic norm is the ultimate norm of a legal system according to one theory of law. Its content is sometimes formulated as the authors of the historical first constitution where authorised to create it. The basic norm is not a posited norm. It is presupposed when acts of will are interpreted as valid law.[166] In other words, the basic norm is a part of an interpretation of an object as valid law.[167] Other premises can be presupposed. Take the assumption that a legal system is non-contradictory, for example. One explanation of the *lex posterior* norm is that it follows from an interpretation of the materials in light of that assumption or it is itself presupposed. It is a part of the sense of the basic norm.[168] The relevant ideas or conceptions are abstract or universal in the sense that acts of will in all

165 Compare and contrast with Dworkin *LE* (n 3) 52-53, 243 and 313-314.

166 For the basic norm, see e.g. Kelsen (n 53) 201-205.

167 Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie and Stanley Paulson tr, OUP 1992) 58, and Kelsen (n 59) 120.

168 Kelsen (n 59) 406-407, says that *lex posterior* and principles of interpretation are 'not established norms, but presuppositions of legal cognition.' They 'are a part of the sense of the [basic norm]'. The purpose is 'to give a meaningful interpretation to the material of positive law.' See also p. 402-406. On p. 402, it says: 'juridical cognition starts, in the interpretation of its object, with the self-evident assumption that such contradictions are solvable.' See also Kelsen (n 53) 206-207.

jurisdictions are interpreted in light of them. It follows on this view that either all legal systems have the *lex posterior* norm because it is presupposed or it is contingent on being posited.[169] Presupposed norms and interpretive norms are, therefore, both related to an interpretation of an object as law.

There are, though, important difference between the two. Interpretive norms are not presupposed but determined by interpretation. Moreover, they need not have the same content across legal systems. They depend on the content and characteristics of the legal system under examination and its political, social and historical settings. Furthermore, the relevant ideas are not limited to abstract or universal ones. They can be contingent and reflect the features of the object in each place and time, including its self-understanding. The interpretation is firmly rooted in the community of which it is the legal system. While presupposed norms are a part of a conceptual or a pure interpretation of an object as law, interpretive norms are a part of social interpretation.

169 For a summary and an analysis of Kelsen's three different views on the matter, see Stanley Paulson, 'On the Status of the *Lex Posterior* Derogating Rule' (1983) 1 Liv. L. Rev. 5-18.

5 WHAT KIND OF NORMS? PART II

The chapter continues with the examination of the non-legal norms, firstly, by analysing some of the main elements of the account introduced in the last chapter and, secondly, by briefly demonstrating the explanatory force of interpretive norms. The main elements will be analysed in light of three questions. How does interpretation work? Which features of legal materials and practices tend to be relevant? What are (the relevant) ideas about law?

The first question takes a step back, so to speak, and focuses on interpretation in general. That is done for two reasons. The former reason is to identify features of interpretation. Understanding them in general can illuminate the interpretation of legal materials and practices in particular. The latter reason is to indicate how interpretation of legal materials and practices fits with a general view about interpretation. The second question focuses on types of features of legal materials and practices that tend to be relevant across legal systems. By learning about them and taking examples, we can better understand interpretive norms. We are also better placed to interpret legal materials and practices in a particular place and time. The third question focuses on the relevant ideas about law. They were introduced and briefly explained in the last chapter. The discussion here will highlight some of their aspects and take examples.

The chapter ends by briefly demonstrating the explanatory force of interpretive norms in the context of a puzzle about norms of legal method and a challenge to some theories of law. The puzzle is that, at least, some of the norms seem to be non-coincidental given their subject matter. The challenge involves theoretical disagreements.

5.1 Features of Interpretation

My intent is not to offer a new theory of interpretation. A voluminous literature exists on interpretation in general and in the realm of law in particular.[170] Instead, a brief explanation of interpretation will be offered. The starting point is this: interpretation is the activity of determining the meaning or significance of something. The starting point needs to be substantiated. That will be done by identifying and discussing ten features of interpretation, some of which are closely related to each other. They are discussed separately for convenience.

1 Object

There must be something that is to be interpreted. Possible objects of interpretation are many. They could, for example, be a speech, a conversation, a facial expression, a gesture, a document, a painting, a sound, a dream, a cloud and historical facts, such as series of events.[171] They could be simple or complex. Moreover, an object of interpretation can be composite. It need not be either, say, a painting or a performance. An artist's performance in unveiling a painting can be interpreted with the painting as a single artistic work.

Which brings us to the demarcation of the object. An object may appear as clearly defined from the beginning. There is, for instance, a person speaking, or a book or painting in front of us. This is often the case when the boundaries of an object are physical. An

170 To name just a few, see Dworkin (n 140) 123-191, Dworkin *MOP* (n 3) 119-181, Dworkin *LE* (n 3) 50-86, Raz (n 127), Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, HP 2005), Antonin Scalia, *A Matter of Interpretation. Federal Courts and the Law* (PUP 1997), Aharon Barak, *Purposive Interpretation in Law* (PUP 2005), and Kent Greenawalt, *Legal Interpretation. Perspectives from Other Disciplines and Private Texts* (OUP 2010).

171 The listed objects may overlap.

object appears to be clearly defined because we approach it with a host of assumptions or prejudgments that influence our view of it. However, demarcating the object is a part of interpretation because there is a back-and-forth relationship between attributing meaning to the object and defining its boundaries. Deciding whether a case is distinct or a part of a series of cases can be an act of interpretation. Even though a case has boundaries, the object of interpretation can, nonetheless, be understood in broader terms.

2 Context

Objects of interpretation are created and they appear in contexts, which shape the meaning of at least some of them. The meaning of different kinds of objects may be sensitive to their contexts to a varying degree. The meaning of some acts of communication, such as an utterance in a conversation, is often highly context specific but the meaning of other objects may be less sensitive to their contexts, at least in some cases and for the purposes of some interpretive questions. An instance of the latter may be a statute of a blindfolded woman holding a scale and a sword and the interpretive question: 'What does this represent?' An illustration of the former may be the Little Mermaid statute in Copenhagen and the interpretive question: 'Why does she have a melancholic look on her face?' A good interpretation probably depends on being familiar with H.C. Anderson's fairy tale.

3 Creative

The interpreter brings something to bear when he interprets the object. He attributes, imputes or imposes something on the object in light of which he understands it. The interpreter determines, decides or constructs the interpretation of the object.[172] The outcome –the interpretation– is not the same entity as the object. It is an abstract entity (or a thought-object). The object of interpretation need not be. Even though the interpretation and the object are distinct entities, there is a relation between them. It is an interpretation *of* the object.[173] Interpretations may, however, differ to the extent they reflect, capture, explain or justify the object and they can be judged accordingly. Some interpretations are faithful to the content and characteristics of the object but others are more innovative.[174] At some point, though, an interpretation may move so far beyond the object that it is no longer an interpretation *of it*.

4 Cognitive Process

To interpret is an activity of the mind. But the interpreter may be unaware that he is interpreting. We interpret so often and so fast in our daily lives we may not even realise when we are doing it. Sometimes, though, the interpreter is aware that he is performing that very activity. The activity of interpreting can be fast or slow. It may take only a moment

172 Dworkin (n 140) 130, says that interpretation takes place within a social practice or a tradition of interpreting.

173 See e.g. Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' *The Stanford Encyclopedia of Philosophy* (Winter edn 2016), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/> accessed 25 June 2021. s. 2.2, Raz (n 127) 299-323, and Timothy A.O. Endicott, 'Putting Interpretation in Its Place' (1994) 13 Law and Philosophy 451-479.

174 Raz (n 127) e.g. 209-305 and 313.

or stretch over a long time, even years. An example may be an interpretation of a particularly complex novel.

5 Point or Purpose

One of the things the interpreter brings to bear, at least when he is aware that he is interpreting, is some point or purpose in the interpretation of the object.[175] For example, an interpreter may wish to 'really' understand the message of a novel. The purposes vary. Some are clear but others are vague. As an example, the point of interpreting a sculpture may be to evaluate it as a piece of artwork or to understand and explain it.[176] Furthermore, an interpretation can have more than one purpose. The purpose affects the interpretive question asked, the norms brought to bear and the kind of outcome to be expected.

6 Interpretive Question

Different questions may be asked about an object and answered by an interpretation. Take a sculpture of a blindfolded woman holding a scale and a sword as an example. 'Is the sculpture beautiful?' 'What does it represent?' 'What message or lesson is conveyed by the sculpture?' These questions represent different ways to approach the object and, accordingly, the answers will be unalike.[177] The interpretive question asked depends on the

175 See in this context e.g. Dworkin (n 140) 131, 134 and 152, and Dworkin *LE* (n3) 52.

176 Evaluations, including moral and aesthetic evaluations, are included in the discussion of interpretation here. However, it may be the case that they are a distinct operation. At least, they can be closely related to, even interwoven with, interpretation.

177 Dworkin (n 140) 134-139, discusses collaborative, explanatory and conceptual interpretation.

purpose or point of the interpretation. The interpretive question can be clearly formulated in the mind of the interpreter or it may be vague. In the latter case, it can be implicit and closely woven with the point or purpose of the interpretation. Diverse interpretive questions call for different norms (or normative entities) but they will be discussed below. The first question stated above is answered by interpreting the sculpture in light of norms about beauty (or a value), the second question by interpreting it in light of ideas about the sort of thing it is and the third question in light of, for example, a principle of retribution or justice.[178]

7 Norm-Governed Activity

Interpretation is a norm-governed activity. The interpreter interprets an object by using norms or in light of them. They shape how the interpreter understands what he senses. Norms are here understood in a wide sense. They include ideas about the sort of thing being interpreted or what something is like.[179] Sometimes the relevant norms are many and diverse.

One and the same object or act can be interpreted in light of different norms. Where one person sees ritual sacrifice in light of religious norms of a cult, another sees murder in

178 For Kelsen's principle of imputation in a wide variety of contexts, see his *Society and Nature: A Sociological Inquiry* (Forgotten Books 2018).

179 Dworkin (n 140) 130-134 and 149-152, discusses a general account of interpretation, which is value-based. For the purpose of this discussion, at least some norms are normative in light of values or goods. The values themselves can be diverse. They include the value of knowledge or understanding. A final stance is not taken here on whether evaluative judgments, such as about beauty, are only made in light of values or also norms about beauty. Dworkin interprets legal practices in light of moral principles, which are norms or moral values. What follows from the discussion here is the view that Dworkin does not emphasis enough the role of ideas about the sort of thing being interpreted. He does, though, mention the relevance of 'hosts of values and assumptions of very different kinds', see p. 154, and 'working assumptions', see p. 124.

light of the state's criminal law.[180] A sculpture of a woman may be interpreted in light of norms about what counts as beautiful (or aesthetic values of beauty), through the lens of ideas about the sort of thing it is, such as of goddesses and Roman mythology, or in light of principles like justice. The sculpture can be interpreted, either or both, as being beautiful and representing *Lady Iustitia*.

A special importance is here attributed to the role of ideas about the sort of thing being interpreted or about what something is like. To illustrate their importance, imagine a wall with five paintings. At the top are paintings of a well-dressed man and a woman. Below them are paintings of a boy, a girl and a dog. The paintings are in identical gold frames and the figures in them have a similar background. The paintings and the frames are distinct physical facts. You could ask many questions about them, such as: 'Are they beautiful or good?' Instead, you ask yourself: 'What are they paintings of?' You examine each of the paintings carefully. An idea occurs to you about the sort of thing the paintings are. Is it a family portrait? You look at the paintings again with this idea in mind. You see them no longer as distinct paintings but as a whole. All of the paintings are now a part of the object of interpretation; it has been defined in a new way. You do not only have an idea of what a portrait and a family is but also of roles within a family. You interpret the paintings in light of these ideas and attribute meaning to them. At the top are the parents; he is her husband and she is his wife. Below are their children and the family pet. You understand the paintings as having certain relations between the figures in them even though they are not painted on the same canvas. You check if your interpretation makes sense. You match the figures with whatever ideas of a family you have. You notice how the paintings are arranged, that they are in identical frames and have similar backgrounds.

---

180 See in this context Kelsen (n 167) 8-9.

These are reasons for interpreting the paintings together as a whole and to understand them as a family portrait.

The ideas that the painting depict a family and are a family portrait are important for how you interpret, see or understand the paintings as well as how you demarcate the object. If you had no idea about family portraits or did not think of them when viewing the paintings, the interpretation would be different. Your interpretation might, of course, be mistaken. Perhaps these are siblings painted at different ages. Maybe, there are no relations between the figures in the paintings. Conceivably, this is the gardener, the maid and the neighbour's children who the painter used for practice. The point is that ideas about the sort of thing being interpreted shape the interpretation of an object, including its boundaries.

8 Reason-based

An interpretation involves identifying and assessing reasons for this or that interpretation of an object, at least when the interpreter is aware of being engaged in the activity. The correct, the soundest or the most convincing interpretation is the one based on the strongest reasons.[181] 'The sculpture is beautiful because its elements are in harmony with each other'. 'This is *Lady Iustitia* because it is a woman who is blindfolded holding a scale and a sword'. The reasons relate to, for instance, the object, the norms brought to bear, and the purpose of the interpretation. For example, you match the features of the sculpture with a picture, an image or an idea you have of *Lady Iustitia* (or Roman mythology and goddesses) and

[181] The same point is made by Dworkin (n 140) 154.

since the features match the idea, you identify the sculpture as representing her. Sometimes not all of the reasons count in favour of the same interpretation. Then they need to be balanced in so far as possible. Since interpretation requires reason-based judgments in light of norms, which may include ideas about the sort of thing something is, it is normative in that sense.

9 Interpretive Point of View

The point of view of the interpreter is of someone who herself engages with the object in order to best understand, evaluate, describe or explain it for some purpose. The interpreter is not merely reporting how others interpret an object but is actually engaged in interpreting.[182] The interpreter does not have an internal or an external point of view with reference to the object of interpretation.[183] She may, however, have such points of view towards the practice of interpretating.[184] When the interpreter says that an object should be interpreted in a particular way, such as: 'This is *Lady Iustitia*', she normally believes or makes a claim that the interpretation is justified, for example, in light of the features of the

182 See in this context e.g. Dworkin (n 156) 2097-2105, where he discusses the difference between interpretation and description as well as different claims. See also Dworkin *LE* (n 3) 13-14 and 49.

183 Sometimes a distinction is made between the external and internal points of view for the purposes of rules and normative statements. See Hart (n 35) 88-91. For a similar distinction between S1 and S2 statements, see Finnis (n 124) 234-237. Dworkin *LE* (n 3) 13-15, distinguishes between the external and internal point of view of (the argumentative aspect of) legal practice. The external point of view of social practice, at least, can be divided into an extreme one, where only external acts are viewed, or a hermeneutic one. See Hart (n 35) 89-90, and Dworkin *LE* (n 3) 13-14 and 49. The hermeneutic external point of view of social practice is (or at least can be) the interpretive point of view, since the interpreter is or, at least, can be interpreting the beliefs, attitudes and dispositions of the participants. The interpretive point of view does not map neatly on the distinction between external and internal points of view.

184 Note also that the observer, say a sociologist, may have an internal point of view with reference to the sociologists' practice of interpreting their subject matters but an external point of view with reference to the particular social practice she is engaged with. She can simultaneously have different viewpoints with reference to different things.

sculpture and the idea about the sort of thing it is.[185] However, the interpreter is only committed to the interpretation that answers the interpretive question but not some other question. In the case of the sculpture of the blindfolded woman holding a scale and a sword, the interpreter is answering the question: 'What does it represent?' The interpreter need not take any stance on some other question, such as: 'Is it beautiful?' The interpreter may claim it is *Lady Iustitia* but be ambivalent about its beauty or even think it is ugly.

Likewise, a lawyer may interpret a statutory provision and reach a conclusion about a legal norm. Suppose Lexie makes a claim about the correct legal norm based on the Environmental Protection Act. Lexie is committed to the claim that this is the correct or the most convincing interpretation of the provision in light of interpretive factors and norms of interpretation in her legal system. However, she need not endorse, approve, be committed to or even make any claim about whether the legal norm is good, morally justified or should be obeyed.[186] She may be ambivalent about that. She might even think it is a bad legal norm.[187] Moreover, after she has identified the law, she might, for instance, make a detached normative claim about what her client should or can do in light of its existence.[188] She might make a claim from the point of view of the law or someone who has a committed point of view towards the legal norm and believes it is morally justified.

---

185 For committed and detached normative statements or being committed or detached about rules, see Raz (n 47) 153-157, Raz (n 32) 170-177, and Raz (n 106) 235-236. See also Kelsen (n 53) 218. For a criticism of Raz, see Kevin Toh, 'Raz on Detachment, Acceptance and Describability (2007) 27 OJLS 403-427. It is left open here whether the detached point of view is a variation of the internal point of view since it involves using a rule or a third point of view in addition to the external and internal points of view. On p. 155 of the first source, Raz calls detached statements the third category of statements. He also distinguishes between those who fully accept a rule, that is for themselves and others, and weakly accept it, that is only for themselves. See also Finnis (n 124) 234-237, for a distinction between S1 and S3 statements. See also in this context Schauer (n 64) 121-122.

186 Regarding normative statements and rules, see Hart (n 35) 89, and Raz (n 47) 155.

187 See in this context, Dickson (n 164) 51-71, who discusses indirect evaluative legal theory as a methodology for legal theory.

188 Same can be the case for using first the hermeneutic external point of view for social practice, see Hart (n 76) 14-15.

'According to the law, a landowner may destroy natural wonders on his land.'[189] In other words, Lexie might think the legal norm is justified *as an interpretation of the statutory provision* without endorsing the legal norm morally or taking a stance on what someone should or can do in light of it. The same applies to norms of legal method.

10 Outcome

An interpretation is the outcome of interpreting an object in its context in light of norms; it is the end product. The outcomes can be different. They can, for example, be a meaning or an understanding, such as: 'It is *Lady Iustitia*.' The meaning attributed to an object can be a norm, such as: 'Murder is forbidden.' They can be the significance of an event or series of events, such as 'The Prime Minister's speech was the turning point in the election.' And for the purposes of the discussion here, the outcome can be a specific value judgment, for instance: 'It is beautiful.' The outcomes depend on the point or purpose of the interpretation, the interpretive question asked and the norms brought to bear.

5.2 Common Types of Features

The object of interpretation in case of the non-legal norms can be complex and composite. Furthermore, its content and some of its features vary between places and times. In light of this, some common types of features will be identified to cast a further light on the

189 In examples like those taken by Dworkin (n 5) 68-73, the point about different questions is less clear since the participants believe or claim that a rule is morally justified and, therefore, make a committed statement about its moral justifiability.

interpretive character of the norms. Examples of common types of features will also be taken and matched with possible norms. When understood in light of an idea about the sort of thing law or its elements are, the features are or can be reasons in support of an interpretation, that is in favour of a particular norm of legal method. The features mentioned are only a part of the interpretation needed to fully support the norms. As is evident from the examples taken in the last chapter, a complete interpretation requires looking at all relevant aspects of the object, its context and ideas about law. The examples are, therefore, incomplete. Some of the same examples will be taken again when discussing ideas about law. In what follows, the types of features have been organised for ease but the categories may overlap.

Content and Characteristics of Legal Materials

The various content and characteristics of legal materials matter. It will have to suffice for now to mention the style, structure and presentation of legal materials. We have already encountered two examples. The first is the relationship between legislative drafting and norms about textual interpretation and the use of *travaux préparatoires*. Where statutes are detailed, long and presented as comprehensive, there may be reasons to view them as being relatively exhaustive of the considerations brought to bear. Where statutes are short, concise and presented as a kind of framework and accompanied with a guide or an explanation, there may be reasons to look beyond 'the four corners of the statute' and treat *travaux préparatoires* as a part of the relevant context.[190]

[190] For English and Swedish law, see e.g. Summers and Taruffo (n 82) 477. For Norwegian law, see Ingvill Helland and Sören Koch, 'Norwegian and German Legal Methods Compared' in Ingvill

The second example is the relationship between the content and style of judgments and norms identifying cases as sources of law. Where the reasoning is extensive and with frequent case analysis in support of the law, such as in English law, there may be reasons to rely on cases as sources. In other instances, as in French law, the reasoning about the law is extremely short, usually without case citations, and a greater focus is placed on applying the law than explaining or justifying the reasons behind its identification. In the latter case, judgments are not presented as sources of law and it is doubtful that we should rely on them as such.[191]

A third example concerns the relationship between the content, structure and style of statutes and codes, on the one hand, and norms about systematic or harmonious interpretation, on the other. Consider a code not unlike the German Civil Code or Code Civil in France. Our code is highly organised by subject matter. It is divided into books and chapters. It starts with general provisions and moves on to articles that apply to more concrete subject matters. Its provisions form or are presented as forming a coherent and a comprehensive scheme that regulates subject matters. There are even cross-references between some of the provisions.[192] These features of the code are reasons in support of the existence of a norm requiring a strong systematic interpretation. A provision is to be

Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014) 294-296.

191 See e.g. Ross (n 50) 105. For the comparison of style of judgments in Germany and Norway, see Ingvill Helland and Sören Koch, 'Introduction to Norwegian Legal Method' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014) 116-117.

192 See e.g. Helland (n 152) 198.

interpreted in light of its place in the overall scheme. Together the legal norms form a more-or-less unified scheme.[193]

Also, the code in our example may be presented as if it is exhaustive. This feature, alongside with the others, may both support a limitation of the scope of the norm about systematic interpretation beyond the code and be a reason for either using analogy from the code's provisions or general principles standing in certain relation to the code's provisions, when they do not explicitly regulate the subject matter. There might even be a provision in the code that further supports this conclusion, like the provision in Code Civil about denial of justice.[194] Where codes or statutes are the main sources of law in the legal system and they lay down a unified scheme, there may be grounds to reason analogically from their provisions. An analogy closes a gap where according to the scheme itself there should be no gap.[195] Where cases are the main sources and they lay down the basic rules about a subject matter, there may be reasons to resort to analogy from them. The case law is thus to be extended in a coherent manner.[196] Furthermore, the presupposition of exhaustiveness may support a norm about extensive interpretation of general provisions that are understood as 'catching' situations not regulated by other provisions and, thereby, preventing gaps, where there should be no gaps according to the scheme.[197]

---

193 It might be the case that something is called a code and seems to have similar organising features but still there are reasons to doubt that it forms a more-or-less unified scheme. In which case the same reasons in support of a norm requiring a strong systematic interpretation do not apply.

194 See in this context article 4 of Code Civil, which says in an English translation: 'A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient may be prosecuted for being guilty of denial of justice.' Michel Troper et al, 'Statutory Interpretation in France' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (AD 1991) 176.

195 On unintended gaps in legislation, see e.g. Häcki (n 82) 243 and 260.

196 See e.g. Summers and Taruffo (n 82) 471.

197 For the relevance of the German Civil Code's features for legal method in Germany, see Helland (n 152) 198.

Contrast the code in our example with multiple and fragmented statutes, which are not organised by subject matter but are published in a chronological order. They do not lay down a general or complete scheme about a certain subject matter but regulate only in a piecemeal fashion. To the extent there are other parts to the scheme, they may be regulated by legal norms based on other kinds of sources, such as legal customs.[198] The statutes in this example do not have systematic features to the extent that the code does.[199] In this instance, there may be reasons to conclude that there is a norm about a weak systematic interpretation. Just as in the case of the *lex posterior* and *lex specialis* norms discussed in the previous chapter, the applicability or the scope of norms about systematic interpretation is sensitive to their rationale. The scope of the norm about weak systematic interpretation covers, for instance, situations where a statute presents a unified scheme or where two or more statutes form a material whole. The scope of the norm about a strong systematic interpretation of the code is wider. It covers the code as such since it as whole forms, or is presented as forming, a general, unified scheme.

The fourth and final example is the relationship between the structure and style of statutes or codes, on the one hand, and norms about interpreting exceptions restrictively and main rules extensively, on the other. Where the legal materials are organised into main rules and exceptions, there are often reasons to conclude that the exception should be interpreted restrictively and the main rule extensively. After all, the framing or presentation of the legal material indicates that the main rule is supposed to apply to the extent the exception does not cover the subject matter. Sometimes restrictions are applied relatively

198 German and Norwegian legislation can be contrasted in this regard. See Helland and Koch (n 191) 104 and 121. For English legislation, see Henninger (n 18) 426.

199 See e.g. Jørn Øyrehagen Sunde, 'The Legal Cultural Dependency of the Norwegian Legal Method – and its Future', in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014) 57.

extensively, though. That is usually the case where we can see from the legal materials and practices that even though a provision is strictly speaking an exception, it is meant to apply broadly to a particular subject matter or within a certain legal field.

Institutional Actors and Structures

Institutional factors shape norms of legal method. They include the existence, structures and procedures of institutions. The relationship between institutional factors and the status of cases is a familiar example.[200] The relevant factors include: the structure of the court system; the organisation of a court into panels, chambers and even a grand chamber; the powers to select cases; the volume of cases; accessibility of the cases; and the number of judges.[201]

Another example is the existence, structure and decision-making procedure of the legislature. Suppose a legislature, for instance, is composed of different members or bodies. The composition may reflect an institutional balance. The different bodies make a compromise by tinkering with the draft text. There may be reasons to interpret a statute in a way that respects the textual choices made in the legislative process and by that the institutional balance.

---

200 See e.g. Ross (n 50) 105, Henninger (n 18) 421, and Michele Taruffo, 'Institutional Factors Influencing Precedents', in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (AD 1991) 437-452.

201 Summers and Taruffo (n 82) 489-500. For Germany, see e.g. Helland (n 152) 191-192 and 218, and Robert Alexy and Ralf Dreier, 'Statutory Interpretation in the Federal Republic of Germany' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (AD 1991) 73. For France, see Troper et al (n 194) 171-172.

Where multiple linguistic versions of an instrument are equally authoritative according to the legislative process, there will be reasons to interpret the instrument in light of its wording in the different languages. After all, the norm is embodied in multiple texts in different languages. That situation may also be a reason not to view the text as exhaustive of the considerations that can be brought to bear, especially if the different linguistic versions are not in harmony.[202]

The Structure and Main Features of the Legal System and the Constitution

A constitution lays down the foundation of a legal system and contributes to its structure and identity. Often, it contains or reflects fundamental principles and values of the legal system, at least those that relate to the political institutions. Legal norms about sovereignty, separation of powers, democracy, human rights, the rule of law and the relationship with international law can be mentioned as examples. The fundamental principles and values enshrined in constitutions differ between legal systems even though they are about similar subject matters. For instance, the division of powers is not the same in France and the United States of America.[203]

---

202 For European Union law, see case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 paras. 18-20. For the European Convention on Human Rights, see e.g. Jon Fridrik Kjølbro, *Den Europæiske Mennskerettigheds Konvention* (4th ed, Jurist- og Økonomforbundets Forlag 2017) 21-22. For Quebec in Canada, see *R v. Daoust* 2004 SCC 6, paras. 27-30. For Switzerland, see Häcki (n 82) 252.

203 On separation of powers in France, see e.g. Michel Troper et al (n 194) 203-204.

Fundamental legal principles and values shape norms of legal method.[204] One way they do that is by being reasons for presumptions in legal interpretation.[205] It may, for example, be presumed that the legislature did not intend to infringe human rights, enact retroactive criminal laws or even deviate from international law obligations unless the words of a statutory provision are clear to that effect.[206] Another way is by being reasons for norms about restrictive or extensive interpretations in cases of doubt. Statutory provisions that interfere with, for example, human rights are often interpreted restrictively but statutory provisions that substantiate human rights are often interpreted extensively.

The general organisation of legal materials and practices in the legal system also matters for determining norms about ranking. Where they seem to be organised hierarchically, there may be reasons to conclude that certain norms about ranking exist. It could be that the constitution is the highest-ranking source, then statutes of Parliament and, finally, regulations of administrative organs. Where the legal materials and practices are more disperse or disorganised, there may be less reasons to conclude that different kinds of sources, such as statutes, cases and conventions, stand in strict hierarchical relations.[207]

Other Fundamental Principles and Values[208]

---

204 See e.g. Helland (n 152) 195.

205 See e.g. Robert S. Summers, 'Statutory Interpretation in the United States' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (AD 1991) 452.

206 See e.g. Zenon Bankowski and D. Neil MacCormick 'Statutory Interpretation in the United Kingdom' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (AD 1991) 386.

207 See e.g. Henninger (n 18) 450, and Michel Troper et al (n 194) 183.

208 See e.g. Helland (n 152) 191.

Not all fundamental principles and values of the legal system have the status of constitutional law. Nonetheless, they can shape norms of legal method. They do so in similar ways as fundamental principles and values of the constitution. An example is the best interests of the child, which today dominates the law of children, at least in many legal systems. Often, it is considered to be a reason to interpret limitations restrictively and children's rights generously.

Areas or Fields of Law

Sometimes law is organised into legal fields, such as tort or administrative law.[209] Many norms of legal method cut across legal fields. The *lex specialis* norm is one example.[210] This is the case when the reasons in support of the norm, which are derived by considering the features of the object in its context in light of ideas about law, are not limited to an area of law. Some of the non-legal norms are, however, limited to an area.[211] Prime examples are some norms within the fields of modern criminal and tax law. Statutory provisions about criminal liability and the imposition of a tax are, commonly, interpreted restrictively. Often, there is also a ban on or a limitation of the use of analogy from such laws. The same applies to such laws having retroactive effect.[212]

209 Dworkin *LE* (n 3) 250-252, discusses local priority and departments of law.

210 See e.g. Helland (n 152) 190.

211 Johan Boucht, 'Introduction to Finnish and Swedish Legal Method' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (MS 2014) 165.

212 See e.g. Helland (n 152) 207, and Summers and Taruffo (n 82) 472.

Practices

Practices of creating, identifying and applying the law are a part of the object itself. They matter for the efficacy of law and can concretize interpretation in support of norms. Sometimes it can be difficult to tease them apart from legal materials. For instance, judgments and decisions of authorities can be seen as both having a certain content and characteristics as legal materials and as being indicative of a law-identifying practice. The legal materials and the practice are intertwined. Moreover, sometimes legal material is a source of law, such as judgments of higher courts in some jurisdictions or practices of courts that form legal customs *in foro*. In such cases, it can be difficult to spot whether a norm of legal method is a legal norm with a basis in a precedent or a legal custom or a non-legal norm, which is the result of interpreting the law-identifying practice and the judgments. The same applies to a legal norm with a basis in a statutory provision and a non-legal norm that is an interpretation of the statute, other legal materials and practices. In these instances, there may be no sharp line between a legal and non-legal norm in practice despite the analytical distinction. Similarly, it can be difficult to separate law-identifying and law-creating practices. Some law-creating practices are about creating laws according to other laws. They are also law-identifying practices.

Practices can matter in numerous ways. Only two examples will be given here. The practice of citing cases and scholars in judgments or treating them as authoritative may be a reason in support of a non-legal norm identifying them as sources.[213]

[213] It is extremely rare to cite prior judgments in France and illegal to cite scholars. See Michel Troper et al (n 194) 187 and 189.

Examples of Contextual Factors

Usually, a legal system has a tradition and a history and it is a part of a political community. Historical and political factors have shaped traditions of legal systems, including, for instance, civil and common law. An interpretation of legal materials and practices may be sensitive to the tradition and other historical and political factors. Contextual factors can influence the understanding of legal materials and practices in numerous ways. Only a few illustrations will be given.

Cases are sources in English law but not in French law. Among the historical factors that may contribute to the difference is the French Revolution 1789 and the mistrust of judges that influenced the court system and the creation of Code Civil. Article 5 of the Code says that judges are prohibited from deciding cases submitted to them by way of general and regulatory provisions. In contrast, judges in English law have played a central role in uniting the law through the common law. After the reorganisation of the English system in 1875, where a hierarchy of courts was established, a doctrine of strict *stare decisis* emerged.[214]

In the original draft of article 1 of the German Civil Code was a provision not wholly dissimilar to article 1 of the Swiss Civil Code. According to it, an analogy should be used if the code does not contain a provision for the legal question. And if analogy cannot be used, then principles embodied in the spirit of the legal system should be used. The article was deleted from the draft because it was thought that no authority was needed

214 See e.g. Geoffrey Marshall, 'What is Binding Precedent?' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (AD 1997) 508-510, and Summers and Taruffo (n 82) 503-504.

for resorting to these methods.[215] This background supports an understanding that the code does not explicitly address every legal problem within its material field and gaps should be filled in a specific way.

Another example is that recent *travaux préparatoires* weigh more than older ones in Finnish law but vintage makes little or no difference in Swedish law. It has been suggested that historical as well as political factors explain this difference. Finland was under the rule of Sweden and Russia. Older *travaux préparatoires* stem from the foreign rulers whereas recent materials stem from the independent, Finnish legislature.[216] If this is the explanation, then it stands to reason that age alone is not decisive but whether or not the *travaux préparatoires* stem from the foreign rulers.

A further example is the lack of a political and religious unity from 1806 to 1871 in the area which now includes Germany. To compensate, the political communities relied on Roman law.[217] The reception and 'scientific development' of Roman law is important for understanding some aspects of civil law jurisdictions like the German one.[218]

5.3 Ideas About Law

Ideas about law are thoughts or understandings about the sort of thing law or its elements are or how they are like. As was noted in the last chapter, the relevant ideas about law are

215 Alexy and Dreier (n 201) 89.

216 Boucht (n 211) 173-174.

217 Ole Lando, 'Forward' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (MS 2014) v-vi.

218 See e.g. Henninger (n 18) 420-421.

those that best explain, capture or illuminate the object's features, including its self-understanding. Oftentimes, the ideas are gotten from or inspired by the object's features, including the self-understanding which appears in practices or is discernible from legal materials. Ideas are a part of the norms brought to bear and imposed on the object through interpretation. Law partly gets its identity and is shaped by the ideas we have of it.

In the sense pertinent here, an idea is a mental impression, a picture in one's mind, an understanding, a thought or knowledge about something, such as about what something is or what it is like.[219] To give an example, legal materials and practices can be interpreted in light of the idea that law is a legal system and a legal system is the sort of thing that has a certain structure. In so doing, an understanding, a structure, or a coherence is imputed to the legal materials and practices. They are interpreted *as a legal system*. They are understood in light of the idea just as the five paintings are understood in light of the idea of a family, that is the sort of thing a family is and that the paintings are like that. Certain relationships are seen between the legal materials and practices just as certain relationships are seen between the figures in the paintings. And the legal materials and practices are seen together, forming a whole, just as the five paintings are seen as parts of the same object. There is a back-and-forth relationship between the ideas and the object, which influences, among other things, the demarcation of its boundaries.

The relevant ideas are about law, that is the sort of the thing law or its elements are. They may be about law in general as well as how law is like in a particular place and time. Often, there is not a single idea relevant but a group of ideas concerning both law as such

---

219 Other terms are conception or notion. Ideals, on the other hand, are about the perfect or the best possible version of something. The relevant ideas about law need not be ideals. Ideology is about a set of beliefs or principles, especially political. The relevant ideas about law need not be a part of ideology.

and its elements. They may include ideas about a legal system, the state, the legislature and legislation, the role of judges, rules, sources of law, the rule of law, a constitution, democracy and so on. Furthermore, the group of ideas brought to bear may be vague, loosely connected and, possibly, in tension with each other. The ideas are also contingent. They can be different between legal systems and within eras of one and the same legal system depending on which ideas best capture and explain the object in its context in each place and time.

Sometimes lawyers and others share similar ideas and they understand law in roughly the same way in light of those ideas. In other cases, their ideas are disparate and they may perceive the object in different ways. People that share a legal culture, such as officials, lawyers and scholars in a jurisdiction, tend to have fuller, more precise and complex ideas about law than those shared by the general public.[220] When lawyers interpret, they need not hold the ideas clearly in their mind's eye. However, they are, at least, implicit or in the background. The ideas they rely on may be those that they learned about in law school, in their apprenticeship or have obtained through their experience of practicing law.

The officials' self-understanding that appears in law-identifying and law-creating practices forms a part of the object of interpretation and can be an inspiration for the relevant ideas about law. But the relevant ideas are not reducible to them, that is are just those ideas that officials have. They are relevant to the extent they are good explanations of the object as a whole. Identifying the relevant ideas may be interwoven with studying the object's features, getting inspired by them and matching one's ideas with those features

[220] See in this context Hart (n 35) 116-117.

to see if they capture and explain them. Only very seldomly can the relevant ideas be in stark contrast or radically depart from settled views and understandings in social practice about law and its elements. Such ideas are usually not a good explanation of the object because they do not correspond with that feature of it.

Two illustrations help to explain ideas about law further. An example of a code was taken before. Add to that a particular idea of a code or codification. That is the idea that codes are coherent, comprehensive and a closed system of legal norms regulating specific subject matters.[221] This idea matters for understanding the legal material. It underscores norms about systematic or harmonious interpretation, extensive interpretation of general provisions, the use of analogy and the existences of general principles. The idea of a code is relevant because it best explains the features of the legal material, that is its content, structure and drafting style, the legal tradition and history of the legal system, such as an attempt at codification and abolishing other sources of law, as well as the law-identifying and law-creating practices concerning the code. An idea that the legal material is a random collection of provisions, for instance, would lead to a poor interpretation of the connection between the provisions in light of the code's features. And the idea is relevant because of the object's feature in this time and place. Finally, the idea of a code is not a moral principle that morally justifies the legal norms based on the code.[222]

Another idea is that statutes are exceptions to the common law or have been super-imposed on it. According to this idea, statutes supplement or correct specific mischiefs of

221 See e.g. Helland (n 152) 198, Henninger (n 18) 425, and Alexy and Dreier (n 143) 25.

222 See in comparison e.g. Dworkin (n 140) 133, where he discusses statutory interpretation.

the common law. As such, they replace and supersede parts of the common law.[223] Such an idea can matter for how statutes are perceived and interpreted. As exceptions or super-imposed elements in the 'sea' of common law, there may be reasons to construe them narrowly. If they are not clear, then the common law may be applied. Also, there may be weaker reasons to resort to analogy from statutes. After all, the common law applies where the exceptions do not.[224] This idea may be relevant when and where the common law is the dominant source of law in the legal system and statutes are rare and piecemeal. When statutes have become more common and comprehensive, there may be reasons to interpret some of their provisions extensively and resort to an analogy from them. The idea about statutes as exceptions or being super-imposed on the common law forms a part of a good interpretation or it is relevant when the object has certain features and it appears in a certain context.

5.4 Explanatory Force

The explanatory force of interpretive norms will be briefly demonstrated, firstly, by arguing that they help explain a puzzle. The puzzle is that, at least some of, the non-legal norms appear non-coincidental given their subject matter. Secondly, it will be suggested that the theory is not vulnerable to the challenge of theoretical disagreements.

---

223 Bankowski and MacCormick (n 206) 363, and Summers and Taruffo (n 82) 471. It has been claimed that this idea casted a light on statutes, at least, in the beginning of the twentieth century in the United States of America See e.g. Henninger (n 18) 424. See also Cross (n 2) 12-15.

224 See Roscoe Pound, 'Common Law and Legislation' (1907) 21 Harv. L. Rev. 383, and Cross and Harris (n 2) 174-175. Possibly, this idea and the resulting interpretive style, among other factors, led to detailed and exhaustive drafting of legislation, which in turn supported the idea that an interpretation should take place 'within the four corners of a statute'.

The Puzzle

The existence and content of norms of legal method harmonise or correspond with the legal materials and practices they are about. They do not seem to have any content whatsoever. That is hardly a coincidence. Nonetheless, they are not conceptually required. They are contingent.[225] No particular norm, such as 'Customs *in foro* are sources of law', is necessary wherever there is a legal system. Moreover, the norms' rationales seem to matter for their scope and application. This is best explained by giving examples.

Norms about interpreting exceptions restrictively in case of doubt exist in many legal systems. Exceptions seem to be interpreted restrictively *because* they are exceptions and they stand in certain relations with other statutory provisions, which embody main rules. The existence and content of the norms of interpretation seem to correspond with the existence of exceptions and a certain understanding of them. Even so, norms about interpreting exceptions restrictively are not conceptually required. We can imagine a legal system where exceptions are interpreted extensively. Also, some statutory provisions are only exceptions strictly speaking and can be interpreted quite generously. Furthermore, exceptions can be interpreted restrictively to varying degrees. Nonetheless, there tend not to be general norms about interpreting exceptions extensively in legal systems. If the norms were merely contingent or merely accidental, we might expect there to be norms, which

225 They do not logically follow from a necessary feature of the concept of law, legislation, legislature or, in our examples in a moment, exception or code. Also, they are not naturally necessary, that is given facts about how things happen to be in our world. For a distinction between a necessary truth and natural necessity, see Hart (n 35) 193-200. See also Finnis (n 124) 260. For an argument about a necessary feature of the concept of law, see e.g. Joseph Raz, *Ethics in the Public Domain. Essays in the Morality of Law and Politics* (OUP 1994) e.g. 217-218. No stance will be taken here on whether some of the norms are practically necessary, that is the only reasonable outcome of a practical judgment. For practical judgments, see Finnis (n 124) e.g. 239.

are considered to be correct, that stand in stark contrast with the rationale associated with their subject matter. After all, people can have different opinions and make mistakes.

