

From Politics to Law: the Decisive Moment

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Second draft

It is often said to be a fundamental property of the law that it provides means for the authoritative settlement of moral and political disagreement. Without its pacifying resources, a society would inevitably be rent by dissension and its life deteriorate into a “Hobbesian nightmare” of endemic conflict¹. It is argued – in particular by those associated with the many confessions of positivism – that the need to do justice to this settlement function of law also determines the way we should view it or, in other words, that it puts constraints on every acceptable theory of law. How restrictive such constraints must be is a moot point and continues to fuel a friendly civil war between inclusive and exclusive positivists. What both factions agree upon, however, is that the need to account for the function of authoritative settlement requires the content of the law to be capable of non-evaluative identification². The rationale for this is easy to see: if finding out what the authoritative settlement is, one always had to take up the very same questions that were supposed to be settled, the law would never cease to unravel itself. Rules that required members of the community to resolve the very moral controversies and uncertainties that gave rise to the need for rules in the first place would be fatally deficient and unable to put an end to the Hobbesian state of affairs.

This consideration implies a need for a clear distinction between desired law and law as it stands. Indeed, positivists of all varieties have insisted that in order for a mere wish, suggestion, or proposal to become hard law, it must be added something which gives it the evasive property of positivity. The 19th century arch-positivist Karl Bergbohm, intent on eradicating the last remnants of natural law from the legal science of his time, described this supplement – marking the threshold of positivity, so to speak – as an act (*That*), something externally perceptible, something that happens (*etwas Geschehendes*)³. Although one can dismiss Bergbohm’s brand of positivism as naïve and antiquated, it is then incumbent upon

¹ Alexander, L., Sherwin, E., *The Rule of Rules*, Durham and London: Duke University Press, 2001, p. 15.

² Instead of authoritative settlement, the function to be explained is sometimes seen to be the ‘guidance’ function. Exclusive legal positivists hold that the latter entails the sources thesis: “in order for rules subordinate to the rule of recognition to be capable even in principle of guiding conduct, their validity or status as law must be a matter of their source.” See Coleman, L. J., “Constraints on the Criteria of Legality”, *Legal Theory*, 6 (2000), p. 176.

³ Bergbohm, K. *Jurisprudenz und Rechtsphilosophie, Kritische Abhandlungen*, Erster Band, Leipzig, Verlag von Duncker & Humblot, 1892, p. 132. For more details, see Kalmo, H., “Le positivisme de Karl Magnus Bergbohm: son arrière-plan et ses reflets dans la théorie pure du droit de Hans Kelsen”, *Droits*, 42 (2006), p. 211.

anyone holding fast to a separation between morality and law to improve on Bergbohm's description and to provide a better account of the transition from non-law to law⁴. This is not an issue that concerns only positivists – philosophy of law in general is largely about locating the boundary of the legal.

This paper examines two attempts – by Hans Kelsen and Joseph Raz – to delimit the nature of law, arguing that both these attempts miscarry because of their failure to do justice to the variability of legal discourse. The line which Raz and Kelsen seek to draw between law and political morality entails an entirely artificial separation of the executive, or formal, and the deliberative, or substantive, components of legal argumentation. In fact, not only would such a separation be arbitrary, it is also impossible. By offering examples from different legal systems and fields of law, it will be argued that the demarcation line which gives rise to the autonomy of law is better described as a semantic sediment from past and present argumentative practices. The paper thus aims to contribute to the strand in recent legal theory which views the concept of law not as universal and static, but rather as contingent and subject to change. The last part pleads for a different approach to legal theory in which the boundaries of the law are seen not as conceptually predefined, but as continually recreated by argumentative stop-rules which limit the relevance of certain considerations. Seen in this light, the decisiveness of the moment of transition between politics and law appears as a reflection of the ethos of self-restraint which governs law as a 'society of discourse'.

Raz on the 'decisive moment'

Joseph Raz has offered an influential theory under which oppositions such as morality v. law, desired v. positive law, creation v. application of legal rules etc. point to two different stages in the legal process: a deliberative and an executive stage. By this distinction, Raz is seeking to give more precise content to the unstated basic intuition of many legal philosophers that the law "has to do with those considerations which it is appropriate for courts to rely upon in justifying their decisions."⁵ In a somewhat roundabout way Raz thus finds himself addressing the very question we set out at the beginning of this paper: given that not all considerations appropriate for courts are legal, how is one to distinguish between legal and non-legal

⁴ For satisfying the non-evaluative identification criterion, the border itself must, of course, be capable of being traced in a non-evaluative way.

⁵ Raz, J. "The Problem about the Nature of Law" in *Ethics in the Public Domain*, Oxford: Clarendon Press, 1994, p. 199.

considerations?⁶ The distinction between a deliberative and an executive stage of the legal process is introduced by Raz precisely for providing an answer to this question. He relies on an analogy with personal action. When the idea of embarking on some course of action is entertained, deliberation ends when an intention is formed which then, hardening into a decision, brings the agent to an executive stage of actually carrying out the intention. According to Raz, the same distinction underlies the difference between political and moral arguments *de lege ferenda* and legal arguments *de lege lata*. When there is yet no law on some matter, the discussion is *de lege ferenda* in the sense that everything is still on the table, political and legal arguments are offered with a view to justifying the adoption of a particular standard. At this stage, one does not rely on authority. The debate revolves around the question as to what is to be done all things considered. Whereas this first deliberative stage therefore marks a process aimed at giving content to the law, the executive stage that follows it consists in the preservation and implementation of the standards which emerge from the first stage. The gist of Raz's argument is that only executive considerations are authoritatively binding: these are the positivist considerations which the courts are bound to apply, or which, in other words, make up the law. The borderline between a deliberative and an executive stage thus nicely leaves the non-legal – morality and politics – on one side, and the legal on the other.

Raz is of course perfectly aware that statutes sometimes contain expressions which necessitate deliberation by the courts. That simply means that the deliberative stage has not yet come to an end. In such a case, “statutes represent but the first step towards a ‘pure’ executive stage.”⁷ What happens here is that a deliberative stage survives down to the adjudicative level and courts will therefore have to resort to non-legal considerations. Left to their own devices, the courts will become law-makers, for understandably, if the law is unsettled, judges will have no option but to supplement executive considerations by taking up political and moral arguments themselves. Evaluative expressions contained in statutes should be seen as a kind of discretionary frame that the courts are called upon to fill in. That said, one gathers from Raz's account that such interstitial remnants of politics in the law are rare. In the general run of cases, the courts can limit themselves to executing. Be it as it may, the main virtue of the

⁶ Raz, however, rejects the argument that the sources thesis is entailed by the need to account for the guidance function of law: “It is true – if at all – because it captures an essential property of the law, not because it is a property which it would be useful for the law to possess.” Raz, J., “Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment”, *Legal Theory*, 4 (1998), p. 16.

⁷ “The Problem about the Nature of Law”, p. 208.

two-stage institutional approach is that it holds out the promise of fully meeting the need for authoritative settlement. “Since law belongs to the executive stage, it can be identified without resort to moral arguments, which belong by definition to the deliberative stage. 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.”⁸ At least for the time being, Raz has salvaged us from the Hobbesian nightmare.

Yet, however hard the law is, its content is finally determined by “the rough and tumble of political debate”⁹. The law cannot remain in step with society’s expectations if it is not continually renewed, and for this to happen, there must be some space for “morality’s universal domain’s entrance into law’s limited domain” (to put it in the technical language of distinguished jurists)¹⁰. In terms of the above Razian account, this means a constant movement of transition from a deliberative to an executive stage. All political bargaining apart, the need for authoritative settlement demands that there be a moment of fundamental discontinuity within the legal process which effects “a basic transformation of the situation” and “turns a standard which hitherto was probably no more than an idea favoured by some and resisted by others into the law of the land.”¹¹ The debate dies down and the political game is at least provisionally over. “Prior to the that moment the legal process, at whatever level, legislative, administrative or judicial, is a process aiming to influence the content of the law. Wielding arguments of principle, jockeying for position, mobilising power, manipulating and applying pressure – all aim either at promoting the chances of certain standards being adopted by the relevant authorities, or at preventing their adoption. From the moment of adoption of a standard and its transformation into law things change.” Raz does not mean to say that the political debate is entirely foreclosed once the deliberative stage has given way to the executive one. “The arguments of principle remain valid, if they ever were. The influence and the pressure are still there.” What happens is that these arguments now become *de lege* (or *sententia*) *ferenda*, i.e. “now they are about whether and how to change the new law, and no longer about whether to adopt it.”¹² In order to emphasise the crucial importance of this watershed event, which transits a society from the political to the legal stage, Raz calls it the

⁸ “The Problem about the Nature of Law”, p. 209.

⁹ Raz, J. “Formalism and the Rule of Law” in George, R. P. (ed.) *Natural Law Theory. Contemporary Essays*, Oxford, Clarendon Press, 1992, p. 317.

