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A SOCIOLOGICAL ANALYSIS OF THE JURAL RELATION

Thesis submitted in accordance with the
requirements of the University of Glasgow for
the degree of Doctor of Philosophy
by Hamish Ross, LL.B.

VOLUME I

Department of Jurisprudence

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To Samantha

A.M.D.G.

*For, where there is no law,
neither is there transgression.*

Romans 4:15

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SUMMARY

As the title suggests, this thesis attempts a sociological analysis of the jural relation. In broad terms, it explores the sense in which relationality in human social behaviour is manifested in the concepts and conceptions which are ordinarily employed in legal thinking. It is argued that by conceiving of legal phenomena in terms of legal *relationships* rather than in terms of legal *norms* it is possible to attain an insight into the essentially *social* nature of such phenomena. To this end, the conceptual unit of the jural *relation* is taken to be the primary unit of social thinking or sociological theorising about law.

A fundamental assumption which underlies the study is that analytical jurisprudence and sociology of law lend themselves *readily* to syncretism. This possibility is explored in the context of Weber's (apparent) dichotomy between the sociological point of view and the juridical point of view.

An expository presentation of Weber's science of social action is the point of departure of the analysis. This serves as a conceptual framework within which the central arguments are presented and developed. Weber's synthetic analytical construct of the ideal type is the primary theoretical device employed in the analysis. An attempt is made to formulate an ideal-type construct representing the perspective of an ultimate judicial actor.

It is argued that the conceptual apparatus of the jural relation is embedded in the subjective meaning of judicial social action. The jural relation is conceived of as an 'emanation' from the ultimate judicial actor outlined in the study. In accordance with Weber's methodological stance, the *causal* dimension of judicial action is also briefly examined.

As a basis for an examination of the nature of human social action, and specifically, judicial social action, the normative component of action is explored. This involves a consideration of the sense in which the social norm becomes incorporated into the subjective meaning of social action, functioning as a reference point for the evaluation and orientation of the individual's social action, and as a reference point for the evaluation by the individual of the action of *others*. A further function of the social norm - the regulative function - is seen to flow from the evaluative and orientative functions.

A model of a stable system of interaction is employed as a basis for discussion of the normative component of human action. It is argued that the essential features of a stable system of interaction are exhibited in the activity of playing a game such as chess, and accordingly this paradigm appears at various points in the discussion as a model for the analysis of the normative component of action.

The phenomenon of *relationality* as an aspect of the subjective meaning of social action is examined. The sense in which relationality is revealed in the structure of the social norm is considered to be a first step towards the elucidation of the normative relationship, a specific manifestation of which is the jural relation. The distinction between substantive and adjective normative relationality is explored in the context of the game paradigm in which an imaginary umpire assumes an adjudicatory function. This allows appropriate conclusions to be drawn as to the nature of the adjudicatory function.

A transition from the sociological notion of *normative* meaning to the jurisprudential notion of *legal* meaning is suggested. It is argued that in order to understand the meaning ascribed to human action, events or legally relevant 'facts' for purposes of the mobilisation of a legal 'coercive apparatus', it is essential to adopt the perspective of an hypothetical ultimate judicial actor, such as that postulated later in the thesis. Consideration is also given to the *ascriptive* nature of jural relations and the ascriptive nature of the process by which legal meaning is attached to legally relevant 'facts'. The fundamental juridical elements of the jural relation are explored and the jural relation is considered, firstly, as social relationship, and secondly, as a relationship of social power. A brief presentation of the historical development of the conceptual apparatus of the jural relation serves as a foundation for an examination of the jural relation as expounded by Hohfeld and Kocourek, and their respective commentators. An analysis of the nature and structure of the Hohfeldian legal power differentiates the legal power from the legal right *stricto sensu* and also seeks to indicate the main points of convergence between the two generic concepts.

Finally, an outline is offered of the major structural elements of a Weberian ideal-type construct of an hypothetical judge, the incumbent of the ultimate judicial office. This outline attempts to define a theoretical perspective from which the process by which jural relations come to be ascribed may be 'visualised'. This outline serves to identify the defining features of the adjudicatory function and demonstrates how these features have a role in shaping and delimiting the conceptual apparatus of the jural relation. Consideration is thus given to the concept of the 'office', the process of adjudication and the notion of ultimacy.

INTRODUCTION AND OBJECT OF THESIS

I.1 Introduction

It is a fact of human experience that the social environment not only generates social norms, but also exerts pressure on individuals, often through human institutions and coercive agencies, to induce conformity to social norms, for the protection and advancement of diverse human interests, however conceived. The complexity of the normative arrangements which exist or evolve within the social environment for the identification, recognition, adjustment and reconciliation of individual and collective human interests is nowhere more clearly manifested than in the laws which human society creates for the regulation of the action of the individual in his relationships with others. ¹

But it is a mistake to believe that legal norms (as a category of social norms) find their expression only in the form of simple imperatives such as 'thou shalt...' or 'thou shalt not...' or that legal thinking should ideally conceive of legal phenomena as ultimately reducible to particular legal norms, or types or combinations of legal norms. ²

Although an attempt to reduce legal phenomena to legal norms or combinations of legal norms may appear on the face of it to reveal the 'true' underlying nature of these phenomena, in fact this type of reductionism often conceals and occasionally distorts what is truly social about human social action: its *relational* quality. The sociological significance of the relationality of human social action has been recognised by the American sociologist Talcott Parsons:

"Since a social system is a system of processes of interaction between actors, it is the structure of the *relations* between the actors as involved in the interactive process which is essentially the structure of the social system. The system is a network of such relationships." ³

But reductionism (of legal phenomena to legal norms) may also lead to distortion in another sense. It may, by failing to emphasise the importance of legal *concepts* within legal thinking, lead to the distortion of ordinary legal thinking by reducing to legal norms those legal concepts which are simply not reducible to one-dimensional artefacts of reason. What Wesley N. Hohfeld and Albert Kocourek term *jural relations* in their respective treatises on legal relationships ⁴ are examples of concepts which are 'irreducible' in this sense. While *jural relations*, in any given instance may be argued to be dependent upon legal norms as an *aspect* or *component* of those relations, they are not exhaustively reducible to legal norms. This will become apparent when it is later suggested that the *jural relation* is constituted by the conceptual act of 'associating' one or more legal *personae* with one or more other legal *personae* through the linking medium of a legal norm upon the occurrence of certain 'operative facts' ⁵ defined by the relevant legal norm. This conceptual act cannot be reduced to only one of its conceptual components: the legal norm.

It is in the conceptual act of linking legal *personae* by reference to a legal norm that the *jural relation* inheres. Indeed the *jural relation* may be said to consist of an ideative device which is a particular (and peculiar) way of conceiving of the relative legal positions of legal *personae* with respect to one another for legal purposes.

For reasons that will later become clear, it is proposed to attempt in this thesis a Weberian sociological analysis of the *jural relation*. One reason for the choice of the *jural relation* has already been mentioned: the relationality of human social action as something of sociological significance. Another reason is suggested after a moment's

reflection on the dependence of legal reasoning on, and pervasiveness within legal thought of, legal concepts such as, for example, right, duty, power, immunity, and so on, and jural relations such as the right-duty or power-liability relationships. As Kocourek points out,

"Legal ideas are necessary in any system of law. It is not possible to have an idea of law acting upon social phenomena without a fulcrum of intermediate concepts. The chief way in which legal advantages are distributed is through a system of claims and powers. It is inconceivable that a system of law can exist and function without this intervening mechanical principle." ⁶

The sociology of the German social theorist Max Weber is considered particularly appropriate for the purpose of an analysis of the jural relation partly because Weber's general sociology gives an important place to the ideative component of human action, and partly also because Weber, with his legal background, was particularly aware of the unique qualities of legal phenomena, and indeed directed a substantial part of his scholarly efforts towards the explanation of such phenomena. It is fitting, therefore, to begin with a consideration of Weber as sociologist and jurist.

I.2 Max Weber as Social and Legal Theorist

Max Weber (1864-1920) has throughout the course of the twentieth century been regarded as an important and influential social theorist and it is conceivable that he is now widely recognised as perhaps the greatest social theorist of modern times. Weber is indeed arguably unrivalled as a theoretician in the epistemology and methodology of the social sciences.

Although Weber died nearly seventy years ago, the pervasiveness of his writings is

undiminished within those fields of knowledge to which he directed his undoubtedly immense erudition: social and political theory, history, comparative religion, economics, art, literature, the philosophy and methodology of the social sciences, and the sociology of law. According to Alan Hunt, "Weber's presence insinuates itself into nearly every important debate and controversy within sociology".⁷ In the first part of his unfinished masterpiece *Wirtschaft und Gesellschaft (Economy and Society)* which was published posthumously Weber attempted, among other things, to develop a systematic exposition of sociological concepts and methodological principles. It is towards this part of his work in particular that considerable scholarly attention is directed within contemporary social theory.⁸ For present purposes, Weber's position as a jurist, and in particular as a sociologist of law, is also of concern.

Weber was himself trained as a lawyer and studied law at the University of Heidelberg, later establishing himself in Berlin as a jurist in 1891 following the publication of a paper on Roman agrarian history. That part of Weber's *Economy and Society* which constitutes his *Sociology of Law (Rechtssoziologie)*⁹ is perhaps a testament to his extensive historical and comparative legal learning. But Weber's *Sociology of Law* is a difficult work for sociologists and lawyers alike. Guenther Roth has observed that "[Weber's] ability to write the *Sociology of Law* as a legal historian makes this the most difficult chapter for the legal layman and mere [sic] sociologist..."¹⁰ Furthermore, this difficulty, for sociologists and lawyers, of usefully applying Weberian sociological analysis towards the solution of problems encountered within both social and legal theory lies in that not only is the *Sociology of Law* (as part of *Economy and Society*) incomplete, but it is integrally related to, and forms an important constituent of, Weber's general sociology. On the one hand, the incompleteness of the *Sociology of Law* has led Anthony T. Kronman to remark:

"[The *Rechtssoziologie*]...is a great, rough-hewn mass of thoughts which, although often suggestive, do not together form a recognizable whole - which do not, in other words, constitute a *work*. The entire Weberian *corpus* resembles a stone quarry filled with monumental statues in varying degrees of completion, some only beginning to emerge from the rock, others finished to perfection. The *Rechtssoziologie* is one of the least finished works in the quarry, and the temptation is strong to treat it as a rich but disorderly storehouse whose contents may be plundered at will without fear of damaging its organizational structure."¹¹

Perhaps one of the clearest examples of incompleteness is to be found in chapter XII of the *Sociology of Law* (Domination) which seems to end mid-chapter in the course of what is likely to be an important discussion of the correspondence between certain 'pure' types of domination and types of legitimation.¹²

On the other hand, the inseparability of Weber's sociology of law from his general sociology is affirmed both by Kronman¹³ and Hunt,¹⁴ the latter of whom points indirectly (and doubtless with some apprehension) to the ponderous ubiquity of Weber's interpretive sociology, when he refers to the "*impediment* of the theoretical framework of [Weber's] subjectivist sociology", within which "the most central and pressing problems for the sociology of law" are located.¹⁵ It would be of no practical utility to attempt to simplify or to summarise here Weber's *Sociology of Law*, firstly because the breadth and complexity of treatment of Weber's concerns (and indeed the density of his writing) are such as to be immune either to simplification or condensation, and secondly because our present concern to attempt a sociological analysis of the jural relation is relatively narrow and it therefore seems unnecessary to confront in its awesome totality the sprawling edifice of Weberian sociology of law. At any rate, it is Weber's *general* sociology which will be applied towards the analysis of the jural relation, rather than, specifically, Weber's sociology of law, although the latter constitutes a particularly valuable reference source in applying (and formulating

a *technique* for applying) Weber's general sociology. But we should nevertheless be aware of the breadth of Weber's concerns in his *Sociology of Law* and shall give brief consideration to this now.

Thus, for example, he constructs an ideal typology of legal systems which is based on a classification of types of legal thought: formal rationality, formal irrationality, substantive rationality and substantive irrationality.¹⁶ He manifests a particular concern with the concept of rationality in legal thinking and devotes attention to the unique type of legal rationality which has evolved in Western culture, characterised in its most advanced stage of methodological and logical rationality by five postulates, derived, according to Weber, from the Pandectists' Civil Law.¹⁷ He classifies fields of substantive law according to traditionally held distinctions found in legal theory: for example, public law and private law,¹⁸ 'government' and 'administration',¹⁹ criminal law and private law,²⁰ and tort and crime²¹. He considers the emergence of legal norms within human society and the development and imposition 'from above' of new legal norms.²² He devotes a substantial chapter to the various social and economic conditions which lead to the creation of legal rights,²³ and he also undertakes a comparative study of legal professionals ('legal honoratiore' ²⁴) and attempts to establish linkages between professional legal training and the emergence of types of legal thought. Finally (according to this overview only) he considers the embeddedness in legal processes of 'superiority' or 'legitimate authority' (which Weber's translators have termed 'domination', being a translation from the German '*Herrschaft*' ²⁵), and he discusses the manifestations of such power in ordinary legal relationships.²⁶

For all the breadth of his concerns in the *Sociology of Law*, Weber curiously does not attempt *explicitly* to apply his general sociology (for example, the method of

interpretive understanding or '*Verstehen*' or of causal explanation) to the sociological analysis of legal phenomena, although, as the passage quoted above from Alan Hunt affirms, the influence of Weber's thinking generally and of his sociology are apparent throughout the work. Very often Weber simply takes for granted that the assumptions he has made will be obvious to the reader, and indeed probably regards many of his assumptions (possibly even the most obscure ones) as being too obvious to state at length. Indeed, Weber might have considered an explicit application of his methodology towards the explanation of legal phenomena to have lacked subtlety (if he even considered it at all), especially as the *Sociology of Law* is actually part of *Economy and Society*.

In the next chapter we will consider at some length Weber's general sociology but this will be preceded by a brief consideration of the object of our study seen in the context of Weber's general sociology. This will be useful in showing the major points of contact between Weber's sociology and the essentially jurisprudential discussion of jural relations. It will also, it is hoped, reveal Weber's sociology as a framework within which the analysis to follow is located.

I.3 Object of Thesis

As we have indicated, our object in attempting a Weberian sociological analysis of the jural relation is in broad terms to explore the sense in which relationality in human social behaviour is manifested in the concepts and conceptions which are ordinarily employed in legal thinking. To this end, a fundamental assumption which underlies our study is that analytical jurisprudence and sociology of law lend themselves readily

to syncretism. This possibility is examined briefly in chapter V. But although Weber's general sociology will provide a conceptual framework within which the central arguments unfold, it will become clear that the Hohfeldian approach to the analysis of *legal* phenomena may actually broaden our understanding of human social behaviour in general. Certainly, a sharpened appreciation of the relationality of social behaviour may be one consequence of the Hohfeldian perspective.

The brief expository presentation of Weber's science of social action in chapter II, then, will be the point of departure for our analysis. From an elementary outline of the philosophical influences which inform Weber's general sociology, we will consider in turn the principal components of Weber's scientific system, culminating in an examination of the analytical construct of the ideal type which in many ways represents the focal point of Weber's sociology. Indeed, the ideal type will play a fundamental role in this study. In chapter VI we will attempt to formulate an ideal-type construct representing the perspective of an ultimate *judicial* actor.

It will be argued that the conceptual apparatus of the jural relation is embedded in the subjective meaning of judicial social action. The causal significance of judicial action, as we will consider, resides in the function of a judiciary as an agency through which the coercive enforcement machinery of the state is mobilised to take official action. Since, as we shall consider, the jural relation is figuratively regarded as an '*emanation*' from an hierarchically *ultimate* judicial perspective, it seems appropriate to construct an ideal-typical judge who, according to our hypothesis, epitomises such a perspective. In this context, 'ultimate' will be taken to mean conclusive and final for purposes of the legal system in which our hypothetical judge is situated. For convenience, the ideal-typical incumbent of the ultimate judicial office will be called '*Iudex*'.

As a basis for our inquiry into the nature of human social action generally, and judicial social action in particular, we will examine in chapter III the normative component of human action. This will involve, in particular, a consideration of the sense in which the social norm becomes *incorporated* into the subjective meaning of social action, functioning not only as a reference point for the evaluation and orientation of the individual's social action, and as a reference point for the evaluation by the individual of the action of *others*, but also as a means of regulating human action. The normative dimension of subjective meaning will be termed 'normative meaning'.

In order to fix ideas in relation to the normativity of action, there is postulated at the beginning of chapter III a speculative scheme which attempts to illustrate the process by which human action becomes subject to governance by norms, or becomes 'normalised'.

In our introductory remarks to this chapter we briefly mentioned the American sociologist Talcott Parsons. In chapter III we will rely upon Parsons' definition of a stable system of interaction as a basis for discussion of the normative component of human action, particularly the expectational and obligational components. As we shall find, these components form the theoretical foundation of the right-duty relationship. The essential features of a stable system of interaction, according to Parsons, are exhibited in the activity of playing a game such as chess. This useful paradigm will therefore appear at various points throughout chapter III as a model for the analysis of the major components of social action.

In the concluding parts of chapter III we will consider the phenomenon of relationality as an aspect of the subjective meaning of social action. We will explore the sense in which this phenomenon is manifested in the structure of the social norm, and to that end an attempt will be made to postulate structural elements of the social norm. This will be considered a first step towards the elucidation of the normative relationship, a specific manifestation of which, as we will find, is the jural relation. Chapter III will conclude with a consideration of the distinction between substantive and adjective normative relationality. This distinction will be examined in the context of the chess game paradigm in which an imaginary umpire assumes an adjudicatory function. The importance of this distinction will hopefully emerge from the discussion of the jural relation in chapter V.

In chapter IV we will attempt a transition from the sociological notion of *normative* meaning to the jurisprudential notion of *legal* meaning. Our starting point will be an examination of the divergence between subjectively intended meaning and legal meaning. It will be argued that in order to understand the meaning ascribed to human action, events or legally relevant 'facts' for purposes of the mobilisation of a legal 'coercive apparatus', it is essential to adopt a perspective such as that of *Iudex*. The reason for this has already been suggested. An actor such as *Iudex*, to a culturally significant degree, is *ex hypothesi* involved in this 'mobilising' task and this obviously has causal significance.

In chapter IV we will also consider the *ascriptive* nature of jural relations and the ascriptive nature of the process by which legal meaning is attached to legally relevant 'facts'. 'Facts' of this kind will be termed 'institutional facts', following Neil MacCormick's institutional theory of law. We will also examine, in chapter IV,

various categories of 'institutional fact', and, finally, consider the process of 'crystallisation' of a jural relation upon the occurrence of Hohfeldian 'operative facts'.

Having sketched, in earlier chapters, an outline of the theoretical structure of the jural relation, in chapter V we will examine the fundamental *juridical* elements of the jural relation and also consider the jural relation, firstly as social relationship, and secondly as a relationship of social power.

As our point of departure, we will suggest a definition of the jural relation. Our reliance on the ideal type *Iudex* as a theoretical perspective for our study will necessitate our approaching chapters V and VI, as it were, 'in parallel'.

A brief presentation of the historical development of the conceptual apparatus of the jural relation will serve as a foundation for our examination of the jural relation as expounded by Hohfeld and Kocourek, and their respective commentators. Chapter V will conclude with an analysis of the nature and structure of the Hohfeldian legal power. This will involve not only differentiating the legal power from the legal right *stricto sensu*, but also indicating the main points of convergence between the two generic concepts.

As we have already indicated, in chapter VI we will outline the major structural elements of a Weberian ideal-type construct, that of the incumbent of the ultimate judicial office, or *Iudex*. In our discussion of *Iudex* we will seek to outline a theoretical perspective from which the process by which jural relations come to be ascribed may be 'visualised'. This outline will serve to identify the defining features of an ultimate judicial office and to demonstrate how these features have a role in

shaping and delimiting the conceptual apparatus of the jural relation. Briefly, we will consider in turn the concept of the 'office', the process of adjudication, and the notion of ultimacy.

In more general terms, if there is an overriding 'message' in this study it is that by perceiving legal phenomena in terms of legal *relationships* rather than in terms of legal *norms* we may attain at least a rudimentary insight into the essentially *social* nature of legal phenomena and this in a sense may 'liberate' us from the constraints of purely juridical conceptions of law and legal relationships rooted in the conceptual categories of traditional legal thought. Thus, the conceptual unit of the legal relationship, and more specifically of the jural relation, will be treated as the *primary unit* of social thinking or sociological theorising about the law.

With these brief introductory remarks in mind, and by way of transition to the discussion of Weber's sociology, it may be useful, in order to gain an initial impression of what Weber conceived the object of sociology to be, to 'meditate' upon Weber's definitions of sociology and of the concept of social action. In chapter II we will give fuller consideration to these definitions, but at this stage it is necessary only to familiarise ourselves with them. At this point, therefore, no comments will be offered upon the definitions.

Weber's famous definition of sociology (incorporating a definition of the concept of *social action*) makes its appearance at an early stage in Part I of *Economy and Society* and is followed by a lengthy elaboration consisting of numbered observations. The complete definition is reproduced below and is of particular use in showing how the constituent parts of Weber's sociology impact upon one another.

"Sociology (in the sense in which this highly ambiguous word is used here) is a science which attempts the interpretive understanding of social action in order thereby to arrive at a causal explanation of its course and effects. In 'action' is included all human behaviour when and in so far as the acting individual attaches a subjective meaning to it. Action in this sense may be either overt or purely inward or subjective; it may consist of positive intervention in a situation or deliberately refraining from such intervention or passively acquiescing in the situation. Action is social in so far as, by virtue of the subjective meaning attached to it by the acting individual (or individuals), it takes account of the behaviour of others and is thereby oriented in its course".²⁷

Weber takes his definition of the concept of social action further, stressing its *meaningful* content.

"Social action, which includes failure to act and passive acquiescence, may be oriented to the past, present or expected future behaviour of others...The 'others' may be individual persons, and may be known to the actor as such, or may constitute an indefinite plurality and may be entirely unknown as individuals....Not every type of contact of human beings has a social character; this is rather confined to cases where the actor's behaviour is meaningfully oriented to that of others."²⁸

These definitions, then, are a foundation for the discussion of Weber in the next chapter where, as previously indicated, our concern is to outline the major features of Weber's sociology both in terms of its epistemological basis and methodological focus.

II

MAX WEBER'S SCIENCE OF SOCIAL ACTION

II.1 Philosophical Influences

The famous Kantian distinction between the *phenomenal* world, or the world of external objects or events which we know by sensory perception, and the *noumenal* world, which is the intelligible world of objects of experience not given by the senses but conceived in the mind, formed the philosophical basis of two strands of late nineteenth century German philosophy, exponents of which (all of them contemporaries of Weber) influenced Weber in the formulation of his science of social action. The philosopher and historian Wilhelm Dilthey (1833 - 1911), continuing the German Idealist tradition, and philosophers Heinrich Rickert (1863 - 1936) and Wilhelm Windelband (1848 - 1915), both representatives of the Southwest German school of Neo-Kantianism, significantly influenced Weber's epistemological and methodological writings. Yet, characteristically, Weber adopted positions which were at points wholly at variance with, yet elsewhere largely in accordance with, their teachings.

Dilthey based his approach on the recognition that the subject matter of the mental sciences (*Geisteswissenschaften*) as he called them, differs from the subject matter of the natural sciences (*Naturwissenschaften*). The natural sciences basically deal with the investigation of the properties and structure of matter (including living matter in the biological sense) and energy, and with changes which these phenomena undergo, in accordance with 'laws' defining these properties derived from such investigation.

Mental sciences, on the other hand, according to Dilthey, were concerned with the study of 'mankind'. Human beings ascribe *meaning* to their actions. They strive towards goals, they interpret the actions of others, they evaluate their own and others' actions, and they adhere to social norms. Knowledge of this, Dilthey maintained, was possible only through experience (*Erleben*) and understanding (*Verstehen*), and this could be achieved through a process of re-experiencing or re-living (*Nacherleben*) the meanings intended by historical actors. Thus, experience is to be understood from within, while the world of physical matter is conceived from without. The study of human action therefore had to recognise the sense in which the inner nature of the individual, the world of the mind, affects his actions:

"Only in the world of the mind which creatively, responsibly and autonomously, stirs within us, has life its value, its goal and its meaning."¹

The critical element of Dilthey's distinction between natural sciences and mental sciences lay in the assertion that the *methods* of the natural sciences were both inadequate and inappropriate to the task of acquiring knowledge about human beings and human action, because in the natural sciences knowledge is based on the observation, categorisation and quantification of externally observable phenomena, whereas the knowledge or understanding of human individuals and their action must proceed from an intuitive grasp of internal phenomena, represented as man's *inner* experience. Dilthey therefore considered it both legitimate and justified for science to consider the world of the mind in order to reach an understanding of mankind. The world of the mind is first of all determined by the world of experience, and it becomes legitimate to make 'objects' of the mind the subject of judgments and theoretical discussion, since these are all part of the reality of human experience. As Dilthey observed:

"What comes first are experiences. As I have tried to prove earlier, these occur in a context which, in the midst of change remains the same throughout life. On the basis of this context, what I have earlier called the acquired structure of mental life develops. It includes our ideas, valuations and purposes and exists as a link between them....This structure constantly affects our actions, colouring our ideas and states, organizing our impressions and regulating our emotions....I see no objection to our abstracting this structure of experience from the pattern of a man's life, calling it the mental and making it the subject of judgments and theoretical discussions."²

The investigator who wished to reach an understanding of the meanings intended by an actor could approach the problem of bridging the gap between his own intuitive experience and that of the actor under investigation by entering into a type of empathic liaison with the actor in question, through careful introspection and a 'projection' of himself into the 'expressions' of the actor. In Dilthey's view, 'expressions' were any manifestation of mental content³ and could consist, generally, of actions of any type, or particularly, of facial expressions, gestures, movements and exclamations, or words and sentences.⁴ The process of empathising, re-living or re-experiencing which leads to 'higher understanding' of a given actor as a methodological approach would depend to a large extent on the experiences which the investigator had *himself* undergone, and the more his experiences had corresponded, even if only approximately, with those of the subject of his investigation, the more enlightened would be his understanding.