Similarly, a norm about the systematic interpretation of the code in our example above corresponds with the structural features and content of the code. The existence and content of the norm does not seem to be coincidental given the content and characteristics of the code in its context in that place and time. The rationale of the norm has to with the fact that it is a code with certain features. However, the norm is not conceptually required.

The puzzling feature materializes in different ways. Some norms of legal method are neither necessary nor merely contingent. They are pervasively common and appear in different legal systems. An example is the *lex posterior* norm, which many modern legal systems have. It is not a necessary norm since there have been legal systems with the opposite one and it is easy to imagine a legal system without one.[226] At the same time, it does not seem to be a matter of chance that the same norm appears in all these legal systems.[227] The same applies to the norm about interpreting exceptions.

Other norms of legal method seem more parochial or local but at the same time non-coincidental given their subject matter. They seem to relate to the content and characteristics of a particular legal system. Examples of a local norm in this sense are the previously mentioned norms about *travaux préparatoires*. The norms exist in all the Nordic

---

226 For the older law being applied over the younger one, see e.g. Lindal *R* (n 146) and Lindal *ULLP* (n 146). See also in this context Alexander Hamilton, 'The Judiciary Department' in *The Federalist Papers: No 78*, who says about the *lex posterior* norm: 'But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing.'

227 See e.g. Paulson (n 169) 18. He calls *lex posterior* intractable in comparison with the relative instability of ordinary legal rules.

legal systems and the legal systems share some characteristics. It can be asked why some of the norms are pervasive but others parochial.

While most of the norms are applied across areas of law, there are some non-coincidental variations between legal fields.[228] It does not seem to be a mere happenstance, for instance, that in modern times textual interpretation usually weighs more within the field of criminal law than in many other areas of law. Some of the reasons behind these norms, that give them a non-coincidental flavour, seem to be connected to the content and characteristics of a legal field. For example, the principle of legality in criminal law and other values associated with the field today seem to influence statutory interpretation.

Moreover, these norms seem to be sensitive to their rationale. The rationale matters for their application, scope and force. Also, the norms do not seem to be completely isolated from each other. Often, there seems to be some coherence between them and they are interpreted and applied in light of each other. Finally, it can be noted in this regard that at least some norms of legal method, such as many norms of interpretation in some legal systems, seem to be flexible and appear in great number, even thousands. There need not be a single norm about interpreting exceptions, for example. They could be many in a legal system and, in a sense, be tailored to the type of statutory provision they are about.[229]

The non-coincidental flair of the non-legal norms might, of course, be explained in various ways. If the norms are social conventions, for instance, then they can develop in light of the participants' view of their subject matter or the view that fuels them may be inherited from ancient legal systems, such as Roman law, and shared across systems. The

228 See e.g. Helland (n 152) 190.

229 See e.g. Ross (n 2) 109, and Cross (n 2) 3.

reason why some norms are pervasive might be that the same social conventions tend to exist across legal systems. But the norms are parochial when different social conventions exist. The same reasons explain why some norms apply across legal fields but others only within some legal fields. Moreover, the social conventions might have developed in light of each other forming some sort of internal relations. So, the reason why the norm about exceptions is pervasively common might be because people across legal cultures have adopted the same view towards exceptions. And the norm about the systematic interpretation of the code exists because people in that place and time have adopted a certain view towards the code. Furthermore, possibly there are thousands of conventions about legal method in a legal system, including many conventions about exceptions. However, social conventions correspond to their subject matter in a contingent way and can have any content. There might be social conventions that exceptions are generally interpreted extensively and main rules narrowly. And there might be a social convention that each provision of the code in our example is interpreted in complete isolation from the other provisions. They would be odd social conventions given their subject matter but they could exist.

Contrary to social conventions, interpretive norms are connected to the content and characteristics of the legal materials and practices in a non-contingent way, even though the norms themselves are contingent. The reason why the non-legal norms are non-coincidental is that they are interpretations *of* legal materials and practices in their historical, political and social settings in light of the relevant ideas about law. They are supported by reasons that have to do with, among other things, features of the object and its context. Even though the connection between the non-legal norms and the object is not a mere contingent matter, the object consists of, for example, law-identifying practices that can be contingent. For instance, there may have been no reason to identify some legal

material as a source before a law-identifying practice formed but afterwards, especially if the practice is settled, the object has changed and there is such a reason. Therefore, interpretive norms share the flexibility of social conventions.

As was said above, some norms of legal method are pervasive but others are parochial. In the former case, the objects of interpretation share some characteristics and the relevant ideas about law are similar. This is why, for instance, the *lex posterior* norm appears in many but not all legal systems. Modern, sophisticated legal systems tend to work in a similar way and the relevant ideas about legislation and legislatures are broadly alike. The same goes for norms about interpreting exceptions restrictively and main rules extensively. In the latter case, however, a legal system has characteristics that are different from the features of other legal systems or the relevant ideas are dissimilar. An example is the tradition of legislative drafting and the view about *travaux préparatoires* as authoritative explanations in the Nordic legal systems. In both cases, the norms are explained in the same way and they are connected to features of the legal system. That is why it does not seem to be a mere happenstance that many legal systems share some norms but not others.

The explanation is the same for why some of the norms apply across legal fields but others are limited to or have special importance within some legal fields. In the former instance, they are supported by reasons that are not limited to particular legal fields but in the latter situation they are.

Furthermore, this explains why and how the norms are sensitive to their rationale. Their existence, content and scope depend on their supporting reasons. This affects when and how they are applied. This also explains, at least in part, the sense that the norms are

not isolated but form a whole or have some coherence between them. Together they form a part of a wider interpretation of the object. Moreover, many norms can be connected to the same idea about law. An example of that are the norms mentioned in relation to the idea of a code. Lastly, the norms, or at least some of them, can appear in great number, be flexible and tailored to their subject matter because they are interpretations of various parts of the legal materials and practices and their scope and application is sensitive to the object's features in each time and place, that is how the reasons in support of them apply in the situation.

The Challenge

It has been argued that the existence or the possible existence of theoretical disagreements is a challenge to some theories of law. What are theoretical disagreements? Lawyers disagree or, at least, can disagree about the law. Despite their disagreement, they argue as if there is a right answer. Their disagreement is not about historical or social facts, such as the enactment of a statute or that it contains certain words. They argue about something else.[230] Therefore, it is not an empirical disagreement.[231] The disagreements can run deep. Lawyers do not only disagree about the law, but also about how the law is determined.

230 Dworkin *LE* (n 3) 5. On p. 13, he says: 'Legal practice, unlike many other social phenomena, is *argumentative*.' On p. 14, he says: '… law as an argumentative social practice.'

231 Ibid e.g. 3-6. Dworkin connects theoretical disagreements with disagreements about the grounds of law, that is those propositions that make it the case that a proposition of law is true or false, and contrasts it with empirical disagreements.

They disagree about the grounds of law.[232] According to the approach here, it can be said that they disagree about norms of legal method.[233]

It is suggested that the account given here of legal method and its norms is not vulnerable to this challenge. However, it should be noted that the challenge is not taken to be that these are necessarily moral disagreements and that lawyers are reasoning morally.[234] That would be a particular and a controversial interpretation of this feature of practice. Therefore, the challenge is understood in a broader way involving reasons in general.

Theoretical disagreements are a symptom of the duality of law. Judges, lawyers and other law-appliers routinely give reasons for their conclusions about the applicable law that involve legal materials and practices.[235] This suggests that the law is determined by both social or historical facts and reasons. According to the simple image of the law and the elements of legal method, a statutory law, for instance, is determined by applying norms of legal method to legal materials and practices. That involves reasoning from the content of sources and interpretive factors in accordance with their role by using the norms. This includes interpreting a statutory provision, which is a reason-based activity. This explains, in part, the appearance of the duality of law.[236]

---

232 For theoretical disagreements, see Dworkin *LE* (n 3) 3-6. For the term 'fundamental disagreements', see e.g. p. 42-43.

233 For theoretical disagreements, see also Dworkin (n 156) 2108-2109, 2112-2113 and 2115-2116. Interestingly, there is another feature of practice that needs to be explained but will be left untouched here. Sometimes lawyers explicitly say that the law is unsettled and it should be settled with reference to some policy considerations.

234 Dworkin (n 156) 2120, connects disagreements about the 'the most fundamental conditions of law' to differences 'in their views about political morality'. See also p. 2124, where it refers to: 'differing political assumptions'.

235 See e.g. Mark Greenberg, 'How Facts Make Law' in Scott Herschovitz (ed), *The Jurisprudence of Ronald Dworkin* (OUP 2006) e.g. 228.

236 In part because a different explanation is needed for moral reasons.

If the law is determined, at least in part, by reasons of the sort just mentioned, then there can be theoretical disagreements. Lawyers can disagree about the law because they, for instance, disagree about the best interpretation of a statute. They give different arguments for the existence and content of the law that are not empirical disagreements. Recall Lexie? She, for instance, disagreed with Justus and claimed that the correct legal norm is that a landowner is competent to do what he pleases with his land save for explicitly laid down exceptions. Even though Lexie and Justus disagree, they both think they are correct.

Disagreements about the law are internal or external to norms of legal method in a particular legal system. They are internal when lawyers, more or less, share norms of legal method but disagree about their application. For example, two lawyers may draw different conclusions from analysing the text of a statutory provision, they may understand information in the *travaux préparatoires* differently or even attribute significance to different parts of it, even though they both share the same norms about textual interpretation and *travaux préparatoires*. These are theoretical disagreements in the sense that they are not mere empirical disagreements. And lawyers give arguments for why their interpretation is the best one. They think that they are correct because they believe their conclusion is supported by the strongest reasons.

Disagreements are external to norms of legal method when lawyers disagree on the particular norms of legal method in their legal system. Therefore, they apply different norms or rely on different kinds of arguments in support of their conclusion about the law. This was the case with Justus and Lexie. Justus, for instance, relied on a norm about a purposive interpretation, which Lexie rejected, but Lexie relied on a norm about textual

interpretation, which Justus rejected. Nonetheless, they both claimed that their legal norm is the correct one and gave reasons in support of their view.

So, lawyers like Justus and Lexie can disagree about norms of legal method. An external disagreement to norms of legal method can itself be internal or external to the account of the non-legal norms offered here. It is internal when lawyers roughly share or use the same method for determining the norms but disagree about which norms are the best interpretations of the legal materials and practices. They may, for instance, disagree about the relevant features of the object, its context or the relevant ideas about law. It is a theoretical disagreement because the lawyers disagree about which norms are supported by the strongest reasons. Justus and Lexie's contention is of this sort. They disagree about the norms but they both argue with references to features of their legal system.

A disagreement is external to the account of the non-legal norms when lawyers disagree about the determination of the law or the nature of the norms. One lawyer, for example, thinks that the norms are social conventions but another lawyer claims that they are interpretive norms. External disagreements can be even more radical. To give an example, a lawyer may claim that the law is not determined by norms of legal method at all. These disagreements are about or depend on views about the nature of law. Interpretive norms compete with other accounts as the best explanation of the phenomenon.[237]

[237] Lawyers and scholars can also disagree about (the nature of) a concept. See e.g. Dworkin *LE* (n 3) 87. We shall not delve so deeply here.

6 NORMATIVE CHARACTER

Norms are ought-standards in the sense that they direct human behaviour, belief etc.[238] Some norms prohibit or require, others permit and yet others empower. These are normative functions and they form the normative character of a norm.[239] Of which normative character are norms of legal method? It is an interesting question because it does not have an obvious answer. The normative character of at least some norms of legal method is puzzling. Consider this norm: 'What the Queen in Parliament enacts is a source of law.' On the face of it, the norm does not seem to prohibit, require, permit or empower. Nonetheless, this is not a descriptive statement but a standard for what counts as a source in a particular legal system. The norm might be viewed as placing judges or law-applying institutions under a duty to treat enactments of the Queen in Parliament as sources when they identify the law, that is with the function of requiring a specific behaviour of them. But it is not apparent that the norm should be understood in this way. The norm neither indicates the requiring-function nor does it identify a specific behaviour as its subject matter. It does not even identify the norm-subjects. At first sight, it merely declares that something is a source.

---

238 Referring to a norm as an ought-standard is inspired by Kelsen. A norm refers to what ought to happen according to the norm but not what will happen. It prescribes but does not necessitate or predict. Furthermore, it does not refer to whether the standard ought to exist or whether it is morally good. Contra Kelsen, norms are not treated here as genuinely normative. See e.g. Kelsen (n 53) 3-8, Kelsen (n 59) 35-37, Kelsen (n 26) 1-9, and Kelsen (n 47) 50. See also von Wright (n 47) 4, for norms that are prescriptive.

239 For the term 'normative function' as opposed to 'social function', see e.g. Raz (n 47) 163-180. Hart (n 35) 27 and 38, discusses rules in light of different social functions. Raz (n 32) 178-179, warns against confusing social function and normative type or character. For what functions are, see Leslie Green, 'The Functions of Law' (1998) 12 Cogito 117-124.

Although the question is interesting, it is too indiscriminating as it stands. A moment's thought leads to the realization that norms of legal method do not all have the same normative character. This is unsurprising given their variety. After all, they were divided into diverse categories in Chapter Two. Which norms of legal method are, then, of which normative character? The aim of the chapter is to answer this question. A case-by-case analysis of all possible norms of legal method would be unwieldly. Instead, our course of action will be to investigate whether norms within one and the same category or of a certain sort regulate their subject matter by performing a specific normative function and, if so, then which one. If a norm cannot be a norm of a specific category or a certain sort without performing a normative function, then it necessarily must be of a certain type. Through this exploration we shall discover whether norms within one and the same category of norms of legal method necessarily are of the same normative character and, if so, then which one.

Before our question can be answered, though, we need to know more about the normative character or functions of norms and the different types of norms in that regard. It will be argued that there are, at least, four types. In addition to duty-imposing, permission-granting and power-conferring norms, there are qualifying norms. A special attention will be given to qualifying norms because of their significance for understanding some norms of legal method and the insufficient attention they have received in jurisprudence. Explaining and establishing qualifying norms will make us stray from norms of legal method for a while. After that, the diverse categories of norms of legal method will be analysed in light of the four types of norms. It will be argued that some centrally important norms of legal method are qualifying norms.

Why does any of this matter, though? Norms of legal method, as well as (other) legal norms, are routinely applied successfully without the need to entertain thoughts about their normative character or, for that matter, whether they are legal norms at all. However, this does not entail that comprehending the different normative character of norms is of no import. It furthers our understanding of what exactly the norms do and how some norms are similar but others unalike in this respect. It may dispel confusion and lead to a more rigorous application of the norms. Also, it is of significance knowing whether a norm, like the one about the enactments of the Queen in Parliament, actually requires specific behaviour of someone and, if so, then which behaviour of whom. A clear sight might also make us appreciate normative functions of norms that may have hitherto received inadequate attention. Finally, the knowledge elucidates the nature of legal method. How so?

Consider these two examples of norms of legal method: 'Precedents are sources of law' and 'Statutes that are *in pari materia* form the context of a statute'. Are the norms (best understood as) requiring some behaviour? If so, then who is placed under a duty according to them? If they require judges to act in a certain way, then how should other people, including lawyers, professors and citizens, apply them? How can it be that these norms do not seem to be special to judges if they only obligate judges? It seems odd, for instance, that only judges should consider precedents to be sources of law and interpret statutes in light of other statutes but not lawyers, professor and citizens. But that follows, insofar as their content goes, if the norms only impose duties on judges. Furthermore, does it have the consequence that legal reasoning is fragmented since there are special norms of judicial reasoning? Even if judges and others can apply norms of legal method effortlessly without considering these matters, the stakes are not trivial. The chapter concludes by answering some of these questions by maintaining that since some centrally important

norms of legal method are qualifying norms, they are not special to judges. We begin, however, with the normative character of norms and examples of ordinary legal norms.

6.1 Norms and their Normative Character

'For the purpose of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.' So declares the first article of the United Nations Convention on the Rights of the Child.[240] Is this a legal norm?[241] And if it is, what sort of legal norm? The very next article bans discrimination. It is presented in familiar language. It begins by stating: 'State parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind'. Clearly, this is a legal norm that imposes a duty on state parties to not discriminate as indicated by the word 'shall'. But the first article is different. It is not couched in the same language. It declares that a child 'means' something for the purpose of the Convention. It is a legal definition.

Maybe the first article of the Convention is an incomplete or a fragmented legal norm. It is merely a condition or a part of the other legal norms. An example is the norm in the second article banning discrimination. But why exactly is the norm incomplete?

Perhaps the first article does not embody a legal norm at all. The article contains information in a similar way as the preamble to the Convention. The preamble announces that state parties, among other things, 'Recognizing that the child, for the full and

240 United Nations Convention on the Rights of the Child. General Assembly resolution 44/25 of 20 November 1989.

241 More accurately, does it embody, contain, ground or express a legal norm?

harmonious development of his or her personality, should grow up in the family environment, in an atmosphere of happiness, love and understanding' and 'Taking due account of the importance of the traditions and cultural values of each people for the protection of harmonious development of the child'. Even though these statements are a part of the Convention, they do not establish legal norms. They do not, for instance, bring into existence legal rights or duties irrespective of the use of the word 'should'. Instead, they give context and information to be taken into account when the articles of the Convention are interpreted.[242] Maybe the first article merely gives information about how the term child should be interpreted in the following articles. However, the definition of a child is not a part of the preamble. It is presented alone in the opening article of the Convention. It appears as a separate article like the one banning discrimination.

Possibly the first article can be interpreted to be of the same sort as the second one. It contains a norm that imposes a duty on State parties to treat a person below the age of 18 years as a child for the purpose of the Convention. The declarative formulation is merely stylistic. But it is not clear it should be understood in that way. There is also something peculiar about the idea that only State parties should consider a person below the age of 18 years a child for the purpose of the Convention but not others who engage with the legal instrument. And why not simply phrase the article in these terms, then? The following Convention articles frequently say that State parties 'shall' do something. The first article is different or so it would appear.

The questions posed and the possibilities raised concern, among other things, the normative character of the first article of the Convention. The term 'normative character'

242 Of course, that depends on the applicable norms of interpretation.

is in need of a further explanation.[243] Let us start with a basic formulation of a norm: someone ought to do or belief something in some circumstance. For instance, a doctor must inform a patient about his rights before a surgery. The basic formulation has four elements that form the norm's content. They are a norm-subject, a normative character, a subject matter and a condition of application.[244] The norm-subject is indicated by the word 'someone' and is the 'doctor' in the example. The normative character is indicated by the words 'ought to do' and the word 'must' in the example. The subject matter of the norm is indicated by the word 'something' and the words 'to inform a patient about his rights' in the example. And the condition of application is indicated by the words 'in some circumstance' and 'before a surgery' in the example. The second article of the Convention is also illustrative. Its norm-subject is a state party, its subject matter is discrimination, its condition of application is all instances that occur within a state party's jurisdiction and its normative character is that the subject matter ought not to be done. The elements of a norm address the issues about who (the norm-subject), what (the normative character and subject matter) and when (the condition of application).

Normative character refers to the specific type of oughtness or normative function of the norm. It is the way in which it guides, prescribes or directs human behaviour, which is usually the subject matter of a norm.[245] Among the normative functions are to require

---

243 See von Wright (n 47) 71, and Raz (n 47) 165, who speak of a (normative) character of a norm. Raz (n 32) 50, and Marmor (n 159) 45, call it the deontic operator. Ross (n 47) 117, speaks of a directive operator.

244 For an analysis of norms, see e.g. von Wright (n 47) 70-78. He says that the norm-kernel is constituted by character, content (here called subject matter), and condition of application. See also Max Black, 'Notes on the meaning of "rule"' (1958) 24 Theoria 107,120, Max Black, 'The Analysis of Rules' in his essay collection *Models and Metaphors. Studies in Language and Philosophy* (Cornell University Press 1962) 108, Raz (n 32) 50, and Marmor (n 159) 45. See also Ross (n 47) 107, who speaks of the subject, situation and theme (action-idea) (here called subject matter). See also Green (n 34) 110. See furthermore Schauer (n 64) 7-10 and 23.

245 See in this context e.g. von Wright (n 47) 71, and Raz (n 47) 165. The latter says the normative character refers to the logical properties of a norm.

(ought to do), to prohibit (ought not to do), to permit (ought to allow or not be under a duty) and to empower (ought to happen).[246] By altering the normative character of a norm, its content changes. Often, the normative functions connect the norm-subject to the subject matter in a particular way. It is the doctor who is required to do the subject matter and a state party is prohibited from doing the subject matter in the examples. The reason why the first article of the Convention is puzzling is that it is not obvious that it should be understood in light of the normative functions just listed; its normative character is unclear.

Three things merit notice before continuing. Firstly, not all norm-formulations explicitly state all the basic elements, such as their norm-subjects.[247] The norm about the Queen in Parliament and the first article of the Convention are examples. Of course, the norm-subjects, as well as other elements, may be implicit or discoverable in light of the context or even other norms. They may also be hypothetical or conditional in the sense that one ought to do something if one has a reason to engage in the activity governed by the norm.

Secondly, the subject matter of norms is usually some human behaviour or conduct.[248] However, the subject matter is not limited to external, physical acts, which will hereafter be used in a narrow sense and called 'behaviour' or 'conduct'. The subject matter can concern other human 'acts', such as feelings (emotions), attitudes and thinking.[249]

---

246 See e.g. von Wright (n 47) 71, and Black *MM* (n 244) 108.

247 Of course, this depends on what is a complete norm. For the term norm-formulation, see von Wright (n 47) 93. For rule-formulations, see Black *MM* (n 244) 100, and for linguistic form, see Ross (n 47) 36.

248 See e.g. Kelsen (n 59) 35, Kelsen (n 26) 29, and Black *MM* (n 244) 107.

249 Kelsen (n 26) 92, discusses external and internal behaviour. Norms about e.g. belief and logic will be not be discussed here. When discussing norms that direct thinking, it will refer to other mental acts than belief and reasoning (logically). For different types of norms, see e.g. von Wright (n 47) 1-4.

Examples are the norms ‘Love thy neighbour’ and the Tenth Commandment about not coveting, among other things, your neighbour’s partner.[250] These norms direct feelings or attitudes. And a mother can tell her sons: ‘You should always think well of your sister’. This norm directs thinking.

Notwithstanding, it might be wondered whether there can be legal norms that only direct thinking.[251] After all, legal norms that may seem to be about thinking turn out to be about behaviour. The freedom of thought and conscience, for instance, concern the behaviour of states. They are not to indoctrinate us by some conduct.[252] And there is a pragmatic problem about surveilling and enforcing acts of thinking that do not manifest themselves in external acts. However, we can imagine a legal norm regulating thinking. A tyrant may ban ill thoughts of himself and make it a punishable offence.[253] With rapidly improving technology, there is a real possibility to surveil and enforce such norms in the future. But we need not wait for the future. Deviations from norms about thinking come to light in the context of external, physical acts, such as expression or when applying norms about behaviour. This broad understanding of the subject matter is relevant for qualifying norms, as we will see in a moment.

Thirdly, a normative character can be analysed in different ways. Since it concerns the way in which norms direct, guide or prescribe, the point of view adopted here is one of ordinary persons who use norms in daily life in variety of ways and for various purposes. When discussing norms of legal method later on, it is the point of view of anyone who

---

250 For norms regulating feelings, thoughts and desires, see e.g. G.E. Moore, ‘The Nature of Moral Philosophy’ in William H. Shaw (ed), *Ethics* (OUP 2005) 139 and 143-144. Kelsen (n 26) 92, classifies the first example as a norm about internal behaviour.

251 Or whether there are purely theoretical reasons in law.

252 See e.g. Article 9 of the European Convention on Human Rights.

253 Consider also in this context ‘thoughtcrime’ in George Orwell’s *1984* (William Collins 2021).

wants to determine the law and applies the norms. Usually, lawyers are the ones most preoccupied with them. The focus is on how the norms are 'thought of, spoken of and used in social life' and law.[254]

6.2 The Variety of Norms

Plainly, not all norms have the same normative character. They can be distinguished into several types. Four of them will be discussed for our purposes. The types of norms in question are those that command, permit, empower and qualify. The first three types are well known.[255] They can be illustrated by an everyday occurrence. Stella is driving on the street but ignores a red light. A policeman pulls her over and gives her a ticket. Three types of norms are at play, which could be put like this: 'Vehicles must stop on a red light'; 'Vehicles may drive on streets'; and 'The police can fine drivers for a traffic violation by issuing a ticket'. The first norm forbids, the second norm permits and the third norm empowers. Let us briefly consider these types of norms.

The first type can be called duty-imposing or mandatory norms.[256] They are norms that prohibit or require an action. In other words, they command. The content of these

---

254 For the quote, see Hart (n 35) 41. It follows that the norms will not be (strictly) analysed in light of whether they can be logically reduced to certain types. See e.g. Ross (n 47) for that kind of exercise. By this is not meant, though, that they will be analysed in light of social functions in the sense explained by Raz (n 47) 163-180 and analysed by Green (n 239).

255 Ross (n 50) 118, distinguishes between norms of conduct and norms of competence. Hart (n 35) 27-38, distinguishes between duty-imposing and power-conferring rules. Kelsen (n 26) 1 and 96-102, speaks of the functions of norms as commanding, permitting, empowering and derogating. Raz (n 32) 9, and 49-107, discusses mandatory, permissive and power-conferring rules. See also Raz (n 106) 147-156 and 170-175, where he discusses duty-imposing and power-conferring laws as well as permissions. von Wright (n 47) 71, discusses obligation-norms (must or must not) and permissive norms (may). On page 192, he discusses powers and competence norms. See further Honoré (n 106) 83, who identifies six types of laws.

256 For the former term, see Hart (n 35) 27-38. For the latter term, see Raz (n 32) 73-85, Kelsen (n 26) 96-98, and Schauer (n 64) 3-6.

norms is to impose a duty on someone to either do or not to do something. They are often, but need not be, indicated by words like 'shall' and 'must'. Also, they can be couched in the language of rights where there is a corresponding duty. They are mandatory in the sense that they are non-optional. The second article of the Convention on the Rights of the Child, which bans discrimination, is of this type. Numerous other examples of the norms could be listed but here are two: 'Driving faster than 90 km per hour is forbidden' and 'Everyone is required to hand in their tax return before 1 February every year'.

The second type of norms can be called permission-granting or permissive norms since they allow some action.[257] Their content is not to place the norm-subject under a duty but to licence or enable. In other words, they permit. They are sometimes indicated by the words 'may' or even 'can'. Permission-granting norms are not mandatory. Duty-imposing norms are about what should or should not be done but permission-granting norms are about what may be done. Here is an example: 'Pedestrians may use sidewalks.'

The third type of norms can be called power-conferring norms or norms of competence. They confer a capacity, competence or facility on someone to change their or others legal (or normative) position. In other words, they authorise or empower.[258] For instance, they confer powers on individuals to mould their rights and duties and on institutions to make law.[259] Power-conferring norms can also limit power by regulating legal (or normative) disabilities. They are sometimes indicated by the words 'can' or

---

257 von Wright (n 47) 85-92, says it is open doubt whether permissive norms have and independent status. See also Raz (n 32) 84-97, and Kelsen (n 26) 98-102.

258 Hart (n 35) 27-38, uses the former term. For the latter term, see Ross (n 50) 41-45, and Ross (n 47) 118. For this type of norm, see also Kelsen (n 59) 90-91, and Kelsen (n 26) 102-106. Raz (n 32) 104-107, analyses power-conferring norms in terms of reasons.

259 Hart (n 35) 26-35 and 81. In the endnotes, Hart cites Alf Ross and continental jurisprudence for the distinction between duty-imposing and power-conferring rules. See p. 284.

'cannot'. Many examples can be given but here are a few: 'Everyone of age and sound mind can contract with another person by making a promise that is accepted or by accepting a promise'; 'Congress has the legislative power'; or 'Parliament makes the law'. The content of these norms is not to place someone under a duty or to merely allow or enable some conduct. Rather, it is to empower someone to change the legal (or normative) position. However, many acts are capable of changing the legal position, for example, those done according to or in violation of duty-imposing and permission-granting norms. What makes power-conferring norms distinct?[260]

They regulate how someone can create, change or cancel norms (or rights and duties) by performing some action or limit that activity. Put differently, they regulate a norm-creating conduct by stating what ought to be done by whom and when in order to create a norm (or a right or a duty).[261] A police officer issuing a ticket is a norm-creating conduct. When the police officer performs that conduct, an individual norm is created, that is a duty-imposing norm that Stella should pay a certain amount of money as a fine. In contrast, it is a rule in chess that 'the bishop can move any number of vacant squares in any diagonal direction'. The chess rule is not a power-conferring norm in this sense since it does not regulate a norm-creating conduct. No norm is created, changed or cancelled by moving the bishop according to the rule (nor is a right or a duty created or abolished *per*

---

260 Maris Köpcke, *Legal Validity. The Fabric of Justice* (HP 2019) 24-25, says that legal powers are facilities to change the legal position with the aim of changing them by the method of say-so. This description is either vague or relatively open-ended as to what sort of changes to the 'legal position' are relevant. As will become clear in a moment, here the relevant changes are, at least, the creation, change and cancellation of a norm (or a right or a duty).

261 In other words, they regulate which conduct ought to be done or is needed in order to bring a norm into existence. Power-conferring norms can also be analysed according to the basic elements of a norm thusly: The norm (or the right or the duty) is the subject matter of the power-conferring norm. The normative character is that subject matter ought to happen (or come into existence). The conduct is (among) the condition(-s) of application and the empowered person is the norm-subject. The norm-subject of the created norm may be another person. On power-conferring norms, see e.g. von Wright (n 47) 190-101. See also Ross (n 47) 96. Kelsen (n 26) 102, as well as Raz (n 32) 103, include the power to apply norms.

se). The chess rule merely allows or enables the move within the game and is best understood as a permission-granting norm.[262]

Duty-imposing, permission-granting and power-conferring norms have a distinct normative character and are, therefore, best viewed as different types of norms.[263] Viewing a power-conferring norm, for instance, as a fragment or as analysable in light of a duty-imposing norm, which is possible to do from certain perspectives, obscures more than it illuminates.[264] But are there any other types of norms? 'In distinguishing certain laws under the very rough head of laws that confer powers from those that impose duties …, we have made only a beginning.'[265] Adding permission-granting norms to the list does not complete the task. There is a fourth type of norms that often goes unnoticed but permeates law and

---

262 Raz (n 32) 115, describes rules about chess moves as power-conferring rules. Power-conferring norms are here understood narrower with a corresponding increase in the scope of permission-granting norms. Even if applications of norms are included, the chess rule is not a power to apply some other rule. The chess rule only seems to be a power-conferring rule because the situation is unregulated beyond the rules of chess.

263 Interestingly, Hohfeldian types of rights map onto the different types of norms. Claim-rights and duties match duty-imposing norms, privileges or liberties correspond to permission-granting norms, and powers and immunities with power-conferring norms and their absence. See Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 YLJ 710. See also Fuller (n 106) 134.

264 Hart (n 35) 26, 32-33 and 35-42. For the opposite view, see e.g. Richard Tur, 'Variety or Uniformity?' in Luís Duarte D'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (OUP 2013) 37-59. Ross (n 47) 120, says one can transcribe a norm of competence into a norm of conduct without changing its meaning.

265 Hart (n 35) 32. Hart's target is theories that reduce all laws to a single type of law. His aim is to discredit that view. He does not claim that by distinguishing the two types of laws as to their content, he has exhausted all the varieties of laws. On p. 29 and 31, he describes some rules as being 'behind' some legal powers.

is of significance for various normative enterprises.[266] They can be called qualifying norms.[267]

Qualifying norms constitute the normative status, state of affairs or situation for some purpose or in some context. They are about which normative status, state of affairs or situation ought to be the case.[268] Whereas duty-imposing and permission-granting norms are 'ought to do' norms, that is the subject matter ought to or may be done, qualifying norms are 'ought to be' norms, that is the subject matter ought to be the case.[269] A further light will be cast on this distinction in the next section.

Some qualifying norms declare what counts as something in some context. These norms categorise, classify or define. Legal definitions, like the first article of the Convention on the Rights of the Child, belong to this type of norms.[270] Persons below the age of 18 years count as children for the purpose of the Convention. A different meaning can be given to the term child in other legal instruments. Another example is the third paragraph of article 289 of the Treaty on the Functioning of the European Union. It states:

---

266 Unnoticed is perhaps too strong. They are sometimes mentioned in passing. Joseph Raz, *The Morality of Freedom* (OUP 1988) 44, says: 'But authorities … do much else besides [than imposing duties]. They can declare that certain day shall be national holiday, that a certain organization shall have legal personality, that a person shall be granted citizenship or shall be divorced …' Raz (n 127) 134-135, says in a footnote: 'Authorities do much more than impose duties. But arguably whatever they do …change status, create and terminate legal persons (corporations and their like), regulate the relations between organs of legal person … they do by imposing duties …'

267 They could also be called constitutive norms. The reasons why that term is not used here are twofold. Firstly, they will be distinguished from what have been called constitutive rules. Secondly, in the next chapter we will discuss the constitutive function that is not limited to this type of norm. The terms classifying or categorising norms are too narrow. For the language of qualifying, see e.g. Hart (n 35) 70, who discusses rules that 'qualify the legislator' and Kelsen (n 53) 4, about the qualification of an act as an execution of the death penalty.

268 See in this context e.g. von Wright (n 47) 3-6, about laws of thought that are in between descriptive and prescriptive; they determine.

269 'Ought to be' norms do not here refer to that some person ought to be, for example, truthful or brave. See Moore (n 250) 142. Rather, some normative status, state of affairs or situation ought to be the case. Ross (n 47) 117, speaks of 'so it ought to be' as the directive operator of norms.

270 See in this context Niels Kristian Sundby, *Om normer* (Universitetsforlaget 1974) 77, and Eckhoff and Sundby (n 14) 50, 125 and 133.

‘Legal acts adopted by legislative procedure shall constitute legislative acts.’ Articles about the purpose of a statute are also qualifying norms. Article 3 of the Treaty on European Union is an example. The first paragraph states: ‘The Union’s aim is to promote peace, its values and well-being of its people.’ This is (or counts as) the aim for the purpose of European Union law. Qualifying norms, furthermore, create and delimit the scope of concepts and categories; they construct and confer a status on something or someone .[271]

To give more examples, sometimes property law defines or constitutes what counts as property. These definitions make their mark on the law and much effort is spent on interpreting and applying them. In German law, to give an instance, article 90 of the German Civil Code declares: ‘Only corporal objects are things as defined by law’. The opening line of article 90a continues by stating: ‘Animals are not things.’ It follows that immaterial entities and animals do not count as things. This is a narrower definition than, for example, in Austrian law, where article 285 of the Austrian Civil Code states that ‘everything that is distinguished from the person, and serves the use of men, is called a thing in the sense of the law’. These legal definitions, like the first article of the Convention on the Rights of the Child, are of immense importance because of their legal effect or consequence. They determine what counts as property and, thereby, to what property rights and duties attach. The same goes for legal norms that define an owner.

Qualifying norms can regulate the scope of rules, rights and duties.[272] The aforementioned article 90a of the German Civil Code does not simply state that animals are not things, it places them within the ambit of rules about things by declaring: ‘They are

---

271 No stance is taken here on whether qualifying norms should be further distinguished. See in this context, Honoré (n 106) 83, who mentions existence laws, categorizing rules, rules of scope, and, if they are not limited to rules conferring powers, position-specifying rules.

272 See in this context Honoré (n 106) 83.

governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.' The normative state of affairs -the normative situation- is that rules about things apply to animals even if they are not things. More examples can be given. Many acts begin with articles that regulate their scope. The following one may be mentioned: 'The administrative act applies to cases where an administrative decision is taken, which is an individual decision taken by an authority that determines the rights or duties of a person.'[273] The first part of the provision fixes the scope of the act by declaring or stipulating in what circumstances it applies. The latter part defines 'an administrative decision' for the purpose of the act. The citizens have the rights and authorities bear the duties laid down in the act only when the condition of taking an administrative decision is satisfied. The stakes are high.

Some qualifying norms stipulate conditions and by that delimit concepts or categories. An example of that is article 1 of the German Civil Code, which states: 'The legal capacity of a human being begins on the completion of birth.' The next article says: 'Majority begins at the age of eighteen.' Yet other qualifying norms establish a legal category or a concept as such. The following article is exemplary: 'Citizenship of the [European] Union is hereby established.'[274] The article continues by stating who counts as a citizen: 'Every person holding the nationality of a Member State shall be a citizen of the Union.' This legal norm brings the concept or category of European Union citizenship into existence simply be declaring it so. And the norm defines who counts as a citizen for the purpose of European Union law. The concept of citizenship and who counts as a citizen

273 The Icelandic Administrative Act No. 3/1993, s 1(2).

274 Article 20(1) of the Treaty on the Functioning of the European Union.

matter. Rights and duties, enumerated in other paragraphs and articles, attach to the status.[275]

Although most of the examples given have been within the field of law, qualifying norms are not limited to law. Consider rules of games, for example.[276] It is a rule in chess, as mentioned before, that 'the bishop can move any number of vacant squares in any diagonal direction'. But which one of the pieces is the bishop? That is designated by a qualifying norm, such as: 'The piece with the round top and a slit cut into it is the bishop'. Better yet, there might be a picture accompanied with the text: 'Bishop'. Or when a parent teaches a child how to play and points to the piece and says: 'This is the bishop'. There are not only qualifying norms in chess designating the other pieces but also their number, the number of players, characteristics of the chess board and, possibly, the starting position of each piece.[277]

Games also have goals.[278] The goal of chess is to checkmate the opponent's king. But what qualifies as check or checkmate? The first is a position where a player's king is under a threat of capture on their opponent's next turn but the latter is a position where a player's king is checked and has no possible move to get out of the check. The norms about check and checkmate either constitute the normative positions or, at least, define the terms. These positions count as check and checkmate for the purpose of chess. The same applies to other games. The aim of soccer is to score more goals than the opposing team before the

---

275 Article 20(2) and 21-25 of the Treaty on the Functioning of the European Union.

276 Raz (n 32) 114-123, analyses games with emphasis on chess. Chess is also used as an example by e.g. John R. Searle, *Making the Social World. The Structure of Human Civilization* (OUP 2010) 9-11, Ross (n 47) 54-54, and Marmor (n 159) e.g. 36-39.

277 Raz (n 32) 117, says that these rules are not norms since they do not guide behaviour but they have indirect normative force.

278 Raz (n 32) 117-123.

end of the game. What counts as scoring? ‘A goal is scored when the ball goes into the goal, that is passes completely over a goal line between the goal posts.’ Qualifying norms like these are a feature of games.

What emerge from all of this is that qualifying norms have a distinct normative character or function. While duty-imposing and permission-granting norms prescribe that the subject matter, which is some act, ought to or may be *done*, qualifying norms prescribe that the subject matter, which is some normative status, state of affairs or situation, ought to *be the case*. The first article of the Convention does not command, permit or empower, it qualifies. It imposes the status ‘child’ on persons below the age of 18 years for the purpose of the Convention.

6.3 Objections to Qualifying Norms

There is no denying the existence of the articles or the provisions in the codes, statutes, conventions and treaties mentioned above. Provisions like these are commonplace and they can make appearances in other sources of law as well. These types of norms are also an important feature of games. What has yet to be established is whether they are indeed a distinct type of norms as to their normative character.[279] It is not obvious which test should be used to assess them in this regard.[280] In light of the scope of the thesis, the route taken is to address three objections and to distinguish them from constitutive rules. By doing this, we gradually learn more about qualifying norms as well as take steps to establish them as

279 Raz (n 32) 117, doubts that these types of rules are norms since they do not guide behaviour.

280 As previously mentioned, Hart (n 35) 41, analyses whether rules ‘… are thought of, spoken of and used in social life differently, and they are valued for different reasons’.

a distinct type of norms. The objections were identified when discussing the first article of the Convention on the Rights of the Child. The first objection is that qualifying norms are not really norms since they do not direct or guide behaviour. The second objection is that qualifying norms really are duty-imposing norms. The third objection is that qualifying norms are merely fragments of complete norms. Let us explore these objections and the distinction.

Are They Norms?

The first objection denies that qualifying norms are indeed norms. The reason is that they do not direct behaviour or conduct. The norms about the meaning of a child, that animals are not things and that the bishop is the piece with the round top are not about external, physical acts that should or may be done. Since they relate to such acts by being taken into account when genuine norms are applied, they have 'indirect normative force'. They can be considered as rules in that sense but they are not norms.[281]

It might be thought that the objection is based on the premise that what is directed must be some behaviour in a narrow sense. If it is accepted that the subject matter of norms can concern or entail other 'acts', such as thinking, then it is not clear that the norms only have an 'indirect normative force'. They establish some normative status, state of affairs or situation for some purpose, sometimes by making it the case that something counts as something else. They direct thinking but not behaviour. It could be said that we ought to

[281] Raz (n 32) 117. Here it is set aside why norms are limited to those that 'directly' guide or what is direct enough in that context. It might be wondered whether the formulation of the example of the ultimate rule of recognition ('What the Queen in Parliament enacts is law') is a rule in this sense. That is, though, not Hart's view. For dependent norms, see Kelsen (n 53) 51 and Kelsen (n 26) 206.

think of a person below the age of 18 years as a child for the purpose of the Convention; that animals are not things but fall within the scope of the rules about things for the purpose of German property law; and that European Union citizenship exists for the purpose of European Union law. In this way, qualifying norms generate a sense of fiction or make believe.[282]

This may sound strange at first but consider games. We ought to think about the piece with round top as the bishop for the purpose of playing chess. The norm serves as a scheme of interpretation in this context and we see or think about the piece as the bishop and treat it as such for the purpose of the rule regulating its moves. When we have internalized the norm, we do not even give it much (conscious) thought. Interestingly, the very same piece can be used in other games, for example, when we have lost a token. The 'bishop' could represent a player in Clue, such as 'Mrs Peacock', or even a murder weapon, for instance, the candlestick. We can think about the piece in different ways in different contexts. We do that in light of standards, such as 'this piece is "Mrs Peacock" for the purpose of this game of Clue.' The qualifying norms make it the case that the piece is the bishop for the purpose of playing chess and Mrs Peacock for the purpose of this game of Clue.