¹⁰ Alexander, L., Schauer, F., “Laws Limited Domain Confronts Morality’s Universal Empire”, *William and Mary Law Review*, Volume 48 (2006-2007), p. 1590.

¹¹ Raz, J. “On the Nature of Law”, *Archiv für Rechts- und Sozialphilosophie*, Volume 82 (1996), p. 13.

¹² “On the Nature of Law”, p. 14.

‘decisive moment’. Indeed, if the mildly Hobbesian world of everyday political debate is to give way to a shared rule, that moment cannot be anything but decisive in the strongest sense of the word. Within the space of a mere instant, it must bring about the supplement of positivity which – as all positivists are willing to grant to Bergbohm – makes all the difference in the world of law.

The decisive moment that Raz seeks to pinpoint in his analysis should not be understood in an exclusively temporal way. We saw that it rather serves to work out a conceptual distinction between the respective domains of law and political morality. For Raz, the law is a set of authoritative considerations which must be ready for applying without resorting to any additional deliberation on the merits. The importance of the decisive moment lies precisely in effecting a fundamental transformation of the argumentative setting. By signalling a shift to an interpretative mode of reasoning, it sustains the opacity or content-independence of legal rules – the importance of which lies in supporting their authoritativeness. Once the decisive threshold is passed, the reasons which prompted the adoption of rules are barred from consideration (except by way of criticism or wish, addressed to those in charge of the deliberative stage). The decisive moment has an implicit imperative dimension, because the lack of transparency that rules exhibit is not simply about the nature of the vocabulary within which they are couched. It is of course crucial for anyone endorsing the Razian account that this vocabulary be at least generally free from direct references to the rules’ underlying purposes. The adoption of a rule would otherwise fail to close the deliberative stage and the law would be unable to fulfil its role of authoritative guidance: when a rule tells us to comply with reasons with which we should comply anyway, it is clearly no rule at all¹³. But even an instrumentally non-transparent rule can be undone when it is seen by its addressee as a rule of thumb, a suggestion as to the best way to achieve some moral or political goal. The opacity is in the eye of the beholder or – to use Frederick Schauer’s words who has argued this point in great detail – the force of a rule is located in the attitude of its addressees¹⁴. It is precisely here that the imperative dimension of the decisive moment comes to the fore. To insist, after the decisive moment has passed, on the plain meaning rather than the rationale of a rule is similar

¹³ According to Raz’s theory, the law can only have legitimate authority if it helps us to comply with reasons which apply to us independently of the law. A legitimate law can thus not be based on reasons different from reasons which should guide our behaviour. A rule which is transparent with respect to its underlying reasons would therefore be tantamount to a rule enjoining us to conform to reasons which apply to us in any case, ie its existence would make no normative difference.

¹⁴ Schauer, F., *Playing by the Rules*, Oxford, Clarendon Press, 1992, p. 10.

to saying “Just do it” to the person empowered to apply it¹⁵ (with the implication that this person is not the one who should be making the substantive decision). The opacity of rules, or their formal character, is ultimately explained by a conviction concerning the question as to where the merits of some policy should be discussed. Unconditional character enables rules to allocate decision-making power and prevents the deliberative stage from being continually reopened. In Raz’s own words, “[n]ormativity is ultimately based on evaluative considerations...”¹⁶

So, how far has Raz taken us? It must be admitted that the above theory of the nature of law in terms of two consecutive stages has great intuitive appeal. The Razian account was indeed hailed by Sir Neil MacCormick as “unquestionably the best defence yet offered for [the traditional positivistic thesis as to the conceptual independence of law from morality].”¹⁷ It also converges in an interesting way to Niklas Luhmann’s distinction between programming (*vorprogrammierende*) and programmed (*vorprogrammierte*) decisions. Similarly to Raz, describing law, Luhmann has pointed out the need for a decisive moment which would “avoid the re-actualisation of the problems involved in legislative decision-making”¹⁸. Raz’s argument is in fact even stronger than his analogy from personal action suggests. Collective political bodies like parliaments face constraints that individual actors do not. For example, it tends to be difficult to bring the whole membership of a large collective body around to adopt the same general moral or political principle. The members could, however, be able to agree on a mid-level principle or even on a fairly specific rule formulation. This would be an instance of what Cass Sunstein has termed an ‘incompletely theorized agreement’: people diverge on some high-level proposition, but reach an agreement when the level of abstraction is lowered. For example, “[p]eople may agree that a 60-mile-per-hour speed limit makes sense, and that it applies to defendant Jones, without having much of a theory about criminal punishment.”¹⁹ In a case like this, the moment when the rule is adopted is particularly decisive: it does not give a precise form to a pre-existing political agreement but rather itself delimits the ground on which that agreement can rest. The discontinuity in the legal process is

¹⁵ Frederick Schauer uses the example of a police officer who, by embarking on a deliberation whether the purposes underlying some constitutional guarantees are really served in a particular case, might actually frustrate these very same purposes, see his “Rules, the Rule of Law, and the Constitution”, *Constitutional Commentary*, Vol. 6, issue 69 (1989), p. 79. Raz also ... protected by exclusionary reasons (Facing up)

¹⁶ Raz, J., “Reasoning With Rules”, *Current Legal Problems*, Oxford University Press, 2002, p. 6.

¹⁷ MacCormick, N., “Contemporary Legal Philosophy: the Rediscovery of Practical Reason”, *Journal of Law & Society*, Volume 10, Number 1 (1983), p. 6.

¹⁸ Luhmann, N., *Ausdifferenzierung des Rechts*, Frankfurt am Main, Suhrkamp, 1999, p. 136.

¹⁹ Sunstein, C., *Legal Reasoning and Political Conflict*, Oxford University Press, 1996, pp. 36-38.

here so marked that a judge wishing to reopen the deliberative stage in applying the rule would have almost nothing to fall back upon. More generally, we can easily agree with Raz that there is a difference between applying a rule and debating an issue in the open, without any particular view enjoying the status of an unconditional imperative (or that of an authoritative assumption prevailing unless some other position can bear the burden of defeating it). Some rule-sceptic admittedly could downplay the importance of the decisive moment by claiming that the mere fact that what was before an avowedly political issue is now masked as an interpretative one makes no substantive difference. But even such a sceptic would find it hard to deny that the issue is now approached in a new way. And that does make a difference.²⁰

Kelsen on the groundless ought

The Razian theory of the nature of law also bears an interesting resemblance to Hans Kelsen's description of the unfathomable Ought in his first major theoretical treatise *Main Problems in the Theory of Public Law* from 1911. Similarly to the whole edifice of the pure theory which Kelsen went on to develop in the following years, this early book is built upon the idea of an unbridgeable gap between the Is and the Ought. To borrow a metaphor from Arnold Kitz on whom Kelsen relies in elaborating the nature of the Is/Ought distinction, the latter is as independent of the former as "der über einem Strome schwebende Vogel von der Continuität des darin fortfließenden Wassers"²¹. But the 'insuperable abyss' that separates the two worlds also has the value of a foundation for Kelsen who makes it stand for the autonomy of the law "in contradistinction to social 'is' that can be comprehended 'sociologically'"²² Kelsen's call for a 'pure' legal science is itself an expression for his demand that this methodological dualism must be respected.

²⁰ In fact, someone could agree with the sceptic that essentially the same issues are being addressed at the time of debating and applying a given rule and yet wish to underline the difference in argumentative mode in an effort to argue against leaving these issues to courts and taking them out of an open political debate. Jeremy Waldron, for example, has criticised the practice of judicial review precisely for leading us to frame substantive moral and political disagreements as questions of interpretation of the "bland formulations" contained in the Bill of Rights, see his "The Core of the Case Against Judicial Review", *The Yale Law Journal*, Volume 115, Number 6 (2006), p. 1369.

²¹ Kitz, A., *Seyn und Sollen. Abriss einer philosophischen Einleitung in das Sitten- und Rechtsgesetz*, Frankfurt a/M 1864, p. 74.

²² Kelsen, H., 'Foreword' to *Main Problems in the Theory of Public Law* in Paulson, St. L., Paulson, B. L., *Normativity and Norms*, Oxford, Clarendon Press, 30.