"The approach of higher understanding to its object is determined by its task of discovering a vital connection in what is given. This is only possible if the context which exists in one's own experience and has been encountered in innumerable cases is always - and with all the potentialities contained in it - present and ready. This state of mind involved in the task of understanding we call empathy, be it with a man or a work.... If, therefore, understanding requires the presence of one's own mental experience this can be described as a projection of the self into some given expression."⁵

While Weber was greatly influenced by, and accepted, much of Dilthey's teaching, especially Dilthey's espousal of the method of *Verstehen* or interpretive understanding, and the processes of empathising and re-living, he nevertheless in his own

methodology adopted a position which opposed Dilthey's rejection of the possibility of positivistic methods (i.e. those appropriate in the natural sciences) being applied in the study of human behaviour. The observation of regular relations between *external* events and *uniformities* and the drawing of appropriate inferences from these, in Weber's view, had to be taken hand in hand with the attribution to actors of subjective meanings and the interpretive understanding of action which emerged from that process. As Lewis A. Coser says,

"The grasping of subjective meaning of an activity, Weber argued, is facilitated through empathy (*Einfuehlung*) and a reliving (*Nacherleben*) of the experience to be analyzed. But any interpretative explanation (*verstehende Erklaerung*) must become a causal explanation if it is to reach the dignity of a scientific proposition. *Verstehen* and causal explanation are correlative rather than opposed principles of method in the social sciences. Immediate intuitions of meaning can be transformed into valid knowledge only if they can be incorporated into theoretical structures that aim at causal explanation."⁶

The German philosophers Heinrich Rickert and Wilhelm Windelband also exerted a powerful influence on Weber, but differed from Dilthey in locating the distinction between methods appropriate to the study of human behaviour and those appropriate to the study of natural phenomena, not in necessities arising from differences of subject matter, but in terms of *method* or approach to that subject matter. They held, as Weber did, that human behaviour could in appropriate cases be studied by the methods of natural science, just as, in other cases, the so-called cultural sciences or *Kulturwissenschaften* approach was more appropriate, although it will be recalled that Weber's radical approach demanded a 'coalescence' of both approaches. The distinction to be drawn between *Kulturwissenschaften* and *Naturwissenschaften* lay in the fact that in the former (for example, history, jurisprudence, sociology), so-called *idiographic* sciences, the approach is to particularise or individualise the subject matter, concentrating on the uniqueness of historical actors or events. In the latter

(for example, chemistry, biology, physics), so-called *nomothetic* sciences, the approach is to abstract and generalise and to evolve universal laws capable of subsuming all particular manifestations of phenomena within their ambit.

In opposition to the Neo-Kantians, Weber argued that scientific methodology, proceeding by way of generalisation and abstraction, could be as appropriate in the context of cultural sciences as it was in the context of natural sciences. The formulation of sociological concepts (such as the ideal type) would proceed from an observation of the concrete action of particular actors, but would then seek to *generalise* and to establish relationships which would transcend the particularity of subjective meanings and individual courses of action present in given observed instances. This point is clearly stated by Coser:

"The natural scientist is primarily interested in those aspects of natural events that can be formulated in terms of abstract laws. While the social scientist may wish to search for such lawful abstract generalizations in human behavior, he is also interested in particular qualities of human actors and in the meaning they ascribe to their actions. Any scientific method must make a selection from the infinite variety of empirical reality. When the social scientist adopts a generalizing method, he abstracts from random and unique aspects of the reality he considers; concrete individual actions are conceived as 'cases' or 'instances', which are subsumed under theoretical generalizations. The individualizing approach, in contrast, neglects generic elements and concentrates attention on particular features of phenomena or concrete historical actors."⁷

Rickert's influence on Weber's thought centred less on the debate which the latter conducted in reference to the 'true' distinction between natural and cultural sciences lying in their status as nomothetic and idiographic disciplines respectively, than on Rickert's doctrine of *value-relevance* (*Wertbeziehung*). Rickert asserted that empirical reality as presented to the senses is both infinite and inexhaustible in space and in time. As H.H. Bruun says "...the number of possible objects of our perception is infinitely great, and any such object may furthermore be divided into an infinite

number of lesser objects, each of them different from all the others at least by its place in space and time".⁸

It was necessary, according to Rickert, for the historian to make a choice or selection from the boundlessness of reality in terms of *values* which guided that selection, according to a criterion of *significance*. What made a particular object of cognition significant was the relationship in which it stood to objective or universally acknowledged cultural values. Thus, according to Bruun,⁹ the value relation would permit a selection from the infinite multiplicity of reality only if the values entering into the value relation were universally acknowledged cultural values.

Against Rickert, Weber took the view that the values which governed the choice of phenomena of interest, and the selection and abstraction from infinite reality were not universally acknowledged cultural values, but those of the investigator himself, influenced by the type of problems under investigation, the particular nature of the subject matter, and the questions which required to be answered. These matters could never readily be contained within objective cultural values, and depended very much on the investigator's *own* calculations of significance. According to Coser, "There are no intrinsically scientific criteria for the selection of topics; here every man must follow his own demon, his own moral stance, but this in no way invalidates the objectivity of the social sciences."¹⁰ Talcott Parsons put the matter this way:

"Once a phenomenon is descriptively given, the establishment of causal relations between it and either its antecedents or its consequences is possible only through the application, explicitly or implicitly, of a formal schema of proof that is independent of any value system, except the value of scientific proof."¹¹

The notion of value-relevance in the sense discussed must, however, be distinguished from Weber's postulate of *value-freedom*. What this means is that once the

investigator has selected an area of concern as his object of inquiry he must not allow his own personal preferences or prejudices, or political or religious beliefs, to colour his judgment or contaminate any of the conclusions he reaches with respect to the subject matter of his investigation. This may be a difficult task, but the more the social scientist approximates to a position of value-neutrality or value freedom, in Weber's view, the more scientifically 'true' or objective will be the results of his investigation. Scientific objectivity demands that the investigator should reach out beyond his own personal values and present a view which is neutral with respect to those values.¹²

While accepting Rickert's view of the boundlessness of reality and the need for selection and choice in scientific investigation, Weber opposed Rickert's insistence on the particularising approach of *Kulturwissenschaften* by adopting a position in which a generalising approach could be combined with the processes of selection and abstraction contained within the notion of value-relevance. It becomes appropriate, then, for the scientist to construct sociological *concepts*. Rickert's influence is again noted by Bruun.

"Just like Rickert, Weber concludes from the view of reality as boundless that a scientific reproduction of the whole of reality is a practical, indeed a logical, impossibility. This again entails that all scientific disciplines *must*, consciously or unconsciously, make use of *concepts*, and that such concepts can only embrace parts of reality."¹³

The pre-eminent sociological concept in Weber's methodology is, of course, the *ideal type*. According to Weber an ideal type is formed "...by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are

arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct."¹⁴ What is included in the ideal-type construct depends on the investigator's judgments of significance, and again, on the problems, questions and specialties necessitated, on the one hand, by the subject matter, and on the other hand, by the investigator's particular objectives.

This concludes our brief survey of the philosophical influences which inform Weber's interpretive sociology. Hopefully it should serve as a backdrop against which, in the remainder of this chapter, the *particular* features of Weber's sociology and their implications in the context of this study may be considered in greater detail.

II.2 Subjective Meaning

As we have considered, for Weber sociology attempts the interpretive understanding of social action and the causal explanation of its course and effects. In this context, 'action' includes all human behaviour when and in so far as the acting individual attaches a subjective meaning (*Sinn*) to it.¹⁵ As we have found, Weber, in accordance with German *Geisteswissenschaften*, held that human action was understandable only if the subjective beliefs, volitions, intentions and motives of the acting individual were in some way penetrated by the investigator.

The subjective meaning of action therefore stands in a relationship to the complex of motivating ideas which impel the actor to act in a particular way. As Dilthey observed, "There is a regular relation between an action and some mental content which allows us to make probable inferences."¹⁶ In a general sense, an actor might be

said to orient his action consciously or purposively towards the attainment of a certain end subjectively represented in advance of its attainment by an idea in the actor's mind. This is perhaps most clearly manifested in goal-oriented or purposive action. The presupposition of the meaningfulness of purposive action is also made by Roberto Unger when he says,

"The intelligibility of human conduct presupposes that action can be understood by reference to ideas about the ends an individual pursues and about the conditions that serve or impede the attainment of those ends. A person's conduct is comprehensible in specifically human or social terms only when we are able to see why he acted in a certain way at a certain moment, given his beliefs about the purposes he wished to achieve and about the circumstances in which he had to act."¹⁷

Since Weberian sociology is concerned with (social) action only when and in so far as the acting individual attaches a subjective meaning to it, it follows that if an individual attaches *no* subjective meaning to his action (e.g. reflex action) it is not 'action' within the meaning of Weber's definition, and is not susceptible of sociological interpretive understanding.

But action may be *partially* explicable by reference to a particular subjective meaning correctly identified by the investigator as a motive for action. For example, if an actor orients his action by reference to a social norm we may conclude that *part* of the subjective meaning of that action is the social norm in question, although certainly the action may not be accounted meaningful *exhaustively* by reference to the social norm.

Weber distinguishes two main categories of subjective meaning: (1) the actual existing meaning in the given concrete case of a particular actor, or the average or approximate meaning attributable to a given plurality of actors, and (2) the theoretically conceived *pure type* of subjective meaning attributed to the hypothetical actor or actors in a

given type of action.¹⁸

The first category of meaning involves the actual meaning which an investigator might attribute to action in a concrete situation. Such a situation may not be restricted to the investigation of one individual at a time, because several individuals ('a given plurality of actors') may be involved in a similar course of action and may, to an extent, share the same goals or purposes. But since a plurality of actors cannot possibly share *identical* subjective meanings, the meaning which the investigator attributes must therefore be, as Weber puts it, "average or approximate".

The second category of meaning, which is the pure or ideal type of meaning attributed to an hypothetical actor, is a theoretical abstraction and might appropriately be found in an ideal-type construct. Since it is 'ideal' it need not (and in many, if not all, cases probably *will not*) correspond to the subjective meaning present in a concrete case of a particular actor. Being theoretical, it may involve generality and synthesis from "a great many diffuse, discrete, more or less present and occasionally absent *concrete individual phenomena*".¹⁹ The second category of meaning may depend on the attribution of meanings of the first category in so far as 'synthesis' is attempted of concrete individual phenomena. The ideal type of meaning probably cannot take account of personality traits of given actors, such as idiosyncrasies or eccentricities. The theoretical abstraction is nomothetic in the sense that it seeks to give an account of common features present in a type of action across a generality of similar yet individual cases. Hence the ideal type of Weberian bureaucrat may approach the Kafkaesque image of the bureaucrat, while in a given case an actual bureaucrat may show sensitivity and concern for the needs of those who transact with him.

Weber emphasises that 'meaning' does not refer to an objectively 'correct' meaning or one which is 'true' in some metaphysical sense.²⁰ In Weber's view, there is no true or valid meaning, but only one which seems appropriate in the light of the data with which the investigator is working. But on the other hand scientific objectivity demands that the meaning ascribed by the investigator should be at least consistent with all the evidence presented to the investigator and from which he might draw any necessary inferences. But a pure or ideal type of meaning will probably never correspond exactly with a concrete empirical instance. Nevertheless, as Weber insists: "All interpretation of meaning, like all scientific observation, strives for clarity and verifiable accuracy of insight and comprehension".²¹

According to Weber, subjective meaning is most clearly grasped when action is oriented purposively to a certain end. This type of action Weber calls rationally oriented action or purpose-rational (*zweckrational*) action.²² In action of this type, the actor tries to achieve certain ends by making a conscious choice of appropriate means to the end. By considering alternative means and weighing these up in relation to the end, the actor may act with a degree of intentionality which transcends that of other types of action, such as, for example, action which is traditionally oriented.²³ For the investigator: "Such an interpretation of this type of rationally purposeful action possesses, for the understanding of the choice of means, the highest degree of verifiable certainty."²⁴ Because rational action involves the actor in consciously weighing up means and ends, subjective meaning is more likely to be accessible to the investigator precisely because the actor himself is *aware* of his reasons for acting. But even then, as Weber concedes, the actor may not be fully conscious of his intended meaning. This may indeed cast doubt on the utility of Weber's whole explanatory scheme. As Weber says,

"In the great majority of cases actual action goes on in a state of inarticulate half-consciousness or actual unconsciousness of its subjective meaning. The actor is more likely to 'be aware' of it in a vague sense than he is to 'know' what he is doing or be explicitly self-conscious about it. ... The ideal type of meaningful action where the meaning is fully conscious and explicit is a marginal case."²⁵

Despite this apparent methodological impediment, Weber favours the construction of *rational* ideal types which, when compared with an actual course of action, allow the identification of irrational elements as "factors of deviation from a conceptually pure type of rational action."²⁶ The end result, then is a rational ideal type:

"The construction of a purely rational course of action in such cases serves the sociologist as a type ('ideal type') which has the merit of clear understandability and lack of ambiguity. By comparison with this it is possible to understand the ways in which actual action is influenced by irrational factors of all sorts, such as affects and errors, in that they account for the deviation from the line of conduct which would be expected on the hypothesis that the action were purely rational."²⁷

Weber stresses that sociology is not solely concerned with rational action nor is it afflicted with a 'rationalistic bias'. The rational ideal type is purely a "methodological device".²⁸ It should also be noted that the ideal type states what course a given type of human action *would take if* it were strictly rational, unaffected by errors or emotional factors,²⁹ and in this sense involves *hypothesis* which conceivably, on the one hand, may eliminate the irrational, while on the other hand, exaggerate (if not 'fabricate') the rational.

According to J.W.N. Watkins, the purpose of the ideal type is as an heuristic aid which tells nothing about the real world, but which throws into relief the real world's deviations from the type. Hence the ideal type should assist in the detection of disturbing factors, such as habit and tradition, which "deflect actual individuals from a rational course of action."

Watkins likens this process to improving one's appreciation of the shape of a roughly circular object "by placing over it an accurate tracing of a circle."³⁰

The process of determining or ascribing subjective meaning also requires the investigator to place any meaning in "a more inclusive context of meaning" (*Sinnzusammenhang*).³¹ Weber illustrates the point by imagining the example of a person writing down the proposition twice two equals four: "Understanding in this sense is attained if we know that he is engaged in balancing a ledger or in making a scientific demonstration, or is engaged in some other task of which this particular act would be an appropriate part."³² Given the complexity of human motivation, this could, at least in theory, involve the investigator in an ever-widening spiral of actual or possible subjective meanings. But Weber would surely counter this objection by arguing that the investigator need go no further than his specific investigatorial objectives require. But even so, he provides a further criterion in terms of which subjective meaning is presumed to be 'adequate'. He defines the term 'motive' (which would ordinarily infer at least an overriding, if not conclusive, reason for acting) as "a *complex* of subjective meaning which seems to the actor himself or to the observer an adequate ground for the conduct in question."³³ He then postulates a criterion of adequacy:

"We apply the term 'adequacy on the level of meaning' (*sinnhafte Adaequanz*) to the subjective interpretation of a coherent course of conduct when and in so far as, according to our habitual modes of thought and feeling, its component parts taken in their mutual relation are recognized to constitute a 'typical' complex of meaning. It is more common to say 'correct'.³⁴

The meaning adequacy of interpretation of a given complex of subjective meaning (relative to a given course of conduct) is assessed according to the "habitual modes of

thought and feeling" of the investigator, by virtue of which meaning is 'adequate' when it is judged to be 'typical' or 'correct'.

This entails, firstly, that the investigator's *habitual* modes of thought and feeling are material to his judgments of adequacy. This suggests that these judgments must be made in accordance with the investigator's ('habitual') working methodology for ascribing meaning to the action of a given actor. Presumably if these judgments are in tune with the best working methodology that a particular investigator, in his experience, has established, they will be adequate for his own purposes. (He may, of course, be a poor investigator). Secondly, the meaning so ascribed should be at least 'typical' if not 'correct'. Even if 'correct' is a near-impossible ideal to achieve in practice (given that even the actor himself may be unaware of his own motives), 'typical' at least suggests that the meaning ascribed should be consistent with, or at any rate should not contradict, anything else that is known about the particular actor in question, i.e. the meaning should be typical relative to the actor in question.³⁵

Weber links the requirement of meaning adequacy to a requirement of causal adequacy, which is the requirement that, "according to established generalizations from experience" there should be a probability that a sequence of events "will always actually occur in the same way."³⁶ This will be discussed more fully later in this chapter, but at this stage we should merely note that in Weber's view meaning adequacy and causal adequacy are *both* necessary for a correct *causal* interpretation of a concrete and a typical course of action:

"A correct causal interpretation of a concrete course of action is arrived at when the overt action and the motives have both been correctly apprehended and at the same time their relation has become meaningfully comprehensible. A correct causal interpretation of *typical* action means that the process which is claimed to

be typical is shown to be both adequately grasped on the level of meaning and at the same time the interpretation is to some degree causally adequate."³⁷

Subjective meaning, as we might expect, also includes a *normative* component. In chapter III it will be suggested that human action can often be accounted meaningful in terms of the relation which it bears to social norms in their function as a motivating influence.

Weber gives many instances in which subjective meaning is accountable to social norms and indeed discusses a type of social action which he calls *Gesellschaftshandeln* (rationally regulated or, more accurately, associative action),³⁸ a major component of which is meaningful orientation towards rules. Moreover, in the course of his discussion of the concept of legitimate order he says: "The subjective meaning of a social relationship will be called an 'order' only if action is approximately or on the average oriented to certain determinate 'maxims' or rules."³⁹ But elsewhere he refers more explicitly to the normative component of the subjective meaning of action. Thus, in his essay *The Concept of 'Following a Rule'*⁴⁰ he says:

"[A]...'rule' of purposive action would have a bearing on empirical knowledge of [an actor's] ...behaviour in two very different senses. First, it might need to be considered as an element in [the actor's]...'maxims', which form the object of the enquiry - that is, as a real determinant of his empirical actions. Secondly, it would be taken into account as an element in the stock of knowledge and concepts with which the investigator comes to his task: his knowledge of the ideally possible 'meaning' of the action makes it possible for him to have empirical knowledge of the action. ...In the empirical sphere, the 'norm' is undoubtedly one determinant of the course of events, but from the logical point of view it is *only* one... And there can be a whole range of degrees of consciousness of the influence exerted on action by these determinants."⁴¹

A concomitant of the notion that action may be accounted subjectively meaningful by reference to social norms is the possibility that such action may also be accounted subjectively meaningful by reference to normative *concepts*, since, according to our opening remarks, social norms do not find their expression only in, nor are they conceived solely in terms of, simple imperatives. If, for example, the content of A's

'legal right' in a question with B is identical to B's 'legal duty' in a question with A, our desire to refer to A's situation in terms of 'A's legal right' rather than 'A's B's legal duty' (!) is necessary conceptual shorthand.

More significant for present purposes is the possibility that the jural relation is part of the conceptual apparatus by which the relative legal positions of legal *personae* (for example, litigants) are conceived. That being so, if such conceptual apparatus is incorporated into the subjective meaning of certain sociologically (and causally) significant modes of social action such as judicial action, a clearer understanding of judicial action and its 'causal effects' must proceed from a clearer understanding of the jural relation itself.

II.3 Social Action

The frame of reference within which Weber theorises about human social behaviour is that of *social action*⁴². We may recall that according to Weber this neutral frame of reference involves, on the one hand, 'action' which (term) includes "all human behaviour when and in so far as the acting individual attaches a subjective meaning to it", and, on the other hand, a social dimension, action being 'social' "in so far as, by virtue of the subjective meaning attached to it..., it takes account of the behaviour of others and is thereby oriented in its course."⁴³

According to Weber's definition, however, action can also be "either overt or purely inward or subjective".⁴⁴ Presumably *purely* subjective 'action' in this sense is inaccessible to sociological inquiry unless it is in some sense objectivated, for example,

by 'externally' perceptible manifestations, or to use Dilthey's term, 'expressions'.⁴⁵ Clearly language is the most obvious and powerful form of 'expression' in this sense, consisting of action in its own right: that is, linguistic expressions. The act of giving linguistic expression to ideas may, of course, allow access to subjective meanings of action *other than* the act of speech itself.

The contribution of language to mutual understanding among social actors in a context of interaction is stressed by Jürgen Habermas, according to his reading of Dilthey, when he says:

"But every form of interaction and mutual understanding between individuals is mediated by an intersubjectively valid employment of symbols that refer in the last instance to *ordinary language*. Language is the ground of intersubjectivity, and every person must already have set foot on it before he can objectivate himself in his first expression of life, whether in words, attitudes, or actions. Dilthey once wrote of language that 'only in it does man's interior find its complete, exhaustive, and objectively understandable expression.' Language is the medium in which meanings are shared, not only in the cognitive sense but in the comprehensive sense of significance that encompasses affective and normative modes..."⁴⁶

The external *and* internal realities of human action are accessible to sociological inquiry, as Weber recognises, because on the one hand action is always an 'external' phenomenon in the sense that it triggers a 'change' in the 'real' world in the sense envisaged, for example, by von Wright. Here, action is seen to 'interfere' with the 'course of nature'.⁴⁷ But on the other hand, action arises from within, in the sense that ideas motivate action. If therefore it is possible to link the observation of some manifested mental content (e.g. an action such as a verbal utterance which reveals an intention to act in a particular way) with a subsequent action which is apparently the carrying into effect of the intention so expressed, Weber (or Weberians) might perceive in this a causal relationship which links the manifested mental content (an 'event' in Weberian terms) with the resultant action (another 'event'). As Weber remarks,

"Thus causal explanation depends on being able to determine that there is a probability, which in the rare ideal case can be numerically stated, but is always in some sense calculable, that a given observable event (overt or subjective) will be followed or accompanied by another event."⁴⁸

The essence of social action, then, is that in Weber's view it is both internal and external in the sense discussed, and these elements are in some way 'observable'. In so far as action is 'internal', the method of interpretive understanding or *Verstehen* is brought to bear in the course of the investigative process. This will be discussed more fully later in this chapter.

Weber's definition of social action allows that a given course of action may be treated as partly social and partly non-social, depending upon the criterion of subjective meaning according to which 'account' is taken of the 'behaviour' of others. This flows from Weber's use of the formula "...action is social *in so far as...*" etc. This limits the 'social' component of human action to that part of the subjective meaning of the action - i.e. the specifically internal or ideative part - which takes account of, and is thereby oriented to, the behaviour of others.

The complex of subjective meaning of a course of social action is presumably not exhausted in a given case by the taking account of the behaviour of others. The action may also be meaningful in terms of, for example, *self*-knowledge, or a *personal* feeling of duty, or a motivation which is primarily (but not wholly) *self*-interested. It is arguable then that the sociological understanding of a course of social action whose wider context of meaning includes non-social elements may, in certain cases, be reached only by taking account of the components of social action which are both social *and* non-social.

Since action, in order to be *social* action, must take account of the behaviour of others, this suggests that all possible human behaviour (i.e. 'behaviour' in its widest sense, including action, inaction, overt or subjective action, purposive or non-purposive action, or social or non-social action) must be capable of subsumption under this category. The act of taking account of the behaviour of others must encompass knowledge (on the part of the actor) of particular behavioural patterns which may be exhibited in a given situation, for example, behaviour of others which is known to be oriented by reference to social or other norms in a given case. It may also include knowledge about human behaviour in general, for example, knowledge of human interests, of particular social norms, or of social norms in general.

Weber also draws attention to the important mode of orientation of social action towards *expectations* of certain types. As we shall see in the next chapter, this mode of orientation is crucial to our understanding of the concept of legal right. Indeed the connection between the expectation mode of orientation and the legal right is explicitly noted by Weber. First, in relation to the expectation mode of orientation, Weber remarks,

"An important (but not indispensable) component of social action is its meaningful orientation to the *expectation* that others will act in a certain way, and to the presumable chances of success for one's own action resulting therefrom. Action can be understood rather clearly - and this is an important type of explanation - when there is an objective chance (i.e., more or less probability as expressed in a 'judgment of objective possibility') that these expectations are indeed well-founded. ...In particular, instrumentally rational action is oriented toward such expectations."⁴⁹

In Weber's sociological definition of 'right', which will be discussed more fully in chapter V, the notion of expectation has an important role.

"Sociologically, such legally guaranteed and limited power over the action of

others corresponds to the expectation that other persons will either engage in, or refrain from, certain conduct...without interference from a third party."⁵⁰

In *Sociology of Law*, Weber also says,

"We have previously defined the existence of a right as being no more than an increase of the probability that a certain expectation of the one to whom the law grants the right will not be disappointed."⁵¹

It is worth pointing out at this stage, though again this will be given more comprehensive treatment later, that in general terms it is immaterial whether a legal *persona* holding a legal right in fact has the mental disposition of expectation as a concomitant of his legal right. Under Scots law a child *in utero* may have legal rights⁵² and it is accepted that insane and indeed comatose persons, are no less capable of having legal rights than those who are fully apprised of their legal situation.