Since norms are ought-standards, we ought to think about it as such. If we treat the piece as the rook and the piece with the horse like features as the bishop in the context of the rules regulating their moves, we are deviating from the rules of the game. Someone who knows chess might exclaim: 'What are you doing?' Responding: 'I'm moving the bishop' warrants the reply: 'That is wrong! This is not the bishop.' The situation is the

[282] By fiction is not meant that it is false. Rather, it is like children playing doctor. One child says to the other: 'I'll be the doctor. You'll be the patient.' While they are not really a doctor or a patient in a medical context, they have these statuses for the purpose of playing the game.

same for the norms about check and checkmate and scoring in soccer. And the same applies in law. A German judge that considers immaterial entities as things has gotten the law wrong irrespective of any external, physical act being done. That being said, the application of qualifying norms can be closely tied with external acts, such as speaking. Even though unsuccessful applications of a qualifying norm can manifest itself in an external act, they are not limited to them. A person who thinks that the French word *pleu* means plums in English is wrong irrespective of uttering the translation out loud.

Are They Duty-Imposing Norms?

The second objection states that qualifying norms can be understood as duty-imposing norms. It is possible to reformulate the norms. For instance, German judges are under a duty to treat material entities as things and state parties are required to treat persons below the age of 18 years as children. Curiously, in all of the examples given of qualifying norms above, none identifies a particular norm-subject or clearly imposes a duty on them.[283] Their primary function is qualificatory. Reformulating the norms distorts or obscures their actually content; it misrepresents and changes what was laid down in the case of enacted norms. Even when an attempt is made at reformulating the norms, they still have an important qualificatory character. However, when they are reformulated, there is a danger that more is lost than gained by the exercise. The duty becomes the focus and the qualifying function is obscured, ignored or minimized.

283 Granted, the norm establishing European Union citizenship uses the word 'shall' but it can easily be exchanged for the word 'is' without changing the meaning of the provision.

It could be responded that no reformulation is needed since the concepts or words used mean or entail that someone is under a duty to act in a certain way. For example, if something is 'law' or 'a source of law', then that means that judges are obligated to apply it.[284] However, it is unclear whether this 'meaning' is derived from linguistic conventions or (philosophical) concepts. If it is the former, then, surely, they are contingent conventions between linguistic communities. The word 'law', for instance, does not mean exactly the same thing in diverse linguistic communities. Moreover, the word might be understood in the context of other words or rules about the phenomenon or even a rationale attributed to it. Even if members of a linguistic community tend to associate a word with an obligation on judges, that does not mean that the word itself means this. If it is the latter, then two things merit notice. Firstly, it is not plain that the norms reflect or embody a philosophical concept. Secondly, the concepts are contested.

Moreover, even if it turns out to be the case that some terms can be understood as imposing a duty on someone, it does not apply across the board. The words 'children', 'things', 'administrative decision', 'majority', 'legal capacity' and 'citizenship' do not as such and standing alone mean or entail that someone is under a duty. This is even clearer in the case of the words: 'bishop', 'check', 'checkmate' and 'goal'. It follows that not every qualifying norm uses a term, which on its own 'really' means that someone is under a duty to act in a certain way.

Before it was said that qualifying norms direct thinking. Perhaps the objection should be understood in light of that. According to this understanding, qualifying norms are just duty-imposing norms that direct thinking. Even though their subject matter is a

[284] Honoré (n 106) 87-88, says that a rule making something an offence is not a normative rule but a categorising one.

mental act, their normative character is to require or prohibit. An initial response involves pointing out that qualifying norms, or at least some of them, do not seem to place a specific norm-subject under a duty. They apply to, for example, whoever wants to play chess or to determine the law. But the objection can be adapted. Accordingly, qualifying norms are simply hypothetical or conditional duty-imposing norms directing thinking. This is a powerful objection that calls for the drawing of a subtle distinction.

None of the examples of qualifying norms state that one ought to think in a certain way. Contrary to the duty-imposing norm 'You must think well of your sister', qualifying norms are not directly about what someone ought to do. Instead, they are norms about what ought to be the case.[285] They are about what *is* or *counts as* something normatively speaking, but not what should be *done*. They establish some normative status, state of affairs or situation by declaring that it so. Whereas thinking is a part of the subject matter of the norm about the sister, it is not a part of the subject matter of qualifying norms. A child that uses a word wrongly, for instance, has not breached a duty. It has simply gotten the word wrong.

Even though the subject matter is not directly about thinking, in order to consider something as something else, one needs to think of it in these terms; thinking is entailed. In light of this, it can be said that qualifying norms direct thinking in an a more indirect or an implicit way than duty-imposing norms. By thinking about the piece with the round top as the bishop in the context of chess, the norm has been successfully applied. Because the structure of the norms is different as to their basic elements, that is the subject matter and normative function, they direct or relate to thinking in a different way. If the subject matter

[285] It is true that the norm-formulations do not include the phrase that something 'ought to be the case'. Instead, the norms declare that it is the case. Nonetheless, it follows from their nature as qualifying ought-standards.

of a norm is thought to be limited to an act, then it stands to reason that the normative functions are (logically) limited.[286]

It is submitted that qualifying norms are 'thought of, spoken of and used in social life' and law in a different way and valued for different reasons than duty-imposing norms.[287] Furthermore, it is valuable to be able to organise or shape our normative world by qualifying, that is by constituting what ought to be the case for some purpose.

Are Qualifying Norms Constitutive Rules?

Now, it might be wondered whether qualifying norms are simply constitutive rules in new clothes. Some have drawn a distinction between regulative and constitutive rules. The former rules regulate antecedently existing behaviour, that is a behaviour that does not logically depend on the rules, whereas the latter do not merely regulate but also create or define the behaviour. It is said that the behaviour is not logically independent of the rules that define it.[288] An example of the former rule is: 'Vehicles should be driven on the right side of the road'. The behaviour can be described or understood without a reference to the

---

286 Ought to do norms concerning a conduct also require thinking in order to be applied. However, they require thinking to be understood (and even in order to physically act) but their subject matter is usually an act that ought to or may be done. While thinking (an act) is required to apply both duty-imposing and qualifying norms, they relate to thinking in a different way. See in this context Raz (n 32) 105-106.

287 For the quote, see Hart (n 35) 41.

288 For this distinction and types of rules, see e.g. John Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3, 24-26, John R. Searle, 'How to Derive "Ought" From "Is". (1964) 73 The Philosophical Review 43, 55-56, John R. Searle, *Speech Acts. An Essay in the Philosophy of Language* (CUP 1969) e.g. 34-38, John R. Searle, *The Construction of Social Reality* (The Free Press 1995) e.g. 27-29 and 43-44, Searle (n 276) e.g. 9-11, Ross (n 47) 53-57 and 131, Black *MM* (n 244) 123-125, David Lewis, 'Scorekeeping in a Language Game' (1979) 8 Journal of Philosophical Logic 339, 343-345, and Schauer (n 64) 6-7. See also e.g. R.M. Hare, 'The Promising Game' (1964) 70 Revue Intern. de. Philosophie 398, and B.J. Diggs, 'Rules and Utilitarianism' (1964) 1 American Philosophical Quarterly 32, 38.

rule. An example of the latter rule is: 'The bishop can move any number of vacant squares in any diagonal direction'. This behaviour cannot be described or understood except in the context of the rules that constitute chess; it gets its meaning from the rules. Therefore, constitutive rules have a dual function of both regulating and creating the meaning of the behaviour.[289] Among the objections to this distinction is that it collapses. Not only do both rules regulate behaviour but it is possible to describe one and the same behaviour in the form of either a regulative or a constitutive rule.[290] If qualifying norms are constitutive rules in new clothes, then they share this weakness.

There are two important differences between qualifying norms and constitutive rules. Firstly, they are distinguished from other types of norms or rules in a different way. Constitutive rules are contrasted with regulative rules in light of the (meaning of the) behaviour, which they regulate. Qualifying norms can be contrasted with central cases of duty-imposing, permission-granting and power-conferring norms in light of their normative function, that is how they direct or relate to the subject matter of the norm. Secondly, constitutive rules regulate behaviour in a narrow sense. On a more limited approach, they are synonymous with power-conferring norms.[291] On a broader account, they are duty-imposing, permission-granting and power-conferring norms just as regulative rules.[292] For example, the norm about 'What the Queen in Parliament enacts is law' could be understood both as a duty-imposing norm and a constitutive rule.[293] Qualifying norms,

---

289 For the examples, see e.g. Searle (n 276) 9-11, although he discusses the knight's moves. Ross (n 47) 53-57, and Black *MM* (n 244) 123-125, mention norms regulating the parking of an automobile.

290 Raz (n 32) 108-111. See also Marmor (n 159) 32-34, who seems to maintain that they do not collapse since the rules constitute the meaning of the behaviour but not the behaviour itself. One can wonder from where the social meaning of the behaviour regulated by regulative rules comes. See also in this context Schauer (n 64) 7.

291 See e.g. Ross (n 47) e.g. 56, 131 and 136.

292 See e.g. Searle's work, e.g. Searle *CSR* (n 288) e.g. 27-29 and 43-44.

293 Marmor (n 159) 155-171, claims the rule of recognition is a constitutive convention.

however, do not regulate behaviour in a narrow sense. They direct thinking in an indirect manner.[294]

Qualifying norms and constitutive rules share the fact that they both impose a status and some of them come in the form: 'X counts as Y in context C.' But it follows from their distinctions that constitutive rules are a much broader category. The norm about the bishop's moves, for instance, is a constitutive rule but not a qualifying norm. Consequently, an analysis in light of constitutive rules is not as refined as one done in light of qualifying norms. Where there are clear cases of what have been called constitutive rules, there is a set of norms where some of them are qualifying norms. The qualifying norms are an important element in explaining why the meaning of the behaviour does not exist antecedently to the rules. To give an example, there are a number of qualifying norms in chess that constitute important features of the game, such as the pieces, the board, check and checkmate. In addition, there are other types of norms. The norm about the bishop's moves is a permission-granting norm (the players may move the bishop in this way) but that norm is a part of a set and is connected to the qualifying norms about which piece is the bishop and the shape and size of the board. Once we realize this, it becomes clear that some of the more peculiar instances of constitutive rules, such as 'The oldest child of the deceased monarch succeeds to the throne', are not qualifying norms and it can be doubted how fruitful it is to think of these matters in light of the distinction between regulative and constitutive rules.[295]

---

294 Searle (n 276) 10, takes the example of checkmate as a constitutive rule. It is not clear what behaviour that norm regulates unless it is the ban or inability of further behaviour by the opponent.

295 For the example, see Searle (n 276) 96-97, who uses the norm that the oldest living son of the deceased king becomes the new king.

Accordingly, the objection to the distinction between regulative and constitutive rules does not apply to qualifying norms. Qualifying norms do not regulate behaviour in the same way as duty-imposing, permission-granting and power-conferring norms. Also, they cannot be described as the other types of norms without changing their content, or at least adding to it, as we have seen with attempts to reformulate them as duty-imposing norms.

Are They Fragments of a Complete Norm?

The third objection states that qualifying norms are merely fragments of complete norms. Let us assume that Ingrid wants to sell her house. Presumably, the norm that confers a power on her to sell the house is at the forefront. The norms that qualify her as an owner and her house as property are relevant for the purpose of the power-conferring norm. More generally, law is paradigmatically about behaviour. We care about the meaning of a child and what counts as a property because of the rights and duties that attach to children and property and the behaviour these norms command, permit or empower.

Much depends on the perspective adopted, though. If the focus is on behaviour (or reasons for actions), then clearly qualifying norms cannot be the whole story. After all, they do not (directly) direct behaviour. From that perspective, qualifying norms appear as fragments of complete norms and as rules with 'indirect normative force'. If the focus is on thinking, however, then qualifying norms are complete norms. The norms about the meaning of a child and things are sufficient reasons to think of persons below the age of 18 years as children and only corporal entities as things provided of course one has a reason

to engage with these legal instruments at all. No other norms are needed to reach the conclusions.

But is it a peculiar perspective since law is preoccupied with behaviour? It is certainly the case that qualifying norms in law are usually applied with norms directing behaviour and the same goes for qualifying norms in games. Nevertheless, qualifying norms have a certain wholeness or completeness about them that warrants treating them as independent or distinct norms. They have the elements of the basic formulation of a norm. They have a hypothetical or conditional norm-subject (whoever engages or has a reason to engage with the activity), a normative character (ought to be the case), a subject matter (some status, state of affairs or situation) and a condition of application (usually in some context or for some purpose). Additionally, three reasons are worth mentioning.

First of all, qualifying norms in law are often presented in distinct or separate articles or paragraphs. The first articles of the Convention on the Rights of the Child and the German Civil Code are examples. They are presented as expressing complete thoughts on a subject matter. It is true that a legal norm can be fragmented between articles and not everything that appears in a statute is a legal norm. Nonetheless, organising materials in articles, sections and paragraphs, on the one hand, and other parts, such as preambles, on the other hand, is a way for the legislature to express a complete thought. Consequently, the appearance in a separate article is not without significance for how norms are thought of, spoken of and used.

Second of all, a qualifying norm is not a mere condition of one other norm. It usually stands in relations to multiple norms of various types, which possibly appear in different sources of law. The norm about an administrative decision is not a part of all the

norms in the act but a norm that regulates their scope; it stands in relation to the other norms as a pre-condition for their applicability but is not a part of them. It is more natural to treat these norms as multiple norms who together determine the legal position.

Third of all, some legal disputes involve only or most importantly issues that are governed by qualifying norms, such as whether an administrative decision was taken or something counts as property. Depending on the rules of civil procedure, declarative judgment can solely concern disputes about the application of qualifying norms to a case.

Confusingly, other norms can have a sense of a qualificatory character. Consider this norm, for example: 'Everyone shall pay 30% tax on their income.' The terms 'tax' and 'income' need to be interpreted and they can have a special meaning. This is a duty-imposing norm, however.[296] The primary normative function of the norm is to require a specific behaviour. If there were a separate article defining the term 'income', for instance, then it would be a qualifying norm. Its primary function would be to qualify something as an 'income'. It follows that the distinction between duty-imposing and qualifying norms can be blurred in some cases.

With this in mind it is, at last, time to return to norms of legal method. It will be asked which norms are of which normative character by investigating whether they must necessarily perform a particular (primary) function to be of the sort they are. In the process, we shall discover whether norms within one and the same category of norms of legal method or of a certain sort necessarily have the same normative character and, if so, then

[296] Interestingly, this is a constitutive rule.

which one. This involves analysing the diverse categories in light of the four types of norms. We begin with and spend the most time on norms of recognition to demonstrate the matching exercise.

6.4 Norms of Recognition

The effort spent on establishing qualifying norms as a distinct type of norms has not been in vain. As it turns out, some centrally important norms of legal method are of this type.[297] Norms of recognition, as has been previously discussed, identify the sources of law of a particular legal system. They could not be norms of recognition if they did not recognize or identify something as a source of law. The identifying function is what makes them into this sort of norm and it is a qualifying function. The norms do not direct behaviour that must or may be done. Rather, they establish, constitute or make it the case that some materials, practices or factors count as sources of law in the legal system by declaring it so. The norms direct thinking of those that have a reason to figure out the sources of the legal system. Unlike the first article of the Convention, though, norms of recognition are not definitions. They do not merely define the term source of law for the purpose of some other norm.[298] That does not mean, though, that another norm cannot refer to them.

Accordingly, a norm can be a norm of recognition without being a duty-imposing, permission-granting or power-conferring norm.[299] But it could not be such a norm without

---

297 See in this context Sundby (n 270) 255 and 259.

298 Contrast with Eugenio Bulygin, *Essays in Legal Philosophy* (OUP 2015) 117-123. Also, they do not define the term valid law.

299 Raz (n 106) 199, argues that for Hart the rule of recognition must be a duty-imposing law since customary laws, which are not a part of a system of laws, can only be duty-imposing laws but not power-conferring laws. Setting aside the use of the term 'law' here, a customary rule can be a power-

having the qualifying function. That is its primary function. Norms of recognition are, therefore, necessarily qualifying norms at their core.[300] Since all legal systems contain at least one norm of recognition, as has been previously stated, it follows that all legal systems have a qualifying norm.[301] Thus, all legal systems have norms that both direct behaviour and thinking.

Consider the norm 'What the Queen in Parliament enacts is a source of law' as an example.[302] Now it might be thought it is a shorthand for a norm the complete description of which 'imposes a duty on judges to consider certain specified characteristics as identifying the legal standards that judges must apply in deciding cases'.[303] This characterization of the norm has two parts or elements that serve different functions. The first part imposes a duty on judges. The second part is the identifying function. Only the latter part is essential for it to be a norm of recognition. It is also the primary normative function of the norm. The former part is contingent. A lawyer, a scholar, a law student or

---

conferring rule without being a part of a legal system. The nature of the rule of recognition as a custom does not, therefore, necessitate that it is a duty-imposing rule.

300 For the rule of recognition as a duty-imposing rule, see e.g. see Hart (n 105) 160, and H.L.A. Hart, 'The New Challenge to Legal Positivism' (2016) 36 OJLS, 459, 464. See also Neil MacCormick, *H.L.A. Hart* (Edward Arnold 1981) 21, Raz (n 106) 199, Raz (n 47) 93, Leslie Green, 'Introduction' to the *Concept of Law* xxiii, Gardner (n 34) 103, Scott J. Shapiro, 'What is the Rule of Recognition (and Does it Exist)? in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 235, Shapiro (n 48) 85, 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* (OUP 2013) 101, 114-115, and Lamond (n 48) 29. For the rule of recognition as a power-conferring rule, see Fuller (n 106) 137. For the rule of recognition as both duty-imposing and a power-conferring rule, see Matthew Kramer, 'Power-Conferring Laws and the Rule of Recognition' (2019) 19 JRLS 87. For the rule of recognition as a conceptual rule or a definition, see Bulygin (n 298) 117-123. For the rule of recognition as a constitutive convention, see Marmor (n 159) e.g. 155. For the rule of recognition as a categorising rule, see Honoré (n 106) 83-88 and Honoré (n 38) 118.

301 Or have a norm that performs the qualifying function.

302 See in this context Hart (n 35) 65, where it says: 'what is to count as law'. See also the discussion on scoring rules on p. 102. See also Finnis (n 106) 419, on the element of identification in the rule. See further Schauer's phrasing (n 18) 81 and 84.

303 Hart (n 300) 464. See also Raz (n 32) 147, and Raz (n 47) 179. Without the qualifying function it is unclear what makes the standard a legal one without some conceptual truth. Judges may be under a duty to apply other kinds of standards as well.

a citizen can apply the norm in the same way as a judge. When a lawyer makes a claim about the law in court, the scholar in an academic article or the law student in an essay, without using or relying on the norm of recognition, where it is applicable, they have gotten the law wrong but not breached a duty or exceeded their power. Furthermore, they apply the norm in a straightforward manner but not from the point of view of judges. They simply use the norm in the same way as the judges.[304]

But why, then, does it seem natural to view judges as being in a different position? Where does their duty stem from? If judges or law-applying institutions have a legal duty in this regard, then it is imposed by a different legal norm. An example is a constitutional norm that states: 'Judges shall apply the law'. This is a norm of adjudication but not a norm of recognition. In order to adhere to the norm of adjudication, judges have to apply the qualifying norm, that is the norm of recognition. Judges are in a different situation because the norm of adjudication exists within their legal system but not because of the character of the norm of recognition.

It should also be remembered that norms of recognition are either interpretive norms or legal norms. The substance of such norms can vary. The same goes for social rules or conventions. It is easy to imagine a practice that places judges under a duty to consider and use certain sources of law when deciding cases. The same goes for conceiving of a social practice conferring a power on judges to decide cases with reference to certain sources of law. Furthermore, it poses no challenge to think of a practice qualifying some legal materials, practices or factors as sources of law without imposing a duty or conferring a power on judges in that regard but where there are norms of adjudication performing

304 Honoré (n 106) 88, refers to assumptions in the legal system. Bulygin (n 298) 117-123, argues that the rule of recognition is a conceptual rule but not a rule of conduct and that the duty of judges stems from some other norm. He argues, though, that it completely lacks any normative character.

those functions. The identifying function is the only necessary function of the norms in order for it be a norm of recognition. Therefore, norms of recognition are qualifying norms at their core.[305]

Counterexamples must be addressed in light of what was said. Norms referring to sources can appear in some legal systems as placing judges under an obligation to use them when deciding cases. Famous examples are presented in these terms. The second paragraph of article 1 of the Swiss Civil Code states: 'In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.' The third paragraph continues by stating: 'In doing so, the court shall follow established doctrine and case law.' Article 38 of the Statute of the International Court of Justice is worded in similar terms.[306] It says the court 'shall apply' international conventions and customs, general principles of law, and so on. This is unsurprising since legal norms can be crafted in various ways. But the examples pose the challenge that not all norms of recognition are qualifying norms.

Two points can be highlighted in response to the challenge. First, a doubt can be cast on whether these are examples of norms of recognition. They do not explicitly or directly identify sources of law even though they mention them. The examples can be seen as instances of norms of adjudication, that is norms that impose duties on judges when deciding cases. Norms of adjudication include institutional considerations, including duties

---

305 If and in so far as there is a conceptual reason for there to be a duty on law-applying institutions relating to existence requirements of a legal system, it does not establish the logical necessity of that function being performed by a norm of recognition instead of a norm of adjudication. It should be borne in mind that there can be ultimate norms of different sorts. See in this regard Raz (n 32) 125-127 and 148. See also the close connection between rules of recognition and adjudication in Hart (n 35) 97, as well as the differences between the latter rules and norms of institutional decision-making laid out in Chapter Two.

306 Statute of the International Court of Justice, 18 April 1946.

imposed on judges, to identify and even apply the law in a certain way. Also, the last part of the second paragraph and the third paragraph of article 1 can be understood as being about judicial law-making, that is norms of change or discretion. Secondly, if the examples identify sources in a more indirect or implicit manner, then they are best seen as composite norms. One part identifies some materials, practices or factors as source of the legal system but the other part imposes an obligation on judges to use the sources when deciding cases. The norms have, then, two functions, that is to command and to qualify. They are instances of both norms of recognition and adjudication. They are complex in two ways.

A valuable lesson can be learned from this. Norms of recognition can appear as parts of composite norms that also command, permit or empower. This is clearly visible with legal norms that can be fashioned in many ways. Examples are doctrines of sources of law that divide them into mandatory and permissive sources.[307] Interpretive norms tend to be only qualifying norms since the interpretive question asked is usually focused on identifying the sources of the legal system. The points about complex norms, interpretive norms and that legal norms can be formulated in various ways, apply to the other categories of norms of legal method and will not be repeated when they are discussed. So much for norms of recognition. What about other norms of legal method?

6.5 Other Secondary Norms

Other Qualifying Norms

[307] No stance will be taken here on whether norms about e.g. permissive sources are best understood as norms of recognition or adjudication (institutional decision-making).

Norms of interpretation regulate or govern legal interpretation by identifying the relevant materials, practices or factors for interpretation, that is interpretive factors or considerations, by specifying their role and, more generally, by establishing the normative state of affairs. These identifying, specifying or establishing functions make them qualifying norms at their core.[308]

Consider the following norms: 'The information in the *travaux préparatoires* forms the context of a statute' and 'When considerations drawn from the text and the internal coherence of a statute point in different directions, the textual considerations prevail'. The first norm determines the relevance of *travaux préparatoires* for statutory interpretation. It is equivalent to saying that it ought to be the case that it counts as an interpretive factor or forms a part of the context in light of which a provision is interpreted. The latter norm specifies the role or weight of some considerations or states the relationship between them. In other words, the norms regulate the normative situation by declaring what ought to be the case.

Consider also article 33 of the 1969 Vienna Convention on the Law of Treaties.[309] The first paragraph says: 'When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree, that, in cases of divergence, a particular text shall prevail.' The third paragraph then states: 'The terms of the treaty are presumed to have the same meaning in each authentic text.' The norms stipulate or declare a normative state of affairs. These norms entail that it

---

308 Gardner (n 34) 123 says: 'In general, these rules are permissive, not mandatory.' On p. 103, he says rules of recognition are duty-imposing rules. This indicates that he either does not think that norms of interpretation are a part of rules of recognition, that is rules that identify the law, since they are permission-granting norms, or that duty-imposing rules include permission-granting norms. If it is the former, then perhaps he views them as permissions about creating new law, that is norms of change, or norms of discretion.

309 Vienna Convention on Law of Treaties. Vienna, 23 May1969.

ought to be the case that linguistic versions are equally authoritative and the terms have the same meaning as a matter of presumption.

But what about norms like the second paragraph of article 31 of the Vienna Convention? It says: 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes' certain other agreements and instruments. Is it a duty-imposing norm since the word 'shall' is used? The first thing to note is that the norm does not direct behaviour. It is about interpretation and that is an activity of the mind. It is something which is done by thinking. Norms of interpretation regulate that activity of the mind; they direct thinking. The second thing to note is that the norm is not an ought to do norm but an ought to be norm. The second paragraph of article 31 is best understood as it ought to be the case that the context is comprised of certain factors. The word 'shall' merely reflects the oughtness of the norm. However, if it is best understood as a duty-imposing norm, then it may be a norm of adjudication or a composite norm. In light of all of this, what can be said is that at least those norms of interpretation that identify, specify and establish are necessarily qualifying norms at their core.

Norms of internal relations include priority and ranking norms. These are the norms that govern the relationship between legal norms within a legal system. Consider the *lex posterior* norm. Plausibly, it can be understood in two different ways. On the one hand, it can be seen as placing judges under a duty, when they decide cases, to apply a newer legal norm when it conflicts with an older legal norm. According to this understanding, it is a duty-imposing norm that directs behaviour. On the other hand, it can be seen as simply declaring that a newer law prevails over an older law in a case of irresolvable conflict. And the same applies to a norm that ranks the constitution as the supreme law of the law. These

norms of priority and ranking, according to the latter understanding, regulate the normative situation or state of affairs, that is the relationship between legal norms. They are norms that direct thinking.

Which understanding is more illuminating? The norms could not be priority or ranking norms without the ought to be character and when they appear in their barest formulation, they are indeed qualifying norms. The norm ranking constitutional law is best understood as it ought to be the case that constitutional law has superior ranking over all laws in the legal system. The norm imposes that status on constitutional law. Norms of priority regulate the applicability of a legal norm but do not direct behaviour. The former understanding of the *lex posterior* norm either describes a composite norm, a norm of adjudication or a situation where there is another norm placing judges under a duty, such as the norm that judges shall apply the law.

Norms of external relations govern the relationship between legal norms of one legal system with norms of another system. Examples are norms governing the relationship between legal norms of European Union law and legal norms belonging the legal systems of its Member States. Consider, for example, the principle of primacy that entails that European Union law take precedence in a case of a conflict with laws of the Member States and the second paragraph of article 288 of the Treaty on the Functioning of the European Union about the direct applicability of regulations.[310] The former legal norm is a priority norm. The latter legal norm (along with norms in the Member States' legal systems) makes it the case that regulations are directly and immediately laws or have legal effects in the

[310] For the former norm, see e.g. case 6/64 *Flamino Costa v. E.N.E.L.* [1964] ECR 585.

Member States' legal systems, meaning without further implementation or transformation. These are ought to be norms.[311]

Finally, norms of subsumption have a qualifying function. Consider, for example, this norm: 'A consideration about preserving value is an objective consideration for the purpose of administrative law' The norms can be composite as well as interact with norms of institutional decision-making. Qualifying norms about what counts as an objective consideration can, for example, interact with the following norm of institutional decision-making: 'An administrative organ shall rely on objective considerations when deciding a case on the basis of an evaluative standard'

Power-Conferring Norms

Norms of change necessarily are power-conferring norms. A norm could not be a norm of change without having that character. An example is the already mentioned norm that confers legislative power on Parliament. That does not mean, though, that the norms made according to norms of change are also power-conferring norms. For instance, Parliament may have the power to cancel laws, that is to repeal them. 'The Infectious Diseases Act of 1990 is no longer in force (or is repealed).' A law that repeals has a qualifying function.[312]

311 See in this context e.g. Dickson *TTELS* (n 94) e.g. 47-50 and Dickson *HMLS?* (n 94).

312 Kelsen (n 26) 106-115, considers derogating norms as having a distinct function from commanding, permitting and empowering norms. For repeals and rules of change, see Hart (n 35) 95. For repeals, see also Raz (n 106) 58 and 64.

Categories of Norms That Are Not Necessarily of a Certain Normative Character

Other categories of norms of legal method do not consist of norms that must perform a particular normative function but are more generally about some subject matter. Therefore, they can be of various types. The remaining categories of norms of legal method are like this.

Other norms of applicability are grouped together because they concern the applicability of norms but they do not regulate it in a specific way like norms of internal and external relations. Many of the norms are duty-imposing norms. A constitutional ban on retroactive penal legislation may be mentioned as an example. The same goes for norms imposing a duty on authorities to publish legislation.

Norms of institutional decision-making can be of all types. Some of them impose a duty ('Judges shall apply the law' or 'Judges may not deny justice'), some of them permit ('Judges may rely on moral considerations when deciding cases'), others confer a power ('Judges have the adjudicative power') and yet others qualify ('A court is an independent and impartial institution with an adjudicative function').

6.6 Not Simply the Judicial Method

What can be learned from this? The main lesson is that the legal method is not simply the judicial method. The reason is that centrally important norms of legal method, that is norms of recognition, interpretation, subsumption, internal and external relations, are qualifying norms at their core. They regulated what ought to be the case and anyone, including judges,

lawyers, professor and citizens, can apply them in a straightforward manner; they are not special to judges. Legal method is, therefore, not merely a matter for a theory of adjudication.[313] Since these norms constitute the law, they are a part of a theory of law. By analysing them, we also learn something about the nature of law. For instance, legal systems necessarily have a norm that directs thinking albeit in an indirect manner by regulating what ought to be the case. Furthermore, we learn that some legal norms are qualifying norms. Finally, we learn that some non-legal norms, such as in games, are also of this type.

However, the matter is not cut and dry. Some norms of legal method do place judges or other institutions under a duty or empower them, namely, norms of change, norms of institutional decision-making and some other norms of applicability. These norms explain why judges, law-applying or law-enforcing institutions are partly in a different situation than lawyers, professors and citizens. Nevertheless, centrally important norms of legal method are not like that at their core. They partly determine the law by regulating what normative status, state of affairs or situation ought to be the case.

313 Raz (n 225) 327, makes this point in a different way.

7 How Law Works

In Chapter Two, it was said that norms of legal method partly determine the applicable law by addressing certain issues. That is their overarching role. This means that they have a constitutive function. They are among the reasons or justifications for why a law exists and has the content it does. They partly make the law what it is. This claim requires a defence. Why is that?

Someone might think, in contrast to what has been said, that norms of legal method, or at least some of them, have the function of dispelling doubts about the law.[314] Their function is to make more certain what would otherwise be uncertain. According to this view, norms of recognition, for instance, specify 'the ways in which the primary rules may be conclusively ascertained' or possess a feature the possession of which by a rule is taken as a 'conclusive affirmative indication that it is a rule of the group'.[315] Another example is canons of interpretation. They 'cannot eliminate, though they can diminish, these uncertainties'.[316] The first impression of terms used to describe norms like these, terms like 'uncertain', 'disposing of doubts', 'ascertain' and 'indication', is that the norms have some sort of epistemic function.[317] By understanding or applying them, we obtain information or knowledge about the law, such as how to find it or what it is on a particular subject matter. But the norms do not partly determine the law.

---

314 See in this context some of the words used by Hart (n 35) e.g. on 92 and 95.

315 ibid 94.

316 ibid 126. The term 'uncertainty' is also used in the context of the open texture of law, see e.g. p. 124-136, and in relation to the rule of recognition itself, see p. 147-154.

317 For the terms, see Hart (n 35) 92 and 94-95.

Someone might also think that the norms are best understood as heuristics. They are rules of thumb, which are helpful and efficient to use, but they do not partly determine the law.[318] Instead, something else, such as moral reasons, does that.[319] We should, therefore, be aware of the norms' nature as heuristics. That entails using the norms when they are helpful but abandoning them when they do not match the actual determinants of the law, that is moral reasons.

Finally, someone might think that norms of legal method cannot partly constitute the law because they conflict or are too vague. If they were constitutive, then that would mean that the law is systematically and radically underdetermined. But we know that is not the case, at least not in many legal systems. Hence, something else must actually determine the law. In what follows, these three objections will be addressed. In the process, the claim about the constitutive nature of norms of legal method will be defended.

7.1 The Cure for Uncertainty

A Just-So Story

318 See e.g. Greenberg (n 8) 1333, where he speaks of 'linguistic or textual canons as rules of thumb for working out the moral consequences of statutes'. On p. 1334, he says that many of 'the linguistic canons can be understood as implementing these moral considerations'. See also in this context Mark Greenberg, 'What Makes a Method of Legal Interpretation Correct?'130 Harv. L. Rev. 105, e.g. 106 and 125. For Dworkin's approach to statutory interpretation, see e.g. Dworkin *LE* (n 3) 337-348.

319 For law-as-morality, see e.g. Dworkin *LE* (n 3) 400, Greenberg (n 8) 1288, and Stavropoulos *RC* (n 135). For a pure, non-hybrid interpretivism or a monist theory, see Stavropoulos *LI* (n 135) s 4. See also in this context, Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andrei Marmor and Scott Soames (eds), *Language in the Law* (OUP 2013) 228.

The first objection is that norms of legal method, at least some of them, primarily have the function of providing certainty about the rules of the group. This idea stems from a famous just-so story about the transformation of a pre-legal society into a community with a legal system. It goes something like this. Imagine a primitive community, such as a tribe, that has no 'legislature, courts, or officials of any kind'.[320] The only rules that the community has are customs or so-called primary rules of obligation.[321] They are duty-imposing norms. The rules are separate but not unified in such a way as to form a system.[322] Now, ask yourself about possible defects of such a community in light of the story's point. According to the story, the defects are of three sorts. They are *uncertainty* about which rules are rules of the group and as to their scope, the *static* nature of the rules and *inefficiency* in determining violations of them. Secondary rules in this context are about primary rules of obligation. They are remedies to the three defects and, correspondingly, are of three types. Rules of recognition cure the defect of uncertainty, rules of change fix the static nature of the primary rules and rules of adjudication are remedies to the inefficiency in determining violations of them.[323] Let us focus on the first pair of defect and remedy.

What exactly is the defect of uncertainty? If 'doubts arise as to what the rules are or to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official'.[324] The rule of recognition remedies this by specifying 'some feature or features the possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group'.

320 Hart (n 35) 91.

321 ibid 91.

322 ibid 92.

323 ibid 91-99.

324 ibid 92.

It is acknowledged 'as the *proper* way of disposing of doubts as to the existence of the rule'.[325] It is 'a rule for conclusive identification of the primary rules of obligation'.[326] And the primary rules are no longer 'just a discrete unconnected set but are, in a simple way, unified' by the rule of recognition.[327] As the story unravels, it becomes clear that the unification of primary and secondary rules forms and is at 'the heart' or 'the centre of a legal system'.[328]

Even though some of the key terms used to describe the rule of recognition in the story indicate that it mainly has an epistemic function, that would be the wrong conclusion to reach. For a different language is also used to describe it. To give an example, it is said that the rule of recognition is authoritative.[329] It provides an 'authoritative mark' or 'authoritative criteria'.[330] It is also said that legal rules 'owe their status as law' to the rule of recognition.[331] More important than language, the rule of recognition provides criteria for the validity of legal rules and unifies them into a system.[332] These are not epistemic functions.

Since the rule of recognition primarily has a constitutive function and its presence on the scene, alongside rules of change and adjudication, marks the existence of a legal system, it can be wondered whether the story told is entirely satisfactory in light of its point.

---

325 ibid 95.

326 ibid 95.

327 ibid 95. See in this context also p. 234.

328 ibid 98-99.

329 ibid 95. On p. 130, Hart contrasts certain rules with unsettled issues. In light of that, perhaps he means 'unsettled', 'unresolved' or 'indetermined' when he uses the term 'uncertain'.

330 ibid 95 and 100.

331 ibid 101.

332 See e.g. Hart (n 35) 95 and 105-107.

Recall that the first defect of a pre-legal society is uncertainty about which rules are rules of the group and the rule of recognition cures it.[333] This description needs to be adjusted in two ways. Firstly, the focus should not be on the rule's function of providing certainty about primary rules of obligation. There is a different pair of defect and remedy that matters more in light of the story's point. The focus should, instead, be on the constitutive nature of the rule. Secondly, the problem in a pre-legal society is not uncertainty about which rules are *rules* of the group but which rules are *laws* of the group. And in light of the new focus, the more important problem is what *makes* something a *legal* rule of the group. Let us consider these refinements in turn.

From Uncertainty to Constituting Rules

Return to the pre-legal society. If it is 'a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment', then it very well may be the case that all or almost all members of the community know which rules belong to the group and are reasonably certain about their scope and application.[334] Members of the community need not experience any uncertainty or doubts about the rules. They may even know a higher proportion of the rules that apply to them and know them better than citizens in modern, complex societies with legal systems. A rule of recognition in a sophisticated community can, in addition, be complex and vague on important points.[335] Not only that, members of a community other than its officials need not know it, at least not well.[336]

333 This does not mean that the rule cures or remedies the defect completely.

334 For the quote, see Hart (n 35) 92.

335 See in this context Hart (n 35) 147-154.

336 See in this context Hart (n 35) 114.

Consequently, rules of recognition provide more or less certainty about the rules in legal societies. The degree of certainty provided is a contingent matter and relative between members of the community. The overall result may be that there is more certainty about the rules in a pre-legal society than in a legal one, at least for the ordinary citizen. In summary, uncertainty is not a defect that ails all pre-legal societies. And not all legal societies have more certainty about the rules than pre-legal ones.

On a closer look, the message of the story is not that wherever there is a rule of recognition, there is more certainty about the rules. Rather, 'in any other conditions' than mentioned above the simple social structure of a pre-legal society is defective.[337] For example, it is unlikely to succeed in large, modern, diverse and complex societies. Therefore, the lesson seems to be that we need rules that are identified in a different way to hold together such communities. Their members may not know all of the rules and they, or a certain subset of them, need a way to identify them in those circumstances; law can be a good tool in conditions of uncertainty. Although uncertainty is relevant for that lesson, it is still the wrong primary focus.

The point of the story is to identify important elements of law that a pre-legal society is missing. We are searching for the elements that make a rule a law.[338] They are identified by comparing a pre-legal society with a characteristic legal system. As is evident from what has been said about a pre-legal and a legal society, the difference between the two does not lie in certainty about the rules of the group. Curing this defect is not one of the most important milestones in transforming a pre-legal society into a legal one; it is not

337 For the quote, see Hart (n 35) 92 and 234.

338 The title of the section is: 'The Elements of Law'. See Hart (n 35) 91.

one of the essential elements of law in this context.[339] Some other element is more significant in light of the story's point.

The greater defect of a pre-legal society in this context is a lack of a mechanism to constitute rules in the requisite way. Remember the simple image of the law and the example of the Corner Shop and Food Supply's dispute? The first question asked there was: does the law exist? It can be put differently: 'does a rule exist as the law?' And it was claimed that norms of recognition address that issue. In that way they are among the reasons why the law exists. Similarly, the rule of recognition is not mainly about certainty. Its primary function is to make it the case that rules exist as rules of the group in a certain way. The same can be said about canons of interpretation. They are not primarily about diminishing uncertainties about the rules but making it the case that they have the content they do. In order to explain this further, we need to consider the second refinement.

Laws of the Group

Presumably, the group in a pre-legal society has various kinds of rules. Some rules may be about religious matters, others about ethics or morality, yet others about etiquette, fashion and politics broadly understood.[340] While all of them are rules of the group, only some are laws of the group. Suppose we were preoccupied with the defect of uncertainty. In that case, we are faced with not one but two sources of doubt. Which rules are rules of the

339 The issue of the connection between certainty and the rule of law is set aside here.

340 When discussing moral rules, Hart (n 35) 170, acknowledges that 'there are many types of social rule and standard lying outside the legal system'.

group? And of them, which rules are laws of the group?[341] The latter question is more important in the context of moving a pre-legal society into the legal world.

