

**Judges, Social Rules and the Constitution:  
An Empirical Inquiry into the Foundations of  
South African Law**



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## THESIS ABSTRACT

This thesis examines whether HLA Hart's theory of the nature of law has explanatory power for the South African legal system. The thesis discusses and elaborates on the empirical conditions necessary for the existence of the master rule of recognition that Hart posits as the foundation of every legal system properly so-called, and addresses certain difficulties associated with attempts to apply Hart's theory to the concrete facts of any particular legal system. Drawing on a series of in-depth interviews with 12 past and present Justices of the Constitutional Court of South Africa, the thesis then explores whether the existence conditions for a Hartian rule of recognition can be observed in the practices and attitudes of the Justices, insofar as these relate to their judicial decision-making processes. The thesis concludes that many such existence conditions are absent from the Justices' practices and attitudes: (i) the Justices do not appear to converge in their ultimate criteria of legal validity; (ii) the Justices do not perceive a common standard of judicial decision-making amongst their colleagues, but rather see fundamental differences; (iii) at least partly on account of their strong sense of judicial independence, the Justices are unconcerned with the kind of official criticism that is essential to motivate conformity to a Hartian rule of recognition; and (iv) the Justices celebrate, rather than condemn, decision-making processes that depart from their own. The thesis concludes that these findings provide strong prima facie evidence that Hart's theory lacks explanatory power for the South African legal system. It also reflects on the implications of its findings for Hart's theory more generally, and for the project of analytic legal philosophy as it is now conceived by its most prominent advocates.

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# 1

## *Introduction*

This thesis examines whether HLA Hart's theory of the nature of law has explanatory power for the South African legal system. Hart's theory—unquestionably the dominant account of the nature of law in contemporary jurisprudence—posits that every legal system is founded on a special kind of social rule, the existence and content of which is determined by the practices and attitudes of the system's officials.<sup>1</sup> This master rule, the 'rule of recognition', specifies the criteria that courts must apply when they identify valid law, and in this way prescribes a 'common standard of correct judicial decision'.<sup>2</sup> By validating all the subordinate rules of the legal system, the rule of recognition unifies them into a 'system' as such, distinguishing not only this legal system from that legal system, but also distinguishing legal systems from other types of normative system like religion or morality.

My question is whether there is a social rule of this kind at the foundation of South African law. The South African Constitution is widely regarded as being 'transformative' in character,<sup>3</sup> in that it articulates a deeply egalitarian vision for the future of South African society, and envisages a special role for law in achieving that future. The Constitution has its own ideas about the ultimate criteria of legal validity

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<sup>1</sup> See generally HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997).

<sup>2</sup> *ibid* 116.

<sup>3</sup> See, for example, Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146; Pius Langa, 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 351.

in South Africa. As far as the Constitution is concerned, and contrary to Hart, these ultimate criteria are not a matter of what officials do and think; instead, the Constitution expressly states that the validity of all law must be tested not only against the Bill of Rights, but also against the values of dignity, equality and freedom.<sup>4</sup> This test of legal validity and the general constitutional scheme of which it is a part has led the Constitutional Court of South Africa to describe the Constitution as ‘not merely a formal document regulating public power’, but as embodying an ‘objective, normative value system’ against which all law must be tested.<sup>5</sup>

At first blush, there is an apparent conflict between the schemes of legal validity projected by the South African Constitution and by Hart. Putting matters bluntly, the Constitution says that the ultimate questions of legal validity in South Africa are questions of substantive political morality. According to Hart, however, legal validity, in South Africa or anywhere, is just whatever legal officials say it is, and what officials say about legal validity in South Africa may have more or less to do with what is written in the Constitution. Hart and other soft positivists might accept the proposition that South Africa’s ultimate criteria of legal validity turn on moral concepts like dignity, equality and freedom, but if that proposition is true, they would argue, it is true only because South African legal officials, adopting the right kind of critical reflective attitude, regularly refer to those concepts when they identify valid law in South Africa.

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<sup>4</sup> Constitution of the Republic of South Africa, 1996, preamble, ss 1-2, 7-10, and especially s 36. See also Lourens WH Ackermann, ‘The Legal Nature of the South African Constitutional Revolution’ (2004) *New Zealand Law Review* 633, 646.

<sup>5</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

If we accept the soundness of Hart's account, then we understand the South African legal system better if we posit a rule of recognition with a semantic content that adequately describes the current practices and attitudes of South African legal officials, as these relate to the officials' identification of valid law. (Indeed, many prominent theorists adopt this approach to explain legal validity in the United States; that is, they try to advance our understanding of American constitutional practices by interpreting those practices within the framework of a rule of recognition.)<sup>6</sup> On this view, the South African Constitution itself plays a secondary and contingent role in determining the criteria of legal validity in South Africa; contingent, that is, on the way the text of the Constitution figures in the practices and attitudes of South African legal officials. If enough officials, for some reason or another, begin to identify law in a way that conflicts with the Constitution's scheme of legal validity, they cannot be said to have made a mistake, still less can they be said to have breached a legal duty. By their very action, they will have simply transformed the foundations of South African law.

While it is clearly possible, as a conceptual matter, to think about legal validity in the way Hart proposes, and while many theorists evidently see some value in this way of thinking, we are still left with the question of whether this is the right way or the best way or even, all things considered, a good way to think about some or all legal systems.

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<sup>6</sup> See, for example, Kenneth Himma, 'Understanding the Relationship between the US Constitution and the Conventional Rule of Recognition', in Matthew Adler and Kenneth Himma, *The Rule of Recognition and the US Constitution* (OUP 2009); Matthew Kramer, *Where Law and Morality Meet* (OUP 2008) ch 4; Kent Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 *Michigan Law Review* 621.

Indeed, despite the continued prominence of Hart's account of the nature of law, many theorists harbour doubts about its soundness. Some of these theorists have sought to criticize Hart's account primarily on philosophical grounds. Ronald Dworkin, for example, working with standard methods of philosophical inquiry, argued that law is an interpretive concept, such that questions of legal validity involve evaluative disagreements of a kind for which Hart's rule of recognition cannot account.<sup>7</sup> Part of the reason why attacks like Dworkin's have struggled to strike critical blows against Hart's account is because the disagreement, despite its philosophical character, often boils down to an empirical disagreement about what legal officials, especially judges, *actually do* and *think*. One need only review the disputes about *Donoghue v. Stevenson*<sup>8</sup> and *Riggs. v Palmer*<sup>9</sup>—cases that Dworkin made famous amongst legal philosophers<sup>10</sup>—to understand that at least part of the debate between Hart, Dworkin and others has been a debate about how to understand the behaviour and attitudes of judges, to the extent that these are expressed in written judgments. As merely the end-products of complex judicial decision-making processes, such judgments can only serve as second-best proxy evidence for the kinds of disagreements judges are really having with one another.<sup>11</sup> Without more concrete

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<sup>7</sup> See, for example, Ronald Dworkin, *Law's Empire* (new edn, Hart 1998) ch 2; Ronald Dworkin, *Justice in Robes* (Belknap Press 2006) ch 8.

<sup>8</sup> 1932 App Cas 562 (HL 1932).

<sup>9</sup> 115 NY 506 (1889).

<sup>10</sup> Ronald Dworkin, 'Model of Rules I' in his *Taking Rights Seriously* (Duckworth 1977); Dworkin, *Law's Empire* (n 7) 15-20. For Hart's discussion of these cases, see Hart, *The Concept of Law* (n 1) 262-64, 268.

<sup>11</sup> Alan Paterson, *The Law Lords* (MacMillan Press Ltd 1982) 1-2.

facts—to which many legal philosophers display a regrettable aversion—it is often hard to know how one could adjudicate between the different points of view on offer.

By contrast, theorists working within a socio-legal studies paradigm often have a wealth of important and interesting facts at their disposal concerning real-world legal systems—including facts about what judges do and think<sup>12</sup>—but they have not always succeeded in showing why these facts undermine, or are otherwise relevant to, philosophical positions about the nature of law. Socio-legal theorists allege that the philosophers are not listening; the philosophers say that the socio-legal theorists are missing the point. As Tony Honoré puts it, ‘the [s]ociologists have never learnt the rules’ for engaging with legal philosophers about the nature of law.<sup>13</sup>

My thesis is an interdisciplinary work of philosophy and socio-legal inquiry that locates itself against the background of these ongoing debates about the relative contributions that each discipline can make to our understanding of the foundations of law. My thesis aims to avoid the above-mentioned shortcomings that have commonly attended both philosophical and socio-legal criticisms of Hart by getting the right empirical evidence to talk to his theory in the right way.

## I. OVERVIEW OF THE ARGUMENT

Briefly stated, my thesis investigates whether certain empirical conditions necessary for a rule of recognition to exist are manifest in the practices and attitudes of the Justices of the Constitutional Court of South Africa, as these relate to their judicial

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<sup>12</sup> See the multitude of empirical studies of judicial behaviour collected in Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press 2013) 89-99.

<sup>13</sup> Tony Honoré, ‘Groups, Laws and Obedience’ in AWB Simpson (ed), *Oxford Essays in Jurisprudence: Second Series* (OUP 1973) 1.

decision-making processes.<sup>14</sup> The evidence for my conclusions is drawn largely from a series of in-depth interviews with 12 former and current Justices of the Constitutional Court which I conducted between August 2012 and January 2013. These are supplemented, where appropriate, by an analysis of relevant case law and with knowledge gained from the 18 months I spent at the Constitutional Court between January 2008 and June 2009 as a judicial clerk for Justice Kate O'Regan.

I conclude that many of the empirical conditions that are necessary, on Hart's account, for the existence of a rule of recognition are absent from the Justices' practices and attitudes, a conclusion that serves as strong *prima facie* evidence that Hart's theory of the nature of law lacks explanatory power as a framework for understanding the foundations of the South African legal system. My argument proceeds as follows.

Part One of the thesis is primarily philosophical in nature. It begins, in Chapter 2, with an exposition of Hart's theory of the nature of law as set out in *The Concept of Law*.<sup>15</sup> I focus in particular on describing and elaborating the empirical existence conditions of a rule of recognition *qua* social rule. I also discuss Hart's seemingly unjustified assumption that the manner in which social rules are formed in less complex social settings (like men baring their heads in church) can be generalized to the rarefied social sphere of the judiciary, where the rule of recognition manifests itself. Chapter 2 demonstrates further that legal philosophers, because of their metaphysical and epistemological commitments to a clean distinction between

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<sup>14</sup> Throughout the thesis, I refer to the Constitutional Court of South Africa in short form as the 'Constitutional Court' or the 'Court'. Similarly, I frequently refer to the Justices of the Constitutional Court simply as the 'Justices'.

<sup>15</sup> Hart, *The Concept of Law* (n 1).

law and other normative systems, have often merely superimposed on legal officials the theorist's desire to see shared criteria of legal validity, without being sensitive to empirical data about whether legal officials are in fact trying to coordinate themselves in this way. Chapter 2 thus argues that it is very much a live question whether the empirical conditions necessary to establish the existence of a social rule like the rule of recognition are present in the Justices' practices and attitudes around their judicial decision-making processes.

In Chapter 3, I argue that attempts to defend or undermine the explanatory power of the rule of recognition in this or that legal system have tended to focus too narrowly on just one of Hart's existence conditions for a rule of recognition: that is, the condition requiring convergent behaviour amongst legal officials in terms of which they identify law by reference to the same shared criteria of validity. As we shall see, convergent behaviour is simply one condition amongst many that must obtain in order for a rule of recognition to exist, and critiques of Hart's theory that focus solely on this condition are ultimately inconclusive. Briefly put, the nature of social rules and the way we interpret them means that it will often be possible, regardless of what we take a group's convergent practice to be, to formulate a putative rule that adequately describes the practice and accounts for the seemingly contradictory features put forward by an objector. For this reason, although the thesis does ultimately address the empirical question of whether the Justices of the Constitutional Court converge in their criteria of legal validity, my goal is to move beyond this narrow inquiry and support my conclusions about the explanatory power

of Hart's account by reference to an empirical analysis of several other conditions that are necessary in order for a Hartian rule of recognition to exist.

To illustrate the methodological pitfalls associated with an empirical investigation of the explanatory power of the rule of recognition—with the aim of avoiding these pitfalls in my own analysis in this thesis—Chapter 4 offers a critique of attempts by Kent Greenawalt and Kenneth Himma to formulate a rule of recognition for the United States (which are, to my knowledge, the only two comprehensive attempts in the literature at formulating a rule of recognition for the legal system of a given jurisdiction). I demonstrate that Greenawalt and Himma offer scant evidence for the detailed empirical claims on which their candidate recognition norms are based, and that there is good reason to suppose those claims to be false, or at least to suppose that more extensive empirical work is required to prove their truth. My critique of their attempts to apply Hart's theory in a concrete way to the United States legal system yields important lessons for my own empirical analysis of the rule of recognition in South Africa.

The outcome of the largely philosophical analysis in Part One of the thesis is a clear research agenda for my empirical investigation of the practices and attitudes of the Justices of the Constitutional Court, the results of which I report and analyze in Part Two.

Chapter 5 provides the reader with the basic understanding of South Africa's constitutional history and current constitutional framework that is necessary to engage with the empirical analysis I undertake in the chapters that follow.

In Chapter 6, I explain how Hart's existence conditions for a rule of recognition can be translated into a specific set of empirical research questions, and why these research questions dictated the use of elite interviews with the Justices as my primary research method. I also discuss the nature of elite interviews and the specific methodological problems they presented for my research.

I begin reporting the results of my empirical investigation in Chapter 7, in which I address the discrete issue of whether the amending clause of the South African Constitution can be said to be the supreme criterion of law in South Africa. I conclude that it is not the supreme criterion, since a majority of the Justices agree that even constitutional amendments can only be valid if they comply with fundamental principles of political morality. Importantly, however, the Justices do not agree on what those fundamental moral principles are, and so do not converge in their ultimate criteria of legal validity in the way that Hart's account predicts.

However, in recognition of the difficulties (outlined in Chapter 3) associated with critiques of Hart's theory that focus only on whether officials really do engage in convergent law-identifying behaviour, my thesis moves beyond the narrow question of convergence to address whether additional conditions required for a rule of recognition to exist are manifest in the practices and attitudes of the Justices. In Chapter 8, I conclude that the Justices do not demonstrate a meaningful awareness of one another's judicial decision-making processes in the way that Hart's account supposes. To the extent that they are vaguely aware of one another's decision-making processes, they do not perceive a common standard of judicial decision-making, but rather fundamental differences. Thus, even if it were possible to

reconcile the Justices' divergent validity criteria discussed in Chapter 7 in accordance with a rule of recognition with the right semantic content, the Justices cannot be seeking, without an awareness of how their colleagues reason their way through legal problems, and without a *perception* that their standards of reasoning are shared (regardless of whether they are shared in fact), to conform their law-identifying behaviour to a rule of recognition in the way that Hart's account predicts.

In Chapter 9, I address further conditions for the existence of a rule of recognition, this time testing whether, as Hart's theory supposes, the Justices criticize one another for perceived departures from their own preferred standards of judicial decision-making, and whether the Justices express a fear of, or desire to avoid, such criticism. In both cases, I answer in the negative. I conclude instead that the Justices criticize departures from their preferred standards of decision-making in terms of a 'reasonable disagreement' as between different standards of decision-making that share an equal claim to correctness. I conclude, further, that the Justices' strong sense of their judicial independence, coupled with material institutional protections of that independence, insulates them from precisely the sort of criticism and social pressure that Hart thinks is essential to motivate conformity to a social rule like the rule of recognition. These two key concepts that emerge from my empirical work with the Justices—reasonable disagreement and judicial independence—are antithetical to the formation of the social conditions that are supposed to constitute a rule of recognition.

In Chapter 10, I explain that the Justices, contrary to the desire for conformity on which Hart's rule of recognition is premised, positively celebrate the presence of difference and disagreement among them. In the course of that explanation, I discuss

the complex ways in which the Justices strike a balance between a number of seemingly disparate ideals: between their commitment to encouraging different jurisprudential approaches amongst their colleagues, and their desire for consensus on outcomes; between their fierce independence from one another, and their strong commitment to collegiality and collective problem-solving; between their recognition of their own fallibility, and their quest for objectivity and truth in their judgments. I conclude by arguing that the underlying, shared expectations amongst the Justices that cause the Court to function effectively at the apex of South Africa's legal system are not, as Hart would have it, expectations about the correct criteria of legal validity, but are instead expectations of collegiality, hard work, and integrity, and of participation in certain institutional processes that drive the Justices to reach decisions in the cases before them and to set out their reasoning for those decisions in written judgments.

The ultimate conclusions that I reach in the thesis are limited. They are restricted only to the South African legal system, and even then only to certain practices and attitudes of the Justices of the Constitutional Court. There is a wealth of evidence that remains to be gathered by further study of the Justices and other South African legal officials that may corroborate or complicate or perhaps even undermine the empirical investigation I have done. It is no small part of my motivation in undertaking this project to make the case that more extensive empirical research is needed before forceful conclusions can be drawn about the foundations of any particular legal system, let alone about the nature of law itself.

Nevertheless, given the prominence that Hart and other legal philosophers have accorded to the role of apex courts in their theories on legal validity, my conclusion that some of Hart's essential empirical conditions for the existence of a legal system are not manifest in the practices and attitudes of the Justices provides, at the very least, strong prima facie evidence that Hart's account lacks explanatory power for the South African legal system.

As I discuss at the very end of the thesis, my conclusions may also have implications for Hart's theory more generally, and for a certain way of doing legal philosophy. To this end, I hope that the thesis will be of interest to South African legal theorists and constitutional scholars as much as to legal theorists more broadly.

## II. ISSUES OF DEFINITION AND SCOPE

Before delving into the argument of the thesis, it is necessary to clarify certain aspects of the scope of the project, as well as to define certain key terms that I use throughout the thesis in ways that may depart from their ordinary meanings or the technical definitions that they may have in other discursive contexts.

### A. Interpretations of Hart

The thesis takes as its object of inquiry a certain reading of Hart's theory of law. There is a sizeable cottage industry in legal philosophy concerned with what constitutes the 'correct' interpretation of Hart, and many of these philosophers will disagree with the interpretation I assert here. In short, my thesis is concerned with a reading of Hart according to which the rule of recognition is an 'essential' or 'necessary' feature of every legal system properly so-called. 'Necessary' and 'essential', as used by Hart and in this thesis, are terms of art. To say that law has a

necessary or essential feature is implicitly to assert a metaphysical commitment to essentialism—the view that some objects, like law, have properties without which they would not be that object, properties that are essential or necessary for them to be the object that they are rather than being something else. To take a commonly used example, a triangle has three vertices—no object with more or fewer than three vertices can be a triangle, such that having three vertices is essential or necessary to something's being a triangle. If we come across a triangle with four vertices, we have either miscounted, or we have made a fundamental conceptual mistake about what it means for something to be a triangle.

Understood in these terms, when Hart says that a rule of recognition is an essential or necessary feature of every legal system, he means that there can be no real-world legal system that lacks at its foundation a rule of recognition of the kind he describes. If we purport to find a real-world legal system that does not have a rule of recognition, then, at least according to the essentialist reading of Hart, we have not, in fact, found a legal system, but rather some other kind of normative system that, for all its interesting features, is not an example of law.

Some interpreters of Hart assert that he does not offer an essentialist account of the concept of law. Rather than offering a strict test for when a set of norms counts as a legal system, these theorists interpret Hart as offering something like a 'use-it-don't-use-it' concept that may simply be useful in illuminating certain important features of law, without claiming the last word.<sup>16</sup> It is not my direct concern to

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<sup>16</sup> Denis Galligan, 'Concepts the Currency of Social Explanation of Law: A Review of the Later Work of William Twining' (2015) 35 *Oxford Journal of Legal Studies* 373, 384-388; Frederick Schauer, 'Hart's Anti-Essentialism', in *Reading HLA Hart's The Concept of Law* (Hart 2013).

defend my interpretation of Hart against these contrary readings, although there is ample textual support, as I demonstrate in my concluding chapter, for the reading of Hart that I adopt. I adopt the interpretation I do because I think the essentialist interpretation of Hart is not only the most problematic, but because it is also the most widely held amongst prominent legal theorists.

## **B. Explanatory Power**

The central question of my thesis is whether Hart's concept of law has 'explanatory power' for the South African legal system. In using this term, I do not mean to assert a determinate stance in relation to complex philosophical debates about the nature of concepts, explanation, or inductive reasoning. I propose to avoid these debates by simply defining 'explanatory power' in what I take to be more or less common sense terms, and which I take to be consistent with the way the term is used by Hart himself in advocating for the rule of recognition.<sup>17</sup> The definition I adopt undoubtedly implies certain metaphysical and epistemological commitments, but defending those commitments is beyond the scope of this thesis.

As I use the phrase, a theory or concept or model of a phenomenon has 'explanatory power', as a general matter, if some significant number, or some important subset, of empirically observed instances of the phenomenon exhibit the features described by the theory or concept or model. The more instances of the phenomenon that conform to the features described by the theory, the greater the explanatory power we accord to the theory. On this view, to take Frederick Schauer's example, a theory which postulates that birds fly has great explanatory power

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<sup>17</sup> Hart (n 1) 81, 98, 155.

because, despite the existence of flightless birds, most birds do fly and thus conform to the feature that the theory ascribes to birds.<sup>18</sup> Because of the ubiquity of flying birds, there is much utility in thinking about birds as creatures that can fly, despite the fact that some birds cannot.<sup>19</sup>

It is possible, therefore, in the sense I am describing here, for a theory to have explanatory power for a phenomenon as a general matter, while lacking explanatory power for specific instances of the phenomenon. That is, while the features called out by the theory may be present in many instances of the phenomenon, they may be absent in others. We will then say that the theory lacks explanatory power specifically for these latter instances. Thus, for example, while a theory which postulates that birds fly has great explanatory power as a general matter—most birds do fly—it lacks explanatory power for the specific instances of ostriches and penguins. While we have good reason to hold on to our theory of flying birds—it is useful for many purposes to think about birds that way—we need a different theory, a theory of flightless birds, to further our understanding of ostriches and penguins.<sup>20</sup>

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<sup>18</sup> Frederick Schauer, *The Force of Law* (Harvard University Press 2015) 4.

<sup>19</sup> *ibid* 4, 37-39.

<sup>20</sup> General and specific explanatory power are nevertheless related in two ways. First, if a theory lacks explanatory power for a specific instance of a phenomenon, this undermines the theory's general explanatory power. In short, we have evidence that counts against the general explanatory power of the theory. A theory may be able to retain its general explanatory power in the face of a few recalcitrant instances of the phenomenon it describes. However, if we discover that the theory lacks specific explanatory power for many or most instances of the phenomenon it describes, then we must conclude that the theory lacks explanatory power as a general matter. Second, the importance we attach to an example where the theory lacks specific explanatory power will depend in part on the ambitions of the theory for its own general explanatory power. If a theory purports to have explanatory power for most or even just some instances of a phenomenon—say, a theory that 'most birds fly'—then our discovery of recalcitrant instances like ostriches and penguins does not entail that the theory has failed by its own lights. Its central claim remains true. If, however, the theory purports to have explanatory power over *all* instances of a phenomenon—say, a theory that 'all birds fly'—then the discovery of even one recalcitrant instance entails that the theory has failed to achieve the goals it set for itself.

This understanding of ‘explanatory power’ partly tracks what Denis Galligan has described as a Weberian approach to concept formation and application.<sup>21</sup> On this approach, once we have identified a certain concept in a social practice, we then ‘use such concepts to reflect back on social practice to test to what extent it matches the concept and to what extent evidence is left over from which to construct other concepts’.<sup>22</sup> How much ‘evidence is left over’ determines, on the view I have set out above, the extent to which the concept has explanatory power.

Applying this understanding of ‘explanatory power’ to Hart’s theory of a legal system, we will say in this thesis that his theory has explanatory power as a general matter if some significant number, or some important subset, of empirically observed instances of legal systems exhibit the features described by Hart’s theory. If certain instances of legal systems do not conform to the features described by his theory, we will say the theory lacks explanatory power specifically for these legal systems (whatever explanatory power it may retain as a general matter). In this thesis, I conclude that Hart’s theory, whatever its explanatory power as a general matter, lacks explanatory power specifically in regard to the practices and attitudes of the Justices of the Constitutional Court of South Africa, in so far as these relate to their judicial decision-making processes. My final chapter reflects on whether, in light of my conclusions concerning the South African legal system, we have cause to doubt that Hart’s theory also lacks explanatory power as a general matter.

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<sup>21</sup> Galligan (n 16) 382-390.

<sup>22</sup> *ibid* 380.

Related to this understanding of explanatory power is the notion of empirical testability. To evaluate whether a concept has explanatory power, in the sense described above, is implicitly to treat a theory or concept as a kind of hypothesis, whereby we test the theoretical or conceptual features of a phenomenon against real-world instances. To treat a theory in this way is to assume that counterexamples to the theory are both logically possible and practically feasible to observe, if they exist.

In this thesis, I treat Hart's concept of a legal system as an empirically testable hypothesis, the explanatory power of which depends on the degree to which real-world instances of law conform to his concept. Hart's hypothesis, on the essentialist interpretation, is that a legal system exists if, and only if, there is a social rule of recognition practised by the system's officials, and accepted by them as a common public standard of judicial decision-making, setting out the legal system's ultimate criteria of legal validity. My thesis offers strong *prima facie* evidence that the hypothesis is false, at least in the case of the South African legal system, but possibly also as a general matter.

### III. UNIQUENESS OF THE PROJECT

Judges, by and large, are a secretive bunch.<sup>23</sup> Particularly while serving on the bench, judges are reluctant to express views on matters that may politicize their work, call on them to indicate how they might adjudicate cases that have not yet, but may well, come before them for decision, or that may simply reveal the human fallibility that underlies an institution that we otherwise take to be the quintessential form of public reason. It is for this reason that empirical scholarship on judicial behaviour has been

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<sup>23</sup> Epstein et al., *The Behavior of Federal Judges* (n 12) 1.

heavily reliant on the analysis of written judgments, rather than on systematic qualitative interviews of the kind I undertake in this thesis. In short, such interviews are hard to come by.

Indeed, I am aware of only one other empirical study of a common law apex court that is based on in-depth interviews with past and present judges of that court, namely Alan Paterson's 1982 study of what was then the House of Lords in the United Kingdom, in which he sought to investigate 'the process by which judicial decisions are arrived at in the House of Lords.'<sup>24</sup> Seeking to understand the role played by the wider legal community, including solicitors, counsel, and academics, in the development of the law in judicial decisions— and, moreover, to understand judicial decision-making as a group activity—Paterson turns, as I do, to in-depth interviews with the Law Lords and others in the legal community. Paterson sees judgments as 'the end products of the decision-making process', and thus unsuitable to 'scrutinizing the dynamics of the [judicial] process itself'.<sup>25</sup> A secondary concern in Paterson's project is the desire to promote the value of role analysis as a method of sociological inquiry.<sup>26</sup>

In contrast, my thesis does not seek to advocate for any particular sociological theory or method, choosing to focus instead on a critique of a certain philosophical theory of the nature of law. Thus, while my project is methodologically similar to Paterson's, and while the projects together constitute, to my knowledge, the only

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<sup>24</sup> Alan Paterson, *The Law Lords* (n 11) 2. An updated study was recently published as Alan Paterson, *Final Judgment* (Hart 2013).

<sup>25</sup> *ibid* 1-2.

<sup>26</sup> *ibid* 2-3.

instances in the common law world in which the judges of an apex court have sat down for systematic interviews about the nature of their decision-making processes, the aims of my project are quite different, and in some sense narrower, than Paterson's. As I discuss in Chapter 6, my approach in this thesis has certainly benefited from an understanding of his methodology, and some of our conclusions are mutually consistent.

I am also aware of one other systematic qualitative study of the behaviour of South African judges, to which my own project bears at least some similarity. In his 'Judges at Work',<sup>27</sup> Hugh Corder undertook a 'systematic study of the role and attitudes of the [South African] judiciary' with the aim of 'provid[ing] an accurate account of appellate judicial performance in the period 1910 to 1950, as a basis for a critical assessment of the judges' approach to their work.'<sup>28</sup> Like my own project, Corder's study sought to analyze the behaviour and attitudes expressed by judges, and like my own project, Corder's investigation focused on the country's apex court at the time (then the Appellate Division), on account of its foundational importance to the South African legal system.<sup>29</sup> Our respective investigations differ, however, in their aims and methods. As far as aims are concerned, Corder's purpose was to explain and analyze the views that judges expressed on a range of legal issues that could be considered crucial to understanding the role of the judiciary in the racialized and oppressive politics of South Africa from 1910, when the Union of South Africa was

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<sup>27</sup> Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-50* (Juta & Co, Ltd 1984).

<sup>28</sup> *ibid* 1-2.

<sup>29</sup> *ibid* 3.

established, to 1950, two years after the National Party took power and began to formalize the system of apartheid.<sup>30</sup> In contrast, my goal in this thesis is to determine whether a certain kind of philosophical theory—which purports accurately to describe the practice of judging in any system of law properly so-called—has explanatory power for the South African legal system, by testing whether the factual conditions postulated by the theory can be observed in the behaviour and attitudes of the Justices of the Constitutional Court. As a result, the kinds of behaviour and attitudes that are relevant to our respective projects diverge considerably. Similarly, in respect of our methods, Corder’s study is largely focused on the written judgments of the Appellate Division as contained in the South African law reports.<sup>31</sup> The aims of my project, however, which focus largely on the group dynamics in which the Justices engage before and after penning their final decisions in any given case, dictate a mode of inquiry that relies principally on in-depth in-person interviews with the Justices themselves. Nevertheless, despite the fact that Corder’s study is in some sense ‘doctrinal’—to the extent that it engages in a close analysis of judicial decisions and seeks to discern trends in legal reasoning—I think that it can be fairly characterized as falling squarely within the tradition of socio-legal scholarship to which my project seeks to contribute, in that Corder seeks to describe and analyze the individual and collective behaviours and motivations of a group of individuals within a defined social sphere, albeit primarily through the lens of case law.

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<sup>30</sup> *ibid* 2-6.

<sup>31</sup> *ibid* 4.

#### IV. A WORD OF THANKS

This thesis would have been an empty shell without the participation of the Justices of the Constitutional Court of South Africa, for whose time and insights I am grateful beyond measure. I owe a great debt indeed to Chief Justice Mogoeng Mogoeng, Deputy Chief Justice Dikgang Moseneke, Justice Laurie Ackermann, Justice Edwin Cameron, Justice Johan Froneman, Justice Richard Goldstone, Justice Chris Jafta, Justice Johann Kriegler, Justice Kate O'Regan, Justice Albie Sachs, Justice Johann van der Westhuizen, and Justice Zak Yacoob. The generosity with which they welcomed me into their chambers and their homes, and the candour and richness of their responses, are the very embodiment of the constitutional values of openness, accountability and responsiveness that the Justices have worked so hard to promote and protect.

While this thesis was being written, South Africa lost some of its greatest legal minds. Justice Arthur Chaskalson and Justice Pius Langa, both former Chief Justices of the Court, passed away before the time of our scheduled interviews, as did Justice Thembile Skweyiya, who had declined an interview. Not only were these men instrumental figures in the fight against apartheid, but the interviews I conducted with the other Justices confirmed how important was their leadership in establishing the Court as the world-renowned institution it has become.

# **Part One**

## 2

### *Social Rules and the Rule of Recognition in Hart's The Concept of Law*

#### I. INTRODUCTION

In this chapter, I provide an overview of Hart's theory of the nature of law, focusing in particular on his claim that there is a certain kind of social rule, a master 'rule of recognition', at the foundation of every legal system. I begin by reviewing the factual conditions that Hart tells us must be present in order for a social rule to exist, drawing out yet further conditions implicit within those he expressly discusses. (Section II.) I go on to discuss these conditions for the formation of a social rule in the specific context of the rule of recognition, and query whether Hart is correct to assume that the manner in which social rules are formed in relatively mundane social settings can be generalized to the elite social sphere of the judiciary. (Section III.) I then consider what reasons or evidence Hart and his followers offer for the view that legal officials are consciously trying to coordinate their agreement on criteria of legal validity in the way that the rule of recognition supposes. (Section IV.)

#### II. HART'S THEORY OF SOCIAL RULES

Hart's account of the nature of law arises first and foremost as a response to the now-familiar problem of legal validity. We know that most legal rules are valid because they meet criteria set out by higher order legal rules—for example, a regulation is valid in terms of a statute, and the statute is valid in terms of a national constitution. But at some point the chain of validity ends: we come to one or more legal rules at the top of the

pyramid which, while they set out criteria of validity for subordinate legal rules, are not themselves valid in terms of some further legal rule. The validity of those top-tier legal rules must therefore be grounded ultimately in some non-legal norm, and, as is well-known, it has traditionally been a central task of analytic legal philosophy to find an acceptable account of what that non-legal norm might be.

Dworkin,<sup>1</sup> as well as some natural law theorists,<sup>2</sup> assert that legal validity is ultimately grounded in moral norms (a view that also helps them explain law's normativity). However, as a legal positivist, Hart is committed to offering a theory of legal validity that is consistent with what has come to be termed the 'social thesis', namely, the proposition that whether a norm is legally valid is a matter of social fact, and not a matter of its merits (moral or otherwise).<sup>3</sup> Before Hart, John Austin (following Jeremy Bentham) had sought to ground law's validity in the threat-backed commands of the habitually-obeyed sovereign.<sup>4</sup> Hans Kelsen, for his part, argued that law's validity could only be grounded in a presupposed, hypothetical, transcendental *grundnorm*, the content of which is roughly '*the original constitution is to be obeyed*'.<sup>5</sup> These legal positivist theories have been discredited,<sup>6</sup> although each is experiencing some degree of renewed interest.<sup>7</sup>

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<sup>1</sup> See, for example, Ronald Dworkin, *Justice in Robes* (Belknap Press 2008) 1-35.

<sup>2</sup> According to John Finnis, many of the most prominent thinkers who are historically associated with natural law theory do not assert the view that a legal norm is valid if, and only if, it complies with what morality requires. John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 363-366.

<sup>3</sup> Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 37. See also John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *Am J Juris* 199, 199-202.

<sup>4</sup> John Austin, *The Province of Jurisprudence Determined* (WE Rumble ed, rev edn, CUP 1995). For Bentham's view, see Jeremy Bentham, *Of Laws in General* (HLA Hart ed, Athlone Press 1970).

<sup>5</sup> Hans Kelsen, *Pure Theory of Law* (M Knight tr, University of California Press 1967).

<sup>6</sup> For a widely accepted critique of Austin, see HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) chs 2-4. For a widely accepted critique of Kelsen, see HLA Hart, 'Kelsen Visited' and 'Kelsen's

Hart's own solution to the problem of legal validity turns on the idea of a social rule. For Hart, a social rule is constituted by a pattern of regular behaviour engaged in by the members of some defined group.<sup>8</sup> However, as Hart famously showed us, the existence of a social rule requires a lot more than just convergent behaviour: our regular neighbourhood trip to the cinema on a Saturday night is a pattern of behaviour, just as it is a regular pattern of behaviour for men to bare their heads in church, but the latter is a social rule while the former is merely a habit. The difference between a habit and a social rule is that the pattern of behaviour constituting a social rule is coupled with the adoption, by those who practice the behaviour, of a distinctive normative orientation towards that behaviour, which Hart variously describes as the 'internal view', 'acceptance', or as a 'critical reflective attitude'.<sup>9</sup> To adopt this normative orientation towards a pattern of behaviour is to regard that behaviour as a general standard to be followed by the group as a whole,<sup>10</sup> and to use the rule as a guide for one's own conduct and the conduct of others.<sup>11</sup> This internal view manifests itself in, but is not reducible to, the application of pressure on others to conform to the rule, criticism of others for failure

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Doctrine of the Unity of Law', in his *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983), and Joseph Raz, 'Kelsen's Theory of the Basic Norm' in *The Authority of Law* (n 3).

<sup>7</sup> Over the last few years Frederick Schauer has advocated for a more central role for sanctions in our understanding of the nature of law. See, for example, Frederick Schauer, *The Force of Law* (Harvard University Press 2015); Frederick Schauer, 'Was Austin Right After All?: On the Role of Sanctions in a Theory of Law' (2010) 23 *Ratio Juris* 1.

Kelsen's notion of a *grundnorm* has experienced some interest in South Africa, where commentators have referred to a *grundnorm* of dignity as a means of explaining the normativity of the South African legal order. See Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity, and the Struggle for Constitutional Transformation* (Fordham University Press 2014) 96, 150; Stuart Woolman, 'Dignity' in *Constitutional Law of South Africa* (2nd edn, original service: 12-05) 36-22.

<sup>8</sup> Hart, *The Concept of Law* (n 6) 255.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid* 56.

<sup>11</sup> *ibid* 56-7, 89, 98.

to conform to the rule, and the group's view that such criticism is legitimate when made.<sup>12</sup> This criticism unfolds through the language of deontic necessity—with the use of words such as 'ought', 'must', 'right', 'wrong'—and is often, though not necessarily, accompanied by psychological experiences of restriction and compulsion by those subject to it.<sup>13</sup> Of course, we cannot say for certain how general a pattern of behaviour must be or how much criticism there must be in order to constitute a social rule—Hart's only concern is to show that a social rule can exist despite the presence of a 'minority of hardened offenders' who break the rule and do not regard it from the internal point of view.<sup>14</sup>

Summarizing Hart's theory, we can say that the following conditions are necessary for the existence of a social rule:

- (1) Most members of the group conform their behaviour to the practice required by the rule;
- (2) Deviations from the practice are regularly criticized;
- (3) Criticism for deviation is regarded as legitimate by the members of the group;
- (4) The practice is regarded as a standard with which the group ought to comply; and
- (5) Justifications for the practice, and criticisms of those who deviate from it, are articulated in terms of deontic necessity with expressions such as 'you ought to conform your behaviour to the practice' or 'it is a rule that you ought to conform your behaviour to the practice'.

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<sup>12</sup> *ibid* 56-57.

<sup>13</sup> *ibid* 57.

<sup>14</sup> *ibid* 56.

These are the conditions that are standardly understood as the test for the presence of a Hartian social rule.<sup>15</sup> Applying these conditions in the context of Hart's well-known example, if there exists a social rule amongst some group of churchgoers that men must bare their heads in church, we would expect to observe the following amongst the congregation:

- (1\*) Most male churchgoers bare their heads in church;
- (2\*) Male churchgoers who do not bare their heads in church are regularly criticized;
- (3\*) Most churchgoers think it is legitimate for male churchgoers who do not bare their heads in church to be criticized;
- (4\*) The practice of men baring their heads in church is regarded as a standard with which male churchgoers ought to comply; and
- (5\*) Justifications for the practice of men baring their heads in church, and criticisms of those who deviate from the practice, are articulated in terms of deontic necessity with expressions such as 'you ought to bare your head in church' or 'it is a rule that you ought to bare your head in church'.

These conditions are all expressly discussed by Hart as necessary for the existence of a social rule. Contained within them, however, are further implicit conditions for the existence of a social rule which are largely ignored by Hart himself and by subsequent literature. These further, implicit conditions for the existence of a social rule are of great significance for the empirical investigation I undertake in Part Two of this thesis, where I ask whether the existence conditions for a social rule obtain in respect of certain practices

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<sup>15</sup> See, for example, Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) 52-53, who sets out these conditions in more formal terms, and Leslie Green, 'The Concept of Law Revisited' (1996) 94 Michigan LR 1687, 1693.

and attitudes of the Justices of the Constitutional Court of South Africa. These implicit conditions for the existence of a social rule are as follows:

- (6) Most members of the group must possess the information they need to perceive and appraise gaps between their own conduct and the relevant conduct of others in the group. This entails that:
  - (6a) Most members of the group individually have sufficient information about the practices of most other members of the group at different points in time; and
  - (6b) Each member of the group must have sufficient information about her own practices at different points in time.
- (7) Most members of the group must perceive that the conduct of the group aggregates to some common practice.
- (8) Most members of the group must have some non-negligible grasp of the semantic content of the putative rule governing the practice.
- (9) The criticism to which deviations are subjected must be of a kind that most members of the group prefer to avoid.
- (10) Most members of the group must have overlapping background interests, values or beliefs that motivate them to conform to the group's practice on this point.<sup>16</sup>

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<sup>16</sup> While this list sets out some of the most important conditions implicit in those expressly discussed by Hart, it is not exhaustive. For example, a further implicit condition is that most members of the group must possess the intellectual capacity to perceive and appraise gaps between their own conduct and the conduct of others in the group. This expresses the requirement, which would ordinarily be satisfied by most groups of adults with ordinary cognitive ability, that each person possess the required faculties of reasoning to relate certain kinds of conduct to one another—how a certain kind of conduct constitutes a failure to engage in another kind of conduct—and to understand that the failure is in some way wrong. There are almost certainly still further conditions for the existence of a social rule. In elaborating these implicit conditions for the existence of a social rule, I have also ignored the question of time. Simply put, a social rule is dynamic over time—in particular, such rules necessarily have a backward-looking component, in that they are constructed from behaviour that has happened in the past. It is therefore necessary for the above-mentioned conditions—such as the possession of information about the group's conduct, an aversion to

Let us take each of these in turn. Condition (6) is implied by Conditions (1) and (2). In order for members of the group to conform their behaviour to a certain practice, or to criticize deviations from the practice of the group, they must, of course, be able to understand if and how their own conduct diverges from the conduct of others. They can only do so if they have sufficient awareness and information about the relevant conduct of enough members of the group (Condition (6a)) and if they have sufficient awareness and information about their own conduct, and how it measures up against the conduct of the group, such that they can align themselves with that behaviour (Condition 6(b)). To take an example, it may be the case that every resident of my apartment building showers before 9am every morning. But we do not ask each other about our showering habits and have no other way of knowing what time each of us showers in the day. Or perhaps, even if I am aware that *everyone else* showers before 9am everyday, it is possible that I do not know what time *I* shower (perhaps because I am blind-drunk every time I shower and do not know what time it is). Under these circumstances, while there may be a shared practice, I do not have the information I need either to consciously conform my behaviour to that shared practice or to criticize others for departing from that practice. In the absence of these conditions, there can be no social rule that requires the practice.

Condition (7) is also entailed by Conditions (1) and (2), and enabled by Condition (6). In order for members of the group to conform their behaviour to a certain shared practice, they must understand that there is a shared practice there for them to conform to. Once members of the group have sufficient information about their conduct and the conduct of others, Condition (7) involves each member of the group taking the

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criticism, the shared values underpinning the practice—to continue to obtain over time, rather than merely to obtain at one static time-slice. In what follows, I largely ignore this complication.

next step of organizing that conduct conceptually so as to recognize that the conduct aggregates to some kind of shared practice or pattern of behaviour. For example, while I might be able to say, if asked, what time each of my neighbours showers (because I hear the pipes rattling or my water stops working or I have some other relevant indicator), it may not have dawned on me yet that the upshot of everyone's showering times is that there is a shared practice in terms of which everyone in my building showers before 9am. This conceptual aggregation of relevant conduct is required for the existence of a social rule, because it enables us to determine what the underlying pattern of behaviour actually *is*.

Condition (8) is entailed by Conditions (2), (4) and (5), and is discussed at greater length in Chapter 3. It is intended to capture the idea that members of the group must recognize that the specific factual nature of the conduct at issue requires that a specific rule or set of rules be applied to the situation at hand, as opposed to other rules that may exist amongst the group. To use Hart's example, when a man wrongly wears a hat in church, the members of the congregation must understand that this is a situation calling for the application of their rule about baring one's head in church, as opposed to their rule about prohibiting vehicles in the park. While the content of the rule may never be expressly articulated by the members of the group, and may have a degree of indeterminacy in its application, Condition (8) expresses the requirement that members of the group have some minimally sufficient grasp of the conceptual content of each of their social rules such that, when they criticize one another in relation to a certain type of conduct, they really are appealing to the same rule.

Condition (9) is implicit within Conditions (1) and (2), and is suggested by Hart when he writes:

No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may often have psychological experiences analogous to those of restriction or compulsion.<sup>17</sup>

It is also suggested when Hart writes of ‘our own powerful “feelings” of compulsion to behave in accordance with the rule and to act against those who do not’.<sup>18</sup> Hart is surely correct to point out that such negative feelings are ‘neither necessary nor sufficient for the existence of “binding” rules’,<sup>19</sup> in the sense that ‘there is no contradiction in saying of some hardened swindler . . . that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so.’<sup>20</sup> However, it is also surely the case that social rules arise through, and are sustained by, a desire amongst most of the group to avoid the kind of criticism and pressure that the group typically applies to breaches of the rule in question. Under Hart’s conception of a social rule, the criticism of the group (including the fear of criticism, and the legitimation of criticism) is clearly supposed to make some difference to the psychological orientation of, and ultimately to the choices made by, most members of the group. In this regard, it is important to note (and we shall see some important examples of this in Chapter 8), that criticism varies in its nature and expression, as do people’s responses to it. I may not care if I am criticized for deviating from a practice by mistake, but I may care greatly if

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<sup>17</sup> Hart, *The Concept of Law* (n 6) 57.

<sup>18</sup> *ibid* 11.

<sup>19</sup> *ibid* 57.

<sup>20</sup> *ibid* 88.

someone accuses me of deviating from it intentionally. I may not care about being accused of forgetfulness, but I may care deeply about being accused of lying. I may not concern myself with accusations that I am irreligious, but I may be greatly concerned with criticisms that I am immoral. I may not care what ordinary members of my congregation think of me, but I may be principally concerned with how I am regarded by the congregation's leaders. The nature of the criticism deployed by the group, as well as the psychological experiences of those subject to the criticism, will vary depending on the nature of the group, the nature of the individuals that comprise it, and the nature of the conduct at issue, amongst other factors. As Hart puts it, 'the forms of criticism and pressure differ with different types of rule.'<sup>21</sup> As a general matter, however, when a social rule exists, we would expect most members of the group to want to avoid the kind of criticism that typically attends departures from that rule.

Condition (10) provides the fundamental condition necessary for a group of people to be interested in converging on a shared practice at all. Social rules only develop and persist because they have some *point*—that is, they further the interests, values or beliefs of the various individuals comprising the group. As Hart puts it, social rules 'are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.'<sup>22</sup> In order for Condition (10) to be satisfied, it is of course unnecessary—and it will often be unlikely—for individuals in a group to share the very same beliefs, values or interests. Indeed, a particular social rule may serve a number of different and perhaps even incompatible beliefs, values or

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<sup>21</sup> *ibid* 55.

<sup>22</sup> *ibid* 87.

interests. To return to Hart's example, the social rule of baring one's head in church may serve an interest in respecting God, or an interest in social conformity, or an interest in preserving a culture or tradition, and so on. Each specific interest need not be widely shared amongst the group; rather, it is certain that each member of any group holds a unique set of interests that partially overlaps with and partially diverges from the set of interests held by others. But a single act is capable of serving many different, and perhaps even competing, interests: you and I can agree that we ought to perform a certain act, even if we disagree about why we should perform it. Social rules arise at these points of overlap, to further a particular intersection of the group's interests, values, or beliefs. Thus, when we encounter social rules, we should expect each member of the relevant group to express some personal interest, value or belief that helps makes sense of why they individually follow the rule, and which, in turn, partly helps us make sense of why the group as a whole has this rule to begin with.

Let us now apply all these implicit conditions for the existence of a social rule to Hart's example of men baring their heads in church. If it is true that a congregation follows a social rule that men must bare their heads in church, then we would expect to observe the following amongst the congregation:

- (6\*) Most churchgoers are aware that most men in the church are baring their heads on some occasion, and have done so in the past. Most churchgoers are also aware of the presence of certain factual conditions (whether the person is a man or a woman, whether they are inside or outside the church, and so on), and each member is aware of whether they themselves are presently baring their heads or not.
- (7\*) Most churchgoers understand that the conduct of the group aggregates to a practice or regular pattern of

behaviour to the effect that men are baring their heads in the church.

- (8\*) Most churchgoers understand that the conduct of some men wearing their hats in church calls for the application of the group's rule about men and hats and church (whatever its precise formulation might be). They may not be able to articulate the rule, and they may even disagree about the exact conduct it covers, but they know that this conduct implicates the rule about men and hats and church in a way that it does not implicate their rule about vehicles in parks.
- (9\*) Most male churchgoers do not want to be criticized for deviating from the practice of men baring their heads in church, and try to avoid that criticism if they can. They might desire to avoid this criticism because they like to be in good standing with their priest and their congregation, for instance, or because they would be hurt by the insults that the group typically directs at those men who do not bare their heads in church.
- (10\*) Most churchgoers have some interest, belief, or value—such as respecting God, or conducting themselves humbly in church, or preserving tradition—that is furthered by their shared practice of men baring their heads in church.

If this all seems obvious, it is only because of the simplistic nature of the examples with which we are typically presented in discussions of the nature of social rules, such as baring heads in church (versus going to the cinema), driving on the correct side of the road, and so on. These are examples in which the practice itself is not complicated to understand, information about the practice is readily available to all, and, crucially, their everyday quality—each of us participates in group conduct of this nature on a daily basis—causes us to assume much that is implicit within the examples about the content of the applicable social rules, about the kinds of criticism that breaches of these rules attract, and about the background information and values we share that bring these

rules into being. However, when investigating a substantially more complex, opaque and rarefied practice like the identification of valid law by a small group of legal officials—which investigation I undertake in Part Two of the thesis—it is essential to be conscious of these further, unstated conditions for the existence of a social rule, for we may find that they are not present in a set of practices and attitudes that we would otherwise take to instantiate a social rule.

### III. THE RULE OF RECOGNITION AS THE FOUNDATION OF LAW

Hart argues that legal validity is ultimately grounded in a social rule of the kind described in the previous section. In the course of his argument, Hart draws our attention to the distinction between primary rules and secondary rules. Primary rules are first-order rules of obligation, ‘concerned with the actions that individuals must or must not do’,<sup>23</sup> whereas secondary rules are rules *about* primary rules, in the sense that they describe how primary rules of obligation are to be identified, changed, and applied.<sup>24</sup> These rules are classified as rules of recognition, rules of change, and rules of adjudication, respectively.<sup>25</sup>

Hart argued that the foundation of every legal system is the union of primary and secondary legal rules under a master rule of recognition setting out the ultimate criteria against which the validity of the system’s primary and secondary rules is to be assessed. This master rule of recognition is a social rule of the kind described above—its content is evinced by the criteria to which legal officials regularly refer in their identification of

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<sup>23</sup> *ibid* 94.

<sup>24</sup> *ibid*.

<sup>25</sup> *ibid* 91-99.

valid law, while adopting a critical, reflective attitude that identifying law in this way is a ‘a public, common standard of correct judicial decision’.<sup>26</sup>

In addition to the proposition that a legal system exists if and only if there is a master rule of recognition of the kind just described, Hart asserts, further, that no legal system can be said to exist unless it is ‘generally efficacious’,<sup>27</sup> such that the rules which are valid according to the system’s master rule of recognition must be generally obeyed by the populace. Together, the rule of recognition and this efficacy condition constitute for Hart the ‘two minimum conditions necessary and sufficient for the existence of a legal system’.<sup>28</sup>

On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.<sup>29</sup>

So conceived, the rule of recognition solves the problem of legal validity for positivists—it ultimately grounds the validity of law in a non-legal social norm, the existence of which is simply a matter of social fact.

We can apply the conditions for the existence of a social rule in general (both those explicitly discussed by Hart, and those which are implicit in his account, as set out in the preceding section of this chapter) to the rule of recognition specifically. Doing so,

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<sup>26</sup> *ibid* 116.

<sup>27</sup> *ibid* 104.

<sup>28</sup> *ibid* 116.

<sup>29</sup> *ibid*.

we will say that there is a rule of recognition in a given legal system when the following factual conditions obtain:

- (1) The system's legal officials converge on a practice of identifying valid law by reference to shared criteria.
- (2) The officials criticize each other's deviations from the practice of identifying law by reference to these shared criteria.
- (3) Criticism for deviation is regarded as legitimate by the officials who make and receive it.
- (4) The officials regard the practice as a standard with which the officials as a group ought to comply.
- (5) Justifications for the practice, and criticisms of those who deviate, are expressed by the officials in the language of deontic necessity, such as 'he ought to identify law by reference to these criteria' or 'it is a rule that she ought to identify law by reference to these criteria'.
- (6) Most of the officials possess the information they need to perceive and appraise gaps between their own criteria of legal validity and the criteria of legal validity used by other officials.
- (7) Most of the officials perceive that the criteria of legal validity used by each individual official in the group aggregate to some common practice of identifying law by reference to shared criteria.
- (8) Most of the officials have some non-negligible grasp of the conceptual content of the putative rule governing their practice of identifying valid law by reference to shared criteria.
- (9) The criticism to which deviations from the practice are subjected is of a kind that most of the officials prefer to avoid.
- (10) Most of the officials share the relevant background commitments, values or interests that motivate them

to conform to the group's practice of identifying law by reference to shared criteria of legal validity.

Setting out the requirements for the existence of a rule of recognition in this way, we can see that the rule of recognition is deceptive in its simplicity, because it implies the existence, in every legal system, of a complex web of empirically testable but untested features of official practice. The explanatory power of Hart's theory that there is a master rule of recognition at the foundation of every legal system depends on whether we can find in real-world legal systems these empirical facts of judicial practice that Hart's account predicts.