A question that immediately comes to the fore once the separation between the Is of politics and the Ought of law is made so radical is obviously the following: How can we then account for the emergence of law? The moment of transition from one sphere to the other must appear entirely inexplicable. Kelsen does not evade this difficulty; on the contrary, he is quite willing to admit that an Is becoming an Ought is “eine für die juristische Konstruktion nicht erfassbare Tatsache, ist juristisch ein Mysterium.”²³ The law is, according to Kelsen, always, i.e. conceptually, cut off from its sources in the moral and political debate – groundlessness (*Grundlosigkeit*) is a defining feature of the category of Ought. In describing this category, Kelsen refers to Georg Simmel who offers an example which can serve to clarify the idea of groundlessness. It concerns the Jewish prohibition of eating certain types of food. Simmel explains that the prohibition might originally have depended on beliefs about the dangerousness of the prohibited food. In other words, the rule was at first only a piece of guidance, capable of being defeated should it turn out that the food is in fact harmless. Its well-foundedness was premised upon its underlying considerations, themselves made up of a chain of instrumental justifications of the form: “you must not eat x because...” According to Simmel, the prohibition only acquires the dignity of a true Ought (*Würde des Sollens*) when this justificatory chain is cut at a certain point so that the prescription now takes on the character of an unconditional command. There is no “because” attached to it anymore. In a more modern language, this is equivalent to saying that the prohibition has become entrenched, opaque in the sense of being non-transparent with regard to the rationale that originally supported it. As Simmel himself put it, the prescription is now unfathomable (*unerklärlich* or *unbegründbar*).²⁴

The emergence of the mystical imperative force of a rule can be the result of a long historical process, as in Simmel’s example. But a loss of transparency can also be effected artificially by an instantaneous legislative fiat. This would consist in “cutting the teleological chain at a link that will [henceforth] justify itself”²⁵ One conserves the propositional content (*der Inhalt* or *die blosse Sachlichkeit*) underlying different modes of consideration²⁶, and adopts a new

²³ *Hauptprobleme*, 334.

²⁴ Simmel, G. *Einleitung in die Moralwissenschaft. Eine Kritik der ethischen Grundbegriffe*, Dritte Auflage, Stuttgart und Berlin, 1911, p. 55.

²⁵ *Einleitung in die Moralwissenschaft*, p. 24. Mario G. Losano has identified two major sources for Kelsen’s description of the Ought: Georg Simmel (main source) and Arnold Kitz (secondary source), see his *Forma e realtà in Kelsen*, Edizioni di Comunità, Milano, 1981, p. 93. Although this is the picture one can get from explicit citations, it amounts to overly simplifying the context within which the Pure Theory was elaborated.

²⁶ Kelsen would later call this propositional content ‘the modally indifferent substrate’, see *General Theory of Norms*, 60.

propositional attitude towards it: the semantic core of what was before a rule of thumb is, by a change in our point of view (*Betrachtungsweise*), transformed into an unconditional imperative. Institutionally, a transition from the Is to the Ought takes place when a political agreement solidifies into a legal norm so that the prescription inscribed into the norm becomes unfathomable – independent of the considerations that prompted its adoption. This is the decisive moment for Kelsen who draws upon Simmel's reasoning to describe modern law. The adoption of a law marks a crucial juncture between the endlessly reconfiguring societal forces and the law as a fixed form of the society. The two are separated by the Is/Ought divide, the stage *de lege ferenda* being: “ein Vorstadium des Rechtes, das – wie der ganze Prozess der Rechtswerdung – als ein rein tatsächliches Geschehen, nur den Seinwissenschaften, etwa der Soziologie, zugänglich, für die normativ-juristische Betrachtung – die nur unter der Voraussetzung formal fertiger Rechtssätze möglich [ist] – nicht fassbar ist.”²⁷ The law itself, on the other hand, is an outgrowth of this process, a frozen expression of society's preferences – “[Erstarrungsprodukt] im Flusse des sozialen Lebens” – which has its own autonomous character and demands a treatment different from sociology. There is thus no continuity between a deliberative and an executive stage from the point of view of legal science. The decisive moment brings about a radical shift in meaning: “„Dadurch, dass das Faktische zum Inhalt einer Norm wird, erfährt es einen ganz eigenartigen Bedeutungswandel, es wird sozusagen denaturiert, schlägt in sein Gegenteil um, wird selbst zum Normativen. Nicht von einer „normativen Kraft des Faktischen“, sondern von einer Metamorphose des Faktischen zum Normativen müsste man sprechen.”²⁸

Clearly, in order for the law to reflect the values, aspirations and conflicts of the society, its “starre Hülle” cannot be impervious to change. “Es muss einen Punkt geben, an dem der Strom sozialen Lebens immer wieder in den Staatskörper eindringt, eine Übergangsstelle, wo die amorphen Elemente der Gesellschaft in die festen Formen des Staates und Rechtes übergehen. Es ist dies die Stelle, wo Sitte und Moral, wo wirtschaftliche und religiöse Interessen zu Rechtssätzen, zum Inhalt des Staatswillens werden: im Gesetzgebungsakte. So ist der Prozess der staatlichen Willensbildung gleichsam die Nabelschnur, die das Staatsgebilde dauernd an den Mutterleib der Gesellschaft bindet! Es ist das grosse *Mysterium* von Recht und Staat, das sich in dem Gesetzgebungsakte vollzieht, und darum mag es

²⁷ *Hauptprobleme*, 103.

²⁸ *Hauptprobleme*, 361. Kelsen later ascribed his early doctrine of the metajuridical character of legislation qua creation of general legal norms to the static point of view which still prevailed in the *Main Problems*, see the foreword to the second printing of the *Main Problems*, XIII.

gerechtfertigt sein, dass nur in unzulänglichen Bildern das Wesen desselben veranschaulicht wird.”²⁹ In talking of the legislative activity as the “the formative process of the State’s will”, and in characterising the law – its result – as the will of the state, Kelsen was, as he would himself later admit, “following a broadly disseminated idea”³⁰. His vocabulary is indeed indebted to a long tradition of constitutional thought that builds on the analogy of legislation with personal action. “Every free action,” wrote Rousseau, “is produced by the concurrence of two causes; one moral, i.e. the will which determines the act; the other physical, i.e. the power which executes it [...] The body politic has the same motive powers; here too force and will are distinguished, will under the name of *legislative power* and force under that of *executive power*.”³¹ Kelsen’s relies on a similar stylized dichotomy when he insists that what counts to lawyers is not the desires or thoughts of the legislator but the ready will of the State (*der fertige Wille des Staates*)³²

As in Raz’s case, one should not ascribe a purely temporal meaning to the Kelsenian decisive moment. It underlies the very structure of legal norms which establish an Ought relationship between a set of conditioning facts and a sanction to be applied if these conditioning facts come about. The groundlessness of the Ought – which makes the act of legislation an absolute beginning in a way – is here expressed in the circumstance that the purpose of a norm can never be read off its face. According to Kelsen, legal norms can, and should, be applied without getting involved in an enquiry into their motives or effects. Legal norms may of course give expression to particular social interests – in fact, they always do –, but that does not mean that these interests are to be had in mind when norms are put into practice. On the contrary, it is a voluntarily blinkered point of view, refusing to look at the purposes of rules, which grounds the normativity of the law for Kelsen. Take for example a rule of criminal law attaching a sanction to certain acts considered harmful by the legislator. One can adopt two incompatible points of view on this rule: a formal and a material one. The legislator, being politically or morally minded, views the sanction prescribed in the rule as a *means* to make potential offenders refrain from the harmful type of behaviour. Such a material perspective has an instrumental character and relies on a continuous justificatory chain. The formal perspective, on the other hand, consists in viewing the sanction as an end in itself without any consideration being given to the reasons why it has been ordered or what its effects in a

²⁹ *Hauptprobleme*, 411.

³⁰ *Hauptprobleme*, X.

³¹ *The Social Contract*, London, 1973, p. 229.

³² *Hauptprobleme*, 294.

particular case may be. This is the way how, in Kelsen's view, judges should approach the law. For them, what counts is not the aims that motivated the adoption of a given legal rule, but the content of the rule itself. Only this content is part of the law; everything else pertains to the world of politics. The normativity of the law is thus protected by an over-arching imperative – not to pierce the veil of ignorance drawn between judges and the deliberative stage at the decisive moment. Expressed in yet another way, the groundlessness of the Ought is itself grounded in an ought: in a prohibition not to enquire into its mystical origins. Paraphrasing the words of Michel de Montaigne, one can say that whoever traces the Kelsenian ought to its source annihilates it³³.

In the *Main Problems*, Kelsen seeks to limit the role of adjudication to verifying whether the conditioning facts included in a norm are present, and if so, declaring that a sanction is to be applied. This is the normative point of view (*normative Betrachtungsweise*) that he also wants to see the legal science adopt. “[Der] teleologische Standpunkt der Gesetzgeber – deren Absicht identisch ist mit dem sozialen Zwecke des Gesetzes – ist nicht der einer formalen Jurisprudenz, die in der Betrachtung des Rechtes den Standpunkt des Richters zu teilen hat. So wie dieser hat die juristische Formaltheorie nur den Willen des Staates zu ergründen, d.h. festzustellen, wie der Staat unter gewissen Umständen handeln will. Die Absicht des Gesetzgebers kommt für beide als solche, d.h. unmittelbar überhaupt nicht, mittelbar aber nur insofern in Betracht, als sie durch den geäußerten Willen des Gesetzgebers realisiert wird.”³⁴ This last sentence enounces the essence of the formalism of the pure theory. The latter obviously does not strive to exclude politics or other substantive considerations from the law. Kelsen himself insists that legal norms are born out of an equilibrium of political forces at a certain time³⁵. Anyone applying the law necessarily furthers some substantive political

³³ These words, which in Montaigne refer to the “mystical foundation of the authority of laws”, are of course famously cited by Jacques Derrida in “Force of Law: “the Mystical Foundation of Authority””, *Cardozo Law Review*, Volume 11 (1989-1990), p. 939.