It was just said that only some of the group's rules are its laws. This assumption is open to challenge. We can ask: does the group have any legal rules at all? We might attempt to draw an analogy from the paradigm case of law or contrast it with moral rules but a pre-legal society does not have any officials.[342] Furthermore, by calling it a 'pre-legal' society, the story indicates that the group does not possess laws, at least not in the focal sense.[343] It might be that the group has laws in an embryonic form, which are so entangled with other social rules that it is hard to tease them apart.[344] Perhaps the focus on doubt about the rules is born out of that thought. Even if the group has laws in an embryonic form, it does not have laws fully born yet. It only has a 'regime of unofficial rules'.[345] We are still in the dark about the element that separates the two.

Under what conditions does the group have legal rules? What makes something a law of the group?[346] Doubtless, several elements are needed not all of which will be

---

341 Hart (n 35) 95, sometimes writes as if the rule of recognition only identifies primary rules of obligation. For a view that these are only duty-imposing norms, see Raz (n 47) 93. However, if they are duty-imposing norms, then the rule of recognition can also identify power-conferring norms. The power-conferring norms that are not secondary rules can be viewed as primary rules in this context. Both primary and secondary rules can be duty-imposing and power-conferring. The rule of recognition can also identify the other secondary rules.

342 For such an analogy and contrasting in the context of international law, see e.g. Hart (n 35) 236-237.

343 ibid 169, says: '… we also drew a picture of a society at a stage in which such rules [that is conventional morality] were the only means of social control.'

344 ibid 95 and 169-170. Despite rejecting the emphasis on and the necessity of coercion that some other theorists attribute to the concept of law, see e.g. p. 20-26, Hart says in this context on p. 169-170: 'Possibly some embryonic form of this distinction might be present if there were some rules which were primarily maintained by threats of punishment for disobedience, and others maintained by appeals to presumed respect for the rules or to feelings of guilt or remorse.'

345 ibid 92.

346 See in this context Paton (n 37) 80 and 97, where he says that the test is whether rule is regarded as law by a particular community.

identified here. That would put us on a different path towards the concept of law, which is not the cornerstone of the present inquiry. An important element will be mentioned, though. As was stated above, what is needed is a rule that regulates the existence of other rules.

However, that feature alone is inadequate. There can be rules that regulate the existence of, for example, religious rules. Suppose a rule has the following content: 'What is written on the two stone tablets are the rules of faith of our community.' This rule recognises certain rules as the group's religious rules. Rules of change and adjudication could also emerge. One of the rules on the stone tablets could be: 'The high priest decides whether the religious rules have been violated.' Another rule could say: 'The high priest can supplement the rules when needed.' According to the story, this is arguably a legal system since 'certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system.'[347] True, that it is 'not the whole' and 'as we move from the centre we shall have to accommodate' 'elements of different character'.[348] Nonetheless, the elements identified by the story are according to it at the centre of a legal system.

It is not obvious, however, that the religious rules form a legal system as opposed to a mere system of rules unless all systems of rules are legal systems. It need not be *the* 'official system' of the group.[349] It should be borne in mind that the group could have multiple systems of rules. We can ask: are all of them legal systems or only one or some of them?[350] Admittedly, a system of rules with an official like the high priest resembles law

347 Hart (n 35) 94.

348 ibid 99.

349 ibid 170. See in this context, Frederick Schauer, *The Force of Law* (HUP 2015) 160-161.

350 Other features of legal systems are needed to identify and distinguish them. See in this context e.g. Raz (n 32) 150, who says: 'Three features characterize legal systems.' According to him, they are

more than an unconnected set of rules about etiquette enforced by the group at large, for instance. But the mere union of primary and secondary rules is not sufficient for making something a legal system, at least not in the characteristic sense.

What is this missing element, then? Consider again our prime example: 'What the Queen in Parliament enacts is *law*.' The rule is not: 'What the Queen in Parliament enacts is *a rule of the group*'. One of the missing features is a qualifying norm the content of which is to identify what counts as a source *of law*.[351] It makes it the case that some legal material is a source and a rule is a legal rule. Such qualifying norms mark the transformation of a pre-legal society into a legal one; they distinguish between laws and rules that could be seen as laws in an embryonic form because they share some of their salient features. Once the group has this sort of qualifying norms and sources identified by them, it has a regime of official rules. The qualifying norms also establish law as a distinct and limited domain. They identify and distinguish the legal rules from the other rules of the group.[352] These are constitutive not epistemic functions. That being said, recognition rules or norms provide some certainty about one type of standard which may be needed in conditions of uncertainty, for example, in complex and diverse societies. The question whether or not the group has a legal system yet will not be answered here.

To sum up, what a pre-legal society is missing in order to transform into a legal one is, among other things, a mechanism to constitute laws. Recognition rules or norms are an

---

(see p. 150-154): legal systems are comprehensive, claim to be supreme and are open systems. See also Finnis (n 124) 267.

351 This is not a matter of language. For example, whether the group calls something 'law'. It is a matter of whether there is a norm identifying sources of law (or laws) as such. That depends on, at least in part, the concept of law.

352 See Hart (n 35) 170. See also Schauer (n 126) 1918, and Vogenauer (n 10) 870.

important part of that mechanism.[353] They qualify some legal material, practice or other factor as a source of law and by that make it the case that some rules count as laws of the group. In so doing, they identify and distinguish them from other rules of the group. Recognition rules or norms are not the full story, though. Other elements are needed as well, such as officials, but that is a tail for another time.[354]

7.2 Heuristics and How-To Rules

Are They Heuristics?

The second objection is that norms of legal method are heuristics. They are rules of thumb that help us to discover the law but they do not constitute it.[355] What is a heuristic? Here it is taken to be a strategy for finding a solution. More specifically, it is a tool or device for aiding or guiding our thinking and decision making in light of our limited time, knowledge and computational powers. Often, it is a simple rule or principle about discovering or finding something, such as searching for information and deciding between alternatives.[356] By using heuristics, the decision maker is able to reach a decision in a shorter time and

353 Other norms of legal method are usually relevant as well, such as norms of interpretation, but more on that in Chapter Nine.

354 Also, it may be the case that a pre-legal society does not have power-conferring norms according to the story. It only has primary rules of obligation, which are duty-imposing norms. And having power-conferring norms is an important stepping-stone in the transformation of a pre-legal society into a community with a characteristic legal system. However, it would be a mistake to think that other types of norms than legal norms cannot have that normative character or that primitive communities do not possess power-conferring norms.

355 See in this context e.g. Greenberg (n 8) 1335-1336. See also Mark Greenberg, 'Natural Law Colloquium. Legal Interpretation and Natural Law' (2020) 89 Fordham L. Rev. 109, e.g. 116.

356 Gigerenzer Gerd and Peter M. Todd, 'Precis of Simple Heuristics that Makes Us Smart' (2000) 23 Behavioral and Brain Sciences 727, 727-729 and 731-733, and Nicole Graulich et al, 'Heuristic Thinking Makes a Chemist Smart' [2010] 39 Chemical Society Review 1505. For rules of thumb, see also Schauer (n 64) 5 and 104-109.

with less effort.[357] An example of heuristic is a rule of thumb for an ER doctor to prioritize incoming patients. 'A patient that at first sight seems to suffer from a massive bleeding wound should be prioritized over a patient that seems to be in decent shape at first glance, is coherent and complains about a minor injury or ailment.' By relying on the rule, the doctor can quickly prioritize patients based on a few cues but without a proper examination.[358]

In the realm of law, a paradigm example of heuristic is the following norm: 'If you want to know a rule of contract law, then you should read Professor so-and-so's textbook.' If the lawyer reads the textbook, then there is a good chance she will discover quickly and reasonably reliably the law on a certain subject matter. But the textbook is not the reason why the law is what it is. The textbook simply helps us to discover the law. According to this view, something else determines the law, such as moral reasons.[359] For example, perhaps it is the outcome of moral reasoning that officials should, in light of fair notice considerations, reach the same conclusions as the Supreme Court has in the past.[360] This result forms a pattern, which can be followed most of the time.[361] We can rely on the rule of thumb: 'Follow past decisions of the Supreme Court.' However, sometimes the outcome of moral reasoning requires abandoning a past decision. Maybe the reason is that considerations of fair notice are outweighed by considerations of justice in the particular case. When that happens, we should not rely on the rule of thumb but set it aside. After all,

357 Graulich et al (n 356) 1505.

358 The example is based on Gerd and Todd (n 356) 727.

359 See e.g. Greenberg (n 8) 1293-1295. Note, though, that a legal obligation is a moral obligation on this account.

360 For an approach in this spirit, see e.g. Greenberg (n 8) 1293 and 1329.

361 See in this context e.g. Greenberg (n 8) 1335-1336 and 1341.

it is only an aid. What matters are the actual determinants of the law, that is the moral considerations according to this view.[362]

In light of what has been said, it is important to figure out whether norms of legal method are heuristics. How to do that? Firstly, we can ask whether the norm in question exists because it is considered a good strategy to find or decide something in light of our limited time, knowledge and computational powers? Secondly, we can look at the norm's content and evaluate whether it indicates that it is a strategy or an aid to find or decide something. Thirdly, we can evaluate the use of the norm in practice in the same way. Fourthly, we can assess whether the norm is capable of constituting the law. Let us put norms of legal method to the test.

First of all, norms of legal method do not exist because they are good strategies for finding the law. They exist as either legal or interpretive norms. This does not suggest that the norms are heuristics or indicative of something else, which constitutes the law. Legal norms are usually legally decisive on their subject matter when they are applicable. Just as murder is a criminal offence *because* it says so in the criminal code, so too are customs relevant for deciding a case in Switzerland *because* it says so in article 1 of the Swiss Civil Code. The same applies to interpretive norms. Failing to use norms of legal method correctly can, moreover, result in a decision or judgment being considered *ultra vires* without probing into other considerations, such as moral reasons.[363]

---

362 See e.g. Greenberg (n 8) 1336, where he says: 'typically without the need to consider moral considerations explicitly'. See also p. 1341.

363 See in this context e.g. the judgment of the German Federal Constitutional Court of 5 May 2020 (n 85), paras 112-117, where the Court considered a judgment of the Court of Justice of the European Union to be *ultra vires* because it had not used the correct legal method, albeit in relation to the principle of proportionality.

Second of all, the content of the norms does not suggest that they are heuristics. Here are three examples of them: 'Precedents are sources of law', '*Travaux préparatoires* form the context of an international convention' and '*Lex posterior derogat legi priori*'. Nothing about the content of the norms suggests that understanding or applying them gives us knowledge of some other factors that constitute the law or that they are merely helpful tools to identify it. Rather, their content suggests that they partly determine these matters. The reason why precedents are sources, that we should look at *travaux préparatoires* when interpreting an international convention or apply the newer law in a conflict with an older law is because it is so decided and reflected in the norms.

Third of all, the norms are commonly used in practice as reasons or justifications but not mere heuristics. It has been pointed out that at 'least in general, a straightforward appeal to which interpretation is a morally better standard does not seem permissible in legal interpretation.' If this is so, then that does not suggest that the norms are mere heuristics since it would be odd if it were generally required to use heuristics, which are aids, instead of the actual determinants.[364] A legal norm is considered to exist, for instance, because a precedent exists and that matters because it is recognised as a source of law by the norm stated above. The same goes for the content of a legal norm with a basis in an international convention. It is considered to have the content it has in part because of information in the *travaux préparatoires* and it is relevant because of the previously mentioned norm. Finally, the newer law is considered to be applicable because of the *lex posterior* norm.

---

364 The quote is taken from Greenberg (n 8) 1293, where he comments on Dworkin's theory. This apparent impermissibility is not easily explained by drawing a distinction between the surface and deeper level of legal practice. For the possible normative force of rules of thumb, see Schauer (n 64) 108-109. In the context of the third point, see also e.g. Germanic and Nordic legal cultures and the previously mentioned judgment of the German Constitutional Court of 5 May 2020 (n 85).

Fourth of all, the norms are capable of partly constituting the law. There is no missing element in the explanation. The feature of practice that the law seems to be determined with reference to some reasons does not thwart the claim since, according to the simple image of the law and the view about legal method adopted here, legal reasoning is involved in applying the norms to legal materials and using them to identify the law;[365] legal reasoning is a part of the story. Furthermore, the reason why it may seem as if something is going on below the surface is simply that the norms are themselves constituted in a certain way.[366] This is especially the case with interpretive norms. Reasoning plays a role in determining them. But that does not make them mere heuristics.

Considering all of this, there are reasons to believe that norms of legal method partly constitute the law and are not mere heuristics. How do they do it? As we have already learned by studying the simple image of the law, a legal norm is often the outcome of an interpretation of a source of law in its context, that is in light of interpretive factors. Sources and interpretive factors are legal materials, practices or other factors that are the 'raw materials' or 'ingredients' of the law. The existence and content of these legal materials shapes the existence and content of the law. Norms of legal method identify these materials and specify their role. In other words, they determine the role and relevance of legal materials for the law. By doing that, they partly constitute it. They do so in part because other factors are relevant as well. It is not enough that a norm declares that precedents are sources of law if there are no precedents. Furthermore, and as has already been stated, the norms need to be applied to legal materials and that requires reasoning.

---

365 For the feature, see Greenberg (n 235) 225-265, 239-240.

366 See in this context, Mark Greenberg, 'The Moral Impact Theory, the Dependence View, and Natural Law' in George Duke and Robert P. George (eds), *Natural Law Jurisprudence* (CUP 2017) 279-281.

Does This Explain All of the Norms?

The existence, content, use and capability of norms of legal method does not suggest that they are mere heuristics. Still, it might be wondered whether there are not some methodological norms that are heuristics. Consider again the norm: 'If you want to know a rule of contract law, then you should read Professor so-and-so's textbook.' Or this norm: 'If you want to figure out the purpose of a statutory provision, then ask yourself about the evil it sought to eradicate.' And in legal systems where judgments of high courts are not sources of law, this norm might, nonetheless, be practiced: 'If you want to know the rule on some subject matter, then you should read the Supreme Court's judgments.' Today there could also be a norm like this: 'You should search for judgments on the court's homepage.' Surely these methodological norms are heuristics and not constitutive. How are they to be explained?

A distinction needs to be made between legal method and legal methodology. The latter is the study or theory of legal method. Legal methodology is a part of legal science and its object is the legal method. A proposition of legal methodology is a statement about the legal method.[367] Such propositions can be in the form of norms or standards that take the shape of 'how-to rules'. What are those? A law student may, for instance, ask his Professor: 'How do I find the law?' To which the Professor may respond: 'You should read Professor so-and-so' textbook' or 'You should read judgments of the Supreme Court.'

[367] This distinction is inspired by e.g. Kelsen (n 59) 45, Kelsen (n 53) 71-75, and Kelsen (n 26) 154-154, where he distinguishes between legal norms enacted by authorities and rules of law, which describe legal norms, formulated by the science of law. It should be noted that the rules of law are descriptive but not prescriptive.

These are how-to rules. They give the student practical knowledge about finding the law in a reasonably reliable manner. The law student graduates and learns more how-to rules from his seniors and in the practice of law. Meanwhile, the Professor writes a textbook for his adoring students and practicing lawyers in the style of how-to rules. The Professor is teaching and disseminating the legal craft or legal knowledge of a particular kind; he is concerned with practical and theoretical knowledge of the legal method in the jurisdiction.

The how-to rules just mentioned are standards or norms of legal methodology, which is a part of the science of law, in addition to be a part of legal practice. They are heuristics. They are *about* the law. They should not be confounded with norms of legal method, which are a part *of* law itself, either as legal or interpretive norms. The function of how-to rules is to help the lawyer, the law student or other people to obtain knowledge about the law or give them information about how to discover it. In practice, such as in judgments, decisions and even the Professor's textbook, how-to rules are discussed with norms of legal method without a sensitivity to their distinction. For this reason, some do not distinguish between the two and others might even think that all methodological norms are how-to rules.

There is a further reason why how-to rules are confused with norms of legal method. Sometimes how-to rules correspond to norms of legal method. This is best explained with an example. Suppose a norm of legal method is this: '*Travaux préparatoires* is a part of the context of international conventions.' In practice or the Professor's textbook, a how-to rule is followed or formulated: 'You should use *travaux préparatoires*, when interpreting international conventions.' It could even be the case that a wide variety of how-to rules are in use, which correspond to one and the same norm of legal method. Examples are these: 'You should use the drafting documents when interpreting the European

Convention on Human Rights' and 'You should rely on the drafting history of the United Nations Conventions of Persons with Disabilities when interpreting it'.[368] Note also that the norm of legal method in question is a qualifying norm but the how-to rules are duty-imposing norms. While norms of legal method are constitutive, not all methodological norms, broadly understood, are norms of legal method. We are concerned here only with the former category.

Lastly, three things are worth mentioning. First, lawyers and judges can rely on other how-to rules, rules of thumb or rough guides than those about the legal method strictly speaking. Among them are rules of thumb for language, that is how people ordinarily speak and write. Some of the following standards may fall under that category but that depends on their function: *ejusdem generis* (of the same kind), *noscitur a sociis* (thing known by its associates) and *expressio unius exclusio alterius* (mention of one thing is exclusion of another).[369] Secondly, although norms of legal method are constitutive, it does not mean that we cannot infer from them how to find the law. Suppose there is a norm that 'Precedents of the Supreme Court are sources of law'. It can be concluded that if we wish to figure out the law, then we should use or look at precedents of the Supreme Court other things being equal. All that has been claimed is that norms of legal method are not *mere* epistemic norms. Thirdly, norms of legal method and how-to rules can be interwoven in practice. In the example, a lawyer may next use the norm about the court's homepage to find the judgments or read about them in a textbook or a case book.

368 United Nations Conventions of Persons with Disabilities. General Assembly Resolution 61/106 of 13 December 2006.

369 For the standards, see e.g. Cross (n 2) 134-135.

7.3 Duelling Canons and the Problem of Radical Indeterminacy

The third objection is that norms of legal method conflict or are too vague to partly determine the law. If they did, then the law would be systematically and radically underdetermined. The concern here is not that the law is merely underdetermined or has fuzzy boundaries. The challenge is not that there is a 'penumbra of doubt'.[370] Radical indeterminacy refers to the law not having any or almost any identifiable 'core of certainty'.[371] There are no clear or easy cases.[372] It is systematic when that is generally the case in the legal system or the problem is widespread. Conflicting norms of legal method underdetermine the law. If conflict reigns, then the law may be systematically and radically underdetermined.

Why focus on 'radical' indeterminacy? Is that setting the bar too high? The reason is the nature of the objection. If conflicting or vague norms of legal method led to the law being only underdetermined, then that does not mean that they cannot be constitutive. That may accurately capture and explain law. However, if the norms lead to the conclusion that the law necessarily would be systematically and radically underdetermined, then we have a good reason to doubt that they are indeed constitutive. For that reason, an examination of the issue is in order.

And All the Animals in the Forest Were Friends … For the Most Parts … Sometimes

370 Hart (n 35) 123.

371 ibid 123.

372 See in this context e.g. (Hart n 35) 126, and Dworkin *LE* (n 3) 265-266.

There is nothing about the nature of norms of legal method as such that necessitates conflict. We can imagine a simple legal system where there is harmony between the norms. Even if they clash, that does not necessarily result in radical, let alone systematic, indeterminacy. That being said, we can also think of a legal system in a very bad shape. Where the norms generally conflict and the legal system as such fails miserably on the rule of law test. Between these two polars is a large space for the norms to conflict to a greater or lesser degree. Where a particular legal system is located on the spectrum is a contingent matter. It follows that there is nothing about norms of legal method as such that prevents them from being able to constitute the applicable law. They may both be a source of determinacy and indeterminacy of the law. A brief tour of a few examples of norms of legal method underscores the point.

A conflict between norms or criteria of recognition arises if there are two or more such norms or a single norm is in internal conflict. Rarely is it the case that there is one norm identifying some legal material as a source, that is a positive norm of recognition, and another stating that the very same legal material is not a source, that is a negative norm of recognition. That is, though, possible, especially if one of the norms is emerging and the other one is fading away. The situation is similar to when a single norm of recognition is beginning or ending its 'life'. The same applies to a conflict between a norm of recognition, stating that some legal material is a source, and a norm of interpretation, declaring that the very same legal material is only an interpretive factor.

A more likely scenario is that there are multiple norms of recognition, say, one identifying statutes as sources and another one identifying precedents as sources. These norms of recognition do not conflict as such. However, the legal norms based on the sources can clash just as legal norms based on one and the same type of source can be in

tension. Sometimes there are hierarchical or priority norms, that is norms of internal relations, that regulate the situation. In other cases, the applicable law is underdetermined.

The same can be said about priority norms. The *lex specialis* and *lex posterior* norms, for instance, do not necessarily conflict as such. Nevertheless, the situation can arise where the newer law is also the more general one. Some legal systems have a priority norm for that situation as well, that is *lex posterior generalis non derogat legi priori specialis*, but others do not. Where there are no special norms addressing the situation, it can still be the case that one of the two priority norms is more suitable in the context. When that is not so, the applicable law is underdetermined. None of this suggests, though, that norms of legal method cannot be constitutive. It merely shows that the law can be underdetermined.

Duelling Canons of Interpretation

Perhaps norms of recognition and applicability are not problematic. Instead, the troublemaker is norms of interpretation. It is well known that they or considerations drawn from interpretive factors by using the norms can point in different directions. To give an example, the text may indicate that the legal norm is narrow in scope but its purpose pushes for a more generous understanding of the provision. It might be thought that these canons of interpretation are 'duelling'. In the end, it is up to the judge to choose a norm of interpretation to apply and, in so doing, decide the content of the law. The law is what the judge says it is.[373]

373 See in this context Karl N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes are to be Construed' (1950) 3 Vand. L. Rev. 395, 395-396.

Although norms of interpretation regulate the content of the law, its main content is gotten from the sources. As previously mentioned, a source is like a frame, within which a legal norm must fit. Even if norms of interpretation 'duel', it does not leave the putative legal norm wholly without content. Of course, it is possible that an utter lack of norms of interpretation or, where they exist, their pervasive conflict reaches such levels that the frame turns out to be an empty shell. That is, though, not the case in many legal systems or, at least, in many situations.

This is assuming that the norms of interpretation pull in opposite directions. Several situations will now be considered to determine whether that is the case. Consider the example above: textual interpretation of a particular statutory provision points to one understanding but purposive interpretation to another. While the considerations drawn from the interpretive factors, by using norms about textual and purposive interpretation, are in tension, the norms themselves are not. Considerations drawn by using the very same norms could point in the same direction in another situation. It follows that the norms themselves do not conflict as such. Just as with sources of law, there may also be other norms of interpretation that specify the weight of the considerations or prioritize them.

Another situation is where the norms of interpretation themselves appear to be in conflict. Consider these two norms. The first is the plain-meaning norm: 'The words of a statute have the same meaning as they ordinarily do in the language.' The other is the special-meaning norm: 'Technical terms have a special meaning in a statute.' At first glance, the plain-meaning and the special-meaning norms demand different things. Nevertheless, they either do not conflict or they only do so in a trivial way.[374] Ask yourself

[374] This applies to many of the examples that Llewellyn (n 373) gives.

about when the plain-meaning norm applies. Suppose its rationale is to guide ordinary citizens in their daily lives. Let us say that the norm applies when a legal norm addresses or is directed at the citizens for that purpose. Then ask yourself about when the special-meaning norm applies. Suppose its rationale is to guide professionals in their business, among other things, by using the terminology prevalent within the professional domain. Let us say that the norm applies when technical terms are used in this context or it is otherwise clear that a term is used in a special sense.[375] Understood in this way, it is not clear that the norms conflict. Even if they do, for instance, because the plain-meaning norm always applies, the special-meaning norm can be seen as an exemption. From that point of view, their conflict is no more troublesome than any other rule and its exemption.

Now, it might be wondered whether this is too neat and convenient. That depends on the legal system. The plain-meaning and special-meaning norms just mentioned, if they exist at all in the legal system in question, may be vague and underdetermined themselves. As before, that does not show that norms of interpretation necessarily clash or conflict in such a way as to render the law radically underdetermined. Moreover, there might be a norm that addresses tensions like these. An example is this: 'The content of the law is the outcome of a balance or harmony of all the relevant interpretive considerations.'

Furthermore, it is worth bearing in mind that norms of legal method have different forms. Some are so-called fixed or strict rules. Examples are: 'Precedents are sources of law' and '*Travaux préparatoires* forms the context of a statutory provision'. Others are principles or considerations that are evaluative or point in a direction. Many norms of

375 See e.g. Reinhard Zimmerman, 'Characteristics Aspects of German Legal Culture' in J. Zekell and M. Reimann (eds), *Introduction to German Law* (2nd edn, Kluver Law inc. 2005) 10, says that the German Civil Code is not addressed to the layman.

interpretation are like principles or considerations.[376] They may need to be balanced and applied in light of their rationale to a greater extent than strict or fixed rules. Moreover, the scope and application of the non-legal norms, as previously noted, depends on the way their supporting reasons apply in the situation. An important part of interpretation is figuring out which of the norms apply and how they do so in light of the existing legal materials. The task of the interpreter is to identify which canons best capture the situation or to balance them in light of the circumstance. That does not mean, though, that the interpreter is free to choose as she desires. Listing and contrasting formulations of the canons overlooks the subtleties of legal interpretation as well as treats them all as fixed or strict rules.[377]

Finally, where norms of interpretation genuinely conflict, the law is underdetermined to that extent.[378] Again, this possibility does not preclude norms of interpretation from being partly constitutive.

A Very Brief Remark on Vagueness

What about vagueness, ambiguity and open-endedness of some of the secondary norms? Indeed, the norms are, to greater or lesser extent, vague or open-textured.[379] They can be a source of vagueness for the law. To reiterate, it does not follow that the law is radically, let

376 This may be the reason why some have thought that canons of interpretation are permissions. See Gardner (n 34) 123. It is not their normative character but their form and applicability that matters here.

377 See again in this context Llewellyn (n 373) 395.

378 See in this context e.g. Hart (n 35) 126.

379 See e.g. Hart (n 35) 126 and 147-154, and Gardner (n 34) 71. For an in-depth discussion of the matter in law, see e.g. Timothy A.O. Endicott, *Vagueness in Law* (OUP 2001).

alone systematically, underdetermined for that reason. Some of the norms are relatively clear and certain. Furthermore, even the evaluative norms have or can have a relatively clear core. Vagueness, like conflict, does not pose a special problem to the claim that norms of legal method are partly constitutive.

8 THE QUEST FOR AN ULTIMATE NORM

What significance, if any, do norms of legal method have for issues of legal validity? This question will be explored in this chapter and the next. The term legal validity will be explained and refined in the next chapter. For now, a norm will be considered legally valid if it is in force or exists within or according to a legal system.[380] The explanation of legal validity is entangled with matters about the foundations and structure of a legal system and the view that some norms are ultimate. In the process of answering the question, we learn about the place of norms of legal method or secondary norms in an account of the entangled topics.

The reason why these issues are intertwined can be demonstrated, briefly, by stating a view, which will be expanded below. Let us call it the simple picture of legal validity. According to some theories, a legal norm (a law) is valid in virtue of another legal norm (a law) and this explanation continues until there are no more legal norms (laws) to validate. The highest legal norm is validated by an ultimate norm, which is somehow different from the legal norms.[381] This ultimate norm forms the foundations of a legal system or, at least, a part of them. And the chain of legal norms validating other legal norms forms or follows the hierarchical structure of a legal system with the ultimate norm at the top. If there are many ultimate norms, then there are many hierarchical structures, each with an ultimate

380 See e.g. Finnis (n 124) 268, for a brief description of validity along the lines of in force or existing.

381 Several well-known and influential theories of law include an element of what will be called here ultimate norms. The norms in question have been referred to as ultimate principles, the basic norm, the ultimate rule of recognition, foundational rules or tests and the master rule or principle. These names and the norms' descriptions indicate they have some property that is captured by the terms basic, ultimate, foundational or master. See for example Salmond (n 1) 222-223, Kelsen (n 53) 198-205, Hart (n 35) 94-95 and 105-108. On p. 105, Hart says: 'The rule of recognition … is in an important sense … an *ultimate* rule…' See also Dworkin (n 5) 42 and 46, and Dworkin *LE* (n 3) 164-167, for these terms although he does not explain validity according to the simple picture.

norm at the top. The explanation of legal validity, the foundations and structure of a legal system as well as the ultimacy of some norms hang together in this way.

What place do norms of legal method have in this explanation? To recall, they are internally diverse and address the issues of the existence, content, application and applicability of the law as well as institutional considerations and powers. And they can be categorised accordingly into norms of recognition and change, interpretation, subsumption, applicability and institutional decision-making. At first glance, it appears that the legal norms in the explanation above are norms of change and the ultimate norm is a norm of recognition. The account of norms of legal method given here is in tension with the simple picture. First, it was claimed that all legal norms have a basis in a source of law, that is a legal material, practice or a factor, identified by a norm of recognition. The simple picture, on the other hand, suggests that some laws are valid in virtue of norms of change but others in virtue of norms of recognition. Secondly, there seems to be no place for other categories of secondary norms than norms of change and recognition in the simple picture. However, norms of recognition only identify sources of law but not the law itself. Other types of norms, such as norms of interpretation and applicability, regulate the highest legal norms as well. Thirdly, it is conceivable that the very same norms regulate the highest legal norms and the legal norms below them in the hierarchy. For example, the very same norms about *lex specialis* or the relevance of *travaux préparatoires* may apply to statutes and the written constitution. This suggests that norms of legal method need not form a neat hierarchical structure with legal norms. So, either the simple picture of legal validity or the account of norms of legal method needs to be adjusted or abandoned.

In what follows, it will be argued that the simple picture is too limited and should be supplemented in various ways. Once a more nuanced and intricate picture emerges, we

are in a better position to explain the significance of norms of legal method for issues of legal validity and the entangled topics. We begin by examining and questioning the simple picture. In light of the complexity of the issues, other categories of secondary norms than norms of recognition and change will be set aside for a moment.

8.1 The Chain of Validity

An entry point into the web of issues is needed. We begin by exploring in what sense, if any, norms could be ultimate. One starting point is asking what differentiates ultimate norms from legal norms. A possible distinguishing mark is that ultimate norms, unlike legal norms, do not have any legal grounds.[382] They are neither created in accordance with a legal norm nor do they have a basis in a source of law.[383] This claim alone does not, though, explain in what sense they are ultimate. It merely entails that they are not legal norms themselves or, at least, not legal norms in the same way as other legal norms are. In other words, they do not share certain characteristics with (other) legal norms.[384] For that reason, the label 'legal norm' will not be used when referring to ultimate norms.

Another approach is explaining the ultimacy of the norms as a solution to what can be called the problem of legal validity.[385] It has been claimed that a legal norm is valid if it was created in accordance with another legal norm.[386] In that circumstance, the latter legal

382 This is not to say that there are no other possible distinguishing marks.

383 See in this context Hart (n 35) 107. Raz (n 47) 69, says: 'The fact that a rule is an ultimate legal rule means no more than there is no legal ground, no legal justification for its validity.'

384 This is assuming that legal norms have either one of these characteristics. It should be noted that other norms, which matter for law, are also not valid in virtue of law, such as grammatical rules, arithmetic and logical maxims. Therefore, this feature alone does not distinguish ultimate norms from these other norms. See in this context, Green (n 133) 324-327.

385 Different versions of the problem include the problem of legal authority. See Scott J. Shapiro, 'On Hart's Way Out' in Jules Coleman (ed), *Hart's Postscript. Essays on the Concept of Law* (OUP 2001) 149, 149-153, and Shapiro (n 48) 57-59.

386 Kelsen (n 53) 193-195.

norm is the reason for or the ground of the validity of the former legal norm.[387] The latter legal norm is in turn valid if it was created in accordance with yet another legal norm. The same explanation applies to the third legal norm. This is problematic because the explanation has no apparent end; it continues *ad infinitum*. There are, though, good reasons to think that the explanation is incomplete and the full account does not lead to infinite regress. At some point, there are no more legal norms to validate legal norms.[388] So, what validates the last legal norm?

The problem shares certain features with the chicken and egg problem, where it is asked which one came first: the chicken or the egg? A chicken comes from an egg but an egg is laid by a chicken. Presumably, the solution to that problem is that some closely related animal to a chicken laid the first egg containing a chick and this occurred through the process of genetic mutation. The solutions offered to the problem of legal validity have a similar structure. The final explanation involves something other than a normal legal norm, for example, a deity, a sovereign or an ultimate norm.[389] In light of this, it can be said that the norms are ultimate in the sense that they are the final explanation of validity.

An inquiry can be made into exactly how the ultimate norms are the final explanation of validity. An example may be helpful. Imagine Astrid, a young woman. After enjoying a delicious milkshake, she throws the empty container on the street. Unluckily for her, a nearby policeman observes this. He tells her: 'This is forbidden. It's illegal! I have to fine you.' Never having heard of this milkshake rule, Astrid asks: 'Why is it illegal?'

---

387 The concept of legal validity is deliberately left relatively undefined for now. It is important to keep in mind, though, that it has different meanings in different theories of law. See e.g. Kelsen (n 53) 44-45 and 193, Hart (n 35) 103, Raz (n 47) 153, and Ross (n 2) 15-18, 29, 34-35 and 56.

388 If we know when a legal system came into existence and all the legal norms in it, then there is little reason to think this line of reasoning leads to infinite regress.

389 Shapiro (n 385) 149-153.

The policeman promptly responds: 'According to article 20 of the regulation on a hygienic environment, littering is forbidden.' Being a curious young woman, Astrid raises the question: 'Why is that the law?' 'Well', the policeman answers hesitantly, 'Because it was enacted in accordance with a statute of Parliament.' Astrid feels like she is on to something, so she enquires further: 'But why is that the law?' Unused to this line of questions and befuddled, the policeman finally replies: 'The statute was enacted in accordance with the Constitution, of course.' Now Astrid thinks she has got him and triumphantly asks: 'But why is that the law?'[390]

One way to understand Astrid's questions is that she is enquiring about the validity of a legal norm.[391] The policeman's responses indicate that the reason is the legal norm was created in accordance with another legal norm. The norm of the regulation is valid because of the norm of the statute, which in turn is valid because of the norm of the written constitution. Astrid asks the last question exultingly because she thinks she is reaching the final answer. After all, not every legal norm can have another legal norm as a reason for its validity.[392] The final answer, which the policeman does not mention in the example, is the ultimate norm. It validates the last legal norm, which in the example is the norm of the written constitution. It has been said that the best way to understand the sense in which some norms are ultimate is by tracing this familiar chain of reasoning concerning validity.[393]

---

390 For this type of reasoning, see e.g. Salmond (n 17) 222, Kelsen (n 53) 200-201, Ross (n 2) 45 and 80-81, Hart (n 35) 107, and Gustav Radbruch, 'Legal Philosophy'. *The Legal Philosophies of Lask, Radbruch and Dabin. The 20th Century Legal Philosophies Series Vol IV* (Kurt Wilk tr, OUP 1950) 112-115. See also von Wright (n 47) 196-202.

391 See in this regard Kelsen (n 26) 254.

392 See e.g. Salmond (n 17) 222-223, Kelsen (n 53) 194-195, Ross (n 2) 80, and Hart (n 35) 107.

393 Hart (n 35) 107.

This explanation of the relations between legal norms and the ultimate norm has been presented through the metaphor of a 'chain' of validity.[394] According to the metaphor, the legal norms are represented as links in a chain. A legal norm created according to another legal norm is, figuratively speaking, 'lower' than it in the chain, which is correspondingly 'higher' than it. The former norm is 'inferior' relative to the latter norm, which is 'superior' relative to the former norm.[395] The last legal norm, that is the penultimate norm in the chain, will be called here 'the highest legal norm' and the final norm in the chain is 'the ultimate norm'. In the example above, the norm of the written constitution is the highest legal norm but, according to some theories of law, the rule of recognition or the basic norm is the ultimate norm. The legal norms and the ultimate norm are linked together through their relations of being reasons for or grounds of the validity of a norm that is, figuratively speaking, lower in the chain. The ultimate norm is the final reason for the validity of all the legal norms below it in the chain. If it changes or ceases to exist, then the legal norms that are lower in the chain can or do lose their validity. In the end, the validity of the legal norms depends on the ultimate norm.[396] It can be said that this is an aspect of the ultimacy of the norm or it is a part of the sense in which it is ultimate.

394 Raz (n 47) 122-127.

395 See e.g. Kelsen (n 53) 193-194. More than one legal norm can be a reason for or a ground of the validity of a legal norm. Some of the 'higher' legal norms may even be ranked lower in the legal system or get the same ranking, for example, conventions affecting the validity of statutes and constitutional provisions created according to amendment clauses. For simplicity's sake, the chapter mainly refers to a single higher legal norm as a reason for or a ground of the validity of a lower legal norm.

396 Kelsen (n 53) 195, and Hart (n 35) 120-123.

8.2 Five Features of the Chain of Validity

There are, at least, five noteworthy features of the chain of validity as it has now been presented, which form the simple picture. The first feature is that the ultimate norm only directly validates or refers to the highest legal norms. The chain in the example above has norms of a written constitution, a statute and a regulation. In the example, the content of the ultimate norm only refers to the written constitution. Metaphorically speaking, the ultimate norm is only at the 'end' of the chain or it is only at the 'top' of the hierarchy. The ultimate norm does not directly refer to the legal norms below the written constitution in the example, such as the norms of the statute and the regulation. It validates them indirectly and is the final reason for their validity through the norms of the written constitution. The norms of the written constitution directly validate or refer to norms of statutes, which in turn directly validate or refer to norms of regulations. The ultimate norm is, figuratively speaking, linked to the written constitution, it is then linked to statutes and they are then linked to regulations. The ultimate norm is, therefore, not only ultimate by being the final explanation of validity, on which the validity of all legal norms in the chain depends, but also in the sense of being the last norm in the chain of legal norms or at the top of the hierarchy.

This does not mean that there cannot be other strands in the chain united by a single ultimate norm or even that there can be multiple ultimate norms in a legal system, each with their own chain of validity.[397] There might, for instance, be a distinct ultimate norm in a legal system validating precedents besides the ultimate norm validating the norms of the written constitution. Nevertheless, each strand or chain has this feature of having an

[397] See e.g. Raz (n 47) 95-96.

ultimate norm at its end and according to its content it only refers to the highest legal norms in the strand or the chain.[398]

The second feature is connected to the first one. The ultimate norm, be it one or many, forms the foundations of a legal system or, at least, an important part of them.[399] Issues of the foundations of a legal system are issues of the foundations of the constitution. This is because ultimate norms only identify and validate the highest legal norms and they are confined to the top of the hierarchy, that is they reside at the level of the constitution and beyond. For this reason, the ultimate norms tend to have a special place in analysing issues concerning legal systems.[400]

The third feature is also connected to the first one. There are two different explanations of validity of legal norms in the chain.[401] The validity of the legal norms below the highest legal norm in the chain, such as norms of the statute and the regulation in the example, is explained with reference to a higher legal norm. This type of validity is somehow within, internal or according to law. The legal norms are valid in virtue of law. It is systematic validity. The validity of the highest legal norm, in our example the norm of the written constitution, is, however, not explained with reference to a legal norm or, at least, not a legal norm in the same sense as the other legal norms. It is explained with reference to an ultimate norm, which, depending on the theory of law, is a presupposition

---

398 Hart (n 35) 101, says the rule of recognition can be complex and there can be criteria for identifying law that 'commonly include a written constitution, enactment by a legislature, and judicial precedents.' If this is one and the same rule, then it is unclear how it fits with his explanation of the chain of validity on p. 107.

399 See e.g. Hart (n 35) 100.

400 See e.g. Hart (n 35) 117-124, and Kelsen (n 59) 117-199, Kelsen (n 53) 198-202 and 208-214, and Kelsen (n 121) 408-418.

401 The explanation of the content and existence of the ultimate norm, such as the basic norm or the rule of recognition, is a third type of explanation in the chain, which relates to the second one mentioned here. The basic norm is presupposed but the rule of recognition is neither valid nor invalid, its existence is a matter of fact. See Kelsen (n 53) 194-195, and Hart (n 35) 107-109.

or a fiction,[402] a hypothesized or presupposed political ideology,[403] a historical or a social fact[404] or a social rule or a convention.[405]

Examples can be given. The norm of the written constitution is valid because of the basic norm, which is the presupposition that the authors of the constitution were authorised to create it or because of the rule of recognition, which is a social rule among the officials identifying the written constitution as valid law. If certain facts change, such as the practiced political ideology of officials leading to a new constitution being effective, then the basic norm or the rule of recognition changes (or a new norm emerges) and with it the validity of the constitution.[406] In other words, the validity of the highest legal norm does not depend on ordinary law but on a norm that lies partly outside of law or depends on factors that are not legal. This type of validity, which only applies to the highest legal norms according to the first feature, is somehow, at least partly, extra-legal, outside of or external to law.[407]

What the validity of the highest legal norm shares with the validity of the lower legal norms is being valid in virtue of another norm. The legal norms lower in the chain are valid in virtue of a legal norm and the highest legal norm is valid in virtue of the ultimate norm. The chain of validity is a chain of legal norms and the ultimate norm. The exact

---

402 Kelsen (n 53) 46, 194-194 and 199-200, and Kelsen (n 26) 254-256.

403 Ross (n 2) 81-83.

404 Salmond (n 1) 222, and Radbruch (n 390) 112-115. On p. 56, Radbruch says that legal science clarifies legal judgments up to its 'ultimate presupposition of world outlook'.