Beyond the sheer complexity of the existence conditions of a rule of recognition—for which Hart offers, at best, limited empirical evidence—we must be mindful of a further difficulty in the way Hart's argument proceeds from a discussion of social rules in general to the rule of recognition in particular. As discussed above, Hart develops the key features of his general account of social rules with recourse to relatively simple examples like removing hats in churches, attending the cinema, or the relatively uncomplicated governance structure that follows from Rex's royal rule.<sup>30</sup> Once Hart has established the existence conditions for a social rule in these uncomplicated social settings, he goes on, in one of the briefest but most significant arguments of the book, to explain the applicability of the account to a modern, institutionally complex society:

[I]n a modern state it would be absurd to think of the mass of the population, however law-abiding, as having any clear realization of the rules specifying the qualifications of a continually changing body of persons entitled to legislate. To speak of the populace 'accepting' these rules . . . would involve putting into the heads of ordinary citizens an understanding of constitutional matters which they might

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<sup>30</sup> *ibid* 50-78.

not have. We would only require such an understanding of the officials or experts of the system . . . . The ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations.<sup>31</sup>

Within this argumentative step is concealed an important but overlooked inference that Hart makes about the generalizability of his theory of the formation of social rules.

For Hart, as we have seen, a social rule is established when there exists a regular social practice in a group such that most members of the group conform their behaviour to the practice required by the rule, deviations from the practice are regularly criticized, and so on. Hart observed that his conditions for the formation of a social rule are often present in mundane practices in ordinary social settings, such as when men bare their heads in church. Crucially, however, as Hart argues in the quoted text above, these ordinary social settings are not where a legal system's rule of recognition, in a modern society, is constituted. In the social settings that comprise their daily lives—their homes, their places of work, their places of worship, their leisure time with friends—ordinary citizens merely *follow* the legal rules that are valid according to the rule of recognition. The rule of recognition itself, while still a social rule, is constituted by the group dynamics in an altogether more rarefied setting: namely, the elite social sphere where legal officials engage in the practice of identifying and applying valid legal rules. Hart assumes, without more, that the manner in which social rules are formed in social settings like a church can be generalized to the way that social rules are formed in the special official settings where the rule of recognition comes to life.

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<sup>31</sup> *ibid* 60-61.

Questioning that generalization is the primary focus of this thesis. In particular, I interrogate whether Hart's conditions for the existence of a social rule obtain amongst the judiciary as a social sub-group, after they are split off from the group of ordinary citizens in the way Hart's account proposes. The object of my analysis is the Constitutional Court of South Africa: specifically, I investigate whether Hart's conditions for the formation of a social rule can be observed in the practices and attitudes of a small but important group of legal officials in South Africa—that is, the Justices of the Constitutional Court—insofar as these practices and attitudes bear on the identification of valid law. Put differently, I ask whether the practices and attitudes of the Justices of the Court conform to the existence conditions of a rule of recognition.

The trouble with Hart's argumentative move, as we shall see, is that once we relegate ordinary citizens from *makers* of the rule of recognition into mere *followers* of the rules it validates, their practices and attitudes no longer help constitute the conditions that create the kind of social rule that the rule of recognition is. That constitutive task—of acting in conformity with a practice, of criticizing and applying pressure to deviations from that practice, and so on—is now left to legal officials alone. Hart's theory simply assumes that legal officials, in identifying valid law by reference to certain criteria, engage in group dynamics that are similar in all relevant respects to the group dynamics of churchgoers enforcing a rule that men must bare their heads in church—he assumes not only that there is a convergent pattern of law-identifying behaviour amongst legal officials, but also that they are responsive to the criticism and choices of other legal officials in the same way that the churchgoers are. It may be, however, that the law-identifying practices and attitudes of legal officials (at least in certain legal systems) do

not exhibit some of these conditions for the existence of a social rule. If so, we will say that Hart's theory of a master rule of recognition lacks explanatory power for the law-identifying practices of those officials.

Thus far, we have seen that the existence conditions for a social rule are more complex than they at first appear in Hart's account. We have also seen that Hart leaps too quickly in applying his general account of the formation of social rules to the rule of recognition specifically, giving us reason to doubt whether the existence conditions for a social rule apply in the elite social sphere and unique institutional setting of the judiciary. In the remainder of this chapter, I offer another reason to be sceptical about the applicability of Hart's account; namely, that Hart gives us no reason—certainly none grounded in empirical evidence—to believe that legal officials are consciously trying to coordinate with one another's criteria of legal validity in the way that his account supposes.

#### IV. PHILOSOPHERS, OFFICIALS, AND THE DESIRE TO ISOLATE LEGAL NORMS

Hart, and some of his followers, have not given us good reason to believe that the practices and attitudes of legal officials exhibit the complex features required by the rule of recognition *qua* social rule. In order for a rule of recognition to exist in a given legal system—as we have seen in the previous section—the system's officials must converge on a shared practice of identifying law by reference to shared criteria of legal validity. But, as Hart was at pains to point out, this mere convergence of behaviour is not enough to establish a social rule like the rule of recognition, for otherwise there would be no distinction between a habit and a rule. The system's officials must therefore adopt the

internal view, or ‘critical reflective attitude’, towards this shared way of identifying valid law, which means regarding the shared practice as ‘as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only.’<sup>32</sup> This critical reflective attitude is what gives rise to the many additional conditions for the existence of the rule of recognition that I set out in the preceding section. According to Hart, adopting the internal view towards convergent law-identifying behaviour is what transforms merely convergent behaviour into conduct that is in some way binding or obligatory. But it does more than this—adopting the internal view also transforms merely convergent behaviour from an unconscious to a conscious activity, from an accidental coincidence to intentional coordination.

As I have indicated, I believe it is an open question whether legal officials are consciously trying to coordinate their agreement on criteria of legal validity in the way that the rule of recognition, *qua* social rule, requires. Of course, in order for a legal system to exist, it must be the case that officials agree on *something*, or that they try to coordinate in *some way*. If one judge thought that his job was centrally about tending the gardens outside the court buildings, and another judge thought it was her primary responsibility to recite passages of the Torah to people who appeared in her court, and another judge thought that her job was about composing music in her chambers, and so on, their ‘shared practice’—however one could describe it—would be nothing like a legal system. Such ‘collective’ action would rapidly break down, if it ever arose in the first place, because of the radical divergence of purposes and activities with which such participants associate the practice of judging.

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<sup>32</sup> *ibid* 116.

What is it, then, that officials must agree on in order to bring at least a barebones legal system into existence? While we may assume that official agreement or coordination of some kind is necessary for a legal system to come into and stay in existence, we need not assume that Hart's answer—that the agreement must necessarily encompass criteria of legal validity—is the only plausible option. Indeed, in what follows, I argue that Hart and some of his followers have sought merely to impose by fiat, without empirical evidence, a certain kind of agreement on officials, namely agreement on the criteria of legal validity. They do this not because this is an agreement that they have observed amongst officials in real-world legal systems, but rather because this agreement is presupposed by their philosophical commitments to thinking about law in a certain way. In particular, legal positivists in the Hartian mould are concerned to show that the law has an *essence* that distinguishes it from other normative systems, and they argue that this essence can only be preserved by supposing that officials, in their law-identifying practices, are rigidly policing a boundary between the legal and non-legal that is designated by their agreement on the criteria for what counts as law. (See Section IV.A below.) Furthermore, given that Hartian legal positivists are concerned to show how this mere agreement on criteria of legal validity can give rise to an *obligation* to apply those criteria, they often impose on officials the sorts of background interests, commitments, and values necessary to ground an obligation of that kind. Again, they do so without any empirical justification that these are the interests that officials have in fact. (See Section IV.B below.) I discuss each of these lines of reasoning in turn, arguing that Hart and some of his followers give us no reason, beyond their own philosophical

commitments, to think that officials are trying to cooperate with one another on the level of shared criteria of legal validity.

#### A. Shared Practices and the Systemic Unity of the Legal System

Hart's primary motivation for asserting that officials must agree on criteria of legal validity is a methodological one, namely a desire to demarcate the legal system as a distinct and unified object of observation, independent of other normative systems. For Hart, the rule of recognition—

if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is *logically a necessary condition of our ability to speak of the existence of a single legal system*. If only some judges acted 'for their part only' on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the *characteristic unity and continuity of a legal system* would have disappeared.<sup>33</sup>

According to Hart, then, common standards of legal validity endow the legal system with its 'characteristic unity and continuity', without which the legal system would not exist at all. By setting out features that valid legal rules must possess, the rule of recognition unites a group of rules into a system. As Hart puts it, '[b]y providing an authoritative mark [the rule of recognition] introduces . . . the idea of a legal system: for

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<sup>33</sup> *ibid* 116.

the rules are now not just a discrete unconnected set but are . . . unified.’<sup>34</sup> Elsewhere, Hart argues that a legal system in which officials disagree strongly about the criteria of legal validity is ‘a substandard, abnormal case containing within it the threat that the legal system will dissolve.’<sup>35</sup>

Thus, for Hart, agreement between legal officials on criteria of legal validity, and criticism of those who depart from this agreement, is not simply what distinguishes a good legal system from a bad one. Rather, acceptance of the rule of recognition ‘is logically a necessary condition of our ability to speak of the existence of a single legal system.’<sup>36</sup>

For Hart, something’s being a ‘system’ entails a kind of unity—a marking-off of a boundary between phenomena which are of a certain type and phenomena which are not of that type.<sup>37</sup> This is consistent with Hart’s methodological commitment to seeking the ‘essential’ features of law that distinguish it from other normative systems, and with his stated aim of—

advanc[ing] legal theory by providing an improved analysis of the *distinctive structure* of a municipal legal system and a better understanding of the resemblances and *differences between law, coercion, and morality, as types of social phenomena*.<sup>38</sup>

It is worth recognizing Hart’s similarities here with Niklas Luhmann’s approach to the study of legal systems. Broadly speaking, Luhmann defines a system as a group of communications which delineates itself from its environment by a relatively closed

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<sup>34</sup> *ibid* 95.

<sup>35</sup> *ibid* 123.

<sup>36</sup> *ibid* 116.

<sup>37</sup> *ibid* 103, 110.

<sup>38</sup> *ibid* 17 (emphasis added).

boundary which it itself produces through recourse to its own existing communications.<sup>39</sup> Luhmann, like Hart, takes it as a methodological premise that systems do, in fact, exist as an empirical reality,<sup>40</sup> and his definition of a system is based on the following intuitive argument, shared by Hart and other positivists seeking to identify the ‘essence’ of law: if a system did not have a boundary marking it off from its environment, making it at least a relatively closed unity, there could be nothing distinguishable as a ‘system’ to observe or talk about at all. Thus, according to Luhmann and Hart, in order for something to be a ‘system’ it must unify and mark-off a group of phenomena according to some set of criteria that distinguish those phenomena from phenomena which are not of that kind. This is precisely how Hart understands the role played by the rule of recognition as the foundation of a legal system: the rule of recognition specifies which characteristics a norm must have in order to form a part of (or be valid for) the system that it—the rule of recognition—founds.

This methodological commitment to a distinct boundary between law and non-law is what drives Hart’s quest for the necessary and sufficient conditions for the existence of a legal system, which crucially include a rule of recognition to identify norms as legal norms, and more particularly, to identify them as norms of *this* particular legal system rather than another legal system in a different place or time. To eliminate the uncertainty

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<sup>39</sup> Niklas Luhmann, *Law as a Social System* (Klaus Ziegert tr, OUP 2008) 80-89; Niklas Luhmann, *Social Systems* (Bednarz and Baecker trs, Stanford University Press 1995) 8-9, 16-17, 34-36, and 187-194; Niklas Luhmann ‘Operational Closure and Structural Coupling: The Differentiation of the Legal System’ (1992) 13 *Cardozo Law Review* 1419, 1423-1425; Niklas Luhmann ‘Law as a Social System’ (1989) 83 *Northwestern University Law Review* 136, 137-139, and 147. See also Klaus Ziegert ‘The Thick Description of Law: An Introduction to Niklas Luhmann’s Theory of Operatively Closed Systems’ in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart 2002) 64-65.

<sup>40</sup> Luhmann, *Social Systems* (n 39) 12-13.

that would arise by not being able to distinguish legal norms from other norms, or to separate ‘our’ legal norms from ‘their’ legal norms, Hart offers us the rule of recognition.

Notice how Hart’s argument proceeds here. Hart is not generalizing, from observations of real-world legal systems, that legal systems always exhibit the unity and certainty that only a rule of recognition could provide. Instead, his argument is that legal systems *must* exhibit this unity and certainty in order for them to be observable as separate normative systems at all. In making this argument, Hart projects his desire for a clean distinction between legal norms and non-legal norms onto officials, who, in their day to day practice, are deemed by Hart’s account to enforce a line between law and non-law through their shared adherence to a rule of recognition setting out criteria of legal validity. Hart, therefore, simply assumes that officials have an interest in enforcing a clean distinction between legal and non-legal norms; he has does not draw on empirical observation of officials actually demonstrating such an interest.

We ought to interrogate this assumption. What professional or personal interest do legal officials have in policing the boundary between law and non-law? What values or beliefs amongst the officials are served by having a social rule that requires them to share criteria of legal validity? As we have seen in this chapter, a social rule only exists when there is some set of background interests, values or beliefs that is furthered by the rule’s existence. However, Hart does not provide us with an explanation of what background interests of legal officials, if any, are furthered by having a social rule that requires them to coordinate their criteria of legal validity with the criteria of their colleagues. It is no defence to say, as some positivists do, that officials can follow the

rule of recognition for any reason they choose,<sup>41</sup> because this already assumes that officials are following a rule of recognition to begin with. Our question is a prior one: we want to know whether officials really are following a rule of recognition in every legal system, and in trying to answer that question, it makes sense to ask what reason they would have to follow it.

Though it is certainly possible for a legal system to be populated by officials whose primary interest is the demarcation of the legal system as clearly conceptually distinct from other normative systems, it is also certainly possible that officials may not be concerned about this at all, or at least have more important concerns that outweigh their desire to coordinate their criteria of legal validity with one another. For example, a group of officials may have as their primary interest a desire to do justice in the specific case before them. If so, it is not clear why such an interest would require those officials to share criteria of legal validity, rather than simply an agreement, for any multitude of reasons, on what the proper outcome is in the case. It is ultimately an empirical question whether legal officials have interests, beliefs, or values that are furthered by converging on shared criteria of legal validity that neatly demarcate legal systems as a site of philosophical and sociological investigation. In Part Two of the thesis, I investigate whether these interests, beliefs or values are expressed by the Justices of the Constitutional Court.

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<sup>41</sup> Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in his *Between Authority and Interpretation* (OUP 2009); Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 379-381; Green, 'Concept of Law Revisited' (n 15) 1696.

## B. Shared Practices and Normativity

Hart's solution to the problem of legal validity triggers complex issues related to another familiar problem in jurisprudence, namely the normativity of law: how can the law give us reasons for action? In Hart's model, legal rules derive their normative force from the rule of recognition, but this only works if the rule of recognition is itself capable of imposing obligations. Yet how can the rule of recognition obligate anyone to do anything, just by being a regular practice accompanied by a certain kind of attitude? Hart's account seems reductive in deriving an 'ought' from an 'is'.

In the preceding section, I argued that Hart and his followers, on account of their philosophical commitment to finding the 'essence' of law, simply impose on judges their own desire for a conceptually distinct legal system demarcated by agreed-upon criteria of legal validity. In this section, I show that this imposition follows also from the attempt by Hart and other legal positivists to show how the mere fact of agreement on criteria of legal validity can place an obligation on officials to apply those criteria (and thus to show how the rule of recognition can be normative).

Dworkin argued that Hart could only hope to explain the normativity of law if the rule of recognition is a 'conventional' rule.<sup>42</sup> Hart, in the Postscript, appears to have accepted this contention:

My account of social rules is, as Dworkin has also rightly claimed, applicable only to rules which are conventional. . . . Certainly the rule of recognition is treated in my book as resting on a conventional form of judicial consensus. That it does so rest seems quite clear at least in English and American law for surely an English judge's reason for treating Parliament's legislation (or an

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<sup>42</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 39-45, 64-68. Of course, Dworkin argues that the rule fails as an explanation even then.

American judge's reason for treating the Constitution) as a source of law having supremacy over other sources includes the fact that his judicial colleagues concur in this as their predecessors have done.<sup>43</sup>

However, explaining the link between this kind of conventionality and normativity is a complicated exercise.<sup>44</sup> As Leslie Green puts the point: 'If rules are merely concordant practices that involve an internal attitude and normative language, it is hard to see how their existence could give anyone a reason for doing anything.'<sup>45</sup>

One previously popular way of explaining the normativity of a shared practice involves reference to the game-theoretic concept of 'coordination conventions', drawing on David Lewis's well-known work in this area,<sup>46</sup> according to which the very fact that a practice is common to the members of a group gives the members a reason to engage in

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<sup>43</sup> Hart, *The Concept of Law* (n 6) 266-7. See also *ibid* 256.

<sup>44</sup> As a description of Hart's rule of recognition, the term 'conventional' is not used uniformly. Sometimes 'convention' is used simply to mean 'shared practice'. To say that the rule is 'conventional' in this sense merely reiterates the claim that judges share criteria of legal validity and view them as a common standard. See Kenneth Himma, 'Understanding the Relationship between the US Constitution and the Conventional Rule of Recognition', in Matthew Adler and Kenneth Himma, *The Rule of Recognition and the US Constitution* (OUP 2009) 97-98; Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2003) 75-76. In some contexts, however, 'convention' is given a stronger meaning—to say that rules are conventional in this stronger sense means, in Hart's words, that 'the general conformity of a group to them is part of the reasons which its individual members have for acceptance'. Hart, *The Concept of Law* (n 6) 255; see also Andrei Marmor, *Positive Law and Objective Values* (OUP 2001) 5. If the rule of recognition is conventional in this latter sense, then part of the reason judges have for following the rule is that other judges follow it too. In what follows I restrict myself to discussing conventionality in this stronger sense.

<sup>45</sup> Leslie Green, 'Positivism and Conventionalism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35, 38.

<sup>46</sup> Gerald Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 *Journal of Legal Studies* 165; Eerik Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* (Kluwer Academic 1995). Jules Coleman initially held this view but no longer does. Compare Jules Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis in Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001) 117ff and Jules Coleman, 'Negative and Positive Positivism' (1982) 11 *Journal of Legal Studies* 139, 159 (both arguing in favor of conventionality) with Coleman, *Practice of Principle* (n 44) 94-95 (abandoning conventionality as an explanation of the rule of recognition's normativity). For Lewis' account of coordination conventions, see David Lewis, *Convention: A Philosophical Study* (Harvard University Press 1969).

the practice.<sup>47</sup> Coordination conventions arise as solutions to coordination problems, and coordination problems arise from the need to coordinate one's actions with others in situations of imperfect information. Some of these problems are games of pure coordination, in which participants have an equal preference for any coordinated outcome: you and I want to meet for coffee, and we do not care where that is as long as we are both there. In other games participants may have a preference between coordinated outcomes, but still prefer any coordinated outcome to any uncoordinated one: my favourite coffee shop differs from yours, but I would prefer to meet you at yours than to go to mine alone. Conventions can solve these problems by creating a focal point around the outcome we both regularly expect each other to select: we regularly go to your favourite coffee shop, so I ought to go there to achieve my goal of meeting you. Once a convention is established, it is self-sustaining. The fact that we are doing it gives us a reason to keep doing it.

The argument for understanding the rule of recognition as a coordination convention has been subjected to trenchant criticisms that I do not intend to rehearse comprehensively here. The position has been cogently and repeatedly attacked by Green,<sup>48</sup> amongst others, and prominent theorists who originally supported the idea no longer do.<sup>49</sup> One problem with the theory, however, is germane to our purpose: we have

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<sup>47</sup> Postema, 'Coordination and Convention' (n 46) 179-182; Coleman, 'Negative and Positive Positivism' (n 46) 159.

<sup>48</sup> Leslie Green has offered a sustained critique of why legal systems should not be thought of as solutions to coordination problems, and more broadly, why positivism should resist conventionalism in the strong sense. See Leslie Green, 'The Concept of Law Revisited' (1996) 94 Michigan LR 1687, 1694-97; Green, 'Positivism and Conventionalism' (n 45); Leslie Green, *The Authority of the State* (Clarendon 1988) ch 4.

<sup>49</sup> Gerald Postema, 'Melody and Law's Mindfulness of Time' (2004) 17 Ratio Juris 203; Coleman, *Practice of Principle* (n 44) 94-95. Some theorists argue that Hart's turn to conventionality in the Postscript is not consistent with his own understanding of social obligation. Dickson, 'Really Conventional' (n 41) 374-88; Green, 'Positivism and Conventionalism' (n 45) 37-41.

no reason to suppose that judges are trying to solve a coordination problem that requires them to share criteria of legal validity. A coordination convention only provides a reason for conforming to the convention when there is some prior reason for conforming in general.<sup>50</sup> If everyone else drives on the left-hand side of the road, that gives me a reason to drive on the left only if driving safely is something I care about. If all of my friends go to the opera on a Tuesday night,<sup>51</sup> that gives me a reason to go on a Tuesday only if I have a reason to see the opera as part of a group. If I prefer seeing the opera alone, their going on a Tuesday is not a reason for me to go with them; in fact, it is a reason for me not to go on a Tuesday. The coordination convention account can thus turn the identification of law into a coordination problem only by imposing on judges background values, interests, or preference structures that they may not have.

Recognizing some of these problems, Marmor argues that coordination conventions are not the only kind of convention there is. There are also ‘constitutive conventions’, so called because they ‘constitute’ a social practice: they define what the practice is and how to engage in it, and also form part of the explanation of what is important about the practice.<sup>52</sup> Marmor’s preferred example is the constitutive conventions of chess: while there is no obligation to play chess, *if* you decide to play chess, the constitutive conventions of chess tell you how to do so. Marmor has consistently maintained that the rule of recognition is best understood as a constitutive

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<sup>50</sup> Green, ‘Positivism and Conventionalism’ (n 45) 38.

<sup>51</sup> This is Jules Coleman’s example. See Coleman, *Practice of Principle* (n 44) 92.

<sup>52</sup> For a recent version of Marmor’s account, see Andrei Marmor, *Social Conventions: From Language to Law* (Princeton University Press 2009). An earlier version was set out in Andrei Marmor, ‘Legal Conventionalism’ (1998) 4 *Legal Theory* 509, which is reprinted in Jules Coleman, *Hart’s Postscript: Essays on the Postscript to ‘The Concept of Law’* (OUP 2001) and in Marmor, *Positive Law and Objective Values* (n 44).

convention.<sup>53</sup> The rule of recognition, according to Marmor, constitutes the social practice of identifying law. It determines what the practice of law is and prescribes what conduct is proper within that practice.

Marmor's account, however, fails to explain the normativity of the rule of recognition for the same reasons that coordination conventions do. On Marmor's view, once we *already have a reason* to coordinate on our criteria of legal validity, a constitutive convention like the rule of recognition helps us decide on the best way to do that. But this establishes that the convention is at best an auxiliary reason, not an operative reason, and only an operative reason can explain the normative force of the rule of recognition.<sup>54</sup> Marmor's constitutive convention tells us what we have reason to do, not what reason we have to do it.<sup>55</sup>

While it is true that the constitutive rules of chess (to take Marmor's example) explain what I have to do if I want to play chess, Marmor's account does not explain why I have an obligation to play chess nor why I have an obligation to follow the rules when I do. If I do not follow the rules, it may be true, as he claims, that I am not playing chess, but this does not explain what obligation I have breached or why.<sup>56</sup>

At points, Marmor himself seems to recognize this:

The normativity of constitutive conventions, I claimed, is essentially conditional, it always presupposes an if clause: if you want to play the game, as it were, the conventional norms tell you what the game is and how to play it.<sup>57</sup>

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<sup>53</sup> Marmor, *Social Conventions* (n 52) ch 7.

<sup>54</sup> Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) 33-35, ch 2.

<sup>55</sup> Dickson, 'Really Conventional' (n 41) 400.

<sup>56</sup> *ibid* 393-396.

<sup>57</sup> Marmor, *Social Conventions* (n 52) 142.

This kind of ‘conditional normativity’ is not clearly an explanation of normativity at all. The difficulty with Marmor’s account is that it suffers from the same problem I set out earlier in relation to coordination conventions. Converging on the rule of recognition, now construed as a constitutive convention, is only required if we already have some operative reason to coordinate in our identification of valid law. Like the coordination account, the constitutive account fails to explain what these reasons are, or why they are necessarily present wherever there is law. What reason do we have to suppose that judges share the background interests, values and commitments that require them to further those interests by converging on their criteria for legal validity? If officials get together and agree that it is important for them to keep law distinct from other normative orders in their society, then we would have good reason to think that identifying law in the same way is something they would need and want to cooperate on. But if those officials get together and agree instead that their paramount concern, for example, is to do justice in each case that comes before them, then it is far from clear that this requires them to cooperate in identifying valid law in the same way. Of course, one could argue that justice may require a shared approach to identifying legal sources, but the argument from justice would support many other approaches besides.

While Scott Shapiro rejects conventions as a means of explaining the normativity of the rule of recognition, his own explanation is beset by the same problem. Shapiro argues that the rule of recognition (or ‘fundamental legal rules’, as he calls them) are best understood as a ‘shared cooperative activity’, following the model of social cooperation

developed by Michael Bratman.<sup>58</sup> On Bratman's account, agents are engaged in a shared cooperative activity when the following three conditions are met:

- (1) Each agent tries to be responsive to the intentions and actions of the others, knowing that they are trying to be similarly responsive.
- (2) Each agent is committed to the joint activity, which commitment their mutual responsiveness is intended to further.
- (3) Each agent is committed to helping the others play their role in the joint activity.<sup>59</sup>

These conditions arise when agents have a 'shared intention', which takes on a specific meaning in Bratman's framework. We have a shared intention 'if we intend that all agents achieve the same end by each acting in accordance with her own subplan that meshes with the subplans of other agents.'<sup>60</sup> Shared intentions 'are the backdrop against which bargaining about how to achieve the shared end proceeds.'<sup>61</sup>

I do not intend to discuss whether Bratman's account sufficiently demonstrates the normativity of shared practices of the kind he describes. I will assume for the purposes of argument that he does, and thus that Shapiro can explain law's normativity if officials, in their law-applying activity, exhibit the conditions set out by Bratman.

Matthew Noah Smith advances a compelling empirical argument against the presence of Bratmanian conditions in legal systems, arguing that Bratman's model is

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<sup>58</sup> Scott Shapiro, *Legality* (Harvard University Press 2011) ch 5.

<sup>59</sup> Matthew Noah Smith, 'The Law as a Social Practice: Are Shared Activities at the Foundations of Law' (2006) 12 *Legal Theory* 265, 272-273. Bratman's account is set out in Michael Bratman, 'Shared Cooperative Activity' in his *Faces of Intention: Selected Essays on Intention and Agency* (CUP 1999).

<sup>60</sup> Smith (n 59) 274.

<sup>61</sup> *ibid.*

‘hypercommittal’ in a way that legal officials cannot possibly be.<sup>62</sup> For present purposes, I want specifically to address the implications of Condition (2) of Bratmanian shared cooperative activity, namely that each agent is committed to the joint activity, which commitment their mutual responsiveness is intended to further.

As we have seen above, on Bratman’s account, the way we respond to one another—what actions we each take and what subplans we each make—depends entirely on what ends we have set for ourselves, on what it is that we have decided to do together. How we have defined what our ‘joint activity’ is determines how our subplans must mesh together. If you and I have a shared intention to ‘get coffee together’ tomorrow morning, our differing subplans must necessarily include being in the same coffee shop together for some period, and avoiding conflicting engagements during the scheduled time. But, of course, you and I might come to a very different agreement. Though we are friends, indeed because we are friends, we both understand the incredible importance each of us places on our first cup of coffee. So instead we might jointly intend that tomorrow morning we both find the best cup of coffee we can, judged by our independent and differing standards about what constitutes good coffee. Notice how the change in the nature of our joint activity—what it is that we are doing together—substantially changes the way our subplans need to mesh in order to realize that joint activity. Our subplans no longer commit us to avoiding conflicting engagements or to being in the same place at the same time. Notice also that we may now need to cooperate in other ways: I will call you if I find a brew I think you would like, I will reserve you a seat at the busy café I

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<sup>62</sup> *ibid* 284-292.

know you want to go to, and so on. The way we change our goals changes what we need to do in order to cooperate with one another in furthering those goals.

Thus, what the approaches based on conventions or ‘shared cooperative activity’ have in common is that the ways in which it makes sense for us to coordinate or cooperate depend entirely on the mutual goals dictated by our agreement or our preference structures. If judges agree on the goal of forming a conceptually distinct legal system, neatly distinguished from other normative systems, they will have reason to cooperate in sharing criteria of legal validity. If they agree to do something else—for example, if they agree to decide cases by tossing a coin, or if they agree to do justice between the parties on a case-by-case basis—then sharing criteria of legal validity may be unimportant or unnecessary. Thus, if we simply *assume* that officials have a shared intention (for whatever reason) to identify valid law in the same way, then the rule of recognition—as a coordination convention, or a constitutive convention, or a shared cooperative activity—may help explain what officials need to do to achieve that shared intention. But all of this just begs the question of whether this is what officials, as an empirical matter, really are trying to do together. As we have seen, Hart and some of his prominent followers do not provide us with an answer to this question.

## V. CONCLUSION

In this chapter, we have seen that a social rule—particularly one as complex as a rule of recognition—is dependent on the existence of an intricate web of factual conditions. We have also discussed several initial reasons to question whether these conditions obtain amongst the practices and attitudes of legal officials. First, we have reason to question whether some of these conditions would be met in rarefied official settings like courts,

where judges may act independently, may make and respond to criticisms, and may have divergent interests, in ways that deviate from the account that Hart develops by drawing analogies to more mundane social settings. Second, we have reason to question whether legal officials share the kind of background interests, beliefs or values that a rule of recognition is supposed to serve, since Hart gives us no explanation—other than his own philosophical commitments concerning the nature of law—of why legal officials would consciously seek to coordinate their criteria of legal validity in the way his theory supposes.

In this thesis, I conduct an empirical investigation to determine whether the practices and attitudes of the Justices of the Constitutional Court conform to the complex existence conditions for the rule of recognition. My inquiry includes an investigation of the interests and values expressed by the Justices in relation to their decision-making processes, and of the ways in which those interests and values require the Justices to cooperate, and the ways in which those interests and values permit the Justices to disagree.

Before I undertake this empirical critique of Hart's theory, I seek, in the next two chapters, to learn from the mistakes made by certain other theorists in their critiques or elaborations of Hart's theory. In Chapter 3, I take issue with a certain approach to Hart's theory—exemplified most prominently by Ronald Dworkin's early critique of Hart—that is excessively focused on the narrow empirical question of whether legal officials actually converge on shared criteria of legal validity. Briefly put, Dworkin argued that so-called 'hard cases' bring to the fore the underlying fundamental disagreements amongst legal officials about the ultimate criteria of legal validity in their legal system.

Since legal officials do not share criteria of legal validity, Dworkin argued, there is no convergent behaviour of the kind that is required for a social rule like the rule of recognition to exist. In Chapter 3, I argue that this kind of attack on the rule of recognition is ultimately inconclusive, in part because it triggers complex problems of first-order philosophy that are not susceptible to easy answers. In the absence of a solution to such problems, it is often possible, in response to objections like Dworkin's, simply to recharacterize the description of the shared practice, and/or reformulate a putative rule of recognition in such a way that it adequately describes the officials' practice and accounts for the seemingly contradictory features put forward by the objector. For this reason, although the thesis does ultimately address the empirical question of whether the Justices of the Constitutional Court converge in their criteria of legal validity, I caution against an inquiry that is excessively focused on that narrow question—which is just one of many conditions necessary for the existence of a social rule like the rule of recognition—and thus investigate, in later chapters, whether some of these further conditions for the existence of a rule of recognition are present in the practices and attitudes of the Justices of the Constitutional Court.

In Chapter 4, I turn to a different set of methodological pitfalls associated with some prominent attempts to apply Hart's theory of the rule of recognition to a given legal system, with the aim of avoiding these pitfalls in my own analysis in this thesis. To this end, Chapter 4 offers a critique of attempts by Kent Greenawalt and Kenneth Himma to formulate a rule of recognition for the United States. I demonstrate that Greenawalt and Himma offer scant evidence for the detailed empirical assumptions on which their candidate recognition norms are based, and that there is good reason to suppose those

claims to be false, or at least to suppose that extensive empirical work is required to prove their truth. This critique not only demonstrates the value of an empirically-based approach to Hart's theory of law—of the kind I undertake in this thesis—but also highlights the factual assumptions which must be interrogated by such an empirical approach. These assumptions are interrogated in Part Two of the thesis.

## 3

### *Convergent Behaviour and the Semantic Content of Social Rules*

#### I. INTRODUCTION

As we have seen in Chapter 2, Hart tells us that the semantic content of a social rule is evinced by the practice of the group whose rule it is. Hart does not say much, however, about *how* we get from an observation of a group's practices, on the one hand, to the semantic content of a putative social rule that adequately describes or captures those practices, on the other hand. In his example of men baring their heads in church, Hart does not give us enough information about the churchgoers' practices to enable us to evaluate his interpretation of those practices or to contest his construction of the social rule ('there is a rule that a man must bare his head in church')<sup>1</sup> that he thinks best fits those practices. However, it is not only Hart who has little to say concerning how a group's practice determines the semantic content of social rules—apart from Ronald Dworkin and Andrei Marmor, whose contributions on the subject are discussed in this chapter, there has been little sustained attention paid to this key element in the application of Hart's theory to actual social practices.

It turns out that inferring the content of a social rule from the observed practices that constitute the rule is a complex enterprise. In this chapter, I discuss some of the complexities of attempting to infer the semantic content of social rules from observation of a group's practices. It is necessary to flag these complexities here in order to evaluate a certain approach to attacking or defending Hart's theory that has been prominent in the

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<sup>1</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 10.

literature since Ronald Dworkin's *Taking Rights Seriously*. Dworkin's primary attack on Hart's theory of the rule of recognition, which he sustains throughout *Law's Empire* and *Justice in Robes*, is that appellate judges—whether in the Supreme Court of the United States or the then-House of Lords in the United Kingdom—do not, in practice, converge on shared criteria of legal validity.<sup>2</sup> Though Dworkin, like others working in the tradition of analytic legal philosophy, eschews overt reliance on empirical methods, his claim is nevertheless an empirical one—if we pay attention to what judges are really saying and doing, Dworkin says, we can see that they in fact disagree profoundly about the standards of correct judicial decision-making. As a result, Dworkin concludes, there is no shared way of identifying law that can serve as a foundation for the rule of recognition *qua* social rule.

In his response to Dworkin in the Postscript to *The Concept of Law*, Hart alleges that Dworkin mischaracterizes the relevant judicial practices under observation, in that the disagreement Dworkin perceives is really only skin-deep. The rule of recognition, Hart says, is not 'meant to determine completely the legal result in particular cases', but rather serves to 'determine only the *general conditions* which correct legal decisions must satisfy in modern systems of law.'<sup>3</sup> The rule of recognition does this most often by setting tests as to 'the manner and form in which the laws are created or adopted', but may also 'supply tests relating not to the factual content of laws but to their conformity with substantive moral values or principles.'<sup>4</sup> For Hart, '[j]udges may be agreed on the

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<sup>2</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 23-31, 81-131; Ronald Dworkin, *Law's Empire* (new edn, Hart 1998) 3-44, 130-139; Ronald Dworkin, *Justice in Robes* (Belknap Press 2006) 223-29.

<sup>3</sup> Hart, *The Concept of Law* (n 1) 258 (my emphasis).

<sup>4</sup> *ibid.*

relevance of such tests as something settled by established judicial practice even though they disagree as to what the tests require in particular cases.’<sup>5</sup> Thus, according to Hart, the superficial disagreement that Dworkin observes amongst legal officials in a particular ‘hard case’ can be resolved simply by reframing the officials’ practice at a higher level of abstraction—while judges disagree about how to apply the standard in a particular case, they agree that *that* is the standard they must apply. Although they are looking at more or less the same factual material, Hart sees shared practices where Dworkin sees discord.

To take a simpler example, if two people walk down a road, and at the end of the road one turns left and the other turns right, one plausible way of describing their conduct is to say that they disagreed about what action to take—one thought it prudent to turn left, the other thought it wise to turn right. However, it seems equally plausible to reframe the situation as one of convergent behaviour—while one person turned left and the other person turned right, both agreed that it was necessary to turn. Thus, on one interpretation of their conduct, our walkers took precisely opposite decisions; on another interpretation, our walkers took the same decision—the decision to turn—though they each applied the decision in a different way.

As I explain more fully in the present chapter, it is difficult to know how to adjudicate between these competing ways of characterizing our observations of the same set of social practices. In this chapter, I raise, but do not attempt to resolve, these difficulties so as to demonstrate why it is important to move away from what I take to be an excessive focus in the literature on the two related questions of (i) whether legal officials really do exhibit convergent behaviour in their law-identifying practices, and (ii)

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<sup>5</sup> *ibid* 258-259.

whether it is possible to formulate a putative rule of recognition that adequately describes or captures that convergent behaviour.

To be sure, one component of the empirical investigation I undertake in this thesis is to determine whether the individual Justices of the Constitutional Court actually converge in their ultimate criteria of legal validity. While I conclude in Chapter 7 that the Justices do not so converge, my analysis in the present chapter counsels caution about how far we can push that conclusion. While it is clearly important, as far as Hart's theory is concerned, to investigate whether some group of legal officials converge or diverge in their decision-making processes, the conclusions we draw will be vulnerable to the kind of response Hart made against Dworkin: that is, due to the indeterminacy of language, and the nature of our interpretation and construction of social practices, it seems that it will often be possible, regardless of what we take the convergent practice to be, to formulate a putative rule of recognition that adequately describes the officials' decision-making processes and accounts for the seemingly conflicting features of those processes that may be put forward by an objector. This is why it is necessary, in the chapters that follow, to support the empirical conclusions in Chapter 7 with further empirical investigation of the many additional conditions that are required for a rule of recognition to exist, regardless of whether officials do or do not converge in their law-identifying behaviour.

## II. THE CONTENT OF SOCIAL RULES

One of Dworkin's initial critiques of Hart was that the rule of recognition, at least as far as the United States was concerned, could not adequately account for two features of

legal practice, namely (i) that judges disagree, in ‘hard cases’ like *Riggs v Palmer*<sup>6</sup> and *Donoghue v. Stevens*,<sup>7</sup> about ultimate criteria of legal validity, and (ii) that judges’ ultimate criteria of legal validity include not only rules but also principles.<sup>8</sup> This critique framed the Hart/Dworkin debate in implicitly empirical terms, and since then it has been common to defend or attack Hart’s theory by arguing about whether officials really do converge in their criteria of legal validity, and if so, whether it is possible to formulate a rule of recognition that adequately describes or captures that convergence. This narrow focus on the question of convergence excludes many other conditions that must obtain in order for a social rule like the rule of recognition to exist.

Part of what is misleading about the treatment of social rules in post-Hartian legal theory is that the examples we are offered usually provide only a bare-bones description of some social group and a particular practice in which the group engages. Since we do not observe the group’s behaviour ourselves, we must take the facts, and the social rule that they purportedly constitute, as these are given to us by the theorist. Once all of the key behavioural and semantic questions have been defined out of the problem in this way, we are then invited to accept the theorist’s conclusions about the dynamics of the group, including the content of the social rule that they are supposedly following. Apart from obscuring many of the important issues at stake in the analysis of social rules, this method of argument also encourages the perception that we need no more than a basic

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<sup>6</sup> 115 NY 506 (1889).

<sup>7</sup> 1932 App Cas 562 (HL 1932).

<sup>8</sup> Dworkin, ‘Model of Rules I’ and ‘Model of Rules II’ in his *Taking Rights Seriously* (n 2); Dworkin, *Law’s Empire* (n 2) 3-44. 130-139.

apprehension of the facts, and a plausible rule of our own making, to understand how social rules are constituted by a group's behaviour.

Let us see if we can come to a better understanding of the dynamics of social rules by spending a more extended time with Hart's group of churchgoers. In the analysis that follows, I take for granted that our linguistic conventions bestow a core of plain meaning on most of our words, such that someone who thinks that 'baseball cap' refers to a fedora either does not share our linguistic conventions, or has made a mistake about them. I do not intend to press any theory about the determinacy of language—I make the assumption because the analysis of the content of social rules simply makes no sense if we take language to be radically indeterminate within a given social group. In a similar vein, it only makes sense to analyze social rules while holding our linguistic conventions constant, and assuming that the social group in question follows the same linguistic conventions that we do. Again, if we hold open the possibility that 'hat' in our hypothetical community really refers to pants, our exercise is pointless.

With all this in mind, let us go to church. Suppose that although the men in a congregation have always bared their heads in church, there have been several occasions in the past on which some men in the congregation entered the church in baseball caps. When this happened, the men were criticized and subjected to various kinds of social pressure. Meanwhile, women in the congregation usually attend church in all manner of hats, including baseball caps, without enduring any criticism at all. Let us suppose further that the criticism to which the men were subjected was not just based on what the congregation thought the men had good reason to do on these particular occasions—as

far as the congregation is concerned, there is ‘a rule’ that prohibits men from wearing baseball caps in church.

At first blush, the example meets at least some of Hart’s conditions for the existence of a social rule. But what *is* the social rule that the congregation believes is violated by men in baseball caps? At the outset, it is important to recognize that this pattern of behaviour, and the normative attitude of the congregation which accompanies it, is consistent with a number of different formulations of the social rule at issue. Consider the following three rules, to which I will occasionally refer in the analysis that follows:

‘CAP’: Men must not wear a baseball cap in church.

‘HAT’: Men must not wear a hat in church.

‘BARE’: Men must bare their heads in church.

All three of these rules are equally plausible interpretations of the congregation’s practice as just described, and there are more besides. Of course, at this point in the congregation’s history, individual members of the congregation may not have critically reflected on which of these rules they mean when they tell the errant men they have broken ‘the rule’. Perhaps they have not even had occasion to think about how they would formulate the rule they are referring to, or about the parameters within which plausible formulations must lie. All they know is that, for them, *there is a rule* about this conduct.

Let us now suppose that there is a man who is considering wearing a fedora at the next church service. He, and the congregation members who are aware of his sartorial desires, are concerned to know whether he will be breaching a social rule of the

congregation. Some of them are certain he will not breach the rule, others are certain that he will, and others are not certain either way or have not yet applied their minds to the question. Is there a social rule in the congregation that forbids him to wear a fedora in church?

#### A. The ‘No-Gap Theory’ of Social Rules

One view held by theorists as diverse as Andrei Marmor and Ronald Dworkin is that the congregation has no social rule about fedoras in church.<sup>9</sup> According to Marmor and Dworkin, the content of a social rule is exhausted by the clear instances of its application. I will call this view the ‘no-gap theory’ of social rules, since it posits that there is no semantic space, or ‘gap’, as Marmor puts it, between the content of the rule and the convergent behaviour which has gone before it. According to this view, if members of the congregation have differing views about whether the rule applies in a particular circumstance—say, because some people think CAP is the rule and others think HAT is the rule—this indicates that there simply is no rule on the matter at all, and ‘they cannot have an intelligent argument about what the convention *really* requires’.<sup>10</sup> Since the community has never applied its rule to fedoras, or would not agree that the rule applies to fedoras, there is, on the no-gap theory put forward by Marmor and Dworkin, no rule on this point at all.

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<sup>9</sup> Andrei Marmor, ‘Exclusive Legal Positivism’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 112-116; Andrei Marmor, *Positive Law and Objective Values* (OUP 2001) ch 1; Dworkin, *Taking Rights Seriously* (n 2) 54-55.

<sup>10</sup> Marmor, ‘Exclusive Legal Positivism’ (n 9) 112-113.

The theory has some initial appeal, and indeed we shall see in due course that there is a grain of truth in it. On closer inspection, however, the theory is dogged by a number of intractable problems which I presently set out.

The first difficulty with the no-gap theory is that it cannot explain *how* convergent behaviour determines the content of social rules. As we have seen in relation to our example of the churchgoers, it is often possible, through creative interpretive work, to formulate a number of competing rules that might adequately describe or capture the empirical data we have before us concerning a given social practice in a community. Moreover, we are also doing creative interpretive work when we observe and conceptually analyze the very empirical data our social rules try to capture. There is no objective interpretation of a social practice—one observer will notice things that another overlooks, and one observer will emphasize certain aspects of the practice that another observer thinks unimportant. While it is true that some interpretations of a practice will be better than others—some may even be downright wrong—observers can and do have reasonable disagreements about the features and purposes of a given practice.

This basic insight concerning the nature of the observation and interpretation of social practices renders inconclusive any attack on Hart's theory that seeks to show that the content of a putative rule of recognition does not fit with observed practice. In response to such attacks, it seems that it will often be possible to reformulate the putative rule and/or to redescribe the practice so as to assimilate the objection; many of the inclusive legal positivist responses to Dworkin's arguments have this flavour.<sup>11</sup>

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<sup>11</sup> See, for example, Hart, *The Concept of Law* (n 1) 258-259; Matthew Kramer, *In Defense of Legal Positivism* (OUP 2003) 130-146; Jules Coleman, *The Practice of Principle* (OUP 2003) 151-161.

The no-gap theory of social rules rejects the position of moderate indeterminacy I have just described, asserting that past practice fully determines the content of a social rule. The no-gap theory must therefore explain how a given practice fixes a social rule with a definite semantic content.

The explanation is elusive. Marmor's own explanation makes repeated use of the claim that the content of social rules is determined by the 'practice of *applying the rule* to certain cases'; that 'it is the application of the rule which constitutes its very existence'.<sup>12</sup> Dworkin, for his part, discusses what 'the social rule would "cover"'.<sup>13</sup> Of course, as these quotations themselves make clear, rule-application logically presupposes the existence of a rule. The extension of a social rule cannot be perceived separately from, and antecedent to, the rule of which it is an extension. Yet, according to the no-gap theory, until we apply the rule, there is no rule to apply. In the face of this circularity, Marmor and Dworkin succeed in their explanation of social rules only by imposing on their hypothetical communities a putative social rule of their own construction, without an explanation of why *that* particular rule should be taken as the community's rule, given the pattern of behaviour in question and the range of different rules it could support.

This feature of social rules—the way they both constitute and are constituted by the instances of their application—presents us with a paradox. In addressing the paradox, we shall see that the content of social rules goes beyond their clear extensions, and thus

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<sup>12</sup> Marmor, 'Exclusive Legal Positivism' (n 9) 112. In *Social Conventions: From Language to Law* (Princeton University Press 2009), Marmor goes even further, arguing that '[t]here is no practice without the rules, and if the rules were different the practice would have been different as well' (40), and, similarly, that 'the identifi[ca]tion of conventional practices is crucially determined by their constitutive rules' (65).

<sup>13</sup> Dworkin, *Taking Rights Seriously* (n 2) 54.

that the no-gap theory is false. Social rules are both more and less determinate than the no-gap theory supposes.

### **B. The Relative (In)Determinacy of Social Rules**

Let us pause to consider whether there is any scope for the no-gap theory to deny the paradox just explained. The only plausible way for conduct to definitively determine a social rule's content *prior* to the existence of the rule itself is for a community to create an ultra-specific list of rules which map one-to-one onto singular instances of conduct. To the first man who wears a baseball cap in church, the congregation following this ultra-specific approach to rules says: 'This, here, now, is a breach of a rule.' The rule does not mark out any general features of the behaviour which has rendered it subject to criticism—it merely marks out what has just happened as an instance of 'wrong'. Let us call this rule *x*. When a second man wears a baseball cap on another occasion, the congregation says: '*This, here, now*, is a breach of a rule.' It avoids any further description other than to say the conduct just witnessed counts as 'wrong'. Call this rule *y*.

A community that insists that rule *x* and rule *y* are separate rules is, in an important sense, not really working with rules at all. They are simply keeping a list of incidents that the community has criticized in the past. The irreducible specificity of the items on this list renders them incapable of playing the role in practical reasoning that rules are supposed to play, namely as guides for future conduct. While it is theoretically possible for a community to adopt this approach to the regulation of its behaviour—the effect of which is to create purely extensional definitions of the community's concepts of 'wrong', 'permitted', and so on—it is also certainly true that real communities do not

work like this. Most communities would recognize, as we do, that  $x$  and  $y$  are the same rule. We should pay careful attention here to what makes this recognition possible.

To recognize  $x$  and  $y$  as the same rule is to recognize, in the first instance, that the separate actions subject to each of these rules involve not just specific individuals, places, and objects, but instances of the concepts ‘man’, ‘church’, and ‘baseball cap’. In addition, to recognize  $x$  and  $y$  as the same rule is to appeal to the existence of a rule in which the concepts ‘man’, ‘church’ and ‘baseball cap’ figure centrally, and are related to one another in certain ways. This rule is what helps us to organize and interpret two otherwise distinct actions as displaying a normatively relevant pattern. To make sense of the infinite patterns of conduct in which our community engages, we pick out ‘men’ and ‘baseball caps’ and ‘church’ as relevant concepts, and we draw relationships between these concepts, because we have in mind a rule that makes these concepts and conceptual relationships salient in some way.

Thus, to do anything more general than simply creating a new rule for each wrongful act—to group together the rules about baseball caps, or about church, or about men, and so on, and therefore truly to be working with rules at all—involves an implicit appeal to a rule or range of rules containing linked concepts capable of marking out these past events as being conduct of one kind. Note that communities that work with rules in this way exhibit two of the implicit conditions for the formation of a social rule that I spelled out in Chapter 2. First, the members of the community perceive that certain individual acts aggregate to a certain practice or behaviour. Second, the members of the community have some non-negligible grasp of the conceptual content of the putative rule governing the practice, such that, when they criticize one another in relation to a certain

type of conduct, they really are appealing to the same rule, or to some range of rules with relevantly similar content.

However, by their very generality, the concepts embodied in these implicit appeals to a rule will apply to more than just the past instances to which they have been accurately applied.<sup>14</sup> Subsuming past conduct about fedoras and baseball caps into a general rule about ‘hats’ or ‘bare heads’ allows the rule to govern potential future cases involving top hats, bowler hats and so on, to which it has not yet been applied. This is a basic feature of language—it is what gives rules both a backward-looking and forward-looking element.<sup>15</sup> A social rule covers all the cases to which it has been properly applied in the past, and it covers certain cases that have not yet been presented to the group for decision.

For the same reason, saying, as Marmor and Dworkin do, that the community has no rule when there is disagreement about its application obscures the normative resources a community has available to it for the resolution of unclear cases. To say that there is no rule about fedoras in the congregation whose rule is ‘Men may not wear baseball caps in church’ is to suggest that a fedora-wearing member of this group has no more guidance about what he is required to do than a person whose group has the rule ‘No vehicles allowed in the park’. Since, according to the no-gap theory, neither rule prohibits the wearing of fedoras, a man from either group who wears a fedora cannot make a mistake about his social obligations. When he wears one, the community will have to decide from scratch what the convention should be going forward.

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<sup>14</sup> Hart generally agrees with this understanding of the nature of rules. See HLA Hart, ‘Problems of the Philosophy of Law’ in his *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 103.

<sup>15</sup> For a fuller discussion of this feature of language, see Joseph Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in his *Between Authority and Interpretation* (OUP 2009) 352-360.

But to say that there is no rule about fedoras fails to capture the very different positions of our two communities. The congregation which has a rule about baseball caps has at least part of an answer (albeit inconclusive) to the problem of fedora-wearing. However we describe the rule that exists in the congregation, it provides some guidance, in the way rules are supposed to, to the man considering wearing a fedora, in a way that the rule about vehicles in parks does not.

Indeed, the question of whether the fedora is covered by the *rule about hats* can only even arise because there *is* a social rule on which the members share sufficient agreement so as to frame the debate as being about *that* rule, as opposed to being a debate about the rule concerning vehicles in the park. One significant oversight in the no-gap theory is that it fails to explain how it is that the question of the fedora arises as a problem for the rule about hats rather than for the rule about the park. The no-gap theory does not explain how it is that the fedora *might* be covered by the community's rule about hats in church, and that members of the community would recognize the plausibility of that possibility *even if* they ultimately disagreed about the conclusion.

What is it about the content of the rule about hats in church that pulls questions about fedoras within its orbit? Contrary to the no-gap theory, the generality of the concepts in which our rules are necessarily couched—which concepts bestow on our rules a degree of indeterminacy—gives them a content that captures more than just their clearest extensions. But if this is so, then we have demonstrated that the no-gap theory is wrong about one thing—social rules have a content that extends beyond the past instances of their application. We have also shown that the no-gap theory is wrong about

something else: we cannot understand how convergent behaviour relates to a rule unless we already have a rule in mind to help us characterize the behaviour.

And yet, it is true that a social rule, unlike a legal or moral rule, cannot exist prior to the pattern of behaviour it governs. We can enact a legal rule to govern a situation that has not yet arisen, but we cannot prospectively lay down a social rule. As Marmor puts it, '[i]t is not the case that we first have a rule-formulation . . . and then we try to make up our minds how to apply [the rule] to particular cases.'<sup>16</sup> Our paradox is that we need the content of the rule to organize our perception of the behaviour, but we need to perceive the behaviour in order to know the content of the rule.

Resolving this paradox reveals two important features of social rules. The moment we adopt a critical normative attitude towards a pattern of behaviour in terms of which we view it 'as a rule', we make an immediate and implicit appeal to the existence of a rule (or range of rules with varying but roughly converging content) that covers the conduct in question. When our congregation is in a mere habit of baring their heads in church, there is of course no rule against the man who wears a baseball cap. But the moment the congregation adopts the normative view that this conduct violates a 'rule', by necessity they imply that there is a rule of a certain content that governs this conduct, whether they have yet had occasion to agree on or even think about how to articulate that content. Thus, while it is true—as Marmor and Dworkin point out—that no social rule exists *before* we judge the relevant conduct to be subject to a rule, they are wrong to suppose that we can speak intelligibly about the conduct without a rule. To view conduct

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<sup>16</sup> Marmor, 'Exclusive Legal Positivism' (n 9) 112.

