TOWARDS A THEORY OF ADJUDICATION:

SOME ISSUES OF METHOD AND PRINCIPLE

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ABSTRACT

Towards a theory of adjudication: some issues of method and principle

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A sound theory of adjudication and of judicial duty requires or presupposes a sound theory of law and of legal argument. Jurisprudential inquiry is properly grounded not in reflections on conceptual properties of law but in reflections on human goods and needs as understood in a morally articulated theory of practical reason and compactly expressed in the normative concept of the common good. Such reflections confirm that law exists, in its central case, as a means to various types of authoritative co-ordination solutions. The underdetermined nature of (a) the positive requirements of practical reasonableness and the common good and of (b) the appropriate means of enforcing compliance and remedying non-compliance with either these requirements or the determinate negative precepts of practical reasonableness entails that a practically necessary aspect of the positive law's role is *constituting* the requirements of justice, i.e. of what is due to whom generally and in particular situations (including situations where an injustice has been or is alleged to have been done). As a distinct and practically necessary mode of legal co-ordination for the common good, adjudication, in its central case, answers litigated questions of justice by applying all relevant law in accordance with the legal system's practice of legal argument. Thus adjudication is performed by authoritative law-applying institutions precisely *because* it is about answering questions of justice, and not *despite* that fact. Theories of law developed on the assumption that it is possible to understand the 'what' of law without reliance on any moral judgments deny any *practically* necessary connection between (a) the promotion of justice and the common good and (b) the nature of law, in its central case, and, hence, the adjudicative application of *the* law. In the absence of this connection a judicial duty to do justice according to law is unintelligible. (299 words)

CONIUGI DILECTISSIMAE ET PATIENTISSIMAE

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AMDG

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ABBREVIATIONS

5½ Myths	Gardner J, 'Legal Positivism: 5½ Myths' (2001) 46 American Journal of Jurisprudence 199
AL	Raz J, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009)
Aquinas	Finnis J, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press 1998)
Argument	Alexy R, *The Argument from Injustice* (Oxford University Press 2002)
BAI	Raz J, *Between Authority and Interpretation* (Oxford University Press 2009)
CEJF I-V	Finnis J, *Collected Essays: Volumes I-V* (Oxford University Press 2011)
CL	Hart HLA, *The Concept of Law* (2nd edn, Oxford University Press 1994)
CUP	Cambridge University Press
Defence	Alexy R, 'A Defence of Radbruch's Formula' in Dyzenhaus D (ed), *Recrafting the Rule of Law* (Hart Publishing 2000)
Describing Law	Finnis J, 'Describing Law Normatively' in *Collected Essays Volume IV: Philosophy of Law* (Oxford University Press 2011)
EPD	Raz J, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (paperback edn, Oxford University Press 1994)
Evaluation	Dickson J, *Evaluation and Legal Theory* (Hart 2001)
Metaphysics	Aristotle, *Metaphysics*
NLNR	Finnis J, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011)
Legal Process	Hart HM and Sacks A, *The Legal Process: Basic Problems in the Making and Application of Law* (Eskridge W and Frickey P eds, Foundation Press 1994)
LE	Dworkin R, *Law's Empire* (Belknap Press 1986)
LJC	Barden G and Murphy T, *Law and Justice in Community* (Oxford University Press 2010)
LMI	Simmonds NE, *Law as a Moral Idea* (Oxford University Press 2007)

LP	Radbruch G, 'Legal Philosophy' in The Legal Philosophies of Lask, Radbruch, and Dabin (Harvard University Press 1950)
NS	Alchourrón C and Bulygin E, *Normative Systems* (Springer 1971)
OUP	Oxford University Press
PRN	Raz J, *Practical Reason and Norms* (Hutchinson & Co 1975)
RML	Keown J and George RP (eds), *Reason, Morality, and Law* (Oxford University Press 2013)
ST	Aquinas, *Summa Theologiae*

Note:

Citations to works of Aquinas refer to texts from Busa R (ed), *Thomae Aquinatis Opera Omnia cum Hypertextibus in CD-ROM* (rev edn, Editoria Elettronica Editel 1996).

Citations to works of Aristotle refer to texts from Barnes J (ed), *The Complete Works of Aristotle: The Revised Oxford Translation*, 2 volumes (Princeton University Press 1995).

CHAPTER I – INTRODUCTION

I.1 Introduction

This thesis offers an account of some of the most important (or defining[1]) features of the act of adjudication in a legal system.[2] In doing so it also considers the relationship between a methodologically sound inquiry into these features and similar inquiries into other important subjects of jurisprudential concern such as the nature of a legal system and legal reasoning or argument. The account is proposed as a response to this overarching question: What is the nature of the adjudicative task? Or, alternatively: What is a judge doing (or intending[3] to do) when adjudicating (well)?

In brief, the answer defended in this thesis is that a judge should intend, as the package or chain of means and ends constitutive of the proposal for acting qua judge, as follows:

- first, to facilitate the promotion by the legal system of the common good; and

- second, as the means to, and in a manner and form appropriate and adapted to, that end, to dispose of every case before the court by doing justice as between those party to, or directly and materially affected by, the case; and,

- third, as the means to, and in a manner and form appropriate and adapted to, these ends, to apply all relevant law to the particular facts of the case.

[1] As will become clear further on, 'defining' is used here to mean an explicative or explanatory definition, not a criterial (e.g. lexical or conceptual) definition.

[2] References to 'most important' features and to 'adjudication' and a 'legal system' in this Chapter must be construed in light of the distinction between central and peripheral cases as outlined in II.3.

[3] Intending is used here such that its object refers to the concrete package of means and ends voluntarily chosen or adopted qua fully determined proposal for action.

I argue that it is only critical and conscientious reflection by the judge on the end or ends to which each means is directed that can provide the proper and adequate deliberative context for the different acts of theoretical and practical judgment required in disposing of a case justly and in accordance with law. In other words, it is the promotion of the common good by government through and under law – a common good that includes the good of employing this very manner of promoting it – which both grounds and gives content to the duty to dispose of cases by doing justice between the parties. And it is the duty to do justice among the parties (construed in that way) which both grounds and gives content to the duty to apply all relevant positive law to the case. Adjudication is performed by authoritative law-applying institutions precisely *because* it is about answering questions of justice, not *despite* that fact.

In a sense, then, this thesis offers a theory of adjudication. In order to avoid misunderstanding on this point, however, the next section, I.2, briefly distinguishes different types of theories of adjudication. In light of these distinctions, I set out more precisely in I.3 the type of theory which is defended here and I also introduce the basic methodological claims made and relied upon in the course of this thesis. In section I.4 a number of preliminary and stipulative definitions are offered to further focus and clarify the thesis's explanandum. Finally, section I.5 gives an overview of the structure of the thesis as a whole and the contents of the succeeding chapters.

I.2 Distinguishing and contrasting theories of adjudication

Inquiries into, and the resulting theories of, adjudication can be distinguished by reference to a number of constitutive features, including:

- The nature of the inquiry;

- The object of the inquiry;

- The method of the inquiry;

- The substantive findings of the inquiry.

It follows that it is a mistake to contrast theories of adjudication solely by reference to their substantive findings, as one may very likely not be comparing like with like. Matters are complicated by the fact that a theorist may not be explicit about the nature, object or methodology of his or her theory or may not have attended to such questions sufficiently or at all, resulting sometimes in an inherently ambiguous account. Alternatively, a theorist may expressly state the goals, objects and method but the correctness of those statements, or the existence of a coherent connection between them, may itself be a matter of dispute or controversy.

Relatedly, when one speaks of critiquing or justifying a particular theory of adjudication this can be understood in a broad and a narrow sense. The narrow sense refers to the critique or justification of the findings of the inquiry. The broad sense includes, in addition, critically evaluating or justifying the formulation and choice of the goal, object and/or method of the inquiry. These formulations and choices are open to criticism (and thus may require justification) in two distinct ways. First, it might be questioned whether they are rationally related to a good practical reason for carrying out the inquiry in the first place. Second, it might be asked whether they are coherent among themselves, i.e. whether the method is optimal or at least appropriate given the nature or goals of the inquiry into the particular object at issue.

As a precursor to describing my own project I shall outline some alternative theories of adjudication by reference to the criteria of nature, object and method.

I.2.1 The nature of the inquiry

To identify the 'nature' of an inquiry, as I use that term, is to identify the type of question or set of questions to which a theorist is seeking an answer. There is no definitive classification of what I mean by 'type' here but a common approach is to distinguish, among jurisprudential questions or projects, between those that are one or more of the following:

- Normative/evaluative;
- Descriptive/empirical;
- Conceptual/analytical.[4]

Care must be taken, however, in using terms such as 'conceptual' and 'descriptive' when one is talking about theories of general social practices.[5] The relations of priority or dependence that can or must exist between these different enterprises (conceptual, normative and descriptive) is a source of much jurisprudential debate. William Lucy has written on the problems incurred by theorists and their critiques alike,

[4] For reference to the distinction between descriptive, conceptual (analytic) and normative theories see Aulis Aarnio, Robert Alexy and Aleksander Peczenik, 'The Foundation of Legal Reasoning II' (1981) 12 Rechtstheorie 257, 260 note 81. See also Steven J. Burton, *Judging in Good Faith* (CUP 1992) xvi. A further basis for distinguishing between the natures of different inquiries is to consider what each theorist understands a 'theory' to be. This is connected, however, to the question of method or what constitutes a 'good theory' or 'theorising well' in respect of a particular object of inquiry. Accordingly it will be considered further below.

[5] These terms are sometimes used inter-changeably. The 'descriptive' aspect of a theory may be characterised as 'conceptual' on the basis that it seeks to provide a more analytical account of a practice than that typically offered by those engaged in the practice, e.g. Burton (n 4) xv, xvi, 6.

by proceeding on the assumption that a 'concept' of a practice like adjudication can be identified (without recourse to any moral evaluation) so that competing 'descriptive' theories can be assessed against it to see if they 'fit the facts'.[6] My view on the proper relationship of apparently 'conceptual' or 'descriptive' questions (e.g. 'what is a judge doing?') to normative questions (e.g. 'what should a judge be doing?') in theorising about legal practices, and on the ultimate dependence of the former on a more generalised form of the latter (i.e. 'how should a truly reasonable person act?'), is set out in Chapter II and contrasted with alternative views in Chapters IX and X. That caveat in place, it is useful to mention a few examples of theories by reference to these basic types.

Richard Wasserstrom's *The Judicial Decision* is a good example of an unambiguously normative theory of adjudication. According to its author it is a 'study…concerned with the problem of how courts ought to decide cases'.[7] Joseph Raz also views theorising about adjudication as primarily a normative inquiry. As he puts it:

> Clearly, a theory of adjudication is a moral theory. It concerns all the considerations affecting reasoning in the courts, both legal and non-legal. In pronouncing which extralegal considerations have force and how much weight is due to them, it is engaged in moral argument.[8]

Alternatively, some theorists endeavour to offer merely a descriptive account of actual judicial practice rather than a defence of the proper standards for such practice. This seems to be the case with proponents of Legal Realism and Critical Legal Realism who,

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[6] William Lucy, *Understanding and Explaining Adjudication* (OUP 1999) 48-62.

[7] Richard A. Wasserstrom, *The Judicial Decision: Toward a theory of legal justification* (Stanford University Press 1961) 3. Another example is Aleksander Peczenik, *On Law and Reason* (2nd edn, Springer 2009). The purpose of the book, says Peczenik, is 'to justify the legal method' which he says 'constitutes not only the core of … "legal dogmatics' but also characterises … legal, *inter alia* judicial, decision-making.' ibid 13.

[8] *EPD* 209. Note however that Raz has also written about particular aspects of adjudication (i.e. precedent in English law) in what appears to be a purely descriptive mode: *AL* 183. For a detailed discussion see IX.2-3.

in the critical rather than distinctly prescriptive aspects of their writings, purport to reveal how judicial decision making truly occurs in contrast to what they consider the obfuscating rhetoric and ideology of its (either dishonest or delusional) practitioners and defenders.[9] A different unmasking agenda is pursued in *Demystifying Legal Reasoning* by Larry Alexander and Emily Sherwin. Unlike the realist 'descriptions' which tend to treat judicial reasoning as a conceit of post hoc rationalisation, the description offered by these authors is of what they consider to be the actual *reasoning* employed by courts.[10]

By contrast, Benjamin Cardozo's lectures on adjudication, published in 1921 as *The Nature of the Judicial Process,* are addressed to a wide-ranging number of questions that seem to jumble together the descriptive and normative approaches as follows:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?[11]

Some fusion of descriptive or conceptual questions with normative ones is evident in most twentieth and twenty-first century theories of legal reasoning and adjudication. Ronald Dworkin is a paradigmatic example. He criticised other theorists on the grounds

[9] On the Legal Realists see discussion and references in Brian Leiter, 'Legal Realism' in Denis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1996) and Brian Leiter, 'Rethinking Legal Realism: Towards a Naturalized Jurisprudence' (1997) 76 Texas Law Review especially at 268. On the Critical Legal Realists see Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 Yale Law Journal 1 especially notes and references at 5 and 6.

[10] Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (CUP 2008) 4. Wroblewski offers an elaborate 'descriptive' inquiry into the 'judicial application of the law' (as practised in Polish law and in systems of socialist law more generally) and the different 'ideologies' which ground competing normative accounts of the practice. Jerzy Wroblewski, *The Judicial Application of the Law* (Kluwer Academic Publishers 1992) 5-7.

[11] Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 10.

that they were 'not faithful to the actual practices of citizens, lawyers, and judges in complex political communities'.[12] By a 'faithful' theory Dworkin meant a theory which possesses a proper combination of both descriptive fit and normative justification. Such a theory is, in Dworkin's terms, an 'interpretation'.[13] Neil MacCormick is another theorist who was explicit about combining descriptive and prescriptive concerns. He stated that one of the purposes of his early monograph on legal reasoning was 'to advance an explanation of the nature of legal argumentation as manifested in the public process of litigation and adjudication upon disputed matters of law.'[14] He made it clear, however, that such 'explanation' has both a normative and a descriptive aspect.[15]

Other examples of theorists who offer some type of combined theory of adjudication which 'organises our views about how judges do and should go about their business'[16] are Edward Levi,[17] Henry M. Hart and Albert Sacks,[18] Karl Llewellyn,[19] David Lyons,[20] Joel Levin,[21] Brian Leiter,[22] Cass Sunstein,[23] Lloyd Weinreb,[24] Steven

[12] Ronald Dworkin, *Justice in Robes* (Belknap Press 2006) 187. He cites to Ronald Dworkin, 'Model of Rules' (1967) 35 University of Chicago Law Review 14 but see also Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 81; and *LE* 37-9.

[13] *LE* 410-3. Soper, on the other hand, characterises (at least part of) Dworkin's theory of judicial reasoning as purely descriptive claiming that 'the dispute between Hart and Dworkin concerning judicial discretion in hard cases emerges as a dispute over [an] empirical question … It is a disagreement over what are in fact the accepted "closure instructions" for the system.' Philip Soper, 'Legal Theory and the Obligation of a Judge: The Hard/Dworkin Dispute' in Marshall Cohen (ed), *Ronald Dworkin & Contemporary Jurisprudence* (Duckworth 1984) 18.

[14] Neil MacCormick, *Legal Reasoning and Legal Theory* (paperback with revised foreword edn, Clarendon Press 1994) 7.

[15] 'My conclusions therefore present a double face: they are both in their own right normative and yet I believe them to describe norms actually operative within the systems under study.' ibid 13.

[16] Lawrence Solum, 'Virtue Jurisprudence: A Virtue-Centred Theory of Judging' (2003) 34 Metaphilosophy 178, 184.

[17] Edward H. Levi, *An introduction to legal reasoning* (University of Chicago Press 1949) v, 1, 104.

[18] *Legal Process* 341-44.

[19] Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown 1960) 3-7.

[20] David Lyons, 'Justification and Judicial Responsibility' (1984) 72 California Law Review 178, 198.

[21] Joel Levin, *How Judges Reason: The Logic of Adjudication* (Peter Lang 1992) 1, 10, 101.

[22] Brian Leiter, 'Heidegger and the Theory of Adjudication' (1997) 106 Yale Law Journal 253, 271.

Burton,[25] William Lucy,[26] Robert Alexy,[27] Frederick Schauer[28] and Richard Posner.[29] Indeed there are good reasons why theories of adjudication tend to be offered as both normatively and descriptively correct. First, the two aspects mutually depend upon and inform each other. For, as will be argued further in Chapters II, IX and X, it is only through a normative evaluation of what, if any, real good or goods are served by the practice typically called adjudication (i.e. the truly practically reasonable reasons for having a legal system with courts disposing of legal disputes justly and in accordance with law) that one can critically identify in the first place a central case of the practice to serve as the basis for critical descriptions, i.e. descriptions capable of expressing a warranted judgment about what is and is not an example, however corrupted or deficient, of adjudication. At the same time, however, it is only through the process of pre-theoretical, pre-critical observation and description that one can obtain a basic acquaintance with the kind of goods which tend to be served by different practices (and how they are so served), including practices typically referred to as law and adjudication.[30] This is the most important reason for the dual aspect of sound theories of adjudication and it is a consequence of the fact that the object of the theory is a general type of social practice.

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[23] Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996) vi-ix, 6, 196.

[24] Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (CUP 2005) vii-viii.

[25] Burton (n 4) xvi.

[26] Lucy presents his discussion of adjudication as a response to the question: 'What *do* we and what *should* we expect from adjudication, from judges deciding cases?' William Lucy, 'Adjudication' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 206.

[27] Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Ruth Adler and Neil MacCormick trs, Clarendon Press 1989); Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002).

[28] Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press 2009) 12 and xii;

[29] Richard A. Posner, *How Judges Think* (Havard University Press 2008) 6, 15.

[30] II.4, II.6.

Second, even if one does conduct the sort of normative reflection suggested above many features of the practice of adjudication will be left underdetermined. These features will only be fleshed out in the context of a particular legal system (which in turn depends, for its proper determination, upon the concrete circumstances of a given society) and so, in this respect, most theories of adjudication will be partially concerned with and shaped by peculiarities of a given legal system (or family of legal systems), e.g. judicial review of legislation in modern constitutional democracies with justiciable bills of rights.

A further two reasons can be offered though both are somewhat contingent, the first on circumstances and the second on argumentative convenience. First, in so far as theorists already consider the practice of adjudication with which they are most familiar (e.g. that of contemporary Irish or British courts) as being *typically* reasonable and just, then their normative conclusions as to what a reasonable practice would be should, to that degree, reflect and (so far forth) be confirmed by the actual practice *usually* taking place.[31] Second, in so far as a theory purports to offer a critical appraisal of adjudication as actually practised, it must also show that what it requires of judges in theory is likely to be possible in practice: *ultra posse nemo obligatur*.[32] But in so far as a theory offers a normative justification of a practice relevantly similar to an existing practice of judging, it already implicitly, and conveniently, satisfies this requirement without the need for a further demonstration.

[31] I believe this reason explains why Dworkin often appears to oscillate between theorising about only 'our judicial practice' and 'our law', on the one hand, and about law in a more general and unqualified sense, e.g. *LE* 410, 411. Brian Leiter, mistakenly I believe, focuses exclusively on this reason as 'one likely explanation' for why '[o]n one prevalent understanding, a theory of adjudication aims to discharge *descriptive* and *normative* functions.' Leiter (n 22) 255, 257.

[32] In other words it is incoherent for a moral theory to hold a person subjectively culpable for failure to perform an act that, for reasons outside of his control or responsibility, it is impossible for him to perform. This is not to say, however, that there is no place for unrealisable ideals in moral theory as a means to the right ordering of the will. On 'integral human fulfilment' as a guiding ideal rather than an intended end of action see IV.3.

I.2.2 The object of the inquiry

The object of a particular theorist's inquiry can be identified by asking two questions. First: what is the nature of the act or practice which the theorist is interested in when he or she speaks of 'adjudication'? Second: what problem or issue relating to adjudication (so conceived) is the theorist interested in addressing or elucidating?

By necessity any answer to the first question can only be given on an interim or pre-theoretical basis and, if necessary, refined further as a result of the inquiry undertaken. For present purposes such an answer can be sketched out by making, firstly, the following binary classification:

(1) Adjudication as act of judge…

(a) qua official of a *legal system*; or

(b) qua judge construed more generally (e.g. arbitrator appointed by the parties, adjudicator of a singing competition, member of a scholarship award panel etc.).

Where adjudication within a legal system (hereinafter referred to as 'adjudication' *simpliciter*) is the object of inquiry it can be further specified along two different axes, one related to the nature of the legal system in which the judge/court functions and the other related to the formal scope or jurisdiction of the adjudicative functions which the judge/court performs within the given legal system. Examples of such further classification are as follow:

(2) Adjudication as carried out…

(a) In a given national legal system (or small selection of States, e.g. US and UK).[33]

(b) In any central case (or just or well-functioning) legal system.

(c) In a constitutional democracy with rights-based judicial review of executive and/or legislative action.[34]

(d) In a legal system of a particular legal family or tradition (e.g. common law, civil law etc.).[35]

(3) Adjudication (in a given legal system of class of system) as performed…

(a) By any court.[36]

(b) By a court of first-instance.

(c) By an appellate court. [37]

(d) By a court of last resort or with jurisdiction to decide matters of constitutional law.[38]

(e) By some combination of (b)-(d).[39]

[33] E.g. Burton (n 4); Levi (n 17); MacCormick (n 14); Posner (n 29).

[34] E.g. Sunstein (n 23); Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006).

[35] E.g. Alexander and Sherwin (n 10) (common law); Wroblewski (n 4) (civil law).

[36] E.g. Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353.

[37] E.g. Llewellyn, *The Common Law Tradition* (n 19); Duncan Kennedy, *Critique of Adjudication: Fin de Siècle* (Harvard University Press 1997) 40.

[38] E.g. Wroblewski (n 4); Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1975) 89 Harvard Law Review 1281; Owen Fiss, 'The Forms of Justice' (1979) 93 Harvard Law Review 1.

Going only by the available combinations of the foregoing examples as formulated under (2) and (3) (which clearly are non-exhaustive, involve terms that are open to multiple definitions and rely on distinctions which could just as reasonably be drawn differently), one could specify the object of an inquiry into adjudication in 28 different ways.

Even when the object of the inquiry into adjudication has been clarified in light of the foregoing options, there remains the second question as to what problem or issue the theorist is seeking to address. In the various works on adjudication mentioned in the last subsection the following three topics enjoy considerable prominence:

- The nature of reasoning about or according to law.

- The indeterminacy of law and the nature of judicial decision-making in light of that indeterminacy.

- The legal and moral authoritativeness of judicial decisions (in light of legal indeterminacy and judicial discretion).

Moreover, it seems that behind all of these topics, but particularly the third, is a concern with better understanding the role which morality does, must or should play in the process of adjudicating according to law.[40]

[39] E.g. MacCormick (n 14) 8.

[40] Dworkin, *Justice in Robes* (n 12) 2; Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 International Journal of Constitutional Law 2, 9.

I.2.3 The method of the inquiry

For present purposes it is assumed as axiomatic that the method of any inquiry should be tailored to the goals and objects of the inquiry (II.2). Thus it is not a matter here of itemising a list of possible methods but merely of noting that for any given choice of goals and objects a discrete question will arise as to what method or methods will be more or less appropriate for the execution of the proposed inquiry. In considering or critiquing this aspect of any theory of adjudication the primary concern is with the adequacy of the method of inquiry as employed by the theorist, viewed either absolutely or relative to any other appropriate approaches. An assessment as to adequacy involves a critical consideration of what constitutes a 'theory' (or a 'good theory') given the theorist's motivating concern and chosen goals and objects of inquiry.[41]

A theorist may accept all of the foregoing but still go awry if he or she believes that an inquiry into the nature of law or the judicial act is primarily an inquiry into 'concepts' (for examples see IX and X). On the contrary, a theory, as that term is understood here, is the intellectual fruit of a truth-seeking inquiry into *reality* – that is, into a type of action that is already found as a social practice and/or can be brought into reality by choice(s) intended to do so. Though using concepts to describe or envisage such realities, and though it cannot successfully describe such a reality without understanding the concepts (intentions and self-understandings) of those whose practice(s) constitute(s) that reality, the theory is not concerned with a truth-seeking inquiry into *concepts*. In short, a 'concept of law' is properly the outcome or result of a

[41] One can include under 'method' the various working philosophical postulates (metaphysical, epistemological, linguistic, ethical etc.) and jurisprudential premises or assumptions in accordance with which a theorist, expressly or by implication, conducts his or her inquiry and develops a theory of adjudication.

theorising inquiry and not itself the primary datum or primary subject-matter of such an inquiry.

I.3 The theory of adjudication offered here

I.3.1 The nature and object of my inquiry

This thesis seeks to develop a sound understanding of the adjudicative task or, correlatively, the duty of a judge in a legal system. It argues that this judicial duty is best summarised as the duty to do justice between the parties according to law. The thesis elaborates this account of the act of adjudication by addressing several more specific questions:

(1) Are judges under a duty to dispose of cases and to do so by reasoned decisions? If so, why? (VII.2-5, VIII.4)

(2) Are judges under a duty to treat positive law as authoritative for the guidance and justification of these adjudicative decisions? If so, why? (VIII.2)

(3) How does or should positive law guide and justify adjudicative decisions (and what are its limitations in this respect)? (VII.2-4, VIII.3, VIII.6)

(4) What role, if any, does or should morality[42] play in the making and justifying of adjudicative decisions? (VII.5, VIII.5)

The first and second questions seek a justification of the reasonableness of a duty to 'do justice between the parties according to *law'.* This requires an account of why judges are

[42] For what is meant by morality see IV.3.

asked to do justice in particular cases *here and now* by deciding in accordance with general standards posited *at some past time*. This involves consideration of the broader issue of the nature and authority of a legal system and the necessity of authoritative law-applying institutions (V, VI). It is not uncommon for theorists of adjudication who are concerned with the third and fourth questions to posit without further argument those aspects of judicial duty which the first and second questions seek to explore and justify.[43]

The third question seeks a justification of the reasonableness of a duty to 'do justice between the parties *according to* law*'.* It requires an account of the possibility of determining particular cases by the application of posited law. This involves consideration of the nature of legal reasoning or argument and, in particular, how it responds to the inherent short-comings of employing general posited laws as a means of social ordering, particularly in view of such law's under-determinacy (VII.4, VIII.2-3).

The fourth question seeks a justification of the reasonableness of a duty to 'do *justice* between the parties according to law'. It requires an account of the relationship between legal and moral reasoning in judicial decision making according to law and of the legal and moral duties which structure this task (VII.5, VIII.5-6). This involves consideration of the diverse means and ends (including, ultimately, the common good) which constitute the act of adjudication (VIII.2).

[43] For example see the twin assertions relied upon by Gardner, in course of a discussion about role of morality in adjudication, that 'judges … have a professional obligation to reach their decisions by legal reasoning' and a 'pressing professional obligation … not to refuse to decide any case that is brought before them and that lies within their jurisdiction'. *5½ Myths* 214, 211. Levin (n 21) 48, 66: 'A judge is required by her institutional role to provide answers to the questions which come before her … An essential part of the judge's roles is to settle disputes rationally.' Also Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823, 847: 'A judge must always invoke some general reasons. He has no discretion when the reasons are dictated by law.' On Raz and Gardner see Chapter IX.

The resulting theory is descriptive, in one sense, in that it seeks to elucidate the nature of the adjudicative act or task in its central case. It is also normative, however, in that this task can also be articulated in terms of the official duty or role morality of a judge qua judge. In this regard the thesis relies upon a critical reflection on the requirements of practical reasonableness which justify and give shape to a legal system in its central case. Thus my goal is not to describe or report upon adjudication as actually practised in any existing legal system or type of court. On the other hand, it is not my contention that this thesis identifies an account of adjudication that represents in any sense a novel or surprising theory – or at least I hope that it does not. Indeed, if my account of the ends and means proper to adjudication appears to be the unexceptional or even trite commonplace of contemporary legal practice and the self-understanding of many lawyers and judges in a relatively just legal system such as that of the United Kingdom or Ireland, this is to be taken, at least in my view, as a mark of the success (rather than the redundancy or failure) of the jurisprudential enterprise attempted here, and as an indication of the enduring significance of the intellectual tradition from which hail the conceptions of practical reason, common good, justice and law relied upon in what follows. For this enterprise is simply an attempt to elaborate the intellectual structure and rational basis of familiar modes of sound legal thought on which most practitioners seldom reflect and on which many theorists do reflect but in a manner sometimes flawed by methodological shortcomings.

This thesis can also be understood as a contribution to a debate of general public importance and not, I hope, one of merely academic interest suitable only for the seminar room. For it concerns a general issue of significance for policy-makers and all thinking citizens, as well as of immediate relevance for parties to litigation, lawyers and, indeed, judges. The issue, at its most colloquial, is this: what sort of judges should we want?

There is one way to interpret this question which, though valid and important in its own right, is not my concern here – namely, to address the query in terms of the professional qualifications, intellectual and other abilities, character traits, virtues and so on which the ideal candidate for judicial office should possess.[44] Clearly any official appointments process may benefit from such an inquiry, and of relevance to such an investigation would be the application of insights from cognitive psychology to the training and work of lawyers and judges and of insights from political science to the process of selection and appointment of judges.[45] But this thesis is not concerned with the formulation of a job specification or training programme or appointments regime. Rather all such projects necessarily rely upon, whether consciously or not, some answer to the question taken in a different sense. That sense, to which this thesis *is* relevant, is made clear by a further refinement of the question in the following, albeit still colloquial, terms: what sort of *judging* should we want? In other words the primary focus of this study is not the judicial actor but the judicial act. For it is only by reference to a sound account of the act of adjudication that the nature and identity of the judicial office can be clarified or any critical assessment made as to what constitutes appropriate or optimal judicial personnel, character and behaviour.[46]

Moreover, while it is not my contention that a judge needs knowledge of a sound theory of adjudication in order to judge well, it is conceivable that a judge who has an unsound theory of adjudication may for that reason judge less well. This is because any theory of a practice which is partly constituted by our self-understanding can 'undermine,

[44] Solum (n 16); Suzanna Sherry, 'Judges of Character' (2003) 38 Wake Forest Law Review 793. cf R A Duff, 'The Limits of Virtue Jurisprudence' (2003) 34 Metaphilosophy 214.

[45] For discussion of potentially relevant works in the fields of cognitive psychology and political science see Schauer (n 28) 209; Posner (n 29) 93-121; Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide* (Princeton University Press 2010) 132-155.

[46] Ruth Gavison, 'The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability' (1988) 61 Southern California Law Review 1617, 1660.

strengthen or shape the practice'[47] that it bears on. In this regard Brian Tamanaha has warned of the 'corrosive' effect of 'excessive scepticism' about the possibility of adjudication in accordance with law.

> There is a vast difference in operation and consequences between a system that instructs judges to "Decide what you think right" and one that instructs judges to "Decide in accordance with the law." There is a vast difference between individual judges who decide cases in terms of the outcome they prefer, manipulating the legal rules to justify that outcome, and judges who … strive to produce the legally correct decision. … What makes a system of judging effectively rule bound despite the limitations of law and human judgment is the commitment on the part of judges to render rule-bound decisions, even when (especially when) this is difficult to carry through. Judging is rule bound only if judges are committed to abide by the rules. If this commitment diminishes among the individuals who serves as judges, a less rule-bound system of judging will come about.[48]

Obviously, wherever a theory of adjudication becomes prevalent which denies the possibility or the reasonableness of judging according to law, the commitment to such judging is indeed likely, *ceteris paribus*, to diminish. A similar point could be made regarding the duty to do justice according to law. To the extent that the meaning of this duty is misunderstood or there is prevalent a belief that it is either inherently contradictory (i.e. not possible) or merely a licence for wilful judging (i.e. not reasonable) then to that same extent one can expect a weakening in the commitment of lawyers and judges to this conception of judicial duty. Thus while the articulation of a sound understanding of an important practice like adjudication is its own reward, it is not unreasonable to at least hope that it may also have tangible benefits for the practice itself

[47] Charles Taylor, 'Social Theory as Practice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (CUP 1985) 101.

[48] Tamanaha (n 45) 197, 199. In a similar vein, Llewellyn offered one of his principal works to counteract the 'corrosiveness' for the professional self-confidence of the American Bar of prevalent (mis)conceptions about the nature of appellate level adjudication. Llewellyn, *The Common Law Tradition* (n 19) 3.

(and thus for the many persons who depend on it for the protection and vindication of their rights).

I.3.2 The method of my inquiry

The intelligibility and reasonableness of a practice of determining legal cases by authoritative decision-making according to law necessarily depends upon a practice of making and assessing arguments about what the law requires, prohibits or permits, and of following such legal argumentation where it leads. Similarly, the intelligibility and reasonableness of a practice of making and evaluating such arguments necessarily depends in turn upon a practice of normatively ordering the life of that society by law. As a consequence of all this, a sound theory (or understanding) of adjudication necessarily presupposes a sound theory both of law and of legal argument.

For this reason the substance of my inquiry into the act of adjudication (Chapter VIII) is preceded by an inquiry into the nature of law and legal argument (Chapters IV-VII). Questions as to the proper methodology for such inquiries are addressed in Chapter II. It argues that only a theory of law that can explain (a) *why*, as a matter of practical reasonableness or morality, we should create and obey a positive legal system is able to give a sound account of (b) *what* positive law, or a legal system, is and, thus, (c) how it should feature in our practical reasoning (i.e. our all-things-considered decision-making according to morality). It contends that a sound theory of law is one that recognises it as a response to (or: means to the end of acting in accord with) the first principles and requirements of practical reasonableness, a response properly informed of the needs and

contingencies of human life in community and in *this* community.[49] Chapter II also argues that a methodologically sound inquiry into the nature of law or of a legal system properly expresses its results by reference to a 'central case'.

Because this thesis proceeds on the basis that the 'what' of law in its central case can only be understood (and hence investigated) in light of both its 'why and its 'how', the resulting theory is perhaps better labelled functionalist than teleological or purposive (Chapter III). As the term is used here the 'functions' of law, legal argument and adjudication, in their respective central cases, encompass the complex package or chain of means and ends that make each what it is. Accordingly this thesis sketches and relies upon an account of the functions of law as the only appropriate way of identifying the central case of the act of adjudication.

Before saying more about the content of individual chapters, however, it may be useful to further state what I mean by certain key terms. Thus I shall partially anticipate the result of my argument by giving in the next section a purely stipulative definition of law, adjudication and judicial duty.

I.4 Law, adjudication and judicial duty as considered in this thesis

I.4.1 Law in its broad and stipulated senses

Let us take as axiomatic that a society of persons exists qua society,[50] as distinct from a mere plurality or aggregation of persons, when, and to the degree that, there is some

[49] Since such principles, requirements and contingencies can be more or less adequately grasped by individuals and communities, one's understanding of law will vary with, *inter alia*, the soundness of one's grasp of such matters.

[50] Or synonymously in this thesis: qua group or community.

common end (or *extrinsic* common good or final cause)[51] for the sake of and as a means to which each person in that society is, qua member, practically disposed to co-ordinate his or her actions over time with other members (i.e. to act for the *intrinsic* common good of the society).[52]

Law, in any sense of that word which is of concern to the practical reasoning of persons,[53] only exists in, for and with respect to a society of persons. Thus one may intelligibly speak (in this present broad sense) of the 'law' of a family or a business association or even a criminal gang. Another way to put this is that law exists, if it exists, for the sake of the intrinsic and extrinsic common goods of that society relative to which it exists as law (or as the law). The law exists 'for the sake of' the society's intrinsic and extrinsic common goods in the double sense of both helping to establish the society in its corporate or representative existence (i.e. its form and constitution etc.) and directing its action[54] and the action of its members. It follows that the law of a given society 'exists' primarily in the sense that, and only in so far as, it both (a) addresses itself to the practical

[51] Finnis speaks in this regard of 'some more or less shared objective or, more precisely, *some shared conception of the point of continuing co-operation*.' *NLNR* 153 (emphasis added).

[52] On the difficulties facing attempts to explain the 'existence' of a society without reference to the practical reasoning or 'internal attitude' of its members see *NLNR* 150-2. Thus in terms of Dworkin's three models of communities, his 'de facto community' is not a society in the sense meant here and his 'rulebook' community only exists as a society in so far as it is already, and more fundamentally, a 'community of principle'. *LE* 208-15.

[53] That the term 'law' is highly equivocal and has since the dawn of Western speculative thought been applied analogically (and without any naive conflation of the so-called 'is' and 'ought') beyond the jural order to the practical order more generally and also to the natural (including metaphysical), logical and technical orders is a historical and linguistic fact that is not without some considerable significance for a philosophical inquiry into law in its strictly jural sense. Eric Voegelin, 'The Nature of the Law' in Robert Anthony Pascal, James Lee Babin and John William Corrington (eds), *The Nature of the Law and Related Legal Writings* (Louisiana State University Press 1991) 24-26. However, it is unnecessary for present purposes to explore that significance here. On the four kinds of order, see Section II.2.

[54] It is beyond the scope of this thesis to analyse the nature of action by a society (as distinct from the action of its members). For a recent discussion see Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) Chapter 3 ('Joint Intentions and Group Agency').

reasoning of members of that society qua members and (b) actually plays some role in the practical reasoning of a significant number of these addressees.[55]

This dual function of constituting and directing the society can also be expressed by reference to the idea of 'order', where order is understood in a broad sense as a 'set of unifying relationships.'[56] The intrinsic ordering[57] of a society can be understood as a 'network of entitlements', where 'entitlement' is used to refer compendiously to the four Hohfeldian jural relations (VI.4). In this sense one can refer to a society as a 'jural order' comprised of those entitlements which are established, expressed and given practical effect over time by the existing law of that society.[58] In this way, it can rightly be said that:

> *Ubi jus ibi societas*. To speak of a legal relation is to speak of a societal relation... The reciprocal statement...is equally true: *Ubi societas ibi jus*.[59]

The jural order is simply that intrinsic order or intrinsic common good of a society which is promoted and pursued (for the sake of the extrinsic common good of that society) in the co-ordinated actions of its members brought about by their deliberating and choosing

[55] Note that on this definition a universal or natural 'moral law' would not count as part of the existing law 'of' a society if it did not in fact play some role in the practical reasoning of at least some members of that society – even though, by definition, it does address itself to the practical reasoning of all. It follows that from the focal sense of law relevant to the present inquiry such a 'moral law' (which enjoys normative force irrespective of levels of compliance) is law in an analogical and secondary sense.

[56] *NLNR* 136.

[57] Following Aristotle and Aquinas one can usefully distinguish the extrinsic ordering of a society (i.e. the ordering of a thing to its end) from its intrinsic ordering (i.e. the ordering of parts of a whole to each other). *Metaphysics* 1075a10; Aquinas, *Sententia Libri Ethicorum* l.1 c.1 n.1.

[58] See *LJC* xiii- -xv, 3-11, 19-34. For a description of the 'legal' as the 'accepted' structure and processes of 'normative generalization' which constitutes 'the effective expression of the *recognized going order*' of a given society (or 'Entirety') see Karl N. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 Yale Law Journal 1355, 1359-67. See also Gerald Postema, 'Positivism and the Separation of Realists from their Scepticism' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart 2010) 272.

[59] Jean Dabin, 'General Theory of Law' in *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press 1950) 235. There is an echo of this in Dworkin's account of 'associative obligation' and his conclusion that '[p]olitical association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation.' *LE* 206.

in conformity with those entitlements or jural relations which are established and expressed by the law of that society as it exists at any given time.[60]

So far I have deliberately spoken of (existing) law in the broadest possible terms so that it can embrace phenomena as diverse as the pre-literate conventional morality of a tribe or the written constitution of a tennis club. However, to clarify further the subject-matter of this thesis the term 'law' *simpliciter* shall (as an initial stipulation) be used hereinafter to refer only to the law of a society of the scope, size and level of complexity classically referred to as a complete community or political society,[61] i.e. the law which constitutes and directs such a society for the sake of its extrinsic common good.[62]

Given the inter-dependent and sociable nature of human persons, complete or political societies are a non-optional feature of (successful, flourishing) human life. A complete society is first and foremost not an organisation but a spontaneous, un-chosen order.[63] Its coming to be is a result of human action rather than human design. However, its 'further development or decline' depends (at least in part) upon 'the choices of those who live within it.'[64] On account of this dependence it can be said that such societies 'are in great part moral constructions.'[65] The extrinsic common good of a complete or political

[60] See discussion, following in part Eugen Ehrlich, of 'living law' in *LJC* 3-11. See also Denis J. Galligan, *Law in Modern Society* (OUP 2007) 209, 208: 'the first task of law is to define legal relations... it is the one task or function law necessarily performs, for without it there would be no legal order.'

[61] See section IV.2.3.

[62] The place of law and legal obligation in this focal sense relative to that of the laws (and correlative 'obligations') of other societies (e.g. families, Churches, political parties, business associations, criminal gangs etc) in the practical reasoning of practically reasonable persons will be properly determined by the relations of subordination or integration (as the case may be) that exist between the public good (by virtue of its unique relation to the common good *simpliciter*) and the different and distinct extrinsic common goods by reference to which these other societies are constituted and to which their laws are ordered. Dabin 237-9. A consideration of the nature of these other societies, their proper goods and their relationships with political society is, however, outside the scope of this thesis.

[63] *LJC* xiii, xv, 19-22.

[64] *LJC* 9, 13, 29.

[65] *LJC* 268.

society is, by virtue of its uniquely comprehensive nature, determined by reference to the common good[66] *simpliciter*, i.e. the good of and common to each and every one of its human members simply (or at least in the first instance and fundamentally) by virtue of the *kind of being* that each is.[67]

So that the law may better address itself to and play a role in the practical reasoning of the members of a political society, and thereby better 'exist' as a means to promoting the common good by establishing and expressing the jural order, practically reasonable persons will seek to bring about or recognise and maintain (or restore) as part of the already existing law of their political society certain customary laws which can reliably ensure across time the necessary and appropriate means, given typical human capabilities, tendencies and limitations, for securing (a) effective (i.e. reasonably convergent) identification of laws by all relevant addressees of those laws, (b) adequate levels of general compliance with the law and (c) effective and reasonable change, application and enforcement of the law and creation of new law. Different societies come up with different solutions. The solutions differ depending on various social, environmental, technological and other contingencies and the degree to which the solution adopted is properly responsive to these contingencies and to the true requirements of the common good.

Nevertheless, a critical inquiry into the requirements of the common good cannot be properly informed by those needs and contingencies of human life lived in society which are typical or relatively stable across time and circumstances unless it can identify a number of important features and guiding ideals of *that kind of means* for

[66] Or at least the 'temporal' common good (see Chapter IV notes 20 and 34).

[67] See IV.2.1, IV.2.3.

accomplishing tasks (a), (b) and (c) which a truly practically reasonable person would prefer. The result, in crude summary, is a mode of political authority which deliberately and effectively establishes, expresses, changes and applies the jural order of the society in a *positive*, *systematic* and *institutionalised* manner *for the sake of the common good*, i.e. a legal system (VI.3.3). The term 'law' (and cognate expressions) shall (as a final stipulation) be used in this thesis in reference to the legal system of a political society.

The successful operation of a legal system as defined above supplements or even supplants the already existing law of a political society[68] and creates the possibility for an intelligible distinction between a specifically 'legal' order and other prior or parallel forms of conventional or normative ordering. Historically, the line between legal arguments and, say, religious or moral arguments or between a legal official and a person asked to adjudicate or arbitrate on account of their personal attributes or religious, social or political status was not always, conceptually or linguistically, a clear or even a meaningful one to draw. But, with the emergence of legal systems, a legal dispute can be reasonably distinguished from a free-standing moral or philosophical debate or from any practical dispute, whether about, e.g., past acts, current entitlements or future choices, which arises in terms of the constitutive goods and standards of a group of friends or business associates or any other group, organisation or society short of the political society itself. The basis of this distinction is at least threefold and includes:

[68] It is important to distinguish between the law of a society and the product of formal law-making acts made possible by the existence of a legal system. As Hayek noted: 'Law in the sense of enforced rules of conduct is undoubtedly coeval with society...[I]t is necessary to free ourselves from the erroneous conception that there can be first a society which then gives itself laws.' F.A. Hayek, *Law, Legislation and Liberty Volume I: Rules and Order* (University of Chicago Press 1973) 72, 95. This thesis is concerned with adjudication according to the law of a legal system but the normative origins of a society's legal system in convention and customary law should not be forgotten as such a recognition weighs against conceptions of legality and validity which float free of or treat as extrinsic considerations the good of the social order and its members.

(1) The nature of the *grounds* (or sources) of the claims that give rise to a legal dispute (i.e. the set of intra-systemically-valid premises and rules of inference which ground the competing arguments and claims of entitlement); and, relatedly,

(2) The nature of the *authority* called upon to determine its resolution (i.e. the purported supremacy within the political society of the standards posited, applied and enforced by the institutions of the legal system); and

(3) The nature of the *obligation* declared or imposed by this determination (i.e. an intra-systemically-valid obligation).

The foregoing is obviously more of a stipulated than a theoretically justified definition of 'law' and 'legal system'. It pre-empts much of the argument about the nature of law offered in Chapters II to VI but it does so simply to clarify at the out-set what is meant when I say that the intended subject-matter of this present inquiry is adjudication *in a legal system.*

I.4.2 Adjudication

A litigated case involves a claim or question of entitlement presented by a party in accordance with the procedural rules of a particular legal system to an adjudicative institution (e.g. a court staffed by a judge[69]) of that legal system for authoritative determination by means of the answering of a, typically binary, legal question (or set of

[69] Thus by court/judge I mean here, and in what follows unless otherwise stated, simply the bearer, within a legal system, of the power of authoritative adjudication of legal claims and thus an official who might or might not also be the bearer of other kinds of governmental power. The decision to allocate judicial power to distinct officials not also (at least expressly or formally) allocated legislative or executive power is a prudential matter of constitutional design which, considered merely as such, falls outside the scope of this thesis. However, in so far as such a decision is motivated or justified by reference, implied or explicit, to a particular conception of the act of adjudication and of judicial duty then reflection on such constitutional designs may prove an instructive aid to the investigation proposed here and vice versa.

legal questions) and, if necessary, a question of fact (or set of questions of fact) implicitly or expressly posed to (or by) the court as the means for properly deciding the litigated claim or question. Thus, by adjudication is meant the act by which a litigated case is disposed of by the authoritative determination of a designated institution of the case's constitutive claims, questions and arguments.

Accordingly, this thesis is not concerned with the various functions of courts and judges distinct from the act of adjudication. For, in addition to this 'case-determining' duty, judges in most modern legal systems also have a range of bureaucratic and administrative powers and duties which they are required to undertake. Some of these can be considered as ancillary to the carrying out of the adjudicative task and involve the just and efficient handling of the court's workload. These tasks range from the legislative positing of Rules of Court to various administrative matters (such as the allocation of judges, fixing of dates etc.). The carrying out of these tasks in a truly reasonable way is itself a requirement of the just and efficient treatment both of the parties which appeal to or are called before the court and of those other members of the political community who fund (or otherwise support) and rely upon the adjudicative work of the courts.

I.4.3 Judicial duty

In referring to judicial duty it is helpful to distinguish legal duty, moral duty and official duty (or, synonymously for present purposes, role morality). Let us say that a legal duty is a reason for action the content and normative force of which is provided by the relationship between a certain possible or actual factual state of affairs and a standard which makes that kind of fact legally significant, i.e. a norm posited or otherwise

recognised by a particular legal system, a law.[70] A moral duty is a reason for action the content and normative force of which is provided by the relationship between a certain factual state of affairs and a rule or principle of 'morality' which can exist independently, or in the absence, of any legal system. An official duty may be either a legal or a moral duty, or both. In either case, however, it is a necessary pre-condition of its functioning as a reason for action for a given person that the person occupies a particular office or institutional role. When I talk of judicial duties or the duty of a judge qua judge I mean the official duties, whether legal or moral, which judges have by virtue of their institutional role in a legal system. In particular, and as already noted, this thesis deals exclusively with the official duties of judges which concerns the act of adjudication itself, i.e. the judicial duty.

I.5 Overview of chapters

Chapters II and III elaborate and defend the functionalist methodology which underscores my whole inquiry. Put summarily, it is the method of raising and answering first the question 'Why do/make/have X?' as a means to answering the question 'What exactly is X?' whenever one is seeking to achieve a critical or explanatorily adequate theory, whether fully normative and justificatory or merely descriptive, of a general type of social practice.

Taking up the agenda set by the functionalist methodology, Chapter IV begins the substantive work of the thesis with an account of the principles and requirements of practical reasonableness to which law in its central case is a response. Chapter V considers in more detail the need for coordination which these principles and

[70] Burton (n 4) 39; *NLNR* 334.

requirements gives rise to given the circumstances of human life in community. The conclusions from these chapters are then applied in Chapter VI to ground a functionalist account of (a) the practical authority and (b) the important formal features and guiding ideals (or means/modalities) of law in its central case. Thus Chapters IV - VI set the scene for the investigation of the functions of legal argument and, ultimately, of adjudication offered by Chapters VII and VIII respectively.

Chapter VII argues that a practice of legal argument is a practically necessary means by which a legal system secures convergence in the theoretical and practical judgments made by different persons at different times as to the content of its general legal norms and their reasonable application to specific situations.

Chapter VIII defends an account of the nature of adjudication and of judicial duty, in its central case, articulated in terms of the disposal of all litigated questions justly by the application of all relevant law. Authoritative norm-applying institutions do justice *because* they apply the law (making such ancillary *determinationes* as the relevant practice of sound legal argument prescribes or are otherwise practically necessary) not despite that fact. This view of adjudication is grounded in the theory of law developed in Chapters IV-VI which recognises the defining place of the common good both in any descriptive account of law's characteristic functions, features and guiding ideals and in any normative account of the law's authority.

Chapter IX considers a possible counter-argument: that the duty of judges to do justice according to law can be adequately described and explained without any need to invoke a theory of law predicated on its service of the common good. Through a consideration of the work of Joseph Raz and John Gardner I argue that a jurisprudential

methodology that considers it possible and necessary to understand the 'what' of law without reliance on any moral or directly evaluative judgments (a methodology which I term 'Positivist') cannot justify an account of adjudication or judicial duty articulated in terms of doing justice *by applying all relevant law.*

Chapter X argues that the methodological problems with theories of adjudication developed through conceptual analysis are not unique to 'legal positivists' such as Raz and Gardner but also affect what is often regarded as a paradigmatic 'non-positivist' claim about of adjudication, the so-called Radbruch Formula, both in its initial assertion by Gustav Radbruch and its contemporary defence by Robert Alexy.

Chapter XI contains a brief conclusion.

I.6 General Caveat

As will become clear, particularly in the course of Chapters II-VI, the understanding of methodology in jurisprudence and of law upon which my theory of adjudication is constructed is itself heavily reliant on the jurisprudential thought of John Finnis. It follows that my theory is not only amenable to critique in terms of its own distinctive claims but is also vulnerable more broadly to any arguments which may be levelled against the general jurisprudence of Finnis. Needless to say, it would simply not be possible in a work of this length to adequately address all, or perhaps even most, of the latter class of objections. To do so would involve justification for a wide host of arguments, and presuppositions, potentially touching upon matters of metaphysics, epistemology, meta-ethics, normative ethics and political philosophy.[71] For this reason

[71] This is not because of anything peculiar to Finnis's work. Though I do not defend the claim here, I do not believe that any philosophical claim about law may be asserted free of any such presuppositions.

while I have endeavoured to set out succinctly but cogently the core arguments for the claims concerning practical reason and the purpose, authority and defining features of positive law (mostly set out in Chapters II-VI) on which my theory of adjudication builds, I have not attempted, nor do I claim, to engage in any substantive or extensive way with possible objections to these foundational arguments. A key exception is my detailed discussion in Chapters II and III of the thesis's functionalist approach to theorising about general social practices. A more elaborate justification and defence of these matters is warranted because of their significance for and highly contested status within contemporary jurisprudential debate – a point emphasised in my critique of alternative accounts in Chapters IX and X.[72] Responses to various other objections to Finnis's account of practical reason and law, including objections that relate to the different fields of philosophical inquiry mentioned above, are readily available in the existing literature.[73] In places I have expressly noted the limitations of my treatment of a topic or argument, but ultimately all of the conclusions concerning adjudication are asserted subject to this general caveat.

[72] Bix considers that this methodological dispute 'is where...the issue between legal positivism and natural law theory may be finally joined...' Brian Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 Notre Dame Law Review 1613, 1623.

[73] John Finnis, *Fundamentals of Ethics* (Georgetown University Press 1983); John Finnis (ed) *Natural Law: Volumes 1 & 2* (Dartmouth 1991); John Finnis, *Moral Absolutes: Tradition, Revision, Truth* (Catholic University of America Press 1991); Robert P. George (ed) *Natural Law Theory* (OUP 1992); Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press 1993); *Aquinas;* Robert P. George, *In Defence of Natural Law* (OUP 1999); Robert P. George (ed) *Natural Law, Liberalism and Morality* (OUP 2002); *CEJF* I-V; *NLNR*; John Finnis, 'Reflections and Responses in *RML*.

CHAPTER II – METHODOLOGY FOR JURISPRUDENCE

> *Political science is suffering from a difficulty that originates in its very nature as a science of man in historical existence. For man does not wait for science to have his life explained to him, and when the theorist approaches social reality he finds the field pre-empted by what may be called the self-interpretation of society. Human society is not merely a fact, or an event, in the external world to be studied by an observer like a natural phenomenon. Although it has externality as one of its important components, it is as a whole a little world, a cosmion, illuminated with meanings from within by the human beings who continuously create and bear it as the mode and condition of their self-realization.*[1]

II.1 Introduction

How should one go about inquiring into the nature of adjudication? Clearly, one way to answer this question is to look at a particular legal system and to investigate the precise powers formally conferred upon or routinely exercised and articulated by its adjudicative institutions. Adjudication, on this approach, is whatever it is that judges and courts are formally empowered to do or typically are doing (and explaining that they are empowered to do). Of course, in order to carry out such a descriptive inquiry one must have first determined what will count, at least at the outset, for the purposes of one's inquiry as a legal system and a court. If linguistic convention or stipulative definition is not itself to determine (rather than merely *express*) the parameters for the inquiry, a further question arises: Which (or whose) account of a legal system and a court should one use? This question can sometimes arise within legal practice itself, but in such cases the resolution primarily depends on the particularities of the legal system in question and is principally a question for legal dogmatics.[2]

[1] Eric Voegelin, 'The New Science of Politics [1952]' in Manfred Henningson (ed), *Modernity Without Restraint* (University of Missouri Press 2000) 109.

[2] For an example of such a debate within Irish law, precipitated by Article 37 of the Irish Constitution which states that 'Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such

When the question is raised at the level of general or critical reflection, however, no such intra-systemic points of reference are readily available. Thus another possible response is to reject the question as ill-informed or misguided on the grounds that it mistakenly presupposes that there is some Platonic form of adjudication that exists independently of the contingencies and peculiarities of individual legal systems or traditions. Such an objection has initial plausibility but, as will be argued below, this is derived from a mischaracterisation of the question. It presupposes that the correct method for answering such a question as 'what is adjudication?', that is to say the method for achieving a better understanding of a particular human act or set of acts, is akin to the correct method for achieving a better understanding of a natural object, such as a rare bird. In the latter case the object exists, and has the properties that it has, independently both of our interest in it and of anyone's reasoning about it. But neither is the case with respect to an intentional or deliberate act. This is because to understand an intentional act (or a social practice constituted by such acts) one must ask why it is done in order to find out what is done.

So this present inquiry into the 'what' of adjudication begins with two pre-analytical or common sense assumptions. The first is that the act of adjudication carried out by a judge is an intentional or deliberate act, that it is something done knowingly and for a reason or purpose. The second is that this reason or purpose is connected in some way with the nature of a legal system. In other words, the 'what' of adjudication is informed in some way by the 'what' of the legal system in which and by which adjudicative institutions exist and operate. If these assumptions are sound, and I hope that the explanatory success of the resulting theory will establish that they are, then the

person or such body of persons is not a judge or a court appointed or established under this Constitution.', see Gerard W Hogan and Gerry F Whyte, *J.M. Kelly: The Irish Constitution* (4th edn, LexisNexis Butterworths 2003) paras 6.4.73-99.

inquiry into the 'what' of adjudication must be informed by a prior inquiry into the most important or defining features of a legal system and the requirements of justice which structure and guide it. Accordingly, a necessary step in my discussion of adjudication will be to say more about what I mean by these defining features and requirements. In this regard, two questions arise. First, how, if at all, are such features and requirements to be identified? Second, provided an adequate methodology for identifying them can be found, what are these features and requirements?

This Chapter and the next address the first of these two questions. In particular this Chapter argues that it is the viewpoint of the practically reasonable person which provides the best perspective for any inquiry into the nature of law, whether that inquiry is pursued for the sake of a general descriptive theory of law or a fully normative critique. Chapters IV, V, VI and VII deal with the second of these two questions.

II.2 The problem of methodology in jurisprudence

To make any claim regarding the 'nature' or 'defining features' of a thing, including the claim that there is here, available for consideration, something that *has* a nature, is to assert, implicitly or otherwise, a particular understanding of the *kind* of thing which this something is and, thus, of the proper *method* by which one may reach or improve an understanding of the thing. Jurisprudential discussion about the nature of law is no exception to this rule. On what grounds is one entitled to assert any claim about the nature of law? Are such claims merely the result of an act of wilful stipulation or are they conclusions somehow deduced or derived from the (or 'our'[3]?) 'concept' of law itself? Or

[3] e.g., *LE* 410, 411. A similar (justificatory) reliance on the beliefs of an undefined first person plural is frequently to be found in Raz's work also, e.g. 'The doctrine of the nature of law yields a test for identifying law the use of which requires no resort to moral or any other evaluative argument. But it does not follow that one can defend the doctrine of the nature of law itself without using evaluative (though not

is there some other way of proceeding?[4] In framing a critical response to such questions it is helpful to distinguish the following two questions:[5]

(1) What *kind* of a thing is the thing we conventionally call law?

(2) How should one go about understanding, or evaluating the soundness of an existing understanding of, things of that kind?

The reasonableness of this twofold structuring of the matter is questioned, however, by those reductivist approaches which dispute the relevance of a consideration of *kind* and thus reject the classical understanding of scientific inquiry. The classical position is well known and easily stated: 'Different objects [of inquiry] require different methods.'[6] And what are these different kinds of objects? Aquinas, following Aristotle, distinguishes four 'irreducibly distinct'[7] sciences, i.e. methods of scientific inquiry, on the basis of the following four irreducibly distinct types of order that together make up our humanly experienced reality. I shall refer to these four orders or kinds of order at various points in the coming chapters. They can be paraphrased as follows:[8]

---

necessarily moral) arguments. Its justification is tied to an evaluative judgment about the relative importance of various features of social organizations, and these reflect our moral and intellectual interests and concerns.' *EPD* 209. See IX.3 below. See also *AL* 50; *BAI* 111; and Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 63.

[4] The intellectual quagmire in which the leading thinkers of mid-20th century Western jurisprudence found themselves when tackling this question is evinced in the (inconclusive) discussion of the subject in Julius Stone, *Legal System and Lawyer's Reasonings* (Stanford University Press 1968) 165-85.

[5] Compare: WJ Waluchow, *Inclusive Legal Positivism* (OUP 1994) 4; Brian Bix, 'Legal Positivism' in Martin P. Golding (ed), *Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2004) 45.

[6] Voegelin (n 1) 91.

[7] *Aquinas* 21.

[8] Aquinas, *Sentenia Libri Ethicorum* lib.1 l.1 n.1. See *NLNR* 136-8, 157; John Finnis, 'Legal Reasoning as Practical Reason' in *CEJF I* 216-9.