³⁴ *Hauptprobleme*, 285. This point was taken up by Herbert Hart in his debate with Kelsen. More precisely, Hart took issue with Kelsen's restrictive conception of juristic definition that is in turn based on his conception of the structure of legal norms which excludes the social purpose of the sanction. “Briefly,” writes Hart, “the criticism is that such definitions will not serve any useful purpose, theoretical or practical, and may introduce at points a confusion. That confusion may be generated is perhaps evident from the following simple case. Sanctions may take the form of compulsory money payments, for example, fines; but taxes also take this form. In both cases alike, to use Kelsen's terminology, certain behaviour of the subject is a condition under which an official or organ of the system ought to demand a money payment from the subject. So if we confine our attention to the content of the law as represented in the canonical form “If A, then B ought to be”, it is impossible to distinguish a criminal law punishing behaviour with a fine from a revenue law taxing certain activities. Both when the individual is taxed and when he is fined, the law's provisions when cast into the Kelsenian canonical form are identical.” Hart, H. L. A., “Kelsen Visited”, p. 80.

³⁵ Kelsen, H. “La garantie juridictionnelle de la Constitution”, *Revue du droit public*, Tome 45 (1928), p. 204.

aims thereby. But that in no way implies for Kelsen that judges should look for politics outside norms and speculate about the purposes which these norms might serve. Rules are handed down to judges as a groundless given (*fertiges Faktum*) which the principle of the separation of powers bars them from second-guessing, for otherwise they would inevitably get involved in politics, giving rise to a serious breach of the Rule of Law. Adopting the legislator's material point of view with a wish to addressing society's concerns *directly*, judges would do nothing but frustrate the political compromise that legal norms bring to expression. Formality itself has instrumental value or, to repeat Raz's words, normativity is ultimately based on evaluative considerations.

Kelsen and Raz on incorporation

Many of the arguments we find in the *Main Problems* recur, although in a more elaborated guise, in Kelsen's posthumously published *General Theory of Norms*. While he repeatedly concedes there that principles of morality, politics, and manners (*Sitte*) influence the creation of legal norms, Kelsen is at pains to emphasise that these principles nevertheless "remain principles of morality, politics, and manners, and they must be clearly distinguished from the legal norms whose content agrees with them." What Kelsen seeks to establish in the *General Theory of Norms* is that the law is not only cut off from the Is of political debate but also from the Ought of moral and political principles. As in the case of social interests, the fact that a rule gives expression to some such principle does not make the latter part of the law. All the more so given that – politics being an art of compromise – the agreement of the content of legal norms with a particular political principle is never complete. "The moral principle of individual freedom, for example, is expressed in a positive legal system as freedom of contract. But a legal system which can be said to embody the principle of freedom of contract does not allow all agreements concluded between individuals to be valid. A promise of marriage is not binding, according to many positive legal systems; likewise contracts concerning immoral behaviour."³⁶ This reasoning harks back to Kelsen's arguments in the *Main Problems*: legal norms are "Erstarrungsprodukte" which register the state of political forces at the decisive moment; they thus reflect an equilibrium of many conflicting principles, interests and visions of society. If judges were to look beyond rules into their political

³⁶ Kelsen, H., *General Theory of Norms* (trans. by Michael Hartney) Oxford: Clarendon Press, 1991, p. 116.

substance, they would inevitably upset this equilibrium and, by way of consequence, trespass into the sphere of the legislator.

Kelsen also argues against the idea that moral and political principles are incorporated into the law by the mere fact of having inspired the content of legal norms. In his view, calling principles like freedom of contract or separation of powers ‘legal’ principles does not mean “that they are law, that they have the character of law.” Such principles are nothing but the “motives of the legislator, the judge, or the administrative organ; and these motives are not legally binding according to positive law.” These motives are, in other words, left behind the threshold that is fixed by the decisive moment. The only things “which are ‘positivated’ (i.e. positive law) are norms of a certain kind (namely, those prescribing specific coercive acts) created in ways specified by the law itself.”³⁷ Just as in the *Main Problems*, Kelsen here combines the idea of groundless Ought with a theory of the structure of legal norms. The latter postulate an unconditional, i.e. non-instrumental, ought-relationship between a set of conditioning facts and a sanction. Kelsen is keen to make the separation between politics and law as watertight as possible, dismissing any talk of transformation from one sphere to the other. “Moral norms and socio-political postulates are directed to the *positing* of legal norms by prescribing to the individuals positing a legal norm that they give a specific content to the legal norms they posit. The fact that the act by which a legal norm is created agrees with the moral norm or socio-political postulate from which the legal norm receives this content does not constitute a ‘transformation’ of the moral norm or socio-political postulate. The moral norm or socio-political postulate remains something different from the law; it is not transformed into law, no more than human behaviour which agrees with a moral norms is a transformation of the moral norm.”³⁸ For Kelsen, a contrary view stems from a failure to appreciate the metaphoric character of the expression ‘creation of law’: for example, from likening the process of creating law to creating tables and then asking ‘From what?’. As we see, it is again the idea of groundlessness that appears here. In the case of an instrumental imperative, we can always ask “Why?”. This is the way how the legislator views law. Judges, like lawyers in general, on the other hand, should take the content of norms as an end in itself, and not as a means to promote some interest or political principle. For them, the law is groundless.

³⁷ *General Theory of Norms*, 116.

³⁸ *General Theory of Norms*, 119.

We should remember that what is at stake for Kelsen in keeping political principles apart from legal rules is the separation between the concepts of politics and law. “It is only a concept of law defined in this way which can be distinguished from the concepts of morality and politics, and such a distinction is of the greatest importance from the point of view of conceptual economy.” Principles must be clearly separated from norms because otherwise “the boundary between positive law on one side and morality, politics, and manners on the other is blurred.” Echoing Bergbohm’s belief that natural law has an inherent “logical capacity of expansion”³⁹, Kelsen gives expression to the traditional positivist *horror pleni*, a fear that if the law is not assigned tight conceptual bounds, we will be unable to resist the invasion of political morality into its domain. It is along these lines that he takes issue with theorists who wish to incorporate principles into law. He criticises them for not having addressed the fundamental question as to how to recognise the authoritative character of a principle. In Kelsen’s view, “the only way of distinguishing authoritative from unauthoritative factors would seem to be the fact that they are the factors laid down *by the law itself*, since no other authority but that of the law is relevant for judicial decisions.” But that must be an argument against the any kind of ‘legalisation’ of principles because “positive law prescribes that the courts are to apply in their decisions only the valid legal norms created by legislation and custom, i.e. the ‘rules’.”⁴⁰

The limiting condition that Kelsen formulates in order to exclude all ‘unauthoritative factors’ – the property of having being laid down by the law – turns out to be broad enough to allow incorporation into the law of principles to which the law itself explicitly refers. That is not Raz’s view. Raz thinks that when we see a statute referring to and giving legal effect to a standard, that does not mean that these standards thereby become part of the law. The incorporation is only apparent. What really happens in such cases, according to him, is similar to rules of international private law ordering the application of foreign law. We know that foreign law is not part of our municipal law just because conflict-of-law rules direct people and courts to follow foreign law on certain occasions⁴¹. Why should it be different with references to morality? Raz thinks it is not, because here we are also dealing with a “nonincorporating form of giving standards legal effect without turning them into part of the law of the land.”⁴² Although Raz himself has doubts about the value of distinguishing between what is part of the law and what are standards binding according to law but not

³⁹ *Jurisprudenz und Rechtsphilosophie*, 365.

⁴⁰ *General Theory of Norms*, 323 (note 80).

⁴¹ Raz, J., “Incorporation by Law”, *Legal Theory*, 10 (2004), p. 17.

⁴² “Incorporation by Law”, p. 12.

themselves part of the law, he nonetheless finds it important to stress that what is seen as incorporation does in fact not entail any inclusion. It rather ‘modulates’ the exclusion of some considerations. “[W]hat appears as incorporation is no more than an indication that certain considerations are not excluded. The courts cannot gainsay the legislation and set it aside because they think that a better standard should be endorsed. The legislation bars them from doing so. It in effect excludes their access to the moral considerations on which the legislator should have relied in passing the act. But they can supplement or modify the standard set by the act in light of the nonexcluded considerations.”⁴³

The above generalises the two-stage story. We saw that it is possible for isolated deliberative gaps to survive down to the adjudicative level. That simply meant that certain matters had not yet reached the decisive moment. But, as we now see, the decisive moment can also extend to some considerations only. In order to explain how “incorporation” of morality “modulates” its exclusion, Raz once again resorts to an analogy with personal action. “Legislative reference to moral considerations [...] is the legal equivalent of the multistage decision procedure we are all familiar with in our lives.”⁴⁴ For example, when looking to buy an apartment, we first decide how much we can afford to spend; then, in light of that decision and other factors, we decide on the neighbourhood etc. Each stage is terminated with a partial decision, the next one bringing to bear considerations that did not play a part in the previous stage (or played only an indirect part). “And crucially, each stage [terminates] deliberations about the impact of some reasons, which were not revisited in later stages.”⁴⁵ The supplement of positivity, unconditional and simple as it first seemed, here begins to rarefy with the result that the process of law creation becomes much more fine-tuned.