405 Hart (n 35) 101-103 and 256. Dworkin *LE* (n 3) 164-167, does not explain the principle of integrity in the context of validity or the chain of validity but it is a political moral principle.

406 In order for a new rule of recognition to emerge, the social practice referring to the new constitution need not only be effective but also to be taken or used by officials as a standard in a certain way.

407 For different types of validity, see for example Raz (n 47) 146-159, especially 153, and Alf Ross, 'Validity and the Conflict between Legal Positivism and Natural Law' in Stanley L. Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms* (Clarendon Press 1998) 158-163.

relationship with the ultimate norm may, nonetheless, be different from the exact relations of lower legal norms to higher legal norms. The legal norms are, to reiterate, valid because they were created in accordance with a higher legal norm.[408] As will be explained in a moment, the connection between the highest legal norm and the ultimate norm varies among theories of law. Suffice it to say for now, the highest legal norm need not to have been created in accordance with the ultimate norm. The highest legal norm is, thus, valid in a different way from the lower legal norms.[409]

This leads to the fourth feature of the chain of validity. It is, at least in part, a chain of power-conferring norms.[410] In the example, the norm of the regulation was created in accordance with a power-conferring norm in the statute. That norm authorises or empowers some institution or official to enact a regulation. The norm of the statute was then created in accordance with a power-conferring norm in the written constitution. The norm at the bottom of the chain, which is the norm of the regulation in the example, need not be a power-conferring norm.[411] It may be a duty-imposing norm, such as a norm forbidding littering.[412] What is the normative character of the ultimate norm?

---

408 This is too simple since there may be multiple norms with different social functions, normative character and rankings that matter for the validity of a lower legal norm.

409 It should be noted that it follows that the lower legal norm need not have been created according to a higher norm that matters for its validity.

410 The term is used here in the same sense as Hart uses power-conferring rules, see Hart (n 35) 26-49. This need not be clear cut. Kelsen (n 53) 199-200, discusses an individual norm created in applying criminal law. Presumably, though, the courts have a power to apply criminal law or decide cases. The example does, however, demonstrate that both duty-imposing and power-conferring norms can be relevant.

411 For simplicity's sake, the individual norm created by a policeman or a judge when fining Astrid is not discussed. If such an individual norm were created, then it would be in accordance with a power-conferring norm higher in the chain of validity and, in the example, it would be a duty-imposing norm.

412 The term is used in the same sense as Hart uses duty-imposing rules, see Hart (n 35) 26-49.

An essential part of the basic norm is that it is an empowering norm. It authorises the creation of the historical first constitution, which is the written constitution in the example.[413] Since the basic norm is presupposed, the written constitution was not, strictly speaking, created according to it. A dominant view on the rule of recognition is that it is a duty-imposing norm.[414] If the ultimate norm is a duty-imposing norm, then its relation to the highest legal norm is, as has already been stated, different from the relationship between other legal norms in the chain of validity. The rule of recognition, then, validates the highest legal norm by imposing a duty on officials to identify the constitution as law but other legal norms are created according to legal norms. Finally, the interpretive norms of recognition discussed here are qualifying norms. They state what counts as sources of law of a legal system.

The fifth feature is that the chain of validity follows or forms the structure of a legal system, which tends to be one or more hierarchies with ultimate norms as parts of them at the top. In the example, the norms of the written constitution are superior to the norms of the statute, which in turn are superior to the norms of the regulation. The norms form a hierarchy of norms and the ultimate norm is at the top. Imagine, though, a modified example where the current written constitution was created in accordance with a power-conferring norm in the previous written constitution (for example an amendment clause) and it is the historical first constitution of the legal system. The question arises in this

413 See e.g. Kelsen (n 53) 196-197, and Kelsen (n 59) 116, but on the latter page it says: 'The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act.' Another common formulation of it is that 'one ought to behave as the individual or individuals who laid down the [historical] first constitution have ordained'. See also Kelsen (n 78) 411, and Raz (n 47) 127. For the term 'historical first constitution' below see e.g. Kelsen (n 59) 115-117.

414 This was Hart's view, see Hart (n 105) 160, and Hart (n 300) 464. See also MacCormick (n 300) 21, Raz (n 47) 93, Green (n 300) xxiii, Gardner (n 34) 103, and Lamond (n 48) 29.

situation whether the content of the ultimate norm directly refers to the current written constitution or the previous one.

The content of the basic norm always refers to the historical first constitution. In the modified example, its content would be that the authors of the previous constitution were authorised to create it. The current constitution is valid because it was created in accordance with the previous constitution. It is no longer the highest legal norm or the penultimate norm in the chain. The previous constitution occupies that place. As such, the previous constitution is or was valid in a different way from the current constitution.[415] It is the reason for the validity of the current constitution, which is valid within, internal or according to law. If a legal norm is valid because it was created in accordance with another legal norm, and the current constitution was created in accordance with the previous constitution, then tracing the chain of validity back in time, so to speak, would seem logical.[416]

The content of the rule of recognition is, however, dissimilar. In the modified example, it identifies the current written constitution as valid law but not the previous one. After all, it is the current social practice of officials. The rule of recognition may incorporate the content of the power-conferring norm in the previous constitution as a criterion for identifying the current constitution. The current constitution is, nonetheless,

---

415 The relevance of the previous constitution for the chain of validity depends on, among other things, whether a legal norm that was, but no longer is, valid can still be a reason for or a ground of the current validity of another legal norm. See e.g. Kelsen (n 59) 117, where he discusses the principle of legitimacy. See also the principle of continuity in Finnis (n 121) 268. More on this in Chapter Eleven.

416 See e.g. Kelsen (n 53) 208-214. Despite the content of the basic norm, it is currently presupposed and that presupposition depends on the principle of effectiveness. According to it, a legal system must be, by and large, effective for a basic norm to be presupposed. The basic norm depends on the currently effective facts. If the effective facts change, then there may be a break in the chain and a new constitution becomes the historical first constitution and the basic norm is the presupposition that its creation was authorised.

currently valid because of the rule of recognition and not the previous constitution. The current constitution is always the highest legal norm or the penultimate norm in the chain, where there is a written constitution. The previous constitution is historically but not normatively significant in the sense of being a reason or a ground of validity; it is never the reason for the validity of the current constitution although it may be its historical cause. Consequently, the current constitution is never valid according to the law in the same way as other legal norms. To conclude the discussion of this feature, it may be said that while the chain of validity maps onto or is the structure of a legal system, which is a hierarchy with the ultimate norms at the top, it is controversial whether it adapts to its own history.

In the next section, the first feature of the chain of validity, the idea that the content of the ultimate norm only directly refers to the highest legal norms in the chain, will be challenged. Once it comes to light that the best explanation of the ultimacy of some norms is different from the one given by the simple picture, that will have consequences for the other features of the chain of validity as well since they are connected to the first feature. Thus far, the discussion of the chain of validity has not focused on a particular theory of law although examples have been borrowed from theories that include the basic norm and the rule of recognition. In testing the simple picture, norms of recognition will be in the foreground. Two key distinctions between them and the rule of recognition should be borne in mind. As ultimate norms, they are interpretive norms but not social rules or conventions and they identify sources of law, that is legal materials, practices and factors, but not the law itself. Despite this focus, the challenge does not depend on the nature of norms of recognition and they could be replaced with the rule of recognition. The simple picture is too simple on either approach.

8.3 The Simple Picture Exposed

The Challenges Presented

The place of the ultimate norm of recognition in the chain of validity faces a couple of interrelated challenges. The first challenge concerns sources of law.[417] If the ultimate norm of recognition only refers to the highest legal norms, such as constitutional norms, then it directly identifies only the written constitution as a source of law. Suppose that statutes of Parliament and regulations of ministers are considered to be sources in the legal system in the example above. In that circumstance, the statutes and regulations are not identified as sources by the ultimate norm of recognition. In virtue of what are the statutes and regulations in the example sources of law?[418]

The second challenge is closely connected to the first one.[419] It concerns legal validity of different kinds of norms or acts. In the example above, it is plausible that all the norms, that is the norms of the written constitution, the statute and the regulation, are legal norms, that is source-based norms. There are, however, many other norms in a legal system not all of which are considered to be legal norms in that sense. Among them are norms of private and public contracts, collective agreements and wills. Moreover, there are 'rules', directives, orders and circulations internal to an administration or the executive branch, judicial or administrative decisions and legal opinions, such as of Parliamentary Ombudsmen. Furthermore, there are guidelines, declarations, recommendations, companies' articles of association and Parliamentary resolutions. Some of these norms or

417 Again, for sources of law, see e.g. Ross (n 50) 89-93, and Schauer (n 50) 66-67. The challenge should also hold for different meanings of the term, such as law-creating acts (legal events), but they will not be kept in the foreground here.

418 For Kelsen's view on sources of law, see e.g. Kelsen (n 53) 232-233.

419 Perhaps, it is merely a different expression of the first challenge.

acts are considered to be, thought of and spoken of as valid, such as valid contracts and judicial and administrative decisions. But they are not the law even though they are created according to the law.

The latter challenge is the following one. If the ultimate norm of recognition only regulates the highest legal norms (the highest laws), then it does not itself distinguish between valid laws and other valid norms or acts lower in the chain. And if that is the case, then what, if anything, distinguishes valid laws from other valid norms? It just so happens in the example above that only traditional legal norms or sources of law are cited. The structure of the chain of validity is, though, the same for the other norms or acts. Here is an example: a contractual norm is valid in virtue of a statutory norm, which in turn is valid in virtue of the norm of the written constitution, whose validity depends on the ultimate norm. Both the contractual norm and the regulatory norm in the example above are valid in virtue of a statutory norm, which is a power-conferring norm. So, either they are valid in the same way or there is something that distinguishes them.[420]

It might be objected at the outset that the challenges assume that there is a difference between valid laws and other valid norms as well as that valid laws are source-based. A competing view is that all norms created according to other norms are a part of the legal system as laws. And the only thing that can sensibly be called sources of law are the authorising norms or their criteria. The reason why people sometimes speak as if some

[420] There is no space here to deal with whether the norms or acts are better thought of as binding than valid. The thought here is, though, that there is nothing in the concept of law that rules out that these acts can be laws. For example, international conventions (treaties), which are agreements, are thought of, spoken of and used as laws in international law although that is controversial. For a view that they are law, see e.g. Kelsen (n 78) 317-265. For a contrary view, see e.g. Torstein Gihl, 'The Legal Character and Sources of International Law' (1957) 1 SSIL 53, 71.

norms are ‘laws’ but others are not is because they think that only general norms are laws. However, that is a mistake.[421]

To this it may be responded, firstly, that it is a common feature of practice to distinguish between valid laws and other valid norms or acts. To give an instance, not every valid norm is considered to be law or have a source of law in English law. Instead, the sources are commonly thought to be legislation, precedent and (local) custom.[422] This distinction is reflected in language and practice. Secondly, there is a subtle distinction between legal norms and other norms or acts as to the reasons for their legal effects. Legal norms have the force of law or legal effect because they are the law. Other norms or acts have the force of law or legal effects because of laws. This distinction is muddled in the case of laws that are created in accordance with laws. Thirdly, even in the muddled cases, there may be contingent differences internal to legal systems. For example, it may be the case that only laws are ranked or hierarchized. It may be that the priority norms, such as *lex specialis*, only apply to laws. Or that only sources of laws are interpreted in light of other laws. Other norms or acts are not ranked, prioritized or form the context of a source in this way. It may also be the case that the power of courts to review, apply and enforce laws and other valid norms is different.[423] These are reasons to pursue a theory that explains this distinction before it is cast away.

A further objection might be directed at a premise of the challenges. The putative sources of law at the lower levels of the chain of validity are not really sources; they are not sources of law in the proper sense since they are not identified by the ultimate norm of

---

421 Kelsen (n 53) 238-239 and 278, Kelsen (n 59) 37-39, and Kelsen (n 26) 7-8.

422 See e.g. Ian McLeod, *Legal Method* (9th edn, Palgrave MacMillan 2013) 106-123, and James Holland and Julian Webb, *Learning Legal Rules* (9th edn, OUP 2016) 35-67.

423 See in this context Raz (n 127) 195.

recognition. Each legal system may have its idiosyncratic view of sources, just like a statute may declare that a whale is a fish. The view of sources internal to a legal system does not make them proper sources any more than the statute makes a whale a fish, except for the purpose of the statute. However, statutes of Parliament and regulations are widely considered to be sources of law.[424] Any concept of a source of law that excludes them, where there is a written constitution, is not only a limited concept but a peculiar one. It has failed to adequately account for what is commonly thought of, spoken of and treated as sources of law in various legal systems.

Meeting the Challenges: Subordinate Norms of Recognition

The challenges presented to the simple picture concern the identification of sources of law and the distinction between valid laws and other valid norms lower in the chain of validity if the ultimate norm of recognition is confined to the top and, therefore, cannot perform the tasks. One way to meet the challenges is by pointing to subordinate norms of recognition.[425] While the ultimate norm of recognition only directly refers to the highest legal norms, the subordinate norms of recognition identify sources of law and validate legal norms lower in the chain. In the example above, the subordinate norms of recognition identify the statute and the regulation as sources. Other valid norms or acts, such as contractual norms or norms of judicial and administrative decisions, are not identified by subordinate norms of recognition. Thus, they are distinct from valid laws even though they are legally valid. This

424 One example is Iceland, see Snævarr (n 1) 161 and 179.

425 Raz (n 47) 150-151, speaks of a rule of recognition being valid in virtue of another rule of recognition and ultimately the rule of recognition.

appears to be a promising solution but much depends on the nature of subordinate norms of recognition.

According to the explanation of the chain of validity offered, subordinate norms of recognition must be legal norms, which are valid in virtue of other norms and are parts of the chain of validity. The ultimate norm of recognition is different. It is not valid in virtue of another norm. Accordingly, the validity of subordinate norms of recognition depends in the end on the ultimate norm of recognition.[426] What the ultimate norm and the subordinate norms of recognition share is that they both identify sources of law. Possible examples of subordinate norms of recognition in this sense are article 1 of the Swiss Civil Code 1907, article 38 of the Statute of the International Court of Justice and the third paragraph of article 289 of the Treaty on the Functioning of the European Union.[427] Arguably, the first provision identifies the code and customs as sources of law but the second one identifies international conventions, international custom, the general principles of law recognized by civilized nations and judicial decisions as well as the teachings of the most qualified publicists as sources of law. The third provision states that 'Legal acts adopted by legislative procedure shall constitute legislative acts.'[428]

426 A written constitution could embody a subordinate norm of recognition referring to itself. The validity of the subordinate norm of recognition would, though, always depend on the ultimate norm of recognition.

427 The norms' content indicate that subordinate norms of recognition are not best thought of as part of a chain or a hierarchy. What was said before in Chapter Six should be kept in mind. Possibly, some of these are norms of adjudication.

428 Subordinate norms of recognition are here taken to be those legal norms that identify sources of law but not all legal norms that furnish criteria of validity for legal norms, including the criteria to invalidate a legal norm. For instance, a legal norm may have to be in accordance with a principle of proportionality to be valid in the sense that it can be invalidated if it is not. See in this context e.g. Raz (n 47) 95.

As propitious as this solution appears to be, there are obstacles in the way. To start with, not all legal systems have subordinate norms of recognition in this sense.[429] Besides, a legal system is conceivable where there are sources of law lower in the chain but no legal norms that identify them as such. Law may regulate its own sources of law but it need not do so even where there are sources of law in the lower levels of the chain.

It could be responded that if statutes and regulations are sources in the example above, then there must be legal norms, written or unwritten, that identify them as such, for instance a legal custom *in foro* or *in pays*. This reply is built on the premise that legal reality must be made to fit a particular theory of law even if it comes at the price of distortion.[430] In any case, the answer may prompt us to seek a better or a more illuminating explanation. Moreover, it does not logically follow that there must exist a legal convention. It could be a social convention, some other kind of social rule or an interpretive norm, to name examples. If it turns out that a subordinate norm of recognition is not a legal norm, but a social or an interpretive norm, then the difference between it and the ultimate norm significantly diminishes and the neat structure of the chain of validity goes awry.

There is a further hindrance. When the familiar chain of reasoning, that is the chain of validity, is described, it is not stated that a regulation is a source of law because it is identified as such by a norm of a statute, whose content is that regulations are sources.[431] Instead, the explanation is traditionally that the regulation was 'made in exercise of powers conferred, and in accordance with procedures specified' by the norm of the statute or the

429 The Icelandic legal system is one example.

430 The debated question is, of course, whether there is any distortion.

431 In Hart's (n 35) 107, example, he refers to a by-law, a statutory order and a statute.

statute empowered a minister to make the regulation.[432] Furthermore, the higher legal norm 'provides the criteria in terms of which the validity' of the lower legal norm is assessed.[433] These legal norms do not appear to have a similar normative character to the ultimate norm, but an example of it, according to one theory, is this: 'What the Queen in Parliament enacts is law.'[434] The legal norms in the explanation are power-conferring norms, who fit the description of norms of change.[435] If they are subordinate norms of recognition, then there is little or no difference between them and norms of change and the category of norms of recognition becomes confusing.[436] A better interpretation of the simple picture is that subordinate norms of recognition are, unlike norms of change, not an essential part of the explanation of the chain of validity according to the simple picture.

Meeting the Challenges: Norms of Change

Another way to meet the challenges is by relying on norms of change, which are legal norms that confer a power to create, change or cancel laws.[437] They are a part of how law regulates its own creation.[438] It could be claimed that they identify sources of law in the lower levels of the chain and distinguish valid laws from other legally valid norms or acts. Valid laws are created according to norms of change except the highest legal norms, which

---

432 ibid 107.

433 ibid 107.

434 ibid 107.

435 For rules of change, see Hart (n 35) 95-96.

436 Or vice versa. See in this context Jeremy Waldron, 'Who Needs the Rule of Recognition?' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 327-349.

437 Hart (n 35) 96-97.

438 For the law regulating its own creation, see e.g. Kelsen (n 53) 221, Kelsen (n 59) 124, Kelsen (n 26) 102, and Kelsen (n 47) 61.

are identified by the ultimate norm of recognition. Other valid norms or acts, such as a valid contract or a valid decision, are created according to power-conferring norms that are not norms of change.

In Chapter Two, it was stated that there is a puzzle concerning norms of change and it is this: what makes a norm into a norm of change and distinguishes it from other power-conferring norms since not all power-conferring norms are norms of change? Or how can a norm of change make it the case that what is created according to it counts as the law? The common-sense response it that they confer a power to create laws whereas other power-conferring norms authorise the creation of other kinds of things. But what makes it the case that what is created counts as law in one instance but not the other. A power to create a norm cannot be the distinguishing mark. But the norms do not simply confer a power, they also define that what is created. It could be said that a norm of change defines that what is created as law but other power-conferring norms define that what is created as, for example, a contract or a decision. This seems straightforward enough. Imagine, for instance, a written constitution that states: 'The legislative power is vested in Congress' or 'Parliament enacts laws'. The name of the power or the product is literally 'legislative' and 'laws'. A reason why a collective agreement, on the other hand, is not the law, according to this explanation, is because the power-conferring norm that authorises its creation does not define or name it as the law.

Now imagine that Congress or Parliament enacts laws, which themselves contain power-conferring norms authorising a wide array of officials or institutions to create regulations, 'rules', orders, directives, advertisements, general decisions, recommendations, opinions and so on. Which one of these are norms of change? In some of these cases it might be said that the terms used indicate that they are laws but that

explanation does not apply across the board. There is nothing about, for example, the word 'decision' that indicates whether or not it is the law. The reason is that not all norms of change can be identified by terms that indicate that what is created is law. Therefore, it is not obvious that they confer a law-making power. Analysing language alone does not solve the problem of whether, for instance, a 'general decision' or an 'order', which are so defined by the power-conferring norms, are laws.

Moreover, not all norms that are called laws by power-conferring norms are the law. For example, a norm may confer a power on an association to set its 'laws'. And some terms can refer to instruments that are sometimes laws and sometimes not. A minister, for instance, may be empowered by a statute to enact 'rules' which are directed at the public and count as laws, and 'rules' which only bind his staff when deciding cases but are not laws. It would seem that defining or naming something in the power-conferring norm alone does not settle whether that what is created counts as the law.

Perhaps the solution is not to focus on definitions or linguistics but whether or not a law-making power has been conferred or delegated. We are to ask: what sort of power has been given? But if definition and naming do not settle the issue, then how does a skilled lawyer spot which is which – what are the identifying and distinguishing marks of a norm of change amidst a jungle of power-conferring norms? Maybe law-making powers have certain features that make it the case that a skilled lawyer can assess the sort of power that has been conferred or delegated. Several possibilities will now be considered.

First, as a preliminary matter, even if there is a concept of legislative power, for example, within constitutional theory, that concept will hardly suffice to identify all norms of change. Legal systems treat power-conferring norms differently. The concept would

have to be able to both identify, for instance, collective agreements as sources of law in one legal system but not another. This suggests that identifying norms of change is not merely a matter of matching power-conferring norms to the concept of legislative power.

Secondly, content, form or purpose do not fully distinguish laws from other norms and acts either. Laws can have diverse content and forms and sometimes laws can have the same form and content as something which is not law. And it is not obvious that norms of change can be identified by their purpose, what the content of that purpose would be or whether all norms of change have a special law-making purpose behind them. Thirdly, although there may be special legislative procedures or institutions in some legal systems, that is not the case for all norms of change in all legal systems. In some cases, the same procedures and institutions may enact something which is not law.

Fourthly, law-making powers do not have a clear identifying feature in this regard. Norms of change are, for instance, not all power-conferring norms that authorise the creation of general norms since not all general norms need to be legal norms. Collective agreements, which are created in accordance with a statute, are an example. Moreover, there might be individual legal norms, such as budgetary laws, repeal laws and singular laws. Norms of change are, furthermore, not all norms that empower some entity to introduce public norms.[439] First of all, we would need to know which norms are 'public', which might entail that the criterion merely shifts the problem. Second of all, and more importantly, not all public norms are legal norms. Internal rules are an instance of that. Stating that the norms must be external, that is directed at the citizens at large, leads to the same problem as saying that they must be public. In any case, not all external norms are

[439] See in this context public and private power-conferring rules in Hart (n 35) 96.

legal norms, such as articles of association, and some internal norms might be legal norms, for instance, the internal rules of an authority in some legal systems. Additionally, norms of change are not all power-conferring norms that authorise the creation of binding norms. There may be binding norms that are not considered to be legal norms, for example, collective agreements and internal rules, and it may even be that not all legal norms are binding, strictly speaking, such as case law in some legal systems. There may be permissive sources. Much depends on what is meant by binding, though. Finally, a combination of these features, that the norms must be general, public, external and binding, might be considered as the identifying mark of norms of change. Nevertheless, that would not make them easily identifiable and distinguishable from other power-conferring norms, especially since sources of law are different between legal systems, even when they have similar power-conferring norms.

Fifthly and lastly, a skilled lawyer might say it depends on an interpretation of each power-conferring norm where various factors are considered and he knows it when he sees it. Saying 'I know it when I see it' is hardly a satisfactory response. It often means that one cannot explain what one knows. But it is an explanation we are after. An interpretation seems to be, though, the strongest reply. Two things merit notice. First, we still need to know the factors that indicate that something is a law-making power and that identifying them may run into the same difficulties as above. Secondly, the wider the object of interpretation becomes, the more likely it is that we are in the business of determining interpretive norms of recognition but not merely interpreting a single provision. For instance, if the interpretation depends on how courts and other officials think of, speak of and treat the products of some power-conferring norms, we are no longer interpreting that source but determining an interpretive norm of recognition.

From the discussion above emerges that it is not enough for a power-conferring norm to simply confer a power to create a (general) norm or to define that what is created as, for instance, 'a statute', 'a regulation', 'a decision' or 'a directive' in order for it to count as the law. They need not constitute or identify them as the law in a similar way to norms of recognition in order to distinguish them from other valid norms or acts. If norms of change do that, then there are two categories of secondary norms that identify the law (or sources of law) although there are important differences between them.[440] And there would be two kinds of laws or sources of law in a legal system. One kind is identified by norms of recognition and the other by norms of change. Consequently, not all laws are directly identified by norms of recognition. In the example above, the norms of the written constitution would not be laws in exactly the same way as the norms of the statute.

A Further Challenge

Even if the challenges can be met, there is a further point to be made. It is not a necessary feature of interpretive norms of recognition or the rule of recognition for that matter that they must be, metaphorically speaking, confined to the end of the chain of validity or the top of the hierarchy. An interpretive norm depends on the existence of legal materials and practices in each legal system. Likewise, the rule of recognition depends on the social practice of officials. These are contingent factors that can differ between legal systems. It takes little imagination to think of a legal system where the practice of the officials supports

[440] The differences depend on the theory of law. Here there are, at least, differences as to both normative character and subjects. Norms of change confer a power on someone, often a specific official or an institution, to change the law whereas norms of recognition are qualifying norms that apply to all who wish to determine the law. In Hart's theory, the rule of recognition imposes a duty on officials and especially the courts to identify certain standards as the law.

a norm of recognition that refers to sources of law at the lower levels in the chain. One and the same ultimate norm of recognition in a legal system, for example, could directly refer to the written constitution, the statute and the regulation as sources of law. This is even easier to envisage if there are multiple ultimate norms of recognition. There could be one norm that refers to the written constitution, another to the statute and a third to the regulation. Ultimate norms of recognition, whether one or many, can operate at every level of the hierarchy.[441]

The ultimate norms of recognition, which are interpretive norms (or the ultimate rules of recognition, which are social rules,) have here replaced subordinate norms of recognition, which are legal norms. We are no longer restricted to insisting that a norm of recognition referring to a source lower in the chain must be a legal norm. This answers the first obstacle to subordinate norms of recognition: they are not legal but interpretive norms. The second hurdle will be addressed in the next chapter. If the norms of recognition that regulate legal norms lower in the chain are not legal norms themselves, and, thereby, not validated by other legal norms and as such a part of the chain of validity, then the difference between them and the ultimate norm becomes less stark. Is it still fruitful to say that one is ultimate but not the other? And if ultimate norms of recognition can operate at every level of the hierarchy, then a more sophisticated picture is needed to explain legal validity.

441 See in this context Kelsen (n 59) 406-407, where he says that *lex posterior* and other 'principles of interpretation' are a part of the sense of the basic norm. This suggests that a part of the basic norm or a part of the presuppositions can apply at every level of the chain.

9 THE CHAIN OF VALIDITY REVISITED

The last chapter suggested that the simple picture of the chain of validity is not fully accurate because ultimate norms of recognition are not confined to the 'top' of the hierarchy (or the 'end' of the chain) but operate at every level. This suggestion requires an explanation that takes into account the familiar and appealing features of the chain of validity but frees us of its shackles. The explanation will set us on a course of discovery of a more sophisticated picture that includes different types of legal validity and helps us to understand the significance of norms of legal method for issues about legal validity. Let us begin by revisiting and revising the familiar chain of reasoning.

9.1 A New Chain of Reasoning

It will be recalled that norms of recognition address the issue of the existence of the law. A legal norm exists as a law of a legal system if it has a sufficient basis in a source of law of that legal system identified as such by a norm of recognition. This explanation applies to all legal norms (laws) of a legal system. Norms of recognition may either be interpretive norms or legal norms. While there must be at least one interpretive norm of recognition, there tend to be many such norms in modern, sophisticated legal systems. There may be one interpretive norm of recognition that identifies all the sources in a legal system or there may be many such norms, for example, one norm identifying the written constitution, another norm identifying statutes and a third one (or even many) identifying regulations. In the former instance, there is one norm operating at multiple levels but, in the latter, there are many norms operating at different levels. In either case, norms of recognition are relevant at every level of the legal system.

This explanation meets the challenges presented to the simple picture. Norms of recognition identify sources of law at every level of the hierarchy (or the chain) and distinguish valid laws from other valid norms or acts. Valid laws are legal norms that have bases in sources identified by norms of recognition whereas other valid norms do not. Where there are valid laws lower in the chain, there are interlocking norms, that is a power-conferring norm and a norm of recognition, but where there are other valid norms, there is only a power-conferring norm. Norms of change are those power-conferring norms that are referred to by norms of recognition.[442] Let us return to Astrid's conversation with the policeman in light of this view to grasp its significance for the chain of validity.

'This is illegal! I have to fine you', says the policeman. 'Why is it illegal?', asks Astrid. The policeman promptly responds: 'It is the law that littering is forbidden.' Astrid raises the question: 'Why is that the law?' The policeman answers confidently: 'Because the legal norm has a basis in a source of law of our legal system, that is article 20 of the regulation on a hygienic environment.' Then Astrid asks: 'Why is the regulation a source of law?' To which the jurisprudentially astute policeman replies: 'Because it is identified as such by a norm of recognition of our legal system.'

This is a new chain of reasoning. It is a chain of a legal norm, a source of law and an ultimate norm of recognition whereas the simple picture is a chain of legal norms and an ultimate norm. Both chains have an ultimate norm of recognition at the end. On this view, a norm of recognition identifies every source of law but, according to the simple

442 See in this context Hart (n 35) 96, where it says: 'Plainly, there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules …' See also p. 69. It is not ruled out here that some norms of change, such as repeal laws, are identified by their relationship with legal norms, which are created in accordance with norms of change that are referred to by norms of recognition.

picture, the ultimate norm of recognition appears when the legal norms run out. On this view, if the norm of recognition is itself a legal norm, then the chain of reasoning is repeated until an interpretive norm is reached. An interpretive norm is not validated by a legal norm. It is suggested that the best way to understand the sense in which a norm is ultimate is by tracing this new chain of reasoning.[443] As will be discussed in a moment, this has consequences for whether other secondary norms can be ultimate.

There are, at least, two upshots of this view. Firstly, the distinguishing mark of norms of change are, at least in part, external to them. They are those power-conferring norms that are referred to and incorporated by norms of recognition and they appear as interlocking norms. Secondly, there are not two kinds of laws or sources of law since all sources are identified by norms of recognition. But the view comes at a cost. The downside is that it may seem unnecessarily complicated to have interlocking norms at work wherever there is something that counts as a source of law in the lower levels of the chain instead of just one norm of change.

9.2 The Five Features Anew

Which Norms Are Ultimate?

Rejecting the explanation of the ultimacy of recognition norms and replacing it with the new chain of reasoning, requires us to rethink the five features of the chain of validity. Clearly, the first feature is no longer appropriate. A norm of recognition is ultimate if it is

443 Compare with e.g. Salmond (n 1) 221-223, Radbruch (n 390) 112-114, Kelsen (n 53) 199-200, Ross (n 2) 79-82, and Hart (n 35) 107.

at the end of the new chain of reasoning and is the final explanation of the problem of validity by identifying a source of law. These norms can be multiple and they regulate all legal norms, not merely the highest legal norms. It would, therefore, be misleading to think of the ultimacy of the norm of recognition as being at the top of a hierarchy (or the end of the chain of validity) as traditionally presented. Furthermore, by restricting a norm of recognition to the top, the role of sources of law at the other levels is obscured.

Can other secondary norms be ultimate? They, too, appear at the end of a chain of reasoning that is similar to the new chain. Consider, for example, norms of interpretation. Suppose Astrid were to query about the content of the statutory norm. The policeman could say that drinking containers are litter in the sense of the statutory norm because that is clearly stated in the *travaux préparatoires*. Now Astrid asks: 'Why does that matter for interpreting the statute?' And the policeman responds: 'Because *travaux préparatoires* form a part of the context of the statute (or are an interpretive factor in our legal system).' To which Astrid queries: 'Why is that?' And our jurisprudentially astute policeman reacts: 'Because of a norm of interpretation of our legal system.' The chain of reasoning here is the (content of a) legal norm, an interpretive factor and a norm of interpretation. The same applies to the other norms of legal method. For instance, a newer law is applied in case of a conflict because of the *lex posterior* norm. The chain of reasoning is (an applicable) legal norm and a priority norm.

From this follows that other norms of legal method can be ultimate in the minimal sense of being at the end of various strands of a chain of reasoning about determining the applicable law. Some of these norms are not legal norms but non-legal norms. They are not validated by other legal norms and, hence, are not a part of the chain of validity. They are ultimate in a thicker sense. Furthermore, some of them concern legal validity and form a

part of the final explanation of it, just as norms of recognition, and are, therefore, ultimate in the same sense. These norms will be identified in the final section. As will become clear in a moment, some norms of legal method that are not directly about legal validity are or can be closely connected to it. Moreover, norms of legal method share the overall role of determining the applicable law, which, as will become apparent in the final section, is closely related to legal validity. As a result, in the context of explaining the ultimacy of some norms, there are reasons to replace the problem of legal validity with the problem of determining the applicable law.

To sum up, ultimate norms are those norms that are not themselves legal norms and are at the end of a strand or a chain of reasoning about determining the applicable law. They are the solution to that problem. Norms of recognition as well as some other types of secondary norms can be ultimate in this sense.

Which Norms Are a Part of the Foundations of a Legal System?

More will be said on the second feature in the next chapter. Suffice it to say for now that if ultimate norms operate at every level of a legal system, it is misleading to think that only the norm of recognition identifying the highest legal norms forms the foundations of a legal system. Moreover, if the other ultimate norms are also part of the foundations of a legal system, then they should not be equated with the foundations of the constitution. That is only one part of the foundations of a legal system. What emerges is the view that norms of legal method, at least those that are ultimate in the thicker sense, determine the law and by that together form the foundations. United they are one of the keys to the science of

jurisprudence. This view has in turn consequences for analysing and explaining some issues of legal systems.[444]

Are There Two Types of Legal Validity?

The third feature was that there are two different explanations of legal validity in the chain. One explains the validity of the highest legal norms, which are identified by the ultimate norm of recognition, but another explains the validity of the lower legal norms, which are valid in virtue of other legal norms, namely norms of change. Other norms or acts are valid in a similar way, that is as products of using power-conferring norms. According to this view, the norms of the written constitution in the example are valid in a different way from the norms of the statute and the regulation. There is some merit to this view but it is misleading in other ways. There are indeed two types of validity but the distinction is not made between the highest legal norms and the lower legal norms. Instead, the distinction is between *valid laws*, on the one hand, and *other valid norms*, on the other. What exactly does this distinction involve?

A distinction between two types of legal validity is reflected in practice. Many civil law jurisdictions use different terms for them. To give examples, the pair of words are *geltendes rechts* and *gültig* in German and *gældende ret* and *gyldig* in Danish.[445] Roughly speaking, the former terms refer to the law in force in a wide sense, that is the law as it is

444 In the next two chapters, more will be said about validity in light of this different explanation, including whether the validity of legal norms lower in the chain in the end depends on the ultimate norm referring to the highest legal norms.

445 See also *gildandi réttur* and *gildur* in Icelandic, *gjeldende rett* and *gyldig* in Norwegian, and *gällende rätt* and *gyldig* in Swedish. See e.g. Ross (n 407) 158-163, Ross (n 106) 1190, and von Wright (n 47) 194-196.

(l. *lex lata*), but the latter words refer to validity (or legal validity in a narrow sense). For instance, an administrative decision is valid (*gültig* or *gyldig*) but statutory and customary laws are a part of the law in force (*geltendes rechts* or *gjeldende rett*). With an eye to this linguistic subtlety, it can be said that there is a distinction between *valid laws* or being *valid as law*, on the one hand, and being *valid according to the law*, on the other.

The primary way for a norm or an act to be valid according to the law is being created according to a legal norm.[446] The norm exists and has legal effect (or the force of law) because of the legal norm.[447] This type of validity appears in different theories of law under the names of juridical validity,[448] the internal function of validity[449] or systematic validity.[450] A legal norm is valid as law (or is a valid law) if it has a sufficient basis in a source of law identified by a norm of recognition. This type of validity appears in other theories of law, for example, as the external function of validity.[451]

At this point it might be objected that the new chain of reasoning is missing important elements. It seems natural that a regulatory norm is valid in virtue of the statutory norm according to which it was created just as a contractual norm may be considered valid in light of the statutory norm according to which it was created. And these are legal norms that confer powers. The norm of the written constitution, on the other hand, need not have been created according to such a legal norm. This indicates that there is a difference

446 Köpcke (n 260) e.g. 3-6, focuses on this type of validity although it is explained more generally with reference to legal power. Here it is not ruled out that something can be valid in a different way.

447 And other legal norms that regulate its force.

448 Radbruch (n 390) 112-114.

449 Ross (n 407) 158-163.

450 Raz (n 47) 150-153.

451 Ross (n 407) 158-163.

between the validity of the highest legal norms and the lower legal norms. If the new chain of reasoning cannot explain this, then surely the simple picture is superior.

The first part of the answer to this challenge involves three claims about the two types of validity. First, all legal norms are valid as law. Constitutional, customary and case laws are valid laws in this sense. Secondly, some legal norms are in a sense both valid as law and according to the law. These are the legal norms that are created according to other legal norms. The statutory and regulatory laws in our example are like this. Thirdly, other valid norms or acts, such as contracts, wills and decisions, are only valid according to the law. Now, it might be wondered how legal norms can be valid in two different senses. The latter part of the answer addresses that and will be discussed with the next feature of the chain of validity.

Is It a Chain of Power-Conferring Norms?

The fourth feature of the chain of validity was that it is, at least in part, a chain of power-conferring norms. The new chain of reasoning can explain this feature and why it appears as if some legal norms are valid in virtue of a norm of recognition but others in light of power-conferring norms. The reason is that a norm of recognition can refer to and incorporate the criterion of a power-conferring norm (or types of power-conferring norms if a norm of recognition refers to them in general) making the new chain of reasoning more complex than presented above. There is an interlocking of norms. Some laws are valid in two different senses because they are both created according to the law, that is a norm of change, and have a basis in a source of law identified by a norm of recognition. This can be explained by returning to Astrid and the policeman's conversation for the last time.

The policeman should have responded to Astrid's question by saying: 'The regulation is a source of law because it was created according to a statutory norm but that is a criterion for counting as a source of law according to a norm of recognition of our legal system, which identifies regulations as sources.' And he could have continued by saying: 'The statutory norm is, likewise, valid law because it was created according to a norm of the written constitution but that is a criterion for counting as a source of law according to a norm of recognition of our legal system, which identifies statutes as sources.'

This view of interlocking norms explains why it seems natural to cite a statutory norm for the validity of a regulatory norm and a constitutional norm for the validity of a statutory norm. The simple picture is too simple because it omits the role of norms of recognition and sources of law and instead only points to a higher legal norm until there are no more legal norms. The reason why the explanation works, so far as it goes, is that the norms of recognition adopt the criteria of the power-conferring norms and lie in the background, so to speak. The lawyer comes to the same outcome by pointing to the higher legal norm as long as she only asks a question about validity, that is about existence, and not whether something *exists as the law* of the legal system; it works for validity in an unrefined manner but not when we focus on valid laws.

But does that not mean that the highest legal norms are still valid in a different way since there are no more legal norms? The structure of the explanation is the same. The constitutional norms are valid laws because they have a basis in a source of law, that is the written constitution, which is identified as such by a norm of recognition of the legal system. It is a chain of a legal norm, a source of law and a norm of recognition just as in the case of the statute and the regulation. If the current constitution was created according to a power-conferring norm (for examples an amendment clause) of a prior constitution,

then the norm of recognition refers to and incorporates the criterion of that power-conferring norm in a similar way as norms of recognition do in the case of the statute and the regulation. In that circumstance, there are interlocking norms and the validity of the highest legal norms is no different from the validity of the statutory and regulatory norms in that regard except insofar as the power-conferring norm in question belongs to a prior constitution.[452] The norms of the written constitution can, then, be valid in two different senses as well. This may explain why some lawyers feel it natural to refer to the prior constitution as a reason for the validity of the current constitution without mentioning the role of a norm of recognition and sources of law as well as why they think the chain of validity traces the history of a legal system. Again, in this circumstance, they lie in the background and the same outcome is reached by only pointing to the old constitution as long as we are only concerned with validity in an unrefined manner.

However, if the current constitution is the historical first constitution, then it was not created according to a legal norm and the norm of recognition does not refer to or incorporate the criterion of such a norm. It may simply point to the constitution and identify it as a source of law. This may explain why the simple picture spots the structure of the explanation of valid laws only at the top of the hierarchy (or the end of the chain of validity), where there are no more interlocking norms, but overlooks it at the lower levels, where it seems obvious that norms of change have an important role.

What is the situation in a legal system without a written constitution? According to one version of the simple picture, statutes of the Westminster Parliament are valid because

[452] As will be discussed in Chapter Eleven, that can also be the situation for statutes and regulations.

of the ultimate norm, which is: 'What the Queen in Parliament enacts is law'.[453] As mentioned before, the dominant view is that the rule of recognition is a duty-imposing norm. The chain goes from statutory norms to the rule of recognition. Two things merit notice. First, the untenable situation seems to follow from this view that Westminster Parliament is not empowered to enact statutes. Instead, the officials, namely the courts, are under a duty to identify statutory laws as laws. Secondly, it is not obvious how legal norm or norms about Parliamentary sovereignty fits into the explanation. Roughly put, they entail that Parliament can make and unmake any law and no one has the power to set aside the legislation of Parliament.[454] The rule of recognition cannot be the norm since it is a power-conferring norm.[455] If there is no room for Parliamentary sovereignty according to the simple picture, then it does not accurately describe English constitutional law.