(1) the given order of the natural world which is unaffected by human thought [ordo quem ratio non facit] (to which order relates, e.g., natural science, mathematics, metaphysics);

(2) the order that, by our reason (or intellect or critical reflection), we bring into ['ratio...facit in'] our own acts of reasoning, i.e. *our thinking* (to which order relates logic in its widest sense);

(3) the order that, by our reason, we bring into all our voluntary actions, i.e. *our doing* (to which order relate all of the sciences concerned with and constituted by practical reasoning, e.g. ethics and, at least in its classical understanding, political science);

(4) the order that, by our reason, we bring into *our making*, and thus into all those things that are external to our thinking and willing and of which our ordering reason is the cause, i.e. all human artefacts such as houses, constitutions, or, in this sense, languages (to which order relate all practical arts or techniques).[9]

The onerous dual challenge for any proponent of the reductivist claim that there is only one method which can truly be considered scientific, i.e. truly informative, is (a) to justify the reasonableness of denying the significance of the obvious differences that exist between the four kinds of order (which denial is entailed by any mono-methodological approach) and (b) to demonstrate that the selection of the solitary method preferred, first, is not arbitrary (in the sense that its selection either implicitly begs or suppresses the

[9] See Rawls's categorisation of the 'three kinds of judgments with their characteristic burdens' John Rawls, *Political Liberalism* (Columbia University Press 1996) 56. Rawls sub-divides judgment about the third kind of order into the use of our 'practical' and 'moral' powers. On the other hand he seems to combine judgments about the first, second and fourth kinds of orders as being 'the theoretical uses of our reason'.

questions which the given inquiry is or should be concerned with answering) and, second, actually allows for a better explanatory understanding of the full reality of the given subject matter than any alternative methodology.

Unfortunately for the reductivist the first challenge can only be properly answered by means of that critical exploration which constitutes just the sort of inquiry that itself cannot properly be carried out until the questions making up the second challenge, the questions of methodological adequacy, have been addressed. With respect to how those questions should be answered Voegelin observes as follows:

> If the adequacy of a method is not measured by its usefulness to the purpose of science, if on the contrary the use of a method is made the criterion of science, then the meaning of science as a truthful account of the structure of reality, as the theoretical orientation of man in his world, and as the great instrument for man's understanding of his own position in the universe is lost…The question whether in the concrete case the way [sc. method] was the right one, however, can be decided only by looking back from the end to the beginning [i.e. 'looking back from the answer to the question']. If the method has brought to essential clarity the dimly seen, then it was adequate; if it has failed to do so, or even if it had brought to essential clarity something in which concretely we are not interested, then it has proved inadequate.[10]

The main substance of this Chapter is found in Section II.3. It provides a critical evaluation of the objections levelled by Julie Dickson against the *adequacy* (to borrow Voegelin's term) of the method which John Finnis, building on the classical recognition of these four irreducible orders, has proposed (correctly, I suggest) in answer to the two questions of jurisprudential methodology set out above (p. 35). Dickson's critique is a version[11] of an important and influential alternative and so I believe a detailed discussion

[10] Voegelin (n 1) 91-92.

[11] As will be discussed further below this position was first fully articulated by Raz but see Dan Priel, 'Description and Evaluation in Jurisprudence' [2010] Paper No 2010-01 University of Warwick Legal Studies Research Paper, 2 note 5 for a list of other theorists identified by Priel as advocates of a similar position.

of why, in my judgment, her critique fails can be instructive in better understanding the methodological issues at stake. Section II.4 briefly responds to the claim that the method of asking 'why choose to have or maintain this general practice?' as a means to answering the question 'what is this practice?' relies on a regressive stipulation of the practice to be studied. In Section II.5 I critically consider a characterisation of the debate over methodology which has been advanced by Nigel Simmonds.[12] Section II.6 responds to the objection that the priority given by Finnis to the central case of a legal system, identified (at least in part) through critical reflection on the requirements of practical reasonableness, makes it impossible to view the result of his inquiry as a theory of law as it has in fact historically emerged or as it actually exists today.

II.3 Julie Dickson's critique of Finnis

II.3.1 Analysis of Dickson's account of Finnis

In the opening chapter of her book *Evaluation and Legal Theory*[13] Julie Dickson explains that her primary concern is not with the nature of law but with the nature of theorising about law.[14] In the course of her discussion she seeks to clarify the methodological dispute between Finnis and Raz. Dickson develops her account of their respective positions in what I consider to be five distinct steps. The first four concern what she sees as common ground between both theorists. The fifth details what she believes distinguishes Finnis and sets out the claims she then goes on to critique.

> [Step 1:] Finnis and Raz ... both agree that in order to construct an explanatorily adequate legal theory, it is necessary to make evaluations

[12] Nigel E. Simmonds, *Law as a Moral Idea* (OUP 2007). Hereinafter referred to as *LMI*.

[13] Julie Dickson, *Evaluation and Legal Theory* (Hart 2001). Hereinafter referred to as *Evaluation*.

[14] ibid 11.

> regarding that which is important or significant about the social practice to be explained.[15]
>
> [Step 2:] Moreover, this is not merely purely meta-theoretical evaluation which applies in respect of theories in general...[16]
>
> [Step 3:] ...a theorist must make sound evaluative judgements regarding that which is important to explain about law which take adequate account of how law is understood by those living under it...[17]
>
> [Step 4:] Moreover, where a legal system is in force, many people, perhaps especially the officials of that system, believe the law's claims to be justified, and this point of view, that of someone who believes that the law dictates what people really ought to do, would seem to be one which it is very important for a legal theory to explain.[18]
>
> [Step 5:] Finnis wishes to make two distinct further claims which Raz challenges. Those claims are that: (1) in order to evaluate which are law's important features, and to explain those features, the legal theorist must morally evaluate the law, and (2) that such an evaluation will lead to the conclusion that the law is a morally justified phenomenon ...[19]

Dickson terms these two claims the moral evaluation and moral justification theses respectively. In what follows I consider her case against Finnis and explain why I believe that it both misrepresents his position and fails to address his key supporting arguments.

In formulating her response to what she posits as Finnis's two theses, Dickson distinguishes two types of evaluative propositions. For, like Raz, she acknowledges that no theories or descriptions are evaluation or value free. Evaluation is inherent in the construction and effective communication of any theory in two ways. First, all theory construction, according to Dickson, involves '"innocent" or purely meta-theoretical

[15] ibid 44.

[16] ibid.

[17] ibid.

[18] ibid.

[19] ibid 45.

evaluation.'[20] This involves 'banal values'[21] such as 'simplicity, comprehensiveness and clarity which it is valuable for any theory, including a legal theory, to possess.'[22] Second, there are evaluations to be made regarding importance and significance if the result of the descriptive theory is not simply to be a list of empirical observations. The dispute between Raz and Finnis, as Dickson frames it, is whether a theorist can make evaluations as to importance and significance without relying upon moral evaluations. To articulate this dispute Dickson introduces a distinction between indirectly evaluative propositions and directly evaluative propositions: an indirectly evaluative proposition says 'X is important,'; a directly evaluative proposition says 'X is good.' Dickson argues that this is a more accurate terminology than the traditional distinction between 'descriptive-explanatory'[23] and 'normative'[24] approaches since even theories purporting to be purely descriptive-explanatory require evaluations to be made both in terms of basic meta-theoretic values and regarding importance and significance.

Dickson then recasts Finnis's position as the claim that 'a legal theory cannot be explanatorily adequate unless it makes directly evaluative judgments' about what features of law are important[25] (i.e. the 'moral evaluation thesis'). She contends that such a claim can only be defended in one of two ways. Either (a) Finnis believes that the only type of evaluation possible is either direct evaluation or an evaluation that entails a direct evaluation, or (b) he believes that indirect evaluations 'about features of law can *only* be

[20] ibid 34.

[21] ibid 32.

[22] ibid 33. One could perhaps object here that the preference for such epistemic values is itself dependent on a prior judgment of practical reason that true knowledge (or a true understanding of how things really are) is itself a good worth pursuing (combined with a minor premise that such practices are statistically or inherently likely to facilitate the attainment of true knowledge).

[23] ibid 33.

[24] ibid 34.

[25] ibid 66.

supported by directly evaluative propositions concerning those features.'[26] Before considering in more detail the arguments offered by Dickson against claims (a) and (b), however, I shall first examine how Finnis himself sets up and develops his argument.

II.3.2 Finnis and the nature of social theorizing

On the first page of *Natural Law and Natural Rights* [hereinafter *NLNR*] Finnis states his general thesis concerning methodology in the social sciences:

> a theorist cannot give a theoretical description and analysis of *social* facts unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.[27]

I will term this his 'social science' thesis. The rest of that first chapter is a justification of that thesis with particular reference to the theoretical description of the social practice that is law.[28] Finnis develops his argument through a series of observations and questions. His first observation reveals the significance of the difference between theories of natural science and those of social science.[29] This is the first, albeit indirect, introduction of the idea of the four kinds of order, which he articulates later in *NLNR* and in other works.[30] Finnis outlines the methodological consequences of this distinction as follows:

> [Human] actions, practices etc. [habits, dispositions and humans discourses], can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as

[26] ibid.

[27] *NLNR* 3.

[28] For a defence of Finnis's position from this perspective see Stuart Toddington, 'Method, Morality and the Impossibility of Legal Positivism' (1996) 9 Ratio Juris 283.

[29] Though it should be pointed out that this passages is setting up two distinctions: (a) between social facts (qua resultants of human choices) and natural facts; (b) between history/biography (qua studies of human individual or social particulars) and social *science* or *theory*, understood as a general account of human affairs (including types of social practice such as law) in general.

[30] See note 8 above.

> conceived by the people who performed them, engaged in them, etc. And these conceptions of point, value, significance, and importance will be reflected in the discourse of those same people, in the conceptual distinctions they draw and fail or refuse to draw. Moreover, these actions, practices, etc., and correspondingly these concepts, vary greatly from person to person, from one society to another, from one time and place to other times and places. *How, then, is there to be a general descriptive theory of these varying particulars?* (emphasis in original).[31]

It is critical to squarely recognise the problem of method that arises when one wishes to switch from merely reporting particulars (including particulars of non-moral and moral evaluations made of others) to developing a 'general descriptive theory'. The question in italics thus sums up the challenge faced by theorists such as Dickson who wish to develop and critically justify a general descriptive theory of law solely by reference to indirect evaluations. The problem is a perennial one faced by any theory builder in the social sciences. Imagine that a theorist develops a theory (or concept) X of a type of social practice x as specified by features p, q, r and s. The theorist then comes across a previously unknown type of social practice (call it x_1) that might or might not be regard as a variation of social practice x, since it has feature p, q, r and t. The theorist is now confronted with a dilemma. Is the theory X undermined as incomplete because its terms do not encompass x_1? Or is the theory vindicated as complete because its terms successfully distinguish x from x_1? On what basis can the theorist decide which is truly the case? Is the problem with the practice x_1 or with the description of the practice X?[32] Another way of putting the same question is to ask how is a social theory validated? And another is to ask how the concept X is shaped up for appropriate adoption as part of a general account of human affairs.

[31] *NLNR* 3-4.

[32] The same problem is of course faced in the formulation, through a form of reflective equilibrium, of theories of the practice that is moral reasoning itself. For one theorist the fact that moral philosophy Y leads to the conclusion that no innocent person may ever be intentionally tortured or killed regardless of what consequences may follow (e.g. the destruction of a whole city) might be a reason to reconsider or reject Y. For another theorist this same feature of Y might be what confirms, or goes toward confirming, Y as sound or truly reasonable moral philosophy.

The difficulty one has in answering *that* question is a result of both the object and the nature of social theorizing itself. As Charles Taylor has argued, social (or, as he terms it, political) theories differ from those of natural science in that they can 'undermine, strengthen or shape the practice'[33] that they bear on. 'And this is because (i) they are theories about practices, which (ii) are partly constituted by certain self-understandings.'[34] Indeed Taylor reminds us that theorizing about social practices is itself a practice.[35] As a practice it is motivated and guided by a reason or purpose, namely the good of understanding what is *really* going on, what up until now has been obscure or unnoticed. Accordingly, the development of a theory or concept of a type of social practice necessarily involves an element of critique. It regards the understanding and views of participants as necessary but not sufficient, for it recognizes that it is possible that they are mistaken (e.g. confused, imperceptive or self-deceiving) as to what is really happening, e.g. Marxist accounts of the alienated condition of workers in a capitalist society. Indeed such a possibility is a necessary prerequisite for social theorizing itself. If the self-understanding of participants could not be improved upon there would be no point in undertaking a process of theoretical reflection at all. As Taylor puts it, 'a theoretical understanding aims at a disengaged perspective' and thus the practice of what the Greeks termed *theoria*

> …is a kind of activity [which] implies two connected things: that we come to distinguish this disengaged perspective from our ordinary stances of engagement, and that one values it as offering a higher – or in some sense superior – view of reality.[36]

[33] Charles Taylor, 'Social Theory as Practice' in *Philosophy and the Human Sciences: Philosophical Papers 2* (CUP 1985) 101.

[34] ibid.

[35] ibid 91.

[36] Taylor, 'Rationality' 136.

Finnis develops his answer to the general methodological question of social theory which he put in italics in the passage quoted above, by reframing the problem in relation to the more specific question of methodology in jurisprudence: 'How does the theorist decide what is to count as law for the purposes of his description?'[37] Outlining the different accounts provided by Austin, Kelsen, Hart and Raz, Finnis concludes 'that the differences in description derive from differences of opinion...about what is *important* and *significant* in the field of data and experience with which they are all equally and thoroughly familiar.'[38] This leads to a more refined version of the previous question, viz.: 'From what viewpoint and relative to what concerns, are *importance* and *significance* to be assessed?'[39] This is the decisive issue between the competing theories of Dickson/Raz and Finnis.

Before answering that question, however, Finnis formally introduces an important heuristic device: 'the identification of *focal meaning.*'[40] It is 'the philosophical device which enables an increasingly *differentiated* description of law to be offered as still a *general* theory of law'.[41] Finnis argues convincingly that both Hart and Raz adopt this technique in their own work (though neither does so explicitly or with reference to the broader problem of method in social science).[42] This is confirmed in their rejection of both the search for strictly univocal meanings of theoretical terms and its associated strategy of forming concepts through identifying the 'one thing common' to all instances

[37] *NLNR* 4.

[38] *NLNR* 9.

[39] ibid.

[40] ibid.

[41] ibid. For references to ancient and contemporary philosophical discussion of 'focal meaning' see ibid 20, 429.

[42] See also John Gardner, 'Nearly Natural Law' (2007) 52 American Journal of Jurisprudence 1, 18: 'Both Hart and Raz espouse versions of the "central case" approach...'

of a given practice. Distinguishing between primary/focal/central and secondary/peripheral/defective instances of a given social practice is what gives a general social theory its explanatory power and critical bite. It allows a theorist to explain how it is possible (a) to assert that theory X is correct to exclude practice x_1 as not x and, at the same time, (b) to accept that x_1 can still be meaningfully described as a type (though deficient in some important way) of practice x.

With this heuristic device the decisive question regarding the assessment of importance and significance now becomes: '[B]y what criteria is one meaning to be accounted focal and another secondary, one state of affairs central and another borderline?'[43] To answer it, Finnis first considers how Hart and Raz have addressed this issue. He points out how they both proceed on the basis that a theorist must 'be concerned with'[44] or 'reproduce'[45] 'one particular *practical* point of view (or set of similar viewpoints).'[46] Thus Hart and Raz give 'descriptive explanatory superiority'[47] to the 'internal point of view' and the 'legal point of view' respectively.[48] For Hart this is the view of one who 'accepts and uses … [the rules] as guides to conduct'.[49] For Raz it is the view of those who accept the 'validity of the norms and follow them.'[50] In doing so,

[43] *NLNR* 11. William Lucy terms this the 'plurality problem' and argues that it follows necessarily from 'a *verstehende* approach to the explanation and understanding of social action.' William N. R. Lucy, 'Criticizing and Constructing Accounts of Adjudication' (1994) 14 Oxford Journal of Legal Studies 303, 332. Since, according to Lucy, the *verstehende* approach is the only tenable way to formulate a theory of a general social practice, such as law, it is necessary for legal theorists to address the plurality problem and he argues that the best solution is offered by Finnis. ibid 318-333.

[44] Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 200 note 2.

[45] *CL* 90.

[46] *NLNR* 12. Practical is meant here in the Aristotelian sense: 'Practical reasonableness is reasonableness in deciding, in adopting commitments, in choosing and executing projects, and in general in acting.' ibid.

[47] ibid.

[48] ibid.

[49] *CL* 89.

[50] *PRN* 171 cited in *NLNR* 13.

they distinguish this view from that of the person who obeys merely to avoid punishment. Dickson attempts to capture this in what I have termed her Step 4 but, crucially, she leaves out any reference to the notion of primary and secondary viewpoints.

This brings us to the point in Finnis's argument which in Dickson's account occurs at Step 5: his assertion, in her terms, of the moral evaluation and moral justification theses. Viewed in his own terms, however, Finnis's next step is to identify what he sees as the fundamental shortcoming in the methodology of Hart and Raz, namely their 'refusal to differentiate the central from the peripheral cases *of the internal or legal point of view itself.*'[51] Both theorists acknowledge that the point of view which they identify as central for theory-formation is in fact a collection of different viewpoints. For Hart 'allegiances to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.'[52] Raz includes within the 'legal point of view' the viewpoint of an anarchist judge together with those who consider the law to be 'morally justified.'[53] Finnis's claim is that this introduces an inconsistency into their use of the technique of identifying and preferring central cases over peripheral cases. His dialectical engagement with their approach reveals no good reason why they should stop where they do, with viewpoints which encompass such a diversity of contradictory views and concerns.[54] This leaves their positions 'unstable and

[51] *NLNR* 13.

[52] *CL* 198 cited in *NLNR* 13.

[53] *NLNR* 14. Raz goes further in work published while NLNR was in press claiming that 'internal, fully committed normative statements' are being made by legal officials 'regularly involved in applying and enforcing the law' even where they 'have reservations concerning the moral justifiability of the law...[and] they accept and apply it for their own reasons (salary, social involvement etc.) or *for no reason at all*.' AL 155 (emphasis added).

[54] *NLNR* 13. John Finnis, 'On Hart's Ways: Law as Reason and as Fact' in *CEJF IV* 245-6.

unsatisfactory.'[55] For though both Hart and Raz recognise that not all viewpoints are of equal value they fail to continue this process of discernment through to its rational conclusion. Finnis explains why this is problematic as follows:

> [T]hey [i.e. the anarchist judge (Raz) and the person moved by calculations of long-term interest or unreflecting inherited or traditional attitudes or the wish to act as others do (Hart)] will not bring about the transition from the pre-legal (or post-legal!) social order of custom or discretion to a legal order, for they do not share the concern, which Hart himself recognizes as the explanatory source of legal order, to remedy the defects of pre-legal social orders...All these considerations and attitudes, then, are manifestly deviant, diluted or watered-down instances of the practical viewpoint that brings law into being as a significantly differentiated type of social order and maintains it as such. Indeed, they are parasitic upon that viewpoint.[56]

In other words, these viewpoints do not deserve to be considered as central or focal since they fail to account for the ends and means by which law purports to be different (and morally superior to) other forms of social ordering (e.g. a tyrant's self-interested or arbitrary governance).[57] Having highlighted the inadequacy of such viewpoints, Finnis continues:

> From the list of types of internal or legal viewpoint offered by Hart and Raz, we are now left only with "disinterested interest in others", and the

[55] *NLNR* 13. For a discussion of the three viewpoints from which a normative statement can be made see *PRN* 171-7. See also: 'Of the three dimensions [prescriptive, practised, or valid], that of validity is beyond doubt the primary one. Only valid norms are valid or good reasons. Practised norms or prescribed norms can be called reasons only in the sense in which we refer to the reason for which a person performed some action: it is reason simply because he believed it to be a reason.' PRN 84; 'Admittedly, statements from a point of view are parasitic on the full-blooded normative statements. That is, there is normally no point in making statements from a point of view unless in relation to a society in which people are often ready to make full-blooded statements. If there is nobody whose point of view it is, why should we be interested in it?' *AL* 159. *NLNR* 13-4 and more fully 235-6 both cites and deploys Raz's prioritising in *PRN* of a point of view which, at *NLNR* 14 note 34, Finnis displays Raz treating as full-bloodedly moral. See also *BAI* 113.

[56] *NLNR* 14. 'Likewise, the man motivated dominantly by calculations of long-term self-interest will dilute his allegiance to law and his adherence to legal processes with doses of that very self-interest which, on everybody's view, it is an elementary function of law to subordinate to social needs.' Finnis, 'Positivism and 'Authority'' (n 56) 80. But cf Matthew H. Kramer, *In Defense of Legal Positivism* (OUP 1999) 233-9.

[57] See John Finnis, 'Law, Problems of the Philosophy of' in Ted Honderich (ed), *Oxford Companion to Philosophy* (OUP 1995) 469.

> view of those who consider the rules, or at least the rules of recognition, to be "morally justified".[58]

Of these remaining two viewpoints, Finnis dismisses the former as either 'unclear'[59] or collapsible into the latter. Thus he extends the methodology of Hart and Raz to its rational limits and by a dialectical process of elimination shows which practical viewpoint ought to be considered focal/central/primary:

> If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation (and thus of "great importance", to be maintained "against the drive of strong passions" and "at the cost of sacrificing considerable personal interest"), a viewpoint in which the establishment and maintenance of legal *as distinct from discretionary or statically customary order* is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law *as distinct from other forms of social order* should come into being, and thus become an object of the theorist's description.[60]

But surely, one could object here: granted that Finnis is looking for and may have found a viewpoint that evaluates law correctly, nonetheless, to paraphrase Hart, a description of an evaluation is still only a description.[61] Finnis can accept this but can reply that in deciding which viewpoint (or evaluation) does evaluate law correctly (i.e. identifies the correct focal meaning of law) even a theorist whose purposes (like Hart's and Raz's)[62] are purely descriptive must ultimately conduct an evaluation of the competing evaluations. And it is at this point that theorists who wish to rely on indirectly evaluative propositions, as defined by Dickson, find themselves in difficulty. What criteria do they have to guide their own evaluation of the competing evaluations of what is important? Here perhaps we

[58] *NLNR* 14.

[59] ibid.

[60] *NLNR* 14-5.

[61] *CL* 244.

[62] Finnis stresses this purely descriptive purpose of these theorists, and explicitly declines to challenge it, at *NLNR* 12, 15, 17 and 18.

see why Hart and Raz failed to differentiate any further. They had justified their initial selection of the internal/legal point of view as simply a common sense consequence of the fact that what they were attempting to describe was an existing *social* practice, i.e. a phenomenon constituted by human-action-for-a-reason and not merely 'behaviour'. Such a common-sense (i.e. apparently indirectly evaluative) approach offers no guidance, however, for selecting between the viewpoints of importantly different kinds of participating in the practice, e.g. the covertly anarchist judge or the truly law supporting judge. In the light of Finnis's dialectical critique, however, we can see that even the initial selection of a practical/internal/legal point of view (or set of such viewpoints) as focal/central implicated these theorists in a practical (i.e. moral/direct) evaluation of what the distinctive value or purpose of law actually is. For their selection was expressly based on a rejection (as secondary/peripheral/deficient – and, consequently, as inadequate for even descriptive theoretical purposes) of any view of law which reduced or equated its claims to obedience to those of, to use Hart's example, an armed bandit, and thus refused to consider it as anything like the kind of reason it purports to be.

Having outlined the case for continuing the process of differentiating between focal and peripheral points of view, Finnis goes on to show where the process ultimately leads. Replacing the term 'moral' with that of 'practical reasonableness'[63] he restates his key argument in terms of persons who suppose that making and maintaining law is a requirement of practical reasonableness. Then, and only then, he notes that 'one further differentiation remains possible',[64] for:

> Among those who, from a practical viewpoint, treat law as an aspect of practical reasonableness, there will be some whose views about what

[63] *NLNR* 15.

[64] ibid.

> practical reasonableness actually requires in this domain are, in detail, more reasonable than others. Thus the central case viewpoint is the viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable...[65]

Of course, for theorists to be able to identify the person who actually is practically reasonable they themselves, as theorists, will have to engage in the sort of substantive normative reflection expressed in his 'social science' thesis (see p. 41 above) and which Finnis restates at this point as follows:

> For the theorist cannot identify the central case of his subject-matter, unless he decides what the requirements of practical reasonableness really are, in relation to this whole aspect of human affairs and concerns. In relation to law, the most important things for the theorist to know and describe are the things which, in the judgment of the theorist, make it important from the *practical* viewpoint to have law – the things which it is, therefore, important in practice to 'see to' when ordering human affairs.[66]

Finnis defends this methodological principle with two related arguments which are independent of the dialectical critique of Hart and Raz.[67] The first, expressed briefly in *NLNR*[68] and restated in later work,[69] is the 'Platonic-Aristotelian argument'[70] which is grounded in the superior perspicacity and understanding of the practically reasonable person.

> The mature person of practical reasonableness … can understand and appreciate the concerns and the reasons for action of the merely self-interested, the mere conformist, the mere careerist, *but the converse does not hold*. So, adoption of this person's practical concerns as the criterion for discerning what features really do 'cluster together' as a coherent, meaningful, and important social institution will make possible not only

[65] ibid.

[66] *NLNR* 16. Lucy terms this the 'third step' in Finnis' argument and defends it against several possible objections in William Lucy, *Understanding and Explaining Adjudication* (OUP 1999) 80-89.

[67] *NLNR* 431.

[68] *NLNR* 15 note 37.

[69] Finnis, 'Positivism and 'Authority'' (n 56) 80.

[70] *NLNR* 431.

> the most intelligible account of legal reasons for action (including reasons for having law and the rule of law at all) but also the best *empirical* account of this aspect of human affairs.'[71]

In explaining the priority (for a theorist) of the viewpoint of the *spoudaios* in terms of his or her greater powers of comprehension this approach has close parallels with a second to be found in the work of Weber. For, as Finnis notes in respect of Weber's discussion of different ideal types of authority,[72] explanatory priority is given by Weber to that form of authority (the 'legal-rational') from which the other forms (e.g. 'charismatic' and 'traditional') can be distinguished 'largely by a series of privations, that is, of negations of the features of legal-rational rule'.[73] This marks a further good reason for prioritising that viewpoint which allows for and 'is defined by a richer, fuller cluster of features or elements'.[74] Indeed it is an approach, as Finnis points out, that Hart himself adopted in claiming that 'primitive law and international law differ from the central type-case of law largely by substraction from its defining or characterizing features (union of primary and seconardy rules of recognition, change, and adjudication).'[75]

II.3.3 Evaluation of Dickson's account of Finnis

Dickson explains the divergence between Finnis and Raz by ascribing to Finnis a distinctive belief in the necessity of moral evaluation in the formulation of a theory or

[71] Finnis, 'Positivism and 'Authority'' (n 56) 80 (references omitted).

[72] Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich eds, University of California Press 1968) 212-45, 941-8, 952-5.

[73] John Finnis, 'Weber, Objectivity, and Legal-Rational Authority' in *CEJF IV* 216. See ibid 213-8.

[74] *NLNR* 431.

[75] *NLNR* 431. See, e.g., *CL* 94, 98, 232. An approach that, like Weber's, supports 'Aristotle's methodological thesis that the non-central differ from the central cases … by *watering down*'. *NLNR* 432.

concept of law.[76] By contrast, as I have shown, Finnis presents his claim as a rational following through of the insights implied in the adoption of the practical viewpoint(s) by Raz and Hart. His argument is an internal or dialectical critique. Moreover, her bifurcation of Finnis's position into a 'moral evaluation thesis' that then leads into a 'moral justification thesis' (see Step 5 at p 38 above) is alien to his own account. This two-thesis reading distorts Finnis's analysis by translating it into Razian terms (i.e. the need to explain law's 'claim to moral legitimacy'[77]) that are nowhere employed by Finnis.[78] More importantly it gets his argument back to front. One does not first conduct a moral evaluation of 'the law' (or better: 'law') and from this arrive at a conclusion that it represents a morally justified phenomenon and therefore is important to social life. Rather Finnis's claim is that there is no focal meaning of 'law', or central case of law, that is 'out there' waiting for us to morally evaluate it.[79] Prior to any moral evaluation of a type of practice there must be some general description of that practice.[80] And for any such description to take place there must be some judgment by the would-be theorist as to what is important and significant about law to such an extent as to differentiate it from other ways of carrying on social life. Law will not exist, distinctly and stably, in face of competing interests and practices, unless it is judged important and worthwhile by persons in a position to make or break it. A close scrutiny of the grounds for and modalities of such practical judgments shows, Finnis has argued, that the only kind of judgment that stably and distinctly grounds a stable and distinctly legal form of life is the judgment that it is morally necessary to have law as distinct from other forms of social

[76] *Evaluation* 45.

[77] *Evaluation* 44, 46, 47, 48.

[78] *NLNR* 432 note 13. On Finnis's view of 'law's claims' see Maris Köpcke Tinturé, 'Finnis on Legal and Moral Obligation' in *RML* 391-5 and John Finnis, 'Reflections and Responses' in *RML* 553-6.

[79] Hence the relevance of Finnis's reference in the endnotes to *NLNR* Chapter I to the passage from Voegelin cited at the head of this Chapter.

[80] Finnis, 'Positivism and 'Authority'' (n 56) 82.

life. And this brings us to the prioritisation of the viewpoint of those who judge that there is a morally compelling reason to bring law into being or to maintain it. Thus the *concept* of law (in its focal sense), whether intended for use in a general descriptive or fully normative theory, properly emerges as a result of our own critical reflection on why it would be good for such a social practice to exist in the first place – and the corresponding answer: because it is considered (whether rightly or wrongly) to be a requirement of practical reasonableness.

In this way *NLNR* reaches the conclusion that, as Dickson puts it, 'a legal theory cannot be explanatorily adequate unless it makes directly evaluative judgments' about what features of law are important.[81] Dickson, however, believes that this position must rest on one of the two following claims:

> (a) … there is and can be only one type of evaluation [i.e. direct evaluation], or that indirectly evaluative propositions entail directly evaluative propositions … or … (b) … indirectly evaluative propositions about features of law can *only* be supported by directly evaluative propositions concerning those features.[82]

The distinction between entailment and necessary ground is here so fine that, while I shall discuss Dickson's treatment of these two claims in turn, I consider her arguments to be essentially aimed at the same target. Dickson bases her rebuttal of claim (a) on her belief that it is possible to draw a 'coherent and tenable distinction between indirectly evaluative propositions and directly evaluative propositions.'[83] She seeks to counter claim (b) with a number of examples of indirectly evaluative propositions which in her view stand independently of any directly evaluative propositions.

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[81] *Evaluation* 66.

[82] ibid.

[83] ibid.

II.3.4 Dickson and the nature of indirectly evaluative propositions

Dickson seems to offer two formulations of what is she means by an 'indirectly evaluative' proposition. The first is quite broad: indirectly evaluative propositions 'state that a given X has evaluative properties but do not entail directly evaluative propositions stating that this same X is good (or bad).'[84] It is not entirely clear what an 'evaluative property' actually is but it seems to be a property which one must evaluate (i.e. 'ascribe value or worth to'[85]) in order to properly describe that of which it is a property. At this point it seems that Dickson's intention is to suggest that *because* something has an evaluative property, it is therefore important and 'as such requires to be explained'[86] in a general theory of whatever exhibits the feature with that property. But in the very next sentence her second formulation (which is perhaps more accurately described as an example of the first formulation) seems to rule out this interpretation:

> An indirectly evaluative proposition of the form "X is an important feature of the law", is thus a proposition which attributes some evaluative property to that feature of the law…[87]

Thus, somewhat puzzlingly, it turns out that for Dickson 'importance' is itself an evaluative property, rather than evaluative properties being important and therefore something to be explained. Or as she puts it in the same paragraph:

> In asserting that "X is an important feature", we are accounting the *existence* of some X as significant and hence worthy of explanation, not directly evaluating as good or bad the substance or content of X.[88]

[84] ibid 53.

[85] ibid 51.

[86] ibid 53.

[87] ibid.

[88] ibid.

But if 'importance' is a separate property from the property 'worthy of explanation' (such that the latter is dependent on us concluding the former) then what does it actually means to state that something is 'important'? This is the nub of the problem with Dickson's formulation of indirectly evaluative propositions. As Richard Ekins has noted, we here encounter

> ...something of an explanatory gap. The classical method [of Finnis] judges some particular to be important because it bears on what is good. The indirectly evaluative method seems just to judge something to be important. Yet unless there is a reasoned ground for this judgment it will not be a judgment but an assertion.[89]

Dickson's insistence on the conceptual independence of indirectly and directly evaluative propositions leaves unclear the grounds on which the legal theorist should judge that a particular feature of law is important. It points to no basis for selecting between competing judgments, or more correctly, assertions as to what counts as an important feature of law, and thus what features require to be accounted for in an explanatorily adequate theory of law. Indeed followed through to its logical conclusions such an approach would bar Hart and Raz from selecting internal or practical viewpoints in the first place.[90] For they both appeal to the view of the law of persons who are evaluating directly (i.e. engaging in practical reasoning about what to do) even if those persons and the theorists who reproduce their viewpoint do not consider their reasoning to be especially moral. Contra Dickson, therefore, one can conclude that an indirectly evaluative proposition, if it is to succeed in its stated purpose of pointing out an important

[89] Richard Ekins, *On Social Theory* (Unpublished paper 2006) 16.

[90] Indeed the incompatibility of this approach with the adoption of the practical viewpoint by Hart and Raz is made explicit in the first two examples given by Dickson of what she considers to be indirect evaluations which do not rely on any direct evaluations. See Sections II.3.5.1-2 below.

feature of law that needs to be explained, must entail or rely on a directly evaluative proposition or simply result in incoherence.[91]

II.3.5 Dickson and the independence of indirectly evaluative propositions

As I mentioned above, in order to refute claim (b) Dickson argues that while indirectly evaluative propositions may sometimes be supported by directly evaluative propositions, they may also be supported in other ways. In particular she gives the following four examples which appear to answer the problem I have just raised as to the coherence of her understanding of 'importance' as itself an evaluative property. According to Dickson:

> ...indirectly evaluative propositions which state that some feature of the law, X, is important to explain may also be supported [1] by the fact that X is a feature which law invariably exhibits, and which hence reveals the distinctive mode of law's operation; [2] by the prevalence and consequences of certain beliefs on the part of those subject to law concerning X, indicating its centrality to our self-understandings; [3] by the fact that the X in question bears upon matters of practical concern to us; [4] and/or by the way in which X is relevant to or has a bearing upon various directly evaluative questions concerning whether it and the social institution which exhibits it are good or bad things.[92]

I shall address these four examples in detail and argue that Dickson is caught on the horns of a dilemma. For in the case of each example either (a) it does actually entail or rely on a direct evaluation (and so her argument fails) or (b) it truly is independent of any direct evaluation but consequently is either incoherent or merely a groundless assertion, and thus valueless as a criterion for what an explanatorily adequate theory of law must include.

[91] A similar criticism is made in N.W. Barber, *The Constitutional State* (OUP 2010) 10.

[92] *Evaluation* 64 (numbering added).

II.3.5.1 Dickson's First Example

There are two criticisms which can be made of this example. First, although Dickson claims to be endorsing the methodological approach of Raz, she fails to notice that searching for a feature of law that it 'invariably exhibits' is, in effect, the same as adopting the 'one thing common' approach to concept formation. This contradicts its rejection by Hart and Raz (in favour of the identification of focal and peripheral cases of law) which is implicit in their discrimination between competing viewpoints. Second, and more importantly, Dickson has also overlooked the very good reasons why the 'one thing common' approach was rejected by Raz and Hart as unsuitable for social theorizing.[93] For in suggesting that a theorist must look for 'a feature which law invariably exhibits' in order to define what law is, Dickson falls foul to a regressive argument. On the one hand we can't know what practices can truly be called x until we have a theory X to tell us. On the other hand, however, we can't formulate a theory X until we have identified the features common to all those practices that can truly be called x. Nor can she escape by reference to what the subjects of the law (i.e. the participants who make up the social practice in question) consider to be features which all instances of 'law' invariably exhibit because there is no necessity (or even likelihood) that everyone will agree on what these are. For the claim that p, q and s are invariable features of law is just another way of claiming that the central case of law is one that exhibits p, q and s (or alternatively that according to the focal viewpoint law exhibits p, q and s) and the process of differentiating focal from peripheral ultimately requires resort to considerations of practical reasonableness. For the question of what features one considers law to have must come after the question of what one considers the purpose or value of law to be. And *that*

[93] *NLNR* 6-9.

question cannot be answered with only indirectly evaluative propositions but instead requires us to take a stand on what we consider to be worthwhile, reasonable etc. or, as Finnis puts it, to participate 'in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.'[94]

II.3.5.2 Dickson's Second Example

In referring to the 'prevalence...of certain beliefs on the part of those subject to the law'[95] Dickson appears to be relying on an assessment of what is statistically typical. In a sense this is simply a watered down version of the first example, in that the criterion of 'invariance' has been weakened to one of 'prevalence.' Certainly, as an approach to grounding evaluations of importance and significance, it suffers from similar problems. First, it contradicts the method used by Hart and Raz when they prioritised certain practical viewpoints over others. For there is no indication that they did so on the basis of empirical sociological studies of the kind which would be required to detect the 'prevalence' of particular social practices or beliefs.[96]

A second problem concerns Dickson's reference to 'our self-understandings.'[97] One must ask: to whom does this 'our' correspond?[98] How is the theorist to decide between the competing 'self-understandings' of all those potentially implicated in the social practice which she hopes to describe? Certainly a theorist could aim to provide a lexical record of all the different 'self-understandings' of all those subject to the law in one way or another. But to go beyond such a mere listing of viewpoints to a theory or

[94] *NLNR* 3.

[95] *Evaluation* 64.

[96] On Hart in this regard see Finnis, 'Positivism and 'Authority'' (n 56) 79.

[97] *Evaluation* 64. See also 141.

[98] See note 3 above and II.7 below.

concept or philosophy of law, some evaluation will have to take place by which certain viewpoints are *prioritised* over others.[99] At this point we go beyond merely describing evaluations and start evaluating evaluations. And because these are evaluations of social practices then our evaluating them will necessarily involve, in two distinct senses, recourse to considerations of practical reasonableness. For firstly, to recap, there is ultimately only one viewpoint for which 'it is a matter of over-riding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's [i.e. Dickson's] description.'[100] And this viewpoint is that in which 'the institution of the Rule of Law, and compliance with rules and principles of law according to their tenor, are regarded as at least presumptive requirements of practical reasonableness itself...'[101] Furthermore, among those who view law as a reasonable response to the requirements of practical reasonableness, there will be those with more and less sound understandings of those requirements and what constitutes a reasonable response to them. As Dickson offers no reason for a theorist to deliberately or knowingly prefer the views of those with an unsound or less sound understanding, one is left with the conclusion that preference should be given, as a matter of principle, to the viewpoint of the *truly* practically reasonable person. And, of course, to be in a position to recognise or pick out such a person or viewpoint requires a theorist to engage, at least to some extent, in the substantive or first-person inquiry into what is truly practically reasonable.

[99] *NLNR* 4, 17; *Describing Law* 34.

[100] *NLNR* 15. This viewpoint results from the enquiry (made in the first instance in the domain of practical life rather than in the social theorist's – or the ethicist's – study): 'Why *have* the sort of thing or things that get called the law...?...The enquiry is nakedly about whether, and if so why I, the reflecting person doing the inquiring, should want there to be this sort of thing...It arises in the course of reflection, *deliberative* reflection, on what I should really do, here and now, and with my life as far as I can envisage it.' *Describing Law* 24.

[101] *NLNR* 15.

II.3.5.3 Dickson's Third and Fourth Examples

Dickson's third and fourth examples can be considered together because they assert essentially the same point: that indirect evaluations can be made about a social practice on the basis of what it may be important or significant for us to know in order for us to make our own direct evaluations (either about our own conduct in relation to that practice or about the practice itself) *at a later point*.[102] In proposing such an approach, however, Dickson misses the very point of Finnis's critique. Implicit in these examples is the assumption that the concept of law is something 'out there' with 'features' which can simply be observed and reported upon by the theorist. In this way, Dickson fails to fully grasp the significance of her earlier acknowledgement that a concept already used by people to describe and justify their actions (e.g. 'law') is different from a conceptual term created as part of an explanatory system of terms in the physical or social sciences (e.g. 'electron' in physics or 'strain theory' in criminology).[103] For in trying to better understand that thing in respect of which the first type of concept is used, one must first understand the actions (and hence reasons for action) of those who already use the concept to describe and justify their actions. And, as we have seen, this is turn leads to the problem of choosing between competing viewpoints.[104] And thus we return to the question posed by Finnis: 'From what viewpoint and relative to what concerns, are *importance* and *significance* to be assessed?'[105] Despite this, in her third and fourth examples, Dickson seems to be suggesting that a theorist can make assessments of

[102] *Evaluation* 64, 13, 137-8, 143.

[103] *Evaluation* 41.

[104] There arises here the further point that objects of social theory can be affected by social theorising itself. For the participants in a social practice can read and be convinced by the accounts of theorists and so, rightly or wrongly, change their self-understanding and, thus, their very practice, e.g. by actually becoming a Critical Realist judge. See Chapter I pp. 17-18 above.

[105] *NLNR* 9.

importance and significance without making any such choice. By contrast Finnis points out that we must settle upon *a* viewpoint and *a* set of concerns from which to make the evaluations of importance and significance necessary for the formation of any social theory, including a merely descriptive general theory.

The viewpoint and concerns that we take up determines our choice of focal viewpoint. To choose a viewpoint is to adopt the heuristic of distinguishing central cases from peripheral cases. In the case of a concept of a social practice, therefore, this choice of a focal viewpoint equates to a choice between the different viewpoints of different participants, real or hypothetical. For his part, as we have noted, Finnis argues that it is necessary to prioritise the viewpoint which explains why law is intelligible as a social practice distinct from other modes of government or social control. The problem for both of Dickson's final two examples remains that it is not possible to answer questions like 'Why should one choose to create, maintain or comply with law?' without making 'direct evaluations', i.e. evaluations regarding what social practices it is truly practically reasonable to create, maintain or comply with.

Wil Waluchow makes an argument similar to Dickson's in the course of his defence of the importance of distinguishing between moral and non-moral evaluations when doing legal theory:[106]

> … one can see moral relevance without making a moral commitment. Consider a parallel case in ethics. It is obviously morally relevant to the abortion debate that a living entity which, if allowed to develop naturally could become a fully-fledged human being, is killed when abortions are performed. One can know that this killing is a morally relevant feature of abortion without knowing whether abortions are ever justified. Indeed, the relevance issue is one upon which all sides of the abortion debate agree

[106] Waluchow (n 5) 19-29.

> even though they disagree radically on the effect of this feature on the ultimate justification of killing foetuses.[107]

What Waluchow fails to appreciate is that this 'morally relevant feature of abortion' is only recognised by 'all sides' of the debate in so far as they have already made a moral commitment (to use his terms) that at least some instances of deliberate killing of human beings are prohibited by morality and that, therefore, such moral rules, whatever their basis, will be (at the very least) *relevant* for the moral evaluation of any act which consists in, or is alleged to consist in, the deliberate killing of a human being. In the absence of such a shared moral commitment, there is simply no reason why it is the *killing* of a 'living entity' which should be seen as a morally relevant feature of abortion rather than some other feature or consequence of abortion, for example its impact on the well-being of the mother or the possible effects of its widespread use on demographics or female participation in the paid workforce or understandings of paternal rights and responsibilities or sexual mores or crime rates etc. Indeed the absence of an agreement among, or within, 'all sides' of the debate on the relevance for the *moral* evaluation of the act of abortion of such multifarious 'features' of abortion is directly explicable by the fact that the various moral commitments, or direct evaluations, which ground such claims of moral relevance are not shared.

II.3.5.4 Dickson's Fifth Example – coming to understand a Roman Catholic mass

Dickson offers two further examples to support her claim that an indirectly evaluative proposition such as 'X is important' does not *necessarily* rely on or entail any directly evaluative proposition such as 'X is good.' As I believe both suffer from the same flaw I

[107] ibid 23.

shall discuss only one for reasons of space.[108] In the more developed of her two examples Dickson asks us to imagine the case of an agnostic who attends a Roman Catholic mass as an observer eager to understand it.

> [T]he observer's indirectly evaluative judgments of the importance of a given feature of the mass will be supported by the role which that feature plays in the self-understandings of those participants in the mass...However...the...observer need not share those values, nor himself take a stance on whether the participants are correct in their ascriptions of spiritual and moral value...[109]

The example could just as easily refer to any group activity such as a game of cricket. But is Finnis really claiming that to understand what is going on at a mass or a game of cricket we must consider and discriminate between the reasons given by the participants for taking part by reference to the requirements of practical reasonableness? The answer is clearly that he does not but the fact that Dickson seems to believe that he does indicates a failure on her part to appreciate the difference between the general or theoretical level (to which Finnis's theory speaks) and the particular (say, lexicographic or biographical) level of her example. Formulating a '*general* descriptive *theory*'[110] of what is meant by 'law' is correctly comparable to formulating a similar theory of what is meant by 'game playing' or 'religious practice' but not comparable to attempting to understand any particular type of game (e.g. the game of cricket) or religious practice (e.g. the Roman Catholic mass) – or indeed any particular instance of that type (e.g. *this* game of cricket, *that* mass).[111] To think otherwise would lead to the mistaken conclusion that Finnis's

[108] The other is at *Evaluation* 53.

[109] *Evaluation* 68-60.

[110] *NLNR* 4 (emphasis added).

[111] As Priel puts it: 'the witness to the Catholic mass can, of course, parrot what she read others say about the practice. But that would hardly count as theorizing about the practice: that is memorizing what those who *did theorize* the practice said about it arguably *after engaging in direct evaluation* of the concepts in question.' Priel 23. And, of course, such an approach would only lead us back to what Lucy termed the

observations on methodology in social theorising are meant to apply to such inquires as what the Statute of Frauds requires for valid property transactions. If Dickson's agnostic theorist was attempting instead to formulate an explanatorily adequate *general theory* of what counts as a religion or a religious practice, it is clear that he would have to face the same challenges as those posed by Finnis to all theorists, legal or otherwise, engaged in the task of providing 'a theoretical description and analysis of *social* facts.'[112] Like those theorists he would ultimately be required to go beyond merely indirect evaluations in order to differentiate focal viewpoints and central meanings in the manner necessary to construct a social theory with explanatory power and critical bite.

II.4 Putting the 'what' before the 'why'

Oran Doyle has offered a critique of Finnis's position which shares the general thrust of Dickson's argument that it puts the cart of moral evaluation before the horse of description. John Gardner has also raised a similar objection.[113] Doyle's argument is that Finnis's methodology

> requires an identification of subject–matter which is supposed to be his endpoint, not his premise. As such his choice of central case is not justified; it is "simply posited at the outset and thereafter taken for granted".[114]

Doyle identifies the following offending passage in Chapter I of *NLNR*:

'plurality problem' (see note 43 above), i.e. *whose* theorizing should we parrot? That is the question upon which a process of theoretical inquiry limited to so-called indirect evaluation must founder.

[112] *NLNR* 3.

[113] *5½ Myths* 226-7 – though Gardner has since suggested that he 'erred' in this regard: Gardner (n 42) 16 note 27. For claims similar to Gardner's original position see *BAI* 384 and *Evaluation* 135-6. See generally IX.3 below.

[114] Oran Doyle, 'Legal Validity: Reflections on the Irish Constitution' (2003) 25 Dublin University Law Journal 56, 89, citing *NLNR* 4.

> [The theorist] must assess importance or significance in similarities and differences within his subject–matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject–matter.[115]

Doyle comments on this passages as follows:

> Finnis attempts a value judgment which will enable him to identify law[2] (his initial question).[116] In order to do this, he refers to the actors in the field of his subject–matter. That is, in order to identify law[2], he relies on the internal perspective of those whose concerns, decisions, and activities create or constitute law[1]. But he has not yet identified law[2]; therefore, he cannot know who are the people whose concerns, decisions or activities create or constitute law[1]. His methodology is regressive. Evaluation as a means for the identification of subject–matter is not possible by reference to the internal perspective of other people, because the question inevitably arises: Whose internal perspective on what? This question cannot be answered within the logical framework established by Finnis.[117]

I believe Doyle's argument rests on an obvious equivocation. The passage uses the single word 'law' in two different senses which I have marked in the text above as law[1] and law[2]. Law[1] refers to the inchoate subject(s) of the pre-analysis, conventional and provisional language, descriptions, and (self-)understandings with which any person seeking to *theorise* about a type of *social practice* must *begin*.[118] It refers, that is, to the 'set of human actions, dispositions, interrelationships, and conceptions…referred to (in an unfocused way) by "ordinary" talk about law'.[119] Law[2] refers to the subject-matter as picked out from these pre-analytical materials by whatever focal viewpoint is adopted by the theorist. It is with an enhanced or clarified understanding (concept, theory) of law[2], as picked out by a critically justified choice of viewpoint, that the theorist is ultimately

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[115] *NLNR* 12 cited in Doyle (n 114) 89. Note that Finnis is here reporting (approvingly) methodological claims of Hart and Raz in respect of a general descriptive theory.

[116] Doyle is here referring to the following question at *NLNR* 4: 'How does the theorist decide what is to count at law for the purposes of his description?'

[117] Doyle (n 114) 89 (superscript numbering added).

[118] See the passage from Voegelin at the head of this Chapter. See also II.6 below.

[119] *NLNR* 278-9.

seeking to conclude.[120] Moreover, provided the theorist has adopted the appropriate focal viewpoint and central case, a theory of law[2] should also help to illuminate and account for law[1] (or the variety of practices originally jumbled together under 'law[1]') by treating it as peripheral or deviant case(s) of law[2].

II.5 Nigel Simmonds's critique

In his book *Law as a Moral Idea* [hereinafter *LMI*] Simmonds is critical of the methodological approach of Hart, Raz and Dickson.[121] He advocates recourse to notions of 'archetypal concepts'[122] (rather than 'class concepts') and 'marginal cases'[123] when theorising about law. He also recognises the role of moral evaluation in theoretical reflection on the nature of law (i.e. on 'legality' as opposed to merely 'validity'[124]). Despite these significant affinities with the position of Finnis, however, Simmonds directs a number of critical remarks in the direction of Finnis's methodological claims which are worth addressing.

Simmonds criticises the debate over methodology in jurisprudence as pursued by (what he calls) certain 'opponents of positivism'[125] (of whom he names only Finnis). For Simmonds the key problem with their general approach is that it involves the 'rapid collapse of substantive inquiry (concerning the nature of law) into meta-theoretical debate

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[120] See *NLNR* 17 ('no escaping' a judgment concerning 'a preliminary set of principles of selection and relevance drawn from some practical viewpoint' but possible for 'reflective and critical theorists' to reach truly reasonable judgment through 'movement to and fro' between practical and theoretical reflection and judgments.)

[121] *LMI* 3, 6, 38, 48-56, 170-2.

[122] *LMI* 51-56.

[123] *LMI* 46.

[124] *LMI* 126-130, 159, 169-76, 190-2, 198.

[125] *LMI* 42.

(concerning the nature of legal theory).'[126] This results in each theorist 'seeking to underpin his substantive conclusion by reference to a highly contestable methodological argument.'[127] The 'collapse' is the result of an encounter with positivism which Simmonds sets out and which I shall summarise in terms of the following six steps:[128]

(1) The positivist denies that there is any necessary connection between law and justice by pointing to cases where law is used as an instrument of injustice.

(2) The opponent of positivism responds that in such cases we can meaningfully speak of law, but not of law in its focal sense.

(3) Consequently both sides agree that the debate between them 'ultimately involves a choice between alternative theoretical regimentations of our ordinary (somewhat fuzzy and unregimented) concept of "law".'[129]

(4) Once this is accepted, the debate next moves to the '"meta" level where the issue is one concerning the grounds on which we should choose between different concepts of law.'[130]

(5) Both sides agree that judgments of 'importance' must be made and that these involve judgments of value, but they divide again into methodological positivists (i.e. proponents of indirect evaluation such as Raz and Dickson) and their opponents.

[126] *LMI* 43.

[127] *LMI* 56 note 28.

[128] See *LMI* 42.

[129] ibid.

[130] ibid.

(6) 'Some such opponents [a] emphasize that we cannot *understand* law's nature without engaging in moral reflection, while others [b] argue that we face a *choice* between different ways of thinking about law, and the choice should be made in the light of moral reflection upon the probable long-term consequences of adopting this or that view.'[131]

The mistake made by the 'opponents of positivism', according to Simmonds, occurs at Step (3) where they:

> are too quick to endorse the positivist's picture of the debate as one involving a choice between "wide" and "narrow" concepts of law. The debate is thereby prematurely transformed into a stark conflict where we must choose between rival sets of assertions, and where we quickly come to feel that such choices are either ungrounded, or grounded by appeal to meta-theoretical considerations that are the real source of disagreement. The conclusion that we have here, not a genuine debate, but an exchange between parties engaged in quite different projects, follows hard on the heels of this discovery.[132]

In what follows I argue that this analysis, at least in respect of Finnis - the only impugned 'opponent' of positivism actually named by Simmonds - needs to be corrected in at least three aspects: First, Finnis does not make the move attributed to him at Step (3). Second, at Step (4), the need for a consideration of method is not properly articulated by Simmonds. Third, the position identified at Step (6a) is an ambiguous summary of Finnis's actual position.

Finnis expressly rejects the idea that theorising about law is concerned with a 'choice' of one concept of law to the exclusion of another.[133] He is not interested in

[131] ibid (lettering added).

[132] *LMI* 43.

[133] *NLNR* 278-9. But see ibid 429 criticising the use of the term 'selection' of viewpoint in the first edition.

debating alternative 'theoretical regimentations of our ordinary…concept of "law"'.[134] His criticism of the positivist's so called 'wide'[135] concept of law is not about semantics or the correct criteria for the use of the term 'law' – nor about the consequences of adopting one 'theoretical' descriptive concept rather than another. Rather, it is directed at the refusal of positivism to acknowledge its implicit reliance on a distinction between central and peripheral cases of the social practice in question and, consequently, its failure to qualify its conclusions about the nature of law accordingly or to critically pursue the rationale of such a distinction to its proper conclusion.

Thus, it is to expose and to remedy such refusal and failures that Finnis turns to an express discussion of methodology. Here, contrary to Simmonds's portrayal, the issue is *not* 'the grounds on which we should *choose between* different concepts of law'[136] but rather the correct method by which we should *develop* 'a concept for use in a theoretical explanation of [the] set of human actions, dispositions, interrelationships, and conceptions…referred to (in an unfocused way) by "ordinary" talk about law'.[137]

Since the method of an inquiry must be tailored to the object of the inquiry (and not the other way around), it is as a result of critical reflection on the object of social theorising, i.e. human action, that methodological positivism is exposed as inadequate. It is in this sense that we should understand the claim that, as Simmonds phrases it, one 'cannot *understand* law's nature without engaging in moral reflection'.[138] To be clear, this is not because of any 'ungrounded' choice of method as Simmonds seems to suggest. It is

[134] *LMI* 42.

[135] *LMI* 43.

[136] *LMI* 42 (emphasis added)

[137] *NLNR* 278-9. This is made clear in Finnis's own response to Simmonds's critique: John Finnis, 'Law as Idea, Ideal and Duty' (2010) 1 Jurisprudence 247, 250-1.

[138] LMI 42.

simply the critically derived conclusion from the recognition that the subject-matter of an inquiry into law is made up of human actions. So while Simmonds is, in a sense, correct to say that what Finnis's analysis of descriptive jurisprudential theorising brings to light is that methodological positivists are engaged, or at least are attempting to engage, in a 'different project' from that preferred by Finnis, this analysis nevertheless advances a genuine debate with positivist project in so far as it directly challenges its coherence and worth.[139]

II.6 Between historical explanation and creative speculation

I wish to consider one further objection to the methodology endorsed by Finnis which goes as follows:[140] Finnis's method for identifying the nature of law is stuck on the horns of a dilemma. Either it attempts to provide an historical explanation of how and why the practice that we call law actually came to exist or it presents a moral argument for why we should have the practice which it labels as law. If it is the former, then it is guilty of begging the question as to whether the emergence of complex human social practices can really be explained in such an 'idealist' or mono-causal way. If it is the latter, then it gives us no reason to believe that the (morally justified or required) practice which it defends as law in its central case will have any intelligible or necessary relation with the historically-determined practice which we (citizens, lawyers, social scientists etc.) actually happen to conventionally call or treat as 'law' here and now. In other words, even if we were to grant for the sake of argument that the understanding of law which emerges from a process of truly practically reasonable deliberation and reflection does largely resemble the contemporary workaday understanding of law which has emerged

[139] John Finnis, 'On the Incoherence of Legal Positivism' (1999) 75 Notre Dame Law Review 1597.

[140] I owe my formulation of this objection to a very helpful discussion with John Gardner and Nick Barber of an earlier draft of this chapter.

from the tangled causal forces of human culture and history, the fundamentally different natures and bases of their respective processes of derivation makes it difficult to see how the former can reasonably be offered as an 'account' or 'theory' or improved understanding of the latter. I believe this objection presents a false dichotomy. The methodology defended by Finnis is caught by neither horn of the dilemma. To show why, I shall consider each in turn.

One should first consider why anyone might think that Finnis is guilty of offering, whether consciously or not, such an obviously under-defended empirical explanation of the historical origins of law and legal systems. Such confusion might arise, I suggest, from the various passages where Finnis justifies distinguishing between different evaluative viewpoints by asking whether they can adequately justify the *bringing into being* or *maintenance* of a legal system as opposed to some other form of social ordering. Consider, for example, this passage:

> For, unreflecting traditionalism or sheer conformism, while capable (up to a point) of maintaining a legal system in being if it already exists, are blind or practically indifferent to the need to remedy the defects of a pre-legal (or post-legal!) social order; that is, they do not share the concern which Hart himself treats as the explanatory source of legal order. Likewise, the man motivated dominantly by calculations of long-term self-interest will dilute his allegiance to law and his adherence to legal processes with doses of that very self-interest which, on everybody's view, it is an elementary function of law to subordinate to social needs. [141]

Note that Finnis is not claiming that where instances of legal social ordering do exist they are exclusively the intended outcome of a coherent set or series of conscious and deliberate decisions on the part of a particular number of practically reasonable individuals. Clearly this would not be an accurate account of how any even moderately

[141] Finnis, 'Positivism and 'Authority'' (n 56) 80. See *NLNR* 14, 16.

complex social practice emerges and evolves over time.[142] The nature of the causal relationships between, on the one hand, the rational forces in human society (ideas, theories, principles etc.) and, on the other, the less conscious or non-rational human motivations together with the various brute extra-human factors at work, and how such relationships shape or determine the temporal course of human affairs are two matters which defy any simple or systematic account.[143] For this reason we should reject the two opposing but equally extreme theories (or caricatures) of historical causation often referred to as reductive Marxism and idealism respectively in favour of some class of a middle or mixed position in which, Charles Taylor claims,

> lies all adequate historical explanation. One has to understand people's self-interpretations and their visions of the good, if one is to explain how they arise; but the second task can't be collapsed into the first, even as the first can't be elided in favour of the second.[144]

Taylor considers that the second task is a question about 'diachronic causation'. It is 'the really ambitious question' which seeks to provide an explanation of what brought a particular social practice or feature of civilization about. By contrast, the first task concerns a

> less ambitious question. … What this question asks for is an interpretation of the identity (or of any cultural phenomenon which interests us) which will show why people found (or find) it convincing/inspiring/moving, which will identify what can be called the "idées-forces" it contains. This can, up to a point, be explored independently of the question of diachronic causation. We can say: in this and this consists the power of the idea/identity/moral vision, however it was brought to be in history.[145]

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[142] *LMI* 184.

[143] For a brief but illuminating discussion see Charles Taylor, *Sources of the Self* (CUP 1989) 204-06, 306-308. Taylor concludes his reflection on the nature of 'diachronic causation in general' by noting that 'The skein of causes is inextricable.' ibid 206.

[144] ibid 204.

[145] ibid 202-3.

Though some of the language chosen could be faulted from the more analytical perspective adopted by Finnis, I believe Taylor's discussion identifies a meaningful distinction between two types of inquiry which is mistakenly overlooked by any framing of Finnis's project as a flawed attempt at historical explanation.

But what of the other horn of the alleged dilemma? The problem for Finnis, according to this part of the objection, is that his method suggests, at least as a theoretical possibility, that a philosopher equipped with only a knowledge of the statistically near-universal or typical needs, capabilities, vulnerabilities and other contingencies of individual and communal human life and an adequate grasp of the first principles and requirements of practical reasonableness could, from the comfort of his armchair, fashion an entire modality of government and call it a legal system without having any knowledge or experience of anything which we would today conventionally call a legal system. If this is true, then while it is wholly conceivable that, as a matter of mere historical happenstance, what we conventionally call a legal system might correspond more or less with the philosopher's vision, it could not be said that this vision constituted or was intended to constitute an account, theory or improved understanding of the actual social practice which is known conventionally as 'law' and which a legal theorist is concerned with understanding.