‘as a rule’ is simultaneously to invoke the existence of a rule, the content of which can then be interpreted or potentially contested.

This first feature of social rules helps us to understand the second. Social rules are dialectical in nature—they are the result of an ongoing process of constructive interpretation according to which members of a group try to make sense of their normative practice by explicitly or implicitly positing rules that plausibly capture what they think ought to be done according to that practice, but they constantly revise those rules as their practice unfolds over time. The content of a social rule thus depends not simply on a description of the group’s past practice (which is itself an interpretation), but also on the interpretive work the group (and we observers) perform in articulating its semantic content. These rules are formulated, implicitly or explicitly, by generalizing about the behaviour of the group, and by revisiting that formulation as new problems about the application of the rule arise. The no-gap theory misunderstands this reflexivity between social rules and their application.

It follows from this conception of social rules that the content of a social rule can be relatively determinate. We can know that there is a rule about men and hats in churches, even if there are many plausible rule formulations that capture that practice. It also follows from this conception of social rules that some people, some of the time, may be mistaken about the social rule of their group. Some people in the congregation may disagree that their rule about baseball caps applies to fedoras—say, because they think the rule is CAP—but, if enough people in the congregation apply the rule HAT or BARE to fedoras with sufficient criticism and so on, then the social rule of the group *does* apply to fedoras, and those who continue to think that the rule is CAP are mistaken in a way

that they may not have been before. As between those who adhere to HAT and those who adhere to BARE, it would remain an open question who had the better understanding of the congregation's normative practice, until some further occasion arose to highlight the distinction between the content of the two rules and to call on the congregation to decide between them.

This kind of divergence in views about what the rule is does not entail, as Dworkin and Marmor think it does, that there really is no rule. If half the congregation thinks HAT is the rule, and half the congregation thinks BARE is the rule, they are in full agreement that there is a rule which, at least, bans men from wearing hats. To the extent that different rule formulations overlap, it is possible to posit another rule which captures that overlap, and to situate that rule amongst the range of rules that plausibly capture the practice. Indeed, the overlap in content between HAT and BARE is such that members of the congregation would agree on the outcome in a significant number of disputes, regardless of which rule they applied. A man with a bandana on his head would bring their disagreement to the fore, but until then, they may not even be aware that they are following different rules at all.

Thus, a social rule can have a relatively determinate content. While there may be more than one rule which can plausibly claim to govern the community's practice at any given time, and while we may not know the precise formulation of any of these rules, we can nevertheless have a good sense of the concepts they employ, and the outer range of their extensions. A social practice can be rule-governed, even while the formulation of the relevant rule is contested or contestable. It is in the nature of social rules that they are always in flux, such that any putative formulation of the social rule can claim no more

than a prima facie truth for itself. The most we could say is that it is plausible to interpret the community as having this rule.

However, if I am right that there may be a number of semantically distinct rule-formulations that can make a plausible claim to being the community's rule on a certain point, then a debate about whether there 'is' or 'is not' a rule of a certain content will be largely futile. If we knew for certain that the rule of the group is 'Men must not wear hats in church', we could sensibly debate, within a given language game, about whether or not the rule covered this or that instance—we could debate about whether the rule is vague on this point, or whether it is better to say, on this point, that there is no rule at all. But we cannot know the content of social rules in this way. If the rule is HAT, then the congregation certainly *does* have a rule about fedoras. If the rule is CAP, then there is no rule about fedoras. The trouble is that, until a fedora-wearing churchgoer provides an opportunity for the community to sharpen the rule, both HAT and CAP offer equally plausible interpretations of the churchgoers' current practice.

The problem will persist no matter how many opportunities for revision present themselves—the situation I am describing is a feature of the interpretive work we do in construing practices and in formulating rules. Since we cannot have a completely determinate sense of a social rule's appropriate formulation, we can only find out later on, as a practice confronts new instances, whether the relevant rule does or does not cover them.

### III. CONCLUSION

We have seen in this chapter that the process of inferring the semantic content of a putative social rule from observations of a group's practice is a complicated exercise that

is typically given short shrift in the existing literature on the rule of recognition. The complexities I have discussed demonstrate why Dworkin's initial critique of the rule of recognition—which focuses on whether legal officials really do converge in their law-identifying behaviour, and whether we can formulate a rule of recognition that adequately describes that convergence—struggles to deal any decisive blows to Hart's account. Contrary to Dworkin's claim,<sup>17</sup> uncertainty is not fatal to the existence of a social rule.<sup>18</sup> Social rules exist in the face of disagreement about their appropriate formulation and application.

But we have also seen that the point cuts equally against Hart and some of his contemporary supporters—the flipside of a social rule's relative determinacy is its relative indeterminacy. Hart can no more shore up his account by pointing to the relatively determinate content of social rules than Dworkin can undermine the account by pointing to their relative indeterminacy.

The upshot is that an empirical critique of the rule of recognition of the kind I undertake in this thesis cannot exclusively focus on only those existence conditions for a social rule that are concerned with whether there is a convergent practice and whether it is possible to formulate a putative rule that can adequately describe that convergence.

In Chapter 7, I do analyze whether the Justices of the Constitutional Court can be said to converge on shared criteria of legal validity. However, while the conclusions I draw in Chapter 7 are consistent with the view that the Justices do not in fact converge in their ultimate criteria of legal validity, on account of the conclusions I have reached in

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<sup>17</sup> Dworkin, *Taking Rights Seriously* (n 2) 54.

<sup>18</sup> Hart, *The Concept of Law* (n 1) 147-154, 251-254.

this chapter, I do not press that conclusion too strongly. Instead, my thesis seeks to move beyond the circularity of debates about whether legal officials really do share criteria of legal validity by supplementing conclusions about convergence with an analysis, in Chapters 8 to 10, of the many further conditions (to do with criticism, social pressure, background interests and commitments, and so on) that must be present in order for there to be a rule of recognition of *any content* at all.

***The Practice Theory in Practice: A Critique of Attempts to Formulate a Rule of Recognition for the United States***

I. INTRODUCTION

In Anglo-American legal theory, the rule of recognition is ubiquitous. Many theorists now take for granted that it is at the foundation of all legal systems, and, depending on the aims of a given piece of writing, many will assume or briefly work out a particular content for the rule in some or other country.<sup>1</sup>

Interestingly, there have been few attempts by major theorists to develop anything approaching a comprehensive statement of a rule of recognition for a specific legal community. This is surprising, not least of all because Hart hoped that the rule of recognition would provide ‘both private persons and officials . . . with criteria for identifying primary rules of obligation.’<sup>2</sup> Hart supposed that an external observer, unsure of a community’s primary legal rules, could identify those rules upon sufficient observation.

To my knowledge there have been only two comprehensive attempts at formulating a rule of recognition, both focused on the legal system of the United

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<sup>1</sup> See, for example, Adam Tucker, ‘Uncertainty in the Rule of Recognition’ (2011) 31 *Oxford Journal of Legal Studies* 61 (adopting the rule of recognition as a framework for understanding the limits on the law-making powers of the United Kingdom Parliament); Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) ch 3 (adopting the rule of recognition as a framework for understanding the role of the Human Rights Act 1998 in the legal system of the United Kingdom); Matthew Kramer, *Where Law and Morality Meet* (OUP 2008) ch 4 (adopting the rule of recognition as a framework for understanding the role of moral principles in the decision-making of the Supreme Court of the United States); Robert B. Seidman, ‘Rules of Recognition in the Primary Courts of Zimbabwe: On Lawyers’ Reasoning and Customary Law’ (1983) 32 *International & Comparative Law Quarterly* 871 (1983) (adopting the rule of recognition as a framework for understanding courts of customary law in Zimbabwe).

<sup>2</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 100.

States. The first appears in Kent Greenawalt's seminal 1987 article in the *Michigan Law Review*,<sup>3</sup> and the second is developed by Kenneth Himma in a more recent series of essays, which culminate in his 2009 chapter for *The Rule of Recognition and the US Constitution*.<sup>4</sup>

Even in this lonely company, only Greenawalt offers a near-complete statement of the rule of recognition in the United States. The essay, which I discuss in greater detail below, builds up to Greenawalt framing, from 'the standpoint of a sociologist studying what counts as law within the American legal system', a rule of recognition for the United States which is derived from official practice and acceptance.<sup>5</sup> (Greenawalt has more recently argued that his original essay remains a persuasive account of how Hart's model of a legal system can be best applied to the United States.)<sup>6</sup>

Himma's project, by contrast, is narrower and in some ways less ambitious than Greenawalt's. Unlike Greenawalt's piece, the two earlier essays on which

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<sup>3</sup> Kent Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 *Michigan Law Review* 621. Strictly speaking, even prior to Greenawalt, Dworkin had already in 1977 tried to apply Hart's rule of recognition to the particularities of the United States legal system. Dworkin, as is well-known, was decidedly less optimistic about the prospect than Greenawalt—he concluded not by formulating a rule of recognition for the United States, but rather by showing that such a formulation is impossible, in that key features of the American legal world could not be accommodated without completely distorting Hart's account and its purpose. See Ronald Dworkin, 'Model of Rules I' and 'Model of Rules II' in his *Taking Rights Seriously* (Duckworth 1977).

<sup>4</sup> Kenneth Himma, 'Understanding the Relationship between the US Constitution and the Conventional Rule of Recognition', in Matthew Adler and Kenneth Himma, *The Rule of Recognition and the US Constitution* (OUP 2009). The two pieces on which this chapter is based are Kenneth Himma, 'Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States' (2003) 4 *Journal of Law in Society* 149, and Kenneth Himma, 'Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism' (2005) 24 *Law and Philosophy* 1.

<sup>5</sup> Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 659-660.

<sup>6</sup> Kent Greenawalt, 'How to Understand the Rule of Recognition and the American Constitution', in Adler and Himma (n 4) 145-146.

Himma's 2009 chapter is based are not concerned with the formulation of a rule of recognition for its own sake—they are concerned instead to undermine the explanatory power of inclusive legal positivism for the legal system of the United States. Himma's argument turns on the formulation of a rule of recognition for the United States which confers on the Supreme Court almost absolute authority to determine the validity of legal norms, irrespective of whether those norms comply with what the Constitution requires as a matter of objective morality.<sup>7</sup>

Unlike the earlier essays, Himma's 2009 chapter omits any specific conclusions about inclusive legal positivism, and indeed the stated purpose of the essay is broadened to be something similar to Greenawalt's—'to determine how the Constitution and the rule of recognition are related by examining the practices of officials'.<sup>8</sup> However, since the new chapter is largely an amalgamation and refinement of those earlier arguments, the substance of Himma's attempt to formulate

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<sup>7</sup> On this view, objective consistency with moral principles embodied in the US Constitution is thus neither a necessary nor a sufficient condition for legal validity. If this argument is correct, it entails that inclusive legal positivism (either as inclusivism or incorporationism) lacks explanatory power for the United States and, in fact, all other legal systems in which a supreme court is given final authority to interpret a constitution. See further Himma, 'Final Authority' (n 4) and Himma, 'Making Sense' (n 4). Matthew Kramer has published an extensive response to Himma defending the plausibility of inclusive legal positivism as an explanatory theory—see Matthew Kramer, *Where Law and Morality Meet* (OUP 2008) ch 4. The central thrust of Kramer's argument is that Himma's final formulations of the rule of recognition deny or neglect the fact that the rule of recognition consists of not one but multiple standards—Himma ignores that multiplicity, as well as the hierarchical relationships between those standards. Once we apprehend the multiplicity and rankings of the rule of recognition, we can see that a highest court's decision-making power is consistent with having moral criteria in a rule of recognition (134-140). Greenawalt, in his more recent piece, provides another sound objection to Himma's argument against inclusive legal positivism. A proper statement of the rule of recognition would make reference to the substantive norms against which officials test law for validity, and only as a secondary matter would the statement of the rule refer to the authority of a final arbiter to bind lower officials with mistaken interpretations of those norms. See Greenawalt, 'How to Understand' (n 4) 152-153, 157.

<sup>8</sup> Himma, 'US Constitution' (n 3) 95.

a rule of recognition still bears the mark of their narrower focus.<sup>9</sup> He does not, as Greenawalt does, formulate the rule of recognition generally, nor does he make comprehensive statements about the relationship between the rule of recognition and the Constitution. Instead he sticks to formulating only that part of the rule of recognition which deals with the Supreme Court's authority to interpret the Constitution. Despite its relative narrowness, Himma's meticulous consideration and rejection of various candidate recognition norms, in light of what he takes to be key features of official practice in the United States, places his essay in the same category as Greenawalt's.

In this chapter I offer a critique of Greenawalt's and Himma's attempts to formulate a rule of recognition for the United States, showing that both pieces suffer from the same methodological flaws, resulting in similarly problematic conclusions. I seek to demonstrate that Greenawalt and Himma offer scant evidence for the detailed empirical claims on which their candidate recognition norms are based, and that there is good reason to suppose those claims are false, or at least to suppose that extensive empirical work is required to prove their truth. I offer this methodological critique of their efforts to see what lessons might be learnt in advance of my own attempt (in Chapters 7 to 10) at analyzing whether the behaviours and attitudes of the Justices of the South African Constitutional Court conform to the conditions required by Hart's rule of recognition, and determining the implications of that analysis for the explanatory power of the rule of recognition for the South African legal system.

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<sup>9</sup> In the remainder of this chapter, I focus primarily on Himma's most recent chapter, though I occasionally draw on the earlier essays where relevant.

Where it is appropriate, I draw on existing empirical evidence to undermine the factual claims made by Greenawalt and Himma. I should emphasize, however, that this evidence is *not* intended to establish the truth of a competing empirical claim. My point is not that we already have sufficient evidence to establish with finality the falsity of the positions I am contesting—my point is rather that we do not yet have enough evidence to decide the empirical points at all. My primary aim, then, is to remake the case for reliance on empirical observation in legal philosophy, and thus to provide a framework for my own empirical work on legal validity in South Africa which appears in Part Two of the thesis.

## II. THE SHARED METHODOLOGICAL PROBLEM

The central problem with both Greenawalt's and Himma's efforts to formulate a rule of recognition for the United States is that they do not take seriously their own methodological commitments. Both essays begin, as they must, by recognizing that the validity criteria contained in the rule of recognition must be constructed from the observed, shared practices of officials in the United States, which practices are supported by serious social pressure to conform to them.<sup>10</sup> In other words, Greenawalt and Himma are methodologically committed to the claim that 'what officials self-consciously treat as validity criteria *are* the validity criteria'<sup>11</sup> in the United States. Both essays (Himma's more explicitly) also recognize that it is not

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<sup>10</sup> Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 624, 626; Himma, 'US Constitution' (n 4) 99. Both accounts describe this feature of Hart's account as 'conventionalist', a term they use here to denote simply that the account is based on social practice. They do not use the term in the more specific sense I explained in Chapter 2—that is, they do not express opinions about whether these social practices constitute conventions properly so-called, nor do they address whether conventions of this kind can be duty-imposing.

<sup>11</sup> Himma, 'US Constitution' (n 4) 99. See also Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 624-626.

only the practices of judges that count for the rule of recognition, but rather the practices of *all* officials in the system.<sup>12</sup>

This all turns out to be lip service. Despite Himma's preface that '[o]ne must employ roughly the same sorts of empirical tools that are commonly utilized by sociologists to study the behaviour of officials', he proceeds to employ not a single one. Instead, he thinks the claims he makes are 'sufficiently uncontroversial to be accepted without detailed empirical study'.<sup>13</sup> Greenawalt similarly overestimates the readiness with which we can make empirical claims about legal systems without engaging in any kind of rigorous empirical observation. Despite accepting that the rule of recognition is about what 'officials purport to follow',<sup>14</sup> there is very little examination of what officials purport at all.<sup>15</sup>

Since Greenawalt and Himma both expressly accept that the content of the rule of recognition must be discerned solely from the behaviour and attitudes of officials, it should be seen as a failing of both efforts that they perform their analysis exclusively on a relatively arbitrary mix of constitutional text, hypothetical examples,

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<sup>12</sup> Himma, 'US Constitution' (n 4) 98; Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 636.

<sup>13</sup> Himma, 'Final Authority' (n 4) 8 fn 7.

<sup>14</sup> Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 625.

<sup>15</sup> Both theorists, of course, inherited this approach from Hart himself, whose own effort at 'descriptive sociology' was based upon the 'common knowledge' of the legal system attributable to 'any educated man' (Hart (n 2) v, 3). There is, however, this difference: Hart relies on common knowledge merely to point to the *concept* of a rule of recognition, *not* to explain the content of any rule of recognition itself. It is possible to accept (though I express no position on the matter here) that the rule of recognition as a *concept* can be explained by reliance on common knowledge, while denying (as I do) that its *content* in any given legal system can be determined by reliance on the general knowledge of an educated person.

a handful of Supreme Court judgments, and several unsubstantiated generalizations about official practice in the United States.<sup>16</sup>

Furthermore, given that both efforts seek to formulate a rule of recognition for the United States as a whole—which requires an analysis of a large number of officials at all levels of government—it should be seen as an additional failing that both Greenawalt and Himma pay most of their attention to the practice of the Supreme Court. Of course, there is nothing wrong per se with focusing on the practice of a country’s highest court—I do that in this thesis. From that kind of enquiry we should expect to learn a lot about what recognition norms, if any, are being practised *by that court*.<sup>17</sup> And that, in turn, may tell us something about the possibility and content of a rule of recognition for that country as a whole—particularly given the privileged role that Hart and others give to the practice of senior judges. But it remains a serious error to look for recognition norms shared by officials across America in the considerably more limited practice of the Supreme Court of the United States.

My goal for the remainder of this chapter is to demonstrate that the empirical claims made by Greenawalt and Himma are not at all uncontroversial or readily observable—some are debatable, others implausible, and several are flatly inconsistent with the existing evidence we have about official behaviour. In so doing,

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<sup>16</sup> Those generalizations are implicitly claimed to rest either on general knowledge or on facts ascertainable by the casual observation of a citizen.

<sup>17</sup> Importantly, we cannot learn, from a court’s practice, what recognition norms are being practiced by *other officials* in respect of what that court does. To learn about those norms, we must look outside the court at the practices of the other officials concerned.

I seek to show precisely how complicated is the empirical project of identifying the accepted recognition norms of officials.

### III. GREENAWALT: TEXT, DOCTRINE AND PRACTICE

#### A. Practice, in Theory

Greenawalt begins his essay by describing it as an ‘attempt to discern the jurisprudential implications of *widespread practices* involving the Constitution and other standards of law.’<sup>18</sup> That is exactly the point of departure we might expect for an exercise in ascertaining the rule of recognition. Almost immediately, however, a central difficulty arises, for Greenawalt pays no attention to the question of the nature and range of practices that could conceivably ground the rule of recognition. He thus does not tell us which practices form the object of his inquiry, or which of their features are important for our purposes.

For his account to be rigorous, Greenawalt would have to begin by identifying the practices in which we will find the application of the legal system’s ultimate criteria of legal validity—he might select the judgments of the Supreme Court, the responses of the executive to these judgments, the attempts of legislatures to contravene Supreme Court findings, and many more besides. Greenawalt would then have to explain what features of these practices are important for the purposes of the rule of recognition—are we looking for dissents, are we looking for trends in rule application, and so on? And finally, having appropriately demarcated the empirical phenomena which must be studied, Greenawalt should proceed to gather data about these phenomena through appropriate empirical methods.

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<sup>18</sup> Greenawalt, ‘The Rule of Recognition and the Constitution’ (n 3) 621 (emphasis added).

An exercise like this could properly be considered a sociological investigation of the type Hart envisaged for the formulation of the rule of recognition. Unfortunately, no such exercise can be found in Greenawalt's essay. Instead, he focuses throughout on what I will call the 'formal legal landscape'—that is, the doctrinal relationships between legal texts and institutions that are taught in law schools, and which practitioners and academics take for granted when they explain how the legal system works. It is little surprise, then, that the hierarchy of legal sources in Greenawalt's complete formulation of the rule of recognition for the United States, which I reproduce here in full, overlaps strongly with the hierarchy of legal sources described by standard US legal doctrine:

[W]ithin one of our states the ultimate rule of recognition, cast in hierarchical order, is approximately this:

- (1) Whatever is in the federal Constitution, that has not lost its legal force and does not derive its present legal force from enactment by a prescribed constitutional procedure, is law;
- (2) On matters not clear from the text, the prevailing standards of interpretation used by the Supreme Court determine what the Constitution means, and Supreme Court decisions interpreting the Constitution establish precedential law;
- (3) On matters not clear from statutory texts, the prevailing standards of interpretation determine what congressional legislation means, and Supreme Court decisions interpreting that legislation establish precedential law;
- (4) Prevailing standards of interpretation for common-law subjects determine federal law for those, and Supreme Court decisions on such subjects establish precedential law;

- (5) Whatever is in the state constitution (or whatever was adopted in accordance with an accepted constitution-making procedure), that has not lost its legal force and does not derive its present legal force from a procedure prescribed in the existing constitution, is law;
- (6) On matters not clear from the text, the prevailing standards of interpretation used by the highest state court determine what the state constitution means, and decisions of that court interpreting the state constitution establish precedential law;
- (7) On matters not clear from statutory texts, the prevailing standards of interpretation used by the highest state court determine what state legislation means, and decisions of that court interpreting that legislation establish precedential law;
- (8) Prevailing standards of interpretation determine the reach of the common law, and decisions of the highest state court establish common-law precedents;
- (9) Customs meeting criteria of legal bindingness constitute customary law.<sup>19</sup>

Thus, while Greenawalt accepts that it is the practices themselves that matter, his account implies that the formal legal landscape sufficiently reflects the relevant underlying practices so as to justify reference to formal doctrine in place of the practices themselves. In adopting this approach, Greenawalt privileges legal text over legal practice in a way that is utterly at odds with Hart's practice-based theory of law.<sup>20</sup>

To see how this difficulty plays out in Greenawalt's argument, we can begin with his assertion that the federal Constitution 'figures prominently in any account of

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<sup>19</sup> Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 659-660 (footnotes omitted).

<sup>20</sup> It is open to Greenawalt to object that legal theory ought to privilege the view of the lawyer-participant over others. For a powerful argument against this objection, see Joseph Raz, 'The Problem About the Nature of Law', in his *Ethics in the Public Domain* (OUP 1995). See text accompanying fn 139-143 below.

our ultimate standards of law.<sup>21</sup> In itself, that statement seems relatively uncontroversial. He accepts, of course, that the rule of recognition is not susceptible to any formulation as simple as: ‘The federal Constitution just is the rule of recognition.’<sup>22</sup> Instead, he recognizes that any sensible formulation of the rule of recognition is likely to omit some parts of the Constitution while including some aspects of state law, as well as interpretive standards.<sup>23</sup> As a preliminary matter, none of this is objectionable—there is no reason at the outset to doubt that the rule of recognition could have that structure. There is still scope, within the framework Greenawalt has set out, for us to find that only a few provisions of the Constitution are relevant to the rule of recognition, or to find that although much of the Constitution is encompassed by the rule of recognition, the rule of recognition encompasses a great deal more in addition. An analysis of the practices and attitudes of officials would guide us to these findings.

In the absence of this analysis, and despite accepting that the Constitution and the rule of recognition are not identical, Greenawalt proceeds to make the problematic assumption that *most* of the Constitution, with a few exceptions, simply is part of the rule of recognition, and that the most complicated questions of ascertaining the rule of recognition therefore relate to the Constitution’s relationship to its own components and to state law.

This is an impermissible assumption. Without engaging official practice head-on, even in a basic way, we cannot know what the rule of recognition looks like.

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<sup>21</sup> Greenawalt, ‘The Rule of Recognition and the Constitution’ (n 3) 621.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.* 622.

We cannot know, in advance, which parts of the Constitution (if any) form part of that rule, and which extra-constitutional norms the rule might encompass.<sup>24</sup> We cannot know at the outset, as Greenawalt thinks we can, what will be the important or complicated dimensions of the rule of recognition that merit our attention.

As a result of his initial approach, many of Greenawalt's arguments proceed in the form of this inference: 'If there exists a norm not validated by the Constitution or any other legal authority, the norm must be part of the rule of recognition.' But that inference is mistaken, and not only because it simply assumes outright that most of the Constitution just is the rule of recognition. It is also mistaken because the rule of recognition may consist of a great many rules besides 'all or most of the Constitution', and the norm with which Greenawalt is concerned may very well be validated (or invalidated) by one of *those* recognition rules. This would deprive the norm under consideration of candidacy for being part of the master rule of recognition itself.

This impermissible inference is at play in the following claim: 'Since the Constitution is silent on the question of the proper procedure for adoption or amendment of state constitutions, this procedure must form part of the rule of recognition.'<sup>25</sup> The inference is doing the legwork in this claim too: 'Since the Constitution is silent on the question of the force of precedents in cases of constitutional interpretation, this force must form part of the rule of recognition.'<sup>26</sup>

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<sup>24</sup> See, for example, Michael Dorf, 'How the Written Constitution Crowds out the Extraconstitutional Rule of Recognition', in Adler and Himma (n 4).

<sup>25</sup> Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 645-657.

<sup>26</sup> *ibid* 653.

Neither claim is sound. Without an analysis of official practice, Greenawalt gives us no reason to accept ‘all or most of the Constitution’ as the basis for the rule of recognition. For the same reason, we are left in the dark about the potentially many extra-constitutional components of the rule of recognition, which may themselves validate or even invalidate norms which Greenawalt offers for rule-of-recognition status.

To highlight how problematic Greenawalt’s method is here, I want to focus on his discussion of the amending clause (article V) of the US Constitution. I draw particular attention to his arguments about the amending clause because in Chapter 7, I examine in detail the corresponding clause in the South African Constitution. As we shall see, adopting Greenawalt’s assumptions and methodological approach in the South African context would lead to a serious misstatement of that legal system’s ultimate criteria of legal validity.

The supreme criterion in the United States, Greenawalt tells us, ‘is rather easy to identify, given *prevailing assumptions* about the American Constitution.’<sup>27</sup> According to Greenawalt, since norms adopted according to the amending clause are the ultimate norms in the United States, in that they defeat any and all norms inconsistent with them, the amending clause is the supreme criterion. For the remainder of that section, Greenawalt’s discussion turns to borderline issues created by ambiguity or silence in the constitutional text, such as whether the courts or the legislature make the final call about whether the amending clause procedures have

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<sup>27</sup> *ibid* 632 (emphasis added).

been complied with,<sup>28</sup> or teasing out the complex circularity entailed by the fact that the Constitution's original validity seemingly did not turn on consistency with a previous constitution or law, but rather on its consistency with the ratification clause which it itself contained.<sup>29</sup>

It is true, of course, as a matter of *constitutional text* (and, more generally, the formal legal landscape), that norms adopted according to article V take precedence over all others. Thus, the amending clause is indeed the supreme criterion *from the perspective* of the US Constitution. But that does not explain, on the Hartian account, why the amending clause is the supreme criterion of the legal system of the United States. As far as the rule of recognition is concerned, the amending clause is only the supreme criterion if it is treated as such by officials. By honing in immediately and exclusively on the text of the amending clause, Greenawalt's analysis leaves us none the wiser about the actual practices of US officials, and what norms *they* treat as ultimate.

For Greenawalt to be correct that the amending clause is indeed the supreme criterion for the United States, he would have to demonstrate that official practice treats the amending clause as the supreme criterion. I do not here attempt, through an examination of official practice in the United States, to pronounce on the truth or falsity of Greenawalt's assumption that officials take their cue on the supreme criterion from the Constitution. (In Chapter 7, I address this assumption in South Africa through an examination of the behaviours and attitudes of the Justices of the

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<sup>28</sup> *ibid* 634-637.

<sup>29</sup> *ibid* 638-640.

Constitutional Court.) For now, we need only notice that, in beginning his analysis by simply assuming that the US rule of recognition maps onto the complex scheme of legal validity set out in the Constitution, Greenawalt departs from Hart's central insight—that the Constitution is only part of that rule, or derivable from that rule, to the extent that official practice treats it as such. If officials in the United States regularly disregarded the Constitution in favour of religious texts, or operated a doctrine of parliamentary sovereignty in which they accepted legislation as final and not subject to any constitutional review, then it would not be right to assume a strong overlap between the Constitution's scheme of validity and the rule of recognition. For Hart, the Constitution's claims about legal validity have no independent relevance (except perhaps as focal points for convergent official behaviour)—it is official practices around criteria of legal validity that matter. And those practices may have more or less to do with the written Constitution.

This point is echoed by Joseph Raz:

Some theorists who broadly follow HLA Hart's theory of law think that the constitution of a country is its rule of recognition . . . [T]here are plenty of independent reasons which establish that constitutions *are not* the rules of recognition of their countries. No constitution can be . . . . For example, most constitutions may be amended or even repealed or replaced . . . by enactment. The rule of recognition cannot be repealed or amended by an enactment. It can change only as the practice that it is changes.<sup>30</sup>

Raz thus confirms that when it comes to the relationship between constitutions and the rule of recognition, it is the practice, not the text, which takes priority. We

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<sup>30</sup> Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in his *Between Authority and Interpretation* (OUP 2009) 333 (emphasis added).

cannot infer, from the mere fact that a community *has* a constitution, that most of its rule of recognition just *is* the constitution, and so restrict ourselves to arguing about details on the borderline. The relationship of a constitution to a rule of recognition is a deeply complex matter, even in places like the United States.<sup>31</sup> Hart himself specifically wanted to hold open the possibility that what looks like a legal system to an outsider (because it has all the trappings of a legal system like our own, such as a constitution, or because it bears features we have hitherto considered essential to law) is not the real, lived legal system of the community in question.

Of course, it would be surprising to discover that the Constitution does not, after all, play some important role in identifying valid law in the United States. But that should not obscure three important points. First, the reasons why the Constitution has that role are due to complex and contingent empirical facts about the history, politics and institutions of the United States—they could easily have been different and are different in other countries. Secondly, to give constitutions a more essential status than this would, at least in Hart's view, be a mistake—it both adds improperly to Hart's leaner necessary conditions for the existence of a legal system, and it undermines the context-sensitive potential of that broad framework for investigating local practices. Finally, the mere fact that the Constitution itself is important to the rule of recognition in the United States tells us nothing about which specific parts of it feature in that rule.

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<sup>31</sup> A selection of complications in the relationship between the rule of recognition and the Constitution are dealt with in Larry Alexander and Frederick Schauer, 'Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance', Richard Fallon, 'Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition', and Michael Dorf, 'How the Written Constitution Crowds out the Extraconstitutional Rule of Recognition', all in Adler and Himma (n 4).

## **B. Absence of Attitudes**

In the preceding section I argued that Greenawalt's initial mistake is his failure to identify and analyze a set of practices that might be relevant to the existence of the rule of recognition. That mistake leads to another—without properly identifying and explaining the practices which form the object of his inquiry, Greenawalt is unable to tell us anything about the internal view that officials adopt in respect of those practices. An investigation of official attitudes would enable Greenawalt to explain whether officials really do manifest their acceptance (in Hart's terms) of the ultimate rules they apply, which is crucial to the existence of the rule of recognition.

Instead of engaging in this inquiry, Greenawalt implicitly assumes that the attitudes of officials, in respect of the sparse practice on which he draws, simply are what Hart's account needs them to be. That is, he assumes that officials (thus far unidentified) adopt a critical reflective attitude towards their rule-application activities in terms of which they accept as binding, and consciously coordinate their behaviour around, the incredibly complex set of recognition rules Greenawalt sets out.

On Hart's own account, this assumption is impermissible. That Hart drew our attention to the 'internal view' of officials is one of the features of his work widely regarded as having revolutionized modern legal positivism. As Hart famously tells us, compliance with a gunman's orders does not indicate an acceptance of his authority, just as Englishmen who regularly go to the cinema on a Tuesday do not necessarily do so as a rule. Rules are constituted not only by an externally observable regularity of behaviour, but also by this internal, normative attitude towards that

behaviour. This distinction between consistency of action with the law's demands, and acceptance of the bindingness of those demands, is central to Hart's account,<sup>32</sup> not least of all because it enables contemporary positivists to explain the normativity of law while claiming that law is exclusively source-based.<sup>33</sup>

Joseph Raz has developed this dimension of Hart's work by demonstrating that we only treat a law as authoritative when we take its existence alone as a reason for action.<sup>34</sup> If we make a fresh judgment ourselves about what to do in each case, considering on balance all the first-order reasons (political, social, moral, prudential) that the legal directive was meant to have taken into account and pre-empted, then the law does not function as an authority for us, even if the course of action we choose happens to coincide with the law's demands. For law to function as an authority, the fact of a norm's being *law* must make a difference in our practical reasoning.<sup>35</sup>

Thus we cannot infer from an action's mere consistency with the law that the action is done out of respect for the law's authority. Conversely, we cannot infer from an action's inconsistency with the law that the action is done out of disrespect for the law's authority—to the extent that we have legal obligations at all, they are

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<sup>32</sup> Indeed, without the distinction, he could not differentiate between the role that citizens play in his theory (their actions need only be consistent with the law) and the role of legal officials, who must additionally view the law as an authoritative source of obligations.

<sup>33</sup> Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) 170-177.

<sup>34</sup> Raz, *Practical Reason and Norms* (n 33); Joseph Raz, *The Morality of Freedom* (OUP 1988), chs 2 and 3; Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' in his *Between Authority and Interpretation* (n 30). For Hart's earlier work on legal reasons, see HLA Hart, 'Commands and Authoritative Legal Reasons', in his *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 243ff. See further Leslie Green, 'Law and Obligations' in Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 514-517.

<sup>35</sup> This is what has come to be called the 'practical difference thesis', whose main proponents are Joseph Raz and Scott Shapiro. For a helpful overview of the thesis, see Andrei Marmor, 'Exclusive Legal Positivism', in Coleman and Shapiro (n 34).

prima facie, and can be outweighed in the overall balance of reasons.<sup>36</sup> In such a case the law still operates for us as a reason for action, even if there are stronger reasons in favour of disobeying the law on this occasion.<sup>37</sup>

This exact competition of reasons for action is borne out by social-scientific studies of official behaviour. We know about environmental inspectors who do not enforce the law when it is at odds with the polluter's moral blameworthiness or the economic necessities of business;<sup>38</sup> about housing officials who unlawfully favour claimants that they perceive to be more deserving;<sup>39</sup> about regulatory officials who promote effectiveness and fairness at the expense of strict rule-application;<sup>40</sup> about lobster-poaching officials who approach the complicated and unmanageable web of laws they are meant to enforce by favouring some rules over others.<sup>41</sup> There are studies of police who depart from the law to maintain their own conception of public order influenced by organizational interests and efficiency;<sup>42</sup> of judges who exercise discretion whether to apply a rule in any given case;<sup>43</sup> and of officials who ignore entire categories of judicial rulings on matters of general principle.<sup>44</sup>

These studies demonstrate that the acceptance of rules is contingent and varies in strength from one set of officials to another, depending heavily on the interaction

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<sup>36</sup> Joseph Raz, 'The Obligation to Obey the Law' in his *The Authority of Law* (2nd edn, OUP 2009).

<sup>37</sup> Frederick Schauer, 'Is Legality Political?' (2011) 53 *William & Mary Law Review* 481, 488-489.

<sup>38</sup> Genevra Richardson et al, *Policing Pollution* (Clarendon Press 1982).

<sup>39</sup> Ian Loveland, *Housing Homeless Persons* (Clarendon Press 1995).

<sup>40</sup> Robert Kagan, *Regulatory Justice: Implementing a Wage-Price Freeze* (Russell Sage 1978).

<sup>41</sup> John McMullan and David Perrier, 'Lobster Poaching and the Ironies of Law Enforcement' (2002) 36(4) *Law & Society Review* 679.

<sup>42</sup> Jerome Skolnick, *Justice Without Trial* (Wiley 1966).

<sup>43</sup> David Robertson, *Judicial Discretion in the House of Lords* (OUP 1998).

<sup>44</sup> Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004).

of the many competing norms in an official's social sphere.<sup>45</sup> The consequence of this is that officials will not have a common attitude to law: while they may each share a general commitment to the legal system or a belief in its legitimacy, the law is only one factor in the complex web of conventions and understandings that impact whether an official will apply, circumvent or defy a given law or category of laws.<sup>46</sup>

What this means for our present purposes is that, in the absence of evidence, Greenawalt is wrong to suggest that the very specific content of the rule of recognition he ultimately proposes really is a social rule in Hart's sense. Without the accompanying critical reflective attitude of the relevant officials, the rule of recognition cannot exist at all.

Attitudes are important in another way too. They are central not only for determining the existence of the rule of recognition, but they are also crucial in the determination of its content. As I explained in Chapter 3, a given practice may be compatible with any one of a number of reasons for acting, or be captured by the semantic content of any number of rule formulations. In our context, this means that a given official act may be compatible with more than one rule which he may or may not take to be authoritative. (Indeed, it may be compatible with there being no applicable legal reasons at all, or compatible with a variety of non-legal reasons.) Understanding the attitudes of the officials in question helps us to determine which of a number of reasons or rules they are following.

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<sup>45</sup> Denis Galligan, *Law in Modern Society* (OUP 2007) 62-63, 95-97; 134-135, ch 16; Lawrence Lessig, 'The Regulation of Social Meaning', (1995) 62 *University of Chicago Law Review* 943; Cass Sunstein, 'Social Norms and Social Roles' (1996) 96 *Columbia Law Review* 903.

<sup>46</sup> Galligan, *Law in Modern Society* (n 45) 95, 134-135, and ch 16.

To see how this is so, let us suppose we have three judges—the Constitutionalist Judge, the Deferent Judge, and the Utilitarian Judge. They may decide a sequence of 100 cases in precisely the same manner—for simplicity’s sake, let us say they overrule common law when it is inconsistent with legislation. This is their convergent behaviour. But their convergent behaviour in these cases cannot tell us, by itself, whether there is a rule of recognition enshrining the superiority of legislation over common law. We cannot know this because each judge’s action is also consistent with a different reason for acting. In these 100 cases, the Constitutionalist judge has applied legislation in favour of the common law because he believes that is what the Constitution demands. The Deferent Judge has favoured legislation because he believes in parliamentary sovereignty. And the Utilitarian Judge has favoured legislation because he believes that each of the pieces of legislation he has thus far been called on to adjudicate promotes the common good better than the common law.

By not investigating their attitudes—by divorcing action from reasons for action—we might infer from these 100 cases that there is a rule of recognition according to which legislation is superior to common law. But now imagine that in the 101<sup>st</sup> case to come before our court, the judges part ways. The Constitutionalist Judge applies common law in favour of legislation because he believes in this instance that the legislation violates constitutional rights. The Utilitarian Judge applies the common law because he thinks on this occasion it does better to promote the common good than the legislation. And the Deferent Judge, of course, applies legislation instead of the common law, as he always will in cases of conflict.

We now do not have a rule of recognition according to which legislation is superior to common law; we never did.<sup>47</sup> Until now, we simply did not have the kind of information that would reveal the extent of judicial disagreement about the truth conditions for a proposition of law.<sup>48</sup> If, however, we had investigated the judges' attitudes and reasons for acting, we would have known there was no rule of recognition from the start (or at least that there was no rule that legislation is superior to common law).

Where can a judge's reasons for action be found? It is conceivable, of course, that the judges may, in their judgments, expressly state or clearly imply the rules of recognition which they are following. If they do, this makes the investigator's task a little easier. However, if the Hart/Dworkin debate tells us one thing, it is that it is not always easy to say precisely, from the text of a judgment alone, what kind of disagreements judges are having, and for what reasons they are having them.<sup>49</sup> The only way we can really know about their normative attitudes is to ask them. As Schauer explains:

Hart has helped us to understand what the internal point of view is, but the question of how many judges within a given system actually have the internal point of view in the Hartian sense is not a question that can be

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<sup>47</sup> Even if the Constitutionalist Judge took it is a rule that legislation is superior to the common law *except* when it is inconsistent with the Constitution, the formulation of his rule of recognition would look very different to the rule of recognition employed by the Deferent Judge. In any case, neither of their rules can be squared with the Utilitarian Judge.

<sup>48</sup> As Dworkin tells us, this is what makes hard cases such an important site of inquiry. See Ronald Dworkin, 'Hard Cases' in his *Taking Rights Seriously* (n 3).

<sup>49</sup> For example, compare the competing interpretations of *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889) offered by Hart, Dworkin and Raz: Ronald Dworkin, *Law's Empire* (Hart 1986) 15-20; Hart (n 2) 262; Joseph Raz, 'Legal Principles and the Limits of the Law', (1972) 81 *Yale Law Journal* 823, 836ff.

answered with philosophical—as opposed to empirical—tools.<sup>50</sup>

We thus cannot conduct a proper inquiry into the rule of recognition for a particular community without also conducting an empirical investigation of the reasons officials offer for their actions.

In the result, Greenawalt’s account lacks an entire category of empirically observable information which is essential to any credible attempt at formulating a rule of recognition. Without knowing if officials accept the rules, or what rules they accept, or why they accept them, it is pointless to speculate about the existence and content of a rule of recognition.

### **C. A Note on Perspective**

Before turning to Himma’s work, I want to address one final error which Greenawalt makes on his way to formulating his rule of recognition for the United States. It concerns the perspective from which the rule of recognition is meant to be framed.

It is undoubtedly true that the various officials within a legal system, particularly those who occupy subordinate positions in the hierarchy, employ different standards in deciding what rules count as ultimate from their point of view.<sup>51</sup> A lower court judge does not directly employ the rule of recognition employed by a country’s highest court when deciding what rules he must apply—for the lower court judge, the ultimate standard is simply what the highest court has said.

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<sup>50</sup> Frederick Schauer, ‘Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour’ (2000) 68 *University of Cincinnati Law Review* 615, 635.

<sup>51</sup> Cf Greenawalt’s discussion of the differing views of officials. Greenawalt, ‘The Rule of Recognition and the Constitution’ (n 3) 634-637.

However, this is not Hart's question. Hart is not interested in determining what standard a given official in the legal system treats as ultimate *for him*, not least of all because these varied standards are incapable of endowing the legal system with the unity Hart thinks is central to the identification of legal phenomena. Hart is interested instead in determining the rule of recognition *tout court*—not a rule of recognition from someone's perspective, but a rule of recognition that truly is an ultimate master rule, in the sense that it validates all of the intermediate rules of recognition which the various officials in the system take to be binding on their actions. Of course the lower court judge does not directly employ this master rule in his own decisions—but his treatment of the highest court's decisions as authoritative is valid, under Hart's account, if and only if the rule of recognition accords the highest court some kind of primacy in the scheme of legal validity. It is true that, for a given official, there may be a grey area between making a completely independent judgment and taking a higher rule as completely authoritative, such as when a lower court overturns binding precedent because he believes it is egregiously mistaken.<sup>52</sup> Again, however, the Hartian scheme will countenance this grey area only to the extent that the master rule permits it.

Greenawalt's mistake, then, is that his final formulation of the rule of recognition for the United States is determined from the perspective of one of the American states.<sup>53</sup> But as I have argued, if our object of inquiry is the US legal system, and we are attempting to find the rule of recognition which provides unity to

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<sup>52</sup> *ibid* 637.

<sup>53</sup> *ibid* 659-660.

that system, it makes no sense to describe the rule as seen from below by, say, the highest court in Arizona.<sup>54</sup> The rule must be stated in such a way that it explains validity across the entire system.

#### **D. The Extent of Required Research**

In the result, Greenawalt's analysis is primarily a piece of constitutional exegesis—he tries to fill in silences and resolve conflicts in the Constitution itself through a process of logic, and through reference to the constitutional text and relevant judicial decisions. In doing so, Greenawalt seeks and largely achieves a textually or doctrinally coherent account of the hierarchical relationships between different sources of law under the United States Constitution. I do not mean by what I write here to undermine the importance of that accomplishment. But while he lucidly explains and expands upon the scheme of legal validity as envisaged by the federal Constitution itself, he does not directly engage the scheme of legal validity that is discernible from the practices and attitudes of legal officials in the United States.

If the application of Hart's theory to a particular legal system is to be rigorous, it must begin in the right place and not assume that which remains to be proven. I am not suggesting that resources should be devoted to proving the simple claim that the Constitution is an important feature of the legal system in the United States—that much is undoubtedly common knowledge. I am suggesting, however, that the further, more detailed claims Greenawalt makes about the Constitution's relationship to the rule of recognition require substantially more evidence than he offers. Indeed, when

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<sup>54</sup> For that approach to make sense, we must instead adopt as our object of inquiry the Arizona legal system, and attempt to find a rule of recognition which unifies *that* system.

we are investigating something as complicated as the group dynamics of judges and other legal officials, it is difficult to know, in advance of more detailed empirical observation, how much of our ‘common knowledge’ about their behaviour really holds true—in which case, it is better to be cautious than to be brave, for otherwise we risk overlooking many of the more important and nuanced questions that are worth asking.

Greenawalt acknowledges that he does not conduct the ‘extensive historical legal research that would be required to make fully considered judgments about every troublesome question.’<sup>55</sup> In this vein, he might object that, as practitioners and students of the law, we surely have enough factual evidence about at least the basic features of the American legal system to make relatively sound claims about the content of the rule of recognition. However, my point is that even the most fundamental questions we can ask about the rule of recognition require this extensive research. Indeed, as we shall see in the next section, much of what Greenawalt, and more explicitly Himma, take to be the most fundamental truths of official behaviour in the United States legal system are undermined even by the evidence readily available to us. Even if knowing the basics is enough, I want to show that we do not even know that much.

If I am right about the level of empirical analysis required even to make simple claims about the rule of recognition, this may well diminish the utility of the rule of recognition as a conceptual tool, or prevent it from ever achieving a concrete

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<sup>55</sup> Greenawalt, ‘The Rule of Recognition and the Constitution’ (n 3) 622.

formulation in a given legal community. If that is the case, so be it. I am simply trying to draw out the implications of Hart's own ambitions for his theory.

#### IV. HIMMA ON THE AUTHORITY OF THE SUPREME COURT

Himma's approach to formulating the rule of recognition improves on Greenawalt's in some important ways.<sup>56</sup> First, the law-identifying practices of officials on which Himma focuses extend beyond the practice of the Supreme Court to embrace also the practice of executive officials who elect or decline to enforce judicial decisions.

Secondly, Himma expressly sets out the features which these practices must exhibit if they are to create rules of recognition: (i) there must be convergent behaviour in respect of how officials identify the law; (ii) these officials must converge on this behaviour as a rule, i.e. they must have a critical reflective attitude towards the behaviour; and (iii) significant social pressure must be brought to bear on those who deviate from the convergent behaviour.<sup>57</sup>

Most importantly, Himma rightly explains that the existence of each of these features is a question of empirical fact:

First, we can empirically ascertain convergence in behaviour. Second, we can empirically ascertain that conformity to the rule is encouraged and that deviations are criticized. Third, we can empirically ascertain that the requisite social pressure is brought to bear on participants in the group to conform to the rule.

To identify the content of the validity criteria in any particular society, one must *employ roughly the same sorts of empirical tools that are commonly utilized by*

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<sup>56</sup> Himma's account no doubt benefits from the increasing sophistication with which Hart's position has been articulated since the posthumous publication of Hart's postscript to *The Concept of Law*, as well as from recent interest in methodological issues in legal theory.

<sup>57</sup> Himma, 'US Constitution' (n 4) 97-98.

*sociologists to study the behaviour of officials. Thus ... a correct description of the validity criteria in a legal system S must express those properties that, as a matter of observable empirical fact, officials collectively recognize as giving rise to legally valid norms they are obligated to enforce.*<sup>58</sup>

Given that Himma emphasizes the empirical, and indeed sociological, investigation required to formulate the rule of recognition, it is curious that his paper contains no trace of empirical study. Indeed, Himma relies on precisely the same methodological assumption evident in Greenawalt's account: that the formal legal landscape adequately captures the reality of official practice, and thus obviates the need for any detailed empirical work.

Here is a particularly clear example of the assumption at work in Himma's account:

Indeed, *lawyers are trained to regard the holdings of the court with final authority as establishing the content of the law. Every casebook in constitutional law in the United States contains excerpts from controversial Supreme Court cases that are widely considered mistaken. . . . It is taken for granted among legal practitioners, students, and officials of the legal system that, for better or worse, the Court's decision in Roe established the content of the 'law' . . . on abortion in the United States. U.S. officials, then, are practicing a recognition norm that requires them to treat the holdings of the court with final authority as establishing the content of the law on certain issues involving the Constitution.*<sup>59</sup>

In this passage, Himma sets out features of the formal legal landscape—what lawyers assume, what students are taught, what books say—and concludes that these provide relatively detailed empirical evidence of the recognition norms that US officials are

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<sup>58</sup> *ibid* 99 (emphasis added).

<sup>59</sup> *ibid* 104-105 (emphasis added).

actually practising. On the basis of this mode of reasoning, Himma offers us a series of factual claims which he repeatedly describes as ‘plausible’.

In the remainder of this chapter I seek to demonstrate that Himma’s central empirical claims are dubious. For the most part, I do not try to show that Himma’s empirical claims are false by proving their opposite. Instead, my ultimate point is that proving Himma’s claims or their converse takes more empirical research on the United States than either he or I have done. It would substantially undermine my argument if I were to engage in precisely the same kind of speculation he does in order to disprove his factual claims. Instead, I want only to demonstrate, through questions or contrary evidence where it exists, that Himma’s formulation of the rule of recognition does not have the veracity it claims. That process will be instructive about the possibility and pitfalls of investigating the recognition norms at play in the South African Constitutional Court.

#### **A. The Supreme Court’s Almost Absolute Authority**

Himma’s central claim is that officials in the United States practise a recognition norm that confers on the Supreme Court almost absolute authority to establish the content of the law through its decisions about legal validity, even when officials think those decisions are objectively mistaken as interpretations of the Constitution.<sup>60</sup> It is

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<sup>60</sup> *ibid* 109-110. Himma follows Dworkin in defining a court’s final authority over a substantive legal issue if there is no official body with the authority to review or override the court’s decision. See Dworkin, *Taking Rights Seriously* (n 3) 72. Himma uses authority here to mean the creation of presumptive obligations on other officials to accept its decision as law. For the sake of simplicity, I stick to Himma’s use of the terms ‘authority’ and ‘discretion’, even though Matthew Kramer is correct to insist that it is preferable to understand the Court as exercising a Hohfeldian ‘power’. As Kramer points out, while the court has the legal *ability* to bind officials with its mistakes, it is not at *liberty* to do so (since, in Himma’s own terms, the court is under a *duty* not to make such mistakes.) Since it is not at liberty to do this, it should not be thought of as having the authority or discretion to bind other

not *what* the Court says that counts for legal validity, but rather the fact that the Court *has said it*.

Recall that according to Hart, a recognition rule of the form ‘An official ought to recognize norm N as a law if it meets criterion C’ exists only if we have at least the following evidence:

- (1) Officials can be observed conforming to a regular pattern of behaviour in which they recognize as law those norms which conform to criterion C; and
- (2) Officials expect one another, as a common public standard of behaviour, to recognize as law those norms which conform to criterion C. This expectation is realized most prominently in criticism of officials who do not recognize as law those norms which conform to criterion C.

Following Hart, Himma’s formulation of the recognition norm concerning the absolute nature of the Supreme Court’s authority involves the following empirical claims:

- (1) Officials can be observed conforming to a regular pattern of behaviour in which they decline to enforce laws which the Court has declared invalid. Importantly, they do this even when they think the Court is mistaken in its declaration of invalidity.
- (2) They expect one another to decline to enforce invalidated laws as a common public standard of official behaviour, and criticize officials who do enforce invalidated laws.<sup>61</sup>

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officials with its mistakes, but rather as having the power to do so. See Kramer, *Where Law and Morality Meet* (n 7) 126-127.

<sup>61</sup> Himma, ‘US Constitution’ (n 4) 102-105. Himma also makes some complicated arguments to do with official *enforcement* of laws which the Court has declared *valid*. For simplicity’ sake, I deal with those arguments at the end of this section.

For Himma, these claims, if true, establish the existence of a recognition norm to the effect that officials are under a duty to treat the Supreme Court's decisions as valid law, regardless of their content.

In the remainder of this section, I examine the evidence which Himma offers for both of these claims. I demonstrate the variety of ways in which his evidence is insufficient to support either his claim about what officials do or his claim about what officials think, and explain how that failure is sourced in a refusal to take seriously the need for empirical research.

i. Official practice and the myth of the rule of law

Himma does not adequately establish, as a factual matter, that there is the required regularity of official behaviour that Hart tells us we need for a recognition norm. That is, Himma does not establish, as a factual matter, that officials regularly comply with Supreme Court decisions that they think are mistaken.