Returning to Weber's more general point that an important component of social action is its meaningful orientation to expectations that others will act in a certain way, it seems clear that in a course of social action or social interaction, especially one which is 'stable' or is likely to be repeated each actor to a greater or lesser extent orients his action by reference to his own prediction of the other actor's probable responsive action. (Such a prediction may or may not be well-founded, as Weber observes). Indeed it is probable that almost every course of social action involves in some way the anticipation by an actor of the likely reaction of other actors to *his* action. Generally speaking, every actor is to some extent concerned to know (so far as predictively possible) the implications which his action will have for him in the sense that it may well 'act back' on him.

An actor's previous knowledge of the stable behaviour of others may furnish him with additional grounds for the expectation that a certain course of conduct will occur in the future. Furthermore, a sort of 'mirror-imaging' may also emerge in that an actor may orient his action in accordance with what he perceives to be the way another

actor is likely to expect him (the 'first' actor) to act.

The expectational component of social action has its origins in the fact that social norms and the social environment *engender* such expectations. Thus, in acting, one may expect that others will act in accordance with social, legal or ethical norms, or that others will react adversely to one's action if they judge that action to be in violation of such norms. In the legal context, a criminal may act in the knowledge that others (e.g. police, civil authorities, judges) will *in all probability* orient their action in response to the recognition of the criminal's violation of the law. Further consideration will be given in chapter III to the expectational component of social action (so far as engendered by social norms), referring in particular to the work of Parsons. That discussion will also, it is hoped, clarify the notion of obligation.

Weber's general position that action is social to the extent that it takes account of the *behaviour* of others, and is thereby oriented, seems unduly limiting as to a considerable degree social action simply takes account of *others* (their physical existence, presence, or factual proximity, etc.). Thus if someone manoeuvres a car to avoid a pedestrian this may not take into account the behaviour or likely future behaviour of the pedestrian. Nor may it take into account the 'behaviour' of 'others' in terms of legal or social consequences of colliding with the pedestrian. The driver's desire to avoid harming the pedestrian may simply arise from a personal identification with the harmful consequences of injuring him. Even if the act of manoeuvring is instinctive (and therefore on the borderline of being subjectively meaningful) it might be argued that an instinctive reaction of this type has been conditioned by previous personal identification with injured pedestrians in general and that this has simply surfaced at the moment of the avoidance act. In any case, Weber appears to recognise that the

existence, presence or proximity of others (rather than their 'behaviour') may be what is 'taken account of' in the course of social action, when he remarks,

"Empirically fluid is the transition from the ideal type of a meaningful relationship between one's own action and that of others to the case in which another person is merely an object (for example, an infant). For us, behavior that is oriented toward meaningful action is only the rational limiting case."⁵³

Elsewhere, Weber observes that overt action is non-social "if it is oriented solely to the behaviour of inanimate objects."⁵⁴ This implies that action is not social in so far as the actor takes account of others in their role simply as 'objects'.

Weber also allows within his definition of social action failure to act and passive acquiescence.⁵⁵ Since for Weber "'social action' ... involves the *purposive (sinnhafte)* orientation of the action of individuals to that of others"⁵⁶ an *unconscious* failure to act (for example, negligent action or, at least, the purely 'negligent component' of such action) would fall outside Weber's definition, although a conscious or deliberate omission would clearly come within the definition and generally within the idea of action which is subjectively meaningful.

Weber's concept of social action is not the frame of reference within which, in the present context, *legally relevant* human action in general will be considered. It is clear that much legally relevant human action is by no means social action within the meaning of Weber's definition. Most of the civil law of negligence, for example, is based on the presupposition of *unintentional* action or inaction being causative of harm to others. Even if such action *is* intentional, the particular consequences of the action may be unintended or unforeseen, and in such a case the law may impose a standard of reasonable foreseeability which is quite remote from any thought that might have passed through the actor's mind as he acted or failed to act.

The law may in addition impose liability in tort where the operative state of affairs giving rise to the liability is not social action (nor even, more generally, human action) but a 'natural event' which has been imputed to a human act chronologically remote from the 'natural event'. Thus in English law liability in tort attaches in certain circumstances when a person brings a dangerous thing onto his land and the thing escapes and causes damage to neighbouring property.⁵⁷ In such a case the actual escape of the thing might not involve human intervention, but liability is imputed by virtue of the act by which the thing was originally introduced to the land.

The law may also *assume* a particular state of affairs (which may or may not be human action, though it may be ultimately capable of imputation to human action) against the true state of affairs *actually* existing, as is the case with certain legal fictions. As Pierre J.J. Olivier has said,

"The [legal] fiction consists of a deliberate false assumption of certain facts *pro veritate*. This means that we are ordered by the legal rule to accept untrue facts as true and to accept them quite literally, i.e. as if they were the real and proven facts, and to act on these facts."⁵⁸

However, the concept of social action in the present context is useful for several reasons. First, as the frame of reference of Weber's general sociology the working concept of social action enables Weber's sociology to be applied to particular types of social action (such as, crucially, *judicial* action, or the action of litigants). As we pointed out in our introductory remarks, we will attempt to incorporate typical subjective meanings of judicial social action into an ideal-type construct of the incumbent of the ultimate judicial office. In doing this, however, we will also be concerned, though only marginally, to understand the social action of litigants, such as that of the prosecutor who 'prosecutes' or of the plaintiff or pursuer who raises a

court action.

Second, social action forms an important part of the definition of social norm postulated in chapter III, and as such has a role to play in shaping one of the key concepts of the thesis.

Third, social action is itself employed by Weber in his delimitation of fundamental modes of orientation of action. These modes include rationally oriented action (*zweckrational*), action which is rationally oriented to an absolute value (*wertrational*), traditionally oriented behaviour, usage (*Brauch*), custom (*Sitte*), and so on.

Before concluding the present discussion, it is useful to consider, very briefly, the main elements of some of these fundamental modes of orientation. For Weber, action is rationally oriented to a system of discrete individual ends "...when the end, the means, and the secondary results are all rationally taken into account and weighed."⁵⁹ According to Weber this involves "...rational consideration of alternative means to the end, of the relations of the end to other prospective results of employment of any given means, and finally of the relative importance of different possible ends."⁶⁰ Of perhaps greater interest, in the present context, is the type of rationally oriented action which we encountered in earlier discussion which Weber calls *Gesellschaftshandeln*. This type of action is of particular interest because of its dependence upon *rules* as a reference point for the orientation of action. Weber defines the principal features of *Gesellschaftshandeln* as follows:

"Social action is *Gesellschaftshandeln* (rationally regulated action) insofar as it is (1) meaningfully oriented toward rules which have been (2) established rationally with a view toward the expected behavior of the 'associates' (*Vergesellschaftete*), and insofar as (3) the meaningful orientation is indeed instrumentally rational on

the part of the actor."⁶¹

In an attempt to gain a clearer understanding of this definition, it is convenient to consider an example.

Let us assume that a certain social norm requires A to \emptyset in a question with B under circumstances n. In this situation, the act of \emptyset -ing, if performed in compliance with the norm will be social action in the Weberian sense. Thus A, if he consciously orients his action by reference to the norm (i.e. \emptyset 's), will either be (i) taking account of B in acting (i.e. the existence, proximity or presence of B, and so on), or (ii) taking account of the (past) behaviour of B (or expected present or future behaviour of B) in so acting, or (iii) taking account, in so acting, of the behaviour or expected behaviour of others (apart from B) who may themselves be obligated to take action if A should fail to \emptyset . (The 'others' may also express criticism and so on.) We must assume that A and B and the 'others' are all the *Vergesellschaftete* or 'associates': those to whom the social norms apply. In orienting his action by reference to the social norm in question, A's action may indeed involve any combination of (i), (ii) and (iii) above.

On this basis, there seem to be at least two ways in which A's action can be considered instrumentally rational in addition to being rule- or norm-governed.

First, the act of \emptyset -ing may itself happen to be the end which A has in sight in acting: i.e. it is his goal. In this case end-directed action coincides exactly with normative prescription. A wishes to \emptyset ; \emptyset -ing is the end A desires to achieve, *but also* \emptyset -ing is prescribed by a norm.

Second, and probably more commonly, the act of \emptyset -ing (which is obligatory according

to the norm) may be only *ancillary* to A's actual goal: it may perhaps constitute part of the means to an end. Thus, A may desire to O rather than to \emptyset . If in O-ing, there are several possible acts that could be performed (including \emptyset -ing) but that \emptyset -ing (in order to O) is actually *required*, then by \emptyset -ing in order to O A's action may be both instrumentally rational and normatively oriented. Further possibilities can now be imagined, for A might wish to achieve a remoter goal: goal X. If the achievement of goal X could potentially involve both \emptyset -ing and O-ing, but that (we assume) the latter is prohibited, A's action may be rationally regulated action in Weber's sense if the achievement of goal X is secured by A's adopting the course of action which is non-O-ing, i.e. \emptyset -ing.

Weber's further qualification that the rules themselves have been 'established rationally' with a view towards expected behaviour, does not seem to make any difference to the nature of the action of A in the examples given above. It probably does not matter *how* the rules have been established. The action arising by virtue of the rules will still be the same even if (say) the rules have been established *irrationally*, for example, if the mode of creation of the rules is completely arbitrary. However, Weber may be referring to the content of the rules as being rational, rather than to the mode of creation.

It can be seen that other requirements of rationally oriented social action, for example, that the actor undertakes "rational consideration of alternative means to the end", may be met if the actor takes account of various consequences of acting in the course of achieving his end. In the last example, he may weigh up the possible consequences of \emptyset -ing (which is not prohibited) or O-ing (which is prohibited) in achieving goal X, and may opt for a course of action which minimises any troublesome consequences.

Weber's other modes of orientation of social action include action which is oriented to an absolute value (*wertrational*). This, according to Weber, involves "...a conscious belief in the absolute value of some ethical, aesthetic, religious or other form of behaviour, entirely for its own sake and independently of any prospects of external success...".⁶² This may entail self-conscious formulation of ultimate values governing action, and consistently planned orientation of its detailed course to these values.⁶³

According to Weber:

"Examples of pure rational orientation to absolute values would be the action of persons who, regardless of possible cost to themselves, act to put into practice their convictions of what seems to them to be required by duty, honour, the pursuit of beauty, a religious call, personal loyalty, or the importance of some 'cause' no matter in what it consists."⁶⁴

Judicial action may perhaps involve a form of *wertrational* action in the sense of belief in the legitimacy of the political system, devotion to duty, loyalty to the state. There may be elements of this in Weber's concept of legitimate order. As Weber says,

"Action, especially social action which involves social relationships, may be oriented by the actors to a *belief (Vorstellung)* in the existence of a 'legitimate order' ".⁶⁵

Such action involves the actor orienting his action by reference to an 'order' of rules:

"As a rule such action in addition is determined by [the actor's]... subjection to an order, the rules governing the department which impose obligations on him, which he is usually careful to fulfil, partly because disobedience would carry disadvantageous consequences to him, but usually also in part because it would be abhorrent to the sense of duty, which, to a greater or lesser extent, is an absolute value to him."⁶⁶

Weber observes that the more a value to which action is oriented is elevated to the

status of an *absolute* value, the more 'irrational' is the corresponding action (presumably, in the sense of '*zweck*' - irrational). This is because, in Weber's view, the more unconditionally an actor devotes himself to a value for its own sake, the less is he influenced by considerations of the consequences of his action.⁶⁷ But the purest form of *zweckrational* orientation, involving "the rational achievement of ends without relation to fundamental values" is only a limiting case.⁶⁸

For Weber, *traditional* behaviour is oriented through the habituation of long practice. It lies very close to the borderline of what Weber would call meaningfully oriented action.

"For it is very often a matter of almost automatic reaction to habitual stimuli which guide behaviour in a course which has been repeatedly followed."⁶⁹

This type of action shades into two other types of action, usage (*Brauch*) and custom (*Sitte*). As Weber says,

"An actually existent probability of a uniformity in the orientation of social action will be called 'usage'..., if and in so far as the probability of its maintenance among a group of persons is determined entirely by its actual practice. Usage will be called 'custom'... if the actual performance rests on long familiarity."⁷⁰

Weber stresses that it would be unusual to find concrete cases of any of the types of action designated as *pure* types which were oriented solely in one or other of the ways described. Nor, as he points out, does his classification exhaust the possible types of action, his object being selectively to formulate "in conceptually pure form certain sociologically important types, to which actual action is more or less closely approximated."⁷¹ A *combination* of types of behaviour, as corresponding to one or more of Weber's pure types, in varying degrees of strength, would, in the case of any

given type of social action (for example, judicial action), more readily approximate to a sociologically accurate characterisation of the behaviour in question.

II.4 Interpretive Understanding

It will be recalled from earlier discussion that the method of interpretive understanding (*Verstehen*) involves the investigator in attempting to understand the subjective meaning of the action of a particular individual under investigation by empathising with him through introspection, and by attempting, in a sense, to re-live, by imaginative participation, the individual's experiences. In a sense this involves an 'extension' (or, to use Dilthey's term, a 'projection') of oneself into the outward expressions of the actor which manifest some mental content (his acts, thoughts or gestures and so on) to reach the actor's *motive* for acting. In the context of interpretive understanding however, empathy has limitations, as Weber notes.

"For the verifiable accuracy of interpretation of the meaning of a phenomenon it is a great help to be able to put one's self imaginatively in the place of the actor and thus sympathetically to participate in his experiences, but this is not an essential condition of meaningful interpretation." ⁷²

As we observed earlier, the attribution of subjective meaning to action by interpretive understanding is for Weber only part of the process of establishing a comprehensive explanation of social action. The role played by empathy in this process is only a *facilitating* role. As Weber points out, it is merely "a great help" to empathise with a subject, but it is not an "essential condition of meaningful interpretation".

The process of interpretive understanding involves a further requirement. "Empathic or appreciative accuracy is attained when, through sympathetic participation, we can adequately grasp the emotional context in which the action took place."⁷³ In this sense, emotional context may be similar to Weber's requirement that any subjective meaning (of action) should be viewed in a more inclusive context of meaning, and that such meaning should be 'adequately' grasped.⁷⁴ *Emotional* context, however, also implies subjective feelings (as opposed to, say, rational motives), and these feelings may, according to Weber, underlie ultimate ends or values towards which human action is oriented. Hence, emotional reactions such as anxiety, anger, ambition, envy, jealousy, love, enthusiasm, pride, and so on may be the outward expression of certain underlying value orientations. In Weber's view, the more radically these values differ from those of the investigator, the more difficult it is for him to make them understandable by imaginatively participating in them.

"These difficulties apply for instance, for people not susceptible to the relevant values, to many unusual acts of religious and charitable zeal; also certain kinds of extreme rationalistic fanaticism of the type involved in some forms of the ideology of the 'rights of man' are in a similar position for people who radically repudiate such points of view."⁷⁵

Weber postulates two kinds of interpretive understanding: direct observational understanding (*aktuelles Verstehen*) and explanatory understanding (*erklarendes Verstehen*). We will consider each in turn.

Direct observational understanding probably involves observation *as such*, and not understanding in the normal sense. The examples which Weber gives to illustrate this type of understanding serve to reinforce this view. They include (the observational understanding of) verbal utterances such as: "the proposition two times two equals four", and ideas. The suggestion is that understanding of this sort involves

apprehending data consisting of some mental content. This seems important in the case of 'observation' of ideas. Presumably any Diltheian 'expression' may be observed then interpreted to reveal its ideative content, but, recalling Habermas,⁷⁶ the pre-eminent form of 'expression' is linguistic expression, whether through the medium of the spoken or the written word.

In terms of a practical 'application' to *judicial* action of the technique of direct observational 'understanding' (in Weber's sense), the 'ideas' that might be 'observed' in this context might include the unique modes of legal thought and legal reasoning which result, firstly, in the use of legal concepts, secondly, in ways of conceiving of human action as, for example, giving rise to legal rights and duties, thirdly, in specific modes of interpretation of legal norms, and fourthly, in typical modes of exercising judicial discretion. All these ideas find their expression in judgments and legal decisions, textbooks, and juristic writings of every kind.

Observational understanding, then, could involve taking account of these sources, possibly at best simply acknowledging that they are, or may be, likely sources of expression of ideas which have a bearing on the way judges behave.

Explanatory understanding probably approaches 'true' understanding in the Weberian sense. This tries to explain *why* someone acts as he does, and involves attempting to penetrate motives for acting. Unlike observational understanding, which perhaps involves information gathering (collecting data etc.), explanatory understanding seeks to find reasons. As Weber says,

"Thus we understand in terms of *motive* the meaning an actor attaches to the proposition twice two equals four, when he states it or writes it down, in that

we understand what makes him do this at precisely this moment and in these circumstances. Understanding in this sense is attained if we know that he is engaged in balancing a ledger or in making a scientific demonstration, or is engaged in some other task of which this particular act would be an appropriate part."⁷⁷

According to Parsons, Weber's requirement, mentioned earlier, that any act which is subject to explanatory understanding be placed in an "intelligible and more inclusive context of meaning,"⁷⁸ refers to a plurality of elements which form a coherent whole on the level of meaning. As Parsons puts it, "There are several possible modes of meaningful relation between such elements, such as logical consistency, the aesthetic harmony of a style, or the appropriateness of means to an end."⁷⁹ This also involves, according to Weber, placing the act in "an understandable sequence of motivation, the understanding of which can be treated as an explanation of the actual course of behaviour."⁸⁰ Weber concludes,

"Thus for a science which is concerned with the subjective meaning of action, explanation requires a grasp of the complex of meaning in which an actual course of understandable action thus interpreted belongs."⁸¹

It will be recalled that explanatory understanding by the method of *Verstehen* must be scientifically validated by explanation in terms of causative factors. Unless this is done, *Verstehen* is only a source of hypotheses about human action. As Weber says,

"Every interpretation attempts to attain clarity and certainty, but no matter how clear an interpretation as such appears to be from the point of view of meaning, it cannot on this account alone claim to be the causally valid interpretation. On this level it must remain only a peculiarly plausible hypothesis."⁸²

Weber lists three factors which make it a methodological necessity for the processes of causal explanation and explanatory understanding to be mutually verifying. Firstly, conscious motives may, even to the actor, conceal real motives which constitute the 'driving force' of a given course of action. Conscious motives may also conceal

'repressions' and it is the task of the sociologist to be aware of all these factors.⁸³ Secondly, courses of action which appear on the face of it to be similar, (and may appear so from a 'causal' or external point of view) may, in Weber's view, "fit into exceedingly various complexes of motive".⁸⁴ So although these processes may appear superficially similar, they may have to be understood in terms of motives or subjective meanings which are "directly opposed".⁸⁵ In this situation, the causal approach, involving explanation in terms of externally observable regularities or uniformities, may distort the true character of action if various different, though superficially similar, courses of action are thought to be identical. Thirdly, actors in any given situation are often subject to "opposing and conflicting impulses", and it may often not be possible to assess the relative strengths of these impulses. Verification of subjective interpretation "by comparison with the concrete course of events" is therefore indispensable.⁸⁶ This, of course, leads conveniently to the matter of sociological *causality* in Weber's methodology.

II.5 Causal Explanation

According to Kurt H. Wolff, what is significant about Weber's definition of sociology⁸⁷ is that,

"...for Max Weber sociology is an enterprise which both interprets or understands (namely, meanings) and (causally) explains (namely, events in time); moreover, which interprets in order to be able to explain; which, as it were, prepares by interpretation its candidates for causal explanation. That is to say, Max Weber thought that before we can ask causal questions calling for explanation, we must understand what we want to ask causal questions about; we must be able to interpret it. Thus, logically, understanding precedes explaining."⁸⁸

The object of the sociological investigation is the "correct causal interpretation"⁸⁹ or

"causal explanation"⁹⁰ of a concrete, or typical, course of action. In other words, the end result of (Weberian) sociological inquiry is explanation of a certain kind: explanation in terms of the theoretical imputation of causal relationships and also explanation in terms of subjective meanings or motives. This latter type of explanation is not denoted by Weber's term 'causal explanation', yet if sociology is "a science which attempts the interpretive understanding of social action *in order thereby* to arrive at a *causal* explanation of its course and effects"⁹¹ the suggestion appears to be that ultimate (Weberian) sociological explanation is *causal* explanation, which is arrived at by *first* attaining a grasp of subjective meanings of action, i.e. interpretive understanding of the action. The temptation is strong, then, to infer that (the term) 'causal explanation' in that context *subsumes* explanation in terms of subjective meaning. This is to an extent borne out by Weber's insistence that the *twin* requirements of adequacy on the level of meaning and causal adequacy must both be present simultaneously for a correct *causal* interpretation.⁹²

The point here is that even if 'perfect' adequacy on the level of meaning is attained in the course of an investigation this can never compensate for a lack of adequacy on the level of causality, and *vice versa*. As Weber says,

"If adequacy in respect to meaning is lacking, then no matter how high the degree of uniformity and how precisely its probability can be numerically determined, it is still an incomprehensible statistical probability, whether dealing with overt or subjective processes. On the other hand, even the most perfect adequacy on the level of meaning has causal significance from a sociological point of view only in so far as there is some kind of proof for the existence of a probability that action in fact normally takes the course which has been held to be meaningful. For this there must be some degree of determinable frequency of approximation to an average or a pure type."⁹³

As we have found, interpretive understanding is a technique applied to *internal* meaningful processes: i.e. purely mental complexes of meaning. There can never be

'perfect' knowledge of the mind of another and therefore the investigator must rely on introspection (examination of *his own* experience of what human experience *in general* amounts to) and an extrapolation from this to the experience of others in order that internal meaningful processes of those others may be meaningful to him. But there will always exist a 'hiatus' between the investigator's ascription (or assumption) of meaning (which, as we may recall, is always only a "peculiarly plausible hypothesis"⁹⁴) and the actual meaning present in the mind of the actor under investigation. This 'hiatus', as Weber seems to suggest, can to some extent be 'bridged' by applying a technique which is appropriate for apprehending empirically observable concrete phenomena (i.e. 'events' in time). By this means, the validity of any ascription of subjective meaning may be verified. As Weber says,

"... verification of subjective interpretation by comparison with the concrete course of events is, as in the case of all hypotheses, indispensable."⁹⁵

Even though a motive (for acting) or intention (to act) may be treated as a 'cause' of the resulting action, the sociological technique of imputing cause, as Weber presents it, seems to focus concern not on the motive or intention *in itself* as a cause of action, but on the external 'event' by which motive or intention is *manifested* (e.g. a 'verbal utterance', to use Weber's term). It then seeks to establish a (causal) connection between that 'event' and a later 'event', for example, an act that accords with the motive or intention so manifested. Nevertheless, we would apply the quite separate technique of interpretive understanding to, for example, the verbal utterance, treated for this purpose not as 'an event' (although that is what it is) but as something possessing significance in a specifically ideative and human sense. Weber's reliance upon two techniques of explanation, one appropriate to *Geisteswissenschaften* and the other to *Naturwissenschaften* does not mean that one technique is subsumed by

another. They remain, on the contrary, separate and valid techniques in their own right, and applicable according to differing interests appropriate to each.

Nevertheless, the outcome of the process (of meaning ascription *and* causal imputation) appears to be a '*causal* explanation' (perhaps an all-embracing term in Weber's usage) which takes account of the internal and introspective aspect of the process, yielding hypotheses about subjective meaning, these hypotheses then being *verified* by the external and empirical aspect of the process (i.e. observation of concrete 'events' which, as we have suggested, may include manifestations of mental content such as linguistic expressions). It is therefore surely more accurate to say *contra* Weber that the end result is explanation in terms of subjective meaning *as verified or supported* by the observation of events in time to which causal relationships are imputed. As Weber says,

"Statistical uniformities constitute understandable types of action in the sense of this discussion, and thus constitute 'sociological generalizations', only when they can be regarded as *manifestations* of the understandable subjective meaning of a course of social action."⁹⁶

The final point of the analysis ("a correct *causal* interpretation of a concrete course of action") is reached when, according to Weber, "the overt action and the motives have both been correctly apprehended and at the same time their relation has become meaningfully comprehensible."⁹⁷

The recognition of the interdependence of the processes of interpretive understanding and causal explanation does not assist us with the question of what causal explanation actually involves. Weber quite simply fails to elaborate his ideas in sufficient detail to enable causal explanation to be applied as a methodological technique. For Weber,

"...causal explanation depends on being able to determine that there is a probability, which in the rare ideal case can be numerically stated, but is always in some sense calculable, that a given observable event (overt or subjective) will be followed or accompanied by another event."⁹⁸

There are basically two aspects to this. The first is that the results of causal explanation are cast in probabilistic terms. The second is that concrete phenomena are reduced to 'observable events' (whether overt or subjective: the latter presumably including manifestations of some mental content) which stand in a causal relation to one another, and on a temporal continuum, the earlier event being adjudged a 'cause' of the later event.

Weber's tendency towards probabilistic 'explanation' is perhaps an indication of his faith in the possibility that social science could be endowed with a degree of mathematical precision which would elevate it to the status of 'true' science in the sense of natural science. The possibility, in the 'rare ideal case' of *numerical* statement implies the use of statistical techniques of research which even in cases falling short of the 'ideal' may allow the actual or assumed calculability of causal relationships to yield results which comply with the criteria of causal adequacy set by the investigator.

Nevertheless, the fact that probability is involved should not lead us to suppose that the results of sociological investigation will yield anything as powerful as 'certainty' in the recognised sense of the term. In fact, certainty is not at all a plausible outcome, as Coser points out.⁹⁹

Raymond Aron¹⁰⁰ distinguishes two types of causality in Weber's thought, historical and sociological, the latter involving the specification of causal relationships (between

events) within a probabilistic framework. Historical causality may in some cases be applied in sociological research which, if it is the only technique available (for whatever reason, on the assumption that sociological causation is not possible), is, in Weber's view, "the dangerous and uncertain procedure".¹⁰¹ According to Weber, this procedure involves an "imaginary experiment" which consists in thinking away certain elements of a chain of motivation and working out the course of action which would probably then ensue, thus arriving at a causal judgment."¹⁰²

W.G. Runciman explains this procedure more fully. According to him, this version of causality involves specifying a 'contrast state' and then demonstrating that a particular condition was 'contingently sufficient' to bring about the actual state of affairs observed, as opposed to the state of affairs that might have obtained without the presence of this condition, given the same background of antecedent necessary conditions.¹⁰³ Hence the investigator draws a comparison between a contrast state (of affairs) and an actually observed state of affairs. The contrast state of affairs is purely an hypothesis. It is the imagined state of affairs which *ex hypothesi* would have obtained if a particular factor had been absent: i.e. the condition or circumstance regarded as 'causative' of, or contingently sufficient for, the actually observed state of affairs.