Perhaps paradoxically, this analysis is correct in principle but ultimately mistaken as a critique of the methodology of inquiry into law's nature actually defended by Finnis. It is correct to say that, in the highly artificial confines of the hypothetical scenario as just described, a person could undertake a process of reflection more or less on the basis described above, that this process could result in the reasonable conclusion that the creation or maintenance of a certain system of government (necessarily adumbrated in

only very broad outline) is a requirement of justice for any complete community, but that the system so outlined should not be adduced as an account or theory of any actual system of government, however similar. It is mistaken, however, to suggest that this is the process which Finnis does, or indeed any legal theorist actually could, undertake, for the simple reason that no-one could begin, or would be reasonably motivated to begin, to theorise about the nature of law in the absence of some awareness and understanding of past or present structures or systems of social ordering conventionally known as 'law'.[146]

Thus the fact that there is indeed a close resemblance between the central case of law which Finnis defends as appropriate (for the purposes of both general descriptive and normative theorising) and the contemporary practice conventionally termed 'law' is not correctly described as a mere happenstance or coincidence. For, on the one hand, the process of practical deliberation and judgment as to what is rationally required by or, if rationally under-determined, is truly consonant with the common good, will be guided and informed, inter alia, by the datum of historical experience,[147] and, on the other hand, this datum itself may very well be, at least partially and notwithstanding the complex role of other causes and factors, the product of earlier such human processes of deliberation and judgment. Granted these two not implausible premises, it becomes clear in what sense the understanding of law that emerges from the actual method of concept-formation defended by Finnis, whether undertaken for the purposes of merely descriptive social science or of normative argument, is properly treated as grounding a theory, or clarified understanding, of what law is, i.e. a theory inherently, and not merely coincidentally, of relevance (through due regard to the distinctions and analogical relations between central and peripheral cases) for either the adequate identification or the moral evaluation (or

[146] See Finnis, 'Positivism and 'Authority'' (n 56) 81; *CL* 3-4.

[147] *NLNR* 17.

both) of historical or extant legal practices and systems.

II.7 Conclusion

According to Dickson:

> analytical jurisprudence is concerned with explaining the nature of law by attempting to isolate and explain those features which make law into what it is. A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law.[148]

The problem ultimately facing Dickson, however, is how to explain what she means by 'necessity' and 'explanatory adequacy' without reliance on any 'directly evaluative' propositions or judgments of practical reason.[149] Finnis puts it this way:

> How can Joseph Raz justify his claim that it is a necessary feature of laws that they claim legitimate moral authority? Why should not some regime set up a legal system which has every feature of, say, Hart's concept of law but expressly asserts...that its authority as a system of law is nothing more, and nothing less, than its willingness and ability to impose sanctions...for non-compliance? In all such cases, it seems to me, there is no necessity to be had save necessity of the kind that good practical reasons pick out for us when we are deliberating about what to want and choose to try to have, necessities that thus earn a place in a normatively virile theory or philosophy of law.[150]

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[148] *Evaluation* 17, citing a then unpublished manuscript by Raz entitled 'Can There Be a Theory of Law.' A piece by Raz of the same name now appears in *BAI* 17-46.

[149] Dickson seems unaware of the problem which Finnis's argument poses for her entire approach and in a footnote to the lines just quoted, Dickson states that: "It would be far beyond the scope of this work to enter into a discussion of the kind of necessity which might be play here. Fortunately, this is not required in order to give a presentation of the analytical jurisprudential approach which is adequate for present purposes." *Evaluation* 17, note 24. See also questions raised in Brian Bix, 'Raz on Necessity' (2003) 22 Law and Philosophy 537, 555-6.

[150] *Describing Law* 40. Or as Simmonds puts it: 'Once we have set our moral understanding on one side as irrelevant to a descriptive grasp of human practices, it becomes hard to see why the theorist should assume that law has a unitary nature that is there to be discovered and articulated in the form of a theory.' *LMI* 9. A similar point was made by Fuller against Kelsen: 'I do not for a moment believe that Kelsen is analysing "the necessary forms of legal thought." What he is analysing are simply the assumptions which customarily underlie positivistic thinking about law, these assumptions being in turn the expression, conscious or unconscious, of certain ethical desiderata which were discussed openly by Hobbes, but which have been passed over in silence by most positivists since his time." Lon L. Fuller, *The Law in Quest of Itself* (Beacon

In this Chapter I have outlined Finnis's position as a defence and an application of a more general 'social science' thesis that 'a theorist cannot give a theoretical description and analysis of *social* facts unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.'[151] I have explained how Finnis regards this approach as contiguous with the basic methodological assumptions made by Hart and Raz. He reaches this conclusion through a consideration of the nature of a social practice – above all its dependence on intentional choices and thus its inherent susceptibility to variations ranging all the way to radical departures and oppositions – and, from that, of the requirements of social theorising itself. Such theorising, he demonstrates, relies on a heuristic of discriminating between focal and peripheral meanings and viewpoints. This process begins with a consideration of the possible purposes or values of the social practice itself but ultimately the choices required to carry this discrimination through to its most illuminating conclusions depend upon the sort of evaluations which can only arise and be answered 'in the course of reflection, *deliberative* reflection, on what I should really do, here and now, and with my life as far as I can envisage it.'[152]

This methodology is put into practice in the remainder of this thesis. Chapter III briefly considers its implications for a theory of law articulated by reference to the ends and/or means of law. Chapter IV offers an account of the first principles and requirements of practical reasonableness and of the needs and contingencies of human life in

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Press 1966) 74. See also Ronald Dworkin, *Justice in Robes* (Belknap Press 2006) 215-6 (memorably describing the essence or nature of law which certain theorists purport to be expounding via purely conceptual analysis as 'positivism's phlogiston'). The challenge to Raz as to what is meant by 'necessity' and how it can be justified also applies to Gardner when he claims that his version of the source-thesis, (LP*), 'merely states one feature that all legal guidance *necessarily* has, viz. that if valid qua legal it is valid in virtue of its sources, not its merits.' *5½ Myths* 203 (emphasis added).

[151] *NLNR* 3.

[152] *Describing Law* 25.

community. This justifies and determines the principles of selection and relevance for the development of an account of the central case of a legal system (V, VI and VII) and, ultimately, of the central case of adjudication in such a system (VIII).

CHAPTER III – FUNCTION IN JURISPRUDENCE

> *You cannot describe what a judge is doing without taking into account what he is trying to do.*[1]

III.1 Introduction

The view that not only an individual law or legal act but law itself (or, synonymously in this thesis, a legal system) exists as a means to an end (or ends) is an uncontroversial commonplace in sophisticated jurisprudential thinking. Leslie Green has termed this view an 'instrumental conception of law'[2] and notes, correctly I believe, that it is shared by a diverse range of legal theorists such as Thomas Aquinas, Jeremy Bentham, Karl Marx, Rudolf von Ihering, Max Weber, Hans Kelsen, HLA Hart, Lon Fuller and Joseph Raz.[3] Green further suggests, however, that advocates of an instrumental conception of law can be divided by reference to their adoption or rejection of what he calls the 'instrumental thesis'.[4] He first states this thesis in terms of the claim by Kelsen that 'law is a means, a specific social means, not an end.'[5] He later seeks to defend a 'qualified version'[6] of this thesis which he states in two different formulations as follows:

> …law's means are more important in identifying law as a social institution than are law's ends.[7]

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[1] Lon L. Fuller, 'Reason and Fiat' (1946) 59 Harvard Law Review 376, 392.

[2] Leslie Green, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart 2010) 173.

[3] ibid 171-3. Of course this should be distinguished from the view that judges do, must or ought treat *laws* and legal reasoning merely as instruments to ends chosen by the judges themselves.

[4] ibid 170, 173 (italics omitted).

[5] Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) 20, quoted at Green (n 2) 169.

[6] Green, 'Law as a Means' (n 2) 170.

[7] ibid 173.

> … law can only be identified by focusing on its (species-typical) means rather than on its ends.[8]

Thus for Green law is distinguished from other 'social institutions … less by what it does than by how it does it: law is less a functional kind than it is a modal kind.'[9] In Green's terminology this makes law a 'mixed kind' which he defines as follows:

> If L is distinguished by the fact that it φ-s by χ-ing, then it is a mixed kind. I am claiming an explanatory *priority* for the modalities in identifying legal systems: (a) law and other social institutions φ, but (b) among the φ-ers, law is the institution that φ-s *by χ-ing*.[10]

It is correct to categorise the central case of law as a mixed kind in this sense but I do not believe there is any significant or meaningful debate to be had about whether law's ends or its means are 'more important' or enjoy 'explanatory priority' in identifying law as a distinctive social institution.[11] If a sound understanding of both the ends and the means of law is necessary in order to understand law in its central case (such that any given legal system's unreasonable departure in either respect results in its deviancy and defectiveness qua legal system) then the issue is largely moot. In this chapter I clarify what I mean by the ends, means and functions of law and the consequences for my argument of the claim that law is a mixed kind in the sense just defined.

[8] ibid 173.

[9] ibid 170.

[10] ibid 170 note 6.

[11] Accordingly I do not agree with Green's suggestion that the '[instrumental] thesis marks a more significant division in legal philosophy than do many of the more familiar ones, including the distinction between positivism and anti-positivism.' ibid 173.

III.2 Ends, means and functions of law

III.2.1 Ends and means

An end can be a means in its own right to another end thereby creating a rational chain of means-end connections. For the purposes of this thesis a means or (synonymously) an instrument is taken to be distinct from the end to which it is a means.[12] The nature of the relationship between means and end and hence the possibility of explaining some X in terms of its being a means to some end Y varies analogically with context. When speaking of intentional actions (i.e. the third order)[13] an end is an intelligible good. In that context the propositions 'doing X is a means to end Y' or 'end Y is the purpose of or a reason for doing X' implies (a) a relationship of efficient causality running from means X to end Y and (b) a relationship of final causality running from end Y to means X. The stringency of these relationships may vary, e.g. a chosen means may be more or less apt at bringing about the desired end and the choice among such means may be determined by final causes unrelated to the ends. Different senses of means-end explanation are also possible. In respect of objects of inquiry in the third and fourth orders (i.e. intentional actions and artefacts respectively, see Section II.2) X is 'explained' by reference to an end Y if X was done or made with the intention of achieving Y, whether or not the achieving of Y by X ever occurred or could ever possibly have occurred. In respect of objects of inquiry in the fourth order or of the first order (e.g. natural objects and kinds and human behaviour viewed as purely an empirical phenomenon) X is also 'explained' by reference to an end Y if X typically causes Y, whether or not the achieving of Y was anyone's intention. The fact that there are two senses of means-end explanation possible

[12] i.e. we shall not say that 'Drawing an equilateral triangle is a means of drawing an equilateral triangle.' ibid 174.

[13] On the four kinds of order see II.2.

in respect of objects of the fourth order and that law has aspects of both third and fourth order objects means that any talk of 'explaining' law or of its ends and means is inherently prone to ambiguity and potential misunderstanding.

III.2.2 Functions

It is necessary to appreciate the possibility of different analogous meanings of means, ends and means-ends explanation in order to clarify our thinking about the functions of law. The view that law performs some social functions is as uncontroversial a proposition as the view that law is a means to an end or ends. Difficulties and differences begin to emerge, however, when we try to say more about what these functions are, how they should be identified and how they ought to feature in a theory of law's nature.[14] Before commenting on those issues, however, I want to first consider what is meant by saying that law has or performs a function.

In an earlier article to that from which I have cited above Green offers the following partial definition of function:

> functions of some thing are consequences or effects that it has; but not all of its consequences or effects count as its functions.[15]

On this view in the case of human acts (third order) and human artefacts (fourth order) a consequence-function can be distinguished from other consequences in two different ways corresponding to two different senses of function. First, one can identify the function by reference to the intention of the doer (or maker or user). Here, Green

[14] See Kenneth Ehrenberg, 'Defending the Possibility of a Neutral Functional Theory of Law' (2009) 29 Oxford Journal of Legal Studies 91, 92; Kenneth Ehrenberg, 'Functions in Jurisprudential Methodology' (2013) 8 Philosophy Compass 447, 448-51; Denis J. Galligan, *Law in Modern Society* (OUP 2007) 195-212.

[15] Leslie Green, 'The Functions of Law' (1998) 12 Cogito 117, 117.

suggests, one can also distinguish between a 'public and common' or 'standard' intention and a 'private and idiosyncratic' intention.[16] Green terms consequence-functions identified in this way 'manifest functions'.[17] A second class of function, according to Green, can be termed 'latent functions'.[18] These are identified without recourse to intentions such that a consequence is a latent function of a particular feature or item

> if and only if the disposition to produce the relevant consequence figures in the best explanation of the existence or persistence of that feature or item.[19]

Thus, for Green, Y is a function *simpliciter* of X if and only if X is either someway intended to (manifest) or typically does (latent) produce Y. In short a function is an end (whether or not it is also a means or, indeed, is an end precisely because it is considered to be a means to some other end) and can be invoked to explain some thing in either of the two senses of explanation already noted above (III.2.1). It is because Green understands functions as ends and thus law's functions as referring only to law's ends that he denies that law is a 'functional kind' and that it can be identified or adequately explained in terms of its functions:

> as a form of social order, law is distinguished not by what it does, but by how it does it. … Thus, social function cannot provide the criterion by which we identify legal systems, and our concept of law, unlike, say, 'leader' is not one that picks out institutions that perform a certain function.[20]

Green's objection to a jurisprudential methodology which seeks to elucidate the nature of law by reference to its functions is that law has no necessary, unique or distinctive ends

[16] ibid.

[17] ibid.

[18] ibid 118.

[19] ibid.

[20] ibid 120, 121. The contrast with 'leader' seems unsustainable and question begging but I shall not pursue that point here.

or social functions and so one should look to law's typical means or form in order to distinguish it from other social institutions. To this objection one can offer three replies.[21] First, even on Green's own terms many aspects of law's 'typical' means or form (e.g. coercion, positing of rules etc.) are not unique or distinctive either. So the switch from ends to means may not get the theorist very far. Second, even if we grant for argument's sake that law's modality is unique, it is not necessarily true that a sound theory of law should be satisfied with merely explicating law's unique modalities. As Kenneth Ehrenberg puts it:

> Consider the fact that one can be healed in a hospital, in a doctor's office, in a clinic, and in a mobile treatment center. If our primary goal is to understand what makes the hospital different from these other institutions then elements of its modality will take explanatory priority. But if our goal is to understand the hospital and its place in society overall, we cannot understand that modality without first coming to grips with its purpose to heal. A complete explanation of the hospital should allow us to distinguish it from a clinic, but an understanding of its function is just as central to a complete explanation, if not more so. Furthermore, if we were primarily concerned with explanatory uniqueness in a particular aspect of a theory, it would be to differentiate the explanandum from other entities that perform the same function and hence the explanation would be assuming a function in order to limit the class of things from which the explanandum must be distinguished.[22]

Third, the form of Green's argument itself is a non sequitur. It overlooks the alternative possibility that law, in its central case, can or should be distinguished from other social practices or institutions by reason of its unique or distinctive *package* of rationally ordered ends and means (regardless of whether those ends and means are individually unique to law). In other words it remains possible that practices which purport to adopt all of law's modalities may fail to fully instantiate a central case of law if they (a) do not

[21] See also Ehrenberg, 'Defending the Possibility' (n 14) 101-3; Ehrenberg, 'Functions' (n 14) 452-4.

[22] Ehrenberg, 'Functions' (n 14) 452. On the relevance of a theorist's motivating concerns for the emphasis which may reasonably be put on different features or aspects of the central case of a legal system see *NLNR* 277.

have the promotion of the common good as an end or (b) do have the promotion of the common good as an end but do not in fact promote it. Indeed Green himself does not deny that an understanding of law's ends may play a role in a sound theory of what law is:

> That said, the social functions of law may have a more modest role to play, for they may provide a constraint on an adequate theory. Our conception of law as a social institution may be incomplete without an understanding of what it is meant to do, or what it typically does. There may be necessary or typical functions of law even if none of them is unique or distinctive.[23]

This is an important albeit tentative concession. And Green is, on the terms of his own argument, right to be hesitant. For there is a discrete shortcoming in Green's preceding discussion of the ends or functions of law which has implications for understanding how any feature of law, whether ends or means, can or should be identified. The problem is this. Green denies that there is any set of ends/functions either unique to a legal system or which every conceivable legal system necessarily has. He therefore proposes as an alternative, at least for the sake of his argument, that a theorist should seek 'only a cluster of typical or normal functions'.[24] Note in this regard the dichotomy between 'necessary' and 'typical' features invoked in the last sentence of the above quotation. This all mistakenly assumes, however, that a theorist should be concerned with a 'one thing common' definition of law whether framed in terms of necessary or typical conditions.[25] It overlooks the possibility (and indeed the necessity, II.3-4) of theorising about general classes of objects in the third and fourth orders in terms of the central and peripheral cases as disclosed by an appropriate focal viewpoint.

[23] Green, 'The Functions of Law' (n 15) 121.

[24] ibid 120.

[25] See II.3.5.1.

III.2.3 Functions and functioning

Allan Beever offers an account of function that differs from Green's view of function as consequence or end. Beever's contention, which I critique below, is that function can refer either 'to purpose or to performance'[26] as exemplified by the following two sentences:

> "The function of a car is to provide a method of transport." "The car functions by burning fuel in an internal combustion engine to produce movement."[27]

He offers a more formal definition of these two senses of function as follows:

> A thing *x* has a purposive function *f* if and only if *f* is held valuable and *x* promotes *f*. A thing *x* has a performative function *f* if and only if *f* describes the manner in which *x* characteristically carries out its activities.[28]

Beever offers the distinction in order to ground a critique of what he terms 'functional analysis' by judges in the field of private law in New Zealand. In essence his critique is that much judicial reasoning which purports to determine legal questions by appeal to the functions of the relevant area of law is fallacious because of a failure to attend to the difference between purposive and performance function. The invalidity results from the fact that 'it does not follow from *f*'s being a purposive function of *x* that *x* ought to seek to promote *f*.'[29] Beever gives tort law as an example: from the premise that deterrence of wrong-doing is a valuable and typical consequence (and hence, on his definition, a 'purposive function') of tort law it does not follow that deterrence is a performative

[26] Allan Beever, 'The Law's Function and the Judicial Function' (2003) 20 New Zealand Universities Law Review 299, 299.

[27] ibid.

[28] ibid.

[29] ibid XXX.

function of tort law. Tort law may operate purely on the basis of principles of fault and compensation without any formal recognition of deterrence and yet in this way deter tortious wrong doing.

While Beever is right to point out this additional 'performative' sense of function, his definition of 'purposive function' allows for the possibility of misleading equivocation between an end and a mere bonus side-effect. From his tort law example it appears that his definition of 'purposive function' is meant to encompass both Green's latent and manifest functions. It is therefore questionable whether 'purposive' is an apt term given its connotation of intentional action.

III.3 Functionalist jurisprudence

I have reviewed the views of Green and Beever not for the purposes of policing the use of the term 'function' but to explain my own usage in what follows. Chapter II has argued that a sound methodology for inquiry into the nature of law proceeds on the basis that law has a 'focused and normative point to which everything else about it is properly to be regarded as subordinate.'[30] This means that 'central cases' make reference to 'purposes, point and value'.[31] It does *not* mean that there is no reference to 'kinds of behaviour and relationships, [i.e.] kinds of *means*.'[32] Nor does it entail either that law can be distinguished from other social practices or institutions *solely* by reference to its point or that this normative point is more important than law's formal features and guiding ideals when distinguishing central from peripheral cases.[33] On the contrary, the features and

[30] *Describing Law* 30 note 9. See John Finnis 'Reflections and Responses' in *RML* 549-51.

[31] Finnis, 'Reflections and Responses' (n 30) 544.

[32] ibid.

[33] ibid 552-3.

ideals that constitute law, in its central case, are only fully intelligible and adequately explained when recognised as links in a complex chain of rationally ordered means and ends (see V.7 below).[34] That is why a sound understanding of law requires an inquiry into both its proper ends and means. Pace Dickson,[35] it is not a matter of prioritising one over the other.[36] They are intelligible (whether descriptively or normatively) as a package: the 'what' of law is determined and revealed by both the 'why' and 'how' of law.[37] For this reason I call the inquiry pursued in this thesis 'functionalist'. This recognises that 'function' may properly be used to refer to either the ends or the means of a complex social practice like law and that any account of the various ways that law, in its central case, functions (e.g. in adjudication) must proceed by attention to both its means and ends.

A functionalist inquiry into the nature of law, as thus defined, must address three principal questions:

(1) How do law's functions feature in a theory of law?

(2) How should these functions be identified?

(3) What are these functions?

I have answered the first already. When one understands 'function' broadly to encompass both ends and means, a theory of the 'what' of law in its central case is

[34] See Lon L. Fuller, 'Means and Ends' in Kenneth I. Winston (ed), *The Principles of Social Order* (Hart 2001) 68-72.

[35] Julie Dickson, 'Law and Its Theory: A Question of Priorities' in *RML* 370-1, 375-7.

[36] Finnis, 'Reflections and Responses' (n 30) 550-2.

[37] Indeed, as Simmonds has noted, 'moral knowledge is distinguished from technical knowledge precisely in the absence of any clear priority, within moral knowledge, for our understanding of the goal over our understanding of the means whereby the goal is to be advanced.' *LMI* 182.

nothing more or less than an understanding of its 'why' and 'how'. This is the essence of the functionalist methodology. With respect to questions two and three, however, different types of functionalist theories will give different answers.[38] My answers to the third question are given in Chapters V-VIII. The second question can be divided into two sub-questions as follows:

(2a) How should the ends of law be identified?

(2b) How should the means of law be identified?

My answer to both has been set out in Chapter II. A sound understanding of law is one that recognises its central case as a response to the first principles and requirements of practical reasonableness, a response properly informed of the needs and contingencies of human life in community. Thus at least one way to start an inquiry into the *ends* of law is by a direct, critical inquiry into these principles, requirements, needs and contingencies.[39] This is the approach adopted in Chapters IV and V which offer an account of the ends or purposive functions of law. The second sub-question is answered by a consistent following through of the same insight. The means (i.e. form, modalities or performative functions) of law are identified in light of and by rational reflection on both the ends of law and the same principles, requirements, needs and contingencies that explain and justify those ends. This claim is considered in more detail in Chapters VI and VII which discusses some of the most important techniques, practices and postulates of social ordering constitutive of a legal system. In this way they set the scene for the discussion of adjudication offered in Chapter VIII.

[38] For an example of a proponent of a functionalist theory of law who disagrees with my answers to questions (2) and (3) see Ehrenberg, 'Defending the Possibility' (n 14).

[39] Finnis, 'Reflections and Responses' (n 30) 551.

CHAPTER IV – PRINCIPLES AND REQUIREMENTS OF PRACTICAL REASONABLENESS

> *When we ask...how are we to choose the basic premises of our legal system we enter the realm of ethics as the science of ultimate human ends.*[1]

> *[A] theory of basic individual rights must rest on a specific conception of the human person and of what is needed for the exercise and development of distinctive human powers.*[2]

IV.1 Introduction

It has been argued in the foregoing chapters that an inquiry into the 'what' of adjudication must be informed by a prior inquiry into the nature (the 'what') of law, i.e. the most important or defining features of a legal system in its central case and the requirements of justice which structure and guide its proper functioning. Accordingly, a necessary step in my discussion of adjudication is to identify these features and requirements. In this regard, as noted in II.1, two questions arise. How, if at all, are such features and requirements to be identified? And then, what are they? Chapters II and III addressed the first question, outlining a methodology adequate to identifying such features and requirements. This Chapter begins the response to the second question, which will extend into Chapters V and VI.

As argued in Chapter II, a sound understanding of the general social practice conventionally called 'law' is one that recognises its central case as a response to the first principles and requirements of practical reasonableness, a response properly informed of the needs and contingencies characteristic of human life in community. It follows that one way to develop a sound understanding of law – the most direct if not the most secure way

[1] Morris R. Cohen, *Reason and Law: Studies in Juristic Philosophy* (Collier Books 1961) 6.

[2] H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 17.

– is to begin, as this Chapter does, by critically reflecting on (a) the goods constitutive of and/or conducive to the flourishing of human beings, both as individuals and as members of different groups or societies, which explain and justify the directiveness of any 'reason' for intelligently and freely acting one way rather than another (IV.2.1-2), (b) the various contingencies and problems associated with the pursuit of such goods individually and collectively in the world as we know it to be (IV.2.3), and (c) the principles which must be respected in order to pursue such goods, or adopt such reasons, in a fully reasonable (or synonymously here: 'moral' or 'virtuous') way in light of these contingencies and problems (IV.3).

IV.2 First principles and basic circumstances of practical choice

In a broad range of writings John Finnis, drawing principally on the insights of classical theorists such as Plato, Aristotle and Aquinas and the contemporary works of Germain Grisez in moral philosophy and theology, has argued for a number of substantive conclusions to the critical reflection on these topics (a), (b) and (c) as well as for a conception of this process of reflection which shows the interdependence of the conclusions in respect of each of these topics.[3] These conclusions appear to me to have met with no decisive refutation, and to be critically justifiable or at least critically defensible against important objections. However it is obviously not possible for me to defend that claim in any comprehensive way in this thesis (see Section I.6) and so I propose merely to summarise in this Chapter these substantive conclusions with a minimum of expository and justificatory argument.

[3] Chapter I note 73.

IV.2.1 The first principle of practical reason

Ethics is the systematic and critical reflection on the nature and principles of practical reason. Practical reason is concerned with human action, that is to say actions which are freely or deliberately chosen rather than performed involuntarily (e.g. sleep-walking) or nonvoluntarily (e.g. digesting one's meal). What is said in this chapter about action and ethics is true also of the actions of groups and (to put the matter simply) their representatives and so of political communities and their representatives (including judges) and of political and legal theory (bodies of critical reflection Finnis considers to be subsumed under ethics). For simplicity, the general theory of practical reason will be discussed in this chapter largely as if it were a matter of individual action and of ethics.

The distinguishing feature of voluntary actions is their intentionality or purposiveness: they are chosen or done for a *purpose*. In the classical tradition, the *reason* which makes this purpose (and hence this particular act) truly choice-worthy or *intelligibly* desirable (i.e. *rationally* desirable rather than merely emotionally so) is characterised as a *good*, i.e. that which determines the act as somehow perfecting, fulfiling or otherwise actualising the potential of the agent as the kind of thing that it is.[4] One *participates* in such a good by achieving the purpose which instantiates it. The first

[4] Such an understanding of reasons and goods as good 'for me and others like me' rests on an endorsement of the common sense acceptance that I and other human persons belong to an intelligible kind of being, a metaphysical judgment that tracks common sense in understanding complex and dynamic realities (of specifiable types) in terms such as nature and essence. I do not intend to offer a justification of that endorsement here but merely note that it is far from as exotic or controversial a claim as some might uncritically imagine. As Sherif Gergis et al have recently remarked: 'such thinkers as … [Kit Fine, Saul Kripke, Hilary Putnam, David Wiggins, Stephen Yablo, and Alvin Plantinga] have embraced essentialism and contributed to a growing body of literature that explores (1) different versions of essentialism (e.g., "sortal" or "origins" essentialism); (2) competing ways of analyzing it (modally vs. non-modally); and (3) its implications for the natural sciences, personal identity, philosophy of mind, philosophy of science, philosophy of language, and much else.' Sherif Girgis, Ryan T. Anderson and Robert P. George, 'Does Marriage, or Anything, Have Essential Properties?' Public Discourse <www.thepublicdiscourse.com/2011/01/2350> last accessed 12 January 2011. Any practical principle of equality is going to rely explicitly or covertly on some such metaphysics.

principle of practical reason can thus be identified as 'Good is to be pursued and evil is to be avoided.'[5] This principle is analogous to the first principle of reasoning, the principle of non-contradiction, for each provides a first principle for its respective order (II.2). The principle of non-contradiction brings order into our *thinking* by prohibiting incoherence in reasoning. The first principle of practical reason brings order into our *doing* by prohibiting pointlessness in acting.[6] Thus the further principles and requirements of practical reason are identified by asking and answering two questions: What is the good (or are the goods) which humans should pursue? (IV.2.2). How should it or they be pursued? (IV.3).

IV.2.2 The first principles of practical reason: the basic goods

In reflecting on the reasons for a person's freely chosen actions, it is possible at every stage to ask 'Why did you think that was a good reason?' There comes a point, however, when it no longer makes sense to ask this question, when it no longer seems possible nor necessary to give a further reason. Such 'ultimate' reasons may therefore be considered the first *principles* of practical reason; for, in a sense, they are determinations of the first principle of practical reason itself. Moreover, because they are neither demonstrable nor requiring demonstration, like the first principle of practical reason and the principle of non-contradiction, they may be called 'self-evident'.[7] The directiveness of these first

[5] See *Aquinas* 86, 99.

[6] Of course neither can *prevent* incoherence or pointlessness respectively, but they create a normative demand that we amend our thinking or acting as appropriate whenever such flaws are discovered or pointed out to us.

[7] Much needless confusion has been caused by treating references to self-evidence as being references to some intuition or 'feeling' of certainty. It is neither. Rather, it refers to a particular logical quality or status of a proposition, i.e. that the proposition, in so far as it truly operates as a first principle, cannot be demonstrated by any deductive argument (though it may be rationally argued for and reasonably affirmed through dialectical defence by refutation of objections) but must be pre-supposed for the sake of further deductive argument. For an account of the mistake made in treating self-evident principles as 'intuitions' see Stephen E. Toulmin, *The Uses of Argument (Updated edition)* (CUP 2003) 221-8.

principles can be explained by reflection on their role in the perfecting or fulfilling of the person who treats them as a reason for action. On this basis such first principles may also be termed 'basic goods', i.e. those goods participation in which is constitutive of human well-being or full-being or complete happiness for every human being simply qua human being – someone of the human *kind*.[8] That one should consider some reason or set of reasons to be final or ultimate seems a reasonable conclusion if one accepts (a) that voluntary or intentional action is always action for a reason and (b) that such action does take place and (c) that an infinite regress of reasons would make it impossible for us ever to know or even attribute, whether before or after our action, a non-instrumental reason for our action. Perhaps a little less obvious from the nature and actuality of intentional action and the logic of reason-giving is the conclusion that there is not one basic good but several goods which are irreducibly distinct and equally basic (and hence incommensurable) qua ultimate reason for action. Such a conclusion, and the actual identification of the basic goods, can rest on the contingent (epistemologically speaking[9]) findings of a critical reflection on our own acts of deliberation (in the third order, see II.2),[10] but it is *affirmed by* (though not *derived from*) and itself affirms the conclusions of a sound philosophical anthropology (in the first order) that recognises the complexity of

[8] For the primary significance of a being's kind, as distinct from its individually actualised, exercised or existing properties/capacities, in judging a being to be a person see, e.g., Patrick Lee, 'The Basis for Being a Subject of Rights: the Natural Law Position' in *RML* and Timothy Chappell, 'On the very idea of criteria for personhood' (2011) 49 The Southern Journal of Philosophy 1.

[9] John Finnis, 'On Creation and Ethics' in *CEJF V* 179.

[10] The resulting list of basic goods may be defended dialectically by (a) elimination of alternative candidates as unsuitable (e.g. pleasure, complete happiness, dignity); (b) rejection of attempts to reclassify certain basic goods as merely instrumental; (c) demonstration of unsound metaphysical premises (e.g. dualism, reductivist naturalism) of objections or of alternative lists; (d) consonance with the findings and very possibility of empirical psychology and anthropology. Germain Grisez, Joseph Boyle and John Finnis, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 American Journal of Jurisprudence 99, 111-13. For Finnis's (revised) account of the basic goods see *NLNR* 85-90, 448; *CEJF I* 9-12; and John Finnis, 'Commensuration and Public Reason' in *CEJF I* 244 note 25.

human nature.[11] There are multiple goods, ontologically speaking, because there are multiple aspects to our human nature,[12] i.e. qualitatively different radical capacities conventionally grouped, roughly following Aristotle,[13] as vegetative, sensory and rational.[14] Recognition of the incommensurability of the basic goods has significant consequences for moral and political theorising. For one thing it undermines any account of practical deliberation and judgment which presupposes that there is only one basic value, such as utilitarianism, or a pre-determined *single* hierarchy of goods.[15] For another it allows for an acknowledgement, indeed an explanation of, the plurality of value(s) and the possibility of a (reasonable) practical disagreement that does not entail moral relativism or non-cognitivism.[16]

[11] That is to say: A 'statement of the basic human goods entails an account of human nature. But it does not presuppose such an account. It is not an attempt to deduce reasons for action from some pre-existing theoretical conception of human nature.' John Finnis, 'Legal Reasoning as Practical Reason' in *CEJF I* 213. John Finnis, 'Is and Ought in Aquinas' in *CEJF I* especially 147. Contrast Lawrence Dewan, 'St Thomas, Our Natural Lights and the Moral Order' in *Wisdom, Law and Virtue: Essays in Thomistic Ethics* (Fordham University Press 2008); and Stephen L. Brock, 'Natural Inclination and the Intelligibility of the Good in Thomistic Natural Law' (2005) 6 Vera Lex 57.

[12] A nature which is neither self-created nor self-creating, but receives its being from outside of itself and is orientated back towards the source of this being apprehended as true, good and beautiful. Eric Voegelin, 'On Debate and Existence' in Ellis Sandoz (ed), *Published Essays 1966-1985* (Louisiana State University Press 1990); and David C Schindler, 'Freedom beyong our choosing: Augustine on the will and its objects' (2002) 29 Communio 618.

[13] Aristotle, *On the Soul* 413a10.

[14] Questions concerning (a) the proper methodology for such philosophical anthropology and for the identification of radical capacities, human or otherwise, and (b) the identity of these radical human capacities, while clearly relevant and important for the argument made here, are beyond the scope of this thesis. See John Finnis, *Fundamentals of Ethics* (Georgetown University Press 1983) 10-23; *Aquinas* 90-4, 176-80; Robert P. George, 'Natural Law and Human Nature' in Robert P. George (ed), *In Defense of Natural Law* (OUP 1999); John Haldane, 'Reasoning about the Human Good, and the Role of the Public Philosopher' in *RML*; and John Finnis, 'Reflections and Responses' in *RML* 468-72.

[15] As Finnis puts it: 'none of the basic human goods is "unqualifiedly commensurable as more or less valuable than the others"...There are a number of hierarchies among them – e.g. life is a kind of presupposition of the others, and practical reasonableness presides over the realization of all of them – but no single hierarchy of value.' John Finnis, 'Scepticism's Self-Refutation' *CEJF I* 80.

[16] Finnis, 'Commensuration and Public Reason' (n 10).

IV.2.3 The practical necessity of choice and co-ordination

This multiplicity of irreducibly distinct and basic goods when taken in conjunction with other empirical features of the world as we know it (such as the experienced limits of time and space) and of the human condition (such as the vulnerabilities, limitations and associated dependencies of solitary human beings) results in the unavoidable consequence that any one person's *effective* participation in the basic goods will:

(1) in some cases require, at least instrumentally, co-ordinated interaction with others (e.g. bodily life, knowledge, excellence in performance, practical reasonableness[17]);

(2) in other cases require, as a constitutive element of participation in the basic good, co-ordinated interaction with others undertaken for the sake of their good (e.g. marriage, friendship or harmony with others[18]);

(3) necessarily require, whether as means or as a side-effect, that (a) the person's participation in certain other goods, or certain other instances of a good, be denied or limited and (b) the participation of other persons in certain other goods, or certain other instances of a good, be denied or limited.

As a result of (1) and (2) various forms of peaceful and cooperative interaction with others properly appear to the practically reasonable person as a fully rational and

[17] For a discussion of the important implications for moral philosophy of ineradicable human inter-dependency, understood both diachronically in terms of the natural continuum of human physical, intellectual, emotional and moral development from conception to old age and synchronically in terms of the spectrum of successful and unsuccessful functioning by individuals in each of these dimensions, see Alasdair MacIntyre, *Dependent Rational Animals* (Duckworth 1999) especially chaps 8-10.

[18] On the central case of friendship (following Aristotle) see *NLNR* 142. See also Finnis, *Fundamentals of Ethics* (n 14) 147.

intelligible end or good to be pursed as a necessary means to his or her own effective participation in the basic goods. Moreover, since the basic goods present themselves as goods for all beings like me, it would be incompatible with my recognition of these goods to deny that such interaction is also an intelligible good for all the other beings that share my nature (since their effective participation in the basic goods, a participation to which they are no more or no less entitled, objectively speaking, than I am, equally depends on it). Thus the truly reasonable person will seek to achieve and sustain practices of cooperative interaction, whether they be instrumental or constitutive to participation in basic goods, not merely as a means to his or her own participation in such goods but also out of (due) consideration for and as a means to the participation of others in such goods.[19] It is for this reason that the good instantiated by such peaceful and cooperative interaction can be called an aspect of the (temporal)[20] 'common good', which is to say that good constituted by:

> the well-being alike of oneself and of one's associates and potential associates in community, *and* the ensemble of conditions and ways of effecting that well-being [which everyone has reason to value] whether out of friendship as such [i.e. to participate in the basic good of harmony with others], or out of an impartial recognition that human goods are as much realized by the participation in them of other persons as by one's own [i.e. by reflection on the nature of a basic good].[21]

[19] The 'requirement that the activities of individuals, families, and specialized associations be co-ordinated...itself derives partly from the requirements of impartiality as between persons, and of impartiality between the basic values and openness to all of them, given certain facts about the ensemble of empirical conditions under which basic goods such as health, education, science, and art can be realized and realized in the lives of each person according to the measure of his own inclinations and capacities.' *NLNR* 149. On the requirements of impartiality see IV.3.2 below. But note: 'One has no general responsibility to give the well-being of other people as much care and concern as one gives one's own; the good of others is as really good as one's own good, but is not one's primary responsibility, and to give one one's own good priority is not, as such, to violate the requirements of impartiality.' *NLNR* 304.

[20] The qualification 'temporal' is merely to mark that the argument of this thesis neither affirms nor excludes the possibility that there may be a more ultimate and comprehensive common good. See note 34 below.

[21] *NLNR* 303 (emphasis added). This definition involves a conjunction of two distinct elements (i.e. the actual well-being of persons and the framework for effecting such well-being) and so is to be preferred to the descriptions of the common good given in *NLNR* 154, 155. cf ibid 459.

A society constituted by an extrinsic common good or principle of ordering at this level of generality and without any qualifying limitation to any specific sub-set of goods can be termed, following Aristotle and Aquinas, a complete or political society.[22] This is not an individualistic, utilitarian or aggregational[23] theory, for the common good is not reducible to the idea of a mere sum of each person's good in the way, for example, that the shared or reciprocal interest of a commercial partnership or mutual exchange is.[24] Nor is this a theory sponsoring talk of the good of society being in competition with the good of individual persons such that one must somehow choose between prioritising the person over society or society over the person. On the contrary the good common to all qua members of the society is nothing more than the highest proper good of each qua human person.[25] There is strictly speaking no singular or particular good that is proper to

[22] In other words: an 'all-round association…[able] to secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each individual of his or her personal development… [A]s the common understanding of the unqualified expressions "law" and "the law" indicates, the central case of law and legal system is the law and legal system of a complete community.' *NLNR* 147-148. Hart and Sacks refer in a similar vein to an 'over-riding, general purpose group' in contrast to 'special-purpose groups' *Legal Process* 2. Some such conception seems to be presupposed in, e.g. Raz's thesis that law is comprehensive, supreme and 'open' (absorptive) *PRN* 150-4. For discussion of the nature of a complete community and the complexities of its qualified identification with the modern nation-state see *NLNR* 147-150, 458 (and five essays from *CEJF* cited therein); and Yves R. Simon, *Philosophy of Democratic Government* (University of Chicago Press 1951) 67-8. For a critical discussion of the Aristotelian conception of a complete community (*polis*) and of the 'vague', 'elastic' but 'dynamic' theory resulting from its adoption by Aquinas see, respectively, Eric Voegelin, *Order and History Vol III: Plato and Aristotle* (Louisiana State University Press 1957) 310-7 (cited in *NLNR* 159) and Eric Voegelin, *History of Political Ideas II: The Middle Ages to Aquinas* (University of Missouri Press 1997) 215-20, 225, 227.

[23] cf Mark C Murphy, *Natural Law in Jurisprudence and Politics* (CUP 2006) 63-90. In Murphy's distinctive terminology, however, what I propose is closer (but not identical) to an 'aggregative' rather than an 'instrumental' or 'distinctive good' conception of the common good. Note that for Murphy what is pooled in his 'aggregative' conception is the well-being of individual persons where it is recognised that each one's well-being may be predicated on or constituted by the well-being of others (i.e. that it may involve irreducibly 'social' goods).

[24] In such schemes of interaction the rational motivation for each agent to participate is solely her own private good (utility) such that the intelligibility or rationale of an agent's *entering into* (as distinct from completing or continuing with) the interaction *necessarily* vanishes if, regardless of the significant good it represents for others, the private good it promises for her is less desirable than that promised by an alternative course of action. Such interactions may be fully practically reasonable in appropriate contexts but they cannot be taken as paradigmatic of that maximally beneficial, sustainable and all-encompassing set of relations among persons that is a political society.

[25] Michael A. Smith, *Human Dignity and the Common Good in the Aristotelian-Thomistic Tradition* (Mellen University Press 1994) 87; Gregory Froelich, 'The Equivocal Status of Bonum Commune' (1989) 43 The New Scholasticism 38, 56. See also *CEJF III* 33-4.

'society'. The common good is not one more particular or basic good (proper to some entity x) that stands over or against the goods proper to individual human persons.[26] Any potential for conflict and competition exists between the private goods (i.e. the unshareable goods, e.g. health, knowledge) proper to an individual person[27] and the common good as it is proper to that person. For the common and the private constitute two distinct types of good proper to (i.e. perfective for)[28] the acting person, with the common good superior to any (merely) private good in its claim on our practical reasoning because it constitutes taking full account of all that is (morally) due to all other persons.[29] Thus the common good can rightly be regarded as the end to which or in light of which every deliberation, choice and act of every reasonable person (including in respect of his or her own private or particular goods) is appropriately directed.[30] (On what is meant by 'appropriate' here and the difference between intending the common good specifically/materially and generally/formally see V.2.1).

[26] 'Hence, the common good is a good which is the good of particulars, not the good of the collectivity envisaged as a sort of singular. In that case, it would be common only accidentally and would be properly singular, or, if one wishes, it would differ from the singular good of the particulars in being the good of none of them.' Charles De Koninck, 'The Primacy of the Common Good against the Personalists' in Ralph McInerny (ed), *The Writings of Charles de Koninck* (University of Notre Dame 2009) 75. See Gerard Brady, 'Thomism and Politics' (1954) 82 Irish Ecclesiastical Record 165, 170.

[27] For completeness one could consider private goods to be a species of the genus of 'particular goods' which would include the common good of incomplete societies (e.g. the common good of a family) and therefore are not shared with all others qua members of the political society.

[28] On the different senses of one's proper good (*bonum suum*) see Aquinas, *Summa Contra Gentiles* l.3 c.24 n.7.

[29] The same reasoning applies by analogy to the common good of less complete societies: 'The good of the family is better than the singular good, not because all the members of the family find in it their singular good: the good of the family is better because, for each of its members, it is also the good of the others.' De Koninck (n 26) 75. See *CL* 167.

[30] *ST* I-II q. 19 a. 10 co, II-II q. 47 a. 10 ad. 2, II-II q. 58 a. 9 ad. 3; *Aquinas* 111-4. On the common good see also Declan O'Keeffe, 'The Nihilism of the Law of Ireland' (PhD Thesis, Trinity College Dublin 2011) 77-92; and Michael Baur, 'Law and Natural Law' in Brian Davies and Eleonore Stump (eds), *The Oxford Handbook of Aquinas* (OUP 2012).

As a result of (3) above, there exists, as a matter of practical necessity,[31] a need for choices to be made between divergent and mutually exclusive (in time, space and objective) possibilities and opportunities for human flourishing.[32] More specifically, as a result of (3)(b), there arises as a requirement of the common good, identified and justified in light of (a) and (b) above, the rational need for the effective co-ordination (i) of the distribution of possible opportunities among members of a complete or political society and (ii) of the choices made between such opportunities by individual members of the society. Thus (3) indicates the need for a further set of practical principles to guide and order one's deliberation, action and choice for the sake of furthering both the common good of the society and, as a means to that end, those particular goods for which, whether by circumstance or prior commitment, one is personally responsible. For, with respect to these particular goods, there is the need for further guidance as to how one should reasonably choose between competing opportunities for human flourishing. (Such choices may be between opportunities for participation in different basic goods or between opportunities for different types of participation in the same basic good or between some complex combinations of one or both situations.) But, as will be argued later, what counts as a reasonable choice is itself dependent on what might be termed the problem of the common good or, more formally, the problem of achieving that just and effective co-ordination among persons and their choices that is the common good.

[31] The notion of *practical* necessity relied on throughout this thesis is that identified by Aristotle and later termed by Aquinas '*necessitas finis'* or '*ex suppositione finis'. Metaphysics 1015a23-26, 1015b4-70; ST I* q. 82 a. 1 co; Aquinas, *De Veritate* q. 17 a. 3 co. Thus a practical necessity is 'that without which some good will not be obtained or some evil averted.' G.E.M. Anscombe, 'On the Source of the Authority of the State' in *The Collected Philosophical Papers of GEM Anscombe: Volume 3 Ethics, Religion and Politics* (Blackwell 1981) 139. For a discussion of the treatment of practical necessity by classical and later theorists see Matthew O'Brien, 'Practical Necessity: A Study in Ethics, Law, and Human Action' (PhD Thesis, University of Texas at Austin 2011) 14-52 from which the aforementioned references are taken at 32, 33 and 15 respectively. Finnis refers to it as 'third-level explanation' in *NLNR* 302-3.

[32] 'To understand right and wrong, one must bear two things in mind. First, the possibilities of fulfilment are always unfolding for there are several basic human goods, and endless ways of serving and sharing them. Second, human beings, even when they work together, can only do so much. No one can undertake every project, or serve in every possible way. Nor can any community. Choices must be made.' John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (OUP 1987) 281.

So by what general considerations and concerns are such choices by individuals qua individuals and such co-ordination of the choices of individuals qua members of a political society to be guided and governed for the sake of the common good? The answer can be developed in two stages, each stage relating to a distinct source or procedure for the identification of a solution. The first stage (IV.3) is concerned with identifying those standing considerations of personal right judgment which can be termed morality. The second stage is concerned with identifying the practical shortcomings of morality as the only source of guidance for choices of persons living in society (Chapter V) and, in light of these shortcomings, the supplementary sources of normative guidance which are practically necessary for the sake of the common good of a political society (Chapter VI).

IV.3 On morality

IV.3.1 The first principle of morality

By what considerations and concerns are choices by individuals qua individuals and co-ordination of the choices of individuals qua members of a community rightly to be guided and governed? In the last section I said that this would be answered in two stages. The answer at the first stage can usefully begin from a further critical reflection on the first principles of practical reason. One such principle, or basic good, is the good of practical reasonableness itself, namely the good of bringing reasoned and reasonable order into all one's thinking, decision-making and acting.[33] Such order is a basic and intrinsic (i.e. *per se* perfecting) good but it is also a necessary instrumental good for effective participation in all other goods. For to the extent that one fails to bring about such order, one frustrates intelligent thought, reasonable deliberation and coherent action and thus one needlessly

[33] *NLNR* 100-103; Finnis, *Fundamentals of Ethics* (n 14) 70-4.

(since it was within one's power to do otherwise) inhibits one's capacity and restricts one's opportunities to do or achieve *anything*, not least to flourish, i.e. to be fulfilled and perfected in one's nature, to more fully and completely actualise one's (natural) potential.

Moreover, in so far as (a) relationships of cooperation and interdependence are necessary for the flourishing of oneself and of others ((1) and (2) above), and (b) it is by being practically reasonable that I recognise and respond appropriately (or at all) to such a necessity, then any deliberate failure on my part to pursue and participate in the good of practical reasonableness also manifests (in principle, regardless of the contingencies of the circumstances) a willingness to restrict needlessly the opportunities for flourishing of others as much as those of myself, and thus a willingness to see them needlessly harmed. And this reflection on the reasons[34] for pursuing practical reasonableness and for shunning whatever is opposed to it can be universalised into a more general first principle capable of providing more determinate guiding principles for personal choice (i.e. morality) and, by rational extension, social co-ordination. Finnis puts it as follows:

> The first principle of morality can, perhaps, be best formulated: In voluntary acting for human goods and avoiding what is opposed to them, *one ought to choose and otherwise will those and only those possibilities whose willing is compatible with integral human fulfilment*.[35]

[34] It is of course possible, and indeed only reasonable, to consider whether there is any further or greater purpose or explanation for why we should attend to the flourishing of ourselves and others. It is by thus rendering intelligible such an inquiry into the point of human existence that practical reasonableness itself requires and directs us towards that speculative (i.e. non-practical) reflection on the origin and end of our being conventionally know as natural theology. It must thus be admitted that no meta-ethics can be considered complete without, at the very least, critically engaging with the philosophical case for the existence of God. It is in this sense that there is nothing peculiarly 'religious' or 'theological' about the natural law tradition, though it is perhaps atypical (in contemporary discourse) in its express recognition of this rational link between ethics and natural theology. *Aquinas* sections X.1-2; *NLNR* chapter XIII and 477-9; Germain Grisez, 'Natural Law and the Transcendent Source of Human Fulfillment' in *RML*.

[35] Finnis, Boyle and Grisez (n 32) 283. A helpful alternative formulation given by Finnis is: 'The master principle of ethical reasoning is this: Make one's choices open to human fulfilment: i.e. avoid unnecessary limitation of human potentialities.' Finnis, *Fundamentals of Ethics* (n 14) 72. For a detailed discussion see Joseph Boyle, 'On the Most Fundamental Principle of Morality' in *RML* and John Finnis, 'Reflections and Responses' (n 14) 473, 578-9.

It is this 'first principle of morality', and the more determinate requirements which flow from its thorough working out and application, which allows us to distinguish between choosing rightly (morally, virtuously, reasonably) and wrongly (immorally, viciously, unreasonably). To understand its implications, however, one must properly appreciate two points. First, this principle of morality is not itself a reason for acting; it is not another basic good. Rather, it is a guiding ideal whose attractiveness and appropriateness depends on the 'directiveness' provided by the basic goods themselves. Second, integral human flourishing is not about 'individualistic self-fulfilment'.[36] It refers to the fulfilment of all human persons (including oneself) in all their respective communities.[37] But this ideal should not be confused with an attainable goal to be achieved. It is not

> some gigantic synthesis of all the instantiations of goods in a vast state of affairs, such as might be projected as the goal of a world-wide billion-year plan. Ethics cannot be an architectonic art in that way; there can be no plan to bring about integral human fulfilment. It is a guiding ideal, rather than a realizable ideal, for the basic goods are open-ended.[38]

IV.3.2 The requirements of practical reasonableness

In essence, the first principle of morality, as a guiding ideal, 'prescribes that non-integrated feelings [i.e. 'non-rational motives, not grounded in intelligible requirements of the basic goods'] be transcended.'[39]

> Moral thought is simply rational thought at full stretch, integrating emotions and feelings but *undeflected* by them...The fundamental principle of moral thought is simply the demand to be fully rational: insofar as it is in your power, allow nothing but the basic reasons for action to shape your practical thinking as you find, develop, and use your opportunities to

[36] Finnis, Boyle and Grisez (n 32) 283.

[37] Grisez, Boyle and Finnis (n 10) 128; Finnis, 'Practical Reason's Foundations' in *CEJF I* 32.

[38] Finnis, Boyle and Grisez (n 32) 283.

[39] ibid 285.

> pursue human flourishing through your chosen actions. Be entirely reasonable.'[40]

More determinate guiding principles (what Finnis terms 'requirements of practical reasonableness'[41] or 'intermediate principles' of morality[42]) are implied by (though not immediately *derived* from) the first principle of morality. They are, each in its own way, a response to the question: how can I bring a *reasonable prioritisation*[43] into my choosing, in a given situation, between different, and perhaps incommensurable, possibilities and opportunities of human fulfilment? Or, alternatively: how can I avoid unreasonably closing off or excluding opportunities for human fulfilment (whether it be my own fulfilment or that of others)? As such the requirements of practical reasonableness are

> expressions of the most general moral principle – that one remain open to integral human fulfilment – in the various normative and existential contexts in which choice must respond to that most general principle.[44]

Accordingly, such requirements can legitimately be formulated and systematized in a variety of ways and are often likely to overlap. Their identification and articulation, like that of the basic goods, represents the specification (relevant to our current questions and concerns) of a general truth through empirically informed and critical (i.e. open to all questions that arise in the effort to be totally reasonable) reflection on our deliberation and acting, and that of others, and on the fruits of past efforts at such reflection. Such reasoned specification is, like all human knowing, a fallible dynamic process of reflective inquiry which moves from attention to experience and intelligent hypothesis to reasonable judgment. It is *not* a search for a timeless, univocal or definitive *formula* or

[40] Finnis (n 11) 215.

[41] *NLNR* Chapter V.

[42] Finnis, Boyle and Grisez (n 32) 284-87; Finnis, *Fundamentals of Ethics* (n 14) 70, 74-7.

[43] See *CEJF I* 12; Finnis, 'Moral Absolutes in Aristotle and Aquinas' in *CEJF I* 196 note 26.

[44] Finnis, *Fundamentals of Ethics* (n 14) 76.

list and any proposed account of the basic goods or the requirements of practical reasonableness should be understood with this in mind. For present purposes I shall adopt the nine requirements as summarised by Finnis as follows:

> The first three respond to the multiplicity of basic goods, of opportunities for participating in them, of persons who can participate in them...: (1) have a harmonious set of orientations, purposes and commitments; (2) do not leave out of account, or arbitrarily discount or exaggerate, any of the basic human goods; (3) do not leave out of account, or arbitrarily discount or exaggerate, the goodness of other people's participation in human goods. The next two respond to the emotional pull of immoderate and one-eyed enthusiasm and of apathy, inertia, laziness...(4) do not attribute to any particular project the overriding and unconditional significance which only a basic human good and a general commitment can claim; (5) pursue one's general commitments with creativity and do not abandon them lightly. The next calls for more than mere well-meaning and good intentions: (6) do not waste your opportunities by using needlessly inefficient methods, and do not overlook the foreseeable bad consequences of your choices....The next is the requirement insisted upon by St Paul and, as the second formulation of his categorical imperative, by Kant; ... (7) do not choose directly against any basic human good...The next acknowledges that the human goods are realized and protected by, *inter alia*, the actions of groups and of group members acting as such: (8) foster the common good of your communities. The [ninth requirement]...responds to the problem of extending reasonable judgment into reasonable choice, in the face of conformism and other temptations: (9) do not act contrary to your conscience, i.e. against your best judgment about the implications for your own action of these requirements of practical reasonableness and the moral principles they generate or justify.[45]

More shall be said about requirements (3), (7) and (8) in the next subsection.

IV.3.3 The moral evaluation of human acts

Thus it is with the recognition of the first principle of morality and its related requirements of practical reasonableness, that one moves from the mere directiveness of the basic goods ('this is to be done') to the full normativity of morality ('this, all things considered, ought to be or should be done'). As Finnis puts it:

[45] ibid 75. Space does not permit an elaborated discussion or defence of each requirement. But see *NLNR* 100-133, 450-7 (and references cited therein).

> the moral sense of "ought", understood critically, not merely conventionally, is reached ... when the absolutely first practical principle is followed through, in its relationship to all the other first principles [basic goods], with a reasonableness which is unrestricted and undeflected by any subrational factor such as distracting emotion.[46]

In other words, moral truth and falsity can be distinguished by consideration of their opposing relationships to the whole set of requirements which can reasonably be brought to bear on any given action.[47] Moral truth requires that every relevant requirement be considered and applied integrally to every act – for there simply are no other practical principles to which one could appeal to truly justify one's *decision* to adopt a selective or arbitrary approach to the consideration of relevant requirements. It follows that the moral evaluation of any human act (as prohibited, permitted or required) consists in considering whether it, or its omission, would be excluded by any one of the requirements of practical reasonableness. Finnis, Boyle and Grisez summarise the process of deriving specific moral norms (i.e. norms that include a description of a particular type of human act) from the requirements of practical reasonableness (also referred by them, as herein, as 'modes of responsibility') as follows:

> Its heart is a deduction which can be formulated in a categorical syllogism. In the simplest case, the normative premiss is a mode of responsibility, which excludes a certain way of willing in respect to the relevant goods. The other premiss is a description of a type of action, which is sufficient to make it clear that an action of this kind cannot be willed except in the excluded way. The conclusion is that doing an act of that kind is morally wrong. Actions not excluded by any mode are morally permissible; those whose omission would violate some mode are morally required.

[46] *Aquinas* 87. For a discussion of the significance for the nature and very possibility of human (i.e. intentional, free) action of the distinction between the object of intellectual appetite (i.e. an intelligible good, in the form of a universal, conducive to fulfilment of the agent as a whole) and the object of purely emotional or sensitive appetite (i.e. an imagined benefit, in the form of a singular or particular, conducive to fulfilment of only a part of the agent, viz. the sentient part), and of the role of feelings and emotion in action see Grisez, Boyle and Finnis (n 10) 104-05, 122-25; and Kevin Flannery, *Acts Amid Precepts* (Catholic University of America Press 2001) 119-37. See also Brock (n 11).

[47] Grisez, Boyle and Finnis (n 10) 125-7.

> ...Descriptions of actions adequate for moral evaluation must say or imply how the agent's will bears on relevant goods.[48]

The last point is important because there are at least three ways in which an agent's will may bear on human goods and which 'constitute three senses of "doing."'[49] The relevant way or sense must be specified by the act's description if the description is to be adequate for the purpose of moral evaluation for, as we shall see, 'not all modes of responsibility apply to all three sorts of doing...'[50] The three ways in which one's actions may relate to human goods can be summarised as follows:

> [Ends:] First, one acts when one chooses something for its intrinsic value, intending it as an end, as something by which one immediately participates in a good...
>
> [Means:] Secondly, one acts in a different way, when one chooses something not for itself but as a means to some ulterior end... The chosen means need not be such that it would never be chosen for its intrinsic value: for business purposes one sometimes makes a trip one might take as a vacation...
>
> [Side-effects:] Thirdly, one acts in a still different way in so far as one voluntarily accepts side-effects caused incidentally to acting in either of the two prior ways...
>
> In formulating moral norms, it is especially important to distinguish the meanings of "intentional". One intends in different senses what one tries to bring about as an instantiation of a good and what one chooses as a means to something ulterior. In the analysis provided [here] one does not *intend* what one accepts as a side-effect.[51]

It is useful at this point to consider in a little more detail, in the light of the above distinctions between end, means and side-effect, the functioning of two particular requirements of practical reasonableness.

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[48] Finnis, Boyle and Grisez (n 32) 291.

[49] ibid 289.

[50] ibid 292.

[51] ibid 289, 291. See John Finnis, 'Human Acts' in *CEJF II* 141-2.

It can now be seen, for example, that the Pauline[52] or Kantian[53] requirement 'Do not choose directly against any basic human good' governs the choice of objects intended as an ends or as a means but does not have a role to play in evaluating the reasonableness of an act which, as a foreseen but unintended side-effect, results in harm to a basic good. There is no such limitation to the relevance of the requirement of impartiality between persons or what can simply be termed the principle of fairness or the Golden Rule: do unto others as you would have them do unto you. Thus, one would act unreasonably in asserting that an act X with side-effect Y was morally permissible on the grounds that it was not excluded by any of the requirements of practical reasonableness, save that of the principle of fairness. Such a non-integral or arbitrary approach to the bringing to bear on moral judgment of all relevant requirements is precisely what has been identified as constitutive of error and unreasonableness in practical reasoning.

An assessment of the fairness of a proposed side-effect requires a consideration of all the contingencies and circumstances of the situation of choice. In this sense, it is a judgment that, though objective (if made attentively, intelligently and reasonably), is necessarily context-relative. Moreover, one's assessment of the reasonableness of allowing an envisaged harmful side-effect may rely in part on an evaluation based on one's own feelings or emotions, which may themselves be more or less reasonable, though typically within fairly wide and culturally-informed limits.[54] By contrast, an assessment of the compatibility of the intended ends or means of a proposed act with the

[52] St Paul's Letter to the Romans 3:8; 6:1, 15.