In highly regulated, high income countries like the United States we take official obedience to the law as a truism, because of its centrality to the prized value of the rule of law. Indeed, Himma's read on the facts of official practice in the United States is that situations in which officials deny the Court's authority are 'too few and far between to justify doubt that the Court has final authority in deciding the constitutionality of a law.'<sup>62</sup> Greenawalt has a similar confidence in official compliance with the law:

In developed legal systems that we know, other officials generally accept judicial determinations about the law as binding, and judges of inferior courts accept

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<sup>62</sup> Himma, 'US Constitution' (n 4) 105.

determinations of the highest court. Nonjudicial officials and lower court judges accept these determinations even if they think them strikingly mistaken.<sup>63</sup>

Greenawalt continues:

With infrequent exceptions, lesser executive officials follow what their bosses tell them about the law. Personnel delivering mail, police on the beat, sanitation workers, firefighters, social workers, and teachers . . . fulfill their duties in line with what their supervisors tell them is legally permitted and legally required.<sup>64</sup>

The utopian orderliness that Greenawalt and Himma project onto the modern state is breathtaking. They offer, as a purportedly accurate description of reality, a bureaucracy of angels who not only treat the law (as determined by their superiors) as having the last word on the question of what they *ought* to do, but who do *in fact comply*, all or most of the time, with what the law requires of them. Even without empirical study, anyone who is familiar with the calamitous state of US politics over the last several years should be hesitant to assert, without qualification, that nonjudicial officials overwhelmingly accept the authority of the law, and more specifically, the authority of the Supreme Court.

The truth is that much of the data we have points in the opposite direction—it tells us that officials often do precisely what the law prohibits, and that they often do not do what the law commands. Indeed, in a series of recent articles, Frederick Schauer has drawn together an impressive range of examples demonstrating, contrary

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<sup>63</sup> *ibid* 147. See also 170: ‘Virtually all officials are trying to contribute to a useful, legitimate government under the overarching umbrella of the federal constitution.’

<sup>64</sup> Greenawalt, ‘How to Understand’ (n 6) 153.

to our ‘self-congratulatory rule of law rhetoric’,<sup>65</sup> that official non-compliance with law, and sometimes outright defiance of it, are pervasive features of American government.

Schauer’s empirical analysis covers officials at all levels. It includes Presidents like George W. Bush, who violated the Foreign Intelligence Surveillance Act of 1978 by authorizing the warrantless surveillance of American citizens, and like Barack Obama (and almost every other President before him) in his disregard for the War Powers Resolution.<sup>66</sup> It includes the State legislators of Massachusetts who refused to vote on an anti-same-sex marriage amendment, in violation of the Massachusetts state constitution.<sup>67</sup> It encompasses mayors, like those of San Francisco and New Paltz who married same-sex couples in violation of state law,<sup>68</sup> or the mayor of New Orleans who, in the aftermath of Hurricane Katrina, urged President Bush to disregard the law and, in the absence of a formal request from the Governor of Louisiana, send the army to assist.<sup>69</sup> Schauer also draws our attention to the extensive practice of ‘nonacquiescence’ by administrative agencies like the Internal Revenue Service, the Department of Health and Human Services, and the

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<sup>65</sup> Fredrick Schauer, ‘The Political Risks (if any) of Breaking the Law’ (2012) 4(1) *Journal of Legal Analysis* 83, 98.

<sup>66</sup> Frederick Schauer, ‘Ambivalence about the Law’ (2009) 49 *Arizona Law Review* 11, 11-12; Schauer, ‘Is Legality Political?’ (n 37) 485 fn 15; Schauer, ‘Political Risks’ (n 70) 90.

<sup>67</sup> Schauer, ‘Ambivalence’ (n 66) 13, citing *Doyle v Secretary of the Commonwealth*, 858 N.E.2d 1090, 1092-94 (Mass. 2006).

<sup>68</sup> Schauer, ‘Ambivalence’ (n 66) 13, citing Jennifer Medina, ‘Charges Dropped Against Mayor Who Performed Gay Weddings’, *New York Times* (New York, 13 July 2005) at B5, and Dean Murphy, ‘California Supreme Court Considers Gay Marriage Licenses’ *New York Times* (New York, 26 May 2004) at A14.

<sup>69</sup> Frederick Schauer, ‘When and How (If At All) Does Law Constrain Official Action?’ (2010) 44 *Georgia Law Review* 769, 771.

Social Security Administration, who refuse to abide by rulings of the federal courts of appeal (except in respect of the immediate case).<sup>70</sup>

To bolster Schauer's analysis, I want to make reference here to the growing practice of 'nullification' in US politics, according to which state legislatures enact laws which declare a federal law unconstitutional, and which purport to deny the law's effect within the state.<sup>71</sup> An especially vigorous example is the recent bill proposed by the Missouri legislature, which would have made it a criminal offence for federal agents to enforce federal gun laws in the state.<sup>72</sup> The bill was supported by an overwhelming majority in both the Missouri senate and the house, but fell short of the votes needed to override a promised veto from the governor.<sup>73</sup> At least 6 other states have enacted legislation (or tried to) which purports to nullify federal gun laws.<sup>74</sup>

Nullification is even more widespread in respect of other contentious political issues. More than 20 states have considered bills that would nullify all or part of the Affordable Care Act (at least partly because they think the Supreme Court was wrong to declare most of its contested parts constitutionally valid, and at least partly because

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<sup>70</sup> See Schauer, 'Does Law Constrain' (n 69) 774, and the many authorities he cites in fn 28.

<sup>71</sup> See Robert Claiborne Jr, 'Why Virginia's Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification' (2012) 46 *University of Richmond Law Review* 917, 924-925, and the authorities cited there.

<sup>72</sup> John Schwartz, 'Gun Bill in Missouri Would Test Limits in Nullifying US Law' *New York Times* (New York, 28 August 2013) <<http://www.nytimes.com/2013/08/29/us/missouri-gun-measure-pushes-nullification-boundary.html?pagewanted=all>> accessed 30 September 2013.

<sup>73</sup> Leslie Bentz and George Howell, 'Missouri lawmakers fail to override governor's gun bill veto' *CNN* (12 September 2013) <<http://www.cnn.com/2013/09/11/us/missouri-gun-laws-challenge/index.html>> accessed 30 September 2013.

<sup>74</sup> Robert Levy, 'The Limits of Nullification' *New York Times* (New York, 3 September 2013) <<http://www.nytimes.com/2013/09/04/opinion/the-limits-of-nullification.html>> accessed 30 September 2013.

they do not think that Congress had the constitutional authority to pass the legislation in the first place).<sup>75</sup> Similarly, over 20 states allow the possession of marijuana for medical use, while it remains an offence under federal law.<sup>76</sup> (Incidentally, federal laws criminalizing the possession of marijuana for medical purposes were upheld by the Supreme Court in 2005.)<sup>77</sup> Interestingly, the Department of Justice responded to these marijuana measures in 2013 by stating that it is ‘deferring its right to challenge their legalization laws at this time.’<sup>78</sup> This situation in particular suggests that there is an ongoing contest between officials of various kinds and at various levels over who has ultimate authority to determine legal validity.<sup>79</sup>

Of course, nothing I have said so far deals with the Supreme Court’s authority specifically. The point of the examples I have set out is that we should be sceptical of Himma’s and Greenawalt’s implicit assumptions that (i) American officials display an unproblematic deference to the law, and (ii) that American officials accept the delineation of legal authority denoted by the formal legal landscape. What the

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<sup>75</sup> *ibid*; Matthew Farley, ‘Challenging Supremacy: Virginia’s Response to the Patient Protection and Affordable Care Act’ (2010) 45 *University of Richmond Law Review* 37, 39-40. See generally Elizabeth Weeks Leonard, ‘The Rhetoric Hits the Road: State Resistance to the Affordable Care Act Implementation’ (2012) 46 *University of Richmond Law Review* 781, and Elizabeth Weeks Leonard, ‘Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform’ (2010) 39 *Hofstra Law Review* 111. The Supreme Court’s decision is reported as *National Federation of Independent Business v Sebelius* 132 SCt 2566 (2012).

<sup>76</sup> National Conference of State Legislatures, ‘State Medical Marijuana Laws’ (September 2013) <<http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx>> accessed 30 September 2013.

<sup>77</sup> *Gonzales v Raich* 545 US 1, 9 (2005).

<sup>78</sup> United States Department of Justice, ‘Justice Department Announces Update to Marijuana Enforcement Policy’ (29 August 2013) <<http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>> accessed 30 September 2013.

<sup>79</sup> See generally Vijay Sekhon, ‘Highly Uncertain Times: An Analysis of the Executive Branch’s Decision To Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws’ (2010) 37(3) *Hastings Constitutional Law Quarterly* 553; Robert Mikos, ‘On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime’ (2009) 62 *Vanderbilt Law Review* 1421.

examples suggest instead is that officials have a complex relationship with the laws they are meant to respect and enforce, and that we need substantially more data before we can draw conclusions about official views on the authority of laws and legal institutions.

In fact, there is a good body of existing evidence suggesting that officials exhibit precisely this complex relationship with decisions of the Supreme Court specifically. Executive denial of the Court's authority extends back to at least Abraham Lincoln, who rejected the Court's infamous decision in *Dred Scott*.<sup>80</sup> It includes also Franklin Roosevelt, who encouraged Congress to ignore the Court's invalidation of New Deal legislation,<sup>81</sup> and Attorney General Edwin Meese, who argued that states could disregard the Supreme Court's decisions regarding school prayer and abortion.<sup>82</sup>

There is a particularly rich history of nullification in relation to Supreme Court holdings, which involves legislatures enacting laws identical to ones which the Court has already struck down.<sup>83</sup> Two years after the Court's decision in *Miranda v Arizona*<sup>84</sup> (holding that a defendant's responses to interrogation would be admissible at trial only if the defendant was informed of certain rights prior to questioning), Congress passed a statute in direct violation of it.<sup>85</sup> In the immediate wake of the

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<sup>80</sup> *Dred Scott v Sandford* 60 US 393 (1857).

<sup>81</sup> Schauer, 'Ambivalence' (n 66) 11, citing Kathleen Sullivan and Gerald Gunther, *Constitutional Law* (15th edn, Foundation Press 2004) 23-24, and Schauer, 'Does Law Constrain' (n 69) 773-774.

<sup>82</sup> Schauer, 'Ambivalence' (n 66) 19. For further acts of Presidential disregard for the Supreme Court, see Schauer, 'Does Law Constrain' (n 69) 773-774.

<sup>83</sup> The examples in this paragraph are taken from Schauer, 'Does Law Constrain' (n 69) 786-789.

<sup>84</sup> 384 US 436 (1966).

<sup>85</sup> It was ultimately struck down in *Dickerson v United States* 530 US 428 (2000).

Court's ruling in *Texas v Johnson*<sup>86</sup> (which invalidated prohibitions on burning the American flag), Congress passed what was effectively the same prohibition.<sup>87</sup> Congress also passed a ban on non-obscene telephonic pornographic conversations in blatant violation of the Supreme Court's first amendment jurisprudence, and which was in fact later struck down in *Sable Communications*.<sup>88</sup>

To this list we can add the on-going assault by states against *Roe v Wade*,<sup>89</sup> which is indicative of the increasingly radical divide in the political culture of the United States. On the subject of *Roe*, Himma offers the following remarks:

Despite the unending controversy about *Roe*, officials treat it as law. Every federal and state enforcement agency enforces *Roe* with whatever coercive mechanisms it uses to enforce any other law. Officials might sometimes attempt to enact rules that restrict abortion in some way, but they unfailingly obey the Supreme Court if it strikes down those rules as unconstitutional.<sup>90</sup>

Greenawalt similarly presents *Roe* as a bastion of official compliance with laws they do not like.<sup>91</sup>

However, the suggestion that officials overwhelmingly defer to *Roe* as law is at odds with the evidence. On 26 March 2013 the Governor of North Dakota signed a law banning abortions from as early as 6 weeks after a woman's last menstrual

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<sup>86</sup> 491 US 397 (1989).

<sup>87</sup> Schauer, 'Does Law Constrain' (n 69) 774 fn 27. The prohibition was subsequently invalidated by the Supreme Court in *United States v Eichman* 496 US 310, 318-19 (1990).

<sup>88</sup> *Sable Communications of California, Inc v Federal Communications Commission* 492 US 115, 131 (1989). See Schauer, 'Does Law Constrain' (n 69) 788.

<sup>89</sup> 410 US 113 (1973).

<sup>90</sup> Himma, 'US Constitution' (n 4) 109.

<sup>91</sup> Greenawalt, 'How to Understand' (n 6) 147.

period—similar bills were being considered by 5 other states.<sup>92</sup> Also in March 2013, the Arkansas state legislature passed a law restricting abortion after 12 weeks of pregnancy.<sup>93</sup> 10 other states have laws banning abortions beyond 20 weeks of pregnancy.<sup>94</sup> All of these laws are in clear contradiction with the 24-week cut-off period established by the Supreme Court in *Roe*, and are expressly intended to be so.<sup>95</sup>

In respect of these legislative re-enactments of laws already invalidated, Himma argues that the new laws nevertheless have ‘no legal effect’.<sup>96</sup> However, this response is not open to him. What Himma is trying to establish is that (i) officials converge on respecting the Court’s decisions (by not doing what they forbid, or by not enforcing the norms now invalidated, and so on), because (ii) they accept the Court’s authority. Both those claims are severely undermined by a legislative re-enactment of a norm just invalidated—nothing could be a clearer indication that they view the decision as being without authority. It is not open to Himma to respond that the re-enacted norm has no legal effect under the scheme of validity that officials now practice, since it is precisely that scheme and those practices which form the subject of our inquiry.<sup>97</sup>

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<sup>92</sup> John Eligon and Erik Eckholm, ‘New Laws Ban Most Abortions in North Dakota’ (*New York Times*, 26 March 2013) <<http://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html>> accessed 3 April 2013; ‘States Chipping Away at *Roe v Wade*’ (*New York Times*, 26 March 2013) <[http://www.nytimes.com/interactive/2013/03/26/us/abortion\\_laws.html](http://www.nytimes.com/interactive/2013/03/26/us/abortion_laws.html)> accessed 3 April 2013.

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> Himma, ‘US Constitution’ (n 4) 109.

<sup>97</sup> If we assume a particular scheme of validity to be true, we can debate about whether the state legislative enactments have force under that scheme. But if we are trying to discover the scheme of

In the absence of empirical evidence of official attitudes, the natural inference to draw is not Himma's. As one author puts the point:

At nullification's core are the premises that the Supreme Court does not have final authority to interpret the Constitution in cases and controversies arising between a state and the federal government and that an individual state, as a party to the Constitution, has ultimate authority to interpret the compact as applied to constitutional disputes arising with the federal government.<sup>98</sup>

It is thus unclear how a recalcitrant legislature could register its 'unfailing obedience' to the Supreme Court by re-enacting laws which the Court has just invalidated, accompanied by an express denunciation of the Court's authority.

All of the examples discussed so far are high-profile acts of official non-compliance which are readily observable in the media.<sup>99</sup> What is omitted here are the thousands of little acts of official rebellion against law that undoubtedly take place every day in the United States, which can only come to light through closer empirical research. Schauer puts the point this way:

American political tradition is replete with instances of Presidents, governors, cabinet officials, members of Congress, and countless less exalted officials and non-governmental leaders who have relatively shamelessly taken the position that immoral and at times simply unwise laws and legal decisions need not be considered

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validity itself, relying on claims about the legal effect of these enactments puts the cart before the horse. Himma in fact recognises this earlier in his chapter: 'If officials decline to back a line of court decisions with the state's police power, then those decisions lack the normative consequences that law, as a conceptual matter, must have if it is to count as law in the positivist's sense of the word.' Himma, 'US Constitution' (n 4) 98.

<sup>98</sup> Claiborne (n 71) 917.

<sup>99</sup> Importantly, the actions of these higher level acts of presidents and congress bears a special methodological importance for present purposes. While lower level officials may be motivated to comply with the law by both a belief in its authority and a fear of sanctions, senior officials, who are immune from sanctions, allow us to see better how often the law is complied with purely out of respect for its authority. Schauer, 'Does Law Constrain' (n 69) 786-789.

binding when they conflict with what those officials and their constituents believe is moral necessity or wise policy.<sup>100</sup>

In none of these cases are the officials concerned subject to ‘a cascade of criticism and a court order to enforce the holding,’<sup>101</sup> as Himma predicts. As with most official actions of this kind, there are no legal penalties for defiance of the law. In fact, officials are often criticized by other officials not because they have broken the law, but because they have followed it.<sup>102</sup> Officials are often praised precisely because they have broken the law in favour of supervening moral, political, or prudential grounds.<sup>103</sup>

The evidence presented here cannot prove the falsity of Himma’s claims by proving their opposite: that is, the contrary evidence set out here cannot establish the claim that most American officials do not comply with most laws most of the time, nor can it establish that American officials do not view those laws as binding on their behaviour. In the absence of more in-depth study of official practices in the United States, we simply do not know enough either way. What the evidence *is* sufficient to establish, however, is a justificatory burden on theorists like Himma and Greenawalt who take for granted that most officials in the United States adopt an unproblematic stance towards the law, in terms of which they almost always comply with its demands, and endow it with an authoritative or binding character.

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<sup>100</sup> Schauer, ‘Ambivalence’ (n 66) 13.

<sup>101</sup> Himma, ‘US Constitution’ (n 4) 106. The claim misses the fact officials, particularly at higher levels of government, are very often immune—technically or in practice—from legal sanctions for flouting the law. See Schauer, ‘Does Law Constrain’ (n 69) 787-789 and the authorities cited there.

<sup>102</sup> Schauer, ‘Ambivalence’ (n 66) 12-13.

<sup>103</sup> Schauer, ‘Does Law Constrain’ (n 69) 770-772.

ii. From behaviour to attitudes

In the preceding section of this chapter I have set out the justificatory burden Himma would need to overcome to demonstrate that there is sufficient regularity of official compliance with Supreme Court validity decisions with which they disagree. However, even if Himma could establish that regularity of behaviour, he would still need to show further that their compliance is coupled with a belief that they are under an obligation to treat the Supreme Courts' decisions as authoritative. Yet, despite an assertion that officials comply with the Supreme Court's decisions because they 'believe they are required to do so by fundamental principles governing the structure of the legal system',<sup>104</sup> Himma supplies no independent evidence for imputing that belief to officials. Certainly there is a sharp debate between philosophers about whether or not there is an obligation to obey the law,<sup>105</sup> and it would be strange if some form of this same range of views were not on display in the attitudes of officials towards their jobs.

As I argued in the preceding section, it is essential to Hart's account that we examine not only the behaviour of officials, but also their normative attitudes towards those practices. However, in the absence of any independent evidence about official attitudes, Himma, like Greenawalt, falls precisely into the trap against which Hart was at pains to caution us—he infers claims about attitudes from loose descriptions of

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<sup>104</sup> Himma, 'US Constitution' (n 4) 105.

<sup>105</sup> For the view that there is an obligation to obey the law, see John Rawls, 'Legal Obligation and the Duty of Fair Play' in Sidney Hook (ed), *Law and Philosophy* (NYU Press 1964); Lon Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; George Klosko, 'The Moral Force of Political Obligations' (1990) 84 *American Political Science Review* 1235. For the view that there is not even a prima facie obligation to obey the law, see Robert Wolff, *In Defense of Anarchism* (Harper & Row 1970); MBE Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950; Raz, 'Obligation to Obey' (n 36); Leslie Green, *The Authority of the State* (Clarendon Press 1988).

(purportedly) convergent official action, missing Hart's fundamental distinction between regular behaviour and rule-governed behaviour.<sup>106</sup>

In particular, we cannot infer from an official's compliance with a decision of the Supreme Court (if and when it happens) that she has a critical reflective attitude towards that decision, in terms of which she views it as a correct standard for her and others to follow, and views departures from that standard with scorn. She may instead follow the decision to get ahead at work, or to avoid getting fired or some other sanction. She may view authority as involving a trade-off: to preserve the effectiveness of future decisions with which she agrees, she knows she must sometimes pretend to treat as authoritative decisions which she thinks are wrong. She may decide that the purpose of the law is served better by not applying the rule as written.<sup>107</sup> The presence of sanctions and the likelihood of their imposition will of course enter her calculus, as will political, social and moral norms, and a multitude of other considerations besides.<sup>108</sup> Indeed, empirical research suggests that her obedience to the law will depend on her views about the law's legitimacy, the procedural fairness of its enactment, and its coincidence with her own moral views.<sup>109</sup>

For these reasons, a given official's actions that are consistent with the law are also consistent with her holding the view that the Supreme Court does not and should

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<sup>106</sup> Himma, 'US Constitution' (n 4) 105; Greenawalt, 'The Rule of Recognition and the Constitution' (n 3) 629.

<sup>107</sup> Galligan, *Law in Modern Society* (n 45) 313; Schauer, 'Does Law Constrain' (n 69) 782-783.

<sup>108</sup> Schauer, 'Does Law Constrain' (n 69) 799.

<sup>109</sup> Tom Tyler, 'Public Mistrust of the Law: A Political Perspective' (1998) 66 *University of Cincinnati Law Review* 847, 859-873; Tom Tyler, *Why People Obey the Law* (Yale University Press 1990) 24-25; Kathryn Hendley, *Trying to Make Law Matter* (University of Michigan Press 1996) 177.

not have the legal power it purports to have, and that officials should avoid implementing as much of a mistaken decision as they can get away with.

Let us take as an example Himma's hypothetical notion of the unthinkable irrational judgment, in which there is no plausible textual basis for the Court's decision.<sup>110</sup> Himma supposes that most officials would probably not comply with such a decision, and that they would not accept it as authoritative. For Himma, this is evidence of a duty on officials to recognize only those validity decisions plausibly grounded in the text.

It is conceivable, however, that officials actually think that all or most of the decisions of the Supreme Court are not authoritative—not just the textually baseless ones. Perhaps their decision whether to act consistently with the Court's decisions (to appear to treat them as authoritative) turns on the anticipated costs of disobedience: they comply when the costs of disobedience are high, and they do not comply when the costs of disobedience are low.<sup>111</sup> If this were so (and we could only know after studying the officials in question), then contrary to Himma, we would not have evidence of a recognition norm in terms of which officials only recognize as authoritative minimally rational decisions. Instead we would have evidence of a practice in which officials disobey decisions when they think they can get away with it. This is likely to be the case with clearly irrational court decisions, which they

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<sup>110</sup> As an example of such a judgment, Matthew Kramer imagines the Court relying on 'the Constitution's specification of the minimum age of a President as the sole basis for a decision concerning the regulation of procedures for abortions' (Kramer, *Where Law and Morality Meet* (n 7) 116). It is hard to imagine the Supreme Court, or any court, making decisions like that. Indeed, it is probably unnecessary to include constraints like this in formulations of the rule of recognition, when the very discussion of legal validity only makes sense against a background of minimum official rationality, in terms of which officials try to give meaningful justifications for their behaviour.

<sup>111</sup> Cf. Schauer, 'Does Law Constrain' (n 69) 794-797.

think most other officials are likely to disobey too. In this scenario, the bare rationality of a court decision serves as a focal point for official expectations about costs of disobedience, not as a minimum condition of their acceptance of it as law.

Himma recognizes that some officials may adopt ‘prudential’ views such as these, but states, without more, that most do not.<sup>112</sup> This empirical claim is baseless—the truth is we simply have no idea, prior to more rigorous sociological observation, what official attitudes are towards decisions of the Supreme Court.

Himma’s attempt to draw inferences about attitudes from behaviour gets him into considerable further difficulties when he attempts to deal with Supreme Court declarations that law is valid. Hitherto Himma has focused on declarations of *invalidity*—he has sought to establish that officials, as a fact, almost *never* enforce *invalidated* laws. It would be ideal for his argument if he could also establish the inverse: that officials, as a fact, almost *always* enforce *valid* laws. That is, it would be ideal if he could demonstrate that:

- (1) Officials conform to a regular pattern of behaviour in which they enforce laws which the Court has declared valid (even if they think the Court is mistaken); and
- (2) They expect one another to do this as a common public standard of official behaviour.<sup>113</sup>

If officials almost always enforced norms that the Court declared valid, and if officials who did not enforce valid (validated) norms were criticized, we would at least have the behavioural regularity needed to support Himma’s conclusion about the authority afforded to the Court.

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<sup>112</sup> Himma, ‘US Constitution’ (n 4) 105.

<sup>113</sup> Himma, ‘US Constitution’ (n 4) 102, 109-110.

The trouble, however—which Himma appreciates—is that officials often do not do what validated norms require.<sup>114</sup> Indeed, in his own words, officials exercise a considerable discretion as to whether they will enforce valid norms or not—such as the policeman who lets off the first-time teenage drug-user, or the tax official who turns a blind-eye to a late filing.

This phenomenon of informal official discretion<sup>115</sup> to enforce valid laws leaves Himma with two difficulties. First, if official enforcement of valid laws is a complicated and sporadic enterprise, there is of course no regular pattern of official behaviour with which we could demonstrate the existence of a recognition norm requiring officials to enforce laws which the Supreme Court has declared valid.

Secondly, earlier in the chapter Himma draws the following inference: because there is widespread non-enforcement of *invalid* laws, there is also a normative attitude held by officials against such enforcement.<sup>116</sup> Now, we are confronted with the question of *valid* laws—and we are told that these valid laws also are often not enforced, just as invalid laws are mostly not enforced. For Himma to be consistent, he must allow us to draw the inference he encouraged us to draw earlier—that a practice of non-enforcement evinces a norm of non-enforcement. But that, of course, would yield a norm *against* enforcing laws which the Supreme Court has declared valid, which is precisely the opposite of what Himma needs to show.

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<sup>114</sup> Himma does not say whether he thinks the behaviour of non-enforcement of valid laws is infrequent or widespread. I assume here, as Himma must, that it is relatively widespread—if such incidents were isolated, Himma would have no need to defend his account against them.

<sup>115</sup> By ‘informal official discretion’ I mean to distinguish the discretion expressly afforded to officials by legislation and regulation.

<sup>116</sup> Himma, ‘US Constitution’ (n 4) 104-105, 108-110. I have already explained above why that inference is impermissible.

Himma tries to overcome these difficulties by denying our inclination to follow his earlier inference in this new case. Despite presumably frequent instances of non-enforcement of valid law, Himma argues that the ‘general thrust of official practice is that it *can* be enforced and hence counts as law.’<sup>117</sup> Unlike official behaviour in respect of invalidated laws—where we are told to infer from the practice of non-enforcement a norm of non-enforcement—Himma now asks us, in the context of validated laws, to forget about the practice of non-enforcement altogether. Instead, without evidence, we must attribute to these officials an attitude of permissiveness: in their minds, he tells us, they understand that they may enforce those laws if they want to, and this, he suggests, supports his claims about the Court’s authority.

Himma therefore offers us two contradictory ways to interpret an official’s non-acquiescence to the law: in some instances non-acquiescence by officials would evince an implicit rejection of the Court’s authority, while in other instances non-acquiescence is compatible with an acceptance of the Court’s authority. To these two plausible interpretations one might add a third: perhaps an official, who acts contrary to a holding of the Court, resolutely believes in the Court’s authority, but has decided in this instance that there are better, non-legal reasons for taking an action inconsistent with what the Court has said is law.

However, as I have argued above, and certainly according to Hart, the real point is that there is no interpretation of official behaviour which could stand independently of an observation and interpretation of official attitudes towards that behaviour. Unfortunately, Himma offers us no evidence at all about official attitudes,

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<sup>117</sup> Himma, ‘US Constitution’ (n 4) 107-108.

relying instead exclusively on just this impermissible inference about the attitudes these officials really display towards their own behaviour.

Like Greenawalt, Himma thus mistakenly assumes that from an official's perspective, legal reasons exhaust the domain of reasons which bear on an official's actions. This creates a binary in which official compliance with the law necessarily evinces an attitude of respect for the law (i.e. they are following the legal reasons applicable to them), and official non-compliance necessarily manifests an attitude of disrespect for the law's authority.

But of course, as I argued earlier, legal reasons are not the only reasons which officials take into account when they consider what to do. They will also consider social reasons, moral reasons, religious reasons, prudential reasons, and many more besides. In a given situation, an all-things-considered judgment of what to do may dictate an action which departs from what the legal reasons, on their own, say should be done. But this does not mean, as Himma and Greenawalt suggest, that the officials deny that there are binding legal reasons which apply to their situation. They can fully accept the authority of those reasons and understand what action they require, while deciding that today the balance of reasons favours acting otherwise. Similarly, an all-things-considered judgment of what to do may lead an official to perform the action that, coincidentally, is required by the legal reasons, and yet the legal reasons may have formed no part of his calculation because he denies their existence or authority. It so happens that he does what the law says, but not because the law says it. This complex interaction of reasons for action underscores why, in attempting to

formulate a rule of recognition, we cannot rely on official behaviour alone, and thus why we need independent evidence of their attitudes towards their behaviour.<sup>118</sup>

In review of the argument thus far, Himma's empirical claims about the Court's near-absolute authority face two major obstacles. First, officials in the United States break the law often enough to rebut the plausibility of Himma's claims about their respect for the Supreme Court's authority. And secondly, when they do comply with the law, they may do so for reasons that have nothing to do with its being law, and thus their compliance may have nothing to do with the Court's authority at all.<sup>119</sup>

#### **B. On the Morally Best Interpretation of the Constitution**

Although Himma argues that the Supreme Court's authority is almost absolute as far as the rule of recognition is concerned, he does accept that there are qualifications to that authority. Much of his essay is consumed by the task of establishing what those qualifications are. Although his arguments on this score suffer from more or less the same empirical defects as his arguments about official compliance with the Supreme Court's authority, there are additional problems here which merit independent consideration.

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<sup>118</sup> See further Schauer, who argues that the only empirically rigorous way to identify instances in which an official confers authority on the Supreme Court's validity decisions would be to identify official actions which depart from the actions the official would have taken on law-independent grounds, but for the existence of a law to the contrary (Schauer, 'Is Legality Political?' (n 37) 489; Schauer, 'Political Risks' (n 65) 88; Schauer, 'Does Law Constrain' (n 69) 789). Schauer's latest analysis suggests that a violation of law by an official will play at most a small role in constraining that official from engaging in actions that turn out to be sound on political or policy grounds, but may aggravate the political penalty for actions that turn out to be unsound on political or policy grounds. See Schauer, 'Political Risks' (n 65).

<sup>119</sup> Of course, this last point entails that officials who do not comply with the law may nevertheless treat it as being authoritative (as giving them a reason for action), even though the balance of reasons in a particular case dictates not following the law. If Himma were not so quick to discount practices of official non-compliance, he might find in this category evidence of respect for law which could strengthen his position.

The first of Himma's qualifications is what he describes as the 'acceptability constraint'—the Court's decisions must appear to be at least plausibly grounded in the text of the Constitution (failing which officials would reject those decisions outright).<sup>120</sup> Beyond this 'acceptability constraint', Himma argues, the Court is more or less free in hard cases to choose between at least two conflicting interpretations of the Constitution (subject to the second qualification, set out below).<sup>121</sup> In Himma's view, the ordinary meaning of the Constitution's terms cannot dictate a particular outcome in hard cases, so the Court is free to validate or invalidate any particular norm that comes before it.<sup>122</sup>

Himma's second qualification of the Court's authority is the most important. He argues that the Court is obligated to decide the validity of duly enacted norms according to what is, as an objective matter, the morally best interpretation of the Constitution. This is so even if, as an objective matter, the Court fails to deliver the morally best interpretation—it is the attempt to deliver such an interpretation that matters.<sup>123</sup>

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<sup>120</sup> While there is no doubt a clear theoretical distinction between (i) official criticisms that the Court is mistaken about what the text of the Constitution requires, and (ii) official criticisms that the Court's decision cannot plausibly be grounded in the text of the Constitution, it is doubtful whether official criticism demonstrates this distinction in practice—many officials who think the Court is mistaken probably do think that the impugned decision cannot be plausibly grounded in the text. Particularly in the deeply polarized political climate currently pervasive in the United States, official disagreement is not often exemplified by a respectful statement: 'I can see how you would get to that answer, but on balance I think it's incorrect.' It is quite plausible that officials who think an interpretation is objectively morally mistaken also think that it cannot be plausibly grounded in the text.

<sup>121</sup> In this regard, Himma's account trades on a strong scepticism about rules—see Kramer, *Where Law and Morality Meet* (n 7) 119-126.

<sup>122</sup> Himma, 'US Constitution' (n 4) 112. Himma adds to the requirement of textual rationality a similar requirement that the decision be 'pragmatically acceptable', by which I take him to mean that officials would not comply with a court order requiring them to do something that is practically impossible or very difficult. See *ibid* 111.

<sup>123</sup> *ibid* 119. Himma's final formulation of the rule of recognition is as follows: 'So (1) officials have a duty to treat as law duly enacted norms until struck down by the Court as failing to conform to what

Following Hart, Himma's formulation of the recognition norm concerning this limit on the Supreme Court's authority involves the following empirical claims:

- (1) Judges can be observed conforming to a pattern of behaviour in which they decide cases in accordance with what they believe to be the morally best interpretation of the Constitution.
- (2) Judges are criticized by each other and by other officials in terms of the moral concepts in the Constitution; that is, they are criticized when they are seen as having failed to deliver the morally best interpretation of the Constitution.

For Himma, these claims, if true, establish the existence of a recognition norm to the effect that the Justices of the Supreme Court are under a duty to attempt to deliver the morally best interpretation of the Constitution.

In support of these claims, Himma argues that each of the prevailing interpretive approaches used by the Supreme Court Justices purports to identify the morally best interpretation of the text. Furthermore, he argues that Justices criticize one another's judgments for failing to produce the morally best interpretation of the text, because they regard this as the standard of correct judicial behaviour.<sup>124</sup> 'These empirical claims,' Himma tells us, 'are quite plausible.'<sup>125</sup>

An obvious initial difficulty with Himma's argument about official behaviour is that his discussion deals entirely with official responses to hard cases—we are

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the Justices have collectively decided is, as an objective matter, the morally best interpretation of the Constitution that satisfies the acceptability constraint; and (2) officials have a duty to treat as not being law duly enacted norms struck down by the Court as failing to conform to what the Justices have collectively decided is, as an objective matter, the morally best interpretation of the Constitution that satisfies the acceptability constraint.'

<sup>124</sup> *ibid* 115-117. Himma is reminiscent here of Dworkin when he claims that judges 'experience themselves as constrained by morally normative considerations of political legitimacy', and that they are trying to interpret the Constitution in a way that justifies the legal system and its official monopoly of legitimized violence.

<sup>125</sup> *ibid* 117.

given no sense of what happens in easy cases, which may play an important role in figuring out the recognition norms concerning the Court's authority.<sup>126</sup>

A much more significant difficulty is that Himma's recognition norm can only exist if officials criticize the Justices solely when they fail to give the best moral interpretation of the Constitution, and abstain from criticism when the Justices succeed. However, as Matthew Kramer cogently points out, in hard cases the Court sustains criticism *no matter what* it decides, and even if its judgments are morally correct.<sup>127</sup>

Kramer, for his part, argues that the duty to give the morally best interpretation of the Constitution may yet exist, if officials nevertheless converge in taking the abstract moral principles of the Constitution as their points of reference for praising or criticizing the Court. If that is the case, so Kramer's argument goes, then the Court is under a duty to use those principles correctly when making validity decisions.<sup>128</sup> Irrespective of how often the judges and other officials misapply those concepts, their shared justificatory focus on them is enough to settle the content of the duty to use them (and to use them correctly). Kramer states that official criticism in hard cases is 'all made with reference to those basic concepts.' Indeed, he states that '[t]he major evidence of the duty is the fundamental moral categories to which American officials refer when evaluating the Court's law-ascertainment decisions.'<sup>129</sup>

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<sup>126</sup> Kramer, *Where Law and Morality Meet* (n 7) 129.

<sup>127</sup> *ibid* 128-129.

<sup>128</sup> *ibid* 129. This claim, when coupled with Kramer's argument that the extensions of basic moral categories are determined not by their application by officials but by the mind-independent, objective facts of morality, supports Kramer's argument that the US legal system can be explained by inclusive legal positivism. *ibid* 130 and ch 2.

<sup>129</sup> *ibid* 133.

The mistake which both Kramer and Himma make here is that they provide no evidence that these really are the terms that officials employ when they criticize the Court. We can certainly imagine officials using many other evaluative concepts besides the moral categories listed in the Constitution—officials can, and often do, complain that a Supreme Court decision is too ‘socialist’ or too ‘capitalist,’ too soft on crime or not soft enough. They complain that a decision is impractical or expensive, or that the Court lacks the knowledge or competence to address a particular issue. These are not constitutionally-entrenched moral categories, and some are not even moral categories at all.

Once again, we simply do not know enough about the kinds of criticisms officials in the United States direct towards the Supreme Court’s validity decisions to make categorical claims about them. Indeed, it is one thing to make claims about the criticisms employed by the Supreme Court Justices themselves, whose practices are familiar to us and highly public. (It is not coincidentally that Supreme Court case law forms the bulk of the evidence that Himma offers for his argument.) But it is another thing entirely to generalize this claim to all officials in the United States.

However, even if we focus solely on the practice of the Justices themselves, it is unclear that these practices support a duty to ground decisions in the best moral interpretation of the Constitution.<sup>130</sup>

To succeed in his claim that each of the Supreme Court Justices presently tries to identify the best moral interpretation of the Constitution, Himma understands that

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<sup>130</sup> My argument here is only that Himma cannot show that the Court is under a *convention-based* duty to deliver the morally best interpretation of the Constitution. Of course, the Court may have such a duty for other reasons—including moral reasons. My argument is that Himma cannot demonstrate that the duty is sourced in the Court’s practice.

he must cast his definition of what would count as a ‘best moral interpretation’ widely, so that it can embrace even something like Justice Scalia’s originalism.<sup>131</sup> The trouble is that Scalia’s originalist interpretations are expressly stated to be *non-moral* interpretations of the Constitution. Justice Scalia, and other judges like him, expressly rejected the suggestion that it is their job or anyone else’s to offer a moral reading of the Constitution at all. Instead, it was expressly part of Justice Scalia’s theory of adjudication that amoral interpretation is not only possible but also desirable.<sup>132</sup>

To deal with this objection, Himma asks us to look past the surface of Justice Scalia’s own statements to a ‘deeper level’, where we can see that judges’ disagreements with one another really rest on their normative views about moral legitimacy, regardless of how they may characterize their own views.<sup>133</sup> Himma points out that Justice Scalia’s originalism, which eschews overtly moral reasoning, is itself a moral interpretation of the Constitution because his originalism ultimately rests on moral beliefs about the role of judges in a constitutional democracy.<sup>134</sup>

However, for the purposes of the rule of recognition, it is not open to Himma to retreat to this ‘deeper’ level, where a judge’s utterances against moral interpretation are reconstructed to show that they are really utterances in favour of moral interpretation after all. What Himma misunderstands is that the success of his

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<sup>131</sup> Himma, ‘US Constitution’ (n 4) 117-119.

<sup>132</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1998). See also Greenawalt, ‘How to Understand’ (n 6) 150-151.

<sup>133</sup> Himma, ‘US Constitution’ (n 4) 118.

<sup>134</sup> Dworkin has argued extensively that this kind of moral scepticism is ultimately self-defeating. See Dworkin, *Law’s Empire* (n 49) 76-86; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 23-68.

argument does not turn on whether Justice Scalia's reasoning, as a matter of philosophy, is *properly characterized* as moral reasoning. Its real philosophical character is irrelevant. Instead, since he sources the Supreme Court's duties in the reactions of officials to *what they see* the Supreme Court doing, what is crucial to his argument is that Justice Scalia, and other American officials, *view* Scalia's reasoning *as moral*; specifically, that his reasoning is *perceived by them* as an attempt at ascertaining the best moral interpretation of the Constitution. Now given Justice Scalia's well-publicized, self-described aversion to importing moral reasoning into constitutional interpretation, we can assume that he and other officials would have been shocked to learn that he had really been following Dworkin's adjudicative prescriptions all along—that he was understood to be holding himself and others to a standard of delivering the best moral interpretation of the Constitution. Even if Scalia's arguments are 'unmistakably moral in *character*',<sup>135</sup> as Himma puts it, they are not unmistakably, in the view of officials, moral interpretations of the Constitution, and it is those views on which we must rely to formulate the recognition norm.

In the result, we should want to see substantially more evidence, from judgments or otherwise, before we conclude that the Justices of the Supreme Court are visibly attempting to ground their decisions in the best moral interpretation of the Constitution. Without such evidence, we have no more reason to think that Justices hold each other to a standard of the morally best interpretation of the Constitution than to a standard of what is the best interpretation overall (not just morally), or a

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<sup>135</sup> Himma, 'US Constitution' (n 4) 118 (emphasis added).

standard of reasonable interpretation, or *their* best interpretation, or to a standard of interpreting in good faith. Himma himself vacillates between a standard of ‘the best interpretation’ and ‘the morally best interpretation’.<sup>136</sup> Those are very different standards, and there are very different possibilities besides.

## V. CONCLUSION

In this chapter I have sought to tease out the full implications of the methodological commitments we are required to make when trying to apply Hart’s rule of recognition to a particular legal system, and to demonstrate the fallibility of the conclusions we draw when we do not take those commitments seriously, and instead elide legal reality and legal doctrine.

There is a similarity between what I have described as the privileging of the formal legal landscape and what Joseph Raz has termed as the ‘lawyer’s perspective’. This perspective is the ‘basic intuition’ which many legal philosophers adopt as the ‘unconscious starting-point’ of their theories of law, namely that ‘[t]he law has to do with those considerations which it is appropriate for courts to rely upon in justifying their decisions.’<sup>137</sup> With reference to Kelsen’s theory (which adopts, according to Raz, a lawyer’s perspective), Raz explains that ‘[t]he picture of law dictated by the methodology . . . is of law in the books, of an analysis of law using as the raw material only law reports and statute-books.’<sup>138</sup>

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<sup>136</sup> Compare, for example, Himma, ‘US Constitution’ (n 4) 116 and 119. See also Greenawalt, ‘How to Understand’ (n 6) 148-149.

<sup>137</sup> Joseph Raz, ‘Nature of Law’ (n 20) 199.

<sup>138</sup> *ibid* 201.

Raz suggests that the adoption of this intuition is explained by the fact that most theorists are trained lawyers writing primarily for other legally-trained theorists and law students in-training.<sup>139</sup> American legal theory in particular, he says, has always emphasized what the courts do (and thus formal legal doctrine) as central to legal theory.<sup>140</sup>

Raz offers a compelling argument against this privileging of the lawyer's perspective, which underscores my argument here:

[T]here is something inherently implausible in adopting the lawyer's perspective as one's fundamental methodological stance. There is no doubting the importance of the legal profession and of the judicial system in society. It is entirely appropriate to make them the object of a separate study and to regard legal theory as that study. It is, however, unreasonable to study such institutions exclusively from the lawyer's perspective. Their importance in society results from their interaction with other social institutions and their centrality in the wider context of society. The law is of interest to students of society generally, and legal philosophy, especially when it inquires into the nature of law, must stand back from the lawyer's perspective, not in order to disregard it, but in order to examine lawyers and courts in their location in the wider perspective of social organization and political institutions generally.<sup>141</sup>

In a similar vein, the problem with the claims put forward by Greenawalt and Himma is not simply that they ignore a range of detailed complexities necessary to

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<sup>139</sup> *ibid* 200. See also Frederick Schauer, 'Fuller's Internal Point of View' (1994) 13 *Law & Philosophy* 285, 294ff.

<sup>140</sup> Raz, 'Nature of Law' (n 20) 205.

<sup>141</sup> *Ibid* 203-204. Although Raz's argument here is directed to the adoption of the lawyer's perspective at the level of theory formation, it applies equally to its adoption at the level of theory application, or at least the application of an institutionally focused theory like Hart's which purports to explain the law from outside legal professional discourse. For a defence of the institutional approach, see generally Raz, 'Nature of Law' (n 20).

give a full account of the rule of recognition in the United States. The very core of their arguments rests on untested and debatable factual claims, which themselves stem from a methodology that runs against some of Hart's most important insights. In simply taking for granted that Hart's theory offers an appropriate framework for the analysis of a legal system, they presuppose the existence of the very facts that must be established to determine the propriety of that framework to begin with: Do officials converge in behaviour? Do they do so as a rule? How do they respond to changes in the behaviour of the group or the group's criticism? To what kind of criticism are they subjected?

Himma and Greenawalt also paint a picture of official acceptance which is entirely binary—under the scheme of analysis they adopt, officials either accept and enforce a decision, or they ignore and denounce it. This obscures the much more complicated and diverse relationships that officials have with the laws they are meant to administer. As Weber explains:

[F]or sociological purposes there does not exist, as there does for the law, a rigid alternative between the validity and lack of validity of a given order. On the contrary, there is a gradual transition between the two extremes.<sup>142</sup>

To add to this, Himma and Greenawalt not only assume that official responses to law are black and white—they also assume that all officials respond to law in the same way. This missing complexity is regrettable not just for its own sake, but because much of that complexity is central to formulating a rule of recognition.

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<sup>142</sup> Max Weber, *Economy and Society, Volume I* (4th edn, University of California Press 1978) 32.

In the absence of empirical evidence to support their claims about official behaviours and attitudes in the United States, Himma's and Greenawalt's pieces are best understood as describing what is *supposed* to happen according to the formal legal landscape, or as describing our normative expectations, when officials are subject to legal obligations under the conditions of the rule of law. This is what we learn formally when we learn about how legal institutions are meant to function. But it remains an open question whether this is what happens in fact, in the complex daily realities of the legal system, which is what really matters. While we should resist the tendency to take the extreme opposite view—that officials do whatever they like with no regard for the law—we should not mistake doctrinal statements in legal texts and judicial pronouncements as offering an account of the practice of law.<sup>143</sup> The mistake Himma and Greenawalt make is to infer from the way that a legal system or Constitution is supposed to work in theory, that that is how it works in practice. For the rule of recognition, it is the latter, not the former, that is essential.

Although there are flaws specific to each of their accounts, Greenawalt and Himma are ultimately victims of the fundamental difficulty underlying any comprehensive attempt at formulating a rule of recognition—namely, that it is impossible, in a complex, modern legal order, to generalize about official behaviour and attitudes at the level we are required to generalize about them, without engaging in detailed empirical study. Indeed, as we have seen, the sociology and anthropology of law is rich with studies showing not only that law on the ground—the way it is used, spoken of and thought of in everyday life, by officials and by citizens—is very

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<sup>143</sup> Galligan, *Law in Modern Society* (n 45) 298.

different to the way it appears from our armchairs or from our textbooks, but also demonstrating the diversity of behaviours and attitudes of officials within one legal order, or even within a single official at different moments in time.

Hart himself recognized that the relationship between officials and the laws entrusted to them is, in practice, a messy and complicated business. Hart thought that the rule of recognition was clear enough as a concept, but he expressed doubts about whether it could ever be comprehensively formulated in practice, precisely because of the detailed sociological work that would be required to do so.<sup>144</sup> Matthew Kramer echoes Hart's doubts in his own critique of Himma's position. For the sake of convenience, and the 'seeming plausibility' of the idea, Kramer *assumes* for the purposes of his argument that there is an incorporationist rule of recognition at work in the United States. But unlike Himma, Kramer admits that mere plausibility is insufficient to establish with finality the explanatory power of incorporationism, or any competing descriptive theory. To establish that would instead require a 'careful empirical investigation of the justificatory concepts' that officials use in their decision-making.<sup>145</sup>

What is needed then, to understand whether Hart's theory is applicable for a given legal system, is a range of social science methods—systematic studies of official action, surveys and interviews to understand motivations and attitudes, and perhaps even behavioural experiments—instead of the arms-length speculation that has bedevilled much of analytic legal philosophy.<sup>146</sup> As Schauer puts it:

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<sup>144</sup> Hart (n 2) 147-154, and especially 117-121.

<sup>145</sup> Kramer, *Where Law and Morality Meet* (n 7) 134-135.

<sup>146</sup> Schauer, 'Does Law Constrain' (n 69) 794.

Law professors tend to prefer [hunches and intuitions], sometimes explicitly relying on their own intuitions but more often resting their conclusions on a simple but undocumented empirical assertion. Yet however common this approach may be, it is hardly clear that the intuitions of law professors are superior sources of data than second-best (or even third-best) empirical studies.<sup>147</sup>

However, even if legal theorists take seriously the need to engage in rigorous empirical examination of official practices and attitudes, ‘the methodological obstacles . . . are formidable, and conceivably insurmountable.’<sup>148</sup> These criticisms are probably at least part of the explanation for why so few theorists have sought to formulate a comprehensive rule of recognition for any particular legal system. Without an incredible amount of data about official practices and attitudes at a given time, it may be impossible for a sociologist to describe, with any certainty, the validity criteria in a given legal community.

But let us not jettison the rule of recognition just yet. Part Two of this thesis undertakes a very manageable empirical project: as opposed to an (impossible) investigation of all officials whose practices are relevant to formulating a rule of recognition, I investigate whether the existence conditions for a rule of recognition are discernible from the more discrete set of practices of the Justices of the South African Constitutional Court.

In searching for those existence conditions, this chapter has demonstrated two important principles. First, a close and detailed analysis of official practice is indispensable if we are to avoid the inaccuracies attendant upon the sort of empirical

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<sup>147</sup> *ibid* 778 fn 53.

<sup>148</sup> *ibid* 778.

speculation in which Greenawalt and Himma engage. The difficulty (perhaps impossibility) of conducting that analysis for a large number of officials at any point in time militates in favour of selecting a small and important sub-set of officials—like the Justices of a country’s highest court—and trying to gain a deep understanding of how they work.

Secondly, this chapter has shown the profound importance of talking directly to officials in an attempt to understand the nature of the practices in which they engage, and their motivations for doing so. Only then can we gain a sense of the critical reflective attitude which officials adopt towards these practices, and whether and why they share these practices and attitudes with others.

With these cautionary tales in mind, I turn now to describe and analyze the practices of the South African Constitutional Court.

## **Part Two**

## 5

### *A Brief History and Overview of the South African Constitution*

#### I. INTRODUCTION

In the interviews and case law discussed in the subsequent chapters, the Justices expressly and implicitly rely on an understanding of the historical events that brought the Constitution and the Constitutional Court into being, and on certain concepts enshrined in the Constitution and developed by the Court's jurisprudence. This chapter provides the reader with a background understanding of South Africa's constitutional history necessary to engage with the empirical analysis I undertake in the chapters that follow. I begin with an overview of the two-stage constitution-making process that unfolded after the end of apartheid, by which the Constitutional Court was established and the Constitution was drafted. (Section II.) I then provide a brief introduction to the key provisions of the Constitution and explain how the Court has interpreted and enforced those provisions in relevant cases. (Section III.)

#### II. THE CONSTITUTION-MAKING PROCESS

In the wake of increasing domestic and international resistance to apartheid—including political violence from within, and crippling economic sanctions from without—the apartheid government of the National Party ('NP') unbanned the liberation movements in 1990, freed Nelson Mandela from prison, and began to

negotiate a transition from a minority regime of racialized oppression to a democratic constitutional dispensation.<sup>1</sup>

Both the NP and the leading liberation movement, the African National Congress ('ANC'), envisaged that the new South Africa would be founded on a new constitution, but critical questions centred around how such a constitution would be enacted and what would be its content. In the first instance, neither the apartheid government, nor, at that point, the ANC, had a democratic mandate to enact a constitution for and on behalf of all South Africans. Such a mandate could only be had by a legislature established pursuant to the country's first free and fair elections, which had not yet taken place. In addition, the NP was concerned that a post-election constitution passed by what would inevitably be a mostly black legislature would not sufficiently protect the interests of the white minority, including, in particular, their interests in private property, in freedom of religious, linguistic and cultural association, and in amnesty for the horrific crimes they had committed during apartheid. Thus, in exchange for relinquishing its power, the apartheid government wanted to exercise—from beyond the grave, as it were—some control over the content of the future constitution. To prevent the fragile peace talks from collapsing, these concerns had to be addressed.

#### **A. The Two Stage Process**

In response to these constraints, the parties agreed that the final constitutional text would emerge from a two-stage process. In the first stage, the NP and the ANC,

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<sup>1</sup> For a brief overview of this historical period, see *Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) ('First Certification Judgment')* paras 1-21.

together with other political parties, negotiated an Interim Constitution, enacted by the legislature of the old regime on 22 December 1993, that would serve a number of purposes. First, the Interim Constitution provided the framework for the first free and fair elections to be held on 27 April 1994, the same date the Interim Constitution itself entered into force.<sup>2</sup> Second, the Interim Constitution provided for the structure of the government that would result from those elections: there would be a separation of powers between the executive, the legislature and the judiciary, there would be power-sharing between the national, provincial and local levels of government, and there would be a relatively comprehensive justiciable bill of rights.<sup>3</sup> Third, Chapter 5 of the Interim Constitution laid out a procedure for the drafting and enacting of a final constitutional text.<sup>4</sup> According to that procedure, the national legislature that emerged from the country's first democratic elections would do double-duty as a constitution-making body called the 'Constitutional Assembly', and would draft and adopt the final constitutional text (by a two-thirds majority) within two years of the legislature's first sitting.<sup>5</sup>

The final constitutional text would have to comply with 34 so-called 'constitutional principles' ('Constitutional Principles') that were agreed to by the negotiating parties, and which were set out in a schedule to the Interim Constitution.<sup>6</sup> The following examples provide a flavour of the sorts of principles that constrained the putative final text:

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<sup>2</sup> Constitution of the Republic of South Africa, Act 200 of 1993, ss 249, 252, and sch 2.

<sup>3</sup> *ibid*, chs 3-4, 6-7, and 9-10.

<sup>4</sup> *ibid*, ch 5.

<sup>5</sup> *ibid*, ss 68, 73(1) and (2).

<sup>6</sup> *ibid*, sch 4, read with s 71(1)(a).

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution. (Constitutional Principle II)

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity. (Constitutional Principle III)

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognized and protected. (Constitutional Principle XII.)

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy. (Constitutional Principle XIV.)