The *actual* state of affairs necessarily *includes* the particular factor which subsequently has been judged (according to the 'imaginary experiment') causative of, or contingently sufficient for, that state.

Sociological causality, on the other hand, involves the recognition of a regular relationship between two events. According to David Hume, causal relationships of

this type can be recognised only after the experience of the 'constant conjunction' or 'regular sequence' of pairs of events in nature, and after experience of several instances of events regularly conjoined, we feel "a determination of the mind to pass from one object to its usual attendant".¹⁰⁴ This position echoes Alfred Schutz, when he considers the postulate of causal adequacy in Weber, and expresses this in terms of probability: "A sequence of events is causally adequate to the degree that experience teaches us it will *probably* happen again."¹⁰⁵ Moreover, according to Weber, a sequence of events is to be considered causally adequate when, and in so far as, "according to established generalizations from experience, there is a probability that it will always actually occur in the same way".¹⁰⁶

We should also note Raymond Aron's observation¹⁰⁷ that a causal relation is never a relation established between the *totality* of conditions obtaining at a given time and the *totality* of conditions obtaining at a preceding time: the relation is individualising and therefore partial, and necessarily depends on the investigator's *selection* of phenomena of interest from the 'totality' of concrete reality presented to him.

Before leaving the subject of sociological causality in Weber we should give brief consideration to causality in the context of social norms (or 'rules' or 'maxims' according to Weber's terminological persuasion). In his essay, *The Concept of 'Following a Rule'*¹⁰⁸ Weber discusses the hypothesis of a worker who comes to rely on the 'chance' of periodically receiving 'certain metal discs' or 'pieces of paper' (money) in return for performing certain services, and who knows that this money can be exchanged for "bread, cabbages, trousers and so on". He knows, moreover, that "...if anyone thereafter tries to take these objects away from him again, there is a certain probability that men with spiked helmets will appear in response to his cries for help

and will assist him to regain possession of them".¹⁰⁹ For Weber, the fact that the factory owner can rely on the probability that the worker will perform services (and by extension that the worker can rely on the probability that money will be accepted in exchange for goods, the retention of which goods, by the worker, is guaranteed by 'men with spiked helmets') involves "causal conditions of a certain 'technical' outcome" which in a logical sense, in Weber's view, are no different because 'conscious processes' are inserted into the causal chain (i.e. the act of thought which is "co-operation according to rules") than similar causal conditions found in other situations envisaged by Weber, including Weber's own example: that the formation of x tonnes of pig iron will result from the use of y tonnes of ore in space z.

Weber's example, of course, characterises 'concrete reality' in the sense of *Naturwissenschaften*. According to Weber, the rules to which the factory owner, worker and countless others orient their behaviour are 'maxims' which causally affect the empirical behaviour of individuals, and which are 'rules' in the *causal* sense which have been "...acquired by reasoned experience or learned from others, of the type 'If I do x, in accordance with empirical rules, y will result'".¹¹⁰ Weber concludes that,

"[the actor]...has to calculate, in the light of experience, the mode of reaction of the 'external world' to certain modes of his own behaviour. It makes not the slightest difference to the 'logical' character of the 'maxims' that in the one case these include human reactions, while in the other they include only reactions by animals, plants and 'inanimate' natural objects."¹¹¹

Crucially, though, the norms or maxims of behaviour, when they are considered by Weber to be 'causes' or determinants of human action, are 'causes' purely in an *empirical* sense, the point being that the investigator can only have knowledge of what is empirically unknowable (e.g. the content of the mind of another individual) through the empirical, externally observable manifestation of what is empirically

known only to that other individual. Hence the following of a norm, by conscious orientation of his behaviour by reference to that norm, is 'empirical' and 'causal' in an unique sense. As Weber says,

When...it is said that the rule in question whether moral, conventional or teleological, is the 'cause' of a certain action, this is of course an extremely imprecise way of putting it: it is not the 'ideal validity' of a norm, but the empirical representation in the mind of an agent that the norm 'ought to be applied' in his behaviour which is the cause".¹¹²

The 'representation in the mind of an agent' is clearly something known only to the agent. If an observer wishes to know in a rigorously empirical or causal sense whether a given actor has oriented his action in a given case by reference to a specific norm he must observe what is externally observable: outward manifestations of speech, action and therefore of mental content, but also of action in some way adjusted or altered *in consequence* of the existence of the norm. He must then apply his knowledge of subjective meanings of human action (i.e. that, by and large, action may be influenced by norms) by conferring meaning on manifestations of mental content. The meaning so conferred must then be combined with the purely empirical observation of the constant conjunction or regular sequence of 'events': i.e. one event following another.

Thus if A orients his actions by reference to norm N requiring act \emptyset , we may observe one event: the verbal utterance by which A expresses an intention to perform act \emptyset in order to comply with norm N. From the point of view of subjective meaning, this is something meaningful in human terms: the use of language (certain sounds which are symbolic of mental content according to a conventional background of known techniques of communicating that content); the particular use of language in this specific context; the desire to orient behaviour by reference to a norm embodying an

'ought' (this is perhaps something uniquely 'human'); and other possibly presupposed background reasons for complying with this norm in particular (e.g. it is a legal norm or a moral injunction, and so on).

From the purely empirical point of view (which is necessarily combined with the point of view of subjective meaning), we mechanically observe a particular sequence of sounds being uttered. If the actor being observed is speaking a language which is 'foreign' relative to the observer, the sounds may be 'meaning-neutral', though not *meaningless*. We may then observe another event: the performance of act \emptyset . From the point of view of subjective meaning, we know that actor A has oriented his action by reference to norm N in order to comply with norm N and in accordance also with his expressed intention so to comply. We are also already aware of the background subjective meanings which attended this event and which are therefore relevant in the context of our understanding of events which may flow from this.

From the purely empirical point of view, we mechanically observe act \emptyset being performed. If for some reason the language spoken by actor A is meaning neutral to us (*qua* observer) on account of the language being, for example, 'foreign,' we may only observe a particular sequence of sounds being uttered (an 'event') in constant conjunction with the supervening performance of act \emptyset (another 'event') and draw necessary conclusions from this in accordance with a 'behaviourist' perspective. Our conclusions, though adequate on the level of causality, will be inadequate on the level of meaning.

Thus, taking a purely empirical perspective, if we noted that the utterance of, for example, the following 'sounds': "I refuse to \emptyset in accordance with norm N" (one

'event'): is typically followed by the performance of act \emptyset (another 'event'), we would be completely unaware of the fact that a contradiction in *meaning* exists here, and that knowledge of this contradiction would allow us to draw other conclusions, for example, that the actor has mistaken the commonly observed linguistic conventions surrounding the use of any of the words used in his utterance (for example, mistaking 'refuse' for 'intend', or thinking that the act of \emptyset -ing actually involves O-ing, which is what he really wishes to refuse to do, and so on). He may also be attempting to mislead the observer. Hence, contradictions with respect to meaning would not be brought to light by a purely mechanical observation of regularities of empirical 'events'.

But equally, if the observer has access to subjective meanings, and observes that a typical 'event' in the example given (i.e. the utterance of the words "I refuse to \emptyset in accordance with norm N") is typically followed by another 'event' (i.e. the performance of act \emptyset), this empirical datum enables him to verify subjective meaning in that he may seek to question whether the subjective meaning of the action as manifested in the verbal utterance is the 'true' or 'correct' subjective meaning with respect to that actor: i.e. does he really mean "I refuse to \emptyset in accordance with norm N" or does he not instead mean (e.g.) "I refuse to O" *simpliciter*?

The combination of interpretive understanding and causal explanation and the requirement that adequacy on the level of meaning and adequacy on the level of causality are mutually verifying processes, are brought together in the legal context in what Weber calls the 'sociological point of view'. This, according to Weber, is the point of view to be adopted in speaking of 'law', 'legal order' or 'legal proposition', and is characterised in the following way:

"...if we take the [sociological] point of view, we ask: What actually happens in a group owing to the probability that persons engaged in social action (*Gemeinschaftshandeln*), especially those exerting a socially relevant amount of power, subjectively consider certain norms as valid and practically act according to them, in other words, orient their own conduct towards these norms?"¹¹³

This is combined with a sociological interest in the "legal guarantees and their underlying normative conceptions" which are treated as "consequences and as causes or concomitant causes of certain regularities of human action", but we shall return to this in chapter V.¹¹⁴ In the meantime, we should note that the sociological point of view concerns itself in particular with (causal) probabilities that persons engaged in social action, "*especially those exerting a socially relevant amount of power*" orient their action by reference to legal norms. As we will consider later, this refers to the need to focus sociological attention upon the action of judges and other officials who, by virtue of the social power which they exercise in the context of their official roles, in some way 'generate' regularities of human action, not only in terms of their own action, but in terms of action of others whose action is in some way oriented by reference to the action of officials.

For present purposes, then, judicial action should be looked upon as being at least in theory *capable* of analysis into 'events' which stand in causal relationships to one another, but only to the extent that causal imputation lends itself to such analysis, to a greater or lesser degree of success. It may however be more rewarding to consider such action as consisting of an endless stream of 'events' each of which, taken with other 'events', is at any given time capable of being analysed as a 'preceding event' in relation to a 'supervening event' and a 'supervening event' in relation to a 'preceding event' all in terms of criteria of individualisation considered appropriate for purposes of the investigation.

II.6 The Ideal Type

The analytical ('mental') construct (*Gedankenbild*) or methodological device of the ideal type represents, as Raymond Aron puts it,¹¹⁵ the 'logical conclusion' of a number of strands of thought underlying Weber's methodological writings. The infinite plurality and multiplicity of concrete reality is, as always for Weber, the starting point:

"Now, as soon as we attempt to reflect about the way in which life confronts us in immediate concrete situations, it presents an infinite multiplicity of successively and coexistently emerging and disappearing events, both 'within' and 'outside' ourselves. The absolute infinitude of this multiplicity is seen to remain undiminished even when our attention is focused on a single 'object', for instance, a concrete act of exchange, as soon as we seriously attempt an exhaustive description of *all* the individual components of this 'individual phenomenon', to say nothing of explaining it causally."¹¹⁶

Order is brought to this 'chaos' because only the part of this reality is significant which is related to the values with which reality is approached. These values influence the investigator in his attempt to formulate criteria which will eventually guide his selection of phenomena of interest. According to H.H. Bruun, it follows from this that because a scientific reproduction of reality is both a practical and logical impossibility all scientific disciplines (whether or not they are conscious of this) must utilise *concepts*, and these concepts can only embrace the parts of reality considered of significance to the investigator.¹¹⁷ The ideal type is such a concept: it articulates similarities which occur in a great number of individual concrete phenomena. These phenomena may be subsumed under the generalising terms of the concept. Each individual datum is seen as a case or an instance (or a contributory factor to a case or instance) of the generic type. As we have already seen, according to Weber,

"An ideal type is formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct (*Gedankenbild*). In its conceptual purity, this mental construct...cannot be found empirically anywhere in reality. It is a *utopia*."¹¹⁸

The ideal type also represents the logical conclusion of Weber's method of *Verstehen*. The investigator first attempts to ascribe subjective meaning which is the "actual existing meaning in the given concrete case of a particular actor", or "the average or approximate meaning attributable to a given plurality of actors".¹¹⁹ But crucially, the data yielded by this process enable the investigator (and qualify him) to construct "the theoretically conceived *pure type* of subjective meaning attributed to the hypothetical actor or actors in a given type of action."¹²⁰ The actors are 'hypothetical' because the theoretically conceived subjective meaning does not relate to any concrete actor in particular, but incorporates similarities found across a range of typical cases. The subjective meaning incorporated in such an ideal-type construct is also theoretically conceived because it represents, as Weber points out, a synthesis of a great many concrete individual phenomena. Ideal-typical subjective meaning is exemplified in Weber's definition of the subjective notion of 'obedience'. Thus,

"'Obedience' will be taken to mean that the action of the person obeying follows in essentials such a course that the content of the command may be taken to have become the basis of action for its own sake. Furthermore, the fact that it is so taken is referable only to the formal obligation, without regard to the actor's own attitude to the value or lack of value of the content of the command as such."¹²¹

The incorporation of a theoretically conceived yet 'typical' subjective meaning into an ideal-type construct suggests that if a similar procedure attends the treatment of ideal-typical causal explanation, then Weber's method of causal explanation should also find its 'apotheosis' in the conceptual apparatus of the ideal type. This certainly

appears to be so, for here the 'concrete individual phenomena' which are drawn upon as data for inclusion in the ideal type would consist of typical sequences of causally linked 'events', i.e. pluralities of 'events' which occur in 'constant conjunction', to use the Humean term. These causal relationships, in accordance with Weber's general methodological stance, would be expressed in terms of probability. In his typology of legitimate orders Weber's definition of 'convention' well illustrates the point.

"A system of order will be called *convention* so far as its validity is externally guaranteed by the probability that deviation from it within a given social group will result in a relatively general and practically significant reaction of disapproval."¹²²

If 'events' occur in constant conjunction or regular sequence, then according to Weber's criterion of causal adequacy, "established generalizations from experience" will yield a probability that the events "will always actually occur in the same way". For incorporation into an ideal-type construct, however, such 'events' must also correspond to typical subjective meanings. To this extent the requirements of causal adequacy and adequacy on the level of meaning must coexist in the ideal type for a correct causal interpretation of a *typical* course of action.¹²³

Weber's preoccupation with rationality in human action also culminates in his preference for the incorporation of rational processes into ideal-type constructs. Rationality, then, for purposes of the present discussion is the *final* strand of Weberian thought whose logical conclusion is found in the analytical construct of the ideal type. Weber favours rational processes because the construction of a purely rational course of action "... serves the sociologist as a type ('ideal type') which has the merit of clear understandability and lack of ambiguity."¹²⁴

Depending on the context, and in particular, on the type of action involved,

'rationality' presumably consists in modes of thinking which exhibit (for example) logical consistency, clarity of thought, coherence, non-contradiction and conceptual precision.

As we observed earlier, the ideal type states what course a given type of action *would take if* it were strictly rational, unaffected by errors or emotional factors.¹²⁵ We saw that this may involve *hypothesis* on the part of the investigator, to the extent, possibly, of suppressing factors deemed 'irrational', and of supplying factors deemed 'rational', and it is clear for this reason and for others already suggested that the ideal-type construct is not intended to be a reconstruction or description of reality. As Weber says,

"It is not a description of reality but it aims to give unambiguous means of expression to such a description."¹²⁶

The essential element of rationality accounts for the fact that the ideal type does not simply represent the typical, but represents also the *ideal*. The ideality of the construct lies in its freedom from irrational elements of behaviour and its 'purity' in terms of rationality. Thus, according to Weber,

"For the purposes of a typological scientific analysis it is convenient to treat all irrational, affectually determined elements of behaviour as factors of deviation from a conceptually pure type of rational action."¹²⁷

Weber gives as an example a panic on the stock exchange. We would begin to analyse this by attempting to hypothesise what direction action would have taken if it had not been influenced by 'irrational' factors. Thereafter any irrational components may account for the observed deviations from the hypothetical course.¹²⁸ But Weber stresses that the ideality of the rational ideal type is only a methodological device.¹²⁹ As Harold Fallding points out, the crucial point to grasp about the type (seen as 'utopia',

to use Weber's term) is that it represents what the sociologist believes those under study would be striving for in pursuing and achieving their goals, under the assumed condition that they are not fettered by "the compromises of life".¹³⁰ What we keep in, or put into, the rational construct are actions that, according to the sociologist, hypothesising the most favourable background conditions, are rationally required by the end in view. This is sensible, according to Fallding,

"...because experience convinces us that rationality is one of the conditions of successful social action. Although the ideal type is a fiction, then, it is not idealized in any purely arbitrary way. It is commended to us as a measuring rod for actual cases. But there would be no virtue in measuring a case's deviance from a purely arbitrary norm. The ideal type is a relevant standard for measuring social phenomena because it measures a case's degree of self-realization."¹³¹

According to Weber, conceptual precision of sociological concepts can be achieved if the highest possible degree of adequacy on the level of meaning is strived for, and this aim can in turn be realised to a high degree if the concepts and generalisations (of the ideal-type construct) formulate *rational* processes.¹³² The suggestion is that the 'purest' and most 'ideal' ideal types are those which tend towards the rational, and in which the construct levels out the irrational, thus facilitating a conception of the type's own self-realisation.

Once the investigator has expended effort in formulating an ideal type, he might well ask towards what *practical* ends can the construct be applied. Coser assists us here:

"An ideal type is an analytical construct that serves the investigator as a measuring rod to ascertain similarities as well as deviations in concrete cases. It provides the basic method for comparative study."¹³³

This resonates with Weber's observation that by comparing concrete courses of action with the ideal type "it is possible to understand the ways in which actual action is

influenced by irrational factors of all sorts, such as affects and errors, in that they account for the deviation from the line of conduct which would be expected on the hypothesis that the action were purely rational."¹³⁴ J.W.N. Watkins' analogy, encountered earlier,¹³⁵ that we can improve our appreciation of the shape of a roughly circular object by placing over it an accurate tracing of a circle, is instructive in this context.

But surely there must be other applications of the ideal type, as, after all, we might not be especially concerned to identify the irrational in a given concrete course of action.

The most obvious use is that the type construct helps to bring 'order' to 'chaos'.¹³⁶ Moreover, even apart from any practical application to empirical data collected by the investigator, the construct may assist us to recognise in purely theoretical terms the significant or *defining* characteristics, or the outstanding features of a particular type of social action. This may allow us, again in theoretical terms only, to separate the defining characteristics from the inessential or peripheral elements.

Furthermore, the construct may be helpful, in the context of a comparative study, in aiding identification of the unique features or peculiarities (not necessarily 'irrational' factors or 'factors of deviation') of an observed type of action.

It may also serve as a model for identifying important 'structural' features of a given course of action: for example, normative 'structures' such as, for instance, the constitution of a political or social entity.

Furthermore, the type, may enable us to identify a particular course of action *as* a type: i.e. as having tolerably well-defined boundaries which set the action apart from other types of action. This may allow us to form judgments about the relationship of one type of action to other types whose boundaries may also be similarly defined. As boundaries obviously lie at the periphery of a phenomenon, the ideal type should help us to distinguish central cases from peripheral cases in the application of the type to concrete phenomena.

It must also follow from the methodological requirement to incorporate typical subjective meanings into the construct that the articulation in theoretical terms of such meanings will enable the investigator to gain a clear impression of the defining characteristics of observed courses of action. If the subjective meaning of a concrete course of action corresponds only approximately to an appropriate type, the type may nevertheless be employed selectively as a framework by which the investigator may construct his *own* ideal type of the action in question.

Finally, the methodological requirement to express in terms of probability *causal* relationships between 'events' which have been selected for inclusion in the construct, may assist the investigator to formulate criteria of individuation of 'events' considered to stand in a causal relationship with respect to other 'events'. It may also allow him to reach a better understanding of observed concrete phenomena if he is aware of typical causal relations obtaining between 'events' so individuated if these have been included in an appropriate ideal type.

According to Aron, there are three categories of ideal-type construct in Weber's thought. First, there are ideal types of historical particulars. Here the sociologist

selects a number of features from an historical whole and presents it ideal-typically. Aron gives capitalism as an example.¹³⁷ The second species of ideal type designates abstract elements of an historical reality, elements, that is, which are found in a large number of cases. These are categorised by Aron on a continuum of increasing abstraction. The examples he gives are firstly, bureaucracy and feudalism; secondly, the three types of 'domination': rational, traditional and charismatic; and thirdly, the types of action: purpose-rational action, value-rational action, traditional action and affectual action. The third species of Weberian ideal type is the type which constitutes "rationalizing reconstructions of a particular kind of behavior".¹³⁸ The example given by Aron is the ideal-typical reconstruction of the pure economic subject.

This last species of Weberian ideal type is especially significant in the present context because in chapter VI we attempt to formulate such an ideal-type construct of *the incumbent of the ultimate judicial office*.

But why is *judicial* social action worthy of sociological typification for purposes of a sociological analysis of the jural relation? One of the reasons, it is suggested, arises from an assumption that 'law' in at least one of its manifestations is to be understood in the sense of the Weberian category of 'guaranteed law', that is, in the sense that there exists a 'coercive apparatus' consisting of "one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement."¹³⁹

The sociological interest of a phenomenon such as this is clear (and again is suggested by Weber): "...the legal guarantees and their underlying normative conceptions are of

interest both as consequences and as causes or concomitant causes of certain regularities of human action...or of regularities of natural occurrences engendered by human action...".¹⁴⁰ The fact is that much human action follows causal regularities not only because action is oriented to legal norms, but because special coercive apparatuses exist which as a matter of empirical fact under appropriate conditions take action to ensure compliance with legal norms or apply sanctions in response to contraventions of such norms.

But this only partially accounts for the sociological significance of judicial action. The key to understanding the importance of judicial action is that the mobilisation of the *specifically* coercive and sanction-exacting mechanisms (a police force, a prison service, sheriff officers and messengers-at-arms) is *conditional* upon the direction or judgment of an appropriate tribunal. The fact that certain forces within society which exercise social power (and which are, however, by no means the *only* such forces) are contained or kept in check by an interposing mechanism of tribunals regulating the use of that power, compels us to direct our interest towards discovering the nature of judicial action, and to understand, both interpretively and causally, the central components of that action.

But what is perhaps of even greater sociological significance is that *because* judicial action mobilises coercive and sanction-exacting forces in society countless individuals in attempting to imagine the legal 'consequences' of their action or the action of others, may strive to adopt the same perspective as an ultimate judge. In this way, the individual may visualise what the legal result would be of a given course of action or of any legally relevant 'facts' if a dispute has arisen following the occurrence of such 'facts' and this dispute has been litigated to a point in the system where it has been

finally and authoritatively determined. What this means is that these countless others either by themselves or with the assistance of legally qualified professionals employ (or purport to employ) the same techniques of legal reasoning, or techniques of legal rationalisation, which would be employed throughout and at the ultimate hierarchical level of the legal system. By orienting their action in accordance with this ultimate legal perspective certain regularities (on a truly vast scale) result. This seems justification enough for identifying judicial social action as being of sociological interest.

In the next chapter we will consider the centrality of the normative component of human action and give attention to the principal functions of the social norm. This will hopefully clarify the notion of normative meaning and of legal meaning, and thus provide a basis for the consideration of the subjective meaning of judicial action. The conceptual apparatus of the jural relation, it will be claimed, is deeply rooted in this subjective meaning. Furthermore, for theoretical purposes, the jural relation will be treated as an 'emanation' from the hierarchically ultimate judicial perspective ideal-typified in the hypothetical judge, *Iudex*.

III

ACTION AND THE SOCIAL NORM

III.1 The Normative Component of Human Action

In the preceding chapter it was suggested that human action can often be accounted subjectively meaningful in terms of the relation which it bears to a social norm functioning as a motivating influence which in some sense acts upon the individual and determines his action. In this chapter we will consider the implications of this suggestion by examining the ways in which the social norm functions in human society as a means by which action is both *evaluated* and *oriented*. Each of these terms will be examined later in this chapter. Other aspects of the normative component of human action will be considered as an essential preliminary to reaching an understanding of judicial social action, and through this ultimately an understanding of the jural relation.

The centrality of the normative component of human action was recognised by the American sociologist Talcott Parsons (1902 - 1979) who has been one of the principal exponents of the sociology of Max Weber in the United States. Parsons locates the normative tendency in human action within his conceptual scheme of 'action' by adopting what seems at times to be an extreme position. At one point, for example, he argues:

"A normative orientation is fundamental to the schema of action in the same sense that space is fundamental to that of the classical mechanics: in terms of the given conceptual scheme there is no such thing as action except as effort to conform with norms just as there is no such thing as motion except as change of location in space."¹

Weber for one would place somewhat less emphasis than Parsons on the normative component of human action and indeed actually describes a species of social action which, despite having all the *indiciae* of normatively oriented action (in terms of stability, invariance, uniformity and so on) is in fact almost entirely instrumentally rational in the sense of being governed by the pursuit of individual ends, i.e. it is a type of *zweckrational* action.² Although for Parsons the normative component of social action appears to be a *definitional* prerequisite of the concept of 'action',³ the actual contribution made by the normative component in terms of resultant stability and regularity of action, can be discerned in David Lockwood's more moderate version of Parsons' theoretical stance:

"For Parsons, the social system is a system of action. It is made up of the interactions of individuals. Of special concern to sociology is the fact that such interactions are not random but mediated by common standards of evaluation. ...The regularity, or patterning, of interaction is made possible through the existence of norms which control the behaviour of actors. Indeed, a *stabilized* social system is one in which behaviour is regulated in this way, and, as such, is a major point of reference for the sociological analysis of the dynamics of social systems."⁴

A convenient starting point for our discussion of the normative component of human action is Parsons' definition of a stable system of interaction. According to Parsons and Shils, processes of interaction take place "between two or more actors":⁵ the interaction of ego and alter is the most elementary form of social system.⁶ Clearly, one person cannot in any meaningful *social* sense 'interact' with himself. Interaction is probably best conceived of as involving mutual social action (in the Weberian sense of action "oriented to the past, present or expected future behaviour of others" ⁷) in which each interacting participant (i.e. actor participating in the interaction process) acts, or orients his action, with respect to the other participants. Parsons' concept of interaction bears similarity to Weber's concept of the social relationship, but Parsons' concept is distinguished by its dependence on the assumption of the *necessary* normativity of action. In Parsons' defence, however, we might argue that although it

is overstating the position to assert that all action or interaction has a normative component, certainly most versions of *stable* action or interaction have a normative component, and in many cases it is precisely because of this that the action or interaction *is* stable.