According to the new chain of reasoning, however, the same explanation applies to legal systems with or without a written constitution. Statutory laws are valid because they were created according to the norm about Parliamentary sovereignty but that is a criterion of the legal system to count as a source of law according to a norm of recognition. There is an interlocking of norms. And the norm about Parliamentary sovereignty is a legal one because it has a basis in a source of law. If it is a custom, then a norm of recognition identifies it (or some customs in general) as a legal custom. If it is a part of the common

---

453 Hart (n 35) 107. Another version is Kelsen's (n 53) 198-200. According to it, statutory laws are valid because of the legal norms about sovereignty who in turn are valid because of the basic norm.

454 See e.g. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan and Co. 1915) 38, and McLeod (n 422) 64-71. Perhaps this doctrine is Hart's inspiration for thinking that the rule of recognition both identifies the rules and hierarchises them.

455 See in this context A.L. Goodhart, 'The Nature of International Law' (1936) 22 Transactions of the Grotius Society 31, 32, who says that the basic norm of English law is 'that the King in Parliament has supreme and unlimited legislative power'. It is unclear that Hart's explanation (n 35) 107, is the full picture. See in this context p. 96. If not, then the explanation on p. 107 is misleading. See also H.W.R. Wade, 'The Basis of Legal Sovereignty' (1955) 13 The Camb. L.J. 172, 189. Furthermore, see in this context Salmond's (n 1) ultimate legal principle.

law, then a norm of recognition identifies cases as sources. It follows that the Westminster Parliament is empowered to enact statutes and the power-conferring norm has a place in the explanation.

Are Ultimate Norms a Part of the Hierarchy of a Legal System?

The fifth feature was that the chain of validity forms or follows the structure of a legal system, which is a hierarchy with an ultimate norm at the top as a part of the hierarchy. This view of the structure of a legal system is misleading since norms of recognition can operate at every level without being themselves legal norms. Instead, there are interlocking norms, where one is a legal norm and a part of the chain, that is a norm of change, but the other is (often) an interpretive norm, that is a norm of recognition, and in that case is not validated by another legal norm. While the norms of change form a hierarchical structure that mirrors or is the chain of validity according to the simple picture, norms of recognition lie to its side or exist on a different plane, figuratively speaking, but regulate the legal norms in the chain at each level. The interpretive norm of recognition identifying the written constitution as a source of law is not a part of the hierarchy in the same way as the chain of power-conferring laws. In other words, the hierarchy of a legal system is only formed by legal norms but not ultimate norms. This may cast light on why some have explained the hierarchy of legal norms and, in a sense, stopped there.[456] Instead, it is better to think of ultimate norms of recognition as existing on a different plane, to the hierarchy's side or in the background, figuratively speaking.

[456] See e.g. Salmond (n 1) 221-223, and Radbruch (n 390) 112-114.

Furthermore, the structure of a legal system becomes even more complex when other categories of secondary norms are considered, such as norms of interpretation and applicability. If they are not legal norms, then they, too, exist on a different plane and can regulate the legal norms at every level. The picture of a legal system that emerges is more intricate than the simple picture of a hierarchy of legal norms with one ultimate norm at the top. But more on that in the next chapter.

In light of the foregoing, it may be said that the chain of validity, as it is traditionally presented in some theories of law, obscures and misleads. Not only should the metaphor be adjusted or abandoned but also the underlying explanation of legal validity. Instead, the focus should be on a different chain of reasoning, which requires rethinking how ultimate norms validate law and identify sources of law. Even though we rejected the claim that norms of recognition are ultimate in the sense that they only directly refer to the highest legal norms, the norms still have the property of being ultimate in the sense that they are the ultimate solution to the problem of determining the applicable law. As a result, there is a need to delve deeper into issues of legal validity and explain the role of other secondary norms in this regard.

9.3 Legal Validity Explained

The last chapter began with a question about the place of norms of legal method in the explanation of legal validity. That set us on, admittedly long, journey of exploring and finally rejecting the simple picture of legal validity for a more intricate and nuanced one. At last, we are in a position to answer the question. We begin by explaining and refining the term legal validity.

What Is It to be Legally Valid?

In the last chapter, it was said that a norm is legally valid if it is in force or exists within or according to a legal system.[457] It was just added that there are two types of legal validity. One is *valid as law* but the other is *valid according to the law*. Now it is time to add details.

A valid law (or, equivalently, being valid as law or being a part of the law in force) means here that a legal norm exists as the law and as such has legal effects according to its content, other things being equal.[458] A law that exists is sometimes said to be in force and when it has legal effects it is sometimes said to have the force of law. For the purpose of the discussion here, it will be assumed that every law is a part of a legal system. As such, a legal norm exists as law of a legal system; it is recognized as a part or a member of the legal system.[459] When it has legal effects, it is, generally speaking, enforceable. Moreover, a legal norm has legal effects within or according to the legal system of which it is a part.

---

457 Validity can refer to various things, some of which are closely connected, for example, existence, membership, applicability, being recognised and enforced, effectiveness and bindingness or justifiability. As will be apparent in the main text, some of these terms can be seen as hanging together in a particular way.

458 The definition or description is based on bits and pieces or inspired by parts of e.g. Kelsen (n 59) 30, 111-117, Kelsen (n 47) 50-51, Hart (n 25) 100-117, Hart (n 105) 160-161, Raz (n 47) 148-153, and Finnis (n 124) 269, writing on legal validity. However, it is not the same as their accounts and their accounts are diverse. For instance, Kelsen (n 59) 30, says: 'By "validity" we mean the specific existences of norms.' Here validity is treated as existence on law's own terms. Kelsen continues by saying: '…which amounts to the same thing … it has "binding force" for those whose behaviour it regulates.' As will be clear in a moment, it is not assumed here that binding according to law is the same as being genuinely or morally binding. See in this context Hart (n 105) 160-161.

459 The way legal validity is explained here relates to Hart's approach, see Hart (n 35) 103. That is because existing as a law *of* a legal system is here taken to be the same as being a member or a part of that legal system.

As the concept is used here, it refers to validity on law's own terms but not to (moral or rational) bindingness or justifiability.[460]

A norm which is valid according to the law means here that it exists according to a legal norm or norms of the legal system. As such it has legal effects according to its content, other things being equal. It, too, refers to validity on law's own terms. Let us explore the significance of norms of legal method for legal validity in these senses.

Valid Laws and Secondary Norms

The building blocks for an explanation of valid laws have already been laid. A legal norm exists (or, equivalently, is valid as law or is a part of the law in force) if it has a sufficient basis in a current source of law identified by a current norm of recognition of a legal system, which is, by and large, effective. Although the legal system needs to be effective to a certain degree to be in force, the same does not apply to each and every legal norm.[461] Norms of change are relevant when a legal norm is created according to another legal norm. In that case, there are interlocking norms and the norm of recognition refers to the norm of change.

These norms do, though, only lay down the general conditions for the existence or the validity of the law.[462] A source of law is like a frame. Often, more than one possible

460 See e.g. Raz (n 47) 148-153, and Finnis (n 124) e.g. 360-361 and 366. For different kinds of validity, see e.g. William Waluchow, 'Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 139.

461 See e.g. Kelsen (n 59) 39-42, Kelsen (n 47) 50-51, Raz (n 47) 152-153, and Hart (n 35) 108. See also Adams (n 160) 225-243.

462 See in this regard Hart (n 35) 258

legal norm fits within the frame. Norms of recognition and change are, therefore, not conclusive on the matter of which legal norm actually exists. Norms of interpretation regulate the content of the law and, thereby, contribute to determining which legal norm actually exists within the frame. The metaphor can be continued by saying that interpretive factors narrow the frame. Even though a legal norm cannot exist with reference to interpretive factors alone, they shape which legal norms actually exist. Since norms of interpretation matter for the law which actually exists –the law in force–, they are a part of the complete explanation of valid laws. Norms of subsumption are too, if and to the extent they determine the content of the law.[463]

Not all legal norms that exist have legal effects according to their content. Imagine two statutory norms that conflict. One is general but the other is specific. According to the *lex specialis* norm, the specific norm prevails. Consequently, the general norm does not have the legal effect specified in its content. The general norm exists but it is not applicable, at least in this situation. Norms of applicability shape and impact the legal effects and enforceability of legal norms. Therefore, they are closely connected to issues of legal validity. Strictly speaking, though, they are not about legal validity since they are not about the existence of legal norms.

Norms of internal relations are about the status of legal norms and their relationship with other legal norms of the legal system. They boil down to issues of applicability that work in a similar manner as the example above of the *lex specialis* norm. A note on the

463 Torben Spaak, 'The Scope of Legal Positivism: Validity or Interpretation'? in Torben Spaak and Patricia Mindus (eds), *The Cambridge Companion to Legal Positivism* (CUP 2021) 443-465, also draws a distinction between existence and content but he seems to treat validity as only a matter of the former.

operation of the *lex superior* norm is in order, though.[464] If a legal norm was not created in the manner or form specified in a norm of change, then it does not come into existence (or is considered a nullity). But if it was, it comes into and continues its existence despite the fact that it conflicts with some other higher legal norm, such as a human rights provision in the constitution. The law does not become automatically null and void (or invalid). Instead, two things may occur. First, according to the *lex superior* norm, the lower legal norms is inapplicable (or unenforceable). Sometimes it is said in this situation that a court or an authority must disapply it or refuse to apply it. This pertains to the principle of primacy of European Union law, which is a norm of external relations, when a legal norm of the European Union legal system conflicts with a legal norm of its member state's legal system.[465] The same goes for some other conditions of applicability. Secondly, the lower legal norm may be unvalidatable according to some norm of change. In some legal systems, courts have the power to strike down statutes that violate the constitution. Until that happens, the legal norm remains valid, that is in existence, until it is invalidated.[466] Existence, that is validity, is not the same as applicability although the two issues are connected through their relations to the legal effect of a legal norm.

The situation above concerns the applicability of a legal norm in case of a conflict with another legal norm. In that case, the legal norm is only inapplicable insofar as there is a conflict. If there is a partial conflict or only for a certain period of time, then the legal norm may apply in other circumstances or at other times. For example, if the specific norm

---

464 See in this context Kelsen (n 167) 73-75.

465 See e.g. case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA.* [1978] ECR 629.

466 See in this context e.g. Kelsen (n 167) 73-75.

in the example above is repealed, then the general norm is applicable according to its content.[467]

Sometimes a legal norm is, though, not generally applicable until a certain date or event occurs or some other conditions are satisfied. Norms about promulgation and when a law comes into force are exemplary. Instances of the latter type of norms are: 'This bill becomes law on 1 May 2020' or 'The bill comes into force six months after is enactment'. Norms about promulgation often prevent the applicability of the law until a certain date after it was published in a specific manner and form. A law may be wholly or largely without its force in these cases and the connection to legal validity, which usually entails that a law has force, is at its clearest. Nevertheless, the law is still valid even if it is generally inapplicable unless a norm of recognition has made a certain condition of applicability, such as entry into force or promulgation, a condition for existence. In that case, the condition is a part of a norm of recognition, not merely a norm of applicability. This arrangement is a contingent matter.

Foreign laws are problematic and, therefore, a good test case for an account of legal validity. The reason is that they can be recognized and enforced within a legal system, that is they have legal effect or the force of law, usually without being considered as laws or parts of the domestic legal system.[468] An account of legal validity needs to be able to

---

467 For the legal effect of repealing a repealing law in English law, see Finnis (n 106) 422.

468 Raz (n 47) 149-150 criticises Hart's account on the basis that it is overinclusive. Hart cannot, or at least does not, explain why a foreign law is not a member of the legal system. See also e.g. Lamond (n 300) 112-113. Hart was aware of the problem and said: 'the notion of recognition by courts will have to be refined'. See Hart (n 76) 340-342 and 341 for the quote. He suggests distinguishing between 'original' and 'derivative' recognition. Nevertheless, the term 'recognition' in the context of this distinction is in need of even further refinement. See also in this context Matthew Kramer, 'How Moral Principles Enter into Law' 6 (2000) Legal Theory 83, e.g. 104, and Matthew Kramer, *Where Law and Morality Meet* (OUP 2004) 39-43, who discusses a control of norm. Leslie Green and Thomas Adams, 'Legal Positivism' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter edn 2019) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed 5 February 2021 s 3, discuss the creative but not merely applicative power

explain why foreign laws have legal effects within a domestic legal system without being laws of that legal system or adopt the counterintuitive notion that foreign laws are incorporated into the legal system and, thereby, become domestic laws.[469]

Commonly, the relevance of foreign laws is determined by rules about the conflict of laws (or private international law). Essentially, the rules refer to whatever is the law on a certain subject matter in another legal system and state that the foreign law applies if certain conditions are satisfied.[470] The rules are not best understood as being about the existence of the foreign law within the domestic legal system. They do not identify foreign sources of law as domestic sources and by that make the foreign laws domestic laws. They are not norms of recognition or change. Since the foreign legal norm does not have a basis in a source of law identified by a norm of recognition of the domestic legal system, it does not exist as the law of the legal system; it is not a member.[471] The foreign law's existence, that is its validity, is determined by the foreign legal system but not the domestic legal

---

over norms. Shapiro (n 300) 256, says that legal norms belong to the same legal system if they have been created by power-conferring rules of the same shared plan. After this was originally written Adam Perry, 'Law's Boundaries' 26 Legal Theory (2020) 103, was published. He draws a distinction between legal norms that are directly relevant (those that belong to a legal system) and those that are indirectly relevant. See e.g. 113.

469 Kelsen (n 78) 255, argues that domestic laws incorporate foreign laws and, thereby, make them into domestic laws.

470 See e.g. Kelsen (n 78) 254, and Adrian Briggs, *Conflicts of Laws* (3rd edn, OUP 2013) e.g. 4.

471 Raz (n 47) 119-120, and Raz (n 32) 152-154, makes a distinction between norms that are recognized as parts of the legal system and those that are only binding according to it. He relies on 'reasons for recognizing these norms as binding'. Some are 'recognized because they are a part of the law' but others 'because of law's function to support other social arrangements and groups'. Then he identifies norms recognized by rules of conflicts of laws and norms made by the consent of the subjects, for example, contracts and commercial regulations, as being only recognized as binding. If these reasons are supposed to be conceptual or a priori, then it is rejected here that there is something in the concept of law that rules out, for example, commercial laws as laws. If these reasons are contingent, then there is a short step in considering reasons for recognizing something as a part of the law as norms of recognition. This problem arises for Raz because he does not consider that ultimate norms can operate at every level of the chain. Raz (n 47) 153, treats membership and enforceability as presuppositions of validity.

system. It has a basis in a foreign source identified by a foreign norm of recognition. Rules about conflicts of laws are not about validity as such.

The rules are, instead, best understood as being about applicability. They are norms of external relations. Foreign laws have legal effects within a legal system if and insofar as norms of external relations internal to the domestic legal system say so.[472] They control its legal effects but not its existence. The rules of conflicts presuppose, rely on or refer to the validity of the foreign law according to the foreign legal system. Foreign laws are, therefore, not valid according to the domestic legal system but have legal effects according to it. This explains why a foreign law is not a part of the domestic legal system but can have legal effect within it.[473] The close connection between the issues of existence and applicability through their significance for legal effects also explains why the problem of foreign laws arises for accounts of legal validity.

Considering all of this, we need to distinguish three types of situations where norms have legal effects or are binding. First are valid laws (or, equivalently, norms that are valid as law) that have legal effects because they are laws and are identified by norms of recognition. Secondly, there are other valid norms that have legal effects and exist as norms because of laws of the legal system. These are usually not considered to be a part of the legal system. They are valid according to the law. Contracts, wills and decisions belong to this category. Thirdly, there are norms that have legal effects because they are applicable

472 See in this context e.g. Briggs (n 470) e.g. 4.

473 Compare with Raz (n 47) 119-120, and Raz (n 32) 152-154. Raz (n 47) 119, says that: 'Many have tried to find the distinguishing mark in the manner or technique of the adoption. It seems to me that this is a blind alley.' Here it is maintained that the distinction is between valid laws, on the one hand, and norms that are either valid or applicable according to the law, on the other. These three phenomena are explained in different ways.

within and according to the legal system but they do not exist because of it. These are not usually considered to be a part of the legal system. Foreign laws belong to this category.[474]

The relationship between the European Union's legal system and its member states' legal systems is an intriguing test case because the legal orders are somehow intermingling. Laws of the European Union penetrate the member states' legal systems deeply, pervasively and, in a sense, permanently.[475] The laws of the European Union are said to be, depending on their kind and other features, 'directly applicable' and 'directly effective' and, in case of a conflict with a domestic law, they prevail.[476] This situation can be explained with reference to norms of legal method in two ways. In some legal systems, the situation is the same as with foreign laws except elevated. Laws of the European Union apply in a legal system and take precedence in a case of a conflict because of norms of external relations internal to the legal system. They are not laws or members of that legal system. It may be the case in other legal systems that they have a norm or norms of recognition that identify sources of the European Union legal system as their own sources. Then they are laws or members of their legal system as well as laws or members of the European Union legal system; they become domestic laws. The latter kind of interlocking of legal orders is tighter than the former one.[477]

---

474 Raz (n 127) 193-196, speaks about standards that are 'binding according to law' without being 'a part of the law'. Here the 'binding according to law' standards are further divided into valid according to the law and applicable according to the law.

475 In a sense because of, among other things, article 50 of the Treaty on the European Union on withdrawal.

476 See e.g. the second paragraph of article 288 of the Treaty on the Functioning of the European Union and case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

477 See in this context Dickson (n 94) *TTELS*, and (n 94) *HMLS?*

Validity According to the Law and Secondary Norms

So much for valid laws. What about validity according to the law? Earlier it was said that the primary way for a norm or an act to be valid according to the law is to be created according to a legal norm, which is a power-conferring norm. These power-conferring norms need not be norms of legal method. This is the case for the legal norms conferring a power to create a contract or a will. Other legal norms that shape and impact the legal effects of the contract or the will are not norms of legal method either. Some of the norms bear a close resemblance to norms of legal method. Norms about interpreting a contract or a will are a prime example. As they are usually understood, norms of legal method are only those norms that determine the applicable law. Simply put, they are about valid laws, not other valid norms.

Norms of institutional decision-making about deference do not determine the existence or content of the law but how 'far' an institution can go in identifying it or reviewing an act of another institution.[478] In the process of applying the law, officials or institutions create individual norms, such as the order of a judgment or an administrative decision.[479] An example is this: 'Astrid shall pay a 250 pounds fine for littering.' The individual norms are valid according to the law and are created according to norms that confer powers on officials or institutions to decide cases. These are norms of institutional decision-making. Sometimes the judgments and decisions, or parts of them, are considered to be sources of law. In that situation, they are usually called precedents.[480] Questions as to

---

478 Sometimes they mirror a power-conferring norm. Suppose an administrative organ has a power to make a decision and a court's role is limited to reviewing the decision. It does not have a power to make a new one instead of the administrative organ.

479 See e.g. Kelsen (n 59) 134-135.

480 See e.g. Cross and Harris (n 2).

the norms' relationship with norms of recognition and their supposed similarity to norms of change arise.

The individual norm of the judgment or the administrative decision is valid according to the law just as a valid contract or a will. In other words, the individual norm is not a valid law since it is not identified as such by a norm of recognition. However, the judgment or the decision, or specific parts of them, may be a source of law identified as such by a norm of recognition. Precedents, at least in a narrow sense of the term, are usually judgments or legal decisions that count as sources of law. The legal norm that has a basis in a precedent is usually a general norm; it is not the same norm as the individual norm. For example, the general legal norm could be about liability attaching to a certain behaviour that causes damage but the individual norm could be that Christian shall pay Sandra damages. When a judgment, which becomes a precedent, is rendered, an individual norm is created between the parties of the case as well as a (general) legal norm that has basis in the precedent. At first sight, this appears to be a similar situation as with the interlocking of norms of recognition and change.

The difference is that the norm created according to the norm of change is the law but the individual norm created according to norms of institutional decision-making is not. Instead, the norm of recognition refers to the product – the judgment -, or parts of it, as a basis for a different (general) norm, which is a law. A norm of recognition may identify the *ratio decidendi* of judgments of higher courts as sources. In that case, it does not refer to norms of institutional decision-making directly although they may need to be consulted to identify the judgments. Alternatively, a norm of recognition may refer to and incorporate some norms of institutional decision-making as a part of its criteria. It is a part of the criteria because the norms of institutional decision-making do not regulate the creation of the legal

norm but the individual norm; the law is not whatever is created according to norms of institutional decision-making. The relationship between norms of recognition and institutional decision-making is looser than the relationship between norms of recognition and change.

10 THE SYSTEMATIC CHARACTER OF LAW

Laws are valid within or according to some legal system. Their existence, content and applicability are regulated by the system's norms. Some aspects of a legal system, therefore, matter for explaining issues about the existence, content and applicability of the law.[481] These issues were discussed in the previous chapters without due regard to law's systematic character. That character was unstated and under normal conditions is in the background or forms the context of these issues. It is, however, important to be attentive to the significance of the existence, continuity and structure of a legal system for determining its laws.[482] With that in mind, the question that will be answered in this chapter is the following one: what is the relationship between the systematic character of law and norms of legal method? The question will be answered by exploring four issues.

To begin with, it might be thought that a legal norm is a member of a legal system because it was created according to a norm of change or it is identified by a norm of recognition belonging to the system but beyond that the significance of the systematic character of law for a legal norm is limited. The first issue is about this concern. Why does the systematic character of law matter at all for norms of legal method and their determination of the law? Two claims will be made in response. First, norms of legal method determine the law *as a part of a system*. The very existence, content and applicability of a legal norm can be sensitive to other laws and elements of the system.

---

481 For the connection between legal validity and a legal system, see e.g. Kelsen (n 53) 193, and Kelsen (n 59) 110.

482 Jeremy Bentham, *Of Laws in General* (H.L.A. Hart ed, The Athlone Press 1970) 236, says: 'At present such is the entanglement that when a new statute is applied it is next to impossible to follow it through and discern the limits of its influence. As the laws amidst which it falls are not to be distinguished from one another, there is no saying which of them it repeals or qualifies, nor which of them it leaves untouched: it is like water poured into the sea.'

Legal norms can be determined in light of each other. Secondly, a person's legal position is usually determined according to legal norms belonging to a legal system. Many laws of the system can be relevant together in determining the legal position. Often, these laws are in force at the same time but sometimes laws of the past matter as well. So, we need to know which laws are a part of the same legal system at a particular moment in time and through time.[483]

Given that the systematic character of law matters for the determination of the applicable law and a person's legal position, we need to know more about it. That is the second issue. In the last chapter, it was claimed that that there are multiple ultimate norms of different kinds with diverse roles at every level of the chain of validity. The ultimate norms 'lie to the side' of the chain and refer to it. Since they are multiple and at every level, legal norms need not share the same ultimate reason for their validity. They need not be united at the constitutional level or beyond. Hence, it is not as important to focus on the 'top' of the hierarchy and view the foundations of the constitution as the foundations of a legal system.[484] But what is the systematic character of law, then? As was claimed in the last chapter and will be elaborated now, norms of legal method, at least the ultimate ones, are a part of the foundations of a legal system. They establish various connections between laws as well as other elements throughout the system, which form its 'web-like' structure. This structure matters for understanding the law.

---

483 For the issues about membership and continuity of a legal system, see e.g. Kelsen (n 59) 110, Kelsen (n 167) 55, Kelsen (n 53) 193, Raz (n 106) 2-3, and Raz (n 47) 81.

484 Hart (n 35) 100, connects the foundations of a legal system with the (ultimate) rule of recognition. In his 'Introduction' to John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (The Hacket Publishing Company, Inc. 1998) xii, Hart calls it a 'constitutional rule'.

From what has been said, we can gather that norms of legal method regulate the applicable law and, in part, form the system's web-like structure. But how exactly are they norms *of* a particular legal system? That is the third issue. The focus will be on ultimate norms or non-legal norms. Chapters Four and Five claimed that the ultimate norms, whether they are about sources, interpretation or the relationship between laws, are the outcome of an interpretation of legal materials and practices in their context. Since the ultimate norms have an interpretive character in that sense and are not social conventions of officials, we cannot help ourselves to well-known explanations about their connection to a legal system. A different, or at least adapted, explanation needs to be offered. According to the view here, ultimate norms of legal method are interpreted as belonging together and forming a legal system of a particular independent political community. They are determined by interpreting legal materials and practices as forming a single object connected to a political community as the basis for its laws. The unity of the object and its connection to the political community is, in part, the result of an interpretation on the basis of social and historical facts in light of the very ideas of a legal system and the particular political community in question. In that way, a legal system is, partly, the outcome of an interpretation.

Finally, it might be wondered how understanding the relationship between the systematic character of law and norms of legal method matters. This is the fourth issue. It will be addressed by taking an example of how it matters for explaining the dynamic nature of the law. It will be argued that the law can change in various ways that follow the 'threads of the web', which are partly established by norms of legal method.

10.1 Why Does It Matter?

A Legal Norm is Determined as a Part of a System

As previously stated, the existence, content and applicability of a legal norm is regulated by norms of legal method, which are norms of a particular legal system. The validity and applicability of laws, thereby, depend on the existence and continuity of the system to which they belong or within which they have legal effect. Beyond that the significance of the systematic character of law for determining the law is more subtle. The key point is that the applicable law is determined by norms of legal method *as a part of the system*. The law's very existence, content and applicability can be sensitive to other laws and does depend on other elements of the system. Even though we often only focus on a single law, norms of legal method determine a bundle of norms at once. These legal norms can be determined in light of each other. This is best explained by discussing the issues of existence, content, application, applicability and institutions in turn.

Having a sufficient basis in a source of a legal system is a condition for the existence of a legal norm according to that system. A legal norm need not have only a single source, though. Many sources at once can be the law's bases and they need not be of the same type or be identified by the same norms of recognition. Together sources of the same legal system can be the law's bases if they are relevant according to their content and norms of legal method.[485] Concrete examples may be helpful to cast a light on this. A legal norm can have bases in a statutory provision and a precedent, where that provision is authoritatively interpreted. Before the judgment was rendered, the legal norm only had the statutory

485 This is not based on an assumption about what counts as a single source or a legal norm. For this purpose, a legal norm and a source can be demarcated in different ways for different purposes. Nonetheless, what is considered to be a sufficient source in one instance can be among a legal norm's sources in another instance.

provision as its source. After the judgment, we may need to look at both sources to determine the law assuming, of course, that a precedent is identified as a source in the system. There can even be a line of cases interpreting the provision with a corresponding increase in the number of relevant sources. Furthermore, there can be a legal custom about the interpretation or the application of a statutory provision or which qualifies the provision in some way. Also, a legal norm can have bases in multiple statutory provisions or even more than one statute.

Sometimes the sources interact in a different way whereby one source 'replaces' another. A customary law can be replaced with statutory law or vice versa, for instance. The term 'replace' is used here loosely to cover several situations, some of which will be discussed further in a moment under different headings. One legal norm can repeal another; a legal norm can lose its force according to *desuetudo derogatoria*;[486] a legal norm can be inapplicable because of a conflict with a higher-ranked source; or irrelevant because a higher-ranked source with the same or similar content is applicable as well.[487] Finally, in our example with the customary law, the practice may cease to exist or change because of the statute. A source is usually only replaced with another source of the same legal system, that is a source identified by a norm of recognition of that system, unless foreign laws are applicable according to norms of external relations. Since sources of the same legal system can determine the law together or replace each other, we need to know which sources or which norms of recognition belong to the same legal system.

---

486 No view is here taken on the exact nature of *desuetudo deorgatoria* and whether it is an instance of a repeal.

487 No stance is here taken on whether the last situation is an instance of a conflict. If the legal norms have the same content, then they need not conflict and could be applied together.

Some sources of law are dependent on other sources in the legal system. Sometimes one type of source, such as a statute, authorises or regulates the creation of another type of source, such as a regulation. In other cases, the connection is looser. An unwritten general principle of law, for example, can stand in particular material relations to legislation. It is said to be 'behind' or 'above' the legislation. A principle about, say, the protection of the consumer as the weaker party to the contract can be inferred from the existence of consumer legislation. If the legislation did not exist, then the principle would not exist. The same can be said about the source, which is sometimes called the nature of the thing.[488] A legal norm establishing the duty of an agent to inform his client of arrangements he has made in his name, at least if asked, can be determined in light of the nature of the legal relationship between the agent and the client as it is regulated by other legal norms. If the legal relationship did not exist or the legal norms regulating it would be different, then so too the legal norm stemming from the nature of that relationship. The material relations between general principles and the nature of the thing with other laws of the system is regulated by norms of recognition.

The systematic character of law can be even more visible when we consider legal interpretation.[489] The content of a statutory law, for instance, can be determined in light of other laws of the system. Depending on the system's norms of interpretation, it can be interpreted in light of legal norms with bases in other provisions of the same statute, other

---

488 This type of source is considered to exist in, at least some, Nordic and Germanic legal systems (g. *die Natur die Sache*, d. *forholdets natur*). See e.g. Ross (n 50) 90-92 and 115-119, and Helland (n 152) 202. In Ross' book, the source is translated as 'the nature of the matter 'and 'cultural traditions'. Sometimes the source is connected to Natural Law. The example taken here focuses on the *legal* nature of the thing, that is the nature something has in light of the legal norms that regulate it. A legal norm is considered to exist on the basis of the nature of the thing when the rationale or reasons that flow from the other legal norms are extended to situations which the other legal norms do not explicitly regulate. The norm may be considered to be inherent or implicit in the law.

489 See in this context Köpcke (n 260) 123-155.

statutes that are *in pari materia*, the constitution, legal custom, general principles and even the nature of the thing. The provision is interpreted harmoniously, consistently or systematically and the content of the statutory law is shaped by other parts of the system. Two statutory provisions can also be interpreted in light of each other. The same can be said for other types of sources. The content of regulatory law can be sensitive to the content of other regulatory laws as well as statutory laws and the content of the written constitution can be sensitive to unwritten constitutional rules and vice versa. Therefore, it can matter for legal interpretation to know which laws or which interpretive factors belong to the same legal system. This does not mean, though, that laws of other systems cannot matter for legal interpretation. Some legal systems have norms of interpretation that make international law or European Union law, for example, relevant as interpretive factors, that is a part of the source's context. Usually, that is only the situation if there is a norm of interpretation explicitly referring to laws of other legal systems.

Laws of the past can matter for legal interpretation as well. This is the case where a norm of interpretation makes legal history a part of the relevant context. To give an example, a statutory law may have replaced an older statutory law, which replaced an even older statutory law or possibly unwritten law. Past laws and the changes that have been made may be relevant for understanding the content of the current law. Is it the same as or different from the content of the previous statutory law? There may be norms of interpretation about this relationship. Examples are these norms: 'The current statutory law has the same meaning as the old statutory law if they are couched in the same language' and 'The current statutory law has the same meaning as has been attributed to the old statutory law in practice if the language has not been altered'. For this reason, it can matter which laws are a part of the same legal system through time.

Similar points can be made about norms of subsumption. The relevant considerations for an evaluative legal standard, for example, are usually related to other laws and elements of the system. They are internal to the system, so to speak. The nature of what will be called here reference legal standards is noteworthy in this regard.[490] They are evaluative legal standards that refer to other standards or considerations, which originate from outside of the legal system. Social, scientific and moral considerations or standards can be among the relevant external factors. An example of a reference standard in this sense is the 'best interests of the child'. What counts as being in the child's best interests may not only depend on considerations drawn from within the legal system but also contemporary views in society about the treatment of children and the best scientific knowledge of experts about child psychology, education and so on. When the external factors change, then so too do the relevant considerations for the application of the reference standard even though it has remained the same. Although the considerations or standards are external, the content of the law can be influential. For example, the views expressed in contemporary law about the welfare of children can be treated as an indication of a social view. Sometimes the relevant external factors do not stop at geographical borders. We may need to consider foreign scientific knowledge and views prevalent in other societies, including their legal systems.[491] This can matter for constitutional norms, namely human rights, that embody reference standards of this sort. An instance is a norm about 'cruel and unusual punishment'. If it is interpreted as a reference standard, then what

490 Roscoe Pound, *An Introduction to the Philosophy of Law* (The Lawbook Exchange, Ltd. 2009) 116-124, discusses 'legal standards'. For rules vs. standards, see e.g. Pierre J. Schlag, 'Rules and Standards' (1985) 33 UCLA L. Rev. 379, who speaks of 'bright line rules' and 'flexible standards'. Cass R. Sunstein, *Legal Reasoning and Political Conflict* (2nd edn, OUP 2018) 28-29, discusses standards as opposed to, among other things, rules. See also Schauer (n 18) 190.

491 Also, foreign laws can be an inspiration or considered to be persuasive about what applies according to domestic law.

counts as ‘cruel and unusual’ may depend on external factors, including those that are inferred from foreign laws and practices.[492]

The systematic character of law also matters for the issue of applicability. Sources or laws are hierarchized or ranked by ranking norms as members of a legal system or relative to other sources or laws of the system. The constitution is higher law than statutory law, for instance. Sources or laws of other legal systems are not relevant unless they are made so explicitly by norms of external relations, in which case they can be ranked according to the legal system. The hierarchy or the ranking of the sources matters not only for conflicts. Sometimes when we identify the applicable law, we start with a relatively high-ranking source, such as a statute. It is applied because of its content and status within the system. If it does not answer the legal question, then we move down ‘the ladder’. We may look at a regulation, then a legal custom or a precedent and, finally, a general principle of law or even the nature of the thing, all depending on the sources recognized in the system and their ranking. As an illustration, sometimes there is a statutory law with a similar content to a general principle of law but with a narrower scope. Within the scope, the statutory law is applied. Outside of the scope, the principle is applied. We fall back on lower-ranked sources to identify the applicable law that addresses the legal question or determines the legal position.

Commonly, only those legal norms that belong to the same legal system conflict and the conflict is resolved according to priority norms of that system. Before the legal norms are considered to be in conflict, though, their sources could be interpreted, as far as it goes, as not giving rise to conflicting legal norms. Also, there could be a presumption,

---

492 For a different view on the matter, see e.g. Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 Harv. L. Rev. 129-147.

that is a norm of interpretation, against conflict. Legal norms are usually not considered to conflict with norms of other legal systems unless they are made relevant by norms of external relations.

In addition to being relevant for issues about the existence, content and applicability of the law as well as its application, the systematic character matters for issues about legal institutions. Norms of institutional decision-making connect legal institutions and laws together. The primary task of courts, for example, is normally to apply laws of the system to which they belong unless and to the extent those laws or norms of external relations make other norms relevant. Often, the norms impose duties on the courts or the authorities to apply the law of the system and even to do so in a particular way. Norms of institutional decision-making can also establish connections between legal institutions. To illustrate, a court may need to grant the legislature some discretion. Of course, there can be norms of institutional decision-making that refer to institutions or laws of another system but that is usually only the case when it is explicitly stated. The normal context, at least of modern municipal legal systems, is the laws and the institutions of the same system.

As the examples suggest, a legal norm need not be determined in isolation from other legal norms and have a basis in a single and clearly defined source. Norms of legal method can make other laws of the system relevant for determining the very existence, content and applicability of the legal norm. Therefore, we need to know which laws or which legal materials, practices and other factors are a part of the same legal system at a particular time and through time. And we need to know which norms of legal method are a part of the same system. The systematic character of law matters for another reason as well. The applicable law according to norms of legal method need not be a single legal norm. Sometimes many legal norms are relevant. We now turn to this situation.

A Legal Position is Determined According to Laws of a Legal System

A legal norm is the law *of* some legal system or political community. We enquire about the law of, say, Canada or France. A person has a legal right or a duty according to, for instance, the United States' legal system. We also answer legal questions and determine a person's legal position according to legal norms of a legal system. Sometimes many laws are relevant for determining the legal position or answering a legal question. The laws that are relevant belong to the same legal system. Laws that belong to a different legal system, for example, a foreign legal system, are not relevant unless they are made so by the system's norms. Let us explore a couple of examples.

Consider a person's criminal liability. There may be a legal norm that makes a conduct a criminal offence. It may overlap with another offence, which may be applicable as well or set aside because of the first norm; the same conduct can constitute multiple offences (l. *concursus idealis*). Other legal norms may lay down general conditions of criminal liability, for example, about intent and negligence, age, time and territory. Further norms may regulate legitimate justifications and excuses as well as statutory limitation, to name just a few examples. The consequences of criminal liability may be punishment or other types of sanctions, such as the deprivation of an ill-gotten property. There may be a legal norm stating the type and scope of punishment for the offence. And there may be other legal norms regulating whether and under what conditions the minimum or maximum punishment can be departed from. Yet other legal norms may be about the relevant considerations for deciding the concrete punishment within the scope.

These legal norms can be a part of the same criminal code but they can also belong to different statutes or even different types of sources. For example, there may be a practice, a convention or a precedent about deciding punishment for certain types of offences or the relationship between offences. Then, there may be other norms about criminal procedure and legal institutions, such as the police, prosecutors, courts and prison authorities, that refer to or have some material relations to 'criminal law'. All these legal norms and more can be relevant if they are in force and applicable and have a bearing on the legal position or the legal question according to their content.

Another example is a long-lasting legal relationship like marriage. Just as with criminal liability and punishment, many laws together may be relevant for determining various aspects of the legal relationship, such as its formation, content and termination. Let us say that two people got married in 1990 when they were 18 years old. At the time there was a particular statute about marriage in force allowing 18 years olds to get married (the 1990 statute). Suppose the statute was replaced with a new one in 2010. The new statute changed the conditions to get married and the reciprocal rights and duties between married couples. Among the changes was raising the marriage age to 20 years. Suppose further that a third statute was enacted in 2020 replacing the 2010 statute and which changed the conditions for divorce and the terms of financial settlement. Suppose none of the statutes enacted a provision explicitly solving questions about their temporal scope. Which statutory law determines the formation, content and termination of the legal relationship?

That is regulated by norms of internal relations about the temporal scope of laws (l. *ratione temporis*). There could be a norm stating that the applicable law for a formation of a legal relationship is the one in force at the time the parties entered into the relationship as long as it was fully formed. The norm makes the 1990 statute relevant for answering

whether the marriage of our couple is still valid even though they do not satisfy later conditions for getting married and the 1990 statute is no longer in force as such. There could be another norm stating that the content of a legal relationship is regulated by the law in force at each time. According to it, the rights and duties were first determined by the 1990 statute, then the 2010 statute, and, lastly, by the 2020 statute. Finally, there could be a norm stating that the termination of a legal relationship is regulated by the law in force at the time of the application for termination. According to it, the conditions of divorce and the terms of financial settlement are regulated by the 2020 statute but not, for example, the 1990 statute, which was in force when our couple got married. All these norms about temporal scope could have had a different content.[493] As this example demonstrates, laws that are relevant for a legal relationship come into and go out of force at different times. When we determine the legal position, we may need to know which laws are a part of the same legal system through time and how they relate to each other. Norms of internal relations are relevant in that regard.

The legal position is determined by or a legal question is answered in accordance with the applicable law. That is, in part, the outcome of applying norms of legal method. The legal norms in the examples above are relevant according to their content on the assumption that they are in force and are applicable at the relevant time according to the system's norms. The significance of viewing legal questions in the context of a legal system can, furthermore, be discerned from looking at legal norms that depend on or refer to other

493 Sometimes muddled situations arise in practice. Consider, for instance, a newer act that repeals an older act when it enteres into force but, at the same time, states that the older act (or some of its provisions) continue to apply to certain situations or for a certain time instead of the provisions of the newer act. This is sometimes done to deal with temporary circumstances. The provision of the newer act regulating the continued relevance of the older act regulates the applicability of the older and the newer act. It is a norm about temporal scope of the acts. The provision that repeals the older act can be understood in light of the provision about temporal scope. The repealing provision may be best understood as not having effect until the temporary situation passes.

legal norms in a general fashion. To end with just a few examples, legal norms may regulate 'illegitimate' conduct or 'grave tax offences', where legitimacy and 'tax offences' depend on other legal norms about those matters in other statutes or other types of sources of law. Another example is the law of children, tax law and laws about various benefits that refer to the status of being married. Although not stated, the laws are understood as referring to or depending on laws about marriage in that particular system or foreign marriages that are recognized by the laws of that system.

10.2 What is It?

Since the law is determined as a part of a legal system and the legal position according to that system, we need to understand the systematic character of law better. The last chapters rejected the simple picture of legal validity, according to which a legal system is structured into a hierarchy with a single ultimate norm at the top uniting all the laws into a legal system.[494] Accordingly, it was refuted that all laws share the same ultimate reason for their validity, that is the single ultimate norm. Moreover, it was denied that there are multiple chains of validity each with ultimate norms residing only at the top. Instead, there are multiple ultimate norms of different kinds with diverse roles at every level of the chain of validity. The ultimate norms need not be a part of the chain but can lie to its side and refer to it. Some of them are about sources, others are about interpretation and yet others are about the relationships between legal norms. Some norms of legal method refer to legal

494 For this view, see Kelsen (n 59) 113 and 115, Kelsen (n 167) 55, and Hart (n 35) 53, 120 and 246. In Austin's theory, the (present) sovereign is the solution. See John Austin, *The Province of Jurisprudence Determined*. With Introduction by H.LA. Hart (The Hackel Publishing 1998) e.g. 193-194 346 and 350. See in this context also Raz (n 47) 126.

norms at multiple levels. This picture of legal validity yields a more complicated picture of a legal system. But what is the structure of a legal system, then?