As we shall see in Chapter 9, the strong sense of judicial independence embodied by the Justices of the Constitutional Court, coupled with material institutional protections of that independence, plays a significant role in determining the nature and extent of the criticism and social pressure to which the Justices subject one another or care about being subjected to themselves. This, in turn, impacts the extent to which the existence conditions for a Hartian rule of recognition can be said to obtain amongst the practices and attitudes of the Justices. For now, it is interesting to note that the judicial independence that the Justices now enjoy has its roots in several of the principles set forth in the Interim Constitution:

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government. (Constitutional Principle IV)

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate

checks and balances to ensure accountability, responsiveness and openness. (Constitutional Principle VI)

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights. (Constitutional Principle VII)

The Constitutional Principles assured both the NP and the ANC that the final constitutional text would meet at least some of the criteria that were important to each of them, regardless of how the national elections turned out.

Of course, if the final constitutional text was to be tested against these Constitutional Principles, some or other body would have to adjudicate the degree to which the final text complied with them. To this end, the Interim Constitution established the Constitutional Court of South Africa. The creation of an entirely new apex court was necessitated in part by the fact that considerable criticism had been levelled against the judiciary during apartheid, both in terms of its exclusively white racial composition but also in terms of its complicity in the crimes of the apartheid regime. While the existing courts were left intact as part of the negotiated settlement (and indeed, all of the apartheid judges continued to hold office after swearing an oath to uphold the Interim Constitution), the ANC would not allow the existing judiciary to invalidate the acts of a democratically elected legislature and executive, still less would it be permitted to pronounce on the content of the final constitutional text.<sup>7</sup>

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<sup>7</sup> See also Laurie Ackermann, 'The Legal Nature of the South African Constitutional Revolution' (2004) *New Zealand Law Review* 633, 639.

And so a new Constitutional Court, comprised of 11 Justices, came into being.<sup>8</sup> The Interim Constitution bestowed on the Court the power and the duty to test the final constitutional text against the 34 Constitutional Principles. In the event that the Court found the new constitutional text to be non-compliant with the Constitutional Principles, the Court would refer the draft text back to the Constitutional Assembly, together with the reasons for the Court's finding.<sup>9</sup> The Constitutional Assembly would then have three months to pass an amended, compliant text to be resubmitted to the Court for certification.<sup>10</sup> The Interim Constitution provided that the new constitutional text would 'not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles'.<sup>11</sup>

On 8 May 1996, after extensive involvement of experts and the general public, the Constitutional Assembly adopted a draft constitutional text and promptly submitted it to the Court for certification.

## **B. The First Certification Judgment**

As stated above, the task of the Constitutional Court was to certify that all the provisions of the proposed final constitution complied with the 34 Constitutional Principles contained in the Interim Constitution. In its *First Certification Judgment*,

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<sup>8</sup> The Justices were initially appointed for a non-renewable term of seven years, which term was extended to 12 years under the Final Constitution and later increased to a maximum of 15 years.

<sup>9</sup> Constitution of the Republic of South Africa, Act 200 of 1993, s 73A(1).

<sup>10</sup> The Interim Constitution provided for further procedures in the event of successive denials of certification by the Court. Constitution of the Republic of South Africa, Act 200 of 1993, s 73. These further procedures are not relevant for present purposes, as the constitution was in fact certified on the second attempt.

<sup>11</sup> Constitution of the Republic of South Africa, Act 200 of 1993, s 71(2).

the Court characterized this task as a ‘judicial and not a political mandate’, noting that it had ‘no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [proposed text], save to the extent that such choices may be relevant either to compliance or non-compliance’ with the Constitutional Principles, nor did it ‘have any power to comment upon the methodology adopted by’ the Constitutional Assembly.<sup>12</sup> The Court also rejected the argument that the new constitutional text had to replicate the provisions of the Interim Constitution, ‘[c]ompiled as it was by the un-mandated negotiating parties’.<sup>13</sup> ‘Provided [the new constitutional text] remained within the boundaries set by the [Constitutional Principles], the [Constitutional Assembly] was fully entitled to do what it wished with any precedent in the [Interim Constitution].’<sup>14</sup>

The *First Certification Judgment* is long and intricate, and an analysis of its findings is unnecessary for present purposes. In summary, the Court held that the Constitutional Principles presupposed 14 ‘basic structures and premises’ of a new constitutional order, a selection of which included the following: ‘a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary’; ‘a democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections’; ‘a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness’; and ‘enjoyment of all universally accepted fundamental rights, freedoms and civil liberties protected by

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<sup>12</sup> *First Certification Judgment* (n 1) paras 27-28.

<sup>13</sup> *ibid* para 29.

<sup>14</sup> *ibid*.

justiciable provisions in the [final constitutional text]’.<sup>15</sup> The Court found that the proposed constitutional text did indeed reflect these basic structures and premises.<sup>16</sup> However, in reviewing the specific provisions of the proposed text, the Court held that several provisions of the text did not comply with the requirements of certain Constitutional Principles.<sup>17</sup> The court therefore declined to certify the proposed constitutional text.

In accordance with the procedure set out in the Interim Constitution, the Constitutional Assembly had three months to pass an amended text that addressed the reasons for non-certification set out in the *First Certification Judgment*. On 11 October 1996, an amended text was adopted by the requisite majority of the Constitutional Assembly, and was submitted for certification once again to the Constitutional Court.

In its *Second Certification Judgment*, issued on 4 December 1996, the Court restricted its review to the handful of grounds for non-compliance set out in the *First Certification Judgment*, and ultimately certified the amended text as being in compliance with the Constitutional Principles.<sup>18</sup> The text thus became the Final Constitution, which was signed by President Mandela on 10 December 1996, and entered into force on 4 February 1997.

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<sup>15</sup> *ibid* para 45.

<sup>16</sup> *ibid* paras 44-46.

<sup>17</sup> *ibid* para 482. For example, the Court held that the proposed text failed to recognize and protect the right of individual employers to engage in collective bargaining; that the proposed text impermissibly shielded legislation from constitutional review; and that the proposed text did not provide special protections against amending the constitution and in particular the bill of rights.

<sup>18</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997* (2) SA 97 (CC).

### C. A Substantive Revolution

This two-stage process of constitution-making gave rise to an anomaly that Emeritus Justice Laurie Ackermann has described as a ‘substantive constitutional revolution’,<sup>19</sup> which he means to distinguish from revolution in the sense defined by Hans Kelsen.

It is worth quoting Kelsen’s definition of a revolution at some length:

A revolution . . . occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the ‘legitimate’ organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order ‘remains’ valid also within the frame of the new order. But the phrase ‘they remain valid,’ does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which were introduced under the old constitution ‘continue to be valid’ under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution. . . . The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides

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<sup>19</sup> Ackermann (n 8) 643.

with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus, it is never the constitution merely but always the entire legal order that is changed by a revolution.<sup>20</sup>

Summarizing this definition, we can say that there are three primary features of a Kelsenian revolution. First, the new legal order arises through a process that is not itself legally valid according to the scheme of validity that comprised the old order. Second, to the extent that any legal rules from the old order remain in force, their validity cannot be traced to that order. Rather their validity is a function exclusively of their compliance with the new constitution, which, as discussed above, is not valid according to the scheme of legal validity that existed under the preceding order. Third, from the perspective of the old order, it has no continuity with the new order; similarly, from the perspective of the new order, it has no continuity with the old. As Kelsen says, 'it is never the Constitution merely but always the entire legal order that is changed'.<sup>21</sup>

The constitutional revolution that took place in South Africa does not bear all of these features. First, the process that gave rise to the Final Constitution was sanctioned by the old legal order. Indeed, there is a continuous chain of legally valid norms that passes unbroken from the Interim Constitution, validly enacted as it was by the apartheid legislature pursuant to the provisions of the Republic of South Africa Constitution Act of 1983, through to the Final Constitution, which was enacted by a

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<sup>20</sup> Hans Kelsen, *General Theory of Law and State* (A. Wedberg tr, Russell & Russell 1961) 117-118.

<sup>21</sup> *ibid* 118.

Constitutional Assembly, certified by the Constitutional Court, and signed into law, all in terms of the process set out in the Interim Constitution. This was a revolution that ‘move[d] *within* a democratic or lawful process, rather than through the total seizure of state power through the victory of the armed struggle.’<sup>22</sup> The Constitution replaced the 1983 constitution, to paraphrase Kelsen, in a way that the former had itself ‘anticipated’; it was ‘the result of a constitutional alteration of the former’.<sup>23</sup> There was thus no complete procedural revolution in the sense described by Kelsen. Second, and relatedly, from the perspective of the old order, there is continuity with the new order constituted by the Final Constitution. Similarly, from the perspective of the Final Constitution, it is but the most recent development in a legal order the continuity of which stretches back to the apartheid regime.

In other ways, however, the emergence of the final Constitution does indeed reflect a revolution in Kelsen’s sense. To begin with, while it is true that Section 229 of the Final Constitution expressly provided that ‘all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority’, their continuation in force was made expressly ‘[s]ubject to this Constitution’. Thus, as in a Kelsenian revolution, to the extent that the laws of the old order remain valid, their validity is derived exclusively from their compliance with the Final Constitution. Furthermore, and more significantly, the legal regime that was created through and within the existing

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<sup>22</sup> Drucilla Cornell and Nick Friedman, *The Mandate of Dignity: Ronald Dworkin, Revolutionary Constitutionalism, and the Claims of Justice* (Fordham University Press, 2015) 4.

<sup>23</sup> Kelsen (n 21) 117.

law fundamentally changed, overnight, the very criteria of legal validity that brought it into being. Indeed, the substantive legal and social change ushered in by the Interim and Final Constitutions could hardly have been more dramatic, and was expressly intended to be so. As Justice Ismail Mahomed, the first Deputy President of the Constitutional Court, said in the Court's death penalty decision:

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>24</sup>

These sweeping changes introduced by the Interim Constitution and, in particular, by the Final Constitution, are what Justice Ackermann describes as, 'in substance, a constitutional revolution, in the sense that the previous constitutional disposition was turned on its head, and that the content of the new constitutional dispensation differed radically from the previous one.'<sup>25</sup>

So dramatic is the substantive difference between what came before and what came after that it still makes sense to say (although this is not Kelsen's meaning) that the 'laws which were introduced under the old constitution "continue to be valid" under the new constitution . . . only because validity has expressly or tacitly been vested in them by the new constitution.' It also makes sense to say (again, in a

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<sup>24</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 261.

<sup>25</sup> Ackermann (n 8) 643.

different sense from Kelsen) that '[i]t is only the contents of [the old] norms that remain the same, not the reason of their validity', for '[t]hey are no longer valid by virtue of having been created in the way the old constitution prescribed.' This is certainly how the Constitutional Court has interpreted the effect of the Constitution on the South African legal order: that not just a constitution, but an entire legal order, was transformed, albeit that the transformation unfolded according to the terms set forth by the old legal order itself.

Ackermann's concept of a substantive constitutional revolution is intended to capture the intuition that the legal order has been fundamentally changed because the previous order's supreme criteria of legal validity have been replaced by supreme criteria with radically different content, even though the process by which these new criteria emerged was an act of self-destruction sanctioned by the supreme criteria of the immediately preceding order.

With these thoughts in mind, I turn now to describe the basic features of the constitutional order that emerged as a result of this substantive constitutional revolution.

### III. A BRIEF INTRODUCTION TO THE CONSTITUTION

The purpose of this section is to provide the reader with a working knowledge of the key provisions of the Constitution and the Court's approach to interpreting them. Its purpose is not to provide a doctrinal analysis of any part of the Court's jurisprudence. Instead, it is intended to give the reader a minimally sufficient background understanding of the constitutional text and the Court's approach to interpretation so

as to enable a meaningful engagement with the results of my interviews with the Justices and my analysis of the relevant case law, reported in subsequent chapters.

### **A. Founding Values**

Section 1 of the Constitution sets out the ‘founding values’ of the nation-state, which include the values of ‘[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms’, ‘[n]on-racialism and non-sexism’, ‘[s]upremacy of the constitution and the rule of law’, and ‘[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

While an amendment to the Constitution typically requires a two-thirds majority vote in the National Assembly,<sup>26</sup> the founding values in Section 1, and the provisions of the Bill of Rights, are subject to heightened amendment requirements. An amendment to the Bill of Rights requires a two-thirds majority in the National Assembly and the support of six of the nine provinces in the National Council of Provinces.<sup>27</sup> Even more restrictively, the founding values set forth in Section 1 may only be amended by a 75% majority in the National Assembly and at least six provinces in the National Council of Provinces.<sup>28</sup>

As we shall see in Chapter 7, it is possible that certain amendments to the Constitution—for example, removing dignity as a founding value in Section 1—

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<sup>26</sup> Constitution of the Republic of South Africa, 1996, s 74(3). If the amendment concerns one of the matters affecting the provinces that are enumerated in s 74(3), then the amendment also requires the support of at least six of the nine provinces in the National Council of Provinces.

<sup>27</sup> *ibid*, s 74(2).

<sup>28</sup> *ibid* s 74(1). Section 74 itself, which sets out the procedural requirements for constitutional amendments, can also only be amended by a 75% majority in the National assembly and at least six provinces in the National Council of Provinces. *ibid*.

would not be recognized by the Court as legally valid, despite having met the procedural requirements set out in Section 74. This raises very interesting questions concerning the ultimate criteria of legal validity in South Africa, and in particular for the applicability of Hart's model of a legal system to the practices of the Constitutional Court.

## **B. Interpretation and Application**

In *S v Zuma*,<sup>29</sup> the first judgment issued by the Court, the Court unanimously set out what it considered to be the proper approach to the interpretation of the rights in the Interim Constitution. Relying on the judgment of Lord Wilberforce in the Privy Council in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), the Court held that constitutional rights call for an interpretation that is 'generous', in the sense of 'giv[ing] to individuals the full measure of the fundamental rights and freedoms'.<sup>30</sup> Relying on the judgment of Dickson J in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4<sup>th</sup>) 321, the Court held that the rights also called for a purposive interpretation, in that '[t]he meaning of a right or freedom guaranteed by the Charter was to be ascertained . . . in the light of the interests it was meant to protect.'<sup>31</sup> The Court held, further, that regard must be paid to the country's 'legal history, traditions and usages', and also emphasized the importance of the constitutional text:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a

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<sup>29</sup> *S v Zuma and Others* 1995 (2) SA 642 (CC).

<sup>30</sup> *ibid* para 14 (internal quotation marks omitted).

<sup>31</sup> *ibid* para 15 (internal quotation marks omitted).

single ‘objective’ meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. . . . [E]ven a constitution is a legal instrument, the language of which must be respected.<sup>32</sup>

As the Court subsequently described it in *Makwanyane*, the Court’s judgment in *Zuma* called for an approach to constitutional interpretation ‘which, whilst paying due regard to the language that has been used, is “generous” and “purposive” and gives expression to the underlying values of the Constitution.’<sup>33</sup> In following this approach, any fundamental right ‘must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the bill of rights] of which it is part.’<sup>34</sup>

In contrast to the well-known disagreements about interpretive methodology on the United State Supreme Court, this approach to constitutional interpretation has never been called into question by the Court, even as the composition of the Court has changed over time. Although this interpretive approach was adopted first in respect of the Interim Constitution, the Court has continued to follow this approach in its interpretation of the Final Constitution.

The Final Constitution itself contains some express mandates for how the Bill of Rights must be interpreted and applied. First, Section 2 of the Constitution provides that the ‘Constitution is the supreme law of the Republic’, and that ‘law or

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<sup>32</sup> *ibid* paras 17-18.

<sup>33</sup> *Makwanyane* (n 25) para 9.

<sup>34</sup> *ibid* para 10.

conduct inconsistent with it is invalid'. Section 172 places a duty on courts to 'declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency', and empowers them to 'make any order that is just and equitable'.

Second, the Constitution expressly provides that the state has not only negative duties in respect of human rights, but also positive duties.<sup>35</sup> That is, the state must not only 'respect' the rights in the Bill of Rights, but also 'protect, promote and fulfil' them.<sup>36</sup> Furthermore, the Bill of Rights binds not only government; natural and juristic persons can also be duty-bearers under the Bill of Rights, 'taking into account the nature of the right and the nature of any duty imposed by the right.'<sup>37</sup>

Third, Section 36 contains a limitations clause which provides that '[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', taking into account certain enumerated factors that, briefly put, address the proportionality between the purpose of the limitation and the extent of the infringement of the right.

Fourth, Section 39(1) provides that a court, when interpreting a right in the Bill of Rights, 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom', 'must consider international law',

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<sup>35</sup> On the distinction between negative and positives duties in human rights, see Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights* (OUP 2008).

<sup>36</sup> Constitution of the Republic of South Africa, 1996, s 7(1).

<sup>37</sup> *ibid* s 8(4). On the horizontality of the Bill of Rights, see Nick Friedman, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 *South African Journal on Human Rights* 63.

and ‘may consider foreign law’. In practice, the Court has had extensive recourse to foreign law in its judgments.<sup>38</sup>

Finally, Section 39(2) provides that a court, ‘[w]hen interpreting any legislation, and when developing the common law or customary law . . . must promote the spirit, purport and objects of the Bill of Rights.’ In its groundbreaking judgment in *Carmichele*, the Court held that—

the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.<sup>39</sup>

As the Court further explained in *Carmichele*, the ‘Constitution is not merely a formal document regulating public power. It also embodies . . . an objective, normative value system. . . . It is within the matrix of this objective normative value system that the common law must be developed.’<sup>40</sup>

### **C. The Bill of Rights**

The South African Constitution is widely regarded as amongst the most progressive constitutions in the world, setting out a comprehensive range of civil and political rights, as well as social, economic and cultural rights.<sup>41</sup> An overview of each

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<sup>38</sup> Sydney Kentridge, ‘Comparative Law in Constitutional Adjudication: The South African Experience’, in Basil Markesinis and Jörg Fedtke (eds) *Judicial Recourse To Foreign Law: A New Source Of Inspiration?* (UCL Press 2006).

<sup>39</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 39.

<sup>40</sup> *ibid* para 54.

<sup>41</sup> In addition to those rights discussed below, the Bill of Rights includes the rights to freedom and security of the person (s 12), to freedom from servitude (s 13), to privacy (s 14), to freedom of religion and opinion (s 15), to freedom of expression (s 16), to assembly (s 17), to freedom of association, (s 18), to make political choices (s 19(1)), to free and fair elections (s 19(2)), to vote (s 19(3)), to

right and the Court's jurisprudence interpreting each right is beyond my purpose here. The following remarks provide a flavour of the Bill of Rights and the Court's jurisprudence that suffices to give context for the interviews discussed in the next several chapters.

The text of the Constitution indicates a clear path forward for decisive, unanimous judgments on some of the issues that have often divided the highest courts in other countries. For example, Section 10 provides that 'everyone has the right to life', without the qualification that commonly appears in other bills of rights, namely that the deprivation of life may be permissible if it is carried out with due process of law and is not arbitrary.<sup>42</sup> In abolishing the death penalty in *Makwanyane*, this unqualified formulation of the right played an important part in several of the Justices' judgments.<sup>43</sup> In a similar vein, the right to equality in Section 9 is framed as including the 'full and equal enjoyment of all rights and freedoms',<sup>44</sup> which the Court has interpreted as embodying substantive and restitutive, rather than a formal, equality.<sup>45</sup> Section 9 itself expressly permits the state to take affirmative action to 'advance persons, or categories of persons, disadvantaged by unfair discrimination' in the past.<sup>46</sup> Section 9 also prohibits both the state and private persons from

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citizenship (s 20), to freedom of movement (s 21), to choose a trade (s 22), to fair labour practices (s 23), to protection of property (s 25), to access information (s 32), to just administrative action (s 33), and to a fair, public hearing before a court (s 34). The Bill of Rights also contains the full panoply of rights for those who are arrested, detained or accused of crimes (s 35). In addition, it includes the right to a healthy environment (s 24), the right to practice one's culture and language (ss 30 and 31), and sets out additional rights specifically for children (s 28).

<sup>42</sup> See, for example, the International Covenant on Civil and Political Rights, art. 6.

<sup>43</sup> *Makwanyane* (n 25) paras 40, 77, 85, 208, 324.

<sup>44</sup> Constitution of the Republic of South Africa, 1996, s 9(2).

<sup>45</sup> *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) paras 22-32.

<sup>46</sup> Constitution of the Republic of South Africa, 1996, s 9(2).

discriminating on the basis of a non-exhaustive list of grounds that includes race, gender, sexual orientation, age, disability, and religion.<sup>47</sup> On the basis of this right, the Court has issued judgments unanimously decriminalizing sodomy<sup>48</sup> and legalizing same-sex parenting<sup>49</sup> and same-sex marriage.<sup>50</sup>

The Constitution also provides for a range of economic rights, namely to housing, healthcare, food, water, social security, and education. The state is obligated to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realization’ of these rights.<sup>51</sup> Some of the Court’s most famous judgments are in this area. For example, in *Grootboom*,<sup>52</sup> a community that was living in deplorable conditions in an informal settlement abandoned it in favour of setting up shacks and shelters on privately owned land that had been earmarked for low-cost housing. After being forcibly evicted from their new settlement, the community filed an action alleging that the government had violated their right to housing. On appeal, the Constitutional Court found in favour of the community, and

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<sup>47</sup> Constitution of the Republic of South Africa, 1996, s 9(3).

<sup>48</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

<sup>49</sup> *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC).

<sup>50</sup> *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

<sup>51</sup> Constitution of the Republic of South Africa, 1996, s 26 provides that ‘[e]veryone has the right to have access to adequate housing’, and s 27 provides that ‘[e]veryone has the right to have access to— health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.’ The state’s obligation in respect of these rights is to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realization’ of these rights. ss 26 and 27. s 28 provides for a right to education: ‘[e]veryone has the right- to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.’

<sup>52</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

held the right to housing required ‘the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations’, and that the government’s housing program fell short of these obligations ‘in that it failed to provide for any form of relief to those desperately in need of access to housing’.<sup>53</sup> The judgment is believed to be the first time in history that a national court has enforced a socio-economic right.<sup>54</sup> In another famous socio-economic rights case, brought at the height of AIDS denialism in South Africa,<sup>55</sup> the Court heard a challenge by the Treatment Action Campaign against the government’s refusal to provide Nevirapene—an anti-retroviral drug that prevents mother-to-child transmission of HIV—beyond a handful of pilot sites. The Court held that the government had violated the right to healthcare and ordered the government to provide Nevirapene throughout the public health sector.

#### **D. Dignity: Value, Right, Interpretive Tool**

The concept of human dignity plays a central and pervasive role in the Constitution as well as the Court’s jurisprudence,<sup>56</sup> and for this reason is also a concept that comes up repeatedly in the interviews with the Justices of the Court. It is therefore worth concluding this chapter by saying a little more about it.

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<sup>53</sup> *ibid* para 95.

<sup>54</sup> Cass Sunstein, ‘Social and Economic Rights? Lessons from South Africa’ (2001) 11 *Constitutional Forum* 123, 124.

<sup>55</sup> For an overview of this historical period under the presidency of Thabo Mbeki, see Nicoli Nattrass, *Mortal Combat: AIDS Denialism and the Struggle for Antiretrovirals in South Africa* (University Of KwaZulu-Natal Press 2007).

<sup>56</sup> Arthur Chaskalson ‘Human Dignity as a Foundational Value of our Constitutional Order’ (2000) 16 *South African Journal on Human Rights* 193, 198-205.

In Section 1, dignity (together with freedom and equality) is proclaimed to be one of the founding values of the new South Africa. The Court has given meaning to the concept of dignity in a series of important judgments. The death penalty case, *S v Makwanyane*,<sup>57</sup> was the first matter to come before the Court, and the second matter in which it issued a judgment. In an important symbolic gesture for the newly established Court, each of the eleven Justices issued a concurring opinion striking down the death penalty as unconstitutional, a gesture that demonstrated a collegial equality amongst the Justices and a respect for the uniqueness of each Justice's voice and style of reasoning. Justice O'Regan, in a passage which the Court has subsequently cited many times, discussed the '[t]he importance of dignity as a founding value of the new Constitution':

'Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3. . . . Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.'<sup>58</sup>

As this passage indicates, in giving content to the concept of dignity, the Court has adopted a recognizably Kantian formulation. In *S v Dodo*, for instance, Justice Ackermann invoked the categorical imperative as he discussed 'the very heart of

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<sup>57</sup> *Makwanyane* (n 25).

<sup>58</sup> *ibid* paras 328-329.

human dignity’, namely that ‘[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.’<sup>59</sup>

The Court has used dignity to give content to two other important constitutional values, namely freedom and equality. In *Ferreira v Levin*,<sup>60</sup> Justice Ackermann expressly relied on Kant to advance a conception of dignity as requiring that an ‘individual [be] permitted to develop his or her unique talents optimally’.<sup>61</sup> This conception, he argued, entails that ‘[f]reedom and dignity are inseparably linked’<sup>62</sup>: ‘[h]uman dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction.’<sup>63</sup>

In *Prinsloo v Van der Linde*,<sup>64</sup> in a judgment jointly written by Justices Ackermann, O’Regan and Sachs, dignity features centrally in the explanation of the concepts of equality and discrimination:

We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity. . . . In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole,

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<sup>59</sup> *S v Dodo* 2001 (3) SA 382 (CC) para 38.

<sup>60</sup> *Ferreira v Levin, NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

<sup>61</sup> *ibid* para 49.

<sup>62</sup> *ibid*.

<sup>63</sup> *ibid* para 49.

<sup>64</sup> *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC).

principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.<sup>65</sup>

In *South African Police Service v Solidarity obo Barnard*,<sup>66</sup> Justice Van der Westhuizen recently provided an eloquent summary of the various roles that dignity has played in the Court's jurisprudence. Noting that the Court had been influenced by Kant's thought, he stated the Court's view that dignity is impaired when persons are treated not as ends in themselves, but merely as a means to an end.<sup>67</sup> Relying on *Ferreira, Prinsloo, Dodo, Makwanyane*, and other judgments of the Court, Justice Van der Westhuizen reiterated that human dignity is foundational to other rights in the Constitution, and serves to 'inform constitutional interpretation and adjudication at multiple levels'.<sup>68</sup> He noted further that the Court had placed dignity at the heart of its equality jurisprudence,<sup>69</sup> and argued that the Kantian conception of dignity was also important in the context of socio-economic rights.<sup>70</sup>

In addition to being a guiding value for the Court's jurisprudence, dignity is also a self-standing right in the Constitution. Section 10 provides that 'everyone has inherent dignity and the right to have their dignity respected and protected.' The

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<sup>65</sup> *ibid* para 31. For an excellent and thorough analysis of the relationship between dignity and equality under the South African Constitution, see Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012).

<sup>66</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

<sup>67</sup> *ibid* paras 172-173, 175.

<sup>68</sup> *ibid* para 172. See also *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35: 'Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . . Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.'

<sup>69</sup> *ibid* paras 175-176.

<sup>70</sup> *ibid* para 175 (citations and quotation marks omitted).

Court has interpreted this provision disjunctively, such that dignity is affirmed as an attribute of all human beings that cannot be taken away—‘everyone has inherent dignity’—but is also something that one has a right to have others respect and protect.<sup>71</sup> Section 37 provides that the right to human dignity is entirely non-derogable in a state of emergency.

Finally, dignity also functions as an interpretive tool. Section 39(2) provides that a court interpreting the Bill of Rights ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’. Dignity plays a role in the interpretation of rights as part of the analysis of limitations on those rights, in that rights may only be limited ‘to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.<sup>72</sup> In this way, dignity serves as a tool of interpretation that is used to give content to the individual rights in the Bill of Rights, and to adjudicate between competing interpretations of these rights.

#### IV. CONCLUSION

With this overview of the Constitution and South Africa’s constitutional history in mind, I turn now to my empirical analysis of the practices and attitudes of the Justices of the Constitutional Court as these relate to their judicial decision-making processes. In the next chapter, I provide an overview of my research methodology, and then proceed, in subsequent chapters, to report the results of my interviews with the Justices and my discussion of the relevant case law.

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<sup>71</sup> *Dodo* (n 60) para 35.

<sup>72</sup> Constitution of the Republic of South Africa, 1996, s 36(1).

## *Methodological Overview*

### I. INTRODUCTION

In subsequent chapters, I report and analyze the results of my empirical investigation of the practices and attitudes of the Justices of the South African Constitutional Court as these relate to their judicial decision-making processes. I attempt to discern whether their practices and attitudes exhibit certain of Hart's existence conditions for a social rule like the rule of recognition. The evidence for my conclusions is drawn largely from a series of in-depth interviews with 12 former and current Justices of the Constitutional Court which I conducted between August 2012 and January 2013. Of the eight Justices still sitting on the Court today, four of them were interviewed: Chief Justice Mogoeng Mogoeng, Justice Edwin Cameron, Justice Johan Froneman, and Justice Chris Jafta. Of the ten former Justices of the Court still living, eight were interviewed: Justice Laurie Ackermann, Justice Richard Goldstone, Justice Johann Kriegler, Justice Dikgang Moseneke, Justice Kate O'Regan, Justice Albie Sachs, Justice Johann van der Westhuizen, and Justice Zak Yacoob.<sup>1</sup> Where appropriate, I have supplemented the interviews with an analysis of relevant case law, and with knowledge gained from the 18 months I spent at the Constitutional Court between January 2008 and June 2009 as a judicial clerk for Justice Kate O'Regan.

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<sup>1</sup> Some of the former and current Justices who were not interviewed expressly declined an interview, while others did not respond to successive requests. I did not contact Justice Madlanga for an interview, as he was appointed to the Court subsequent to the conclusion of my research.

In this chapter, I explain how I translated the existence conditions for a rule of recognition into a set of empirical research questions and how these research questions dictated the use of elite interviews with the Justices as my primary research method. (Section II.) I go on to discuss the nature of elite interviews and the specific methodological problems they presented for my research. (Section III.)

## II. FROM EXISTENCE CONDITIONS TO EMPIRICAL QUESTIONS

The social science research methods one employs—interviews, case studies, surveys, participant observation, and so on—are dictated by the kind of information one wants to know.<sup>2</sup> In turn, the information one wants to know is dictated by one's initial research questions. In this section I explain how the aims of my thesis translate into the set of specific research questions that animated my empirical investigation of the Justices of the South African Constitutional Court.

As we have seen in Chapter 2, Hart assumes that the existence conditions for a social rule in relatively uncomplicated social settings like taking off hats in churches and attending the cinema can be generalized to the elite social sphere where legal officials engage in the practice of identifying and applying valid legal rules. If Hart's account is to have explanatory power with regard to the Justices' decision-making processes, then, based on the various conditions for the formation of a social rule discussed in Chapter 2, we would expect the following factual conditions to obtain amongst the Justices:

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<sup>2</sup> Joel Aberbach and Bert Rockman, 'Conducting and Coding Elite Interviews' (2002) 35(4) PS: Political Science and Politics 673.

- (1) The Justices conform their behaviour to shared judicial decision-making processes;
- (2) The Justices criticize each other's deviations from these decision-making processes;
- (3) Criticism for deviation is regarded as legitimate by the Justices who make and receive it;
- (4) The Justices regard these decision-making processes as a standard of correct judicial decision-making with which the group ought to comply; and
- (5) Justifications for these decision-making processes, and criticisms of those who deviate from them, are expressed by the Justices in deontic language, such as 'he ought to interpret the Constitution this way' or 'it is a rule that she ought to disregard foreign law as a source of law'.

As we also saw in Chapter 2, these conditions imply yet further conditions for the existence of a rule of recognition, which, if Hart's account has explanatory power, we would also expect to observe in the practices and attitudes of the Justices:

- (6) Most of the Justices must possess the information they need to perceive and appraise gaps between their own judicial decision-making processes and the decision-making processes of the other Justices. This entails that:
  - (6a) Most of the Justices individually have sufficient information about the decision-making processes of the other Justices at different points in time; and
  - (6b) Each Justice has sufficient information about her own decision-making processes at different points in time.
- (7) Most of the Justices must perceive that the judicial decision-making processes of the individual Justices aggregate to some common practice of judicial decision-making.

- (8) Most of the Justices have some non-negligible grasp of the conceptual content of the putative rule governing their judicial decision-making processes.
- (9) The criticism to which deviations from these shared judicial decision-making processes are subjected must be of a kind that most of the Justices prefer to avoid.
- (10) Most of the Justices must share the relevant background commitments, values or interests that motivate them to conform to these shared judicial decision-making processes.

These factual conditions for the existence of a rule of recognition informed the research questions I developed for my empirical analysis, though not all of these conditions figured equally prominently. Certain conditions, like Condition (8), were difficult to translate into precise empirical questions. Other conditions, like Condition (6), I simply assumed to be true—I am confident that each Justice has a good grasp of her own decision-making processes, or would be able to articulate them if asked. Finally, some of the factual conditions have overlapping themes, and were thus grouped under the umbrella of a single research question.

Ultimately, based on the existence conditions for a rule of recognition set out above, I extracted the following empirical research questions:

- (A) How aware is each Justice of the judicial decision-making processes employed by his colleagues in deciding cases?
- (B) Do the Justices converge on shared judicial decision-making processes?
- (C) Regardless of whether the Justices do in fact converge on shared judicial decision-making processes, do they perceive that they share such processes?

- (D) Do the Justices criticize one another for perceived departures from a shared standard of judicial decision-making?
- (E) Do they regard this criticism as legitimate?
- (F) How is such criticism expressed?
- (G) Do the Justices express a fear of or desire to avoid this criticism (including by demonstrating psychological experiences of restriction or compulsion, or even shame or guilt)?
- (H) Do the Justices exert insistent and serious pressure on their colleagues to conform to standards of correct judicial decision-making perceived to be held by the group (including in the form of hostile reactions to deviation or verbal manifestations of disapproval)?
- (I) By reference to what background interests, values or beliefs do the Justices justify their conformity to standards of correct judicial decision-making?

From these research questions, it is clear that the primary empirical evidence we are looking for concerns what Hart described as the ‘internal view’, namely the beliefs and attitudes of the Justices themselves. While the case law may contain some evidence of the Justices’ decision-making practices and their critical reflective attitudes towards those practices, many of these practices and much of the Justices’ internal worlds—including, importantly, the ways they experience criticism and pressure from other Justices and officials, and whether they are concerned to mimic the practices of their colleagues—cannot be gleaned from a textual analysis of reported judgments.

Furthermore, as I demonstrated in my critique in Chapter 4 of the attempts by Himma and Greenawalt to formulate a rule of recognition for the United States, it is not always easy to understand, simply by reading cases, what standards of judicial decision-making judges are employing in their written judgments, and therefore to understand the

nature of the disagreements they are having with one another. As Hart himself says, ‘it is important to distinguish the ritual language used by judges and lawyers in deciding cases in their courts from their more reflective general statements about the judicial process.’<sup>3</sup> And as Alan Paterson says in respect of his methodologically similar study of the House of Lords:

To restrict one’s inquiry to the judgments of the courts, the end products of the decision-making process, rather than scrutinizing the dynamics of the process itself, is in some senses no more intellectually satisfying than attributing Christmas presents to Santa Claus, or babies to storks.<sup>4</sup>

For this reason, there is much to be gained in the understanding of the Justices’ practices and attitudes around judicial decision-making from conversations with the Justices themselves.

Yet a further reason for the centrality of interviews to my research questions is the highly collaborative nature of the Court’s judgment writing processes, which I set out now in some detail.

#### **A. Collegiality and Collaboration Amongst the Justices**

It is the practice of the Court to assign a ‘writing’ Justice to each matter once the matter is set down for hearing (the assignments are of course completely confidential and known only to the staff of the Court). Once the case has been heard, the writing Justice takes the lead on preparing a draft judgment. Although that judgment will ultimately bear the name of the writing Justice—and I do not mean by what I say here to suggest that the judgment does not express the Justice’s own voice, or that each Justice is working with

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<sup>3</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 274.

<sup>4</sup> Alan Paterson, *The Law Lords* (Palgrave Macmillan 1982) 1-2.

anything less than a rigorous sense of independence—the process of preparing that judgment is extremely collaborative, and typically involves a degree of input from colleagues uncommon to other highest courts.

The first stage of this post-hearing process is the circulation of a brief note (usually no more than several pages) explaining how the writing Justice views the legal issues, and how he or she proposes to resolve them. The other Justices will then discuss the outline and share comments (via email or in person). It is usual at this stage for the Justices to indicate their preliminary assent to or dissent from all or part of the writing Justice's position, and indeed the apparent default position adopted by the writing Justice is to attempt to adjust his or her reasoning to accommodate these initial concerns and challenges, as far as possible, within the fundamental approach and outcome they prefer.

At some point after this preliminary exchange, the writing Justice circulates a draft judgment. Again, all of the Justices will comment, to a greater or lesser extent, suggesting edits to the facts, logic, law or values expressed in the judgment. A relatively final draft is then prepared and discussed extensively by the Justices at a conference, where yet more alterations are accepted or rejected. It is also at this stage that compromises tend to be made—a Justice may agree to sign on to a judgment, provided that the writing Justice changes the reasoning of the judgment in some way. As we will see in the subsequent chapters, each Justice of the Court places a significant value on agreement, cooperation and unity—a consequence of which is that they have a strong

preference for accommodating the concerns raised by their colleagues, in the hope of achieving a majority or even unanimity.<sup>5</sup>

If one or more concerns cannot be met, Justices who feel strongly will prepare dissents or concurrences. Ultimately, all of the Justices who sat in the matter will gather at a final conference to conduct a line-by-line read-through of each judgment that will be delivered in the matter in question. Thus, even at this late stage of the process it is not uncommon for a Justice to help sharpen the reasoning of the main judgment, while finalizing his or her own dissent.

The upshot of all of this is that a judgment written by a particular Justice will often not express the untouched reasoning of that Justice in isolation. It is not clear whether the criteria of validity expressed or implied in any particular judgment are the criteria employed by the writing Justice, by some or all of those who signed onto the judgment, or even perhaps by Justices who have not signed on. It is a further possibility that the resulting validity criteria discernible from a given judgment are an aggregated compromise between the relevant Justices, and are possibly in tension with one another, or may not truly represent the validity criteria of any Justice or group of Justices in particular.

Since the Court is expressly committed to the value and practice of collective reasoning, one must take this into account when drawing conclusions on the basis of the Court's written judgments, including conclusions about the Justices' decision-making processes. There is thus a need to search for evidence of judicial behaviour and attitudes beyond what can be gleaned from the case law. To this end, elite interviews with the

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<sup>5</sup> For example, of the 421 cases the Court had decided up to 25 August 2011, 277 (almost two-thirds) of its decisions were unanimous.

Justices of the Court have provided a rich source of data. Nevertheless, I have drawn on case law where relevant to support the veracity of the conclusions I draw from the interviews.<sup>6</sup>

### III. ELITE INTERVIEWS

Elite interviews are widely regarded by political scientists as a cost-effective means of generating unique, rich and reliable data about the practices and attitudes of political officials.<sup>7</sup> They are particularly useful for examining abstract concepts that are otherwise difficult to investigate,<sup>8</sup> for understanding how actors think or how they interpret events,<sup>9</sup> and for enabling a better understanding of other available data about official behaviour.<sup>10</sup>

However, literature dealing with the particular methodological challenges of conducting elite interviews is relatively scarce,<sup>11</sup> and there appear to be few hard and fast rules. Indeed, as in any social interaction, it seems that the primary determinant of the success of an interview will be the sophistication of the interviewer's interpersonal skills.

In fact, since each interview is as unique as the person being interviewed, there would be

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<sup>6</sup> Kenneth Goldstein, 'Getting in the Door: Sampling and Completing Elite Interviews' (2002) 35(4) PS: Political Science and Politics 669; Glenn Beamer, 'Elite Interviews and State Politics Research' (2002) 2 State Politics & Policy Quarterly 86.

<sup>7</sup> Lewis Dexter, *Elite and Specialized Interviewing* (European Consortium for Political Research 2006); Beamer (n 6); Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (Sage Publications 1990); Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers College Press 1998); Charles Judd et al, *Research Methods in Social Relations* (6th edn, Holt, Rinehart, and Winston, Inc 1991).

<sup>8</sup> Beamer (n 6).

<sup>9</sup> Aberbach and Rockman (n 2); Adrianna Kezar, 'Transformational Elite Interviews: Principles and Problems' (2003) 9(3) Qualitative Inquiry 395; Teresa Odendahl and Aileen Shaw, 'Interviewing Elites' in Jaber Gubrium and James Holstein (eds), *Handbook of Interview Research: Context and Methodology* (Sage 2001).

<sup>10</sup> Goldstein (n 6) 669.

<sup>11</sup> Beth Leech, 'Interview Methods in Political Science' (2002) 35(4) PS: Political Science and Politics 663; Margaret Desmond, 'Methodological Challenges Posed in Studying an Elite in the Field' (2004) 36(3) Area 262; Susan Ostrander, 'Surely You're Not in This Just to Be Helpful: Access, Rapport and Interviews in Three Studies of Elites' (1993) 22(1) Journal of Contemporary Ethnography 7.

something misguided about offering one-size-fits-all prescriptions. As Lewis Dexter puts it in his seminal textbook on the subject, '[w]hat may be suicidal or impractical for one interviewer or in one situation may be feasible or even the best way to proceed for another interviewer or in another situation.'<sup>12</sup> Much of the recent literature on the methodology of elite interviews therefore proceeds largely in the form of tips and advice about how to interact well in the process of securing and conducting the interview, such as dealing with issues of tone, rapport, professionalism, responsiveness, preparedness, and so on.<sup>13</sup>

Furthermore, since the problems presented in elite interviews tend largely to be a specific instance of problems presented by interviews generally, distinguishing interview subjects into 'elites' and 'non-elites' is, to some extent, artificial.<sup>14</sup> This is particularly so since there is not much work on how 'elites' are to be defined.<sup>15</sup> The literature generally treats elites as persons who are highly skilled and knowledgeable professionals in positions of authority,<sup>16</sup> though elites are sometimes also defined in terms of a power or knowledge imbalance between the interviewer and interviewee.<sup>17</sup> These grey areas around the characterization of elites are not relevant for present purposes, however, since Constitutional Court Justices undoubtedly count as 'elites' by any measure of the term.

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<sup>12</sup> Dexter (n 7) 32.

<sup>13</sup> William Harvey, 'Strategies for Conducting Elite Interviews' (2011) 11 *Qualitative Research* 431, 433-434; Harriet Zuckerman, 'Interviewing an Ultra-Elite' (1972) 36 *The Public Opinion Quarterly* 159, 167; Ostrander (n 11).

<sup>14</sup> Katherine Smith, 'Problematizing Power Relations in "Elite" Interviews' (2006) 37 *Geoforum* 643, 652; Harvey (n 13) 439.

<sup>15</sup> Smith (n 14).

<sup>16</sup> See for example Linda McDowell, 'Elites in the City of London: Some Methodological Considerations' (1998) 30 *Environment and Planning A* 2133, 2135; Leech (n 11) 663.

<sup>17</sup> Harvey (n 13) 433; Neil Stephens, 'Collecting Data from Elites and Ultra Elites: Telephone and Face-to-Face Interviews with Macroeconomists' (2007) 7(2) *Qualitative Research* 203; Smith (n 14) 643.

Indeed, they constitute what the literature sometimes refers to as ‘ultra elites’, in that they form part of a ‘thin layer of people who exhibit especially great influence, authority, or power, and who generally have the highest prestige within what is a prestigious collectivity to begin with.’<sup>18</sup>

Despite the absence of clear rules for conducting elite interviews, there are a few problems which they raise uniquely or at least acutely, and which were relevant to my own investigation. First, in contrast with a standard interview in which the researcher will look for specific answers to questions as she has defined them, it is not only likely but also desirable in an elite interview that the respondent help define the research agenda.<sup>19</sup> Relatedly, because of this desire to learn from the respondent, and also because of power and knowledge imbalances, the interviewer will typically be able to exert less control over the direction of the interview. Elite interviews therefore take on a more conversational character than standard interviews. Finally, convincing elites to be interviewed in the first place tends to pose a significant challenge. Not only are they usually very busy, but they may also be reluctant to be interviewed on account of the sensitive nature of the information they may divulge.<sup>20</sup>

In the following sections, I set out how these methodological challenges associated with elite interviews generally manifested themselves in my specific research project. They relate to access, interview structure, and ensuring the validity of data.

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<sup>18</sup> Zuckerman (n 13).

<sup>19</sup> Dexter (n 7) 6-7.

<sup>20</sup> Erwin Smigel, ‘Interviewing a Legal Elite: The Wall Street Lawyer’ (1958) 64(2) *American Journal of Sociology* 159.

## **A. Gaining Access**

The Constitutional Court of South Africa is strongly committed to the values of openness, transparency and accountability. These values, enshrined in the Constitution<sup>21</sup> and given life even in the architecture of the Court building, are a powerful animating force for the way the Justices run the Court. The fact that the Justices value and encourage the involvement and interest of the public in their work counted in my favour as I sought to gain access to them. Furthermore, having served as a judicial clerk at the Court, I hoped that the Justices who remembered me from my time there would vouch for my character and my skill as a researcher. I hoped that they would see me as an insider or ‘family member’ of the Court whom they would be willing to assist, and whom they could trust to deal sensitively with the interview data.

One obstacle to gaining access was time. All of the Justices, both current and former, are of course extremely busy and deal on a daily basis with matters of considerable importance. The Justices currently serving on the Court presented a particular problem in this regard, as their schedules are fixed, and dictated by an increasingly dense court roll of pressing constitutional matters. To get their attention, and to convince them I would not take too much of their time, I kept my initial contact email and statement of my research project very brief (see Appendix B). I also undertook to restrict the interview time to an hour. Most of the interviews ultimately lasted between 60 and 90 minutes, a typical length for elite interviews.<sup>22</sup>

A more significant obstacle was the fact that I wanted to record the interviews with the Justices, and to have their statements be attributable to them. Recording not

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<sup>21</sup> Constitution of the Republic of South Africa, 1996, ss 1, 36 41, 165.

<sup>22</sup> Stephens (n 17); Harvey (n 13).

only facilitates better interaction between the interviewer and the respondent—which is especially important given the conversational nature of elite interviews—but it also allows for a far more accurate capturing of data.<sup>23</sup>

However, even when elites consent to be interviewed, they seldom consent to attribution. Of particular relevance in the present context is the fact that over the last several years the Court has been involved in a series of high-profile political spats with the executive branch of government and members of the ruling African National Congress (ANC). While tape recording is generally regarded as causing a respondent to be less candid,<sup>24</sup> I was concerned that the politically sensitive environment presently surrounding the Court might lead the Justices to refuse consent for an interview altogether. In particular, I was concerned, against the background of the attacks made on the Court, that the Justices would reject being involved in a project which carried with it risks of showing them to disagree with one another, and which in any event raised complex political issues of a type judges are typically reluctant to discuss.

In light of this delicate political background, and the potentially sensitive material which may have arisen in the interviews, it was extremely important to put the Justices at ease concerning how the recorded material would be used.

Out of respect for his position, and so as to secure maximum buy-in for my project, I proceeded by sending an initial email to Chief Justice Mogoeng Mogoeng to

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<sup>23</sup> Aberbach and Rockman (n 2); David Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16(3) *Politics* 199.

<sup>24</sup> Glenn Beamer, *Creative Politics: Taxes and Public Goods in a Federal System* (University of Michigan Press 1999); Malcolm Jewell and Marcia Whicker, *Legislative Leadership in the American States* (University of Michigan Press 1994); John Kingdon, *Congressmen's Voting Decisions* (3rd edn, University of Michigan Press 1989); Richard Fenno Jr, 'Observation, Context, and Sequence in the Study of Politics' (1986) 80 *American Political Science Review* 3.

explain the nature of my research and to request his permission to contact the Justices of the Court individually. In order to allay any fears that the Chief Justice may have had, I was at pains to emphasize that I had no intention of criticizing the Court, and that my only goal was to describe the practices and attitudes of the Justices in respect of relatively non-political dimensions of their work. I informed him that the Justices would receive the questions far in advance, such that there would be no surprises in the interviews. Finally, I undertook to furnish the Justices with copies of the empirical chapters of my thesis prior to submission, such that they could correct inaccuracies in my reporting of their comments and request deletions of statements that they did not want attributed to them.<sup>25</sup>

After having discussed my request with the other Justices at their weekly conference, the Chief Justice granted me permission to contact them, and also consented to be interviewed himself. In my subsequent emails to individual Justices, these undertakings were reiterated (as they were again in the interviews themselves when certain Justices requested reassurances of my good faith).<sup>26</sup>

## **B. Structure of Interviews**

Closed-ended questions are generally discouraged in elite interviews, as elites tend to dislike being confined to a narrow set of issues, and being subjected to standardized treatment.<sup>27</sup> Furthermore, such a highly structured interview with narrow questions is

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<sup>25</sup> The empirical discussion that follows in subsequent chapters reflects any comments received from the Justices.

<sup>26</sup> I used a similar method of contact for most of the former Justices. Justices Kate O'Regan, Laurie Ackermann, Albie Sachs were initially approached informally, and were subsequently sent the questions and an explanatory email.

<sup>27</sup> Aberbach and Rockman (n 2) 674; Harvey (n 13) 434.

most effective when the interviewer is confident in her knowledge of the subject matter and of the possible categories of answers.<sup>28</sup> While I had a strong sense of the issues I wanted to investigate, I thought it crucial to leave the Justices free to convey to me what was important *from their perspective*, rather than impose on them my own perception of what was significant about their practice.<sup>29</sup>

Admittedly, one benefit of a rigid interview structure based on closed-ended questions is that it makes possible very precise comparisons. However, while I certainly wanted to be able to compare results across the interviews, I had no intention of performing the kind of quantitative analysis of relationships between variables that would have required me to code the interviews, and which would have thus necessitated closed-ended questions.<sup>30</sup> Nevertheless, giving structure to the interview seemed essential to make the most efficient use of a short time frame, especially since a lack of structure can result in a wandering interview that does not produce reliable and relevant data.<sup>31</sup>

In the result, I struck a balance between these competing demands by opting for a semi-structured but free-flowing interview procedure, based on a set of relatively narrow questions which nevertheless had a degree of open-endedness. This allowed me to gather sufficiently rich and relevant detail from the Justices, while allowing enough similarity between the interviews to facilitate a comparison of responses.<sup>32</sup>

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<sup>28</sup> Beth Leech, 'Asking Questions: Techniques for Semistructured Interviews' (2002) 35(4) PS: Political Science and Politics 665.

<sup>29</sup> Dexter (n 7); Odendahl and Shaw (n 9).

<sup>30</sup> Aberbach and Rockman (n 2); Zuckermann (n 13) 167.

<sup>31</sup> Leech (n 11).

<sup>32</sup> *ibid*; Aberbach and Rockman (n 2).

On the basis of the research questions set out earlier in this chapter, I prepared a list of 33 more specific questions that I sent to each Justice in advance of the interview (see Appendix A). However, given my desire to avoid an overly rigid interview, and particularly given the time constraints of the interviews themselves, I did not cover each individual question on the list I sent to the Justices. (A question-by-question approach is in any event out of place in elite interviews, since the intellectual sophistication of the respondent often results in answers which cut across many of the questions set in advance.)<sup>33</sup> Instead, the interviews were structured around the following themes:

- 1) *Social dynamics*: How much attention each Justice pays to the reasoning processes of his colleagues; what kinds of criticism he is worried about; how much he cares about receiving criticism from his colleagues and from other officials; how he characterizes disagreements between himself and his colleagues.
- 2) *Processes of reasoning*: How each Justice reasons her way through a dispute (in particular, how she determines the legal position governing the case) from the time she receives the first set of papers to the delivery of the final judgment.
- 3) *Sources of law*: How each Justice treats precedent and legislation, and why he considers them authoritative; how each Justice treats the amending clause of the Constitution; from where each Justice thinks the Constitution derives its authority.

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<sup>33</sup> Zuckermann (n 13).

- 4) *Morality*: How each Justice understands and works with moral principles; how each Justice gives content to the values of dignity, equality, and freedom.
- 5) *Judicial role*: How each Justice describes her role as a judge, and the role of the Court.
- 6) *Interpretation*: What approach each Justice adopts towards interpretation of the Constitution.
- 7) *Discretion*: How each Justice experiences the constraint of language and rules, and other factors which limit his discretion.

While my thesis is ultimately concerned with the Justices' practices and attitudes in relation to criteria of legal validity, my questions to the Justices largely eschewed specific reference to 'criteria of legal validity' or other technical philosophical terms. Instead, I asked the Justices about their decision-making practices generally, to which I refer throughout the thesis, as I did in the interviews, as a proxy for criteria of legal validity.

My reasons for this approach are two-fold. First, for the reasons discussed in Chapter 3, my goals in this thesis extend beyond merely determining whether the Justices in fact converge on shared criteria of legal validity. Convergence of behaviour is only one condition for the formation of a social rule like the rule of recognition. As we saw in Chapter 2, there are many other conditions besides, which are concerned with the extent to which individuals in a social group are even aware of the group's convergent behaviour, whether the individuals criticize one another for departures from the group's perceived convergent behaviour, and whether they view that convergent behaviour as a rule or a standard with which the group ought to comply. Understanding these group

dynamics necessitated going beyond questions narrowly focusing on whether the Justices share criteria of legal validity.

Second, and relatedly, I was concerned that I would not get an accurate picture of the social dynamic amongst the Justices—in particular, how much they understand about one another’s thought processes (concerning criteria of legal validity or otherwise), and how they criticize perceived departures from shared standards of correct judicial decision-making—if I presented them with complex, technical philosophical propositions, given that they have very practical and robust conceptions of their work that do not unfold in the jargon of analytic philosophy. I had a strong suspicion (which my early interviews confirmed) that overly technical philosophical questions were likely to be viewed by the Justices as misguided or confusing. Instead, I asked the Justices about their decision-making processes more broadly, which they understood to encompass not just the way that they worked with sources of law (i.e., their criteria of legal validity), but also their use of precedent and analogy, the role they accorded to logic and empathy, the way they work with the factual record, pleadings and briefing, and, to a certain extent, their styles of writing and styles of reasoning.