[53] 'So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.' Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor tr, CUP [1785] 1997) 37 [4:429].

[54] Finnis, 'Commensuration' (n 10) 252.

Pauline/Kantian[55] principle is neither context-relative nor emotional, in the senses just outlined. Accordingly, it is possible to generate moral conclusions or specific (negative) moral norms from the application of this principle which, unlike positive moral norms based on the principle of fairness (or the other requirements of practical reasonableness), are context-independent and hence exceptionless (absolute).[56]

Exceptionless negative moral norms, however, while important (especially in law), are few in number and necessarily leave a vast area of practical deliberation and judgment underdetermined. Within that area of choice the context-dependence and relative abstraction of positive moral norms (taken in conjunction with the incommensurability of the basic human goods whose reasonable pursuit they aim to guide), though certainly capable of narrowing the range of acts which may be judged morally acceptable, also necessarily leave many practical choices rationally underdetermined. Contrary to the idea that practical deliberation and judgment can be reduced to mere calculation and demonstration, the frequently underdetermined rationality of practical reasonableness creates the very possibility of meaningful or significant, i.e. free and self-determining, moral *choice*. For a free choice is a choice between one or more *intelligible* goods, a possibility denied by those for whom practical reasoning always aims at the discovery of the best or uniquely reasonable (and therefore solely intelligible) course of action.[57]

[55] See notes 52 and 53 above.

[56] NLNR 223-6; John Finnis, *Moral Absolutes: Tradition, Revision, Truth* (Catholic University of America Press 1991) 1-57.

[57] On the dependence of the possibility of significant moral choice and genuinely creative self-determination, and hence the valid affirmation of human free choice, on the incommensurability of the basic goods see Finnis, *Fundamentals of Ethics* (n 14) 136-42. See also Finnis, 'On Creation and Ethics' (n 9) 184.

The rational underdeterminacy of practical reasoning means that many of an individual's wholly reasonable choices, though not in any sense *irrational*, will necessarily be ultimately determined by subjective and highly personal factors that resist expression as a universalised or general rule or as a deduction from such a rule. In this limited sense, one can agree with Yves Simon that 'unlike scientific judgment, practical judgment, for the very reason that it is ultimately determined by the obscure forces of the appetite, does not admit of rational communication.'[58]

IV.4 Conclusion

In this chapter, I have explored those standing considerations of personal right judgment (or 'morality') which help determine, as a general matter, the reasonableness of choices between competing opportunities for human flourishing. In the next chapter I consider in detail the practical shortcomings of relying on morality alone as the only source of guidance for choices of persons living in society. These shortcomings stem from both the underdeterminacy of practical reason itself (as noted above) and the inescapable reality of error and unreasonableness in the practical reasoning of members of any typical political society.

[58] Simon (n 22) 25. Note that, strictly speaking, this ineradicable underdeterminacy applies only to reasoning about goods chosen as means and not to reasoning about ultimate ends (i.e. the basic goods) on which the practical reasoning of all perfectly intelligent, perfectly informed and perfectly reasonable/virtuous people would agree. ibid 24-8.

CHAPTER V – ON THE PRACTICAL NECESSITY OF SOCIAL CO-ORDINATION AND AUTHORITY

> *Legal philosophy is nothing but practical philosophy applied to one social institution.*[1]

V.1 Introduction

Chapter IV argued that even faultless adherence to the principles and requirements of practical reasonableness by every member of a political society is not sufficient to eliminate the possibility of divergence of opinion between truly reasonable individuals when faced with certain choices. It can be added that such saintly adherence could reasonably be expected to increase the potential for reasonable disagreements occurring.[2] Consequently, this chapter argues, it is practically necessary, and hence reasonable, for each member of the community to recognise as authoritative certain supplementary sources of more specified and contextually appropriate norms to provide more determinate guidance for personal decision-making.[3] Different classes of such supplementary sources of norms can be differentiated in two principal ways. They can be

[1] *PRN* 149.

[2] For 'dedicated members of the group will always be looking out for new and better ways of attaining the common good, of co-ordinating the action of members, of playing their own role. And intelligent members will find such new and better ways, and perhaps not just one but many possible and reasonable ways.' NLNR 231-2. See also ibid 254-5. Finnis is here building upon a theme richly developed in Yves R. Simon, *Philosophy of Democratic Government* (University of Chicago Press 1951).

[3] It is a point of considerable importance to the history of modern legal theory that one of its shaping masters failed to recognise this feature of the theoretical tradition that he was devoted to opposing. Kelsen's failure to advert to the classical natural law tradition's acknowledgement of the underdeterminacy of moral reasoning (and, indeed, the likelihood of both inculpable error and culpable unreasonableness on the part of significant numbers of individuals) prevented him from understanding the rationale for such supplementary sources of norms according to that tradition: 'From the point of view of ...[natural law] doctrine the organs of the community do not produce the law, they only re-produce a pre-existing law created by God, nature, human reason, or in some other mysterious way,' Hans Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1947) 57 Yale Law Journal 377, 386; '[W]hy should a human-arbitrary order be needed for the regulation of human conduct, if a just regulation can already be found in an order "natural," evident to all and in harmony with what all men of good will would propose?' Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949) 412. There is little evidence that Hart recognised this misunderstanding at the heart of Kelsen's opposition to natural law theory.

distinguished by considering them from the practical (or first-person or internal) perspective of the deliberating moral agent. For different systems will have a different place in our practical reason depending on the degree of directness or stringency of their connection with the furthering of the common good. The different types of norms can also be distinguished from an external perspective by reference to certain features or properties such as the social consequences of their violation or the formality of their articulation and modes of creation, amendment, application and enforcement. At one end of the spectrum, whether considered from either the internal or external perspective, we can locate, for example, the wholly conventional rules of etiquette prevalent in a society governing dining in a restaurant, while we can place at the other end the criminal law of homicide in a modern nation state. The method pursued in this thesis seeks to explain the law's defining features by prioritising attention to the internal perspective and thus to law's ends. In this chapter I consider in more detail the argument for the practical necessity of law understood as a mode of political authority capable of identifying, and facilitating the removal of, the various obstacles to the co-ordination (including negative co-ordination) of the choices and actions of members of a political society which is necessary for the common good. The next chapter considers what this tells us about the nature of this mode of political authority.

V.2 On the need for co-ordination among practically reasonable persons

I have argued (IV.2.3) that the common good requires a reasonable and effective co-ordination (a) of the distribution among the members of the society of possible opportunities for participation by individual members in certain goods and (b) of the choices made between such opportunities by individual members. In this section I wish to consider in more detail the various problems which face practically reasonable

individuals seeking to bring about or sustain such co-ordination. First, it is necessary to say something about my terminology. As will be seen, my analysis of the authority and nature of law is closely connected with the idea of a co-ordination solution. What I mean by a co-ordination solution will become clear, but obviously this term and the related term 'co-ordination problem' have been legitimately used by different theorists in different ways. Finnis, for example, understands a 'co-ordination solution' to be something which resolves a 'co-ordination problem' and defines a 'co-ordination problem' quite broadly to include a range of circumstances which cut across the categories of strategic games or problems often discussed by those working within the distinct discipline known as game theory.[4] By contrast, I shall use the term 'co-ordination problem' to designate merely one of the several classes of what I shall call 'problems of strategic interaction' to which the law responds. Despite this difference, however, I shall for ease of exposition follow Finnis in using the term 'co-ordination solution' to refer generically to any solution of a problem of strategic interaction, regardless of the specific class of problem in question.

V.2.1 Intending particular goods as a means to the common good: the problem of ends

What exactly does it mean to say that the practically reasonable person should act for the sake of the common good or intend the common good as an end or goal of action? An example may be helpful. Imagine a political community engaged in a war of self defence against an aggressor. One can say that the common good (or a constitutive element of it) of that community and of its army is victory. An officer is ordered by his superiors to

[4] 'The term...extends to any situation where, if there were a co-ordination of action, significantly beneficial payoffs otherwise practically unattainable would be attained by significant numbers of persons, where there is sufficient shared interest to make some such co-ordination attractive, and where the problem is to select some appropriate pattern of co-ordination in such a way that co-ordination will actually occur.' John Finnis, 'Law's Authority and Social Theory's Predicament' in *CEJF IV* 61.

hold a certain position at all costs. As a good citizen and a good soldier he intends the common good of his community and his army, namely victory. Let us call this the general or ultimate object of his intention. But he acts on this ultimate intention by obeying as best he can the orders given to him by his superiors and defending his assigned position. Let us call this the specific or immediate object of his intention. It is clear from this example that while every member of the army, from the highest ranking general to the lowest serving solider, may and should share the same general intention ('victory'), it would be unreasonable and counter-productive if all treated this as the specific object of their intention. But it is equally clear that it would be unreasonable and counter-productive if no one was responsible for *specifically* intending the victory and acting upon such a specific object by the design and implementation of a military plan, i.e. by co-ordinating the actions (i.e. particular goods specifically intended[5]) of every individual agent. Indeed it is only on the assumption that at the top of the army's and community's chain of command (i.e. at the level of what can be termed the 'public reason and will') victory is both the general and specific object of intention that it is rational for the officer to pursue the general intention of the common good by means of acting upon the specific intention of defending his position according to command of his superiors.[6]

The army example is enlightening with respect to the distinction between general and specific intentions. It allows us to see how participation in schemes of purely private advantage, such as commercial contracts, on the part of individuals may be rationally justified (or even required) and specifically intended as a mode of acting for (or with due

[5] For simplicity's sake this example assumes the practical reasonableness of every individual. The complexities that emerge with the recognition of that the actions of practically unreasonable individuals must also be co-ordinated are considered below (V.3).

[6] For this example and several others, see Simon (n 2) 39-47. See also Mary M. Keys, *Aquinas, Artistotle, and the Promise of the Common Good* (CUP 2006) 118-24. For discussion of Aquinas's use of the military chain of command example see *Aquinas* 32-7. For further analysis see Simon (n 2) 48. He distinguishes between intending the common good 'formally' and 'materially'. See also *NLNR* 144-7, 165-73, 233, 305.

regard to) the common good of their complete society.[7] The army example is perhaps misleading, however, as a guide to the ordering of a political society in two respects: first in respect of the nature of the common good as a specific object of intention and second in respect of the constitution of the public reason and will.

The nature of the common good of an army at war differs in at least one important sense from that of a political society. The common good of the former is a particular goal or foreseeable end state (victory) attainable by efficient deployment of means. There is no such equivalent goal in respect of a complete or political society or its jural order (as established and expressed by its existing laws – I.V.1). Thus a legal system does not have a purpose in the same sense that one can say that an army at war has a purpose. Rather (and strictly in this same sense of purpose):

> …the law…does not serve any purpose but countless different purposes of different individuals… [L]aw is therefore not a means to any purpose, but merely a condition for the successful pursuit of most purposes. Of all multi-purpose instruments it is probably the one after language which assists the greatest variety of human purposes.[8]

With respect to the public reason and will, it is not necessary that only a small subset of the community are charged with the responsibility of specifically intending the common good – as is the case in an army. All that is claimed is: (a) that there is a distinction between (i) the responsibility of generally intending the common good (which the common good requires of each member), (ii) the responsibility of specifically intending, in a reasonable manner, one's own particular good (which the common good also requires of each member) and (iii) the responsibility of specifically intending the common good (which the common good requires of *someone* – whether that be one, some

[7] See *NLNR* 305.

[8] F.A. Hayek, *Law, Legislation and Liberty Volume I: Rules and Order* (University of Chicago Press 1973) 113.

or all members);[9] and, therefore, (b) that what counts as 'a reasonable manner' for action on the basis of the intention in (a)(ii) cannot be reasonably known or determined without the co-ordinating action of someone acting on the basis of the intention in (a)(iii).

For Simon the intending of the common good specifically by some person or persons can only be achieved by the exercise of authority. For, as the distinction between a specific and general intention of the common good reveals: 'The primacy of the common good demands that those in charge of particular goods should obey those in charge of the common good.'[10] In the other words, the co-ordinating action of those responsible for specifically intending the common good cannot succeed unless it is treated by all members of the community as authoritative and this itself creates at least one reason why every reasonable member of the community should so treat it (at least presumptively and defeasibly). I shall return to this claim in V.4 and V.5.5 and consider in more detail in V.6 what is meant by authority and of being responsible for specifically intending the common good.

V.2.2 Intending particular goods as a means to the common good: the problem of means

The last subsection looked at the need for co-ordinating the choices made by members of a complete society about which goods to pursue. This need would arise even in a community of truly reasonable persons or saints, i.e. of persons committed to acting for the sake of the common good. The discussion has relied on a distinction between particular goods and the common good of the complete society and has explained how the

[9] Simon (n 2) 37-8, 47.

[10] ibid 57. Note that, as Simon makes clear, this does not answer the question of how that authority should be identified or constituted. The questions of the proper *modes* and *instruments* of authority is separate from the above discussion of the essential *functions* of authority for a community of even perfectly practically reasonable persons.

former must somehow be properly ordered to the latter. In this subsection, I want to consider in more detail the problems facing individuals in attaining their chosen particular goods.

To begin, it is necessary to recall two conclusions from the above meta-ethical discussion. First, effective participation in a basic good (and hence in any goods pursued as a means to such basic goods) will often require, whether instrumentally or constitutively, co-ordination, including negative co-ordination,[11] diachronically and/or synchronically, with another person or group of persons (IV.2.3). Second, even a perfect knowledge and application of the principles and requirements of practical reasonableness cannot rationally determine a uniquely correct answer as to what one ought to do at every given moment – though it may of course rule out very many options as morally inappropriate or practically unreasonable (IV.3). These two realities account for both the necessity of and the problems surrounding what may be termed situations of *strategic interaction*. A situation of strategic interaction exists where each person's 'best choice of action depends on the action he expects the other to take, which he knows depends, in turn, on the other's expectations of his own.'[12]

In assuming that all parties to any possible strategic interaction are practically reasonable we are assuming that all are ready and willing to direct their pursuit of specifically intended particular goods by reference to their general intention of the

[11] i.e. co-ordination required not as a means to facilitate co-operative encounters between agents but rather primarily as a means to *prevent* undesirable encounters, e.g. the rules of the road regulating traffic in the interests of preventing collisions. *NLNR* 138-9. This addresses Green's objection that co-ordination cannot properly be viewed as the justificatory rationale of legal authority since law often works to *prevent* solutions to co-ordination problems (e.g. laws against cartels). Leslie Green, *The Authority of the State* (OUP 1988) 117.

[12] Thomas C. Schelling, *The Strategy of Conflict* (Harvard University Press 1960) 86. See also Gerald Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 Journal of Legal Studies 165, 173; and Edna Ullmann-Margalit, *The Emergence of Norms* (OUP 1977) 78.

common good and, therefore, to the authoritative directions of those, whoever they might be, who are responsible for ordering such specific intentions for the sake of the common good. This necessarily excludes the possibility of pure-conflict or zero-sum situations and so the types of strategic interaction at issue among practically reasonable persons are in the form of a co-ordination problem.[13] Rewording only slightly the formulation proposed by Köpcke Tinturé,[14] one can say that a strategic interaction problem is a co-ordination problem when its end and means have the following properties:

> End: **Goal of general interest:** A goal is recognised by a practically reasonable person as needing to be brought about (as a requirement of practical reasonableness / for the sake of the common good).
>
> Means:
>
> > **Convergent behaviour:** The goal can only be (appropriately) brought about if and as the behaviour of a certain number of people converges on a pattern; and
> >
> > **Alternatives:** There are at least two mutually exclusive but similarly appropriate and available patterns of behaviour (or co-ordination equilbria).[15]

[13] For discussion of strategic interaction as a spectrum running from pure co-ordination problems to pure conflict or zero-sum problems, see Schelling (n 12) Chapter 4 and Appendix C; David K Lewis, *Convention* (Harvard University Press 1969) 13-14. See also *NLNR* 255.

[14] Maris Köpcke Tinturé, 'Some Main Questions Concerning Legal Validity' (DPhil thesis, Oxford 2009) 113.

[15] Postema (n 12) 174. See also Lewis (n 13) 24.

Assuming perfect intelligence and perfect information on the part of all the practically reasonable parties, an instance of strategic interaction may be successfully achieved where, united in pursuit of a common end, all parties judge that there is only one pattern of co-ordinated action that counts as an appropriate means. Given the fact, however, that practical judgment is very often rationally underdetermined such situations are likely to be rare and there will more often than not be two or more not unreasonable patterns of co-ordinated action suitable as means to the agreed end.[16]

V.3 On the need for co-ordination with practically unreasonable persons

So far, in discussing the problems of co-ordinating choice by reference to the common good of their political society, I have restricted my analysis by stipulation to a community of saints, i.e. perfectly intelligent, perfectly informed, perfectly reasonable/virtuous persons. One purpose of this restriction has been to show that the need for co-ordination of choice and action does not arise solely from any deficiency of human nature or from any amoral or individualistic account (whether egoistic or altruistic) of human motivation. Another purpose is to facilitate a greater precision in the analysis of the different ways that law, and ultimately adjudication, functions to facilitate strategic or co-ordinated interaction for the sake of the common good. Assuming that the first purpose has been achieved, it is necessary to extend our analysis beyond the circumstances of the community of saints and into the daily realities of the actual communities in which we live and in which individuals are rarely, if ever, perfectly intelligent, informed or practically reasonable. I shall term these 'mixed communities'. In a mixed community,

[16] Theorists distinguish between 'pure' and 'partial' co-ordination problems. For discussion and examples of the partial conflict problem see Jean Hampton, *Hobbes and the Social Contract Tradition* (CUP 1986) 151-3. It has also been called the 'battle of the sexes' problem: Robert Duncan Luce and Howard Raiffa, *Games and Decisions* (Wiley 1957) 90-94, Chapter 6.

the law will both acquire a new function and, in addition, will be required to perform its co-ordinating function in new ways.

The new function arises from the fact that, outside of a hypothesised community of saints, there is the standing possibility that persons will fail to act voluntarily in accordance with universal negative and positive moral norms (i.e. with those general requirements of practical reason knowledge of which is not contingent on either the outcome of any strategic interaction or a specifying act of authoritative *determinatio*). Thus there will arise situations where there is a practical need to compel, under threat of sanction, such persons to act in certain ways, in particular where this is necessary to prevent serious harm to the well-being of other persons. The function of the law in compelling behaviour in conformity with basic moral norms will be considered further below (V.3.1). In addition, several further types of problems of strategic interaction, beyond the problems just considered (V.2.1-2), will face those members of a mixed community who strive to act for the sake of the common good. These can be grouped into the following three basic types: pure conflict problems, co-ordination problems and free-rider problems.[17] Each type of problem shall be considered in turn below (V.3.1-3). Finally, in V.3.4 I distinguish a class of co-ordination problems that emerge as a consequence of the securing of solutions to these first three problems, namely problems related to the violation of co-ordination solutions.

[17] Russell Hardin speaks of 'co-ordination, exchange (prisoner's dilemma), collective action (n-Prisoner's Dilemma), and fundamental conflict problems'. I deal with exchange and collective action under the common heading of free rider problems. Russell Hardin, 'Why a Constitution?' in Denis J. Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP 2013) 62.

V.3.1 Pure conflict problems

A pure conflict problem arises where either one or both of A and B do not believe that there is at least one scheme of co-ordination (including in particular negative co-ordination) that will be more desirable to both A and B than no scheme of co-ordination. Accordingly, these are situations which Luce and Raiffa describe as 'strictly competitive' or 'zero-sum' games.[18] A pure conflict problem is characterised by both an epistemic and a motivational obstacle to the pursuit by A or B or both of successful co-ordination. Accordingly this is a type of situation or game that cannot arise within a community of saints nor be accepted at face value by any practically reasonable person. For such a community or person the common good provides an over-riding general principle of action in light of which all conflicts among specifically intended goods can be reconciled and the possibility of an ultimate (true) conflict of reasonably pursued ends must be rejected. Thus the willing or causing of harm to another by one's failure (culpable or otherwise) to adhere fully to the requirements of practical reasonableness or the common good can be characterised as creating a type of pure conflict problem in which there are epistemic and motivational obstacles to the achievement of an appropriate scheme of negative co-ordination.[19] It is because of the actuality and standing possibility of such failures that the need arises in a mixed community for at least some of the norms of morality to be treated or re-stated as laws of a political society.[20]

[18] Luce and Raiffa (n 16) Chapter 4.

[19] If person X desires (whether maliciously or innocently) to do act φ and φ involves an (unreasonable, immoral) harm to person X (such that the doing of φ by X is contrary to the common good) then one can speak of a pure conflict problem in that X (unreasonably) desires that φ be done and Y (reasonably) desires (or can be presumed to desire) that φ not be done and there is no scheme of co-ordination which, in the eyes of either X or Y, can either satisfy or reconcile both desires.

[20] The question as to the appropriate limit (and limiting principles) to the transformation of requirements of practical reasonableness into sanction-backed laws and government polices more generally (i.e. the question of 'limited government') is beyond the scope of this thesis, save to note that it too constitutes a co-

In the case of moral norms which require no further specifying determination to be complied with such a transformation into law has at least three distinct ends:

(1) To create an additional and independent incentive for compliance that is of relevance to influencing the decision making of the practically unreasonable (i.e. fear of sanction).

(2) To facilitate the solving by law of the co-ordination problems that any breach of these moral norms may create with respect to the investigation and identification of the breach and the remedying of the wrong done.[21]

(3) To educate and effect the moral (re)formation of immature or unreasonable members of the society.

With respect to other moral norms their transformation into law by means of a specifying restatement may be necessary even in a community of saints in order to resolve co-ordination problems resulting from their underdeterminacy. The problem here is epistemic only and not motivational. In the circumstances of a mixed community, however, the specifying transformation of such norms into law may also be required to address the combination of epistemic and motivational obstacles presented by pure conflict problems. Such transformation has the same three ends just noted in relation to the transformation into law of determinate moral norms.

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ordination problem (see V.3.2) which requires solution for the sake of (and by means of critical refection upon the substantive requirements of) the common good.

[21] HLA Hart, 'Problems of the Philosophy of Law [1967]' in *Essays in Jurisprudence and Philosophy* (OUP 1983) 114. *NLNR* 281-3. On remedies see V.3.4.

V.3.2 Co-ordination problems

In addition to the types of co-ordination problems already discussed in V.2.2 in respect of a community of saints, there is a further class of such problems where one or more of the parties are, or even potentially are, practically unreasonable. These are situations where (a) it is necessary for persons X and Y to conform to one of several possible schemes of co-ordination in order for each to secure certain private goods, (b) both X and Y know (a) and are instrumentally-rational; and (c) both X and Y know (b). Here pursuit of the private good of each person coincides with the pursuit of their collective good (i.e. aggregated private goods) and the only obstacles to successful co-ordination are epistemic (i.e. the lack of mutual knowledge as to which scheme of co-ordination they should both conform to). A variation is where either X or Y or both do not know if (or are not sufficiently assured that) the other party is both fully informed and rational. Here pursuit of the private good of each should coincide with pursuit of their collective good but there are both epistemic and, as a consequence, motivational obstacles to successful co-ordination. This variation of the co-ordination problem (which can also be viewed as a variation of a Prisoner's Dilemma problem[22]) has been called an 'assurance game' by Amartya Sen.[23] Many real life co-ordination problems are probably of this type since, given the realities of human fallibility, instrumentally-irrational actions by other people (as distinct from wholly practically unreasonable actions) is an ever present possibility in any situation of strategic interaction.[24]

[22] Green (n 11) 140.

[23] For references and discussion see Hampton (n 16) 67-8.

[24] Assurance-based problems are also referred to as 'Stag Hunt' problems. Ullmann-Margalit considers them an 'intermediary case' between a prisoners' dilemma and a co-ordination problem. Ullmann-Margalit (n 12) 121-7. See also Lewis (n 13) 7 and William Poundstone, *Prisoner's Dilemma* (Anchor Books 1992) 218-221.

These situations, like those in the community of saints, present co-ordination problems (in the narrow sense - V.2.2) with the same structure of strategic or interdependent choice as the identically-named 'games' studied by game theorists but differ, crucially, with regard to the postulates of what constitutes the circumstances and criteria of a rational choice. For game theory relies on a deliberately reductive modelling of practical deliberation as a form of purely instrumental reasoning about transitively-ordered subjective preferences blind to the existence of a common good as an intelligible end or ordering principle of action. Such analysis can be insightful with respect to certain problems of strategic interaction faced by practically reasonable and unreasonable persons alike, but they generally suffer from the unavailability in most real life situations of all or most of the idealising assumptions and postulates that structure the modelled games. The most obvious of these non-transferable assumptions are: (a) transitivity of personal preferences,[25] (b) common knowledge of each player's order of preferences (and, hence, 'utility function'),[26] (c) common knowledge of who is and is not a player and of the rules or circumstances or bounds of the game,[27] (d) exclusion of a rationally motivating recognition of a common good that transcends the immediate individual goods constitutive of the game. Moreover it is the practical impossibility and/or unreasonableness of each of these postulates which renders rare in real life the stability which in game theory both characterises the salient solution of an iterated co-ordination problem and renders deviation from it, once achieved, simply irrational.

[25] See discussion in Luce and Raiffa (n 16) 25-6, 35-7.

[26] ibid 5, 34-7.

[27] ibid 7. For ease of exposition I have tended to analyse the different classes of strategic interaction problem in terms of only two players. Needless to say, from the perspective of pure games theory, there may be important additional considerations when there are more than two players (e.g. coalition formation), but such considerations have no bearing on my argument.

V.3.3 Free rider problems

Free rider problems include situations where it is in the strictly private interests of both X and Y respectively, when faced with a once-off situation of strategic interaction, not to conform to a scheme of co-ordination beneficial to both *no matter what the other person does* (i.e. to 'defect'), and both X and Y know this. Here an instrumentally-rational, maximising pursuit of private goods by each person *contradicts* both pursuit of the collective best interest of the group (i.e. the maximum aggregate of private goods) and the achievement of the best possible personal outcome for each. Thus there is a motivational obstacle to the achievement of a successful pattern of co-ordination. Such situations are traditionally termed a Prisoner's Dilemma[28] which in turn may be considered an instance of a free rider problem. There is a non-Prisoner's Dilemma variation of a free rider problem in situations involving three or more parties where it is in the individual interests of X, Y and Z not to comply with a scheme of co-ordination providing a non-excludable good to all if (a) the co-ordination only requires the compliance of two of the parties (i.e. it is a 'step good') and (b) each party has reason to believe that the other two parties are more likely to comply than not to comply.[29] In structure this is comparable to a form of co-ordination problem (see V.2.2) and so admits of a different type of solution from that of Prisoner's Dilemma problems. It should be clear, however, that no free rider problems of either kind could emerge in a community of saints. For it is only because of the failure of one or more parties to recognise the common good as an end to which all truly reasonable action is referable that (a) interactions with potential for mutual individual benefit can present a Prisoner's Dilemma problem or (b) the reliable production of

[28] See ibid 94-7; Ullmann-Margalit (n 12) 18-31.

[29] Hampton (n 16) 177-181 who borrows the term 'step good' from Russell Hardin, *Collective Action* (John Hopkins University Press 1982).

collectively beneficial step goods can fall hostage to the self-serving gambles of every individual.[30] Thus it seems that instrumentally-rational self-serving individuals (i.e. individuals who do not recognise the common good as a practical principle) would be hindered not only in forming any (complete or incomplete) society constituted by a common good (which one might expect) but also in entering into and sustaining relationships (e.g. contractual or promise based agreements) desired merely as means to private goods[31] – an irony that forms the basis for efforts by theorists committed to Hobbesian or game theoretical accounts of practical reason to demonstrate the 'rationality' (in the purely instrumental sense) of the recognition and empowerment of an authority in such a society.

As should be clear from the foregoing discussion (V.3.1-3) of the three basic types of problems arising in situations of strategic interaction in a mixed community, while my analysis recognises all the various problems discussed by game theoretical accounts it does so for significantly different reasons and on the basis of a more substantive theory of practical reasoning and morality. It thus stands apart from the

[30] That the denial of the existence and practical priority of the common good is a necessary pre-condition for a Prisoner's Dilemma is hinted at in the non-philosophically-refined concluding remark of Poundstone's book that 'Cold war propaganda painting the "enemy" as a nation of heartless automatons is the sort of thing that predisposes people to prisoner's dilemmas. The ability to see "opponents" *as fellow beings* frequently transforms a nominal prisoner's dilemma into a much less troublesome game.' (emphasis added) Poundstone (n 24) 277-78.

[31] It is beyond the scope of the present discussion to consider the literature devoted to discussing whether a Hobbesian state of nature actually presents a once-off Prisoner's Dilemma problem. Iterated problems, and like situations where individuals' choices are not simultaneous but contingent on each other, are more amenable to solution without recourse to contracts, promises or externally imposed norms. See Hampton (n 16) 74-89, 225-39; Russell Hardin, 'Time and Rational Choice' in Guy Kirsch, Peter Nijkamp and Klaus Zimmerman (eds), *The Formulation of Time Preferences in a Multidisciplinary Perspective* (Gower Publishing 1988); Robert Axelrod, *The Evolution of Co-operation* (Penguin 1990) 126-32.

theories (and critiques) of contractarian or conventionalist justifications of authority derived from Hobbesian or game theoretical premises.[32]

V.3.4 Problems arising from violation of co-ordination solutions

The different types of problems just considered have a common feature. They all arise because there is no co-ordination solution in place that is adequate either epistemically or motivationally or both. In this sense the distinctions drawn are synchronic. But it is also possible to distinguish the different needs for co-ordination solutions diachronically. On this division all of the preceding problems can be classed together as related to forward looking solutions, namely solutions which aim to provide the epistemic and motivational grounds for heading-off the various obstacles to co-ordination required by the common good. This class of problem can be distinguished from a second class that concerns the problems of co-ordination for the sake of the common good that arise on foot of the solutions to the first class. With the recognition of solutions constituted by entitlements and norms (see V.5 below) comes the possibility of both clear and unclear cases of their violation and of allegations, both true and false, of and about the occurrence of such violations. This creates the possibility of new co-ordination problems which must be solved for the sake of the common good: Did what is alleged to have occurred count (then) as a violation? Did what is alleged to have occurred actually occur? These two questions are necessary precursors to a third, which gives them their point and urgency: What is now due to the wrongdoer and the victim respectively as a result of *that* violation? These questions are all backward looking in that they require sound judgments

[32] This is recognised in principle by Green (n 11) 102 note 18 and nothing here takes issue with his conclusion that: 'it is wrong to think that the rigours of an individualistic and instrumental consequentialism justify political authority' – though of course I reject his implicit mischaracterisation of Finnis's position in those terms. For an opposite assessment of the success of a conventionalist, rather than contractarian, understanding of a Hobbesian justification for authority see Hampton (n 16) Chapters 8 and 9.

to be made *in the present* about (a) what the jural relations required at the (past) time of their alleged violation, (b) what actually occurred at that time (both factually and legally speaking) and (c) what is required *now* to *restore or rectify* what elements of just order were lost *then* (or since then) given the particulars of the violation.

V.4 Justifying the authority of the law

The discussion so far has outlined the various types of obstacles to strategic interaction which may potentially stand in the way of that effective and reasonable participation in basic goods by practically reasonable persons which requires, whether diachronically or synchronically, instrumentally or constitutively, the co-ordination (both positive and negative) of their choices and actions with those of other persons. It follows that the common good requires a reasonable and effective ordering of the individual members of a political society through a co-ordination of their choices and actions (IV.2.3).[33] It is in so far as a legal system is practically necessary for such co-ordination that it may be correctly judged *authoritative*. In the remainder of this chapter I defend this account of the authority of law (V.4-6) and discuss its implications for our understanding of the defining features and ideals of a legal system (V.7).

By the attribute 'authoritative' in the previous paragraph, I mean: possessing the power to promulgate normative standards for that society and thereby (i.e. correlatively[34]) the power to impose on members of that community a political (or legal, as the case may be) obligation[35] to act in accordance with such standards which is '[1] comprehensively

[33] This is accepted as a 'commonplace' by Raz: *AL* 51-1. See also *Legal Process* 102-13.

[34] I am assuming that these two powers are correlative and inter-definable. For debate on this point see Rolf Sartorius, 'Political Authority and Political Obligation' (1981) 67 Virginia Law Review 3; Green (n 11) 237-40; John Finnis, 'Positivism and 'Authority'' in *CEJF IV* 82-7.

[35] I shall use the term obligation and duty interchangeably.

applicable, [2] universally borne, … [3] content-independent'[36] and (4) *per se* creates, presumptively and, therefore, defeasibly, a moral duty to obey.

The third feature of political obligation is simply an elaboration of what is meant by authority *per se* which Finnis summarises as follows:

> A person treats something (e.g. an opinion, a pronouncement, a map, an order, a rule...) as authoritative if and only if he treats it as giving him sufficient reason for believing or acting in accordance with it *notwithstanding* that he himself cannot otherwise see good reason for so believing or acting, or cannot evaluate the reasons he can see, or sees some countervailing reason(s), or would himself otherwise (i.e. in the absence of what he is treating as authoritative) have preferred not so to believe or act. In other words, a person treats something as authoritative when he treats it as, in Joseph Raz's useful terminology, an exclusionary reason, i.e. a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant and would in the absence of the exclusionary reason have sufficed to justify proceeding in some other way.[37]

By contrast, the first two listed features of political obligation follow from the fact that we are here considering *political* authority, i.e. the authority concerned with facilitating the solution of all of the problems of strategic interaction which bear upon the common good of the political society. The obligation is 'comprehensively applicable' in that it applies in full to every promulgated norm – there are no degrees of obligation from the perspective of legal discourse or argument. The obligation is 'universally borne' in that it applies without exception to all addressed by the standards.

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[36] Matthew H. Kramer, 'Moral and Legal Obligation' in Martin P. Golding and William A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 179 cited in William A. Edmundson, 'State of the Art: The Duty to Obey the Law' (2004) 10 Legal Theory 215, 215.

[37] *NLNR* 233-4 citing *PRN* 35-48, 58-73. The account given here by Finnis, particularly when taken with his discussion of Razian 'protected reasons' in the endnote to the passage quoted (255), synthesised the state of the discussion which Raz's then recent analyses had brought to a reasonably high degree of clarity, and subsequent debate seems not to have affected the soundness of this abstract summary.

To say that a legal obligation imposed by a legal system in its central case presumptively and defeasibly creates a moral obligation is to assert the moral authority of law in its central case. The functionalist approach to theorising about law evaluates this assertion in light of the ends and means of law. It supports a defence of the moral authority of law which I term the argument from practical necessity.[38] The argument relies on the following principle:

> [W[hat is instrumental in securing a morally obligatory goal must itself be morally obligatory, unless there is some other instrumentality, equally or more serviceable.[39]

It follows that an argument of this form for the moral authority of law must do two things. First it must show what 'morally obligatory goal' the law serves. Second it must show that law is the most 'serviceable' instrument for securing that goal. The first step has been addressed in the preceding sections: the morally obligatory goal is the just and effective co-ordination necessary (V.2-3) for the sake of the common good (IV.2.3). The second step will be addressed in the following three stages:

(1) Evaluation of the alternative sources of co-ordination solutions and judgment as to the practical necessity for authority (V.5).

(2) Discussion of the problem of identifying a determinate authority for a political society (V.6).

[38] For examples of this approach to the defence of the moral authority of the law see Simon (n 2); G.E.M. Anscombe, 'On the Source of the Authority of the State' in *The Collected Philosophical Papers of GEM Anscombe: Volume 3 Ethics, Religion and Politics* (Blackwell 1981); Samantha Besson, *The Morality of Conflict* (Hart Publishing 2005) Chapter 13.

[39] John Finnis, 'Law's Authority and Social Theory's Predicament' (n 4) 48. On practical necessity see IV.2.3 note 31 above.

(3) Identification of the reasons for judging that law is the mode of authority most serviceable for providing the co-ordination required for the sake of the common good (V.7, VI.1, VI.3).

V.5 Different sources of co-ordination solutions and the rational necessity of authority

There are ultimately only two sources of co-ordination solutions: agreement (i.e. unanimity) and authority.[40] Solutions from either source must accomplish two distinct tasks in order to prove effective, namely

> (1) the selection of a pattern of co-ordination, and (2) the implementing of that pattern in actual cooperation to the degree required to attain desired benefits.[41]

Co-ordination based on agreement faces serious difficulties in fulfilling either task. Given the plurality and incommensurability of the first principles of practical reason (IV.2.2) the typically underdetermined range of possibilities not excluded by the requirements of practical reasonableness (IV.3.3), practically reasonable disagreement over the best pattern of co-ordination to adopt in any given situation of strategic interaction (not to mention disagreement generated by inculpable errors of judgment or by unreasonable concerns and motivations leading to Prisoner's Dilemma and pure conflict situations) can be reasonably expected within any political society. Moreover, even if a particular pattern of ends and means could be agreed on unanimously, it would only be effective if this unanimity could endure throughout the whole period of implementation in the face of potential changes of opinion, both reasonable and unreasonable. These represent serious

[40] ibid 61.

[41] ibid.

shortcomings given the practical necessity, for the common good, of the achievement of effective solutions, not only on a once-off basis but repeatedly and reliably. It is the evident inadequacy of proceeding on the basis of unanimity-based solutions that makes authority-based co-ordination solutions a practical necessity. To see how, I shall summarise the different types of authoritative solutions which the four types of problems outlined above (V.3.1-4) require.

V.5.1 Co-ordination problems

All the parties to a co-ordination problem have an interest in a co-ordination solution emerging (V.2.2, V.3.2). Here the two primary obstacles are epistemic. For a solution to be achieved every person needs to know (a) that there is a co-ordination problem and (b) what course of action they should adopt to bring about its solution. In other words there is primarily a need for a *directive or informative solution* to distinguish one pattern as salient. In game theory the salience of a particular scheme of co-ordination, however achieved, is itself always sufficient to ensure a stable co-ordination solution. In real life this cannot be assumed (V.3.2). Thus in the interests of stabilising the co-ordination solution the epistemic obstacles to marking or maintaining a solution as salient are best addressed by *authoritative norms*. Moreover, where the issue is one of assurance caused by uncertainty as to the likelihood of another party acting rationally on the available information, then an *incentivising or motivational solution* will also be required, i.e. an authoritative norm backed by a sanction, giving all a parallel independent reason for acting in accordance with the norm.

V.5.2 Free-rider problems

In contrast to co-ordination problems every free rider problem necessarily requires an incentivising or motivational solution (V.3.3). Every person, whether practically reasonable or not, has, by definition, a reason to be dissatisfied with their predicament. For it is the essence of the Prisoner's Dilemma scenario that if each person aims for the individually most rational or secure outcome they all obtain their individually second-worst. Thus each party to the Prisoner's Dilemma problem has an interest in every party being subjected to an authoritative norm backed by a sanction in order that the choice required for the collectively most optimal outcome becomes also the individually most rational choice.[42] As Ullmann-Margalit puts it: 'In this sense it can be said that such situations "call for" norms.'[43]

V.5.3 Pure conflict problems

With respect to pure conflict problems (V.3.1), it can be said that every practically reasonable person, though not necessarily every unreasonable person, has an interest that the parties to the conflict be subjected to an authoritative norm backed by a sanction so as to either (a) transform the situation into a co-ordination problem (which may or may not then require a further solution by means of law) or (b) dissolve the problem by addressing the epistemic or motivational obstacles that may prevent a party recognising and doing what is practically reasonable. An example of the later is where the restatement by the law of a moral norm provides an independent incentive (e.g. avoidance of punishment)

[42] Ullmann-Margalit (n 12) 22. Axelrod (n 32) 133-4.

[43] Ullmann-Margalit (n 12) 22. Or as Poundstone more colloquially puts it on the concluding page of his popular introduction to game theory: 'The only satisfying solution to the prisoner's dilemma is to avoid prisoner's dilemmas. This is what we've been trying to do all along with laws, ethics, and all the other cooperation-promoting social machinery.' Poundstone (n 12) 278.

for a practically unreasonable person to comply with the norm, thereby avoid the 'pure conflict' which his failure to abide by the norm creates between the attainment of his (unreasonably) chosen 'good' and the promotion of the common good.

V.5.4 Problems of violation of entitlements and norms

The co-ordination solutions required to address problems related to the violation of authoritative solutions have a 'backward looking' character and the obstacle to such solutions is primarily epistemic in the sense that they require the giving of authoritative answers to the types of questions identified in Section V.3.4. In particular such solutions require authoritative determinations to be made as to what specifically is to be done *now* by whom in order to make good a particular past violation.

V.5.5 Is there a third option besides authority and unanimity?

That coercively enforced authoritative norms might work in these various ways to facilitate the achievement of co-ordination solutions seems plausible, but Leslie Green has argued that before one can derive from this the practically necessity of authority, one must first consider the feasibility of what he considers to be a third possibility, namely co-ordination solutions that are neither unanimous nor authoritative.[44] I shall only consider Green's argument with respect to the resolution of co-ordination problems.[45]

Green has two main objections to the premise that unanimity is the only alternative to authority. The first is that one is only faced with the two alternatives of

[44] Green (n 11) Chapter 4 and 5.

[45] Green does not address the role of authority in responding to pure conflict problems and space does not permit me to discuss the alternatives to authority which he proposes in respect of free rider problems. The essence of my critique of these alternatives is that they either do not address the issues raised by free rider problems or they merely transform the situation into a co-ordination problem and hence are themselves reliant upon the success of his argument in respect of this latter class of problems. See ibid 130-44.

unanimity or authority when one considers the question of what way to resolve a co-ordination problem from the perspective of 'the community, which needs such a way as a matter of social choice' rather than treating it as a 'problem of individual choice: [where] each agent needs some ground on which to choose.'[46] In the latter case, according to Green:

> The dilemma [between unanimity and authority as ways to choose between 'admissible equilibria'] does not arise. Each chooses only for himself, although he succeeds only if most others choose as he does. The problem of individual choice is one of choosing as others do...Each tries to co-ordinate his own behaviour with that of others on the basis of what expectations he predicts will be generally shared...He does not ask the generic question of what alternatives would be best, of what the universal norm should be, unless that helps answer the individual question of what he ought to do.[47]

Green suggests that, when the co-ordination problem is viewed from the perspective of the individual chooser 'customary regulation' appears as a third possible option between 'authoritative imposition and unanimity'[48] such that to

> show that authority is needed one must establish, not merely that unanimity is an unacceptable method of social choice, but also that non-authoritative means of establishing conventional solutions are unlikely to succeed.[49]

Green's distinction between the social choice and individual choice perspective is not sound, however, for the reason partially acknowledged by Green in the final clause of the penultimate quotation. The problem for Green is that while something like the distinction between the social and individual choice perspectives is possible with regard to co-ordination problems in the narrow, game theoretic sense, the distinction disappears in

[46] ibid 107.

[47] ibid.

[48] ibid.

[49] ibid 108.

relation to the types of co-ordination problem in response to which one might reasonably seek solutions from an authority. Such co-ordination problems are only relevant to a normative justification of authority because they create obstacles for practically reasonable people who are trying to support and promote the common good of their communities. For such individual choosers the problem is *precisely*: 'what, among the not unreasonable alternatives, should the universally practised pattern of co-ordination of this group/community be in situations like this?' (i.e. the very type of question which Green implicitly considers to be distinctive of the social choice perspective). This question identifies a co-ordination problem because at least *one* of the factors determining the appropriateness of the chosen answer is how others are likely to choose or to act. Green is right to suggest that such questions can sometimes be answered by the emergence of 'customary regulation' but he is mistaken in concluding (a) that such 'emergence' is not itself dependent upon a form of unanimity and (b) that the sheer possibility of such customary regulation removes the practical necessity of a co-ordinating authority for a complete community.

To see why, I must consider Green's second objection, namely that conventions can render unnecessary the provision of solutions to co-ordination problems by an authority. Green first sets out Ullmann-Margalit's example of a crowded hall with four doors which needs to be evacuated and filled with a new group in a matter of minutes for the sake of an important interest recognised or shared by all concerned.[50] If one person takes the initiative to shout out a set of instructions specifying the North and South doors as exits and East and West doors as entrances, this intervention will itself create a good first order reason for each member of the crowd to act in line with the instructions and not to act contrary to them, in so far as he or she (a) judges the instructions to have been

[50] Edna Ullmann-Margalit, 'Is Law a Co-ordinative Authority' (1981) 16 Israel Law Review 350, 350-1.

generally heard and understood, and (b) recognises (as being obvious to all) the fact that an orderly movement of the two groups will be swifter than a disordered one. Green argues that this example shows the possibility of co-ordinative solutions without the recognition of an authority.[51] For while the individual's shout created a content-independent reason to use the North and South doors as exits, its efficacy as a co-ordinating solution did not require it to provide an exclusionary reason to do so and for this reason cannot be properly considered 'authoritative.'[52] The reason is that once a certain scheme of exits and entrances is established as salient and people begin to act in conformity with this scheme, there no longer exists any good reason to act according to any other scheme given the shared goal of emptying and refilling the hall in as short a time as possible. Thus there simply is no competing first order reason to be excluded by the second order reason provided by an authoritative, i.e. exclusionary, norm. Green uses this example to assert, as a general principle, the sufficiency of first order reasons to solve co-ordination problems and thus deny the necessity of second order reasons or authoritative norms for the provision of such solutions. The primary flaw with Green's analysis is that it fails to see that the shout in the hall has the effect of creating unanimity and it is this unanimity which grounds the successful co-ordination. Accordingly his example, if it proves anything, proves only what Finnis has already proposed as axiomatic: that there exists an alternative to authority-based instances of co-ordination, and that this is unanimity. It does in fact not identify any third option.

In addition to the shortcomings with Green's two objections to the minor premise of Finnis's argument (i.e. that co-ordination solutions require either unanimity or authority), there is the further problem that his argument does not address Finnis's major

[51] Green (n 11) 112-5.

[52] For the meaning of authoritative relied on here see above V.4. cf Ullmann-Margalit (n 50) 351.

premise, namely that authority is a far superior means of achieving co-ordination when faced with the sorts of obstacles to co-ordination experienced by a political society. And this can be seen most clearly if we consider the ways in which the solution generated by the shout in the hall example exhibits the inadequacies and vulnerabilities typical of unanimity-based solutions, inadequacies and vulnerabilities which make it practically reasonable to prefer a mode of co-ordination based on authority:

(1) Everyone desired precisely the same end goal (e.g. there was no significant objection to leaving the hall or difference in opinion as to what constituted an acceptable time period for the proposed manoeuvre);

(2) One person (and only one person) actually took the initiative to shout out a set of specifying instructions;

(3) The instructions were successfully heard and understood by most of the crowd;

(4) Most of the crowd knew that most of the crowd was likely to have heard and understood the instructions;

(5) The instructions were sufficiently clear and more or less indisputably reasonable (i.e. they were not vague or ambiguous and, e.g. they did not specify all four doors as entrances and none as an exit).

In the absence of any one of these elements no co-ordination solution would be achieved. The risk of failing to achieve a solution in such situations would be considerably lessened if, instead of leaving it each time to the chance occurrence of the necessary elements,

there was a pre-existing or standing rule, known to all, governing the situation in question. So, contra Green, the question is not whether authority is *always necessary* to solve a co-ordination problem, such as the hall example, but rather whether it is practically reasonable to leave the solution of regular or foreseeable problems (with significant implications for the common good) to the chance emergence of a salient solution at the moment it is required, if there exists as a feasible alternative the option of deliberately creating a salient option in advance. It is the obvious superiority of the latter course of action, both in terms of the reasonableness and likelihood of the solution, given the importance and the number of the particular problems of strategic interaction (not to mention the potential pure conflict problems) that face a complete community,[53] that grounds the practical need for the recognition by all of an authoritative means for marking solutions as salient.

So while one should agree with Green that a non-authority-based solution does not need to be backed by an exclusionary reason in order to become salient for a given co-ordination problem, the more relevant point is that a single agent (personal or institutional) with responsibility for specifically intending the common good of the community (V.2.1) can only make certain options salient for all the relevant (actual or potential) co-ordination problems of a complete community on a consistent, reliable and *reasoned* basis if that agent has the power to create and coercively enforce exclusionary reasons. Since a single agent could not create such salience without being an authority, then it becomes clear why practically reasonable people should seek, in the interests of the common good, to establish or endorse a mode of political authority capable of facilitating salience in this way.

[53] i.e. given what Shapiro calls the 'circumstances of legality' Scott J. Shapiro, *Legality* (Harvard University Press 2011) 170.

A final issue is Green's characterisation of the stability of convention-based non-authoritative solutions to co-ordination problems, a characterisation which forms part of the justification for his claim that authority is unnecessary for the resolution of co-ordination problems. Green is clearly correct that a distinctive feature of a recurring game theoretical co-ordination problem is that once a particular means to the desired goal of the group has become salient, convention is sufficient to ensure that alternative means cease to be alternatives in so far as they cease to be effective means to the desired end and thus are no longer rational or reasonable options. The nullification of alternatives, however, and the resulting stability of the salient solution over time is a direct consequence of the game theoretical postulates of preference-transitivity and common knowledge which, as already noted (V.3.2), are inapplicable to the real world. Accordingly, the salient solution picked out by a convention must often be underwritten for the sake of stability (i.e. for the sake of making it practically reasonable to continue relying on a pre-existing scheme of mutual expectations) by a norm which precludes individuals from considering the settled, conventional solution as open to revision on the basis of their individual first order reasons.[54] I shall call such norms conventional norms or co-ordination norms.[55] Where a convention concerns matters of sufficient importance to the common good of a complete community, any resulting co-ordination norm rightly features in our practical reasoning as, at least presumptively and defeasibly, (morally) authoritative. I shall call norms with such status customary *laws*.

[54] See argument by Hampton that the outcomes of 'symmetry-breaking' devices, such as coin-flips etc, can only secure salient solutions to partial conflict co-ordination problems when their renegotiation is regarded by all as 'unlikely, undesirable or impossible.' Hampton (n 16) 160.

[55] See Ullmann-Margalit (n 12) 74-133.

V.5.6 Are the authoritative norms of customary law an alternative source of co-ordination solutions?

The last subsection mentioned the role of authoritative customary laws in maintaining schemes of co-ordination first created by convention/unanimity rather than authority. In this subsection I consider why customary law is neither a third source of co-ordination as distinct from unanimity and authority nor a practically reasonable alternative to an authority capable of deliberate and reasoned making, changing, applying and enforcing of authoritative norms.

There are various accounts as to precisely why and how authoritative rules of customary law can come to exist in the absence of any recognised authoritative rulers. Most rely to some extent on the normative consequences that follow from being responsible for or benefiting from a recurring pattern of concordant mutual expectations.[56] I believe a particularly incisive analysis is provided by Finnis which clearly articulates what is often left obscure in other accounts, namely how exactly practical and empirical judgments interact so as to give rise to a *legal* judgment that a morally binding customary law exists.[57] It can be closely paraphrased as follows:

> Let PJ signify a practical judgment (i.e. a judgment according to the principles and requirements of practical reason), EJ signify an empirical judgment, and JJ a legal judgment (i.e. a judgment according to the rules of customary law):
>
> PJ_0 (a) It is desirable for the common good of the complete community that there be some determinate, common, and stable pattern of conduct with respect to a certain situation of strategic interaction

[56] See, e.g., Lon L. Fuller, 'Human Interactions and the Law' (1969) 14 American Journal of Jurisprudence 1, 16; Lewis (n 13) 97-100; Ullmann-Margalit (n 12) 85-9; Russell Hardin, 'The Emergence of Norms' (1980) 90 Ethics 575, 578-82 (criticising Ullmann-Margalit); Postema (n 12) 179-82 (criticising Fuller); *LJC* xiii-xiv, 3-13, 20.

[57] *NLNR* 238-45.

(i.e. a convention providing a co-ordination solution) and a corresponding authoritative rule (i.e. a rule of customary law) to support and underwrite it.

(b) This particular pattern of conduct, φ, is (or would be if generally adopted and acquiesced in) an appropriate pattern for adoption as an authoritative rule.

EJ_1 There is widespread concurrence and acquiescence in this pattern of conduct φ by members of the community.

EJ_2 The practical judgment PJ_0 (hereafter the *opinio juris*[58]) is widely subscribed to by members of the community.

PJ_1 EJ_1 and EJ_2 are sufficient to warrant judgment (PJ_2) that there is now an authoritative rule of customary law requiring (or permitting) φ.

PJ_2 φ is required (or permitted), by virtue of an authoritative rule of customary law of the community.

EJ_3 Most members of the community accept the customary law that φ is required (or permitted).

JJ_1 According to the customary law of the community, φ is required (or permitted).[59]

One of the merits of this analysis is that it helps to uncover the practical justification for, and hence rational possibility of, authoritative customary law. The key justificatory step in the argument is PJ_1 which, as Finnis points out, relies on a further practical premise (or 'framework' principle) which can be formulated as follows:

PJ^F The emergence and recognition of customary rules (by treating a certain degree of concurrence or acquiescence in a practice and a corresponding *opinio juris* as sufficient to create such a norm and to entitle that norm to recognition even by members of the community who do not engage in the practice or accept the *opinio*

[58] Finnis's analysis is based on the example of customary *international* law but it is useful for ease of exposition to borrow the term in discussing the customary law of a complete community.

[59] *NLNR* 242.

> *juris*) is a desirable or appropriate method of solving interaction or co-ordination problems for the complete community.[60]

Thus it becomes clear that the formation of customary law depends on the judgment PJ^F being more extensively accepted by members of the community than a judgment PJ_0 with respect to any given problem of strategic interaction. Moreover, the acceptability of PJ^F to any one individual will itself depend on the extent to which it is accepted by others. As Finnis puts it, 'the "framework" practice of treating custom-formation as a source of authoritative norms [PJ^F] is itself one instance of the pattern-of-conduct "φ" in the analysis.'[61] One this is understood, it is possible to see that

> the requirements, preconditions, and forms of custom-formation are themselves determined, in large part, by custom...The authoritativeness of this framework custom derives not from some yet further custom, but from the opportunity of advancing the common good, the opportunity which is afforded by widespread (not necessarily universal) recognition of the framework custom, and of the particular substantive customs, as authoritative....[Thus] [b]oth the framework custom and the particular customs which become authoritative within its framework derive their authoritativeness directly from the fact that, if treated as authoritative, they enable states to solve their co-ordination problems – a fact that has normative significance because the common good requires that those co-ordination problems be solved.[62]

The foregoing analysis of customary law makes clear how the agreement or unanimity (or near unanimity) which first causes a solution to become salient can become via the process of convention-formation a source of authority-based solutions. This reveals the flaw in treating convention as a third source of co-ordination in opposition to unanimity and authority. Second, Finnis's analysis of how a customary law emerges reveals how complex and contingent the process is. It is not hard to see the radical uncertainties which plague any attempt to justify an assertion of EJ1 or EJ2, not least because of the

[60] This is a modified version of Finnis's 'PJ^m'. *NLNR* 243.

[61] *NLNR* 244.

[62] *NLNR* 244.

indeterminacy facing judgments as to the boundaries or membership of the complete community. Disagreements may also arise, for example, about the nature of the conduct dealt with by a customary rule, or whether a rule has been broken, or, if so, what the consequences should be. For this reason, the attempt to secure all of the co-ordination solutions required for the common good of a political society by means of customary law suffers largely from the very same drawbacks which make it practically unreasonable to rely exclusively on unanimity as manifested in spontaneously created and conventionally maintained solutions. In short, while customary law adds a greater level of stability to conventionally achieved solutions, thus enhancing the reasonableness of continued conformity, both sources of co-ordination solutions lack the capacity to *deliberate*ly change or create solutions. It is for this reason that, save perhaps in the most exceptional of circumstances, it should be judged practically necessary for all members of a society to bring about or recognise and maintain a customary law (or set of laws) empowering a particular person or group of persons to deliberately create authoritative co-ordination norms for the sake of the common good of that society (I.4.1 text after cue to footnote 62).[63]

V.6 The problem of identifying an authority

Accepting that an authoritative agency is rationally necessary for the sake of the common good of a political community, how in practice should a community select *an* authority? This question brings us to the second of the three stages (V.4) in the justification of the authority of a legal system.

[63] Note that even purely norm-applying institutions are involved in the deliberate creation of authoritative co-ordination norms, in the specific sense meant here, in that they (a) make a concrete norm addressed to the parties as a means to applying an existing general norms and (b) thereby help to solve co-ordination problems arising from disagreement about the content or effects of existing authoritative co-ordination norms.

The answer to the question just posed depends on the normative consequences of the conjunction of a factual judgment with a certain normative principle. The principle follows from the so-called argument from practical necessity pursued so far: not merely authority but, more particularly, *deliberately-exercised authority* is a good, i.e. is morally (rationally) justified, because deliberately-identified authoritative solutions are the most serviceable means to the resolution of the problems of strategic interaction required for the sake of the common good. This principle gives normative significance to a judgment as to who, in fact, can secure the deliberate implementation of appropriate patterns of co-ordination. In other words, the necessary (but only presumptively and defeasibly sufficient) condition for recognising a particular person or body (or their acts or prescriptions) as authoritative is a factual judgment as to the efficacy of their governance, i.e. 'the sheer fact that virtually everyone *will* acquiesce in somebody's say-so'.[64] Thus 'the first and most fundamental...[though] not the last word on the requirements of practical reasonableness in locating authority'[65] can be formulated as the following principle:

> Authority (and thus the responsibility of governing) in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community.[66]

This cannot be the last word because 'the *fact* that the say-so of a particular person or body or configuration of persons will be, by and large, complied with and acted upon' is only presumptively sufficient to 'justify the claim to and recognition of authority.'[67] It will not be sufficient in at least two obvious cases. The first is where the sheer power to

[64] *NLNR* 250. For a fascinating discussion as to how such situations of general acquiescence might emerge without the action of an authority see Hampton (n 16) 147-88.

[65] *NLNR* 246.

[66] *NLNR* 246. Recall the broad meaning attributed to 'co-ordination problem' by Finnis. See note 4 above.

[67] *NLNR* 246.

ensure compliance, or its attendant authority, is used in a manner radically or substantially opposed to the common good. Clearly in such a situation the argument from practical necessity for the authoritativeness of the selected solutions will be undermined or may be removed entirely. The second is where a functioning authority is already in place. As Finnis puts it:

> Practical reasonableness requires (because of the self-same desirability of authority for the common good) that, faced with a purported ruler's say-so, the members of the community normally should acquiesce or withhold their acquiescence, comply or withhold their compliance, precisely as he is, or is not, designated as the lawful bearer of authority by the constitutional rules, authoritative for that time, place, field, and function – if, by virtue of custom or authoritative stipulation, there are such rules.[68]

On the account of authority just sketched the 'consent' of the governed is not a necessary condition of the justified authority of rulers. Nevertheless,

> the notion of consent may suggest a sound rule of thumb for deciding when someone should be obeyed even though general acquiescence is not likely, and for deciding when someone whose stipulation will be generally acquiesced in should nevertheless be treated as having no authority in practical reason. This rule of thumb is: someone's stipulation has authority when practically reasonable subjects, with the common good in view, would think they ought to consent to it.[69]

Note, as a point of clarification, that the distinction implicitly drawn in this subsection between the act of coming-into-existence of a political community and the

[68] *NLNR* 250. This follows from the conjunction of (a) the recognition that an effective or recognised authority is a practical necessity and (b) the recognition that the transition from a state of affairs where there is no recognised authority to one where there is such an authority is most often a hugely costly (in the widest sense) and difficult enterprise. Accordingly it is no surprise that, as Finnis notes, 'very commonly, the first authoritative act of unauthorized bearers of authority is to lay down directions for ensuring that in future the location of authority (whether in themselves or in their successors) shall be determined, not by the hazards of those ['very taxing and exhausting'] processes of arriving at unanimity from which they have just emerged as the beneficiaries, but by authoritative rules.' *NLNR* 249.