Norms of legal method contribute to the structure of a legal system. They establish various connections between laws, between laws and legal materials, practices and other factors on which they are based and between laws and legal institutions. As we have now learned, these connections can be between laws that are in force at the same time as well as through time. These connections are like threads in a web. Each legal norm has various connections with other laws, sources and interpretive factors. It is a part of the web. And each part of the web connects to other parts. Together they make up the same web. Norms of legal method establish the web-like structure of a legal system. Primary norms, as we have seen, can have various material relations with each other. They add a layer to the web.

Where the legal norms form a hierarchy, because they are created according to norms of change or different sources are ranked by ranking norms, it is a part of the web-like structure. But the hierarchy is only a part of the various connections established by norms of legal method. The structure of a legal system, at least, modern, sophisticated ones, is more complicated. If we adopt the simple picture of a legal system, then it is natural to think of the foundations of the constitution as the foundations of a legal system. After all, from that point of view, laws form a hierarchy with an ultimate norm or norms at the top. From the point of view of the web-like structure of a legal system, however, the top is only a part of the web, even though it is important. A result of this different outlook on legal validity and legal systems is that the foundations of the latter become the foundations of the entire web. Norms of legal method are an important part of the foundations since they establish various connections. This picture of a legal system has consequences for some issues about them some of which will be discussed in the next chapter.

Earlier it was said that we need to know which laws are a part of the same legal system at a particular point in time and through time. Norms of legal method are a key part of the answer. As is clear by now, a legal norm is a member of a legal system if it based on a source, interpretive factors and considerations that belong to the legal system. They do that if they are identified by norms of recognition, interpretation and subsumption of the legal system. Legal norms belong to the same legal system if they are based on sources and factors identified according to norms of legal method of that system. Consequently, we need to know when or how norms of legal method are norms *of* a legal system.

10.3 Ultimate Norms as Norms of a Legal System

The law regulates its own validity and applicability.[495] Some norms of legal method are legal norms in the same way as other laws. They have a basis in a source and their content is shaped by interpretive factors and considerations. In light of this, the focus here will be on the ultimate norms or the non-legal norms. As was claimed in Chapters Four and Five, the ultimate norms are determined by interpretations of legal materials and practices in their social, historical and political context in light of ideas about law. They have an interpretive character in that sense. Since they are not social conventions shared by officials, although those social conventions form a part of the object of interpretation, we cannot simply point to the same explanation for the relationship of social conventions with a legal system, at least not without adaptations and clarifications. An explanation of the interpretive character of ultimate norms was given in Chapters Four and Five. In what

[495] See e.g. Kelsen (n 53) 209, and Kelsen (n 59) 124.

follows, a few remarks are offered on the significance of the interpretive character of ultimate norms for legal systems.

The ultimate norms are interpreted as belonging together and being connected to a particular independent political community. They are the outcomes of interpretations of legal materials and practices that are seen as forming an object of interpretation. They are interpretations of the same object. But there are many legal materials and practices and it can be unclear which of them make up the 'same' object or why it is 'a single' object. Demarcating the boundaries of an object is a part of interpretation. The object is, therefore, identified and defined in the process of interpretation. The legal materials and practices are interpreted as belonging together. We move back and forth in the interpretive process. From this follows that the unity of the ultimate norms and, thereby, the legal system is, at least in part, a result of an interpretation.

The object is demarcated and interpreted in light of ideas about law. Among the ideas that can be, and often is, relevant is the very idea of a legal system. There may be a specific conception of a legal system that corresponds with the understanding embedded in the legal materials or shared in practice as a part of the self-understanding. The object or the laws are interpreted in light of this idea *as a legal system*. Certain connections or a structure is imposed on or attributed to the legal materials and practices through the process of interpretation in light of the specific idea. The outcomes are ultimate norms of legal method that establish various connections and, thereby, contribute to making it into a legal system. In other words, an idea about a legal system can shape the existence and content of ultimate norms, which in turn contribute to making the laws into a system.

A legal system is the law of some independent political community, such as a state.[496] Some laws are the laws of the Netherlands, for instance. The legal materials and practices must be bases for the laws of that political community. Just as there are social and historical facts concerning the legal materials and practices, including whatever social conventions are shared by officials, there are social and historical facts which make an independent political community. These social and historical facts are part of the object. It is interpreted as being connected to that community. A part of the interpretation is identifying and demarcating the relevant community. These ideas are seldomly stated or even explicit in the mind of the lawyer. An idea of a particular independent political community, such as the Dutch people or the Netherlands, is usually in the background, though.[497] The lawyer is identifying the laws *of* the Netherlands and that is done in the context of a host of assumptions or ideas, including the very idea of the laws of the Netherlands.

10.4 How Does It Matter?

Finally, it might be wondered how understanding the relationship between the systematic character of law and norms of legal method matters. The question will be answered by

---

496 Political communities are not limited to states. They can include, for example, empires and a community of states. A political community is independent when it is not under the control of another political community and it has political power to govern and regulate itself. In practice, that means the individuals that officially yield the political power can regulate the affairs of the community, including its structure. This is sometimes expressed as if the legal system claims supremacy or the state is sovereign. See e.g. Raz (n 32) 151-152, and Raz (n 47) 118-119. Hart (n 35) 24-25 and 70, characterizes a legal system as externally independent and internally supreme. See also John Finnis (n 124) 267. Shapiro (n 48) 218-224, criticizes the criterion of supremacy. Instead, he relies on an organisation being self-certifying, i.e. it is supreme or it enjoys a general presumption of validity before it enforces its rules. He says that supremacy is not necessary because it would rule out Florida from having a legal system. To this it may be responded that it does not rule out Florida from having a sub-legal system.

497 See in this context, Hart (n 35) 3.

giving an example of how it matters in explaining the dynamic nature of the law. At least some changes in the law are fruitfully understood in light of norms of legal method and the web-like structure of a legal system. The changes will be analysed in light of the issues of the existence, content, application, applicability and institutions.

The most obvious way the law changes is when a source of law changes. A new source can be made, altered or eliminated. This can happen according to a norm of change. For instance, a statute can be enacted, amended or abolished. It can also occur in another way. A custom can, for example, form, change, or fade away. Sometimes a legal norm is based on multiple (types of) sources. For example, a constitutional law can change when a precedent comes into existence even though the text of the constitution stays the same. Moreover, a legal material may be identified by a norm of recognition under certain conditions. When the conditions change, the legal material may no longer be identified by the norm. Lastly, norms of recognition and change may themselves change.

A legal norm can also change even when its source stays the same. The reason is that, at least some, legal norms are sensitive to their contexts. When interpretive factors or the context of a statutory provision changes, for instance, it can affect the content of the statutory law. The statutory provision is interpreted, for example, in light of new statutes and even an amended constitution. Other factors matter as well. To give an instance, language can develop over time. The meaning of words can change. Whether these developments affect the content of the law, depends on a norm about textual interpretation referring to either the old or the contemporary meaning of the words. Finally, norms of interpretation themselves might change.

Something similar can be said about evaluative legal standards. They are applied in light of considerations, which can be identified by norms of subsumption. Sometimes the relevant considerations depend on other laws and elements of the legal system. When the laws or the elements change, then so too do the relevant considerations even though the evaluative legal standard stays the same. A reference legal standard, as has already been mentioned, refers to standards or considerations originating from outside of the legal system, such as social, scientific or moral considerations. When prevalent views in society or the best scientific knowledge changes, for instance, then so too can the relevant considerations for the reference legal standard. Suppose a reference legal standard states that a debtor can keep belongings necessary for a 'modest household', when his mortgage is foreclosed. What counts as a 'modest household' depends on the living standard and prevalent views in a particular society at each time. A desktop computer may have been considered a luxury in Iceland in the 1980s but not in the 2020s. Finally, norms of subsumption can change as well.

Even though the existence and content of the law stays the same, its applicability can change. In other words, its legal effect may change. This occurs, for example, when other legal norms change. For example, a new statute is enacted or higher laws are amended that come into conflict with the legal norm. Moreover, norms of applicability can change.

New institutions can be established and old institutions may be eliminated. Norms of institutional decision-making can also change, such as norms about deferring to another institution.

In order to determine whether the law has changed, we need to examine the various 'threads in the web', the norms of legal method that partly establish the web and the sources, interpretive factors and considerations identified by the norms.

11 The Continued Validity of a Legal Norm

From what has been said, it is clear that norms of legal method matter for explaining legal validity and legal norms are valid within or according to some legal system. One of the issues about legal validity that has been left untouched is this: in virtue of what does a legal norm continue to be valid within a legal system? Since norms of legal method are relevant for legal validity, the question that will be asked here is this: what, if any, significance do norms of legal method have for the continued validity of a legal norm within a legal system? A few scenarios will be discussed.

The first scenario concerns the continued validity of a legal norm under normal conditions as well as when its legal basis is repealed by another legal norm. The second scenario concerns constitutional change in accordance with an older constitution, where the new constitution repeals the old constitution. In other words, it repeals its own legal basis. This raises the question: in virtue of what does the new constitution and all the laws in the legal system continue to be valid?

The third scenario concerns the validity of the law of a colony or a Dominion when it is peacefully granted independence by law of the governing state. The focus will be on the situation where the independence-granting law ceases to be law for the newly independent colony or Dominion after its new constitution enters into force without the independence-granting law being repealed, for example, by the new constitution. Even though the last example is an unusual event, it is a good test case for an account of legal validity and it demonstrates the effects of certain important changes in a legal system for its norms of legal method. The existence of a legal system and its continuity through time matter for all these scenarios.

11.1 Normal Conditions and Repeal of Legal Basis

A legal norm that becomes valid stays in force until certain conditions are met. The conditions are, mainly, regulated by the legal system according to which it is valid. A legal norm can lose its validity according to its own terms, for example, after a prescribed time passes; or the terms of the law authorising its creation; or if it is repealed by another legal norm.[498] Furthermore, an individual legal norm can lose its force according to *desuetudo derogataria*, when the norm is not observed for some time, if such a negative custom is recognized by the system.[499] A legal norm can, also, lose its validity if the legal system in its entirety loses its effectiveness and, thereby, ceases to exist.[500] We shall not focus on the last scenario here. A legal norm that stays valid persists through time within an existing legal system. The continuity of a legal system, therefore, matters for legal validity. This raises the question: in virtue of what does a legal norm continue to be valid within or according to a legal system?[501]

Suppose a legal norm was created according to a norm of change. For instance, a regulatory law was enacted on the basis of a power-conferring norm in a statute. After its enactment, the regulatory law continues to be valid in two different senses. It is valid according to the law because of the norm of change, which continues to be in force. And it is valid as law because it has a basis in a source, that is a regulation, which is identified as

498 See in this context Kelsen (n 59) 120, and Finnis (n 106) 423.

499 See e.g. Kelsen (n 59) 119-120, Kelsen (n 26) 139-140, and Kelsen (n 167) 63.

500 See e.g. Kelsen (n 59) 117-119.

501 For the question, see e.g. Finnis (n 106) 423. On p. 417, he uses the phrase 'the problem of the temporal dimension of legal rules and systems.'

such by a norm of recognition that interlocks with the norm of change. This is familiar by now.

What happens to the regulatory law if the norm of change loses its validity, for example, because it is repealed by another statutory law? That depends on the legal system and the situation. In some legal systems the regulatory law may lose its validity as well but in others it may continue to be in force. There may, for example, be a 'savings clause' in a statute stating that the regulatory law continues to exist.[502] In which case the regulatory law continues to be valid according to the law in virtue of the savings clause. There could also be a 'repeal clause' in a statute stating that all regulations enacted on the basis of the repealed statutory law lose their force. In which case the answer is clear. But what if there are no clauses like these?

Again, the answer depends on the legal system in question and the exact situation. The regulatory law does not continue to be valid because of the norm of change. It is not valid according to current law. Instead, the answer turns on a norm of recognition. A legal norm can only have the status of law and continue to have it as long as it is identified as such by a current norm of recognition of the legal system. Hence, the regulatory law continues to be valid if the norm of recognition continues to exist and identify the regulation as a source of law. In which case the norm of recognition refers to a norm of change that was, but no longer is, in force.[503] The regulatory norm continues to be valid as law. However, the regulatory norm loses its force if the norm of recognition ceases to exist

---

502 See in this context Finnis (n 106) 423.

503 The complication will be set aside here that a new norm of recognition emerges that identifies the regulatory law.

or, for example, only identifies regulations as sources, which are enacted on the basis of currently valid statutory law.

This explanation of the continued validity of the regulatory law does not rely on the point or the nature of validity being that a norm that comes into existence continues to be in force until something makes it lose its validity.[504] It may well be the case that when the statute in our example is repealed by another statutory law, the regulatory norm loses its validity without there being any legal norm, such as a repeal clause, with that legal effect. If it is no longer identified by a norm of recognition of the legal system, then it is no longer valid law according to that system. And the explanation does not rely on the existence of a general principle, which is somehow a part of the legal system and regulates the law's validity.[505] The regulatory law does not continue to be valid in virtue of such a general principle. Instead, the explanation relies on the norms of legal method we have already

---

504 Raz (n 106) 117, says that laws already created according to a power-conferring rule are not affected by the repeal of the power-conferring rule. See also in this context Kelsen (n 59) 117. The principle of legitimacy can be interpreted as being a description of a state of affairs or the nature of legal norms rather than an independent norm in virtue of which legal norms continue to be valid.

505 According to the principle of legitimacy, legal norms 'remain valid as long as they have not been invalidated in the way which the legal order itself determines.' See Kelsen (n 59) 117. See also Kelsen (n 53) 209. The principle could be interpreted as an independent norm in virtue of which legal norms continue to be valid or Kelsen's theory could be supplemented by such an interpretation. For the principle of continuity, see Finnis (n 106) 423-425, and Finnis (n 124) 268. It is described in this way in the former source: 'a law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal*.' According to the latter source, it is 'a working postulate of legal thought' and, according to the former, it is 'a general principle of practical and theoretical understanding of law'. According to Finnis, the general principle 'generalizes Ross's 'legally unchangeable' basic norm. See in this context Alf Ross, 'On Self-Reference and a Puzzle in Constitutional Law' (1969) 78 Mind 1, 24. For comments on the nature of the principle of continuity, see e.g. John Finnis, 'Reflections and Responses' in John Keown and Robert P. George (eds), *Reasons, Morality, and Law. The Philosophy of John Finnis* (OUP 2013) 459, 555-556. It is unclear how the principle is a part of law or can be the reason in virtue of which the law continues to be valid. It is not a logical or conceptual truth about norms or law. The situation might be different. Hart (n 76) 16, accepted Finnis' general principle as the solution and said that courts do, then, tacitly accept the general principle. It follows that for him the principle is contingent. However, the relationship between the rule(-s) of recognition and the principle is unclear and as distinct norms they might theoretically be in tension with each other. Consider a situation where a rule of recognition ceases to recognize a source but the legal norm based on it has not ceased to exist according to the principle.

encountered, that is norms of recognition and change, and the former's continued existence and content. Whether the situation in our example applies generally in the legal system in question depends on the generality of the norm of recognition and whether other norms of recognition lead to similar outcomes. The continued validity of legal norms that are not created according to the law is also conditional on their continued identification by norms of recognition.

Even though the regulatory law continues to be valid because of a current norm of recognition, it can be repealed by another regulation, lose its force according to its own terms or because of *desuetudo derogatoria*, to name examples. It follows that we may need to consider multiple norms and even the absence of some norms to determine the continued validity of a legal norm.[506] Despite the regulations continued existence as a source of law in the legal system, changes in its legal basis, for example, when a new statute replaces the statute according to which the regulation was enacted, can affect the content of the regulatory law. As was noted in the last chapter, the legal norm can change when the context of the regulation alters. Whereas the regulation was interpreted in light of its original legal basis according to a norm of interpretation to that effect, now it may be interpreted in light of a new statutory law with corresponding changes in its content. The exact legal norm that exists may change although its source stays the same.

The situation can even be more complex when norms of applicability are added to the mix. There may be a principle of legality in the legal system leading to the conclusion that a regulatory law continues to be applicable, when the norm it was created according to is repealed, only if it has a legal basis in current statutory law. And if a new statutory law

[506] See in this regard Raz (n 106) 60-65.

is passed, with which the regulatory law conflicts, then the latter can be inapplicable according to the *lex superior* norm. From this follows that we need to consider all the relevant threads of the web when we answer questions about the continued existence, content and applicability of a legal norm.

The explanation of the continued validity of a legal norm, when the norm it was created according to is repealed, is possible because ultimate norms of recognition can operate at every level of the chain of validity and they interlock with norms of change. But what about situations where there is no norm of recognition, for instance, when we are confronted with questions about the validity of a legal act or a legal relationship after the repeal of its legal basis? For example, when a contract was made according to the law that has since been repealed. In that situation, the answer hinges on norms of internal relations about the temporal scope of the law. If a norm exists like the one in our example in the last chapter about marriage, then the contract continues to be valid because of the norm, which refers to the repealed law. Just as in the case of law, norms of legal method can regulate the continued validity of a legal act or a legal relationship by regulating certain issues about the applicable law.

11.2 Constitutional Change

The Problem and the Features to Explain

Imagine that a written constitution was created in accordance with a legal norm (an amendment clause) of the old constitution, which is the historical first constitution, and the new constitution repeals the old constitution. In the example about the regulatory law,

another legal norm repealed the statutory law. In this example, the new constitution repeals its own legal basis. Imagine also that there were other legal norms in force before the new constitution was enacted, such as statutory laws enacted on the basis of a norm of change in the old constitution and regulatory laws enacted on the basis of those statutory laws. How do we explain the validity of the new constitution and the continued validity of other laws?[507] We encountered a part of this example in Chapter Nine. Now it is time to fill in the blanks in light of what we have learned about the continued validity of a legal norm.

The explanation needs to account for, at least, four features of constitutional change according to an older constitution. The first feature is that the new constitution becomes immediately valid and applicable once it enters into force according to the amendment act and other laws of the system, such as promulgation rules. An analogy can be drawn from the succession of sovereigns. Rex II becomes sovereign immediately after the death of Rex I according to a rule to that effect. We do not have to wait and see whether Rex II will be habitually obeyed in order to identify him or her as the sovereign.[508] The same applies to the new constitution. The second feature is the legal authority of the constitutional maker. A constitutional assembly or legislature may be legally authorised by the old constitution to enact the new constitution.[509] The third feature is that other laws of the legal system remain valid and their validity is 'uninterrupted'. No uncertainty about the validity of all other laws need to or normally does arise when a new constitution is enacted.[510] The fourth

---

507 See in this context e.g. Finnis (n 106) 417-419.

508 For the point, see Hart (n 35) 53-55. Note, though, that Austin does speak of the office of the king, Act of Settlement, and that the successor instantly gets the office according to the Act, see Austin (n 494) 147. See also the discussion on Roman emperors not succeeding by generic title on p. 152-154. A rule of succession is, though, a part of positive morality but not law according to Austin's scheme. See e.g. p. 255. Hart's criticism does not take this explicitly into account.

509 See in comparison Hart (n 35) 58-59, where he discusses the authority of the legislator to legislate.

510 See in this regard Hart (n 35) 62, where he asks about the continuity of authority to make law and the persistence of law in the form of the questions: 'Why law already?' 'Why law still?'

feature is the intuition that a new legal system does not come into existence with the new constitution.[511] There is such a continuity and connection between the old and the new constitution that it would be odd if they did not form one and the same non-momentary legal system.[512] How does the account here fair?

Immediately Valid and Legal Authority of the Constitutional Maker

511 See in this regard Raz (n 106) 188, who speaks of 'constitutional continuity' as one factor. Another is the content of the law (of great constitutional importance).

512 According to the simple picture, a new legal system comes into existence with a new ultimate norm and all the laws get a new ultimate reason for their validity. The basic norm, it will be remembered, traces the history of a legal system. It is the presupposition that the authors of the historical first constitution were authorised to create it. A new legal system does not come into existence with the new constitution since the old and the new constitution can be traced back to the same basic norm. And the new constitution becomes immediately valid because its validity is traced back to the old constitution. The same reason explains the legal authority of the constitutional maker, which is regulated by the old constitution. Lastly, the other laws of the system remain valid because of the principle of legitimacy. The version of the simple picture with the basic norm fairs well in explaining the four features assuming the principle of legitimacy is accepted. Ross (n 50) 97-99 can be seen as challenging Kelsen's theory in this regard. He claims the basic norm must change. He does not seem to take into account Kelsen's principle of legitimacy, though.

The rule of recognition, however, always identifies the current constitution. There was a rule of recognition identifying the historical first constitution. When the new constitution was enacted, even if it was in accordance with the old one, a new rule of recognition emerged. With a new ultimate norm comes a new legal system. It should be noted, though, that Hart (n 35) 123, says that the expression 'the same legal system' is 'broad and elastic' But on p. 120, he speaks of a 'new rule' in this regard. This matters for the validity of the new constitution. It depends on the emergence of a new rule of recognition. So, we have to wait and see whether the new constitution will be identified in practice by the officials. But that does not fit with the insight that the new constitution is immediately valid. And it does not explain the legal authority of the constitutional maker to enact the new constitution. It is assumed here that the rule of recognition is a social convention or, at least, depends on social practice. Possibly, most officials adopt the same rule at the moment of the new constitution's creation, which could be described as a social rule, without being *practiced* yet. See e.g. Hart (n 35) 111, where it says the rule 'must consist in an actual practice'. When speaking of the independence of a colony, he says, on p. 120, that the legal competences 'to legislate for the former colony is no longer recognized in its courts'. Also, it should be remembered that Hart (n 35) 62-63 and 65, does allow for a rule to refer to the past even though the rule itself must be presently accepted. Furthermore, Hart (n 105) 362-363, says that the old laws are valid on the basis of a new rule of recognition. This also applies to the state of affairs after a revolution. See also in this context Finnis (n 106) 417-418. If all other laws, such as statutory laws, are now valid in virtue of the new constitution and ultimately the new rule of recognition, then it seems to be an open question during the first moments of the new constitution whether old laws persist. Setting aside attempts to supplement this version of the simple picture with, for example, the principle of continuity, it fails in explaining all four features of constitutional change according to an older constitution. Ross' first solution (n 50) 97-99, that the basic norm changes, shares these weaknesses.

When a new constitution is enacted in accordance with the legal norms of the old constitution, as we have already learned, it is valid in two different senses. At the moment when it enters into force, it is valid according to the law because it was created according to a norm of change (the amendment clause) of the old constitution. The old constitution stays valid until the new constitution enters into force and repeals it. That is why the old constitution is normatively significant and not a mere historical cause. This also explains the legal authority of the constitutional maker. Since the new constitution repeals the old constitution, the latter ceases to be valid and the former is, henceforth, not valid according to current law. At the moment of the new constitution's enactment, a new norm of recognition is determinable that identifies it as a source of law and, thereby, makes the constitutional norms valid as laws.[513] The norm of recognition refers to the norm of change of the old constitution as a criterion for identification and continues to do so after the old constitution ceases to be valid. After that, the norm of recognition refers to the past connecting the old and the new constitution.

This also explains the legal authority of the constitutional maker. Since the norm of recognition in question is an ultimate norm with an interpretive character, it can be determined from the moment the new constitution is created and there is no need to wait and see whether officials, namely judges, will in practice identify the new constitution as valid law. The ultimate norm is an interpretation of the legal materials and practices, which include the creation of the new document according to the amendment clause of the old constitution by the constitutional authority.[514]

---

513 This is assuming the transition is smooth and the legal system functions normally. See in this context, Hart (n 76) 340.

514 It might be wondered why the new constitution has the same status or rank as the old constitution within the legal system given the fact that the former was created according to the latter. In other words, why is the new constitution not inferior to the old constitution? The answer turns on norms

It was just said that a norm of recognition is determinable when the new constitution is created. However, the new constitution can be identified as a source by a norm of recognition that was already in existence before it was enacted. Consider first a constitutional change according to the constitution itself, that is its amendment clause, which does not result in a change or a repeal of the amendment clause. For example, when a provision is added to the constitution. Theoretically, every provision of the constitution except the amendment clause could be changed in this way. The new provision in our example is valid in two different senses, that is according to a norm of change (the amendment clause) as well as a norm of recognition that identifies what is enacted by the constitutional maker in accordance with the procedure laid down in the amendment clause as a source.[515] When a new constitution is enacted, which repeals and replaces the amendment clause with a new one, even if it is substantively the same, it can be identified by this norm of recognition. Both the provision and the new constitution are valid as law immediately because of the norm, which interlocks with the amendment clause.

Even though the new constitution can be immediately valid as law because of a norm already in existence, the norm changes or it can change with the new constitution.[516] Firstly, the part of the norm that identifies the historical first constitution as a source can

---

of internal relations, that is ranking norms. They identify the new constitution as having the same status.

515 Ross (n 50) 95-99, says that the highest amendment clause cannot be reflexive (self-referential) and the basic norm changes when it is amended. Hart criticises Ross and claims, among other things, that the new and the old amendment clauses do not conflict for they are valid for different periods of time. See Hart (n 76) 176-178. For Ross' response, that the new amendment clause cannot derive its validity from the old amendment clause, and second solution, that is the unchangeable content of the basic norm, see Ross (n 505) 21 and 23-24. Likewise, Finnis questions Hart's response and presents his own solution, that is the principle of continuity, based on Ross' solution. See Finnis (n 106) 415-416 and 423-424. Later on, Hart (n 76) 16, recognized that there was something problematic that needed an explanation and accepted Finnis' solution with an addition.

516 Ross (n 505) 24, suggests an unchangeable basic norm, which is this: 'Obey the authority instituted by [the amendment clause] until this authority itself points to a successor; then obey this authority, until it itself points out a successor; and so on indefinitely.' The norm does not explain, though, the continued validity of a legal norm lower in the chain of validity.

cease to exist when that constitution is repealed. The historical first constitution is no longer identified by a current norm of recognition. Whether this change occurs is not crucial since the constitution has been repealed. Secondly, the part of the norm referring to the amendment clause of the historical first constitution may now refer to it as a thing of the past. It need not recognize future enactments based on that amendment clause as sources. Again, whether this change happens is not of utmost importance since the amendment clause has been repealed. Thirdly, a new part of the norm comes into existence, which identifies that what is enacted on the basis of the amendment clause of the new constitution as a source. These changes are best explained by an example.

Suppose that the first norm of recognition was this: the historical first constitution and what the constitutional maker enacts according to the procedure laid down in its amendment clause are sources of law. Both a new provision changing the historical first constitution and a new constitution are identified as sources by the norm. It changes (or a new norm emerges) when the new constitution is enacted, which repeals and replaces the amendment clause. The norm becomes this: that what was (or the constitution which was) enacted by the constitutional maker in accordance with the procedure laid down in the amendment clause of the historical first constitution as well as what is enacted by the constitutional maker in accordance with the procedure laid down in the new amendment clause are sources of law. If a third constitution is enacted on the basis of the amendment clause of the second constitution, then the explanation is repeated.[517] These changes are

[517] As the situation becomes more complex, so does the norm or the norms. We can imagine, for instance, a constitution enacted on the basis of the amendment clause of the historical first constitution, which was, then, changed on the basis of the amendment clause of the new constitution, where one of the changes was a new amendment clause. The norm of recognition could be this: that what was (the constitution which was) enacted on the basis of the amendment clause of the historical first constitution as well as what is or was enacted on the basis of the new constitution's amendment clause as well as what is enacted on the basis of the new amendment clause of the new constitution are sources of law.

determinable at the moment of the new constitution's creation. As the object of interpretation changes, so can ultimate norms with an interpretive character.

Although the example describes a single norm of recognition, there is nothing to preclude it from being two norms. There could be one norm identifying the historical first constitution and another identifying that what is enacted on the basis of its amendment clause. Later on, there could be one norm identifying that what was enacted on the basis of the historical first constitution's amendment clause and another identifying that what is enacted on the basis of the new amendment clause. And the original example could be seen as a single norm of recognition which changes or a new norm replacing an old one.[518] Furthermore, the norm could also be more or less general. It could, for example, simply refer to the constitution and amendments according to it. Irrespective, the norm or the norms of recognition connect the constitutions and their amendments together through a chain of references, which are more or less general, to their amendment clauses.

'Uninterrupted' Validity of Other Laws

Other laws of the legal system, such as statutory laws, need not share the constitution's reason for validity. Therefore, the reason for their validity need not change with the enactment of a new constitution. The statutes that were passed in accordance with the norm of change of the old constitution were valid in two different senses. They were valid according to the law, that is the norm of change, but they cease to be valid according to the current law unless the new constitution validates them. And they are sources because they

518 It can be difficult to discern whether changes in social practice constitute a new rule of recognition. See Raz (n 47) 94 and 98.

are still identified by a norm of recognition that refers to the norm of change of the old constitution. This norm of recognition need not change with the enactment of a new constitution. The norm refers to the same constitution although it is now a thing of the past. This explains why many laws continue to be valid when, for example, the constitution changes or a colony or a Dominion becomes independent without the need to rely on a general principle to that effect.[519]

Norms of interpretation and subsumption, however, can change or they can refer to entities that have changed. For example, a norm of interpretation making the constitution a part of the context of a statutory provision may now refer to the new but not the old constitution. That can affect the content of the statutory law. And if the statutory law is now in conflict with the new constitution, then that impacts its applicability according to the *lex superior* norm. Since a legal system has a web-like structure, a constitutional change can have seismic effects throughout the web.

A New Legal System Does Not Come into Existence

Explaining the last feature of constitutional change requires a theory of a legal system. It will have to suffice for present purposes to make the following points. According to the view here, the continuity of a legal system is not equivalent with the continuity of a single ultimate norm. We look instead at norms of legal method, which establish the web-like structure of a legal system, and the connection of the system to a particular independent political community. Whether or not a new legal system replaces an old one depends on a

[519] For many of the laws being similar, see e.g. Finnis (n 106) 408.

holistic judgment of various factors that indicate a significant break in the continuity and connection between the momentary legal systems or fundamental changes in the identity or status of the political community of which it is the law.[520] Since laws and norms of legal method can still refer to the past and all laws need not share the same ultimate reason for their validity, there will be many instances where the use of the label 'a new' legal system will not be significant.[521] The important thing is to explain changes in norms of legal method and their determination of the applicable law. Some changes in the status or the identity of a legal system impact norms of legal method and the applicable law as we will see in the case of peaceful grant of independence by law.

In the case of a constitutional change according to an older constitution, there is not a significant break from the past which suggests that the ties with the previous momentary legal system have been severed. The new constitution was created according to norms of change of the old constitution and the norm of recognition interlocks with and refers to that norm of change. Even though there is an important change at the top of the hierarchy and in the foundations of the constitution, that is the change in or the formation of a new norm of recognition, both senses of validity suggest a certain continuity and connection to the past. Furthermore, norms of interpretation, subsumption and applicability are relevant as well. These may be largely the same norms for the old and the new constitution. The same can be the case for norms of institutional decision-making. Add to it that other laws of the legal system remain valid and the identity and status of the political community in question

520 For momentary and non-momentary legal systems, see e.g. Raz (n 106) 35, and Raz (n 47) 81. For the status of the political community, see e.g. Raz (n 106) 211. For multiple factors, see Raz (n 106) 188-189.

521 For vague boundaries, see e.g. Raz (n 106) 189, and Raz (n 32) 150. See also Austin (n 494) 202 and 204-207. On p. 205 he says: 'The definition or general notion of independent political society, is therefore vague or uncertain.'

has not fundamentally altered and we can judge it to be or interpret it as the same legal system through time.

11.3 Peaceful Grant of Independence by Law

Why Is It Challenging?

When a colony or a Dominion becomes independent from its governing state, it is sometimes said it gets a new legal system.[522] The laws of the colony or the Dominion were, in some sense, subordinate to the laws of the governing state and formed a part of that legal system but when the colony or the Dominion becomes independent the tie is severed.[523] When independence is granted peacefully by law of the governing state, it can be particularly challenging to explain the validity of the laws of the newly independent colony or Dominion.[524] There are, at least, a few of reasons for this.

First, it might seem that there is no break in the chain of validity since the constitution of the newly independent colony or Dominion was enacted on the basis of a law originating from the governing state. Therefore, the laws of the newly independent colony or Dominion are still a part of the governing state's legal system.[525] Secondly, if

---

522 Hart (n 35) 120-121, says the legal system now has 'a 'local root''.

523 See in this regard e.g. Hart (n 35) 118 and 120-121. Austin (n 494) 201, says that a political society that is 'subordinate is merely a limb or a member of a society political or independent.' For his discussion on federal and confederal states, see p. 245-253.

524 Australia, Canada and New Zealand are examples. Peter C. Oliver, *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP 2015) discusses them. Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (HP 2018), discusses Australia

525 See e.g. Raz (n 106) 102-103 and 188, Raz (n 47) 126-127, and Finnis (n 106) 414-415 and 421, criticising Kelsen's theory.

there is a break in the chain- 'a peaceful' or 'a disguised revolution' of a sort -, then the independence-granting law of the governing state seems to amount to no more than a political symbol or a historical cause but it is not normatively significant. It is not the reason why the new constitution is valid.[526] And the explanations for the independence of a colony or a Dominion by legal and extra-legal means become largely the same, that is in virtue of a new norm of recognition. That might be surprising given that independence is granted by law and not gotten in violation of law.[527]

Furthermore, in the case of a disguised revolution, we have to wait and see whether the new constitution becomes valid. That does not match the intuition that a new legal system emerges and the new constitution becomes valid immediately. Moreover, we need to account for the fact that new laws of the governing state do not become laws of the newly independent colony or Dominion even though some or even most of the old laws enacted by the governing state may continue to be laws. How do we explain this?

Peaceful independence of a colony or a Dominion by law of the governing state is interesting for our purposes because there is a tension between the continuity of the laws and a break from the legal system of the governing state. Explaining the validity of the laws of the newly independent colony or a Dominion is, therefore, a good test case for an account of legal validity and the significance of the systematic character of law.

The exact legal effect of independence-granting law or other law on which basis the new constitution is enacted depend on the details of the legal arrangement. Granting

---

526 See e.g. Hart (n 35) 120-121. On the former page he says it is 'only an [sic] historical fact' and the law does not 'owe its contemporary legal status' to it.

527 See e.g. Wade (n 455) 191, Oliver (n 524) 6 and 293-294, and Peter C. Oliver, 'Change in the Ultimate Rule of a Legal System' (2015) 26 King's L.J. 367, 375-376, 378 and 408.

independence can be complex and happen in steps. The ties between the laws of a colony or a Dominion, on the one hand, and the laws of the governing state, on the other, can loosen gradually. Sometimes a colony is first given self-government over internal affairs by law of the governing state, including its own constitution, before it is granted independence. Furthermore, the new constitution can be enacted on the basis of one law, even internal law to the colony or the Dominion, but the community is granted independence with a different law. The independence-granting law may also require a legal act or acts to be made in order for a colony or a Dominion to become independent. The legal acts can have bases or legal effects in both the law of the governing state and the law of the colony or the Dominion as well as international law, all depending on the legal arrangement. In light of this, only a simplified example will be taken here to convey the basic idea about the significance of independence of a colony or a Dominion for norms of legal method and their determination of the applicable law.

How Does the Independence-Granting Law Lose Its Force?

Let us say that the new constitution was passed on the basis of the independence-granting law and the colony or the Dominion became independent when it entered into force. This is a familiar situation from the example above about constitutional change according to an older constitution. But there is a twist. We need to account for the sense that a new legal system emerges and does so immediately as well as that the independence-granting law is no longer the constitution's legal basis.

The new constitution could repeal the independence-granting law just as the new constitution repealed the old constitution in the example above. Alternatively, the

independence-granting law could lose its force according to its own terms; or the terms of some other law; or because of *desuetudo derogataria*. However, we can imagine a situation where the independence-granting law ceases to be law for the newly independent colony or Dominion without it being repealed by the new constitution or losing its force because of the other reasons just mentioned. How do we explain this?

When the constitution of the newly independent colony or Dominion was passed, it was valid in two different senses. At that moment, it was valid according to the independence-granting law. If the new constitution repealed the independence-granting law, then the latter was valid up until the new constitution became valid. However, the independence-granting law might cease to be law of the newly independent colony or Dominion in another way. It can cease to be valid law because it is no longer identified as such by a current norm of recognition of *that* legal system. How exactly can that happen?

As soon as the independence-granting law serves its purpose, it changes the legal context of both the colony or the Dominion and the governing state. The former becomes independent from the latter. Once the new constitution enters into force, it can be interpreted as belonging to a new or a distinct legal system with its own norms of legal method. The laws of the colony or the Dominion are no longer a part of the legal system of the governing state. Whereas the independence-granting law was identified by a norm of recognition of the governing state's legal system, of which the colony or the Dominion's legal system was a part, it is not recognized by the new legal system. The norm of recognition of the governing state's legal system is not a norm of recognition of the new legal system. As soon as the colony or the Dominion becomes a distinct legal system, the independence-granting law ceases to be law for it. Therefore, the constitution ceases to be valid *according to current law of the new legal system*. After that, the constitution is only

valid in one sense, that is as law in the new legal system, because it is identified as such by a norm of recognition, which is the result of an interpretation of the object as a distinct legal system. This norm of recognition may, though, refer to the independence-granting law as its criterion.[528] Norms of interpretation and subsumption can refer to the independence-granting law as well. There is a sense of continuity despite the change.[529]

This explains why there is both a sense in which there is no break in the chain of validity as well as a break without it amounting to a disguised revolution. The independence-granting law is not a mere historical cause since it has legal effect, even if it is only one-off or momentary. After that moment, a new legal system has emerged of which the independence-granting law is not a member. The situation becomes similar to the one with the repealed constitution. As the example demonstrates, law plays a prominent role that distinguishes independence by legal and extra-legal means. But the role of the norm of recognition explains to an extent the similarities between the legal and extra-legal means. Furthermore, the constitution of the newly independent colony becomes immediately valid just as the new constitution in the example about a constitutional change. There is no need to wait and see whether it becomes valid or whether a new legal system emerges. This is one of the advantages of norms of recognition having an interpretive character as opposed to being social conventions.

Other Laws

528 See in this context Oliver (n 524) e.g. 23-24 and 312-314, who relies on the principle of continuity.

529 For a (slightly) different explanation, see Oliver (n 524) e.g. 23-24 and 312-314. For the sense of continuity, see e.g. Oliver (n 527) 374-375.

The validity of other laws of the colony need not change since a colony can have its own ultimate norms of legal method. The laws need not share the same ultimate reason for their validity. Therefore, there need not be a total revision of the legal system. This is also the reason why there is not as stark choice between *this* or *that* legal system *in toto* in the 'half-way stages', when a legal system become independent by extra-legal means, such as a revolution.[530] There is not an exclusive focus on competing constitutional structures at the apex of a legal system and a choice to be made between the single ultimate reason for the validity of all the laws, such as laws about traffic, contracts and marriages.

Returning back to peaceful grant of independence, the norms of recognition of the newly independent colony or a Dominion may identify old laws of the governing state but do not identify the new ones. The governing state can no longer enact laws for the new legal system. The content of those norms of recognition changes with the emergence of an independent legal system in the way that they now only refer to the past.

A New Legal System Comes into Existence

The reasons why the label 'a new' legal system seems appropriate in this situation are twofold. First, the identity or, at least, the status of the political community has

530 See in this context the example of Southern Rhodesia and F.M. Brookfield, 'The Courts, Kelsen, and the Rhodesian Revolution' (1969) 19 The University of Toronto L.J. 326-352, R.W.M. Dias, 'Legal Politics: Norms behind the Grundnorm' (1968) 26 The Camb. J.L. 233-259, and J.M. Eekelaar, 'Splitting the Grundnorm' (1967) 30 The Mod. L. Rev. 156-175. See also S.K. Date-Bah, 'Jurisprudence's Day in Court in Ghana' (1971) 20 The International and Comparative Law Quarterly 315, T.K.K. Iyer, 'Law in Pakistan: Kelsen in the Courts' (1973) 21 The American Journal of Comparative Law 759, Abiolo Ojo, 'The Search for the Grundnorm in Nigeria: The Lakanmi Case' (1971) 20 The International and Comparative Law Quarterly 117, S.A. de Smith, 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 Western Ontario L. Rev 93. For 'half-way' stages, see Hart (n 35) 112 and 118.

fundamentally changed. It has become independent from the governing state. Secondly, there is a significant break from the past, that is the laws of the newly independent colony are no longer subordinate to the laws of the governing state and, at least, new laws of the governing state do not form a part of the newly independent legal system. Changes in the object of interpretation and its context can lead to changes in the ultimate norms of legal method. This happens when the legal materials and practices are interpreted in light of ideas, such as about independence or self-government, as forming a distinct object and ultimate norms of legal method are the outcomes of such an interpretation. The laws of the colony are seen or interpreted as forming an independent legal system. The severed tie with the governing state results in new norms about the relationship between the legal systems, such as new norms about sources of law, ranking and external relations.