On this understanding of what constitutes judicial decision-making practices, the judge who decides cases by thinking about what outcome would be just and the judge who decides cases on an originalist interpretation of the black-letter law, are each using different judicial decision-making processes. The judge who works with a strict hierarchy of legal sources and the judge who works with a flexible hierarchy also have different judicial decision-making processes. The judge who makes extensive recourse to foreign law to tease out principles of universal reason that can be applied in the case at

hand is also working with a certain judicial decision-making process. The interviews with the Justices are rich with references to these kinds of judicial decision-making, all of which implicate, directly or indirectly, the Justices' criteria of legal validity, without discussing them in those express terms. These discussions had the desired effect of eliciting from the Justices the practices and attitudes that surround their judicial decision-making processes that are of concern to me in assessing the existence of certain social conditions necessary to establish a Hartian rule of recognition.

### **C. Validity of Data**

One challenge that often crops up in interviews (including elite interviews) is to determine who will form part of the sample. If the sample size is not sufficiently large, or sufficiently representative of the larger population, the data will be compromised.

Given the aims of my project, this difficulty does not arise. My goal is to understand the practices of a small, ultra-elite population—a high rate of participation by the population of Constitutional Court Justices (past and present) means that my sample is very close to the target population, thus minimizing issues related to random sampling errors and selection.<sup>34</sup> Furthermore, having a small group with a low nonresponse rate aids the process of comparison.

There were, however, three methodological issues concerning data validity which had to be thought through. The first concern, particularly in the context of recorded interviews, was to get the Justices to answer questions in a frank and detailed way. To this end, a common interview strategy is to begin with general questions, and proceed to

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<sup>34</sup> Goldstein (n 6) 669-670.

more specific ones.<sup>35</sup> A widely recommended approach is to begin with what has been referred to as a ‘grand tour’ question, asking the interviewee to explain something they know well, such as a typical part of their work day.<sup>36</sup> In order to help the Justices become comfortable with the interview context, I began each conversation by asking them to describe their process of judgment writing, from the time when an application is first lodged to the time the judgment is handed down.

The second concern is triggered by the fact that although I covered the same themes in each interview, and put the questions to the Justices in more or less the same way, the order of the questions varied after this standard lead-in. This is an acknowledged drawback of the conversational character of elite interviews, in that the unavoidable differences in the order in which questions are asked is likely to affect the substance of the answers, and therefore also the comparisons which can be made between interviews.<sup>37</sup> There are, of course, benefits to this conversational flow, in that it facilitates depth in responses, and allows the respondents to guide the researcher to important issues,<sup>38</sup> but there was in any event no way, given the social dynamic, that the interviews with the Justices could have been conducted in a more ordered way than this.

The third issue affecting validity was that the Justices demonstrated some degree of familiarity with, and views about, some of the philosophical theories their responses were meant to test. Take, for example, Justice O’Regan’s claim that ‘in the South African legal system we closed down [the] distinction between a legal positivist and a

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<sup>35</sup> Dexter (n 7); Kingdon (n 24); Seidman (n 7).

<sup>36</sup> James Spradley, *The Ethnographic Interview* (Holt, Rinehart and Winston 1979) 86-88; Leech (n 11) 667.

<sup>37</sup> Aberbach and Rockman (n 2).

<sup>38</sup> *ibid.*

natural law debate'.<sup>39</sup> Or the following statement by Justice Ackermann: 'I would say that for South Africa, in a very deeply Kelsenian sense, the Constitution is our *grundnorm*.'<sup>40</sup> Indeed, it was not uncommon, in the course of their responses, for the Justices to express views on theories of law and adjudication, and to reference thinkers as diverse as Ronald Dworkin, Duncan Kennedy, Oliver Wendell Holmes, Joseph Raz and Immanuel Kant.

I was concerned that the Justices' responses to my questions might be prejudiced by their perceptions of which philosophical positions a given answer would support or undermine. Indeed, as is to be expected in an elite interview,<sup>41</sup> I think it is necessary to assume that the Justices were self-reflecting upon and self-editing their answers with a view to impacting my assessment of them.

Although, once again, there was no way to conduct the interviews to eliminate this possibility, one benefit of the varied order of questioning in each of the interviews is that it largely avoided the suggestion of conceptual links between the issues, and by returning to an issue at a later stage in the interview from a different angle, I was able to test both the coherence of a Justice's position on a particular subject and the fullness of his or her commitment to it.<sup>42</sup>

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<sup>39</sup> Interview with Justice Kate O'Regan, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 20 August 2012).

<sup>40</sup> Interview with Justice Laurie Ackermann, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 13 August 2012).

<sup>41</sup> Matt Bradshaw, 'Contracts and member checks in qualitative research in human geography: reason for caution?' (2001) 33(2) *Area* 202; Emmanuele Sabot, 'Dr Jekyll, Mr H(i)de: the Contrasting Face of Elites at Interview' (1999) 30 *Geoforum* 329.

<sup>42</sup> Judd et al (n 7); Beamer (n 6).

To the extent that there remains a degree of contamination in the data as a result of these latter methodological challenges, I have tried to remain vigilant of their possible effects while analyzing the interviews.

#### IV. CONCLUSION

As discussed in Chapter 1, my empirical investigation of the practices and attitudes of the Justices of the Constitutional Court bears some similarities to Alan Paterson's study of decision-making in the House of Lords.<sup>43</sup> However, our projects are quite different: Paterson's is a more straightforwardly sociological endeavour that seeks a broad understanding of the process by which appeals are decided in the House of Lords, and as part of that endeavour, he is concerned to promote the value of role analysis as a method of sociological inquiry.<sup>44</sup> My project is an interdisciplinary project that draws on empirical research, but its primary motivation is to test certain philosophical claims about the nature of law. I thus do not advocate for a certain method of social inquiry, even if the methods I have adopted entail commitments to some such methods over others. The evidence I seek is also considerably narrower than Paterson's: rather than an open-ended inquiry into the decision-making processes of the Justices of the Constitutional Court, I test for the presence of certain factual conditions to determine whether a rule of recognition exists amongst the Justices, and thus whether the dominant philosophical theory of the nature of law has explanatory power for their judicial decision-making.

Despite the differences in our goals, I have made similar methodological choices in conducting my interviews with the Justices of the Constitutional Court. Like Paterson,

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<sup>43</sup> Alan Paterson, *The Law Lords* (MacMillan Press Ltd 1982).

<sup>44</sup> *ibid* 3-4, 201-212.

I have relied substantially on a series of interviews with current and former Justices of the country's highest court.<sup>45</sup> Like Paterson—and in response to the same concerns about the nature of elite interviews—I opted for a standardized set of questions administered in a semi-structured way that flowed with the direction of each conversation.<sup>46</sup> And to secure access to the Justices and to encourage their permission to allow me to attribute quotations to them, I gave them the option of reviewing the quotations on which I rely in the following chapters.<sup>47</sup>

Interestingly, in addition to sharing a methodological approach, in Chapters 9 and 10 I draw some conclusions that are mutually consistent with Paterson's. In the course of his study of the House of Lords, Paterson argued that judicial decision-making in the United Kingdom's final court of appeal is best understood as a collective and social process constituted by the dialogues taking place between judges and those with whom they frequently act (notably, counsel) in making their decisions.<sup>48</sup> As in Paterson's project, the results of my empirical investigation of the Justices of the Constitutional Court, particularly those reported in Chapters 9 and 10, reveal a highly collaborative and extremely collegial Court, suggesting, in line with Paterson's conclusions, that it is misguided to regard judicial decision-making as 'merely several individuals at work'.<sup>49</sup> Furthermore, Paterson argues, as I do, that focusing exclusively on judgments, as merely the end product of this collaborative process, obscures much of interest about the

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<sup>45</sup> *ibid* 4-8.

<sup>46</sup> *ibid* 6-7.

<sup>47</sup> *ibid*.

<sup>48</sup> *ibid* 109-121.

<sup>49</sup> *ibid* 1.

decision-making processes of the Law Lords.<sup>50</sup> I hope that the discussion of my interviews with the Justices in the chapters that follow reveals how much we would miss about the Justices' judicial decision-making processes without deeper empirical investigation that probes what lies behind their written conclusions.

It is to that empirical investigation that I now turn.

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<sup>50</sup> *ibid* 1-8.

## *The Supreme Criterion of Legal Validity in South Africa*

### I. INTRODUCTION

In the next four chapters I report and analyze the results of my empirical investigation of the practices and attitudes of the Justices of the South African Constitutional Court, as these relate to their judicial decision-making processes. I attempt to discern whether certain factual conditions necessary for a rule of recognition to exist are manifest in the Justices' practices and attitudes.

As we saw in Chapter 2, one of the conditions that must be met in order for a group to have a social rule is that most members of the group must actually conform their behaviour to the practice required by the rule. Thus, if a rule of recognition is to exist in a given legal system, most legal officials in that system must converge in their practice of identifying valid law by reference to shared criteria of legal validity. In this chapter, I seek to determine whether the Justices of the Constitutional Court converge in their ultimate criteria of legal validity by investigating their practices and attitudes in relation to the amending clause of the South African Constitution.

I begin with a brief overview of the place that the amending clause occupies in the South African constitutional scheme. (Section II.) I show that if we attempt to discern the supreme criterion of legal validity in South Africa using the methodological approach adopted by Greenawalt (and discussed in Chapter 4)—that is, if we rely simply on the formal legal landscape of the constitutional text and our doctrinal understanding of its provisions—we would likely conclude, consistently

with Greenawalt's own findings in the United States, that the supreme criterion in South Africa is the amending clause, set forth in Section 74 of the Constitution. I go on to review the way the Justices have dealt with constitutional amendments in the Court's case law. (Section III.) I show that the Court's judgments foreshadow what is known as the 'basic structure doctrine'—according to which a procedurally flawless constitutional amendment can be unconstitutional for failure to comply with given principles of political morality—though the Justices do not give much content to the doctrine or even expressly hold that it is part of South African law. As I demonstrate, it is only through conversation with the Justices that we learn that a large majority of the Justices endorse a scheme of legal validity according to which some constitutional amendments may themselves be invalid—notwithstanding the fact that they are in flawless compliance with the procedures prescribed by the amending clause—because they fail to comply with certain even more supreme criteria of legal validity. (Section IV.) However, when each Justice describes the criteria that he or she does in fact treat as ultimate, it appears that the Justices subscribe to different and perhaps even competing visions of the ultimate criteria of legal validity in South African law. Thus, one of the most well-known conditions for the formation of a Hartian social rule, namely, a convergent practice amongst the group's participants, is seemingly absent from the judicial decision-making processes of the Justices of the Constitutional Court.

II. THE AMENDING CLAUSE OF THE SOUTH AFRICAN CONSTITUTION  
Hart offers us the following definition of the supreme criterion of legal validity for a given legal system:

We may say that a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion.<sup>1</sup>

Adopting this definition, Greenawalt asserts that the supreme criterion in the United States 'is rather easy to identify, given prevailing assumptions about the American Constitution':<sup>2</sup>

The criterion about which [Hart's definition] is true in the United States is the amending clause, article V, of the Constitution. A provision adopted according to its procedures for amendment has priority not only over state law, federal statutes, and federal judicial decisions, but also over what is in the original Constitution or in earlier amendments.<sup>3</sup>

As I argued in Chapter 4, the mistake Greenawalt makes here is to conflate the importance of Article V vis-à-vis the formal constitutional scheme with the importance of Article V vis-à-vis the putative rule of recognition in the United States. As far as Hart's theory is concerned, there is no necessary connection, in the way Greenawalt supposes, between a country's constitution and a country's rule of recognition.<sup>4</sup> Thus, while an amending clause of a constitution in a given legal system may *appear* to be the supreme criterion as a matter of constitutional text, the amending clause is in fact the supreme criterion only if it is treated as such in the practices and attitudes of the officials of the legal system.

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<sup>1</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 106.

<sup>2</sup> Kent Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 *Michigan Law Review* 621, 632 (my emphasis).

<sup>3</sup> *ibid* 632.

<sup>4</sup> Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in his *Between Authority and Interpretation* (OUP 2009) 333.

If, following Greenawalt, we were to conflate the Constitution and the rule of recognition in South Africa—relying, as Greenawalt does, on some unstated set of ‘prevailing presumptions’ about the South African Constitution—we would surely conclude that Section 74 of the Constitution is the supreme criterion of legal validity in South Africa. As we saw in Chapter 5, Section 2 of the Constitution declares that the Constitution is the supreme law in South Africa, and Section 74 sets out the process for making amendments to it. The process differs depending on which part of the Constitution is being amended: an amendment to section 1 (which contains the founding values) or Section 74 itself requires a 75% majority in the National Assembly and the assent of 6 of the 9 provinces in the National Council of Provinces (NCOP); other amendments require a two-thirds majority in the National Assembly, and, if such amendments relate to the Bill of Rights or a matter affecting the provinces, they require the assent of 6 provinces in the NCOP as well. Unlike the amending clause in the United States Constitution, there are no express limits within the text of Section 74 (or indeed elsewhere in the Constitution) on the nature of amendments that may be made to the Constitution. Whatever kind of amendment is passed thereafter becomes as much a part of the Constitution as its other provisions, ‘to be read as a whole and . . . interpreted in harmony with one another.’<sup>5</sup>

As a matter of constitutional text, then, amendments to the Constitution that are enacted in full compliance with the procedures prescribed by Section 74 create legal rules that are superior to all others—they trump any existing provisions of the Constitution with which they are in conflict, and so too do such amendments trump

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<sup>5</sup> *United Democratic Movement v President of the Republic of South Africa and Others* 2003 (1) SA 495 (CC) para 12.

conflicting legislation, common law and customary law. Doctrinally speaking, this entails that Section 74 is the supreme criterion of legal validity in South Africa.

However, as we shall see in the following section, the handful of judgments in which the Court has pronounced on the validity of amendments to the Constitution already suggest that Section 74 is not the last word on legal validity, and that a deeper investigation of the Justices' practices and attitudes is required.

### III. THE AMENDING CLAUSE AND THE BASIC STRUCTURE DOCTRINE

The idea of the unconstitutional constitutional amendment is not a novel one, and finds application in the law of several constitutional states.<sup>6</sup> Perhaps most famously, the phenomenon is embodied in India's 'basic structure doctrine', which was recognized by a majority of the Indian Supreme Court in 1973 in *Kesavananda Bharati v State of Kerala*.<sup>7</sup> That case concerned challenges to constitutional amendments that attempted to place land reform legislation (impacting the constitutional right to property) beyond judicial review. Although the Indian Supreme Court ultimately upheld the validity of the amendments in question, it laid down the principle that Parliament's amending power did not include the power to alter the 'basic structure' of the Constitution.

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<sup>6</sup> For a useful comparative survey of the issue in different jurisdictions, see Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israeli Law Review* 321. Many of the jurisdictions Barak discusses have constitutions that include 'eternal clauses', which declare (similarly to Article V of the United States Constitution) that certain features of the constitution cannot be amended. Strictly speaking, amendments that violate eternal clauses are not 'unconstitutional', since the amending power is limited by the text of the constitution itself. Such constitutions are not relevant to the present inquiry.

<sup>7</sup> AIR 1973 SC 1461. The possible application of the doctrine had been raised previously in Justice Mudholkar's dissent in *Sajjan Singh v State of Rajasthan* 1965 AIR 845.

Although some might criticize the doctrine as being anti-democratic, its subsequent application was arguably pivotal to the maintenance of democracy in India. Immediately following her election in 1975, Indira Gandhi instituted a state of emergency, in the course of which Parliament enacted the 39<sup>th</sup> constitutional amendment (which attempted to insulate Gandhi's controversial election from judicial review) and the 42<sup>nd</sup> constitutional amendment (which purported to remove all restrictions on and review of Parliament's power to amend the Constitution). The Indian Supreme Court subsequently declared parts of the 39<sup>th</sup> and 42<sup>nd</sup> amendments unconstitutional—the former for violating the principle of free and fair elections, and the latter for exceeding the limits of the power to legislate.<sup>8</sup> Both these principles were held to be part of the Constitution's basic structure.

With explicit reference to the Indian experience, the possibility of the application of the basic structure doctrine in South Africa was in fact raised in one of the first judgments of the Constitutional Court—*Premier of KwaZulu-Natal*—in which the applicants sought an order declaring the Second Amendment to the interim Constitution unconstitutional.<sup>9</sup> A minor part of the applicants' argument made an oblique reference to the basic structure doctrine, contending that constitutional amendments had to fall within the 'spirit' of the Constitution. Responding to this

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<sup>8</sup> The judgment dealing with the 39<sup>th</sup> Amendment is *Smt. Indira Nehru Gandhi v Shri Raj Narain And Another* AIR 1975 SC 2299 and the judgment dealing with the 42<sup>nd</sup> Amendment is *Minerva Mills Ltd and Others v Union Of India and Others* AIR 1980 SC 1789. Relying on *Kesavananda*, the doctrine was subsequently adopted by the Supreme Court of Bangladesh in *Anwar Hossain Chowdhary v Bangladesh* 41 DLR 1989 App. Div. 165.

<sup>9</sup>*Premier of KwaZulu Natal and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC) para 45.

argument in an *obiter dictum*, Justice Mahomed (then Deputy President of the Court) stated:

It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an ‘amendment’ at all.<sup>10</sup>

Ultimately, however, Justice Mahomed found that it was unnecessary to decide the point, since none of the amendments at issue in that case could even remotely have been considered to have had that kind of effect on the Constitution.<sup>11</sup>

Approximately seven years later the Court was again asked to pronounce on the basic structure doctrine in the *United Democratic Movement* case.<sup>12</sup> The applicants in that case sought declarations of invalidity against the first two amendments to the final Constitution, which collectively enabled ‘floor crossing’; that is, the amendments enabled legislators in the local, provincial and national legislatures—having been elected as members of a particular political party pursuant to a system of party-list proportional representation—to change their political party affiliation after being elected and take their legislative seat with them to their new party. The first rung of the applicant’s argument was that the floor-crossing provisions undermined the right to vote and the existing system of proportional representation, which were argued to be part of the Constitution’s basic structure and thus unamendable. The Court once again declined to pronounce on the doctrine. It

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<sup>10</sup> *ibid* para 47.

<sup>11</sup> *ibid* paras 47-49.

<sup>12</sup> *United Democratic Movement* (n 5).

held that democracy is consistent with a wide variety of electoral systems—as such, proportional representation (and a prohibition on parliamentary floor-crossing, which buttresses proportional representation) could not be regarded as so fundamental to the South African constitutional structure that it required the Court to make a decision on the applicability of the basic structure doctrine.<sup>13</sup>

These remain the only two cases in which the Court has directly (if briefly) addressed the basic structure doctrine. There is, however, more jurisprudence of the Court on Section 74 to which we might look to determine whether the Justices regularly treat procedurally flawless constitutional amendments as legally valid, and if not, what further criteria must be met in order for them to do so.

To date, the Court has dealt with six cases in which the validity of constitutional amendments has been challenged. Two of them—*Premier of KwaZulu-Natal* and *UDM*—have been mentioned above.<sup>14</sup> The remaining four all concern challenges to either the Twelfth or Thirteenth Constitutional Amendments, which altered boundaries between the provinces and relocated some ‘cross-boundary’ municipalities from one province to another. Groups within the affected municipalities, concerned about the implications of this relocation for the delivery of governmental services, sought to challenge the constitutionality of the amendments.

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<sup>13</sup> *ibid* paras 15-17. The implication of the Court’s argument, of course, is that amendments that do undermine democracy would likely violate the basic structure of the Constitution, if the basic structure doctrine were to be accepted.

<sup>14</sup> The other challenges raised against the constitutional amendment in *Premier of KwaZulu Natal* (n 9) (all of which were unsuccessful) related to manner and form provisions peculiar to the interim Constitution and the transitional arrangements related to it, and are not germane to the present inquiry. In *UDM*, the other challenges raised against the constitutional amendment (also unsuccessful) alleged that the amendment offended the founding values in section 1 or the Bill of Rights, and thus had to be passed in accordance with the manner and form provisions of Section 74(1) or 74(2), rather than 74(3). This does not deal with the authority of the amending clause, and is thus not relevant here.

In one of these cases—*Matatiele II*—part of the Twelfth Amendment was declared unconstitutional for failure to comply with the procedural requirements established by Section 74 (as elaborated by the Court in that case).<sup>15</sup> According to the Court, the assent of a provincial legislature, which the Section requires for certain constitutional amendments, is only valid if the assent itself has not arisen by way of a violation of other provisions of the Constitution. Since the KwaZulu-Natal legislature, in violation of Section 118 of the Constitution, failed to facilitate adequate public involvement in its decision to assent to the Twelfth Amendment, its assent to that Amendment was invalid.<sup>16</sup> And since its valid assent was required for the validity of the Amendment, the Court declared the relevant section of the Amendment unconstitutional. For present purposes, however, there is nothing in *Matatiele II* to support or deny the existence of the basic structure doctrine in South African law, since the relevant provision of the amendment was declared invalid for violating the procedural limits specified in Section 74 itself.

In the remaining three cases, however, the Court imported a substantive requirement into the test for the legal validity of a constitutional amendment. In *Poverty Alleviation Network*,<sup>17</sup> *Merafong*,<sup>18</sup> and *Moutse*,<sup>19</sup> the impugned

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<sup>15</sup> *Matatiele Municipality and Others v President of the RSA and Others* 2007 (1) BCLR 47 (CC) ('*Matatiele II*'). See also *Matatiele Municipality and Others v The President of the Republic of South Africa and Other* 2006 (5) SA 47 (CC) ('*Matatiele I*'), dealing with a preliminary matter in which the Court ordered that the respective provincial legislatures be joined to the application.

<sup>16</sup> For an elaboration of Parliament's duty to facilitate public involvement in its law-making, see *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

<sup>17</sup> *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC).

<sup>18</sup> *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC).

constitutional amendments were tested not only against the procedural requirement of public involvement (as in *Matatiele II*), but also against the requirement that all government legislation be rational, in the sense that it must not be arbitrary or manifest naked preferences, but must instead be rationally connected to a legitimate government purpose.<sup>20</sup> As it happens, in all three cases the rationality, and thus the validity, of the amendments was upheld, though there existed, of course, the possibility that the amendments could have been struck down instead, had they not in fact been rationally connected to a legitimate government purpose.<sup>21</sup>

Nevertheless, the introduction of the requirement of rationality, extraneous to Section 74 itself, into the criteria of validity for constitutional amendments suggests the beginnings of a bare-bones basic structure doctrine: Section 74 is not the supreme criterion of legal validity, since even procedurally flawless constitutional amendments are only valid if they meet the criterion of being rationally connected to a legitimate government purpose.<sup>22</sup> As we shall see in the following section, however, while this sparse jurisprudence on Section 74 already suggests that the Justices do not treat it as the supreme criterion, it is only after talking to the Justices themselves that one can see that they not only largely endorse something like the basic structure doctrine, but that the extent to which constitutional amendments are subject to higher order norms extends beyond the minimal rationality review evident from the Court's case law.

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<sup>19</sup> *Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others* 2011 (11) BCLR 1158 (CC).

<sup>20</sup> On this requirement see *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paras 84-90.

<sup>21</sup> *Poverty Alleviation Network* (n 17) paras 64-76, *Merafong* (n 18) paras 62-115; *Moutse* (n 19) paras 31-43.

<sup>22</sup> Depending on how broadly we define 'legitimate government purpose' this doctrine on its own could already import a heavily substantive basic structure doctrine.

#### IV. POLITICAL MORALITY AS THE SUPREME CRITERION

During my interviews with the Justices, I asked the Justices how they would treat the validity of a hypothetical constitutional amendment that purported to remove all references in the Constitution to ‘human dignity’. It should be emphasized that the question was phrased at a high-level of abstraction, and thus did not call on the Justices to express their views on any concrete situation that may yet come before the Court for adjudication. Indeed, a number of the Justices couched their views tentatively, noting that they may come to a different view in a case in which the question of whether to adopt the basic structure doctrine was squarely before the Court and had been addressed at length in the arguments of the parties. Moreover, as we saw in Chapter 5, human dignity is the value widely understood to be of the utmost importance to the South African constitutional framework, and which is at the centre of much of the Court’s jurisprudence. It can be expected that the hypothetical question of amending dignity out of the Constitution framed the basic structure doctrine as starkly as possible for the Justices, and indeed the question was expressly designed to do so.

To this hypothetical question Justice Zak Yacoob responded as follows:

In terms of our constitutional structure, there are certain things which I think not even 100% of Parliament can do. For example, they cannot change the Constitution to say that all Jews who commit offences are not entitled to a trial, and that the police can decide their guilt instead. I think that that is absolutely wrong. If Parliament changes the Constitution to say that X is a terrorist and he must be killed on sight, I do not think

that the Constitution can do that at all. So there are clear limits.<sup>23</sup>

Justice Albie Sachs echoed this sentiment:

Three quarters of the votes in the National Assembly is not the ceiling as far as amendability is concerned. It's an important benchmark, but if the foundational principles of the Constitution are amended in a way that undermines the whole project, then that would be unconstitutional.<sup>24</sup>

Indeed, a large majority of the Justices I interviewed not only endorsed something like the basic structure doctrine as a good idea, but, importantly for present purposes, they described it as part of the scheme of legal validity currently in practice.<sup>25</sup> Justice Kriegler, for example, asked rhetorically: 'Do you allow somebody to amend the Constitution to such an extent that it is no longer the Constitution? No.' Justice Kriegler further described this stance as 'an essential attitude for a judge to adopt,

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<sup>23</sup> Interview with Justice Zak Yacoob, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 28 January 2013).

<sup>24</sup> Interview with Justice Albie Sachs, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 15 August 2012).

<sup>25</sup> My time with three of the Justices was truncated and I was unable to discuss with them their views on the basic structure doctrine or to put to them his hypothetical question to them my hypothetical question about a constitutional amendment that removed all reference to 'dignity' in the Constitution. These Justices were Chief Justice Mogoeng, Deputy Chief Justice Moseneke, and Justice Van der Westhuizen. Justice O'Regan explicitly did not endorse the basic structure doctrine:

I think it's good that constitutions can be amended. I'm not somebody who believes that you should have a rigid document. . . . [I]n South Africa all aspects of our Constitution can be amended. I may be wrong, but I don't think we're going to adopt the basic structures doctrine. . . . I think Section 1 does the work of the doctrine in the South African Constitution. . . . So constitutional amendments which sought, for example, to seriously damage multi-party democracy, or a system of democracy which encourages those values, would, I think, all be arguably challengeable under Section 1. . . . Of course, Section 1 is amendable with a 75% majority—but that's a very high threshold. Again, as a citizen, I don't have a difficulty with the idea that a constitution, even the very founding basics of it, should be amendable if most people feel that that's the way to go.

In response to my hypothetical question, Justice O'Regan stated that she 'would have to be respectful of a text that amended human dignity out of the Constitution, in the sense that I could not just carry on regardless'. Justice O'Regan did note, however, that dignity is 'powerful to me in making it possible to adjudicate this constitution'.

because otherwise you cannot do your job.<sup>26</sup> Other Justices similarly explained that amendments which fundamentally ‘affect what the Constitution is all about’<sup>27</sup> would ‘not be recognized’<sup>28</sup> or ‘not be upheld’.<sup>29</sup>

The upshot of the Justices’ responses to this line of inquiry is that a large majority of the Justices express the view that some constitutional amendments may themselves be invalid—notwithstanding the fact that they are in flawless procedural compliance with Section 74—because they fail to comply with certain even more supreme criteria of legal validity. This tells us that most of the Justices do not, in fact, treat the amending clause as the supreme criterion of legal validity in South Africa.

However, this seeming convergence amongst the Justices—which we might, at first blush, interpret as a data point that is indicative of the existence of a Hartian social rule—breaks down when one inquires further about what criteria the Justices *do* treat as ultimate. As one can see from the statements discussed above, the Justices, when asked about these higher order norms with which even procedurally flawless constitutional amendments must comply, vaguely allude to some set of principles of political morality. However, while the Justices implicitly endorse the proposition that constitutional amendments must comply with such principles of

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<sup>26</sup> Interview with Justice Johann Kriegler, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 27 January 2013).

<sup>27</sup> Interview with Justice Johan Froneman, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013).

<sup>28</sup> Interview with Justice Richard Goldstone, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 7 Jan 2013).

<sup>29</sup> Interview with Justice Chris Jafta, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013).

political morality, they appear to diverge in their views about what those principles are.

Justice Goldstone, for example, stated that judges ought not to recognize constitutional amendments that offend dignity, equality or the separation of powers. Justice Jafta, for his part, urged that the 34 Constitutional Principles contained in the interim Constitution, against which the final Constitution had to be tested and certified, would be instructive about the kinds of values with which constitutional amendments had to comply. Justice Cameron tentatively suggested that the rule of law may be another possible value (in addition to dignity) against which a constitutional amendment would have to be judged. Offering a justification for the doctrine, Justice Cameron expressed his agreement with Lon Fuller in his debate with Hart, who, in Justice Cameron's view, was correct to assert that 'order connotes good order in some way. In order to be exercised with the help of law at all, it has to be exercised within certain preconditions.'<sup>30</sup>

What is clear from the Justices' responses concerning the standards of political morality with which constitutional amendments must comply is that each of the Justices is relying on a *different* set of standards. It is not just that the Justices seem to disagree with one another about the *application* in specific instances of overarching moral principles on the *applicability* of which they agree.<sup>31</sup> Rather, it is

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<sup>30</sup> Interview with Justice Edwin Cameron, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 31 January 2013).

<sup>31</sup> Cf. Matthew Kramer, *Where Law and Morality Meet* (OUP 2004) ch 4, who suggests that the Justices of the Supreme Court of the United States agree on the fundamental moral criteria with which law must comply, even though they may disagree about the conclusions that result from an application of those criteria.

not clear that the Justices agree on which overarching moral principles are applicable to begin with.

Thus, despite the fact that a large majority of the Justices do agree that Section 74 of the Constitution is not the supreme criterion of legal validity in South Africa, since procedurally flawless constitutional amendments are not the highest form of law, it appears that the Justices do not agree on the still more supreme set of norms of political morality which do constitute the supreme criteria of legal validity. If this is correct, then the Justices do not seem to converge on shared ultimate criteria of legal validity in the way Hart's theory supposes.

Now, a defender of Hart's theory might object to this conclusion by arguing that it is possible to recharacterize the Justices' practices just described in a way that synthesizes their apparent divergence in behaviour at a higher level of abstraction. Once we reframe our description of the Justices' practice, so the objection goes, we can see that they really do agree on the ultimate criteria after all. Indeed, as we saw in Chapter 4, part of Himma's objection to the explanatory power of inclusive legal positivism is that the Justices of the Supreme Court seem to disagree with one another when they apply moral concepts in their judgments. Though Himma's purposes are different to mine, his observation is not dissimilar to the observation I have made in relation to the apparent disagreement amongst the Justices of the Constitutional Court, insofar as they do not converge on the same principles of political morality with which constitutional amendments must comply. This disagreement, says Himma, suggests that moral criteria do not form part of the set of validity criteria that the Justices actually share, which, for Himma, entails that exclusive legal positivism,

rather than inclusive legal positivism, is a more accurate description of the Justices' judicial decision-making practices.<sup>32</sup>

In seeking to defend the explanatory power of inclusive legal positivism against Himma's attack, Matthew Kramer employs the rebuttal strategy that we discussed at length in Chapter 3, pursuant to which he reframes the Justices' seeming disagreement at a higher level of abstraction. The upshot for Kramer is that where Himma sees disagreement about the Justices' application of moral categories, Kramer in fact sees agreement amongst the Justices that those are moral categories that they need to apply.<sup>33</sup> For example, while the Justices may disagree about what constitutes an "unreasonable" search, the Justices agree that searches must be evaluated in light of the moral category of "unreasonableness".

Perhaps it is possible to deploy this kind of argumentative strategy to undermine the conclusion that the Justices of the Constitutional Court really do share ultimate criteria of legal validity after all. Perhaps, for the reasons discussed in Chapter 3, it is possible to reframe the Justices' seeming divergence on the ultimate criteria of legal validity in a way that reveals convergent behaviour on some higher level, and so to defend the explanatory power of Hart's account. However, if such an objection is to be a good one, there is one considerable difficulty that it must overcome in light of what the Justices report about their practices and attitudes in relation to constitutional amendments. As we have seen, it is not the case (as in Kramer and Himma's example on the United States Supreme Court) that the Justices

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<sup>32</sup> Kenneth Himma, 'Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism' (2005) 24 *Law and Philosophy* 1, 32-39.

<sup>33</sup> Kramer, *Where Law and Morality Meet* (n 32), at 129-134.

agree on the fundamental principles of political morality against which the validity of constitutional amendments must be subjected, while merely disagreeing about how those principles are to be applied in a specific case. Rather, each Justice refers to a different and perhaps even competing set of moral principles with which constitutional amendments must comply.

Thus, in order to deploy the kind of synthesis on which Kramer relies to rebut Himma, one would have to argue that the Justices' seeming disagreement as to the principles of political morality to which constitutional amendments must be subjected can be reframed as an agreement on the very abstract proposition that constitutional amendments must be subjected to principles of political morality *as such*. While the Justices do not agree on which principles of political morality are the supreme criteria, the objection goes, they do at least agree that those supreme criteria are principles of political morality, whatever they may be. If such an objection succeeds in demonstrating that the Justices share agreement on the ultimate criteria of legal validity in South Africa, it succeeds only by collapsing the distinction between legal validity and political morality, which, for both inclusive and exclusive legal positivists, would be a pyrrhic victory indeed.

## V. CONCLUSION

In this chapter, we set out to determine whether the Justices of the Constitutional Court converge in their ultimate criteria of legal validity by investigating their practices and attitudes around the amending clause of the South African Constitution, which, from a strictly doctrinal perspective, might be proposed as the supreme criterion of legal validity in South Africa. We have seen, however, that there is a

difference between the way that the amending clause is treated in the constitutional text and the way that it is treated in the judgments of the Court, and that it is treated differently still in the practices and attitudes of the Justices, as reported by the Justices themselves. From this result, we can draw two conclusions: one methodological—concerning the proper method for testing the explanatory power of Hart’s theory of law—and one substantive—concerning whether Hart’s theory does indeed have explanatory power for the practices and attitudes of the Justices of the Constitutional Court.

On the question of methodology, this chapter strongly underscores the arguments of Chapter 4; namely, that one cannot adequately test the explanatory power of Hart’s theory of law by focusing exclusively on the formal legal landscape, to the exclusion of observing the practices and attitudes of the Justices that lie behind this landscape of constitutional texts and doctrinal assumptions. Indeed, this chapter demonstrates the limited utility of written judgments in an empirical attempt to determine the criteria of legal validity actually practiced by legal officials. This is perhaps particularly so for legal systems where such judgments are issued by a highly collaborative, highly collegial Court like the Constitutional Court of South Africa, where a single judgment will reflect the input of any number of Justices on the Court.

To this extent, the analysis of the Justices’ approach to the amending clause of the Constitution could hardly provide a clearer refutation of the kind of non-empirical approach to the application of Hart’s theory that I discussed in Chapter 4. The fact that the Justices do not, at least as far as Hart’s theory of the rule of recognition is concerned, treat the amending clause of the Constitution as the supreme criterion of

legal validity is undoubtedly an important feature of the South African legal system, and yet we could not know this by relying solely on what I have called the formal legal landscape of text and doctrine.

The second conclusion we can draw from the analysis in this chapter is substantive, and it provides the first empirical data point undermining the explanatory power of Hart's theory in respect of the judicial decision-making practices of the Justices of the Constitutional Court. That is, contrary to what Hart's account predicts, the Justices do not appear to converge in their ultimate criteria of legal validity. While the Justices agree that the amending clause is not the supreme criterion—since even constitutional amendments must comply with further criteria involving some subset of principles of political morality—the Justices do not seem to agree on what those principles are. In the result, one of the conditions necessary to establish a social rule like the rule of recognition—namely, convergence by the Justices on shared ultimate criteria of legal validity—appear to be absent from the Justices' judicial decision-making practices.

However, as we saw in Chapter 3, and as we have discussed again here, the conclusion is, in principle, open to an objection that the Justices' apparent divergence on these ultimate criteria of legal validity can in fact be recharacterized at a higher level of abstraction to reflect shared criteria of some kind, and thus that their practice is seemingly consistent with one of the conditions (namely, a convergent pattern of behaviour) necessary for the existence of a social rule like the rule of recognition.

This objection faces some difficulties (as noted above), but even if it is a good one, we need not get hung up on adjudicating the matter with finality one way or the

other. For the reasons discussed in Chapter 3, this kind of disagreement about whether legal officials really do converge on shared criteria of legal validity is unlikely to be conclusive either way. It is precisely in anticipation of this kind of objection that I have broadened my empirical analysis of the Justices' decision-making practices beyond the narrow question of whether they converge on shared criteria of legal validity. In the following chapters, I proceed to shore up the conclusion that Hart's theory lacks explanatory power for the practices and attitudes of the Justices by investigating whether they exhibit the further conditions, besides convergent behaviour, that are necessary for the existence of a rule of recognition.

## *Awareness of a Standard of Correct Judicial Decision-Making*

### I. INTRODUCTION

Recall that in order for a social rule to be established amongst a group, it is necessary for the group participants to perceive at least the broad features of the relevant acts in which each other person in the group is engaged. To return to our church example from Chapter 2, I must perceive that my fellow male churchgoers regularly remove their hats as they walk into church. If I do not see what they have done, or if I cannot comprehend their actions, I cannot become conscious of, and therefore cannot adjust my behaviour in accordance with, a social rule that the action is required. Recall further that the establishment of a social rule also requires the group participants to perceive that the relevant individual acts aggregate to some kind of shared practice within the group. If I do not perceive that every man in this group removes a hat of some kind when they walk into church, then once again I simply cannot grasp that there is a social rule requiring them to do so. Without these perceptions, there is no way for an individual participant to seek to adjust his conduct to match the group's practice: I do not know how I must conform my conduct to the standard, or even that there is a standard there to conform to.

Thus, according to Hart's account, a rule of recognition exists in a given legal system when, amongst other conditions, the system's judges participate in a common practice of identifying valid law by reference to certain shared criteria and criticize each other for deviations from that 'common standard of correct judicial decision'.<sup>1</sup> We saw

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<sup>1</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 116.

in Chapter 2 that these two conditions cannot be met unless the judges possess sufficient information about each other's judicial decision-making processes so as to be able to perceive and appraise gaps between their own decision-making processes and the decision-making processes of their colleagues. We saw also that each judge has to perceive that the judicial decision-making processes of each of their colleagues aggregates to some shared practice of judicial decision-making.

In this brief chapter, I investigate whether these conditions obtain amongst the practices and attitudes of the Justices of the Constitutional Court. If a rule of recognition exists amongst the Justices, we would expect them to report that:

- (1) They possess the information they need to perceive and appraise gaps between their own criteria of legal validity and the criteria of legal validity used by other Justices.
- (2) They perceive that the criteria of legal validity of the individual Justices aggregate to some common practice of identifying law by reference to shared criteria.

I conclude that the Justices do not demonstrate a meaningful awareness of one other's decision-making processes, and that to the extent that they are aware of each other's decision-making processes, they perceive that these are different from one another, not the same.

## II. KNOWLEDGE OF EACH OTHER'S JUDICIAL DECISION-MAKING PROCESSES

Throughout the interviews, the Justices never displayed a meaningful awareness of, or even a particular concern for, the judicial decision-making processes employed by their colleagues. For example, when I asked Justice Goldstone about whether he perceived that the Justices shared processes of judicial decision-making, he responded as follows:

I have never been conscious of that. I would not be able to tell you the reasoning process of Kate O'Regan or Albie Sachs. By the time we came to discussion that was already water under the bridge. But it never occurred to me to question them.<sup>2</sup>

Justice Yacoob, too, expressed a disinclination to question the decision-making practices of the other Justices: 'I would not like to know the processes that my colleagues go through in their chambers to arrive at their conclusions.'<sup>3</sup> Chief Justice Mogoeng also indicated that he was not concerned with the nuts and bolts of his colleagues' decision-making:

I look at the final product. I trust my colleagues. I know that they are men and women of integrity. It is just a matter of style. At the end of the day, the product that we are all looking forward to will be on the table for us to assess for what it is worth, and we will take it from there.<sup>4</sup>

These responses are characteristic of the views expressed by the Justices as a group when asked about their awareness of one another's decision-making processes—the Justices uniformly deny knowledge of, and some deny even an overt interest in, the way that their colleagues reason their way to legal conclusions.

To the extent that the Justices discussed their understanding of the decision-making practices employed by the other members of the Court, it was always in terms of a relatively vague perception of 'differences' that led to disagreements between them. As Justice Ackermann put it:

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<sup>2</sup> Interview with Justice Richard Goldstone, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 7 January 2013).

<sup>3</sup> Interview with Justice Zak Yacoob, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 28 January 2013). But see the discussion in Chapter 10 concerning the Justices' attentiveness to each other's tentative positions in a case.

<sup>4</sup> Interview with Chief Justice Mogoeng Mogoeng, Chief Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 21 January 2013).

I do not think that the issue of the methodology of judicial decision-making was ever a separate topic of debate or discussion, odd as that may seem. . . . I think that there was a variety of different approaches. For example, in terms of my own methodology, I got the sense that there were a lot of judges who came to an outcome-based decision too quickly and too easily. That illustrates a disagreement as to the methodology of problem-solving.<sup>5</sup>

Justice Sachs, for his part, referred to the presence of ‘different styles of reasoning’ on the Court, and explained that—

colleagues, whom I admired and loved and respected, enormously disagreed. And I couldn’t call them reactionaries or say they were incompetent or lazy—they just saw it differently. They put the pieces together differently. It would be basically the same pieces, but the configuration would be different.<sup>6</sup>

Justice Goldstone also took the view that ‘[m]ore frequently than not . . . in a dissent there is a difference of the law, and a difference in perspective on what the law is.’ Justice Ackermann similarly referred to ‘very difficult areas where one’s concept of law affects the findings that one makes.’

The practical significance of these differing concepts of law was highlighted by Justice Cameron in reference to a case that the Court had recently heard:

It was one of those cases where I thought: ‘If there is anything that can legitimately and properly be done, it ought to be done.’ . . . One colleague wrote to me and said: ‘The solution that you have found is not tenable because the only bases of obligation in our law are constitutional, statutory, delictual, and contractual.’ And I wrote back and I said: ‘That’s not correct. What about quasi-contract, what about estoppel? There are borderline bases of obligation.’ So sometimes you do have a debate about

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<sup>5</sup> Interview with Justice Laurie Ackermann, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 13 August 2012).

<sup>6</sup> Interview with Justice Albie Sachs, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 9 and 16 August 2012).

concepts of the law. And my concept of the law supported being innovative in this particular case.<sup>7</sup>

In all of the above responses, the Justices expressly convey a perception that, as a group, they employ a number of different and sometimes competing decision-making methodologies as they each reason their way to a collective decision on what the law requires in the case before them. Some Justices, like Justice Cameron or Justice Ackermann, are more specific about the differences they perceive between these methodologies. In Justice Cameron's example, he sees bases of legal obligation where another Justice does not; in Justice Ackermann's example, he believes that some Justices too readily reverse-engineer their legal findings from the conclusions they wish to reach. Other Justices are more general in their description of the different methodologies they perceive, referring, as Chief Justice Mogoeng and Justice Sachs do, to different 'styles' or 'configurations' of reasoning. Nevertheless, whether vague or specific, the responses of the Justices overwhelmingly support the conclusion that, to the extent that they are conscious of their colleagues' judicial decision-making practices at all, they perceive not convergence, but meaningful differences.

And so we have come to the second way in which Hart's account lacks explanatory power in respect of the judicial decision-making practices of the Justices of the Constitutional Court. As we have seen, a rule of recognition can only come to exist if (i) each Justice has some relatively determinate conception of her colleagues' judicial decision-making practices, and (ii) if each Justice perceives that those individual practices aggregate to some kind of shared standard against which she might measure her

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<sup>7</sup> Interview with Justice Edwin Cameron, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 31 January 2013).

own decision-making. The responses of the Justices indicate that neither of these two conditions is met in their practices of legal reasoning. First, the Justices evince no clear awareness of, or even a special interest in, the judicial decision-making practices that their colleagues employ to reason their way to legal conclusions. The Justices appear to have no more than a vague sense about the decision-making processes employed by their colleagues, and thus lack the information that they would need in order to seek to conform their own decision-making processes to the processes they perceive to have been adopted by their colleagues. Second, the information that the Justices do report having at their disposal concerning each other's decision-making processes does not manifest itself in a perception that the Justices are following convergent standards of judicial decision-making. Quite the contrary, their perception is that they approach legal problem-solving differently from one another.

As we shall see in Chapter 10, this perceived difference in jurisprudential approaches is hardly a cause for the Justices to criticize one another, as the Hartian account predicts, but is in fact celebrated by and actively encouraged amongst the Justices. For now, however, we can draw the following conclusion: if the Justices are not conscious of or even necessarily concerned about one another's judicial decision-making practices, let alone conscious of the extent to which their decision-making practices are shared, the Justices cannot be seeking to conform their own decision-making practices to a perceived 'standard' employed by their colleagues. In fact, the Justices do not seem to think that there is a shared standard of judicial decision-making amongst their colleagues to conform to. In the result, two of the key conditions for the existence of a social rule in Hart's theory—namely, that the Justices display a relatively

determinate idea of their colleagues' judicial decision-making practices, and that the Justices perceive that they share such practices in common—is absent amongst the Justices of the Court.

### III. CONCLUSION

That the Justices do not display a detailed knowledge of one another's judicial decision-making practices should not be surprising. Consider the sheer complexity of the candidate rules of recognition for the United States put forward by Himma and Greenawalt (as discussed in Chapter 4), including the significant qualifications and nuances they build in to their putative rules to make them fit in with the doctrinal (and, to a much lesser extent, the empirical) intricacies of the United States legal system. It bears emphasis that the assertion of such a complex rule of recognition is not just an assertion of a rule with a semantic content that accurately describes a certain normative practice; it is simultaneously an assertion that legal officials are aware of the details of the specific content of that rule and that the officials enforce the content of that rule on their colleagues in their daily professional lives. We have no basis for thinking that judges, like the Justices of the Constitutional Court, have sufficient information about their colleagues' judicial decision-making practices such that they can converge on a rule of correct judicial decision-making of the order of complexity suggested by Himma and Greenawalt. Indeed, as I argued in Chapter 2, we have no basis for thinking that legal officials are motivated to seek out that kind of information about their colleagues to begin with—while it is true that some philosophers, particularly those applying the Hartian model, are concerned to see a complex master rule or 'shared plan' at the core of judges' law-applying activities, we have no reason to think that judges share this philosophical

concern, and thus no reason to think that judges are actively trying to enforce a master rule of legal validity that lends their practice philosophical coherence.

Now, it may be objected that the Justices, while not aware of one another's judicial decision-making practices, nevertheless do converge on the same decision-making processes in practice. It does not matter whether the Justices are *aware* of the practices they share, so the objection goes; what matters is the fact that they do share them. On this view, the Justices' awareness of each other's decision-making practices is largely irrelevant.

To this objection there are two responses. First, the objection is premised on an impoverished approach to sociological analysis, which seeks unduly to privilege the external observation of behaviour to the exclusion of the participants' understandings of that behaviour. However, as Hart himself argued, one cannot adequately understand a social practice without understanding the internal view that the participants adopt in relation to that practice. For the reasons discussed in Chapter 6, understanding the true nature of a social practice requires attending to how the practice is understood by those actually practicing it. This is particularly so since, as we established in Chapter 3, a given set of judicial practices can often be plausibly consistent with various competing formulations of a rule of recognition, and may of course be consistent with an account that eschews rules of recognition altogether. To adjudicate between these accounts we must take seriously how legal officials understand their own practices.

Second, even if the objection were premised on a sound approach to social scientific inquiry, it misses its target. As stated above, what we are presently investigating is not whether the Justices do in fact share a practice, once their practice is

'properly' construed by the external observer. What we are investigating is whether the Justices are consciously trying to align themselves, as Hart predicts, with a practice that they perceive to be common amongst their colleagues. It appears that they are not. If they do not perceive some standard of judicial decision-making that exists amongst their colleagues, it is impossible for them to seek to conform their behaviour to it. They simply do not know where the goalpost is.

## *Criticism, Reasonable Disagreement, and Judicial Independence*

### I. INTRODUCTION

If a Hartian social rule is to exist, we have seen that deviations from the practice it requires must be criticized, and that such criticism must be regarded as legitimate by those who make and receive it. This criticism reveals itself in deontic language, such as ‘ought’, ‘must’, ‘right’, and ‘wrong’. We have seen further that the criticism to which deviations are subjected must be of a kind that most members of the group prefer to avoid. Indeed, it is a central if often unspoken aspect of Hart’s theory that fear of criticism by the group is supposed to make some difference to the psychological orientation of, and ultimately to the choices made by, most members of the group, including those who threaten to deviate from the group’s convergent behaviour. If the criticism of the group does not make a difference, then we cannot explain either the existence or the normativity of the rule of recognition in the way Hart thinks we can.<sup>1</sup>

In this chapter, I investigate whether these conditions obtain amongst the practices and attitudes of the Justices of the Constitutional Court, insofar as these may indicate the presence amongst the Justices of a rule of recognition specifying the correct standards of judicial decision-making that they are expected to apply. If a rule of recognition exists amongst the Justices, we would expect them to report (i) that they criticize each other as

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<sup>1</sup> There are good reasons to think that the rule of recognition cannot be constituted as normative in this way, but they are not Hart’s reasons. See Joseph Raz, *Practical Reason and Norms* (Princeton University Press 1975) ch 2; Leslie Green, ‘Positivism and Conventionalism’ (1999) 12 *Canadian Journal of Law and Jurisprudence* 35, 37-41; Julie Dickson, ‘Is the Rule of Recognition Really a Conventional Rule?’ (2007) 27(3) *Oxford Journal of Legal Studies* 373.

‘wrong’ when they deviate from what they perceive to be a common standard of correct judicial decision-making, (ii) that they regard such criticism of their own decision-making by their colleagues and other officials as ‘right’ or ‘legitimate’, and (iii) that they fear or otherwise desire to avoid such criticism from their colleagues and other officials.

I conclude that the Justices do not criticize each other in strong deontic terms for departures from what they each believe to be the correct standard of judicial decision-making, nor do they regard such criticism as legitimate when made by their colleagues or other officials. (Section II.) I conclude instead that the Justices criticize departures from their preferred standards of decision-making in terms of a ‘reasonable disagreement’ between different standards of decision-making with equal claims to correctness. I go on to demonstrate that the Justices do not fear or otherwise desire to avoid the criticism of their colleagues and other officials. (Section III.) I conclude instead that the Justices’ strong sense of their judicial independence, coupled with the material institutional protections of that independence, insulates them from precisely the sort of criticism and social pressure that Hart thinks is essential to motivate conformity to a social rule like the rule of recognition. (Section IV.)

## II. CRITICIZING OTHER JUSTICES

Thus far, I have described several ways in which the practices and attitudes of the Justices depart from what Hart’s account predicts. First, as we saw in Chapter 7, the Justices do not seem to converge on shared ultimate criteria of legal validity. Second, as we saw in Chapter 8, the Justices do not appear to be trying to conform to some shared standard of judicial decision-making: the Justices do not demonstrate a meaningful

knowledge of the judicial decision-making practices employed by their colleagues, and to the extent that they do, they perceive different practices, rather than a shared standard.

In this chapter, I offer another way in which the Justices depart from the Hartian model, namely, that the Justices do not criticize one another for employing judicial decision-making practices different from their own, and do not indicate a desire to avoid such criticism.

However, before engaging with the nature of the criticism to which the Justices subject one another, and the degree to which they care about receiving criticism from their colleagues, it will be helpful to briefly review the competing views of judicial criticism put forward by Hart and Dworkin, as these provide a useful framework within which to interpret the responses of the Justices.

#### **A. Two Views of Judicial Disagreement**

Dworkin makes two distinct claims about the nature of judicial disagreement, alleging that positivists have it wrong on both counts. First, against Hart's rule of recognition, Dworkin argues that judges, at least those in the United States, do not share an agreement on ultimate criteria of legal validity. If we look carefully at their judgments, Dworkin says, we can see that judges are really having pervasive 'theoretical' or 'criterial' disagreements about the concept of law.<sup>2</sup> Judges are not merely having disguised moral arguments about what the law *should be*, says Dworkin, they are arguing about what the law *is*.

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<sup>2</sup> Ronald Dworkin, *Justice in Robes* (Belknap Press 2008) 9-12, 224-226; Ronald Dworkin, *Law's Empire* (Hart 1986) ch 1.