Discretionary politics – how much?

In order to appraise Kelsen’s and Raz’s attempts to delimit the concept of law, we must first seek to tease out the implications of their theories. An important feature shared by the two accounts consists in their defining the concept of law universally without regard for the particularities of different legal systems that exist. For Raz, it is a conceptual truth that the law belongs to the executive stage as described above. All deliberative elements to be found in

⁴³ “Incorporation by Law”, p. 14.

⁴⁴ “Incorporation by Law”, p. 13.

⁴⁵ *Ibid.*

adjudication represent extralegal considerations. Kelsen and Raz re-describe evaluative terms to be found in statutes in discretionary terms, as the survival of politics and morality within the wider net of hard law. As Leslie Green has written commenting on Raz, when there is yet no source-based authority on some point, “we may have something that *should* be the law, perhaps even something that is *likely* to become law, but not anything that *already is* the law.”⁴⁶ Both Kelsen and Raz agree that the degree to which courts are given such discretion is an empirical matter, and variation in this regard is entirely irrelevant for us when all we are concerned with is the universal nature of law⁴⁷.

But how should we delimit the category of executive considerations? Given that deliberative and executive elements are defined by their opposition or mutual exclusion, we must pin down at least one of the two categories in order to escape circular reasoning. Kelsen aims to do this by introducing an idea of indeterminacy. Being a non-cognitivist, he holds evaluative terms to be necessarily indeterminate. By making use of “imprecise and equivocal” expressions such as ‘justice’, ‘equality’, ‘freedom’, ‘morality’ etc. the legislator does not give any clear directive to judges⁴⁸. It would not be correct to include such evaluative language in our description of the law. „Es ist ein leichtes,“ writes Kelsen in the *Main Problems*, „den Rechtssatz, der den Willen des Staates zu Kriegserklärung und Friedensschluss enthält, in der Weise zu konstruieren, dass der Staat, *wenn es das allgemeine Wohl erfordert*, Krieg erklären und Frieden schliessen will; so das auch die Festsetzung der Bedingungen, an die der betreffende Staatswille geknüpft ist, in die Rechtsordnung verlegt erscheint. *Formell das gleiche Resultat* – und die Wirklichkeit entsprechender, weil unter Verzicht auf die Fiktion des allgemeinen Wohles – erzielt der Satz: Der Staat will, unter Umständen die zu bestimmen zu Ermessen des Monarchen liegt, Krieg erklären und Frieden schliessen.“ All evaluative language is thus to be interpreted as an indirect grant of discretion to organs applying the law. The grant is indirect because “der *Wortlaut* des Gesetzes [enthält] zwar *scheinbar* eine vollkommene Determinierung z.B. des bedingenden Tatbestandes, [bedient] sich dabei aber eines Begriffes [...], dessen Inhalt und Umfang gesetzlich nicht festgestellt oder objektiv garnicht feststellbar sind.”⁴⁹ Although evaluative vocabulary is, in Kelsen’s opinion, inherently indeterminate and therefore always implies discretion, it does not exhaust the class of vague terms. Kelsen rather offers the reader a motley collection of words to exemplify this

⁴⁶ Green, L., “Three Themes from Raz”, *Oxford Journal of Legal Studies*, Volume 25 (2005), 508.

⁴⁷ Raz, J. “The Inner Logic of the Law” in *Ethics in the Public Domain*, Oxford: Clarendon Press, 1994, p. 253.

⁴⁸ “La garantie juridictionnelle de la Constitution”, 241.

⁴⁹ *Hauptprobleme*, 506.

class: 'public interest', 'integrity', 'factory', 'railroad' etc. To a greater or lesser extent, all such words represent blank areas in the law.

Raz approaches the matter in a somewhat different way. His theory of law rests on the sources thesis, and as he points out, certainty is no part of this thesis. To return to Kelsen, his understanding of vagueness does seem to link it to certainty. Take for example the word 'factory': we may say that it has an open texture, but we may also say that in certain cases, it is doubtful whether it applies. Kelsen seems to hold the view that such areas of doubtfulness inevitably translate into discretion – the existing law does not prescribe a definite content to the decision as long as it stays within the bounds of the discretionary frame, defined by the extent of vagueness involved. Raz admits that there is “no general reason to think that so-called factual issues are easier to resolve than moral ones, or that there are fewer controversies regarding them.” He stresses, however, that “the sources thesis distinguishes not between ways of establishing the law with certainty and those open to doubt, but between nonevaluative and evaluative criteria.”⁵⁰ One gathers from this that executive considerations do not have to be easy to follow or clear as to what they require on a given occasion. Their main characteristic is not certainty but finality⁵¹. We see that the decisive moment – as a metaphor for finality – appears in the very definition of executive considerations. Whereas Kelsen assimilates the need for evaluation to vagueness as a general feature of language, Raz points to a more restricted set of cases, without, however, giving us an entirely satisfactory indication as to how this set is to be defined.

Both Raz and Kelsen set up a concept of law which is supposed to be precise enough to be used as a standard to measure the juridicity of any given legal system. They thus offer us an objective instrument that we can use to ascertain, in almost quantitative terms, how much law and how much politics there is in a given legal system. The term 'legal system' admittedly is equivocal. Let us concentrate on judicial reasoning instead. To take an already canonical example, studied by Patrick Atiyah and Robert Summers, it is generally agreed that reasoning in the American legal system is more guided by substantive considerations than is the case in the English one. Although Atiyah and Summers do not define 'substantive' in any very precise way, and use it in different senses in different parts of their study, it is a kind of

⁵⁰ “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment”, 13.

⁵¹ They concern not only moral but also “other social issues” irrespective of whether these issues were controversial, see “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment”, 14.

catchall expression for covering everything that does not fall into the category of the formal. The latter, on the other hand, can safely be identified with non-evaluative considerations in the Razian sense. Now, if Atiyah and Summers are correct, and we proceed to translate their results into the Razian scheme, we have no option but to affirm that the American type of legal reasoning is more political (or moral) and less legal than the English one. This conclusion may be entirely palatable to many legal theorists, although some Americans could perhaps wish to protest that it is incorrect to describe their legal reasoning as being relatively less about law than reasoning in some other system. They could retort that they simply have a different kind of law.

Be it as it may, this result is hardly an argument against Kelsen and Raz. Nevertheless, the above conclusion may appear somewhat less palatable when we take an inside view of a legal system and consider its several branches. Anyone sharing Raz's identification of the law with executive considerations would have to conclude that some branches have a higher concentration of law than others. Criminal law and a large part of procedural law would probably rank highest in most systems, competition law definitely being located at the bottom. Under the Razian test, many parts of what is commonly called family *law* would come out as being nothing but margins of law framing yawning discretionary gaps left open for political and moral decision-making. Drawing a borderline between politics and law across the legal system in this way, leaving some branches and rules on the legal, others on the political side seems rather artificial. Again, this does not, in itself, weigh against Raz and Kelsen who might well be willing to pay the price of some counter-intuitive and seemingly artificial results for having a clear-cut definition of the law.

Unfortunately matters are worse. In many cases, it is simply impossible to draw a line between the deliberative and the executive components of a rule. Consider a highly formal procedural rule – a rule from a statute of limitations, for example – which has an exception grafted on it, expressed in evaluative terms. This is far from being a rare case. Many areas of modern law exhibit this structure: broadly defined exception-clauses hanging above detailed rules meant for typical situations. After having spelled out such a rule with all the limiting clauses attached, how will the executive and the deliberative components come to relate to each other? Does the 'deliberative' exception necessarily swallow up the 'executive' part? Kelsen would have to say yes. The pure theory is unable to give any legal meaning to the fact that the substantive limiting clause is meant for exceptional use only. This is clearly shown by

Kelsen's arguments against the idea that there can exist gaps in the law. In an essay dedicated to the problem of interpretation, incorporated into the first edition of the *Pure Theory of Law* (1934), he seeks to determine the effect of the clause included in the Swiss Civil Code according to which "[i]f no directive can be derived from the statute, then the judge shall decide in accordance with customary law or, failing that, the rule that he as a legislator would adopt." (art 1) Kelsen argues that judges are thereby granted unlimited freedom to step in the legislator's place, despite the fact that the "statute is formulated in such a way that the official applying the statute is not aware of the extraordinary power that is in fact delegated to him"⁵².