[69] *NLNR* 251. See also Jeremy Waldron, 'Special Ties and Natural Duties' (1993) 22 Philosophy and Public Affairs 3, 27. See Simon (n 2) 190-4 for a differentiation of seven possible meanings of the principle of 'government by the consent of the governed.' That it is only the seventh meaning which is denied here shows the need for great care in any discussion of the role of consent in justifying the authority of a particular ruler.

conventional recognition by that community of an authoritative representative is only for the purposes of analysis. It does not purport to describe a historical or sociological process. In reality there can be no political community or society without the conventional recognition of an authoritative representative. As Voegelin puts it:

> A multitude of men exists as an ordered society inasmuch as it is articulated into rulers and ruled. … *Organization for action, both internal and external, through a representative, is the manner in which a society exists*. The lawmaking process, from the making of the constitutuion to the individual administrative and judicial decisions, is the self-organization of society for its ordered existence through representatives.[70]

V.7 Law as the most serviceable form of authority

So far the argument has shown why and how one ought to recognise an agency as an authority for a complete community. But such political authority can be constituted in various forms and exercised through various instruments.[71] What is it about a legal system that qualifies it as the most serviceable means for the deliberate exercise of political authority in furtherance of the common good? The answer, according to Finnis,

> lies in the *quality* of the legal system as a device for solving co-ordination problems. The quality of a legal system that makes it authoritative is its general salience. By holding itself out as a public and privileged identification of a solution for the case of every co-ordination problem, and by offering grounds for acknowledging that privileged status, the law achieves the salience it seeks in particular co-ordination problems.[72]

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[70] Eric Voegelin, 'The Nature of the Law' in Robert Anthony Pascal, James Lee Babin and John William Corrington (eds), *The Nature of the Law and Related Legal Writings* (Louisiana State University Press 1991) 59 (emphasis added). See further Eric Voegelin, 'The New Science of Politics [1952]' in Manfred Henningson (ed), *Modernity Without Restraint* (University of Missouri Press 2000) 109-28. See also *Aquinas* 23-9 and at 27: 'human societies have their distinctive reality as orders of intelligent, voluntary and purposive action.'

[71] On the distinction between the modes, instruments and functions of authority see Simon (n 2) 7-9.

[72] Finnis 63. The form of this answer is thus consonant with the 'form' that, according to Raz's own analysis, 'the question of the legitimacy of authority takes...[namely]: an examination of the grounds that justify in certain circumstances regarding some utterances of certain persons as exclusionary reasons.' *AL* 27.

But how does law hold itself out in this way? And what grounds does it offer for acknowledging the privileged status of its solutions? To answer such questions is to give an account, respectively, of the formal characteristics of law and of its structuring and guiding ideals. This account will be taken up in the next chapter. Here it is important to note how the discussion in Chapter II regarding the appropriate methods for identifying the nature of law feeds into the present investigation into the authority of law. For it turns out that the inquiries into the nature of law and into the justification of law's authority are not two independent inquiries, but rather two ways of approaching the same issue.[73] Law, in its central case, has the nature and the authority that it does for one and the same reason: because of the requirements of practical reasonableness, which ground the need for just and effective co-ordination for the sake of the common good.[74]

It is important not to misunderstand the connection being proposed here between the two inquiries or one may be tempted to reject the account of law's authority and nature offered in this chapter and the next as merely tricks of conceptual stipulation.[75] My point is simply that one should be no more surprised to find that law's defining features and ideals render it uniquely *worthy to be recognised* as authoritative than to discover that

[73] This is similar to the key claim upon which Soper's elaboration of a quasi-Thomistic theory of law is built (see Philip Soper, *A Theory of Justice* (Harvard University Press 1984) 6-12, 15, 55-6, 176 note 57) though he supports it with arguments different from, and in many places incompatible with, those of Finnis (see especially ibid Chapter 4).

[74] As Finnis notes: 'The truth is, then, that *explanatory descriptive general theory* of law and *the moral justification and critique of law for the guidance of one's own conscience* are radically inter-dependent intellectual enterprises.' (Emphasis in original) Finnis, 'Positivism and 'Authority'' (n 34) 82. Or as Fuller noted: 'Common sense tells me that there is a clear distinction between a thing's being a steam engine and its being a good steam engine. Yet if I have a dubious assemblage of wheels, gears, and pistons before me and I ask, "Is this a steam engine?" it is clear that this inquiry overlaps mightily with the question: "Is this a good steam engine?" In the field of purposive human activity, which includes both steam engines and the law, value and being are not two different things, but two aspects of an integral reality.' Lon L. Fuller, *The Law in Quest of Itself* (Beacon Press 1966) 11.

[75] Or, equally mistakenly, to consider them examples of the (straw man) 'natural law theories' which Raz described as 'the definitional argument' and 'the derivative approach'. *PRN* 163-70.

a glove is uniquely suited to fit a human hand.[76] For in both cases, as with every instance of order of the third and fourth kinds (II.2), the form follows (i.e. is rationally determined and explained by) the function (qua end or purpose), which in turn is what it is because the *need* for such a form performing such a function is very readily intelligible. Consider in this regard the following claim made by Raz:

> I have already conceded that the law, by its nature, has a moral task...But we learn of the moral and other tasks of the law in part from its nature.[77]

This is true in the same way that we may *learn* what the 'task' of a glove is by reflecting on its 'nature' (i.e. its form), namely on such things as its size, shape, material etc. But this is only because its task or function can be *inferred from* its nature on the assumption that form follows function. For a glove (as a product of human intention) only has the nature (in the sense under discussion here) that it has as a consequence of its intended function, i.e. the end or good which it is to serve, namely to cover a human hand (for some purpose). In *this* sense the nature of a glove is not learnt or discovered but is first creatively devised and invented in light of its intended purpose. And this purpose is ultimately determined by a deliberate response to a recognised practical need of some sort. In short the glove's purpose is primary and thus its nature *qua* glove, in its central case,[78] has no independent rationale (no other intelligible reason for having this form

[76] Or, pace Coleman, to discover that a hammer is *especially* suited to bringing force to bear on a point (in a way that any other (potential) kind of 'murder weapon', 'paperweight' or 'commodity' may not be). See Jules Coleman, *The Practice of Principle* (OUP 2001) 194.

[77] *BAI* 383. Dickson makes essentially the same point in *Evaluation* 138. I take her invocation there of an analogy with an object of the third order (a 'toy electric toaster') as acceptance of the premise underlying my own analysis, i.e. that the same form-function relationship operates in both the third and fourth kind of orders.

[78] One can imagine a giant glove – perhaps created to be a piece of installation art – which could not and was never intended to fit a human hand. It would nevertheless be intelligibly identifiable as a type of glove (and not, say, a giant shoe) by virtue of its relevant similarity with the central case of a humanly wearable glove.

rather than some other) apart from it. It is with this analysis in mind[79] that we should approach the statement of Raz that directly follows the lines quoted above.

> If we can show (1) that securing co-ordination is good, and (2) that the law is better at securing co-ordination than alternative methods, and (3) that its doing so has no adverse effects (or none serious enough to outweigh the advantage of its doing so) then we can conclude that it has the task of securing co-ordination. But to do this we need first to establish the second premise.[80]

The approach proposed by Raz can be criticised on two grounds. First, his step (1) misstates a principal desideratum. Co-ordination *per se* can be secured and used for good or ill. Hence any attempt to show that 'securing co-ordination' *per se* is 'good' faces an impossible task. The appropriate question is this: 'Can we as individuals direct our actions by reference to the common good of our society without some co-ordination by an authority?' I have argued that we cannot and that co-ordination by an authority for the sake of the common good is therefore a practical necessity. It follows that one should next inquire into *how* such co-ordination can best be brought about. The possible forms of such an inquiry can be characterised (for analytical purposes) in terms of two alternatives. One can start with a blank slate, so to speak, and try to work out the practical consequences of the requirements of practical reasonableness in the context of typical human circumstances, needs and limitations. Or one can start with describing and then critically reflecting upon the means used historically or presently for the purposes of securing co-ordination in those matters in respect of which co-ordination must be secured (and secured appropriately) for the sake of the common good. In reality these two projects are complementary and mutually enriching rather than mutually excluding (II.6).

[79] Of course, the ways in which law's end or purpose is disanalogous from the purpose of a glove must also be recognised. On the disanalogy between the 'purpose' of an army and the jural order of society see p. 114 above.

[80] *BAI* 383.

In either case the theorist is required to take a stand on the true requirements of practical reasonableness and the common good. In either case (one can now say in light of fruits of such past inquiries) the result is an account of a social practice identified by reference to how that practice promotes the common good, i.e. by securing the co-ordination required by the common good and doing so in a way that is itself constitutive of the common good. This all points to the second problem with the agenda outlined by Raz: its three steps assume that it is both worthwhile and possible, first, to seek out the nature or concept of a practice called 'law' and, then, to hold it up for evaluation in terms of functions conceived as being wholly extrinsic to and independent of the nature and rationale of the practice – as is proposed in his steps (2) and (3).[81]

[81] In so far as notions of success and failure presuppose the notion of a function or task, Gardner and Raz have on occasion arguably made similar points to my own: 'As in any other field of human endeavour, understanding the nature of the endeavour in full admittedly means having an ability to tell success in the endeavour from failure.' *5½ Myths* 226. '[T]he...claim that law by its nature has a moral task, seems both true and...interesting...as it sets the way in which we should think about the law. It sets a critical perspective for judging it. Just as we do not fully understand what chairs are without knowing that they are meant to sit on, and judged (*inter alia*) by how well they serve that function so, the claim is, we do not fully understand what law is unless we understand that it has a certain task, and is to be judged (*inter alia*) by how well it performs it...*The law's task, put abstractly, is to secure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realized.*' *BAI* 178. Neither accept, however, that such observations have problematic implications for the preferred jurisprudential method of contemporary legal positivism (as noted in II.4, II.7). For Raz's attempt to insulate the above concession from such implications see IX.3.

CHAPTER VI – IMPORTANT FEATURES AND IDEALS OF A LEGAL SYSTEM

> *Not only does every particular legal arrangement have its own particular purpose but that purpose is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law.*[1]

VI.1 Introduction

We are now finally in a position to address directly the question first raised in Section II.1: What are the most important or defining features of a legal system and the requirements of justice which structure and guide it? The answer proposed in this chapter does not purport to be comprehensive or exhaustive. Rather its necessarily abbreviated scope and depth have been limited by the question's rationale: to give practical context for a functionalist inquiry into the nature of adjudication, in its central case, qua intentional or purposive act (I.3.2, III.3). The answer is developed by examining different ways in which a legal system operates to facilitate the securing of practically necessary co-ordination solutions in the face of the problems and obstacles noted in IV.2.3 and V.2-3. Recall that for Finnis the salience provided by law as an aid to such solutions derives from *two* aspects of law:

> The quality of a legal system that makes it authoritative is its general salience. By [1] holding itself out as a public and privileged identification of a solution for the case of every co-ordination problem, and [2] by offering grounds for acknowledging that privileged status, the law achieves the salience it seeks in particular co-ordination problems.[2]

[1] *Legal Process* 148.

[2] John Finnis, 'Law's Authority and Social Theory's Predicament' in *CEJF IV* 63 (numbering added).

This further distinguishes Finnis's analysis from standard game theory accounts in which salience is attributable to a solution by the sheer fact that it 'stands out' in some fashion.[3] In the grounds it affords for acknowledging the privileged status of the solutions it publicises, law distinguishes its salience from that created by alternative forms of authority by virtue of 'its superior capacity to carry out *in a reasonable way* the determinations that must be made.'[4] Thus we may investigate the important (or defining) features of law and its guiding ideals by asking:

(1) *How* does the law hold itself out as a public and privileged identification of a solution for the case of every co-ordination problem?

(2) *What grounds* does it afford for acknowledging the privileged status of its solutions?

(3) Are these grounds sufficient to show that it is a kind of means superior or 'more serviceable'[5] to all other kinds?

Ultimately, (2) and (3) are answered together by showing the unique capacity of a legal system to bring about co-ordination solutions that are both reasonable and effective - and to show this is in effect to answer (1). Section VI.3 will argue that this unique capacity results from the conjunction of law's formal features and guiding ideals. The functionalist method as deployed in this chapter proceeds on the basis that these features and ideals of law in its central case (i.e. its means, modalities or performative functions) can be identified (or reports of such features and ideals critically reviewed) in light of and by

[3] John Finnis, 'Law as Coordination' *CEJF IV* 67.

[4] Mark C Murphy, *Natural Law in Jurisprudence and Politics* (CUP 2006) 107 (emphasis added).

[5] See V.4.

critical reflection upon both the ends of law and the same practical principles, requirements, needs and contingencies that explain and justify those ends (III.3, V.7).

VI.2 Different types of co-ordination

It is analytically useful for present purposes to distinguish different types of co-ordination which a legal system provides or facilitates. There are many valid ways that such a functionalist analysis can proceed, and the complex and self-reflective character of law which follows from its systematic and institutionalised nature defies any categorical or static account.[6] I propose to consider six types of co-ordination solution provided by or through the law, by reference to six relatively distinct (though wholly inter-dependent) problems or questions which must be addressed if a legal system is to succeed in its defining and justifying purpose of securing the co-ordination necessary for (and partly constitutive of) the common good of a political community.[7] In summary:

(1) Problem of authority: who shall decide? (VI.2)

[6] Postema speaks of three levels or 'points of intersection between law and social life at which significant problems of co-ordination arise.' Gerald Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 Journal of Legal Studies 165, 182-97. Besson also distinguishes three 'levels' though her third level appears equivalent to Postema's first level. Samantha Besson, *The Morality of Conflict* (Hart Publishing 2005) 186-97. Similar in strategy too is Llewellyn's identification of five 'basic functions' or 'law-jobs'. Karl N. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 Yale Law Journal 1355, 1373-4, 1392. See also note 18 below.

[7] My ordering of the first five problems is comparable to the 'four-stage procedural model' of Robert Alexy. See Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 370-1; and Carsten Bäcker, 'The discourse-theoretic necessity of flexibility in the law' (2008) 59 Northern Ireland Legal Quarterly 125, 134-6. Comparisons can also be made with the 'four-stage sequence' of Rawls which 'sets out a series of points of view from which the different problems of justice are to be settled, each point of view inheriting the constraints adopted at the preceding stages.' John Rawls, *A Theory of Justice* (OUP 1999) 176.

(2) Problem of the identification of the jural order: what shall count as an authoritative decision?[8] (VI.3)

(3) Problem of positing the jural order: as a general rule what shall count as being due to whom? (VI.4)

(4) Problems of knowing and applying the law: as a general rule what is due to whom? In this case what is due to whom? (VII)

(5) Problem of authoritative application of the law: in this case what shall count as due to whom? (VIII)

(6) Problem of wilful non-compliance: how can injustices and inefficiencies arising from wilful non-compliance with answers given to (1)-(5) be prevented or redressed? (VI.5, VIII.1)

It should be noted that all of these problems (and not merely the sixth) concern in some way the instrumental effectiveness of a legal system and its co-ordination solutions as a going concern in the circumstances of human life in society. Such 'real life' effectiveness is obviously necessary for the common good of a political society and thus is itself a requirement of practical reasonableness. Problems (1), (2), (3) and aspects of (6) and the ways and means of co-ordination provided by law which correspond to their solution will be considered in the remainder of this chapter. Problems (4) and (5) and their implications for legal argument and adjudication will be considered in Chapters VII and VIII respectively.

[8] Llewellyn pithily discusses this and the foregoing problem in terms of what he calls 'the job of *arranging the say, and its saying*.' Llewellyn (n 6) 1383.

VI.2 Co-ordination in response to problem of authority

The problem of authority is a framework co-ordination problem in the sense that it must be solved as a necessary means to providing solutions for the other types of co-ordination problems.[9] In line with the discussion in Sections V.2-3 and Subsections V.5.1-3 this can be formulated in terms of the question: 'Who is to decide if some co-ordination solution is necessary for the common good and how it shall be provided?' The answer involves the identification of an *authority* for the given society in order to create at least *the capacity* for the deliberate (V.5.5), reasonable (V.2.1) and effective (V.6) making of such decisions. The argument from practical necessity for the authority of law sketched in Sections V.4-6 is an answer to this framework problem on the basis that a legal system, in its central case, is a mode of authority which meets these requirements. It does so because of three important features which the 'authoritative' decisions (and resulting solutions) made by a legal system in its central case share with other modes of political authority when viewed in their central cases. These may be termed the purported comprehensiveness, the supremacy and the absorptive or ratificatory capacity of its authoritative decisions. As Finnis, drawing on Raz, puts it:

> ...it is characteristic of legal systems that (i) they claim authority to regulate all forms of human behaviour …; (ii) they therefore claim to be the supreme authority for their respective community, and to regulate the conditions under which the members of that community can participate in any other normative system or association; (iii) they characteristically purport to 'adopt' rules and normative arrangements (e.g. contracts) from other associations within and without the complete community, thereby 'giving them legal force' for that community;[10]

In Section V.4 these features were merely stipulated, to clarify what was meant by the claim that law is authoritative. In light of the account of the need for authority elaborated

[9] Finnis, 'Law's Authority and Social Theory's Predicament' (n 2) 61.

[10] *NLNR* 148. See also *PRN* 150-4; *AL* 116-20.

in Chapters IV and V, however, it should now be clear that these three features 'have their foundation, from the viewpoint of practical reasonableness, in the requirement that the activities of individuals, families, and specialized associations be co-ordinated.'[11]

VI.3 Co-ordination in response to the problem of identification of the jural order

VI.3.1 The formal features of co-ordination by a legal system

For the establishment or recognition of an authority with the above-mentioned features to function effectively as a solution to the framework problem a second type of co-ordination problem must be resolved, namely: 'How should this authority mark the 'public and privileged' status of its proposed co-ordination solutions?' To recall, there are two distinct classes of obstacle to successful co-ordination solutions and two distinct modes of authoritative solution, namely directive or informative solutions and incentivizing or motivational solutions (V.5.1-3).[12] The latter are necessary to ensure or enhance the effectiveness (and hence, to that extent, the reasonableness) of the former and shall be considered later (VI.5). For it is in considering how law provides its directive and informative solutions that we come to the distinctive formal or modal features of law. These can be identified by reflecting, first, on those techniques and postulates which would still be necessary for the common-good-fostering co-ordination of a political society even if it was comprised of individuals committed to keeping the common good as the general object of their intention. For, even in such a community there would still exist a need for co-ordination solutions as a result of both the underdeterminacy of the principles and requirements of practical reasonableness (V.2.1-2) and the fallibility of human judgments (theoretical and practical) however conscientiously made. In what

[11] *NLNR* 148, 149, again drawing on Raz: see note 10 above.

[12] See *AL* 246.

ways would the designated political authority of such a community need to operate in order to render its posited solutions as identifiable as reasonable possible? At the very least the authority must provide an effective means by which members of that society can distinguish authoritative solutions from non-authoritative (i.e. merely purported) solutions.[13]

The distinctive means deployed by a legal system to this end is its deliberate use of (what Maris Köpcke Tinturé insightfully terms) 'count-as-norms'[14] or what can also be called, in the legal context, power-conferring norms.[15] Such norms make possible the attribution of legal 'validity' that is used to 'mark'[16] (i.e. to simultaneously create and make identifiable as so created) certain solutions as authoritative solutions.[17] In short one can say that the 'criteria of legal validity are *the salient method to produce salience*.'[18] Count-as-norms make possible (a) the creation and recognition of various legal persons and institutions and (b) the conferral on such persons and institutions of powers to validly

[13] Important also, of course, is some means for the identification of the *content* of these authoritative solutions but this is dealt with in respect of the problem of knowing and applying the law (see Chapter VII).

[14] Maris Köpcke Tinturé, 'Some Main Questions Concerning Legal Validity' (DPhil thesis, Oxford 2009) Chapter 3. Her analysis builds upon that of Searle and Hart (for references see ibid 27-37, 86 note 171). See also *PRN* 108-11.

[15] I use 'legal norms' as the generic term for legal standards, rules and principles. A legal norm may be expressed in general terms or in particular terms (e.g. an adjudicative ruling and order).

[16] Köpcke Tinturé (n 14) 227.

[17] For discussion in terms of 'criteria of identification' and 'legality policies' see, respectively, NS 72-5; and Giovanni Sartor, 'Legality Policies and Theories of Legality' (2009) 2 Ratio Juris 218, 221-3.

[18] Köpcke Tinturé (n 14) 160 (original emphasis). The analysis given by Köpcke Tinturé distinguishes a primary and secondary level of co-ordination. Her primary level incorporates the type of co-ordination which I discuss in respect of the problem of authority (VI.2) and the problem of positing the jural order (VI.4). I draw heavily on her discussion of her secondary level (ibid 154-62) for my account of co-ordination in this section (i.e. co-ordination in response to the problem of the (formal) identification of the jural order). Endicott makes a similar distinction between 'the coordination that law provides in virtue of the *social* functions that it performs' and 'the coordinating *reflexive* functions of law: the ways in which law regulates itself.' Timothy Endicott, 'The Subsidiarity of Law and the Obligation to Obey' (2005) 50 American Journal of Jurisprudence 233, 237. I discuss this latter type of co-ordination in connection with both the problem of the identification of jural order (this section) and the problems of knowing and applying the law (Chapter VII) and of authoritative application of the law (Chapter VIII).

create authoritative norms and thereby change jural relations (I.4.1) involving themselves and/or others.[19] As Finnis puts it:

> [L]aw brings definition, specificity, clarity, and thus, predictability into human interactions, by way of a system of rules and institutions so interrelated that rules define, constitute, and regulate the institutions, while institutions create and administer the rules, and settle questions about their existence, scope, applicability, and operation.[20]

Thus institutionalised normative systems are a class of normative system distinguishable by their use, in addition to norms directive of the conduct of individual norm-users, of norms concerning the establishment, functioning, effects and termination[21] of institutional agencies which are in turn capable of interacting in various ways with the system's set of norms. These institutional agencies are themselves norm-users, but they can be distinguished partly by reference to the different functions which their use of norms serves as follows:[22]

- Authoritative-norm-applying - which requires authoritative-norm-identification and sometime norm-interpretation (VII.3). Since all norm-users are, in a certain sense, norm-appliers[23] I add the qualifier 'authoritative' here to indicate the distinctive significance for other norm-users of the norm-application practised by a norm-applying institution.[24]

[19] See *NLNR* 268. See also *CL* 27-32, 96 for discussion of these 'power-conferring' rules.

[20] *NLNR* 268. See *AL* 115 (and generally 105-15).

[21] See Neil MacCormick, *Institutions of Law* (OUP 2007) 36.

[22] This is not to say that certain institutions may not be authorised or required to perform more than one of these three types of function. Thus different *types* of institutions (e.g. legislatures, courts, executive agencies etc.) can be distinguished by consideration both of which functions they have and *how* they perform those functions (III.2.2, III.3). cf *AL* 106.

[23] *AL* 107. See *Legal Process* 120 for distinction between self-application, tentative official application and authoritative application.

[24] See *AL* 108-9.

- Norm-changing – which includes norm-positing and norm-repealing.

- Norm-enforcing – which requires what can be considered a secondary type of authoritative norm-application.

As shall be argued in Chapter VIII the capacity to perform authoritative-norm-application is a necessary, though not always sufficient, condition for the efficacy of a legal system as a source of co-ordination solutions given the reasonable (and unreasonable) uncertainty and disagreement about the content or concrete practical implications of such solutions which it is reasonable to anticipate in any typical political society.[25] Likewise, it is in response to the need to maintain the reasonableness and efficacy of these solutions, across time and in light of changed circumstances and revised judgments as to the requirements of practical reasonableness, that a capacity for deliberate and reasoned change of the system's norms and the associated jural order must also be deemed a rationally necessary element of a legal system in its central case.[26] This functional capacity for norm-changing may reasonably be institutionalised in different forms but two basic types or powers of amendment can be distinguished for analytical purposes. The first is the sort of deliberate, express, programmatic and relatively unconstrained positing of general norms which, in its central case, may be termed legislative (see VI.4).

[25] See *PRN* 132-7 for analysis of what Raz terms 'primary norm-applying organs' to distinguish them from norm-creating institutions and from the sense of norm-application relevant to norm-enforcing institutions and indeed, at its most general, to all legal officials. Primary norm-applying organs 'are institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding even when wrong...The presence of primary institutions indicates that the normative system concerned provides for an institutionalized and authoritative way of settling disputes...[T]he difference between normative systems which provide systematic and institutionalized methods of settling disputes and those which do not is of momentous importance to their utility and function in regulating social behaviour.' *PRN* 136, 137. See also IX.2.1 below. See also MacCormick (n 21) 34, 55. On the problem of uncertainty see *CL* 92 and Larry Alexander and Emily Sherwin, *The Rule of Rules* (Duke University Press 2001) 11-25.

[26] Hart recognises these needs in terms of the defects he identifies with a system comprising only primary rules of obligation, i.e. the static nature of the rules and inefficiency. *CL* 92-93. For an argument that these defects are merely instances of the defect of uncertainty, see Alexander and Sherwin (n 25) 22-5.

The second is the sort of incidental, implied, re-active and constrained positing of general or particular norms which, in its central case, may be termed adjudicative (see VIII.3).

It is of course conceivable that a system-in-all-other-respects-identical-to-a-legal-system could operate on the basis of only customary laws and wholly voluntary submission to the determinations of authoritative-norm-applying institutions, but such a system would enjoy such a precarious existence given known facts about typical human behaviour (including the difficulty of efficiently changing customary rules in response to changed circumstances and the inherent limitations of adjudicative norm-changing[27]) that the reasonableness of its being deemed authoritative must rank decisively behind that of a legal system in its central case, in which norms and institutions create functional capacity for deliberate norm applying, changing and enforcing.[28]

It is in order to maximize the effectiveness of this institutionalised system of legal norms that the law's constitutive count-as norms, wherever reasonably possible, designate, as necessary and (at least defeasibly) sufficient conditions for their operation, conditions judgments about the satisfaction of which are highly likely to converge. Thus, as Finnis notes:

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[27] See further Chapter VIII.3.

[28] For this reason, in so far as Raz (see note 25 above and *PRN* 124, 129) might be understood as viewing the rational need for primary law-applying institutions as greater or more significant than that for other types of institution, I believe he is mistaken with respect to a legal system in its central case. However, elsewhere Raz's argument relies on how typical (understood as an empirical matter) the different institutions are or have been in legal systems. See e.g. *AL* 87-8. The problem facing the latter approach, however, is to justify theory or concept formation of general social practices by reference to typical features rather than by a central/peripheral case analysis. See Chapter II. It is of course a different matter to claim that from the perspective of 'legal history, comparative jurisprudence, and legal anthropology' that 'tribunals have always and everywhere been more central to the origins and developments of law than have legislatures.' James Bernard Murphy, *The Philosophy of the Positive Law: Foundations of Jurisprudence* (Yale University Press 2005) 219. Such a claim does not contradict the analysis offered here. The existence of a 'court-only' legal system may be practically reasonable (given all the contingencies of a particular case) as a necessary first step to the emergence of a more reasonable or efficient solution. Or it may reflect the fact that the full requirements of what is practically reasonable are only discoverable over time and by a process of experiential learning.

> The primary[29] legal method of showing that a rule is valid is to show (i) that there was at some past time, t_1, an act (of a legislator, court, or other appropriate institution) which according to the rules in force at t_1 amounted to a valid and therefore operative act of rule-creation, and (ii) that since t_1 the rule thus created has not...ceased to be in force...by virtue either of its own terms or of any act of repeal valid according to the rules of repeal in force at times $t_2, t_3, \ldots$'[30]

This technique relies on a 'working postulate'[31] of legal thought (i.e. an axiom for sound legal argument - VII) concerning the persistent nature of legal validity, namely:

> that whatever legal rule or institution … has been once validly created remains valid … until it determines according to its own terms or to some valid act or rule or repeal.[32]

These observations on the way in which law solves the problem of formally identifying and distinguishing between authoritative and non-authoritative patterns of co-ordination point also to its distinctive technique for effectively and conveniently bringing about particular co-ordination solutions, namely

> the treating of (usually datable) past acts (whether of enactment, adjudication, or any of the multitude of exercises of public and private "powers") as giving, now, sufficient and exclusionary reason for acting in a way then "provided for". In an important sense the "existence" or "validity" of a legal rule can be explained by saying that it simply is this relationship, this continuing relevance of the "content" of that past juridical act as providing reason to decide and act in the present in the way then specified or provided for.[33]

This technique is further supported by a second postulate which holds that

> every present practical question or co-ordination problem has, in every respect, been so "provided for" by some such past juridical act or acts (if only, in some cases, by provisions stipulating precisely which person or

[29] Note: not necessarily the *only* method. See VII.4-5, VIII.6 and X note 4.

[30] *NLNR* 268 (note added).

[31] *NLNR* 268, 269.

[32] *NLNR* 268.

[33] *NLNR* 269 (emphasis in original).

> institution is now to exercise a discretion to settle the question, or defining what precise procedure is now to be followed in tackling this question).[34]

Taken together these techniques and postulates allow for a sophisticated mode of political governance which serves the common good by existing as an institutionalised system of norms which are themselves formally distinguished and distinguishable from the norms of practical reasonableness by their grounds of existence, authority and obligatory force. This perhaps needs emphasis because a two centuries old tradition of English-speaking jurisprudence has been self-consciously based (at least until very recently[35]) upon the belief that a clear recognition of the positivity of law was that tradition's own novel and defining achievement.[36] According to Hart:

> What both Bentham and Austin were anxious to assert were the following two simple things: first in the absence of an expressed…legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.[37]

Accepting that Hart is correct in his exegesis of his nineteenth century predecessors, the following 'puzzle' immediately presents itself: 'Who realistically could this have been news to? Who ever failed to see that one can't simply infer from the fact that a rule violated standards of morality that it was not a rule of law?'[38] To believe that these 'simple things' were usefully and

[34] *NLNR* 269.

[35] See *CEJF IV* 7-9 citing remarks of Gardner, Green and Raz.

[36] HLA Hart, 'Positivism and the Separation of Law and Morals' in *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 50-56.,

[37] ibid 55, cited in Martin Stone, 'Positivism as Opposed to What? Law and the Moral Concept of Right' [2010] Cardozo School of Law Working Paper No 290, 15.

[38] Stone (n 37) 15. Stone considers two common targets in this regard, namely Blackstone and Dworkin. Regarding the latter Stone makes the obvious point that 'the intelligibility of a revolution in jurisprudence shouldn't have to depend on what comes a century later.' As to Blackstone, he suggests that the line in his

controversially asserted is to posit the historical existence of a contrary 'moral filter theory'[39] of the intra-systemic validity of positive law. Even allowing, as Stone should, that there was dubious judicial rhetoric about the properties of the common law deserving of Bentham's and Austin's concern, there should be no doubt today that, as a matter of record, no natural law theorist ever advocated such an account of intra-systemic legal validity.[40] For as Stone notes:

> The main question before the nineteenth-century positivists seems to be not "What is it for law to *exist*?" but rather, "What is it for *law* to exist?." which is perhaps better expressed by asking "What *kind of thing* law is," [sic] or "What kind of thing exists when there is law – the law of a time and place – as the positivist understands it?"[41]

Stone's analysis serves to emphasise the importance and centrality of the methodological debates considered in Chapters II and III. For it is only by re-casting classical accounts of the nature of law as possible answers to the positivist's inquiry into the existence-conditions of the legal system and laws of a given place and time that the classical

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Commentaries usually relied upon in this regard 'has always been taken piecemeal out of a context which contains other statements contradicting it, and which involves political currents irrelevant to the legal theorist.' ibid. See also John Finnis, 'Blackstone's Theoretical Intentions' *CEJF IV*.

[39] Stone (n 37) 17.

[40] *NLNR* 25-9, 363-6, 437-9; John Finnis, 'The Truth in Legal Positivism' in *CEJF IV*. However as Stone notes: 'this is not to say that the polemical attack on the previously non-existent "moral filter" theory of legal validity does not *later* invite attempts to challenge positivism by defending views of that general form – one's [sic] which leave the structure of the positivist's *question* unchallenged.' Stone (n 37) 17. Stone identifies Radbruch as the first clear instance of the 'moral filter' view. I believe Alexy is another. For this and related reasons Chapter X discusses the account of adjudication and judicial duty given by Radbruch and Alexy. Philip Soper is perhaps another good example though he also attributes to Aquinas (without supporting argument or citations) a 'moral filter' theory of positive legal validity. Philip Soper, 'In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All' (2007) 20 Canadian Journal of Law and Jurisprudence 201, 205.

[41] Stone (n 37) 17. See also John Finnis, 'Comment' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (OUP 1987) 64: 'Every competent "natural law theorist" (Plato, Aristotle, Aquinas) can produce a "positivist" analysis of what is involved in people accepting a rule, that is, of what is involved in the pragmatic "existence" of such a rule … What would strike these theorists as odd, and in need of explanation, is that some "social scientists and ethical theorists" apparently consider such an "analysis" somehow an interesting and complete topic in its own right.' As regards the application of Stone's analysis to Bentham, however, cf Dan Priel, 'Towards Classical Legal Positivism' [2011] Paper No 20/2011 Osgoode CLPE Research Paper (locating the shift to a jurisprudential method focused on legal validity and ostensibly independent of metaphysical and ethical claims in the work of Hart rather than in any nineteenth century theories).

understanding of law as *the* means to practically necessary *determinationes* of justice's requirements can be viewed and contested as a problematizing challenge to the positivity of law.

VI.3.2 The guiding ideals of co-ordination by a legal system

The various formal features considered in the last subsection only partially explain why law, with its systematic, institutionalised and self-regulating techniques for positing, applying and enforcing of co-ordination solutions and its operational postulates of the persistence and completeness of valid law, is *justified* in 'holding itself out as a public and privileged identification of a solution for the case of every co-ordination problem.'[42] For, as noted (VI.1), law also affords 'grounds' for practically reasonable persons to acknowledge that privileged status in their own practical deliberation, i.e. to deem it *authoritative*. Accordingly this subsection returns to and completes the discussion of law's authority by asking: What are these grounds and do they offer sufficient justification?

We can begin by noting that, as follows from the very nature of the argument from practical necessity offered for law's authority (V.4), these grounds only exist to the extent that a legal system operates and regulates itself[43] in a manner consonant with and informed by the requirements of practical reasonableness and such intermediate principles as may be implied by those requirements, i.e. in a manner responsive to the requirements of the common good that explain and justify its functions and functioning.[44]

[42] Finnis, 'Law's Authority and Social Theory's Predicament' (n 2) 63.

[43] Or rather: is operated and regulated by those with the authority and responsibility to do so. See *NLNR* 271.

[44] See *NLNR* 271-2 for the important insight that this responsiveness 'also works to suggest new subject-matters for authoritative regulation.' This is also what I understand Endicott to suggest when he identifies

The principles that determine or constitute the law's use of its defining techniques and postulates in this way are often collectively termed the ideals, or ideal, or idea of the 'Rule of Law'. They are the 'conditions under which we can reasonably say that the "legal system" is working well.'[45] They are what I refer to as the 'guiding ideals' of law. There is some merit in using the term 'ideal' here, for it makes clear that (contrary to the common sense belief of the practising lawyer used to working within the bivalent logic, so to speak, of legal argument) 'legal systems and the rule of law exist as a matter of degree,'[46] i.e. they are truly authoritative to the extent that, inter alia, they successfully and appropriately respect or instantiate these ideals. However, strictly speaking, it is not necessary to use the concept of a regulative ideal (i.e. a central case) to preserve this insight and these requirements may equally well be classified as 'a stringent moral duty or cluster of duties of justice'[47] – a classification which perhaps more accurately reflects the conclusions of the critical elaboration of the nature and authority of law presented in this chapter and the last. Moreover, there is some reason to worry about the possibility of significant misunderstanding being caused by the description of this duty as an 'ideal' given that the term is commonly used either to express a contrast with duty or to somehow diminish its relevance for our non-ideal *real* world.[48] In what follows, however, I shall continue, for the sake of convenience, to refer to the Rule of Law as an ideal and its components as the 'guiding ideals of law' (analytically thought not practically distinct from what I have termed the formal or defining features of law) – but this usage should

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the Rule of Law with this ideal: 'control by law of aspects of the life of the community, and forms of official conduct that it is the law's proper function to control.' For, as he puts it, an 'understanding of the ideal [of the Rule of Law] requires an understanding of what ought to be controlled by law. The reason of the law gives an answer *for the community* to that moral question.' (emphasis in original) Timothy A.O. Endicott, 'The Reason of the Law' (2003) 48 American Journal of Jurisprudence 83, 85, 86.

[45] *NLNR* 270.

[46] *NLNR* 279. See also *PRN* 150; and Lon L. Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969) 122-3. See VIII.4.1, VIII.5.

[47] John Finnis, 'Law as Idea, Ideal and Duty' (2010) 1 Jurisprudence 247, 248.

[48] See ibid note 3; *Describing Law* 28 note 8.

be understood in light of this clarification such that these ideals should at all times be understood, to borrow Lon Fuller's terms (but not his usage[49]), as belonging to the morality of duty and not the morality of (mere) aspiration.

Although there is debate over the foregoing characterisation of these guiding ideals, there is significant agreement among theorists about their substance and, in particular, about the list of eight *desiderata*[50] famously expounded in contemporary jurisprudence by Fuller[51] and summarily reformulated by Finnis as follows:

> A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retrospective, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent with one another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.[52]

Returning to the question posed above (p. 153) as to the grounds for acknowledging the 'privileged status' of law's co-ordination solutions, we can conclude with Finnis that, 'it is the values of the Rule of Law that give the legal system its *distinctive* entitlement to be

[49] The different in usage is clear when one compares my statement with Fuller's claim that 'the inner morality of the law is condemned to remain largely a morality of aspiration and not of duty.' Fuller (n 46) 43. As is clear from his immediately preceding discussion of these terms, however, by an 'aspiration' Fuller idiosyncratically means what is more commonly termed a positive duty or norm, and by 'duty' a negative duty or norm. ibid 41-43.

[50] A term I prefer for its appropriate equivocation between the twin poles of 'legal excellences' and 'indispensable conditions' which Fuller's own account of the eight elements of his 'inner morality of law' recognises but then struggles to encompass as a consequence of his problematic distinction between the moralities of duty and aspiration. ibid -3.

[51] See, e.g., ibid 39, 46-91.

[52] *NLNR* 270-1. See also *AL* 214-8; Timothy A.O. Endicott, *Vagueness in Law* (OUP 2000) 185-6; Brian Z. Tamanaha, *On the Rule of Law* (CUP 2004) 92-99; and Grant Lamond, 'The Rule of Law' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

treated as the source of authoritative solutions.'[53] For, to the extent that it exemplifies the Rule of Law and is treated as presumptively authoritative, a legal system (constituted by those features outlined above (VI.3.1) and those yet to be discussed – VI.5, VII, VIII)

> offers the prospect of combining speed with clarity in generating practical solutions to constantly emerging and changing co-ordination problems, and in suggesting devices by which such solutions can be generated. Its institutions for devising and maintaining solutions secure fairness by the stability, the practicability, and the generality or non-discriminatory character of the solutions, and by the imposition of those solutions on free-riders and other deviants by processes which minimize arbitrariness and self-interested or partisan deviance in the very processes themselves.[54]

VI.3.3 A working definition of a legal system

The functionalist account of the ends and means of a legal system which has been developed in IV and V and this chapter can be summed up for the purposes of the remaining analysis of legal ordering, legal argument and, ultimately, adjudication as follows:

> A legal system, in its central case, is the social practice (a) undertaken and maintained for the ultimate purpose of effectively facilitating the reasonable co-ordination (including negative co-ordination) of choices and actions of individual members of a political society necessary for the common good and to that end (b) constituted by reasoned, institutionalised, and presumptively authoritative communicative acts of establishing, expressing and giving practical effect to the

[53] Finnis, 'Law's Authority and Social Theory's Predicament' (n 2) 64 (emphasis added, reference omitted). Note that this is not to say that instantiating the ideals of the Rule of Law is sufficient to justify such treatment.

[54] ibid.

> jural order of that society each performed in a manner and form appropriate and reflexively adapted to its respective function and that ultimate purpose.[55]

Communication has been deliberately emphasised in this working definition because it is the essential means by which the practical propositions intended and claimed by the law to be co-ordination solutions are made efficacious by being made present to the practical reason of choosing and acting persons. Legal communication is 'institutionalised' because what is to count as an authoritative communicative act as well as what the legal effect of any such act is upon the jural order are both ultimately determined by reference to the law's self-regulating system of positive norms, institutions, techniques and postulates (VI.3.1, VII.4). The communication is 'reasoned' in two different but related ideas. The term is meant to indicate, first of all, that the communication occurs for a reason, that it is purposive. This purpose can itself be understood as comprising two levels. At the most general level it is the purpose of the legal system itself, i.e. co-ordination for the common good (including co-ordination involved in rectifying and remedying wrongs), and this is reflected in the guiding ideals of the Rule of Law. At the more specific level it is the purpose particular to a communicative act of a legal agent understood in terms of the interaction with or effect upon the jural order thereby intended by the agent. This second level is perhaps tautologous on any typical understanding of 'communication' but it is necessary to state it expressly because this understanding of law rejects the view that an act of legal communication in its central case (such as a legislative act, adjudicative act or private contractual agreement) can be understood qua

[55] This definition should be taken in light of Finnis's clarificatory remarks on the nature of such 'definitions'. *NLNR* 276-81. It has been formulated with a view to foregrounding the role of communication for reasons that should become clear in the later consideration of legal argument and judicial reasoning in Chapters VII and VIII respectively. That coercion is part of the 'manner' in which the jural order is given practical effect is considered below (VI.5).

act without reference to some agent's practical intention[56] – the view of those theorists, for example, who deny the possibility of ascribing an intention to a legislative assembly.[57]

Second, 'reasoned communication' is here meant to suggest that the form and content of the act of communication has been critically considered and deliberately chosen in light both of its purpose(s) and the context of its utterance. This second sense clearly follows from the first. But it is of critical importance in its own right if one is to properly understand the human acts by which law is deliberately made, amended, known and applied. In this regard, it is useful to distinguish between knowledge and its expression, between the insight one wishes to communicate and the form of words that one ultimately uses for this purpose.[58] Although this distinction is merely analytical (for clearly language, thought and knowledge are practically interdependent[59]), it can help us to clarify the different elements that make up successful communication. Bernard Lonergan illustrates these different elements as follows:

> By way of illustration let us suppose that a writer proposes to communicate some insight A to a reader. Then by an insight B the writer will grasp the reader's habitual accumulation of insights C; by a further insight D he will grasp the deficiencies in insight E[60] that must be made up before the reader can grasp the insight A; finally, the writer must reach a practical set of insights F that will govern his verbal flow, the shaping of his sentences, their combination into paragraphs, the sequence of paragraphs in chapters and of chapters in books. Clearly, this practical

[56] This is not to say that the jural meaning or effect of the act is determined solely by the meaning or effect intended by the legal actor. See p. 175 below.

[57] See for example Jeremy Waldron, *Law and Disagreement* (OUP 1999) 119-46; *LE* 313-54. While I reject the position of such theorists, I do not propose to enter into that debate here. For a detailed discussion see Richard Ekins, *The Nature of Legislative Intent* (OUP 2012).

[58] See generally Bernard Lonergan, *Insight: A Study of Human Understanding (Collected Works of Bernard Lonergan, Volume 3)* (Frederick E. Crowe and Robert M. Doran eds, University of Toronto Press 1997) 577-81.

[59] ibid 577.

[60] To clarify: E refers to the deficiencies (of insight).

> insight F differs notably from the insight A to be communicated. It is determined by the insight B, which settles both what the writer need not explain and, no less, the resources of language on which he can rely to secure effective communication. Further, it is determined by the insight D, which fixes a subsidiary goal that has to be attained if the principal goal is to be reached. Finally, the expression will be a failure in the measure that insights B and D miscalculate the habitual development C and the relevant deficiencies E of the anticipated reader.[61]

Thus, in sum, by 'reasoned communication' I mean to acknowledge compendiously that both the thought (insight A) to be expressed and the understanding (practical insight F) that determines the formulation of that thought's expression result from deliberation engaged in and judgment reached by a legal agent or agents who deliberated *with a view to* the intended interaction with or effect upon the jural order sought *for the sake of* the common good. Such acts of judgment, concerning both the various ends and the means of legal acts (i.e. their motivating insights and their concrete public expressions) are paradigmatic of what Aquinas termed *determinatio*.

By *determinatio* is meant the second of the two principal modes by which, according to Aquinas, the normative content of a given legal system, can be derived from the first principles and requirements of practical reasoning. It is a derivation in the rationally guided but under-determined way that a particular implementation is a derivation of a general directive or a particular artefact is an instantiation of a universal form.[62] By contrast the first mode of derivation is that of application in a strict sense – as conclusions deduced from general principles.[63] While 'the central principle'[64] of certain rules of positive law (e.g. those against murder or theft) can be viewed as straight-forward derivations of the first mode from the requirements of practical reasonableness, it is also

[61] Lonergan (n 58) 579.

[62] The classic example given by Aquinas relates *determinatio* to the freedom enjoyed by an architect in realising the commission to design and build a house. *ST* I-II, q. 95, a. 2c.

[63] *ST* I-II, q. 95, a. 2c

[64] *NLNR* 289.

clear that the particularities of their integration into a given system of rules and institutions 'will require of judge and legislator countless elaborations which in most [or, in this context,[65] *all*] instances partake of the second mode of derivation.'[66] Thus it follows that the authoritative positing of any entitlement or norm, regardless of the proximity of its rationale to the universal requirements of practical reasonableness, requires *determinationes* to be made.

VI.4 Co-ordination in response to problem of positing the jural order

Sections IV.2.3 and V.2-3 explained the practical necessity of co-ordination in terms of its necessity for reasonable participation by persons in the basic goods (i.e. their fulfilment, well-being, perfection or flourishing qua human persons). Such participation is reasonable if ordered by reference to the common good. It was shown that such ordering requires a supplementary source of normative guidance beyond that of morality (IV.3). This guidance is provided by the law of a political society understood as being that which establishes and expresses what is due to whom (i.e. a jural order) by reference to the common good (I.4.1).[67] This order can be conceived of as a network of personal entitlements (i.e. of one's 'due') expressed in terms of inter-personal jural relations (such as those decisively elaborated by Hohfeld).[68] The technical or formal means by which (and the guiding ideals in accordance with which) a legal system (as opposed to customary law – V.5.5) establishes, expresses and gives practical effect to these

[65] In the passage cited Finnis was not directly including under his discussion of *determinatio*, as I am here, judgments concerning the communicative *expression* of the norm to be posited.

[66] *NLNR* 289.

[67] It is this understanding of law that explains what is meant by the claim that the 'form of law' is linked to the 'form of justice'. cf John Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 Current Legal Problems 1, 12-21. See also IX.2.3 below.

[68] W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judical Reasoning* (Yale University Press 1919).

entitlements or relations was briefly considered in the last section (VI.2). Those formal means were outlined as the solution offered by law to the type of co-ordination problem which, in the absence of such means, would arise among practically reasonable persons seeking to guide their actions by reference to whatever decisions and solutions were truly those of their society's governing authority. By contrast the type of co-ordination solution which this section considers functions as an answer to questions of the following form:

> 'What shall (henceforth) count as due to this type of person from that type of person in these types of circumstances?'

In other words, this type of legal co-ordination is concerned with *putting to use* the means identified in the last section in order to decide upon and provide for co-ordination solutions both in response to and (preferably and ideally) in anticipation of the many and various problems of strategic interaction and pure conflict which must be resolved for the sake of the common good. All of the other types of co-ordination brought about by the law are instrumental to making this class of co-ordination solutions possible and efficacious.

If the answers given by a legal system to questions in the above form are truly to facilitate and promote the common good, however, it is necessary that decisions as to what shall 'count as' due according to the society's jural order should, at a minimum, be informed by what *is* truly due (or *ought to count as* due) as a matter of morality or practical reasonableness. The requirements of practical reasonableness vary in their determinacy and in their defeasibility (IV.3) and this is reflected in the distinction noted in the last section between the two principal modes by which posited norms of law may be derived from the norms of morality (VI.3.3). Ultimately different political societies

and legal systems may reasonably propose different institutional solutions to ensure as best they can the practical reasonableness of their jural order as a going concern. As noted above (VI.3.1) one of the essential means to this end is the institution of a capacity to deliberately give express, programmatic and critically justified answers to the above question and in like manner to later change (radically if necessary) those answers. This can be termed the act of legislation in its central case and it comprises two inter-related but analytically distinct stages or practical judgments:[69]

> First stage or practical judgment: the adoption in the mind of the legislator of a practical proposal in order to promote some 'pattern of a future social order, or of some aspect of such an order'[70] (i.e. to provide a co-ordination solution framed in general terms and derived from the universal principles and requirements of practical reason either in the mode of a mere conclusion/application or by way of a chosen *determinatio*). A legislative proposal is a complex package of both ends and means (including ends chosen as means to further ends – III.2.1). The choice of proposal to adopt is, in principle, unconstrained by the existing jural order and is open to critical judgments about the requirements of practical reasonableness and of the relevant facts.
>
> Second stage or practical judgment (as a means to giving practical effect to the proposal and its intended future order): the making of a *determinatio* by the legislator by formulating (VI.3.3) and authoritatively uttering a particular meaning-statement, which act of utterance is *intended* as a means both (a) to change the existing set of all valid norms by making valid (or invalid), for the

[69] John Gardner, 'Some Types of Law' in Douglas E. Edin (ed), *Common Law Theory* (CUP 2011) 76.

[70] *NLNR* 282.

> norm-users of that legal system, a legal norm (or set of norms) N and (b) to communicate, or make known, the fact that the legislator intends N to be made valid (or invalid).[71] The making of this *determinatio*, if it is to be effective, will require due account to be taken of the existing jural order and practice of legal argument and in this sense will be constrained by both. Indeed the authoritative utterance itself is constituted by a norm-governed illocutionary-declarative act, e.g. voting, signing etc., or series of such acts (V.3.1).

The regulative requirement that the law's solutions should serve the common good applies not only to their substantive content but to the manner in which they are made, changed, made known and applied. Many of the these additional requirements are expressed in the ideals of the Rule of Law noted above (VI.3.2) but those which relate especially to the formal qualities of the adopted proposals and *determinationes* of the legislative act can be crudely summarised as the *desiderata* of promulgation, generality and clarity.[72] As Finnis has noted with respect to the desiderata of the Rule of Law more generally these qualities are not merely intended as 'characteristic of a meaning-content, or even of the verbal expression of a meaning-content; all involve qualities of institutions and processes.'[73]

Thus one may describe the specific purpose of a legislative act as the causing of a change to the legal system's set of valid norms and, thereby, to the jural order (i.e to the practical or normative context or network of entitlements relevant to the deliberating

[71] Given these two functions one should say that in performing this act of uttering the legislator performs two meaning-acts. Köpcke Tinturé (n 14) 71.

[72] For a recent discussion of generality and clarity see Paul Yowell, 'Legislation, Common Law and the Virtue of Clarity' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis 2011) 101-8. The desideratum of clarity, in so far as it implies precision and specification, is tempered by that of generality in situations where a degree of vagueness is practically necessary. See Timothy Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Language in the Law* (OUP 2011).

[73] *NLNR* 271.

agents for whom that legal system purports to be authoritative). For convenience I shall refer to these changes collectively as the 'jural effect' of the legislative act. However, as already noted, legal communication differs from ordinary inter-personal communication in so far as its success is determined by systematic considerations which operate independently of (though not without taking due account of) the intention and *determinationes* of the legal agent. Such considerations may operate to deny the illocutionary-declarative acts the status of an authoritative legislative utterance or may cause them to bring about a different jural effect than that intended by the legislator. However, since it is a requirement of a legal system in its central case that it should be appropriately responsive to the practical needs (broadly understood) of the political community across time and, accordingly, that it should provide for a means of changing the law to this end, cases where legislative acts do not succeed in bringing about the jural effects which were actually intended by the legislator in acting as it did should be regarded as non-central or secondary cases of such acts. These secondary cases, though deficient qua legislation, may nevertheless quite reasonably occur in a legal system in its central case, for they are merely a necessary consequence of the legal system's institutionalised and systematic approach to the determination of the jural effect of any legally-empowered (valid) act.

VI.5 Co-ordination in response to problem of wilful non-compliance

Law, in its central case, provides various types of co-ordination solutions for the sake of (and in a manner itself constitutive of) the common good. It is reasonable, in light of historical and contemporary experience, to anticipate that there will be always some in any given political society who, for whatever reason, will either reject this presumption or consider it defeated. It is a matter of justice and of fairness that (within limits of process

and means) wilful non-compliance should not be allowed occur with impunity. Moreover the authority of law depends not only on the justice of its decisions and solutions but also on its ability to reliably secure compliance with those decisions and solutions (V.6). Thus, there is a need for what has been termed an incentivising or motivational solution in order to render compliance by such people more probable (V.5.1-3). A central case legal system provides such solutions by means of a feature shared with other forms of effective authority, namely the authorisation of the institutionalised threat and use of sanctions. Such authorised and deliberate coercion is necessary to prevent, respond to or redress the harmful practical effects of both unreasonable disagreement (i.e. the recalcitrance of those indifferent or unmoved by the requirements of practical reasonableness) and what can be called 'reasonable disagreement' (i.e. the resistance or opposition of those acting *bona fide* or conscientiously on the basis of their own (objectively unreasonable) judgment of what is reasonable). It does this in at least two ways. First the law incentivises conformity with its authoritatively identified solutions by deliberately changing through the threat of sanctions the first order reasons for action of those solely (and therefore unreasonably) motivated by considerations of their private good. In this way the coercive power of law functions with a view to transforming all assurance, free rider and pure conflict problems (V.5.1-3) into co-ordination problems capable of resolution by the directive or informative solutions provided by the law (VI.3). Second, by thereby increasing the rate of conformity with its authoritatively proposed solutions, the law also increases the purely conventional salience of such solutions which itself increases the likelihood of compliance by those who, whether motivated by the common good or not, do not consider themselves under a *general* duty to obey the law or under a general duty to obey this particular legal system. The making good on the threat of imposing sanctions is also practically necessary. Coercion in this form actually curtails

the *capacity* (jural and/or physical) of the non-compliant person to act on his first order reasons. This form of coercion is necessary, at the very least, to ensure the efficacy of the threat of sanctions. It may also be required and justified by other substantive requirements of justice and of the common good.[74]

In addition to, and as a result of, its foregoing effects authoritative and institutionalised coercive enforcement of the law also makes it practically reasonable for those who do recognize a presumptive general duty to obey the law for the sake of the common good to actually submit themselves to its concrete burdens and obligations by mitigating the otherwise very considerable risk of their suffering loss at the hands of (or when compared with) those who refuse to so submit.[75]

[74] A consideration of such requirements is beyond the scope of this thesis. In so far as they concern what is due to the victims and perpetrators of wrongful acts and/or to their society they are the subject of the third type of co-ordination discussed above (VI.4) and of the fifth type (i.e. authoritative application of the law, e.g. sentencing – VIII.2.2).

[75] *CL* 198.

CHAPTER VII – CO-ORDINATION THROUGH LEGAL ARGUMENT

> *No doubt courts must interpret and apply statutes from above and must interpret and apply customs from below, but courts do so by means of distinctively lawyerly bodies of legal principles and rules, some customary and some stipulated. Lawyers and judges are not merely ministers of the sovereign legislator or merely agents of the popular will: they are also guardians of a relatively independent tradition of legal ideals, methods, doctrines, principles, customs, and rules.*[1]

VII.1 Introduction

A legal system exists to the degree that it provides normative guidance, i.e. that it addresses itself to the practical reason of the members of a political society and is typically treated as authoritative in that society. For the law to provide normative guidance it must, at a minimum, be reasonably knowable – there is a 'need for intelligibility'.[2] This is one of the most specific or immediate (but not the only – VII.5) *desideratum* or need which informs the type of co-ordination by law considered in this chapter. This type of co-ordination functions as an answer to what in section VI.1 was called the problem of knowing and applying the law.[3] This chapter explores my claim that theoretical and practical knowledge of the jural order is acquired through and made possible by a legal system's practice of legal argument, a practice well described as 'a disciplined practice of public practical reasoning.'[4] No less than the four types of legal co-ordination solutions considered in the last chapter (VI.2-5), the practice of legal argument in any given legal system will comprise many *determinationes* particular to that

[1] James Bernard Murphy, *The Philosophy of the Positive Law: Foundations of Jurisprudence* (Yale University Press 2005) 225.

[2] Timothy Endicott, 'The Subsidiarity of Law and the Obligation to Obey' (2005) 50 American Journal of Jurisprudence 233, 240.

[3] The second class of legal co-ordination solution, which functions as an answer to the problem of the formal identification of 'valid' law (VI.3.1), provides a necessary means (i.e. the concept of 'validity') for the co-ordination discussed in this chapter.

[4] Gerald Postema, 'Positivism and the Separation of Realists from their Scepticism' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart 2010) 260, 275.

system. However, it is possible by means of a functionalist analysis to sketch out the important features of legal argument in its central case.

To this end, one must first acknowledge that people may have *various* reasons for seeking to know about the jural order of a society (as established, expressed and given practical effect by its legal system). The comparative lawyer, textbook writer, potential investor, political activist, legislator, injured party, counsel for the accused, judge and so on presumably have significantly or subtly different concerns and purposes in asking the questions that they do about the law of a particular political society. These differences will impact on what degree of precision and level of certainty will be deemed ideal or at least acceptable in the answers received. Nevertheless, if one recognises that law exists as a complex instrument (in the 'fourth order', that of technical reason – II.2) for co-ordination (in the third order, that of practical reasoning towards morally significant choice) required for the common good, it follows that these various standpoints of inquiry are ultimately secondary to or, in a sense, parasitic upon one perspective in particular,[5] viz. that of the practically reasonable person seeking to evaluate, for the purposes of making a practical judgment, the reasonableness of a particular act (past or contemplated) of a particular person in a specific set of circumstances (a 'situation') by classifying that act as either legally prohibited, required or permitted. To use one's knowledge of the law in this way is (in the sense meant in this thesis) to *apply* the law. Thus this chapter proceeds on the basis that the practice of legal argument, in its central case, functions as the solution – so to speak 'the law's solution' – to the problem of knowing the law where such knowledge is viewed and sought as a necessary condition to the resolution in turn of a problem of applying the law to a situation.

[5] *NLNR* 234-7; *PRN* 80-84, 170-177.

VII.2 The point of legal argument

Effective normative guidance according to the jural order established, expressed and given practical effect by a legal system is impaired when people are uncertain or disagree about (a) whether an entitlement or norm is valid (i.e. authoritative) or (b) how to apply a valid entitlement or norm to a specific situation. In some cases a person's uncertainty about the law may be for reasons unrelated to the law itself – such as the person's lack of legal knowledge or inability to speak a language or afford professional advice. In other cases the uncertainty may have an accidental relationship with the law. For example the sheer length of a statute or the number of subsequent amending statutes may make any effort to correctly comprehend even its most obvious and uncontroversial jural effects a demanding and difficult task. Nevertheless, because of the distinctive techniques and postulates of a legal system (VI.3.1) such uncertainty can usually be resolved by what Alchourrón and Bulygin term an 'effective procedure':

> By an effective procedure we understand the existence of a set of rules determining univocally each one of the steps in the procedure, which leads, in every case where it is applied, to the desired solution in a finite number of steps.[6]

For this reason information technology (whether in the form of statute law 'Indexes'[7] or electronic databases) can often go a long way to resolving the questions posed by this type of uncertainty in the law (e.g. 'Has this section of the statute ever been repealed by Parliament?'). Sometimes, however, law-users may experience uncertainty that relates to something essential to the law in question. Such uncertainty may represent a failure by the legal system to adequately conform to its guiding ideals of the Rule of Law and may

[6] *NS* 85.

[7] Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England [1681]* (Joseph Cropsey ed, University of Chicago Press 1971) 56 [6].

represent a deficiency in the law qua law. Sometimes however this uncertainty is an unavoidable effect of a necessary or desirable feature of a well-functioning legal system. Some of these features are as follows:

- The establishing, expressing and giving practical effect to the jural order by means of general norms (i.e. norms capable of effective application across a range of times and circumstances and to general classes of persons and acts identified by specified universal properties which mark them as deserving equal treatment).[8]
- The use of a natural language to communicate legal propositions.
- The deliberate use of norms containing evaluative standards or vague terms.

In these cases the uncertainty occurs as an undesired but reasonably foreseeable side-effect that is accepted as practically reasonable all-things-considered.[9] It follows that such problems of uncertainty cannot reasonably be wholly eliminated by purely preventative means. Remedial solutions are practically necessary too.