Second, against Hart's claim that there are gaps in the law that judges fill through the exercise of their discretion,<sup>3</sup> Dworkin argues that, in every case, a judge has a *duty* to decide in a particular way. One of the consequences of Dworkin's theory of law as integrity is that the law never 'runs out', because moral principles, constructed from the best justification we can offer for the community's past legal decisions, never run out. For Dworkin, there are no gaps for discretion: a judge has a duty to decide cases in accordance with these moral principles. Another consequence of Dworkin's theory—implied by his view that a 'best' justification is possible—is that there is a demonstrably right answer to legal questions in hard cases.<sup>4</sup> Against the notion of discretion, Dworkin claims that judges are not merely free to, but are bound to, find the right answer to disputes before them.<sup>5</sup>

The 'right answer farrago'<sup>6</sup> frustratingly dogged Dworkin over the course of his career as he sought to defend it against theorists with diverse philosophical commitments.<sup>7</sup> For Dworkin, the most important among the various objections to his

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<sup>3</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 252-254; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823; Joseph Raz, 'Dworkin: A New Link in the Chain' (1986) 74 *California Law Review* 1103, 1100, 1115-1116; Joseph Raz, 'Legal Reasons, Sources and Gaps' in his *The Authority of Law* (2nd edn, OUP 2009).

<sup>4</sup> Dworkin's most comprehensive defence of the right-answer thesis appears in 'Is There Really No Right Answer in Hard Cases?' in his *A Matter of Principle* (Harvard University Press 1985). See also Ronald Dworkin, 'How Law Is Like Literature' and Ronald Dworkin, 'On Interpretation and Objectivity', both in his *A Matter of Principle*, *ibid*; Ronald Dworkin, 'Integrity in Law' in his *Law's Empire* (n 2); and Ronald Dworkin, 'Pragmatism and Law' in his *Justice in Robes* (n 2).

<sup>5</sup> Ronald Dworkin, 'Hard Cases' in his *Taking Rights Seriously* (Duckworth 1977).

<sup>6</sup> Dworkin, *Justice in Robes* (n 2) 41-43.

<sup>7</sup> For the positivist challenge to Dworkin's right-answer thesis, see Joseph Raz 'Legal Reasons, Sources and Gaps' (n 3). For a sustained argument that Dworkin's right-answer thesis wrongly presupposes the objectivity of interpretation, see Stanley Fish, 'Working on the Chain Gang' (1982) 60 *Texas Law Review* 551; Stanley Fish 'Wrong Again' (1983) 62 *Texas Law Review* 299; 'Still Wrong After All These Years' (1987) 6 *Law and Philosophy* 401.

right answer thesis was the claim that there can be no right answer to a dispute when reasonable lawyers disagree about what the right answer is.<sup>8</sup>

His response to this objection was to claim that knowledge properly consists of more than just hard facts, including not only the possible existence of ‘moral facts’, but also facts of what he calls normative consistency.<sup>9</sup> He compares criticizing the outcome in a legal dispute to criticizing interpretations of novels, alleging that facts of narrative consistency clearly favour one interpretive account over another.<sup>10</sup> It is from this argument that he develops his notion of normative consistency in the law. According to Dworkin, just as ‘certain interpretations of an Agatha Christie mystery would be wrong because they would make a shambles of her novel’,<sup>11</sup> legal arguments can be wrong in their interpretation of what has gone before in the legal community.<sup>12</sup>

Importantly, for whatever ambiguities existed in his position in *Taking Rights Seriously*, since *A Matter of Principle* Dworkin consistently maintained that the right answer thesis is a *description of legal discourse*, not a claim about the metaphysics of morals.<sup>13</sup> Dworkin’s claim seems to be that any legal argument is necessarily premised on the *supposition* that it is the best explanation available for a particular legal state of affairs.<sup>14</sup> However much judges may deny that there are right answers—only differences

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<sup>8</sup> Dworkin, *Law’s Empire* (n 2) 131, 137.

<sup>9</sup> *ibid* 138-141.

<sup>10</sup> This idea is most fully expressed in Dworkin’s description of the chain novel in *Law’s Empire* (n 2) 228-239.

<sup>11</sup> Dworkin, ‘On Interpretation and Objectivity’ (n 4) 167.

<sup>12</sup> Ronald Dworkin, ‘Is There Really No Right Answer in Hard Cases?’ in his *A Matter of Principle* (n 4).

<sup>13</sup> Dworkin, *Justice in Robes* (n 2) 43 (refusing to be ‘hijacked to some mythical philosophical level where external sceptics hang out’). See also Dworkin, ‘On Interpretation and Objectivity’ (n 4) 171-174.

<sup>14</sup> Dworkin, *Justice in Robes* (n 2) 41-43.

of opinion—when they ‘finally decide one way or another they think their arguments better than, not merely different from, arguments the other way’.<sup>15</sup>

We shall see below whether the Justices describe their disagreements with one another in this way. Before we do so, it is worth noting two important points of overlap between Dworkin and Hart about judicial disagreement. First, they both suppose that a judge’s criticism of her colleagues is couched in strong deontic language. They differ, of course, about the source of judicial disagreement—whether it is mainly about the application of legal validity criteria in borderline cases (Hart) or whether it is about the criteria themselves (Dworkin)—and about the extent of disagreement—whether it is relatively confined (Hart) or pervasive (Dworkin)—and they differ about whether these disagreements really involve ‘right answers’. Nevertheless, they both agree that disagreement, when it happens, must be in strongly critical terms—deviations from what a judge sees as the right approach must be described by her as ‘wrong’. Second, Hart and Dworkin both imply a binary picture of judicial disagreement. For them, hard cases involve either disagreements about the right legal answer (Dworkin), or they mostly involve an exercise of discretion (Hart) in which a judge ‘makes the best moral judgment he can’.<sup>16</sup> Hart and Dworkin do relatively little to categorize hard cases into possible sub-types, and to distinguish the sub-types of disagreement that each category might present.

With these remarks in mind, I turn now to discuss which of these characteristics, if any, are displayed by the disagreements of the Justices of the Constitutional Court.

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<sup>15</sup> Dworkin, *Law’s Empire* (n 2) 10.

<sup>16</sup> Hart, *The Concept of Law* (n 3) 254.

## **B. The Notion of ‘Reasonable Disagreement’**

In contrast to the binary picture of disagreement painted by Hart and Dworkin, it is interesting to note that the Justices generally stated that they had disagreements of both kinds: (i) instances where a Justice feels her answer is the right answer; and (ii) instances where a Justice says there is no right answer, only a ‘difference in opinion’. These categories are captured by Justice O’Regan’s distinction between what she describes as reasonable and unreasonable disagreement:

In the cases where I disagreed with my colleagues, in some of those cases I think it was an unreasonable disagreement. In other words, I thought they were simply wrong. And in other cases I would say that it was a reasonable disagreement—an appropriate disagreement—because there was more than one reasonable answer, and it was a right answer. And it was appropriate for citizens to understand that. Therefore, the role of dissent or concurrence was proper.<sup>17</sup>

Interestingly, most of the Justices indicated that only a few of their disagreements with one another are about ‘right’ answers. Justice Yacoob, for example, described his disagreements with his colleagues in this way:

I would say that there are more cases in the category of ‘difference in opinion’ than in the other category where I have thought that my colleagues are just wrong. I would imagine in all the time that I have been at this Court, there are only three cases where I have thought that my colleagues are just wrong.<sup>18</sup>

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<sup>17</sup> Interview with Justice O’Regan, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 20 August 2012). The distinction was also expressed by Justices Ackermann, Goldstone, Cameron, Froneman, Mogoeng, Moseneke, Sachs, Van der Westhuizen, and Yacoob.

<sup>18</sup> Interview with Justice Yacoob, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 28 January 2013).

Chief Justice Mogoeng offered a similar view:

I hardly ever write with a conclusion that my colleagues are wrong. I see it more as a difference of opinion, because their different viewpoint will always be well-motivated. It is only that I will not be persuaded by what they have to say, and it is on that basis that I would choose to follow the different line that I feel strongly about.<sup>19</sup>

These statements capture the views of nearly all of the Justices. As a group, they believe that on most occasions when another Justice reasons differently to them, it would be inappropriate to describe that Justice's 'deviation' as 'wrong'. As Justice Kriegler put it: 'I can't remember anybody ever during my time saying to somebody else: "You can't write that, you can't say that." That kind of pressure wasn't there.'<sup>20</sup>

Thus, in contrast with Hart's claim that Justices criticize departures from their own standards in strong deontic language, and in contrast, too, with Dworkin's right answer thesis, the Justices largely describe themselves as having 'reasonable disagreements' as between different arguments with an equal claim to correctness. In such cases, although they are not persuaded by the argument of their colleague, they do not criticize the argument as the product of wrongheaded judicial decision-making that deviates from some proper standard of decision-making that the Justices seek to enforce on one another.

A minority of Justices did express the view that their disagreements are largely about 'right answers'. Justice Cameron, for example, with reference to his dissent in

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<sup>19</sup> Interview with Chief Justice Mogoeng Mogoeng, Chief Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 21 January 2013).

<sup>20</sup> Interview with Justice Johann Kriegler, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 27 January 2013).

*Opperman*,<sup>21</sup> stated that: ‘It is the closest I have come, ever, in 19 years, to saying “I can’t really say that the opposing judges are all that wrong.” In every other case . . . you’ve got to say that they are wrong.’<sup>22</sup>

This category of response is worth analyzing in more detail, as it involves a complicated and paradoxical position on what the commitment to a right answer may entail. As part of my analysis, I want to suggest not only that Dworkin’s work on right answers helps us to understand some of the distinctions the Justices imply here,<sup>23</sup> but that Dworkin’s claims about the nature of his ‘right answer’ thesis are themselves illuminated by the Justices’ statements. I make reference to Dworkin not least of all because the Justices themselves explain their position by reference to his work.

Take, for example, the following statement by Justice Cameron:

I think Dworkin is actually right—that you have to operate from the premise that the meaning of the commitments, the principles, the history, the words, can only be one thing. That’s the *supposition of all legal discourse*, I think. Legal discourse would not make sense unless you assume that there is a right answer. The notion of discretion does not do justice to the power of legal argument. [My emphasis.]

Justice Cameron argued further that taking this view was the only way to justify the power that judges exercise:

When you are wielding power, I think you have to say that the only explanation under the circumstances, and the best explanation—in other words, rendering every other explanation less best and therefore wrong—is the explanation that you are offering.

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<sup>21</sup> *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC).

<sup>22</sup> Interview with Justice Edwin Cameron, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 31 January 2013).

<sup>23</sup> I do so without expressing a view on the soundness of the right answer thesis itself.

Justice Cameron's statements give credence to an interpretation of Dworkin according to which right answers are merely presupposed by the exercise of legal argument, rather than being 'really right' in a way that presupposes epistemic access to objective moral facts. Indeed, despite Justice Cameron's strong commitment to a legal discourse premised on right answers, he does not believe that the answer will necessarily be knowably right, or that the competing answer will be knowably wrong. When asked about whether the differences between the Justices entail that those who differ from him have made a 'mistake', Justice Cameron replied: 'You can't talk about mistakes.' This suggests a paradoxical set of commitments: on the one hand, Justice Cameron believes he must claim that his answer is right and that an opposing answer of his colleague's is wrong; but on the other hand, he does not think it appropriate to describe his colleague's answer as mistaken.

This complex position was expressed also by Justice Froneman. In response to a question about how he characterizes the nature of his disagreement when he dissents—whether he thinks his colleagues are wrong, or whether he thinks they merely have a difference in opinion—Justice Froneman replied:

When I dissent, I accept that there may be reasonable disagreement, but I think that my interpretation of the law serves this particular case—serves the Constitution—better than my colleagues'. Theoretically, there may be a right answer in the Dworkinian sense—I think my interpretation approaches that right answer better than my colleagues.<sup>24</sup>

The responses of these two Justices appear to embody a claim that Dworkin at times found it difficult to express: that the judicial assertion that an answer is right can

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<sup>24</sup> Interview with Justice Johan Froneman, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013).

be understood consistently with not only the judge's own fallibility, but also with the epistemological claim that moral answers cannot be knowably 'right'. In short, the judge must implicitly claim to be Hercules, even though he knows that he is not.

While not expressly endorsing the claim that legal discourse is premised on right answers, Justice Ackermann also reconciles fallibility and objectivity in this way:

Isaiah Berlin said that not all good ends are commensurate. I do not want to be so arrogant as to say that there may not be two different but equally valid ways of deciding the case. But one has to choose for oneself what one accepts to be for oneself the most legitimate and the most morally—in the sense of discharging the functions of a judge—acceptable way of deciding a case.<sup>25</sup>

Thus, while Justice Ackermann accepts that there may be more than one valid means of resolving a case, he seemingly shares Justice Cameron's view that it is necessary, in the act of judging, to assert a view about which means is the 'most legitimate' or 'most morally acceptable'.

With these expressions of their own fallibility, I take this set of three Justices to be resisting the objection that Dworkin resisted all along—the objection that the supposition of right answers that underpins legal discourse entails a commitment to the claim that the answer is 'really' right, in the sense that its truth is a knowable fact. On this view, Dworkin's descriptive claim about the nature of legal discourse does not entail the metaphysical claim that the judge's answer is ultimately right, or that its rightness is objectively verifiable. Restating Dworkin's position, we might say that it is essential to the nature of every legal argument that it *claim* to be a right answer, even though those legal arguments may often lack the rightness they claim.

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<sup>25</sup> Interview with Justice Laurie Ackermann, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 13 August 2012).

I return to the issue of fallibility below, as it influences other important views that the Justices express, including their praise of disagreement and differing jurisprudential approaches. For now, we need only note that each of these three Justices, while espousing the view that legal conclusions necessarily presuppose their own rightness, simultaneously credit the cogency of the contrary conclusions adopted by their colleagues. For Justice Cameron, '[y]ou can't talk about mistakes'; for Justice Froneman, 'I accept that there may be reasonable disagreement'; for Justice Ackermann, 'I don't want to be so arrogant to say that there may not be two different but equally valid ways of deciding the case.' These seemingly contradictory positions appear to rest on an implied distinction that the Justices draw between, on the one hand, what the Justices must claim for their arguments as a matter of legal discourse, and on the other hand, how the Justices criticize their colleagues as a matter of social practice. In writing their judgments, these Justices must suppose, for the reasons set out above, that their arguments are right and that their colleagues' argument are wrong. Yet in the social practice constituted by each Justice of the Court observing his own distinctive judicial decision-making processes, these three Justices refrain from describing perceived differences between themselves and their colleagues as 'wrong'.

Importantly, then, the majority of the Justices, and in a certain sense even this minority of Justices who make claims to 'right' answers, do not hold the view that their colleagues are departing from a standard of correct judicial decision-making. This being the case, another of Hart's conditions for the formation of social rules is absent from the Justices' law-applying activities: the Justices do not criticize one another as 'wrong' for engaging in judicial decision-making that differs from their own.

### III. AVOIDING THE CRITICISM OF OTHER OFFICIALS

In addition to not criticizing one another for failing to conform to particular standards of judicial decision-making, the Justices report that they are not concerned with being criticized by their colleagues in this way.

I asked the Justices about the degree to which their decision-making practices were influenced by what other officials expected of them. An important theme that began to unfold over the course of the interviews was the concept of judicial independence—not just the institutional independence of the judiciary from the other branches of government, but the independence of individual judges vis-à-vis their colleagues and other officials.

In the first instance, speaking about government officials as a general category, the Justices unequivocally denied that their decision-making processes were in any way determined by the expectations or reactions of other officials. Rebuking the suggestion that judicial activity be determined by what other officials think, the Chief Justice stated:

Judicial independence entails independence from the other arms of the state. But having that independence is incomplete as long as, for fear of being criticized in the public domain, you would find yourself consciously or subconsciously intimidated into taking a decision that accords with the views of the most vocal in the public domain. You've got to be independent from all of them. That is the only way that the judiciary will enjoy the confidence of the nation.

This view was echoed by Deputy Chief Justice Moseneke and Justice Cameron, who indicated not only that they were unaffected by the criticisms of other officials, but that they perceived this to be the case for all the judges they had worked with. For his part, the Deputy Chief Justice stated:

I don't think that official criticism has changed the way I do my work. I have not been unmindful of the fact that some constituencies think that we abuse the judicial power, and sometimes accuse us even of abusing that power. Accusations go in all sorts of directions. But it's part of our duty to ignore them. For my part I have found that South African judges have been quite strong on that front.<sup>26</sup>

Justice Cameron, like the Deputy Chief Justice, felt that this disregard for official criticism was pervasive in the judiciary:

An official consensus, an executive-grouped consensus, is entirely irrelevant. I think every single person I've sat with has been independent in the sense of not being submissive to or seeking to comply with or anxious to please an official expectation.

Justice Jafta accepted that the criticism of other officials was sometimes an 'irritation', but explained that it did not affect him 'to the extent of influencing how I should approach my work.'<sup>27</sup> Justice Froneman offered a similar sentiment:

On a personal level, it's not nice if other officials criticize me. But on a broader level, it's not serious. I think the more discussion there is, and the more criticism there is, the better and more mature our democracy becomes.

I was also moved by Justice O'Regan's passionate explanation of the independent-mindedness and singular focus that attends the judicial role, which is worth quoting at length:

'With most judgments there are going to be people who don't like it. That's irrelevant. It's got to be irrelevant. . . . It's not that courts aren't alert to what people might think, but that's not their job. It's a stick-to-your-knitting job. You read the record, you study at the law, you decide what the outcome is, and you write your reasons for

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<sup>26</sup> Interview with Deputy Chief Justice Dikgang Moseneke, Deputy Chief Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 31 January 2013).

<sup>27</sup> Interview with Justice Chris Jafta, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013).

what the outcome is. The noises-off may be enormous and disconcerting if you pay a lot of attention to them, but that's not for the courts to do. . . . It doesn't matter where the pressure is coming from—it can come from politicians, it can come from sectors of civil society, it can come from all sorts of things—you just have to keep doing the same job regardless of who it is before you.

On the basis of these responses, it became clear that the Justices accord negligible professional and psychological importance to the expectations of other officials concerning how the Justices should do their jobs.

Many of the Justices discussed specifically whether they were affected by the expectations of other *judges* concerning the proper approach to judicial decision-making. The Justices were clear that, as between the group of Constitutional Court Justices themselves, there was never any group pressure for conformity to a certain standard of judicial decision-making. As Justice Kriegler noted:

Certainly as between us, that the less experienced judges, the younger judges, the ones with the least exposure to judicial work, would feel constrained by the attitudes of their colleagues, I was totally unaware of it. And I think that we actually positively encouraged 'maverickism', if you like. There were some colleagues who were pig-headed and you would say: 'But that doesn't tie in with that—if you want to get from there to there then you must go that way.' It would take quite a lot of persuasion and argument, and sometimes you wouldn't succeed and you would have to write something of your own, but it was a very open debate.

Justice Goldstone's description of former Chief Justice Arthur Chaskalson echoes this claim:

Arthur was very respectful of people who disagreed with him. He didn't like it, and he didn't hide his dislike. But if anything he would encourage you to stick to your guns if that was how you felt about it.<sup>28</sup>

It appears, then, that the Justices neither apply social pressure to one another to conform to a particular judicial decision-making process, nor do they express a special concern to avoid this kind of criticism. As Justice Sachs put it:

I never worried about how my colleagues were thinking, what they were saying, and so on, in the sense of not wanting to be out of line. And I'd like to think that none of us were influenced by that.<sup>29</sup>

This attitude was confirmed also by the Chief Justice. When asked specifically about whether he sought conformity to the behaviour of other judges, he replied: 'You have some role-models—not because you want to be a copycat, but because you have seen something in them that is worth pursuing.' When giving examples of judicial behaviour worth emulating, the Chief Justice cited the fierce independence of progressive judges under the apartheid regime, like John Didcott, who, despite having to apply apartheid law, attempted to do justice ('stating the law as it ought to be') in 'total disregard of the consequences.' The Chief Justice accepted that, when comparing two judges you might 'find some similarities in approach', but stated that he was 'not aware of any judge who would want to be a photocopy of another judge.'

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<sup>28</sup> Interview with Justice Richard Goldstone, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 7 January 2013).

<sup>29</sup> Interview with Justice Albie Sachs, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 9 and 16 August 2012).

The Justices' general lack of concern to fall in line with the expectations of other officials, including the expectations of other judges, was confirmed by their responses to another series of questions I asked about which audience they had in mind while they were writing their judgments. I asked these questions because I was interested in finding out whose criticism they were most concerned about meeting as they authored their written opinions.

Some Justices, like Justice Yacoob, maintained that they do write first and foremost with the other Justices of the Court in mind. For Justice Yacoob, this was followed by academics ('they are a very important part of the puzzle'), lawyers, and sometimes citizens (in social policy cases that they are likely to read). Justice Cameron articulated a similar hierarchy, noting that he writes in the first instance for his colleagues on the Court, and then the lawyers in the case. Despite this, Justice Cameron felt it was important that he not write 'for an inside audience. I want a clever 18-year-old to read my judgments from the beginning to the end.'

In contrast, other Justices privilege citizens (like Justice Jafta, who shares Justice Cameron's commitment to simple, accessible language) or litigants (Justice Froneman) as their primary audience. Yet other Justices accorded a low weight to judges and lawyers as an audience. One such view was Justice Kriegler's:

I believed at all times that we were not really writing for the judiciary. In Bloemfontein [where Justice Kriegler had been a judge of the then Appellate Division], I was writing for the judges of the lower courts. In the Constitutional Court we were writing for a much broader public, and in some cases we were writing specifically for the executive. It was a much broader readership than was envisaged in Appellate Division judgments.

The Chief Justice was equally unconcerned with law-applying officials as an audience:

The only audience that I am always worried about is a person called 'Justice'. That's it. I do so alive to the challenges that come with going against the grain. Whichever way the decision goes, you will find some people who are very happy with it and other people who are not so happy, but that should never be a consideration. The consideration, in my view, is and should always be: Does this decision accord with the spirit, purport and objects of the Constitution?

While a small number of the Justices report that their judgments are addressed first and foremost to other judges, the bulk of the responses from the Justices on the question of their target audience supports the conclusion that the Justices, as a general matter, are not reasoning with a view to meeting official expectations, including the expectations of other judges, about how they should do their jobs.

The various characterizations, set out above, of the lack of influence of official expectations on the Justices' judicial decision-making processes show how inappropriate it would be to conclude, as Greenawalt and Himma do in respect of the United States, that the Justices frame their duties with reference to the expectations of judges and other officials.<sup>30</sup> Instead, it is a fundamental part of the way the Justices understand their role that they do not allow the expectations of officials to impact the way they reason through legal problems. This basic professional and psychological orientation amongst the Justices is crucially tied to the concept of judicial independence, a theme to which I return towards the end of this chapter.

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<sup>30</sup> Kenneth Himma, 'Understanding the Relationship between the US Constitution and the Conventional Rule of Recognition', in Matthew Adler and Kenneth Himma, *The Rule of Recognition and the US Constitution* (OUP 2009).

For now, we can note that the responses of the Justices indicate that another two of Hart's conditions for the formation of a social rule are absent from their practices and attitudes—they do not express a belief that official criticism of their judicial decision-making processes is legitimate, and they do not express a desire to minimize deviations in their own judicial decision-making practices from the decision-making practices that other judges and officials might expect. These are yet further reasons why Hart's account lacks explanatory power over the practices of the Justices of the Constitutional Court.

#### IV. JUDICIAL INDEPENDENCE

Given that the Justices so prominently highlighted judicial independence as relevant to understanding why they do not respond to criticism in the way Hart supposes, the remainder of this chapter provides a deeper analysis of the concept, focusing in particular on how the Justices have addressed judicial independence in their relevant judgments, and how the Constitution protects their judicial independence.

In a modern constitutional democracy based on the rule of law and the separation of powers, judicial independence is regarded as foundational to the discharge of the judicial function. And yet, judicial independence is a notoriously vague concept. It immediately invites the questions, 'independence from what or whom?', and 'independence to do what?', neither of which is susceptible to easy answers.<sup>31</sup> Surveying the contemporary literature on judicial independence, Frank Cross notes that—

[a]t its core, judicial independence means freedom from absolute control by other government institutions. Judicial independence also means some degree of freedom from control by litigants and public opinion and even possibly

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<sup>31</sup> Frank Cross, 'Judicial Independence', in Gregory Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (OUP 2008) 558, 561.

some freedom from positive law. . . . [T]he concept is roughly understood to involve judges' ability to render decisions in cases without fear of retribution.<sup>32</sup>

He notes, however, that '[t]here is no single, indisputable definition of judicial independence', and further, that '[t]he precise degree of independence, from whom and to do what, is not easily defined'.<sup>33</sup>

Happily, it is unnecessary for present purposes to advocate for any particular theoretical construction of judicial independence. While the Justices have indicated in their interviews that the concept of judicial independence is very important to them, the concept is not a question of abstract theory for them as it is for us. For the Justices, judicial independence is a concept—or more specifically, as we shall see, an attitude and a set of material conditions—that they work with in their daily professional lives. Since we are trying to gain a better understanding of their psychological and professional orientation to the social dynamics that may shape their legal reasoning, the Justices' own understanding of the meaning of judicial independence is ultimately the relevant inquiry here. I therefore propose largely to circumvent theoretical debates about the nature of judicial independence and to focus instead on how judicial independence is specifically enshrined in the Constitution, and how the Justices, in their judgments dealing expressly with the subject of judicial independence, have understood the protections the Constitution affords them.

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<sup>32</sup> *ibid* 561.

<sup>33</sup> *ibid*.

## **A. The Constitutional Protection of Judicial Independence**

The Constitution proclaims that the South African courts are independent and impartial, and provides important protections for courts and judges against external interference with their judicial functions. The Court itself has described judicial independence as a ‘constitutional imperative’,<sup>34</sup> and has stated that its own independence as the highest court in the country is given ‘vigorous protection’ by the Constitution.<sup>35</sup> Indeed, it will be recalled that judicial independence was not only expressly required by Constitutional Principle VII in the Interim Constitution, but the Court found, in the *First Certification Judgment*, that an independent judiciary was one of the ‘basic structures’ presupposed by the Constitutional Principles collectively and which the final Constitution was required to instantiate.<sup>36</sup> In testing the Constitution against the Constitutional Principles, the Court held that the requirement of judicial independence—conceived as impartial and functionally independent courts—was adequately protected by the various provisions of the Constitution.<sup>37</sup>

The primary constitutional source of judicial independence is Section 165 of the Constitution, which provides as follows:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

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<sup>34</sup> *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) para 66.

<sup>35</sup> *ibid.*

<sup>36</sup> *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (*‘First Certification Judgment’*) para 45.

<sup>37</sup> *ibid* paras 118-132.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

Judicial independence is also at the core of the right of access to courts, which provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, *another independent and impartial* tribunal or forum.'<sup>38</sup> A commitment to judicial independence is also embodied by the oath or affirmation, prescribed by the Constitution, that judges take when they assume office:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.<sup>39</sup>

In addition to these provisions dealing expressly with the independence of the courts, the Court has stated that judicial independence is entailed by other values enshrined in the Constitution. For example, the Court has found that 'judicial independence . . . is foundational to and indispensable for the discharge of the judicial

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<sup>38</sup> Constitution of the Republic of South Africa, 1996, s 34 (my emphasis).

<sup>39</sup> *ibid*, sch 2, s 6(1).

function in a constitutional democracy based on the rule of law.<sup>40</sup> The rule of law, as the Court understands it—

requires that the actions of all those who exercise public power must comply with the law, including the Constitution. . . [and] that those who exercise public power including the President, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law.<sup>41</sup>

Furthermore, the Court has often linked judicial independence to the doctrine of the separation of powers: ‘[a]n essential part of the separation of powers is that there be an independent judiciary.’<sup>42</sup> In order to discharge their duty to ensure that ‘the limits to the exercise of public power are not transgressed’, the Court has said that it is crucial that ‘the courts be and be seen to be independent.’<sup>43</sup> Without the separation of powers—

the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined.<sup>44</sup>

While the separation of powers implies an independent and impartial judiciary, the Court has noted that the Constitution does not provide for a separation of powers that is absolute, since it is also an important feature of the separation of powers that each branch of government will perform checks and balances on the power exercised by the

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<sup>40</sup> *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 59.

<sup>41</sup> *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 173.

<sup>42</sup> *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (‘*First Certification Judgment*’) para 123. See also *De Lange* (n 40) para 47 (“The singular importance of the judiciary as the protector of constitutional guarantees [must be] seen also as a manifestation of the separation of powers doctrine”), and *Justice Alliance* (n 34) (noting that an independent judiciary is “[a]n essential part of the separation of powers”).

<sup>43</sup> *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para 25.

<sup>44</sup> *ibid* para 26.

others.<sup>45</sup> This includes the executive and the legislature ensuring the accountability of the judiciary. On the question of where the balance lies, the Court has stated that there is no universal model of the separation of powers, and that South Africa could be expected to evolve its own brand of the doctrine over time.<sup>46</sup>

For these and other reasons, the concept of judicial independence is a cornerstone of the constitutional regime, and certainly the Justices of the Court treat it as such.

## **B. The Core Content of Judicial Independence**

Since the *First Certification Judgment*, the Justices of the Court have had a number of occasions to give content to the concept of judicial independence as they see it. Foremost among these judgments is *De Lange v Smuts*,<sup>47</sup> which constituted the Court's first extended engagement with the concept. Since the Court has repeatedly returned to *De Lange* as the foundation of its thinking on the importance and requirements of an independent judiciary, it is worth setting out the Court's decision in some detail.

*De Lange* was concerned with a constitutional challenge to a provision of the Insolvency Act 24 of 1936, which provided that a person summoned to appear before a meeting of creditors could be committed to prison by the presiding officer in the event that the person refused to be sworn in, to produce a document, or to answer questions. A presiding officer, for the purposes of the Insolvency Act, could be a magistrate, a Master of the High Court, or a designated officer in the public service. The majority judgment by Justice Ackermann held that the impugned provision was unconstitutional to the

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<sup>45</sup> *De Lange* (n 40) para 60; *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others* 2013 (5) SA 571 (CC) ('NSPCA') para 13.

<sup>46</sup> *De Lange* (n 40) para 60; *NSPCA* (n 45) para 13.

<sup>47</sup> *De Lange* (n 40).

extent that it authorized non-judicial government officers to commit a person to prison. He held that ‘the power to commit an uncooperative witness to prison. . . is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.’<sup>48</sup> In the course of Justice Ackermann’s judgment—as well as in the dissents of Justices Sachs, Mokgoro, and O’Regan—the Court gave content to the concept of judicial independence, some of the most important aspects of which are discussed below.

First, as Justice O’Regan put it, the Constitution provides that one of the essential characteristics of the courts is that ‘[they] are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.’<sup>49</sup> Justice Ackermann, for his part, expounded on these characteristics by reference to the pronouncements of the Canadian Supreme Court in *Canada v Beauregard*:<sup>50</sup>

[T]he generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. . . . The ability of individual judges to make decisions on concrete cases free from external interference or influence continues . . . to be an important and necessary component of the principle.<sup>51</sup>

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<sup>48</sup> *ibid* para 61.

<sup>49</sup> *ibid* para 178.

<sup>50</sup> (1986) 30 DLR (4<sup>th</sup>) 481.

<sup>51</sup> *ibid* 491.

In a subsequent case, the Court unanimously adopted this conception of judicial independence.<sup>52</sup> Thus, at the heart of the Court's conception of its own independence is the view that the Justices should have the 'complete liberty' to decide the cases before them 'free from external interference or influence', and that no outsider, 'even another judge', should even attempt to interfere with 'the way in which a judge conducts his or her case and makes his or her decision'. So conceived, it is clear why the Justices so strongly rebuke any suggestion that they might be seeking to conform their judicial decision-making processes to the expectations of other judges and public officials. Part of their independence is the independence to work with legal sources in the way they see fit.

Second, Justice O'Regan, relying on the Canadian Supreme Court's decision in *R. v. Valente*,<sup>53</sup> held that 'judicial independence involves both individual and institutional relationships'.<sup>54</sup> The individual dimension encompasses the concept of impartiality, which is 'a state of mind or attitude of the tribunal in relation to the issues and the parties

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<sup>52</sup> The Court's other principal judgment on the concept of judicial independence is *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), though it largely reiterates the principles set out in *De Lange* (n 40). *Van Rooyen* was concerned with several criminal accused who were facing charges, or had been convicted of crimes, in regional magistrates courts around the country. They had each challenged the legality of the proceedings against them, arguing that the magistrates courts lacked the institutional independence contemplated by Section 165(2) of the Constitution. The consolidated action came before a division of the High Court, which held that various statutory provisions and regulations made thereunder were inconsistent with the Constitution and thus invalid, finding that the magistrates' courts lacked institutional independence in terms of the control of the executive over the day-to-day functioning of these courts, and that magistrates themselves faced impediments to independence in terms of the method of appointment, promotion, and disciplining of magistrates. In accordance with s 172(2) of the Constitution, the declarations of invalidity were referred to the Constitutional Court for confirmation. While the judgment contains detailed discussions of the constitutionality of various sections of the acts and regulations, the general thrust of its reasoning in respect of all of these provisions is that the Constitution treats higher courts differently to lower courts, and that as long as the higher courts enjoy more robust independence, the lower courts need not enjoy the same extent of protection. *ibid* paras 27-28.

<sup>53</sup> (1985) 24 DLR (4<sup>th</sup>) 161, 171.

<sup>54</sup> *De Lange* (n 40) para 159.

in a particular case’, connoting an ‘absence of bias, actual or perceived’.<sup>55</sup> But the Court has also held that it encompasses more than just ‘a state of mind or attitude in the actual exercise of judicial functions’, but also ‘a status or relationship to others, particularly the [e]xecutive [b]ranch of government, that rests on objective conditions or guarantees.’<sup>56</sup> Importantly, the Court has held that the—

status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups.<sup>57</sup>

To this end, the Court has held that the individual dimension of judicial independence is to be protected by security of tenure and by financial security,<sup>58</sup> which are discussed in greater detail below.

The institutional dimension of judicial independence requires that ‘the institution or proceedings over which the officer presides must also exhibit independence and impartiality in the judicial sense’, which is ‘reflected in [the court’s] institutional or administrative relationships to the executive and legislative branches of government’.<sup>59</sup> Of course, the individual and institutional dimensions of judicial independence are partly overlapping and mutually reinforcing. In particular—

an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other

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<sup>55</sup> *ibid* para 71.

<sup>56</sup> *ibid*.

<sup>57</sup> *ibid* 72 (internal quotations marks omitted).

<sup>58</sup> *ibid* paras 70-74, 159.

<sup>59</sup> *ibid* para 159.

branches of government, in what is essential to its function,  
he or she cannot be said to be an independent tribunal.<sup>60</sup>

Third, the Constitutional Court has held that judicial independence, as ‘status or relationship to others’ requires the realization of certain ‘objective conditions or guarantees’.<sup>61</sup> Following the decision of the Canadian Supreme Court in *R v Valente*,<sup>62</sup> the Court has enunciated that at least the following three material conditions are required to protect and promote judicial independence. The first condition is security of tenure, ‘which embodies as an essential element the requirement that the decision-maker be removable only for just cause, secure against interference by the executive or other appointing authority.’<sup>63</sup> The second condition is a ‘basic degree of financial security free from arbitrary interference by the executive in a manner that could affect judicial independence.’<sup>64</sup> The third condition is ‘institutional independence with respect to matters that relate directly to the exercise of the tribunal’s judicial function’.<sup>65</sup> I discuss each of these conditions in turn.

i. Security of Tenure

In discussing the extent to which the Constitution protects the Justices’ security of tenure, I take a broad view of security of tenure that encompasses not only the circumstances under which a Justice can be removed from office, but also the procedure for appointing the Justices as well as the length of their terms.

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<sup>60</sup> *ibid.*

<sup>61</sup> *ibid* para 71.

<sup>62</sup> *Valente* (n 53).

<sup>63</sup> *De Lange* (n 40) para 70 (internal quotation marks omitted).

<sup>64</sup> *ibid* (internal quotation marks omitted).

<sup>65</sup> *ibid* (internal quotation marks omitted).

The Constitution provides that the Constitutional Court consists of the Chief Justice, the Deputy Chief Justice and nine other judges.<sup>66</sup> While any appropriately qualified, ‘fit and proper’ South African citizen can be appointed as a Justice of the Court,<sup>67</sup> there are restrictions on the collective composition of the Court, in that at least four of the Justices must have already been judges of a lower court at the time of their appointment.<sup>68</sup> The Constitution also expressly requires that ‘the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.’<sup>69</sup>

The Judicial Service Commission (‘JSC’)—a body composed of members of the executive, the legislature, and the judiciary and the broader legal profession<sup>70</sup>—plays a central role in the appointment of Justices to the Court.<sup>71</sup> The President appoints the Chief Justice and the Deputy Chief Justice ‘after consulting the Judicial Service Commission and the leader of parties represented’ in Parliament.<sup>72</sup> To appoint the remaining Justices to the Constitutional Court, the JSC is required to prepare a list of nominees with three names more than the number of vacancies on the Court.<sup>73</sup> The President then makes appointments from that list, or otherwise provides the JSC with reasons why the nominees are unacceptable. At that point, the JSC must supplement the

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<sup>66</sup> Constitution of the Republic of South Africa, 1996, s 167(1).

<sup>67</sup> *ibid* s 174(1).

<sup>68</sup> *ibid* s 174(5).

<sup>69</sup> *ibid* s 174(2).

<sup>70</sup> *ibid* s 178(1). Five commissioners are (or are designated by) members of the executive, eight are members of the judiciary or the broader legal profession, and ten are members of the legislature.

<sup>71</sup> *ibid* s 174.

<sup>72</sup> *ibid* s 174(3).

<sup>73</sup> *ibid* s 174(4).

list with further nominees and the President must make the appointments from that list.<sup>74</sup> When making appointments, the President is required to consult with the Chief Justice and the leaders of the political parties represented in Parliament.

The balanced composition of the JSC—and, in particular, the relatively small number of executive commissioners compared to the relatively substantial role played by the legal profession itself—minimizes the extent to which Justices must pander to the interests of the executive or any particular interest group in order to be appointed to the Court. The process, too, minimizes the influence of the executive and other interest groups by constraining the President to appointing a Justice from the JSC’s list, and requiring him to consult with the Chief Justice and the leaders of the political parties in Parliament. Of course, the President has greater latitude in appointing the Chief Justice and Deputy Chief Justice, though in practice, since the first round of appointments to the Court, the President has always made these appointments from among the Justices already serving on the Court.

Once appointed, the Constitution provides that the Justices may serve for a non-renewable term of 12 years, or until they reach the age of 70, whichever occurs first.<sup>75</sup> However, the Constitution also permits the extension of the Justices’ terms of office by means of legislation. The term of office has in fact been extended by the Judges’ Remuneration and Conditions of Employment Act 47 of 2001, which provides that that a Justice whose 12-year term of office expires or who reaches the age of 70 years before completing 15 years’ collective service on the bench, must continue in office

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<sup>74</sup> *ibid.*

<sup>75</sup> *ibid* s 176.

until the completion of 15 years' active service or until that judge attains the age of 75 years, whichever occurs first. The Court has held that a non-renewable term of office is a central feature of judicial independence, in that it is a 'bedrock of security of tenure and a dyke against judicial favour in passing judgment,' removing the threat of the executive using the prospect of term renewal as a means of inducing favourable decisions from the Justices.<sup>76</sup> And indeed, the fact that Justices serve for fixed, non-renewable terms is widely regarded as having avoided in South Africa the highly politicized appointment process commonly observed, for example, in lifetime nominations to the Supreme Court of the United States.

Once appointed, a Justice may only be removed from office if the JSC finds that 'the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct', and two-thirds of the National Assembly calls for that judge to be removed.<sup>77</sup> Again, this fosters judicial independence to the extent that Justices know that they are free to decide cases as they please, given that they can only be removed for a limited set of reasons, and only then on a finding by the JSC supported by two-thirds of the Parliament.

ii. Financial Security

The Court has confirmed on a number of occasions that 'a basic degree of financial security'<sup>78</sup> or 'adequate remuneration'<sup>79</sup> is an important aspect of judicial independence.

As the Court put it in *Van Rooyen*—

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<sup>76</sup> *Justice Alliance* (n 34) para 73.

<sup>77</sup> Constitution of the Republic of South Africa, 1996, s 177.

<sup>78</sup> *De Lange* (n 40) para 70.

<sup>79</sup> *Van Rooyen* (n 52) para 138.

[i]f judicial officers lack that security, their ability to act independently is put under strain. Moreover, if salaries are inadequate it would be difficult to attract to the judiciary persons with the skills and integrity necessary for the discharge of the important functions exercised by the judiciary in a democracy.<sup>80</sup>

The Court has also held that judicial officers should not be required to negotiate with the executive over their salaries.<sup>81</sup>

To this end, the Constitution provides that '[t]he salaries, allowances and benefits of judges may not be reduced.'<sup>82</sup> The Constitution also requires that '[n]ational legislation. . . establish frameworks for determining the salaries, allowances and benefits of judges'.<sup>83</sup> That national legislation is the Judges' Remuneration and Conditions of Employment Act 47 of 2001, which provides that the Justices' annual salaries are to be determined by the President by proclamation. The latest proclamation sets the Justices salaries at just over R2 million, with the Deputy Chief Justice earning over R2.3 million and the Chief Justice earning over R2.6 million,<sup>84</sup> which is comparable to what they could be expected to earn in private practice. Depending on their length of service and other circumstances, the Act also provides that the Justices continue to earn all or substantially all of their judicial salary once they retire.<sup>85</sup>

These financial protections not only protect the Justices from the prospect of financial threats from the executive, but also ensure that they do not have to curry favour

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<sup>80</sup> *ibid* para 139.

<sup>81</sup> *ibid* paras 138-139.

<sup>82</sup> Constitution of the Republic of South Africa, 1996, s 176(3).

<sup>83</sup> *ibid* s 219(5).

<sup>84</sup> Proc 12 GG 38568 of 13 March 2015.

<sup>85</sup> Judges' Remuneration and Conditions of Employment Act 47 of 2001, s 5.

with litigants or firms that appear before them in the hope of securing employment upon the expiration of their terms.

iii. Institutional Independence

Institutional independence is concerned with ‘matters that relate directly to the exercise of the tribunal’s judicial function’, including ‘judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.’<sup>86</sup>

Institutional independence is the aspect of judicial independence most closely associated with the doctrine of the separation of powers, and entails that the judiciary may exercise only judicial functions, and that judicial functions may be exercised only by the judiciary.<sup>87</sup> As noted above, the Constitution protects the institutional independence of the courts by providing that ‘judicial authority . . . is vested in the courts’, that the ‘courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’, and that ‘[n]o person or organ of state may interfere with the functioning of the courts.’<sup>88</sup> The Constitution further bestows on the courts ‘the inherent power to protect and regulate their own process’.<sup>89</sup>

While the Court has held that ‘judicial officers may, from time to time, carry out administrative tasks’, the Court has said that ‘[t]here may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers.’<sup>90</sup> In *Heath*, the Court set out a non-exhaustive list of factors

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<sup>86</sup> *De Lange* (n 40) para 70 (internal quotation marks omitted).

<sup>87</sup> *ibid* paras 59, 70, 154; *Heath* (n 43) para 35.

<sup>88</sup> Constitution of the Republic of South Africa, 1996, s 165.

<sup>89</sup> *ibid* s 173.

<sup>90</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 141 n 107.

relevant to the consideration of when it is permissible to assign a non-judicial function to a judge. These factors were whether the non-judicial function—

(a) is more usual or appropriate to another branch of government; (b) is subject to executive control or direction; (c) requires the Judge to exercise a discretion and make decisions on the grounds of policy rather than law; (d) creates the risk of judicial entanglement in matters of political controversy; (e) involves the Judge in the process of law enforcement; [and] (f) will occupy the Judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.<sup>91</sup>

These factors aside, the Court in *Heath* held that the question is ultimately—

one calling for a judgment to be made as to whether or not the functions that the [j]udge is expected to perform are incompatible with the judicial office and, if they are, whether there are countervailing factors that suggest that the performance of such functions by a [j]udge will not be harmful to the institution of the [j]udiciary, or materially breach the line that has to be kept between the [j]udiciary and the other branches of government in order to maintain the independence of the [j]udiciary.<sup>92</sup>

Tellingly, the Court has generally described judicial functions as those that must be ‘performed by a person of undoubted independence and integrity.’<sup>93</sup>

The Court has frequently struck down statutory provisions on the basis that they offend the institutional independence of the Courts. In *De Lange*, for example, the Court overturned a provision of the Insolvency Act on the basis that it permitted non-judicial officers to exercise what the Court considered a central judicial function, namely committing a person to detention.<sup>94</sup> Similarly, in *NSPCA*, the Court declared provisions

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<sup>91</sup> *Heath* (n 43) para 29.

<sup>92</sup> *ibid* para 31.

<sup>93</sup> *ibid* para 30.

<sup>94</sup> *De Lange* (n 40)

of the Performing Animals Protection Act unconstitutional because they assigned the function of issuing licences for the training, exhibition or use of animals to Magistrates.<sup>95</sup> The Court held that this unjustified assignment of an administrative function to the judiciary violated the separation of powers.<sup>96</sup> And in *Heath*, the Court invalidated certain provisions of the Special Investigating Units and Special Tribunals Act 74 of 1996 on the grounds that it was unconstitutional for a judge to be appointed as the head of the Special Investigating Unit, which was set up to investigate government corruption, and required the judge to perform functions ordinarily performed by the police, the prosecuting authorities and the state attorney.<sup>97</sup>

These judgments and others evince a Court that is fiercely protective of its own independence and the independence of the judiciary generally.

## V. CONCLUSION

Against this background, it should be unsurprising that some of the conditions that Hart describes as essential to the formation of social norms amongst the general public are, as we have seen in the last three chapters, largely absent from the practices and attitudes of the Justices of the Constitutional Court. Hart's account of the formation of social rules, and of the rule of recognition in particular, assumes the existence, within the given group, of a desire to conform and to get along. His account assumes that members of the group have a strong preference for not being criticized by other members, that they have a strong preference to come to agreements with one another, and that they have a strong

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<sup>95</sup> *NSPCA* (n 45) para 40.

<sup>96</sup> *ibid* para 39.

<sup>97</sup> *Heath* (n 43) paras 39-40, 45.

preference to blend in with the perceived norms of their immediate social group. While this may be true in ordinary social settings, it misses the mark as far as the Justices of the Constitutional Court are concerned.

Instead, the Justices are deliberately insulated from precisely the sort of social pressure that Hart thinks is essential to motivate conformity to a social rule. Hart would have us believe that the man who removes his hat in church for fear of scorn from his peers is similar in all relevant respects to a judge who tries to discern how other judges perform their work so that he might do the same, and thereby avoid their criticism. However, as I have argued, the man in the church and the judge on the bench are dissimilar in several material respects. The most important of these differences is that the judge is provided with an array of institutional bulwarks specifically geared to render criticism of her behaviour irrelevant, such that she may follow her own conscience of right and wrong (both legally and morally), and follow her own individual style of legal problem-solving.

To begin with, judges are typically selected for their innately independent character traits. As the Justices themselves have proclaimed in *Heath*, judges are persons of ‘undoubted independence and integrity’,<sup>98</sup> and they publicly commit, through their oath of office, to continue to act independently and with fidelity only to the Constitution.

These independent-minded people, after making this public commitment to be independent, are then placed in an environment of very real institutional protections that are designed specifically to preserve and encourage their independence. Whatever desire they may have had, prior to appointment, to conform to expectations or follow their

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<sup>98</sup> *Heath* (n 43) para 30.

peers, can be dispensed with in the context of guaranteed tenure, a good salary, and the freedom to control their own processes.

The notion, at the core of Hart's theory, that judges fear the criticism of their colleagues and other officials to the point that they allow it to influence how they come to decisions about the law, is therefore out of sync with the notion of judicial independence, as it is understood and practiced by the Justices of the Constitutional Court themselves. The Deputy Chief Justice captures perfectly what is wrong with the Hartian conception of judicial duty: 'our duty is inward', he says, 'it's not outward.'

Justice Yacoob expressly linked this absence of pressure to conform to the notion of judicial independence:

Judges should be strong enough to be independent when they are appointed. And if they are sufficiently independent when they are appointed, then it does not matter with whom they share thoughts or from whom they get their ideas, because independence does not mean you know it all. So you continue to learn and change your ideas, and provided you independently evaluate what you get from others, there is nothing wrong with that. Hearing from another colleague is like open-mindedly listening to an argument from counsel in a court. It's no different.

Justice Cameron echoed this point:

We all think we're appointed on merit, so we really get independent. A judge has enormous power. And it goes to your head, in a good way.

Contrary to Hart, then, it seems that the Justices are neither deterred by the criticism of their colleagues, nor do they expect their criticism to deter others. Rather than a harm to be avoided, criticism and difference is seen as a strength of the Court's process. Their independence causes them both to reject pressure to conform to the

reasoning of their colleagues, and to feel secure enough in their own reasoning to consider and evaluate the suggestions of their colleagues.

This last issue—concerning the ways in which, and the reasons why, the Justices work together despite their fierce commitment to judicial independence—is explored in the next and final empirical chapter.

## *Collegiality, Difference, and Objectivity in Adjudication*

### I. INTRODUCTION

From the discussion in the previous chapter, it is clear that the Justices do not criticize one another in the way that Hart's account predicts. It transpires, however, that the Justices go a great deal further than merely refraining from criticizing each other: they actively *encourage* difference and disagreement amongst themselves, and have established a variety of elaborate mechanisms for having those differences and disagreements feed into and enrich the judgment-writing process.

In explaining the value the Justices ascribe to difference and disagreement, this chapter discusses the complex ways in which the Justices strike a balance between a number of seemingly antithetical ideals: between their commitment to encouraging different jurisprudential approaches amongst their colleagues, and their desire for consensus on outcomes; between their fierce independence from one another, and their strong commitment to collegiality and collective problem-solving; between their recognition of their own fallibility and their quest for objectivity and truth in their judgments.

Given the extent to which the Justices interweave these themes in their responses, I venture a brief and broad summary here, before discussing certain aspects of their responses in more detail. In short, the Justices believe that it enhances the legitimacy of and respect for the Court if each judgment issued by the Court, regardless of which Justice authors the judgment, is the best it can possibly be. The Justices unanimously and

forcefully assert that each judgment is the best it can possibly be when the diversity of judicial decision-making processes, worldviews, and personal backgrounds of the Justices feeds into and enriches the reasoning of each of the Court's judgments. The Justices believe that these differences result in judgments that are more likely to approach the values of truth and objectivity than judgments written by one judge in isolation. The Justices therefore afford one another an extensive range of opportunities to give input into one another's judgments, *even if they disagree* with the fundamental approach their colleagues espouse in those judgments.

I begin the discussion in this chapter by describing the nature and extent of the Justices' collaboration in the judgment-writing process. (Section II.) I then discuss the interrelated reasons that the Justices offer for their commitment to collegiality and cooperation, namely: (i) their belief in the value of diversity and its positive impact on judicial reasoning (Section III), and (ii) their belief that collaboration brings the Court's judgments closer to the objectivity the Justices seek (Section IV).

## II. A HYPER-COLLEGIAL COURT

The extent of the collaboration amongst the Justices was stated most succinctly by Chief Justice Mogoeng: '[I]t's important to understand that every Justice of the Constitutional Court participates in the production of a judgment, irrespective of who the case is allocated to.'<sup>1</sup> Other Justices offered a similar description of the Court's collective decision-making. Justice Froneman, for example, stated that:

In terms of our process of arriving at a judgment, I think its very important to take very seriously what your colleagues

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<sup>1</sup> Interview with Chief Justice Mogoeng Mogoeng, Chief Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 21 January 2013).

are saying. When you circulate a draft, you get comments on the judgment from colleagues, you consider the comments, and you adapt to them. In the end, even if the judgment is in your name, it really is a joint effort.<sup>2</sup>

Justice Froneman noted that while ‘I like to have my own way of doing things and thinking’,—

if colleagues come up with particular suggestions, then I try to incorporate them into the judgment in my own language. In some cases there have been huge collaborative efforts, not only in my judgments but also in the judgments of my colleagues.

Justice Yacoob shared this sentiment—‘[w]ith me, it is pretty much everyone’s effort’<sup>3</sup>—as did the other Justices.

It is helpful at this juncture to recall the general processes, discussed in Chapter 5, by which the Court ensures extensive participation by each Justice in each case that comes before it. Absent extenuating circumstances, all eleven Justices will sit for each case. After the hearing, the assigned writing Justice will circulate a note setting out how they propose to dispose of the case. All Justices are expected to comment on the note, and indicate their agreement or disagreement with the general line of reasoning proposed. The Justices will then meet at a conference to discuss their positions on the case. After the conference, the writing chamber will produce a first draft of the judgment and circulate it to the other Justices for discussion. The Justices will meet again (possibly a number of times) to give input on the draft. At some point between the post-hearing conference and the circulation of the draft judgment by the writing chamber, other

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<sup>2</sup> Interview with Justice Johan Froneman, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013).

<sup>3</sup> Interview with Justice Zak Yacoob, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 28 January 2013).

Justices may begin to pen dissents or concurrences. These judgments go through the same process—they are circulated, commented on, and discussed at one or more conferences. Each Justice will provide more or less extensive comments on each draft, whether or not they are presently writing their own judgment, and whether or not they intend to sign on to that particular judgment. As this process unfolds, the Justices begin to indicate which judgment they intend to sign on to. Some Justices may remain on the fence for some time—each of the writing Justices may seek to sway the undecided Justices to their side by adjusting their reasoning further, by adding or deleting certain paragraphs, or by reaching or avoiding certain legal issues. Before the Court issues the final judgments in the case, all the Justices convene for a line-by-line read-through of each judgment, which at times, according to Justice Sachs, ‘could be severe to the point of punishing—but we all respected each other very much.’<sup>4</sup>

Justice Goldstone offered some illustrative examples of how this collaboration plays out in practice. With reference to his seminal decision on the law of equal treatment in *President of the Republic of South Africa and Another v Hugo*,<sup>5</sup> Justice Goldstone reported that he ‘was strongly influenced by other colleagues, in the way it was written, particularly by Kate [Justice O’Regan]. It was interesting,’ he said, ‘she influenced what I wrote, and then she wrote a separate concurrence.’<sup>6</sup> Emphasizing the Court’s often collective voice, Justice Goldstone added that—

[a] lot of judgments are written in the names of two or three Justices, because they have all contributed substantially.