Weber defines 'social relationship' as "the behaviour of a plurality of actors in so far as, in its meaningful content, the action of each takes account of that of the others and is oriented in these terms."⁸ Weber adds that as a *defining* criterion, "it is essential that there should be at least a minimum of mutual orientation of the action of each to that of the others."⁹

The meaningful content of a social relationship (that is, its subjective meaning) can, for Weber, be various, for example, conflict, hostility, sexual attraction, friendship, loyalty or economic exchange. But in Weber's analysis, the normative component of a social relationship is strictly limited to the governance of the meaningful content which remains relatively constant through time. Here the meaningful content may be capable of formulation in terms of 'maxims':

"The meaningful content which remains relatively constant in a social relationship is capable of formulation in terms of maxims which the parties concerned expect to be adhered to by their partners on the average and approximately."¹⁰

At this point Weber's position is quite close to that of Parsons since, crucially, for Parsons,

"It can be shown that, within the action frame of reference, *stable* interaction implies that acts acquire 'meanings' which are interpreted with reference to a common set of normative conceptions."¹¹

Weber's influence on Parsons' sociology can be seen in the latter's dependence on the concept of *meaning* as a theoretically postulated component of human action. In this

context, meaning in Parsons' sense denotes the *part* of the subjective meaning of human action in terms of which human action may be explicable through a knowledge of the social norms by reference to which individuals evaluate and orient their own social action, and in so doing may also evaluate (and act upon) the action, social or otherwise, of others. We will refer to this subjective meaning as *normative meaning*. In this chapter we shall use as a basis for the discussion of the concept of normative meaning a model of a stable system of interaction which is employed by Parsons, that of the game.

According to Parsons a game, such as chess, can be used to illustrate the essentials of an interaction system. Parsons' stable system of interaction will be used to clarify firstly, the *regulative, evaluative* and *orientative* functions of the social norm, and secondly the evaluative and orientative component of the subjective meaning of social action in terms of which, on the one hand, the individual evaluates and orients his *own* social action by reference to social norms, and on the other hand, the individual evaluates the action of *others* by reference to social norms *with a view to the orientation of his own action*.

But before turning to consider these matters we should first attempt to reach a preliminary understanding of the process by which human action might be said to *acquire* normative meaning, recalling Parsons' observation. For this purpose a *speculative* scheme is proposed which indicates the stages by which action becomes, in a sense, 'normalised' or subject to governance by social norms, and then becomes meaningful by reference to those norms. This speculative scheme attempts to show how the action of 'ø-ing' might become 'normalised' through a particular course of development. We should not look upon the scheme as following any *necessary*

chronological sequence, though certain stages more naturally precede or follow others. Indeed, some stages may under certain circumstances be thought to be interchangeable with, or be subsumed by, others.

To begin with, there may be a recurrence of the act of \emptyset -ing within a process of interaction among participants in the interaction. The regular or periodical occurrence of the act of \emptyset -ing may be acknowledged or noted by the participants, although it is not strictly necessary that the participants actually acknowledge *to one another* that this act occurs. It is possible that the act of \emptyset -ing either could have occurred only once or is considered, hypothetically, to be capable of occurring at some future time and still be the subject of the 'normalisation' process.

The participants in the interaction process may identify interests which the act of \emptyset -ing in some way affects whether advantageously or disadvantageously. Thus, if \emptyset -ing causes or is likely to cause (e.g.) physical harm, mental anguish, damage to property, and so on, it may be desirable to prohibit \emptyset -ing. On the other hand, if \emptyset -ing is likely to advance certain interests, for example, concerted action advancing communal interests, it may be desirable to make \emptyset -ing obligatory.

The participants may then attribute *value* to the act of \emptyset -ing, i.e. they make value judgments about this act. Is \emptyset -ing a good or a bad thing? Is it desirable or undesirable, worthy of approval or disapproval? This exercise may lend itself to the making of more sophisticated value judgments, as for example on a value continuum of aesthetic to non-aesthetic, and so on. The evaluation of the act of \emptyset -ing may involve evaluation by reference to existing normative standards: moral standards, ethical norms, custom, religious belief, and so on. We may assume that at this stage

the participants in the interaction process do not actually feel *obliged* either to \emptyset or to refrain from \emptyset -ing according to any existing normative standards, although such standards may ultimately influence their judgment, e.g. analogies may be drawn between the act of \emptyset -ing and other acts which are already governed by existing normative standards.

The participants in the interaction process may then discuss and share opinions about the act of \emptyset -ing and may share and exchange their own personally held views or beliefs as regards this act, and about any interests affected or likely to be affected by the act. This forum may cause participants to moderate their opinion or to feel more strongly about the act of \emptyset -ing, and this may lead to unanimity of opinion about the act, or, as is more likely, to broad overall consensus.

The process of opinion-sharing may eventually result in the interacting participants' attributing *deontic* evaluations to the act of \emptyset -ing, in the sense of: 'ought the act of \emptyset -ing to be the subject of regulation?' Furthermore, the attribution of value to, and exchange of opinion about, the act of \emptyset -ing may produce value judgments which involve the use of deontic language: 'in my opinion one ought not to \emptyset ' or 'in my opinion one ought to \emptyset only under circumstances n', and so on. Again, opinions may be exchanged about whether, in a general sense, one should not \emptyset and so on, and this may again lead to unanimity or broad overall consensus.

The interacting participants may then attribute a *norm* (to the act of \emptyset -ing) which is considered applicable on the occurrence of this act following the explicit mutual acknowledgment by the participants of the appropriateness of having such a norm applied to that act within that social environment. It may then be possible to

articulate a norm of the type: 'no-one shall ø', or, 'ø-ing is prohibited'. This stage in our developmental model bears a similarity to Roberto M. Unger's depiction of *customary law*:

"In the broadest sense, law is simply any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgment by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied. I shall call this customary or interactional law."¹²

The participants may then make judgments as to whether the act of ø-ing ought indeed to be subject (or to continue to be subject) to governance by a norm or norms, e.g. is it a good thing or a bad thing that one should be prohibited from ø-ing?

On the assumption that a norm is in fact established which governs the act of ø-ing, and that participants actually orient their action by reference to the norm (at least for a period of time), the norm in question may eventually become 'internalised' to the effect of making the behaviour governed by the norm in some way habitual or automatic. In this context, action may be oriented by reference to the appropriate norm without any *conscious* acknowledgment of the norm as such. The sociologist Georg Simmel, in the context of a discussion of conscience ('moral consciousness'), makes an observation which is helpful in the present context:

"What is useful to the species and the group, the argument runs, and what the group, therefore, requests of its members for the sake of its own maintenance, is gradually bred into the individual as an instinct. He thus comes to contain it in himself, as his own, autonomous feeling, in addition to his personal feelings properly speaking, and thus often in contrast to them. ...Society confronts the individual with precepts. He becomes habituated to their compulsory character until the cruder and subtler means of compulsion are no longer necessary. His nature may thereby be so formed or deformed that he acts by these precepts as if on impulse, with a consistent and direct will which is not conscious of any law."¹³

Internalisation (of normative standards) may produce expectations (that persons *other*

than oneself ought or ought not to \emptyset). Correspondingly, it may also produce obligations (that one ought or ought not to \emptyset oneself). Expectation and obligation may come together in one actor in that he both expects others not to \emptyset (or to \emptyset) and feels obliged not to \emptyset (or to \emptyset) himself.

Given that many within the interaction process may have similar or approximately similar attitudes and that they acknowledge that the norms applicable to the act of \emptyset -ing are considered to be effective and operative within that social environment, a social norm might then be said to exist to the effect of prohibiting (or rendering obligatory) the act of \emptyset -ing. It is helpful at this point to consider Weber's notion of the *empirical validity* of norms. For sociological purposes, this means that the validity of a norm is judged according to the extent to which it functions as an "actual determinant of human conduct".¹⁴ If, in an empirical sense, an actor by virtue of the subjective meaning of his action orients his conduct by reference to a social norm and does so to an empirically measurable degree (for example, in terms of a stable probability) then the norm, for Weber, is empirically valid in the sense that it actually determines human conduct.

Any further stages of the developmental scheme would necessarily *presuppose* empirically valid social norms in terms of which the individual may conceive of his own action and that of others as meaningful by reference to such *norms*.

Having speculatively considered how a particular mode of action might acquire normative meaning through a given course of development, it is convenient now to return to the discussion of Parsons' stable system of interaction in order to examine from the point of view of participant actors, various levels on which meaning can

exist. In this case, the stable system of interaction in question is an orderly (!) game of chess. After this, we will consider Parsons' *definition* of a stable system of interaction,¹⁵ and this will serve as a basis for discussion in the remainder of this chapter of, firstly, the expectational and obligational components of stable interaction, secondly, the principal functions of the social norm, thirdly, normative meaning, fourthly the relationality of social action, and lastly relationality in the context of the game model.

Although Parsons' notion of stable interaction happens to involve *co-operative* interaction, it is not suggested that only co-operative human interaction exhibits the quality of being 'stable' by virtue of being governed by norms. Human *conflict* can be 'stable' for, as Weber points out in the course of a discussion of the concept of 'conflict', there are "all manner of continuous transitions from the bloody type of conflict which, *setting aside all rules*, aims at the destruction of the adversary, to the case of the battles of medieval chivalry, bound as they were to the strictest conventions...".¹⁶ Thus human interaction, both co-operative *and* confrontational, may possess the quality of being 'stable' by virtue of being governed by norms. The choice, in the present context, of Parsons' stable system of *co-operative* interaction does not overlook the possibility of stable *non-co-operative* human interaction, which is stable precisely because it *is* governed by norms. It might perhaps be argued, however, that a model of a stable system of co-operative human interaction is a paradigm case of 'successful' or 'functional' social action, and as such is arguably the best model for illustrating the normative component of human action.

As previously observed, Parsons' example of the chess game situation is introduced in the context of his discussion of interaction.

"The essentials of the interaction situation can be illustrated by any two-player game, such as chess. Each player is presumed to have some motivation to participate in the game, including a 'desire to win'. Hence, he has a goal, and, relative to this, some conception of effective 'strategies'. ...the meaningfulness of the goals and the stability of the generalized pattern of facilities depend on the existence of a well defined set of rules... . Without such rules the interactive process could not be stable ... neither player would know what was expected of him or what the consequences of a given set of moves would be."¹⁷

For Parsons, therefore, the meaning ascribed to a game of chess by players exists on several levels.

First, each player has a motivation to participate. It might be desirable for its own sake to participate. This has resonances of Weber's *wert-rational* (value rational) mode of orientation of action, in which the individual orients his action in accordance with the value that participation in the game for its own sake is a 'good thing' in itself. This value may be treated (by players) as a sufficient ground for participating without needing to give further reasons.

Second, in playing, each player may pursue a goal which includes the desire to win, or, particularly in the case of chess, the will to achieve some kind of intellectual domination of an opponent. This has a clear association with Weber's *zweck-rational* (purpose rational) mode of orientation of action, in which the desired end is the winning of the game.

Third, each player may formulate strategies for play. This would involve the rational formulation of a particular means of winning the game or of gaining advantages which, taken cumulatively, may enable a player eventually to win the game.

Fourth, stability of the conduct of the game will be achieved by each player's adhering to, or orienting his action by reference to, the rules of the game. Stability of expectations of each player with respect to the action of the other player and any accompanying feeling of 'obligation' are important because such stability enables continuation of interaction on the same basis. This in turn depends on continuing adherence by players to the mutually accepted rules of the game. Through the rules, all the *other* factors which make the game meaningful are brought together. For instance, there may be no motivation to participate, or participation might be 'an undesirable thing', if all action within the game is arbitrary or random: "I'll just have *that* pawn, and *that* knight" etc. It may indeed be impossible for a player to achieve any goals or to formulate strategies unless action is guided by rules which apply equally to each player. Ideally, then, the rules of the game should allow the complex sequence of actions which constitute 'playing the game' to hang together in a rational manner according to a rational plan.

It can be seen therefore that although meaning is conceivable on several levels, the normative component of interaction is a crucial element since it has a bearing on meaning at every level: motivation to participate, pursuit of goals, formulation of strategies, and stability of conduct of the game. We should also note that the four examples of meaning given above (albeit important examples) do not by any means constitute an exhaustive list of meaningful categories.

Now, it is against this background of the imaginary interactional scenario of a game that Parsons defines the essential features of a stable system of interaction.

"A stable system of interaction, therefore, orients its participants in terms of mutual expectations, which have the dual significance of expressing normative

evaluations and stating contingent predictions of overt behavior. This mutuality of expectations implies that the *evaluative* meanings of acts are shared by the interacting units in two ways: what a member does can be categorized in terms meaningful to both; also, they share criteria of behavior, so that there are common standards of evaluation for particular acts."¹⁸

In the discussion to follow, we will consider some of the main implications of this definition. We begin then, with the *expectational* and *obligational* components of stable interaction. These components have a special significance since, as we shall later see, they have a hand in defining the theoretical basis of the conceptual apparatus of the jural relation.

III.2 Components of Stable Interaction

If, according to Parsons, a stable system of interaction "orients its participants in terms of mutual expectations" which are an expression of "normative evaluations", this suggests that each participant purposively orients his action towards the attainment of an end (at least partly) in terms of a subjective feeling of *expectation* which has been engendered by a social norm governing the action in question. It also suggests the *normative* component of obligation in terms of which, possibly in varying degrees of strength, it is felt something *ought* to be done, or a certain act ought to be performed. Clearly, shared expectations and mutually acknowledged obligations produce *reliance* among participants in the interaction process and heighten the probability of future conduct following the same pattern. The result of this is stability which in turn implies the possibility of repeatability. The existence of norms may therefore enhance one's expectation that others may act in a particular manner. Recalling Weber's remark:

"An important (but not indispensable) component of social action is its meaningful orientation to the *expectation* that *others* will act in a certain way,

and to the presumable chances of success for one's *own* action resulting therefrom."¹⁹

But the expectation of one participant relates to a course of action which is expected to be undertaken by the *other* participants. One cannot meaningfully 'expect' oneself to act in a particular way except in the loose sense of, e.g. "I expect I shall do this today".

The presence within Parsons' stable system of interaction of 'expectations' which are mutual to the participants (each participant having an expectation of how the *other* participants should act) does not imply that each participant necessarily expects the others to act in the *same* way. The norms governing action in a given case specify the content of the action to be performed, and this may or may not be an identical type of action for each participant in the interaction process. The norm therefore is the determinant, or partial determinant, of the action that is expected of each participant.

In the same way, each participant also purposively orients his action towards the attainment of an end (at least partly) in terms of a subjective feeling of *obligation* engendered by a social norm governing the action in question. The subjective feeling of obligation which a participant has by virtue of the appropriate norm relates to the *acting* participant's action. Thus each participant may experience in varying degrees of strength a feeling of obligation with respect to the action which he himself must undertake in the context of the interaction, *in fulfilment of* the expectations of others participating in the interaction process.

What this means is that if participant A has an expectation (justified by a norm) that participant B should \emptyset , and participant B has an obligation to \emptyset in fulfilment of A's expectation, the content of A's expectation is equivalent to the content of B's obligation, namely, that B should perform the act \emptyset . This does not mean that A's

expectation is the same as B's obligation, merely that in each case the *content* of the duty act is the same. This is precisely true of legal rights which are correlative to legal duties. As we have already seen, and as we shall consider in greater depth in chapter V, a legal right in the sociological sense according to Weber's definition produces "an increase of the probability that a certain expectation of the one to whom the law grants the right will not be disappointed."²⁰ A legal right inherent in one legal *persona* may have the same content as a legal duty (correlating with that right) incident to another legal *persona*, but this is not to say that the right and the duty are 'the same thing'.²¹

In a system of co-operative social interaction where the normative basis of the interaction is likely to have been voluntarily assumed (and to that extent, the participants' freedom voluntarily curtailed) there is perhaps a greater probability that the participants may actually experience immediate feelings of expectation or obligation, as appropriate. Furthermore, in that case the content of the expectation or obligation will probably be known, at least within reasonable limits, and interacting participants will therefore be aware of the nature of the act to be performed (e.g. the act of \emptyset -ing).

However, in the *legal* domain where the normative basis of interaction is defined by legal rules, the individual may have little or no knowledge of the precise content of legal rights and legal duties, and may therefore have no accompanying feeling of expectation or obligation engendered by the rules. However, in a limited sense, the individual may recognise that his interaction with others is in some way governed by legal rules. In such a case, any accompanying feeling of obligation or expectation may arise from the acceptance of a general *moral* norm 'prescribing' that *whatever* the law's

content is, in its particulars, the individual's interaction ought to be governed by that.

In any case, as we shall see in chapter V, where legal rights and duties exist in given instances, there is often no question of their existing within the context of 'interaction' in the Parsonian sense, they are simply *ascribed* upon the occurrence of certain 'operative facts'. One reason for this is that legal rights and duties exist as much to govern the behaviour of courts and other 'coercive apparatuses' as to govern the behaviour of those who 'have' the rights and duties. The Parsonian system of interaction is nevertheless instructive if only to demonstrate hypothetically what the expectational and obligational feelings of an individual *might in all probability be* if the individual in question were fully knowledgeable of his legal position.

We should finally note the predictive aspect of a stable system of interaction. As we may recall, where a course of social action or interaction is 'stable' each actor may, to a greater or lesser extent, orient his action by reference to his own prediction of the other actor's probable responsive action, although such a prediction may or may not be well-founded. An actor's previous knowledge of the predictable behaviour of another may furnish him with additional grounds for the expectation that a certain course of conduct will take place in the future. Certainly, the existence of norms will also help to reaffirm such an expectation. Hence, the mutual expectations of Parsons' stable system of interaction (to use Parsons' terminology) state "contingent predictions of overt behavior".

III.3 Functions of the Social Norm

In the last chapter we observed that one person can never have 'perfect' knowledge of

the mind of another person. This is true as a *methodological* principle in terms of the investigator's limited ability to attain an understanding of the subjective meaning of the action of a given actor. But it is *also* true as a necessary feature of *day to day* human action and interaction. No-one can claim to act on the basis of 'perfect' knowledge of the mind of another. But it can hardly be claimed that this constitutes an insuperable obstacle to the ordinary course of human interaction.

Indeed, for this reason it is essential to recognise that if an individual is a 'meaningful' actor in the Weberian sense that motives, purposes, goals and essentially subjective states of mind lie behind his action, then he must also, and of course does, ascribe meaning to, and attempts to understand, the action of other individuals by reference to the *same* categories of meaning by which his *own* action is meaningful to him. It follows that if an individual in the course of acting socially in a subjectively meaningful manner and thus taking account of the behaviour of others ascribes meaning to the behaviour of others, such an ascription of meaning must be treated as a special case of 'taking account of the behaviour' of others. The action to which meaning is thus ascribed may include action in the sense of both 'external' acts and 'external' manifestations of mental content, both of which are, of course, 'external' acts in the wider sense.

The ascription of meaning by one individual (A) to the action of another individual (B) might include one of the following meaningful processes.

1. A attempts to understand B's *own* intended meaning, by reference to which A orients his action accordingly.

2. A ascribes a meaning *of his own making* to B's action. This may or may not coincide with B's intended meaning, but serves A's purposes, whatever they may be. Thus, A may be content to believe that B's action has a meaning which is valid according to criteria of meaning applied by A, irrespective of whether it correctly apprehends B's intended meaning.

An example of non-coincidence of meanings in the sense of 2 above is suggested by Weber when he refers to social relationships which are 'asymmetrical'. In such a case the parties associate different meanings with their actions and the social relationship is to that extent objectively 'asymmetrical' from the point of view of the two parties. This may constitute 'mutual orientation' in a special sense:

"It may nevertheless be a case of mutual orientation in so far as, even though partly or wholly erroneously one party presumes a particular attitude toward him on the part of the other and orients his action to this expectation."²²

If, however, recalling Weber,²³ an individual has difficulty even in knowing the content of the subjective meaning of his *own* action, he should in theory experience enormously greater difficulty in attaining an understanding of the meaning of the action of other interacting individuals. In practice, of course, interaction may often proceed with a tolerable degree of mutual understanding and this may allow interaction to be not only in *some* sense meaningful to the participants, but also reasonably *functional* in terms of serving the participants' needs. At any rate, the shared linguistic conventions of language in human interaction often enable meaning to be conveyed with the least ambiguity.

Since social action may involve the actor himself in ascribing meaning to the behaviour of others, the task of sociology is to that extent more complicated. For in

order to understand the action of actor A in terms of its subjective meaning, we may first have to understand the meaning which actor A in a given case ascribed to the behaviour of *another* actor, actor B. But, complicated or not, the focus of our attention would still be upon the subjective meaning of *actor A's action* (he being the object of our investigation), and *part* of this subjective meaning would be the meaning which he (actor A) placed on the action of actor B.

This should not be taken in any way to suggest that there are two 'types' of subjective meaning involved in the sociological task in that case (i.e. the subjective meaning of actor A's action and that of actor B's action). Let us assume that the (Weberian) sociological task is directed towards attempting to penetrate the subjective meaning of action of a given actor whom we may call 'ego'. Thus, in so far as ego, the individual under investigation, himself ascribes meaning to the action of another individual (whom we may call 'alter'), the latter ascription of meaning becomes part of the subjective meaning of ego's action, and is of interest for sociological purposes. We must assume that ego has oriented his action at least partly by reference to the meaning which he has ascribed to alter's action.

The importance of this stance in the context of normative meaning can be seen if we turn our attention now towards a consideration of the principal functions of the social norm. On a narrower perspective, however, we should be aware that *judicial* social action involves a judge in ascribing meaning to the action of litigants and other interested parties. An understanding of the subjective meaning of the *judge's* ('ego's') action, as we shall later find, is necessary for attaining an insight into the nature of the conceptual apparatus of the jural relation.

For purposes of the present discussion, then, a social norm may be defined as a deontic proposition which functions as a reference point firstly for the *evaluation*, and secondly for the *orientation* of an individual's *own* social action (e.g. that of ego). If, according to Weber, action is 'social' in so far as by virtue of the subjective meaning attached to it by an actor (e.g. ego) it takes account of the behaviour of others or another (e.g. alter) and is thereby oriented in its course, the taking account of alter's behaviour may involve ego in ascribing *evaluative* meaning by virtue of the same or a different social norm to the behaviour of *alter*.

It follows that a third function of the social norm is as a reference point for the evaluation by *one* individual (ego) of the behaviour of *another* individual (alter). But since an act of evaluation of this type is *part* of the subjective meaning of ego's social action, in terms of which ego orients his own action, the use by ego of the social norm for the evaluation of alter's behaviour is merely part of the ostensible function of the social norm as a reference point for the orientation of *ego's* social action. Here the act of 'orientation' in question merely follows upon an act of 'evaluation' of alter's behaviour by reference to the appropriate social norm.

Arising from this, we can assert a fourth function of the social norm which is as a means of *regulating* the action (social or otherwise) of one individual (or plurality of individuals) in a question with, or in relation to, another individual (or plurality of individuals). This function is based on the recognition that the individual in evaluating and orienting his social action by reference to a social norm takes account of the behaviour of 'others' in the sense either that he expects 'another' to act in the manner prescribed by the norm or that he feels obliged *himself* to act in that manner in fulfilment of the expectation of 'another'. The regulative function is also based on

the recognition that when action is so oriented, it is social action at least in a broad sense that it involves the individual in taking account of the behaviour of others by acknowledging the normativity of the social environment which consists of innumerable 'others' who both promulgate and also evaluate and orient their social action by reference to social norms.

Some observations will now be made in order to clarify certain aspects of this suggested outline of the principal functions of the social norm.

When it is said that a norm functions 'as a reference point' this means that the norm is referred to as an *idea*: a motivating normative idea embodying the notion of 'ought' (or 'shall' or 'must') in relation to human action. A norm does not in any sense physically *enact* human action. It is a proposition embodying ideas which motivate action. Hence the term 'reference point' means simply that norms are propositions which are referred to for the purpose of evaluating and orienting human action.

A social norm may in any given case constitute only *one* motivating idea within the complex of ideas which constitute the subjective meaning of the action in question. In such a case, if an actor has in fact oriented his action by reference to a social norm, his action may be understood as having been at least *partly* motivated by the norm. We should note that the orientation by an individual of his action by reference to a social norm does not necessarily imply *compliant* orientation in the sense that the individual attempts to make his action conform to the prescription contained in the norm. Orientation by reference to a norm may be compliant or non-compliant orientation in that the norm may constitute a reason for acting in some way *other* than that prescribed by the norm. For example, a legal norm may provoke civil

disobedience, or, as Weber appropriately remarks,

"A thief orients his action to the validity of the criminal law in that he acts surreptitiously. The fact that the order is recognized as valid in his society is made evident by the fact that he cannot violate it openly without punishment."²⁴

According to the preceding discussion, one of the functions of a social norm is as a reference point for the evaluation by an individual (e.g. ego) of his own social action. According to this ego in acting socially (and therefore in taking account of the behaviour of others, e.g. alter) may, for example, act socially by evaluating his own action in terms of whether he is under an obligation (or actually feels obliged) to \emptyset in fulfilment of alter's actual or presumed expectation that he (ego) should \emptyset .