A principal remedial solution is provided by a legal system's stipulation of a special procedure as the *only appropriate means* for determining the correctness of a proposition of law or an application of law, namely the practice of legal argument (or, synonymously for my purposes: legal reasoning, legal discourse[10] or legal science[11]). One specific point of this practice is to facilitate to the greatest extent *reasonably* possible a stable and predictable convergence in the application of the law. Given the complex

[8] *CL* 124-5. Endicott, 'The Subsidiarity of Law and the Obligation to Obey' (n 2) 239-42.

[9] John Finnis, 'Reflections and Responses' in *RML* 539. cf Timothy Endicott, 'The Irony of Law' in *RML* 337-9.

[10] Aulis Aarnio, Robert Alexy and Aleksander Peczenik, 'The Foundation of Legal Reasoning II' (1981) 12 Rechtstheorie 257, 274-8. Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Ruth Adler and Neil MacCormick trs, Clarendon Press 1989) 287-8.

[11] *NS* 67.

multiplicity (across time and actors) of communicative acts purporting to be validly establishing, expressing and giving effect to the jural order of a society the practice of legal argument 'serves the aspiration of the legal system to speak through many actors with one voice.'[12]

Though the law aspires to speak with one voice it nevertheless addresses different legal norms and sets of legal norms to different classes of person and types of situation and this is a highly relevant consideration for the making of any legislative *determinatio*. The levels of generality and complexity of a given body of law must be reasonably tailored to both the moral and technical complexities of the acts and practices being regulated and the capacities (understood broadly in terms of intellectual ability, personal expertise, access to expert legal advice, resources for compliance etc.) of the relevant actors to grasp what is required of them and to act accordingly. The degree of convergence, stability and predictability which it is reasonable even to try to bring about by law (and hence facilitate through legal argument) will also vary depending on these complexities and capacities.

That recourse to some mode of *argument* is the appropriate means for resolving uncertainties about the law follows from the analysis of a legal system which has been presented so far. The intelligibility and practical superiority of a mode of authority that creates the *capacity* for a deliberate and reasoned ordering of the community's common life over and against a reliance on co-ordination solutions determined by whim, chance, deception, divination or (mere) force, has an enduring and determining significance for the features and structuring ideals of the resulting system of government by law and on

[12] Grant Lamond, 'Persuasive Authority in the Law' (2010) 27 Harvard Review of Philosophy 16, 33. This aspiration is another way of articulating certain guiding ideals of the Rule of Law, such as practicability and coherence (IV.3.2).

the operation of its constitutive institutions.[13] In particular, it requires that, when seeking to overcome some uncertainty about the law one should not *needlessly* adopt a procedure of inquiry any less rational than that which ought to have been used in the initial act of law-making *determinatio*. This requirement is articulated in the postulate that a sound legal argument is the only mode of resolving uncertainty about the correct application of the law. This postulate is not incompatible with recognising that a judicial application of the law may be legally authoritative even when it is mistaken and represents an unsound legal argument. That the very act of applying the law has certain legal consequences when performed by a judge (qua authoritative norm-applier – VI.3.1) does not change the fact that a judge can only apply *the law* by means of legal argument. Thus it is the 'ideals, methods, doctrines, principles, customs, and rules'[14] of the legal system's practice of legal argument that determine how judicial reasoning *should* be performed and not vice versa. Nevertheless, because judicial applications of law are authoritative, what counts as sound legal argument will in part be determined by how that argument *is actually* practiced by judges of that system. This is not a vicious cycle but another example of the law's reflexive practice of systematic self-regulation as a means of enhancing the intelligibility, stability and predictability of its co-ordination solutions.

There is an understandable temptation to overlook the function of legal argument outside of formal litigation and to propose courts and judges as the principal solution provided by a legal system in securing the convergence of reasonable judgments about the law in response to doubts and disagreements. In a well-functioning legal system, however, the reality is otherwise. For in such a jural order the occurrence of doubts about

[13] 'In societies in which it is thought that what is just is to be intelligently, reasonably, and responsibly discovered, the ideal is that an impartial, intelligent, reasonable, and responsible person is chosen to arbitrate.' *LJC* 132.

[14] Murphy (n 1) 225.

what the law requires in a given situation will be extremely rare when compared with all of the acts and omissions that consciously or unconsciously apply the law.[15] Moreover, when such doubts do arise the vast majority of them will be resolved without the involvement of any authoritative norm-applying institution of law. Instead recourse will first be had to the theoretical authority of a person deemed to be sufficiently proficient (for the question at hand) in the practice of sound legal argument, i.e. in knowing and applying the law. Where disagreement persists it can be attributed to one or more of the following reasons:

(1) Each party is motivated by a belief that the law is determinatively in favour of its claim.

(2) One or both parties are motivated by a belief that the true status of the purported legal entitlement is underdetermined by the law (in the sense that more than one reasonable resolution of the issue can be justified by a sound legal argument).

(3) Either or both of the parties are motivated to disagree about the true status of the purported entitlement by reasons independent of their beliefs about the determinacy of the law or the relative soundness of the competing legal arguments.

Where such disagreements persist despite a discursive process of making and testing competing legal arguments the legal system will very often still play a vital though

[15] This is well expressed by the base and second layer of the seven layers of 'the great pyramid of legal order' outlined in *Legal Process* 286. See also Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 128; *CL* 135; Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press 2009) 137.

indirect role in facilitating resolutions based not on authority but on agreement or unanimity. These solutions are reached through a variety of practices which, though defying hard and fast classification and existing along a spectrum that shades into adjudication as defined earlier (I.4.2), are often categorised as negotiation, mediation, conciliation and arbitration.[16] Such 'private ordering' is accomplished 'in the shadow of the law'[17] or, perhaps more accurately in disputes which turn on highly arguable propositions of law, in its penumbra.[18] For it is the virtually all-encompassing practical effects of the network of legal entitlements that are uncontested by the parties which make possible civilised dispute, reasoned negotiation, prudential compromise and trustworthy and enforceable settlement agreements. Moreover the law not only makes possible but also incentivises such agreement by institutionalising a means by which, in principle, any question about the correctness of an application of the law not otherwise resolved or dissolved by private agreement may be given a timely, determinate, conclusive, and authoritative public answer.[19] In the next chapter I argue for an account of the act of adjudication in terms of the mode of co-ordinative resolution which such authoritative application of the law provides.

[16] Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (2nd edn, OUP 2012).

[17] See generally Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale Law Journal; and *Legal Process* 6-9, 286-7.

[18] On the jurisprudential use of 'penumbra' as metaphor for indeterminacy see Timothy A.O. Endicott, *Vagueness in Law* (OUP 2000) 8.

[19] A legal system may or may not provide institutional means for authoritatively answering questions about the correctness of propositions of the law where such questions are unrelated to any specific or live question of law application. For where no application is implicated it is difficult to see how the practical necessity addressed by the capacity to give authoritative answers to such questions differs from the necessity addressed by the legislative function. Hence where a legal system empowers some body to issue authoritative declarations of the law without any requirement that they be related to law application that power is better viewed as legislative even if the body is otherwise charged with and constituted to perform an adjudicative function.

VII.3 The form of legal argument

To apply the law in or to a given situation is to act in accordance with a judgment (made more or less consciously) as to what the law permits, obliges or prohibits one to do in that situation and a choice to act according to that decision. Such a judgment comprises judgments of both law and fact. If one accepts that the law exists as a *public* standard of practical reason then one must also recognise the possibility of mistakes in judgments about what the law requires. To raise a question about what a correct application of the law was or would be in a given situation is to ask a question about the normative content of the jural order. Such questions can only be asked and answered propositionally. Answering them involves the testing of doubted or contested propositions of law by reference to the jural order, i.e. by reference to propositions of law that are not in question. This 'testing' is accomplished by means of a practice of justificatory argument made possible and partly determined by the law's systematic, institutionalised and self-regulating techniques and its operational postulates and guiding ideals (VI.3). In what follows I consider this practice of justification in more detail.

VII.3.1 Justification and legal argument

To give a justification is to explain a decision to act in one way rather than another by appealing to a practical reason. It is this articulation of a set of practical propositions – a set intrinsically open to terminating in principles identifying intrinsic human goods – which distinguishes a justification from a causal explanation or a mere reporting of subjective motivation or desire. We can view such a proposition as a universal norm or rule because to accept my justification is to accept that the reason for my decision is also, at least presumptively, a good reason for anyone else relevantly-like me and faced with a

relevantly-similar situation of choice.[20] To accept this is in effect to recognise a universal rule prescribing how to act in the given situation and to affirm the appropriateness of my application of the rule in my act. To justify is thus to articulate an *argument* which rationally connects a universal practical proposition or norm to an act as a premise to a conclusion. In other words, it is to engage in a (propositional) form of *practical* reasoning.

As a way into a consideration of the features of legal argument, let me say more about what I mean by an argument. According to Stephen Toulmin the practice of offering argument in support of claims can be analysed into six constitutive elements.[21]

1. There is the justified claim or conclusion C.

2. There is the datum D: a fact (or set of facts) that is presented as the ground or basis for (i.e. in part justification for) C.

3. There is a warrant W: a rule of inference (or 'inference licence' or 'canon of argument' or 'practical standard'[22]) that justifies moving from belief in D to belief in C. It answers the question 'Why does D ground C?' or 'If I affirm D, why should I affirm C?' by giving a justifying, practical reason.

4. There is a qualifier Q: an indication of the 'strength' or modality conferred by W on C.[23]

[20] Christopher Tollefsen, 'Universalizability in Ethics' (2005) 50 American Journal of Jurisprudence 225, 227ff.

[21] Stephen E. Toulmin, *The Uses of Argument (Updated edition)* (CUP 2003) Chapter 3.

[22] ibid 91.

[23] ibid 93-4.

5. There may be a rebuttal or reservation R: the conditions (if any) in which the general authority of W is to be set aside.[24]

6. There may be a backing B: another datum that grounds W, which may itself require appeal to a further warrant and thus, potentially, to a further backing and so on.

To say that the practical judgment or act (expressed as C) is a particular *application* of a universal practical proposition or rule W is simply to say that C is *justified* (at least in part) by appeal to W. Application always refers to a situation and thus justificatory argument always requires and implies a discursive or deliberative *context*. That is to say, justification only occurs as a response to a (practical) question which itself is only possible on the basis of further unquestioned assumptions and presuppositions (VII.4). This question can be posed by one person to another (discourse) or by a person to himself (reflection, deliberation) but is essentially of the form: 'Why do x?' or (to use Toulmin's terms) 'Why C?' Until such a question is actually posed, or supposed, one cannot talk of justification in the sense under consideration here. There is a second important aspect to what is meant here by a discursive or deliberative context. It refers not just to the practical concerns and unquestioned beliefs of the person or persons engaged in the deliberation or discourse (which will settle for the purposes of that argument what warrants can be asserted without need for further justification) but also to the entitlements of persons making an argument to invoke certain warrants. For example, in the context of legal argument, there may be warrants which a superior but not a lower ranking court or private individual can invoke by virtue of the superior court's entitlement to deliberately over-rule past precedents from lower or equally ranked courts.

[24] ibid.

VII.3.2 Internal and external justification

As is the case with any argument, a distinction can be drawn between the formal validity and the soundness of a legal argument. An argument may be formally valid but unsound because its premises are false or incomplete. In recognition of this distinction some theorists of legal argument analyse and evaluate legal argument in terms of what is called internal and external justification respectively.[25] Internal justification concerns the deductive validity of the legal argument formulated as what can be termed a legal syllogism. External justification is concerned with the acceptability or truth of the premises used in such a legal syllogism. The basic form of a justificatory legal argument for the application of a norm can be expressed as shown in Table VII.1 below.[26] Needless to say, in any even moderately complex case a party may be asserting many such legal syllogisms which will relate to each other in various ways to form larger chains of argumentation.[27]

Table VII.1

Toulmin term	*Description*	*Example*
W, Q[28] & R	Legal (operative[29], practical,	If (situational properties) **p**,

[25] Alexy (n 10) 221; following the analysis of Jerzy Wróblewsk, for which see references given in Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification* (Kluwer 1987) 119 note 102. MacCormick draws a similar distinction between what he terms 'deductive' and 'second-order' justification. Neil MacCormick, *Legal Reasoning and Legal Theory* (paperback with revised foreword edn, Clarendon Press 1994) Chapter 1, Chapter 5. A similar distinction is relied upon in Richard A. Wasserstrom, *The Judicial Decision: Toward a theory of legal justification* (Stanford University Press 1961).

[26] For a more detailed discussion of internal justification see Alexy (n 10) 221-230.

[27] For a distinction between single, convergent, linked, serial and divergent arguments see Douglas Walton, *Fundamentals of Critical Argumentation* (CUP 2006) Chapter 4.

[28] Strictly speaking there is no need for the modal operator in the context of an internal legal justificatory argument as the legal premise can only be asserted as either true or false.

	normative) premise	then (normative consequence) **q**
D	Informational (auxiliary[30]) premise	**p**
C	Claim or outcome (via judgment of application)	Therefore **q**

This basic form, however, seems to omit (or compact) a number of steps which may need to be distinguished in the course of an actual justificatory argument. For in justifying an application of the law to a given situation the conclusion will be the deontic qualification of a specific act while the legal premise will be a general norm. How should one rationally reconstruct and justify the judgments involved in subsuming the particularities of the situation under the terms of a general rule? Martin Stone, following Wittgenstein, has made a compelling case against viewing the everyday human act of rule-applying judgment in a way that invites or requires some further theory or philosophical account of what it is to apply a rule or how one can or should determine, as a general matter and apart from simply making for oneself a rule-applying judgment, what is to count as *an* application of *this* rule.[31] Instead, borrowing from the analysis of legal justification given

[29] 'If belief in the conclusion entails having a practical critical attitude it is only because belief in one of the premises requires such an attitude...I shall call any reason an *operative reason* if, and only if, belief in its existence entails having the practical critical attitude. A reason which is not an operative one will be called an *auxiliary reason*.' *PRN* 33.

[30] See note 29 above.

[31] Martin Stone, 'Focusing the Law' in Andrei Marmor (ed), *Law and Interpretation* (Clarendon Press 1995). See also Martin Stone, 'Formalism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 202-3; and Endicott, *Vagueness in Law* 22-24.

by MacCormick,[32] it is both possible and useful to recognise two additional types of judgment (and hence of premise) that in addition to the legal premise may form part of the basic legal syllogism that justifies an act of law application.[33] This extended version is set out in Table VII.2.

Table VII.2

Toulmin term	*Description*	*Example*
W, Q & R[34]	Legal premise	If **p**, then **q**
W	Interpretive premise	**p** means **p'**
D	Informational premise	**x, y, z**
D / W	Classification premise	**x, y, z** is an instance of **p'**
C	Claim or conclusion (via judgment of application)	Therefore **q**

[32] Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 43. See also MacCormick, *Legal Reasoning and Legal Theory* (n 25) 65-72, 93-97.

[33] For an alternative but not substantially different schema see Jerzy Wroblewski, *The Judicial Application of the Law* (Kluwer Academic Publishers 1992) 30-35, 235-6.

[34] Depending on how one wants to conceptualise the defeasibility of legal reasons, one might also add as an express premise what can otherwise be understood as implied by the assertion of the legal premise: 'No unformulated or unconsidered valid proposition exists which defeats this legal premise.' See Brian Flanagan, 'Revisiting the Contribution of Literal Meaning to Legal Meaning' (2010) 30 Oxford Journal of Legal Studies 255, 266-267.

The deductive form of internal justification is an essential feature of legal argument.[35] Together with the other distinctive features of law's systematic and self-regulating nature we can say that it is

> designed to provide the citizen, the legal adviser and the judge with an algorithm for deciding as many questions as possible – in principle every question – Yes (or No), this course of action would (or would not) be lawful; this arrangement is valid; this contract is at an end...and so forth.[36]

Attention to the deductive form of internal justification discloses a number of significant features of legal argument. First, by recognising the necessity for a legal norm as the major or operational premise in legal argument, this schema shows how the Rule of Law principle of consistent application of the law (VI.3.3), itself derived from the universal requirements of practical reasonableness concerning fairness and impartiality between persons (IV.3.2), is formally brought to bear on the practice of deciding according to law. Second, it forces an open acknowledgement of the possible role of premises which are not themselves legal norms (e.g. the premises of interpretation and classification). This helps us to identify the different types of reasoning and judgment which may bear on an application of the law. Finally, in setting out the deductive shape of any legal claim or argument, one can more easily see the formal limits of such reasoning. These limits are reached when a question or challenge is raised in respect of any of the judgments relied on for the premises in the legal syllogism. In this regard the schema in Table VII.2 helps to show how there are four basic types of substantive[37] challenge to a deductively valid

[35] MacCormick, *Rhetoric and the Rule of Law* (n 32) 43 49-77; Alexy (n 10) 229-30; Kent Jr Sinclair, 'Legal Reasoning: In Search of an Adequate Theory of Argument' (1971) 59 California Law Review 821, 833-40.

[36] John Finnis, 'Legal Reasoning as Practical Reason' in *CEJF I* 220.

[37] I am thus not considering here as challenges to the soundness *per se* of a legal syllogism challenges to the right of a party to assert the syllogism in a particular context, e.g. challenges to *locus standi* or jurisdiction, which are obviously quite common in practice. Obviously such a jurisdictional challenge is itself a legal claim and so will be constituted by a legal syllogism.

justificatory legal argument can take, corresponding to the four types of judgment or premise in an argument of internal justification, namely:

(1) Denial of a legal premise (i.e. the norm is invalid, irrelevant or otherwise inapplicable) – judgments of law (and equity).[38]

(2) Denial of an informational premise – judgments of fact.

(3) Denial of an interpretative premise – (deliberate) judgments of interpretation.[39]

(4) Denial of a classificatory premise – (deliberate) judgments of classification (or evaluation).[40]

It is the function of arguments of external justification to justify, in response to specific doubts or denials, the judgments on which an argument of internal justification is premised.

VII.4 External justification

How one conceives of the rationality and determinacy of external justification in the law will to some extent be determined by one's conception of practical reasoning in general

[38] This schema runs together two questions which certain theorists (e.g. *EPD* 233; *5½ Myths* 224) are keen to separate, namely the questions 'Is W a valid legal norm?' and 'Should W be judicially applied in this situation?' For now, it is sufficient for present purposes merely to note that, even if importantly distinct, both questions constitute a challenge to the soundness of a valid internal argument by querying the truth of the *legal premise*.

[39] 'Interpreting' a legal norm (or its constituent terms), in the narrow sense used here, is not equivalent to applying, understanding or rendering-more-determinate. On this conception one may understand and apply rules without necessarily interpreting them and one may correctly interpret a vague rule without thereby reducing its vagueness. Endicott, *Vagueness in Law* (n 18) 159-60; *ST* II-II q. 120 a. 1 ad. 3, cited in *Aquinas* 263 note 57.

[40] A judgment of classification or evaluation is a deliberate judgment applying a general term of the legal premise (e.g. 'spouse', 'reasonable care'). Its characterisation as a judgment of classification or evaluation is necessary if one is to differentiate between the mere application of rules and the assertion (or positing) of new highly-specific decrees. Stone, 'Focusing the Law' (n 31) 71.

and of rule application in particular. A sceptical or non-cognitivist view of practical reason and practical truth will – in any thorough reflection or discussion – translate into a sceptical account of the rationality of legal argument. Like reductivist or deterministic accounts of human reasoning and choice it will critique the very idea of justification and downplay the rational motivation offered by practical reasons and instead emphasises the causative role of non-intellectual factors. I don't purport to address or refute such accounts here except to note that they undermine the very possibility and intelligibility of law itself and not just particular understandings of justificatory legal argument.

At the other extreme, an excessively formalistic or rationalistic account of practical reasoning may posit an 'effective procedure'[41] (VII.2) as a necessary condition for the very possibility of deductively valid practical judgment. It is hard to find any advocates of such an account of practical justification but there is no shortage of theorists ready to impute it to any person who seeks to distinguish the determinacy available through legal argument from that possible in free-standing moral deliberation.[42] On this view it is fatal to the soundness of a justification if the deliberative process resulting in a decision can be distinguished from the process of rationally justifying the decision as the conclusion of a valid syllogism.[43] That a practical judgment is rarely the outcome of an effective decision procedure is held up as proof that talk of its justification is usually only a post hoc and bad faith rationalisation of a choice actually made for other reasons.

[41] *NS* 85.

[42] For example: 'Legal doctrine is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorizing, describing, organizing and comparing; it is *not* a methodology for reaching substantive outcomes.' Allan Hutchinson and Patrick J. Monahan, 'Law, Politics, and the Critical Legal Scholars' (1984) 36 Stanford Law Review 199, 206. Leaving aside the gratuitous charge of manipulation, it is hard to see how this otherwise quite accurate account of how legal argument provides for decision making according to the law reveals 'the irremediable crisis within the legal process' and collapses the distinction 'between legal reasoning and vulgar political debate' (ibid 207) *unless* one imputes to 'mainstream legal thought' (ibid 207) the belief that legal argument is distinguished by its access to an 'effective procedure'.

[43] Charles Yablon, 'The Indeterminacy of Law: Critical Legal Studies and the Problem of Legal Explanation' (1985) 6 Cardozo Law Review 917.

Such sceptical critiques misunderstand both the relation of logical implication and the relation of practical inference in requiring as a condition of such relations that the deduction of one term from another according to such relations can be performed mechanically or computationally. On the contrary, even in mathematics finding a new theorem or constructing or examining a proof 'is an activity in which rational and intuitive factors are combined; it requires talent, creative imagination and sometimes luck.'[44] Likewise in practical reasoning a process of analysis by which concrete decisions are traced back to general norms may often need to precede the process of synthesis by which those decisions are formally justified as valid derivations or applications of those norms. This process of analysis is not a matter of moving mechanically from one proposition to another. Rather 'we test out, i.e., posit, alternative stratagems, until, through a process often characterized by fits and starts, we arrive at a solution: a path up to the principles. … the process is not a step-to-next-step process but, rather, a matter of hypothesis and even invention.'[45] The point of a 'disciplined practice of public practical reasoning' like legal argument is not to disguise or attempt to eliminate as far as possible the need for moments of creative imagination and invention in the making of norm-applying practical judgments. Rather the point is to ensure that the equality of entitlement and treatment (required by the common good), which is the very reason for the positing of the jural order through general norms of universal application, is effectively realised in practice through the consistent application of the appropriate norms to the relevantly-similar situations which they are intended to govern. As Finnis puts it:

> In the working of the legal process, much turns on the principle – a [non-posited] principle of fairness – that litigants (and others involved in that process) should be treated by judges ... *impartially*, in the sense that they

[44] *NS* 85.

[45] Kevin Flannery, *Acts Amid Precepts* (Catholic University of America Press 2001) 71.

> are as nearly as possible treated by each judge as they would be treated by every other judge. It is this above all ... that drives the law towards the artificial, the *techne* rationality of laying down and following a set of positive norms identifiable as far as possible simply be their "source" (i.e. by the fact of their enactment or other constitutive event) and applied so far as possible according to their publicly stipulated meaning, itself elucidated with as little as possible appeal to considerations which, because not controlled by facts about sources (constitutive events), are inherently likely to be appealed to differently by different judges. This drive to insulate legal reasoning from moral reasoning can never, however, be complete...[46]

To this end the practice of legal argument will comprise various 'legal ideals, methods, doctrines, principles, customs, and rules.'[47] These techniques will vary from system to system. Moreover they will vary depending on the type of premise or judgment for which external justification is sought. For, in Toulmin's terms, the backing for a warrant is always field-dependent.[48] Their common point, however, is to facilitate a reasonable convergence in the many judgments leading to the application of the same general norm to relevantly-similar situations despite these judgments being made by different persons and at different times. These techniques do not operate to ensure that by some mysterious means legal *rules* will regulate their own identification and application.[49] Instead they function to structure (so far as is reasonably possible and appropriate) individual acts of law application in terms of a constitutive series of further judgments (including further judgments of rule application) which the different addressees and anticipated appliers of the law are deemed likely, as a matter of fact, to make in an acceptably similar way.[50] A

[46] John Finnis, 'Legal Reasoning as Practical Reason' (n 36) 228-9.

[47] Murphy (n 1) 225.

[48] Toulmin (n 21) 96.

[49] Hence it is a mistake either to seek a theory by which such regulation does or could operate or to conclude that the impossibility of such regulation means that determinate normative guidance is unattainable by means of general norms. For criticisms of theories which equate rule application with interpretation as a means of overcoming what is perceived to be a problematic gap between rules and their application see Endicott, *Vagueness in Law* (n 18) 159-67 (contra Dworkin); and Stone, 'Focusing the Law' (n 31) 37-41, 60-66 (contra Burton).

[50] One could argue that it is only in so far as Critical Legal Realists are disappointed theorists of rule application that they could really consider it fatal to the intelligibility or practical reasonableness of the rule

primary example of this structuring function are the various techniques and working postulates by which the law helps to co-ordinates judgments identifying the legal premise of the law-applying syllogism by tying them to further judgments about the occurrence of certain past acts defined by the system's own criteria of validity (VI.3.1).

Perhaps at the root of sceptical critiques of external justification is a failure to accept that calculative and deliberative reasoning, while very different, provide authentically and appropriately rational modes of justifying their conclusions. The former type of reasoning is formalistic and quantitative. It has only two conditions for success: first that the meaning of the signs are identified correctly (hence the preference in artificial languages for univocal terms) and second that the operations are carried out correctly. It both cases, 'correctness' can be exhaustively defined by reference to a finite set of definitions, axioms and rules. Such reasoning can rightly be called mechanical or computational. By contrast, deliberative reasoning is substantive and qualitative. It culminates not with the outcome of a calculation but with a *judgment*.[51] The capacity for conscious and reasoned deliberation and judgment is a distinctly human capacity which defies reduction to any other known natural or artificial process.[52] While it is obviously

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of law to point out that the law's capacity for such determinate guidance as it can achieve on any given subject is crafted out of and depends upon the existence of commonly shared judgments about certain other subjects. For example: 'Explanation … involves a statement about the event sought to be explained and the assertion of a causal (that is, invariable) generalization that if an event of the first type occurs, an event of the second type will also occur… The Critical theorist … [claims] – and I believe this is a central claim – that no legal decision can be adequately *explained* without reference to the underlying social and normative structures of thought which give meaning to the decision.' Yablon (n 43) 925, 935. On the reductivist conflation of human choice with natural causation (such as in evident in Yablon's account of explanation) see note 53 below.

[51] 'Judgment is a form of mental activity that is not bound to rules, is not subject to explicit specification of its mode of operation (unlike methodological rationality), and comes into play beyond the confines of rule-governed intelligence. At the same time, judgment is not without rule or reason, but rather, must strive for general validity. If subjectivity could not be transcended, at least in principle, the rendering of judgments would be an entirely vain activity of asserting claims that could never be vindicated. For there to be the mere possibility of valid judgments, there must exist a way of breaking the twin stranglehold of methodological rules and arbitrary subjectivism.' Ronald Beiner, *Political Judgment* (Methuen 1983) 2.

[52] *NLNR* 399.

beyond the scope of the present thesis to defend such a claim, it is clear that a refusal to accept at least the possibility of such a capacity will render irredeemable problematic any theory of law and legal ordering which (correctly) recognises the irreducible role played by the practical judgments of individual norm-appliers' (both private and authoritative).[53]

The requirement that legal solutions be practicable and effective might seem to be undermined by the claim that the law is only known through a discursive or argumentative practice. For in principle, this means a further question can always be raised concerning the premise of an argument of internal or external justification, with each question demanding a new chain of justificatory answering argument.[54] There are several reasons, however, why in practice this potentially unending chain of question and answer does not present a significant obstacle to effective and reasonable legal ordering. First, if a challenge to the premise of a justificatory argument is even to be intelligible (never mind compelling) it must rely on a set of unchallenged premises and norms of rationality shared by the disputants. As Toulmin puts it:

> ...unless, in any particular field of argument, we are prepared to work with warrants of *some* kind, it will become impossible in that field to subject arguments to rational assessment. The data we cite if a claim is challenged depend on the warrants we are prepared to operate with in that field, and the warrants to which we commit ourselves are implicit in the particular steps from data to claims we are prepared to take and to admit. ... Some warrants must be accepted provisionally without further challenge, if argument is to open to us in the field in question: we should not even know what sort of data were of the slightest relevance to a conclusion, if we had not at least a provisional idea of the warrants acceptable in the situation confronting us. The existence of considerations such as would

[53] On the modern tendency to reduce the human power of free decision to a class of causal power see Thomas Pink, *Free Will: A very short introduction* (OUP 2004) 108. For a typical manifestation of the presumption (though expressly not an argument) against such a power see Richard Taylor, 'Determinism and the Theory of Agency' in Shafer-Landau (ed), *Ethical Theory* (Blackwell Publishing 2007) referring to 'certain odd metaphysical notions' upon which belief in human agency must be based. For a good account of the nature and origin of this tendency see Eric Voegelin, 'The New Science of Politics [1952]' in Manfred Henningson (ed), *Modernity Without Restraint* (University of Missouri Press 2000) 90-108.

[54] For a discussion of resulting levels of argument see Aarnio (n 25) 120.

> establish the acceptability of the most reliable warrants is something we are entitled to take for granted.[55]

By requiring that a conflict be translated into competing legal arguments as a condition to its being resolved by the law's authority, a legal system supplies a rich set of shared warrants that makes intelligible and non-regressive disagreement possible. Second, it should be accepted that a point exists at which no further *relevant or pertinent questions* can be asked.[56] It is this limit (what Peirce termed the 'final settled opinion'[57]) which forms the horizon for all reasonable (truth-seeking, justified) inquiry and judgment, and is the ultimate measure of correctness and objectivity in human knowing. In the legal context, given the requirement of justice that legal solutions be not only reasonable but *effective*, this general principle should be supplemented by recognition of a point at which no further questions can *reasonably be asked*. Where the good of flesh and blood individuals is at stake because of a disagreement about a proposition or application of law then it is a practical necessity that argument is not allowed to continue ad infinitum but instead is brought in a timely matter to a reasonable and determinate resolution either by agreement or, failing that, by authority. Accordingly a legal system in its central case both makes institutional provision for authoritative resolution and seeks to facilitate resolution by agreement. Fourth, in any actual deliberative or discursive context pragmatic and prudential considerations of, *inter alia*, time, cost, strategy (diminishing returns, redundancy of certain issues, balance of risk in maintaining disagreement etc.) and appreciation, whether consciously acknowledged or not, of the limits of the *de facto* audience's settled conception of what is a plausible or acceptable argumentative

[55] Toulmin (n 21) 93, 98-9.

[56] Bernard Lonergan, *Insight: A Study of Human Understanding (Collected Works of Bernard Lonergan, Volume 3)* (Frederick E. Crowe and Robert M. Doran eds, University of Toronto Press 1997) 309-312, 366-71.

[57] C.J. Misak, *Truth and the End of Inquiry: A Peircean Account of Truth* (Clarendon Press 2004) 123, 46-47.

challenge to make, will also narrow (more or less reasonably) the range of demands for further justification that individuals, or ultimately judges themselves, will deem reasonable to engage with and respond to with argument or authoritative determination. 'Hence the "final point" that can reasonably be posited in respect of sound justificatory legal argument is fixed in the audience or, in the terms introduced by Peczenik, it is contextually bound.'[58]

Thus before any argument of external justification is formulated or asserted, a practical judgment will already have been made by a party to the discourse as to the reasonableness of making, or of responding to, a demand for such justification.[59] This does *not* necessarily mean, however, that whenever an argument of external justification is neither demanded nor proffered by interlocutors that this is the result of practical deliberation and judgment on their part. That every theoretical or practical principle present in a rational justificatory reconstruction of our intentional acts might conceivably be contested does not mean that when something is not actually contested, this is because it has been somehow implicitly contested and determined. It is this notion of hidden or implicit or unintentional acts of justification, carried out in the absence of any actual or reasonable doubt, challenge or question, that results (unhelpfully, I believe) in the all-encompassing conception of interpretation which underpins claims that every application of a rule is an interpretation of the rule or that every legal judgment by which the legal premise is asserted is an act of interpretation.[60]

[58] Aarnio (n 25) 118-9.

[59] See the 'general rule of justification' proposed by Alexy: 'Every speaker must give reasons for what he or she asserts when asked to do so, unless he or she can cite reasons which justify a refusal to provide a justification.' Alexy (n 10) 129, 192. See also *LJC* 170.

[60] See note 39 above.

VII.5 Is efficacy the point of it all?

This overview of the function of legal argument has been at a fairly abstract and general level. I do not purport to defend any substantive theory of legal argument or of its typical techniques. My focus is on its function within the broader practical project of co-ordination through law for the common good. In the foregoing sections I have emphasised the ways in which a discrete practice of legal argument functions to promote, through convergence of judgment, the efficacy of a legal system's co-ordination solutions. That is not its only purpose. Recall that the co-ordinating techniques and postulates that structure the meaning of 'validity' (VI.3.1) must themselves be used in line with the guiding ideals of the Rule of Law (VI.3.2) so that the *means* for effective identification of the law are, by their reasonableness, themselves constitutive of the common good. It is the same with the practice of legal argument. Legal arguments about the *validity* of a posited norm, or its *meaning,* or its *relevance* to a given situation, or the *appropriateness* of its application, or the determinate effect of its correct application are all guided and structured by various norms of rationality and rules of inference. Some of these feature in legal argument because of their conventional force as custom and some because of their sheer reasonableness or practical necessity as sound practical principles. This is well captured by Finnis when he notes that

> ...in no legal system responsive to human needs do citizens, judges, or other officials look to the bare social fact of a past legislative act or act of adjudication. Always the reference is to such acts in their intra-systemic context. And that context is, first and foremost, a set of propositions identifying necessary and sufficient conditions of validity both of legislative and adjudicative acts and of the legal rules identifiable by reference (directly but in part!) to those acts. And such validity conditions pertain not only to the circumstances and form of those acts but also to the consequent rules' persistence through time as members of a set of propositions the membership of which changes constantly by addition, subtraction, amendment, clarification, explanation, and so forth.

> Contributing both rationale and countless details of content to this complex of propositions and intellectual acts (juristic interpretation), will be found "references"—often silent but detectable by inference—to the desirability of coherence here and now, of stability across time, of fidelity to undertakings, respect for legitimate expectations, avoidance of tyranny, preservation of the community whose laws these are (and of its capacity for self-government), protection of the vulnerable, incentives for investment, maintenance of that condition of communal life we call the Rule of Law, and many other "evaluative arguments".[61]

This means that in a central case legal system the rationality norms of external justificatory argument can never be reduced or stipulatively restricted to a set of posited or merely customary standards. Whether the additional standards of practical reasonableness found in sound legal argument should or should not be called 'law' or 'legal' (in the very same *sense* that is picked out by a system's positive criteria of validity) is not a question of properly philosophical concern. There are pragmatic arguments that can be made on both sides and a lot depends on the discursive context. The important jurisprudential point, however, is that the recognition and use of these additional standards of practical reason is not *accidental* to the existence of law as the *kind* of thing or practice that it is, i.e. a reasonable and effective mode of practical co-ordination for the common good. Rather, the use of such standards in external justificatory argument is as 'intrinsic' to law in its central case as are its defining techniques and guiding ideals (VI.3).

It follows that those who, through their publicly articulated acts of reasoning and through the judgments which they purport to make in line with that reasoning, have the power to influence the conventions of legal argument (e.g. judges, leading academics, influential practitioners) have a moral duty do so with a view to protecting both the effectiveness and the reasonableness of the law. As participants in a reflexively self-

[61] *CEJF IV* 5.

regulating practice they have a duty to both utilise and preserve the opportunities for effective and reasonable co-ordination provided by law's systematic and institutional nature and to do so in ways that are wholly reasonable, i.e. truly responsive to the first principles and requirements of practical reasonableness.

CHAPTER VIII – CO-ORDINATION THROUGH ADJUDICATION

Litigation and adjudication are always the law's Plan B.[1]

The court of law is a court of justice.[2]

VIII.1 Adjudication as the answering of questions of justice

Talk of justice is only intelligible in the context of entitlement[3] – which is to say only in a social context or in a community of persons. Finnis has spoken of this 'inter-definability' of entitlements and justice, noting that:

> the object of the virtue of justice, and thus the source of the justness of just acts and arrangements, is that people all get what is theirs by right. Which is to say: that (to the extent measured by one's duties of justice) each person's rights are respected and promoted.[4]

This Justinian[5] and Thomistic[6] understanding of justice recognises that entitlements

> …whether they are classed as "natural", "individual", "subjective", "fundamental", or "human", are a function of justice understood as the giving to each what is due...The virtue of justice is the settled determination to render to each what is due. The practice of the virtue of justice demands that one knows what is due, and so the question of justice is always of this form: What belongs to whom?[7]

The law of a complete society exists, in its central case, as a source of authoritative answers to 'questions of justice'. This law establishes, expresses and gives practical effect

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[1] Leslie Green, 'Law and the Causes of Judicial Decisions' [2009] Paper No 19/2009 Oxford Legal Research Paper Series, 21.

[2] *LJC* 142.

[3] ibid 43, 45.

[4] *CEJF III* 2.

[5] *Digest* I, 1, 10; *Institutes* I, 1, 1.

[6] *ST* II-II, q. 57 a. 1; q. 58 a. 1, 3, 11.

[7] *LJC* 203, 42.

to the network of jural relations or entitlements that constitutes the jural order (i.e. the intrinsic common good or principle of order) of a complete society (VI.4). The effectiveness in any given situation of the answers given by the law to questions of justice depends, however, at a minimum, on the recognition by all relevant parties of the normative guidance given by the law and their willingness to act in accordance with that guidance. Where such recognition or willingness is absent the effectiveness of the law as a means of just co-ordination will be diminished and injustice is likely to be suffered as a result. In the last chapter I argued that the practice of legal argument is a legal system's primary means of resolving epistemic disagreements about the normative implications of the law whether considered generally (problem of legal knowledge) or with respect to a concrete case or situation (problem of application). Nevertheless there are four broad scenarios where the discursive practice of legal argument alone will likely be insufficient to secure either an authority-based or agreement-based co-ordination solution. These are:

(1) The law's answer to the question of justice at issue is underdetermined (in the sense that more than one answer can be justified by a sound legal argument), each party knows this and one or both parties are motivated by a belief that it makes more sense all things considered to seek an authoritative *determinatio* through litigation than to resolve the issue by agreement.

(2) The law's answer to the question of justice at issue is underdetermined but each party is motivated by a mistaken belief[8] that the law gives a determinate answer in its favour and therefore that running a small risk of losing in litigation is preferable to securing any resolution practically available by agreement.

[8] The basis of this mistaken belief may itself be a mistaken judgment of law or fact or both.

(3) A determinate answer is given by the law to the question of justice at issue (in the sense that only one answer can be justified by a sound legal argument) but one party is motivated by the mistaken belief[9] that (a) the law gives a determinate answer in its favour of its claim or (b) the law's amswer is underdetermined and it makes more sense all things considered to seek an authoritative *determinatio* through litigation than to resolve the issue by agreement.

(4) Either or both of the parties are motivated to disagree about what answer is given by the law to the question of justice at issue (and to litigate rather than resolve the disagreement by agreement) by reasons independent of any beliefs about the determinacy of the law's answer or the relative soundness of the competing legal arguments.

Persistent disagreements of these kinds tend to arise when one party (e.g. private citizen, law-enforcement official) believes that there has been (or is ongoing or likely) a failure to act in accordance with the jural order (e.g. breach of contract, ultra vires act, criminal act, tortious wrong etc.) and is seeking a remedy that will restore and make good (or, sometimes, prevent) the breach of justice that this failure of law application represents. If such questions are not resolved effectively (or are not resolved by a timely and reasonable answer arrived at by a fair process) *a further breach of justice occurs*.

There are also questions of justice which cannot be resolved through legislation or legal argument regardless of whether there is disagreement about what justice requires. These are questions which arise in circumstances where the power to apply a general norm to a particular case is specifically reserved by the law to the 'public reason and

[9] See note 8 above.

will', for example: the sentencing of persons who plead or are found guilty, the making of various private law or inter-partes orders (including on foot of uncontested applications) and the supervision or administration of various legal institutions (typically involving multiple important entitlements or claims to entitlement) such as insolvency, public licencing and wards of court schemes. As there are good practical reasons for designating appropriately constituted bodies to make these types of judgment and because of the necessity that persistent disagreements of the four kinds listed above be properly resolved, it follows, as a requirement of the common good, that a legal system in its central case must supplement the modes of co-ordination for the common good already discussed (VI.3-5, VII) with a capacity:

(1) to bring about timely, reasonable and effective resolutions to

a. questions of justice where the answers purportedly afforded by the law to the questions are the subject of persistent disagreement; and/or

b. questions of justice which arise on foot of violations (alleged or admitted) of the jural order (V.3.5); and/or

c. questions of justice which it is not permissible to resolve either by private judgments and acts of law application or by private agreement;

(2) to bring about such resolutions through a process that is itself reasonable.

The law creates this capacity by institutionalising processes of litigation and adjudication by which these questions of justice (i.e. of what is due to whom) can be formally articulated, their answers authoritatively and conclusively determined and the

enforcement of these answers secured. To say that the process of adjudication must itself be reasonable is to recognise that the answers given must be the outcome of intelligent and reasonable judgments which (a) take into account all relevant considerations, (b) ignore all irrelevant considerations, and (c) are guided in the assessment of relevancy by general rules and principles designed to facilitate intelligent and reasonable judgment across the generality of cases.

In light of the foregoing, I offer in the following sections an account of the nature of adjudication in its central case in a legal system.

VIII.2 Adjudication answers questions of justice because it applies all relevant law

In this section I argue that the first and most important feature of adjudication in its central case is that it answers litigated questions of justice by means of applying all relevant law in accordance with the legal system's practice of legal argument. It is for this reason that adjudication is something done by an authoritative norm-applier (or institution of authoritative norm-application).

Consider the following account of adjudication offered by Garrett Barden and Timothy Murphy:

> Adjudication is the effort to resolve a dispute by determining, amid the clamour of rival claims, what is just.[10]

The limitation of adjudication to the resolution of disputes and rival claims is certainly an unnecessary stipulation. But is the identification of adjudication with the determination of

[10] *LJC* 132.

'what is just' a sound one? Compare that statement with the following claim by Neil MacCormick:

> 'The essential function ... or point of courts and the judges who staff them is the hearing and determining of issues for trial under law whenever a binding decision is required on a case competently brought to court.'[11]

MacCormick makes no mention of determining what is just. On the face of it these two accounts appear to be incompatible. For although they both imply that the practice of adjudication is case-based and reactive (i.e. backward looking and application-centred) and committed to providing a resolution,[12] nevertheless they seem to offer two competing accounts of the *purpose* of the practice. Which one is correct? In fact, a choice is unnecessary. For it is possible to affirm both views if one recognises that the two purposes are rationally connected by a means-end relationship. The first statement expresses the more general purpose or end of adjudication: the resolution of a question of entitlement (i.e. of justice) by the determination of what is due to whom. The second statement, by contrast, articulates the proper *means* to this more general end by positing a more specific or immediate end of adjudication: the determination of a legal argument.

At first blush this claim may seem to mistakenly conflate what is meant by justice and by law. For, one may reasonably ask: *How* is authoritatively resolving arguments about what the positive law requires, prohibits or permits in any given situation rationally linked to determining what is just and, thereby, promoting the common good? To ask this question is to invite a critical inquiry into the nature and purpose of law itself. This inquiry has been pursued in Chapters IV-VII. It reveals two rational connections between

[11] Neil MacCormick, *Institutions of Law* (OUP 2007) 55.

[12] These features are considered below (VIII.4).

judgments about what justice requires and judgments of law application which I shall consider in turn.

VIII.2.1 Judgments of law as determinationes *of the requirements of justice*

The message of Chapters IV-VI is that law, in its central case, exists as a necessary supplement to the underdetermined requirements of practical reasonableness. What is just is determined ultimately by reference to the common good. Many acts are determinately ruled out as unjust and contrary to the common good by the negative universal precepts of practical reasonableness (known to common law doctrine under the name of *mala se*). However, as was argued in IV.3 and V.2, what counts as acting for the common good (i.e. with the common good as one's general object of intention – V.2.1), in any given situation, is very often simply unknown and unknowable until it has been established and expressed by or under the law of one's complete community. In other words, the underdetermined nature both of (a) the positive requirements of practical reasonableness and the common good and of (b) the appropriate means of enforcing compliance and remedying non-compliance with either these requirements or the determinate negative requirements entails that the point of law *cannot* be merely to coercively reinforce and publicise *existing* norms of morality. Equally practically necessary (and therefore essential) is the positive law's role in *constituting* the requirements of justice, i.e. of what is due to whom in what situations (including situations where an injustice has been done or is alleged to have been done). As Stone puts it: 'The law, on this account, is a constitutive and not merely an instrumental means of making a certain region of morality possible.'[13]

[13] Martin Stone, 'Positivism as Opposed to What? Law and the Moral Concept of Right' [2010] Cardozo School of Law Working Paper No 290, 17. An interesting analogy can perhaps be drawn here with

It is crucial, for the purposes of theorising about adjudication, to recognise this justice-determining function of positive law (whether wholly customary or also institutionalised). Only a failure to appreciate its full implications makes possible a conception of law (in its central case or as the kind of thing that it is) as merely *one possible way* of identifying what the common good requires in any specific situation. On this conception of law my account of adjudication obviously presents a serious puzzle: if judges function as authoritative appliers of the norms *of their legal system* how is it *possible* that their purpose is to answer certain questions *of justice*? Or, to reverse things: if the defining task of judges is to answer certain questions of justice how is it *reasonable* to expect them to fulfil that task through the application of legal norms? Is there not an obvious mismatch in my theory between the ends of adjudication and its means?

If one were to accept that there is indeed such a mismatch, there might appear to be three ways to fix it. First, one could re-characterise the questions addressed by judges as *merely* questions of law rather than questions of justice. Second, one could re-characterise the judicial method as the finding of answers which the judge considers to be truly just (independently of any legal arguments). Third, one could pursue both strategies: the judicial task is to answer questions of law but to do so only by giving answers that the judge considers (on grounds independent of legal argument) to be truly just. I believe all three would be unsound ways of fixing the supposed mismatch. And, more important, there is no mismatch to be fixed. The ultimate guiding question is always the question of justice: what is due to whom in this situation? It is not: what is due to whom in this situation *according to law*? However, in order to answer this ultimate question the *next*

Gardner's account of the relationship between human rights and human dignity according to which (a) the latter is (at least in part) constituted by the former and (b) one can therefore attribute certain characteristics to the former (i.e. universality). John Gardner, ''Simply in Virtue of Being Human': The Whos and Whys of Human Rights' (2008) 2 Journal of Ethics and Social Philosophy 1, 21.

question that must be answered is this: what determines what is due to whom in this situation? To be a subject of the law – or, in Fuller's terms, to have fidelity to law[14] – in one's capacity as a private norm-applier or an institution of authoritative norm-application, is simply to be a person whose answer to this *second* question is 'The law!' For, to treat a legal system as (presumptively and defeasibly) morally authoritative is to recognise (presumptively and defeasibly) its jural order, as identified through the practice of sound legal argument, as *the* means for determining what is due to whom. Thus, for the judge who does regard the law as authoritative (i.e. for a practically reasonable judge in a central case legal system) there are not two processes of practical reasoning according to the common good going on, one according to law and one according to morality. On the contrary, the recourse to the practice of legal argument (though itself defined by a systematic restriction of direct appeals to principles of practical reasonableness) is assimilated as a necessary step into a single, continuous process of practical deliberation by which any question of justice requiring determination is answered as intelligently and reasonably as possible. It is only this understanding of adjudication as a single and integrated process of practical reasoning that soundly grounds the coherence and reasonableness of the traditional but compacted formula that a judge's duty is to *do justice according to law*.[15] That this single process of reasoning may properly involve the answering of questions underdetermined by the law is considered in section VIII.3 That in certain cases it is not reasonable to have recourse to legal argument in order to answer a question of justice is considered in section VIII.5.

[14] Lon L. Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969) 41.

[15] A common sense conception of the judicial role evident in the oaths of office of American, British and Irish judges (28 U.S.C. § 453; Promissory Oaths Act 1868, s. 3; Constitution of Ireland, Article 34) and often endorsed by legal theorists (Neil MacCormick, *Legal Reasoning and Legal Theory* (paperback with revised foreword edn, Clarendon Press 1994) 17, 73-74, 107, 250; Timothy A.O. Endicott, *Vagueness in Law* (OUP 2000) 183.)

The important means-ends relationships between justice, positive law and adjudication can be expressed by summarising the ends and means of adjudication as follows, not forgetting what has been said above (at note 13) about some means being not merely instrumental to but also or rather constitutive of their end(s):

Means (specific purpose):	resolution of litigated questions by authoritative determination of legal arguments.
Proximate end (general purpose):	authoritative determination of what is due to whom in a given situation.
Intermediate end (general purpose):	securing of just and effective co-ordination solutions.
Ultimate end (general purpose):	promotion of justice and the common good.

VIII.2.2 Judgments of justice as determinationes of the requirements of the law

There is a second rational relationship between justice and law application confirmed by the account of law and adjudication just summarised. The judicial task, in a central case legal system, of deciding what is due to whom requires both the application of all relevant past *determinationes* confirmed by legal argument as valid general norms of the legal system (VIII.2.1) and, as a constituent part of that process, the making of adjudicative *determinationes* on the basis of all the relevant circumstances of a given case. For a judgment of law application, unlike a legislative judgment or a judgment about the

normative content of statutory, customary or decisional law, is addressed to situations, not situation-types. It is concerned with what is due to whom *in this particular case*.

A paradigmatic example is the sentencing of an offender where no fixed penalty is prescribed by the law. Though some may speak of legal underdeterminacy in this context, I believe this obscures important differences between the *determinatio* necessitated by any act of norm application (VII.3.2) and the *determinationes* which may or may not be required depending on the determinacy of the law with respect to a particular question of justice. For in the case of sentencing there is no requirement for any judicial elaboration or positing of a new and more determinate norm in order to ground a justificatory legal argument for the sentencing decision. Likewise there are no judgments of interpretation of a norm or classification under a norm required. The law may often be as determinate as it reasonably needs to be in so far as it identifies the modes of punishment available and the upper limit or range of sentence permitted. What is then required for the application of the sentencing rules is an act of judgment as to what justice requires given the concrete particulars of the case. Which particulars are relevant cannot be exhaustively stipulated in advance and the general requirements of justice will likely underdetermine both that issue and the question of what should be done all things considered. In short, choices must be made – choices that it would not have been practically reasonable to try to wholly exclude by more determinate general laws. The sentencing decision that results from and expresses these choices is properly considered, in its central case, a determination of justice. The ruling is derived, through rational deliberation and choice, from the relevant general norms of the law and they in turn are *determinationes* derived, in one way or another, from the general requirements of justice.

Many law-applying decisions made by judges involve *determinationes* of this type. Interlocutory matters and issues relating to the conduct of a hearing will very often fall to be determined under broad rules of procedure conferring jurisdiction on judges to decide specified questions as they think fair or just or reasonable. Certain factors may also be prescribed as necessary considerations to be taken into account. Where such interlocutory matters are contested the dispute will rarely be about which rule is valid, relevant or applicable or about the interpretation of the rule. Instead submissions will typically focus on pointing out to the judge the features of the situation which each side deems most relevant for a judgment as to what would be *just* (in light of the rule). Thus application of norms of this kind requires 'a distinctively practical form of thinking which tries to see what is salient in the facts of a case in light of a correct, but (as it appears) not fully codifiable understanding of the relevant rule.'[16]

Many such judgments are often made before a court delivers a judgment that is dispositive of the substantive question or questions giving rise to the litigation. It is surely a weakness of any theory of law or adjudication if very many (or perhaps most) of the judgments properly made by judges, in a central case legal system, must be treated in the theory as (or as if) exceptional or as (or as if) 'legal' only because of *who* made them. Recognising that the dominant purpose of adjudication according to law is determining what is just (and that the application of all relevant law, such as it is, is merely the proper *means* to that end in a central case legal system) avoids the need to differentiate two (or more) types of adjudication depending on the degree of determinacy purportedly afforded by the jural order and/or the practice of legal argument.[17] This leaves it a separate and

[16] Martin Stone, 'Formalism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 201.

[17] See *LMI* 197.

prudential question whether in any given area of social life where questions of justice arise and need to be judicially answered for the sake of the common good the level of guidance (and hence predictability and stability) given by and through the law and the practice of legal argument for adjudicative judgments of justice is sufficient or appropriate all things considered.

VIII.3 Adjudication answers questions of justice even if they are (or might be) underdetermined by the law

The application of all relevant law to a given situation will not always identify a single reasonable answer to the question of justice which has been posed (VII.2, VIII.2.2). That such application is sometimes not sufficient to identify a single answer does not mean that it is ever not necessary. Applying all relevant law will always rule out a great many answers and will exclude a number of considerations as being irrelevant to a reasonable judgment. It will also help (through its 'sophisticated vocabulary and repertoire of … techniques for categorizing, describing, organizing and comparing'[18]) to identify some of the most important relevant considerations that must be taken into account if the judgment is to be informed, intelligent and reasonable. It is a mistake to think that parties to litigation are entitled to presume that conscientious application by a judge of all relevant law will point out to him or her only one answer as right.[19] It is a bigger mistake to see such an entitlement as a precondition for the moral authority of adjudication

[18] Allan Hutchinson and Patrick J. Monahan, 'Law, Politics, and the Critical Legal Scholars' (1984) 36 Stanford Law Review 199, 206. See VII.4.

[19] cf Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 81ff.

according to law.[20] Rather such authority exists if (and only if) there is a sufficiently close means-end relationship between the jural order and the common good (VIII.5.1).

Where the law guides but underdetermines the identification of a sufficiently determinate general norm which can be applied in order to answer the question being litigated there are several ways that the determining act of adjudication can be reasonably characterised. If one wishes to emphasise that this determination invokes, whether deliberately or unconsciously, a justificatory norm of justice not previously identified as a 'valid' norm of the system by any authoritative norm-changing or norm-applying utterance, then one may speak of the 'positing' of a new legal norm through 'adjudicative law-making'. However, if one wishes to emphasise that this new norm is justified in a discursive context which assumes, as its defining premise, that law is the expression of the requirements of justice, then one may speak of the reasoned elaboration or development of the existing law. Ultimately the two characterisations work best together, with each complementing and qualifying a too literal understanding of the other.

The second characterisation elucidates the practical implications of the Rule of Law principle that, where a question of justice is underdetermined by the law, it is a necessary condition of the soundness of the legal argument by which that question is resolved that it does not – or would not if adopted – entail or create any normative inconsistency or incoherence in the law.[21] It also reflects how the practice of legal argument is systematically ordered to facilitating consistency, predictability and stability in the law and thus to building upon existing (or likely) convergences in practical

[20] cf ibid 280.

[21] MacCormick, *Legal Reasoning and Legal Theory* (n 15) 106-8, 119-28; Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 189-213. This is not equivalent to the 'adjudicative coherence thesis' discussed by Raz. *EPD* 301-14.

judgment. In this way the '"new" judicially adopted standard' is 'controlled by the contingencies of the existing posited law'.[22] Thus the use of analogical reasoning and appeals to precedent and the existence of various other stabilising practices and conventions[23] all make intelligible characterisations of a legally underdetermined judicial decision as the making explicit of what 'was in an important sense *already part of the law*.'[24]

The first characterisation, however, reminds us that in another important sense the judicial choice in such situations adds something new and does so by considering both what would be just to the parties and reasonable as a new legal norm. By referring to 'adjudicative' law-making it tries to capture how this choice fits within the ends and means of adjudicative practice (VIII.2) by drawing a distinction with legislative law-making. There are many ways this distinction can be elaborated.[25] The basic starting point is that legislation is essentially forward looking. It seeks to change the jural order so as to bring into existence a pattern of (normative) order adopted in the mind of a legislator. On the contrary, adjudication is essentially backward looking. It functions to resolve questions of justice made intelligible by the jural order as it is or was, namely questions resulting from the violation of that order and questions litigated because of persistent disagreement about the identity of the jural order or (more commonly) about its application to some events paradigmatically though not exclusively located in the past. In the case of alleged violations of the legal order the process of adjudication looks

[22] John Finnis, 'Natural Law: the Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 10. See also John Finnis, 'Adjudication and Legal Change' in *CEJF IV* 399-402.

[23] See, e.g., the list of 14 'relatively stable and strongly stabilizing factors' which, according to Llewellyn, 'steady' the 'activity' and 'results' of American 'appellate judicial deciding': Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown 1960) 19-51.

[24] Finnis, 'Natural Law: the Classical Tradition' (n 22) 10. cf Timothy A.O. Endicott, 'Adjudication and the Law' (2007) 27 Oxford Journal of Legal Studies 311, 319.

[25] Some have already been mentioned: VI.3.1, VI.4.

backwards in the sense that it requires sound judgments to be made *in the present* about (a) what the jural relations required at the (past) time of their alleged violation, (b) what actually occurred at that time (both factually and legally speaking) and (c) what is required *now* to *restore or rectify* what elements of just order were lost *then* (or since then) given the particulars of the violation (V.3.3).

It is because of this backward looking aspect of adjudication that any articulation of new norms in or by the answers it gives occurs only as a necessary and constitutive step in a justificatory argument of law application. This is not to play down the element of choice that may ultimately be required. Maxims requiring the judge in such situations to choose like a legislator can perhaps be better expressed if we say that a judge, when engaging in such norm-creation, must not focus exclusively on the effects on the parties of the available options but must take into account their broader implications for the common good *just as* a legislator must do when choosing between different legislative proposals and formulations.[26]

In this sense, adjudicative law-making is always ancillary to its primary function of law-applying. Legislation, by contrast, posits new norms independently of any such legally justificatory reasoning. Of its nature it is not addressed to law-application or constrained by the norms of legal argument. These differences in function translate in turn into the very different institutional forms and practices of courts and legislatures.[27]

[26] MacCormick has summed up this requirement of reasonable judicial *determinatio* as a due concern for 'consequences' as distinct from the requirements of consistency and coherence. MacCormick, *Legal Reasoning and Legal Theory* (n 15) 104-119, 149; MacCormick, *Rhetoric and the Rule of Law* (n 21) 100-120.

[27] Forms and practices, however, that can be put under severe strain when there is an unacknowledged shift in function as has arguably occurred in jurisdictions where courts have been conferred with the express power to over-turn legislation by reference to highly indeterminate standards of review.

There are thus several reasons why adjudicative reasoning should not come to an end when the law underdetermines the question before the court. First, there is the need, for the sake of the common good, that important questions of justice relating to specific situations (particularly alleged incidents of injustice) not be left unresolved. A failure to bring resolution to such questions is itself an injustice and contrary to the common good (VIII.1, VIII.4.1).[28] Second, there is no other institution better suited to the resolution of such questions. As noted in the last section, the very point of law is to determine what is just (VIII.2.1) and the very point of applying law is to determine what is just in a given situation (VIII.2.2). Adjudication is performed by authoritative norm-applying institutions precisely because it is about answering questions of justice, not despite that fact. Third, the judicial act of *determinatio* cannot reasonably be deemed a defect of legal ordering or a *prima facie* usurpation of the legislature. For it is obvious that the vagueness which necessitates such *determinatio* is not only an ineliminable feature of law but is often a very valuable feature and a deliberate legislative technique (VII.2). Fourth, it would fundamentally contradict the legal system's aim of bringing 'such definition, specificity, clarity, and thus, predictability into human interactions'[29] as it reasonably can (and the techniques, postulates and practices which it deploys to this end) if the jurisdiction of its ultimate dispute resolving bodies were predicated on distinctions that cannot be drawn in practice with any such clarity or predictability. It is rarely possible to apply in practice the distinctions which are drawn in theory between: (a) norm-interpretation and norm-changing; (b) the exercise of a discretion implicitly conferred and the use of a new norm for decision; and (c) the application of a general norm and the

[28] Endicott, *Vagueness in Law* (n 15) 197-202.

[29] *NLNR* 268. See *AL* 105-15, especially 115.

positing of a more determinate one.[30] This is particularly the case when the law in question is not identifiable by reference to a legislative utterance. Decisional law (to adopt a useful term)[31] is identified in the course of and as a constitutive part of a legal argument justifying a judgment of law application. It does not require a deliberate or express act of law-making or, hence, the use of a definitive propositional form.[32] The resulting imprecision of decisional law adds to the difficulty of drawing clear distinctions (at least in practice as opposed to in theory) between (a) the clarifying interpretation of such law and (b) over-ruling or the making of new decisional law. This means that any attempt to systematically or institutionally exclude *all* adjudicative law-making is as self-defeating and impracticable as it is unreasonable and unnecessary. This analysis does not apply, however, to situations where courts engage in *express* over-ruling of legislated or decisional law. In such cases they exercise a power conferred by the norms of their legal system (including norms of legal argument).[33] For a power to deliberately and expressly repeal or over-rule what, but for that power, would be valid law is not a practically necessary constituent of the institutionalised practice of *adjudication* in its central case.