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<sup>4</sup> Interview with Justice Albie Sachs, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 9 and 16 August).

<sup>5</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC).

<sup>6</sup> Interview with Justice Richard Goldstone, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 7 January 2013).

There were other judgments—certainly in my time—which were issued in the name of ‘The Court’.

A survey of the judgments that the Court has issued since its inception corroborates the Justices’ claims that they take collaboration seriously, and indeed that their collaboration and assimilation of diverse viewpoints leads frequently to unanimity. Of the 524 judgments issued between 5 April 1995 (when the Court issued its first judgment in *S v Zuma*)<sup>7</sup> and 15 May 2014, 82 of these judgments (almost 16%) have been issued in the name of ‘The Court’. In these judgments—typically dealing with sensitive political matters—no single Justice is identified as an author. Instead, all eleven Justices simply sign on to the judgment of ‘The Court’. A further 306 judgments (more than 58%) were authored under the name of one (or more) of the Justices, but were unanimous.<sup>8</sup> (Of course, in light of the Justices’ responses above, ‘authorship’ here does not imply that the other Justices would not have had a meaningful role in producing the judgment.) Together, these figures indicate that the Justices have acted unanimously in more than 74% of the cases the Court has heard, on what, almost by definition, are the most contentious questions in South African law. By comparison, the same figures for

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<sup>7</sup> *S v Zuma and Others* 1995 (2) SA 642 (CC).

<sup>8</sup> A total of 16 judgments have been issued in the name of two or more Justices, who co-authored the judgment together. While the practice is rare (and has become more so), some of the Court’s most famous judgments have been principally co-authored by two or more Justices. See, for example, *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) (joint judgment by Ackermann, O’Regan and Sachs JJ); *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (joint judgment by Chaskalson P and Goldstone and O’Regan JJ); *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (joint judgment by Ackermann and Goldstone JJ); *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) (joint judgment by Chaskalson CJ, Ackermann and Kriegler JJ); *S v Jordan and Others* 2002 (6) SA 642 (CC) (joint dissent by O’Regan and Sachs JJ) *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (joint dissent by Mokgoro and O’Regan JJ).

the United States Supreme Court between 2000 and 2012 reveal that less than 40% of the cases heard by the Supreme Court were decided unanimously.<sup>9</sup>

This hyper-collegiality amongst the Justices begs explanation, in particular because it might at first glance appear to undercut the Justices' claims about their independence, as well as the respect for different judicial decision-making processes upon which they so energetically insist. If one were to look at the above statistics only, one might make the inference that the Justices are all following the same judicial decision-making processes.

That inference is incorrect, and one only realizes that is so by engaging with the explanations the Justices themselves provide for the high degree of unanimity in their issued judgments. As the Justices tell it, their unanimity is not proof that there are no differences in their jurisprudential approaches; quite the contrary, their unanimity arises only because they take seriously the difference and disagreement of their colleagues as part of a highly collaborative process that feeds those disagreements into the reasoning of each judgment.

It should be noted that the hyper-collegial nature of the Court's decision-making practices raise yet a further criticism against Hart's model. While the unit of Hart's inquiry is undoubtedly the group—a group of churchgoers, a group of law-applying officials, and so on—his understanding of interactions within the group is fundamentally individualistic. The shared practice at the core of a given social rule is ultimately an aggregation of discrete, but similar, individual acts. Amongst the Justices of the Constitutional Court, however, we do not observe a situation in which each individual

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<sup>9</sup> Lee Epstein et al., "Are Even Unanimous Decisions in the United States Supreme Court Ideological?" (2012) *Northwestern University Law Review* 106(2) 299 at 702.

Justice is working alone, separately identifying valid legal rules, which, aggregated across all the Justices, yields a general standard for the identification of valid law. Instead, the Justices are participating in the identification of law *together*, such that their practice is shared not in the sense that most judges follow this practice on their own, but rather in the sense that the Justices share in shaping the practice as a collaborative enterprise that may begin in their individual chambers, but continues outward to the multiplicity of group interactions in which they participate.

The Justices offer two principal reasons for their practice of collaboration, which highlight their love of difference, not sameness. First, according to the Justices, collaboration strengthens the persuasiveness of their judgments, and thus the legitimacy of the Court, because it solicits and incorporates the diversity of perspectives on the Court. Second, collaboration exploits the Court's diversity so as to bring their judgments closer to achieving the truth and objectivity the Justices desire. I discuss each of these justifications in turn.

### III. DIFFERENCE, PERSUASIVENESS AND LEGITIMACY

Across my interviews, the Justices unanimously expressed a shared commitment to building a collegial and collaborative judicial environment. They also unanimously justified that commitment by reference to a belief that the criticisms of the other Justices strengthen the reasoning in each judgment, and thus, ultimately, the legitimacy of the Court. The following statement by Justice Yacoob is exemplary of the Justices' collective stance:

I like to receive comment from colleagues whether they agree or disagree with me, because very often the comments of colleagues improve the quality of judgments

significantly. So I am a very strong believer in this collegial approach. My colleagues come from different backgrounds—they understand life differently, they understand things differently—and therefore their comments and our interaction in our cases, even if it is an interaction on the basis of difference, enriches the process and quite often enriches the judgment.

Justice Sachs echoed this sentiment:

It is very valuable to be part of a team. It meant that you could take chances. It also meant that you could test every proposition: colleagues would email their views to one another, and there would also be roundtable discussions. The dialogue was wonderful. Each person had his or her own voice, their own style of reasoning—though this would be more pronounced at the roundtable discussions than in the final written judgment.

The responses by Justices Yacoob and Sachs pick up on two distinct but related virtues that flow, according to the Justices, from the input of their colleagues. The first is the ‘enrichment’ of the judgment as a result of the different understandings and styles of reasoning offered by each of the Justices. The second is the ‘testing of propositions’ in terms of their logic, reasoning, and persuasiveness. This last point is elaborated in another of Justice Sachs’ comments:

I wanted to be taken seriously by my colleagues. In that sense, I wanted a blind-folded person just reading the text, knowing nothing about me, to say: ‘This is well-reasoned, this is well argued, this is persuasive.’ There was a kind of pride involved in that.

Justice Kriegler expressly linked this augmenting of the persuasiveness of each judgment to the Justices’ ‘collective responsibility’ for the Court’s output:

We had a collective responsibility for what went out of the Court. So even though Yvonne [Justice Mokgoro] may have been writing a dissent or an opinion with which I had no particular sympathy, I would make it my job to see that

her case was as competently, compellingly, and correctly reasoned as my editorial help could make it.<sup>10</sup>

It is worth considering this set of responses from the Justices in more detail, since they suggest an apparent paradox in the Justices' views. On the one hand, we understand from the Justices' responses discussed earlier in this chapter that they not only refrain from criticizing their colleagues for thinking differently, but positively encourage them to do so. On the other hand, the Justices also report involving themselves in their colleagues' judgments to ensure that they are 'well-argued' or 'correctly reasoned'. The former set of views indicates that the Justices do not hold one another to, in Hart's terms, 'correct standards of judicial decision-making', while the latter set of views suggests the opposite.

The concept of the 'reasonable disagreement' again provides the key to understanding and reconciling these seemingly conflicting practices and attitudes. When the Justices discuss the way they influence one another's writing, they point out, as Justice Kriegler does above, that their role is to make the judgment the best it can be *on its own terms*: 'I would make it my job to see that *her case* was as competently, compellingly, correctly reasoned *as my editorial help could make it*', despite having 'no particular sympathy' for the arguments the judgment contains. Thus, while the Justices may disagree with the premises on which a colleague's argument relies, or with the particular decision-making process that animates it, they nevertheless try to improve upon what we might describe as the argument's 'logico-rhetorical qualities', which encompass not only the validity, soundness, and cogency of the arguments presented, but also their

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<sup>10</sup> Interview with Justice Johann Kriegler, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 27 January 2013).

rhetorical persuasiveness. This seems to me to be related to the nature of the ‘reasonable disagreement’ that the Justices claim to be having with one another: while they may not necessarily agree with a colleague’s proposed disposition of the case, they nevertheless understand their colleague’s reasoning, and understand also how that reasoning can be improved on its own terms to make the judgment into the best possible version of itself.

The following response by Justice Jafta gives credence to the interpretation of the Justices’ views just advanced:

What happens is that the lead judgment is sent around, and all judges are expected collegially to comment on it. Some judges may sponsor a paragraph or two just to strengthen the reasoning, *even if ultimately they don’t agree with the outcome*. They may do that, even as they start writing a separate judgment, saying ‘I *accept that this is the position* taken by my colleague, but I think that for these reasons we cannot reach that outcome.’<sup>11</sup>

Here, Justice Jafta is drawing the distinction, discussed in Chapter 9, between condemning a colleague’s judicial decision-making process as wrong or mistaken (which the Justices, as a general matter, do not do), and believing that an alternative decision-making process is more persuasive under the circumstances.

We can see this distinction at work again in the following comment by Justice O’Regan, who emphasized perhaps more strongly than any other Justice the nature of the Justices’ collaborative processes of reasoning:

You are engaging with one another all the time. It is a very deliberative court with a lot of conversation. Of course one paid a lot of attention to what other colleagues did. There are *obviously differences of jurisprudential style and differences of approach*, but my view was that we had to be very careful that what went out from the Court, whether I

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<sup>11</sup> Interview with Justice Chris Jafta, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013) (my emphasis).

signed on to it or it not, did the job of being a judge in the way I thought it ought to be doing the job of being a judge. I felt a responsibility to my colleagues to make sure that . . . we approached the task in a proper way. And I think that most of my colleagues would have felt the same. Although we *might have differences of emphasis and formulation*, by and large everybody would agree that the court was more important than the individual judge, and that the Court, as an institution, had to be seen to be doing the job properly.<sup>12</sup>

At another point, Justice O'Regan echoed this sentiment:

That is why a collegial court is such a powerful institution—because everybody pays a lot of attention to what everybody else is doing, and it is not easy to get away with a *less than serious minded approach*.

Justice O'Regan's reference to a 'serious-minded approach' is illuminating. While she strongly emphasizes that the job of judging must be done 'properly'—suggesting an affinity with Hart's view that judges hold each other to a 'correct standard of judicial decision-making', she in fact emphasizes on multiple occasions that she is not talking about 'differences of jurisprudential style and differences of approach' or 'differences of emphasis and formulation'. Justice O'Regan is seemingly discussing the same logico-rhetorical qualities that the other Justices refer to in their responses above: she wants the judgments to be, in the words of Justices Sachs and Kriegler, 'competent', 'compelling', 'well-reasoned', 'persuasive', or, in her words, 'serious-minded'.

In effect, the Justices appear to distinguish between different types of standards of judicial decision-making: on the one hand, they refer to standards governing the correct legal methodology for deciding what the law requires in a given case (including standards for the identification of valid law), and on the other hand, they refer to standards

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<sup>12</sup> Interview with Justice Kate O'Regan, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 20 August 2012) (my emphasis).

governing well-reasoned, persuasive argument. In respect of the latter, the Justices appear to share, and to hold one another to, standards of what they consider to be a logically valid or strong or cogent legal argument, whether or not they accept the premises on which it is based or the outcome that it supports. But this is not the type of standard of judicial decision-making with which Hart's account is concerned. Hart's account is concerned with standards of the former kind—standards of the correct legal methodology to employ in coming to legal conclusions, including standards about correctly identifying and working with sources of law. It is these standards that the Justices appear to reject when they embrace 'differences of jurisprudential style and differences of approach'.

It is interesting to note that, as the Justices solicit and respond to the diverse criticisms of their colleagues, they often amend the reasoning in judgments they are presently authoring, sometimes radically, in order to secure the support of their colleagues. Thus, the Justices seek to understand how their colleagues are reasoning in a given case not only so that they can assist that colleague in the best expression of their own position (as discussed above), but also so that they might strengthen the competing reasoning in another judgment that they or another Justice will author, or convince an undecided colleague to sign up to the Justices' preferred outcome. As Justice Kriegler put it: 'If that's what a colleague thinks, it's your job, if you want to have your view prevail . . . to try to persuade them of its correctness.' Or as Justice Cameron put it, 'it's

not just bean-counting, but it doesn't exclude bean-counting. There is even tacticality in it.'<sup>13</sup>

The following response by Justice Yacoob summarizes much of what has been discussed so far:

It is not important for me to know what my colleagues are doing. But if colleagues are thinking differently from me, I want to know that. I want to know that they are thinking differently, and I want to know why they are thinking differently, and the more directly they tell me the better, so that I can engage with them and work through the issues. I think colleagues have a great deal to add. I would not like to know the processes that my colleagues go through in their chambers to arrive at their conclusions. But I would like to know what their positions are, particularly if they are different from mine, and to motivate them.

Here, Justice Yacoob affirms the conclusion that he has little concern for 'the processes that my colleagues go through in their chambers to arrive at their conclusions', which I take to be a rejection of a concern to hold his colleagues to a particular judicial decision-making process. At the same time, he expresses an interest in understanding 'why [his colleagues are thinking differently]', so that he 'can engage with them and work through the issues'. I take this latter point to express Justice Yacoob's concern to both persuade a colleague to agree with his own view if he can, and to learn how he might

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<sup>13</sup> Interview with Justice Cameron, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 31 January 2013). Deputy Chief Justice Moseneke expressed this 'tacticality' in more detail:

'By the time I start writing, I will have seen the responses of my colleagues to my case note and to my proposed route in identifying the issues and resolving them. So our system is effective in the sense that very early, you know whether your characterization of the issues, on which we sometimes differ, carries the day. And once you pass that stage, you know whether the proposed resolution of the issues is consistent with what other judges think.'

Interview with Deputy Chief Justice Dikgang Moseneke, Deputy Chief Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 31 January 2013).

assist in enhancing that colleague's reasoning, should that colleague choose to go her own way.

On the basis of the above responses, it is clear that the Justices are anything but islands unto themselves. Rather, they are deeply engaged with one another's views, and pay a great deal of attention to the substantive opinions expressed by their colleagues, so as to understand how they might change their minds or how a Justice can shore up the reasoning in his own judgment. It is important to recognize, however, that the Justices are not concerned, as Justice Yacoob put it, with 'what my colleagues are doing' or 'the processes that my colleagues go through in their chambers to arrive at their conclusions', but rather with what their substantive 'positions' are, and with whether their views embody accepted standards of logic and persuasiveness. They are not collaborating with one another, and paying attention to one another's reasoning, for the purpose of converging on some shared judicial decision-making process; rather, they are collaborating and engaging with one another's reasoning specifically so that the different judicial decision-making processes that they perceive to be employed by their colleagues, as well as the different values and perspectives expressed by their colleagues, can filter through to each judgment issued by the Court.

#### IV. DIVERSITY, FALLIBILITY, AND THE QUEST FOR OBJECTIVITY

Despite the fact that the majority of Justices refrain from describing their positions as objectively better than those of a colleague with whom they differ, all of the Justices expressed a commitment to an objective view of justice. In contrast to the contestation of this position in contemporary moral philosophy, the Justices unanimously agree that statements about justice are truth-apt. As Justice Ackermann put it:

All modest and good judges—I use the phrase ‘the modest judge’ as a term of appreciation and approbation—would long to think that, somewhere out there, there is a final and definitive answer to the question you are looking for. And I don’t think it is wrong to think that way as a point of departure, because I think it stresses the desire not to impose subjective and perhaps misguided values on what is an objective endeavour.<sup>14</sup>

Deputy Chief Justice Moseneke located the objectivity of the constitutional enterprise in the ‘universal normative scheme that we chose in our Constitution, [which] resonates, I think, with many human beings in varying degrees.’

However, while the Justices all support the view that principles of justice are objective, they express doubt about whether they can come to know those principles by acting alone. As Justice Froneman explained: ‘One always strives for objective justice. But I do not believe that one can ever come to a point where one can definitively know that one’s conclusion is objectively true.’

For the Justices, therefore, the truth may lie in the opinions of others. This is precisely why they largely refrain—subject to the qualifications discussed earlier in this chapter—from claiming objectivity for their arguments against their colleagues. As the Deputy Chief Justice put it:

For every moment that you are certain about how right you are, just remember that it could be equally certain that you are wrong. As you move along in your judicial career you learn humility, and therefore you learn to interrogate the positions that other people take.

Justice Van der Westhuizen took a similar view:

I am not someone who thinks that the way I read something first is necessarily the correct way. I am always very much

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<sup>14</sup> Interview with Justice Laurie Ackermann, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 13 August 2012).

aware that I may make a mistake—on the law, or on the interpretation of something, or simply with regard to logical reasoning. If, during our discussions, somebody points out that I am making a blatant error, I will listen. I do not mind at all admitting that I was wrong.<sup>15</sup>

The Justices also unanimously accept that their different subjective standpoints inform their judicial reasoning. Again, this recognition of the subjectivity of their views is what prevents them from claiming a superiority or objective correctness for their respective conclusions. Interestingly, however, the Justices view this subjective multiplicity also as a strength, not just as a weakness. Indeed, the Justices think that their different subjective views enrich their decisions and strengthen the likelihood that the group, as a whole, will reach correct conclusions. Justice Yacoob expressed this tension in the following way:

The notion of judges judging things objectively is, in my view, demonstrably a notion which is flawed. But it is a very difficult balance: if you bring too little of yourself into a case, you are wrong; if you bring too much of yourself into a case, you are also wrong. So for me the right approach is to effect the correct balance between the subjective and the objective.

A similar sense of balance between the subjective and the objective was expressed by Justice Froneman:

Inevitably, one must interpret legal rules, and in that interpretive process, moral values play a role. Your own subjective values play a role as well. But you also try to test whether your subjective views are in accordance with a more objective kind of constitutional value. I do not think it is ever possible to exclude one's own subjective views in that regard. I think the best that one can do is to acknowledge that you have such subjective views, and then to test those views against what others are saying. That is

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<sup>15</sup> Interview with Justice Johann van der Westhuizen, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013).

the best kind of objectivity that you can arrive at or strive for.’

This last-mentioned response by Justice Froneman hints at an important theme of the interviews, which is the link that the Justices unanimously drew between their fallibility and subjectivity, their quest for objectivity, and their commitment to a large, diverse and collegial bench.<sup>16</sup> The subjectivity and individual life experiences that the Justices bring to bear on each case enhance the possibility of arriving at an objective justice and minimize their scope for error. The following statement by Deputy Chief Justice Moseneke is exemplary of how the Justices link collegiality, diversity, and the search for the truth of justice:

A search for the truth, we have learnt, is neither linear nor atomistic. We draw also from African values which see wisdom as collective, as something that arises from collective ownership. Hence the Court’s emblem—of people sitting under a tree, seeking consensus and understanding. So there is a close connection between listening to others, appreciating their viewpoints, and reaching a just outcome.

As Justice Moseneke continued:

Every individual judge has to bring her or his mind to bear on the issues and come up with what is first and foremost an individual response. That explains why we are eleven. We could be seven or five—but that is why we are more than one. Our plurality is meant to be a sieve—it is meant to purify outcomes, to eliminate error, and to increase just

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<sup>16</sup> Note that Section 174(2) of the Constitution provides: ‘The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.’

A selection of the literature arguing for diversity on the bench includes Brenda Hale, ‘Equality and the Judiciary: Why should we want more Women Judges’ (2001) Public Law 489; Claire L’Heureux-Dubé ‘Making a Difference: the Pursuit of a Compassionate Justice’ (2000) International Bar Association Joint Session on ‘Women on the bench’ 20 September 2000; Richard Devlin ‘We Can’t Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R v R.D.S.*’ (1995) 18(2) Dalhousie Law Journal 408; Errol Mendes ‘“Promoting Heterogeneity of the Judicial Mind”: Minority and Gender Representation in the Canadian Judiciary’ (1991) in Ontario Law Reform Commission’s *Appointing Judges: Philosophy, Politics and Practice* 91.

and credible outcomes. If all of us just sang off the same hymn sheet, the risk is quite obvious isn't it? The sheet could just as well be printed out by somebody in the President's office. That is why apex courts are never populated by a single person. The whole idea is that the nation hopes that we would all bring our minds to bear on these issues, in order to eliminate, or at least reduce, the scope for error.

While the metaphor of the sieve emphasizes the important work the judges do to help one another avoid error, the notion of multiple hymn sheets—a harmony of voices rather than a single musical line—underscores the Justices' commitment to the value of subjective diversity. Justice Yacoob underscored this latter point, stressing that—

[w]e know that we come from a diverse society. There are eleven judges here who come from different walks of life, and the very idea of a collegial court, as we have always understood it, is that the richness of eleven judges comes through if we learn from each other.

In sum, the responses of the Justices draw a complicated relationship between the themes of collegiality, diversity, individual fallibility, and the search for an objective rightness in their judgments. The Justices are committed to fostering the legitimacy of the Court, and to producing the best-reasoned judgments they can collectively muster. Each individual Justice accepts their own fallibility, and therefore opens themselves up to the perspectives offered by Justices from different backgrounds. By providing meaningful opportunities for each Justice to participate in the writing of each judgment, the Justices hope that their collective wisdom will be brought to bear on the question of what is the just outcome for each case they hear.

# 11

## *Conclusion*

Over the course of the last four chapters, we have seen that the practices and attitudes of the Justices of the South African Constitutional Court, as these relate to their judicial decision-making processes, do not exhibit many of the ‘essential’ or ‘necessary’ conditions that, according to Hart, must lie at the foundation of every legal system.

First, according to Hart’s theory, we should have found that the Justices share a common practice of identifying law by reference to the same criteria of legal validity. However, we saw in Chapter 7 that the Justices do not converge in their criteria of legal validity in the way Hart’s account predicts. While the Justices agree that the amending clause of the Constitution is *not* the supreme criterion of legal validity in South Africa—because even constitutional amendments can only be valid if they comply with certain fundamental principles of political morality—the Justices do not agree on what those fundamental moral principles are.

Second, as we saw in Chapter 2, Hart’s rule of recognition presupposes that each Justice is sufficiently aware of the judicial decision-making processes followed by the other Justices, and that such awareness fosters a perception in each Justice that there is a common standard of judicial decision-making amongst his colleagues. Contrary to Hart, however, we saw in Chapter 8 that the Justices do not display a meaningful awareness of, or even a particular concern for, the judicial decision-making processes of their colleagues. Exemplary statements of this lack of awareness and concern came from Justice Goldstone—‘I’ve never been conscious of that. I wouldn’t be able to tell you the

reasoning process of Kate O'Regan or Albie Sachs'<sup>1</sup>—from Justice Yacoob—'I would not like to know the processes that [my colleagues] go through in their chambers to arrive at what they get to'<sup>2</sup>—and Justice Ackermann—'I don't think that the issue of the methodology of judicial decision-making was ever a separate topic of debate or discussion'.<sup>3</sup> Furthermore, to the extent that the Justices demonstrate a vague awareness of how their colleagues reason their way to legal conclusions, they perceive difference, not conformity. As Justice Goldstone put it, '[m]ore frequently than not . . . in a dissent there's a difference of the law, and a difference in perspective on what the law is.' Or as Justice Sachs put the point, 'colleagues whom I admired and loved and respected enormously disagreed. . . . They put the pieces together differently.'<sup>4</sup>

Third, according to Hart's theory, we should find that the Justices criticize one another when they depart from a perceived standard of judicial decision-making, and that they regard these criticisms as legitimate when made. Contrary to Hart, however, we saw in Chapter 9 that the Justices do not criticize one another for employing judicial decision-making processes different from their own, and do not apply pressure to one another to conform to a shared standard of decision-making. The Chief Justice, for example, stated that 'I hardly ever write with a conclusion that my colleagues are wrong. I see it more as a difference of opinion, because their different viewpoint will always be well-motivated.

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<sup>1</sup> Interview with Justice Richard Goldstone, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 7 January 2013).

<sup>2</sup> Interview with Justice Zak Yacoob, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 28 January 2013).

<sup>3</sup> Interview with Justice Laurie Ackermann, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 13 August 2012).

<sup>4</sup> Interview with Justice Albie Sachs, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 9 and 16 August 2012).

It's only that I will not be persuaded by what they have to say'.<sup>5</sup> Instead of the criticism that Hart's theory leads us to expect, the Justices instead appear to be having what Justice O'Regan described as a 'reasonable disagreement', meaning that 'there was more than one answer, and it was a right answer'.<sup>6</sup> Even the minority of Justices who characterize their disagreements with their colleagues in terms of 'right' and 'wrong' answers ultimately take the view, as Justice Cameron did, that 'you can't talk about mistakes',<sup>7</sup> or, as Justice Froneman did, 'that there may be reasonable disagreement'.<sup>8</sup>

Rather than expressing a fear of or desire to avoid such criticism, as Hart's account supposes, we saw further that the Justices unequivocally denied that their decision-making processes were in any way influenced by the fear of criticism from, or by a desire to please, other officials, including the other Justices. As Justice Cameron stated, 'I think every single person I've sat with . . . has been independent in the sense of not being submissive to or seeking to comply with or anxious to please an official expectation'. Or as Justice O'Regan expressed the view:

With most judgments there are going to be people who don't like it. That's irrelevant. It's got to be irrelevant. . . . [I]t doesn't matter where the pressure is coming from . . . you just have to keep doing the same job regardless of who it is before you.

Nor did the Justices state that they experienced any pressure to conform to some correct standard of judicial decision-making. As Justice Kriegler put it: 'I can't

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<sup>5</sup> Interview with Chief Justice Mogoeng Mogoeng, Chief Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 21 January 2013).

<sup>6</sup> Interview with Justice Kate O'Regan, Emeritus Justice of the Constitutional Court of South Africa (Cape Town, South Africa, 20 August 2012).

<sup>7</sup> Interview with Justice Cameron, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 31 January 2013).

<sup>8</sup> Interview with Justice Johan Froneman, Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 29 January 2013).

remember anybody ever during my time saying to somebody else you can't write that, you can't say that. That kind of pressure wasn't there.'<sup>9</sup> As Justice Sachs put it: 'I never worried about how my colleagues were thinking, what they were saying, and so on, in the sense of not wanting to be out of line. And I'd like to think none of us were influenced by that.' The Chief Justice, too, stated that he was 'not aware of any judge who would want to be a photocopy of another judge.'

This basic professional and psychological disregard for criticism was expressly linked by the Justices to the concept of judicial independence. We saw from their responses and from the Court's express writing on the subject that the Justices' understanding of their independence—both as an individual mental state and as a set of material institutional conditions—plays a significant role in insulating the Justices from precisely the sort of criticism that is supposed, in the Hartian account, to motivate their conformity to a certain standard of judicial decision-making.

In fact, we saw in Chapter 10 that the Justices go a great deal further than merely refraining from criticizing their colleagues for thinking differently. Instead, we saw that the Justices celebrate their diversity of reasoning—in Justice Kriegler's words, 'we actually positively encouraged "maverickism"'—and that the Justices have set up a variety of collaborative processes to ensure that their diversity of approach feeds into the judgment writing process.

Finally, according to Hart's account, we should have found that the Justices try to coordinate their judicial decision-making processes, specifically in terms of trying to converge on shared criteria of legal validity. Only if the Justices converge on the same

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<sup>9</sup> Interview with Justice Johann Kriegler, Emeritus Justice of the Constitutional Court of South Africa (Johannesburg, South Africa, 27 January 2013).

criteria, Hart and his followers have said, can we neatly demarcate legal systems from other normative systems. Contrary to Hart's view, however, we have seen over the course of the last few chapters that the Justices do not share the philosopher's concern to neatly demarcate the concept of law from other concepts by agreeing on shared criteria of legal validity. We saw, in Chapter 10, that the Justices definitely do coordinate their behaviour in certain ways, but this coordination does not centre around convergent judicial decision-making processes. Instead, the Justices try to coordinate around expectations of collegiality, hard work, and integrity, and of participation in certain institutional processes that drive them to reach decisions and set out their reasoning for those decisions in written judgments.

These conclusions constitute strong *prima facie* evidence that Hart's theory lacks explanatory power for the South African legal system. I describe this evidence as *prima facie* because there is yet a wealth of information to be gathered by further study of the Justices and other South African legal officials. That information may corroborate or complicate or even undermine the empirical investigation I have done. This is of course in the nature of social scientific inquiry, and it has been no small part of my motivation for undertaking this project to make the case that we need more empirical evidence from real-world legal systems before we draw strong conclusions about the foundations of this or that legal system, let alone the foundations of every legal system properly so-called. Nevertheless, given the prominence that Hart and other legal philosophers have accorded to the role of apex courts in their theories on legal validity, our conclusion that some of Hart's essential conditions for the existence of a legal system are not exhibited by the

practices and attitudes of the Justices provides, at the very least, strong prima facie evidence that Hart's account lacks explanatory power for the South African legal system.

## I. IMPLICATIONS FOR HART'S THEORY

Mine is not the first project to challenge the explanatory power of Hart's theory for a given legal system. Socio-legal scholars like Roger Cotterell, Denis Galligan, Martin Krygier, Nicola Lacey, Brian Tamanaha, and William Twining have for a long time argued that there is insufficient conversation taking place between analytic jurisprudence and socio-legal studies, and have sought to challenge or complicate Hart's conclusions with non-conforming empirical evidence.<sup>10</sup> However, I believe that certain features of my project insulate it from two of the primary rebuttals that Hart's defenders have levelled at empirical investigations of this kind in the past.

The first common rebuttal asserts that Hart's account is not intended to provide a richly detailed account of this or that legal system. It is a thin account, restricting itself to those features that law cannot fail to exhibit whenever and wherever it occurs. While they are quick to praise socio-legal studies for turning up all manner of interesting facts about legal systems the world over, legal philosophers are equally quick to point out that it was not Hart's task (or theirs) to explicate law at that level of detail. Rather, their task is to work at a greater level of abstraction, describing the features that are true of law

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<sup>10</sup> Roger Cotterell, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171; Denis Galligan 'Legal Theory and Empirical Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010); Martin Krygier 'The Concept of Law and Social Theory' (1982) 2 *Oxford Journal of Legal Studies* 155; Nicola Lacey, 'Analytical Jurisprudence Versus Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 944; Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001); William Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *Law Quarterly Review* 561

whenever and wherever it may be found. ‘This’, as Raz puts it, ‘is the difference between legal philosophy and sociology of law’:<sup>11</sup>

The latter is concerned with the contingent and with the particular, the former with the necessary and the universal. Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.<sup>12</sup>

Thus, when socio-legal scholars like Lacey have called for a ‘fuller articulation of the institutional dimensions of law’<sup>13</sup> or a ‘richer . . . characterization of law’s social basis—its institutional forms, its various types of rules, its role, and its functions’,<sup>14</sup> legal philosophers have typically responded that this richness, while interesting, is outside the purview of legal philosophy.<sup>15</sup>

This objection is not open to a critic of the empirical investigation I have undertaken in this thesis. My conclusions are not that Hart’s account omits or obscures interesting features of the South African legal system. Rather, my charge is that the very conditions that Hart’s theory posits as essential to law—the conditions that no legal system, properly so-called, can fail to exhibit—are not exhibited in the practices and attitudes of the Justices of the South African Constitutional Court. To the extent that the theory asserts that every legal system rests on a social rule of recognition, the conclusions I draw in this thesis provide strong *prima facie* evidence that the theory itself is false.

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<sup>11</sup> Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 104.

<sup>12</sup> *ibid* 104-105.

<sup>13</sup> Lacey, ‘Analytical Jurisprudence’ (n 10) 958.

<sup>14</sup> *ibid* 957.

<sup>15</sup> Gardner makes just this response to Lacey. John Gardner, *Law as a Leap of Faith* (OUP 2011) ch 11. For Lacey’s counterresponse, see Nicola Lacey, ‘Institutionalising Responsibility: Implications for Jurisprudence’ (2013) 4 *Jurisprudence* 1.

The second common objection to empirical work of this kind has been to deny, on account of the very fact that it does not exhibit the features required by Hart's theory, that what has been observed is actually a legal system properly so-called. This objection has been levelled, for example, at Brian Tamanaha's study of the Yap in Micronesia.<sup>16</sup> Tamanaha has argued that in Micronesia, although a legal system is formally in place—with a legislature, judges, attorneys, a police department, and a complete legal code (based in its entirety on laws transplanted from the United States)—the day-to-day behaviour of the Yapese is not governed by state law. Vast portions of the code have never been applied, and few people have any knowledge of the content of the laws or of the operation of the legal system. Instead, a large proportion of social problems are dealt with through traditional means without participation of the state legal system. Tamanaha summarizes the situation as follows:

For most Yapese, when confronted with the law, it was like being confronted with the command of an alien sovereign, despite the fact that they were an independent country and this was their own legal system. While they did not routinely act in conflict with the law . . . it could not be said that they were obeying or complying with the primary rules in Hart's terms, since they were ignorant of these rules and paid them almost no heed.<sup>17</sup>

Tamanaha's study thus seemingly refutes Hart's claim that all legal systems are necessarily efficacious. Gerald Postema, however, argues that the imposed legal system and associated 'legal furniture' is not in fact the legal system of Micronesia, precisely because it fails to meet Hart's efficacy condition.<sup>18</sup> According to Postema,

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<sup>16</sup> Tamanaha, *General Jurisprudence* (n 10).

<sup>17</sup> *ibid* at 145-146.

<sup>18</sup> Gerald Postema, 'Conformity, Custom, and Congruence : Rethinking the Efficacy of Law' in Matthew Kramer et al (eds), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (OUP 2008) 60.

if a system of norms fails to order the social life of a community to a substantial extent, we must conclude that that set of norms is not the legal system in that community, even if a self-appointed elite treats it as such.<sup>19</sup>

For Postema, Tamanaha has made a conceptual mistake about what it means for something to be law. The very fact that the Yapese ‘legal system’ does not comply with Hart’s theory—here, that the system does not exhibit Hart’s efficacy condition—entails that it is some other kind of normative order, and irrelevant to Hart’s account for just that reason.

This objection triggers a host of methodological issues in legal theory, some of which I discuss further below. For now, we need only recognize that a critic seeking to make this objection against the empirical conclusions I reach in this thesis would be in a difficult position. The South African legal system is not an unusual or obscure form of normative order. The South African legal system is a central case of a legal system in the Anglo-American tradition that is the focus of Hart’s inquiry. The Constitutional Court is a central case of an apex court in the common-law world. If the South African legal system is not a legal system, nothing is. If it lacks features that Hart asserts as essential to all legal systems, then it is surely Hart’s theory that must be revised, not our well-grounded view that South Africa really does have a legal system.

## II. IMPLICATIONS FOR LEGAL PHILOSOPHY

This latter objection is premised on a view, widely held amongst legal philosophers,<sup>20</sup> about the proper division of labour between the disciplines of philosophy and socio-legal

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<sup>19</sup> *ibid.*

<sup>20</sup> Joseph Raz, ‘Can There Be a Theory of Law’ in his *Between Authority and Interpretation* (OUP 2009) 27-36; Gardner, *Leap of Faith* (n 13) 300-301.

theory. According to this view, legal philosophers already have all of the empirical evidence about legal systems that they need in order to engage in *a priori* reflection about the nature of law. This evidence, as Hart put it, consists of the ‘widespread common knowledge of the salient features of a modern municipal legal system . . . attribut[able] to any educated man.’<sup>21</sup> John Gardner goes so far as to say that gathering further empirical evidence about law is not only unnecessary for philosophical reflection on the concept of law, but that such evidence is impossible to gather *prior* to that philosophical reflection, since ‘one must already know what counts as law before one can make either empirical or evaluative observations about it *qua* law.’<sup>22</sup> For Gardner, only ‘once we know more about what counts as a law’ can we ‘ask subsidiary empirical . . . questions in applying what we have learnt to particular candidates for the status of law, to see if law is indeed what they are.’<sup>23</sup>

On this view, detailed empirical studies can play no role in determining law’s essential properties. It falls to philosophers to explicate, conclusively, the distinction between the legal and the non-legal, leaving socio-legal scholars the subsequent and subsidiary task of *applying*, rather than challenging or refining, the philosophers’ distinctions. The net effect of this view is to insulate the conclusions of legal philosophy from any empirical critique whatsoever, which, to borrow Lacey’s phrase, sets up ‘philosophy as the “master-discipline” that illuminates our access to knowledge about the world.’<sup>24</sup>

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<sup>21</sup> HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997) 239-240 (my emphasis).

<sup>22</sup> Gardner, *Leap of Faith* (n 13) 275-276.

<sup>23</sup> *ibid* 276.

<sup>24</sup> Lacey, ‘Analytical Jurisprudence’ (n 10) 969.

There is a growing body of literature on the methodological issues implicated by this way of approaching legal theory, which is beginning to call into question the entire project of analytic legal philosophy as it is now conceived by its most prominent advocates. Since Austin, analytic jurisprudence has increasingly rejected scientific modes of inquiry in favour of a ‘focus on the analysis of concepts and their internal relations’.<sup>25</sup> The end result has been what Dan Priel describes as a ‘methodological halfway house’<sup>26</sup> between metaphysics and science, in which Hart and his followers have sought—

to mix the goals of science[,] of an objectively correct and morally neutral description of law[,] with the methods of the humanities—not by resorting to empirical testing of hypotheses, but rather by trying to understand the role law plays in human action through introspection.<sup>27</sup>

Indeed, we can see in Hart’s work a tension between his desire to describe what the law is exclusively by reference to social facts, and his commitment to a method of inquiry that eschews any significant empirical observation of those facts. Hart’s aim was to produce necessary truths about the law without recourse to facts about real-world legal systems, yet, by his own lights, law is ‘a social phenomenon’ that is embodied in attitudes, practices and institutions.<sup>28</sup> Furthermore, while Hart sought to draw conclusions at a sufficiently general and abstract level that they would be true of law wherever and whenever it exists, he also wanted to develop a theory that ‘fits the facts’, and saw it as an advantage of his account over Austin’s that it better reflected ‘the

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<sup>25</sup> Dan Priel, ‘Jurisprudence Between Science and the Humanities’ (2012) 4 Wash U Juris Rev 269, 293-294.

<sup>26</sup> *ibid* 317.

<sup>27</sup> *ibid* 316-317.

<sup>28</sup> Hart, *Concept of Law* (n 19) 61.

*complex actualities* of a modern legal system,<sup>29</sup> For Hart, Austin's theory distorted not only 'the complex *facts* which constitute the minimum conditions which a society must satisfy if it is to have a legal system,'<sup>30</sup> but also 'the ways in which these are *spoken of, thought of, and actually used in social life.*'<sup>31</sup> Because of these tensions in his aims for the project, Hart's stated methodology of conceptual analysis repeatedly collapses into generalized if unsystematic empirical observations about the law.

The tension—which makes Hart's conclusions peculiarly susceptible to the kind of counterfactual empirical evidence that I have set out in this thesis—is now pervasive in analytic legal philosophy. Many of the field's most prominent contemporary thinkers—including Joseph Raz, John Gardner, Scott Shapiro, Julie Dickson, and Andrei Marmor—are unanimous in their view (i) that a theory of the nature of law must consist of propositions which are necessarily true of law whenever and wherever it exists, and (ii) that we can learn these properties through the kind of *a priori* reflection that makes philosophy its home.<sup>32</sup>

Other theorists are increasingly arguing that this methodological position is untenable. Brian Leiter, for example, draws on Quine's well-known attack on the distinction between analytic and synthetic propositions to argue that jurisprudence (or at least the theory of adjudication) ought to be more 'naturalized'; that is, it ought to be

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<sup>29</sup> *ibid* 80 (my emphasis).

<sup>30</sup> *ibid* 112 (my emphasis.)

<sup>31</sup> *ibid* 80 (my emphasis.)

<sup>32</sup> Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) 17-25; Gardner, *Leap of Faith* (n 13) 270-271, 300-301; Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Clarendon Press 2005) 27; Joseph Raz, *The Authority of Law* (n 11) 104-105; Scott Shapiro, *Legality* (Harvard University Press 2011) 9.

‘continuous with empirical inquiry in the natural and social sciences’.<sup>33</sup> Frederick Schauer has recently focused fresh attention on whether it is proper to think about the law as having essential properties. In Schauer’s view, it is a highly debatable whether law has an essence, and the narrow focus it implies for the task of legal philosophy often serves to obscure rather than illuminate our understanding of concepts like coercion.<sup>34</sup> Coercion, Schauer argues (I think rightly), is central to our understanding of law, even if it is not ‘essential’ to law, since it is conceptually possible to think about laws and legal systems that are not coercive.<sup>35</sup>

From the standpoint of intellectual history, philosophy’s legitimate terrain appears to be shrinking, as advances in areas such as cognitive neuroscience and experimental ethics, for example, have begun to address and answer questions that have traditionally been reserved for philosophical inquiry. Dan Priel, who has paid considerable attention over the past few years to methodological issues in jurisprudence, asserts that there is a ‘real possibility’ that ‘legal philosophy has completed its historical role as a unique intellectual endeavour’.<sup>36</sup> As Priel notes,

with much more data at their disposal, social scientists are able to reach interesting and often counterintuitive findings about human action and human nature, even though they are based on purely ‘external’ observations. In contrast, it is not easy to find many successful examples of explaining social phenomena by means of *a priori* reflection.<sup>37</sup>

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<sup>33</sup> Brian Leiter, ‘Rethinking Legal Realism: Toward a Naturalized Jurisprudence’ (1997) 76 *Texas Law Review* 267, 285.

<sup>34</sup> Frederick Schauer, *The Force of Law* (Harvard University Press 2015) 35-42.

<sup>35</sup> *ibid* ch 3.

<sup>36</sup> Priel, ‘Between Science and the Humanities’ (n 23) 320.

<sup>37</sup> *ibid* 319

In the face of these challenges, legal philosophers have struggled to explain why the law's essential properties (if law does indeed have an essence) are uniquely susceptible to philosophical speculation. Take, for example, Joseph Raz's important article, 'Can There Be a Theory of Law', in which he offers an account of what a theory of law is and what it takes for such a theory to be successful.<sup>38</sup> In the course of his account, Raz mounts a defence of the role of philosophy, and in particular of conceptual analysis, in developing a theory of law. Raz accepts that the purpose of a theory of law is to 'explain the nature of a certain kind of social institution', and further concedes that this 'suggests that the explanation is part of the social sciences, and that it is guided or motivated by the considerations which guide theory construction in the social sciences.'<sup>39</sup> But Raz ultimately recoils from this insight, arguing that law 'is a concept entrenched in our society's self-understanding.' He writes:

In large measure what we study when we study the nature of law is the nature of our own self-understanding. The identification of a certain social institution as law is not introduced by sociologists, political scientists, or some other academics as part of their study of society. It is part of the self-consciousness of our society to see certain institutions as legal. And that consciousness is part of what we study when we inquire into the nature of law.<sup>40</sup>

For Raz, the fact that law is tied to our 'self-understanding' makes theorizing about the nature of law a task for philosophical inquiry. It is not clear why that should follow. Indeed, as Priel points out, 'philosophers' accounts are not likely to be particularly helpful (or accurate) as accounts of our collective self-understanding (if there

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<sup>38</sup> Raz, 'Can There Be a Theory' (n 18). Dickson's criteria for evaluating a theory of law stem from Raz's work in this paper. See Dickson (n 30) 17-25.

<sup>39</sup> Raz, 'Can There Be a Theory' (n 30) 31.

<sup>40</sup> *ibid* 31.

is such a thing).<sup>41</sup> Further, it is difficult to imagine any research in the social sciences that would not qualify as furthering ‘society’s self-understanding’, and that research has had a much better track record at producing meaningful ‘self-understanding’. To quote Priel again:

[I]t is becoming increasingly clear that the attempt to recast legal philosophy as the enterprise of describing the ‘concept’ or ‘nature’ of law has not been a success. Instead of the internal point of view focusing the theorist’s attention to the important aspects of law, it seems to have drawn participants into an increasingly insular debate that has not been particularly helpful in helping people understand themselves.<sup>42</sup>

Julie Dickson’s defence of analytic legal philosophy runs into similar problems. Building on Raz’s work, she defends the view that a theory of law is successful if it meets two criteria: (i) it consists of propositions about the law which are necessarily true, and (ii) those propositions *explain* what the law is.<sup>43</sup> In elaborating on this second criterion, Dickson explains that a successful theory of law needs ‘to *deal with the data* which it purports to characterize in a way which is *appropriate* to, and *adequate* in respect of, the nature of that data.’<sup>44</sup> Dealing appropriately with the data, Dickson goes on to say, means ‘illuminat[ing] that which is most important about and characteristic of the phenomena under investigation’, and being ‘sufficiently sensitive to the way in which those living under the law regard it.’<sup>45</sup> Thus, even as Dickson rejects empirical investigation as an

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<sup>41</sup> Priel, ‘Between Science and the Humanities’ (n 23) 321.

<sup>42</sup> *ibid* 307.

<sup>43</sup> Dickson (n 30) 17-25. See also Raz, ‘Can There Be a Theory’ (n 18) 17.

<sup>44</sup> Dickson (n 30) 24.

<sup>45</sup> *ibid* 25.

appropriate methodology for inquiry into the nature of law, she asserts that a successful theory of law must be responsive to empirical facts.

The problem for the project of analytic jurisprudence is not just that it is myopic or impoverished by an absence of factual detail. The problem is more fundamental than that. Simply put, the problem is that philosophers try to make empirical claims, supposedly true everywhere in the world that we find law, without relying on any empirical evidence. This approach is born from the conviction that we need to fully understand the concept of law—what are its essential features that distinguish it from other normative systems—before we are able to know if the real-world evidence we are looking at is evidence related to law at all. By contrast, socio-legal scholars, and increasingly some legal philosophers, are arguing for a more reflexive relationship between concept-formation and concept application, consistent with the way theory construction typically proceeds in the sciences and social sciences, and very much along the Weberian lines described by Galligan.<sup>46</sup>

It is beyond the scope of this thesis to adjudicate these claims. The primary conclusion of my thesis is that the Hartian framework is inadequate for understanding the foundations of the South African legal system. That conclusion, however, does have implications for how we evaluate the success of Hart's theory, and corroborates the growing scepticism about the methodology employed by post-Hartian legal philosophy. At the very least, it advocates strongly for continued empirical research into some of our most important social institutions.

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<sup>46</sup> Denis Galligan, 'Concepts the Currency of Social Explanation of Law: A Review of the Later Work of William Twining' (2015) 35 *Oxford Journal of Legal Studies* 373, 383-390.



## APPENDIX A: INTERVIEW QUESTIONS

*[This is a copy of the letter I sent to each Justice setting out the questions that would be covered in the interview.]*

### **Outline of Research**

H.L.A. Hart's *The Concept of Law* remains by far the dominant account of the nature of law in the Anglo-American world. As is well known, Hart argues that the validity of law turns not on its moral justification but rather on matters of social fact. Hart claims that, by observing the criteria which legal officials refer to and accept as binding on their practice, we can identify a social 'rule of recognition'. This rule of recognition provides rules for making, changing and adjudicating the law, and thereby provides the ultimate criteria for legal validity.

My research examines the applicability of Hart's model of a legal system to South African constitutional law. Locating Hart within broader disputes in mainstream legal theory, I seek to test claims made by philosophers about judicial practices and attitudes against trends and divergences in actual judicial practices and attitudes, as evinced by in-depth, structured interviews with all past and present Justices of the Constitutional Court of South Africa. Whether practice accords with Hart's account will determine whether his model provides us with a useful framework for conceptualizing the Constitution's role in promoting social justice through law in South Africa.

### **A Note on the Questions**

It is not intended that we will cover each and every one of the questions listed below. Rather, the list conveys the general subject matter I would like to explore, leaving room for us to talk more about certain questions, and to digress to more interesting topics if they come up.

Most of the questions below are very abstract—they are not always amenable to precise formulations, and certainly there is not one "correct" answer to any of them. I simply want to record whatever response comes to your mind. Some of the questions may also appear repetitive—this is because I am trying to test different formulations of the same claim, or come at the claim from different perspectives. Still other questions may appear trite or silly—their presence is necessary to avoid methodological objections that I have asked leading questions or that I have presumed the truth of something which remains the subject of my investigation.

### **Questions**

1. From where or what does the Constitution derive its authority?
2. In a given case, how do you, as a judge, find out what is the relevant legal position that governs the outcome of the case?

3. What process do you follow when you are trying to decide a case, from the time a matter is set down to the time you deliver judgment?
4. What are the sources of law that are in force/valid/binding in South Africa?
5. Why are these sources of law? What is the reason for their status as sources of law?
6. Do you use criteria to determine whether something is law in South Africa? Do you pick out certain features that a rule or norm must possess in order for you to consider it as part of the law in South Africa?
7. Do you think other judges have different reasons for accepting the sources you have mentioned as sources of law? Would it matter to you if they thought you were wrong about why these are sources of law?
8. Is there a hierarchy between the sources of law you have identified? If so, where does that hierarchy come from?
9. How were the sources of law in South Africa affected by the final Constitution?
10. What method of lawmaking, if any, is superior to all other sources of law in South Africa?
11. Is there an ultimate source of law in South Africa? Is there a body of law that takes precedence over all others?
  - a. If so, what is it?
  - b. If so, why is this the ultimate source of law? What is the source of its authority?
12. Do you believe that there is a 'right' way, or a 'best' way, to interpret the Constitution?
13. How would it affect the South African legal system if the Constitution were amended to remove all references to 'dignity'?
14. Do you follow the doctrine of precedent? If so, why do you follow it? And how much weight do you accord to precedent?
15. How much do you pay attention to the way in which other judges adjudicate cases, or decide what the law is? Do you try to follow what they are doing?
16. Do you perceive that other judges have ways in common of deciding cases?
17. What guides your decision-making as a judge?

18. How much of your decision-making is guided or constrained by rules? Do you feel constrained to conform to rules?
19. What are the limits on the discretion you exercise as a judge?
20. How do moral principles shape your answers to legal questions?
21. Is morality a source of law?
22. It is said that the Constitution embodies moral principles. Does the Constitution exhaust the applicable moral principles in South Africa, or are there others?
23. How do you give content to the moral principles in the Constitution? For example, how do you reason through what 'dignity' or 'equality' requires?
24. What does the term 'dignity' mean to you? What about 'equality', and 'freedom'?
25. Many of the interpretive standards and approaches to understanding the Constitution that the Constitutional Court now follows were established in the early days of the Court. Why do you continue to follow those standards?
26. You must have written judgments in which you disagreed with other judges because you thought they had gotten the law wrong. Do you think this is because they are following a different approach to figuring out the law to you? If so, do you think they are wrong to follow a different approach?
27. What is the role of a court?
28. What is the role of a judge? Is it your job simply to apply the law, or is there something more to it than that?

Nick Friedman  
24 October 2012

## APPENDIX B: CONTACT EMAIL

*[This is the text of my initial contact email sent to Chief Justice Mogoeng Mogoeng on 19 June 2012. Virtually identical emails were sent to individual Justices once the Chief Justice approved my contacting them.]*

Dear Chief Justice Mogoeng,

I hope this email finds you well.

I used to work at the Constitutional Court in 2008 and 2009 as a clerk for Justice O'Regan, and I am currently teaching human rights and jurisprudence at the University of Oxford. The reason I am emailing is that I am currently doing research (for my PhD thesis) on the South African Constitution and the work of the Constitutional Court. Specifically, I would like to ask your permission to interview you and the other the Justices of the Court about your work as judges, and to use those interviews in my research.

In brief, my research tries to show that English and American philosophers do not properly understand the way that judges do their jobs. I think that philosophers are missing something important about the role that judges play in a legal system.

I would like to add an African perspective to these debates. Our Constitution is a relatively new and wonderful document, very different from other constitutions around the world. Our Constitutional Court is also unique—it is a diverse and open bench, and each Justice has a unique and valuable approach to the law. This makes the Court a perfect example to show what is missing in current thinking in legal philosophy.

Here at Oxford and around the world, the Court's judgments form a significant part of human rights courses—the Court is generally praised as an example of how effectively and innovatively judges can be involved in the promotion of democracy and the upholding of human rights. In my thesis, I would like to show that the work of the Court is as important to legal philosophy as it has been to human rights and constitutional law.

I would be profoundly grateful to you and to the Court if I were able to interview each of you for about an hour about your work as Justices.

I would like to make it clear that I have no intention of being critical of the Court—I only want to describe how the judges talk about their work. If anything, the thesis will present the Court in a positive light—the Court is doing wonderful and interesting things, which I would like to bring to the attention of legal philosophers.

I would send the Justices the questions I intend to ask in advance—the Justices will have the opportunity to think about their answers, and there will be no surprises. Moreover, before I submit my thesis, I undertake to submit to the Justices a full copy of the thesis,

highlighting chapters and passages in which I have reported results of the interviews. The Justices will therefore be able to tell me to fix any inaccuracies in my reporting—I will also delete any statement which the Justices are not happy to have published.

If you and the other Justices agree to the interviews, would it be best for me to contact your secretaries individually to work out a time that would be best? I will be in South Africa for the month of August (I am speaking at the conference in honour of Justice O'Regan)—I wonder if it would be possible to meet with some of the Justices over that period? That said, I will be in South Africa again sometime between November and January, and so perhaps we could also try to do it then if August is not appropriate?

Once again, I would be honoured to have the opportunity to interview the Justices of the Court, and to be able to base my thesis on the important work that the Justices are doing for human rights in South Africa.

Warmest regards and best wishes to you,

Nick Friedman

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