Kelsen is here wonderfully consequential, implicitly setting in view the premises – or limitations – on which the pure theory is built. This theory is blind, for systematic reasons, to any constraints that operate within the discretionary frame. Any exception, formulated in evaluative terms and classed as a negative condition for the application of a rule, must swallow the rule, pushing it into the legally indifferent domain of non-law. The conception of law that underlies the Kelsenian pure theory is rooted in an idea that the law is a set of competences, a conception that was carried over from private law and adapted to the treatment of public law in the mid 19th century. Rudolf von Jhering's discussion of the institute of *patria potestas* offers an illuminating example for understanding its nature. Jhering criticised those commentators who concluded from the extraordinarily wide powers that the Roman law granted to heads of family over their wives and children (which included putting them to death) that life in Rome must have been primitive and cruel. According to Jhering, the fault of the commentators consisted in not understanding that these powers only represented the outer limits – rarely or never reached – to the action of heads of family. Within these bounds, other social norms, non-legal in character, were operative, ensuring that those *in patria potestate* would not be treated too harshly. Those, like Friederich von Gerber and Paul Laband, who brought constructivist methods to the study of public law, adopted a similar line of reasoning when distinguishing politics and morality from "purely legal elements". For them, law was about the size of the sphere of competence given to individuals, whereas the question as to the way in which the individual made use of this competence, how he or she actually behaved or should have behaved, was to be left to those interested in politics or morality. „Aufgabe der juristischen Begriffsbildung,“ writes Kelsen in the same spirit, „ist es ja gerade [die] Schranken des Gesetzes – das formale Element – und nicht die

⁵² Kelsen, H., "On the theory of interpretation", *Legal Studies*, Volume 10 (1990), p. 135.

innerhalb derselben stattfindende Tätigkeit zu erfassen! Denn Recht ist Schutz und nicht das Geschützte, ist Schranke, nicht das Beschränkte!“⁵³ We can now see that since a gap-clause such as the one contained in the Swiss Civil Code automatically becomes part of every rule within the legal system, Kelsen cannot avoid the bizarre conclusion that what was before a legal system is by the effect of this clause entirely surrendered to politics. There might exist other norms or considerations which guarantee that judges will not make full use of their exorbitant powers, but such restrictions have no legal relevance. Application of *every* rule being now a political choice on the part of judges, the system has become one of absolute discretion in the Hartian sense.

Does Raz fare better? He certainly is more discriminating. Raz admits that on some occasions common-law courts have the power to revisit their decisions, including the power to distinguish and to overrule. In cases like this, the law cannot have pre-emptive force for courts⁵⁴. The hard question is: Does a legal rule bind its subjects if the courts are not bound to apply it? Kelsen would have to give a negative answer. For him, the rights and duties of subjects are nothing but a reflection of the powers of the organs that apply the law: I am under a duty to perform an action when the courts are under a duty to apply a sanction in the case I do not perform that action. Discretion thus translates into a legal vacuum for everyone. Raz is at great pains to avoid such a nihilist result. He concedes that “[t]he limits on the intelligibility of the claim that a norm exists are transgressed when every occasion for its application is also an occasion for its modification or repeal.” He then goes on to note, however, that “when this is not so, when there are occasions of its application which are not occasions for its modification, there is no such problem.” How can we formalise this proposition within the kind of legal theory that Raz is elaborating? He apparently sees no other way out of the difficulty but to invoke practical considerations. “The case of being subject to revision by the courts, “ he writes, “is a long way from getting near the borderline of intelligibility. In the nature of things only an infinitesimally small proportion of the circumstances to which the law applies *can* ever be subject to litigation in the courts. When the application of the law to a situation is challenged in the courts, the matter is decided after a significant time lag, and in deciding to take matters to court most people incur risks of considerable costs (not only financial).”⁵⁵

⁵³ *Hauptprobleme*, 500.

⁵⁴ Raz, J., “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment” (*supra* note 6), 18.

⁵⁵ “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment”, p. 20.

Let us take stock and see what has happened. The discretionary frame has expanded so as to include the whole law, its normativity being henceforth made to rest on the attitude of courts and the various difficulties involved in bringing a dispute before them. Raz does what he can to downplay the implications of this. He admits that “[t]he matter is of considerable practical significance,” yet reassuring us that “it has no theoretical significance at all.”⁵⁶ In light of Raz’s efforts to present the above difficulties as something marginal, it is interesting to note that Kelsen’ is forced to resort to a similar last-ditch attempt to prevent the discretionary frame from expanding and turning the entire positive law into politics and morality. By holding fast to his theory of alternative authorisation, he manoeuvres himself into a rather awkward position: it becomes inescapable to conclude that the law authorizes judges and legislators either to apply higher legal norms or totally to disregard them. Kelsen goes out of his way to avoid this unexpected upshot of his theory. He admits that „[i]t could be argued that the principle of *res judicata*, which confers validity on any judicial decision which does not correspond to a valid materially determinate general legal norm, amounts to a conferral on the judge by positive law of the power to decide concrete cases according to his, and in particular according to any principle he considers to be just.”⁵⁷ But he then seeks to counter this anything-goes argument by claiming that „there is this difference, that if there are valid general legal norms whose meaning is that they are to be applied by the courts, then as a rule the courts do apply them, and it is only exceptionally that judicial decisions which do not correspond to the general norms become valid. The principle of *res judicata*, that is the principle that the conflict must come to an end, is not in fact an abrogation but only a qualification of the Principle of Material Legality of judicial decisions.”⁵⁸ Again, it is courts themselves who decide how much politics there really is in the law.

Points of view – how many?

All this trouble stems from Kelsen’s and Raz’s assumption that the relationship between formal and substantive, or executive and deliberative, elements of a legal system is conceptually predetermined so that when we read a rule like the Swiss gap-clause, we can figure out its legal effect *a priori*, without any consideration of the way it is actually used by courts. In the final instance, they indeed both appeal to “the nature of things” or how courts

⁵⁶ *Ibid.*

⁵⁷ *General Theory of Norms*, 249.

⁵⁸ *Ibid.*

behave “as a rule”, but only to avoid the need to modify their theoretical accounts. Contrary to this *ex ante* conceptual approach, it must be said that we cannot say much about the law without paying attention to how those charged with its application actually reason. In one legal system, courts may be very unwilling to resort to substantive exceptions so that the formal rule almost always prevails; elsewhere, such clauses could be leveraged into an instrument to look at the merits of individual cases on a regular basis. One could say that the law is the same in these two systems, only the manner in which it is applied differs. But that seems highly dogmatic. We can easily see this by considering an extreme example provided by Nazi Germany. The new regime prompted courts to make a much more extensive use of general principles such as good faith (*Treu und Glauben*) laid down in the Civil Code. The authoritative wording of these substantive principles remained unchanged, but they were now more frequently turned into a tool to justify declaring contracts invalid. Judges also became more willing to find gaps in existing laws and adopted a less formal and more instrumental style of reasoning⁵⁹. In view of the fact that the letter of the law remained largely unchanged, can we say that the contract law meted out under the Nazi regime was the same as before, with only some more politics added? It seems much more natural to say that the law itself changed and this not because of an increased percentage of (im)morality and politics, but because the whole manner in which law was seen, talked about and practiced had undergone a profound transformation.

Kelsen’s idea of two points of view – the legislator’s and the judge’s – closely matches the Razian account of two stages. Comparison of the two theories is particularly useful in that it allows us to better appreciate that Raz’s ‘decisive moment’ is also about a point of view. A rule becomes a rule only by being treated as such. The mere fact that a political agreement (or disagreement) is expressed in a canonical formula is not in itself sufficient to carry us into the executive stage if the rule-prescription remains premised on the configuration of political forces that led to its adoption. In Kelsenian terms, it must solidify, or as we might say today, become entrenched. It is true that we take this for granted in case of adopted legislative rules. But that is only justified if judges are in fact willing to obey the implicit imperative attached to every rule: “Just do it”. Kelsen is not entirely hyperbolic when he calls the emergence of a norm a mystery. To appreciate his reasoning on this point we should attend to the divide that separates a precarious political equilibrium from the stable Ought expressed in a norm. As we

⁵⁹ See Rütters, B., *Die Unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, J. C. B. Mohr, Tübingen, 1968, pp. 228-231.

saw above, this divide is bridged by a change in our point of view. A detailed rule-formulation can make its appearance already at the deliberative stage, it can even be agreed upon, but what matters is that it is still seen in a very different light compared to the situation when it has become hard law. What has changed in the meantime? Raz is not very clear about the question as to what does the supplement of positivity, provided by the decisive moment, consist in. He speaks about “endorsement by a legitimate authority”⁶⁰, but this expression is equivocal. The legitimate authority can endorse a text – and Raz, in fact, talks about texts being endorsed⁶¹ – by putting a seal of normativity on it, but one still needs to decide what meaning is to be given to it and how opaque will its prescriptions be. As the hermeneutical maxim goes: *quidquid recipitur ad modum recipientis recipitur*, whatever is received is received according to the mode of the receiver.