Independence of a legal system can, therefore, affect norms of legal method and, thereby, the applicable law. Independence becomes an important feature of the object and the ties with the governing state an important part of its historical context. These features shape norms of legal method that continue to be relevant for determining the law long after a colony or a Dominion gets its independence. For instance, they may still be relevant in explaining modern constitutional law, the persistence of old laws and the relationship between the legal systems of the former governing state and the independent state.

We have used what we have learned about the continued validity of a legal norm and the example of regulatory law to explain constitutional change according to an older constitution. Similarly, we have used what we have learned about constitutional change to explain peaceful grant of independence by law. In all these instances, the web-like structure of a legal system matters. The interpretive character of the ultimate norms can as well. In the last example, the independence of the political community or the emergence of a new

legal system makes a difference for, among other things, why the independence-granting law is no longer recognized by a current norm of recognition of that legal system, why old laws persists but new laws of the governing state are no longer recognized and the formation of new norms of applicability. As is evident from all this, the systematic character of law matters for norms of legal method and their determination of the applicable law in various ways.

12 THE IMPORTANCE OF BEING METHODOLOGICAL

We conclude by asking: what have we learned? The question will be answered by summarizing the thesis.

What Are Norms of Legal Method?

This is the overarching question. From Justus and Lexie's search for the law emerged that norms of legal method seem to have something to do with identifying or determining the applicable law. They seem to be a central feature of practice and they need to be properly explained. Legal method is the way to work out the law in a particular place and time. Norms of legal method are about the role and relevance of legal materials, practices and other factors in determining the applicable law. They identify sources of law and interpretive factors as well as specify their roles. Furthermore, they determine the status of and the relationship between legal norms. They affect which arguments are appropriate or relevant in identifying the law and matter for what it is 'to think like a lawyer'. They are norms about legal norms. In that sense, they are secondary norms or methodological norms.

The overarching question -what are they?- was focused on the norms' nature, role and significance. In order to address the question, it was divided into two sorts of topics. The first sort was about the norms themselves. What do they do? How many norms are there? Are any of them necessary? Of what kind are they? What is their normative character? What is their function? The second sort of topics was about the norms' significance for issues about legal validity and legal systems. Each topic was further

explained and demarcated in the relevant chapters as needed. So, what are the answers to these questions?

What Do They Do?

Norms of legal method partly determine the applicable law. That is their overarching role. They can be viewed together in light of this role. However, their specific roles are diverse. They regulate the applicable law in different ways. This raises the question about their diverse roles. It was claimed that the roles can be identified by analysing issues that arise in determining the applicable law. There are, at least, five issues:

1. Does the law exist?
2. What is the content of the law?
3. Is the law applicable?
4. How does the law apply to the facts?
5. Are institutional considerations or powers relevant for determining and applying the law?

These are issues about the existence, content, applicability and application of the law as well as the relevance of institutional powers and considerations in identifying and applying it. Norms of legal method address these issues. It was argued that there are reasons to categorise the norms depending on which issue they address and how they do that instead of bundling some of them together.

What are the types of norms of legal method?

- *Existence*. Norms of recognition regulate the existence of the law by identifying sources of law. Norms of change are relevant as well since they are about creating, changing or cancelling laws.
- *Content*. Norms of interpretation regulate the content of the law by identifying interpretive factors and specifying their role.
- *Applicability*. Norms of applicability were divided into three sub-categories:
    - Norms of internal relations are about the status of a legal norm and its relationship with other legal norms of the same legal system. They were further divided into norms about:
        - ranking,
        - priority and
        - other relations, such as about the temporal scope of a legal norm.
    - Norms of external relations are about the relationship of a legal norm with norms of other systems.
    - Other norms of applicability include a variety of requirements that matter for a norm's applicability or legal effect, such as a ban on retroactive criminal liability and punishment.
- *Application*. Norms of subsumption regulate the application of the law, for example, by identifying the relevant factors or considerations for applying evaluative legal standards and balancing principles.
- *Institutions*. Norms of institutional decision-making regulate institutional powers and considerations. They were divided into:
    - norms of adjudication,
    - norms of executive action and
    - other institutional norms.

Norms of discretion are closely related to law-applying powers.

How Many Norms? Are Any of Them Necessary?

None of the categories must consist of a single ultimate norm. There can, for example, be many (ultimate) norms of recognition in a legal system. But are any types of norms of legal method necessary? It was claimed that at least one norm of recognition must exist in each legal system. Even though most of the norms are not necessary, they tend to be multiple and diverse in modern, sophisticated legal systems.

What Kind of Norms?

Some of them are legal norms just like any other laws. They are based on sources of law, interpretive factors and considerations identified by norms of recognition, interpretation, and subsumption. But not all of them can be legal norms in this sense. What are the non-legal norms, then? It was suggested that they are outcomes of interpretations of legal materials and practices in a particular place and time (the object of interpretation), in their social, historical, and political settings (the context of interpretation), in light of ideas about law (the normative element), where a question is asked about one of the five issues (the interpretive question). In some ways, they are similar to statutory laws, which are based on interpretations of statutory provisions in their contexts in light of norms of legal method, namely norms of interpretation.

The interpretive character of the non-legal norms is best explained by taking an example. Suppose we are concerned with the content of the law and wish to figure out the interpretation of a statutory provision in case of doubt (the interpretive question). We look at the statute in question and possibly other statutes and practices concerning their creation, identification and application (the object of interpretation). These include social conventions of officials. There might, for instance, be a practice about interpreting statutes. But the object is not limited to them. The statute itself matters. That includes its content and structure. We notice that some of the statutes are structured, framed or presented in a particular way. There are legal norms that have a wide scope and there are legal norms that depart from them in certain instances. We might also look at the legal tradition or history of the legal system. It might have been the case that legislation was previously disorganised and framed in an *ad hoc* manner. To clarify the situation, the legislature started to organise clearly legal norms with a wide scope and keep them, as a matter of presentation and framing, distinct from legal norms departing from them in particular instances (the context of interpretation). From analysing the statutes and practices in light of the legal tradition and history, we get an idea about the sort of thing we are interpreting, that is the relationship between the legal norms with a wide scope and the legal norms that depart from them. The former are main rules but the latter are exceptions. The former are meant to apply except when the latter depart from them (the relevant idea about law).

This structural relationship between the legal norms matters for their interpretation. A certain logic or rationale stems from viewing the statutes and practices through the lens of the idea about main rules and exceptions. The legal norms with a wide scope are understood as main rules but the legal norms departing from them as exceptions. Since main rules are meant to apply generally but exceptions only exceptionally, there are reasons to interpret exceptions narrowly in case of doubt since it is not clear in that instance that

we should depart from what applies generally. We can conclude that there is a norm about restrictive interpretation of exceptions in case of doubt. It applies wherever and to the extent these reasons are applicable. This norm of interpretation is applied in the interpretation of a particular statutory provision, which is identified as an exception. It regulates the interpretation of the statutory provision and by that the content of the law.

Only the first steps in developing the view about the interpretive character of the non-legal norms were taken. The focus was on laying the foundations for the account but not to argue for and defend it. Despite that, the explanatory force of the account was briefly demonstrated. First, it was argued that the view explains a puzzling feature about the non-legal norms. The puzzling feature is that while most of the non-legal norms are contingent, they, nonetheless, seem to be non-coincidental given their subject matter. For example, the existence and content of norms about exceptions seems to correspond with their rationale as exceptions. That kind of norm is also pervasively common in legal systems. Most legal systems do not have general norms about interpreting exceptions extensively and main rules narrowly. Nevertheless, norms about restrictive interpretation of exceptions are not conceptually required.

This feature might, of course, be explained in various ways. To give an example, social conventions can develop in light of participants' view of their subject matter or the view that fuels them may be inherited from ancient legal systems and shared across systems. But social conventions correspond to their subject matter in a contingent way. There might be a social convention that exceptions are generally interpreted extensively and main rules narrowly. It would be an odd social convention but it could exist.

Contrariwise, it was argued that the non-legal norms as interpretive norms correspond to their subject matter in a non-contingent way because they are interpretations *of* legal materials and practices in their context in light of ideas about law. They are non-coincidental in a stronger way than social conventions because their existence and content depend on reasons that have to do with their subject matter. To give an example, the norm about interpreting exceptions restrictively exists and has the content it does because the statutes are structured and framed in a certain way, the legal tradition and history of organising legislation more clearly and the idea about main rules and exceptions.

Secondly, it was argued that the view is not vulnerable to the challenge of theoretical disagreements. Lawyers can disagree and still think there is a correct answer, for example, about interpreting a statutory provision and determining a non-legal norm. They can disagree about which norm is supported by the strongest reasons. The relevant reasons have to do with statutory interpretation and interpreting the legal materials and practices according to the account given here. These disagreements are not empirical. To the extent that lawyers disagree about the character of the non-legal norms, or even the existence or nature of norms of legal method, the account given here competes with other views.

What Is Their Normative Character?

Normative character is about the normative function of a norm. From the point of view of how norms are used, thought of, and spoken about in social life and law, it could be said that some norms impose a duty (duty-imposing norms), others permit (permission-granting norms) and yet others empower (power-conferring norms). Additionally, there are norms

that regulate which normative state of affairs, situation or position ought to be the case. For example, what counts as what for some purpose. These norms can be called qualifying norms since they qualify something as something else. They are a part of games, such as: 'The piece with the slit cut through the top is the bishop in chess.' And they are a part of law. 'A child for the purpose of the Convention is a person below the age of 18 years old.'

Now, it might be thought that qualifying norms are just constitutive rules in new clothes. Therefore, they are liable to familiar objections to the idea of distinctively constitutive rules. Constitutive rules both regulate and create the meaning of a behaviour, whereas regulative rules only regulate behaviour. A familiar objection is that the distinction between the two functions collapses and, thereby, the distinction between constitutive and regulative rules. Even though qualifying norms and constitutive rules are similar, there are important distinctions. First of all, they are distinguished from other types of norms in a different way. Constitutive rules are contrasted with regulative rules in terms of creating the meaning of a behaviour. Qualifying norms have a distinct normative function and can be contrasted with the normative functions of duty-imposing, permission-granting and power-conferring norms. Second of all, constitutive rules regulate behaviour in a narrow sense but qualifying norms direct thinking.

It might be objected, first, that qualifying norms are not really norms since they do not direct or guide behaviour. To which it was responded that they direct thinking but not (external) behaviour. It might be objected, secondly, that qualifying norms are really duty-imposing norms. In response a subtle distinction was drawn. While duty-imposing norms can direct thinking ('Think well of your sister'), qualifying norms ('This piece is the Bishop') do not have thinking as such as a part of its subject matter. The structure of the norms as to their basic elements, that is subject matter and normative function, is different

and as a result they direct thinking in a more indirect manner. They are about what is the case, normatively speaking, but not what should be done. It might be objected, thirdly, that qualifying norms are merely fragments of complete norms. From the point of view of (external) behaviour, the norms can only have 'indirect normative force'. But from the point of view of thinking in a certain way, they need not be considered as fragments of other norms.

With this in mind, it was asked which norms of legal method have which normative character and that was answered by investigating whether they must necessarily perform a specific function to be of the sort they are. It was claimed that norms of recognition are, at their core, qualifying norms. They could not be norms of recognition without identifying some legal material as a source of law and that is their primary function. Something similar applies to norms of interpretation, internal relations, external relations and subsumption. Norms of change, on the other hand, are necessarily power-conferring norms. Other norms of applicability are often duty-imposing norms and norms of institutional decision-making are a mixture. Finally, it was claimed that legal method is not simply the judicial method. Norms of legal method do not only impose duties on judges in deciding cases, although some norms, like norms of adjudication, do. Since centrally important norms of legal method are qualifying norms, they matter for anyone who wishes to identify the law for whatever reason.

What Is Their Function?

It was claimed that norms of legal method partly determine the law by addressing the five issues. They have a constitutive function. They make the law what it is. This claim requires

a defence. That was offered by addressing three objections. The first objection is that at least some norms of legal method primarily have the function of making certain which rules are rules of the group. In order to answer the objection, a just-so story about the transformation of a pre-legal society into a legal one was analysed. It was claimed that, despite the ambiguous language used, the rule of recognition has a constitutive function. However, the focus of the just-so story should be different. It should not be on which rules are rules of the group but which rules are laws of the group. And it should not be on certainty but what makes something a law of the group. This is a constitutive function.

The second objection is that norms of legal method are heuristics or rules of thumb. It was argued that the existence, content, use and capability of the norms does not suggest that they are mere heuristics. However, we should distinguish between norms of legal method, which are a part *of* law and are constitutive, and how-to rules, which are a part of legal methodology and the practice of law and have an epistemic function. The latter are *about* the former. 'Precedents of the Supreme Court are sources of law' is a norm of legal method. The norm makes it the case that precedents are sources. 'You should look on the Court's website to find its judgments' or 'read Professor so-and-so's textbook' are how-to rules. They help us to ascertain the law but they do not make it the case that the law is what it is.

The third objection is that norms of legal method conflict or are too vague to partly determine the law. It was argued that norms of legal method do not necessarily conflict and even when they do, it does not necessarily mean that the law is systematically and radically underdetermined for that reason. Finally, even though the norms can be vague, it does not mean that they cannot determine the law. They may still have a clear core. Therefore, the norms can be determinative of the law.

What Is the Norms' Significance for Legal Validity?

Issues about the foundations and structure of a legal system, ultimate norms and legal validity seem to be entangled, at least according to some theories of law. Some of these are captured by the metaphor of the chain of validity. Very roughly speaking, a legal norm is valid because of another legal norm and so it continues until there are no more legal norms to validate. Then we reach the ultimate norm, which is somehow different from (other) legal norms. The structure of a legal system seems to trace the chain and the ultimate norm, one or many, forms the foundations of a legal system.

There are reasons to doubt this picture. Since the ultimate norm only resides at the end of the chain, this explanation cannot account for how sources of law are identified and valid laws are distinguished from other valid norms at the lower levels of the chain. And it does not fit smoothly with the versatile types of norms of legal method identified above, some of which can regulate legal norms at multiple levels of the chain. It was argued that we should, instead, view norms as ultimate if they are the solution to the problem of determining the applicable law and are not legal norms themselves. Ultimate norms are not a part of the chain of validity as such but lie to its side and refer to the legal norms belonging to it. Consequently, ultimate norms, that is the non-legal norms, can be multiple, diverse and regulate legal norms at every level of the chain.

With this new picture in mind, a distinction was made between valid laws (valid as law) and valid according to the law. Every legal norm is valid as law. It is valid law because it has a basis in a source of law identified by a norm of recognition and is in accordance with interpretive factors and considerations identified by norms of interpretation and

subsumption. An act or a norm, such a contract or an administrative decision, is valid according to the law when it is validated by a legal norm. Some legal norms are both valid as law and according to the law. This is the case when they are created according to a norm of change so identified by a norm of recognition. Norms of change and recognition interlock. This view has consequences, for example, for explaining the validity of constitutional law.

Norms of applicability are not about validity as such even though they affect a legal norm's legal effect. Distinguishing between norms of recognition, interpretation and subsumption, on the one hand, and applicability, on the other, matters for explaining the status of foreign or international law in a legal system, for instance. Lastly, norms of institutional decision-making can matter for explaining validity according to the law.

What Is the Relationship Between the Norms and the Systematic Character of a Law?

The question was approached by addressing four issues. The first issue is: why does the systematic character of law matter at all for determining the law? It was claimed that the law is determined as a part of a legal system and its very existence, content and applicability depend on other laws and elements of that system. A legal norm need not have a basis in a single, clearly demarcated source. Moreover, the legal position is normally determined according to legal norms that belong the same legal system unless other norms are relevant according to the system's norms.

The second issue is: what is the systematic character of law? It was maintained that a legal system has a web-like structure, which is partly constructed by norms of legal

method which establish various connections between legal norms, the factors they are based on and institutions. Norms of legal method also determine which laws are a part of the same legal system at a particular time and through time.

The third issue is: how are norms of legal method a part of a legal system? It was claimed that the ultimate norms, that is the non-legal ones, are interpreted as belonging together and forming a legal system in light of the very ideas of a legal system and a particular independent political community.

The fourth issue is: how does understanding the relationship between the systematic character of law and norms of legal method matter? To answer the question, an example was taken of how it matters for explaining the dynamic nature of the law. Norms of legal method and the web-like structure of a legal system casts a light on the various ways the applicable law can change.

What is the Norms' Significance for the Continued Validity of a Legal Norm?

Different threads of the thesis were woven together in answering the question about the continued validity of a legal norm within a legal system. It was argued that norms of legal method and the structure and continuity of a legal system are significant for explaining the continued validity of a legal norm. Three scenarios were discussed. First was the continued validity of a legal norm under normal conditions and when its legal basis is repealed by another legal norm. Second was the continued validity of a constitution created according to an older constitution, which it repeals, as well as other legal norms of the system. Third

was the peaceful grant of independence to a colony or a Dominion by law of the governing state.

A legal norm continues to be valid according to law if the norm of change according to which it was created is still valid. In which case it is valid in two different senses. The norm of change interlocks with a norm of recognition that identifies that what is created according to the power-conferring norm as a source of law. If the norm of change is no longer valid, the legal norm continues to be valid as law if it still has a basis in a source of law identified by a current norm of recognition of the legal system. Since a legal system has a web-like structure, a change in the legal basis of a legal norm can, though, have various effects.

A constitution enacted on the basis of an older constitution is valid in two different senses at the moment it enters into force. After the old constitution ceases to be valid, the new constitution is only valid as law because of a norm of recognition that identifies it as a source. The norm of recognition might, though, refer to the norm of change of the old constitution (the amendment clause) as its criterion of identification. A new non-legal norm of recognition is identifiable with the creation of the new constitution according to the amendment clause of the old constitution. That is one of the advantages of the non-legal norms having an interpretive character. However, it could also be the case that a norm of recognition was already in existence that referred to the amendment clause of the old constitution and it continues to exist after the new constitution replaces the old one.

At last, a peaceful grant of independence by law works in a similar way as a constitutional change according to an older constitution. Since the ties between two legal systems are severed when a colony or Dominion becomes independent from the governing

state, norms of recognition, as well as other norms of legal method, can cease to exist or change in the new legal system of the independent colony or Dominion. Because norms of legal method operate at every level of the chain of validity, changes in constitutional law or the highest laws of the legal system do not necessarily change the valid laws lower in the chain. That is why many laws continues to be valid despite a constitutional change or independence of a colony or Dominion.

BIBLIOGRAPHY

Adams, T., 'The Efficacy Condition' (2019) 25 *Legal Theory* 225.

Alexander, L., and Sherwin, E., *Demystifying Legal Reasoning* (Cambridge University Press 2008).

Alexy, R., *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford University Press 2002).

Alexy, R., *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick tr, Oxford University Press 2010).

Alexy, R., and Dreier, R., 'Precedent in the Federal Republic of Germany' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Aldershot: Darthmouth 1997).

Alexy, R., and Dreier, R., 'Statutory Interpretation in the Federal Republic of Germany' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (Aldershot: Darthmout 1991).

Allen, C.K., *Law in the Making* (7th edn, Clarendon Press 1964).

Austin, J., *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence. With Introduction by H.L.A. Hart* (The Hacket Publishing Company, Inc. 1998).

Bankowski, Z., and MacCormick D.N., 'Statutory Interpretation in the United Kingdom' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (Aldershot: Darthmout 1991).

Barak, A., *Purposive Interpretation in Law* (Princeton University Press 2005).

Bentham, J., *Of Laws in General* (H.L.A. Hart ed, The Athlone Press 1970).

Black, M., 'Notes on the meaning of "rule"' (1958) 24 *Theoria* 107.

Black, M., *Models and Metaphors. Studies in Language and Philosophy* (Cornell University Press 1962).

Boe, E., *Grunnleggende juridisk metode* (Tano 2005).

Boucht, J., 'Introduction to Finnish and Swedish Legal Method' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Briggs, A., *Conflicts of Laws* (3rd edn, Oxford University Press 2013).

Brookfield, F.M., 'The Courts, Kelsen, and the Rhodesian Revolution' (1969) 19 *The University of Toronto Law Journal* 326.

Bulygin, E., *Essays in Legal Philosophy* (Oxford University Press 2015).

Cross, R., and Harris, J.W., *Precedent in English Law* (4th edn, Oxford University Press 1991).

Cross, R., *Statutory Interpretation*. With John Bell and George Engle (3rd edn, LexisNexus 1995).

Date-Bah, S.K., 'Jurisprudence's Day in Court in Ghana' (1971) 20 *The International and Comparative Law Quarterly* 315.

de Smith, S.A., 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 *Western Ontario Law Review* 93.

Dias, R.W.M., 'Legal Politics: Norms behind the Grundnorm' (1968) 26 *The Cambridge Journal of Law* 233.

Dicey, A.V. 'Private International Law as a Branch of the Law of England' (1890) 6 *Law Quarterly Review* 3.

Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan and Co. 1915).

Dickson, J., 'How Many Legal Systems?: Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union' in *Legal Research Paper Series*, paper no. 40/2008, at <http://ssrn.com/abstract=1279612> accessed 5 June 2020.

Dickson, J., 'Interpretation and Coherence in Legal Reasoning' *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret/> accessed 25 June 2021.

Dickson, J., 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27 *Oxford Journal of Legal Studies* 373.

Dickson, J., *Evaluation and Legal Theory* (Hart Publishing 2001).

Dickson, Julie, 'Towards a Theory of European Legal Systems' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

Diggs, B.J., 'Rules and Utilitarianism' (1964) 1 *American Philosophical Quarterly* 32.

Dworkin, R., 'Hart's Posthumous Reply' (2017) 130 *Harvard Law Review* 2096.

Dworkin, R., 'Legal Theory and the Problem of Sense' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (Oxford University Press 1987).

Dworkin, R., 'No Right Answer?' in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society* (Oxford University Press 1977).

Dworkin, R., *A Matter of Principle* (Harvard University Press 1985).

Dworkin, R., *Justice for Hedgehogs* (Harvard University Press 2011).

Dworkin, R., *Justice in Robes* (Harvard University Press 2006).

Dworkin, R., *Law's Empire* (Hart Publishing 1998).

Dworkin, R., *Taking Rights Seriously* (Harvard University Press 1977).

Eckhoff, T., *Rettskildelære* (2nd edn, Tano 1989).

Eckhoff, T., and Sundby, N.K., *Rettssystemer* (Tano 1991).

Eekelaar, J.M., 'Splitting the Grundnorm' (1967) 30 *The Modern Law Review* 156.

Eleftheridis, P., 'The Law of Laws' (2010) 1 *Transnational Legal Theory* 579.

Endicott, T.A.O., 'Putting Interpretation in Its Place' (1994) 13 *Law and Philosophy* 451.

Endicott, T.A.O., 'The Generality of Law' in Luís Duarte D'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Oxford University Press 2013).

Endicott, T.A.O., *Vagueness in Law* (Oxford University Press 2001).

Falk, N., *The Scientific Study of Law* in *Outline of the Science of Jurisprudence* (T & T Clark 1887).

Finnis, J. 'Reflections and Responses' in John Keown and Robert P. George (eds), *Reasons, Morality, and Law. The Philosophy of John Finnis* (Oxford University Press 2013) 459.

Finnis, J., *Natural Law and Natural Rights* (Oxford University Press 1980).

Finnis, J., *Philosophy of Law. Collected Essays: Volume IV* (Oxford University Press 2011).

Foster, N., *Foster on EU Law* (6th edn, Oxford University Press 2017).

Fuller, L. L., *The Morality of Law* (Harvard University Press 1977).

Gardner, J., *Law as a Leap of Faith* (Oxford University Press 2012).

Gareis, K., *Introduction to Science of Law*. (Albert Kocourek tr, The MacMillan Comp. 1924).

Gerd, G., and Todd, P.M., 'Precis of Simple Heuristics that Makes Us Smart' (2000) 23 *Behavioral and Brain Sciences* 727.

Gihl, T., 'The Legal Character and Sources of International Law' (1957) 1 *Scandinavian Studies in Law* 53.

Goodhart, A.L., 'The Nature of International Law' (1936) 22 *Transactions of the Grotius Society* 31.

Graulich, G. Hopf, H., and Schreiner, P.R., 'Heuristic Thinking Makes a Chemist Smart' (2010) 39 *Chemical Society Review* 1505.

Gray, J.C., and Gray, R., *The Nature and Sources of the Law* (2nd edn, The MacMillan Company 1948).

Green, L., 'Escapable Law' (2019) 19 *Jerusalem Review of Legal Studies* 110.

Green, L., 'Introduction' to the *Concept of Law* (3rd edn, Oxford University Press 2012).

Green, L., 'Law and the Role of a Judge' in Kimberly Kessler Ferzan and Stephen J. Morse (eds), *Legal, Moral, and Metaphysical Truths* (Oxford University Press 2016).

Green, L., 'Notes' to *The Concept of Law* (3rd edn, Oxford University Press 2012).

Green, L., 'The Functions of Law' (1998) 12 *Cogito* 117.

Green, L., and Adams, T., 'Legal Positivism' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter edn 2019) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/> accessed 5 February 2021.

Greenawalt, K., *Legal Interpretation. Perspectives from Other Disciplines and Private Texts* (Oxford University Press 2010).

Greenberg, M., 'How Facts Make Law' in Scott Herschovitz (ed), *The Jurisprudence of Ronald Dworkin* (Oxford University Press 2006).

Greenberg, M., 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andrei Marmor and Scott Soames (eds), *Language in the Law* (Oxford University Press 2013).

Greenberg, M., 'Natural Law Colloquium. Legal Interpretation and Natural Law' (2020) 89 *Fordham Law Review* 109.

Greenberg, M., 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Review* 1288.

Greenberg, M., 'The Moral Impact Theory, the Dependence View and Natural of Law' in George Duke and Robert P. George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press 2017).

Greenberg, M., 'The Standard Picture and its Discontents' (2011) 1 *Oxford Studies in the Philosophy of Law* 39.

Greenberg, M., 'What Makes a Method of Legal Interpretation Correct? Legal Standards Vs. Fundamental Determinants' (2017) 130 *Harvard Law Review* 105.

Häcki, R., ‘An Introduction to the Application of Law in Switzerland’ in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Haferkamp, HP., ‘Historical Conditions for the Contemporary Understanding of Legal Method in Germany’ in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Hamilton, A., ‘The Judiciary Department’ in *The Federalist Papers: No 78*.

Hare, R.M., ‘The Promising Game’ (1964) 70 *Revue Intern. de. Philosophie* 398.

Hart, H.L.A., ‘Introduction’ in John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (The Hacket Publishing Company, Inc. 1998).

Hart, H.L.A., ‘The New Challenge to Legal Positivism’ (2016) 36 *Oxford Journal of Legal Studies* 459.

Hart, H.L.A., *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983).

Hart, H.L.A., *Essays on Bentham* (Oxford University Press 1982).

Hart, H.L.A., *Law, Liberty, and Morality* (Stanford University Press 1963).

Hart, H.L.A., *The Concept of Law* (3rd edn, Oxford University Press 2012).

Helland, I., ‘Introduction to German Legal Method’ in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Helland, I., and Koch, S., ‘Introduction to Norwegian Legal Method’ in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Helland, I., and Koch, S., ‘Norwegian and German Legal Methods Compared’ in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Henninger, T., ‘Legal Culture and Common Principles of European Legal Method. Legal Method as an Obstacle or Facilitator for a Uniform Private Law in Europe’ in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Hershovitz, S., ‘Integrity and Stare Decisis’ in Scott Hershovitz (ed), *Exploring Law’s Empire* (Oxford University Press 2008).

Hershovitz, S., ‘The End of Jurisprudence’ (2015) 124 *Yale Law Review* 1160.

Hohfeld, W.N., ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710.

Holland, J., and Webb, J., *Learning Legal Rules* (9th edn, Oxford University Press 2016).

Holland, T.E., *The Elements of Jurisprudence* (10th edn, Oxford University Press 1906).

Honoré, T., 'Real Laws' in P.M.S. Hacker and J. Raz (eds), *Law, Morality, and Society* (Oxford University Press 1977).

Honoré, T., *Making Law Bind* (Clarendon Press 1987).

Iyer, T.K.K., 'Law in Pakistan: Kelsen in the Courts' (1973) 21 *The American Journal of Comparative Law* 759.

Kantorowicz, H., *The Definition of Law* (Cambridge University Press 1958).

Keeton, G.W., *The Elementary Principles of Jurisprudence* (2nd edn, Isaac Pitman & Sons, Ltd. 1949).

Kelsen, H., 'On the Theory of Interpretation' (1990) 10 *Legal Studies* 127.

Kelsen, H., 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44.

Kelsen, H., *General Theory of Law and State* (Anders Wedberg tr, The Lawbook Exhange, Ltd. 1945).

Kelsen, H., *General Theory of Norms* (Michael Hartney tr, Oxford University Press 1991).

Kelsen, H., *Introduction to the Problems of Legal Theory* (Bonnie and Stanley Paulson tr, Oxford University Press 1992).

Kelsen, H., *Principles of International Law* (The Lawbook Exchange, Ltd. 1959).

Kelsen, H., *Pure Theory of Law* (Mac Knight tr, The Lawbook Exchange, Ltd. 2005).

Kelsen, H., *Society and Nature: A Sociological Inquiry* (Forgotten Books 2018).

Kjølbro, J.F., *Den Europæiske Mennskerettigheds Konvention* (4th edn, Jurist- og Økonomforbundets Forlag 2017).

Köpcke, M., *Legal Validity. The Fabric of Justice* (Hart Publishing 2019).

Kramer, M. 'Power-Conferring Laws and the Rule of Recognition' (2019) 19 *Jerusalem Review of Legal Studies* 87.

Kramer, M., 'How Moral Principles Enter into Law' 6 (2000) *Legal Theory* 83.

Kramer, M., *Where Law and Morality Meet* (Oxford University Press 2004).

Kristjánsson, H.D., 'The Plateau of Legality. What Makes Law 'Law'?' (2016) 62 *Scandinavian Studies in Law* 15.

Kristjánsson, H.D., *Að iðka lögfræði. Inngangur að hinni lagalegu aðferð* (Bókaútgáfan Codex 2015).

Kristjánsson, H.D., *The Concept of a Legal System*. Long thesis at Harvard Law School 2013.

Lamond, G., 'Legal Sources, the Rule of Recognition, and Customary Law' (2014) 59 *The American Journal of Jurisprudence* 25.

Lamond, G., 'The Rule of Recognition and the Foundations of a Legal System' in Luís Duarte A'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Oxford University Press 2013).

Lando, O., 'Forward' in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Levi, E.H., *An Introduction to Legal Reasoning* (The University of Chicago Press 1949).

Lewis, D., 'Scorekeeping in a Language Game' (1979) 8 *Journal of Philosophical Logic* 339.

Líndal, S., 'Um lög og lagasetningu í íslenzka þjóðveldinu' (1984) 158 *Skírnir* 121.

Líndal, S., *Réttarsöguþættir* (Hið íslenzka bókmenntafélag 2003).

Líndal, S., *Um lög og lögfræði* (Hið íslenzka bókmenntafélag 2003).

Llewellyn, K.N., 'Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes are to be Construed' (1950) 3 *Vanderbilt Law Review* 395

MacCormick, N., 'Why Cases have Rationes and What These Are' in L. Goldstein (ed), *Precedent in Law* (Clarendon 1987).

MacCormick, N., *H.L.A. Hart* (Edward Arnold 1981).

MacCormick, N., *Legal Reasoning and Legal Theory* (Clarendon Press 1994).

MacCormick, N., *Rhetoric and the Rule of Law* (Oxford University Press 2005).

Marmor, A., *Interpretation and Legal Theory* (2nd ed, Hart Publishing 2005).

Marmor, A., *Social Conventions. From Language to Law* (Princeton University Press 2009).

Marshall, G., 'What is Binding Precedent?' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Aldershot: Darthmout 1997).

McLeod, I., *Legal Method* (9th edn, Palgrave MacMillan 2013).

Moore, G.E., 'The Nature of Moral Philosophy' in William H. Shaw (ed), *Ethics* (Oxford University Press 2006).

Ojo, A., ‘The Search for the Grundnorm in Nigeria: The Lakanmi Case’ (1971) 20 *The International and Comparative Law Quarterly* 117.

Oliver, P.C., ‘Change in the Ultimate Rule of a Legal System’ (2015) 26 *King’s Law Journal* 367.

Oliver, P.C., *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press 2015).

Orwell, G., *1984* (William Collins 2021).

Paton, G.W., *A Textbook of Jurisprudence* (Paton and David P. Derham eds, 4th edn, Clarendon Press 1972).

Paulson, S.L., ‘On the Implications of Kelsen’s Doctrine of Hierarchical Structure’ (1996) 18 *The Liverpool Review* 49.

Paulson, S.L., ‘On the Status of the *Lex Posterior* Derogating Rule’ in (1983) 1 *Liverpool Law Review* 5.

Perry, A., ‘Law’s Boundaries’ 26 *Legal Theory* (2020) 103.

Pollock, F., *A First Book of Jurisprudence for Students of the Common Law* (6th edn, MacMillian 1929).

Pollock, F., *Jurisprudence and Legal Essays* (MacMillian and Co. Ltd. 1961).

Pound, R., ‘Common Law and Legislation’ (1907) 21 *Harvard Law Review* 383.

Pound, R., ‘Hierarchy of Sources and Forms in Different Legal Systems’ (1932-1933) 7 *Tulane Law Review* 475.

Pound, R., *An Introduction to the Philosophy of Law* (The Lawbook Exchange, Ltd. 2009).

Pound, R., *Courts and Legislation* in *Science of Legal Method* (The Boston Book Company 1917).

Radbruch, G., ‘Legal Philosophy’ in *The Legal Philosophies of Lask, Radbruch and Dabin. The 20th Century Legal Philosophies Series Vol IV* (Kurt Wilk tr, Oxford University Press 1950).

Rawls, J., ‘Two Concepts of Rules’ (1955) 64 *The Philosophical Review* 3.

Raz, J., *Between Authority and Interpretation. On the Theory of Law and Practical Reason* (Oxford University Press 2009).

Raz, J., *Ethics in the Public Domain. Essays in Morality of Law and Politics* (Oxford University Press 1994).

Raz, J., *Practical Reasons and Norms* (2nd edn, Oxford University Press 1990).

Raz, J., *The Authority of Law* (Oxford University Press 1979).

Raz, J., *The Authority of Law* (2nd edn, Oxford University Press 2009).

Raz, J., *The Concept of a Legal System* (2nd edn, Clarendon Press 1980).

Raz, J., *The Morality of Freedom* (Oxford University Press 1988).

Ross, A. 'On Self-Reference and a Puzzle in Constitutional Law' (1969) 78 *Mind* 1.

Ross, A., 'Review of The Concept of Law by HLA Hart.' (1962) 71 *Yale Law Review* 1185.

Ross, A., 'Validity and the Conflict between Legal Positivism and Natural Law' in Stanley L. Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms* (Clarendon Press 1998).

Ross, A., *Directives and Norms* (The Lawbook Exchange, Ltd. 1968).

Ross, A., *On Law and Justice* (Stevenson and Sons 1958).

Ross, A., *On Law and Justice* (Uta Bindreiter tr, 2nd edn, Oxford University Press 2019).

Salmond, J.W., *Jurisprudence* (7th edn, Sweet & Maxwell 1924).

Salmond, J.W., *Jurisprudence* (9th edn, Sweet & Maxwell 1937).

Salmond, J.W., *The First Principles of Jurisprudence* (Sweet & Haynes Law Publishers 1893).

Scalia, A., *A Matter of Interpretation. Federal Courts and the Law* (Princeton University Press 1997).

Schauer, F., 'The Limited Domain of the Law' (2004) 90 *Virgina Law Review* 1909.

Schauer, F., *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press 1991).

Schauer, F., *The Force of Law* (Harvard University Press 2015).

Schauer, F., *Thinking Like a Lawyer. A New Introduction to Legal Reasoning* (Harvard University Press 2009).

Schauer, F., *Thinking Like a Lawyer. A New Introduction to Legal Reasoning* (reprint as paperback, Harvard University Press 2012)

Schlag, P.J., 'Rules and Standards' (1985) 33 *UCLA Law Review* 379

Searle, J.R., 'How to Derive "Ought" From "Is". (1964) 73 *The Philosophical Review* 43.

Searle, J.R., *Making the Social World. The Structure of Human Civilization* (Oxford University Press 2010).

Searle, J.R., *Speech Acts. An Essay in the Philosophy of Language* (Cambridge University Press 1969).

Searle, J.R., *The Construction of Social Reality* (The Free Press 1995).

Sethna, M.J. *Jurisprudence* (Lakhani Book Depot 1959).

Shapiro, S.J., 'On Hart's Way Out' in Jules Coleman (ed), *Hart's Postscript. Essays on the Concept of Law* (Oxford University Press 2001).

Shapiro, S.J., 'What is the Rule of Recognition (and Does it Exist)? in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (Oxford University Press 2009).

Shapiro, S.J., *Legality* (Harvard University Press 2011).

Snævarr, Á., *Almenn lögfræði* (Bókaútgáfan Codex 1989).

Spaak, T., 'The Scope of Legal Positivism: Validity or Interpretation'? in Torben Spaak and Patricia Mindus (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021).

Spagnolo, B., *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing 2018).

Spanó, R.S. *Túlkun lagaákvæða* (Bókaútgáfa Codex 2007).

Stavropoulos, N., 'Legal Interpretivism' *The Stanford Encyclopedia of Philosophy* (Summer edn. 2014) 4 <https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/> accessed 20 April 2018.

Stavropoulos, N., 'Obligations, Interpretivism and the Legal Point of View' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2015).

Stavropoulos, N., 'The Debate that Never Was' (2017) 130 *Harvard Law Review* 2082.

Stavropoulos, N., 'The Relevance of Coercion: Some Preliminaries' (2009) 19 <ssrn.com/abstract=1400422> accessed 20 April 2018.

Stavropoulos, N., 'Why Principles?' (2007) *University of Oxford Legal Studies Series* No. 28/2007 2 and 7 <ssrn.com/abstract=1023758> accessed 20 April 2018.

Stavropoulos, N., 'Words and Obligations' in Luís Duarte D'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Oxford University Press 2013).

Summers, R.S. and Taruffo, M., 'Interpretation and Comparative Analysis' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (Aldershot: Darthmouth 1991).

Summers, R.S., 'Statutory Interpretation in the United States' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (Aldershot: Darthmout 1991).

Sundby, N.K., *Om normer* (Universitetsforlaget 1974).

Sunde, J.Ø., 'The Legal Cultural Dependency of the Norwegian Legal Method – and its Future', in Ingvill Helland and Sören Koch (eds), *Nordic and Germanic Legal Methods* (Mohr Siebeck 2014).

Sunstein, C.R., *Legal Reasoning and Political Conflict* (2nd edn, Oxford University Press 2018).

Taruffo, M., 'Institutional Factors Influencing Precedents', in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (Aldershot: Darthmout 1991).

Thomas Erskine Holland, *The Elements of Jurisprudence* (13th edn, Clarendon Press 1924).

Toh, K., 'Raz on Detachment, Acceptance and Describability (2007) 27 *Oxford Journal of Legal Studies* 403.

Troper, M., Grzegorczyk, C., and Gardies, J., 'Statutory Interpretation in France' in D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes* (Darthmouth 1991).

Tur, R., 'Variety or Uniformity?' in Luís Duarte D'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Oxford University Press 2013).

Vinogradoff, P., *Common-Sense in Law* (Williams & Norgate 1914).

Vogenauer, S., 'Sources of Law and Legal Method in Comparative Law' in Matthias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2012).

von Wright, G.H., *Norm and Action. A Logical Enquiry* (Routledge & Kegan Paul 1963).

Wade, H.W.R., 'The Basis of Legal Sovereignty' (1955) 13 *The Cambridge Law Journal* 172.

Walden, R.M., 'Customary International Law: A Jurisprudential Analysis' (1978) 13 *Israel Law Review* 86.

Walden, R.M., 'The Subjective Element in the Formation of Customary International Law' (1977) 12 *Israel Law Review* 344.

Waldron, J., ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 *Harvard Law Review* 129.

Waldron, J., ‘International Law: A Relatively Small and Unimportant Part of Jurisprudence?’ in Luís Duarte D’Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart’s The Concept of Law* (Oxford University Press 2013).

Waldron, J., ‘Who Needs the Rule of Recognition?’ in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (Oxford University Press 2009).

Waluchow, W.J., ‘Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism’ in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (Oxford University Press 2009).

Waluchow, W.J., *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press 2007).

Williams, G., *Learning the Law* (Stevens & Sons Ltd. 1957).

Williams, G., *Salmond on Jurisprudence* (11th edn, Sweet & Maxwell 1957).

Zimmerman, R., ‘Characteristics Aspects of German Legal Culture’ in J. Zekell and M. Reimann (eds), *Introduction to German Law* (2nd edn, Kluver Law Inc. 2005).

Zippelius, R., *Introduction to German Legal Method*. (Kirk W. Junker and P. Matthew Roy tr, Carolina Academic Press 2008).