This is not to say that there are not good prudential reasons for conferring these kinds of powers on adjudicative institutions. There is a particularly strong case to be made for some such power (albeit reserved to higher courts) in respect of decisional law. This is because of the inherent impracticability of confining to the legislature the power to correct and amend decisional law. It is impractical because decisional law (a) often lacks authoritative propositional form and (b) is typically expressed in response to very

[30] This is evident in the equivocation typically found in judicial practice and rhetoric. Endicott, 'Adjudication and the Law' (n 24) 311-12, 324-6.

[31] *Legal Process* 125.

[32] John Gardner, 'Some Types of Law' in Douglas E. Edin (ed), *Common Law Theory* (CUP 2011) 66-70.

[33] This is not to say that the nature or scope of this law-changing power will be determinate or clearly defined.

specific factual and discursive contexts. This makes it hard for a legislative amendment to pick out what is being repealed without risking unintended harms. It is also impractical because the shortcomings or injustice of decisional law may not be apparent in the abstract. The changes needed may be only incremental and deficiencies may only come to light in the course of litigated legal argument relating to a specific situation.

VIII.4 Formal features and guiding ideals of the institutionalised practice of adjudication

From what has been said above about the specific means and general purposes of adjudication in its central case it is possible to identify a number of important formal features and guiding ideals of the institutionalised practice of adjudication in a legal system.

VIII.4.1 Commitment to timely and effective resolution

Acts of adjudication by authoritative norm-applying institutions are a distinct and necessary source of co-ordination solutions. These solutions are addressed to concrete cases. Because solutions to such cases are required as a matter of justice the practice of litigation in its central case will respect what Alchourrón and Bulygin call the '*Principle of unavoidability*: Judges must resolve all the cases submitted to them within their sphere of competence.'[34] This principle is related to another: the working postulate of the law's completeness (VI.3.1). It is of course possible to conceive of a legal system in which the conclusive resolution of a litigated question of justice might be achieved in a given case by nothing more than the authoritative but, in a sense, purely 'procedural' answer that there is no substantive answer, one way or another, which the court or even the legal

[34] *NS* 176, 178. See also *NLNR* 292.

system is validly empowered to give.[35] The possibility of such outcomes might be tolerable if such results were rare and the only interests at stake in the problems left unresolved were not particularly significant, i.e. if a solution is not required as a matter of practical reasonableness. However a legal system that allowed for a more widespread derogation from the postulate of the law's completeness would be a deficient or non-central case system because of its needless refusal to supply co-ordination solutions required by the common good (V.3.4). For this reason the postulate will be given effect in a sound practice of legal argument by the recognition, whether as a matter of practical reasonableness or, later, custom, of formal closure rules, e.g. everything not prohibited by law is permitted by law.[36] These may also be supplemented by various formal limitations on litigation, e.g. res judicata, statute of limitations, finite rights of appeal etc.

To be effective the resolutions provided through adjudication must be sufficiently determinate to exclude the possibility of good faith misunderstanding or disagreement about the answer they have given. This determinacy in outcome, despite the underdeterminacy of the relevant standards to be applied, is secured by various techniques including the framing of all issues in terms of bivalent questions or a nested series of such questions.[37] Thus legal argument proceeds by the posing, expressly or implicitly, of questions formulated such that there are only two possible alternative

[35] For the claim that there was a time in English law when 'judges were very much less inclined to reach decisions at all if the law was unclear' see Scott Veitch, *Moral Conflict and Legal Reasoning* (Hart Publishing 1999) 170 quoting J.H. Baker, 'English Law and the Renaissance' in J.H. Baker (ed), *The Legal Profession and the Common Law: Historical Essays* (Hambledon Press 1986) 472. By contrast if a legal system contains a relevant closure rule for such situations or requires a court to transfer an unregulated issue to another authoritative body for a law-making determination, one cannot say that the system has failed to provide for an authoritative resolution of the issue. Moreover even a transfer rule would still require the court to reach an authoritative conclusion, by means of sound legal argument, that the issue is not regulated by existing law.

[36] cf *AL* 77 (closure rules are 'analytic truths rather than positive legal rules'); *NS* 165-80 (postulate of normative completeness is a 'purely rational ideal' with an 'ideological function').

[37] Endicott, *Vagueness in Law* (n 15) 72-74.

answers, e.g. valid or invalid, lawful or unlawful, liable or not liable, guilty or not guilty etc. By a 'nested series' of questions I mean a sequence of questions rationally ordered such that for any questions A and B where the terms, intelligibility or relevance of question B presuppose or follow from the answer to question A, question A is posed and answered prior to question B. To say that certain questions are implicitly posed is to affirm the possibility of rationally reconstructing the justification for the decision of the court in terms of answers to such questions.[38]

Finally, resolution must not only be possible and determinate, it must also be provided in a timely manner. What this requires in any given situation is a complex question and one that has been very heavily litigated before the European Court of Human Rights.[39] However, it suffices to note for present purposes that this consideration, as a requirement of justice, may properly bear on the norms and practices governing the formalities of the processes of litigation and adjudication. As suggested in section VII.4 there comes a point where argument and deliberation must conclude and a judgment be made.

[38] Although questions of fact (such as the historical question 'What (probably) happened?' or the predictive question 'What will (probably) happen, or be more likely to happen, if X?') are posed in the resolution of litigated questions, the epistemic or empirical indeterminacy affecting the answering of factual questions is not unique to acts of adjudication and thus is not pursued here. For a mention of the role of judges' settled opinions on background questions of fact (which do not expressly arise for judicial determination) in enhancing the determinacy of judicial reasoning despite the rational underdeterminacy of the strictly legal reasons, see Finnis, 'Natural Law: the Classical Tradition' (n 22) 36; *CEJF IV* 15.

[39] Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that 'everyone is entitled to a fair and public hearing within a reasonable time…'. Of the 15,947 violations of Convention rights identified by the ECtHR between 1959 and 2012 31.5% concerned the length of proceedings. *European Court of Human Rights: Annual Report 2012* (Registry of the European Court of Human Rights 2013) 159.

VIII.4.2 Channelling of questions through formal process of litigation

Conflicts and grievances arising between members of a community do not come before a court in 'raw' terms so to speak. A function of the process of litigation is to frame all inter-personal disputes (whatever their true origins or sustaining grounds) as if they were the consequence of and dependent upon an epistemic disagreement about a concrete question of justice. Every litigated question begins and, unless resolved by agreement, ends with the assertion of a justificatory argument in the form of a basic legal syllogism (VII.3). For a claim of entitlement (e.g. to a certain remedy) and the judicial judgment which grants or refuses it are each framed as an expression of what justice requires as identified through the reasoned application to the situation of all relevant law.

VIII.4.3 Entitlement of parties to meaningful participation in a fair process

The lawyerly acts of translation and presentation which constitute the litigation process serve important practical functions. First, they work to narrow down and specify the facts and issues that are actually contested. This helps avoid unnecessary delay and expense. It also maximises the factual and jural common ground available to the court in evaluating the soundness of the competing arguments and in constructing its own legal argument. It also enhances the potential for relevant preparation (evidential and legal) by each party and the meaningful testing of each side by the other. This all helps to ensure that the court is as well placed as possible to make, in a properly informed manner, whatever factual and legal judgments are necessary to dispose of the case justly. Indeed Lon Fuller argued that what distinguishes adjudication from other forms of social ordering by which particular co-ordination problems can be resolved, such as contracts and elections, is that adjudication 'confers on the affected party a peculiar form of participation in the decision,

that of presenting proofs and reasoned arguments for a decision in his favour.'[40] Thus Fuller considers that judicial duties, such as to be impartial and to hear both sides, follow as a rational consequence from this defining mode and ideal of participation (what might be called 'argumentative' participation) in order to ensure that such participation is not rendered empty or *pointless*.[41] More generally the requirements of the common lawyer's 'natural justice' traditionally marked out by maxims such as *nemo judex in causa sua* and *audi alteram partem* can also be seen as the tried-and-tested juristic rules of thumb that render more determinate the following abstract principle of fair and wise decision making: take into account all relevant considerations and do not take into account any irrelevant ones (VIII.1).[42] The various other rules of a legal system dealing with evidence and witnesses and with the conduct of trials and the making of submissions and so on are also intelligible as *determinationes* made with a view to facilitating fair processes leading to well-informed and reasonable judgments.

The guidance given by the law and the practice of legal argument (both when questions of justice are determined and underdetermined) as to what considerations must be considered, may be considered and may not be considered for a decision to be made fairly and wisely also serves to facilitate consistency and convergence in the law-applying

[40] Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 364. See also T.R.S. Allan, 'Text, Context, and Constitution: The Common Law as Public Reason' in Douglas E. Edin (ed), *Common Law Theory* (CUP 2007) 202.

[41] Fuller, 'The Forms and Limits of Adjudication' (n 40) 365, 382-4. See also: 'We cannot define a judge simply as one who is bound to reach his decisions impartially; such a definition would not distinguish him from many others who exercise powers of government. A judge is one who decides disputes within an institutional framework assuring to the litigant a collaborative role, which consists in the opportunity to state, prove, and argue his case. *This participation of the affected party loses its point if the litigants talk past one another, so that all each says is irrelevant to the other's conception of the issues involved in their controversy.*' Lon L. Fuller, *Anatomy of the Law* (Pelican Books 1971) 154 (emphasis added).

[42] On the history of audi alteram partem in English common law and classical and Christian antiquity see John M. Kelly, 'Audi Alteram Partem' (1964) 9 Natural Law Forum 103.

and justice-determining decisions made by different judges with respect to relevantly similar persons, acts and situations.

VIII.5 When law and justice diverge

VIII.5.1 The problem of an unjust general legal norm

Perhaps the most obvious objection to the account of adjudication set out above (VIII.2-4) is that it seems oblivious to the reality of unjust laws. How does it make sense to say that adjudication is the determination of what is just by means of the application of all relevant law when the relevant law may sometimes be grossly or undeniably unjust? An answer to this objection requires further elaboration of the dependence of my theory on the distinction between central and non-central cases. More immediately, however, it requires a clarification of the objection itself. The reference to a law that is 'grossly or undeniably unjust' is ambiguous. Does it refer to what is truly unjust or what a judge believes to be truly unjust? In the first sense the objection disputes my theory of adjudication in so far at it purports to identify the task or act of adjudication in terms of its defining ends and means. In the second sense the objection disputes my theory of adjudication in so far at it purports to identify the task or act of adjudication in terms of a corresponding judicial duty to do justice according to law. The two versions of the objection can be reformulated as follows:

> O1: Since there are times when the law to be applied is unjust, it is incongruous to claim that adjudication always involves law application *because* its point is to dispose of every case by determining what is just, i.e. what is truly due to whom.

O2: Since there are times when a judge believes that the law to be applied is unjust, it is incongruous to claim that a judicial duty to apply all relevant law exists because of and as a means to satisfying a prior duty to dispose of every case by determining what (the judge believes) is just, i.e. what (he believes) is truly due to whom.

These objections rely on equivocating between central and non-central cases of adjudication. The more any given legal system falls short of the central case in its everyday operation (by the error or indifference of its laws and practices with regard to the requirements of justice and the Rule of Law) the less it enjoys the quality of authoritativeness in *its* central case, i.e. the quality of being an exclusionary reason. At first glance, this may seem unsatisfactory, since after all it is partly to rid ourselves of uncertainty in practical judgment that we turn to institutionalised systems of normative order and the use – a characteristic of legal and lawyerly thought – of clarifying bivalent categories like valid/invalid and lawful/unlawful. It is simply a category mistake, however, to think that because *within* the class of a system's legal reasons, a reason is either valid or invalid, a judgment as to the authoritativeness of that class of reasons (in our practical reasoning) must itself be an all or nothing matter.[43] On the theory of law defended here, a legal duty (including the official duty of a judge qua judge to do justice according to law) only ever *presumptively* and *defeasibly* entails a moral duty. This means that the rationality of the chain of practical inferences which links the means of adjudication to the ends of law and thus to the common good itself (VIII.2.1)[44] always depends on a prior or framework critical judgment that the law to be applied has been (or

[43] *LMI* 157. See VI.3.2, VIII.4.1.

[44] See John Finnis, 'Legal Reasoning as Practical Reason' in *CEJF I* 220 for a related reflection on the chain of means and ends running from the distinctive techniques of law to the open-ended good of 'just harmony'.

can be) reasonably derived from the requirements of practical reasonableness and, thus, is truly a constitutive element of the common good.

In so far as this derivation is absent, as in the case, for example, of a grossly unjust law, then the practical rationality of the link between the means proper to adjudication and its various ends (proximate, intermediate and ultimate) may well be lost.[45] This is a standing possibility which any theory of law and adjudication should openly acknowledge.[46] But it would be a mistake to acknowledge it as anything other than a non-central case. Thus the question of what judges should do when faced with an unjust law is not the focus of a theory of adjudication in a central case legal system. It is a question the answer to which, whether in abstract high theory or in concrete practice, involves many prudential considerations which are often quite complex and context dependent. Not much can be said about these considerations at an abstract level and I do not propose to investigate them here.[47] The pertinent issue for my purposes is whether the possibility or reality of unjust laws undermines my theory of adjudication and judicial duty in a central case legal system. I contend that it does not.

VIII.5.2 The problem of injustice in application

In a reasonably just legal system one can hope that occasions will rarely arise when a practically reasonable judge is faced with the problem of having to apply an unjust law. In a sense one can say that the issue is in the hands of the law-makers (legislative and adjudicative) themselves. So long as they consistently decide within the parameters of

[45] The same considerations determine the rationality of the link between the end of respecting the common good or just harmony of one's community and the means of acknowledging a general (presumptive) duty to obey the law of that community.

[46] See *ST* I-II q. 96 a. 4 c, II-II q. 69 a. 4 c; and *NLNR* Chapter XII. See also *CL* 208; *LE* 219.

[47] *NLNR* 362; John Finnis, 'Natural Law Theories' Stanford Encyclopedia of Philosophy (Fall 2008 Edition) sections 3.3 and 4; MacCormick, *Legal Reasoning and Legal Theory* (n 15) 74-5.

what is not practically unreasonable no such problem should arise.[48] By contrast, even such saintly law-making cannot exclude the possibility that reasonable laws framed in general terms may require (or at least appear to require) outcomes in particular cases that are practically unreasonable. This possibility and the appropriate ways of avoiding such injustice has been a topic of jurisprudential reflection since at least Aristotle and his discussion of equitable rectification of a general rule.[49]

A merit of the theory of adjudication defended here is that it can account for the necessity and reasonableness of various techniques and postulates of legal argument that provide for, in substance if not in name,[50] equitable application of the law. For such measures makes good sense when application of law is carried out in the context of and as a means to determining what is just in a given situation. Equitable application does not make sense as a type of law-applying (rather than law-changing) when the *dominant* purpose of acts of legislating or of adjudicating qua such acts is simply controlling behaviour or co-ordinating conduct *per se* by, e.g., creating and satisfying expectations, or threatening and imposing sanctions, or positing and applying normative standards merely on the *pretence* that they are just. It also does not make sense when the dominant purpose of adjudication is to bring about whatever the judge believes would be the best result (with the law merely a means to give effect to that belief rather than its constitutive guide). For the practice of equitable interpretation *assumes* that the purpose of any positive law (and the standing intention of its makers) is to determine what is *just* in the

[48] This, of course, overlooks the possibility of a judge mistakenly judging (culpably or otherwise) a reasonable law to be unreasonable.

[49] Aristotle, *Nicomachean Ethics* 1137a32-1138a2. For a brief discussion of Aristotle's position and a useful comparison with Aquinas's understanding of equity see Paul Yowell, 'Legislation, Common Law and the Virtue of Clarity' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis 2011) 102-5. For discussion, including quotations from Aristotle, Aquinas, St German, Coke, Bentham and commonwealth case law, see Jim Evans, *Statutory Interpretation* (OUP 1988) 174-216. See also Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 275-84.

[50] Evans (n 49) 179.

generality of cases by reference to the common good. For this reason law-appliers may reasonably presume that if a proposed application of law that would constitute a practically unreasonable result in all the circumstance of the case, this indicates (at least the possibility of) a defect, not in the law, but in the propositional *expression*, *identification* or *interpretation* of the general norm said to justify or require such an application. It is only on this view that equitable interpretation can be characterised as an intrinsic feature of legal argument and adjudicative judgment and not the exercise of a power of over-ruling which is only contingently possessed, if at all, by an authoritative norm-applying institution in its central case.[51]

VIII.6 Relationship between reason in law-making and reason in adjudication

The significance of the working assumption just noted (VIII.5.2) for the practice of legal argument is not confined to occasions of equitable interpretation. A judicial duty to do justice *according to* law is necessarily oxymoronic if the central case of a legal system is not identified by reference to its service to the common good. It is postulates of legal argument premised on this conception of law that make it possible for the diverse normative standards authoritatively posited in the name of the law to be communicated and understood as forming a *system* and to be applied in ways that render them intelligible, coherent and worthy of being deemed authoritative. Such postulates provide what can be called the pragmatic context of legal communication. What I mean here by 'pragmatic' is set out by Scott Soames as follows:

> [a] text's content …, which encompasses everything conveyed or asserted by the text, often includes information that goes well beyond the semantic

[51] Ekins (n 49) 275. Note that what I have said here does not apply to so-called 'interpretation on the equity of the statute' which consists in the *extension* of the scope of a legislatively posited norm 'by analogy'. See Evans (49) 217-36; Ekins (n 49) 278-9.

> contents of the sentences involved. *Typically, an agent produces a sentence in a context with* [1] *a communicative goal and topic,* [2] *a record of what has been supposed or established up to then, and* [3] *assumptions about the beliefs and intentions of participants*. This pragmatic information interacts with the semantic content of the sentence to add content to the discourse... Semantic content is often merely a vehicle for getting to pragmatically enriched content, and sometimes the semantic content of a sentence is not itself asserted, or even included in what the speaker is committed to. The semantic-cum-pragmatic information-generating process governing the routine interpretation of linguistic texts and performances may start with literal meaning, but it doesn't end there.[52]

Part of the pragmatic context relevant to legal argument and law application are the practical principles, postulates, presumptions, techniques etc. which define and regulate the nature and functioning of a legal's systems constitutive institutions (including its practice of legal argument). Taken cumulatively, these considerations operate in legal discourse *analogously* to the co-operative principle and maxims of conversation discussed by Paul Grice with respect to everyday inter-personal communication ('talk exchanges'[53]) undertaken with a view to a co-operative or 'maximally effective exchange of information.'[54] For, whatever the over-riding goal of a certain form of communication, the practical adoption of this goal will 'generate norms for its rational and efficient achievement.'[55] In the case of the 'purposive…rational behaviour'[56] that is legislating the over-riding aim is the establishing, expressing and giving practical effect to a reasoned

[52] Scott Soames, 'Interpreting Legal Texts: What is, and What is Not, Special about the Law' in *Philosophical Essays, Volume 1: Natural Language: What it Means and How We Use It* (Princeton University Press 2008) 403, 404 (emphasis and numbering added). Of course prior to any particular pragmatic context is the 'basic context' of all communication, i.e. the human mind 'which is the ground of the possibility of understanding one another. [For] The effort to understand another presumes and rests upon the basic intellectual context that is human intelligence, or mind, and which is the possibility of all contexts...' *LJC* 155.

[53] Paul Grice, *Studies in the Way of Words* (Harvard University Press 1989) 26.

[54] ibid 28. Note that Grice himself expressly recognised the possibility of extending the 'co-operative principle' beyond 'talk exchanges'. ibid.

[55] Scott Soames, 'Drawing the Line Between Meaning and Implicature - and Relating Both to Assertion' in *Philosophical Essays, Volume 1: Natural Language: What it Means and How We Use It* (Princeton University Press 2008) 298, 298.

[56] Grice (n 53) 28.

choice about what is to count as being due to whom, according to the common good, in certain situation-types (VI.4). As already noted (VI.3.1), the level and type of control which a legislature has over the successful reception of the 'meaning' (or jural effect) of its utterances is considerably different from that which interlocutors in a face to face conversation enjoy over such matters. Nevertheless, it is practically reasonable for a legal system to provide means for ensuring that, in so far as is possible, deliberate law-making acts have the jural effect intended by the law-maker. Thus the choice by a legislature of a particular text to communicate its intention (understood as a proposal for normative ordering adopted and chosen as a reasoned package of both ends and means) should be informed, and thus presumed to have been informed (in any reasonable attempt to infer this intention from the uttered text), by the 'record of what has been supposed or established up to then, and assumptions about the beliefs and intentions of participants.'[57]

It is useful at this point to distinguish two distinct questions which, according to Larry Alexander, must be addressed by theories of legal interpretation.[58] The first concerns the intention of the law-making authorities and its role, as a matter of semantics and pragmatics, in determining what has been asserted by their law-making utterances. The second concerns the authority (or 'jural effect' – see VI.4) which should be given, as a matter of law, to that assertion.[59] The second question cannot be settled by philosophy of language and is a matter of both political morality (i.e. practical reason) and positive

[57] Soames, 'Interpreting Legal Texts' (n 52) 404. On the importance of (positive) conventions for effective law-making see *5½ Myths* 219 and *BAI* 124.

[58] Larry Alexander, 'All or Nothing at All? The Intention of Authorities and the Authority of Intentions' in Andrei Marmor (ed), *Law and Interpretation* (OUP 1995)

[59] That *some* authority must be given to authorial intent seems a necessary condition if the practice of positing law is to make any sense at all. As Alexander puts it: 'A legal system in which one group of authorities had the role of choosing the words (the marks?) of legal norms but a second group then assigned *its* meaning to the words would be a decidedly weird system. In effect, the second group of authorities would actually be performing the role of determining what ought to be done, but it would be handicapped in its ability to communicate its determinations by the first group's choice of words (marks?).' ibid 382.

legal theory.[60] The first question, however, is formally a matter for the philosophy of language, though the content of the pragmatic context will itself be determined by other considerations, which may also be properly termed political morality and positive legal theory.

Thus there are various principles of law which, as a matter of practical reasonableness, should be acknowledged if the rationality of the link between the specific and the general purposes of adjudication (i.e. between law-applying and doing justice) is to be preserved.[61] For example, legislators should formulate their texts on the assumption that they will be interpreted and their jural effects determined by persons and officials orientated towards the common good. And such persons and officials should interpret those texts on the assumption that their authors were orientated towards the common good, including fairness in its various dimensions and applications. For any theory of law, however, developed on the methodological premise that one can properly understand the 'what' of law without reliance on any moral or directly evaluative judgments, principles of practical reason are extrinsic or contingent elements of the pragmatic context of legal argument (see IX.3). For such theories any connection between the act of determining what is just in a given case and the act of determining the relevant legal claims is merely a fortuitous overlap of outcomes that tells us nothing about the nature of law. By contrast, my argument is that the working assumptions just mentioned express the pragmatic context that defines *legal* communication. Where such assumptions are not recognised, or

[60] On the limited relevance of philosophy of language for theories of legal interpretation see Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andre Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011). For recognition of the 'political' (i.e. moral, practical) choices involved in theorising about legal meaning see also Brian Bix, 'Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy' (2003) 16 Ratio Juris 281, 291.

[61] For a more detailed consideration of these 'principles of law' in both their first-order (legislative) and second-order (adjudicative) forms see *NLNR* 286-9.

are intentionally or explicitly rejected (perhaps reasonably in some circumstances), the communicative acts of those positing and interpreting the law can only be called 'legal' in a secondary or corrupt sense. For it is the effective controlling presence in legal argument of principles and assumptions derived from the requirements of the common good that (a) distinguishes legal ordering from other forms of institutionalised social control and (b) makes such legal ordering both possible and effective by (c) providing a stable pragmatic context within which judgments of law identifying, interpreting and applying can be made that are both reasonable and reckonable (i.e. afford reasonable certainty and predictability). That *some* relatively stable pragmatic context is necessary for any mode of deliberate authority to be even minimally effective in co-ordinating choice and action through prospective general rules seems obvious. As Wittgenstein put it:

> Someone says to me: "Shew the children a game." I teach them gaming with dice, and the other says "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?[62]

Evans makes a related point regarding equitable interpretation of the law, noting:

> General understandings that exceptions may be made to instructions for exceptional cases can only work effectively if the recipient of an instruction has some understanding of what is valued by the instructor. … Odd as it may seem to some modern sensibilities, such understandings do exist in human communities – even among those who are strangers to one another.[63]

I would go further and say not only that such understandings 'of what is valued' exist but that it is a practical necessity that in a central case legal system those 'instructed' should be able to reasonably assume that the ultimate 'value' of the law is the common good and that its constitutive norms or relations of entitlement (its *determinationes*) are means to

[62] Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe tr, 3rd edn, Blackwell 1967) 33 cited in Evans 188.

[63] Evans (49) 186.

that end. For there are three possible scenarios when it comes to the pragmatic context for legal argument and law application. The first is where it can reasonably be assumed that law-makers and authoritative law-appliers value (or better: have as their general object of intention – V.2.1) the common good. The second is where it can reasonably be assumed that they value some particular good (e.g. the good of the Leader, the promotion of the Party). The third is where it cannot reasonably be assumed that there is any uniformity or stability, either diachronically or synchronically, in what law-makers and authoritative law-appliers value (as the general object of their legal acts). The second option is deficient as a legal system not least because its co-ordination solutions are systematically orientated towards a 'good' which renders them unfit to be treated as authoritative (other than for accidental and contingent reasons) by any reasonable person. The third option is deficient as a legal system in terms of both the reasonableness and the efficacy of its co-ordination solutions. For the lack of any stable pragmatic context would needlessly hinder both the effective communication of the law-makers' intentions and the consistency and predictability of judgments of law interpretation and law application. This *indeterminacy* (and its resultant uncertainty and disorder) should be formally and theoretically distinguished from the *underdeterminacy* which may naturally occur, so to speak, in a community of saints because of the underdetermined nature of the common good. Nevertheless, from a practical perspective, it remains salutary to note that the degree to which freedom from arbitrary (in the sense of being unpredictable or unexpected by the reasonable and well-informed) applications of the law can be secured in a central case legal system may, with even the most conscientious of officials, ultimately depend on the prevalence of shared *determinationes* of justice and the common good within society.[64]

[64] See VII.4. See also Fuller, *Anatomy of the Law* (n 41) 154-5. Apposite in this regard is Finnis's recognition that: 'To the extent that there is lack of agreement on *basic issues*, to that extent there is an

obstacle to genuine community. This obstacle is in itself a great harm for a society, and so "pluralism" of opinion on matters basic to the common good is a deficiency, an evil, something to be regretted – not something to be held up as a standard.' John Finnis, 'Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections' (1996) 71 Notre Dame Law Review 595, 596.

CHAPTER IX – ADJUDICATION IN 'POSITIVIST' LEGAL THEORY

> *The judicial judgment is addressed to the litigants amongst others, and is intended to justify the judicial decision. An adequate account of law's nature must be able to make sense of this, and must therefore be able to explain how the arguments characteristically offered in judicial judgments (arguments that attach central importance to the status of certain rules as law) can intelligibly be offered as a justification for a decision that may involve the ordering of coercive force against the citizen.*[1]

IX.1 Introduction

Chapter VIII defended an account of the nature of adjudication and of judicial duty, in its central case, articulated in terms of the disposal of all litigated questions justly by the application of all relevant law. It suggested that any apparent antinomy between doing justice and applying positive law can be resolved by recognising that law, in its central case, is the kind of thing which not only expresses but also constitutes the requirements of justice and the common good. Authoritative norm-applying institutions do justice *because* they apply the law (making such ancillary *determinationes* as the relevant practice of sound legal argument prescribes or are otherwise practically necessary) not despite that fact. This view of adjudication was thus grounded in a theory of law which recognised the defining place of the common good both in any descriptive account of law's characteristic functions, features and guiding ideals and in any normative account of the law's authority (V.7).

This chapter considers a possible counter-argument: that the official duty of judges to do justice according to law can be adequately described and explained without any need to invoke a theory of law predicated on its service of the common good. The attractiveness of such a claim, if true, is clear. In so far as my account of adjudication

[1] *LMI* 136.

depends on the theory of law developed in Chapters III-VII, it is in a sense hostage to the soundness of the various ethical and meta-ethical premises of that theory, as noted in my 'general caveat' at the outset (I.6). Even assuming that my account of judicial duty is sound, surely a supporting argument that did not require such a theory of law would be preferable? That the possibility of such an argument deserves serious consideration is clear when one surveys the contemporary jurisprudential landscape and discovers that two of the most prominent advocates for theorising about law without recourse to moral or directly evaluative judgments are equally committed to defending the obligation of judges to decide justly. This chapter seeks to explore this seemingly paradoxical aspect of the work of Joseph Raz and John Gardner. The chapter argues that developing a theory of law according to a jurisprudential methodology that considers it both possible and necessary to understand the 'what' of law without reliance on any moral or directly evaluative judgments has an important knock-on effect for any subsequent account of adjudication premised on that theory of law. For ease of exposition, though fully aware of the shortcomings and infelicities of any resort to jurisprudential labels and to this label in particular, I shall refer to any such theory of law as 'Positivist'.[2] This chapter argues that accounts of adjudication premised on a Positivist theory of law are unable to provide a coherent rationale for a judicial duty to do justice *according to law*.

Both Raz and Gardner affirm (or have affirmed[3]) the following four theses:

> (T1): It is a necessary feature of a legal system that it has authoritative norm-applying bodies.

[2] Bix has invoked a similar definition though post-Dickson's *Evaluation* (see II.3) his reference to evaluation may be considered ambiguous: 'Legal positivism is the belief that it is both tenable and valuable to offer a purely conceptual and/or purely descriptive theory of law, in which the analysis of law is kept strictly separate from its evaluation.' Brian Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 Notre Dame Law Review 1613, 1614.

[3] With respect to Gardner see note 4 below.

(T2): It is a necessary feature of a legal norm that it can be identified without recourse to any moral or directly evaluative argument or judgment.

(T3): It is a necessary feature of adjudication that a judge should decide cases justly.

(T4): Neither the actual promotion of justice and the common good nor an aspiration to promote justice and the common good is a necessary feature of a legal system or of a legal norm.

My argument makes two claims. First, (T1), (T2) and (T3), as argued for by Raz and Gardner, are not sufficient, either individually or cumulatively, to justify an account of adjudication or of judicial duty framed in terms of the disposal of all cases justly *by applying all relevant law*. This is the case even if one interprets the three theses as statements about law in its central case only.[4] Second, the addition of (T4) actually makes it impossible to propose such a duty because it denies any intrinsic or non-incidental connection between (a) the promotion of justice and the common good and (b) the nature of law and, hence, the application of *the* law. For in the absence of any such connection a duty to do justice in which the applying of all relevant law is the constitutive means becomes incoherent. (T4) does not refute such a duty so much as render it unintelligible.

[4] A distinction not made by Raz and Gardner in the works cited below. It should be noted, however, that in an article which post-dates those considered below Gardner has said that 'the study of the nature of law can and must begin, in a certain sense, with the central case of law as morally successful law.' John Gardner, 'Nearly Natural Law' (2007) 52 American Journal of Jurisprudence 1, 23. See also Chapter II note 113. The writings by Gardner which I consider do not employ or refer to this distinction between central and non-central cases of law or of adjudication. I am not primarily concerned in this Chapter, however, with tracking possible changes in emphasis or thought in the works of Gardner or Raz and do not purport to offer an up to date report of their current positions.

My argument is thus distinct from those criticisms of theories of legal reasoning and adjudication based on (T1)-(T4) which tend to treat (T2) as the root of the problem.[5]

Section IX.2 briefly locates the first three theses in the works of Raz and Gardner and considers my first claim regarding them. Section IX.3 looks at (T4), the thesis that defines what I have termed Positivist legal theory, and discusses my claims as to its implications for an understanding of adjudication.

IX.2 Raz and Gardner on adjudication, law and justice

IX.2.1 (T1): It is a necessary feature of a legal system that it has authoritative norm-applying bodies.

Raz and Gardner explicitly advocate (T1). Gardner, expressly following Raz on this point, has argued that 'adjudicative institutions are … the linch-pin of all legal systems.'[6] As he puts it, without any qualifying reference to central or peripheral cases:

> One may have a legal system with no legislature and no police force and no legal professions – that is to say a purely customary legal system – but one has no legal system at all until one has courts, i.e. adjudicative institutions *charged with administering a system of rules by which they themselves are bound* (and indeed, as Hart said, constituted).[7]

[5] For criticisms of this type see, e.g., Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 14-130; WJ Waluchow, *Inclusive Legal Positivism* (OUP 1994) 140-1; Fernando Atria, *On Law and Legal Reasoning* (Hart Publishing 2001) 188-95; Robert Alexy, *The Argument from Injustice* (OUP 2002) 68-81.

[6] John Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 Current Legal Problems 1, 19. Gardner cites *AL* 105ff.

[7] Gardner, 'The Virtue of Justice and the Character of Law' (n 6) 20 (emphasis added). On the relationship between a legal system, in its central case, and norm-applying institutions see VI.3.1.

It is a central tenet of Raz's theory of law that courts are a necessary feature of a legal system and that they are, again by some class of necessity,[8] bound by the law of the legal system.

> It is a necessary feature of all legal systems (1) that they contain norms establishing primary institutions, (2) that a law belongs to them only if the primary institutions are under a duty to apply it, and (3) that they have limits.[9]

Primary norm-applying institutions are

> institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding when wrong.[10]

Legal systems are distinguished from 'other methods of social control' by these institutions. For

> The presence of primary institutions indicates that the normative system concerned provides for an institutionalized and authoritative way of settling disputes...[T]he difference between normative systems which provide systematic and institutionalized methods of settling disputes and those which do not is of momentous importance to their utility and function in regulating social behaviour.[11]

[8] See, e.g., 'My claim is that *our common knowledge of intuitively clear instances* of municipal systems confirms that they all contain primary institutions and that such institutions *play a crucial role in our understanding* of legal systems and their function in society.' *AL* 111; 'Three features characterize courts of law: … 3. In their activities they are bound to be guided, at least partly, by positivist authoritative considerations…. So much we can learn *from our intuitive understanding* of the nature of courts of law as a political institution.' *EPD* 205, 206. See generally Chapter II, especially notes 3 and 150 and below at IX.2.3.1 and IX.3.

[9] *AL* 115.

[10] *AL* 110. See also *PRN* 132-7.

[11] *PRN* 137.

That this 'institutionalized and authoritative' way of 'regulating social behaviour' operates by applying the 'normative system' is what distinguishes law from what is the only alternative to such application, i.e. a system of absolute discretion.[12] Thus

> legal systems *consist of laws which the courts are bound to apply* and are not at liberty to disregard whenever they find their application undesirable, all things considered. …[Courts] are to apply a certain body of laws regardless of their views on its merits and are allowed to act on their own views only to the extent that this is allowed by those laws.[13]

IX.2.2 (T2): It is a necessary feature of a legal norm that it can be identified without recourse to any moral or directly evaluative argument or judgment.

Raz and Gardner have each advanced a version of (T2) and I shall consider each separately.

IX.2.2.1 Gardner and (LP*)

Gardner uses the term 'positivist' differently from my above stipulated sense of Positivist (see p. 239 above). One might say that for Gardner positivism is a theory about what 'the law' is rather than what 'law' is.[14] According to Gardner the 'distinctive proposition of "legal positivism"' (on which, he says, Hobbes, Bentham, Austin, Kelsen, Hart, Raz and Coleman unanimously converge[15]) is:

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[12] *AL* 115.

[13] *AL* 113 (emphasis added). See also *AL* 216-7.

[14] Recall in this regard Martin Stone's suggestions that legal theory before nineteenth century 'legal positivism' tended to prioritise inquiry into what it means for *law* to exist rather than on what it means for law to *exist* (see VI.3.1 at note 41). Note that Gardner himself does not draw this terminological distinction in this context. See at note 19 below.

[15] *5½ Myths* 199. Strictly speaking Gardner asserts this of a thesis labelled (LP) but a few pages later he offers (LP*) as a more exact formulation of that thesis. For alternative accounts of the continuities (and discontinuities) among these thinkers see David Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24 Oxford Journal of Legal Studies 39, 40-45; Andre Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 Oxford Journal of Legal Studies 683, 685-90; Martin Stone, 'Positivism as

> (LP*) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).[16]

Gardner sets out and discusses (LP*) in order to dispel what he considers to be a number of serious misunderstandings (myths) about legal positivism. Many of these myths are said to arise from a tendency of critics to treat, mistakenly Gardner claims, legal positivism either as a comprehensive theory of law or as a thesis about legal validity which has practical consequences for how judges should decide cases. In debunking both characterisations Gardner makes a number of points about (LP*) of which I shall just highlight two.

First, he states that the two categories of 'sources' and 'merits' are to be understood as 'jointly exhaustive of the possible conditions of validity for any norm.'[17] Thus 'source' is 'to be read broadly such that any intelligible argument for the validity of a norm counts as source-based if it is not merits-based.'[18] Gardner offers a restatement of (LP*) that draws out in more detail what is meant by a non-merit-based source.

> [(LP*)] says...that in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it.[19]

Opposed to What? Law and the Moral Concept of Right' [2010] Cardozo School of Law Working Paper No 290; Dan Priel, 'Towards Classical Legal Positivism' [2011] Paper No 20/2011 Osgoode CLPE Research Paper.

[16] *5½ Myths* 201.

[17] *5½ Myths* 200. Whether these two conditions are also mutually exclusive involves a consideration of the disagreement between so called 'soft/inclusive' and hard/exclusive' positivism, which Gardner expressly seeks to avoid by deliberately leaving the formulation of (LP*) 'ambiguous in respect of it.' *5½ Myths* 202.

[18] *5½ Myths* 200.

[19] *5½ Myths* 200.

Second, Gardner states that (LP*) 'is concerned only with the conditions of legal *validity.*'[20] (LP*) is merely a '*thesis about law*' and is not 'a comprehensive *theory of law*'.[21] Thus, according to Gardner:

> once one has tackled the question of whether a certain law is valid there remain many relatively independent questions to address concerning its meaning, its fidelity to law's purposes, its role in sound legal reasoning, its legal effects, and its social functions, to name but a few. To study the nature of law one needs to turn one's mind to the philosophical aspects of these further questions too. To these further questions there is no distinctively "legal positivist" answer, because legal positivism is a thesis only about the conditions of legal validity.[22]

This is a very significant stipulation. It states that while (LP*) determines how one shall identify what is a valid norm, i.e. a norm of a particular legal system, the test set out by (LP*) does not determine how one shall identify the meaning of a valid legal norm or its jural effects or even its role in legal reasoning.[23] When one takes (T1) and (T2) together this seems to introduce a gap in the account. (T1) requires the legal system to have norm-applying institutions that are bound to apply legal norms. (T2) says, according to Gardner, that what counts as a legal norm is to be settled according to (LP*). But (LP*) does not indicate how the meaning or jural effect of a legal norm is to be settled. Can one apply a norm without knowing its meaning or normative effect (or without attributing a meaning or effect to it)? If not, it seems that what (LP*) picks out and what courts are under a duty to apply are not necessarily the same thing. For one thing, this leaves unclear

[20] *5½ Myths* 223. Green concurs in characterising legal positivism as a theory 'of the *validity* of law'. Leslie Green, 'Legal Positivism' Stanford Encyclopedia of Philosophy (Fall 2009 Edition) section 2 (emphasis added).

[21] *5½ Myths* 233. cf Marmor (n 15) 685-6.

[22] *5½ Myths* 224 (emphasis added). cf 'Legal positivism provides a theory of hard cases.' Dworkin (n 5) 81; 'This essay presents an outline of a *positivist view of adjudication*.' *AL* 180.

[23] cf 'A legally valid rule is one which has legal effects…A legally valid rule is one which has the normative effects (in law) which it claims to have.' *AL* 149.

the rational relationship between the grounds for asserting (T1) and the grounds for asserting (LP*).

IX.2.2.2 Raz and the sources thesis

Like Gardner and Green,[24] Raz has maintained that legal positivism can be boiled down to a single thesis which 'has always been at the foundation of positivist thinking about the law'[25] and is the 'backbone of the version of positivism'[26] which he seeks to defend. Raz labels this the 'sources thesis'[27] or what he also calls the 'strong' version of the 'social thesis' which in its 'weak' form was advocated by Hart. The sources thesis asserts that:

> All law is source-based... [And:] A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument.[28]

Raz thus has a particular 'technical'[29] definition of social or social-fact source.

> A law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example). The sources of law are those facts by virtue of which it is valid [i.e. it exists] and which identify its content. This sense of 'source' is wider than that of 'formal sources' which are those establishing the validity of a law (one or more Acts of Parliament together with one or more precedents may be the formal source of one rule of law). "Source" as used here includes also "interpretative sources", namely all the relevant interpretative

[24] 'Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits.' Green (n 20) paragraph 1.

[25] *AL* 41.

[26] *AL* 39.

[27] *AL* 47.

[28] *EPD* 211. For alternative formulations see *AL* 46; *BAI* 376. For a critical analysis of their differences and argument in favour of the formulation which I have preferred here see Atria (n 5) 65-7.

[29] *AL* 47.

> materials. The sources of a law thus understood are never a single act (of legislation, etc.) alone, but a whole range of facts of a variety of kinds.[30]

Thus on its face the sources thesis appears to be of broader concern than (LP*) which was, at least expressly, concerned only with the intra-systemic validity or existence of a legal norm. This addresses the concern raised in the last subsection as to the possibility of a type of law application that relies solely on a test for legal validity like (LP*). For since the sources thesis, unlike (LP*), expressly asserts the possibility of identifying both the existence *and* the content of a norm without recourse to moral argument its acceptance does not entail either that it is possible to apply norms without knowing their meaning or that there are two senses of valid legal norms in play – one defined by the sources thesis and the other invoked in the account of the curial duty to apply the law.

On the other hand, it is clear that for this very reason the sources thesis represents a more ambitious claim than (LP*). Accordingly, Raz expressly notes (as Gardner did not need to) that 'sources' for him includes 'all the relevant interpretative materials.' On this basis it seems that one of the principal justificatory burdens facing Raz is to show that such materials are correctly reducible to 'a whole range of facts of a variety of kinds.'[31]

IX.2.3 (T3): It is a necessary feature of adjudication that a judge should decide cases justly.

In light of the foregoing it is perhaps surprising to find that both Raz and Gardner contend that it is a duty of a judge to decide cases justly. I have proposed such a duty by a

[30] *AL* 47-8.

[31] In light of what has been said in preceding chapters about the nature of legal argument (VII.5) and the pragmatic context of law-making and law-applying (VIII.6), I believe that Raz's characterisation of the 'interpretative materials' necessary to establish the 'content' (qua jural effect) of a statute as merely 'a whole range of facts' is mistaken. But I do not intend to pursue that argument here. See also Chapter X note 4.

functional analysis of the ends and means constitutive of the practice of adjudication that relates it back, through its institutional role within a legal system, to the service of the common good. But Raz and Gardner ground their claims differently and the differences are significant for my claim that their assertion of theses (T1), (T2) and (T3) are *insufficient* to justify a judicial duty to do justice *according to law*. I shall consider each theorist in turn.

IX.2.3.1 Gardner and the judicial duty to do justice

According to Gardner judges have a 'definitive adjudicative mission to be just'.[32] For Gardner questions of justice arise whenever there is a question of allocation: 'The just person is one who particularly cares, in other words, about who is allocated which proportion of what goods and ills, and on what grounds.'[33] Gardner correctly insists that such questions of allocative justice may arise regardless of whether there are rules (including rules of law) to be applied.[34] For Gardner adjudication is simply the making of decisions about allocation, the answering of questions of justice. Hence, he concludes, 'adjudicative institutions should be just above all'.[35] The upshot for an understanding of law and justice is as follows:

[32] Gardner, 'The Virtue of Justice' (n 6) 21 note 27.

[33] ibid 6.

[34] ibid 19, 21.

[35] ibid 19, 21. That is to say 'above all other virtues.' Gardner's article is concerned with explaining why justice is often considered the proper virtue of law as opposed to other virtues such as courage, honesty, temperance etc. ibid 151. Thus his discussion relies, by implication and later by stipulation (154), on Aristotle's account of 'particular justice' (justice as 'a part of excellence', as 'a species of the proportionate') as distinct from what the latter termed 'legal justice' (justice as 'complete excellence … in relation to others'). See Aristotle, *Nicomachean Ethics* 1129b27-1131a30; *NLNR* 164, 193. (It is interesting to note that the same, stipulative, definition of justice is essential to Radbruch's theory of law – see Chapter X note 34). My argument has consistently relied on the broader sense of justice and the virtue of justice (VIII.1). For present purposes, however, nothing material turns on this difference between my use and that of Gardner. It is sufficient that Gardner's usage entails that judges have a defining duty to make critically justified judgments as to what is truly due (owed) to whom in a given situation.

> The connection of justice to law, on this view, turns out to be indirect and non-exclusive. It comes of the combination of two facts: first, that adjudicative institutions should be just above all; second, that adjudicative institutions are, in a sense, the lynchpin of all legal systems.[36]

This effectively reverses my analysis which derives the practical necessity for a legal system, for adjudicative institutions within that system and for the duty of such institutions to decide all cases justly from the same source: the requirements of justice. By contrast, on Gardner's account (T1) (the necessity for legal systems to have courts) is simply a 'fact' about what makes a legal system a legal system. Moreover it is a fact that appears to hold quite independently of the 'fact' – one of the 'two facts' in the preceding quotation from Gardner – that bodies required to answer questions of (allocative) justice must always do so justly.

Nevertheless Gardner does acknowledge some significance for the further 'fact' (as also expressed by (T1) above) that courts 'are bound and constituted by rules' and adjudicate 'problems arising under a system of rules'.[37] This fact, he says, 'is by no means irrelevant…to what they should do in order to be just.'[38] But its relevance is not what I have proposed: that in a central case legal system courts do justice and decide justly precisely by applying all relevant law to the question of justice to be decided (VIII.2-3). It is a much more tentatively expressed relevance:

> One effect…is that, among the many goods and ills that they [courts] have to allocate between litigating parties, there are extra goods and ills of fulfilled and frustrated legitimate expectations, these legitimate expectations having been forged by the rules themselves. This means that the fact that a certain institution is a court of law, and not a mere arbitrator,

[36] Gardner, 'The Virtue of Justice' (n 6) 19.

[37] ibid 20.

[38] ibid.

> *does sometimes make a difference to what answer it should give to questions of justice*.[39]

It is possible that by referring to 'sometimes' Gardner intends what I mean when I limit my account to adjudication in its central case. If that is so, however, his formulation is misleading to the extent that it suggests that the central case of law or of adjudication is identified by, or its explanatory priority premised upon, its frequency or typicality. Moreover, if Gardner is concerned about accounting for judicial practice when faced with unjust laws, this can be accommodated within my theory (VIII.5). Indeed Gardner's remarks on unjust laws are telling:

> If they are to be just, the courts should still not surrender to a rule that cannot be justly applied; in that case, justice would have the courts either change the rule (by distinguishing or overruling) or depart from the rule in favour of a conclusion that would be just on its raw unruly merits (by resort to equity).[40]

In a footnote to this last sentence Gardner continues:

> Of course, the judicial obligation of fidelity to law may sometime militate against the courts taking either of these routes. But this only goes to show that occasionally judges are not morally well-placed to fulfil their definite adjudicative mission to be just. In such cases … there is always a temptation for judges to behave like arbitrators, to emphasise the first part of their oath at the expense of the second, to dispense "*justice* according to law" rather than "justice according to law".[41]

Gardner is certainly right to acknowledge that, as I have put it, there is a standing possibility that the rational means-end connection between applying the law and doing justice will break down in the face of the substantively unjust laws or legal practices of a particular legal system. The problem is that Gardner's account leaves it obscure why

[39] ibid 20 (emphasis added). Gardner notes that it is a mistake to think that this is all that has to be allocated between litigating parties. Such a view neglects, he says, 'the other things that must still be allocated apart from the frustrated and fulfilled expectations (such as the losses and the penalties).' ibid.

[40] ibid 21.

[41] ibid 21 note 27.

judges, as persons apparently under an 'obligation of fidelity' to positive law, should be considered to be 'morally well-placed' to fulfil 'their definite adjudicative mission to be just.' After all, it is no part of Gardner's argument that it is necessary for legal systems to have courts because it is necessary for legal systems (and their laws) to bring about justice. Thus while Gardner's account offers a suggestion as to why judges may be tempted to emphasise one or other of the 'parts' of their oaths, it offers no justification for why those two parts should have been conjoined in the first place. That is, it does not *locate* the duty to 'do justice according to law' in the universe of facts, concepts and other components of the subject-matter of a theory of law and/or of adjudication. It is for this reason that I conclude that theses (T1), (T2) and (T3), as articulated in the writings of Gardner, are insufficient to ground an account of adjudication or judicial duty articulated in terms of doing justice *according to law*.

IX.2.3.1 Raz and the judicial duty to do justice

Raz affirms that judges have a duty to decide justly – in the broad sense of being morally right. However, his reasons for doing so stand in contrast to my account of judicial duty. On my view judges have a duty *qua judges* to decide justly because such decision-making is practically necessary if a legal system is to perform its defining function of facilitating reasonable and effective co-ordination solutions for the sake of the common good and in a manner that is itself constitutive of the common good. For Raz, as I shall show, the obligation on judges to be just follows from two other premises, one relating to his sources thesis and the other to the moral duties of any human person whose decision-making may have a significant impact on others. It does not involve any recognition of the practical necessity of law or authoritative application of the law or adjudicative *determinatio* for the common good.

In perhaps his most important discussion of adjudication, Raz frames his account of legal reasoning as a response to the question: 'if legal reasoning turns on legal reasons, is there room in it for moral reasons?'[42] Raz develops his answer by distinguishing two types of legal reasoning which he terms 'reasoning about what the law is'[43] and reasoning 'about how legal disputes should be settled according to law.'[44] As he puts it: 'The first is governed by the sources thesis, the second …[is] quite commonly straightforward moral reasoning.'[45] Thus legal reasoning has 'two aspects'[46]:

> On the one hand, legal reasoning aims to establish the content of authoritative standards; on the other hand, it aims to supplement them, and often to modify them, in the light of moral considerations.[47]

What is the rationale for each of these two aspects according to Raz? I shall consider each in turn briefly. The important point to note, however, is that Raz justifies neither aspect of legal reasoning by reference to the law's function qua law (or the judge's function qua judge) to promote the common good.

According to Raz whatever social functions (ends) law might have it fulfils them by functioning as a kind of thing that *claims* to be morally authoritative; its making this claim is part of what is entailed by treating it as both 'a structure of and a product of authority'.[48] His sources thesis and his account of adjudication are thus, in form, instances of a means-end functionalist analysis which purports to works out the necessary

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[42] *EPD* 326.

[43] *EPD* 327.

[44] *EPD* 327. See also *EPD* 332. Gardner adopts the same distinction in *5½ Myths* 215-6.

[45] *EPD* 332. See also:'[R]easoning according to law…is – arguably – applying moral considerations.' *EPD* 332. 'Legal reasoning [according to law] is an instance of moral reasoning.' *EPD* 340.

[46] *BAI* 116.

[47] *BAI* 116.

[48] *BAI* 107. See also *BAI* 180.

implications for the nature of law and legal reasoning if law is to be *capable* of making this kind of claim. It is not always clear, however, what type of 'necessity' he is relying upon when he speaks of courts being bound by valid law (IX.2.1).[49] Consider the following claim:

> Once legal schemes are in place people are entitled to expect them to be followed and enforced by legal institutions. This arises because of the fact that law is put in place to foster expectations, and to encourage people to plan on the assumption that it will be followed and enforced by legal institutions. In large measure this is the way law achieves its intended social effects.[50]

Here we have an 'entitlement' that is said to 'arise' (presumably as a *practically necessary* consequence) because of a 'fact' about the reason for a certain practice being put in place. It is hard to see how any practical inference can be made from such a fact, however, without some further practical (normative) premise. In an earlier work Raz had made a similar point but in terms of purely instrumental necessity or efficacy:

> If the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it. …Since just about any matter arising under law can be subject to a conclusive court judgment, it is obvious that it is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reason.[51]

So here we have a claim based on what is instrumentally necessary *if* law is to be obeyed. In the absence of any argument for why law should be obeyed, however, this too seems unable to provide a *practical* reason for a judicial duty to apply the law.

[49] The situation is made more puzzling by Raz's claim that 'the nature and limits of law' articulated by the sources thesis has no bearing 'on what judges should do, how they should decide cases.' *EPD* 233.

[50] *EPD* 337.

[51] *AL* 214, 217.

Consider now Raz's argument for why judges must resort to moral reasoning (and not, say, self-interested or prudential reasoning) when reasoning 'according to law'. For Raz it is those who *deny* that reasoning according to law is moral reasoning who bear the burden of justification. For they must show what else besides moral reasoning could rightly be employed when the direction given by the law's authoritative norms (as identified by the sources thesis) underdetermine the question to be decided. As Raz puts it, they must:

> produce a body of grounds for decisions which can be reasonably believed to be morally better than any alternative, in particular one which will be reasonably believed to lead to morally better legal decisions than instructing the court to reason morally directly, and which is capable of being applied without invoking moral considerations in its application. Barring considerations of authority, I do not know of any body of grounds for decisions which meets this dual condition.[52]

Raz notes that this argument may seem to commit him to a connection, at least in principle, between what is legal and what is moral. After all, why else is it necessary for a theory of 'legal' reasoning to show that it will lead to morally superior decisions? The answer Raz gives is very revealing. He explains this requirement as follows:

> I am taking it to be a necessary truth, however, that whatever people do they do because they believe it to be good or valuable, however misguided and even reckless their beliefs may be. Given that the courts are manned by people who will act only in ways they perceive to be valuable, principles of adjudication will not be viable, will not be followed by the courts, unless they can reasonably be thought to be morally acceptable, even though they can be misguided. So let us return to the main argument.[53]

This seems to involve a non sequitur. One may grant (*akratic* cases aside) that a judge will always seek to act in a way which appears to him to be good (qua intelligibly

[52] *EPD* 333.

[53] ibid (reference omitted).

desirable). But it doesn't follow from this that he will always seek to act justly or morally. Perhaps what Raz is trying to say is that judges have a duty to decide cases justly but that it is not a duty which a judge possesses qua judge of a legal system but rather is a sort of necessary consequence of the sheer fact that the judge is a moral agent. This is a point he has made elsewhere when he states: 'In being human, they [judges] are subject to morality. … *they would not be subject to the law were they not subject to morality*.'[54] This argument has an interesting parallel with Gardner's. Both theorists try (or have tried) to ground the duty of courts to do justice in something other than an appeal to the central case legal system's service to the common good. Gardner sees (or has seen) it as a (conceptually) necessary consequence of what it means to adjudicate (i.e. to decide questions of allocative justice). Raz sees (or has seen) it as a (conceptually) necessary consequence of what it means to be human (i.e. to be subject to morality).

To conclude, let me consider what appears to be a different argument given by Raz for a judicial duty to decide according to what is morally right. It goes as follows:

> Legal reasoning is an instance of moral reasoning. Legal doctrines are justified only if they are morally justified, and they should be followed only if it is morally right to follow them. The legal systems of different countries, with their doctrines of balancing the powers of the different organs of government, make varying claims, and have differing principles, as to when the courts are morally justified or even required to deviate from legal doctrine when it conflicts with morality and when the courts should leave the reform of doctrine to other bodies of government. *These separation-of-power principles determine the official view of the right, i.e. the morally right, balance between morality and doctrine, when they conflict. In reasoning according to law the courts ought to follow those principles, which are moral principles, though they may be mistaken moral principl*es. Thus legal reasoning is an instance of moral reasoning, though sometimes it is morally incorrect, or based on morally deficient legal principles.[55]

[54] *BAI* 183, 189.

[55] *EPD* 340 (emphasis added).

This seems like an attempt to justify a moral duty to do justice according to law by introducing a novel third element into the traditional discussion of the relationship between legal norms and moral norms, namely posited moral norms: 'the official view of …the morally right.' A system's posited moral norms seem to occupy a mid-way or hybrid position between moral norms and legal norms. They constitute the intra-systemic norms upon which a court, according to Raz, is both legally (and thus somehow morally)[56] required to rely in order to resolve any conflicts that may arise between moral norms and legal norms. There seems an obvious problem with this analysis: in so far as these conflict-resolving moral principles are posited by a particular legal system, there is no reason why they too would not have the same potential for conflict with the requirements of true, i.e. non-posited, moral norms. Given the possibility of such a conflict and Raz's own sources thesis account of what counts as law (IX.2.2.2), it is unclear how Raz can conclude that a judge 'ought to' resolve conflicts between law and morality by applying posited 'moral principles' rather than by complying with true moral principles. Indeed his position seems to combine the worst of two worlds. On the one hand, because of Raz's normatively inert account of what a legal system is, he cannot provide a moral argument for a judicial duty to do justice solely by reference to the posited content of a legal system. On the other hand, because of his assertion of a *moral* duty to follow a legal system's 'official view of …the morally right' way to resolve a conflict between an unjust law and justice, even when this official view is mistaken, he appears to bind judges in those very situations which we would expect a reasonable theory of adjudication to recognise a non-central case of law, e.g. by prescribing that the judge should resign or otherwise refuse or decline to enforce the unjust law.

[56] Although why, for Raz, this moral obligation should necessarily follow from the legal stipulation is not clear.

The difference between my position and that of Raz is evident from his own summary of the nature of reasoning according to law which, he says

> is (in shape and form) ordinary evaluative reasoning, which is undertaken according to law, *for the law requires courts to reach decisions through such reasoning.* … [B]y and large, all judicial reasoning is … reasoning according to law, reasoning that imports moral and other premises in accordance with the role they have by law, or at any rate consistently with the law. *The exceptions* are those cases where judges feel that the law does not allow enough scope for moral reasoning, that following it compels them to endorse immoral results, and that in the circumstances it would be right to flout the law and do the morally right thing.[57]

So there seems to be two different sources for judicial duty. The duty to apply the law is a requirement imposed by the positive law. It is not necessarily a requirement of justice. It is an intra-systemic duty which can be over-ridden by a duty not to apply the law. That over-riding duty, when it arises, *is* a requirement of justice. The asymmetry is clear. Justice may require the judge not to apply the law, but it is not justice *per se* that requires the law to be applied. Law application, like law itself, has no intrinsic connection with doing justice and, thereby, promoting the common good.

It is evident from the foregoing that theses (T1), (T2) and (T3), as defended by Raz, are insufficient to justify an account of adjudication or judicial duty articulated in terms of doing justice *by applying all relevant law*.

XI.3 Why a Positivist theory of law cannot justify an intrinsic link between doing justice and applying law

It is no coincidence that both Gardner and Raz have sought to justify the duty of judges to decide justly or morally by arguments other than one predicated on the law's practically

[57] *BAI* 378, 379 (emphasis added).

necessary role in promoting the common good. The possibility of such an argument being made within, or as a matter of, legal theory (or philosophy of law) is closed off by a commitment to what I have termed a Positivist theory of law, namely a theory of law developed according to a jurisprudential methodology that considers it both possible and necessary to understand the 'what' of law without reliance on any moral or directly evaluative judgments.

The Positivist position tends to be expressed through a distinction between features and ideals[58] of law that are intrinsic and those that are extrinsic. Only intrinsic characteristics define the kind of thing that law or a legal system *is*. Intrinsic features are 'necessary' features. They determine what can *intelligibly* be predicated of a particular law or legal system, i.e. what extrinsic characteristics a law or legal system might have, or what 'attractive ideals'[59] it may realise. By contrast in speaking of law or adjudication in its central case I am proposing an 'attractive ideal' that is constitutive and is grounded not in reflections on the concepts of law and adjudication (as given in cultures however universal) but in reflections on human needs and goods as comprehensively understood (at least in outline) in a morally articulated theory of practical reason and expressed in the summary normative concept of the common good (IV.2-3).