Yet, as we sought to make out above, the “mode of the receiver” varies in different legal systems. Both Raz and Kelsen rely on far too rigid a dichotomy in this regard. The two points of view they explore are rather the two endpoints that define a spectrum of degrees of ruleness. In other words, rules used in law are not always perfectly opaque but rather range from unconditional to fully transparent, i.e. conditioned upon the achievement of some underlying goal or value. The question as to where on this scale does a rule cease to be a rule and turn into a standard has largely only terminological importance. The crucial point is that we do not only have clear-cut rules and open standards. To start with, rules have a dimension of weight. Ruth Gavison, for example, has found that it is the idea of presumptive ruleness – which, depending on the strength of the presumption, can cover all the points on the spectrum – that “captures the reality of much of adjudication. Judges have an initial tendency to look only to the rule and to what the rule deems relevant. Only if there is something disturbing in the situation or in the result, will judges conduct more elaborate inquiries.”⁶² To move to a different point of the scale, closer to standards, writers on competition law have noted that the line between per se prohibitions and a full rule of reason (involving consideration of the particulars of individual cases) often is not bright and includes intermediary steps such as a “quick look” rule of reason. “Discussions of legal methodology”, it has been said, “typically discuss the supposed dichotomy between mechanical rules and flexible standards, as if all legal commands were of these two extreme types. Actually, these are the opposite ends on a

⁶⁰ “On the Nature of Law”, p.14

⁶¹ “Postema on Law’s Autonomy and Public Practical Reasons”, 13.

⁶² Gavison, R. “Comment: Legal Theory and the Role of Rules”, *Harvard Journal of Law and Public Policy*, Volume 14 (1991), p. 758.

continuum of legal techniques from bright line tests to formless “all-the-factors” standards. Where the law confronts complex subjects, neither extreme can work.”⁶³ The rule of reason thus has a sliding scale built into it: from an ‘abbreviated’ or ‘quick look’ to a ‘full-blown’ version⁶⁴. Such hybrid forms, located between unconditional rules and transparent standards, are not irrelevant theoretical possibilities but must belong to any model capable of making visible the complexity of modern law.

Half-way stations between deliberation and execution, as Raz and Kelsen understand those terms, can render it increasingly difficult to draw the line of transition between the non-legal and the legal. This hardly applies to competition law only. The phenomenon extends to the length and breadth of the law. Referring to the difficulties involved in locating the moment beyond which a legal norm exists in international law, one author has written about “the blurring of the normativity threshold”.⁶⁵ A more general twist is given to these observations by Patrick Atiyah who argues that today not even criminal law is immune from the “great growth of overt discretions”. That is not all. Instances of discretion, with which “every branch of the law abounds”, are complemented, according to Atiyah, by an “increased tendency to use legal tools and techniques which have an in-built flexibility.”⁶⁶ For example, we are accustomed to associate private international law with formal conflict rules, and yet, as Atiyah argues, “the modern doctrine appears to represent the abandonment of rule altogether.”⁶⁷ This does not mean a replacement of old-fashioned all-or-nothing rules by blanket discretion for judges. In Atiyah’s opinion, the story of modern law is far more complex. Rules will “tend increasingly to become prima facie rules”⁶⁸. The exclusionary reasons, which the decisive moment introduces, “only operate within certain limits, and [...] today these limits seem to be narrowing...”⁶⁹ Invasion by factors inviting deliberation does not concern only the most

⁶³ Arthur, T. Workable Antitrust Law: the Statutory Approach to Antitrust. *Tulane Law Review*, Vol 62 (1988), pp. 1225-1226.

⁶⁴ Arthur, T. A Workable Rule of Reason: a Less Ambitious Antitrust Role for the Federal Courts. *Antitrust Law Journal*, Vol 68 (2000-2001), p. 359.

⁶⁵ Weil, P. “Towards Relative Normativity in International Law?”, *American Journal of International Law*, Volume 77, Nummer 3 (1983, pp. 415,421. An important challenge to the Is-Ought dichotomy, between the “existing *lex lata* and the wishful thinking of *de lege ferenda*” has been mounted by the New Haven school, on this see Weiler, J. H. H., Paulus, A. L. “The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law?”, *European Journal of International Law*, Vol. 8, No. 4 (1997), p. 550.

⁶⁶ Atiyah, S.P., “From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law”, *Iowa Law Journal*, Volume 65 (1979-1980), p. 1256.

⁶⁷ Atiyah, S.P., “From Principles to Pragmatism”, 1257.

⁶⁸ “From Principles to Pragmatism”, 1271.

⁶⁹ Atiyah, P. S., “Form and Substance in Legal Reasoning: the Case of Contract” in MacCormick, N., Birks, P., (eds) *The Legal Mind*, Oxford, Clarendon Press, 1986, p. 42.

‘substantive’ branches of law and the surface of legal techniques. Atiyah believes that such changes go far beyond any “marginal adjustment and are of a more structural character”⁷⁰.

Patrick Atiyah does not limit himself to noting the gradual movement of contemporary law “from principles to pragmatism”. He also offers an explanation for the decreased importance of formal reasons in law. “[T]he widespread use of formal reasons for decisions seems [...] to presuppose that substantive reasons either will be, or have been, or at least could have been, more appropriately and satisfactorily dealt with another time, or in some other manner, or by some other person.” The same point can be expressed in terms of the two stages by saying that if the deliberative and the executive stages are entrusted to different individuals, their cooperation is possible only if there is sufficient trust between them. “To make a decision by reference to a formal reason, after all, is to refuse to consider the reasons of substance bearing on the issue [...] Now it seems to me that one of the reasons why formal reasons are today less favoured in contract law may stem from increasing doubts as to whether the reasons of substance which bear most directly on the result have ever been properly weighed by anyone.”⁷¹ When the authority of the decisive moment is put into question in this way, how should we proceed to disentangle deliberative from executive elements in legal materials? Does the prima facie rule represent ‘the law’, the positivist consideration, and other factors, impinging on it, matter for politics and morality (“ordinary evaluative reasoning”, as Raz puts it⁷²)? That would mean that every time a presumptive rule is overridden, the law is breached or amended. Kelsen and Raz would have us describe the shift “from principles to pragmatism” – as far as legal theory is concerned – in quantitative terms, as a constant addition of politics to the law (at the adjudicative level). Atiyah ventures a different suggestion; namely, that what we are witnessing “may have implications for the concept of “the law of the land” existing at all time and places like some brooding omnipresence in the sky”⁷³.

⁷⁰ “From Principles to Pragmatism”, 1271.

⁷¹ “Form and Substance in Legal Reasoning: the Case of Contract”, p. 43.

⁷² Raz, “Postema on Law’s Autonomy and Public Practical Reasons”, 5.

⁷³ “From Principles to Pragmatism”, 1271-1272. Stephen Perry has suggested a way how the Razian theory could be expanded so as to accommodate this complexity and account for “the fact that common law “rules” are generally spoken of as being settled or established to a greater or lesser degree rather than as being valid or invalid in all-or-nothing, positivist sense.” (Perry, S. R., “Second-Order Reasons, Uncertainty and Legal Theory”, *Southern California Law Review*, Volume 62 (1989), p. 976.) This modification would allow to introduce the idea of weight measuring the extent to which rules can “resist reformulation, qualification, revision and replacement.” (Perry, S. R., “Judicial Obligation, Precedent and the Common Law”, *Oxford Journal of Legal Studies*, Volume 7 (1987), p. 241.) For brief comments by Raz, see his “Facing Up: A Reply”, *Southern California Law Review*, Volume 62 (1989), p. 1178.

Law as a society of discourse

The need to do justice to the variability of legal discourse does not only concern the question *quid juris* but also the more fundamental question *quid jus*. The conclusion that Atiyah and Summers draw from their wide-ranging comparative study is that the nature of law differs in fundamental ways in different societies. They do not deny that there might exist phenomena of law that all societies have in common which can usefully be studied provided that the analysis is pitched at a sufficiently abstract level. Having said that, they suggest, however, that “legal theorists would do well to approach many of the standard questions of jurisprudence at a lower level of abstraction, a level that at least takes account of *basic* variations in the phenomena of law from system to system – such as variations in the nature of valid law, in the role of judges, and in the methods of statutory interpretation...”. All these considerations lead Atiyah and Summers to plead for “jurisprudential relativism”, insisting that “legal phenomena cannot be understood, and not to be studied, apart from the context in which they operate.” They invite legal theorists to keep their feet firmly planted on the ground in answering questions about the nature of law⁷⁴.