Another function of the social norm is as a reference point for the evaluation by ego of alter's behaviour (i.e. action, whether social or otherwise) according to which ego may, for example, evaluate alter's behaviour in terms of whether or not alter has complied with an obligation imposed by a social norm. (In such a case the obligation in question may be owed by alter to anyone, including ego.)

In each case, the act of evaluation involves the actor in a purely *mental* judgmental act consisting of a mental 'calculation' about the applicability or non-applicability (and the manner, incidence, method or appropriateness etc. of applicability or non-applicability) of a social norm with respect to behaviour in a given case. As we shall see, 'orientation' (by reference to a social norm) differs from this in that orientation should be seen as the result or outcome of a process that *involves* an act of evaluation. The point is that orientation involves a conscious alteration (or adjustment or re-adjustment) of behaviour which consists of an effort of will to 'produce' 'external' acts, which induce or bring about (according to von Wright's analysis²⁵) a

perceptible 'change' in the 'real world.'

An act of evaluation is probably of sociological interest only in so far as it *leads to* the *orientation* of action, even if the orientation in question is only a manifestation of the content of the evaluative act, for example a verbal utterance that a given act complies with a social norm, or something beyond this, such as verbal criticism for the supposed contravention of a norm.

For present purposes, an act of evaluation may involve a judgment that a given action, whether past, present or future (future action being *hypothetical*) complies with or is in conformity with the prescription contained in a social norm. The evaluative judgment in question may relate either to ego's judgment in relation to his own past, present or future action, or ego's judgment in relation to alter's past, present or future action.

Evaluative judgments may be of various kinds and are by no means restricted to uncomplicated judgments of whether an act complies with a given norm. In fact a judgment of compliance or non-compliance is relatively uncomplicated. Conceptually more complex judgments may include (for example) whether an act is *intra vires* or *ultra vires* relative to a power; whether a deed is valid or invalid relative to conditions for the recognition of the deed; whether someone has 'capacity' to act in a certain way; and whether an argument is within or outside the scope of a doctrine. More concrete examples are, of course, to be found in a specifically legal context.

If the act of evaluation is a purely mental judgmental act, the act of *orientation* by contrast, as we suggested above, involves both a 'mental' aspect being the purposive or

conscious mental effort to change or direct one's action in a certain way, often following upon an act of evaluation in the sense described, and also an overt or 'externally' perceptible action which is the realisation (whether successful or unsuccessful) of the mental effort. Here the overt action consists of muscular movement of some sort. No attempt will be made here to elaborate upon the idea of a 'mental effort' in terms, for example, of conscious or unconscious motivations of the type expounded in psychological theory. For present purposes we should simply accept a (hopefully not too misleading) commonsense notion of 'mental effort' in the hope that this will serve in some way to assist us to understand the orientative function of social norms.

The orientation by an individual of his action by reference to a social norm may be preceded by one or more acts of evaluation which constitute a basis for the acts of orientation. If the norm in question is 'internalised' in the sense of Simmel's analysis,²⁶ there may be no conscious evaluative act, the action in question being in some sense habitual.

Accepting, then, that an act of evaluation (by reference to a social norm) may precede an act of orientation (by reference to the same or different social norms), it may be helpful to identify three modes of evaluation which constitute a basis for the orientation by ego of his action.

1. Evaluation by ego of ego's *own* action by reference to a social norm (e.g. social norm x).
2. Evaluation by ego of *alter's* action by reference to a social norm (e.g. social

norm y).

3. Evaluation by ego of ego's own action by reference to a social norm and evaluation by ego of alter's action by reference to a social norm (e.g. either social norm x or social norm y).

This third mode of evaluation combines the first two modes, and each should be understood to constitute a basis for the orientation of *ego's* social action, in the sense of forming part of the subjective meaning of his action.

To make matters more concrete, we will consider an example of the mode of evaluation which combines the first and second modes (i.e. the third mode). For purposes of our example, the object of our investigation is the action of Hamlet (ego). We may assume the example to be valid regardless of the justification for the existence of norms x and y used in the example, whether moral, legal or otherwise.

According to our example then, in terms of norm x Hamlet is under a duty in a question with Rosencrantz (alter 1) to punish anyone who fails to comply with norm y, and Rosencrantz has a right in a question with Hamlet that Hamlet should so punish anyone.

In terms of norm y, Guildenstern (alter 2) is under a duty in a question with Rosencrantz to sweep the floor, and Rosencrantz has a right in a question with Guildenstern that Guildenstern should sweep the floor.

As it happens, for purposes of the example, Guildenstern fails to sweep the floor. In

this case Hamlet may orient his action on the basis of the following acts of evaluation, which are, of course, by no means exhaustive of possible acts of evaluation by reference to norms x and y. In the first place there is the act of evaluation involved in conceiving of Guildenstern's failure to sweep the floor as a 'contravention' of, or failure to comply with, norm y. Here ego (Hamlet) uses norm y as a reference point for the evaluation of the behaviour of alter 2 (Guildenstern).

In the second place, there is the act of evaluation involved in Hamlet's conceiving of his own intended future action (i.e. whether or not to punish Rosencrantz at some future time) as complying with (or failing to comply with) norm x. Here ego (Hamlet) uses norm x as a reference point for the evaluation of his own (intended) social action. Such action is 'social' to the extent that it takes account of: (1) alter 1 *simpliciter* or (2) alter 1's behaviour in the sense of his supposed probable expectation that ego should comply with norm x, or (3) alter 1's behaviour in the sense of his probable responsive action should ego fail to comply with norm x (e.g. criticism) and so on.

If Hamlet punishes Guildenstern, then in Weberian terms the subjective meaning of his action is accountable in part to Hamlet's decision to orient his action by reference to norm x and norm y. This would involve firstly, separate acts of evaluation by reference respectively to norm x and norm y as described above, and secondly, an act of compliance with norm x. By so orienting his action, Hamlet also acts socially since by virtue of the subjective meaning of his action he takes account of the behaviour of others. On the one hand he ascribes evaluative normative meaning to the behaviour of Guildenstern (alter 2), and on the other hand he takes account of the behaviour (or probable behaviour) of Rosencrantz (alter 1) in any of the senses, which are by no means exhaustive, mentioned above.

In summary, then, orientation involves a conscious alteration or adjustment of action, and where orientation is by reference to a social norm, the norm may be said to constitute part of the subjective meaning of the resultant action. In terms of a purely empirical causal analysis, as we suggested earlier, the investigator (without conferring 'meaning' on action as manifested by, for example, words or gestures) may note the constant conjunction or regular sequence of 'events' in the sense that one event (e.g. Hamlet's asserting: 'I propose to punish Guildenstern in compliance with norm x') is invariably followed by another event (e.g. Hamlet's striking Guildenstern on the jaw). This 'meaning-impoverished' sequence of events may then be ascribed meaning in accordance with Weber's methodological requirement.

As we have found, one of the functions of the social norm is as a means of *regulating* the action (social or otherwise) of one individual (or plurality of individuals) in a question with, or in relation to, another individual (or plurality of individuals).

The regulative function of the social norm, as suggested earlier, arises from the recognition that the individual does in fact evaluate and orient his social action by reference to social norms, and also orients his action by reference to the evaluative normative meaning ascribed by him to the action of others. It follows that social norms may be used as a means of *inducing* individuals so to orient their social action and may often be used in combination with other types of inducement (e.g. physical or psychological coercion).

The regulative function is comprehensible in terms of the objectives which the regulation is intended to secure. If individuals voluntarily subject their intended

interaction to governance by social norms this self-imposed curtailment of freedom may be understood in terms of the specific individual or collective goals which the interacting participants wish to achieve. For example Parsons' chess game scenario assumes that both players have either overtly or by implication agreed to be bound by the rules in that they orient their actions, wholly or partly, by reference to the rules.

Meaningful interaction is expressed through the objects which the game is designed to secure, and any other ends which the players *personally* find to be secured by the game as such. For players, the voluntary 'giving up' of freedom by the imposition on their interaction of rules in a sense allows the players 'freedom' to interact meaningfully towards a shared pursuit. In the case of chess the competitive element is expressed, by virtue of the rules, through the medium of the playing apparatus of the game. As John Finnis appropriately remarks,

"The third basic aspect of human well-being is play. ... each one of us can see the point of engaging in performances which have no point beyond the performance itself, enjoyed for its own sake. The performance may be solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal..."²⁷

In the same way, when parties enter into a contract they subject their action to governance by norms in order to achieve certain ends which are considered useful or desirable. But the voluntary subjection of action to regulation by social norms is by no means the most typical manifestation of the regulative function. Regulation may be imposed through relationships of *authority*, both legitimate and illegitimate, and may indeed weigh against the will of those upon whom it is imposed. In this context, the nature of the authority relationship may enable us to understand the nature of the regulation involved. Regulation, then, may facilitate interactional stability (among those regulated) or may assist in the resolution of confrontational interaction or allow

societal objectives to be achieved.

But on the other hand regulation within an authority relationship may secure *repression* of a minority (or less powerful) group, or facilitate the exploitation of one sector of society to the advantage of another sector. Clearly, an understanding of the nature and effects of regulation must proceed from a consideration of the consequences of regulation as experienced by those subject to it, and also those who 'do the subjecting'. The 'true' nature of a repressive authority relationship (especially legal authority) may be revealed in the content of the 'repressive' legal norms. The norms in question may serve as a reference point for the orientation of *official* action in terms of being primarily directed towards exacting sanctions against (e.g.) a minority group. We may find that in such a case it is merely a secondary function of the legal norms promulgated by the authority to regulate the action of the minority group, especially if the norms in question are in some sense morally repugnant to that group. To that extent, legal repression may also be understood in terms of its ability to secure the continued existence of a political power group and to facilitate the suppression of political dissent.

More generally, when we assert that a social norm regulates the action of one or more individuals *in a question with or in relation to* one or more other individuals, this acknowledges the necessary and inherent *relationality* of human social action. The regulative function of the social norm assumes that ego acts socially. Ego, therefore, by virtue of the subjective meaning of his action, takes account of alter or the behaviour of alter in orienting his action by reference to the social norm. What this means, more concretely, is that, adopting ego's point of view, if the social norm is to be intelligible in a social context in which 'egos' in acting socially take account of

'alters' or the behaviour of 'alters', it seems to follow that the social norm must reflect this relationality by embodying an 'oughtness' with respect either to the action of ego or the action of alter in relation to the alter with respect to whom ego is acting socially.

In terms of the present analysis, this relationality is inherent in the structure of a social norm, and any norm which does not possess this structure cannot intelligibly be a *social* norm. So unless a social norm functions in some way to regulate the action of one person in a question with one or more other persons or is at least capable of fulfilling this function by virtue of its structure, it cannot be a social norm.

Thus, if ego is acting socially and making reference to a social norm in so acting, he (ego) may consider (by reason of the social norm in its application to his situation or that of others) either (1) that he (ego) ought to act in manner \emptyset in a question with alter, or (2) that alter ought to act in manner \emptyset in a question with him (ego), or (3) that alter 1 ought to act in manner \emptyset in a question with alter 2, and so on. But the social norm is only intelligible *as* a social norm in a context in which one person ought to act in a particular manner with respect to *other* persons, for if we imagine a norm existing in a social vacuum (for example, ego has a duty which does not avail against anyone at all) such a duty is not intelligible as a social duty because the person of inherence (i.e. the person having an expectation or right) must be at the *same time* the person of incidence (i.e. the person having an obligation or duty).

Such a norm may of course, be intelligible as a precept embodying a subjectively prudential course of action, possibly valid only to the person to whom the norm applies. Norms having a strictly religious derivation (for example, those governing

acts of thought) may, in a secularist and a-metaphysical sense, even if they do not involve social action in the sense of the present analysis, involve a relationship of a kind similar to a social relationship in which God is conceived in anthropomorphic terms. This seems especially true of those acts of thought which, according to St. Thomas Aquinas, constitute sins of thought.²⁸

This seems a convenient point, then, to conclude our observations on the principal functions of the social norm. In the next part of this chapter we consider the notion of normative meaning as a basis for discussion in chapter IV of *legal* meaning.

III.4 Normative Meaning

Normative meaning has special significance in the present context not only because in purely theoretical terms it may be considered part of the broader Weberian notion of subjective meaning, but because by any view of social reality individuals *do* in fact orient their social action by reference to social norms in terms of which their action is at least in part meaningful to them. As we have seen, such meaningful orientation may follow upon purely mental evaluative acts consisting in the ascription of evaluative normative meaning (by ego) either to (1) ego's own past, present or (hypothetical) future action, or (2) the past, present or (hypothetical) future action of alter, or (3) a combination of ego's own, and alter's, past, present and (hypothetical) future action.

It is convenient to return to Parsons' model of stable interaction to consider normative meaning in that context. We may recall that according to Parsons the mutuality of

expectations (and presumably also the mutuality of obligations) arising from adherence to social norms, e.g. the rules of chess, "implies that the *evaluative* meanings of acts are shared by the interacting units in two ways: what a member does can be categorized in terms meaningful to both; ... [and] there are common standards of evaluation for particular acts."²⁹ It can now be seen that in order to attain an understanding of the actions of each player, the investigator must attempt to grasp the sense in which the subjective evaluative (and orientative) meanings of one player's actions are shared with those of the other player. The fact of the matter, as we observed earlier, is that both players overtly or by implication agree to subject their actions to governance in terms of the rules of the game. It follows that their actions then become meaningful by reference to those rules in terms of what a player may or may not do in a question with the other player and in terms of whether a particular action on the part of one player counts as a basis for a given responsive action by the other player. This process may continue successively and sequentially, according to the rules, until the game ends. Furthermore, the normative basis of interaction should be clear at the outset to *both* players.

Thus if one player (e.g. Rosencrantz) 'takes' another player's (e.g. Guildenstern's) bishop, this will be interpreted not as an attempt to disestablish the Church nor to interfere with the Lords Spiritual in their legislative endeavours, but as something meaningful not only in terms of the rules of the game, but also in terms of the internal logic of the strategic potential of the game. At this point we should note what is perhaps inordinately obvious: that the rules of chess govern how *players* are to move the playing-pieces and not how the playing-pieces themselves 'move'. It is however certainly true to a degree that the rules 'attach' in some way to the playing-pieces, for example, in the sense that the bishop may be thought of as a playing-piece which may

only move diagonally, and so on. Here we attribute the property of diagonal movement to the bishop rather than to a player. But the principal function of the rules is to regulate the action of players with respect to one another, and therefore the rules define that players may only *move* the bishop diagonally. Looked at this way, the rules define what *players* do, not what 'bishops' do.

Now because the players share the same normative definition of the situation the categorisation of the actions of each player is, according to Parsons, in terms meaningful to both players. The tendency to 'categorise' action suggests that in a sense meaning 'attaches' to action by virtue of the rules in that an action may be treated (as regards any player with respect either to his own or the other player's action) as falling into any of the following categories, which are not exhaustive: (1) a compliant action (i.e. one that complies with a prescription), (2) a non-compliant action (i.e. one that contravenes a prescription), (3) a 'dubious' action (e.g. one that is difficult to categorise either because there is doubt about the meaning of the rules themselves, or because there is doubt about whether the action in question is within the scope of a prescription), and (4) an 'irrelevant' action (e.g. Rosencrantz makes some coffee during the game. An unreasonable delay, however, may be capable of categorisation under a different head).

Turning our attention to compliant and non-compliant action, if in compliance with the rules Rosencrantz executes a two-square lateral movement of his rook, this may be interpreted by both Rosencrantz and Guildenstern as a 'lawful' move and will, in accordance with the rules, constitute a basis for Guildenstern thereupon to orient his action in response by executing an appropriate move of his own making. In so doing, Guildenstern orients his responsive action partly by reference to the meaning which he

has ascribed to Rosencrantz's move which Guildenstern, in deeming the move 'lawful' considers to be a (partial) basis for his responsive action.

If however, in response, Guildenstern executes a five-square *lateral* (not diagonal) movement of his bishop, this may be interpreted by Rosencrantz (and possibly also Guildenstern) as an 'unlawful' move and may also constitute a basis this time for Rosencrantz to orient his action in response, but not necessarily to execute a move as such. More likely, Rosencrantz will point out to Guildenstern that he has made an unlawful move and the process of interaction, possibly itself normatively oriented, may continue with a view to resolving the matter of Guildenstern's unlawful move. At this stage it might be said that in so far as interaction had until then been constituted by the playing of the game of chess according to the rules, interactional stability (in Parsons' sense) may be jeopardised by Guildenstern's unlawful move (so far as continuation of the *game* is concerned) because there is a possibility that the normative meanings of actions are not actually *shared* by the players. For example, Guildenstern may 'erroneously' (i.e. relative to, say, an 'authoritative'³⁰ statement of the rules) believe that a player may lawfully execute any of the following moves with his bishop, all of which might be consistent with Guildenstern's unlawful move: (1) lateral movement only; or (2) lateral *and* diagonal movement; or (3) lateral movement, provided the movement extends to (a) not less than three, or (b) not less than four, or (c) not less than five, squares; or (4) lateral movement if and only if diagonal movement is otherwise impossible, and so on.

'Interaction' in the sense of playing the game of chess may become *unstable* by virtue of this presumed failure to share the normative meanings of actions and may in consequence break down completely. Alternatively the players may have to redefine

the basis of interaction so that both players eventually agree upon a basis for the movement of the bishop. Indeed Guildenstern's unlawful move may be given a more 'sinister' interpretation.

There may in fact be no failure in terms of authoritative meanings of actions in that both Rosencrantz and Guildenstern know the rules or share a knowledge of at least one version of the rules which is the agreed basis for play. The point is that Guildenstern may be cheating and, like Weber's surreptitious thief, may attempt to gain an advantage over Rosencrantz while he is making the coffee. Here, Guildenstern still orients his action by reference to the rules of chess, but the rules in this situation are not sufficient to enable us to understand Guildenstern's (surreptitious) action. Here we have to have knowledge of the (uniquely?) human attribute of dishonesty.

The point here is that deliberate contravention of the rules in order to gain an unfair advantage has a meaning which is somehow extrinsic to the rules as such, and lies more appropriately in the moral realm. Morality may indeed determine the content of specific rules, such as for example, a rule prohibiting cheating. Moreover, much of the conduct of the game, whether in terms of the content of specific rules or otherwise, may only be truly meaningful because of an unfathomable background of unstated moral assumptions shared by the interacting participants. In that sense Guildenstern's surreptitious move may have a meaning (in morality) shared by both players by which they acknowledge that cheating is wrong, and therefore that a cheating move is wrong.

In this situation, clearly the evaluative meaning of actions is shared by the

participants. Hence we must modify Parsons' implied assertion that stability of interaction somehow arises from the mere *sharing* of evaluative meanings. Interactional stability arises not only from a sharing of evaluative, and therefore expectational and obligational, meanings, but also *adherence* to the rules of the game, or the rules governing any interaction.

It is convenient to conclude this discussion of normative meaning by suggesting a route that leads to the notion of legal meaning. Legal meaning should be understood as an unique type of normative meaning which depends analytically on two special features which are not exemplified in the Parsonian model of stable interaction. Legal meaning arises in the context of rules which govern interaction of a distinct type.

The first distinguishing feature of legal meaning presupposes that 'law' assumes an institutional form in the sense of Weber's category of 'guaranteed law'³¹ in which a 'coercive apparatus' either possesses or responds to an *adjudicatory* function. Hence, law in its institutional form presupposes the existence of a legal institution or system of legal institutions³² i.e. courts and tribunals, one of whose principal functions is to 'adjudicate' upon the action of litigants or other individuals with a view ultimately to the mobilisation of a specifically coercive (in the sense of sanction-exacting) institutional apparatus. In this sense the adjudicatory function could be conceived in simple terms if we inserted an *umpire* into the Parsonian model and considered the function which the umpire fulfils in that context. Briefly, the umpire does not 'do' what the players 'do', i.e. play the game. His function is basically that of making an authoritative judgment about the meaning of the actions of the players by reference to the rules of the game, and of the meaning of the rules of the game in their *application* to the actions of the players, usually in the event of a dispute between the players as

to the normative meaning of players' actions, or the meaning of rules in their application to the players' actions.

In this situation, drawing on the preceding analysis, the umpire's social action in umpiring the game, is meaningfully oriented, but not by any means exhaustively oriented, in terms of: (1) the meaning of his *own* social action evaluated by reference to social norms which define *his* adjudicatory role in a question with 'others' who may include (a) *only* the players, or (b) persons other than the players (e.g. an 'authority' of some sort), or (c) a combination of the persons in the two preceding categories, and possibly (d) others beyond that; and (2) the meaning of his *own* social action, i.e. his decision or adjudication relative to the players' action, based on the evaluative meaning which he has ascribed *to the action of the players*, that is, the action of each player with respect to the other evaluated in terms of the rules of the game.

The umpire's ascription of evaluative normative meaning to the players' action by reference to the rules of the game may differ completely from the evaluative normative meaning which each player, by reference to the rules of the game, ascribes not only to his own action but to the action of the other player with a view to the orientation of his own action.

Whether the umpire takes account, or is under an obligation to take account, of the meaning of the players' actions as conceived from their distinct points of view depends on the umpire's adjudicatory function as determined by the relationships between the umpire and each player as defined by social norms. The norms in question also govern how the players themselves act following an authoritative ruling by the umpire.

The second distinguishing feature of legal meaning arises from the recognition that the adjudicatory function involves relationships whose content is at least partly defined by social norms. In fact this assertion is simply a particular manifestation of a more general assumption that social action is definitionally, necessarily and inherently *relational*. This relationality is expressed not only in the subjective meaning of social action as such, but is reflected in the structure of the social norm.

In the example given, the normative (or 'normalised') social relationship obtaining between one player and the other player differs from that between the umpire and each player simply because the umpire is involved in an activity which, though it relates to the conduct of the game as between the players, differs completely from the activity in which the players are involved, i.e. playing the game. Nonetheless, the content of the player-player relationship may depend on the content of the umpire-player relationships, for example, in terms of the umpire's power, if any, to make a ruling accepted by the players as binding in relation to the conduct of the game.

It follows that in similar fashion the content of the umpire-player relationships as regards the umpire's role in relation to the conduct of the game must be determined in some way by the player-player relationship, as defined by the rules of the game. Clearly any ruling which the umpire makes concerns the normative meaning of the player's action or the meaning of the rules of the game in their application to the players' action. This will depend on the relationship between the players as defined by the rules of the game.

It will be recalled that a similar kind of interdependence of relationships was

encountered in an earlier example³³ in terms of which Hamlet had a duty in a question with Rosencrantz (according to norm x) to punish anyone failing to comply with norm y (which imposed a duty on Guildenstern in a question with Rosencrantz to sweep the floor). Here norm x determines the content of the normative social relationship obtaining between Hamlet and Rosencrantz, while norm y determines the content of the normative social relationship obtaining between Guildenstern and Rosencrantz. But the relationships in question are linked because the norms are linked contentually in the manner described.

In essence, this interdependence of normative social relationships is to be found in the legal context within the adjudication process and, as might be expected, this has implications for the process of ascribing legal meaning to human action or other 'facts' for legal purposes, whether in the narrower context of adjudication or in the wider context of the mobilisation of a legal 'coercive apparatus'. But we will give further consideration to interdependence later in this chapter.

Throughout the preceding discussion we have adverted to the importance of the relationality of human social action and it is now appropriate to consider relationality as a preliminary to the discussion, in the next chapter, of legal meaning.

III.5 The Relationality of Social Action

It might be argued, in the sense of the preceding discussion, that social action is relational in that it is in some sense intelligible for a 'meaningful actor' to conceive an ideative linkage or imaginative connection between certain objects of cognition, or

ideas, by virtue of some common property which is found either to inhere in, or to attach to, those objects or ideas.

In the context of social action, following Weber's definition of social action, the 'objects' or 'ideas' might be said to correspond, on the one hand, to the subjectively meaningful social behaviour or action of the 'self' (i.e. ego: the actor who is involved in meaningful social activity), and on the other hand, to an actor other than the 'self' (i.e. alter) or to the behaviour or action of that actor, who, or whose behaviour, is 'taken account of' by ego. Ego's act of contemplating or of taking account of alter (or of alter's behaviour) may, from ego's point of view, in itself constitute sufficient imaginative connection to enable the existence of a 'relationship' between himself (ego) and alter to be acknowledged. But a mere act of thought on the part of one actor is probably insufficient to enable the investigator to assert the existence of a *social* relationship, because, according to Weber's definition, the social relationship consists in "the behaviour of a plurality of actors in so far as, in its meaningful content, the action of each takes account of that of the others and is oriented in these terms".³⁴ It will be recalled that Weber added a further requirement: "that there should be at least a minimum of mutual orientation of the action of each to that of the others".³⁵

The relationship, then, so far as social, might be said to be constituted, firstly, by acts of thought by which an imaginative connection is made by an actor (as part of the 'subjective meaning' of his action) by reference to a 'content' which is the common property or linking medium, and secondly, by the corresponding orientation of the action of each to that of others. The common property or linking medium which is the 'content' of the relationship may be said to consist, correspondingly, of, firstly, the 'ideas' which govern the meaningful content of the relationship, for example, ties of

mutual affection, friendship, a common purpose, natural (family) connections, religious belief, a conflict of interests or confrontation; and secondly, the overt action, perceived by the interacting participants to be more or less oriented by reference to the relevant ideative content.

The perception by participants of the appropriate action may constitute part of what links the participants ideatively, either in the sense of 'confirming' an existing linking medium which constitutes the meaningful basis of their action (e.g. mutual affection, etc.), or in the sense that since each participant is experiencing to a greater or lesser extent the overt behaviour of every other participant, this, in a minimal sense, links the participants in a shared experience of 'external' events.