Thus a Positivist theory is effectively a means-end functionalist analysis, such as I have pursued here, except that it decapitates the analysis by precluding (as unnecessary for a descriptive theory) any reference to ends which are identified through critically justified practical judgments about what types of social practices it is good (or necessary)

[58] Jules Coleman, *The Practice of Principle* (OUP 2001) 194; *BAI* 180 (referring to 'intrinsic excellence' and 'intrinsic virtue' of law).

[59] ibid.

to have or maintain as a matter of practical reasonableness.[60] This requires Positivist theorists to identify (through the implicit or explicit choice of a focal viewpoint) an alternative terminus point for their functionalist analysis of the law's intrinsic or defining means and ends (including ends chosen as means to other ends). It also requires every Positivist theorist to justify the choice of terminus. Raz justifies the terminus of his Positivist theory as follows:

> The doctrine of the nature of the law [i.e. the sources thesis] yields a test for identifying law the use of which requires no resort to moral or any other evaluative argument. But it does not follow that one can defend the doctrine of the nature of law itself without using evaluative (though not necessarily moral) arguments. Its justification is tied to an evaluative judgment about the relative importance of various features of social organizations, and these reflect our moral and intellectual interests and concerns.[61]

Unfortunately this justification raises more questions than it answers. Three are most pertinent. First: Assuming that 'we' (?) are not completely uniform or homogenous in 'our moral and intellectual interests and concerns', *whose* interests and concerns is Raz actually reflecting? Second: Why should 'the evaluative judgment' which justifies Raz's theory of the intrinsic or necessary features of law 'reflect' *those* interests and concerns and not others? Third: What is it about an 'evaluative judgment' based on (certain) people's 'moral and intellectual interests and concerns' that counts as *justifying* a theory of law? I don't propose to pursue here these questions or the questions they raise about the cogency of Razian assertions about what is an intrinsic/necessary and extrinsic/unnecessary feature of law. It suffices to note that (T4) is evidently a corollary of a Positivist theory of law:

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[60] I have argued in Chapter II that this decapitation is fatal for any effort to develop a general theory of law (whether for descriptive or normative purposes). In this section I am merely teasing out its implications for an understanding of adjudication.

[61] *EPD* 209 (emphasis added).

(T4): Neither the actual promotion of justice and the common good nor an aspiration to promote justice and the common good is a necessary feature of a legal system or of a legal norm.

Raz has been one of the foremost proponents of the Positivist viewpoint (and by implication (T4)).[62] The following passage (from an essay first published in 1998) is a good example of his views in this regard:

> Justice, I believe, is not the law's ultimate aspiration, for there is no one moral virtue that all law by its nature aspires to, other than to be good: that is to be as it should be… It is important to remember that the law has no specific function (though it, or parts of it, have many such functions). Being good is but a formal function: everything should be good… That does not tell us anything of substance about how it should be. It merely says that that thing is subject to normative evaluation. … I know of no reason to think that there is any abstract description of their [legal systems'] function which applies to all of them and to which all other functions are instances…[63]

Scott Shapiro has recently expressed uncertainty as to whether Raz 'now believes that the law has a constituent moral aim.'[64] Shapiro's doubt is based on a 2003 article of Raz in which he endorses as 'true' a claim that 'postulates that some specific (though possibly abstractly conceived) moral task is central to the law, essential to its being the type of institution it is.'[65] Indeed Raz goes further and articulates the law's 'essential' 'moral' task as follows:

> The law's task, put abstractly, is to secure a situation whereby moral goals which, given the current social situation in the country whose law it is,

[62] See *Evaluation* 29-69. For other examples see Coleman (n 58) 194-5;and Marmor (n 15).

[63] *BAI* 374, 375.

[64] Scott J. Shapiro, *Legality* (Harvard University Press 2011) 446.

[65] *BAI* 177.

> would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realized.[66]

Thus Raz concedes that law, 'by its nature, is an institution with a moral task to perform.'[67] This is a sound claim as far as it goes.[68] Indeed it is this type of claim which is required, I suggest, if a judicial duty to do justice according to law is to be even intelligible. For it at least goes some way to showing how, in a central case of law or of a legal system, a judge can decide what is just in a given situation *by* and *through* the application of all relevant law. Nevertheless, it is not sufficient. For a central case legal system is not merely one that has a 'moral duty' to promote the common good. It is also one that is constituted and operated in a way that is apt to fulfil that duty.

Raz, however, rejects the claim that, as he puts it: 'Law, by its nature, is a morally valuable institution.'[69] His argument in this regard is strained and implausible. It relies on a purported distinction between this claim and the claim that promising is a morally valuable institutions (which he accepts). He gives two arguments for such a distinction. First, because promises are made voluntarily 'it is reasonable to think that the law is more prone to abuse, to injustice and immorality than promises.'[70] This claim rests on an obvious equivocation about what makes an institution 'morally valuable'. In respect of promising, Raz had earlier noted that

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[66] *BAI* 178 (italics removed).

[67] *BAI* 177.

[68] I don't believe, however, that Raz's methodology affords a sound route to its justified assertion.

[69] *BAI* 177. This claim, like the last, is only an imperfect and incomplete formulation of the classical natural law view of law defended in this thesis using the central/peripheral case heuristic. Indeed it is interesting to note that in an essay expressly dedicated to the question of the rational connection between law and morality, in which Raz posits eleven different possible theses about such a connection, he does not discuss (or even succeed in correctly stating) this view and the connection between law and the common good that it advances. See *BAI* 166-181.

[70] *BAI* 179.

> There is a good which binding promises can serve or achieve, and that is why they can be binding. That is, the practice of promising is a morally valuable practice because it is one which can achieve valuable goals.[71]

This analysis is sound – indeed it is the structure of the argument for the authority of law developed in V.4-7 and VI.3. Notice, however, that it makes no reference to the typicality or the frequency of valuable goals being achieved by the practice of promising. Notice also that this argument is clearly premised on a central case of promising. Raz makes this clear when, immediately after the lines just quoted, he add: 'It does not follow that all promises bind.'[72] And then in a footnote continues: 'In other words, the argument has to be hedged with qualifications when applied to promises, just as when applied to the law.'[73] But these sensible riders appear to be forgotten by Raz when it comes to his first argument for the distinction between the moral value of 'law' and 'promising'.

Perhaps it does not matter, for Raz says that 'it is the second different between them [promises and law] that is crucial.' It runs as follows:

> When we say that promising is a morally valuable institution … we are judging the abstract institution, not the way it is put into practice in one country or another. … Not so when we say that *the law* is a morally valuable institution. "The law is …" is, *in most contexts,* short for the law of the country of which we speak. …When we do not refer to the law of a specific country *we normally* refer to the law of all countries, or of all countries today, etc. Therefore, '*the law* is a moral institution' means something quite different from 'promising is a moral institution'. The latter refers to an abstract moral institution, the former to the way it is actually implemented in history. But that is not a claim that can be warranted. While we can affirm … that, where it [the law] exists, it has moral tasks to discharge, so that it is to be judged, among other ways, by its success in discharging them, we cannot say that in its historical manifestations through the ages it has always, or generally, been a morally

[71] *BAI* 176 (emphasis added).

[72] *BAI* 176.

[73] *BAI* 176 note 20.

> valuable institution, and we can certainly not say that it has necessarily been so.[74]

This argument is equally fallacious. It rests from start to finish on a contrived interpretation of the claim under consideration that begs the question and has the effect of changing the subject. The claim that Raz himself originally proposes for discussion does not refer to 'the law' but to 'law'. It states: '(iii) Law, by its nature, is a morally valuable institution.'[75] On any fair or sensible construction this claim is concerned with law as an 'abstract institution' or, to put it more accurately, law in its central case. It should make no difference to an analysis purporting to compare this claim with one about the 'institution of promising' whether 'in most contexts' or 'generally' we (whoever 'we' are) speak about particular legal systems rather than law in its central case. The claim that law, 'by its nature' or, rather, in its central case, is 'a morally valuable institution' does not purport to be (nor has anyone ever asserted it as) a claim that describes or determines the moral value of historical or presently existing legal systems. Raz's whole argument for the distinction with the claim about promising (in its central case, as an 'abstract institution') is thus addressed to a straw man. Moreover, if one really did want to assess, though a comparison with promising, a claim like '*the law* [as it exists/existed in X or Y, e.g. the UK, Nazi Germany etc], by its nature, is a morally valuable institution' then the relevant or analogous claim about promising would be something like 'promising [as utilised by X or Y, e.g. families, businesses, kidnappers, blackmailers, bribers, terrorist cells etc], by its nature, is a morally valuable institution'.

[74] *BAI* 177 (emphasis added).

[75] *BAI* 177.

Whatever we make of its soundness the upshot of this argument is that Raz rejects the claim that 'law/the law' is a morally valuable institution while affirming that 'law/the law' has an essential moral duty. He contrasts the two positions as follows:

> All we can say is that *the law* can be a valuable constituent component of valuable social groups, and if it is it has a moral merit in being a worthy object of identification and respect. But we cannot say that it must be such a constituent component, or that it fails if it does not. On the other hand, *all law* must enjoy legitimate authority [i.e. actual moral authority], or *it fails* in meeting its inherent claim to authority.[76]

This confirms my claim that a Positivist theory of law, such as that advanced (however consistently) by Raz, does not so much refute as renders simply unintelligible an account of adjudication and of judicial duty in which the defining end is determining what is just in a given situation and the defining means to that end (precisely *because* it requires the answering of a question of justice and not despite it) is the application of all relevant law – both the substantive law applicable to the conduct of the persons party to the case and the procedural and evidential law designed to make adjudication a systemically fit means to its end (VIII.4). For the Positivist theory of law, of which (T4) is but one specifying corollary, makes it incoherent – or at least simply gratuitous or baseless – to say that in intending to decide according to the requirements of the law the judge is, by that very same act, also and equally intending to decide according to the requirements of the common good. In other words a means-end relationship between the jural order and the common good cannot be recognised as an intrinsic or constitutive principle of the act of adjudication in its central case. It cannot be so recognised because the function of a legal system, in its central case, in establishing (i.e. constituting through practically necessary *determinationes*), expressing and giving practical effect to the requirements of the

[76] *BAI* 181 (emphasis added).

common good is treated by a Positivist theory of law as an extrinsic, and hence merely accidental and contingent, feature of a legal system. Thus any account of adjudication premised on this function is not premised upon an intrinsic or necessary feature of law. It follows that such an account cannot be the basis for either a *general* descriptive or normative theory of adjudication, i.e. a theory that describes or justifies the central case of adjudication or, in the terminology of Positivist theory, its necessary features.

CHAPTER X – THE 'POSITIVISM' OF RADBRUCH'S FORMULA

> *Today we need to realize that the 'moral filter' theory [of legal validity] belongs not to the history of natural law but to that of legal Positivism: it is a re-making of natural law themes in the image of positivism, with morality cast into the role of an alternative answer to the positivist's central question, that of the validity or systemic existence conditions of the law of a time and place.*[1]

X.1 Introduction

According to Andrei Marmor, 'the debate between legal positivism and its opponents is mainly about the conditions of legal validity'.[2] Marmor may well be correct as a matter of twentieth century academic history, but I believe his claim is mistaken as a philosophical diagnosis of what is really at issue. As the discussion in Chapters II and IX suggests, the *fons et origo* of many contemporary debates in legal philosophy (that so often appear to leave supposed disputants talking in circles around each other)[3] is at the level of competing answers, whether implicitly or explicitly proposed or recognised, to the two principal methodological questions which I formulated in II.2 as follows:

(1) What *kind* of a thing is the thing we conventionally call law?

(2) How should one go about understanding, or evaluating the soundness of an existing understanding of, things of that kind?

Thus, much more fundamental that any scuffles over 'conditions of legal validity' is, I suggest, the rupture between (a) inquiries into the nature of law that trace the law's

[1] Martin Stone, 'Positivism as Opposed to What? Law and the Moral Concept of Right' [2010] Cardozo School of Law Working Paper No 290, 17. On a 'moral filter' theory of validity see VI.3.1. Radbruch's Formula, as embedded in and emergent from Radbruch's theorising, is a stark example of such a theory.

[2] Andre Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 Oxford Journal of Legal Studies 683

[3] See examples given in Stone (n 1) 13-4.

distinctive package of ends and means, in its central case, back to its *practically* (rationally, morally) necessary service to the common good and (b) those which (purportedly) cut off that chain of functional analysis before it reaches any moral judgment by grounding their choice of viewpoint (and so their judgment about what is important and significant) in what are said to be *conceptually* necessary propositions. If I am correct, a thesis like (T2) (as set out in IX.1 at p. 241) – whether framed in terms of Gardner's (LP*) or or Raz's sources thesis, with its stringent claim (unnecessarily stringent from the perspective of what is *practically* necessary for the common good)[4] about the hermetic seal that excludes from the conditions of legal validity (in all legal systems everywhere and at all times) any non-posited principles of practical reason – is merely a symptom of a deeper problem that goes beyond the particulars of the 'legal positivist' accounts of validity of Hart, Raz, Gardner, Green, Marmor, Waluchow, Kramer and others.

To test this contention this chapter briefly considers a claim about adjudication and judicial duty that, if Marmor were correct, would surely be paradigmatic of the opposition to 'legal positivism', namely the claim ('Formula') first articulated famously (or notoriously) by Gustav Radbruch and now defended by Robert Alexy. I argue that a Razian approach to legal theorising, which I have labelled 'Positivist' (IX.1 at p. 240), is in fact at the base of the arguments for 'Radbruch's Formula' (as it is conventionally known). The point of the argument is to show how a reliance on conceptual analysis can

[4] As argued in Chapters VI and VII, the positivity of law and the insulation of determinations of intra-systemic validity from unrestricted moral reasoning is a prudential *technique* fully explicable and justifiable by reference to the requirements of justice and the common good. By recognising the technique of 'legal validity' as a mere means to that type of (practical) end, rather than as a conceptual necessity (deduced from the 'concept' of authority or whatever else), this view allows for the sort of appropriate flexibility in the concrete instantiations and use of this technique (in a given legal system's practice of legal argument) that one can reasonably expect and permit in matters of practical reasoning and inference (i.e. in reasoning about the third kind of order (II.2) as opposed to, say, about logical or technical order). See also Maris Köpcke Tinturé, 'Some Main Questions Concerning Legal Validity' (DPhil thesis, Oxford 2009) 252-5.

generate radically different 'necessary' conclusions – such as about the relations between legal validity and morality – including, in Radbruch's case, from the same theorist. It is offered as support for my claim that a Positivist methodology, whether employed by Marmor's 'legal positivists' (see IX.3) or their 'opponents', is ultimately incapable of providing any justification for a judicial duty to do justice *by and through the applying of all relevant law*. Whereas the Positivist theories of Raz and Gardner result in something closer to a judicial duty to do justice despite the law (IX.2.3), the Positivist theory behind Radbruch's Formula yields (at most) only a judicial duty not to do extreme injustice according to law.

X.2 Radbruch on Radbruch's Formula

X.2.1 What the Formula says

An extremely unjust posited legal norm should never be recognised or applied as a valid legal norm by a judge (or, at least, a judge of last resort) acting *qua judge*. That, in essence, is the claim about judicial duty or legal validity or perhaps both made by Radbruch in articulating his Formula. It is perhaps one of the most famous and influential modern claims about the connection between morality and law in adjudication. It has been adopted approvingly many times by the federal courts of the Federal Republic of Germany[5] and gained wide currency in English-speaking circles after it featured prominently in the debate between HLA Hart and Lon Fuller in 1958.[6]

[5] Or at least the part quoted below has been so adopted. See, e.g., BVerfGE 23, 98 (106) as quoted in Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed), *Recrafting the Rule of Law* (Hart Publishing 2000) 18. Hereafter *Defence*. See also cases cited in *Defence* 15 notes 2-5, 19 note 17; Robert Alexy, *The Argument from Injustice* (OUP 2002) 28 note 52, 29 note 53 (hereafter *Argument*); and H.O. Pappe, 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 Modern Law Review 260, 261. See generally Heinrich A. Rommen, 'Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany' (1959) 4 Natural Law Forum 1, 9-22; Ernst Von Hippel, 'The Role

Its first and most influential expression by Radbruch was in the following passage in a 1946 German article which Stanley Paulson believes to be the most cited legal essay published in the twentieth century:[7]

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law' ['*unrichtiges Recht'*], must yield to justice.[8]

It should also be noted that in the same article Radbruch went on to emphasise the importance of 'legal certainty' as follows:

> That the law be certain and sure, that it not be interpreted and applied one way here and now, another way elsewhere and tomorrow, is also a requirement of justice. … In the face of the statutory lawlessness of the past twelve years, we must seek now to meet the requirements of justice with the smallest possible sacrifice of legal certainty. Not every judge acting on his own initiative should be allowed to invalidate statutes; rather, this task should be reserved to a higher court or to legislation.[9]

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of Natural Law in the Legal Decisions of the German Federal Republic' (1959) 4 Natural Law Forum 106, 111-7; Edgar Bodenheimer, 'Significant Developments in German Legal Philosophy since 1945' (1954) 387-91.

[6] HLA Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 Harvard Law Review 593; Lon L. Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1957) 71 Harvard Law Review 630.

[7] Stanley L. Paulson, 'On the Background and Significance of Gustav Radbruch's Post-War Papers' (2006) 26 Oxford Journal of Legal Studies 17, 17.

[8] Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (2006) 26 Oxford Journal of Legal Studies 1, 7 (translated by Bonnie Litschewski Paulson and Stanley L Paulson). I have deliberately not quoted the lines that follow these and which many consider to offer a second version of the Formula. The debate about whether there are one or two formulations being proposed by Radbruch and, if two, the possible relations between them raises interesting and important questions that space unfortunately precludes me considering. They are not, however, strictly relevant to my argument. See generally: Stanley L. Paulson, 'Radbruch on Unjust Laws: Competing Earlier and Later Views?' (1995) 15 Oxford Journal of Legal Studies 489, 491; *Defence* 16; Frank Haldemann, 'Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law' (2005) 18 Ratio Juris 162, 166; Paulson, 'Background' (n 7) 26-27; Torben Spaak, 'Meta-Ethics and Legal Theory: The Case of Gustav Radbruch' (2009) 28 Law and Philosophy 261, 273; Brian Bix, 'Radbruch's Formula and Conceptual Analysis' (2011) 56 American Journal of Jurisprudence 45, 46.

[9] Radbruch, 'Statutory Lawlessness' (n 8) 8.

X.2.2 Understanding the Formula in the context of Radbruch's legal philosophy

To better understand Radbruch's talk of conflicts between 'values' of 'legal certainty' and 'justice' it is necessary to consider his philosophy of law as articulated in his principal work of jurisprudence, the third edition of his *Rechtphilosophie* published in 1932.[10] I rely on the 1950 English translation of this third edition by Kurt Wilk.[11]

Radbruch's general jurisprudence is a paradigmatic example of the conceptual approach to legal theory which I have termed Positivist. His method was determined by his adoption of the 'philosophical doctrines' of the so-called Baden or Southwestern Neo-Kantians.[12] These entailed both a radical 'methodological dualism' based on the 'logical' independence of 'Is' and 'Ought' (Reality and Value, *Sein* and *Sollen*) and a commitment to a Weberian 'relativism' according to which there can be no scientific (i.e. rational) inquiry into or judgments about 'ultimate statements concerning the Ought'.[13] In keeping with these methodological principles Radbruch recognises 'four attitudes' of 'the mind' which he terms 'Value-blind, Evaluating, Value-Relating, [and] Value-Conquering.'[14]

[10] The second edition of this work was published in 1922 but was merely reprint of the first edition of 1914. In his preface to the third edition Radbruch says that '[i]t is a new book rather than a new edition.' Gustav Radbruch, 'Legal Philosophy' in *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press 1950) 48 (hereafter *LP*). The fourth edition of *Rechtphilosophie* was published posthumously in 1950 and the fifth in 1956. The editor of these editions, Erik Wolf, stated that Radbruch 'had provided that in the event of his death a new edition should be issued without changes' but the fourth edition does include notes on the text which Radbruch had prepared in anticipation of a new edition. Erik Wolf, 'Revolution or Evolution in Gustav Radbruch's Legal Philosophy' (1958) 3 Natural Law Forum 1, 3. On Radbruch's philosophy of law see generally Anton-Hermann Chroust, 'The Philosophy of Law of Gustav Radbruch' (1944) 53 The Philosophical Review 23; Max A. Pock, 'Gustav Radbruch's Legal Philosophy' (1962) 7 St Louis University Law Journal 57, 59-63; and Julius Stone, *Human Law and Human Justice* (Stevens & Son 1965) 227-262.

[11] See note 10 above.

[12] See *LP* 49 note 1 referring to Wilhelm Windelband (1848-1915), Heinrich Rickert (1863-1936) and Emil Lask (1875-1915). See also Paulson, 'Background' (n 7) 29-32. For a contrary view, contesting both the degree to which the Neo-Kantians are correctly deemed Kantian and the degree to which Radbruch was a Neo-Kantian, see Deitmar Von Der Pfordten, 'Radbruch as an Affirmative Holist. On the Question of What Ought to Be Preserved of His Philosophy' (2008) 21 Ratio Juris 387.

[13] *LP* 53, 55. See also 48, 57-8, 69 and 117. See Wolf (n 10) 11-14.

[14] *LP* 49.

The value-relating ['*wertbeziehende*'] attitude is the 'methodological attitude of the cultural sciences.'[15] Examples of such 'cultural sciences' are science, art, morals (as studied by anthropology) and law.[16] For Rabruch these 'concepts' are all 'human creations' or 'work[s] of man'[17] and so derive their meaning from their 'purpose'[18] or that at which they are 'aimed'[19] or that for which they 'strive'[20] or, synonymously, their 'values'[21] or 'idea'.[22]

Radbruch applies his methodological apparatus to the philosophical study of law as follows. Since law is a 'human creation' or 'cultural concept' it cannot be viewed with the value-blind attitude of mind: '[a] view of human creations that is blind to purposes, that is, to values, is impossible; so, then, is a value-blind view of the law or of any single legal phenomenon.'[23] This point is similar to that made by Hart, Raz and Finnis in recognising the priority of an internal viewpoint over any external one for the purposes of theoretical reflection on the nature of any social practice, including law (II.3). In Radbruch's Neo-Kantian framework, however, the impossibility of a value-blind inquiry into law leads him to conclude that

> The concept of law can be defined only as the reality tending toward the idea of law. … The idea of law is value, but law is a reality related to value, a cultural phenomenon. This marks the transition from a dualism to

[15] *LP* 50. The '*wertbeziehende Methode*' is associated with Windelband and, in particular, Rickert (see Paulson, 'Background' (n 7) 29 note 81; Andrea Staiti, 'Heinrich Rickert' The Stanford Encyclopedia of Philosophy (Fall 2013 Edition) Section 4).

[16] *LP* 50-1.

[17] *LP* 69.

[18] *LP* 51.

[19] *LP* 50.

[20] *LP* 50.

[21] *LP* 52.

[22] *LP* 51. His discussion of such concepts is flawed, however, by its failure to adopt the heuristic of the 'central case/peripheral case' distinction. See in this regard his discussion of 'science' at *LP* 50.

[23] *LP* 52.

> a triadism [‘*Trialismus*’] of approaches ... That triadism, turns legal philosophy into a cultural philosophy of law.[24]

It is patent from this passage that the commonplace reference to Radbruch’s pre-War ‘cultural philosophy of law’ as being some class of ‘legal positivism’ is more equivocal than informative.[25] For having rejected the separation of law and value (as espoused by Kelsen[26] and, in a different sense, by Stammler[27]), Radbruch consciously constructed his theory as an answer to the question: what are the ‘values’ to which law (as a cultural fact or phenomenon) relates and from which the concept (or meaning) of law can be derived?[28]

In framing this answer Radbruch begins by asserting, without supporting argument, that there are four values (the just, the good, the true and the beautiful) which are ‘absolute’, which is to say that they ‘cannot be derived from any other value.’[29] Such values represent ‘an ultimate point of departure’ for the theorist engaged in an inquiry of cultural philosophy.[30] That this account of absolute values should pass without further argument is, though undesirable, perhaps understandable given his expressly stated reliance on a Kantian philosophical framework,[31] though even such a framework would not itself explain why the just should be posited in parallel to the good as a distinct absolute value.[32] Less acceptable, however, is the manner in which he then argues, or

[24] *LP* 70.

[25] See also *LP* 111. See Paulson, ‘Background’ (n 7) 36. For examples of references to Radbruch as a ‘legal positivist’ see, e.g., Von Hippel (n 5) 110; *Argument* 45; Haldemann (n 8) 164; Spaak (n 8) 269.

[26] *LP* 71.

[27] *LP* 68-69.

[28] See *LP* 76.

[29] *LP* 73.

[30] *LP* 73.

[31] For this view see Paulson, ‘Background’ (n 7) 30 citing to commentary of Marc André Wiegand.

[32] Paulson notes that Windelband had identified three absolute values of the true, the beautiful and the good as corresponding to the three faculties of knowledge, feeling and willing distinguished by Kant in his *First*

rather wholly fails to argue, for his answer to the question as to the value to which law relates and from which the concept of law is derived. It is contained in the following two sentences:

> Now the idea of law can be none other than justice. *Est autem jus a justitia, sicut a matre sua, ergo prius fuit justitia quam jus*, reads the gloss on 1.1 pr. Dig. 1, 1.[33]

It is no exaggeration to say that the remainder of Radbruch's discussion of the 'concept' of law boils down to the unpacking, in accordance with his methodological relativism, of that quasi-stipulative definition of law by reference to another quasi-stipulative definition, that of justice as a purely formal principle of equal treatment.[34] With this latter definition he in fact departs widely from the Roman jurists' conception of justice on which he purports to rest his account of law and justice. From this problematic premise, that justice qua formal equality is 'the specific principle of law, that which governs the determination of the concept of law', Radbruch seeks to deduce 'what kind that reality is that is intended to serve justice' thus defined.[35] It is beyond the purpose of the present chapter to follow in detail the course of his subsequent argument. But it boils down to two basic steps leading to the assertion of two further 'values' of law, namely 'purposiveness' and 'legal certainty'.

The first step begins with Radbruch's recognition that 'while justice directs us to treat equals equally, unequals unequally, it does not tell us anything about the viewpoint

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Introduction to the Critique of Judgment. See Paulson, 'Background' (n 7) 30 and references therein. This would appear to make Radbruch's bare assertion of the just as a fourth absolute all the more anomalous.

[33] *LP* 73. An alternative formula is asserted earlier in the text: 'Law may be unjust (*summum jus – summa injuria*); but it is law only because its meaning is to be just.' ibid 52. A similar wording appears twice on a later page: 'law is the reality the meaning of which is to serve justice.' ibid 75.

[34] *LP* 74-5, 107.

[35] *LP* 76.

from which they are to be deemed equals or unequals in the first place'.[36] The pure formality of the value of justice (as *stipulated* by Radbruch) requires that such questions be answered by reference to a second 'idea'[37] or 'postulate'[38] or 'element of the idea of law',[39] namely 'expediency or suitability for a purpose'.[40] The term used by Radbruch is '*Zweckmäßigkeit*'. Paulson notes that this is often rendered as 'expediency' (as in the Wilk's translation) or 'utility' but argues plausibly for his preferred translation of 'purposiveness'.[41]

Radbruch's notion of a 'purpose' is not concerned with what he calls 'empirical statements of the purposes which may have produced the law' in a historico-causal sense but rather what he terms 'the transempirical idea of purpose by which law is to be measured.'[42] In the jurisprudential methodology which I have sought to defend here that 'transempirical' or intelligibility-conferring purpose of law is, and can only be, picked out by judgments of practical reason.[43] In stark contrast, however, Radbruch's inquiry is essentially what I term Positivist (IX.1 at p. 240), and is conducted in light of a methodological pre-commitment to 'relativism' and with that to the working out of necessities that in the last analysis can only be conceptual. As he states:

> Any answer to the question of the purpose of the law other than by enumerating the manifold partisan views about it has proved impossible –

[36] *LP* 107.

[37] *LP* 91.

[38] *LP* 108

[39] *LP* 108

[40] *LP* 108.

[41] See Radbruch, 'Statutory Lawlessness' (n 8) 6 note 17.

[42] *LP* 91.

[43] See II.6.

> and it is precisely on the impossibility of any natural law, and on that alone, that the validity of positive law may be founded.[44]

The second key step in the argument, however, is Radbruch's assertion that such

> relativism cannot remain the last word of legal philosophy. The law as the order of living together cannot be handed over to disagreements between the views of individuals; it *must* be one order over all of them... Since, however, in the relativistic view reason and science are unable to fulfil that task, will and power *must* undertake it. If no one is able to determine what is just, somebody *must* lay down what is to be legal; and if the enacted law is to fulfil the task of terminating the conflict of opposing legal views by authoritative fiat, law *must* be enacted by a will which is able also to carry it through against any contrary legal view.[45]

One should query here the sense or senses of the four uses of 'must' in these lines. In the non-relativistic account of law which I have outlined in Chapters IV-VIII it is the 'must' of *practical* necessity that explains and justifies the account which should presumptively be taken by our practical reasoning of a reasonably just and effective law-positing political authority.[46] By contrast, if he is to be consistent in his relativism, Radbruch can only ever mean by 'must' a 'conceptual' necessity following from that 'concept of law' which is in turn derived from the 'value' of formal justice. If this is so, it remains unexplained why or how such necessity should or can entail the very practical obligations which the final three uses of 'must' in the passage quoted seem to express.[47]

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[44] *LP* 116. That this rejection of the possibility of objectivity in practical judgments is a further corollary of Radbruch's Kantian commitments is implicit in his claim that '[t]he decisive blow against natural law has been struck not by legal history and comparative law but by epistemology; not by the historical school, but by critical philosophy; not by Savigny, but by Kant.' *LP* 60.

[45] *LP* 108, 117 (emphasis added).

[46] On practical necessity see IV note 31.

[47] Spaak puts his finger on the problem: 'We should note, however, that Radbruch's relativism would seem to be applicable to the claim that we need stability and predictability, too. For this is a claim about moral values, at least morally relevant values. Hence on Radbruch's analysis, this claim – that we need stability and predictability – can be no more valid than the counter-claim that we do *not* need stability and predictability. This indicates not that Radbruch wasn't a legal positivist, but that his commitment to legal positivism rests on rather shaky ground.' Spaak (n 8) 271.

It is by this route that, as Radbruch puts it, 'relativism, so far only the method of our approach, enters our system as a structural element'[48] such that

> we are confronted with a third element of the idea of the law: legal certainty ['*Rechtssicherheit*']. The certainty of the law requires law to be positive: if what is just ['*gerecht*'] cannot be settled, then what ought to be right ['*was rechtens sein soll*'] must be laid down; and this must be done by an agency able to carry through what it lays down. So, most oddly ['*in hoechst merkwuerdiger Weise*'[49]], the positivity of the law itself becomes a prerequisite of its rightness ['*Richtigkeit*']: to be positive is implicit in the concept of right law ['*richtigen Rechts*'] just as much as rightness of content ['*inhaltlich richtig zu sein*'] is a task of positive law.[50]

This is a problematic passage for several reasons. First there is the difficulty of rendering in English the nuance of both the differences and the subtle connections between the German terms *rechtens, richtig* and *gerecht*. The expression 'right (or correct or proper) law' ['*richtigen Rechts*'] is particularly complex given its echo of Stammler's 'theory of the right law'[51] and Radbruch's later use of the expression '*unrichtiges Recht'* in his 1946 'formula'. Second, Radbruch's equivocating use of 'must', to include assertions of both conceptual and practical necessities, is again noticeable. Third, while it is, in a sense, truly odd (better: 'most remarkable') that the mere fact of a positive law can change moral obligations this is a feature of law which Radbruch's methodology makes unnecessarily mysterious. It is indeed a consequence of the method of conceptual analysis of asserted definitions that even its purportedly normative conclusions emerge naked of any intelligible practical rationale. That the possibility of a rational connection between a system of positive laws and the requirements of practical reasonableness is not so puzzling after all becomes clear when one refuses to exclude *a priori* from a scientific or

[48] *LP* 116.

[49] Perhaps better translated as 'in the most remarkable way' rather than 'most oddly'.

[50] *LP* 108

[51] See *LP* 68.

theoretical inquiry into law any judgments concerning the content of such requirements as they bear on the typical circumstances and contingencies of human life in society (such as those canvassed in Chapters IV and V).

To conclude this sketch it is necessary to consider Radbruch's observations on the relationship between these three elements of the idea of law. Here we come to a prime example of what Radbruch and others have termed the 'antinomic character' of his philosophical outlook in general and his legal philosophy in particular.[52] For while different worldviews and associated 'parties' will tend to emphasise and prioritise one element over the others, legal philosophy must accept the 'contradictory many-sidedness of the idea of law' as something which ultimately cannot be resolved.[53] Nevertheless Radbruch distinguishes purposiveness from the other two elements as follows:

> Of the three elements of the idea of law, it is the second, expediency, to which relativistic resignation applies. But the other two, justice and legal certainty, are above the conflicts between views of law and the state, above the struggle of the parties. It is more important *that* the strife of legal views be ended than that it be determined justly and expediently. The existence of a legal order is more important than its justice and expediency, which constitute the second great task of the law, while the first, equally approved by all, is legal certainty, that is order, or peace. So, too, all submit to the postulates of justice.[54]

This passage is another example of Radbruch's tendency to rely on bare assertion at key points in his conceptual analysis. His unqualified assertion of the absolute priority of order and 'peace' over justice and purposiveness is apparently made (if his avowed relativism is not to be comprised) on the basis that there is or can be no alternative, 'partisan' view of the matter. On its face this appears an implausible claim. It is not hard

[52] *LP* 111, 112 note 10. See also Wolfgang Friedmann, 'Gustav Radbruch' (1960) 14 Vanderbilt Law Review 191, 209.

[53] See *LP* 48, 53, 109, 111.

[54] *LP* 108.

to imagine (nor find historical examples) of situations where individuals and 'parties' prefer struggle to an order and 'peace' (which in this apparently amoral context can only mean an absence of conflict however viciously achieved[55]) imposed in violation of what they regard as non-negotiable principles of justice (e.g. Nazi order, Cold War (i.e. Mutually-Assured-Destruction-based) peace etc.). Moreover it is a claim which he appears to contradict a few lines later when he states:

> The idea of justice is absolute; it is formal, indeed, but universally valid withal. Like legal certainty, it is a nonpartisan postulate; but upon the view of the state and the law, the party attitude, it depends how far these postulates are to precede or rank below other postulates concerning the law, to what extent expediency or justice of the law is to be sacrificed to them. Universally valid elements of the idea of the law are justice and legal certainty; a relativistic element, however, is not only expediency itself but also the rank of the three elements relative to each other.[56]

So having previously asserted without qualification that legal certainty is 'more important' than justice or purposiveness, Radbruch here appears to recognise that, on the basis of a different worldview, certain parties may regard another element as more important in a given situation and that no ranking is possible from the perspective of legal philosophy.[57] There is perhaps no better example of the free-wheeling instability of Positivist jurisprudential theorising as pursued through purportedly analytical or necessary derivations from concepts intuited or asserted without any (admitted) grounding in practical judgments.

X.2.3 Radbruch's Formula as a Positivist theory

[55] For this essentially Hobbesian notion of 'peace' see also *LP* 118.

[56] *LP* 109.

[57] See also *LP* 118.

It is clear from his writings that Radbruch was moved to articulate his 'formula' in 1946 in response to his experience of the 'menace and oppression'[58] under National Socialism and of the efforts of the post-War German legal system to come to terms with the legacy of the grave immoralities which had been carried out under the rubric of law.[59] There has been substantial debate about whether Radbruch's Formula coheres with his earlier work or represents a change.[60] It centres largely, though not exclusively, on the contrast between the 1946 Formula and his discussion of judicial duty in *Legal Philosophy* towards the end of Chapter 10 (entitled 'The Validity of Law'). Some key passages, found in a subsection entitled 'Antinomies of the Doctrine of Validity',[61] are as follows:

> It is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just. To be sure, the question may be raised whether this very duty of the judge, this *sacrificium intellectus*, this devotion in blank of one's own personality to a legal order the future changes of which one cannot even anticipate, is morally possible. But however unjust the law in its content may be, by its very existence ... it fulfils one purpose, viz., that of legal certainty. Hence the judge, while subservient to the law without regard to its justice, nevertheless does not subserve mere accidental purposes of arbitrariness. Even when he ceases to be the servant of justice because that is the will of the law, he still remains the servant of legal certainty.[62]

[58] Radbruch, 'Statutory Lawlessness' (n 8) 11.

[59] See cases discussed in ibid 1-6.

[60] See note 66 below.

[61] The text quoted is from the 1950 English translation of the 1932 third edition. The section remained wholly unchanged in the fourth edition published posthumously in 1950 (see note 10 above) save for the addition of a new footnote to a line that comes shortly after those quoted below at cue to note 62. The lines states 'Against the latter [i.e. 'the defendant who is bound by his conscience to regard unjust or inexpedient law as invalid although it is enacted'], the law may prove its power but can never demonstrate its validity.' The text of the new footnote, however, goes only to underline what Radbruch considers the insoluble nature of the 'tragic case' rather than indicate any non-relativist ranking. It quotes and comments upon a short passage from Sophocles's Antigone, before citing to a work of the German Lutheran theologian Rudolf Bultmann. See Gustav Radbruch, *Rechtsphilosophie* (Erik Wolf ed, 4 edn, K.F. Koehler Verlag 1950) 183 note 1.

[62] *LP* 119 (emphasis added).

While there are many important exegetical nuances to be considered in determining what Radbruch may really have intended by these remarks,[63] I believe it is undeniable that the 1946 Formula represents a novel element not to be found expressly in his earlier work. Indeed it is hard to find a statement that more dramatically contrasts, at least on its face, with the affirmation, just quoted, of judicial subservience 'to the law without regard to its justice'[64] than Radbruch's statement in in the 1946 article setting out the Formula that:

> the judge's ethos ought to be directed toward justice at any price, even at the price of his own life.[65]

This volte-face was achieved without any apparent embarrassment on Radbruch's part or any express qualification of his 1932 position. On the contrary he said in 1949 that

> The tension between my present and my earlier thinking … does not call for changing the substance of the earlier ideas; rather it calls simply for shifting the accent, simply bringing into the light what formerly stood in shadow.[66]

But whether Radbruch's Formula should be characterised as a revolution, evolution or something in between is not my present concern. My point is that, on any reading, it simply does not follow from any mere *working out of conceptual necessities*. Rather it is a fairly obvious and direct result of a shift in Radbruch's thought at the level of practical reasoning. More particularly, it results from the reversal of his relativism at two distinct

[63] See especially Paulson, 'Background' (n 7) 33-35

[64] *LP* 119.

[65] Radbruch, 'Statutory Lawlessness' (n 8) 10.

[66] Gustav Radbruch, 'Afterword' in Arthur Kaufmann (ed), *Kulturlehre des Sozialismus* (4th edn, Atenãum 1970) 79 cited in Paulson, 'Radbruch on Unjust Laws' (n 8) 499. For alternative characterisations see: an 'about face ...Pauline conversion' Von Hippel (n 5) 110; 'profound modification' Lon L. Fuller, 'American Legal Philosophy at Mid-Century' (1953) 6 Journal of Legal Education 457, 482 cited in Paulson, 'Radbruch on Unjust Laws' (n 8) 493; 'conversion' Hart (n 6) 616; 'an apparently unintegrated and perplexing rider to his system as a relativist.' Stone (n 10) 250; 'shift in emphasis' Barend Van Niekerk, 'The Warning Voice from Heidelberg - The Life and Thought of Gustav Radbruch' (1973) 90 South African Law Journal 234, 247; 'correcting a mistake' Paulson, 'Radbruch on Unjust Laws' (n 8) 493.

places in his previous theory.[67] First, there is Radbruch's new view (only implicit in the formula but more obviously stated by him in other texts both prior to and after his 1946 article[68]) that the idea of 'purposiveness' is not wholly formal and relativistic but in fact contains a core body of substantive moral precepts (i.e. 'human rights'[69]) which even a scientific relativism cannot dismiss as merely another partisan worldview. The coherence of this revision with his carefully elaborated methodological dualism, relativism and defence of a 'cultural philosophy of law' is questionable to say the least. It would have been more straightforward and frank for Radbruch to revise his methodological assumptions in light of his new belief that every legal system must contain, albeit as a *conceptual* requirement, a certain minimum of morally correct content. The second, and related, change is the new (or at least now unqualified) assertion of the possibility of a non-relativist ranking of the three elements of the idea of the law.[70] Behind this is a shift away from a purely formal concept of justice towards a more substantive conception[71] which would appear to mirror the move from a formal to a more substantive conception of purposiveness. At the level of his articulated reasoning it is a shift that is as ungrounded as his initial stipulation of justice as a purely formal principle. In short, while some have portrayed Radbruch's act of articulating the post-War Formula as manifesting a conversion on his part to a 'natural law' perspective on law and adjudication,[72] it is

[67] Compare Paulson, 'Background' (n 7) 39.

[68] See Gustav Radbruch G, 'Five Minutes of Legal Philosophy' (2006) 26 Oxford Journal of Legal Studies 13, 14-15 (translated by Bonnie Litschewski Paulson and Stanley L Paulson); Van Niekerk (n 66) 247 note 65; Paulson, 'Radbruch on Unjust Laws' (n 8) 495 note 27; Pock (n 10) 66; Stone (n 10) 247.

[69] See Radbruch, 'Five Minutes of Legal Philosophy' (n 68) 15; Pock (n 10) 68, 71; Stone (n10) 250.

[70] Paulson, 'Background' (n 7) 39.

[71] See Friedmann (n 52) 195, 207; Pock (n 10) 68.

[72] Bodenheimer (n 5) 382; John M. Kelly, *A Short History of Western Legal Theory* (Clarendon Press 1992) 418; Alexander Somek, 'German legal philosophy and theory in the nineteenth and twentieth centures' in Denis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing 1996) 351; Julian Rivers, 'The Interpretation and Invalidity of Unjust Laws' in David Dyzenhaus (ed), *Recrafting the Rule of Law* (Hart Publishing 2000) 41;.

clear that on the plane of *theoretical* self-understanding Radruch's jurisprudence was consistent in at least one regard: its adherence to a methodology of conceptual analysis based on merely intuited or asserted judgments of importance and significance ungrounded in any moral or directly evaluative judgments, i.e. its adherence to a Positivist theory of law (as defined in IX.1 at p. 240).

X.3 Alexy on Radbruch's Formula

X.3.1 The form of Alexy's defence of Radbruch's Formula

It is perhaps not surprising that Robert Alexy should be one of the most prominent contemporary champions of Radbruch's Formula. In many ways it is a better match for Alexy's philosophical and methodological commitments than Radbruch's. For while Alexy shares an affinity with Radbruch for conceptual analysis, he rejects relativism as a methodological presupposition and defends the possibility of rational and objective justification of normative statements.[73]

Alexy understands jurisprudence to be an inquiry into the 'concept' of law.[74] He acknowledges, however, that different standpoints correspond and give rise to different concepts of law.[75] His principal distinction in this regard is between the standpoint of the observer and the standpoint of the participant.[76] Alexy says that the 'participant's context is defined by the question "What is the correct legal answer?", the observer's by the

[73] Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Ruth Adler and Neil MacCormick trs, Clarendon Press 1989) 177-208; *Defence* 33; Robert Alexy, 'The Dual Nature of Law' (2010) 23 Ratio Juris 167, 172; Robert Alexy, 'Some Reflections on the Ideal Dimension of Law and on the Legal Philosophy of John Finnis' (2013) FORTHCOMING American Journal of Jurisprudence, 6-7.

[74] *Argument* 3, 5, 13. See also Robert Alexy, 'On the Concept and the Nature of Law' (2008) 21 Ratio Juris 281, 291-2.

[75] *Argument* 31 note 56.

[76] *Argument* 25; *Defence* 23; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 9-10.

question "How are legal decisions actually made?".'[77] He states that the Radbruch formula cannot be justified from the perspective of the observer[78] and should be understood as a thesis concerned with the nature of the connection between the validity of an individual legal norm and its moral merits or correctness from the standpoint of a participant such as, paradigmatically, a judge.

Alexy distinguishes two classes of argument which may be advanced in favour of a particular concept of law. These are analytical arguments which are based on what 'is conceptually or linguistically necessary, impossible or merely possible'[79] and normative arguments based on a 'normatively necessary connection'[80] for example 'that the inclusion or exclusion of moral elements is necessary to fulfil certain norms, such as the prohibition on retroactivity, or to realise certain values, such as human rights.'[81]

'Non-positivism', as understood by Alexy (and applied to his own theory), is a theory of (the concept of) law which is defined by its rejection of what he terms the 'separation thesis' and its correlative endorsement of some type of 'connection thesis'. In response to criticism from Raz,[82] Alexy has revised his earlier formulations of the separation thesis[83] and now states it as follows:

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[77] Robert Alexy, 'An Answer to Joseph Raz' in George Pavlakos (ed), *Law, Rights and Discourse* (Hart Publishing 2007) 46.

[78] *Defence* 26; *Argument* 30.

[79] *Defence* 25.

[80] *Argument* 26.

[81] *Defence* 25.

[82] Joseph Raz, 'The Argument from Justice, or How Not to Reply to Legal Positivism' in George Pavlakos (ed), *Law, Rights and Discourse* (Hart Publishing 2007) 18-22.

[83] See *Argument* 3.

> There is no necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other.[84]

Thus Alexy's account, like that of Radbruch's post-War Formula, is a prime example of a theory that emerges as a *reaction* to and attempted rebuttal of legal positivism but does so in a way that Stone rightly expresses as creating 'the target positivism has always needed'[85] and that (as I have been arguing) classical natural law theory had never actually provided.[86] At its most generic Alexy's 'connection thesis' is the conceptual claim that law necessarily (and not just in a central case) has or is connected to an 'ideal or critical dimension' *in addition to* a 'real or factual dimension'.[87] By the real or factual dimension (also termed the 'institutional dimension') Alexy means 'authoritative issuance and social efficacy'.[88] Alexy's justification for this necessary connection with an 'ideal dimension' and his explanation of what is meant by this 'ideal dimension' is contained in an 'analytical argument' which Alexy terms the 'argument from correctness'. This argument maintains that

> individual legal norms, individual legal decision, and also whole legal systems necessarily lay claim to correctness.[89]

I shall touch on the soundness of this argument below (X.3.2). At this point, I merely wish to clarify how it features in Alexy's defence of Radbruch's Formula. To do so it is

[84] Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73). See also Alexy, 'On the Concept and the Nature of Law' (n 74) 284-5.

[85] Stone (n 1) 17. See also quote at head of this chapter.

[86] In the terms of the analysis set out in section IX.1 at p. 240, Alexy offers a theory that defines itself in opposition to (T2) instead of, as I advocate, opposing (T4).

[87] See Alexy, 'On the Concept and the Nature of Law' (n 74) 292; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 4.

[88] Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 3-4. It is interesting to note that for Alexy there is an equivalent to the Rabruch Formula's 'limiting condition' which applies to the real dimension of law such that, in his view, 'an individual norm forfeits legal validity if it fails to exhibit a minimum social efficacy or prospect of social efficacy.' *Argument* 93.

[89] *Defence* 27. See also Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 4.

necessary to introduce one further distinction relied upon by Alexy. It is the distinction between 'classifying connections' and 'qualifying connections'.[90] The distinction addresses the effect on a legal norm of 'moral defects.'[91] A classifying connection between law and morality means that a moral defect renders a law legally invalid (and therefore inapplicable qua norm of the legal system). A qualifying connection between law and morality means that a moral defect renders a law 'legally defective'[92] or 'legally incorrect' [scil. '*unrichtig*'] though not legally invalid. The separation thesis, in referring merely to 'connections', intends to exclude both types of connection.

The argument from correctness is offered by Alexy only in support of a qualifying connection between law and morality. What the argument (or any other analytical argument) does not do, however, is determine whether a further classifying connection may exist by virtue of some connection between the legal defectiveness of a law and its legal validity. Thus, on the basis of the argument from correctness, Alexy contends that

> non-positivism can determine the classifying connection, that is, the effects of moral defects on legal validity, in three different ways. Non-positivism can say, first, that legal validity is lost in all cases of moral defect, or, second, that legal validity is lost in some cases and not in others, or, third, that legal validity is affected in no way whatever. In this way, three forms of non-positivism emerge: exclusive non-positivism, inclusive non-positivism, and super-inclusive non-positivism.[93]

According to Alexy the choice between these three options is not dictated by any analytical argument but requires recourse to normative arguments.[94] More particularly, this means that 'a decision on the correctness of Radbruch's formula is ultimately

[90] *Argument* 26; *Defence* 24; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 10-11.

[91] Alexy, 'On the Concept and the Nature of Law' (n 74) 287; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 10.

[92] Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 11.

[93] ibid; Alexy, 'On the Concept and the Nature of Law' (n 74) 287-91.

[94] *Argument* 22-3, 40.

possible only on the basis of normative arguments.'[95] Alexy terms the additional normative argument needed to support the Radbruch formula 'the argument from injustice'[96] or 'the injustice argument'.[97] This recognition of a need for normative argument is perhaps a move in the right direction but it is far from sufficient to redeem Alexy's methodology. For one thing, these normative arguments only gain relevance, according to Alexy, if his (analytical) argument from correctness is sound. For another, the 'injustice argument' is itself flawed in at least two respects. First, it purports to justify a conceptual claim about all legal systems qua legal systems (rather than recognising the need to distinguish between central and peripheral cases when theorising about any general type of social practice). Second, it is mostly addressed to rebutting claims that judicial adoption of Radbruch's Formula would result in harmful side-effects and to suggesting the possible prudential benefits that such adoption might secure. In both cases it relies on what Raz rightly describes as 'highly speculative empirical assumptions.'[98] This is not to say that the considerations adduced would not be sound or relevant at the level of political science or intra-systemic constitutional law and policy. But it does mean that they are simply not the right *kind* of argument to support the ostensibly conceptual and categorical jurisprudential claim (about an intrinsic or necessary connection between the intra-systemic legal validity of a norm and its degree (quotient?) of injustice) that Alexy takes Radbruch's Formula to be making.

[95] *Defence* 25. See also ibid 28.

[96] See *Argument* 40-68.

[97] *Defence* 28-39.

[98] *AL* 332.

X.3.2 Critique of Alexy's 'argument from correctness'

The primary shortcoming with the analytical argument which Alexy calls the argument from correctness is, quite simply, that it is an analytical argument. In other words, it is an argument in which there is nothing in the conclusion which is not already to be found in the premises. As an argument for a particular *theory* of law (i.e. for the results of a critical inquiry primarily concerned with the third and fourth orders of reality as opposed to the first or second – see II.2) it is therefore bound to fall foul of the fallacy of begging the question, i.e. of asserting by quasi-stipulative definition that which it is seeking to prove or discover. In this regard the similarities with Radbruch's own conceptual analysis of the 'concept' of law are striking.

Alexy's contention is that 'individual legal norms, individual legal decision, and also whole legal systems necessarily lay claim to correctness ['*Richtigkeit*'].'[99] Thus

> [e]veryone who, as a participant in a legal system, for example, as a lawyer at court or as a citizen in a public discussion, makes an assertion about what is obligatory, prohibited, or permitted in the respective legal system and what it authorizes raises a claim which consists of the assertion of correctness, the guarantee of justifiability, and the expectation of acceptance.[100]

Space precludes a description of the interesting complexities of his account of this claim.[101] I shall here merely note Alexy's response to the objection that he has not shown that the claim to correctness is a necessary, rather than merely a contingent, feature of law.[102] His response is that the 'necessity of raising this claim can be shown by

[99] *Defence* 27. See also Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 4.

[100] See Robert Alexy, 'Law and Correctness' (1998) 51 Current Legal Problems 205, 208.

[101] See ibid 205-9; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 8.

[102] Alexy has noted and discussed several other objections: Alexy, 'Law and Correctness' (n 100) 209-221; Alexy, 'On the Concept and the Nature of Law' (n 74) 294-6; Alexy, 'The Dual Nature of Law' (n 73) 168-73.

demonstrating that the claim to correctness is *necessarily implicit in law*.'[103] The demonstration which he offers in this respect relies on what he calls 'the method of performative contradiction.'[104] For Alexy '[c]ontradictions between the content of an act and necessary presupposition of its execution can be designated as "performative contradictions".'[105] His 'demonstration' consists of proposing examples of where the assertion of an individual legal norm or decision (a) constitutes a performative contradiction and (b) does so because what is being asserted is not compatible with the claim to correctness raised by its assertion. His favoured examples are the following:

1. The adoption of a constitutional article that states: 'X is a sovereign, federal, and unjust republic.'[106]

2. The delivery of a judicial verdict that states: 'The accused is sentenced to life imprisonment, which is an incorrect interpretation of prevailing law.'[107]

Alexy assumes that this article and verdict are undeniably 'defective'[108] or 'absurd'.[109] Moreover he rejects the possibility that this absurdity results from the fact that (a) there is a 'conventional defect' in their unorthodox departure from typical legal language, (b) there is a 'technical defect' in their unpersuasive and politically inexpedient use of

[103] Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 4 (emphasis added).

[104] Alexy, 'The Dual Nature of Law' (n 73) 168; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 5.

[105] Alexy, 'Law and Correctness' (n 100) 210.

[106] ibid; *Argument* 36; *Defence* 27; Alexy, 'The Dual Nature of Law' (n 73) 169; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 5.

[107] *Argument* 38. For alternative formulations of the same example see also Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* 215; Alexy, 'Law and Correctness' (n 100) 212; Alexy, 'The Dual Nature of Law' (n 73) 169; Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 6.

[108] *Argument* 36, 38.

[109] Alexy, 'Law and Correctness' (n 100) 209, 212.

language or (c) there is a 'moral defect' in the substance of what is asserted.[110] Rather Alexy insists the absurdity is the product of what he considers the only remaining option: a 'conceptual defect'[111] understood in a 'broad sense' that 'also relates to violations of rules being constitutive for speech acts, that is, linguistic utterances as actions'.[112] His argument with respect to the constitutional article therefore is as follows:

> [1] The claim to correctness ... is necessarily attached to the act of framing a constitution. [2] A constitutional framer gives rise to a performative contradiction if the content of his act of framing a constitution negates the claim to justice, [3] even though he makes this very claim in acting to frame a constitution.[113]

Alexy says that the only way to avoid a performative contradiction in these cases is to deny that an 'implicit'[114] claim to correctness is a necessary claim. This escape is barred, he argues, because such a denial would 'represent a transition from a legal system to a system of naked power relations.'[115] It would constitute a 'radical change in the present practice and in what the law stands for at present.'[116] This argument, however, is fallacious. It merely begs the question because the very thesis he is purporting to justify is precisely that a legal system (if it is truly to be or remain a legal system) necessarily makes claim to correctness. More interesting, then, is another of Alexy's responses, his clarification of the 'necessity' of the claim to correctness. It is necessary, he states,

> relative to a practice that is essentially defined by the distinction of true or correct and false or wrong. ... [A] practice in which only power, will, and

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[110] ibid 210; *Argument* 36-7.

[111] *Argument* 37.

[112] Alexy, 'Law and Correctness' (n 100) 210.

[113] *Argument* 37-8 (numbering added). For a longer version of what is, structurally, the very same argument see Alexy, 'Law and Correctness' (n 100) 210.

[114] Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 5.

[115] ibid.

[116] Alexy, 'Law and Correctness' (n 100) 213.

> decision count lies beyond the categories of just and unjust, and correct and wrong.[117]

Or as he puts it elsewhere:

> The claim to correctness determines the character of law. It excludes understanding law as a mere command of the powerful.[118]

But this brings us full circle. For why should we not understand law solely by reference to its real or factual dimensions, such as authoritative issuance or social efficacy? Alexy cannot answer this by asserting that a legal system necessarily makes a claim to correctness (and thus to justifiability and hence to objectivity and reasonableness) because he is here attempting to defend that very assertion. The limitations of his, and I have been arguing, all such reliance on analytical arguments based on 'conceptual' necessity can be seen when one compares what he defines as the participant's standpoint with what Finnis terms 'the central case of the legal viewpoint' namely:

> If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation (and thus of "great importance", to be maintained "against the drive of strong passions" and "at the cost of sacrificing considerable personal interest"), a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description.[119]

About that characterisation, Alexy himself has said that it is a viewpoint which 'seems to come quite close to what' he means by the 'participant's perspective'.[120] But there is at least one critical difference which highlights the shortcomings of Alexy's whole 'non-

[117] ibid 214, 213.

[118] *Defence* 28.

[119] *NLNR* 14-5.

[120] Alexy, 'Some Reflections on the Ideal Dimension of Law' (n 73) 9.

positivist' (or what I have been calling, in my terms, Positivist or conceptual) strategy of argument. Finnis's conclusion, as noted in II.3, follows from a transparent consideration of the preconditions for a successful general theory (science) of a general kind of human practice, and, moreover,[121] expressly opens out into a fully normative account of the common good as structured by justice and necessitating law. It is *not* a thesis which purports to be derived from the specific 'character' or 'present practice' of the very social phenomenon whose 'character' and 'practice' it is the purpose of the inquiry to disclose.

[121] See *NLNR* 434.

CHAPTER XI – CONCLUSION

> *Justice must be relevant to every case. The judges must, so to speak, read the law as a body of texts concerning justice.*[1]

Nigel Simmonds has observed that '[t]o say judges should decide cases justly may seem like a yawn-inducing platitude.'[2] But as his own work makes clear, *how* one understands and justifies such a claim can have important and 'pervasive implications'.[3]

This thesis has endeavoured to show that a sound theory (or understanding) of adjudication and of judicial duty necessarily requires or presupposes a sound theory both of law and of legal argument. For this reason my argument began with a consideration of how such theories should be developed. The method defended in Chapters II and III grounds jurisprudential inquiry not in reflections on the conceptual properties of law and adjudication (as given in cultures or otherwise intuited) but in reflections on human needs and goods as comprehensively understood (at least in outline) in a morally articulated theory of practical reason and compactly expressed in the normative concept of the common good.

The message of Chapters IV-VII, which put this method to work, is that law, in its central case, exists as a necessary supplement to the underdetermined requirements of justice and of practical reasonableness. What is just is determined ultimately by reference to the common good (IV.2). Many acts are determinately ruled out as unjust and contrary to the common good by the negative universal precepts of practical reasonableness (IV.3). However, what counts as acting for the common good in any given situation is

[1] *LMI* 197.

[2] Ibid.

[3] Ibid.

very often simply unknown and unknowable (giving rise to various problems of strategic interaction) until it has been established and expressed by or under the law of one's complete community (V). In other words, the underdetermined nature both of (a) the positive requirements of practical reasonableness and the common good and of (b) the appropriate means of enforcing compliance and remedying non-compliance with either these requirements or the determinate negative requirements entails that the point of law *cannot* be merely to coercively reinforce and publicise *existing* norms of morality. Equally practically necessary (and therefore essential) is the positive law's role in *constituting* the requirements of justice, i.e. of what is due to whom in what situations (including situations where an injustice has been done or is alleged to have been done)(VI.4). These defining tasks of law were elaborated in terms of the different modes of co-ordinating pursued and types of co-ordination solution afforded by a legal system in its central case (VI.2-5, VII).

Building on this view of law as co-ordination for the common good I argued that the first and most important feature of adjudication in its central case is that it answers litigated questions of justice by means of applying all relevant law in accordance with the legal system's practice of legal argument (VIII.2). Thus adjudication is performed by authoritative law-applying institutions precisely because it is about answering questions of justice, and not despite that fact. The various implications of this means-end relationship between applying positive law and doing justice were sketched out, including its significance for our understanding of judicial law-making (VIII.3), unjust laws and equity (VIII.5), and the pragmatic context of legal argument (VII.4-5) and of legally effective communication (VI.4, VIII.6).

Finally, I considered the possibility that my account of adjudication could be equally well supported by a theory of law developed according to a jurisprudential methodology that considers it possible to understand the 'what' of law without reliance on any moral or directly evaluative judgments. In reviewing the work of Raz, Gardner, Radbruch and Alexy (IX, X), I argued that such theories of law (whether denying or asserting *conceptually* necessary connections between legal validity and morality) make it impossible to justify a theory of adjudication articulated in terms of doing justice according to law because they deny any practically necessary connection between (a) the promotion of justice and the common good and (b) the nature of law, in its central case, and, hence, the adjudicative application of the law. For, in the absence of any such connection, a view of adjudication or judicial duty in which the applying of all relevant law is an intrinsic or constitutive means to doing justice is rendered unintelligible.

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