This undoubtedly is a good advice. We should not imagine that there is some object ‘law’ that different societies approach in different ways, combining it with morality and politics to a different degree. If we view the law itself as being made up of practices, such way of seeing things will turn out to be an obvious instance of reification. Yet, what is the alternative to the kind of conceptual analysis that Kelsen and Raz are engaged in and which – everyone should recognise that – has considerably improved our understanding of ‘law’, however defined? Should we “require jurisprudence to get up from the armchair and find out what anthropologists, sociologists, psychologists, and others can tell us about the social practices in and around law”, as Brian Leiter has suggested?⁷⁵ What is certain is that we should avoid the simplistic alternative of either conceiving of law as a set of norms or identifying it with “what the courts do” in a crudely behaviouristic sense. The Kelsenian Is/Ought distinction can easily mislead us into thinking that giving any weight to the actual practice of law is to make an illegitimate inroad into the threatening domain of “the sociology of law”. To be sure, interesting work in legal theory starts by escaping this vicious alternative. We should seek to

⁷⁴ Atiyah, P., Summers, R. *Form and Substance in Anglo-American Law*, Oxford, Clarendon Press, 1987, pp. 418-419.

⁷⁵ Leiter, B., “Legal Realism and Hard Positivism” in Coleman, J. (ed.), *Hart’s Postscript*, Oxford University Press, p. 369.

bring the object 'law' and its practice into a continuous relationship among themselves, and this already at the conceptual stage. In this way, we will hopefully be able to account for both the phenomenology of law-application, experienced by some judges as being limited to finding pre-existing law, but also the fundamental dependence of the object 'found' on the way it is handled and thought about. Our analysis should follow the circular movement between practices and the referent of those practices without concentrating exclusively neither on the normative world of rules nor the causal relationships between the practices.

One way of doing this would be to describe the law as 'a society of discourse'. This expression makes its appearance in one of Michel Foucault's writings⁷⁶ but is left largely untheorised by him. The value of this concept consists in the fact that it is carefully crafted precisely to capture the looping relationship we described above. It stands for a set of institutions that are identified by their participation in a certain discourse which is, in turn, fashioned by these very same institutions. There is a complex circularity at work here. The institutions are held together by their referent, but the latter is itself conditioned by the rules that structure the workings of those institutions. "Doctrine brings about a double subjection: of the speaking subjects to discourses, and of discourses to the (at least virtual) group of speaking individuals"⁷⁷. A scientific discipline, like biology, could be an example of such a society of discourse. The referent of biology is, of course, not identical to "what the biologists do"; and yet, what goes under the name of 'biology' at any given time is largely the result of discursive 'policing' operating within the scientific community. This community gradually works out its own identity by implementing various schemas of exclusivity and disclosure regarding the 'scientific' character of propositions that can circulate in this particular society of discourse. "The discipline fixes limits for discourse by the action of an identity which takes the form of a permanent re-actualization of the rules."⁷⁸ One need not, of course, deny that the kind of propositions that are accepted have truth value in some sense. But we can bracket the question of truth and still say much about what counts as a scientific proposition within a given field.

It is a part of every discourse to demarcate its own limits which, in turn, involves creating its multiple outside. Steven Shapin and Simon Schaffer have produced an interesting study of the

⁷⁶ Foucault, M., "The Order of Discourse" in Shapiro, M. J. (ed.), *Language and Politics*, New York University Press, 1984. This is, in fact, a written version of Foucault's inaugural lecture at the Collège de France.

⁷⁷ "The Order of Discourse", 123.

⁷⁸ "The Order of Discourse", 120.

ways in which the experimental community of 17th century science developed its specific ‘boundary-speech’. In their historical work, they do not take as their point of departure a notion of politics “as something that happens solely outside of science and which can, so to speak, press upon it”. Shapin and Schaffer remind us that one cannot use the boundary-speech “unthinkingly as an explanatory resource”. This is because “[t]he language that transports politics outside of science is precisely what we need to understand and explain.” An empirical study of boundary-conventions shows us how “actors allocated items with respect to *their* boundaries (not ours), and how, as a matter of record, they behaved with respect to the items thus allocated.” Shapin and Schaffer are keen to insist that we should not take “any one system of boundaries as belonging self-evidently to the thing that is called “science”.”⁷⁹ The identity of a discourse – a definition of its borders – can, in other words, not be taken aboard as an immutable part of our methodological toolkit when studying the development of this discourse, projected upon it in order to find out how ‘pure’ it is compared to our a priori definition. The borders are themselves ‘endogenous’ in the sense of being constructed from within the society of discourse under study.

Why should the same caveats not apply to the study of law? If we set about our enquiry with a pre-conceived notion of law, we will sooner or later be forced to conclude that we are witnessing ‘the end of law’ or a process of ‘de-differentiation’⁸⁰. The law also has *its own* boundary-speech. Judges, of course, rarely address the issue of a conceptual divide between law and politics. But this is not at all the way in which the boundary-speech is practiced. One often hears it asked whether a legal system must be in possession of a concept of law in order to be able to operate. If one has in mind a definition of law, wrapped up in a short sentence, the answer to the question may well be no. After all, what is the definition of law ‘possessed’ by, say, the French legal system? There are many conflicting definitions in circulation none of which has been given the status of an official one. Nevertheless, it is hard to see how a legal system of any complexity can do without a boundary-speech. The latter is made up of numerous related distinctions concerning permissible and non-permissible considerations that members of the legal community – and in particular judges – can appeal to. The distinction between matters *de lege ferenda* and *de lege lata* is a very important example. Courts very often limit themselves by arguing that some question is not for them to decide but must be left

⁷⁹ Shapin, S., Schaffer, S., *Leviathan and the Air-pump. Hobbes, Boyle, and the Experimental Life*, Princeton University Press, 1985, p. 342.

⁸⁰ Deschouwer, K., *Droit et politique: une relation double et ambiguë*, rapport réalisé à la demande de la Fondation Roi Baudoin, 1998.

to the legislator, i.e. that it is an issue *de lege ferenda*. Such limitations implicitly define what *is* for courts to decide, i.e. what is law. The type of questions that courts put beyond their reach differs across legal systems, depending on what is the established role of courts within these systems. There naturally also exists individual variation across judges, but as the work of Atiyah and Summers bears out, generalization is possible. The identity of the law and its difference from politics would thus appear as a ‘semantic sediment’ from the ethos of self-restraint that courts, and other authorities applying the law, have elaborated in the course of their activity.

Although their theories differ in this respect, both Raz and Kelsen describe the phenomenon of incorporation as if there were a right answer to the question whether some principle belongs to the law. But what exactly does it mean for a moral or political principle to ‘belong’ to the law? As we saw, Kelsen went to great trouble to prove that the agreement of some legal rules with a political principle does not make this principle part of the law. If the only thing he meant was that not all the consequences flowing from this principle are part of the law, and that rules contradicting this principle may also become valid, he is certainly right. It is not clear, however, in what way does the fact that the law explicitly refers to some principle change things. Surely, if the constitution sets up as a principle that everyone’s dignity is to be respected, a norm authorizing an action that, in our opinion, does not respect this principle can also become valid. A principle does not have a set of detailed rules attached to it exhausting “all its consequences”. Those in charge of applying the law will work out what belongs to this set. The thrust of Raz’s denial that such explicit references ‘incorporate’ moral principles is also difficult to understand. To start with, what is there to incorporate? One does not have to be a non-cognitivist to hold that the implications of most moral and political principles are deeply contested. Rather than talking of ‘incorporation’, and whether it has taken place or not, it certainly seems preferable to attend to the practical consequences of statutory references to moral principles. For this, we need to attend to the way how courts actually respond to such references, how it modifies their reasoning, in particular, how it changes their interpretation of detailed rules. The response admittedly might consist in courts arguing that these principles henceforth have been ‘incorporated’ into the legal system, but as legal theorists, our attitude to this language should hardly be one of verification, i.e. asking whether the claim is ‘true’. Similarly to Shapin and Schaffer, we should stay at the surface and study the way how organs applying the law allocate items with respect to *their* boundaries (not ours), and how, as a matter of record, they behaved with respect to the items thus allocated.

This leads us to a more general problem that finally vitiates Raz's and Kelsen's attempts to delimit the nature of law. Fearful of identifying the law with "what the courts do", they assume that the actual practice of legal reasoning should have no ramifications for conceptual analysis. Of course, we saw that both Kelsen and Raz leave the courts the role of filling in the legal frame, deciding the question *quid juris*, but neither of them thinks that the character of courts' reasoning determines the question *quid jus*. If there is discretion, it comes from above; if a principle is part of the law, it has been incorporated already at the legislative stage. Somewhat surprisingly, Kelsen and Raz, two well-known positivists, adopt an entirely normative point of view when characterizing the nature of judicial reasoning. The decisive moment means that certain considerations are now to be treated as if they were final. If courts are reluctant to treat them as such, and still call what they are doing 'law', they are simply wrong, or worse – in breach of their duties.