In this latter sense mere overt action could in itself constitute the common property or linking medium which might enable an actor to assert the existence of a 'relationship', but it is doubtful whether this would constitute a Weberian *social* relationship.

A social relationship might be said to be constituted by a course of social action in which each actor acts with respect to other actors, and therefore takes account of the other actors or their behaviour, by making reference, among other things, to some acknowledged common property or linking medium. From ego's point of view the relationality of his social action lies in the subjective meaning of his action by virtue of which, in taking account of alter or of the behaviour of alter, he *conceives* of his action *in relational terms* by reference to the appropriate linking medium, whatever its content may be. This linking medium may be found to be *intersubjectively* valid: i.e. taking successively each and every participant in the interaction process, and treating him as 'ego', we may find that the property which links the participants is shared in

some way, to a greater or lesser extent.

Now, as we observed earlier, where a social norm exists, and is empirically valid in the Weberian sense,³⁶ then social action which is meaningfully evaluated and oriented by reference to the norm may also be relational in the sense that the norm functions, by virtue of the subjective meaning of the action in question, as at least *one* linking medium, that is, a medium by which ego's past, present or (hypothetical) future action may be normatively linked with the past, present or (hypothetical) future action of alter. In similar fashion, ego may use the norm as a medium by which alter 1's past, present or (hypothetical) future action may be normatively linked with alter 2's past, present or (hypothetical) future action, for example where the norm is used as a reference point for the evaluation by ego of the action of alter 1 and alter 2 with a view to the orientation by ego of his own action.

In order to be clear just how the social norm operates as a medium of relationality we will consider a suggested scheme of structural elements of the right-duty social norm which itself reflects the relationality of social action. By looking at the social norm as a medium of relationality we may hopefully discover what elements are 'linked' or 'connected', by means of the social norm.

Based loosely on two separate analyses, that of J.W. Harris,³⁷ and that of John Finnis,³⁸ the following structural elements of a typical social norm might be identified. These structural elements should not be treated as being exhaustive since there are many types of social norms serving manifestly different functions:-

1. identification criteria of persons of inherence: i.e. those having an 'expectation'

or 'right' that *other* persons should act in a prescribed manner;

2. identification criteria of persons of incidence: i.e. those having an 'obligation' or a 'duty' to act in a prescribed manner;
3. deontic operator (e.g. 'shall', 'will', 'may', 'ought', 'should', etc.); and
4. description of an act, act-situation, action or course of action prescribed as being the subject of the obligation or duty.

It is not suggested that any given formulation of a social norm will on the face of it contain *all* these elements together, for it takes little effort to imagine social norms of the form: 'A has a duty to \emptyset ', or 'A has a right to \emptyset ', or 'A has a right to that book' or 'one ought to \emptyset '. In the case of each formulation the social dimension of what are supposedly social norms is concealed precisely because there may be uncertainty as to the identity of the person or persons whom A in acting socially is taking, or ought to take, account of in so acting, or as to the nature of the behaviour of such person or persons which A is taking, or ought to take, account of in acting socially.

Hence 'A has a duty to \emptyset ' does not seem intelligible in a social context unless we receive an answer to questions such as: 'to whom does A owe this duty?' or 'whom does A have in mind, or whose expected future behaviour does A take account of if, in acting socially, he \emptyset 's?'. We can attempt to answer these questions by reformulating the norm 'A has a duty to \emptyset ' as (e.g.): 'A has a duty to \emptyset in a question with B'.

Since this implies firstly that B has a right that A should \emptyset in order to fulfil both A's

duty (or obligation) and B's right (or expectation), and secondly, that owing to A's having the appropriate duty it may be said (regardless of any higher justification) that A 'ought to' or 'should' or 'must' ϕ in a question with B, we might then assert that the structural elements described are found in the social norm in the example in the sense that (1) A is identified as the person of incidence, (2) B is identified as the person of inherence, (3) there is, or is implied, a deontic operator, and (4) act ϕ is identified as the act which is subject to the duty or obligation.

If we reformulate a right-duty (or expectation-obligation) social norm into minimal structural elements which accentuate the social context in which such norms are intelligible *as* social norms, this should presumably afford a basis for comprehending the nature of the relationality of the social action regulated by the norm. To that end, it is important to consider the way in which actors whose action is governed by a social norm conceive of their action in relational terms by virtue of the norm. Social norms may then be seen as a medium of relationality, that is, a medium by which the participant actors' action is normatively linked.

Using our earlier example, let us imagine that Guildenstern has a duty in a question with Rosencrantz to sweep the floor. The norm might be in the following terms: 'Guildenstern shall sweep the floor, if so requested by Rosencrantz'. The four structural elements of the norm are explicitly present here, although the norm only *implies* the person of inherence (Rosencrantz) because Guildenstern may owe the duty to someone other than Rosencrantz, the point being that Rosencrantz may simply be the person appointed to 'do the requesting'. But anyhow, we assume Rosencrantz to be the person of inherence.

Let us also imagine that the norm is empirically valid for both Rosencrantz and Guildenstern, in the sense that they accept it as governing their relationship. Thus, it is treated, firstly, as regulating Guildenstern's action in a question with Rosencrantz, secondly, as a reference point for the evaluation and orientation by Guildenstern of his own social action and also as a basis for the orientation of the action of Rosencrantz, if, for example, Guildenstern should fail to sweep the floor, and thirdly as a means by which evaluative and orientative normative meaning may be ascribed by each participant to his own action and to the action of the other participant.

Now if we are to understand the sense in which the social norm defines a relationship between Rosencrantz and Guildenstern we need only identify as one of the 'common properties' which thus link them, the social norm. In this way an ideative linkage or imaginative connection is conceived between past, present or (hypothetical) future action.

According to David Hume, a relation exists when two ideas are connected together in the imagination and a comparison is drawn between them. Hume calls this a 'philosophical relation'.³⁹ The connecting principles may include resemblance or similarity, identity or quality. In a situation where two parties subject their interaction to governance by a mutually acknowledged social norm, the connecting principle of *identity* seems to be present at a number of levels which in many ways correspond to the structural elements of the social norm. To be more concrete, and in terms of the example, identity is present on the following suggested levels.

First, there is identity, adopting the point of view either of Rosencrantz or of Guildenstern, in the sense that each recognises that Rosencrantz's expectation (or right)

and Guildenstern's obligation (or duty) both relate to the *same* subject matter which is the act to be performed by Guildenstern, the act of sweeping the floor.

Second, again adopting either viewpoint, each is presumed to recognise that the act in question (sweeping the floor) is to be performed by the *same* person: Guildenstern.

Third, again adopting either viewpoint, each is presumed to know *who* are involved in this process in the sense that each knows the identity of his 'opposite number'. (Ego knows that both ego and alter are involved in this process).

Fourth, again adopting either viewpoint, each is presumed to know that the same norm governs their conduct and that there is identity to a greater or lesser extent in the mind of each participant as to the evaluative and orientative meanings of actions.

Fifth, taking Guildenstern's point of view since he has the obligation to act, Guildenstern, in evaluating (in advance of acting) his intended social action and orienting his action by reference to a social norm which makes implicit or explicit reference to Rosencrantz, acts *socially* in the sense that he takes account of Rosencrantz, or of his expected responsive behaviour. In this sense, Guildenstern at each stage of the process, from 'pre-action' until 'post-action' imaginatively links 'himself' or his imagined intended future, then present, then past action (all of which correspond to the act of sweeping the floor at the appropriate time) with Rosencrantz by virtue of the social norm in terms of all or any of the linking factors already mentioned. But other factors can be mentioned: for example, whether Guildenstern considers that his action will please Rosencrantz, or fulfil Rosencrantz's expectations, or give Rosencrantz 'no reason' to criticise him or to punish him, and so on.

Sixth, taking Rosencrantz's point of view, his role is essentially passive in that he need not 'act' (overtly) to comply, like Guildenstern, with the social norm. Nevertheless, Rosencrantz presumably has an interest in having his expectation fulfilled that Guildenstern comply with the obligation prescribed by the social norm. To this extent Rosencrantz may, in acting meaningfully, take account of Guildenstern's behaviour *ex post facto* in terms of, for example, categorising it as compliant or non-compliant action, this being the evaluative normative meaning which Rosencrantz ascribes to Guildenstern's action. This may then constitute a basis for Rosencrantz's action. Throughout this process, however, Rosencrantz, like Guildenstern, ideatively links 'himself' or his imagined intended future, present and past action with Guildenstern, again by virtue of the social norm in terms of all or any of the linking factors already mentioned, but essentially reflecting Rosencrantz's passive role, the point being that he need only 'expect' Guildenstern to fulfil his obligation and need not 'act' in order to fulfil an obligation (like Guildenstern). But he may well 'act' in consequence, for example, of Guildenstern's fulfilling, or failing to fulfil his obligation.

Thus the normative relationality of the social action of Rosencrantz and Guildenstern respectively lies in the intersubjectivity of ideas about their own and each other's normative positions in the sense that at various points there exist identity of ideas, or minimally, similarity or resemblance of ideas, but sufficient, certainly, to enable each participant to conceive an ideative linkage by reference to an appropriate social norm governing their interaction.

It is possible then, in this sense, to refer to the normative situation obtaining between Rosencrantz and Guildenstern as a normative relationship given that each participant,

whether consciously or unconsciously, conceives of his situation relative to the other participant *in terms of* its relationality. This relationality derives from the linking medium of social norms, or *other* such media, e.g. ties of affection, which define at least in part the actual obligatory or expected behaviour of participants. It follows that someone other than the immediate participants (for example, an investigator) based on his experience of similar relationships with others may thus empathically ascribe the quality of relationality to the subjective meaning of the action of interacting participants. Such an ascription would furthermore be based on the assumption derived from experience that relationality of this type actually constitutes an *aspect* of subjective meaning.

In the same way, an investigator may comprehend the action of someone who himself ascribes normative relationality to the past, present or future (hypothetical) action of others with a view to the orientation of his own action. This is important in the present context in that if we attempt a sociological inquiry into judicial action we find that a judge conceives normative relationships as obtaining between individuals based upon their (or others') action or upon natural occurrences attributed to such action. His conception, as we shall later argue, is specifically in terms of *jural relations*.

If a judge orients his action subjectively meaningfully by reference to a jural relation which he conceives as obtaining between litigants, in terms of the linking medium of a legal norm, then arguably sociological interest must focus on the jural relation as a component of the action of the judge. But interest should not be diverted from the action of others, such as solicitors, advocates, bankers, accountants, and so on. The point here is that other categories of actors, or position-occupants, may attempt to orient their action by reference to the same, or similar, criteria used by judges. This

is because, firstly, they ascribe the quality of 'authoritativeness' to judicial pronouncements, and secondly, they treat as worthy of close attention any modes of legal thought or reasoning employed by a judge in issuing a judgment which leads to the mobilisation of a 'coercive apparatus'. The 'coercive apparatus' in question can be relied upon to take action, coercive or otherwise, in order to give effect to such a judgment.

This much has been said before, but in the present context it is the concept of the jural relation as an ideative device employed in legal reasoning that is important precisely because it is a constituent of the subjective meaning of causally significant modes of social action.

Before considering how the concept of the jural relation fits into the general notion of legal meaning it is helpful to return to a theme which was not fully explored at the conclusion of part 4 of this chapter: that of the relationships obtaining between (firstly) player and player and (secondly) each player and umpire in the context of a process of interaction such as a game. A preliminary examination of the nature and content of these relationships might enable us to identify similarities between these relationships and those which obtain between litigants and the judge in the context of litigation before courts of law.

III.6 Relationality in the Game Model

As a starting point, we may recall that the following differences were noted as to the activities of players and umpire respectively. In the first place, the umpire does not

do what the players do. He 'umpires' or adjudicates, he does not play the game. But depending on the nature of the relationship between umpire and players, what the players do will be affected by what the umpire does if he is called upon to make a ruling, while conversely, what the umpire does will be affected by what the players do.

In the second place, the normative meaning which in the course of the game a player ascribes to his own action and to the action of his opposite number with a view to the orientation of his own action, may, again depending on the nature of the player-player and player-umpire relationships, though it need not necessarily in the case of either player, *differ* from that which the *umpire* ascribes to the actions of each player, with a view to the orientation of his own (adjudicatory) social action.

These differences accentuate the interdependence of the relationships involved and this is revealed in the manner in which the social norms are contentually linked. For example a duty under norm x may be dependent upon the perceived violation of a duty under norm y.

It is helpful now to consider the interdependence of the relationships described by reference to the game paradigm. In this way we may understand not only the nature and content of the relationships in question, but also the nature of contentual linkages between norms.

In the game model, let us imagine firstly that Rosencrantz and Guildenstern agree to play chess according to the rules. These may be expressly declared in an 'authoritative' source. But authoritative statement of the rules is by no means

necessary. All that is necessary is that the rules must be *known* to the players otherwise the normative meanings of acts may not be shared by them. Thus, given that the players subject their meaningful interaction to governance in terms of rules, the content of the relationship obtaining between them may be articulated in terms of expectations (or rights) and obligations (or duties).

For convenience, we will distinguish player-player relationships from player-umpire relationships. The former will be termed *substantive* relationships and the latter *adjective* relationships.⁴⁰ The point of this distinction is that adjective relationships are *predicated upon*, and their content is partly determined by norms defining substantive relationships. To that extent the relationships are interdependent in the sense already considered. More fundamentally, adjective norms define the content of the *umpire's* action.

We should imagine secondly that Rosencrantz and Guildenstern by agreement establish a system of *adjective* relationships between themselves and Hamlet in his role as umpire. This may involve norms which confer upon Hamlet a power to make an authoritative ruling on any disputed question arising between Rosencrantz and Guildenstern in the course of the game. Any such ruling relates to the *substantive* relationship between Rosencrantz and Guildenstern as defined by the rules of the game. In terms of the adjective norms, a ruling by Hamlet is a basis for the orientation of the players' action and has the same 'status' as any uncontroversial or unchallenged move by a player in that it 'induces' a responsive action by the player to whom it applies.

To clarify matters further, let us suppose that the adjective relationships between

Hamlet and the players are governed by the following (Hohfeldian) normative power,

e.g.:

Hamlet has a power in a question with each player (on being so requested), to make a final and binding ruling with respect to any disputed matter arising during the course of the game relating to the conduct of play.

Now without pre-empting the discussion in chapter V of Hohfeldian legal powers and in order to fix ideas, it is useful to make some preliminary observations on the nature and function of normative powers in order to understand the adjective relationships obtaining between Hamlet and the players in the example given. As we will later consider, there are certain power-liability norms which confer upon the person of inherence (or power-holder) not merely a specific right that another (i.e. a person of incidence or liability-bearer) should act in a certain manner (e.g. \emptyset) but a range or spectrum of possible rights, defined in the norm, which the person of inherence *may* have in a question with the person of incidence. This spectrum of rights depends upon, firstly, the discretion of the person of inherence, secondly, the exercise of the power (which concretises the relationship into a right-duty relationship), and thirdly, the validity of the power exercise: i.e. whether it is *intra vires* or *ultra vires* with respect to the power-liability norm.

The scope of the discretion which the person of inherence has is defined in the norm. For instance, there may be discretion in the *choice* of person of incidence, or in the *content* of the right arising on the exercise of the power, and in the appropriateness of the 'facts' inducing a power exercise. In the example, the assumption is that Rosencrantz and Guildenstern have conferred power upon Hamlet to the effect that their actions will be subject to Hamlet's 'rulings' with regard to the conduct of play. To that extent, Rosencrantz and Guildenstern voluntarily restrict their freedom of

action by subjecting it to Hamlet's adjudicatory power.

The relationship between Hamlet and each player *concretises* into a right-duty relationship upon Hamlet's exercising his power in a given case. It follows that by virtue of the (unexercised) power, the possibility exists of innumerable (individuated) right-duty relationships obtaining between Hamlet and each player. The following are examples: a right as against Rosencrantz to make a ruling that a diagonal movement of his rook is unlawful; a right as against Guildenstern to make a ruling that a lateral movement of his bishop is unlawful; a right as against Rosencrantz to make a ruling that a reverse movement of his pawn is unlawful; a right as against either player to make a ruling that a delay in making a move, if deemed unreasonable by Hamlet, is unlawful; and so on.

The content of a right-duty relationship between Hamlet and either player upon the (valid) exercise of a power is determined by the content of a *ruling*. For example, Hamlet might order that an unlawfully moved rook be returned to its original place, and that another (lawful) move be made. The power-liability norm may additionally empower Hamlet to impose a discretionary penalty.

It is a question of 'validity' whether any ruling issued by Hamlet is accepted by the participants as a sufficient basis for orientation of action. The validity of any ruling or penalty depends on whether it is *intra vires* the power conferred. Thus, a judgment is made as to whether the ruling is 'conceptually within' the power, the scope of which is descriptively given in the norm.

Examining more closely the relationships obtaining between Hamlet, Rosencrantz and

Guildenstern, we find that there are several *systems* of (actual or potential) relationships here: (1) those between Rosencrantz and Guildenstern (substantive), (2) those between Hamlet and Rosencrantz (adjective) and (3) those between Hamlet and Guildenstern (adjective). Unless Hamlet is called upon to give a ruling, the system of relationships obtaining between Rosencrantz and Guildenstern is defined *solely* by substantive norms, i.e. the rules of the game. If Hamlet gives a ruling, the system of relationships obtaining between Rosencrantz and Guildenstern is defined by a more complex normative regime which includes the following elements: (1) the substantive norms directly governing the Rosencrantz-Guildenstern relationship (the rules of the game); (2) the adjective norms governing the Hamlet-Rosencrantz and Hamlet-Guildenstern relationships ('adjudicatory' power-liability norms) and (3) the ruling itself.

A ruling may redefine the substantive relationships but specifically addressing any issue in dispute. Alternatively, it may only reaffirm the position obtaining between the players as they already understand it, but it may be that in requesting Hamlet's intervention the players merely seek the benefit of a third-party opinion. As a deontic proposition, the ruling functions for each player not only as a reference point for the evaluation and orientation of *his* action but for the evaluation by him of the action of his opposite number with a view to the orientation of his action.

The matter, of course, is not exhaustively accounted for in terms of substantive relationships obtaining between Rosencrantz and Guildenstern as 'varied' by Hamlet's ruling. For, as we have seen, there are two further quite distinct systems of normative relationships obtaining between the participants: those between Hamlet and Rosencrantz and between Hamlet and Guildenstern.

If we seek to examine the subjective meaning of judicial action based on the simplified situation of the umpire (Hamlet) in the chess game model, it is necessary to grasp the relationships obtaining between the interacting participants as conceived by, and from the point of view of, the *umpire*, rather than as conceived by, and from the point of view of, any player. The assumption here is that the umpire's action is similar to *judicial* action.

In the model Hamlet conceives a system of relationships as obtaining between himself and each player by reference to adjective norms. He also conceives a system of relationships as obtaining between the players by reference to substantive norms. In the latter case, ego (Hamlet) uses a social norm as a medium by which alter 1's (Rosencrantz's) past, present or (hypothetical) future action is normatively linked to alter 2's (Guildenstern's) past, present or (hypothetical) future action, *but* as a basis for the evaluation and orientation of ego's action.

Hamlet's action then, is oriented firstly, by reference to the power-liability norm governing his conduct in relation to the players according to *his* conception. Secondly, given the contentual linkage between that norm and the rules of the game, his action is oriented by reference to the rules of the game themselves, so far as governing the conduct of the players with respect to one another. Again, this is according to *Hamlet's* conception.

To make the analysis more concrete it may be helpful now to reformulate the power-liability norm suggested above in a way that illustrates the various relationships in the model and the contentual linkage between the power-liability norm and the

rules of the game. Thus,

Hamlet has a power in a question with Rosencrantz and Guildenstern (on being so requested) to make a final and binding ruling with respect to any disputed matter arising during the course of the game relating to the conduct of play *so far as such conduct is governed by the rules of the game.*

As we can see, this extended version of the power-liability norm is *predicated upon* the rules of the game in that a ruling falls to be made with regard to any disputed matter which arises between Rosencrantz and Guildenstern during the game so far as the conduct of play as between the players is governed by those rules.

Although the focus of our concern is Hamlet's perspective, it is not suggested that the way in which any one participant conceives of his own and the other participants' action in relational terms would *necessarily* differ in terms of content as from player to player or player to umpire. But in a more inclusive context of meaning⁴¹ Hamlet's conception of the substantive relationships between Rosencrantz and Guildenstern (or any of the other relationships in the model) may well differ substantially from a player's conception of those relationships.

In a wider context of meaning, relationships are not strictly defined by the letter of the norms governing the action in question. Other components of meaning enter the frame of reference. To give an example, in the course of the game Rosencrantz is certain to be influenced by the fact that he is personally involved and has a 'stake' in the outcome. By contrast, Hamlet in his role as umpire may be guided by a principle of impartiality in terms of which personal factors will be suppressed.

Taking the example further, it may be a rule of the game that each player should not take an unreasonable time to make a move. In such a case, what Hamlet considers

unreasonable may differ from what Rosencrantz and Guildenstern consider unreasonable. The same piece of action, or of inaction, when viewed from contrasting perspectives and according to differing interests may well bear a different normative meaning, *even* where the *same* norms are applied with a view to the evaluation of the action or inaction in question. This is especially true of an umpiring situation where the umpire in a sense stands outside the game and ideally distances himself from the essentially personal factors which motivate the players.

The main components of relationality to be found in the subjective meaning of Hamlet's action, then, can be summarised as follows.

Hamlet conceives of his own action *qua* umpire in relational terms with respect to the action of Rosencrantz and Guildenstern by reference to a power-liability norm. His action consists of making 'rulings'. The adjective relationships which he conceives as obtaining, on the one hand, between himself and Rosencrantz, and on the other hand, between himself and Guildenstern are predicated upon the substantive relationships which he conceives as obtaining between Rosencrantz and Guildenstern. It may be helpful to illustrate this diagrammatically. In the diagram the broken line represents adjective normative relationships, while the continuous line represents substantive normative relationships. Letters in circles represent, respectively, Hamlet, Guildenstern and Rosencrantz.

Fig. 1 'represents' Hamlet's conception of the substantive normative relationship obtaining between Rosencrantz and Guildenstern by reference to the rules of the game.

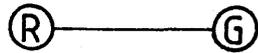


Fig. 1

Fig. 2 'represents' Hamlet's conception of the adjective normative relationships obtaining between himself and each player, there being *two* systems of such relationships. These *subsume* the substantive normative relationships obtaining between the players.

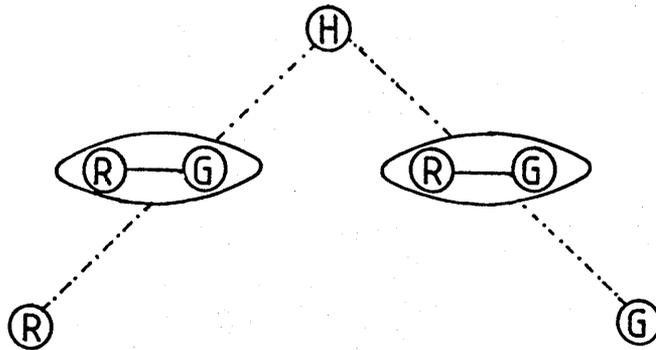


Fig. 2

Taking as an example the Hamlet-Rosencrantz relationship, Hamlet may conceive a substantive relationship as obtaining between Rosencrantz and Guildenstern in terms that (1) Rosencrantz has a duty in a question with Guildenstern to reinstate an unlawfully moved bishop to its starting point, and (2) Guildenstern has a corresponding right that Rosencrantz reinstate the bishop accordingly. This represents

certainly the core of the substantive relationship obtaining between Rosencrantz and Guildenstern according to *Hamlet's* conception. Of course, Rosencrantz may not think that he is under any duty to reinstate the bishop, for whatever reason, and may therefore see the content of the substantive relationship in a different way.

Given this conception of the substantive relationship obtaining between Rosencrantz and Guildenstern, Hamlet may then make a ruling that Rosencrantz reinstate the bishop. In so doing, Hamlet conceives of the *adjective* relationship obtaining between himself and Rosencrantz in terms that Rosencrantz has a duty in a question with *Hamlet* to reinstate the unlawfully moved bishop, this being by virtue *inter alia* of the fact that Rosencrantz *also* has that duty in a question with Guildenstern.

Now in conceiving of any relationship between himself and a player (adjective) or between a player and a player (substantive), Hamlet confers evaluative normative meaning upon the action of the player as part of the subjective meaning of his own action, and orients his action accordingly. Hamlet therefore continuously ascribes normative meaning both to his own action (past, present and *intended* future) and to the action of the players (past, present and *anticipated* future). Actual or hypothetical action is thus at all times categorised or re-categorised in terms of its meaning as a basis or potential basis for the orientation of Hamlet's action.

For example, a 'request' by Guildenstern to intervene by making an appropriate ruling in the event of Rosencrantz's making an unlawful move involves Hamlet in making a number of judgments of normative meaning, including (1) categorising Rosencrantz's move as 'unlawful' by reference to appropriate rules of the game, (2) categorising the situation obtaining between Rosencrantz and Guildenstern following an unlawful move

as (say) a 'dispute' within the meaning of the power-liability norm, and (3) categorising Guildenstern's request for Hamlet's intervention as a 'request' within the meaning of the power-liability norm.

Hamlet may also consider whether the dispute in question is within his 'jurisdiction' in the sense that if it is not a 'dispute' concerning the playing of the game (for example, a dispute about cold coffee) then it will be outside his remit, and it will not be competent for him to make a valid ruling with respect to it. He may also consider whether he has been properly 'requested' to make a ruling as one of the players may only seek an informal *opinion* rather than the full Majesty of a formal ruling.

In advance of making a ruling, Hamlet may also question whether the content of his intended ruling will be conceptually within (*intra vires*) the scope of the power-liability norm, and therefore constitute a valid power exercise. He may do this in the expectation that if the ruling should be *ultra vires* it may not constitute, whether for Rosencrantz or Guildenstern, a legitimate basis for the orientation of their action in compliance with the ruling.

A further consideration is that there may be *implied* by the power-liability norm a right-duty relationship in terms of which Hamlet actually has a *duty* to make a ruling on being so requested by a player. In this situation each player has a corresponding right that Hamlet should make a ruling if requested. It would follow that Hamlet had both a power *and* a duty to make a ruling, and the exercise of the power (i.e. the making of a ruling) would give him a right in a question with the player to whom the ruling applied that the player in question act in the manner specified in the ruling.

Finally throughout this process Hamlet ascribes meaning to the social norms themselves in their application to the action to which they are relevant. The norms are, of course, open to numerous interpretations, both *in abstracto* and in application to concrete instances of action. The meaning which Hamlet confers upon the norms may well differ from that which the players confer upon them, and to that extent the 'finality' of the ruling may depend upon the meaning which *Hamlet (qua umpire)* confers upon the appropriate norms.

This concludes our discussion of the 'relational' components of the subjective meaning of the umpire's action and prepares the way for an examination of legal meaning. Just as substantive and adjective relationships obtaining between and among interacting participants in the chess game model have been considered from the perspective of the umpire with a view to understanding the *umpire's* action, our analysis of the legal meaning ascribed to human action, or other 'facts' for legal purposes should be treated as part of the subjective meaning of *judicial* action. For this purpose, legal meaning is considered to flow from the ultimate judicial perspective outlined in Chapter VI.

REFERENCE NOTES to VOLUME I

The following abbreviations will be used in these reference notes:

ES Max Weber, *Economy and Society. An Outline of Interpretive Sociology*, Guenther Roth, Claus Wittich and others (Eds. and Trans.), Bedminster Press, Inc., New York, 1968.

(Translation from German of Max Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*)

TSEO Max Weber, *The Theory of Social and Economic Organization*, Trans. A.M. Henderson and Talcott Parsons (Revised and Edited with Introduction by Talcott Parsons), William Hodge and Company Ltd., London, 1947.

(Translation from German of Part I of Max Weber, *Wirtschaft und Gesellschaft*.)

LES Max Weber on *Law in Economy and Society*, Trans. Edward Shils and Max Rheinstein (Ed. with Introduction and Annotations by Max Rheinstein), Harvard University Press, Cambridge, Mass., 1954.

(Translation of Chapter VII of 1925 Edition (2nd Ed.) of Max Weber, *Wirtschaft und Gesellschaft: otherwise Rechtssoziologie or Sociology of Law*)

OSS Max Weber 'Objectivity' in *Social Science and Social Policy*, Ch. II of Max Weber, *The Methodology of the Social Sciences*, Trans. and Eds. Edward A. Shils and Henry A. Finch, The Free Press, New York, 1949.

(Translation of Max Weber, *Die 'Objektivität' sozialwissenschaftlicher und sozialpolitischer Erkenntnis*, originally published in *Archiv für Sozialwissenschaft und Sozialpolitik*, 1904)

CHAPTER I

1. The American jurist Roscoe Pound attempted a comprehensive classification of interests which the law must protect: the interest in the general security (those forms of action which threaten the existence of society); the interest in the general health, safety and peace, (which included the security of acquisitions, and of public order); the interest in the security of social institutions (including domestic institutions such as the family, and also religious, political and economic institutions); the interest in the general mores (security against actions offensive to moral sentiments); the interest in conservation of social resources; and other interests such as the interest in the general progress, the interest in the individual life, the interest in freedom of the individual will, of individual opportunity and of minimum conditions of human life. See Pound 'A Survey of Social Interests', (1943) 57 Harv. L. Rev. 1.

2. Thus, see J.W. Harris, *Law and Legal Science*, Clarendon Press, Oxford, 1979. At p. 17 Harris says: "Hohfeld does not deny the logical priority of the concept *legal rule* over *legal relation*. I shall argue that in all contexts descriptive information about the law may conveniently be given in terms of rules. The concept legal relation, on the other hand, is of use to legal science only when a litigious context requires legal information to be expressed about a pair of actual or potential opponents. Since the discipline of legal science is not exclusively court-centred, the logically prior unit is also the more convenient unit."

One of the main assumptions of this study will be that relationality (as defined in chapter III) is so deeply embedded in the subjective meaning of social action that we cannot lightly ignore the manifestations of this in the legal context (i.e. in legal relationships) simply because it appears to be more convenient to give attention to a 'logically prior' unit which may constitute only an *aspect* of this relationality.

3. Talcott Parsons, *The Social System*, Tavistock Publications Limited, 1952, p. 25. See also Talcott Parsons, Edward A. Shils and others (Eds.) *Toward a General Theory of Action*, Harvard University Press Cambridge, Mass., 1951 pp. 61 - 62.

4. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919) (Ed. Walter Wheeler Cook), Yale University Press, 4th printing, 1966; and Albert Kocourek, *Jural Relations* (2nd Ed.), The Bobbs-Merrill Company, Indianapolis, 1928.

5. Wesley N. Hohfeld, op. cit. pp. 32 et seq.; Albert Kocourek, op.cit. p. 17 and pp. 259 et seq. ('jural acts').

6. Albert Kocourek, op. cit. p. 44.

7. Alan Hunt, *The Sociological Movement in Law*, The MacMillan Press, Limited, 1978, p. 93.

8. See, for example, Wolfgang J. Mommsen and Jürgen Osterhammel (Eds.)

Max Weber and his Contemporaries (The German Historical Institute), Allen & Unwin, London, 1987; W.G. Runciman, *A Critique of Max Weber's Philosophy of Social Science*, Cambridge University Press, 1972; Tom Bottomore and Robert Nisbet (Eds.) *A History of Sociological Analysis*, Heinemann Educational Books Limited, London, 1978, esp. Chh. 5, 7 and 10; and Otto Stammer (Ed.) *Max Weber and Sociology Today* (Trans. Kathleen Morris), Basil Blackwell, Oxford, 1971. Only a completely comprehensive bibliography could do justice to the enormous literature, both primary and secondary, on Weber. The texts cited in this note are merely an illustration of the range and complexity of Weber's work and of the issues raised and debates generated by Weber's often impenetrable writings.

9. This part of *Economy and Society* has been published separately as *Max Weber on Law in Economy and Society*, Max Rheinstein (Ed.) and Edward Shils and Max Rheinstein (Trans.). See the note accompanying the abbreviation 'LES' *supra*.
10. Guenther Roth, Introduction to Max Weber, *Economy and Society*, Guenther Roth, Claus Wittich and others (Eds. and Trans.) Bedminster Press Inc., New York, 1968, p. LXXXII.
11. Anthony T. Kronman, *Max Weber*, Edward Arnold (Publishers) Ltd., London 1983, p.2. In fact Kronman goes on to affirm that the *Rechtssoziologie* has an 'overarching conceptual unity' and is closely related to the other branches of Weber's general social theory: *ibid.* pp. 2-5.
12. See ES pp. 941-955, esp. p. 954; and LES pp. 322-337, esp. pp. 336-337.
13. Anthony T. Kronman, *op.cit.* pp. 3-4.
14. Alan Hunt, *op. cit.* pp. 93 et seq.
15. *Ibid.* pp. 93-94 (emphasis added). Hunt suggests that the most central and pressing problems for the sociology of law must be 'liberated' from Weberian sociology and stripped from this *impediment* of sociological theory. Against Hunt, and in accordance with Kronman's remark that the *Rechtssoziologie* has an 'overarching conceptual unity' (see note 11 *supra*) it is difficult to see how Hunt's liberation could be achieved without impossibly distorting and obfuscating the very problems in sociology of law which Weber attempts to solve. Difficult though it may be for legal theorists, Weber's sociology of law must be seen as part and parcel of his general sociology.
16. ES pp. 654-658; LES pp. 61-64.
17. ES pp. 657-658; LES p. 64. Weber identifies the following five postulates (ES pp. 657-658): "...first, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system

of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be 'construed' rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof, since the 'gaplessness' of the legal system must result in a gapless 'legal ordering' of all social conduct." See Kronman, *op. cit.* pp. 78 et seq. for discussion of the five postulates derived from the Pandectists.

18. ES pp. 641-644; LES pp. 41-44.
19. ES pp. 644-647; LES pp. 44-49.
20. ES pp. 647-649; LES pp. 49-53.
21. ES pp. 649-651; LES pp. 53-56.
22. ES pp. 753-784 ('imposition from above': pp. 760 ff.); LES pp. 65-97 ('imposition from above': pp. 75 ff.).
23. ES pp. 666-752; LES pp. 98-197.
24. ES pp. 784-808; LES pp. 198-223.
25. ES pp. 941-955; LES pp. 322-337. The term '*Herrschaft*' is defined by Weber in ES p. 53 as: "... the probability that a command with a given specific content will be obeyed by a given group of persons". See Alan Hunt, *op.cit.* pp. 112-118 and Anthony T. Kronman, *op. cit.* pp. 56-61.
26. ES p. 942; LES p. 323. At p. 942 of ES, Weber says this: "If, as has occasionally been done, one looks upon the claims which the law accords to one person against one or more others as a power to issue commands to debtors or to those to whom no such claim is accorded, one may thereby conceive of the whole system of modern private law as the decentralization of domination in the hands of those to whom the legal rights are accorded." The power component of legal relationships will be discussed in chapter V *infra*.
27. TSEO p. 80.
28. TSEO p. 102. In *Max Weber - An Introduction to his Life and Work* (Trans. Philippa Hurd), Polity Press, 1988, Dirk Käsler examines Weber's concept of social action and advances, quite literally, a *graphic* model in which *social action* is conceived as a sub-category of *action*, which in turn is conceived as a sub-category of *human behaviour* in the most all-embracing sense. See p. 150. An excellent expository presentation of Weber's general sociology is given in Chapters 5 and 6 (pp. 142-196).

CHAPTER II

1. From H.P. Rickman (Ed. and Trans.) *W. Dilthey Selected Writings*, Cambridge University Press, 1976, p. 172.
2. Ibid. pp. 170-171.
3. Ibid. p. 218.
4. Ibid. pp. 221-222.
5. Ibid. p. 226. Dilthey further observes: "On the basis of this empathy or transposition there arises the highest form of understanding in which the totality of mental life is active - re-creating or re-living." (loc. cit.)
6. Lewis A. Coser, *Masters of Sociological Thought - Ideas in Historical and Social Context*, (2nd Ed.), Harcourt Bruce Jovanovich, Inc., 1977, pp. 220-221.
7. Lewis A. Coser, op. cit. pp. 219-220.
8. H.H. Bruun, *Science, Values and Politics in Max Weber's Methodology*, Munksgaard, Copenhagen, 1972, p. 85.
9. Ibid, see generally Ch. 2.
10. Lewis A. Coser, op. cit. p. 221.
11. Lewis A. Coser, op. cit. p. 221 (quoting Talcott Parsons, *The Structure of Social Action*, The Free Press, New York, 1958, p. 594).
12. See Talcott Parsons, 'Value-Freedom and Objectivity' in Otto Stammer (Ed.), *Max Weber and Sociology Today* (Trans. Kathleen Morris), Basil Blackwell, Oxford, 1971, p. 33.
13. H.H. Bruun, op. cit., p. 100 (Bruun's emphasis and emphasis added).
14. OSS p. 90 (Weber's emphasis).
15. TSEO p. 80. For Weber, the acting *individual* is the 'basic unit' of (social) scientific research. As Weber says, TSEO p. 91: "Action in the sense of subjectively understandable orientation of behaviour exists only as the behaviour of one or more *individual* human beings." The social universe, therefore, is to be conceived as the sum total of component *individuals*. Collectivities such as the state or the corporation are thus treated as the resultants and modes of organization of the particular acts of individual persons (TSEO p. 92). For a discussion of the postulate of *methodological individualism* (as it has come to be known) see further Steven Lukes, 'Methodological Individualism Reconsidered' (1968) 19 *British Journal of Sociology* 119.

16. H.P. Rickman, *op. cit.* p. 219.
17. Roberto Mangabeira Unger, *Law in Modern Society*, The Free Press, New York, 1976, pp. 246-247.
18. TSEO p. 81.
19. OSS p. 90.
20. TSEO p. 81.
21. TSEO p. 82.
22. TSEO pp. 104-107.
23. TSEO p. 105.
24. TSEO p. 82.
25. TSEO p. 101.
26. TSEO p. 83.
27. TSEO pp. 83-84.
28. TSEO p. 84.
29. TSEO p. 83.
30. J.W.N. Watkins, 'Ideal Types and Historical Explanation', Ch. V of Alan Ryan (Ed.) *The Philosophy of Social Explanation*, Oxford University Press, 1973, p. 85.
31. TSEO pp. 82, 83 and 86.
32. TSEO p. 86.
33. TSEO p. 89 (emphasis added).
34. TSEO pp. 89-90.
35. See Alfred Schutz, 'Problems of Interpretive Sociology', Ch. XII of Alan Ryan (Ed.) *The Philosophy of Social Explanation*, Oxford University Press, 1973, p. 208.
36. TSEO p. 90.
37. TSEO p. 90 (emphasis added).
38. ES p. 1376.
39. TSEO p. 113.

40. Max Weber, "The Concept of 'Following a Rule'", Ch. 5 of W.G. Runciman (Ed.) and E. Matthews (Trans.), *Max Weber, Selections in Translation*, Cambridge University Press, 1978.
41. Ibid. p. 105.
42. See Alan Dawe, 'Theories of Social Action', Ch. 10 of Tom Bottomore and Robert Nisbet (Eds.), *A History of Sociological Analysis*, Heinemann Educational Books Limited, London, 1978, pp. 362 et seq.
43. TSEO p. 80.
44. TSEO p. 80.
45. See H.P. Rickman (Ed. and Trans.) *W. Dilthey Selected Writings*, Cambridge University Press, 1976, pp. 218-220.
46. Jürgen Habermas, *Knowledge and Human Interests*, (Trans. Jeremy J. Shapiro), Heinemann, London, 1972, p. 157.
47. Georg Henrik von Wright, *Norm and Action, A Logical Enquiry*, Routledge & Kegan Paul, London, 1963, pp. 35-36.
48. TSEO p. 90.
49. ES pp. 1375-1376.
50. ES p. 667; LES p. 99.
51. ES pp. 666-667; LES p. 98.
52. Rights of children *in utero* are recognised for certain purposes under Scots law provided the individual is subsequently born alive and has lived for however short a time: See David M. Walker, *Principles of Scottish Private Law*, (2nd Ed.) Clarendon Press, Oxford, 1975 p. 207. See also *Elliot v Joicey* 1935 S.C. (H.L.) 57,70. In his treatise on wills and succession, Lord McLaren made the following observation: "Posthumous children - To this part of our subject may be referred the doctrine of the Civil Law which has long been received in our system of jurisprudence, - that a child born after the period at which the vesting of a right falls to be determined, but proved by the period of its birth to have been *in utero* at that time, is entitled to the rights of an existing person from the period of its conception". John McLaren, *The Law of Wills and Succession*, (3rd Ed.), Bell & Bradfute, Edinburgh, 1894, p. 696.
53. ES p. 1376.
54. TSEO p. 102.
55. TSEO p. 102.
56. ES p. 1377.

57. See, e.g. *Rylands v. Fletcher* (1866) L.R. 1 Ex. 265.
58. Pierre J.J. Olivier, *Legal Fictions in Practice and Legal Science*, Rotterdam University Press, 1975, p. 61.
59. TSEO p. 106.
60. TSEO p. 106.
61. ES p. 1376.
62. TSEO p. 105.
63. TSEO p. 106.
64. TSEO p. 106.
65. TSEO p. 113.
66. TSEO p. 113.
67. TSEO p. 107.
68. TSEO p. 107.
69. TSEO p. 105.
70. TSEO p. 110.
71. TSEO p. 107.
72. TSEO p. 82.
73. TSEO p. 82.
74. TSEO p. 82, 83 and 86.
75. TSEO p. 83.
76. Jürgen Habermas, *Knowledge and Human Interests*, (Trans. Jeremy J. Shapiro), Heinemann, London, 1972, p. 157.
77. TSEO p. 86.
78. TSEO p. 86; See also TSEO pp. 82-83
79. TSEO p. 86 n. 4
80. TSEO p. 87
81. TSEO p. 87
82. TSEO p. 87

83. TSEO pp. 87-88
84. TSEO pp. 87-88
85. TSEO pp. 87-88
86. TSEO pp. 87-88
87. See TSEO p. 80
88. Kurt H. Wolff, 'Phenomenology and Sociology', Ch. 13 of Tom Bottomore and Robert Nisbet (Eds.) *A History of Sociological Analysis*, Heinemann Educational Books Limited, London, 1978, p. 501.
89. TSEO p. 90
90. TSEO p. 80
91. TSEO p. 80 (emphasis added)
92. TSEO p. 90
93. TSEO p. 90
94. See TSEO p. 87
95. TSEO p. 88
96. TSEO p. 91 (emphasis added)
97. TSEO p. 90
98. TSEO p. 90
99. Lewis A. Coser, *Masters of Sociological Thought - Ideas in Historical and Social Context* (2nd Ed.), Harcourt Bruce Jovanovich, Inc., 1977, p. 225
100. Raymond Aron, *Main Currents in Sociological Thought* (Trans. R. Howard and H. Weaver), Weidenfeld and Nicolson, London, 1967, pp. 193 et seq.
101. TSEO p. 88
102. TSEO p. 88
103. W.G. Runciman, *A Critique of Max Weber's Philosophy of Social Science*, Cambridge University Press, 1972, p. 64.
104. David Hume, *A Treatise on Human Nature*, (Vol.II) (T.H. Green and T.H. Grose, Eds.) Longmans, Green and Co., London, 1882 p. 182
105. Alfred Schutz, 'Problems of Interpretive Sociology', Ch. XII of Alan Ryan (Ed.) *The Philosophy of Social Explanation*, Oxford University

Press, 1973, p. 204 (emphasis added).

106. TSEO p. 90
107. Raymond Aron, *op.cit.*p.194.
108. Max Weber, "The Concept of 'Following a Rule'", Ch. 5 of W.G. Runciman (Ed.) and E. Matthews (Trans.), *Max Weber Selections in Translation*, Cambridge University Press, 1978, p. 99.
109. *Ibid.* p. 101
110. *Ibid.* pp. 101-103
111. *Ibid.* p. 103
112. *Ibid.* p.105
113. ES p. 311; LES p. 11
114. See chapter V, part 1
115. Raymond Aron, *op. cit.*, p. 201
116. OSS p. 72
117. H.H. Bruun, *Science, Values and Politics in Max Weber's Methodology*, Munksgaard, Copenhagen, 1972, pp. 100 et seq.
118. OSS p. 90 (Weber's emphasis)
119. TSEO p. 81
120. TSEO p. 81
121. TSEO p. 300
122. TSEO p. 116
123. TSEO p. 90
124. TSEO pp. 83-84
125. See this chapter, p. 25. *supra*; TSEO p. 87
126. OSS p. 90
127. TSEO p. 83
128. TSEO p. 83
129. TSEO p. 84
130. Harold Fallding, 'Explanatory Theory, Analytical Theory and the Ideal

Type', Ch. 39 of Kenneth Thompson and Jeremy Tunstall (Eds.), *Sociological Perspectives*, Penguin Books Limited, 1971, p. 503. (Excerpt from Harold Fallding, *The Sociological Task*, Prentice-Hall, 1968)

131. Ibid. p. 505
132. TSEO p. 100
133. Lewis A. Coser, op.cit.p.223.
134. TSEO p. 84
135. See reference note 30 of this chapter.
136. OSS p. 78. As Weber says, "Order is brought into this chaos only on the condition that in every case only a *part* of concrete reality is interesting and *significant* to us, because only it is related to the *cultural values* with which we approach reality. ... an *exhaustive* causal investigation of any concrete phenomena in its full reality is not only practically impossible - it is simply nonsense. We select only those causes to which are to be imputed in the individual case, the 'essential' features of an event." (Weber's emphasis)
137. Raymond Aron, op. cit., p. 203
138. Ibid. p. 204
139. ES p. 313; LES p. 13
140. ES p. 332; LES p. 34

CHAPTER III

1. Talcott Parsons, *The Structure of Social Action*, (2nd Ed.), The Free Press, Glencoe, 1949, pp. 76-77
2. TSEO pp. 111-112. Weber gives as an example the dealers in a market who treat their own actions as a means for obtaining the satisfaction of the ends defined by what *they* realise to be their *own* typical economic interests. (See TSEO p. 112)
3. See for example Talcott Parsons, Edward A. Shils and others (Eds.), *Toward a General Theory of Action*, Harvard University Press, Cambridge, Mass., 1951, pp. 53 et seq.; See also Talcott Parsons, *The Structure of Social Action* (2nd Ed.), The Free Press, Glencoe, 1949, pp. 44-45.
4. David Lockwood, 'Some Remarks on "The Social System"', (1956) *7 British Journal of Sociology*, p. 134 at p. 135 (emphasis added).
5. Parsons and Shils, op. cit. p. 55
6. Ibid. p. 105
7. TSEO p. 102
8. TSEO p. 107
9. TSEO pp. 107-108
10. TSEO p. 109
11. Talcott Parsons, 'An Outline of the Social System' in Talcott Parsons, Edward Shils and others (Eds.) *Theories of Society* (Vol.1), Free Press of Glencoe, 1961 at p. 41 (emphasis added)
12. Roberto Mangabeira Unger, *Law in Modern Society*, The Free Press, New York, 1976, p. 49.
13. Georg Simmel, 'On Superordination and Subordination', in Talcott Parsons, Edward Shils and others (Eds.) *Theories of Society* (Vol.1), Free Press of Glencoe, 1961 at p. 545.
14. ES p. 312; LES p. 12
15. See this chapter pp. 78-79 *infra* and reference note 18.
16. TSEO p. 121 (emphasis added)
17. Talcott Parsons 'An Outline of the Social System' in op. cit., pp. 41-42.
18. Talcott Parsons, 'An Outline of the Social System' in op. cit., p.42 (Parsons' emphasis)

19. ES p. 1375 (Weber's emphasis and emphasis added)
20. ES pp. 666-667; LES p. 98
21. See Max Radin, 'A Restatement of Hohfeld' (1938) 51 Harv. L. Rev. 1141 at p.1150. See criticism of Radin's rather overstated position in *Salmond on Jurisprudence*, (Glanville Williams, Ed.), (11th Edition), Sweet and Maxwell Ltd., London, 1957, p. 265 n. (i).
22. TSEO p. 108
23. TSEO p. 101
24. TSEO p. 114
25. Georg Henrik von Wright, *Norm and Action, A Logical Enquiry*, Routledge & Kegan Paul, London, 1963, pp. 35-36.
26. Georg Simmel, 'On Superordination and Subordination', loc. cit.
27. John Finnis, *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, p. 87
28. St. Thomas Aquinas, *Summa Theologiae*, Vol XXV, Question 72, Art. 7, Blackfriars Edition 1969, (Trans. John Fearon), at p. 49: "It seems that we should not distinguish between sins of thought, word and deed. For St. Augustine describes three stages of sin of which the first is, *when the carnal sense offers enticement*, which is a sin of thought; the second stage is reached *when one is satisfied with the mere pleasure of the thought*; and the third stage, *when consent is given to the deed*. These three pertain to a sin of thought. Therefore, sins of thought ought not to be a special classification." (Aquinas's emphasis)
29. Talcott Parsons, 'An Outline of the Social System', in op.cit. p.42.
30. According to John Finnis, "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 it is that 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...an exclusionary reason...". *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1980, pp. 233-234.
31. ES pp. 313-314; 317; LES pp. 13-14; 17-18
32. Neil MacCormick, 'Law as Institutional Fact', (1974) 90 Law. Q. Rev. 102 at p. 110: "For there is another use of the term 'institution' which is also of great importance in relation to the law, but which is quite different from the well-established lawyer's notion of a 'legal institution'

which I have just explicated. There are certain types of social system or sub-system, such as universities, schools, hospitals, orphanages, libraries, sporting organisations and the like, to which we often refer as 'institutions'. These are organisations of people which retain their organisational identity through time even though their personnel may change, because they are getting on with some job, and getting on with it in an organised way. Such I shall call 'social institutions'. To this class it is obvious that courts, parliaments, police forces, civil service departments, the Faculty of Advocates, and the Law Society, all belong".

See also Weber, ES p. 217 (Legal Authority with a Bureaucratic Administrative Staff)

33. See this chapter, pp. 91 et seq., *supra*
34. TSEO p. 107
35. TSEO pp. 107-108
36. ES p. 312; LES p. 12
37. J.W. Harris, *Law and Legal Science*, Clarendon Press, Oxford, 1979, pp. 20-21 and p. 84
38. John Finnis, op. cit. pp. 218-219
39. David Hume, *A Treatise of Human Nature*, (Vol.1) (Everyman's Library Edition), J.M. Dent & Sons Ltd., (1974 Reprint), pp. 22-23
40. This distinction is maintained by Professor David M. Walker in *The Law of Civil Remedies in Scotland*, W. Green & Son Limited, Edinburgh, 1974, pp. 4-5; See also Hans Kelsen, *General Theory of Law and State*, (Trans. Anders Wedberg), Russell & Russell, New York, 1961, p. 129; Weber also distinguishes substantive law and procedure: ES pp. 653-654, and LES pp. 59-60.
41. Recalling Weber, TSEO pp. 82, 83 and 86.

